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The political relationship between the EU member states and the European Court of Justice

A statistical analysis of the credibility of the governments' threats of non-compliance

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Abstract

This thesis focuses on two main theories about the shape and power of the EU and the role of the European Court of Justice: intergovernmentalism, which claims that the ECJ is too restrained by the members in order to make autonomous decisions, and neofunctionalism, which argues that the ECJ is an independent political actor with an agenda of its own trying to create more Europeanization. Based on the research and scientific debate between Carruba, Gabel and Hankla on one side and Stone Sweet and Brunel on the other, this study is concerned with the credibility of the EU member states' threats of non-compliance with EU law. According to intergovernmentalism, threats of non-compliance shape the behavior of the ECJ and prevent it from becoming a runaway agent. Neofunctionalists disagree and argue that there is no proof that such threats are real and carried out, and that the ECJ is not concerned about them anyway. In this thesis, a statistical analysis has been conducted in order to study if these threats are real. The results show that political disagreements between the national and supranational level do increase the risk of actual non-compliance compared to when the member state was neutral or supported an ECJ decision. The intergovernmental perspective is therefore supported by the results in this study. Still, more studies need to be conducted about the true motives behind the member states threats of non-compliance before any definitive conclusions can be made.

1. Introduction

The political role of the European Court of Justice (hereinafter the ECJ) has been widely debated among researchers within the field of political science. Some argue that the ECJ is a runaway agent trying to force more Europeanization upon the reluctant members of the European Union (EU) while others claim that the ECJ is restrained by the member states' governments due to threats of override and non-compliance. This thesis will test the credibility of such threats made by the governments and thus contribute with additional information on which perspective is more accurate in its description of the role of the ECJ. More specifically, this study will investigate how the risk of non-compliance is affected by political disagreements and conflicting opinions presented by the member states during preliminary rulings and evaluate if the threats of non-compliance are real or only empty threats.

The importance of conducting this type of study can be traced back to the legitimacy question of the EU. It is a unique political institution with legislative authorities which goes beyond any other international cooperation. Due to its complex structure and composition of multilevel governance, it is difficult to define what it actually is. The EU is often referred to as 'sui generis' (one of a kind), neither a national state nor just an international agreement between sovereign governments. The EU is often considered to have a problem with legitimacy and suffer from a democratic deficit based on the fact that more power is being transferred to the supranational level without there being a full comprehension on what the legislative powers of the EU should be and how to link this to the people (Schmidt 2006:1-9). There are competing theoretical views on how to define the EU. This thesis will focus mainly on two perspectives: neofunctionalism and intergovernmentalism, which give two different views of and explanations to the EU development and integration process. Neofunctionalism provides a more federalistic view where the EU institutions have had a major influence on the deepened European cooperation. Other transnational actors, e.g. international companies, are also believed to have had a large impact. The spill-over effect is considered to have been important for the addition of more legislative areas to the EU level. Intergovernmentalism, on the other hand, argues that the national states and their governments are still the main actors on the international arena. The Europeanization which has occurred is only the result of strategic actions made by the member states. The EU, its institutions and treaties are merely tools in the hands of the nation states which agree to this cooperation only because it is in

their own best interest (Tallberg 2010:32-3). Depending on which interpretation prevails, there might be different legitimacy issues. EU opponents often argue that the EU lacks legitimacy due to increased power without the true consent from the member states. If the ECJ, which is often used to symbolize the supranationality of the EU, is a runaway agent trying to impose more Europeanization without the full political authority to do so, then the EU is exercising power it is not fully entitled to possess. This is what the neofunctional view implies. On the other hand, if the ECJ is constrained by the member states, especially the most powerful ones, and therefore is precluded from applying the EU laws in the best interest of all the members, then the original purpose of this transnational cooperation is endangered. The law might have several interpretations, but by systematically interpreting it in favor of some member states wishes, the ECJ loses its legitimacy as an impartial actor and the rule of law might be threatened. This may be the outcome if the intergovernmentalist view is proven to be true.

This study is based on the clashing views of the neofunctionalists and intergovernmentalists and concentrates on the debate on the sovereignty of member states and the actual power of the EU with focus on the ECJ. Drawing on the debate between Carruba, Gabel and Hankla (2008, 2012), who advocated an intergovernmental view, and Stone Sweet and Brunel (2012), who relied on the neofunctional perspective, the focus will be on the credibility of the threats of non-compliance. The ECJ is concerned about non-compliance since member states that do not follow the EU law diminish the court's status and importance as a judicial actor with powerful influence on the policy applications. The authority of the ECJ is insignificant without the implementation of the EU law among the members. My research questions and hypotheses, which will be presented in more detail further on in this thesis, address the problem of threats of non-compliance among national governments and tries to discover if these threats are real and carried out or not. Dependent on the results of the study, the ECJ might be considered as most likely constrained by these threats or the results might support the view of the ECJ as an independent actor with a political agenda of its own.

2. Theory and previous research

The following section is divided into four parts in order to give a comprehensive background on the major debate issues in this research field. First, it begins by describing the legislative power of the EU and the possibility of infringements against states that do not follow the

agreements. Secondly, it continues by giving an overview of neofunctionalism and intergovernmentalism, the main theories of EU integration and supranationality. The third part introduces the specific theories linked to the possible constraints of the ECJ due to threats of non-compliance and also provides a different interpretation of the threats. In the fourth and final part the theories about the reasons behind non-compliance with the EU law will be presented along with arguments about why political motives for non-compliance are a larger threat to the democratic legitimacy of the EU than other reasons.

2.1. The legislative power and structure of the EU

The EU has received more and more power over the member states with every new treaty. By becoming a member of the union, the state hands over some of its sovereignty and agrees to comply with the collective decisions and laws of the EU. EU law has priority before national laws and in cases where there is a disagreement the EU law is supposed to have interpretational priority (Nugent 2006: 138-40, 292). The legislative powers of the EU take on different forms and are regulated by the treaties. Due to the problems emerging when all of the EU members try to come to an agreement when legislating EU laws, the laws are often unclear and indistinct which makes it difficult to interpret them. This has led to the establishment of preliminary rulings. A national court that is uncertain about how to apply an EU law can seek advice from the ECJ. Such a question cannot be about how to interpret the law in a specific case but instead requests an interpretation of a more general nature. The preliminary rulings are considered binding and the jurisprudence of the ECJ has priority before national law. The member states' governments can hand in observations during these preliminary rulings stating their political opinion and preferred interpretation. These could either be observations supporting the subsequent interpretation made by the ECJ, observations in conflict with the interpretation or neutral observations. However, it is the ECJ that ultimately makes the decision. By allowing the ECJ these interpretative privileges, its power has increased in terms of deciding the direction and extension of the EU law. This is sometimes referred to as 'the silent revolution', a way for the EU to gradually take on a more federal shape without drafting a new treaty (Nilsson and Lundberg 2006:24-5, Carruba et al. 2008:440). Some scholars, like Alter (1998:125), have argued that while the original idea of the preliminary rulings was to help the national courts in their interpretation and move more of the power to a national level, the actual result has also led to an increase in power among national citizens and of the ECJ. Prosecuted citizens have now the right to invoke a preliminary ruling during a national court case and the interpretation which the ECJ provides

is supposed to prevail that of the national court. Much of the legislative power which was intended for the national courts was thus moved to an EU level.

Even if the ECJ has extensive power to decide what the right and wrong interpretation is does not mean that its guidelines are always followed. One of the major problems of the EU is that member states often do not comply with the EU law due to late or inconsistent implementation. The European Commission is the monitoring institution which controls the implementation and application of the different laws, that they are interpreted correctly and followed by the national courts. The Commission also has the right to take legal actions against member states which fail to comply with the law. If non-compliance with the EU law is discovered by the Commission, it contacts the concerned state informally, making it aware of the problem. If the conflict is not quickly resolved, a formal infringement procedure of three steps is initiated. The first step is to send a formal notice to the state, giving more substantive information on the non-compliance issue. If the problem is not solved by this, a reasoned opinion is sent with a more detailed statement of the shortcomings of the implementation. The state governments usually try to suggest compromise solutions or they might sometimes notify that they do not intend to change their law during these initial steps. The third and last stage is when the Commission sends a referral to the ECJ in the more severe cases of disagreement. Then the court settles the dispute, mostly in favor of the Commission. The states which are convicted are obliged to pay an economic fine (the European Commission 2014b; Tallberg and McCall Smith 2014:126-7). Panke (2007) argued that the ECJ judgments and threats of sanctions are helpful but not always effective in encouraging compliance among member states.

2.2. Intergovernmentalism vs. neofunctionalism

As previously mentioned, there is a polarization on the view of European integration within the research field and whether or not the sovereignty of national governments is restrained by EU's supranational institutions. One of the first researchers of this area was Geoffrey Garrett (1992, 1995), who presented an intergovernmental point of view in his articles. He argued that while the ECJ is a powerful institution, it is the member states which are the main actors and for most of the time in control of their own compliance with the EU law. Garrett used game theory in order to explain why the member states follow the EU law even though there is no real supranational institution that can force them into obedience. The ECJ was considered to be a weak institution in reality, since its powers are not based on the treaties of the EU but

rather on the willingness of member states to obey. Garrett concluded that no international political institution could take on a governing structure due to the sovereignty of states. According to Garrett's game theory, all member states benefit from the cooperative arrangement that is the EU, but all states still have individual incentives to not comply fully with the common laws. Therefore, the monitoring institutions of the EU play an important role in order to inform about other states' compliance and also make sure that there are repercussions for those that try to escape their responsibilities. By reducing the cost of monitoring other states and also limiting the possibility of free riding, the Commission and the ECJ help moderate the effects of the political game where all states try to maximize their self-interests (Garrett 1992:534-5).

Anne-Marie Burley and Walter Mattli (1993), however, did not agree with Garrett's arguments. According to them the claims of the followers of intergovernmentalism lack empirical evidence. Instead, they argued that the EU integration is increasing and that the ECJ is becoming more powerful step by step. They used a neofunctional view in order to explain the development of the EU where the member states are not considered to be the main actors and a spillover effect on economics and politics with an increased common interest has transferred more power to the supranational level over time. They argued that the law functions as a mask for politics in order to achieve results which would be difficult to obtain through ordinary political decisions. By interpreting the law slightly differently than what was the explicit intention of the legislators, it is possible for the court to carry out its own political agenda. However, this politicization of law is only possible as long it is not a transparent political act straying too far away from the framework of the law. The law thus functions both as a mask for politicization and a shield from misuse (Burley and Mattli 1993:44, 72-3). The ECJ was believed to have strengthened its powers this way, especially with the preliminary rulings. Burley and Mattli discussed if this was possibly unintentional from the member states' side. The role of the national courts was also strengthened by the establishment of preliminary rulings, especially the lower national courts, but their true influence was questioned. Burley and Mattli argued, in line with the arguments later made by Alter (1998:125), that while it is the national courts that ultimately decide in the actual cases, it is the interpretation of the ECJ that determines the outcome. They made the conclusion that the ECJ has acted rationally in order to gain more power by making it appear as though it is the national courts that have been empowered while it actually is the ECJ that is the real winner.

Even if it is the national courts that seek the ECJ's guidance and ultimately is the ones that decide the judgment in specific cases, the ECJ creates the jurisprudence that other national courts have to consider in the future (Burley and Mattli 1993:64-5). In order to strengthen their thesis about the diminishing importance of the nation state, Burley and Mattli argued that even if member states are often protesting against judgments, both at preliminary rulings and during infringement cases, they tend to accept the outcome over time and adjust their behavior accordingly (Burley and Mattli 1993:51).

There is little empirical evidence, especially empirical statistics, within this area of research. The existing research results point in both directions. Some empirical examples have even been used in order to gain support for both sides. One such example is the "Cassis de Dijon" case. This case is one of the most famous cases in the ECJ which led to the principle that if a product is legally produced and sold in one member state, it cannot be prohibited in any of the other member states (Nilsson and Lundberg 2006:57-8). In his articles, Garrett (1992, 1995) relied on a strict rational choice theory where both the member states and the ECJ are rational actors using cost-benefit analyses in order to calculate which action will serve their own best interest. He used the "Cassis de Dijon" case in order to illustrate these claims. He argued that the only reason why Germany accepted the ECJ decision to allow the French liqueur "Cassis de Dijon" to be sold in Germany in spite of it breaking the German national law on alcohol percentage for liqueurs was because the cost of not allowing it would be greater than the cost of a French invasion on the German liqueur market. It was therefore not an example of Germany giving in to EU law because it was weak. The German state could now also refer to this principle in order to promote its own goods on the European market and claim that since they yielded for the EU law in the "Cassis de Dijon" judgment, other states should be obliged to do the same in other cases. It was a small price to pay allowing the French liqueur on the German market compared to the economic benefits that the German government would gain in other market areas.

Mattli and Slaughter (1995), on the other hand, used the same case in order to prove their neofunctional theory. They also believed that member states act rationally and that the European institutions are not working against the interest of the member states, but disagree with Garrett on the amount of gradual empowerment of the ECJ and to what extent it takes the member states' opinions into account. They claimed that the example of "Cassis de Dijon" was a way for the ECJ to strengthen its power and limit the member states' possibility to

resist, a process which has continued ever since. Mattli and Slaughter argued that the court indeed has outer limits regulating how far it can stretch the EU integration without losing its legitimacy. The authors considered the “Cassis de Dijon” case to have been a major step towards supranationality after which the possibilities of the ECJ to rule against the will of a government to protect its sovereignty without risk of override increased greatly. They considered the “Cassis de Dijon” case to demonstrate how a powerful state can protest against more Europeanization initially but ultimately accept the outcome of the court’s decision. Mattli and Slaughter emphasized that the ECJ is being very careful in deciding how far it will try to extend the EU integration and that it usually uses the Commission as a political bellwether before making any radical decisions. However, these articles are from the 1990s and the EU project has deepened and become more supranational with every treaty since then. More recent research the actual power of the ECJ is presented in the following section.

2.3. The ECJ: an independent political actor or constrained by the members?

In the research, the ECJ is often targeted as a representative for the supranational power of the European Union. The rule of law indicates that legal bodies are supposed to be impartial and judge according to existing laws uninfluenced by political forces (Tamanaha 2008:11-12), but research in this area implies that courts still have to consider the possibility of parliaments overruling the court decisions if it is considered politically undesirable by the lawmaking institutions. The empirical research on national courts, mainly the U.S. Supreme court, is ambiguous and some studies show that the court is sometimes influenced by other political actors (e.g. Harvey and Friedman 2006) and others imply that the court judges can decide according to their sincere legal conviction without constraints (e.g. Segal 1997). There is naturally a difference between national and international courts. However, the ECJ is difficult to pigeonhole as either national or international. Alter (2008a:40-44) argued that compared to other international courts, the ECJ possesses legal and political privileges far beyond the norm and its political autonomy and influence is evident. However, there are no scholars who equate the ECJ to actual national courts.

A scientific debate between Clifford Carruba, Matthew Gabel and Charles Hankla (2008, 2012) and Alec Stone Sweet and Thomas Brunel (2012) was initiated in order to discuss the differences between the intergovernmental and neofunctional perspectives based on their clashing views on the political power of the ECJ. Carruba et al.’s (2008) research investigated whether and to what extent constraints from the member states shaped the judicial process in

the ECJ. They focused on threats of non-compliance and override based on all judgments made by the ECJ during 1987-1997, including preliminary rulings, direct actions against member states and actions for annulment of decisions made by the EU institutions. By studying the observations handed in by member states during court cases stating their preferred outcome, the authors could examine how these opinions affected the judgment of the ECJ. These observations filed by the member states' governments during the court cases could be considered as political threats. According to Carruba et al. (2008:435), when a government is dissatisfied with an ECJ decision, it can demonstrate this in two different ways: either by threatening to override the legislation and draft new laws or through non-compliance where it misapplies or ignores the court decision. Therefore, the court might be prevented from interpreting a law in a certain way if that would increase the risk of member states disobeying or changing the current law later on. This is what they tested in the study in order to determine to what extent the ECJ could be considered an independent actor or how much its behavior is shaped by the opinions of the member states. Threats of non-compliance are considered more realistic and therefore more likely to have an influence, since it is easier to execute non-compliance than an override where collective actions from at least a majority of the members is necessary. Carruba et al. found in their study that these political constraints in the shape of filed observations from the member states do affect the judicial decision made by the ECJ, a support for the intergovernmental perspective.

Nevertheless, Stone Sweet and Brunel (2012) did not agree with these findings and argued that the threats of override were not credible and the threats of non-compliance were only of minor importance and thus did not have an effect on the outcome of ECJ decisions. Their neofunctional inspired arguments were based on the fact that an override needs a consensus or qualified majority in the council in order to change a law and that the number of countries protesting against a decision was never large enough in order to systematically restrain the ECJ. Other scientists, such as Alter (1998:144), have also emphasized the unlikelihood of override. According to Alter, the only option for member states disagreeing with the court judgment is to change the EU legislation, but since it is difficult to execute an override the threats might be empty.

Also, Stone Sweet and Brunel (2012:205, 207) argued that the nature of the threats of override and non-compliance has not been fully examined by Carruba et al., that the threats are rather just assumed to be genuine and that the results were analyzed on the basis of these threats

being real and observed by the ECJ. According to Stone Sweet and Brunel, it is not the governments that ultimately decide about the actual non-compliance, but it is rather the judiciary (the national courts) which is the holder of that authoritative role. Therefore, the theoretical causal link between threats of non-compliance and actual non-compliance is lacking, since the actor which makes the threat is not the one with the power to execute it. Moreover, they argue that the threats of non-compliance does not paralyze the ECJ since non-compliance is not as undesired by the ECJ as the intergovernmentalists believe. Instead, non-compliance creates opportunities for the court to generate progressive and expansive case law during infringement processes, increasing the Europeanization of national laws. Their empirical tests based on the same data as Carruba et al. used showed support for their theory that the Commission's opinions during court cases were more influential than those of the member states. Carruba et al. (2012) later replied that Stone Sweet and Brunel were too limited in their interpretation of the possible realization of threats of override and also the importance of non-compliance. They argued that it is not necessary for a qualified majority to protest during a court case for the threat of override to be realized since a mobilization of member states might occur later through logrolling and compromises. They also emphasized the importance of members complying with EU law, since the actual power of the ECJ is insignificant if the members refuse to comply. In order for the ECJ to reduce the risk of non-compliance, it might decide according to the preferences of the governments rather than against them. This was also supported by their empirical findings.

The core of the research done by Carruba et al. is the identification of observations handed in during the ECJ judgments as threats of non-compliance. This view has been questioned by Karen Alter (2008b). She refuted the usage of the Principle-Agent theory when describing the role of the ECJ and instead highlighted the view of the ECJ as a Trustee. According to the Principal-Agent theory, the Principal (the member states) delegates power to the Agent (the ECJ) in order to gain a more efficient control over the other member states' behavior. This type of delegation is believed to only make sense as long as the Agent serves the Principal's best interest. The Principal has the power to control the Agent by threatening with sanctions if the Agent becomes too independent, which is in line with what Carruba et al. argued is done by the member states during the ECJ judgments. Alter (2008b), on the other hand, saw the role of the ECJ as more of a Trustee than an Agent. The delegation of power to a Trustee is believed to be done in order to gain more credibility and legitimacy. Trustees are considered

to be professional experts whose independence can convince a third party that its interests are being protected during the settlement of a dispute. In order to not lose its legitimacy, a Trustee must follow the laws impartially when judging. The member states will still try to persuade the ECJ in their own favor, but the observations are not considered to be threats of sanctions. Instead they are considered as arguments and opinions used as rhetoric weapons in order to convince the ECJ that it should follow the lead of the member states. Voeten (2013:27), on the other hand, argued that the Agent-Trustee discussion is too polarized. According to him, none of the extreme views are correct and he argued that they rather complement each other in trying to explain the power of the EU and the ECJ than exclude the other interpretation.

My research is based on the Principle-Agent inspired view of the observations during ECJ judgments as threats of non-compliance and the theoretical and scientific disagreement about the credibility of such threats, as illustrated by the Carruba et al. and Stone Sweet and Brunel debate. What this debate is lacking is empirical arguments about the extent and credibility of the threats of non-compliance. In order for any of the theoretical views to be right about how the ECJ reacts to such threats, there is a need for an investigation about if member states are likely to execute these threats or if they are mainly empty threats. Intergovernmentalism would lose much of its credibility if the threats are not executed, since the ECJ would probably not adjust its behavior according to the will of the member states in order to reduce the risk of non-compliance if the threats were empty. In my research, I therefore plan to look into this area more closely and study if the member states' threats increase the risk of non-compliance later on or not. Even if they were not explicitly meant as threats (which is not possible to determine from this study), they might still be seen as signals about an increased risk of non-compliance. Carruba et al. assume that the threat exists, Alter and to some extent Stone Sweet and Brunel assume that it does not and this thesis will discover whose theory is more likely to be correct.

2.4. Reasons for non-compliance

Non-compliance with EU law is a central threat towards the EU legitimacy and it is one way for member states to protest against the EU supranationality. Even though one of the Commission's tasks is to supervise the member states and ensure that they implement and apply the laws correctly, its monitoring authority does not fully prevent states from disobedience. One of the fundamental mechanisms behind the EU's legitimacy and effectiveness is compliance with the supranational law. Some states are neglecting these

commitments more often than others, which ultimately cause a problem for the EU's legitimacy and democratic status. Therefore it is important to try to localize the reasons behind incorrect implementation processes and understand what might cause a delay. Most of the previous research on non-compliance with EU law has been focused on causes within the political institutions and the political bureaucracy of the different member states and how this has affected the countries' ability to meet the implementation deadlines of directives (see Lampinen and Uusikyla 1998; Linos 2007; Perkins and Neumayer 2007; König and Luetger 2008). Lampinen and Uusikyla (1998) conducted a research which showed the effects of different political institutions and political cultures on the number of late transmissions of EU directives. Their results revealed that stability and efficiency within a state government reduced the likelihood of late implementations. Coalition governments and parliamentary electoral systems also had positive effects on EU law compliance. The authors discussed this and argued that the cause behind these correlations might be that coalition governments and parliamentary systems encourage cooperation over party lines and foster a political culture of compromises and a willingness to adjust to decisions and laws made at the national level as well as the international level. Linos' (2007) research, on the other hand, showed a negative effect of coalition governments on the transposition process. This could probably be explained by the fact that coalition governments are considered as less efficient than single party governments and therefore encounter bigger obstacles in making decisions and drafting new legislation, making it more difficult to implement EU laws (Hague and Harrop 2004:275-277).

Perkins and Neumayer's (2007) study has linked the powerfulness of the member states to their implementation rate of directives. They found that older member states with big populations were less likely to implement directives on time than newer members with small populations. The conclusion was that the new members needed to have a good implementation rate in order to legitimize their membership, while the older, larger and therefore more powerful members did not have to prove their value as an EU member in the same way. Their results were also confirmed by Börzel, Hofmann, Panke and Sprungk (2010).

While many researchers have focused on the administrative characteristics as explanations for non-compliance, others (e.g. Falkner, Hartlapp, Leiber and Treib 2004), have argued that more attention needs to be given to political disagreements and how this might affect the willingness of a country to implement the EU laws on time. In their study, Falkner et al.

(2004) found that the reason for non-compliance could be traced back to four different categories of reasons: political opposition, administrative shortcomings, issue linkage and interpretation problems. According to the authors, the theory that some states use the non-compliance as a way of expressing their dissatisfaction with the decisions made within the Council was to some extent supported by their empirical evidence. However, most of the time a failure to meet the implementation deadline appeared to be the result of a slow administrative process or problems with interpreting the meaning of the law instead of an intentional political protest. Thomson's (2008) research, on the other hand, did not find support for the claim that states' disagreement with directives increases the likelihood of non-compliance. His study was based on the summaries from the council meetings. Since the negotiation procedure within the council is surrounded by secrecy and non-transparency, it is difficult to measure the opinions of state governments quantitatively. The voting is often preceded by polarized debates which are not reflected by the final voting results in the Council. Many of the negotiations and discussions about compromises are also taking place during informal meetings instead of in the official Council meeting halls, something which is not reflected by the official summaries (Nugent 2006:206-17). This makes it even more difficult to observe and distinguish the opinions of each state in the lawmaking process. Falkner et al.'s own research is based on both interviews and statistics about the implementation of six labor law directives. Due to the difficulty of finding public minutes from the meetings in the Council where member states' oppositions of different legislations are being published, the reliability of such studies is lacking.

The importance of political culture in distinguishing reasons for non-compliance is prominent within this field of research. According to Falkner, Hartlapp and Treib (2007) and Falkner and Treib (2008) the different implementation rates of EU law in different countries can be explained by three or four different political cultures. The authors emphasize the importance of distinguishing between administrative and political phases of the implementation process. These different domestic implementation patterns which emerged could be explained by the attitude of the member states towards handling bureaucratic and political disputes between the national and the EU level. When they studied the implementation behavior of the EU-15 (states that were members before the enlargement in 2004)¹, three clusters of countries

¹ EU-15: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. Ireland and Italy were originally excluded from the study since they showed a divergent pattern.

appeared. In “the world of law observance” (Scandinavia)² member states implement directives correctly almost all the time no matter the administrative or political circumstances. There seem to be a will for abiding the EU laws in both the administrative and political phases. In “the world of domestic politics” (e.g. Germany and the United Kingdom)³ the states only implement as long as the EU law does not clash with their national interests. Here, the administrative system is more abiding towards the EU law than the political system. In “the world of transposition neglect” (e.g. France and Greece)⁴ states are unlikely to implement unless being forced to by the Commission or the ECJ. In these countries, the implementation of EU law is not a priority even for the national administration (Falkner et al. 2007). In an additional study, Falkner and Treib (2008) also included four new member states from Central and Eastern Europe (e.g. the Czech Republic and Hungary)⁵ that joined in 2004 and it resulted in the creation of a fourth group, “the world of dead letters”⁶. This group also included Ireland and Italy, two countries of the EU-15 which did not fit into any of the three original groups. The implementation rate of the studied directives for the new members was generally better than that in the EU-15. However, the main obstacle for countries belonging to “the world of dead letters” did appear to be financial limitations as well as insufficient enforcement systems and legal bodies rather than political or administrative constraints. These member states usually incorporated the EU law in the national law on time but lacked the ability to monitor the implementation and apply it properly in the national courts.

This “different worlds of compliance” theory has suffered some critique. Thomson (2008) has tested Falkner et al.’s theory and found no support for it. According to his research, where he tested the three original “worlds” separately, the same causal mechanisms were affecting the non-compliance in all three worlds. A high misfit between the national law and EU law increased the risk of a late implementation in all three worlds, not just the world of domestic politics. The only variable that appeared to be different among the groups was government efficiency. Nevertheless, as argued earlier in this text, his research is based on the official documents from council meetings, which are not always revealing the true positions of the national governments.

² The world of law observance: Denmark, Finland and Sweden.

³ The world of domestic politics: Austria, Belgium, Germany, the Netherlands, Spain and the United Kingdom.

⁴ The world of transposition neglect: France, Greece, Luxembourg and Portugal.

⁵ The countries used in that study: the Czech Republic, Hungary, Slovakia and Slovenia

⁶ The world of dead letters: the Czech Republic, Hungary, Ireland, Italy, Slovakia and Slovenia

Even though there appears to be consensus among scholars within this research field that bureaucratic reasons are causing most of the non-compliance cases, more attention needs to be given to the political dimension. One of the main issues of non-compliance is not that some political institutions are causing administrative delays in the implementation process, but that some countries are more likely to express their dissatisfaction with an EU law by not implementing it correctly for political reasons. In this thesis the focus will be on the question of to what extent a conflicting observation handed in during a preliminary ruling can be seen as a political threat of non-compliance later on and if these threats are being carried out or not. It will address the non-compliance issue with emphasis on political disputes rather than bureaucracy and administration. Further details are presented in the next part of this thesis.

3. My research

In light of existing theories and empirical research, this study will focus on empirically testing some aspects of the intergovernmental claim that member state governments use threats of non-compliance and override in order to strategically influence the decisions made by the ECJ. One presumption for this claim is that these threats are real, something neofunctionalists question because of lack of empirical support. This thesis will only focus on non-compliance and not the override mechanism, since non-compliance is more occurring and easier to operationalize. No previous study has been made about the credibility of the threats of non-compliance, which is why this thesis will bring attention to this issue. More specifically, my research will study if a political conflict during a preliminary ruling increases the likelihood of non-compliance later on. This will test the two theoretical views on the supranational political power of the EU with focus on the ECJ and whether or not it is likely that the ECJ judgment is being restrained by the political actions of the member states' governments. Previous research (Falkner et al. 2004) has stated that some states use non-compliance in order to express their political dissatisfaction with EU laws. Handing in observations which favor a different interpretation than the one eventually decided by the ECJ during preliminary rulings is also considered as a way to express political disagreements. According to the intergovernmental theory, the conflicting opinions expressed during preliminary rulings can therefore be seen as threats of non-compliance. My research will give an answer to the question if these threats are realized and carried out if the ECJ decides not to follow the position of member states or if they are only empty threats. If conflicts in preliminary ruling cases are threats of non-compliance, then we should (from time to time) see these threats

being carried out, as the ECJ repeatedly rule against the wishes of member states. If the results show that the threats are real, it is likely that the court is restrained by the opinions of the member states. If not, there should be no reason for the ECJ to avoid making decisions based on the fear of non-compliance.

It is important to conduct a study such as this in order to unveil more details about the nature of the relationship between the national and supranational level of the EU. The polarized debate between intergovernmentalists and neofunctionalists reveals two perspectives where EU is either pictured as a supranational union heading for more Europeanization without the true consent of the member states or as a union still at the intergovernmental stage where the member states continue to be the main actors. It is therefore essential to find out more about the conditions of the claims made by the two theories in order to evaluate their true credibility.⁷

3.1. Research questions and hypothesis

The aim of the thesis is to evaluate the different claims made by the intergovernmental and neofunctional scholars about the ECJ's role as a political actor and the member states' attempts to control it in order to find support for one of them. Intergovernmentalism indicates that all observations handed in during preliminary rulings are possible threats of non-compliance. Only by deciding in favor of an observation can the ECJ reduce the risk of actual non-compliance. The political opinion of a member state should therefore be of importance and the risk of non-compliance would either increase or decrease dependent on if the ECJ decides to conform to the wishes of that state or not. The research questions which are intended to be answered by this study are:

Are political opinions and threats of non-compliance with EU law affecting the risk of actual non-compliance? If the conflicting observations during preliminary rulings are considered as threats of non-compliance, are these types of threats carried out by the member states or simply empty threats?

⁷ There are other theories addressing the independency of courts, such as the attitudinal model (Segal 1997) and neoinstitutionalism (Epstein, Walker and Dixon 1989). However, since the previous research on the ECJ has mainly been focused on intergovernmentalism and neofunctionalism, this thesis will follow in their footsteps in order to better reflect the current scientific debate.

More specifically, the two hypotheses that will be tested are inspired by the intergovernmentalist claims about the member states' attempts to try to influence the ECJ. The first one, which is also the main hypothesis, reads as follows:

H1: A conflicting observation against the ECJ's interpretation of an EU law handed in by a member state during a preliminary ruling increases the risk of non-compliance in that specific state compared to when it does not hand in a conflicting observation.

If conflicting observations are threats of non-compliance constraining the behavior of the ECJ, it is likely that these threats will be carried out if the ECJ has decided not to interpret the law according to the will of the member state. Otherwise, the threats would be empty and most likely would not have an effect on the decisions made by the ECJ.

The second hypothesis tested in this study has a reversed approach to the issue and predicts the following:

H2: A supporting observation towards the ECJ's interpretation of an EU law handed in by a member state during a preliminary ruling decreases the risk of non-compliance in that specific state compared to when it does not hand in a supporting observation.

When a member state specifically supports the interpretation of the ECJ, the risk of non-compliance should be smaller since the ECJ has adapted its decision to be consistent with the will of the member state. According to the intergovernmental theory, the ECJ was most likely affected by the political opinion of the member state and judged in favor of that opinion. This would decrease the willingness of the member state to disobey by not complying later on, since the outcome of the preliminary ruling was the one desired by that state.

3.2. Expected results

If H1 is true, we would expect to see a positive effect of threats of non-compliance on the actual non-compliance, i.e. that the threats are increasing the risk of non-compliance by having a positive b coefficient. The direction of the b coefficient (positive or negative) will be more important than the effect size⁸. According to H2, we would also most likely see a negative effect on non-compliance when the states supported the ECJ interpretation. This would support the intergovernmental theory that the threats of non-compliance are real, that member states use this as a way to try to control the ECJ and that the ECJ is most likely

⁸ More detailed information on the interpretation can be found in part 6. "Results and analysis" in this thesis.

constrained by such threats. If the results do not support the two hypotheses, e.g. if the threats have a negative or insignificant effect on the risk of non-compliance, then there is no reason for the ECJ to adjust its decisions based on the political opinion of member states since the threats are most likely empty or no threats at all but simply legal arguments, as Alter (2008b) suggested. Such results would be more in line with the neofunctional theory of the role of the ECJ. Still, even if the threats turn out to be real, there is no guarantee that the ECJ does pay attention to these threats. In other words, a refusal of the hypothesis would be a major disadvantage for the intergovernmental theory, but a support for the hypothesis would not necessarily diminish the claims of the neofunctional theory. Still, the credibility of the intergovernmental theory would increase considerably if the threats were proven to be true since one of the theory's foundational claims would have been supported.⁹

4. Method

The aim of this thesis is to explore if the threat of non-compliance leads to an increased risk of actual non-compliance. When trying to generalize an observed behavior, quantitative methods are at an advantage. However, by using a statistical method in order to test this we can only see if there is a correlation. We cannot discover if the member states had the actual intention of using conflicting observations as a mean for controlling the ECJ, which is the core of the scientific debate as well as an important factor for the ECJ to consider when making its decisions. In order to find the answer to that question, one must turn to qualitative methods such as interviews among the people involved, as proposed in the concluding part of this thesis as a suggestion for future studies. However, first we need to discover if there is a correlation before we try to explain the reasons behind it.

The dependent variable in this study is a dichotomous variable, either the supporting or conflicting observation during a preliminary ruling led to non-compliance or it did not. Thus, we cannot use a linear OLS regression but has to turn to logistic regression. A logistic regression analysis predicts the probability of the dependent variable being either of two outcomes instead of predicting the absolute value of it (Field 2013:762). Also, since the units of analysis are not independent from each other, a multilevel regression analysis is needed (Fields 2013:815). The data is clustered both at a preliminary ruling level (1610 clusters) and

⁹ A refusal of the hypothesis might also support the intergovernmental view, if the ECJ is constrained by the member states' threats and therefore only rarely judges against their will. A more detailed reasoning about this is presented in the appendix under section 1. "Expected results".

at a country level (25 clusters). However, it was not possible to combine a logistic regression and a multilevel regression with this data that converged, which would have been preferred. One reason for this problem might be that some clusters contain very few occurrences of both member state observations in the court and also cases of non-compliance.

According to Hellevik (2009:68-9), linear OLS regression models can also be used for dichotomous dependent variables, which indicates that this study could be done with a linear multilevel regression analysis, but it is not appropriate when the value of interest only rarely occurs in the dataset. In such studies the effects of the independent variables might be too small to detect when using linear OLS regressions. In this study, the outcome of the dependent variable is vastly skewed in favor of compliance, since non-compliance is only an exception from the norm. Therefore, a linear regression might not notice the true effects of the variables tested. Logistic regression might also have a problem with analyzing rare events data. It all comes down to the sample size and proportion of rare occasions. King and Zeng (2001) highlighted that samples of 200 are too small, that 5000-10 000 might cause problems and that even samples of 300 000 are problematic if the proportion rate is too low (in their case the studied value of interest only occurred 0.34% of the time). This study is based on a dataset of 30 780 units of analysis of which 4314 turned out to be non-compliant (14%), which should not be a problem. The data is thus too skewed to use a linear multilevel regression but not skewed enough to cause problems with a logistic regression. Therefore, when deciding between these two methods, the logistic regression was beneficial. Also, the main independent variables (conflicting and supporting observations) in the focal relationship are not contextual variables, which deemphasize the need for a multilevel dimension. If the search for a main causal mechanism for non-compliance had been focused on the country level, then the multilevel context would not be possible to exclude¹⁰. Still, in order to solve the problem with not using a multilevel analysis, clustered robust standard errors based on the 1610 preliminary ruling cases and the 25 member states were used instead in order to take into account the correlating effects between the units of analysis. Dummy variables for each member state were also created in order to compensate for not using multilevel analysis. It would also have been beneficial to cluster by year as well, since many of the control variables

¹⁰ E.g. if the purpose had been to study if the effect of the threats is different in different countries and that some countries are more likely to realize their threats than others, then it would have been essential to do a multilevel analysis.

have values which change over time. However, this was instead solved by creating a mean value of these variables over several years¹¹.

The importance of control variables was emphasized by Aneshensel (2002:72, 97) in order to reduce the risk of making the wrong conclusions based on spurious or suppressed correlations. Spuriousness appears when two variables coincide because they are both affected by a third variable, even though there is no true correlation between them. A suppressed correlation appears when a third variable reveals a correlation between two variables which bivariately had no initial correlation. Hence, multiple models with control variables will be used in the analysis in order to find suppressed correlations and rule out spurious correlations.

5. Operationalization

5.1. The main causal relationship

In order to test if political disagreements are threats of non-compliance and if these threats are carried out, first the main concepts need to be defined and operationalized. The focus in this study lies on the behavior of member states during preliminary rulings, where their actions are considered to represent their political opinions on the preferred interpretation of the EU law. Threats of non-compliance will be operationalized as observations handed in during these preliminary rulings in favor of a different interpretation of the EU law than the one later decided by the ECJ. These will be referred to as “conflicting observations”. By handing in an observation promoting a different understanding of the meaning of a law than what the ECJ eventually decided, there is a clear political disagreement between the national level and the EU and this might be a way for the member states to try to influence the ECJ’s decision in their own favor. The member states might also have filed observations which were in favor of the interpretation that the ECJ chose. These will be referred to as “supporting observations”. The member states might also file a neutral observation or none at all, which is the most common behavior. More than one conflicting or supporting opinion might have been handed in during the same preliminary ruling, which is why the number of observations will be

¹¹ See section 3. “Control variables” in the appendix for more information.

distinguished by this study¹². Both conflicting and supporting observations might have been handed in during the same preliminary ruling, which is why they are defined as two different variables. I.e. if no conflicting observation has been handed in, the state might have handed in either only supporting observations, neutral observations or no observations at all. This is nevertheless only one way for the national governments to express their political opinions on EU law and its interpretations, but this study will focus on their behavior during preliminary rulings.¹³

The concept of non-compliance is central in this thesis since it is the dependent variable. The aim is to discover if the threats of non-compliance made by member states are real or if they even are threats at all. One broad definition of non-compliance would be all cases where national law clashes with EU law after the time limit for implementation has expired. This is however difficult to operationalize since all such cases are not acknowledged by official sources, making it impossible to test empirically. Many previous studies are based on either measuring how many member states that met the implementation deadline or the two initial steps of the infringement process conducted by the Commission (e.g. Lampinen and Uusikyla 1998; Linos 2007; König and Leutgert; Perkins and Neumayer 2007). The problem with that definition is that it mostly includes cases of non-compliance due to minor administrative reasons or interpretation errors which are solved by the Commission and the member state before the infringement process begins or proceeds any further than the two initial steps. This thesis will only focus on the cases which were referred to the ECJ in the final step of the infringement process, which will exclude all minor non-compliance issues. Still, not all cases of non-compliance are noticed by the Commission and turned into infringement processes. The Commission will only pay attention to and take formal action against the member states' non-compliance if it is quite certain it will win the case, since it tries to avoid unnecessary public disputes with the members (Mendrinou 1996). Therefore, the formal infringement procedure is incomplete when it comes to registering all events of non-compliance. However, it is still the best way to define non-compliance since it is the only official record of the occurrence.

¹² A state which handed in zero conflicting observations have been coded as "0", one conflicting observation has been coded as "1", two conflicting observations have been coded as "2" etc. The same was done for supporting observations.

¹³ A more comprehensive discussion on other possible operationalization approaches of threats of non-compliance can be found in the appendix section 2. "The operationalization of threats of non-compliance".

5.2. Data and sample

The sample studied in this thesis will be the preliminary rulings which took place 1997-2008 and the analysis will be focused on whether or not the laws interpreted by the ECJ resulted in a court judgment against any member state at least two years after the preliminary ruling. It is difficult to find information on the discussions which took place during preliminary rulings due to the confidentiality of the debates leading up to the ECJ decision. The dataset on which this study is based has been created by Naurin and Larsson (2013) and consists of 84% of the preliminary rulings 1997-2008 and specifies the opinion of each member state on the ECJ's interpretation (how many times each country handed in a conflicting or supporting observation compared to the ECJ's final decision or stayed neutral).

The dependent variable, non-compliance, was created by first compiling all infringement cases brought to the ECJ 1999-2013.¹⁴ The source used to compile data on the ECJ infringement cases was the official database for EU documents, EUR-Lex (2014). All court cases derived from the accusation of a member state failing to fulfil its obligations initiated in January 1999 and forwards, and which were closed no later than December 2013. EUR-Lex should be an appropriate and reliable source since it is the official database of EU documents. However, it is not always consistent in its publications. During the collection of data on court cases, it became obvious that the information found there is not always correct, complete and updated. This problem was also addressed by Hartlapp and Falkner (2009). Still, it is the best source of this type of data and for a majority of the time the information to be found is correct.

Afterwards, all laws mentioned during the preliminary rulings in the original dataset were controlled against the list of infringement cases in the ECJ. All laws brought up at a preliminary ruling which had been subject to an infringement case two years or more in the future were coded as non-compliant for each specific member state. Since the national opinions during the preliminary rulings are believed to affect the risk of non-compliance, the infringement process needs to have been initiated after the preliminary ruling took place. An average infringement process takes about two years (the European Commission 2014a), which is why only the infringement cases initiated in the ECJ two years or more after the

¹⁴ All infringement cases were included, even those accusations which were considered unfounded by the ECJ. Even if the court did not agree with the Commission that the state had failed to fulfil its obligation, it means that there was a major political disagreement between the state and the EU (or at least the Commission). In a handful cases the accusation of non-compliance came from another member state. These cases have also been included, even though none of them led to a conviction.

preliminary ruling took place have been included in this study as definitions of non-compliance.

This study focuses on the observations during the preliminary rulings rather than the infringement cases. A majority of the ECJ infringement cases have been preceded by a preliminary ruling, some even several preliminary rulings and thus affecting many units of analysis. The sample of ECJ infringement cases collected before the study was a total sample, but those infringement cases concerning laws which were never the subject of a preliminary ruling were not included in the analyzed dataset. This non-compliance study is therefore different than most previous studies due to the fact that not all non-compliance cases are included, only the ones preceded by a preliminary ruling. Many preliminary rulings also address several laws. It has not been possible to distinguish which law or which part of the law that the conflicting observation addressed during one preliminary ruling due to the design of the dataset used. A conflicting observation might have concerned one law during the preliminary ruling and the non-compliance might have been caused by a different law during that same preliminary ruling. The seemingly causal link between the threat and non-compliance might therefore not be accurate. The operationalization of non-compliance is thus a little too wide, which might risk the validity of the study. This analysis is also only referring to the main EU law in an infringement case, not any additional laws that might have replaced or been replaced by that same law. E.g. if an infringement case concerned another (older or newer) version of a directive that had previously been subject to a preliminary ruling, this would not be noticed in this analysis even if the same part of both versions of that directive were the subject of both the ECJ interpretation and the non-compliance judgment. The reason why this limitation has been made is that it would be too complicated and time consuming to study all preliminary rulings, what parts of the laws they concerned and compare if the same parts were subject of an infringement process of all previous and forthcoming versions of each specific law.

The EU enlargement in 2004¹⁵ might induce some problems. Since the period studied is 1997-2008, the data includes preliminary rulings which took place both before and after the enlargement. The new members' observations are thus only available from 2004 to 2008. The older members are consequently overrepresented in the dataset, but since the other option

¹⁵ The EU enlargement in 2007, when Bulgaria and Romania entered, has not been included since those countries were only members during the last two years of the studied period.

would have been to either exclude the new members or only study the years 2004-2008, it was considered to be better to include as many years and countries as possible in order to receive the most accurate result. Also, the operationalization of the control variables was adjusted in order to reduce the problems due to the enlargement.¹⁶

5.3. Control variables

In order to rule out other risk factors for non-compliance than political conflicts, this analysis will control for other known causal mechanisms. As presented earlier in the theory section, previous research on reasons for non-compliance has shown the importance of having effective bureaucracy as well as political willingness to implement EU laws. Drawing on these previous studies, this research will control for power (here defined as GDP) and EU membership length, i.e. since more powerful states who have been members for a longer time are considered to be more likely to not comply than newer and smaller members (Perkins and Neumayer 2007; Börzel et al. 2010), government effectiveness (Lampinen and Uusikyla 1998; Linos 2007) and political culture defined as the different worlds of compliance (Falkner et al. 2007; Falkner and Treib 2008).¹⁷

6. Results and analysis

The results of the logistic regression analysis are shown in table 1 on the next page. In logistic regression, the b coefficients represent the change in the logit of the outcome variable (the natural logarithm of the odds of the dependent variable occurring) with one unit change in the independent variable (Fields 2013:784). The direction of the coefficient is the most essential result since it shows if the effect is positive or negative. The expected results in this study according to the tested hypotheses are that the effect should be positive for conflicting observations (H1) and negative for supporting observations (H2).

The first hypothesis (H1) which has been tested in this thesis is:

H1: A conflicting observation against the ECJ's interpretation of an EU law handed in by a member state during a preliminary ruling increases the risk of non-compliance in that specific state compared to when it does not hand in a conflicting observation.

¹⁶ More details can be found in the appendix section 3. "Control variables".

¹⁷ See appendix section 3. "Control variables" for more information on the operationalization and sources of the control variables along with table 4 with values for each member state.

Table 1. The effect of conflicting observations during preliminary rulings on non-compliance (b coefficients, clustered robust std. err. in parentheses)

	Model 1	Model 2	Model 3	Model 4
Conflicting observations	0.276*** (0.029)		0.186*** (0.033)	0.183*** (0.029)
Supporting observations		0.167*** (0.037)	-0.011 (0.047)	
Power - GDP mean 2004-2008 (per 1000 000 000 USD)			0.000* ¹⁸ (0.000)	0.000* ¹⁹ (0.000)
Government effectiveness mean 2004-2008			-1.466*** (0.051)	-1.466*** (0.051)
EU membership (years in 2008)			0.018*** (0.001)	0.018*** (0.001)
Political culture Worlds of compliance (World of dead letters reference)				
World of law observance			2.102*** (0.103)	2.103*** (0.103)
World of domestic politics			1.938*** (0.065)	1.938*** (0.065)
World of transposition neglect			1.300*** (0.049)	1.300*** (0.050)
Cyprus			-0.461 (0.306)	-0.460 (0.306)
Malta			-2.192*** (0.582)	-2.191*** (0.582)
Intercept	-1.857*** (0.043)	-1.835*** (0.043)	-1.751*** (0.058)	-1.752*** (0.058)
McFaddens Pseudo-R ²	0.004	0.001	0.078	0.078
Correctly Classified	85.98%	85.98%	85.98%	85.98%
N	30 780	30 780	30 780	30 780

p<0.05=*, p<0.01=**, p<0.001=***

Robust Std. Err. are adjusted for 1610 clusters of cases of preliminary rulings and 25 clusters of countries. Sources: Naurin and Larsson (2013), EUR-Lex (2014), the World Bank (2014), QoG (2013), the EU (2014), Falkner et al. (2007), Falkner and Treib (2008).

The results in table 1 show that there is a statistically significant positive effect of conflicts on the risk of non-compliance. The effect on the logit is 0.276 in the bivariate analysis (model 1). When a member state hands in a conflicting observation against an interpretation of a preliminary ruling, the logit of the risk of non-compliance increases with 0.276 compared to when it is neutral or exclusively supports the ECJ interpretation. Conflicts become less affecting when controlling for other variables (model 3) but the effect is still significant. When all other values are 0, the logit of the risk of non-compliance increases with 0.186 for a

¹⁸ The b-coefficient is 0.00004. This means that there is a positive effect, but too small to be shown in the table.

¹⁹ The b-coefficient is 0.00004.

member state with one conflicting observation during a preliminary ruling compared to 0 conflicts. For each additive conflict against the ECJ's interpretation, the logit of the risk of non-compliance increases by another 0.186. These results support the tested hypothesis and the intergovernmental assumption that protests during preliminary rulings can be seen as threats of non-compliance which are likely to be realized later on.

The second hypothesis (H2) which was tested is:

H2: A supporting observation towards the ECJ's interpretation of an EU law handed in by a member state during a preliminary ruling decreases the risk of non-compliance in that specific state compared to when it does not hand in a supporting observation.

When the member state supported the ECJ's interpretation, the bivariate effect was surprisingly also positive on the risk of non-compliance (model 2) compared to when it did not hand in a supporting observation. The effect on the logit is 0.167. This would mean that member states which supported the ECJ interpretation would have a higher risk of not complying with that law compared to when it was neutral or exclusively disagreed with the ECJ's interpretation, something that is not consistent with any previous theory and logic. However, when controlling for the other variables (model 3) the effect is reversed but no longer significant, which indicates that the correlation between supporting observations and non-compliance in model 2 is only spurious (Aneshensel 2002:72). There should be no reason as to why a member state supporting the interpretation made by the ECJ would have a higher risk of being accused of non-compliance due to that law compared to when they hold a neutral position or only handed in conflicting observations. One possible explanation might be that the member state is highly committed to the policy area addressed by the law and is therefore more likely to have strong opinions about that specific subject. Most of the time, member states do not express their opinion during preliminary rulings. When they do, it most likely signals that the law is of importance and is therefore worth the attention of handing in an observation. Since EU laws are complex and consist of many different parts, it is to be expected that a state occasionally agrees with some parts of a law and disagrees with others. As mentioned earlier in the operationalization part, it would have been too time consuming to specify which parts of a law that were addressed during the preliminary ruling and which parts of that same law were later the subject to non-compliance. Consequently, a member state might have expressed a positive opinion about the interpretation of some part of a

specific law and still did not comply with it later on because it disagreed with some other part of the interpretation. Since more attention-worthy laws are more likely to result in an observation during the preliminary ruling, both positive and negative ones, the risk of non-compliance might be increased for both types of observations.

Another reason behind the surprising results in the bivariate analysis of supporting observations in model 2 might be caused by the operationalization of non-compliance. Since a preliminary ruling might include several laws and the operationalization of non-compliance in this study doesn't specify which law was the subject of the non-compliance accusation, the true effect of successes might not be revealed by this test. A state might hand in both conflicting and supporting observations during the same preliminary ruling. E.g. during a preliminary ruling concerning two different laws where the member state agreed with the interpretation of the first law but disagreed with the interpretation of the second law, the member state will be considered as non-compliant if it does not apply the second law correctly even if it has applied the first law according to the ECJ's interpretation. Since this study does not take into account which law caused the non-compliance, the effect of conflicts will be much more dominant than the effect of supporting observations even if supporting observations probably are affecting the outcome to some extent. Other factors are therefore probably more important and if a member state both agrees to some parts of the ECJ interpretation and disagrees with others, it is the conflicting opinions which will trigger the increased risk of non-compliance regardless of how many supporting observations that have been handed in.

Since supporting observations did not have the expected effect specified by H2, a new analysis without this variable was created (model 4) in order to test if the fit of the model would increase and the effects of the remaining variables would be more accurate. However, the changes of the effects were negligible and McFaddens Pseudo- R^2 is 0.078 in both models (3-4). The correctly classified value of all models (1-4) is 85.98%, which means that the models correctly predict the outcome in 85.98% of the cases (Fields 2013:784).

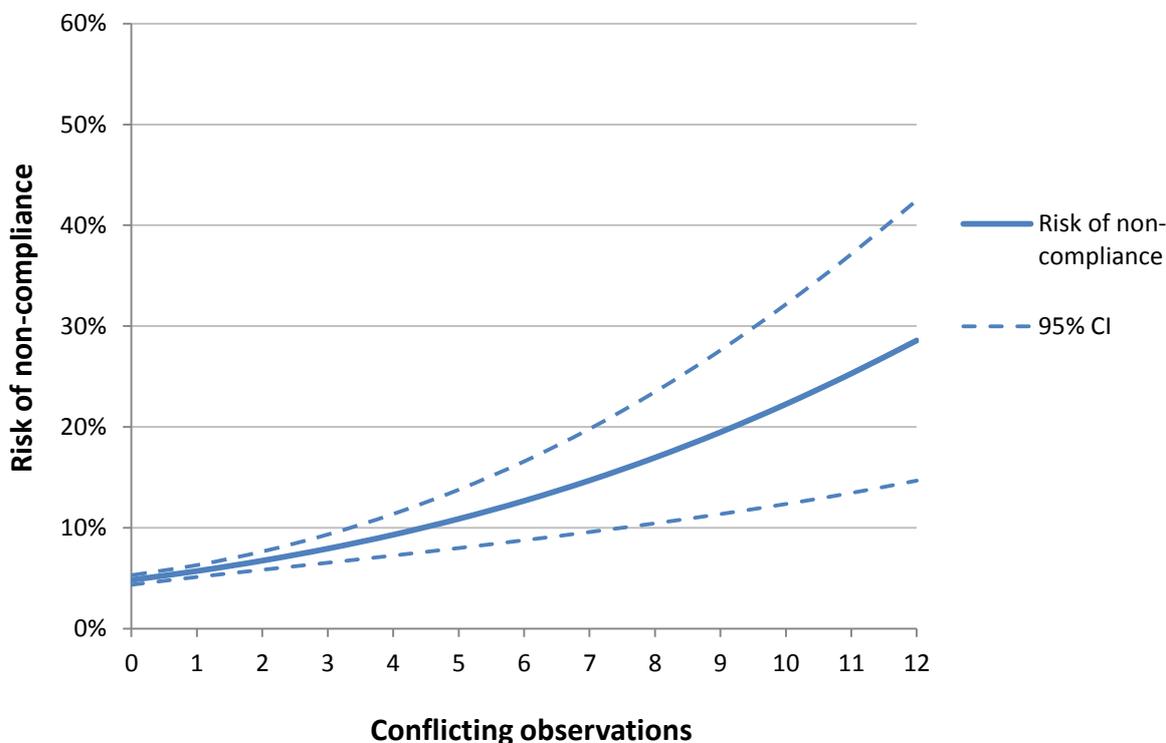
When observing the results of the control variables (model 3 and 4) used in this study, which were all chosen based on previous research, we can see that some were better at predicting the results than others. Power, here operationalized as the GDP, had only a very small positive effect on the outcome. Government effectiveness, on the other hand, appears to be very

important where more effective governments have a clear negative effect on the risk of non-compliance. The effect of older and newer member states also turned out as expected. For every year the state has been a member, the logit of the risk of non-compliance increases with 0.018. The effect of the different worlds of compliance on the risk of non-compliance was not as perfect as the theory put forward by Falkner, Hartlapp and Treib (2007) and Falkner and Treib (2008) would have us believe. One obvious thing to notice is that the expected results of the different worlds is more or less the opposite of what was discovered. The Scandinavian countries are usually considered the most obliging when it comes to implementing EU laws, but these results show that this group of countries is the one most likely to not comply, followed by the world of domestic politics. An analysis was therefore made with all the member states separated (see table 2 in the appendix). When controlling for all unique qualities of the different member states, the effect of conflicting observations decreased from 0.186 (in model 3 table 1) to 0.166 (model 1 table 2). This means that the logit of the risk of non-compliance increases by 0.166 when a member state disagrees with the interpretation of the ECJ compared to when it does not disagree. The effect of supporting observations is slightly more negative when controlling for countries instead of worlds of compliance, -0.016 (model 1 table 2) compared to -0.011 (model 3 table 1), but still not significant. The fit of the model is also better when controlling for countries in model 1 table 2 (McFaddens Pseudo-R² = 0.106) instead of using the concept of different worlds of compliance in model 3-4 table 1 (McFaddens Pseudo-R² = 0.078).

As illustrated by figure 1 (based on model 3 table 1)²⁰ on the next page, we can clearly see that the risk of non-compliance increases with the number of conflicting observations handed in by a member state. The risk is only 4.8% with zero conflicting observations and increases to 5.7% when one conflicting observation has been handed in. With twelve conflicts, the risk is almost 30%. Evidently, the number of conflicts has an impact on the risk of non-compliance and the more conflicting observations, the greater the risk of non-compliance.

²⁰ The figure is based on table 1 model 3. All other variables are at their means apart from political culture where World of dead letters is used. See table 3 in the appendix for more information about the values.

Figure 1. The risk of non-compliance dependent on the number of conflicting observations



What do these results tell us about the credibility of the intergovernmental and neofunctional arguments about the consequences of protests made by the member states and threats of non-compliance? Is this a way for the member states to try to control the ECJ or is it an ineffective threat neither likely to be heard by the ECJ nor realized by the member states? Returning to the debate between Carruba et al. (2008, 2012) and Stone Sweet and Brunel (2012), one major disagreement between the authors was the credibility of the threats made by the member states. According to Carruba et al.'s research, the ECJ is constrained by the protests made by member state governments since it increases the risk of override and non-compliance. Stone Sweet and Brunel (2012), on the other hand, accused Carruba et al. of making assumptions about the credibility of these threats without referring to any reliable data and emphasized the fact that the ECJ might not be constrained by the threats of non-compliance even if they were carried out. Neofunctionalists do acknowledge that the risk of non-compliance exists and that threats of non-compliance might be carried out, but also deemphasizes their effect on the ECJ decisions. This thesis aimed to give more clarity about the threats of noncompliance during

preliminary rulings and whether or not they are empty threats. The specific research questions intended to be answered by this study were:

Are political opinions and threats of non-compliance with EU law affecting the actual risk of non-compliance? If the conflicting observations during preliminary rulings are considered as threats of non-compliance, are these types of threats carried out by the member states or simply empty threats?

The results show that political disagreement with EU law does increase the risk of non-compliance. A threat defined as a conflicting observation during a preliminary ruling made by a member state government does increase the risk of non-compliance compared to when it holds a neutral position or exclusively supports the ECJ's interpretation. The threats do not appear to be empty, even if not all threats of non-compliance are carried out by the member state governments. Also, the results indicate that the more conflicting observations a member state hands in, the larger the risk of non-compliance later on. More surprisingly, it did not affect the non-compliance risk if the member state supported the ECJ's decision. This might, however, be a consequence of the design of the study which was mainly suitable to study the conflicting observations.

This does not, however, confirm the intergovernmental claim that the ECJ pays attention to these threats and adjusts its interpretations accordingly, but it shows that member states are more likely to not comply with an EU law if they do not agree with the ECJ's interpretation, something that is a presumption for the intergovernmental theory to be true. Therefore, the intergovernmental theory has been substantially supported by the findings in this research. For those interested in discovering if the ECJ is constrained by this and follows the lead of the member state or not, the research done by Carruba et. al (2008, 20012) and Stone Sweet and Brunell (2012) addresses that specific area. What this research confirms is that conflicting observations during preliminary ruling could be seen as threats of non-compliance and that these threats are likely to be carried out. If there had not been a correlation between conflicts and non-compliance, then the intergovernmental theory would have been disproven to some extent, since the fundamental idea is that the ECJ is adjusting its behavior due to the increased risk of non-compliance. The threats are not crucial for the risk if non-compliance, but the effects are significant and noteworthy. Still, these results do not fully disprove the

neofunctional theory, but the neofunctionalists' dismissal of the credibility of the threats of non-compliance has been proven false.

However, we cannot know the true motives behind the threats and if they even are threats at all. It might be as Alter (2008b) suggested that the observations are arguments and opinions, not threats of non-compliance. We now know that threats are credible and do increase the risk of non-compliance, but we still do not know if they are intentionally being used by the member states in order to control the ECJ and if they succeed in that mission.

7. Conclusion

This thesis has tested the claim made by the intergovernmental theory that threats of non-compliance are restraining the ECJ's independence by examining the credibility of these threats. The results showed that threats of non-compliance do increase the actual risk of non-compliance, and the more conflicting observations a member state hands in during a preliminary ruling, the greater the risk of non-compliance. However, only the political opinions which were specifically contrary to the subsequent interpretation made by the ECJ had an influence on the results in this study. It did not have a significant decreasing effect on the risk of non-compliance if the member state specifically expressed that it agreed to the interpretation made by the ECJ. This is probably because the design of this study was not able to capture the true effects of the supporting observations. Still, the main purpose of the thesis was to examine the credibility of the threats of non-compliance and those results are evidently and distinguishably pointing in the direction of supporting the intergovernmental theory.

Intergovernmentalism has gained substantially more credibility based on this thesis since the claim that the threats of non-compliance are carried out turned out to be real. Even if neofunctionalism does not dismiss the claim that conflicting observations during preliminary rulings are threats of non-compliance, that theory still downplays their effect and credibility. Only a part of the intergovernmental theory has been tested in this thesis, but the results strongly support the theory's assumptions about the credibility of the threats of non-compliance and it is likely that the ECJ would notice them and adjust its behavior accordingly. An implication of this might be that the ECJ corresponds differently towards threats dependent on which state has made them, e.g. that the threats from powerful member states are more likely to affect the ECJ than threats from less powerful states. As mentioned in the introduction, if the ECJ systematically favors some countries and not others due to

questionable reasons, this might have consequences for the impartiality and legitimacy of the ECJ and in extension the EU. Therefore, future research should investigate if the ECJ does tend to listen more to some member states than others, which would help determine if the behavior of the ECJ is a legitimacy problem or not.

We still do not know the real intentions of the member states' governments behind these threats of non-compliance, if it is a way for the members to try to control the ECJ or simply a platform for the expression of political opinions. Nevertheless, even if the conflicting observations are not meant as conscious threats from the governments, they still indicate that conflicting political opinions between the national and supranational level signals an increased risk of non-compliance, regardless of the intention behind the filed observation. It is difficult to find the causal mechanism and true motives behind the actions of the member states and the ECJ by a statistical analysis such as this. More studies need to be conducted, such as interviews or surveys among the people involved in these strategic political games, in order to find the causal mechanisms and understand why the member state governments and EU institutions act the way they do. As Falkner et al. (2004) mentioned, we need to focus more on the political reasons for non-compliance. Is there a strategy behind the member states' threats of non-compliance and does the ECJ respond to it?

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Appendix

This appendix contains further explanations and arguments about subjects mentioned in the thesis as well as additional tables.

1. Expected results

If the intergovernmental perspective is correct when describing the political role of the ECJ, then the court is very restricted by member states' views and opinions. This might mean that there will be no significant results for the test that this study is conducting, since the cases in preliminary ruling that caused major disagreement between member states and EU, the ECJ will decide according to the view of the member states and not according to its own political agenda. This means that in the cases that are left, there will be only the cases where there were no major political differences. This was observed and described by Carruba et al. (2012:222). However, since we can see that member states handed in conflicting observations to the ECJ several times during the preliminary rulings studied in this thesis, it is precluded that the ECJ always follows the path of the member state governments. Therefore, there are many cases where some members protested against a preliminary ruling decision and the study has reasons to be conducted.

2. The operationalization of threats of non-compliance

Due to the difficulty of empirically collecting the true political preference of all states regarding EU laws, political scientists have approached the operationalization of political disagreements and threats of non-compliance in different ways. Thomson (2008) used the detailed summaries from the Council of ministers in his research in order to define the member states' political position already during the legislation. Others, like Falkner et al. (2007) used interviews. When only studying a limited number of laws it is possible, but that would however not be applicable in this extensive research. Also, the reliability of the summaries from Council meeting is not good enough, since not all member states' true positions are revealed during the formal meetings and the official reports. The study of observations during preliminary rulings also has its limits since states most often do not hand in observations. Nonetheless, since there is a scientific debate and disagreement about the effect of these observations there is a need for examining the true outcomes of them and if they are true threats of non-compliance or not. That is why this study has operationalized threats of non-compliance as conflicting observations during preliminary rulings.

3. Control variables

The control variables included in the study is power, government effectiveness, membership length and political culture. This section will describe the control variables in more detail and the exact values per country are displayed in table 4 in this appendix.

Power has been operationalized as the Gross National Product (GDP), a measure commonly used for economic power (see Perkins and Neumayer 2007; Börzel et al. 2010). The value is based on the mean GDP per year 2004-2008 (per 1000 000 000 USD). Since one year's GDP is too limited to generalize, a mean of several years' GDP was used. In order to handle the EU enlargement in 2004, the years between 2004 and 2008 were chosen since those are the only years that all member states included in the study were all part of the union. The source of the member states' GDP is the World Bank (2014).

Government effectiveness has been measured by using the variable for government effectiveness (*wbgi_gee*) in the Quality of Government dataset (2013). The variable combines measures of the quality of bureaucracy, public service provision, the independence of civil service and governments' commitment to policies. A mean per year was created for the years 2004-2008.

The membership length has been measured as the number of years the member state had been a member in 2008, which is the latest year of the studied preliminary rulings. The source is the EU's official website (2014).

Political culture has been operationalized as Falkner et al.'s (2007) and Falkner and Treib's (2008) Worlds of compliance. The world of law observance consists of Denmark, Finland and Sweden. The world of domestic politics includes Austria, Belgium, Germany, the Netherlands, Spain and the United Kingdom. The world of transposition neglect involves France, Greece, Luxembourg and Portugal. The world of dead letters is defined as the Czech Republic, Hungary, Estonia, Ireland, Italy, Latvia, Lithuania, Poland, Slovakia and Slovenia. Six countries (Cyprus, Estonia, Latvia, Lithuania, Malta and Poland) were not mentioned in any of the articles. Since Estonia, Latvia, Lithuania and Poland are situated in Central and Eastern Europe, they have been included in the World of dead letters. Cyprus and Malta were more difficult to define and they have therefore been incorporated as two dummy variables.

Dummy variables for all countries were included in table 2 in the appendix in order to control for the multilevel context of the analysis as well as compensate for the Worlds of compliance concept, which did not behave as expected in table 1.

4. Tables

Table 2. The effect of conflicting observations on non-compliance with dummy variables of member states (b coefficients, clustered robust std. err. in parentheses)

	Model 1	
Conflicting observations	0.166***	(0.033)
Supporting observations	-0.016	(0.048)
Power - GDP	0.000*** ²¹	(0.000)
mean 2004-2008 (per 1000 000 000 USD)		
Government effectiveness	-0.465***	(0.045)
Mean 2004-2008		
EU membership	0.035***	(0.006)
Length in years 2008		
Member state (Germany reference)		
Austria	2.374***	(0.259)
Belgium	0.514***	(0.071)
Czech Republic	-1.261*	(0.589)
Denmark	-0.233	(0.195)
Estonia	-1.133	(0.589)
Finland	2.262***	(0.266)
France	-0.099	(0.055)
Greece	1.736***	(0.175)
Hungary	1.492***	(0.339)
Ireland	0.396*	(0.160)
Lithuania	-0.746	(0.433)
Malta	-1.436*	(0.656)
Netherlands	1.158***	(0.080)
Poland	1.055**	(0.311)
Portugal	1.974***	(0.205)
Slovakia	-0.141	(0.386)
Spain	1.952***	(0.204)
Sweden	1.563***	(0.268)
United Kingdom	-0.767***	(0.164)
Intercept	-3.617***	(0.332)
McFaddens Pseudo-R ²	0.106	
Correctly Classified	85.36%	
N	29 454	

p<0.05=*, p<0.01=**, p<0.001=***

Latvia and Slovenia are excluded because of no cases of non-compliance. Cyprus, Italy and Luxembourg are excluded because of collinearity. Robust Std. Err. are adjusted for 1610 clusters of cases of preliminary rulings and 25 clusters of countries. Sources: Naurin and Larsson (2013), EUR-Lex (2014), the World Bank (2014), QoG (2013), the EU (2014)

²¹ The b coefficient is 0.0004.

Table 3. Risk of non-compliance (based on model 3 table 1)

Number of conflicting observations	Risk of non-compliance	95% CI min	95% CI max
0	0.048	0.044	0.053
1	0.057	0.051	0.063
2	0.067	0.058	0.077
3	0.079	0.065	0.093
4	0.093	0.073	0.114
5	0.109	0.080	0.138
6	0.127	0.088	0.166
7	0.147	0.096	0.198
8	0.170	0.104	0.235
9	0.195	0.114	0.276
10	0.223	0.124	0.322
11	0.253	0.135	0.371
12	0.286	0.147	0.425

All other variables are at their means apart from political culture where World of dead letters is used. Robust Std. Err. are adjusted for 1610 clusters of cases of preliminary rulings and 25 clusters of countries. Sources: Naurin and Larsson (2013), EUR-Lex (2014), the World Bank (2014), QoG (2013), the EU (2014), Falkner et al. (2007), Falkner and Treib (2008).

Table 4. The member states' values on the control variables

	Power GDP mean 2004-2008 (per 1000 000 000 USD)	Government effectiveness mean 2004-2008	EU membership length years in 2008	Political culture Worlds of compliance
Austria	342.116	1.82	13	World of domestic politics
Belgium	421.199	1.67	56	World of domestic politics
Cyprus	19.683	1.33	4	-
Czech Republic	159.667	0.97	4	World of dead letters
Denmark	286.416	2.26	35	World of law observance
Estonia	17.701	1.08	4	World of dead letters
Finland	222.179	2.1	13	World of law observance
France	2372.425	1.63	56	World of transposition neglect
Germany	3068.568	1.59	56	World of domestic politics World of transposition neglect
Greece	275.353	0.71	27	World of dead letters
Hungary	123.023	0.82	4	World of dead letters
Ireland	227.046	1.61	35	World of dead letters
Italy	1965.854	0.47	56	World of dead letters
Latvia	22.435	0.59	4	World of dead letters
Lithuania	32.992	0.72	4	World of dead letters World of transposition neglect
Luxembourg	44.066	1.7	56	World of transposition neglect
Malta	6.817	1.04	4	-
Netherlands	715.881	1.85	56	World of domestic politics
Poland	370.621	0.46	4	World of dead letters World of transposition neglect
Portugal	212.541	0.97	22	World of dead letters
Slovakia	73.684	0.88	4	World of dead letters
Slovenia	42.083	1	4	World of dead letters
Spain	1289.322	1.12	22	World of domestic politics
Sweden	416.083	1.95	13	World of law observance
United Kingdom	2514.013	1.73	35	World of domestic politics

Sources: the World Bank (2014), QoG (2013), the EU (2014), Falkner et al. (2007), Falkner and Treib (2008).

Table 5. Summary statistics

	Mean	Min.	Max.	Std. Dev.	N
Conflicting observations	0.13	0	12	0.526	30780
Supporting observations	0.11	0	7	0.475	30780
Power	770.519	6.817	3068.568	940.345	30780
GDP mean 2004-2008 (per 1000 000 000 USD)					
Membership lenght (years in 2008)	29.68	4	56	29.68	30780
Government effectiveness (mean 2004-2008)	1.404	0.46	2.26	0.523	30780
Political culture (world of dead letters reference)					
World of law observance	0.16	0	1	0.364	30780
World of domestic politics	0.31	0	1	0.464	30780
World of transposition neglect	0.21	0	1	0.407	30780
Cyprus	0.2	0	1	0.145	30780
Malta	0.2	0	1	0.145	30780
Member states (Germany reference)					
Austria	0.5	0	1	0.223	30780
Belgium	0.5	0	1	0.223	30780
Cyprus	0.2	0	1	0.145	30780
Czech republic	0.2	0	1	0.145	30780
Denmark	0.5	0	1	0.223	30780
Estonia	0.2	0	1	0.145	30780
Finland	0.5	0	1	0.223	30780
France	0.5	0	1	0.223	30780
Greece	0.2	0	1	0.223	30780
Hungary	0.2	0	1	0.145	30780
Ireland	0.5	0	1	0.223	30780
Italy	0.5	0	1	0.223	30780
Latvia	0.2	0	1	0.145	30780
Lithuania	0.2	0	1	0.145	30780
Luxembourg	0.5	0	1	0.223	30780
Malta	0.2	0	1	0.145	30780
Netherlands	0.5	0	1	0.223	30780
Poland	0.2	0	1	0.145	30780
Portugal	0.5	0	1	0.223	30780
Slovakia	0.2	0	1	0.145	30780
Slovenia	0.2	0	1	0.145	30780
Spain	0.5	0	1	0.223	30780
Sweden	0.5	0	1	0.223	30780
United Kingdom	0.5	0	1	0.223	30780

Sources: Naurin and Larsson (2013), EUR-Lex (2014), the World Bank (2014), QoG (2013), the EU (2014), Falkner et al. (2007), Falkner and Treib (2008).