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To act or not to act?

A study of Commission inaction against breaches of the rule of law: the case of Spain and the non-renewal of the General Council of the Judiciary.

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Abstract

In light of the EU's growing compliance problem and the generalized decline in Commission-led enforcement, this thesis studies the phenomenon of Commission inaction against breaches of EU law, and, specifically, Art. 2 TEU. By focusing on its lack of action against Spain's non-renewal of the General Council of the Judiciary, a long-standing breach of the rule of law, this thesis aims to shed light on the reasons behind Commission inaction outside of Hungary and Poland's infringements, the two most studied cases of non-compliance. A theoretical framework that combines Kelemen and Pavone's theory of supranational forbearance and Emmons and Pavone's rhetorics of inaction is used to identify patterns of perversity, futility and jeopardy in the Commission's direct and indirect discourse about the Spanish infringement that justifies its lack of action. Although the qualitative analysis of different Commission discursive interactions found little-to-no-support for the proposed hypotheses, this thesis also discusses other important findings such as how the Commission has increasingly gained an awareness about the severity of the Spanish infringement or how it sees dialogue as the best tool to approach the Spanish national authorities as opposed to Hungary and Poland's infringement, demonstrating that the Commission acts strategically against Member States' infringements.

Key words: Commission inaction, rule of law, infringement, Spain, discourse
Words: 19960

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1 Introduction

Oftentimes labeled as the *enfants terrible*s, Hungary and Poland's speedy democratic backsliding represents the most visible contemporary example of non-compliance with EU law and the most discussed in policy and scholarly circles to this day (Bakke & Sitter, 2022). Between the two, they amount to more than 1200 infringement procedures registered in the EU Infringement Decisions database since 2010, as they have systematically failed to transpose EU law into their national legislation, apply or enforce key pieces of primary and secondary legislation, such as the Charter of Fundamental Rights of the European Union Equal Treatment Directive (2000/78/EC), and smaller and routine Treaty provisions, Directives and Regulations across all policy areas. However, the reason why they are constantly under the microscope is due to their systemic breaches of Art. 2 TEU, a key EU law provision that includes the rule of law as one of the EU's foundational values.

Budapest and Warsaw's deliberate choice not to uphold the rule of law, not only threatens the democratic foundation of the EU but also jeopardizes the functioning of the European legal order and the rights of EU citizens, amounting to yet another EU crisis to deal with (Lavelle, 2019: 36-37). One that has been difficult to ignore in Brussels. In response, the Commission, as the guardian of the Treaties, has deployed several instruments in its toolbox to ensure compliance with Art. 2 TEU in these two countries, such as the standard compliance mechanism of the infringement proceedings regulated in Arts. 258 to 260 TFEU and the "nuclear weapon" of Art. 7 TEU, as well as developed new ones, namely Regulation 2020/2092's conditionality mechanism on the EU budget and *NextGenerationEU* funds (Kochenov, 2017; Council of the European Union, 2022; Regulation 2020/2092, 2020).

Two insights worthy of further discussion can be extracted from these two cases. First, Hungary and Poland are the most dramatic examples of this trend, but non-compliance with the EU acquis must not be reduced to this extreme version, as often it is a more subtle challenge than goes beyond Budapest and Warsaw (Vinocur & Hirsch, 2022). Countless stories of non-compliance with the enforcement of EU law surface every day in all four corners of the EU affecting Schengen rules, product safety regulations and environmental policies (see Vela, 2023; Gijs & Haeck, 2022; and Galindo, 2022). The Commission's own non-compliance data shows that Poland and Hungary are not the biggest non-compliers and that traditionally regarded "pro-EU" Member States such as Italy, Portugal, Belgium, or Spain are much less law-abiding.

Second, Poland and Hungary exemplify how the EU response can be forceful and decisive against serious violations of EU law. However, this is not always the case. In the last two decades, Commission-led enforcement of EU law seems to have hit an all-time low according to the data from the EU Infringement Decisions database with a steady drop in both the number of new infringement cases opened by the Commission as well as the number of cases referred to the Court of Justice (Vinocur & Hirsch, 2022). Interestingly, this declining trend coincides with the 2004 enlargement and the overlap of other EU-wide crises where further EU integration was questioned by some Member States leading to less compliance or more creative forms of it (Kelemen & Pavone, 2021: 4-5; Batory, 2016: 686).

Hence, given the timing and the multi-crisis context in which this phenomenon is taking place, it could be argued that the Commission's vigorousness depends on the political climate in which it acts as both the engine of EU integration and the guardian of the Treaties. However, the literature studying enforcement action outside of cases of systemic infringements of EU acquis such as Poland and Hungary has left an interesting gap where more can be said about this phenomenon of underenforcement in other parts of the EU, especially when it comes to the rule of law as a foundational value of the EU. Departing from this gap, I will focus on the reasons behind the Commission's inaction to Spain's very own "constitutional crisis", where a four-year-long political deadlock over the renewal of the General Council for the Judiciary (hereinafter, the General Council), the governing body of the Spanish judiciary, is leading to a justice deficit in the country possibly breaching Art. 2 TEU's rule of law standards.

1.1 Statement of the problem and research question

I aim to analyze the reasons behind the Commission's inaction against violations of the EU acquis and, specifically, breaches of the rule of law through the study of a specific case outside the "usual suspects" in Central and Eastern Europe. The Commission's approach to Spain's long-standing breach of Art. 2 TEU, where the Parliament's inability to appoint a new General Council of the Judiciary is threatening the effective functioning of both the Spanish and EU legal order, is paradigmatic and deserves academic attention.

The General Council for the Judiciary, the Spanish judiciary's self-governing body has been working in interim since 2018 due to the main political parties in Parliament's inability to agree on a new composition for its compulsory renewal. As a result, the General Council cannot fulfill its functions, which is leading to a justice deficit in the country with the potential to threaten the rule of law.

The appointment of the members of the General Council must be voted by the Spanish parliament. However, deep political divisions in the negotiations between the current PSOE and Unidas Podemos (UP) left-wing coalition government and

the main opposition party People's Party (PP) over the ideological composition of this body have resulted in a five-year-long delay in the appointment of a new General Council, last renewed in 2013 (Torres Pérez, 2018). This political anomaly is negatively affecting the normal functioning of the Spanish judiciary, a pillar institution for ensuring the rule of law is upheld within and outside of Spain. For instance, the General Council has not been able to fulfill its duty to appoint judges in any of the different ranks of the judiciary, from the Supreme Court to the lower courts, with the automatic consequences of fewer rulings being issued. If this trend is to continue, fewer laws will be applied in Spain, including relevant pieces of EU law transposed into the Spanish legal system. In a wider European context, this justice deficit is the reason why this very Spanish-centered issue is concerning.

The case of Spain does not amount to the severity of the Hungarian and Polish challenges, both of which would be considered systemic cases of rule of law non-compliance, following Patrick Lavelle's categorization of this phenomenon (2019: 37). However, the case of Spain should not be considered episodic either, because the national actors involved in the renewal of the General Council are unable to successfully address the situation on their own, as the ongoing political deadlock shows. Since 2023 will be an intense electoral year in the country with local and regional elections taking place in most Autonomous Communities in May and a general election in the autumn, the possibility of this situation being solved without any sort of external pressure seems unlikely. One can only wonder if the PSOE-UP coalition government and the main opposition party PP would have the incentive to correct the situation if an external actor like the Commission launched compliance-seeking actions against Spain.

Yet, the Commission has opted for a non-confrontational, dialogue-based approach, simply inviting Spain to correct the situation on its own. An approach that has proven insufficient to prompt consensus. For the third year in a row, the Commission has expressed its concerns about this issue in its *2022 Rule of Law Report* by stating that the non-renewal of the General Council "remains a concern" and by putting forward data that showcases how "the level of perceived judicial independence in Spain continues to be low among the general public" (European Commission, 2022). Moreover, because of once again the suspension of negotiations between the main parties to renew this institution in early December 2022, Justice Commissioner Didier Reynders has called Spain to "proceed with the renewal of the General Council for the Judiciary as a matter of priority" (2022). Yet, the Commission remains inactive despite the potential negative consequences for the EU legal system and the state of EU democracy.

Thus, this situation poses a major puzzle, which informs the formulation of this thesis' research question:

"What are the reasons behind the Commission not triggering any compliance-seeking actions against Spain over the non-renewal of the General Council of the Judiciary?"

1.2 Purpose and outline

The primary aim of this study is shedding light on the Commission's response to breaches of EU law by Member States outside of the "usual suspects" in Central and Eastern Europe, an under-researched perspective in the literature on the Commission's response to non-compliance. Specifically, this research seeks to explain why the Commission has not yet acted against Spain over the five-year-long non-renewal of the General Council when it constitutes a threat the rule of law as a common value contemplated in Article 2 TEU.

This thesis will be structured as follows:

Chapter 2 provides the background information on the topic of this thesis, namely the EU's compliance problem, the EU's mandate and toolbox to address non-compliance with EU law and an overview of Spain's rule of law problem.

Chapter 3 presents an overview of the existing literature on Commission action and inaction against breaches of EU law.

Chapter 4 outlines the theoretical framework of this study for understanding what drives Commission inaction against Member states' infringements of and the forms it can take in discourse. It also presents this thesis hypotheses.

Chapter 5 contains this thesis' research design and methodology, including the case selection and its justification, the operationalization of variables, chosen method and analytical materials. It also addresses the limitations of this study.

Chapter 6 consists of the chronological analysis of the selected materials. It is divided into two sections, the first one conducts the analysis of the Commission's indirect discursive interactions while the second one does the same for the direct discursive interactions.

Chapter 7 presents the key findings of the analysis and discusses its implications other relevant findings and their implications for the study of Commission inaction against non-extreme infringements of the EU acquis.

Chapter 8 concludes this study, summarizing it and presenting some reflections and potential avenues for future research.

2 Background

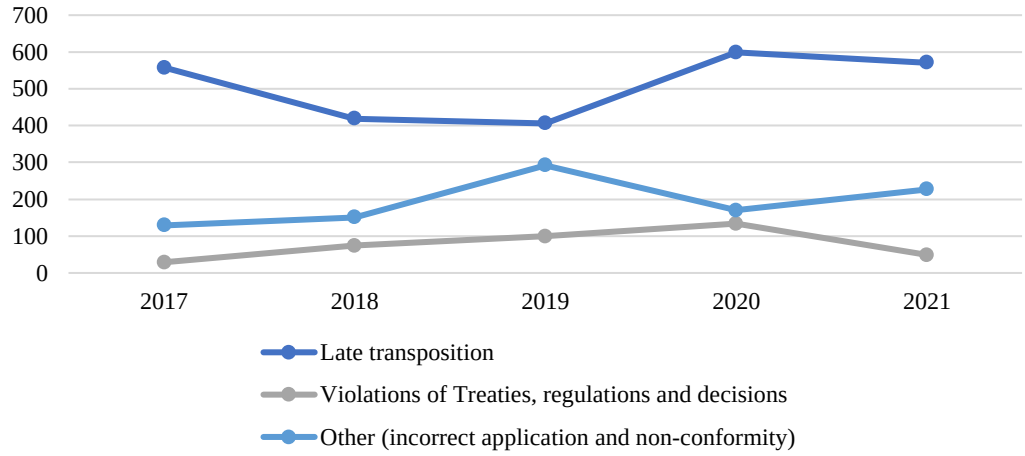
2.1 The EU's compliance problem

The rule of law crisis in Poland and Hungary is the tip of the iceberg of an increasing trend of non-compliance with EU law across the bloc. Full-time compliance is not the default behavior of Member States, regardless of how much scholars and policymakers expect it to be the case (Börzel, 2021a). Hence, this section aims to define compliance and non-compliance with EU law, show what forms non-compliance can take, as well as evidence the previous EU's compliance problem diagnosis with empirical data.

Compliance refers to an agent's behavior that is consistent with prescribed rules, norms or objectives (Batory, 2016; Börzel, 2021a: 14). In the EU context, this behavior refers to the correct transposition of EU law into the Member States' legal systems, as well as its correct application and enforcement by the national authorities (Börzel, 2021a: 14). Alternatively, non-compliance refers to rule-inconsistent behavior. Due to the EU legal system's composite nature, some level of rule-inconsistent behavior from the Member States must be expected.

The Commission identifies four types of breaches, depending on the form EU law takes (European Commission, 2021a: 20): failure to timely notify a directive transposition, a Member State's laws are not in line with the requirements of EU law (i.e. "non-conformity" or "non-compliance"), infringements of directly applicable legislation (i.e. the Treaties, regulations or decisions) and incorrect application of EU law, either incorrectly or not applied at all, by a Member State's authorities. Figure 1 presents the Commission yearly *Report on the Monitoring the Application of EU Law*'s infringement trends between 2017 and 2021. Most breaches take the form of late transposition of directives (571 cases, 67.41% of all infringement procedures in 2021). However, there is a relevant number of violations of directly applicable legislation (49 cases, representing 5.8%). The majority of these infringements are taking place mostly outside of Hungary and Poland, as the same report demonstrates (European Commission, 2021a).

Figure 1. Trends in infringement procedures (2017-2021)



Source: *Monitoring the application of European Union law* (European Commission, 2021a)

In order to assess the existence of an "EU compliance problem", I turn to the available data on the enforcement of EU law. Academics note that the lack of reliable data outside of official sources, such as the Commission's yearly reports on the Monitoring the Application of EU Law published only since 2017 make this task difficult (Batory, 2016; Börzel, 2021a; Pavone, 2023). Regardless, they still offer some valuable insights to determine whether or not the EU suffers from a compliance problem.

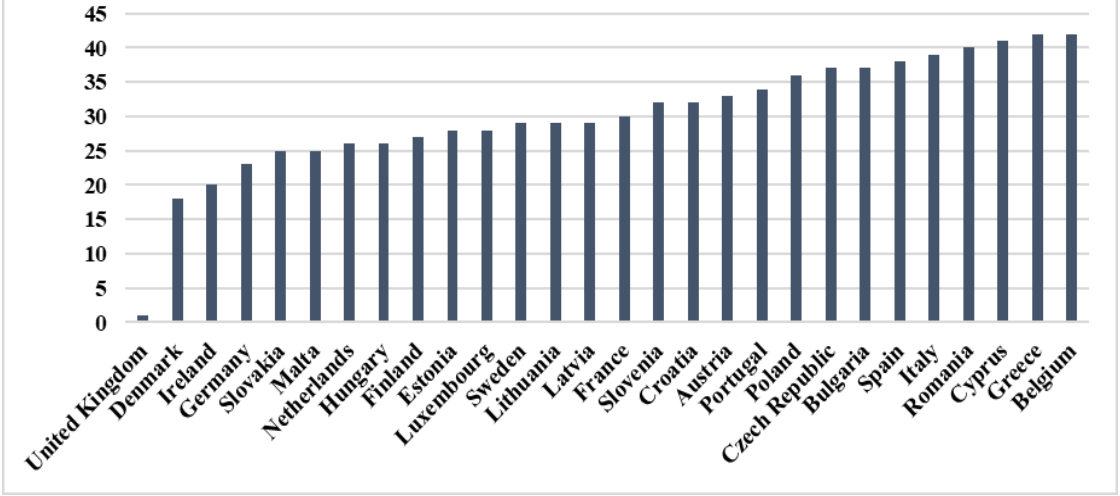
For instance, in 2021, the three Member States with the most complaints[1] were not Central and Eastern European countries, but Spain with 933, followed by Germany with 372 and France with 348 complaints. These three represent 1653 out of 4398 complaints received by the Commission in 2021, one-third of the total. Moreover, out of the 117 complaints the Commission chose to pursue (either by using the EU Pilot tool or by opening an infringement procedure), most of them affected pro-EU Member States, notably Italy, Spain, France, Greece, Portugal or Germany and were related to justice and consumer protection, employment, taxation and the environment (European Commission, 2021a).

Furthermore, the European Commission launched 847 new infringement proceedings and pursued 239 further by sending out Reasoned Opinions (ROs) (European Commission, 2021a). Figure 2 shows how, again, pro-EU Member States have a higher number of infringement proceedings open against them, whereas Poland and Hungary can be spotted in the middle of the chart (see Figure

[1] Thanks to this mechanism, any EU citizen or natural or legal person residing or having a registered office in a Member State has the right to contact the European Commission about violations of EU law by a Member State's authorities (see Art. 227 TFEU).

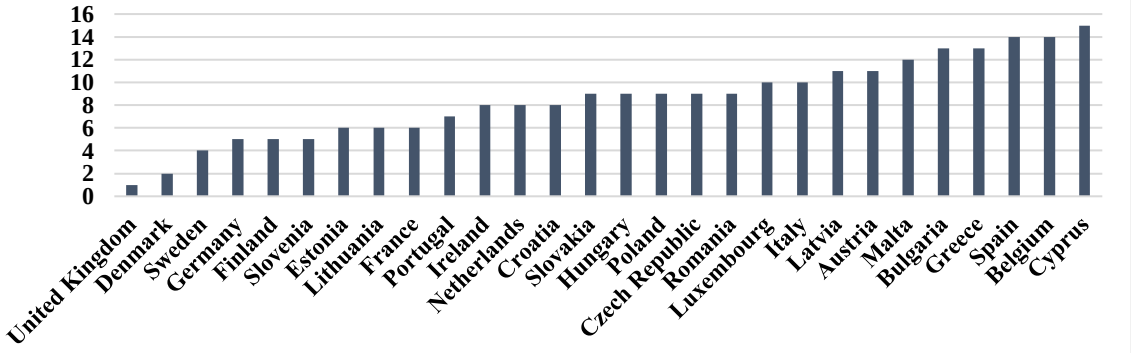
2). Similarly, for those cases in which the Commission proceeded to send ROs Poland and Hungary remained in the middle of the chart, as showcased by Figure 3 (European Commission, 2021a; European Commission, 2022).

Figure 2. New infringement procedures launched in 2021.



Source: *Monitoring the application of European Union law* (European Commission, 2021a)

Figure 3. ROs sent to Member States and the United Kingdom in 2021.



Source: *Monitoring the application of European Union law* (European Commission, 2021a)

To sum up, the Commission's most recent data on the application of EU law by the Member States shows how the EU suffers from a problem of compliance with EU law not exclusively circumscribed to Central and Eastern Europe.

2.1.1 A compliance problem beyond Central and Eastern Europe

The rule of law is a prominent feature of the EU acquis. It is always invoked alongside references to democracy and respect for fundamental rights, although no Treaty provision defines it (Pech, 2022, Smith & Drake, 2019; Lavelle, 2019: 36; Kelemen, 2019). To be able to enforce it across the EU, the European Commission has operationalized it as compliance with the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, an independent and impartial judiciary, effective judicial review and due process, respect for fundamental rights and equality before the law (2014: 4). These six principles converge with the central elements of liberal democracy.

At the EU level, compliance with the rule of law matters for different reasons, but one will be emphasized for the purpose of this paper. It is essential for the effective functioning of the European legal order, which works under the presumptions of mutual recognition and mutual trust between Member States. Mutual recognition supposes that authorities across all Member States are all law-abiding and automatically enable the domestic implementation and compliance of EU law, recognize and enforce each other's judicial resolutions and legal acts. This is only possible if Member States trust each other's legal systems (Lavelle, 2019: 36-37; Closa, 2016). In the words of the Commission, "the confidence of all EU citizens and national authorities in the functioning of the rule of law (…) will only be built and maintained if the rule of law is observed in all Member States" (European Commission, 2014: 2). Hence, when one Member State ceases to uphold the rule of law it threatens to undermining the functioning of the European legal order, jeopardizing the recognition of rights to EU citizens and legal persons operating within and beyond the offending Member State and with the possibility of spilling into other areas, such as fiscal policy, environmental policy or the internal market (Hegedüs, 2019; Closa, 2016).

If violations of the rule of law remain unaddressed by the EU, their consequences are bound to be more far-reaching than those of the democratic accountability of the EU institutions (Lavelle, 2019; Hegedüs, 2019; Closa, 2021). Next, I turn to give an overview of the EU's toolkit to deal with Member States' infringements of EU law as well as the latest trends in enforcement.

2.2 EU action against breaches of EU law

Although the EU is facing a compliance problem as previously discussed, it has the institutional architecture and capabilities to enforce law-abidance. This section will present the actors and instruments that deal with Member States' infringements, as well as the trends in enforcement of EU law.

2.2.1 In principle…

The Commission, as the guardian of the Treaties, is the main actor behind the enforcement of EU law. Following Art. 17(1) TEU, it must advocate for the EU's general interest and "take the appropriate initiatives to that end" by overseeing policy implementation, intervening when Member States do not comply with EU law and referring Member States to the Court of Justice when they do not take the appropriate actions. In doing so, the Commission has full discretion (as long as the CJEU has not issued a judgment) to launch different actions against Member States who are not observing the acquis.

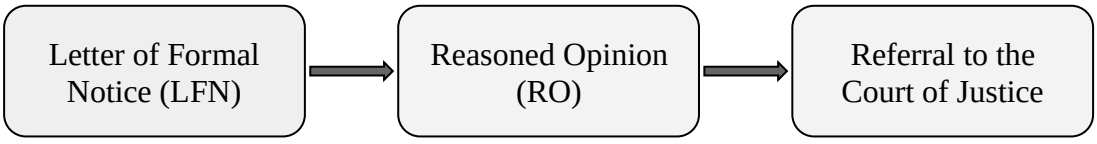
Given the theme of this research, I distinguish between actions according to their appropriateness to deal with the different forms of Member States' rule law infringements can take following Peter Lavelle's categorization, which can either be episodic or systemic (2019).

Actions against episodic breaches of the rule of law

The Commission's go-to compliance mechanism against episodic infringements, meaning "normal features of any legal order" that do not undermine the presumptions of the rule of law and can be corrected by the offending Member State's institutions and through standard enforcement mechanisms, is the infringement proceedings (Arts. 258-260 TFEU) (Lavelle, 2019: 37-38). It is a three-stage procedure by which the Commission can take legal action against Member States before the Court of Justice, with the possibility of the Court imposing financial penalties if they fail to comply with its judgment (see Figure 4).

Today infringement proceedings are mostly triggered in cases of non-compliance with directives, but they were devised to enforce the rule of law long before it was defined as a common value. Therefore, they are also part of the Commission's rule of law compliance toolbox (Lavelle, 2019; Börzel, 2021).

Figure 4. Stages of the infringement procedure



Given the high organizational costs of opening and monitoring infringement proceedings, the Commission has investigated other ways to address Member States' non-compliance. The main one is the EU pilot, an "informal clearinghouse for cases of potential infringements" (Hofmann, 2018: 739). It is an online platform

in which Member States and the Commission clarify the factual and legal background of alleged violations of the EU acquis to avoid the opening of infringement proceedings (European Commission, n.d.).

Actions against systemic breaches of the rule of law

On the other hand, systemic infringements (which can easily be categorized as cases of democratic backsliding) pose a serious threat to the rule of law and advise for stronger EU action to uphold EU law (Bermeo, 2016; Haggard & Kauffman, 2021; Sitter & Bakke, 2019). Considering the rule of law crisis in Hungary and Poland and the inefficiency of the infringement proceedings and the EU Pilot to address systemic breaches of EU law, this toolbox has rapidly evolved to adapt to more serious scenarios of non-compliance.

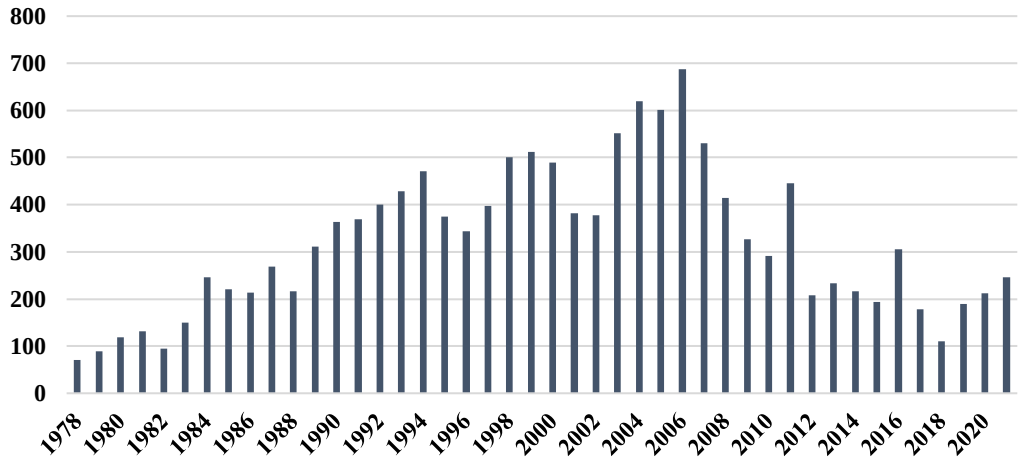
The main instrument is Art. 7 TEU, the Treaties' last-resort mechanism for addressing systemic breaches of Art. 2 TEU (Lavelle, 2019). It "seeks to secure respect for the conditions of Union membership" and allows for its application to any "sufficiently serious" breach of fundamental values that is likely to undermine the foundations of the EU and the trust among Member States "whatever the field in which the breach occurs" (European Commission, 2003: 5). It empowers the Commission, the Member States and the European Parliament to suspend the voting rights of the offending Member State in the Council (7(3) TEU) (Kochenov, 2017: 5). However, it is difficult to trigger due to high voting requirements and intergovernmental dynamics prone to blockage in the Council and the European Council. For this reason, the Commission developed the Rule of Law Framework, aimed at preventing threats to the rule of law from escalating to the point where the Commission has to trigger Art. 7 TEU (European Commission, 2003).

Given the difficulty of successfully deploying Art. 7 TEU against Poland in 2017, the Commission developed Regulation 2020/2092's conditionality mechanism for the EU budget and Next Generation EU funds, a secondary law instrument to enforce its rule of law standards by way of cutting funding to the offending Member State. Its function is to protect the financial interests of the bloc from breaches of the rule of law that seriously risk affecting the "sound financial management" of EU funds and the financial interests of the bloc. This mechanism was triggered in December 2022 against Hungary, suspending 65% of the budgetary commitments under three operational programs in Cohesion Policy (Council of the EU, 2022).

2.2.2 … and in practice

Earlier subsections have discussed the EU's compliance problem and the decreasing number of infringement cases in the last few decades. Despite the Commission's assessment of its own performance in enforcing the EU acquis, the Berlin Infringement Dataset, one of the most complete datasets on EU compliance, tells a different story. There is a downward trend on new infringement cases, a phenomenon of underenforcement of EU law, which is noticeable from 2004 onwards as can be seen in Figure 5 below.

Figure 5. Trends in the number of new infringements cases (1978-2021)



Source: Berlin Infringement Database (Börzel, 2021b)

Furthermore, the Commission's own data seem to support that last statement. From the 4398 complaints the Commission received in 2021, it dismissed or closed 4281 complaints while it pursued 117 complaints by investigating them in the EU Pilot mechanism or through an infringement procedure. This represents only 2.66% of all complaints registered (European Commission, 2021a). Although many of these complaints could have either been resolved before being pursued further or suffered from problems of substance and form, it is a very low number. However, in a scenario where non-compliance is on the rise, an alternative explanation for this could be that the Commission is deliberately not pursuing offending Member States, given its discretion in deciding whether and when to open official proceedings or not. The reasons as to why the Commission is deliberately underperforming its role of guardian of the Treaties will be discussed in the next section of this thesis.

2.3 Why Spain's rule of law problem?

Since 2018, the Spanish General Council of the Judiciary, the self-governing body for the judiciary tasked with appointing, transferring, promoting, training, recruiting judges, and ensuring and overseeing judicial independence, has been working in interim due to the main political parties' inability to agree on a new composition for its renewal creating a justice deficit in the country. It is a long-standing violation of the rule of law in a pro-EU Member State that remains unaddressed by the Commission in terms of active enforcement actions.

The selection of the General Council members is entrusted to the Congress of Deputies and the Senate by a majority of three-fifths every five years, according to Art. 122 of the 1978 Spanish Constitution and Arts. 566 and onwards of the Organic Law of the Judiciary (Constitución Española, 1978; Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial., 1985) The changes in the structure of the Spanish party system and increasing polarization can be pinpointed as two causes driving the deadlock in the negotiations to renew the General Council (Torres Pérez, 2018). Before the 2015 general election, the two main parties, the center-right PP (People's Party) and the center-left PSOE (Socialist Party), divided most of the nominations between themselves depending on their parliamentary positions (government or opposition) and offered the remaining nominations to the minority parties. From 2015 onwards, the Spanish party system evolved from a two-party to a multi-party system, making reaching this threshold to renew the General Council more difficult (Kassam, 2015). The last time the necessary majority of three-fifths was achieved was in 2013.

This long-standing deadlock is causing a justice deficit in the country with far-reaching consequences for the rule of law within and beyond Spain. A report from the Supreme Court states that since the General Council cannot appoint judges to top positions in interim, Spain's highest court is currently working with 14% fewer judges than legally required, which will if prolonged over time, lead to it issuing 1000 fewer rulings per year (Comunicación Poder Judicial, 2021). General Council data shows how this is also affecting lower courts. As of December 2022, 70 appointments in different ranks of the judiciary were not made and more than 3 million cases were pending judicial resolution, according to data from the own General Council of the Judiciary (Maldita.es, 2022; Morcillo, 2023). If this is to continue, fewer rulings will be issued across all levels of the Spanish judicial system, affecting the capacity of the Spanish courts of meeting its European obligation to ensure the mutual recognition of judicial decisions from other EU Member States and thus hinder the functioning of a European regulatory and judicial interconnected system.

In a wider European context, this is the reason why this Spanish-centered issue is concerning and yet, the Commission has not triggered any sort of enforcement action against Spain. Interestingly, the Commission has only brought up concerns

about the non-renewal of the General Council due to the deadlock's negative consequences for judicial independence (European Commission, 2022). However, General Council has always mirrored the political divides present in Spanish politics, as its members often hold the political preferences of the party that nominated them, and this was never flagged as concerning by the Commission before 2015 (Torres Pérez, 2018; Pérez, 2018).

In any case, it must be noted the Spanish infringement does not amount to the severity of systemic infringements of the rule of law, such as those of Hungary and Poland. Nevertheless, it no longer is episodic, given the inability of the PSOE-UP government and the main opposition party PP to strike a deal for the composition of the General Council on their own (Lavelle, 2019). This quite unique infringement situation is bound to be extended in time, as the political agenda both within and beyond Spain presents the Commission with no incentives to intervene any time soon. In May, local and regional elections are taking place in most Autonomous Communities, as well as a highly anticipated and competitive general election in December, with those involved in the negotiations expected to be invested in their respective political campaigns and away from the negotiations to renew the General Council finally (Chislett, 2023). Moreover, as Spain prepares to hold the Council Presidency for the fifth time in the second half of this year, a position that grants it an important leadership role, the possibility of the Commission triggering infringement proceedings over such a sensitive issue dissipates in the name of camaraderie with their soon-to-be leadership counterparts (MAEUEC, n.d.).

All these reasons make the Spanish case an interesting point of focus in the academic analysis of the way in which the Commission, specifically Von der Leyen's, responds to a protracted, neither systemic nor episodic, internal institutional crisis that is affecting the rule of law.

3 Literature review

The Commission does not pursue every instance of non-compliance that takes place in spite of having a clear mandate to do so, and yet the sudden decline in infringement numbers in the post-2004 period has not gone unnoticed by academics. This chapter aims to present the most relevant accounts of this phenomenon divided into three camps. They create the foundation for this research to build upon and contribute to identifying the research gap that I look to address by the specific analysis of the case of the Commission's inaction against Spain's long-lasting infringement of Article 2 TEU.

3.1 Declining infringement numbers

A first group of scholars argues that the decline of Commission action towards non-compliant Member States is a consequence of the declining numbers of infringement proceedings registered in the EU Infringement Database. Relying on the number of infringement proceedings as a proxy variable for non-compliance, they claim that the observable decline in infringement rates post-2004 can be explained as a result of the decrease in the EU legislative output since the 1980s as well as increased Member States' compliance after 2004 than in the past (Börzel et al, 2012; Börzel & Sedelmeier, 2017; Börzel, 2021a). These two underlying causes have been refuted both by scholars and compliance indicators.

For instance, Kelemen and Pavone counter Börzel and Sedelmeier's (2017) argument that the decrease in the EU legislative output since the 1980s is behind the sharp decline in infringements post-2004 by pointing out that this decline should have slowly occurred and been detected before 2004 (2021). Moreover, the 2004 "big bang" enlargement increased the violative opportunities of Community law because of 10 new Member States joining the ranks of the EU with still important numbers of incompatibilities of their national law with EU law. Infringements dropped, and yet the number of complaints by natural and legal persons grew, as well as the number of preliminary ruling proceedings from national courts to the CJEU (Kelemen & Pavone, 2021).

In addition, in the post-2004 period, several crises ensued in the EU, such as the 2008 Eurozone crisis or the refugee crisis in 2015 (Genschel & Jachtenfuchs, 2018; Scicluna, 2021), which allowed Member States to disregard EU law in different ways, either creatively, creating the appearance of norm-conform behavior, or to

completely disobey it, as is the case in the ongoing the rule of law crisis in Poland and Hungary (Batory, 2016; Emmons & Pavone, 2021).

In sum, this account is not convincing considering the aforementioned counterarguments. More importantly, it does not fully capture the complexities behind the choice to address breaches of EU law or not as it completely sidelines the Commission's discretionary role in pursuing Member States' infringing conducts.

3.2 Alternative compliance-seeking mechanisms

A second group of scholars contends that the EU's "governance by lawsuit" approach (Pavone, 2016: 60) of decentralized enforcement has contributed to the decline in Commission enforcement actions.

These alternative methods include private enforcement before national courts, and the use of the preliminary reference procedure (Hofmann, 2018; Falkner, 2018). They allow private parties to take their EU-related grievances to be settled in a national court, which will either apply EU law in enforcing or rejecting the claim, or ask for an authoritative interpretation on the correct application of EU law to the CJEU, which will then refer the case back to the national court for a final decision (Hofmann, 2018). This way, these scholars argue, many cases of non-compliance can be settled without the Commission's intervention. The CJEU emphasises that de-centralized enforcement procedures must be an effective means of enforcing EU rights and that it should be just as easy to enforce an EU right as it is to enforce a national right (Craig & de Búrca, 2011).

This argument has been refuted by Pavone and Kelemen's research (2019), as well as Naurin et al's (2021), according to which decentralized enforcement mechanisms have not in fact substituted direct enforcement mechanisms, as both have risen and fallen in tandem (see Figure 4 on Kelemen & Pavone, 2021: 13). Moreover, decentralized enforcement is seen as complementary to centralized mechanisms by the Commission itself. In a 2010 report from the then Internal Market Commissioner Mario Monti, he emphasized that, while private enforcement mechanisms can be useful to ensure some level of compliance with EU law, it will never be "total and homogeneous", since it has limitations that can be solved by recurring to other centralized mechanisms such as infringement proceedings (Monti, 2010: 96).

Therefore, this account does not seem to provide an explanation for the decline of Commission-led enforcement against Member States infringements of EU law given that data shows decentralized mechanisms are not completely substituting infringement proceedings and, additionally, they are not regarded as a viable standalone alternative to achieve compliance by the own Commission.

3.3 A strategic Commission

A third group of scholars looks at a spread of strategic considerations behind the Commission's inaction when facing non-compliance with the EU acquis. Due to the EU's constant state of crisis and given that, generally, enforcement mechanisms increase tensions between the Commission and the offending Member States, the Commission has sidelined the more confrontational tactics to achieve compliance in other ways, which explains the decline in the number of new infringement procedures in the post-2004 period. Within this account, there are several explanations for this phenomenon, some of which are discussed in this subsection.

3.3.1 Strategic prioritization of infringement cases

Börzel (2021a), König & Mäder (2014) and Fjelsful & Carubba (2018), among others, argue that the Commission only pursues those cases in which it is certain that it will be successful in correcting Member States' non-compliance. The Commission's "strategic prioritization" of infringements (Börzel, 2021a: 21) stems from a need to compromise its role as an engine of integration while also monitoring Member States' compliance with the acquis communautaire while also having limited resources. As a result, thanks to the discretionary powers it has over how and when to trigger infringement proceedings, the Commission strategically selects cases that both look more convincing on legal grounds (i.e. with stronger legal basis) and advance its own supranational political and institutional interests (Börzel, 2021a).

This is not a new trend, as strategic prioritization has been occurring long before the rule of law crisis even became a concern. In 2002, the Commission announced that it would focus on "serious infringements" of the acquis, referring to breaches of supremacy and uniform application of EU law, repeated violations of the same legal provision that weaken the "smooth functioning" of the EU's legal system and the failure to transpose or the incorrect transposition of directives (European Commission, 2002).

3.3.2 Better governance approach and a "policy of prudence"

Another explanation lies behind the Commission taking a "better governance approach" to non-compliance. According to Falkner (2018), what explains the decline in Commission enforcement is the outcome of the Commission's own "policy of prudence" (2018). She argues the Commission has shifted from promoting confrontational compliance mechanisms to out-of-court mechanisms in line with its *Better Regulation Agenda* (2017). This is a strategy that aims to handle non-compliance through dialogue and capacity building to improve the Member

States' capacity to enforce the EU acquis and improve the quality of law-making at the EU level, to keep from devaluating the instrument of infringement procedures (European Commission, 2017). A shift that, according to Falkner, is an "urgent concern" in today's context with Hungary and Poland's rule of law challenges and a climate of "open resistance against some Council votes and related CJEU judgments" (2018: 774). She concludes that this downward turn in the use of infringement procedures is necessary, otherwise excessive use can leave the EU completely powerless since the "nuclear" option of activating Art. 7 TEU is "vain" as soon as two or more Member States vote against it (2018: 774).

3.3.3 Enforcement by engagement and anticipation of effects

Alternatively, Closa (2019) argues that the Commission's choice to pursue infringements of EU law is the existence of multiple strategic considerations. In particular, referring to the use of Art. 7 TEU by the Commission in cases of infringements of the values of Art. 2 TEU, these combine a preference for "enforcement by engagement", through dialogue and less confrontational means, and the "anticipation of effects due to a lack of Council support", which informs different calculations about the support for the compliance measures in the Council, in the offending Member State (e.g. rally-round-the-flag effects), and about the calculation of enforcement probabilities (Closa, 2019: 706).

In line with some of the arguments already discussed, Closa finds that, even when the Commission activates infringement procedures in cases involving breaches of rule law, it prefers to deal with non-compliance politically, engaging with the offending Member State in political dialogue, rather than referring the case to the Court of Justice and open the door to the possibility of sanctions. Furthermore, the Commission does in fact anticipate the support of its own measures in the Council and the possible effects any sanctioning action might have – e.g. the implicit endorsement of the offending Member State, the cancellation of the Commission by the Member States, the devaluation of its own enforcement mechanisms and the disengagement of the offending Member State – and, with these predictions in mind, chooses whether to act or not (Closa, 2019). If the Commission expects to receive backlash in the Council from triggering an enforcement action, inaction should be expected as it "serves to protect the Commission's institutional position" (2019: 707).

Lastly, Closa also finds that the Commission's predisposition toward enforcement is dependent on the attitudes of the offending Member States' governments (2019). Specifically, it justified a differential treatment between the Commission's response to Poland and Hungary's rule of law challenge since the Hungarian authorities are prepared to talk to the Commission while the Polish ones are not" (Closa, 2019: 709).

3.4 Mind the (literature) gap!

This chapter has presented an overview of the literature review on Commission inaction against breaches of EU law. Both the declining numbers of infringement proceedings explanation and EU's "governance by lawsuit" approach can be easily disregarded as explanations for the Commission's inaction against infringements of the EU acquis (see **sections 3.1 and 3.2**). Meanwhile, the literature on strategic considerations (see **section 3.3**) points to some interesting arguments regarding Commission inaction against infringements of EU law, some of which are yet to be empirically tested in non-extreme cases, and closely aligns with the chosen theoretical framework for this study, which will be presented in the next chapter.

Therefore, this study finds its place within the existing literature on Commission's strategic considerations and aims to build on it by testing these strategic assumptions in a non-extreme case of non-compliance with the rule of law such as Spain's. This is the literature gap this thesis aims to fill.

4 Theoretical framework

Previous sections have shown there is a compliance problem in the EU that is not being addressed by the Commission, as evidenced by the decline in the number of infringement proceedings and the low percentage of complaints it decides to pursue further. However, studying the Commission's strategic considerations that lead to the underenforcement of EU law against a growing EU compliance problem remains a difficult task to be achieved. Especially, proving intention to underenforce EU law is challenging given how Commission operations remain confidential and accessing officials' testimonies via interviews is highly restricted. Thus, to bypass this limitation and answer this thesis research question – *What are the reasons behind the Commission not triggering any compliance-seeking actions against Spain over the non-renewal of the General Council of the Judiciary? –*, a theoretical framework that combines Kelemen and Pavone's supranational forbearance theory with Emmons and Pavone's rhetoric of inaction will be introduced in this section. Its aim is to provide a structure to analyze the Commission's public discourse on its response to Spain's infringement of Art. 2 TEU to uncover patterns in its arguments that justify its lack of enforcement action.

4.1 Supranational forbearance as the starting point

Kelemen and Pavone (2021), based on Allisha Holland's theory on forbearance (2016), argue that the Commission engages in a strategic behavior against offending Member States called "supranational forbearance". The Commission's inaction is the outcome of an "intentional and revocable leniency toward violations of the law, as a distinct phenomenon from weak enforcement" (Holland, 2016: 233), even though it has the resources to act. The logic behind supranational forbearance lies in the fact that law enforcement is perceived as unpopular by the Member States and that Commission interference can boost political support among them.

This theory departs from the idea that the willingness of the Commission to trigger action or remain inactive in the face of infringements of EU law is inherently linked to the political environment in which the Commission is expected to act. Where pre-Maastricht the Commission enjoyed significant discretion as the engine of integration and guardian of the Treaties, the end of the "permissive consensus" about EU policy-making in national political arenas (Marks & Hooghe, 2009), as well as the reassertion of Member States' national sovereignty and the shift towards state-driven intergovernmental bargaining at the EU level, especially in the Council

and the European Council (Hodson & Puetter, 2019; Puetter, 2012; Bickerton et al, 2015; Schimmelfennig, 2015), have made the Commission highly dependent on the EU national capitals to perform its duties and flesh out its political agenda (Peterson, 2017). In this context, Kelemen and Pavone (2021) argue that Commission officials have the incentive to engage in supranational forbearance to gain the Member States' support in the Council and European Council's intergovernmental bargains.

For forbearance to be operative in the EU's institutional setting, Kelemen and Pavone propose three revisions to Holland's (national) forbearance framework. First, the Commission is policy-driven and seeks to boost support from Member State governments rather than constituencies at the national level. Second, supranational forbearance will more likely take the form of hidden bargains between Commission officials and national authorities. And third, to avoid being accused of partisanship or fixation with certain Member States, forbearance will most likely be generalized, applying to all Member States and all policy areas (Kelemen & Pavone, 2021: 9). Table 1 provides an overview of the elements of this framework.

Table 1. Operationalization of supranational forbearance.

Key political actors	Supranational politicians *facing Member States' governments in the Council/European Council*
Actors' motives	Secure and increase support for supranational policy agenda
Key mechanism	Intergovernmental pressure not to enforce the law *against Member States' whose support is valuable to pass policy*
Scope of the outcome	Generalized *to all Member States*
Visibility of the outcome	Concealed *as private bargains*

Source: Kelemen and Pavone (2021)

Kelemen and Pavone's research targeted Barroso's Commission presidency (2004-2014). During this period, there was a clear preference for forbearance and an institutional structure that allowed for it. First, the Commission's Secretariat General was transformed into "personal service for the Commission presidency" that acted as a political filter for the Legal Service before they could launch compliance-seeking actions against Member States. Second, the EU Pilot program institutionalized the mechanism that substituted infringement procedures with "conciliatory political dialogues" with the authorities from the offending Member

States (2021: 20-21). These two reforms explain the decrease in new infringement proceedings post-2004.

While Kelemen and Pavone briefly discuss the use of forbearance in the Juncker presidency as "more selective", they only present speculations from their interviewees about the take of the current Von der Leyen Commission on forbearance. Thus, since the number of infringement cases continues to go down, I propose supranational forbearance as a plausible explanation for this Commission's current inaction against infringements and, specifically, the inaction against Spain's longs-standing infringement of Article 2 TEU.

However, as has been mentioned, proving the Commission's intention to apply supranational forbearance with no access to Commission officials' testimonies as empirical evidence is difficult from an analytical perspective. Hence, another theoretical account must be introduced to answer this thesis' research question.

4.2 The rhetorics of inaction

The EU has a "hardwired reflex" of making use of crises as opportunities to spur integration, according to Jones et al's failing forward theory (2016). However, the EU has chosen to remain inactive in the face of its own compliance problem and the rule of law crisis. Considering this, questions arise about what the EU is (specifically the Commission as guardian of the treaties) doing to justify its inaction. Emmons and Pavone argue that the Commission engages in a "rhetoric of inaction", a discursive practice that tries to legitimate its paralysis against enforcing EU law (2021: 1612).

Inspired by Albert Hirschman's rhetorics of reaction framework (1991), which he used to analyze the responses to progressive policy thrusts by conservative actors in domestic policymaking settings, Emmons and Pavone's rhetorics of inaction theory holds that rhetorical action can be employed preemptively to bolster caution about the potential failure of a policy and to justify inaction before evidence to the contrary is obtained (Emmons & Pavone, 2021: 1615). Specifically, they focus on the settings in which EU responses about inaction have been "deliberated, delayed and derailed", and how rhetorical action is used by EU officials to resist change, hold the status quo, and legitimize their inaction and failure to respond to crises (2021: 1612-1615).

It is a theory that stems from the literature on rhetorical action and discursive institutionalism's assessment of the EU as an institutional setting in which actors constantly argue, bargain, and justify their interests and courses of action (Elster, 2000; Risse, 2000). Within this environment, political actors have incentives to hide their intentions behind "norm-based arguments" grounded on the institutionalized identity, values, and norms of the EU that strengthen the legitimacy of their

position, as well as a logic of appropriateness triggered by social pressure (Schimmelfenning, 2001: 63-65).

Emmons and Pavone emphasize three conditions that must be met for the rhetoric of inaction to be more effective in its aim to legitimize the EU's failure to respond. First, inaction should be framed as a protection mechanism for the EU's values and policies. Second, it should be employed consistently, and its "prophetic warnings" taken seriously by actors with the capacity and inclination to act. Last, it should provide norm-based arguments useful to the parties involved (usually national and supranational elites) to reconcile differing interests and preferences (2021: 1616). To empirically assess these claims, Emmons and Pavone analyse different discursive interactions between EU institutions and the Hungarian and Polish governments considering the rule of law crisis (2021). To do this, they adapt Albert Hirschman's three arguments that anti-change policymakers use in his rhetorics of reaction framework, namely, the perversity, futility, and jeopardy theses (1991).

For this research project, Hirschman's three theses will be reformulated as hypotheses to analyze the Commission's inaction against the specific case of Spain with the non-renewal of the General Council. Following Schimmelfennig's conceptualization, rhetorical action is understood as the intervening mechanism that explains how the Commission turns a rational outcome (inaction) based on strategic preferences (forbearance to secure and increase support for its supranational policy agenda) into normative ones (reasons of perversity, jeopardy and futility of acting against infringements) (2001: 48).

4.2.1 The perversity thesis

Policymakers making use of this thesis to oppose change highlight the counterintuitive, counterproductive, or perverse effects of pushing society in a certain direction (Hirschman, 1991: 11-12). Hirschman argues that political actors using these arguments see the world as volatile, where it is impossible to predict the many countermoves of the implementation of a possible, hence the best course of action is to oppose its implementation altogether.

Emmons and Pavone argue that, in the EU setting, the language the Commission uses to address rule of law violations emphasizes how EU action will ultimately undermine democracy and the rule of law. In the case of Spain, a similar language is expected, hence the formulation of the following perversity hypothesis:

H1: the Commission justifies infringement inaction against Spain's violation of Article 2 TEU because they argue EU action will backfire

4.2.2 The futility thesis

In Hirschman's original argument, the language used by policymakers takes the form of a denial or a downplay of possible change (1991: 72). Change is portrayed as "largely surface, facade, cosmetic, hence illusory", since the deep structures of that gave rise to the phenomenon a policy is trying to change remain, according to the users of these futility arguments, "wholly untouched" (Hirschman, 1991: 43).

The specificity of the Spanish case, as it is neither a case of systemic infringement nor episodic given the inability of the national political actors to find a way out of the deadlock in the renewal of the General Council on their own, makes the use of an EU infringement tool the next logical step unless the parties in the negotiation are willing to face the possibility of a penalty from the CJEU. Looking at how the Commission argues its way out of triggering an enforcement action in this case due to its usefulness is therefore interesting. Thus, the formulation of the futility theses in this research is as follows:

H2a: The Commission justifies infringement inaction against Spain's violation of Article 2 TEU because they argue they lack the appropriate EU action tools to effectively intervene to safeguard the effective functioning of the General Council of the Judiciary

and

H2b: The Commission justifies infringement inaction against Spain's violation of Article 2 TEU because they argue they lack the competences to effectively intervene to safeguard the effective functioning of the General Council of the Judiciary

4.2.3 The jeopardy thesis

In Hirschman's framework, the policymakers making use of the jeopardy arguments argue that policies, while desirable in themselves, involve an "unacceptable cost (...) of one sort of another", that advise against pursuing them further (1991: 81). In other words, these policies should be opposed because they could potentially put other arduous policymaking achievements at risk (1991).

In the case of Spain, narratives surrounding the convenience of triggering Article 7 TEU are not considered given the intermediate nature of the infringement in the Spanish case. However, a narrative advising against the use of infringement procedures to solve rule of law infringements to avoid undermining its effectiveness is more likely to be expected. Therefore, the formulation of the first jeopardy thesis goes as follows:

H3a: The Commission justifies infringement inaction against Spain's violation of Article 2 TEU because they argue EU action could undermine the effectiveness of infringement actions

Given the active part of Spain in the negotiation of many of these policies (such as …) since its joining in 1986, and the central role it will have in the second half of 2023 when it holds the rotating Council Presidency, the possibility of the Commission rhetorically holding off on launching infringement actions against Spain seems likely. Therefore, the formulation of the second jeopardy thesis goes as follows:

H3b: The Commission justifies infringement inaction against Spain's violation of Article 2 TEU because they argue EU action could jeopardize policies reliant on intergovernmental dialogue and cooperation

In sum, this chapter has presented this thesis' theoretical framework and the different hypotheses for empirical testing. Thus, the theoretical considerations set forth in this chapter, notably the construction of a framework characterized by its discursive nature as a result of combining Kelemen and Pavone's theory of supranational forbearance with Emmons and Pavone's rhetorics of inaction theory, will heavily influence the methodological choices of this study, which will be presented in the next chapter and be comprised of a qualitative analysis of various documents in a single case study research design.

5 Methodology

In this chapter, I present this thesis' research design, along with the selection of my case and the operationalization of variables, the chosen method to execute the analysis and the selection of materials, which will be thematically and temporally limited. The ontological and epistemological considerations are also addressed in this chapter.

5.1 Research design

The chosen research design to address this thesis' research question – *what are the reasons behind the Commission not triggering any compliance-seeking actions against Spain over the non-renewal of the General Council of the Judiciary?* – is to conduct a single case study through a limited period of time. Its unit of analysis will be the long-standing Spanish infringement of Art. 2 TEU's rule of law from 2018 until the present day, which coincides with the Von der Leyen Commission. The goal behind these methodological choices is shedding light on the possible reasons behind the Commission's inaction against rule of law infringements in Member States outside of the "usual suspects" of Poland and Hungary, specifically the Von der Leyen's Commission (Gerring, 2004; Gerring, 2017; Clark et al, 2021).

In social sciences, there are different understandings of the concept case study (see Flyvbjerg, 2011; Tight, 2010 or Gerring, 2004), but in this thesis it will be regarded as "intensive study of a single case (...) which draws on observational data and promises to shed light on a larger population of cases" (Gerring, 2017: 28). Specifically, due to the choice of theoretical framework and the formulated hypotheses, this research design will be structured following a longitudinal design, a causal case study whose goal is to test the researcher's expectations by estimating a causal effect in a time-series analysis of a continuously observed case (Gerring, 2017).

A single case design is preferred over a comparative analysis for various reasons. First and foremost, as mentioned, one of the aims of this research is to go beyond the cases of Poland and Hungary when studying the Commission's response to Member States' rule of law breaches. Throughout this thesis, I have argued that the Spanish infringement of the rule of law is different to those of Poland and Hungary because of its background conditions and its outcome. The fact that Spain is not in the same boat as them is backed up by reputed democracy think tanks such as Freedom House, who state that Spain, despite its long-standing infringement of

Art. 2 TEU, is, both procedurally and results-wise, a high-performing democracy in all dimensions (2022). Moreover, the distinctive nature of the Spanish case, neither systemic nor episodic following Lavelle's infringement categorization (2019), makes a single case study design the most appropriate to flesh out this thesis' research potential, therefore ruling out the use of most-similar and most-different case designs respectively (Gerring, 2017).

Ultimately, the aim of this research design is to conduct explanatory research that tests the theoretical framework and the hypotheses presented in earlier sections of this paper, to ultimately understand how and why theory and data explain the Commission's inaction against Spain's infringement of the rule of law, with the possibility of shedding light on the possible causes for Commission underenforcement of EU law in other corners of the bloc (Clark et al, 2021).

5.1.1 Case selection: Spain's rule of law problem

As has been touched upon in previous sections, since 2018, the Spanish General Council of the Judiciary has been working in interim due to the main political parties' inability to agree on a new composition for its renewal creating a justice deficit as well as threatens the independence of the judiciary in the country. This phenomenon is interesting because it presents a long-standing violation of Article 2 TEU's rule of law in a pro-EU Member State that remains unaddressed in terms of active enforcement by the Commission. The selection of this case as the single unit of analysis used to answer this thesis' research question is valuable for various reasons.

First, this is a case outside of the "usual suspected" of Hungary and Poland, which have been extensively studied as discussed in previous sections of this thesis.

Second, this is a case that can be found in the "grey area" of Lavelle's categorization (2019), an area of non-compliance with the rule of law that remains completely understudied. Thus, there is a strong interest in understanding the extent of the Commission's response to this non-extreme rule of law infringement, as well as shedding light on the possible patterns of the Commission's response's narrative to similar infringements in Member States like Spain (i.e., pro-EU, "old" Member States, etc.). This is especially interesting given the pressing compliance problem of the EU and how it is affecting many Member States outside of the post-2004 Member States of Central and Eastern Europe.

Third, it is Spain's traditional pro-EU stance what makes the study of the Commission's reaction to its infringement of a key EU law provision worthy of academic attention, and replicable to similar Member States with compliance problems. Unlike Poland and Hungary, especially since the start of the rule of law crisis, Spain has been a reliable ally to the Commission abiding by its agenda and standards on different issues including democracy and the rule of law – at least on

paper (Mestres, 2019; MAEUEC, n.d.). Moreover, the arrival of Pedro Sánchez to power in 2018 (a few months before the General Council's mandate expired) opened a new chapter of Spanish engagement and leadership at the EU level, characterized by its great camaraderie with the Commission and most Member States. While embracing Macron's philosophy of the "Europe that protects", Sánchez's connections with the "Southern Seven" with the Franco-German powers in the Council were indispensable for the Commission to advance its agenda in key moments during the pandemic (Mestres, 2019). Thus, the characteristics of Spain as a Member State within the EU make it an interesting case to study the Commission's justifications for infringement inaction against pro-EU Member States whose good relationship with the EU leadership are well known and established.

5.1.2 Operationalization of variables

This section presents the variables that will be used to test this thesis' hypotheses in the analysis of the Commission's discourse surrounding inaction in the Spanish case. The dependent variable is the observed outcome, the Commission's justifying rhetoric of inaction against the Spanish infringement of the rule of law, while the independent variables point out to the possible arguments identified by Emmons and Pavone as possible reasons for the Commission's inaction, those of perversity, jeopardy and futility.

X: rhetorics of inaction → **Y**: justification of Commission inaction
X_1: perversity discourse X_2: futility discourse X_3: jeopardy discourse

As has been established before, the intervening mechanism here is rhetorical action, which explains how the Commission justifies inaction based on strategic preferences to secure and increase Member States' support for its policy agenda into reasons of perversity, jeopardy and futility that advice against activating compliance-seeking actions (Schimmelfennig, 2001: 48).

Dependent variable: Commission's justification for infringement inaction

The dependent variable of this research, that is, the observed outcome, is the Commission's justifying discourse accompanying their inaction against Member States' infringements of EU law.

As has been discussed before, the Commission has a wide variety of tools at its disposal to correct Member States' non-compliance with the acquis and has discretion in choosing whether and when to act (see section 2.3 above). I understand the concept of "action" to mean the use of formal tools regulated in EU legal instruments, such as infringement proceedings of Arts. 258-260 TFEU for episodic infringements, Art. 7 TEU or Regulation 2020/2092's rule of law conditionality mechanism for systemic ones (Hofmann, 2018; Smith, 2016). This is because they are the most visible forms of EU action, and their use has been recorded and can be traced back in time. Relatively informal modes of EU action, such as the EU Pilot and the Rule of Law Framework, could be considered instances of "action" too. However, tracing back their use is difficult since they are relatively new instruments, and the only data available about them is found in the Commission's Monitoring the Application of EU Law and the EU Justice Scoreboard yearly reports. Alternatively, I understand "inaction" as the complete passiveness in triggering any of the aforementioned instruments. In this regard, I consider rhetorical actions such as statements unaccompanied by the triggering of one of the actions against non-compliance as equal to inaction for the sake of this research.

Table 2. Operationalization of Commission infringement response

"Action"		**"Inaction"**
Formal	*Informal*	Passiveness in triggering any of the aforementioned instruments
Infringement procedures Art. 7 TEU Regulation 2020/2092	EU Pilot Rule of Law Framework	

Independent variable 1: perversity discourse

Emmons and Pavone consider the discourse of the perversity thesis can be found in situations in which the Commission needs to address rule of law violations by emphasizing how actions to protect democracy and the rule of law will ultimately undermine both. This is because those actions would "allegedly infringe upon the democratic mandate of the targeted governments" as well as "violate EU law along the way" (2021: 1620). This discourse is expected to alter the Commission's response to infringements in **H1.**

Independent variable 2: futility discourse

In debates about the usefulness of EU mechanisms for compliance with the rule of law, Emmons and Pavone find that politicians who employ a rhetoric of inaction tend to claim that the EU's tools are inadequate for dealing with most instances of non-compliance. This discourse will take the form of arguments such as that EU action is either too weak, as informal pressure tends to not work, difficult to trigger due to the high thresholds to make tools like Article 7 TEU functional, or impossible to trigger action simply because the EU does not have the legal basis to act (2021: 1622). Such discourse is expected to alter the Commission's response to infringements in **H2a and b**.

Independent variable 3: jeopardy discourse

Jeopardy arguments in the EU context have taken different shapes. For instance, regarding Article 7 TEU, Emmons and Pavone recollect how Member States' governments in the Council resisted EU enforcement actions anticipating self-defense, but also citing a "gentlemen's club agreement" where "if you don't talk about my case, I don't talk about your case" (2021: 1619). They also account for the existence of a narrative among EU policymakers in the Council of the Commission's lack of competence over Article 7 TEU and defending its prerogatives on top of a possible undermining of the procedure if triggered unsuccessfully one too many times (2021). This type of language is expected to alter the Commission's response to infringements in **H3a.**

Moreover, in the past, EU officials have cited concerns about the EU infringement actions' collateral damages of targeting and labeling certain Member States as "problematic". Emmons and Pavone point out how EU officials' language shows concerns about infringements undermining the principle of mutual trust among Member States, risking losing the dialogue and cooperation needed to negotiate and pass important policies in the Council (2021). Such language is expected to alter the Commission's response to infringements in **H3b**.

Table 3. Commission's discursive arguments to justify inaction.

Perversity discourse	Futility discourse	Jeopardy discourse
EU action against infringements of the rule of law will ultimately undermine democracy and the rule of law	Denial or downplay of change through EU action against infringements of the rule of law.	EU action against infringements of the rule of law, while desirable, should be opposed because it could put important policy-making achievements at risk.

Source: Emmons & Pavone (2021), Hirchsman (1991).

5.2 Qualitative analysis

I take inspiration from Emmons and Pavone's approach to empirically assess the perversity, futility, and jeopardy thesis in the cases of Hungary and Poland's breaches of the rule of law in the context of the rule of law crisis in the Spanish infringement case (2021). Specifically, I will carry out a qualitative analysis of all available and public EU discursive interactions towards relevant Spanish political and judicial actors (i.e. government, the main opposition party, and the actual General Council of the Judiciary) between December 2018, when the mandate of the General Council expired, to the present day. The aim is to test whether the hypothesized arguments of perversity, futility and jeopardy are found in the Commission's discourse about the Spanish infringement of the rule of law and if so, if they help explain the Commission's infringement inaction.

Qualitative analysis is the best method to test this thesis' hypotheses and answer its research question due to the following reasons. It is central to case study research, and more specifically to single or small-N case study designs such as this one. Additionally, the selection of materials for analysis is non-comparable, drawn from different settings where the Commission has discussed the situation of the Spanish infringement of the rule of law, and constitutes a diverse pool of observations that cannot be collected into a matrix, as is the case with formal methods of quantitative research (Gerring, 2017). Lastly, since the aim is to conduct a theory-guided analysis of the Commission's discourse about the Spanish infringement of the rule of law following the framework of Emmons and Pavone (2021), the "informal" nature of qualitative analysis and its use of natural language as an analytic tool is the most appropriate (Gerring, 2017).

5.3 Materials, time period, and delimitations

The selection of materials for the analysis has been carried out taking into account the materials' connection to the theoretical interest of this thesis, their proximity to Spain as the unit of analysis, and their authenticity and objectivity since all of them can be attributed to the European Commission as the main actor involved in compliance-seeking action at the EU level, as well as their diversity, since they exemplify a variety of statements in which the Commission discusses this thesis' topic. Moreover, other considerations connected to the particularities of the Spanish case have been considered in the selection process, such as the time period in which the Spanish infringement has been taking place.

The retrieved materials for the analysis can be found in Appendix B and include both direct and indirect discursive Commission interactions about the Spanish infringement of the rule of law for the duration of the Spanish infringement of the rule of law. In other words, all available materials analyzed in this thesis are dated between the 4th of December 2018 (the exact date when the mandate of the General Council expired) and the present day.

Specifically, the selection of these documents has been carried out by looking at the key junctures in the timeline of the Spanish infringement. Emmons and Pavone understand "key junctures" as moments that should have reasonably triggered some type of EU enforcement response but where EU action did not occur due to delays or renounces from the Commission (2021: 1616). The key junctures of the Spanish case have been identified through process tracing and are summarized in an event history map that can also be found in Appendix A (Waldner, 2015; Gallardo & García, 2022; Brunet, 2023; Rincón, 2022; García de Blas, 2023), have been helpful to identify *direct* EU discursive interactions about those events, comprised notably of letters or statements via social media from Commission authorities such as Justice Commissioner Reynders. However, only relying on these few direct discursive interactions is not enough to carry out this analysis, and thus other discursive actions not directly addressed towards the Spanish authorities but related to the Spanish infringement will be used to carry out the analysis. These *indirect* EU discursive interactions thus complete the analysis include written statements from EU officials, *Rule of Law Reports*, parliamentary questions to Commissioners and their answers, as well as extracts from Commissioners' speeches in settings such as European Parliament debates or dialogues with politicians and civil society during country visits, among others.

5.4 Limitations

Like any other study, this thesis presents limitations which will be discussed in this section. The main one is the small sample size of available analytical materials. This is a limitation that I was aware of from the very beginning of the study given to the specific research gap this thesis aims to fill, the sensitive nature of the proposed research question and the confidentiality of Commission operations in this respect. There is a lack of EU discourse about rule of law breaches outside of Hungary and Poland, the two most-extreme cases of this phenomenon, which has made the identification of discourse about the Spanish case more difficult.

Another limitation is the characteristics of the selected materials. While they represent a varied sample within its small size due to their different lengths, nature and focus, one common trait most of them present is a lack of depth in their discussion about the Spanish infringement of the rule of law and its implications for the EU's legal system, or they simply mention the issue in passing. All this makes the identification of the hypothesized discourse more difficult.

Additionally, while access to more specific and detailed discourse collected through interviews with Commission officials and civil servants from the relevant DGs or official EU documents petitioned through document requests (such as meetings minutes between Commission officials and national authorities from offending Member States) would have been desirable for this study, this was not plausible due to time constraints and the Commission authorities' precaution about disclosing sensitive information that could compromise their role as guardian of the Treaties.

5.5 Epistemological and ontological considerations

Understanding how scholars see the world when they conduct research is essential and this is done through scientific theory or, in other words, by addressing the epistemological[2] and ontological[3] roots of their studies. In particular, the scientific theory underlying this thesis combines a positivist epistemology and a constructivist ontology.

My positivist epistemological perspective is derived from the choice of this thesis' theoretical framework and the formulation of hypotheses that will enable the

[2] Epistemology refers to the ways in which the social world can and should be studied (Clark et al, 2021: 23).
[3] Ontology refers to the "study of the being". In other words, whether social entities can and should be studied as objective entities that exist independent of social actors or as constructions that are products of constant social interactions (Clark et al, 2021: 27).

theoretical framework's explanations of reality to be empirically tested within the limits of a qualitative analysis. Additionally, the lack of normative implications behind my research, given how it aims to conduct a legal-political analysis of the reasons behind Commission inaction against the Spanish infringement of the rule of law with no assessment as to whether the findings are "right" or "wrong", also point to my thesis' epistemology to be positivist (Clark et al, 2021: 23-27). Then, my constructivist ontology is the outcome of the theoretical framework's assumption that the Commission's discourse justifying inaction against the Spanish infringement is a social phenomenon produced through social interaction. The construction of this discourse and the Commission's position cannot be understood as isolated from other social actors and their actions (Clark et al, 2021: 27-31).

6 Analysis

In this chapter, the analysis of the selected materials will be conducted. Its aim is to test whether the Commission's inaction against the Spanish infringement of the rule of law, a case outside of the "usual suspects" of Poland and Hungary, can be explained by the Commission's use of the hypothesized perversity, futility and jeopardy arguments in its discourse. It will be executed chronologically by looking at two categories of materials, indirect and direct Commission discursive interactions, hence, this section is divided in two. The first one corresponds to the analysis of those materials labeled as indirect discursive interactions, while the second subsection contains the analysis of those discursive interactions that directly respond to developments in the Spanish rule of law situation.

Ultimately, no rhetorics of inaction were present in the selected materials as most interactions did not contain any language or elements of the hypothesized discourses of perversity, futility and jeopardy that have characterized the Commission's justifications of inaction against Hungary and Poland, the most studied cases in previous research. Nevertheless, the analysis revealed other interesting findings related to the Commission's approach to the case of Spain as a non-extreme case of non-compliance with the rule of law. All these findings will be dealt with in the next chapter.

6.1 Indirect discursive interactions

This section will analyze the Commission's response to Spain's rule of law infringement with the non-renewal of the General Council by looking at different indirect discursive interactions, both written and oral. Through them, the Commission is not directly responding to specific developments in the case of the non-renewal of the General Council but addressing the situation in more general terms or responding when being directly asked about it in specific settings. Specifically, this section will analyze three *Rule of Law Reports*, four Commission interventions at the European Parliament, and two Commission statements to the press and social media.

6.1.1 *Rule of Law Report: Country Chapter Spain* (2020-2022)

The *Rule of Law Report* is a yearly Commission-led assessment of the situation of the rule of law in all 27 Member States. Dedicating one "country chapter" to each Member State, it examines the positive and negative developments on the rule of law in four areas: the justice system, anti-corruption framework, media pluralism and other institutional issues related to checks and balances. Published for the very first time in 2020, the *Rule of Law Report* is one of the Commission's tools to promote compliance with EU law and, particularly, Art. 2 TEU values such as the rule of law.

Neither the report, nor the country chapter on Spain, are published as a response to specific developments in the case of the non-renewal of the General Council but as a "blanket statement" from the Commission on all rule of law-related issues taking place in Spain. Specifically, I will look into the Abstract and the first section, Justice System, of Spain's country chapter in all three available *Rule of Law Reports*, as well as any other section where the General Council is explicitly discussed.

Rule of Law Report: Country Chapter Spain (2020)

In the Abstract, the Commission identifies the impossibility of appointing the new members of the General Council of the Judiciary as one of the main challenges for the Spanish judicial system. However, this is the Commission's second cause for concern for the rule of law in the country, only behind the generalization of "increasingly lengthy" court proceedings (European Commission, 2020: 1).

In Section I: Justice System, the Commission gives an overview of the structure and functioning of the Spanish judicial system. Alongside other relevant judicial institutions, the General Council's structure, functioning, and responsibilities are introduced in this section. This section also assesses the independence, quality, and efficiency of the Spanish justice system. The only mention of the General Council can be found as part of the "Independence" subsection, where the report provides detailed information about the process of nomination and appointment of the members of the General Council, a brief timeline of the events that have led to the current deadlock as well as the assessment of the situation by national actors such as professional associations of judges or the then Chairman of the General Council, who considers the situations, two years into the deadlock, as a "political anomaly" (European Commission, 2020: 3). The Commission also mentions the Council of Europe's assessment of the non-renewal of the General Council and endorses the "importance of ensuring that the Council of the Judiciary is not perceived as being vulnerable to politicization" (European Commission, 2020: 3). All these elements are fact-checked and cited with footnotes, whose references can be found at the end of the report.

The *2020 Rule of Law Report*'s country chapter on Spain is a heavily informational document that simply outlines the Commission's concerns regarding the non-renewal of the General Council. It does not collect any information about the Commission's course of action to enforce EU law and hence none of the language of the hypothesized perversity, futility and jeopardy discourses can be found in it.

Rule of Law Report: Country Chapter Spain (2021)

In the Abstract, the Commission continues to acknowledge that the Spanish justice system continues to face important challenges. This time, the deadlock in the renewal of the General Council stands as the most concerning development in the rule of law situation in the country (European Commission, 20201: 1). The pending renewal of the General Council is part of a wider phenomenon of the absence of parliamentary consensus to renew many constitutional bodies, such as the Ombudsman.

In Section I: Justice System, under the "Independence" subsection, the Commission develops this assessment further by recalling the previous year's report in arguing that the extension of the mandate of the General Council is "prolonging the concerns that it might be perceived as vulnerable to politicization" (European Commission, 2021b: 2). While praising the latest positive developments (i.e. the decision of tabling a reform that would have changed the election system of the members of the General Council from the current three–fifths to an absolute majority in the event of a second vote on October 13th, 2020 and the approval of the Organic Law 4/2021, a regulation establishing an *ad interim* regime for the General Council to adapt its functions when its mandate its extended on March 25th, 2021), the Commission reiterates calls to the Spanish authorities for a reform of the election system of the members of the General Council so that they are elected by their peers "in line with European standards" and by consulting all relevant stakeholders (European Commission: 3-4). All these elements are fact-checked and cited with footnotes, whose references can be found at the end of the report.

The *2021 Rule of Law Report*'s country chapter on Spain is, again, a purely informational document about the developments of the situation of the rule of law in Spain. Encore, the Commission does not present any information about its response to the non-renewal of the General Council of the Judiciary, nor its course of action to enforce EU law in this institutionally blocked scenario, and hence none of the language of the hypothesized perversity, futility and jeopardy discourses. However, one main difference from the previous year's report is the fact that the non-renewal of the General Council is gaining traction as the main concern and point of focus of the Commission's rule of law promotion in Spain.

In the Abstract, the Commission continues to consider the deadlock in the renewal of the General Council stands as an important concern in the rule of law situation in the country that remains to be solved by the national actors. Recalling the past reports, the Commission emphasizes how, in the event of a reform of the system of election, this should be done "in line with European standards" (European Commission, 2022: 1) now including that "no less than half of its judges-members" must be elected by their peers (European Commission, 2022: 1). This shows the Commission is becoming more forceful and, possibly, impatient with the persistent deadlock on the renewal of the General Council, especially since other constitutional bodies that were pending their renewal in 2021, such as the Ombudsman, had their members appointed by parliament by reaching a consensus through similar majorities.

In Section I: Justice System, under the "Independence" subsection, the Commission reiterates how the delay in the renewal of the General Council "remains a concern", alluding again to how it can be perceived as "vulnerable to politicization" (European Commission, 2022: 3). It collects opinions from stakeholders, such as the President of the Supreme Court and Chairman of the General Council, that the situation is "unsustainable and anomalous" (European Commission, 2022: 4). Additionally, there is a paragraph dedicated to the recurrent calls for reform in the appointment process of its members "in line with European standards, so that no less than half of its members be judges chosen by their peers" (European Commission, 2022: 4). In comparison to 2020 and 2021, the Commission is now more specific in pointing to the desired aspects of the reform to elect the members of the General Council.

The *2022 Rule of Law Report* stands out in comparison to the 2020 and 2021 reports for the inclusion of recommendations. The wording of these recommendations shows the Commission is taking a much more direct stance than in previous reports by calling Spain to address those challenges, instead of simply informing about them. The language of the recommendation about the non-renewal of the General Council shows the Commission is now taking a much more direct stance by calling Spain to "proceed with the renewal of the Council for the Judiciary as a matter of priority" and to "initiate, immediately after the renewal, a process in view of adapting the appointment of its judges-members, taking into account European standards" (European Commission, 2022: 2).

In sum, in the *2022 Rule of Law Report*'s country chapter on Spain, there is a change that can be seen from previous reports. It is still a highly factual document, but the Commission has become more direct and proactive in its language to address the deadlock in the negotiations for the renewal of the Spanish General Council of the Judiciary. The most vivid example of this change in the Commission's approach can be found in the language used in the recommendations, directly addressing Spain to change the situation regarding the non-renewal of the General Council. Other examples of this shift can also be found in the Abstract and section on the

Justice System, where previous messages about a needed reform of the system of election are included (i.e. “according to European standards”, a dialogue with stakeholders, etc) now with more specific aspects to consider in it (i.e. “no less than half of its judges-members” must be elected by their peers). However, again, the Commission does not present any information about its response to the non-renewal of the General Council of the Judiciary, nor its course of action to enforce EU law in this institutionally blocked scenario, and hence none of this language contains any of the elements of the perversity, futility and jeopardy discourses that justify Commission inaction according to Emmons and Pavone.

6.1.2 Interventions in the European Parliament

This subsection contains the analysis of the Commission’s discursive interactions in the European Parliament, specifically the Commission’s answer to two Parliamentary questions about the reform of the General Council of the Judiciary and a Joint debate about the findings of the *2022 Rule of Law Report* in Greece, Spain and Malta. I consider neither to be a response to specific developments in the case of the non-renewal of the General Council, they represent the Commission’s response to parliamentary inquiries on the matter.

Written answer to Parliamentary question - E-005007/2020(ASW) (November 26th, 2020)

This is a two-fold question submitted by three Spanish MEPs from the Left and the Greens groups in the European Parliament. It addresses the situation of the General Council as a consequence of the main opposition party’s position in both Spanish legislative chambers. According to these MEPs, PP “is blocking the renewal procedure for purely partisan reasons” and "preventing both Chambers from complying with their constitutional obligation to renew the Council, attacking the independence of the judiciary as a fundamental principle of the rule of law and calling into question its independence and non-subordinated position”. Then, the Commission is directly asked whether they think the PP’s actions may constitute a “breach of the rule of law as a fundamental value of the EU” and if it intends to follow up on this matter (Rodríguez Palop et al., 2020).

Commissioner Reynders’ answer on behalf of the Commission is brief and concise. First, he states how the EU regularly monitors the functioning of the Spanish justice system as they do all European justice systems. Then, he recalls the assessment made in the *2020 Rule of Law Report*, specifically highlighting “the importance of ensuring that the Council is not perceived as being vulnerable to politicization”, while he reassures these MEPs that the Commission will follow all developments surrounding this issue (Reynders, 2020).

In sum, Commissioner Reynders does not only not answer the question he is asked, as no mentions of whether the Commission thinks the tactics of the main

opposition party in Spain over the renewal of the General Council are leading to the country to commit a breach of Art. 2 TEU, but also does not mention any specific ways in which it will follow up the matter. This is qualified as inaction in this thesis' operationalization of Commission discourse and does not contain a justification of perversity, futility and jeopardy for it.

Written answer to Parliamentary question - E-005626/2020(ASW) (January 20th, 2021)

This two-fold question[4] was submitted by four Spanish MEPs from the Renew Europe (RENEW) group in the European Parliament for a written answer on October 14th, 2020. It is regarding the Government's proposal for a reform of the parliamentary majority necessary to elect the members of the General Council, so that instead of a three–fifths majority new member can be elected with an absolute majority in the event of a second vote[5]. The MEPs cite that Spain's two leading judicial associations are "highly critical of this reform and assert that it affects the separation of power to the extent that aligns Spain closer to countries such as Poland and Hungary". Furthermore, they link these concerns to previous findings by the Council of Europe on judicial independence (Garicano et al., 2020).

Justice Commissioner Reynders' answer, registered on January 20th, 2021, makes use of references to previous Commission statements and documents such as the *Rule of Law Report*. Firstly, he states the Commission has already expressed its position with regard to this reform, but the written answer lacks a citation to such a statement[6]. His answer also refers to similar themes present in the Spanish country chapters of the *2020 Rule of Law Report*, notably those of the dangers of the perceived politicization of the General Council and the presence of European values and standards on judicial independence in going forward with the election of its members (Reynders, 2021a).

Ultimately, Commissioner Reynders' answer does not mention any specific compliance-seeking action carried out by the Commission to respond to the non-renewal of the General Council, nor to the reform mentioned the question alludes to. He simply states that "the Commission continues to follow closely the developments in this respect", which is categorized as inaction as operationalized in this thesis, and does not contain a justification of perversity, futility and jeopardy (Reynders, 2021a).

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[4] "Will the Commission ask the Spanish Government for information on these changes to the legislation on the judiciary which aim to facilitate appointments by the Government and may therefore affect the independence of the highest judicial governing body? Will it take this into account in the next Rule of Law Report?"

[5] This proposal of reform was later tabled, a positive development praised by the 2021 Rule of Law Report.

[6] After further research, I was not able to retrieve it either.

Written answer to Parliamentary question E-002389/2021(ASW) (July 20th, 2021)

This question was submitted by two Spanish MEPs from the Greens/EFA group in the European Parliament for a written answer on May 3rd, 2021. The answer to this question is interesting because the MEPs are directly asking the Commission whether it intends to trigger compliance-seeking actions given the three-year-long deadlock in the negotiations to renew the General Council:

> "What actions will the Commission undertake to ensure that Spain complies with the rule of law standards to guarantee the independence of the CGPJ (General Council) from political parties?" (Solé & Riba i Giner, 2021)

There are some interesting elements worthy of attention in Commissioner Reynders' answer. He makes use of previous statements in the European Parliament and other Commission documents such as the *Rule of Law Report.* For instance, he starts by acknowledging that "the Commission is aware of the issue (...) as mentioned in the chapter on Spain of the *2020 Rule of Law Report*" and brings back themes of the General Council's vulnerability to politicization. He cites his own answer to the RENEW question (Garicano et al., 2020; Reynders, 2021a), which as was discussed earlier does not mention any specific compliance-seeking action carried out by the Commission to respond to the non-renewal of the General Council. Other familiar formulations, such as "when Member States reform their judiciary, it is recommended that this is done in consultation with all relevant stakeholders (...) and taking into account European standards", can be found again in the Commissioner's answer to these MEPs (Reynders, 2021b).

Ultimately, Commissioner Reynders avoids answering the question but assesses these two MEPs that the Commission will continue to "follow rule of law developments in all Member States, including Spain", as he did in his previous answer to the question. Not a single element of the perversity, futility and jeopardy discourses can be found in this Commission interaction, despite the directness of the question (Reynders, 2021b).

Joint Debate on the 2022 Rule of Law Report and the Rule of law in Greece, Spain and Malta (March 30th, 2023)

On March 30th, 2023, the European Parliament held a joint debate on the Rule of Law. Věra Jourová, Commission Vice-President and Values and Transparency Commissioner was there to discuss the findings of the *2022 Rule of Law Report* and the developments in three Member States, among them Spain. My focus will be on her opening and closing statements in that particular debate.

In her opening remarks (10:22:41-10:31:34), VP Jourová gives an overview of the rule of law situation in each of the three Member States. When it comes to Spain, she uses the *Rule of Law Report*'s informative language about the renewal of the

General Council and reiterates the report's recommendation (Jourová, 2023)[7]. Hence, not a single element of the rhetorics of inaction can be found in this interaction. This shows how the Commission is highly coordinated in its discourse about the Spanish infringement, seeing the consistency in Jourová's and Reynders' discourse.

In her closing remarks (11:35:25-11:36:56), after MEPs from these three Member States have intervened, VP Jourová alludes to the actions the Commission undertakes to promote the rule of law in the EU. She speaks of the nature of the *Rule of Law Report* as not "an end in itself" but a mechanism with which the Commission and the Member States can "promote mutual knowledge, *trigger discussion and bring about the necessary changes on the ground*" (Jourová, 2023). One of the ways in which the Commission does this is by discussing these rule of law problems with the Member States' technical and political authorities during country visits (Jourová, 2023). This extract shows what could be the Commission's turn towards "conciliatory political dialogues" with the authorities from the offending Member States, which could potentially be because of the Commission becoming more strategic when enforcing EU law. This instance of EU action (which remains unclear if it would be under the label of the EU Pilot or the Rule of Law Framework) is not as visible as the triggering of an infringement procedure or Article 7 TEU, and VP Jourová is aware of it when she states that:

> "The discussion today shows that for some what we are doing to protect the rule of law as a principle is too much and *for others is too little*. The Commission *always acts within the boundaries of the competencies given by the Treaties"* (2023).

Her explicit mention of the Treaty boundaries, with a special emphasis on when the Commission does "too little" to protect the rule of law could be interpreted as VP Jourová justifying the Commission's inaction by making use of futility discourse, specifically, the one hypothesized in H2b which refers to a lack of competences to effectively intervene to safeguard the effective functioning of the General Council of the Judiciary, especially if the Commission wanted to do more than trigger dialogue but less than triggering more confrontational instruments (e.g. infringement proceedings). This could be the case due to the nature of the infringement cases discussed in the debate (i.e., Spain, but also Greece and Malta) which are serious enough to deserve more action than "concealed" discussions with politicians and policy experts during a country visit but not systemic or extreme in comparison to Poland and Hungary. This statement alone is not enough to falsify H2b, seeing as the language is not explicit enough on its own. Also, no other instances of the hypothesized futility discourse were found in this closing statement.

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[7] "The Commission has recommended to Spain to proceed with the renewal as a matter of priority and initiate immediately after such a renewal a process of adapting the appointment of its judges-members taking into account European standards".

6.1.3 Press and social media statements

This subsection contains the analysis of the Commission's discursive interactions on social media and the press, specifically a tweet and an interview by VP Jourová. Neither the tweet, nor the interview are published as a response to specific developments in the case of the non-renewal of the General Council.

Tweet from VP Jourová (April 19th, 2021)

This tweet was published by VP Jourová after meeting with the Spanish Justice Minister to discuss "current issues of common interest, including the situation of the Spanish National Council of the Judiciary" on April 19th, 2021. The tweet was accompanied by an attachment with a longer statement, in which VP Jourová recalled the Commission' position expressed in the 2020 Rule of Law, namely that "it is important to address the issue of the Council while ensuring that it is not perceived as vulnerable to politicization" and, when speaking of reforming the system, that "any of such reforms should always be accompanied by wide consultations (...) and expect that such consultations will always take place for any future reforms" (Jourová, 2021).

In sum, like the *Rule of Law Report*, this interaction is purely informative, does not collect any information about the Commission's course of action to enforce EU law and hence, does contain any of the hypothesized perversity, futility and jeopardy language.

VP Jourová's interview for EL PAÍS (June 13th, 2022)

VP Jourová gave an interview to EL PAÍS[8], Spain's most read newspaper, prior to an official visit to Madrid to ask the main parties in Parliament and parties in the negotiation to renew the General Council, PSOE and PP, to put an end to the deadlock and end this institutional crisis. This interview is interesting for several reasons.

First, when asked about Poland and Hungary, VP Jourová is very concrete and direct in describing the Commission's approach to these two Member States violations of the rule of law. She mentions how the Commission the approval of the Polish and Hungarian Recovery Plans is conditional to "seeing the system has changed" (Jourová, 2022a). Specifically, regarding Poland, she points out that this is "a state where the Constitutional Tribunal has decided that part of the treaty is not valid in Poland and it decided it on a demand of the government" and what the Commission expects to see is Poland "making it clear that, as a Member State, it fully respects and follows the EU treaties" (Jourová, 2022a). A similar view is expressed about the situation in Hungary, where they are witnessing negative

[8] The text of the interview is in Spanish. Therefore, all direct quotes will be translated by me.

developments in the Hungarian judiciary and Supreme Court as well as in the freedom of press.

Meanwhile, when asked directly about Spain and the consequences of the continuation of the non-renewal ("Will the delay in renewing the CGPJ have consequences for Spain in the upcoming *Rule of Law Report*?"), VP Jourová is not as clear and direct in describing the Commission's approach. She points to how the General Council "has not been renewed and has not been fully functional for too long" and how the non-renewal "leaves empty spaces", referring to the General Council's inability to appoint judges while in interim and its impact on the application of the law, including EU law (Jourová, 2022a). However, no answer as to the what the consequences of the non-renewal for Spain could be if the political deadlock in the negotiations continues.

Lastly, VP Jourová is pressed on the message she will convey to the parties in the negotiations during her visit to Spain ("What exactly are you going to tell Spanish politicians about the deadlock?"). Her answer is clear:

> "*Try to find a solution and a compromise*. Find a solution that establishes a sound and sustainable system for nominations and appointments and for the functioning of the CGPJ. So, the message is: *try again."* (Jourová, 2022a)

This last extract is interesting because the Commission does not envision getting involved in solving the non-renewal of the General Council by triggering any of the most visible compliance-seeking action tools, signaling inaction. However, VP Jourová does not give reasons to justify this inaction by introducing any of the perversity, futility or jeopardy arguments in her statements.

6.2 Direct discursive interactions

This section will analyze the Commission's response to Spain's rule of law infringement with the non-renewal of the General Council by looking at different direct discursive interactions. These interactions, which are both oral and written, constitute direct responses to developments in the case of the non-renewal of the General Council and were identified through the event history map. Specifically, this section will analyze a letter from VP Věra Jourová to the Chairman of the General Council, Justice Commissioner Reynders' speech at an event with Spanish politicians and the press during an official visit to Spain and a social media statement by Commissioner Reynders after another suspension of the negotiations between the Government parties and the main opposition party PP.

6.2.1 Letter to Chairman of the General Council Carlos Lesmes (September 9th, 2022)

This letter was sent from VP Jourová to Carlos Lesmes, Chairman of the General Council, as he gave an ultimatum to the parties in the negotiations for the renewal of the General Council that he was going to resign due to the impossible renewal of this body at the fourth opening of the Judicial Year with a deadlocked General Council.

VP Jourová reiterates the "publicly known" Commission's position to the political deadlock over the renewal of the General Council, directly quoting the language and arguments used in the *2022 Rule of Law Report*, namely that the Spanish authorities should:

> " (…) proceed with the renewal of the Council for the Judiciary as a matter of *priority* and initiate, *immediately* after the renewal, a process in view of adapting the appointment of its judges-members, taking into account European standards" (Jourová, 2022b).

Once more, using similar language to the *Rule of Law Report*, she emphasizes the "urgency and absolute priority" of ending the interim situation of the General Council so that the Spanish judicial system can recover its "full institutional normality" and the General Council "can thus carry out properly the essential democratic tasks it is responsible for", namely appoint judges to all vacant positions in high and lower courts, and immediately proceed to the reform of the system of election of the members of the General Council. She also reiterates the idea that the General Council should not be vulnerable to politicization, more specifically that the "correct functioning of all State institutions should not be part of the political debate, even less should it be taken hostage by that debate" (Jourová, 2022b).

Interestingly, VP Jourová describes the long-standing non-renewal of the General Council as "harmful to the rule of law" (Jourová, 2022b). This is the closest the Commission has come to publicly admitting this situation is a rule of law infringement. However, as was the case with other documents already analyzed, there is no mention of the possible consequences in terms of possible EU compliance-seeking action if this situation is not solved in a timely manner. However, VP Jourová does not give reasons to justify the Commission's inaction using perversity, futility, or jeopardy arguments in her statement.

6.2.2 Justice Commissioner Didier Reynders' speech at Forum Europa (September 30th, 2022)

This discursive interaction takes place during Reynders' country visit to Spain on September 30th, 2022, as part of the EU dialogue ("peer review") between the Commission and the Member States. Forum Europa is an event organized by Nueva Economía Forum (a private, independent, and non-partisan debate organization in Spain that aims to promote debate and dialogue in open, neutral and pluralistic events) that takes place when relevant European figures visit Spain. In this Forum Europa[9], Commissioner Reynders is directly asked about relevant questions regarding the Commission's involvement in the Spanish infringement of EU law just a few weeks after Carlos Lesmes, Chairman of the General Council, threatened to resign from his position to force the negotiation parties into an agreement. I have chosen to analyze those extracts from his speech in which he is directly asked about the renewal of the General Council of the Judiciary, the Commission's response to this institutional anomaly and the impact of Spain's non-compliance with the Commission's rule of law standards considering the upcoming Spanish Council Presidency in July 2023.

Firstly, the Commission reiterates its general concerns about the rule of law situation in Spain and specifically the non-renewal of the General Council of the Judiciary in the same terms as they did in their *Rule of Law Reports* (2020-2022). However, overall, Commissioner Reynders admits that they are not worried about the way in which Spanish judges decide on judicial cases and believes there is "great respect for the rule of law and the independence of the judiciary". This is because they have observed a "clear commitment" among the parties involved in the negotiations to renew the General Council of the Judiciary, as well as to reform the system of election of judges (Forum Europa, 2022).

On the role the Commission plays in this complex situation, where the parties in the negotiation have tried and failed to come up with a new composition for the General Council for close to four years at this point in time, Commissioner Reynders states that "the Commission is here to promote the rule of law and *to foster dialogue* in order to move forward". Specifically, by distinguishing between Spain and "other Member States where there are systemic problems and where we use other tools" (i.e. Poland and Hungary), he argues that what the Commission is doing in Spain is "talking with all the different political actors involved to improve a situation which is already *good*, while in other Member States we are fighting against a degradation of justice" (Forum Europa, 2022). He clearly states that Spain is not like Poland and Hungary, and thus it does not require EU action in the same way as these two countries do, that dialogue with the national actors to correct the situation is enough (Forum Europa, 2022). Hence, this extract of Commissioner

[9] I accessed Commissioner Reynders speech through Nueva Economía Forum's website, where it was uploaded as a video. The video is dubbed in Spanish and it is not possible to hear exactly what Commissioner Reynders is exactly saying, therefore all direct quotes from the translator will be translated by me.

Reynders' speech is another evidence of the Commission's turn towards "conciliatory political dialogues" with the authorities from the offending Member States, potentially the outcome of the Commission acting strategically when deciding how and when to enforce EU law.

When asked whether or not his visit will be useful to pressure the Government and the main opposition party to renew the General Council, Commissioner Reynders reiterates that what the Commission's objective is that "the main political parties participate in the renewal and reform, but also the whole Parliament (...) because the promotion of the rule of law is a task for all parliamentary forces". He also emphasizes that the type of reform that should be carried out immediately after the renewal of the General Council, as recommended by the *Rule of Law Reports*, must be agreed upon the different political parties in Spain and that the only thing the Commission envisions doing in this regard is "assess the situation in light of the elaboration of the *2023 Rule of Law Report* which will be published in 2023" (Forum Europa, 2022). Again, no action is foreseen by Commissioner Reynders beyond fostering dialogue, achieving the renewal and reform of the General Council are matters that the Spanish political actors must solve themselves with no Commission involvement in triggering these changes.

Commissioner Reynders is also directly asked in this event whether the Spanish Presidency of the Council could be threatened by the non-renewal of the General Council, especially given that the *2023 Rule of Law Report* will be published in July 2023, at the beginning of the Spanish Presidency, to what he replies:

> "It is clear that it is always better to set a good example. It would be good to show that in Spain it was possible to implement the various recommendations of the report. *It is a question of reputational effect*" (Forum Europa, 2022).

The underlying idea of this extract is the same as it was before, no Commission involvement is foreseen beyond calling the parties to dialogue and keep trying to solve this issue, at least for Spain to maintain its standing as a high-functioning democracy at a time where they will hold an important leadership role in the EU.

Ultimately, as was the case with other materials already analyzed in this section, there is no mention of the possible consequences in terms of possible EU compliance-seeking action if this situation is not solved in a timely manner. Commissioner Reynders does not give reasons to justify the Commission's inaction through the use of perversity, futility, or jeopardy arguments in the analyzed sections of his speech.

6.2.3 Press and social media statements

On December 22nd, 2022, because of the suspension of another round of negotiations between the PSOE-UP Government and the main opposition party, PP, Justice Commissioner Reynders published a three-tweet thread in which he reiterates most of the messages that have been uncovered in this analysis.

First, he reiterates the Commission's position in the *2022 Rule of Law Report* and makes an explicit mention of the recommendation about the General Council, the themes of urgency and priority of the renewal, the necessity of reform, and the standards such reform should follow ("European standards") (Reynders, 2022). Then, he reiterates previous calls from the Commission to the Spanish actors involved in the negotiations to "take the necessary actions for the successful implementation of this recommendation" (Reynders, 2022).

In terms of EU action, the tone of these tweets resembles Jourová's message in her interview for EL PAÍS ("*Try to find a solution and a compromise.* (...) So the message is: *try again"*) (Jourová, 2021). The Commission does not foresee triggering any of the most visible compliance-seeking action tools against Spain yet. However, no reasons of perversity, futility, or jeopardy in Reynders' tweets were used to justify Commission inaction.

7 Discussion

This chapter discusses and summarizes the findings of the qualitative analysis on the different direct and indirect Commission discursive interactions about the Spanish infringement with the rule of law I previously carried out. It also discusses other relevant findings and their implications for the study of Commission inaction against non-extreme infringements of the EU acquis.

7.1 Key findings

Overall, no rhetorics of inaction were detected in the selected materials surrounding the case of Spain and the non-renewal of the General Council of the Judiciary as a non-extreme, neither-episodic-nor-systemic infringement of the rule of law. Most interactions did not contain any language or elements of the hypothesized discourses of perversity, futility and jeopardy that have characterized the Commission's justifications of inaction against other Member States with rule of law infringements, namely Hungary and Poland. In other words, the proposed hypotheses were not falsified by the findings of the analysis. This is because, in most materials, there was no mention of the Commission's course of action if the renewal of the General Council was not solved in a timely manner, nor of the possible consequences in terms of possible EU compliance-seeking actions the Commission could decide to trigger. The only instance of what could assimilate to a futility discourse was found in a particular extract of VP Jourová's in her closing remarks at the Joint Debate on the *2022 Rule of Law Report* and the Rule of law in Greece, Spain and Malta on March 30th, 2023. However, as was discussed this statement alone was not enough to falsify any of the proposed futility hypothesis, seeing as the language was not explicit enough on its own, nor other instances of the hypothesized futility discourse were found in her closing statement.

This analysis was useful in showing how written interactions, such as the public EU materials analyzed, have restricted the potential of answering an ambitious research question and a theoretical framework like the ones proposed in this thesis. While the written documents were able to provide interesting insights, these were limited. Interestingly, the two spoken discursive interactions of this analysis (i.e. Joint Debate on the *2022 Rule of Law Report* and the Rule of law in Greece, Spain and Malta on March 30th, 2023 and Justice Commissioner Didier Reynders' speech at Forum Europa on September 30th, 2022) were found to be especially relevant because both VP Jourová and Commissioner Reynders relied on the "script" of, for example, the Rule of Law of Report, while at the same time went slightly off-script,

providing depth, another legal-political argument or simply improvising. This thesis would have benefitted from having more material for the analysis, so if this work is to be retrieved for further research, it should include data gathered from interviews with relevant Commission civil servants (i.e. Legal Services, DG for Justice and Consumers, etc), as well as written official documents (i.e. deliberations between Commission officials and national governments) available through document requests (see Art. 15 TFEU).

Therefore, the answer to this thesis' research question – *What are the reasons behind the Commission not triggering any compliance-seeking actions against Spain over the non-renewal of the General Council of the Judiciary?* – is that perversity, futility or jeopardy have not been found to be the reasons justifying the Commission's inaction against Spain. Ultimately, the analysis found little-to-no support for all proposed hypotheses. Nevertheless, different findings related to this thesis' research question and the cited literature can be found in the analyzed materials, are interesting and worthy of attention. They will be discussed in the next section of this chapter.

7.2 Other relevant findings

This section synthesizes other relevant contributions extracted from the analysis of the Commission's response to the Spanish case, a neither-episodic-nor-systemic rule of law infringement, which could be useful to analyze similar cases in the future.

First, the Commission is aware of the Spanish infringement of the rule of law and the threats it poses, even though it has remained passive in triggering concrete actions with more teeth such as infringement procedures. Specifically, the analysis has shown how the long-standing political deadlock between the PSOE-UP government and the main opposition party PP that has led to the non-renewal of the General Council has been a matter of concern for the Commission since 2020. It has been labeled as such in different ways since 2020: "a challenge" and "political anomaly" (European Commission, 2020), a remaining "concern" (European Commission, 2021b; European Commission, 2022) and "harmful to the rule of law" (Jourová, 2022a). Additionally, the Commission has been consistent in pointing out that one of the negative effects of this deadlock is that it makes the General Council vulnerable to politicization and poses a threat to the independence of the Spanish judiciary (2020; 2021; 2022; Reynders, 2020; Reynders, 2021a; Reynders, 2021b; Jourová, 2021).

Interestingly the Commission's realization of the magnitude of the issue has been progressive, as it increasingly elevated its interest in the concerning nature of the implications of the political deadlock in the renewal of the General Council for the rule of law as time went by. This is especially noticeable in the issue's placement

in the different documents and especially in the Rule of Law Reports. Whereas in 2020 it was considered one concern among several, in 2022 it became one of the main concerns and the object of its recommendations. This progression can also be seen in the tone and language employed by the Commission, which became more direct and proactive in addressing the matter (European Commission, 2020; European Commission, 2021b; European Commission, 2022).

Furthermore, and in line with what was established early on in this thesis, the Commission considers the Spanish infringement as not comparable to Hungary and Poland's. Commissioner Reynder's speech at the Forum Europa event emphasizes this idea, which is what ultimately conditions the Commission's response against the long-standing non-renewal of the Spanish General Council (2022).

Second, this analysis also evidences how in all materials the Commission consistently articulated their position and response towards the Spanish infringement of the rule of law around three arguments. First, the General Council of the Judiciary needs to be renewed as *a matter of priority* by the relevant national actors, namely the political parties in Parliament. Second, once this is done the political parties need to proceed with an *immediate reform in the method of nomination and selection of the members* of this body. Lastly, the Spanish relevant authorities need to carry out this reform *taking European standards into account* by, for example, consulting all relevant stakeholders, so that future members of the General Council should be elected by their peers (e.g., the *2022 Rule of Law Report* specifies that "no less than half of its judges-members" must be elected by fellow judges) (European Commission, 2020; European Commission, 2021b; European Commission, 2022).

Third, the analysis shows how this three-pronged-answer is the standard response the Commission has given when directly asked about the actions they will undertake to correct this situation, as was seen in Commissioner Reynders' answer to both Parliamentary questions posed by Spanish MEPs, or his speech at Forum Europa during his country visit to Madrid in September, 2022. When complementing this response, the Commission tends to add that they will continue monitoring the situation as well as how they will continue to "promote the rule of law and *to foster dialogue* in order to move forward" (Forum Europa, 2022). This approach appears in all analyzed Commission interactions, showing that the Commission is highly coordinated in how it discusses its approach to the Spanish infringement.

The constant allusions throughout the materials to the Commission's role in promoting dialogue are tied to the way in which the Commission sees the seriousness of the Spanish infringement. As has been mentioned before, while the Commission argues Hungary and Poland represent extreme cases of non-compliance with the rule of law that require the use of "other tools" (Forum Europa, 2022), the long-standing deadlock over of the General Council (as well as the negative consequences for the Spanish judicial system and the potential dangers for the wider EU justice system) is assessed as nothing more than what Lavelle

categorized as episodic insofar the only solution put forward by the Commission on their end is to promote dialogue between the relevant parties in the negotiation (2019). In other words, those of Reynders', because Spain's infringement of the rule of law is not systemic, the Commission is "talking with all the different political actors involved to improve a situation which is already *good*" (Forum Europa, 2022).

Fourth, this analysis shows the Commission engages with the Spanish case through conciliatory political dialogue with the national authorities to try to correct this infringement instead of triggering more confrontational means, as the many mentions of "dialogue" in the analysis of all available and public EU discursive interactions has shown. Ultimately, this pro-dialogue language could be explained as an outcome of the Commission taking a better governance approach or a "policy of prudence" towards the Spanish case in line with their 2017 *Better Regulation Agenda* (Falkner, 2018). This translates into the Commission handling Spain's breach of the rule of law through dialogue instead of triggering more confrontational and costly mechanisms, as was previously discussed in the Literature Review chapter (see **3.3.2 Better governance approach and a "policy of prudence"**).

In sum, as discussed, the analysis has evidenced that the reasons behind the Commission's justification of inaction against Spain cannot be said to be founded on Emmons and Pavone's perversity, futility or jeopardy theses as expected, which constitutes the answer to this thesis' research question. However, it has also revealed other elements worthy of attention that can be analyzed in future research on the Commission's inaction against non-extreme infringements of the rule of law in other Member States outside Central and Eastern Europe.

8 Conclusions

This thesis sought to analyze the reasons behind the Commission's inaction to the non-renewal of the General Council of the Judiciary, Spain's long-standing breach of Art. 2 TEU that is threatening the effective functioning of both the Spanish and EU legal order. Specifically, this thesis has aimed at contributing to the existing literature body on the Commission's response to non-compliance with EU law as guardian of the Treaties by identifying an under-researched area within it: the Commission's response to breaches of EU law by Member States outside of the "usual suspects" in Central and Eastern Europe.

In order to answer the proposed research question – *What are the reasons behind the Commission not triggering any compliance-seeking actions against Spain over the non-renewal of the General Council of the Judiciary?* – this thesis relied on a theoretical framework based on the supranational forbearance and the rhetorics of inaction theories to analyze the Commission's public discourse on its response to Spain's infringement of Art. 2 TEU. The goal was to uncover patterns of perversity, futility and jeopardy in its arguments that justify its lack of enforcement action. However, the findings of the analysis provided little-to-no support for the proposed hypotheses. Therefore, the answer to the research question is that the hypothesized elements of perversity, futility and jeopardy do not explain the reasons behind the Commission's inaction in the case of Spain.

Yet, the analysis hinted to other interesting Commission dynamics in its response to the Spanish infringement as a neither-episodic-nor-systemic infringement of the rule of law. For instance, the analysis shows how the Commission is indeed aware of the seriousness of the Spanish infringement and has progressively elevated its interest in the situation by calling out the negative consequences of the political deadlock in the renewal of the General Council (e.g., vulnerability to politicization) and possible ways forward to the Spanish authorities (e.g., calling for its renewal *"as a matter of priority"* followed by *the immediate reform* of the method of nomination and selection of members taking *European standards* into account). Moreover, the Commission categorizes the Spanish case as different from the extreme breaches of the rule of law taking place in Hungary and Poland, which, in the eyes of the Commission, prioritizes the use of conciliatory political dialogue with the Spanish authorities over the use of "other tools" (e.g., infringement procedures) to respond to possible negative developments. Therefore, tying it back to the discussed literature in this thesis, the Commission's approach to the Spanish infringement would fall under the label of a "policy of prudence" in line with the 2017 *Better Regulation Agenda* goals.

Within the field of EU studies, this research on Commission inaction against non-extreme breaches of the rule of law is, to my understanding, one of the first of its kind. As the literature review and theoretical framework chapters showed, the studies on the Commission's response to extreme infringements of the rule of law, with a focus on Poland and Hungary as the prime examples, outnumber those who study the Commission's approach to infringements found in the under-researched grey area of Lavelle's categorization, making this study a pioneer in its own right.

As happens when things are done for the first time, there are plenty of ways for future studies to build upon these findings and overcome the limitations this study faced. Due to the growing compliance problem the EU is facing, exploring the reasons why the Commission chooses to remain inactive against breaches of the rule of law calls for the conceptualization of the phenomenon outside of the "usual suspects" of Hungary and Poland and with a focus on non-extreme infringements. Methodologically, further research should analyze this phenomenon by looking at a larger sample of analytical material, one that includes Commission insights gathered from first-hand interviews, in addition to official EU documents, press and social media. Access to Commission officials and their assessments of the different cases is key to fully flesh out the potential of any of the theoretical frameworks that explain Commission inaction against neither-episodic-nor-systemic infringement of the rule of law, including the one used in this thesis, given the sensitivity of the topic and the legal-political underpinnings of the potential findings. It would be interesting to see other single cases or comparative studies looking for the differences and similarities between non-extreme infringements of the rule of law in other Member States. Similarly, future research should welcome other discursive methods to analyze the Commission's response to these infringements, such as Critical Discourse Analysis to uncover possible power relations in the construction of the Commission's discourse to different non-extreme infringements.

This thesis has attempted to show, in empirical terms, what are the reasons behind Commission inaction against infringements of the rule of law as a core principle of EU law beyond Central and Eastern Europe. While its findings have unexpectedly taken a different turn than initially expected, this research strives to inspire further efforts in understanding the complexity of addressing breaches of EU law provisions from a top-down perspective. By shedding light on the Commission's compliance-seeking processes and activities, this thesis also hopes to promote a culture of accountability towards the EU institutions within academia, a much-needed stance in the era of misinformation and, democratic backsliding and populism.

9 References

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10 Appendix

10.1 Appendix A: Event history map

This event history map contains the key junctures in the Spanish infringement of the rule of law. Elaborated by looking at Spanish news sources as well as the Commission's press corner for direct statements, it has been useful to identify the case's key junctures and the Commission's direct EU interactions about the case, which can be seen in the "EU response" column.

Table 4. Event history map: key junctures and Commission's direct responses

Date	Identified key junctures	EU response
4 Dec 2018	The mandate of the General Council expires	No response.
10 Jan 2019	Carlos Lesmes, the Chairman of the General Council sends a letter to the Presidents of the Congress and the Senate urging them to renew this body.	No response.
July 2019	The Chairman of the General Council sends a second letter to the Presidents of the Congress of Deputies and the Senate.	No response.
9 Sept 2019	Chairman of the General Council, gives a speech for the opening of the Judicial Year presiding over a Council that remains unrenewed by the lack of agreement of the PSOE and the PP. He calls for the renewal that the body is not weakened and thus be able to maintain its "independence"	No response
4 Dec 2019	First anniversary of the expiration of the mandate of the General Council. Chairman sends a thrid letter to the Presidents of the Congress of Deputies and the Senate urging them to renew this body.	No response.
15 July 2020	The Chairman of the General Council sends a fourth letter to the Presidents of Congress of Deputies and the Senate.	No response.
7 Sept 2020	The Chairman of the General Council, in his speech for the opening of the Judicial Year without a renewed General Council. He raises the tone and affirms that the existing political deadlock in the negotiations for the renewal is a serious "anomaly" and urges to face it "without delay".	No response.

7 Sept 2020	Throughout the COVID-19 pandemic, the deadlock over the renewal of the General Council continued. Chairman Lesmes elevates his tone in speech for the opening of the Judicial Year and expresses concerns about the “anomaly” of the deadlock and calls the parties to solve the situation as soon as possible.	No response.
11 March 2021	The Congress of Deputies passes a reform of the Organic Law of the Judiciary (LOPJ) that limits the functions of the General Council while in interim, prohibiting appointments to the top chambers. The PSOE-UP coalition government tries to force an agreement with center-right PP. Far from yielding results, the vacancies that will remain in the Supreme Court will leave some chambers on the verge of collapse in the following months.	No response.
6 Sept 2021	The Chairman of the General Council, in his speech for the third opening of the Judicial Year without a fully functional General Council. He calls the situation "unsustainable" and demands the main parties in Parliament to leave it out of the "partisan fight". The parties still do not agree on the renewal.	No response.
4 Dec 2021	Third anniversary of the expiration of the mandate of the General Council.	No response.
5 March 2022	One of the members of the General Council reaches the age of 72 and thus, retires. The Congress of Deputies refuses to find a replacement due to the ad interim situation of the General Council. The General Council starts operating with 19 members.	No response.
30 June 2022	One of the members of the General Council passes away. Again, the parties in the Congress of Deputies are unable to agree in finding a replacement. The General Council functions with 18 members.	No response.
14 July 2022	The Congress of Deputies passes a reform of the Organic Law of the Judiciary (LOPJ)so that the General Council, despite still not being able to make appointments to top courts such as the Supreme Court, it can appoint the two magistrates of the Constitutional Court that correspond to it after the expiration of its mandate on June 12. It is up to the Government to appoint another two. The decision has caused the PP and also the conservative sector of the Council, eight of whose members form a blocking nucleus that will prevent the appointments.	No response.
7 Sept 2022	Fourth opening of the Judicial Year in deadlock over the renewal of the General Council. The Chairman of the General Council loses patience and warns that he will resign if politicians do not compromise	On September 9, VP of the Commission Jourová sends a letter to Chairman Lesmes. On September 29-30 Commissioner Reynders

	to the unprecedented "mess" of the Judiciary.	visits Spain and attends a Forum Europa event. He calls for the renewal of the General Council to be a priority for the parties in the negotiation and, immediately after, a legal reform should be initiated to change the system for the nomination and election of its members.
10 Oct 2022	The Chairman of the General Council resigns. The PSOE-UP coalition government and center-right PP gear up for a compromise on the renewal of the body.	No response.
27 Oct 2022	PP breaks off negotiations, claiming that the government's announcement to reform the crime of sedition in the Spanish Criminal Code amounts to "an insurmountable incongruity" that prevents reaching an agreement.	No response.
4 Dec 2022	Fourth anniversary of the expiration of the mandate of the General Council	No response.
21 Dec 2022	Main opposition party, PP, breaks off the negotiations once again.	Commissioner Reynders tweets about it reminding Spain of the position of the Commission.
22 March 2022	One of the members of the General Council, Concepción Sáez, presents her resignation due to the “unsustainable situation” the General Council is in. The General Council will now operate with 17 members.	No response.
23 March 2023	The deadlock remains. The progressive sector within the General Council ponders over the possibility of collectively resigning to put pressure on the government and the opposition to sit down and finalize the agreement.	No response.
10 May 2023	The deadlock continues as the main opposition party, PP, announces they will only negotiate the renewal of the General Council if a plan for the reform of the system of selection is approved first, as opposed to the Commission’s recommendations in this regard.	No response.

Source: Gallardo & García (2022); Brunet (2023) ; Rincón (2023); García de Blas, (2022).

10.2 Appendix B: Analysis materials

10.2.1 Indirect discursive interactions

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10.2.2 Direct discursive interactions

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