



Cooperation and Expected Policy Compliance in the Council of the EU

Markus Johansson

Centre for European Research (CERGU)

University of Gothenburg

Box 711, SE 405 30 GÖTEBORG

December 2018

© 2018 by Markus Johansson. All rights reserved.



Cooperation and Expected Policy Compliance in the Council of the EU

Markus Johansson
Centre for European Research (CERGU)
Department of Political Science
University of Gothenburg

Abstract

Collective action among nation-states is necessary for overcoming a number of pressing cross-border challenges, such as various environmental problems, antibiotics resistance, public security and trade liberalization. The most prominent product of state collective action is the European Union, which encompasses numerous policy fields of cross-border nature. But what factors affect the likelihood of generating this collective action through joint decisions in the EU? A central tenet in collective action theory and social dilemma theory is that the prospects of generating collective action through cooperative decisions will be affected by whether that cooperation will be honoured or sustained. A key prediction is that cooperation will only be possible if there is an expectation that others will comply with agreed policies. While this is crucial for understanding individual level behaviour, whether it is also true for collective agents (i.e. member state representatives) is less understood. This paper focuses on this relation between expected (non-)compliance and cooperation in member state negotiations in the Council of the EU. Using new survey data, it is tested whether a non-compliance risk affects cooperative choices, and if the level of that non-compliance risk, as well as the reason for the non-compliance risk matters for this relationship. The results indicate that non-compliance risks are considered by the member state negotiators, but that they are insensitive to the level of that risk, as well as the reason for it.

Introduction

An international rule-based system is dependent on its members following the rules that have been agreed. Yet, non-compliance with international rules is a recurring problem in the still anarchic international system. At a global scale, this has been seen during the past year with for instance the US withdrawal from the Paris climate agreement, from the nuclear deal with Iran, and with (alleged) violations of WTO trading rules. But also within the more strictly regulated system of cooperation within the European Union, non-compliance with agreed rules is a problem. The EU Commission has a supervisory function when it comes to policy compliance, and regularly reports on issues where they consider the member states to not comply with the joint rules by failed transposition or implementation. A recent example of member states not complying with joint rules, which gained some public attention, came in the wake of the 2015 migration crisis, where some member states refused to follow the burden-sharing agreement on relocation of migrants from the member states at the EU's external borders (European Commission 2017).

The issue of non-compliance in the EU has received much scholarly attention. This compliance research has for instance been devoted to how the system for securing compliance is designed (Tallberg 2002), but also what factors that explain non-compliance (e.g. Falkner et al. 2007; Mastebroek 2005). Less attention has been given to the effects of non-compliance on the sustainability of cooperation within the EU. In a wider perspective, the problem with non-compliance is the threat it poses to the very survival of an international organization, by introducing free-riding that lowers the effectiveness of the organization and feeds distrust. Cooperative behaviour is generally believed to be reciprocal, both if looking at individual level behaviour (e.g. Ostrom 1998) and if looking at state behaviour in international politics (Keohane 1986), where the own behaviour is influenced by the expectations held about other actors' behaviour. Consequently, non-compliance can be expected to be reciprocated and have negative effects, both on others' willingness to comply but also on their will to cooperate already when a decision is about to be taken. In this paper, the focus is on the latter effect, and whether non-compliance, or the mere prospect of it, affects the member state negotiators' willingness to continue cooperation and make policy decisions.

The paper utilizes new survey data with 251 elite respondents who work as representatives of the 28 member states to the Council of the EU. This data was collected during the spring and summer 2018. The results presented in this paper come from two survey questions that ask for how the negotiators would react to information from any of their adversaries about them having potential problems to comply with a decision that is about to be

made in the Council. The two survey questions are built on short treatments, which were randomly assigned to the respondents, where the first varies the information regarding the level of the non-compliance risk, and the second varies the information about the reasons for the non-compliance risk. The treatments themselves are shown to not affect the respondents indicated likelihood of cooperating. Instead, it is shown that any information about a non-compliance risk makes the negotiators willing to accommodate the associated concern, and that negotiators thereby try to make it possible for the other member state to comply. This is evidence that negotiators care about other member states' compliance, and adjust the decisions accordingly. This is seen as evidence that agreements become more shallow when a non-compliance risk is introduced. There is thus an effect of non-compliance information on the type of cooperation that can be achieved in the Council of the EU, which at least partly is in line with the reciprocal prediction that the paper derives.

The paper is structured as follows. The coming section introduces the theoretical logic of the paper, and the reciprocal relation between non-compliance and decision-making cooperation in the EU. It also discusses this in relation to existing research on non-compliance in the EU, and its lack of focus on the effects of non-compliance. The section also derives the three tested hypotheses. Following this, the data and operationalisations are presented. The third section presents the results of the survey, followed by a final section with discussion and conclusion about the effect of non-compliance risks for the negotiations and cooperation in the Council of the EU.

The reciprocal relation between non-compliance and cooperation in the EU

The relation studied in this paper is between cooperation in two policy-making phases, and in particular how anticipated non-cooperative behaviour (non-compliance) at the implementation phase affects cooperation at the decision-making phase. As a basic assumption, it is here believed that the possibilities to enforce an agreement should factor in when actors decide whether to commit to it (cf. Poletti and De Bièvre 2016, 5). For instance, in the extreme case when no actor believes that others will comply with a decision that is about to be made, why should they bother making it? Whether a decision will be complied with or not depend on a number of factors. The institutional mechanisms in place to enforce decisions are important (e.g. Tallberg 2002), but so are factors such as political preferences or administrative constraints (e.g. Fjølseth and Carrubba 2018). These sources of non-compliance have been a central study object for researchers on EU governance, but less is known about which effects non-compliance have on cooperation in decision-making.

Non-compliance is here referring to the incorrect or absent implementation of joint decisions, and it has for long been acknowledged that non-compliance is a central problem for the effectiveness of international regimes (Tallberg 2002). Non-compliance should however not only be believed to decrease effectiveness, but is here hypothesised to have negative effects on the appetite for cooperation in a more general sense and ultimately be a threat to the sustainability of international legal regimes such as the EU. Non-compliance in international cooperation is an effect of an enforcement problem that essentially stems from a lack of enforcement capacity of a centralised authority with a legitimate monopoly of violence. This is often understood to result in the strategic structure of a prisoner's dilemma, in which defection from a joint agreement is associated with some short-term benefits that comes from free-riding¹, and provides incentives to not comply at the implementation phase (Fearon 1998). This highlights a well-recognised clash between short-term self-interested behaviour of defection and long-term rational behaviour of cooperation for the provision of a common good (e.g. Dawes 1980), which in the most pessimistic accounts would make international cooperation unlikely². Yet, international cooperation sometimes both occur and is sustainable. The reasons for this are manifold, but has been argued to follow a selection effect in which states cooperate only when they will also be able to follow the joint rules (Fearon 1998). It is also an effect of institutional design, by which the enforcement problem can be mitigated by increasing the cost of non-compliance through different forms of institutional measures. In the case of the EU this means that the member states have delegated tasks of oversight and judiciary functions to supranational institutions as a way to demonstrate a credible commitment to sustained cooperation (Moravcsik 1998).

The EU system for enforcing the EU law builds on a number of tools, including infringement procedures against member states on the initiative of the Commission or another member state and the preliminary reference procedure used by national courts to guide their interpretation of EU law (e.g. Phelan 2018). In both cases the EU Court of Justice has a prominent role of adjudicating potential disputes in interpretation. It has been argued that the available tools for enforcing the common legislation are comparatively strong in the EU

¹ Most issues that are dealt with in the international system can be modelled as this type of cooperation problem, with the possibility of free-riding by non-compliance for comparative advantage (for exceptions see Snidal 1985). EU decision-making have to a large extent also sought to limit the possibilities of free-riding, by addressing e.g. regulatory competition (Holzinger 2005; Holzinger and Sommerer 2011) or burden-sharing (Thielemann 2018). While this alters the payoffs of the game, it does not by necessity take away the incentives to (secretly) avoid compliance.

² With this strategic structure, cooperation is predicted to be unlikely also if the parties are individuals, which is described as a collective action problem (e.g. Olson 1965).

(Tallberg 2002; Tallberg and McCall Smith 2014). Others have nuanced this image and argued that the supranational institutions have strategic considerations that underlie their choices of initiating, or carry out measures against potential non-compliance (Fjelstul and Carrubba 2018; König and Mäder 2014). In terms of its available institutional mechanisms however, the EU system for enforcement is comparatively strong, which should generally decrease the concerns about non-compliance. The EU is also different from many other international systems for securing compliance, such as the WTO, in which compliance is secured by interstate mechanisms rather than supranational mechanisms (Tallberg and McCall Smith 2014). The cooperation problem with the structure of a prisoner's dilemma can in interstate systems be resolved by applying a tit-for-tat strategy towards states that do not comply (retaliation with authorized own non-compliance) (Poletti and De Bièvre 2016). Such retaliatory mechanisms, or other forms of unilateral safeguard or escape mechanisms used in many other international treaties, does not exist in the EU legal order (Phelan 2018), and such responses would therefore constitute infringements in themselves, which is costly if addressed through the EU's supranational proceedings.

Empirically, compliance in the EU has often been studied using data on timely and correct transposition of directives into domestic law (e.g. Falkner et al. 2007), initiated infringement procedures by the Commission against member states (e.g. Fjelstul and Carrubba 2018; Perkins and Neumayer 2007), or both (König and Mäder 2014). This essentially deals with regulatory compliance and adopted EU legislation. But the notion of compliance can be extended to also cover areas where the EU merely have coordination competences. In foreign policy for instance, decisions can take the form of e.g. Council conclusions, and compliance can then be understood as whether member states act and speak in accordance with those conclusions or not. Similarly, in other areas where EU competences are limited to coordination measures, compliance can still be understood in terms of whether the member states implement recommendations and generally act in accordance with what the coordination stipulates.

Yet, it is clear that the enforcement mechanisms available for different policy areas differ, and for regulatory decisions there are the ultimate hard possibility for the Commission to ask the Court of Justice (ECJ) to impose fines on member states that fail to comply with joint rules. But irrespective of these available mechanisms, member states still occasionally fail to comply with joint rules or decisions (Falkner 2016; Fjelstul and Carrubba 2018). In addition, in cases where compliance with EU laws are tested in national courts via preliminary references in the ECJ, it is not guaranteed that the national courts will actually abide by the rulings of the ECJ (e.g. Conant 2012). This means that even if enforcement mechanisms are relatively strong at

the EU level, the system has its limits and non-compliance continues to pose a problem. This apparent risk for non-compliance should in sum exist for all decisions, and be acknowledged already when taking them.

It has for long been noted that strong enforcement mechanisms are effective in securing compliance with joint rules, but also that they affect decision-making. In particular, strong enforcement mechanisms have been argued to increase the stakes at the decision-making stage, since they limit the possibilities of escaping from an agreement by not complying. This has been argued to make states more cautious when it comes to striking far-reaching or “deep” agreements that are capable of reaping the full extent of potential benefits that an agreement can generate (Downs et al. 1996), and it also risks prolonging the time it takes to reach agreement (Fearon 1998). In essence, when it becomes difficult or costly to escape agreements by non-compliance, which is the case in the EU, it becomes more important to only make decisions that can be complied with. When a member state risks being unable to comply, and this is apparent already at the decision-making phase, it should therefore be predicted to generally decrease cooperation by lowering the incentives to negotiate at all, and at best lead to continued negotiations and more shallow agreements (Fearon 1998). This is in line with literature on informal governance in the EU, where it is argued that when member states have difficulties with aspects of a proposed decision, they often demand certain flexibility by evoking a norm of discretion. Such problems emanate from a risk of causing disruptive domestic conflicts (which may cause non-compliance), and the flexibility demanded often means that decisions are postponed, or include provisions for derogation and thus more flexible application of rules (Kleine 2013). In essence, this leads to prolonged decision-making, often with more shallow decisions as a result.

This predicted relation between behaviour at the implementation phase and the policy-making phase can hence be understood as reciprocal. In a general sense, this means that actors behave in a way where “good is returned for good, and bad for bad” (Keohane 1986, 8). Reciprocal behaviour is often seen a facilitator for cooperation, both among individuals (e.g. Ostrom 1998) and among representatives of states (Johansson 2015; Naurin 2010). This can be understood as a form of positive reciprocity and is especially likely in situations of iterated encounters and a long shadow of the future (Axelrod 1984). When instead non-cooperation is met with non-cooperation, reciprocity can be understood as negative, which is most clearly illustrated with the tragedy of the commons and overuse of common-pool resources (Hardin 1968). The generic prediction is that such negative reciprocity leads to suboptimal outcomes. In many situations, the implication of this is that non-compliance by one actor should be likely

to spread, and make other actors less willing to comply too. But as have been argued above, this is costly in the EU and non-compliance is therefore likely to instead lead to unwillingness to further far-reaching integration efforts, and hence decrease the likelihood for continued cooperation. This means that mere expectations about an actor not being able to comply with a policy that is to be decided, i.e. a non-compliance risk, should make that actor less credible as a signatory party, and should therefore decrease other actors' willingness to actually take the decision (Fearon 1998, 279).

Such negative reciprocity is however empirically less understood, not least in the relation between non-cooperation at the implementation phase and cooperation at the decision-making phase in international politics. One exemption is a study by Hafner-Burton et al. (2017), who have studied this relation in an experimental setting among US foreign trade officials, but focused on how the own state's risk of not complying with agreed rules affects the own preference for cooperation. They argue that the own non-compliance risk introduces strategic uncertainty and shows that it decreases their own willingness to cooperate by signing a trade deal. Their focus is thus self-regarding when it comes to non-compliance risks, whereas the focus in this paper is other-regarding. The aim is therefore to make an empirical contribution to the literature on the relation between implementation and decision-making in international politics, by a specific focus on whether the introduction of a non-compliance risk, and its associated strategic uncertainty, affects decision-making in the Council of the EU.

Hypotheses

The hypotheses developed for this paper aim not only to explain if the introduction of a non-compliance risk negatively affect cooperation in decision-making in the Council of the EU, but also under what circumstances and how. The general prediction outlined above is that non-compliance should negatively affect cooperation already at the decision-making phase. The reciprocal nature of cooperation implies that actors, when having iterated encounters, will engage in mutual cooperation as long as there is no free-riding. Such positive collective action outcomes can be facilitated by communication and building of trust, which has been shown among individuals in local settings (Ostrom 1998). This is likely to be important also in group decision-making among agents. The Council of the EU, and the EU itself, is widely understood as an arena for negotiations where communication is a key component (Elgström and Jönsson 2000), and has often been described as an institution of consensus, conducive to building trusting relationships (Lewis 2005). As such, the environment is both well suited for, and likely to achieve collective action. It is also a decision-making environment where it has been shown

that both diffuse and specific reciprocity is used to facilitate the identification of jointly beneficial agreements (Naurin 2015). Whether the reciprocal norms are having the opposite effect, awarding others' non-cooperation with own non-cooperation is less understood in this context. Negative reciprocity is widely recognized when it comes to micro-level behaviour among individuals (Ostrom 1998), but less knowledge about this exists for government agents. The hypothesis is therefore that even in the generally cooperative environment of the Council of the EU, once non-cooperation (in the form of non-compliance) is introduced it may cause disturbances to the cooperative spirit, and non-cooperation is therefore expected to be reciprocated.

H1: Information about an actor's non-compliance risk should decrease other negotiators' willingness to cooperate.

If the introduction of a non-compliance risk is important for whether negotiators choose cooperative strategies or not, it is also likely that the level of that non-compliance risk matters. In iterated games, it is often pointed out that individual responses will change between rounds based on observations about others' behaviour, primarily in the sense that actions are reciprocated based on notions of fairness or equal treatment (Keohane 1986; Ostrom 1998). This implies that a certain degree of non-cooperation should be retaliated to an equal extent, which in turn means that if an actor's non-compliance risk increases, the other actors' appetite for cooperation should decrease to an equivalent extent.

H2: An increase in an actor's non-compliance risk should decrease other negotiators' willingness to cooperate.

A central controversy in research on non-compliance in the EU is how different levels of non-compliance can be explained (for a recent overview see Fjelstul and Carrubba 2018; and also Mastenbroek 2005). Two main groups of explanations have emerged from this literature. First, non-compliance has been argued to be a consequence of too high adaptation costs, that often stems from a misfit between new EU rules and existing domestic rules. This essentially means that there are administrative or financial constraints that hinder member states from complying with the joint rules (Duina 1997; Mbaye 2001). This can also be understood as a form of involuntary non-compliance, requiring assistance to the non-complying member states for capacity building. Such problems are generally understood to be best addressed with a

management approach for compliance (Downs et al. 1996; Tallberg 2002). Second, others argue that non-compliance is better explained by looking at political factors in the member states, such as the resistance from domestic veto players (Haverland 2000) or government preferences (Treib 2003). Here, it is rather political preferences and potential political consequences that hinder member states from complying with joint EU rules. This can consequently be understood as a form of voluntary non-compliance, which instead is best addressed by forceful monitoring and effective sanctions, which is known as the enforcement approach (Downs et al. 1996; Tallberg 2002).

These outlined reasons for non-compliance are here believed to also be important for negotiators' responses to information about non-compliance risks. That is, political reasons for non-compliance can be expected to be more difficult to get understanding for compared to high adjustment costs or incapacities, and therefore also to a greater extent be punished by reciprocated non-cooperation. Political unwillingness to comply might also be more difficult to address than a lack of capacity due to its voluntariness (Fjelstul and Carrubba 2018), and non-compliance for political reasons might therefore also be more long-term. It has even been argued that the ultimate sanctions in the form of fines might merely work as a kind of "infringement tax" on the member states in such cases, a cost worth taking to avoid detrimental domestic political effects (Falkner 2016). In a sense, this makes political non-compliance more credible, and should therefore negatively affect decision-making cooperation to a greater extent than if the reason is high adjustment costs.

H3: If political reasons are given for a non-compliance risk, other negotiators will be less willing to cooperate compared to if the reason for the non-compliance risk is based on high adjustment costs as a form of incapacity.

Data and Operationalisations

This paper is focusing on if and how prospects of non-compliance affect the process of negotiating agreements in the Council of the EU. The study objects are therefore the member state negotiators to a number of different Council preparatory bodies. These are often *de facto* decision-makers in the Council in that they do the preparatory work with legislation for their ministers, who in turn deal with the relatively few but contested issues that cannot be agreed at lower levels, and who also make the final and formal decisions (e.g. Häge 2008). The member state representatives in preparatory bodies are mandated to negotiate based on instructions from their governments and they exchange information about positions and their foundation with

each other in a collective effort of exploring similarities and differences in the zone of potential agreements, and ultimately get closer to making a decision. One type of information that is relevant for these negotiations is the prospects of making decisions that in the end can be implemented in the member states.

The empirical analyses are based on empirical data from a telephone survey conducted with member state representatives to 11 of the Council's preparatory bodies³. The sample covers a broad range of policy areas, and includes both senior committees, such as Coreper I and II, and more junior working parties. The sample of preparatory bodies is made purposely to get a wide coverage of senior and junior committees, as well as different policy areas dealt with in the Council. The targeted respondents range from technical experts to ambassadors, but form a civil servant elite. The data was gathered between April and July 2018 and targeted 308 member state government representatives (28 member states x 11 preparatory bodies), of which 251 respondents participated in an interview, amounting to a response rate of 81 %. The response rates vary somewhat between the covered preparatory bodies (64-96 %) and member states (64-100 %). The respondents were first contacted with an e-mail including a letter about the project, and this was later followed-up with a telephone call to conduct or schedule the interview. The survey is part of (and follows the model of) a series of surveys that have been conducted every three years since 2003, and in total consists of 1343 conducted interviews and a total response rate of 81 % (Naurin et al. 2018). The results reported in this paper is based only on the 251 respondents that participated in the 2018 survey round.

Operationalizations

The survey items included in this paper are two, aiming to test the outlined hypotheses. Both survey items utilize short vignettes with information about a risk for non-compliance, and the hypotheses will be evaluated based on the effects generated by these treatments. For both survey items, information to the respondents is randomly varied to test the different effects. Two points are worth noting about non-compliance and why the risk of it can be expected to be communicated in negotiations. First, non-compliance was earlier defined as absent or incorrectly implemented decisions, which is sometimes an obvious and deliberate choice, but can also be unintentional if it is based on different interpretations of joint rules. The

³ The preparatory bodies covered are: Coreper I, Coreper II, Political and Security Committee (PSC), Special Committee of Agriculture (SCA), Economic Policy Committee (EPC), Politico-Military Group (PMG), Working Party on Tax Questions, Coordinating Committee in the area of policy and judicial cooperation in criminal matters (CATS), Working Party on Agricultural Questions, Working Party on Competitiveness and Growth, Working Party on the Environment.

interpretation of what constitutes non-compliant behavior can therefore vary between different actors, which is not reflected in the vignettes. However, the paper is not concerned with the effect of non-compliance as defined in any objective sense, but how perceptions about non-compliance shape the strategic considerations of member state negotiators. Second, given the argument made above that non-compliance can be a way of free-riding if it goes undetected, it might seem counterintuitive that a negotiator would want to reveal that it faces a risk for non-compliance. In the EU context however, where the institutions to secure compliance are relatively strong, it is likely to be worth more to change the coordination point of a decision and thereby secure compliance, compared to the short-term payoff to extract from free-riding. The non-compliance risk is therefore understood to form a domestic constraint, which is signalled with the purpose of changing the coordination point, and thus get a better agreement for the signalling party (cf. Johansson 2015). Open information exchanges of this kind in the Council context are also in a more general sense understood as a mean to promote efficient bargaining (Moravcsik 2018, 1657-1658).

The first treatment is used to test hypothesis 2, and includes information about different levels of non-compliance risk without specifying why there is a risk for non-compliance:

Imagine a scenario where one of the other member states signal that there is [a slight risk – about 20 % – / a significant risk – about 50 % –] that it will be unable to fully comply with the decision that is to be made. You are currently satisfied with the content of the decision, and the issue is of average importance to you.

The levels of risk chosen for the treatment groups are somewhat arbitrary, and therefore worth some brief elaboration. A 50 % non-compliance risk has in other contexts been deemed realistic, yet high (Hafner-Burton et al. 2017). It has also been accompanied in this brief description with a wording that the risk is *significant*, as compared to a 20 % risk, which is described as *slight*. It was crucial to make the descriptions imaginable for the respondents, and higher risks than 50 % was in light of this deemed to potentially be exceptionally certain, whereas a lower risk than 20 % in turn perhaps would have been negligible for the respondents. A larger difference between the levels could have been beneficial for testing the hypothesis, but the levels set were, based on these reasons, deemed realistic and sufficiently different.

A second treatment was used to test hypothesis 3, and includes information about the reason for the non-compliance risk, while keeping the risk level constant at 50 % in both groups:

Imagine a scenario where one of the other member states signal that there is a significant risk – around 50 % – that it will be unable to fully comply with the decision that is to be made because of [high adjustment costs, either in administrative or economic terms / political pressure on the government, and potential political costs]. You are currently satisfied with the content of the decision, and the issue is of average importance to you.

The first hypothesis is tested by making within-treatment comparisons to look for variation in the level of cooperation based on the information about the non-compliance risk. The implication of this is that there is not, strictly speaking, any control group when testing this hypothesis, which also means that it cannot be established which level of cooperation that would be present if there were no risk for non-compliance. Whether such control group would offer a relevant point of comparison is however not obvious. Nevertheless, the design makes it possible to evaluate whether the respondents' instinct is to react to the information by continued cooperation or not.

The question posed to the respondents for both scenarios aims to measure the dependent variable on cooperation. The question posed was related to three possible ways of behaviour, capturing various degrees of cooperation. The phrasings used were:

Based on this information, how likely would you say it is that you would act in the following three ways?

- 1. You would work for adjusting the decision to meet this concern, and thereby make it possible for the member state to comply.*
- 2. You would not work to incorporate this concern, since compliance is a domestic problem for the member state in question.*
- 3. You would seek to avoid taking a decision on the proposal.*

The scale used for the respondents is a symmetric likert scale varying from 0-10, where 10 means 'very likely', 5 means 'neither likely nor unlikely', and 0 means 'not very likely'. The three ways of reaction corresponds to a common threefold choice in negotiations, separating between (1) choosing the available terms, (2) further bargaining, or (3) to choose non-agreement (Ik le 1964). These generic forms of action have then been slightly adapted to the particular question of non-compliance risk, and to also realistically mirror situations that the negotiators face in the Council of the EU context.

These statements can in turn be understood to represent different forms and degrees of cooperative behaviour. Cooperation should here be understood as aiming to find collective agreement. Statement 3 should therefore be understood as representing the least cooperative behaviour, by referring to a completely reciprocal behaviour where the non-compliance risk is met with unilateral action rather than collective action. In line with the reasoning above, this is argued to be the most likely action when there are uncertainties about compliance (Fearon 1998, 279). Statement 1 and 2 can in this light be understood as different forms of cooperative behaviour, but holding various degrees of ambition. While statement 1 might intuitively be understood to mean the most cooperative behaviour – listening to the information and go further than necessary to accommodate another member state’s concern – this will inevitably mean more shallow cooperation, which, if taken to its extreme, will approximate a non-agreement. Statement 2 in turn – continuing cooperation while disregarding others’ potential non-cooperation – can be seen as the staunchest and most ambitious form of cooperation in that it means cooperating even if there is a risk that others will free-ride (by not complying in the end). Statement 1 is in this sense less cooperative than statement 2, in that it implies a departure from what would have been agreed in the absence of a signalled non-compliance risk, likely resulting in a more shallow agreement (Downs et al. 1996, 383). This is further indicated by the final sentence of the two survey treatments, where the information is given that the respondent is currently satisfied with the content of the decision. Statement 2 will hence be regarded as most cooperative, even if it should be acknowledged that statement 1 is closer to the type of cooperative behaviour that is associated with the often discussed consensus culture of the Council (e.g. Lewis 2005; Naurin 2015) and associated informal governance practices (Kleine 2013). In sum, statement 2 is regarded as most cooperative, statement 1 as second most cooperative, and statement 3 as least cooperative.

Results

The results from the survey are discussed separately for treatment 1 (Table 1) and treatment 2 (Table 2), and their implications for hypotheses 2 and 3 will be discussed first, and after that for hypothesis 1.

Table 1 shows the respondents’ responses to information about another member state’s level of non-compliance risks. The treatment mentioning a slight non-compliance risk of 20 % was given randomly to in total 135 respondents, and the treatment mentioning a significant non-compliance risk of 50 % was given randomly to 116 respondents. On the 0-10 scale used for the responses on the three different types of behaviour, there are only minor differences between

the two treatments, and none of them are statistically significant. The expectation here was that higher risks of non-compliance would trigger less cooperative responses, according to a reciprocal logic of equality. This essentially imply lower mean responses on statement 1 and 2, and higher mean responses for statement 3 in the group of respondents treated with the higher non-compliance risk. What the results instead show is that the treatment did not have any such effect on the respondents' likely behaviour. The respondents are hence here shown to be insensitive to the different levels of non-compliance risks assigned in these treatments. Hypothesis 2 is therefore not given any support in the survey data.

Table 1. Negotiators' responses to the treatments on different levels of non-compliance risks

	Slight risk (20 %)		Significant risk (50 %)	
	Mean	N	Mean	N
1. You would work for adjusting the decision to meet this concern, and thereby make it possible for the member state to comply.	6,30	135	6,12	116
2. You would not work to incorporate this concern, since compliance is a domestic problem for the member state in question.	3,76	135	3,72	116
3. You would seek to avoid taking a decision on the proposal.	2,59	135	2,85	116

Note: 'Imagine a scenario where one of the other member states signal that there is [a slight risk – about 20 % – / a significant risk – about 50 % –] that it will be unable to fully comply with the decision that is to be made. You are currently satisfied with the content of the decision, and the issue is of average importance to you. Based on this information, how likely would you say it is that you would act in the following three ways?' Scale (0-10), 10: very likely; 5: neither likely nor unlikely; 0: not very likely.

Table 2 shows the respondents' responses to information about the different reasons for the other member state's non-compliance risk. The risk level is held constant at 50 % between the two treatments. The treatment using high adjustment costs was given randomly to in total 124 respondents, and the treatment mentioning potential political costs was given randomly to 127 respondents. On the 0-10 scale used for the responses on the three different types of behaviour, there are also here only minor differences between the two treatments, and neither of these are statistically significant. The expectation here was that political reasons for the non-compliance risk would be met with less cooperative behaviour compared to a non-compliance risk for reasons of bureaucratic incapacities or high administrative burdens. Here, this means an expectation for lower mean responses on statement 1 and 2 and higher mean responses for statement 3 in the group of respondents treated with political reasons for the non-compliance risk. Neither for this treatment is there any statistically significant effect on the respondents'

indicated likelihood on the three statements, and their responses are instead insensitive to the different reasons for non-compliance. Neither hypothesis 3 is therefore given any support in the survey data.

Table 2. Negotiators’ responses to the treatments on different reasons for non-compliance risks

	Adjustment costs		Political costs	
	Mean	N	Mean	N
1. You would work for adjusting the decision to meet this concern, and thereby make it possible for the member state to comply.	6,10	124	6,22	127
2. You would not work to incorporate this concern, since compliance is a domestic problem for the member state in question.	3,77	124	3,69	127
3. You would seek to avoid taking a decision on the proposal.	2,64	124	2,95	127

Note: ‘Imagine a scenario where one of the other member states signal that there is a significant risk – around 50 % – that it will be unable to fully comply with the decision that is to be made because of [high adjustment costs, either in administrative or economic terms / political pressure on the government, and potential political costs]. You are currently satisfied with the content of the decision, and the issue is of average importance to you. Based on this information, how likely would you say it is that you would act in the following three ways?’ Scale (0-10), 10: very likely; 5: neither likely nor unlikely; 0: not very likely.

To evaluate hypothesis 1, it is necessary to make within-treatment comparisons, where the variation in treatment information is kept constant, and the responses to the behavioural statements instead can be analysed irrespective of the level or reason for the non-compliance risk. This can thus test whether *any* information about a non-compliance risk yield cooperative or non-cooperative responses.

When comparing responses within the treatments there are clear and statistically significant differences ($p < 0.05$) between the three statements in all four treatment groups. The pattern is however different from what was expected. As was argued above, statement 1 and 2 represent versions of cooperative behaviour, but that statement 2 was suggested to be more cooperative than statement 1, in the sense that it describes a type of behaviour that is cooperative regardless of whether other member states’ cooperate too. Based on this, the expectation was that information about a non-compliance risk would make the respondents indicate the highest likelihood for statement 3, second highest likelihood for statement 1, and third highest likelihood for statement 2. The empirical reality looks at least partly different. The pattern is the same in all treatment groups, where the highest values are given to statement 1, second

highest values are given to statement 2 and third highest values are given to statement 3. The likelihood indications for statement 3 in particular diverges from the derived expectation, coming out lowest in all treatment groups. Statement 1 in turn stands out as clearly receiving the highest likelihood indications, and is, in line with the expectation, higher than for statement 2.

The low likelihood indications for statement 3 might in turn be a consequence of the EU negotiation machinery, where controversial proposals are rarely permanently dropped from the agenda, but can instead be given lower priority during certain periods of time, e.g. during particular presidency periods (Tallberg 2003)⁴. The general practice is instead that if the member states fail to strike compromises, the proposals will continue to engage them in negotiations, through the Council's preparatory bodies over sometimes long periods of time (Häge 2008). It is possible that this made the third statement insufficiently realistic and therefore representing a strategy less likely to be pursued. The results are in sum interpreted to lend some support for hypothesis 1, in that any information about non-compliance risks is met with higher likelihood indications for the less cooperative statement 1 compared to the most cooperative statement 2, but no support for hypotheses 2 and 3.

Discussion and Conclusion

This paper deals with what effect non-compliance, or the mere risk thereof, has on cooperation in the European Union. While there is a general understanding that non-compliance is a threat to the effectiveness of international organizations in general, it is obvious that it is also threatening the legal order that the EU is built on. In addition, it has here been hypothesised that non-compliance might not only be reciprocated with non-compliance, but that it also should decrease the appetite for further collective action and joint decision-making. That is, if it cannot be trusted that decisions will be complied with, why bother making them in the first place? This reciprocal relation between cooperation in the implementation phase and cooperation in decision-making is tested in the paper. Given that previous research on the EU has focused extensively on non-compliance, and in particular what explains it, it is surprising how little we know empirically about the effects on non-compliance, and in particular when and how non-compliance affects cooperation in the EU.

⁴ In some policy areas it has, however, also been observed some stagnation in policy output (e.g. Hayes-Renshaw and Wallace 2006, 311), which would be a much larger effect that is more likely to come as a consequence of e.g. widespread factual non-compliance.

The results presented above are based on survey data from telephone interviews with 251 member state representatives to EU Council preparatory bodies, and indicate that information about a non-compliance risk makes respondents continue cooperation, but in a more shallow way, by trying to help and accommodate the concern of the member state that risk facing compliance problems. This sides with arguments from previous studies on informal governance in the EU (Kleine 2013). Only to a lesser extent would the member state representatives opt for the most cooperative choice of disregarding non-compliance risks, and risk facing the costs of own compliance when others free-ride. The survey treatments included were used to test if the level of non-compliance risk, and the reason for the non-compliance risk, affected the choices made, but they were shown to not matter. For the overall problem of the paper, this means still that information about a non-compliance risk is included in the considerations underlying decision-making in the Council. Member state negotiators are not as willing to cooperate if it comes with the cost of other member states free-riding through non-compliance. Consequently, it also means that non-compliance negatively affects cooperation in the EU, but not by complete abolishment of collective action, but instead by adapting to the concerns raised and thereby lowering the cooperative ambitions.

Two aspects of the design of the survey and questions that might affect the results of the paper are worth noting: first, that the questions focus on the immediate responses to information about non-compliance risks, and second, that they focus on a future risk rather than factual non-compliance. On the first point, reciprocal norms or behaviour are often described to be diffuse and/or specific (Keohane 1986). What is tested here is whether specific reciprocity is applied by negotiators in the given situation where they receive information about a non-compliance risk. Specific reciprocity has been shown elsewhere to be important in Council of the EU negotiations, as a way to facilitate decision-making by exchange of support on issues within proposals that member states find salient and problematic to various degrees (e.g. Johansson 2015). But also diffuse reciprocity has been shown to be present in the Council for that reason. Diffuse reciprocity as a cooperative norm is associated with some more general goodwill, as compared to specific reciprocity in which exchanges are specified to specific actors. When diffuse reciprocity applies, the exchanges are not by necessity equal, and the timing of them are not specified (Naurin 2015). This in essence means that diffuse reciprocity is imprecise and long-term. The flip-side of diffuse reciprocity as a cooperative norm is obviously that it might also react on the negative stimuli of repeated non-compliance, or signals about non-compliance risks, and create “badwill” for actors in negotiations. This could thereby have effects that are not visible in the survey data presented here. Any such negative diffuse reciprocity with long-

term effects on cooperation might be just as important for the sustainability of European collective action.

The second point raised above is that the survey questions only focus on risks, and not factual non-compliance. This might matter as it introduces uncertainty to the game. Member state negotiators act on delegation, and are not themselves in control of the implementation phase and hence policy compliance. This implies that there is always a risk for involuntary non-compliance that need to be considered by Council negotiators. The risk levels used in the treatments were deemed high enough (see also Hafner-Burton et al. 2017), and sufficiently different from each other to yield differences in responses. However, if the treatments included larger differences, and generally higher risk levels, it might have been possible to observe larger, and statistically significant, differences in responses. It could also matter that no factual non-compliance was included in the study. Especially when it comes to the option of working to avoid taking a decision, this might be perceived as a rather harsh type of action until any non-compliance has been factually observed, or can be expected with even greater certainty. Observed non-compliance within a policy area might instead have more substantial effects on the trust in the groups of negotiators, and thereby change a generally cooperative sentiment. In addition, factual non-compliance might spread, and as such effectively undermine the jointly agreed rules.

In sum, as suggestions for further research a focus on long term effects of non-compliance and signals about non-compliance risks would be welcome, but also to include factual non-compliance, whether it spreads, and how it affects the appetite for further decision-making and collective action within the EU.

Bibliography

- Axelrod, Robert. 1984. *The evolution of cooperation*. New York: Basic Books.
- Conant, Lisa. 2012. Compliance and What EU Member States Make of It. In *Compliance and the enforcement of EU law*, edited by M. Cremona. Oxford: Oxford University Press.
- Dawes, Robyn M. 1980. Social Dilemmas. *Annual Review of Psychology* 31 (1):169-193.
- Downs, George W., David M. Rocke, and Peter M. Barsoom. 1996. Is the good news about compliance good news about cooperation? *International Organization* 50 (3):379-406.
- Duina, Francesco. 1997. Explaining Legal Implementation in the European Union. *International Journal of the Sociology of Law* 25 (2):155-179.
- Elgström, Ole, and Christer Jönsson. 2000. Negotiation in the European Union: bargaining or problem-solving? *Journal of European Public Policy* 7 (5):684-704.
- European Commission. 2017. Relocation: Commission refers the Czech Republic, Hungary and Poland to the Court of Justice. Brussels.
- Falkner, Gerda. 2016. Fines against member states: An effective new tool in EU infringement proceedings? *Comparative European Politics* 14 (1):36-52.
- Falkner, Gerda, Miriam Hartlapp, and Oliver Treib. 2007. Worlds of compliance: Why leading approaches to European Union implementation are only 'sometimes-true theories'. *European Journal of Political Research* 46 (3):395-416.
- Fearon, James D. 1998. Bargaining, Enforcement, and International Cooperation. *International Organization* 52 (2):269-305.
- Fjelstul, Joshua C., and Clifford J. Carrubba. 2018. The Politics of International Oversight: Strategic Monitoring and Legal Compliance in the European Union. *American Political Science Review* 112 (3):429-445.
- Hafner-Burton, Emilie M., Brad L. LeVeck, and David G. Victor. 2017. No False Promises: How the Prospect of Non-Compliance Affects Elite Preferences for International Cooperation. *International Studies Quarterly* 61 (1):136-149.
- Hardin, Garrett. 1968. The Tragedy of the Commons. *Science* 162 (3859):1243-1248.
- Haverland, Markus. 2000. National Adaptation to European Integration: The Importance of Institutional Veto Points. *Journal of Public Policy* 20 (1):83-103.
- Hayes-Renshaw, Fiona, and Helen Wallace. 2006. *The Council of Ministers*. 2. ed. Basingstoke: Macmillan.
- Holzinger, Katharina. 2005. Tax Competition and Tax Co-Operation in the EU. *Rationality and Society* 17 (4):475-510.
- Holzinger, Katharina, and Thomas Sommerer. 2011. 'Race to the Bottom' or 'Race to Brussels'? Environmental Competition in Europe. *JCMS: Journal of Common Market Studies* 49 (2):315-339.
- Häge, Frank M. 2008. *Decision-making in the Council of the European Union: The Role of Committees*: Department of Public Administration, Faculty of Social and Behavioural Sciences, Leiden University.
- Iklé, Fred Charles. 1964. *How nations negotiate*. New York: Harper & Row.
- Johansson, Markus. 2015. Negotiations as Usual. Putting Domestic Constraints on the Table in the Council of the European Union. Doctoral thesis, Department of Political Science, University of Gothenburg.
- Keohane, Robert O. 1986. Reciprocity in International Relations. *International Organization* 40 (1):1-27.
- Kleine, Mareike. 2013. *Informal governance in the European Union: how governments make international organizations work*. Ithaca: Cornell University Press.
- König, Thomas, and Lars Mäder. 2014. The Strategic Nature of Compliance: An Empirical Evaluation of Law Implementation in the Central Monitoring System of the European Union. *American Journal of Political Science* 58 (1):246-263.

- Lewis, Jeffrey. 2005. The Janus Face of Brussels: Socialization and Everyday Decision Making in the European Union. *International Organization* 59:937-971.
- Mastenbroek, Ellen. 2005. EU compliance: Still a 'black hole'? *Journal of European Public Policy* 12 (6):1103-1120.
- Mbaye, Heather A. D. 2001. Why National States Comply with Supranational Law: Explaining Implementation Infringements in the European Union, 1972-1993. *European Union Politics* 2 (3):259-281.
- Moravcsik, Andrew. 1998. *The choice for Europe: social purpose and state power from Messina to Maastricht, Cornell studies in political economy*. Ithaca, N.Y.: Cornell University Press.
- Moravcsik, Andrew. 2018. Preferences, Power and Institutions in 21st-century Europe. *JCMS: Journal of Common Market Studies* 56 (7):1648-1674.
- Naurin, Daniel. 2010. Most Common When Least Important: Deliberation in the European Union Council of Ministers. *British Journal of Political Science* 40 (1):31-50.
- Naurin, Daniel. 2015. Generosity in intergovernmental negotiations: The impact of state power, pooling and socialisation in the Council of the European Union. *European Journal of Political Research* 54 (4):726-744.
- Naurin, Daniel, Markus Johansson, and Rutger Lindahl. 2018. *The Cooperation and Negotiations in the Council of the European Union Dataset*. Centre for European Research at the University of Gothenburg (CERGU).
- Olson, Mancur. 1965. *The logic of collective action: public goods and the theory of groups, Harvard economic studies*. Cambridge, Mass.: Harvard University Press.
- Ostrom, Elinor. 1998. A Behavioral Approach to the Rational Choice Theory of Collective Action: Presidential Address, American Political Science Association, 1997. *The American Political Science Review* 92 (1):1-22.
- Perkins, Richard, and Eric Neumayer. 2007. Do Membership Benefits Buy Regulatory Compliance?: An Empirical Analysis of EU Directives 1978—99. *European Union Politics* 8 (2):180-206.
- Phelan, William. 2018. European Legal Integration: Towards a More Liberal Intergovernmentalist Approach. *JCMS: Journal of Common Market Studies* 56 (7):1562-1577.
- Poletti, Arlo, and Dirk De Bièvre. 2016. *Judicial politics and international cooperation: from disputes to deal-making at the World Trade Organization*. Colchester: ECPR Press.
- Snidal, Duncan. 1985. Coordination versus Prisoners' Dilemma: Implications for International Cooperation and Regimes. *The American Political Science Review* 79 (4):923-942.
- Tallberg, Jonas. 2002. Paths to compliance: Enforcement, management, and the European Union. *International Organization* 56 (3):609-643.
- Tallberg, Jonas. 2003. The agenda-shaping powers of the EU Council Presidency. *Journal of European Public Policy* 10 (1):1-19.
- Tallberg, Jonas, and James McCall Smith. 2014. Dispute settlement in world politics: States, supranational prosecutors, and compliance. *European Journal of International Relations* 20 (1):118-144.
- Thielemann, Eiko. 2018. Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU. *JCMS: Journal of Common Market Studies* 56 (1):63-82.
- Treib, Oliver. 2003. EU Governance, Misfit and the Partisan Logic of Domestic Adaptation: An Actor-Centered Perspective on the Transposition of EU Directives. Paper presented at EUSA 8th Biennial Conference, March 27-29 2003, Nashville.