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WHY THE ECJ RESTORES COMPLIANCE FASTER IN SOME CASES THAN IN OTHERS

Comparing Germany and the UK

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Abstract

This paper qualitatively explores the prospects to restore compliance with EU law against the rigid and eminently strong resistance of the affected member states. An empirical study of Court cases on incorrect legal transposition of EC directives in Germany and the UK reveals that states give in to the European prosecutors early in some cases, but maintain non-compliance for a longer period in others. This paper demonstrates that policy variables such as the interpretational scope of the disputed element, domestic norms, the organizational degree of organized interests, and the strength of domestic non-compliance constituencies influence the settlement dynamics of hard cases.

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1. Introduction

Compliance is an important prerequisite for the effectiveness of international law. Empirical studies revealed that 'almost all states comply with almost all international norms almost all the time' (Henkin 1968).Yet, non-compliance occurs and impairs the power of international law. States reacted to non-compliance problems in creating and strengthening international institutions, to which they delegated monitoring and adjudication competencies in order to restore states' compliance with international law. Hard cases of non-compliance, as instances in which states strongly opt for non-compliance are often sooner or later referred to international courts or tribunals. The 1992 EFTA Court, the COMESA Court, the ECOWAS Court, and the European Court of Justice (ECJ) are such international courts. For hard cases of non-compliance, they can apply judicial discourses before they issue rulings (Smith 2000). If non-compliance prevails, the European Union just like many other international institutions can enforce judgments with threats of financial or economic sanctions.

Although we observe a wave of legalization on the international level (Abbott et al. 2000, Abbott and Snidal 2000, Smith 2000), we know very little on how these international courts operate and how they perform in restoring compliance. In order to shed light on this issue, this paper focuses on the European Union and inquires why some cases referred to the European Court of Justice are settled quickly, while others require six additional years until compliance can be restored. While power and capacity are good predictors for the settlement prospects of cases in early stages of the infringement procedure (Börzel et al. 2007), these variables cannot sufficiently explain, why some ECJ cases are settled quickly while others need additional time (Börzel, Hofmann and Panke 2005). As it comes to hard cases of non-compliance that the European Commission sooner or later refers to the Court, country-specific variables such as power, capacity or culture loose their explanatory power. The share of votes in the Council of Ministers (political power) or the strength of the national economy (economic power), the training and motivation of the administrative staff (administrative capacity) or the number of domestic veto players (political capacity), as well as the judicial or political culture of states do not affect their willingness or their ability to transform non-compliance into compliance in reaction to the ECJ. States with a continental-Roman legal culture such as Germany or Italy are not more responsive to ECJ judicial discourses than states with a common law tradition such as the UK. Powerful states, such

as Germany and France, cannot deter the ECJ from rulings to a stronger extent than weak states, such as Luxemburg or Portugal. Likewise, weak states are not more likely to shy away from ECJ penalties than their stronger counterparts. Finally, federal states with many veto players and a respectively low political capacity such as Belgium or Germany are not disabled by their regions when reacting to the ECJ.

This is not too surprising, since there is significant intra-state variation. Each state has Court cases which are quickly settled and others requiring several additional years until compliance is achieved. Why, for example, is it that the drinking water case against Germany was settled within two years after the ECJ referral, while the environmental impact assessment case took six years until compliance was restored? How can we explain that the compliance was restored in the UK collective redundancy case within two years after the ECJ referral, while non-compliance had already persisted for more than ten years? The very fact that norm violations had been abolished is puzzling, since both countries have high political and economic power in the EU and are, thus most likely to be recalcitrant vis-à-vis the Court. In addition, there is no ready-handed explanation of why the transformations took place at different speeds, although delays clearly hamper the effectiveness of Community law.

This paper inquires into the research question of why some cases are settled quickly after the ECJ referral, while others take much longer. It basically argues that policy-constellations are crucial for the settlement dynamics of non-compliance hard cases. In particular, judicial discourses are successful, if state and European advocates share a judicial method of interpretation, which additionally fits to the interpretational problem. If this policy-specific scope condition is present, judicial discourses succeed in restoring compliance with international law – even against the initial strong resistance of the affected states. Judgments do not induce compliance top-down as long as they are not complemented by a threat of penalties, which induce compliance only if external non-compliance costs exceed domestic non-compliance benefits. Hence, ceteris paribus, for policies with highly organized strong non-compliance constituencies, the shadow of financial sanctions must be darker to be effective in restoring compliance, than for policies with loosely organized non-compliance proponents.

The paper is organized into four parts. In the next step, it inquires into the operation of judicial discourses and sanctions and develops two hypotheses accounting for intra-

state variation (II). A series of qualitative studies on the UK and Germany illustrates the theoretical claims. In a third step, the British collective redundancy and the German drinking water cases are inquired. They are instances in which non-compliance was maintained for several years in the infringement procedures, but settled quickly after the ECJ referrals (III). By contrast, the German Environmental Impact Assessment and the British nitrates case are instances in which compliance was restored not earlier than two to three years after the ECJ judgment (IV). The paper demonstrates that country-specific capacity variables such as veto players, effectiveness of administration, financial resources, or power variables such as the share of votes in the Council of Ministers or the economic power do not determine the settlement dynamics of hard cases of non-compliance. If member states eminently oppose compliance with European law, policy-constellations crucially influence, whether the European Court of Justice succeeds in restoring compliance.

2. Explaining Quick and Slow Transformations

The straightforward answer to the question of why some ECJ cases are settled faster than others relates to the applied compliance instruments. Judicial discourses are applied to each case referred to the ECJ, which usually take two years, followed by binding judgments, which can be enforced with threats of sanctions, if non-compliance persists for more than two years after the Court ruling. If judicial discourses are effective, cases are settled quickly within one to three years after the ECJ referral, if sanctions are effective, cases are settled after two to three years after the judgment. Yet, the institutional design of the EU infringement procedure is constant and judicial discourses, judgments and the shadow of penalties is applied to all states equally. Hence, the presence and the application of discourses and threats cannot explain, why some Court cases are settled quickly and others take longer – even within one and the same state. Thus, the important question is, under which conditions judicial discourses and judgments are effective in restoring compliance. Why is it that every state has significant variation in the settlement dynamics? Why are only some judicial discourses effective? Why do some judgments require a severe threat of sanctions to be complied with? This section inquires into the operation of the ECJ and the scope conditions for its success.

For all cases that the European Commission has referred to the ECJ, judicial discourses take place between the national and the European advocate. The highly legalized design of the ECJ facilitates the exchange of arguments, which are considered as legitimate speech acts, while bargaining is perceived as contextually inappropriate (Alexy 1983, Onuf 1989). In processes of judicial arguing, state and European advocates can choose between different methods of judicial interpretation inquiring into the wording of the norm, into its systematic or into its purpose in order to find out, how the aim and the scope of the disputed norm should be interpreted. The judicial argumentation proceeds in a written and an oral stage. In both, European and state advocates exchange judicial arguments on what the norm in question is about and where and how it should be applied. At the end of the oral procedure after all judicial arguments on possible interpretations of the European legal act in questions are exchanged, the European Advocate General prepares a written opinion. The written opinion summarizes the arguments made during the judicial discourse and suggests how the ECJ judges might decide. The judicial discourse ends with the ECJ judgment, in which the ECJ judges decide the case by consensus and, thereby, clearly define the content and scope of application of the disputed norm.

Judicial discourses take place in all cases of eminently rigid non-compliance, which the European Commission refers to the ECJ, but are not always successful – even for one and the same state, for one and the same government or within a policy field. Hence, the fact that a judicial discourse takes place cannot explain whether it is successful in restoring compliance with EU law or not. This indicates that not every judicial argument is per se good and persuades states to comply with a European norm. Thus, the crucial question is: What characterizes a good judicial argument? Or put differently: Which judicial arguments are likely to change states' compliance-adverse attitudes in order to promote compliance?

In order to answer this question, this paper theoretically draws on a modified version of the Habermasian discourse theory that inquires contextual preconditions for collective ideational changes. Governments can be talked out of non-compliance, if they undergo processes of collective ideational changes that alter their preferences from non-compliance into compliance. Generally, collective ideational changes are only likely under specific conditions related to the flow of ideas (dominant pattern of speech acts) and the quality of ideas (shared criteria for the evaluation of the quality of communi-

cated ideas) (Panke 2006a). Collective ideational change requires that actors do not talk cross-purposes, but can relate to each other. Meaningful communication presupposes that all participants share standards of how the quality of speech can be assessed. In meaningful interactions, results (compromises or consensus) to which all participants agree can be achieved incrementally (without voting or authoritative decision). By contrast, if actors do talk cross-purpose, there will be no consensual outcome, which is supported by all actors and for which all actors have reasons to comply with.

Truth, rightfulness and appropriateness are three possible standards to assess the quality of arguments (Habermas 1995a). If actors share such standards, they can develop consensual perspectives, because they can commonly factor out good from less compelling ideas and incrementally arrive at a consensus. The standard of truth encompasses epistemological and methodological principles and also ontological elements. Argumentative interactions, in which the quality of arguments can be measured based on standards of truth, are conducive to a consensual norm definition when the actors share expertise on the subject matter. However, truth-related reasoning becomes meaningless when there is no consensus of whether an effect reproduces or reinforces the norm, proper to its content and scope. Thus, a consensus on the purpose of the norm is essential.[1] However, for all ECJ referrals contents and/or scope of the respective norm are most likely contested. Yet, actors are not trapped in the dilemma that they can only develop a consensual norm definition when they consent on the purpose of a norm, while the very fact that the case has been carried on to the Court indicates that such a consensus is absent. The judicial discourse offers an expedient: It aims at the clarification of the contents and scopes of disputed norms and thus of the standard of rightness itself. In order to identify and clarify a norm's contents and scope, judicial methods of interpretation are applied (e.g. wording, systematic or teleological heuristics) and can serve as additional yardsticks to measure commonly the quality of arguments. The wording heuristic aims at solving interpretational differences by analyzing the wording of the paragraphs in question: Are new concepts introduced? How are they defined? Are exceptions named and enumerated? The systematic heuristic solves interpretational questions by analyzing the paragraph or article in question in the context of the whole legal norm: Are new concepts introduced in other para-

[1] Norms are expression of a common interest of the norm-producing actors (Habermas 1992, Habermas 1995b) and the quality of normative ideas is measured by the extent to which they express the purpose of a norm, as the standard for rightfulness (Habermas 1995a: 42).

graphs that define or delimit the issue in question? Are exceptions in other parts of the norm named and enumerated and do they impact scope and content of the interpretational issue? The teleological heuristic aims at defining content and scope of a disputed norm or paragraph by analyzing the broader legal context: What is the purpose of the treaties and how does it relate to the norm in question? Although judicial discourses take always place, their success in restoring compliance varies. Hence, judicial discourses can only be effective and induce compliance, if actors do not talk cross-purposes, but share common standards for the evaluation of communicated arguments. Shared judicial methods of interpretation (judicial heuristics, e.g. wording, historical, systematic, teleological) serve as additional evaluative standards (which were not present in the management phase). During the judicial discourse, a shared judicial heuristic serves as a standard on which the goodness of ideas on how to interpret a norm's content and scope can be commonly evaluated. If actors equally factor out good from less compelling ideas, they can finally arrive at a consensus. Hence, if shared, judicial interpretational heuristics allow actors to develop new insights on how the contents or scope of a norm have to be understood and contribute to the funneling of consensual norm interpretations.

Yet, not every judicial heuristic is suited to solve every interpretational problem. In order to select a single interpretation out of the variety of possible norm readings, a high goodness of fit between the interpretational scope of the norm and the seizure of the shared heuristic is required. A narrow interpretational heuristic (such as the wording heuristic) might not produce a single interpretation, for all issues with broad interpretational scopes (since different articles interpreted according to their wording can lead to completely different interpretations of the whole norm and there is no way of deciding which article should be given priority out of the variety of wording based interpretation). Disputed elements with broad interpretational scopes are better dealt with broader heuristics (teleological, systematical), because they allow developing a comprehensive reading of the whole norm. Respectively, contested issues with narrow interpretational scopes are best dealt with by narrow heuristics. Narrow heuristics allow dealing with problems of detail, while broad heuristics applied to a norm with a narrow interpretational scope multiply the number of possible readings broadening content and scope ex-post. This is not conducive to a successful consensual funneling process, since it jeopardizes the explicitly defined scope. Successful judicial discourses require, firstly, that actors share a judicial heuristic and, secondly, that the shared heuristic has a high

goodness of fit with the interpretational problem at hand. If both conditions are met, European and national advocates can develop a consensual norm definition regarding aims, procedures, and applicatory scope of the formerly contested norm. During successful judicial discourses actors become persuaded that the new consensual norm definition is better (or more adequate) than a previously upheld norm definition. These processes of persuasion facilitate compliance: if governments change their attitudes inherent in a certain norm (which were responsible for non-compliance in the first place or were used to publicly justify non-compliance), they have no longer non-compliance incentives.

In a nutshell, the application of judicial heuristics provides opportunities for consensual norm funneling and restoring compliance, which were absent in the interactions prior to the ECJ referral. Yet, judicial discourses can only develop a consensual norm interpretation if the actors share a judicial heuristic fitting to the interpretational problem at stake. Only if this independent variable is present, actors do not talk cross purposes but commonly sort good and convincing judicial arguments from less convincing arguments, which, in turn, facilitate processes of mutual persuasion leading to a consensual norm definition. The hypothesis on the success of judicial discourses states: *H1: Consensual norm interpretations that quickly facilitate compliance are likely, if actors share a judicial heuristic that reveals a high goodness of fit to the interpretational problem at hand.*

If judicial discourses fail, transformational processes do not take place quickly and non-compliance is maintained for an additional period. This is, because judgments do not directly induce compliance top-down. They transport no new arguments, which have not already been made during the judicial discourse and can therefore not restore compliance via processes of persuasion. At the same time, judgments are not threatening to states in increasing non-compliance costs. They are not automatically linked to financial sanctions and do not facilitate reputational losses on the EU level, simply because all states face adverse-ECJ judgments at some point. Only if non-compliance prevails for more than a year after the judgment, a top-down enforcement instrument comes into play and restores compliance with a delay.

Although the shadow of sanctions is present for all cases on which the ECJ issued judgments, the threat of sanctions is only effective in facilitating transformations into

compliance, if states take them seriously and perceive the costs for future non-compliance as exceeding domestic non-compliance benefits (Fearon 1998, Horne and Cutlip 2002). Within the first year after the ECJ judgment, the shadow of possible sanctions is still bright. Since European actors do not introduce first enforcement measures in this period, governments do not shy away from sanctions immediately after the ECJ ruling (Panke 2006b). Even highly risk-adverse governments value non-compliance benefits of today stronger than avoiding non-compliance costs in the remote future, when they might not even be in office anymore. Although a shared reference system on what constitutes bargaining power is most likely present, threats with sanctions are too weak to facilitate the adaptation of strategic positions and unstable compliance within the first year after ECJ rulings.

As the shadow of financial penalties darkens, since first measures towards enforcement have been introduced by European actors, the distinction between centralized and decentralized enforcement systems becomes important. Comparing the implications of a reasoned opinion based on Art. 228 ECT (after 1993) and a referral to Art 171 ECT (before 1993), the likelihood that non-compliance costs are increased and exceed non-compliance benefits is lower for decentralized sanctions. It is uncertain whether other states will indeed react to losses of reputation and credibility and it is unclear, in which negotiations in the Council of Ministers losses in reputation negatively affect the bargaining power of a state. Moreover, decentralized sanctions might take place with a severe time lag and punish subsequent governments rather than those responsible for the maintenance of non-compliance in the first place. By contrast, the consequences for non-compliant governments are more concrete in centralized enforcement systems. If states do not adapt legal acts at all within the average time period of two after the first ECJ judgment, the European Commission sends a second reasoned opinion to the respective state (Commission of the European Communities 2005). This increases the likelihood of being sanctioned within the next twelve months severely, although there are still two further steps (second ECJ referral and second judgment) until non-compliant governments face financial penalties. External non-compliance costs increase additionally, if the European Commission suggests a sum as daily penalty to the ECJ.

For all cases in the enforcement stage of the EU infringement proceeding, policy interests and strategic positions at stake are eminently strong, since the state would have

already given in an earlier stage of the infringement procedure. This indicates that domestic non-compliance benefits are high. Nevertheless, there can be variation. The stronger the domestic non-compliance clientele is organized, the higher are domestic non-compliance benefits, while policy characteristics, in turn, influence the organizational degree and strength of societal norm proponents and norm opponents. A strong domestic non-compliance constituency can especially be expected if a certain policy issue has concrete compliance costs, but only diffuse compliance benefits (Wilson 1975).

Taken together, threats of sanctions are the more effective, the more likely they exert punishments while the government is still in office. The mere possibility of sanctions in the remote future hardly increases non-compliance costs, and it is unlikely that they override domestic non-compliance benefits, especially if the domestic non-compliance constituency is strong. Only if first steps towards sanctions are undertaken (e.g. if the Commission sends a letter of formal notice), future sanctions turn increasingly into external costly constraints to governmental non-compliance. The threat of penalties becomes prohibitive, if the Commission suggests a certain sum as daily penalty to the ECJ. The compliance re-storing instrument 'threat of sanctions' alters strategic cost-benefit calculations. If external non-compliance costs exceed domestic benefits, governments adapt strategic positions accordingly. Governments pursue delayed compliance. Since they quickly abolish the continuation of non-compliance, minimalist changes more effectively prevent the ECJ from issuing a financial penalty. The hypothesis on sanctions as compliance re-storing instrument, thus, states: H2: Strategic adaptations of governmental positions facilitating delayed compliance are expected after judgments, if threats of sanctions are likely to be realized in the near future and if non-compliance benefits are not equally high because domestic non-compliance constituencies are not strongly organized.

3. Early Settlements of ECJ Cases

This section focuses on early settlements. Using a most different systems design in regard to country-variables, it inquires into the German drinking water and the British collective redundancy cases. Governmental non-compliance interests were strong, so that non-compliance prevailed for eleven (UK) and seven (Germany) years before the European Commission finally referred the cases to the Court. In front of the ECJ, judicial discourses took place. Since the advocates shared judicial heuristics fitting to the interpretational problems at hand, the hypothesis expects that non-compliance was quickly restored in both instances.

The drinking water directive (DWD, 80/778) aimed to protect both, the environment and public health. Therefore, it formulated 64 emission based quality standards that water must fulfill, in order to be suited for human consumption. The DWD created a misfit to German water aquis in two regards. The polluters-pay principle was strongly institutionalized in Germany but not prescribed in the directive and the DWD incorporated environmental parameters, which were not part of the German public health-oriented water legislation (Bundestag 1988d, Bundestag 1987, Bundestag 1988b, Bundestag 1990, Börzel 2003: 76-81, Knill 2001: 134). The conservative/liberal Kohl-government opposed the environmental parameters because of cost implications for water suppliers who were ultimately responsible for achieving the quality standards (c.f. Börzel 2003: 81, Bundestag 1989, Bundesregierung 1988). Hence, Germany was reluctant to comply with the DWD. The environmental parameters were not legally transposed in the 1986 drinking water regulations (DWR) and the exceptional clause for granting departures had been interpreted extensively, which restricted the DWD's scope of application. Already in 1987, the Commission opened an infringement proceeding (1987/0440) and accused the Federal Republic for incorrectly legally transposing the DWD. The Kohl-government had strong non-compliance preferences and dispute continued, so that the Commission referred the case to the ECJ in 1990 (237/90).

Two issues were at stake in the judicial discourse. Firstly, the advocates disputed under which conditions exceptions form the DWD can be granted and secondly, whether and how all exceptions and derogations have to be communicated to the public and the European Commission. The following discussion focuses on the second issue, for which non-compliance was maintained a couple of months longer.

In the first phase of the judicial discourse, dissent on whether all derogations and exceptions from the water quality standards have to be communicated prevailed, since the European and the German advocate did not commonly apply a judicial heuristic with a high goodness of fit to the interpretational problem at hand.[2] Hence, the 1990 drinking water regulation did not require comprehensive information and communication measures. After the 1990 reform, the judicial discourse shifted substantially from the abstract question of whether communicational requirements should be legally prescribed in Germany, to the issue of whether derogations and exceptions based reasons related to the texture of the soil (geogen) must also be communicated to the Commission, or whether the information responsibilities encompasses only those derogations and exceptions from the directive, which were caused by climatic 'emergencies'.

The German advocate aimed to justify the exception of geogen causes from communicational requirements in the 1990 DWR with reference to the wording of Article 9 I of the DWD (Advocate General 1992: 19). The wording of Article 9 I DWD states:

> "Member States may make provision for derogations from this Directive in order to take account of: (a) situations arising from the nature and structure of the ground in the area from which the supply in question emanates. Where a Member State decides to make such a derogation, it shall inform the Commission

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[2] This was, firstly, because the shared wording instrument did not fit of the interpretational problem and, secondly, because they did not share the broader method of judicial interpretation such as the directive-immanent teleological heuristic. The text of the DWD lacked an explicit rule in regard to legal requirements of notifications and communications of granted exceptions form the DWD's quality parameters. Consequently, a shared wording heuristic could not be applied successfully in facilitating a single reading of the interpretational problem. The text of the DWD was silent in this regard, so that the wording heuristic allows for two conclusions. Firstly, and that was the German argumentative strategy, one can conclude from the fact that the text of the DWD is silent, that the DWD does not require certain legally binding communicational mechanisms, but that the choice of how to achieve 'wholesome communication' is entirely up to the member states. Secondly, the European advocate argued that very fact that the wording heuristic produces no clear definition can also be interpreted as indication that a certain communicational mechanism might not be the only option for legal transpositions. It cannot be concluded that every transposition is equally good, only because the wording is silent. Hence, competing interpretations could have been maintained and the wording instrument did not allow singling out the better from the worse interpretation. While the less narrow directive-immanent teleological method of interpretation had a much better fit to the interpretational problem at hand and, in turn, might have provided a single interpretation, it was not shared by the German advocate. Hence, the first stage of the judicial discourse regarding the issue of communicational requirements is an instance, in which the actors shared a judicial heuristic (wording), which did not fit to the interpretational problem, while they did not commonly apply a broader judicial heuristic with a better fit to the interpretational problem at hand.

> accordingly within two months of its decision stating the reasons for such derogation; (b) situations arising from exceptional meteorological conditions. Where a Member State decides to make such a derogation, it shall inform the Commission accordingly within 15 days of its decision stating the reasons for this derogation and its duration."

Based on the wording heuristic, Germany concluded that derogations can be granted because of geogen reasons, and did no longer deny the necessity of communicational requirements in this respect.

The European advocate also applied the wording heuristic to the DWD and pointed out that Article 9 I a allows granting specific but not general derogations based on geogen factors (Advocate General 1992: 20). The European advocate additionally argued that the wording of the directive does not allow granting general derogations for reasons related to the texture of the soil, so that all granted derogations must be communicated to the European Commission (Advocate General 1992: 20).

The wording heuristic had a high goodness of fit as regards to the issue of granting exceptions form the DWD for reasons related to the texture of the soil. Using the wording instrument, the European advocate concluded that derogations due to geogen reasons are possible, but since derogations are 'exceptions' they have to be communicated to the European Commission. The German advocate did not challenge this wording-based conclusion. Even if Germany would have tried to defend non-communication of general exceptions due to soil-related reasons with the wording instrument, it would have failed. This is because the wordings of Article 9 I a and Article 10 II clearly and unambiguously specify the reasons for possible derogations with geogen or exceptional meteorological conditions. These Articles state that both types of possible must be communicated to the European Commission. Since neither wording nor directive-immanent teleological judicial heuristic would have allowed successfully defending the original German position, it is not surprising that Germany stopped defending lacking communicational requirements for derogations and, consequently, accepted that the 1990 DWR only incorrectly legally transposed the DWD (European Court of Justice 1992).

In line with the hypothesis the German government changed its substantial policy interests in response to the late stage of the judicial discourse and opted quickly for compliance. In order to abolish non-compliance, the Kohl-government initiated a legally binding provision entailing communicational requirements, in order to meet the criteria as required based on Articles 9 and 10 of the DWD already towards the end of the judicial discourse (Federal Ministry for Health 1992: 1). The DWP ensured the comprehensive communication of exceptions and derogations as well as their circumstances from local authorities to the federal ministry for health (Federal Ministry for Health 1992: 1, 6). Especially the Christian Democrats' in Bundestag and Bundesrat opposed the complete communication of deviations to the DWD quality parameters (Bayern 1992, Bundesrat 1992). Even the Committee for Health of the Bundesrat was less empathic towards the ECJ judgment than the Kohl-government and suggested scope restrictions to the communicational requirements in the governmental draft DWP (Bundesratsausschuss für Gesundheit 1992: 2, Bundesrat 1992: 487). Against this resistance, the federal government managed to pass the DWP in December 1992. Within less than one year of the ECJ judgment, the Kohl-government induced a legal change that completely and precisely legally transposed the norm definition as developed during the late stage of the judicial discourse before the ECJ.

The Kohl-government and the Töpfer-environmental ministry pushed for such a fast legal change, because they changed their substantial policy interests in reaction to the judicial arguments. Already towards the end of the judicial discourse, federal decision-makers stated that the DWD is of high quality and should be implemented because of its importance for the prevention of environmental and health damages (e.g. Bundestag 1992). This is stark contrast to the arguments prominent in 1989, were the scientific and technological basis of the DWD was severely attacked from all sides (e.g. Bundestag 1988c, Bundesregierung 1988, Bundestag 1988a). Rather than opting for a narrow drinking water quality approach with broad exceptional clauses and intransparent derogations, the government was keen to emphasize that environmental concerns are important for water quality issues in general and specifically for the maintenance of Germany's high water quality standards (Federal Ministry for Health 1992, Bundestag 1993a, Bundestag 1993a, Bundestag 1994b, Bundestag 1994b, Bundestag 1994a, Bundesregierung 1994, Bundesregierung 1993). While drinking water issues were debated in terms of public health in the German Bundestag before the ECJ judicial discourse, drinking water quality was regarded as an issue of environmental protection

afterwards (Bundestag 1993a, Bundestag 1993a, Bundestag 1994b, Bundestag 1994b, Bundestag 1994a, Bundesregierung 1994, Bundesregierung 1993). Accordingly, the distinction between rightful health-related quality parameter and 'unnecessary' environmental-protection related parameters was no longer maintained and the possibilities for broad exceptions and intransparent derogations were severely limited (Bundestag 1993a, Bundestag 1994c).[3] Thus, non-compliance was quickly abolished only two years after the European Commission referred to case to the ECJ.

The collective redundancy directive (75/129) protects employees in the event of collective redundancies through prescribing consultations with employee's representatives and official protective procedures. In 1985, the conservative government substantially altered the UK's initial legal implementation (the Employment Protection Act (EPA) of 1975). After the European Commission became aware of this change, it suspected that the 1985 EPA only incompletely legally transposed the directive, since information and consultation of trade unions through employers were ultimately voluntary and because the protective rights did only apply for some but not all redundancies (European Commission 1991). Therefore, the Commission issued a reasoned opinion in March 1991. Yet, the Conservative government upheld its claim of not violating EU law, mainly because employer associations as important conservative clientele severely opposed the

[3] A counter factual argument also indicates that a governmental change of substantial policy interests is more likely than strategic adaptation of positions to increasing external costly constraints. Conservatives and Liberals in both chambers overwhelmingly opposed the DWD in fall and winter 1991 (Bundestag 1991a Bundestag 1991c, Bundestag 1991b). Against the background of non-compliance preferences in the Bundestag, the Bundesrat, among the chemical industry, and the agricultural lobby (Bundestag 1991b, Bundestag 1993b), the federal government could have easily delayed strategic adaptations until the costs for non-compliance became compulsory high – which would have been more likely after the ruling was issued. Yet, the very fact that the conservative federal government pushed for a legal adaptation completely in line with the consensual norm interpretation already before the ECJ judgment, although the domestic opposition was strong, shows that a change of substantial policy interests took place. Moreover, after the ECJ judgment, the German federal health authority (BGA), which had extensive contacts to water providers, opposed the 1990 DWR and the 1992 DWP and campaigned for ignoring some of the parameters (interview federal ministry 08/03/05). The BGA feared that comprehensive monitoring and communicational system will highlight all instances of poor drinking water quality and, in turn, increase pressures on the BGA, local authorities, and water suppliers or even lead to additional EU infringement proceedings for failures of practical implementation of the DWD. The health ministry did not use the skepticism of the BGA as a window of opportunity to shift back into a less demanding drinking water quality approach, but reacted promptly with threats of dismissals in order to bring the BGA in line with compliance (interview federal ministry 08/03/05). This is in line with its changed policy interests: The government no longer accepted that the BGA strategies of promoting lax applications but reacted in a fast and straight forward manner to eradicate non-compliance with public health and environmental parameters.

directive (c.f. House of Commons 1989, House of Commons 1991). In 1992, the European Commission referred the case to the ECJ. Before the Court, four issues were at stake: Should employees be protected by the directive for redundancies in general or only for redundancies for economic reasons? Are consultation procedures between the employer and workers' representatives compulsory or voluntary? Which penalties for non-compliant employers are prohibitive? Are employers required to merely inform workers' representative of the conditions of redundancies or do they have to engage in consultations?

In all four issues, the advocates of the parties consented on applied heuristics. For reasons of scope, this paper focuses on one of the two very problematic issues, namely the nature of involvement of workers representative's into the process of dealing with collective redundancies. It was contested whether an employer could easily reject the worker representative's attitudes during the consultation procedure or whether the worker representation has real bargaining power and enforceable rights. This affects the very heart of the directive's protective aim. The employee protection would be much weaker in processes of collective redundancies, if worker representatives had a voice, which employers could de facto completely ignore. Such a lax interpretation of the collective redundancies directive would jeopardize the directive's protective purpose (as defined by a more demanding interpretation). For more than 10 years before the ECJ referral, the Conservative Party strongly opposed collective protection rights of workers, because they did not fit to the conservative liberal economic approach (House of Commons 1989: 475, House of Commons 1991: 476, House of Commons 1992: 172, Ashford 1981: 101-114).

During the judicial discourse, the European and UK advocates shared the wording heuristic. The wording interpretation of the collective redundancies directive and the British legal act revealed that Article 2 I of the collective redundancies directive precisely prescribes the aim of information and consultation endeavors of employee representatives and employers as reaching an agreement (European Court of Justice 1994: 34-36). The subsequent paragraph (Article 2 II) states that consultations "shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and mitigating the consequences". However, section 99 VII of the British Employment Protection Act was less demanding since employers could reject the positions of employee representatives as long as he stated his reasons. The wording in-

strument fitted well to the interpretational problem. Regardless of whether one would start with Article 2 I or with Article 2 II of the directive, the wording heuristic suggests that the directive clearly stated aims for information and consultation procedures (European Court of Justice 1994: 35). Hence, the judicial discourse hypothesis expects that the UK government changed its substantial policy interests in reaction to the judicial discourse and accepted a broader and more demanding reading of the collective redundancy directive in general and of the status of collective rights in the process of redundancies in particular.

Already during the ongoing judicial discourse, the UK government introduced legal changes in the Trade Union Reform and Employment Act (TUREA) (Advocate General 1994: 34). In general, the TUREA fitted well to the liberal economic approach of the conservative government and abolished several elementary trade union rights. Yet, contrary to the general trend and its general economic policy, the conservative government explicitly incorporated into the TUREA that in cases of collective redundancies employer and worker representatives shall aim for an agreement in consultations (House of Commons 1993). Thereby, the government extended collective protective rights in line with the arguments made during the judicial discourse (House of Commons 1993). This is surprising, since employers' associations (e.g. the Confederation of British Industry) as the Conservative government's clientele strongly opposed collective worker rights for their cost implications before and after the ECJ judicial discourse (compare House of Commons 1992 with House of Commons 1996a, House of Commons 1994b, c.f. Docksey 1986). Although the strategic environment and the domestic distribution of benefits and costs remained stable in the UK, the conservative government changed its policies as regards the worker representation in collective redundancy processes during the judicial discourse. Before the judicial discourse took place, the government applied a liberal economic cost-benefit frame and highlighted costs for the economy resulting from newly introduced protective rights regarding redundancies (House of Commons 1991, House of Commons 1992). By contrast, after the judicial discourse, the government applied a frame of rightfulness and supported the inclusion of workers representatives in processes of collective redundancies (House of Commons 1993: 327).

> "We reached a point of considerable uncertainty where it looked as though an employer had to consult in cases of collective redundancy only if there were a recognised trade union. If there were no recognised trade union, the employer

> was apparently under no obligation to consult anyone, which cannot be right. The ECJ must be supported in its judgment. Tonight we are trying to ensure that, in the case of collective redundancies, everyone is consulted, either through a recognised trade union or through an election" (Minister for Competition and Consumer Affairs (Mr. John M. Taylor) in House of Commons 1996a: 205).

In the wake of the unaltered strong domestic opposition of employer associations vis-à-vis a demanding interpretation of the directive, it is not only remarkable that the government changed its policies on worker representatives already during the late stage of the judicial discourse, but also that the government pursued this legal change *without* blame shifting to the EU or ECJ (House of Commons 1993; House of Commons 1994b: 432). If the UK government would have maintained its substantial policy interest for non-compliance, but adapted strategic cost-benefit calculations to losses in reputation vis-à-vis the Commission, vis-à-vis other member states, or to the shadow of future penalties, it would have been strategically rational to avoid domestic reputational losses and losses in support of its own clientele. Blame shifting to the EU-level highlighting that the EU and not the UK government was ultimately responsible for the strengthening of collective rights would have allowed the UK government to avoid rising external costs for non-compliance and at the same time justify the extension of collective rights against the preferences of their clientele and avoid high domestic compliance costs. Yet, the conservative government did not engage in blame shifting to the ECJ and also abstained from highlighting the compliance-cost and -benefit implications of legal changes. The conservative government even defended the 1993 and 1995 legal changes as compatible with their deregulative macro economic approach and their general skepticism vis-à-vis trade unions (House of Commons 1994b, House of Commons 1996a). In line with substantial changes of policy interests, the conservative government avoided overlaps between the 1993 TUREA and the 1995 regulation and other bodies of employment law, abstained from inserting broad exceptions into both legal acts, and did not introduce ambiguity in relying on undefined, underspecified or completely new and complex concepts. Hence, in 1995, only one year after the ECJ ruling, the collective redundancies directive was correctly legally transposed and could finally be completely reproduced – although the conservative government had previously opposed collective rights and maintained non-compliance for more than ten years.

Comparing both cases, it is, firstly, remarkable that judicial discourses facilitated compliance, although the governmental opposition to demanding interpretations of the directives were strong for eleven (UK) and for seven (Germany) years prior to the ECJ referral. In addition, in the German drinking water case and in the British collective redundancy cases, governmental constituencies opposed demanding interpretations of the disputed directives from the very beginning and continued to do so even after the end of the judicial discourse. In both instances, the governments in London and Berlin opted for compliance with the consensual norm definition, despite domestic resistance. At the same time, there were no external non-compliance costs arising from EU-level losses of reputation or from threats of the European Commission or the ECJ (c.f. Panke 2007). In both instances, the shadow of external sanctions was bright, since the Commission did not introduce first steps towards enforcement with a second infringement procedure. Moreover, the DWD and the collective redundancy directive were also violated by other member states, and every member state had already been subject to an adverse ECJ judgment, so that the Kohl and the Major government were not threatened by losses of reputation on the EU-level. As expected by the judicial discourse hypotheses, compliance was quickly restored, because the advocates shared judicial methods of interpretation fitting to the contested issues. Thus, the German and the British governments were talked out of non-compliance and introduced domestic changes based on the consensual norm definition soon after the ECJ referral.

Secondly, the most different systems design allows concluding that country-variables did not matter. Germany and the UK differ in regard to their political capacities (number of veto players), their political cultures (majoritarian v consensual), their legal cultures (common law v continental), or the popular support rates for EU-integration. Despite all these differences, which are prominent in the state of the art (c.f. Mitchell 1996), the settlement dynamics of the German drinking water case and the UK collective redundancy case do not differ. While state-variables matter in early stages of infringement procedures (Börzel et al. 2007), they do not in adjudication settings. Once cases are referred to international courts, state-differences are mitigated and compliance can be quickly restored through discursive means, if the policy-specific scope conditions are present, so that actors do not talk cross-purposes but arrive at a consensual norm definition.

4. Late Settlements of ECJ Cases

This section focuses on cases, in which non-compliance was maintained for more than two years after the judicial discourse was finished and the ECJ issued its judgment. It also applies a most different systems design and compares the British nitrates case and the German environmental impact assessment cases.

The nitrates directive (91/676) seeks to protect the environment in reducing the level of nitrates in fresh and groundwater. It especially focuses on nitrates from agricultural sources, which is the main water polluter. The directive prescribes the designation of Nitrate Vulnerable Zones (NVZ) and Action Programs as instruments to protect water from nitrates. The UK legally transposed the directive with three regulations in 1996 ("The Protection of Water Against Agricultural Nitrate Pollution Regulations"). However, instead of applying the nitrates directive to all groundwater and freshwater, the regulations only referred to drinking water. This scope restriction was in line with the widely held British perception of the early and mid 1990ies that water quality is not an environmental but a public health issue (House of Commons 1994a: 9, House of Commons 1996b:814-815, House of Commons 1997).

The European Commission referred the case to the ECJ in February 1999 (case C-69/99). Before Court, it was firstly contested, whether all surface waters and groundwater are subject to the nitrates directive, or only water intended for human consumption. Secondly, there was dissent on whether the UK failed to designate sufficient nitrate vulnerable zones and, thereby, restricted the applicatory scope of the nitrates directive. Thirdly, the actors disagreed whether the British action programs that are required for the NVZs were sufficient. The judicial discourse remained ineffective. In none of the three issues, the European and the British advocate applied common judicial heuristics fitting to the interpretational problem at hand. In fact, the British advocate did not apply judicial heuristics at all. Hence, after the ECJ ruled that the UK violated EU law in incorrectly transposing the nitrates directive into national legal acts in 2000 (European Court of Justice 2000), the UK undertook not even first steps towards the legal and practical implementation of the judgment, but continued non-compliance (c.f. House of Commons 2002e, House of Commons 2002h, House of Commons 2002f).

The second hypothesis expects that governments adapt strategic positions to rising external non-compliance costs and opt for delayed compliance, if external costs override domestic non-compliance benefits. This requires that the threat of penalties is eminently strong so that the government can expect to be punished in the near future, while being still in office. In addition, external non-compliance costs override domestic benefits the easier, the less organized the domestic non-compliance constituency is.

In the immediate period after the judgment, external non-compliance costs were relatively low, since the European Commission did not introduce first steps towards centralized enforcement. At the same time, domestic non-compliance benefits were considerably (Farmers Guardian 2000, The Express 2001a, The Daily Telegraph 2000, House of Commons 2000, House of Commons 1999). Farmers as domestic non-compliance proponents were highly organized and received broad public support, not the least because of the BSE crisis and the foot and mouth disease. As expected, the Blair-government maintained its compliance-adverse strategic position and did not introduce any preparatory steps towards domestic change (House of Commons 2000, House of Commons 2001). Despite the government repeatedly committed itself to a more demanding nitrates approach in Court (Advocate General 2000, European Court of Justice 2000), non-compliance was continued and the UK remained inactive for an additional year.

The European Commission reacted to non-compliance in sending a *letter of formal notice* to the UK in fall 2001 (Farmers Guardian 2001, Belfast Newsletter 2001, The Express 2001b, The Daily Telegraph 2001). This increased external non-compliance costs, in particular because a second ECJ judgment issuing financial penalties was only two procedural steps away. While it became increasingly likely for the Blair-government to become convicted and penalized while being still in office, the domestic non-compliance benefits were still very strong. This was not the least due to fact that farmers were well organized and received wide public attention and support. At the same time, environmental activists as societal compliance proponents were relatively inactive, so that the domestic cost-benefit calculation still strongly pointed towards maintaining non-compliance. It is most likely that domestic compliance costs (primarily for farmers, but also the reputation vis-à-vis the broader public) almost equaled rising external non-compliance costs after the European Commission sent a the letter of formal notice the governmental perception (House of Commons 2001, House of Com-

mons 2002a: 426). In line with this interpretation, the Blair government was very reluctant to introduce delayed compliance in winter 2001/2002 (House of Lords 2001). At the same time, the government was no longer inactive, but prepared for the initiation of a consultation process with farmers on the designation of NVZs. This endeavor was publicly labeled as a preparatory step towards legal change (House of Lords 2001, House of Commons 2001). Yet, this de facto delayed domestic legal changes even further. The ECJ had not only already specified content and scope of the nitrates directive, so that consultations with farmers were not necessary to legally transpose the nitrated directive correctly and completely into UK law. The government also changed the options for the consultation during the ongoing process, without starting a new consultations or at least providing farmers with an update on the options, which rendered the consultation obsolete (Department of the Environment 2002b). Since the consultations were neither required nor consequently pursued, the consultation endeavor had a window dressing character. This could indicate that the government wanted to demonstrate its new commitment regarding nitrates in order to prevent the European Commission from initiating another step towards financial penalties, while saving domestic compliance costs at least temporarily.

The European Commission was not satisfied with this domestic change, sent a *second reasoned opinion* to the UK, and proposed a sum of as daily penalty (135 000 £) in May 2002 (House of Commons 2002c, Financial Times 2002b, Financial Times 2002a, Financial Times 2002a, Western Daily Press 2002). This increased the external non-compliance costs tremendously, since an ECJ judgment issuing the proposed penalty was not only very likely, but also very likely to happen so soon that the government would still be in office, while being penalized. The domestic non-compliance benefits were still high, but did not exceed the threat of external penalties. Hence, the second hypothesis expects that changes in strategic positions take place so that delayed compliance was achieved.

In line with the second hypothesis, cost-benefit calculations changed. Delayed compliance became more beneficial than maintaining non-compliance, as the threat of sanctions from above increased. In this context, the Minister for the Environment admitted

> "We are subject to infraction proceedings if we do not implement it in full, and non-compliance fines could run as high as £135,000 a day. (..) Those constraints are unavoidable, and we have delayed implementation as long as pos-

sible (...) we now risk fines and therefore have to act." (Mr. Meacher in House of Commons 2002c: 906).

The 2002 nitrates regulations were issued soon after the European Commission threatened the UK with financial penalties (House of Commons 2002c, Department of the Environment 2002b). The regulations of December 2002 had a broader applicatory scope than the 1996 nitrates regulations and included all fresh and groundwater, regardless of whether it is intended for human consumption (House of Commons 2002e). While the Blair-government quickly introduced delayed compliance in order to prevent a second Court judgment and penalties, they pursued no comprehensive legal changes, but introduced a less demanding nitrates approach through the backdoor. Firstly, the government designated only 55% of the territory as NVZs, although the majority of farmers opted for 100% designation in the consultation procedure (mostly due to fairness considerations) (House of Commons 2001, Department of the Environment 2002b). Moreover, the 2002 regulation and the NZVS and action programs entailed ambiguities. In particular, the government maintained considerable uncertainty as to which territories are subject to action programs and codes of good agricultural conduct (House of Commons 2002c).[4]

[4] Another indicator for changes of strategic positions is the language governmental actors use in respect to nitrates. Although the Blair-government no longer claimed that the nitrates directive applies exclusively to drinking water in 2002, none of the public speeches highlight the appropriateness, or rightfulness, or scientific properness of a demanding interpretation of the nitrates directive (House of Commons 2002b, House of Commons 2002a). Moreover, the framing was maintained and the government did not defend nitrates reduction as a measure of environmental protection, but still applied the public health and the costs frames (House of Commons 2002f, House of Commons 2002g). If environmental protection was mentioned at all in the context of the nitrates directive, even the DEFRA highlighted especially the merits of high drinking water quality (public health) or the effective uses of fertilizers (costs) (Department of the Environment 2002a). Rather than emphasizing environmental protection, the government focused on the domestic compliance costs (House of Commons 2001, House of Commons 2002a: 426, House of Commons 2002b, House of Commons 2002a, Select Committee on Environment 2002: 552; Select Committee on Environment 2003: 14).
Most importantly, instead of recurring to normative or causal arguments and highlighting the superiority, the merits, or the quality of the nitrates directive or to a logic of appropriateness requiring compliance with EU law from good member states, the Blair-government repeatedly recurred to the ECJ and its 2000 ruling against the UK in a blame-shifting manner (House of Commons 2002h, House of Commons 2002d, House of Commons 2002e, House of Commons 2002f), such as "The Department's current proposals to reduce nitrate pollution from agriculture arise from the requirement to comply with the European Court of Justice judgment that implementation of the Nitrates Directive is currently incomplete in the UK" (House of Commons 2002d). These blame-shifting endeavors shifted the responsibility for domestic changes (against the preferences of the domestic clientele) to the EU. Through

The Environmental Impact Assessment directive (EIA, 1985/337) seeks to prevent environmental damages and prescribes a mandatory procedure for the evaluation of projects' impacts on the environment. Only when a project is not regarded as significantly impacting the three media (air, water, and soil) it may be approved (Knill 2001: 144, 147; Wurzel 2004: 103). The EIA directive did not fit to the German media-specific environmental law, since it resembled a cross-media approach and (Liefferink and Jordan 2004: 37). The conservative/liberal German government transposed the directive with the 1990 environmental impact assessment law (UVPG), which restricted the applicatory scope of the EIA directive severely. Since the Kohl-government maintained their positions rigidly despite the Commission's criticism, the later referred the case to the ECJ in 1995.

Three issues were at stake in the judicial discourse, which failed in quickly transforming non-compliance into compliance. The European and German advocates developed no consensual norm definition. Except for the question on informational requirements, they either shared no judicial heuristic at all, or the shared heuristic fitted poorly to the interpretational problem at hand. Thus, three years after the referral to the Court, the ECJ issued its ruling (European Court of Justice 1998: 45, 46).

Directly after the ECJ ruling, the newly elected Social-democratic/Green government headed by chancellor Schröder continued non-compliance. Their substantial policy interests were already in line with compliance with a demanding EIA (Bundestag 1998, Bundestag 1996b, Bundestag 1996a). Hence, the government opted for a comprehensive legal reform of the German body of environmental law via an environmental code (the UGB), of which the EIA directive as interpreted by the ECJ should have been an integral element (Trittin 1999, Trittin 2000), although such a comprehensive reform required additional time – during which non-compliance was continued. Yet, cost considerations were less important for the government. Instead of highlighting compliance costs of the EIA directive (as the conservatives and the liberals did), the government argued that the EIA and an environmental code were rightful and appropriate (Bundesregierung 1999, Bundestag 1999a, Bundestag 1999b). In line with the expecta-

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such two-level games, the Blair-government pacified the compliance-adverse public and the farmers and avoided electoral ex-post sanctions for their involuntary policy change.

tion of the second hypothesis, the government did not adapt strategic positions to potential financial sanctions, as long as the shadow of sanctions was weak and the European Commission abstained from sending a reasoned opinion based on Article 228 ECT.

The environmental code was never realized, not because of domestic veto players, but because of lacking federal competencies (e.g. Bundestag 2001: 16066). As a consequence non-compliance prevailed several months after the comprehensive reform failed and the European Commission sent a letter of formal notice. The domestic compliance constituency was not too strong, since environmental organizations preferred an UGB. At the same time, the industry strongly opposed the EIA for the cost implantations. Thus, domestic non-compliance benefits were moderately high and, nothing happened after the letter of formal notice, so that the European Commission issued a reasoned opinion based on Article 228 ECT in late 2000. In spring 2001, as the German government had not yet legally transposed the directive, the European Commission suggested a daily penalty of 237 600€ a day (Bundestag 2001: 16076). The second hypothesis expects that governments quickly pursue delayed compliance, if external non-compliance costs exceed domestic compliance costs. In the EIA case, the threat of an RO 228 ECT changed strategic positions of the federal government, which quickly introduced delayed compliance. The SPD/Green government wanted to avoid a second ruling and financial penalties and, therefore, speeded up the process of legal change – although this led to the trade off of giving up the environmental code project as a comprehensive legal reform. The result was a compound patching-up law ('Artikelgesetz'), which changed several pre-existing laws at once. It resembled a less demanding form of compliance than the comprehensive UBG. During the process of legal change, the government, and especially the Green environmental minister Mr Trittin continuously referred to the potential financial penalties and shifted the blame for minimalist legal changes to the EU-level (Bundesrat 2000: 625, Bundestag 2001: 16076, Bundestag 2001: 16066). Environmental organizations were fragmented and not coherently organized. Often they were specialized in one media (water, soil, air) rather than in cross-cutting issues and integrated approaches. Nevertheless, their majority preferred a comprehensive reform and consequently opposed narrow legal changes (BUND für Umwelt und Naturschutz Deutschland 1999, DNR 2000, Greenpeace 1999, TAZ 1999). In this context, blaming the EU allowed the government to justify deviations from the comprehensive reform vis-à-vis its environmentalist clientele. In line with hy-

pothesis 2, a weak shadow of financial penalties after the ECJ ruling in 1998 had no effect and Germany maintained non-compliance. Yet, the German government became sensitive to external non-compliance costs as the threat of financial penalties grew intense. After the European Commission proposed a daily sum as financial penalty, the government opted for delayed compliance and, thereby, compromised substantial policy interests and the support of environmental organizations (opted for a UGB) and the industry (opted for non-compliance).. Thus, the government abandoned the environmental code project as a comprehensive reform, since this would have required a constitutional change and, in the meantime, the maintenance of non-compliance and penalties from the EU-level.

Both cases support the second hypothesis, according to which judgments can only be enforced with the threat of sanctions, if external non-compliance costs exceed domestic non-compliance benefits. This is influenced by the density of shadow of sanctions, which darkens if the government is most likely to be punished while being still in office on the one hand, and by the domestic non-compliance benefits, which depend on concrete or diffuse cost benefits implications of the policy in question on the other hand (Wilson 1980) and the organizational strength of the constituency and its relation to the government. The UK nitrates case and the German EIA case are both instances, in which governments opted non-compliance after the ECJ judgments. In both cases, domestic non-compliance constituencies were strong so that the letter of formal notice was no sufficient threat to induce delayed compliance. The Blair government would have maintained non-compliance and saved domestic compliance costs for their clientele, if the threat of sanctions has not been applied. Only as the Commission suggested a daily sum as penalty to the ECJ, external non-compliance costs overrode domestic non-compliance benefits and the UK opted for delayed compliance. Similar in the German case, where the Schröder government would have continued non-compliance (until federal competencies were reformed so that the UGB project would have been possible), had not the European Commission with the threat of penalties risen the non-compliance costs to a prohibitive extent so that delayed compliance was pursued. In both instances, the governments adapted legal acts in a manner that compromised their substantial policy interests in order to avoid a second ECJ judgment and penalties. While it took two years after the judgment, until compliance was restored in the UK nitrates case, the German EIA case needed three years. Yet, in the end, both states complied with the formerly severely contested directives.

The most different systems design allows excluding alternative explanations. Country-specific variables cannot explain transformational dynamics. This is because Germany and the UK differ in the political, financial and administrative capacities, in the political and legal cultures, and the support of EU-integration, but nevertheless reveal very similar settlement dynamics. This indicates that non-compliance cases of all states can be transformed into compliance, as long as the international institutions have a toolbox which allows for threats with sanctions.

5. Conclusions

Non-compliance with European law impairs its effectiveness. This is the more sever, the longer the duration of time is, in which a state violates EU laws. Therefore, this paper focused on the question, why after the ECJ referral some cases can be settled earlier in than others. Why is it that every state has instances of settlements within the first two years after the ECJ referral, while there are also cases, which require six additional years, until non-compliance can be abolished?

The paper demonstrated that early settlements are due to successful judicial discourses, while delayed settlements that take place four years or longer after the ECJ referral are due to judgments which the European Commission and the ECJ seek to enforce with threats of sanctions. Since the institutional design of the EU infringement procedure is constant and since all compliance restoring mechanisms are applied in the same order in every Court case, neither the presence nor the application of the compliance mechanisms explain their differential success. So why is it that judicial discourses succeed sometimes, but fail in other instances even vis-à-vis the same government?

This paper theoretically and empirically demonstrated that states abolish non-compliance quickly after the ECJ referral, if the advocates in the judicial discourse do not talk cross-purposes but develop a consensual norm definition. This requires that the actors apply a common judicial method of interpretation that fits to the interpretational problem at hand. The British collective redundancy and the German drinking water cases exemplified that successful judicial discourses quickly abolish non-

compliance. Yet, as the UK nitrates and the German environmental impact assessment cases indicate, if judicial discourses fail, non-compliance is maintained for an additional time period. Judgments as such do not threaten states with increasing top-down non-compliance costs, but they can be enforced with a threat of sanctions, if states maintain non-compliance for more than a year after the ECJ ruling. The shadow of sanctions darkens severely, if the Commission not only sends a second letter of formal notice, but also a second reasoned opinion. After that, it is very likely that the government will still be in office and subject to financial penalties, if non-compliance will be maintained. Only than, external non-compliance costs become prohibitive and exceed domestic non-compliance benefits, so that the governments opt for delayed compliance.

Table 1: Non-compliance in years

	Collective Redundancy (UK)	Drinking Water (Germany)	Nitrates (UK)	EIA (Germany)
Duration of non-compliance prior to the detection (expiration date for transposition-letter of formal notice)	10	5	4	3
Duration of the managerial phase (RO 226- ECJ referral)	1	2	1	4
Duration of the judicial discourse (ECJ referral-judgment)	2	2	1	3
Duration of non-compliance between the ECJ judgment and the legal change	0, 1 (regulation)	0 (regulation)	2 (regulation)	3 (law)
Total duration of non-compliance between the occurrence of non-compliance and the abolishment of non-compliance	15 years	10 years	9 years	14 years
Effective Compliance Instrument	Judicial Discourse	Judicial Discourse	Threat of Sanctions	Threat of Sanctions

This paper demonstrated that compliance with international law can be restored by international courts, even against the will of states and although a legitimate monopoly of force is lacking for international courts. Policy-variables provide crucial scope conditions, while state characteristics have no significant effect on the operation and success of compliance restoring instruments. However, one and the same instrument is sometimes successful, but fails in other instances, even within the EU, even for one and the same state, and even for one and the same government. As a consequence, the proper mix of tools is essential for a political and legal community. Although it might take up to 15 years until compliance with European law is finally achieved, in the end

all states comply. This is good news for the effectiveness of international law– as long as international institutions entail judicial discourses, judgments, and threats of sanctions as the most prominent compliance restoring instruments.

6. Literatur

Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne Marie Slaughter and Duncan Snidal (2000) The Concept of Legalization, International Organization, 54, 3, 401-19.

Abbott, Kenneth W. and Duncan Snidal (2000) Hard and Soft Law in International Governance, International Organization, 54, 3, 421-56.

Advocate General (1992) Opinion of the Advocate General Jacobs on February 12th 1992. Incorrect Legal Transpotision of Directive 80/778 by the Federal Republic of Germany; C-237/90, Sammlung der Rechtssprechung, 1992, I-05973.

Advocate General (1994) Opinion of the Advocate General Van Gerven on March 2nd 1994. Commission of the European Communities v United Kingdom of Great Britian and Northern Ireland, Incorrect Legal Transposition of Directive 75/129, Case C-237/90. Safeguaring of Employees' Rights in the Event of CollectiveRedundancies, Sammlung der Rechtssprechung, 1994, I-02435.

Advocate General (2000) Opinion of the Advocate General Leger on July 13th, 2000. Incorrect Legal Transpotision of Directive 91/676 by the United Kingdom; C-69/99, Sammlung der Rechtssprechung, 2000, I-10979.

Alexy, Robert (1983) Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung. Frankfurt: Suhrkamp.

Ashford, Douglas E. (1981) Policy and Politics in Britain. Philadelphia, PA: Temple University Press.

Bayern (1992) Antrag 24.09.1992.

Belfast Newsletter (2001) Britain in the Docks. In Belfast Newsletter. Belfast.

Börzel, Tanja A. (2003) Environmental Leaders and Laggards in the European Union. Why There is (Not) a Southern Problem. London: Ashgate.

Börzel, Tanja A., Meike Dudziak, Tobias Hofmann, Diana Panke and Carina Sprungk (2007) Recalcitrance, Inefficiency, and Support for European Integration:Why Member States do (not) Comply with European Law, Harvard University. Center for European Studies Working Paper Series, No. 148.

Börzel, Tanja A., Tobias Hofmann and Diana Panke (2005) Who's Afraid of the ECJ? Member States, Court Referrals, and (Non-) Compliance. In Paper prepared for the ECPR Joint Sessions, Granada, April 14-19, 2005. Berlin.

BUND für Umwelt und Naturschutz Deutschland (1999) Waffengleichheit für Umweltnützer und -schützer, BUND Pressearchiv, 04/03.

Bundesrat (1992) Plenarprotokoll 25.09.1992.

Bundesrat (2000) Plenarprotokoll vom 21.12.2000.

Bundesratsausschuss für Gesundheit (1992) Empfehlungen zur Allgemeinen Verwaltungsvorschrift über Trinkwasser, 14.09.1992.

Bundesregierung (1988) Antwort der Bundesregierung auf eine kleine Anfrage der Abgeordneten Frau Kiehm und der Fraktion der SPD - Schadstoffbelastung Wasser, 11/2285.

Bundesregierung (1993) Antwort Bundesregierung; BMG (federführend) 18.01.1993. Wasserversorgung; Trinkwasser; Abwasser, 12/4143.

Bundesregierung (1994) Unterrichtung der Bundesregierung 06.09.1994. Politik für eine nachhaltige, umweltgerechte Entwicklung.

Bundesregierung (1999) Plenarprotokoll vom 08.10.1999. Schriftliche Antwort Simone Probst, Parlamentarischer Staatssekretär Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit 08.10.1999.

Bundestag (1987) Plenarprotokoll vom 08.10.1987.

Bundestag (1988a) Plenarprotokoll vom 14.04.1988.

Bundestag (1988b) Plenarprotokoll vom 15.04.1988.

Bundestag (1988c) Plenarprotokoll vom 19.08.1988.

Bundestag (1988d) Plenarprotokoll vom 27.10.1988.

Bundestag (1989) Plenarprotokoll vom 16.06.1989. Anfrage zur Trinkwassergefährdung furch militärische Altlasten.

Bundestag (1990) Plenarprotokoll vom 14.02.1990.

Bundestag (1991a) Plenarprotokoll 12/64 vom 05.12.1991.

Bundestag (1991b) Plenarprotokoll vom 05.12.1991.

Bundestag (1991c) Plenarprotokoll vom 12.03.1991.

Bundestag (1992) Plenarprotokoll vom 24.11.1992.

Bundestag (1993a) Plenarprotokoll vom 22.04.1993.

Bundestag (1993b) Plenarprotokoll vom 14.01.1993.

Bundestag (1994a) Plenarprotokoll vom 21.09.1994.

Bundestag (1994b) Plenarprotokoll vom 23.06.1994.

Bundestag (1994c) Plenarprotokoll vom 27.05.1994.

Bundestag (1996a) Plenarprotokoll vom 05.06.1993. Anfrage zu Stand der Arbeiten am Umweltgesetzbuch, SPD.

Bundestag (1996b) Plenarprotokoll vom 27.06.1996.

Bundestag (1998) Plenarprotokoll vom 05.03.1998.

Bundestag (1999a) Plenarprotokoll vom 08.10.1999. Fragestunde. Notwendigkeit einer Umweltverträglichkeitsprüfung wegen Nichtumsetzung der EU-Änderungsrichtlinie; Wettbewerbsnachteile deutscher Unternehmen.

Bundestag (1999b) Plenarprotokoll vom 19.11.1999. Fragestunde. Umweltverträglichkeitsprüfung für die Nordumfahrung der Hörselberge (Thüringen) im Zuge der A 4.

Bundestag (2001) Plenarprotokoll vom 05.04.2001.

Commission of the European Communities (2005) Communication from the Commission. Application of Article 228 of the EC Treaty. SEC (205) 1658. Brussels: Commission of the European Communities.

Department of the Environment, Food, and Rural Affairs, (2002a) News Release - Nitrate Controls to Spearhead Long-Term Strategy to Improve Water Quality.

Department of the Environment, Food, and Rural Affairs, (2002b) Nitrates Directive Consultation. A Report Prepared by NOP Social & Political for teh Department for Environment, Food and Rural Affairs (DEFRA).

DNR (2000) DNR Deutschland Rundbrief. Naturschutz und Umweltpolitik auf Bundesebene. In. Bonn.

Docksey, Christopher (1986) Information and Consultation of Employees: The United Kingdom and the Vredeling Directive, The Modern Law Review, 49, 3, 281-313.

European Commission (1991) Report by the Commission to the Council on Progress with Regard to Implementation of the Directive on the Approximation of the Laws of the Member States Relating to Collective Redundancies (Council Directive75/129/EEC of 17February1975), 51991SC1639, /*SEC/91/1639FINAL. Brussels: European Communities.

European Court of Justice (1992) Court Judgment of November 24th 1992. European Commission Against the Federal Republic of Germany Regarding the Incomplete Legal Transposition of Directive 80/778; C-237-90, Sammlung der Rechtsprechung, 1992, I-05973.

European Court of Justice (1994) Court Judgment of June 8th 1994. European Commission Against the United Kingdom Regarding the Incomplete Legal Transposition of Directive 75/129, C-383/92, Sammlung der Rechtsprechung, 1994, I-02479.

European Court of Justice (1998) Court Judgment of October 22th 1998. European Commission Against the Federal Republic of Germany Regarding the Incomplete Legal Transposition of Directie 85/337, Sammlung der Rechtsprechung, C-301-95, I-06135.

European Court of Justice (2000) Court Judgment of December 7th, 2000. The European Commission Against the United Kingdom Regarding the Incomplete Application of Directive 91/676, C-69/99, Sammlung der Rechtsprechung, 2000, I-10979.

Farmers Guardian (2000) Revised Crop Input Recommendations. In Farmers Guardian. London.

Farmers Guardian (2001) Britain in Dock Over Nitrates. In Farmers Guardian. London.

Fearon, James (1998) Bargaining, Enforcement, and International Cooperation, International Organization, 52, 2, 269-305.

Federal Ministry for Health (1992) Allgemeine Verwaltungsvorschrift zu Trinkwasser, 09.07.1992.

Financial Times (2002a) Government to Implement EU Water Directive. In Financial Times. London.

Financial Times (2002b) Nitrate Pollution Zones 'Will Cover Only 55% of UK'. In Financial Times. London.

Greenpeace (1999) Umweltminister Tritin macht es seinen Gegnern in Industrie und Politik zu leicht, Greenpeace Magazin, 99, 4, 1-3.

Habermas, Jürgen (1992) Handlungen. Sprechakte, Sprachlich Vermittelte Interaktion und Lebenswelt. In Jürgen Habermas (ed.), Nachmetaphysisches Denken - Philosophische Aufsätze. Frankfurt am Main: Suhrkamp.

Habermas, Jürgen (1995a) Theorie des Kommunikativen Handelns. Band 1 Handlungsrationalität und gesellschaftliche Rationalisierung. Frankfurt am Main: Suhrkamp.

Habermas, Jürgen (1995b) Theorie des Kommunikativen Handelns. Band 2 zur Kritik der funktionalistischen Vernunft. Frankfurt am Main: Suhrkamp.

Henkin, Louis (1968) How Nations Behave: Law and Foreign Policy. New York: Columbia University Press.

Horne, Christine and Anna Cutlip (2002) Sanctioning Costs and Norm Enforcement, Rationality and Society, 14, 3, 285-307.

House of Commons (1989) House of Commons Hansard Debates for 6 July 1989.

House of Commons (1991) House of Commons Hansard Debates for 7 May 1991.

House of Commons (1992) House of Commons Hansard Debates for 17 November 1992.

House of Commons (1993) House of Commons Hansard Debates for 17 February 1993.

House of Commons (1994a) House of Commons Hansard Debates for 7 February 1994.

House of Commons (1994b) House of Commons Hansard Debates for 11 March 1994.

House of Commons (1996a) House of Commons Hansard Debates for 6 February 1996.

House of Commons (1996b) House of Commons Hansard Debates for 14 October 1996.

House of Commons (1997) House of Commons Hansard Debates for 23 July 1997.

House of Commons (1999) House of Commons Hansard Debates for 20 October 1999.

House of Commons (2000) House of Commons Hansard Debates for 10 February 2000.

House of Commons (2001) House of Commons Hansard Debates for 19 December 2001. Commons Written Answers.

House of Commons (2002a) House of Commons Hansard Debates for 12 December 2002.

House of Commons (2002b) House of Commons Hansard Debates for 14 May 2002.

House of Commons (2002c) House of Commons Hansard Debates for 16 May 2002.

House of Commons (2002d) House of Commons Hansard Debates for 28 January 2002. Commons Written Answers.

House of Commons (2002e) House of Commons Hansard Debates for 30 January 2002. Commons Written Answers.

House of Commons (2002f) House of Commons Hansard Debates for 30 January 2002. Commons Written Answers.

House of Commons (2002g) House of Commons Hansard Debates for 31 January 2002.

House of Commons (2002h) House of Commons Hansard Debates for 31 January 2002. Commons Written Answers.

House of Lords (2001) House of Lords Debates, Lords Written Answers. 20 December 2001.

Knill, Christoph (2001) The Europeanisation of National Administrations. Patterns of Institutional Change and Persistence. Cambridge: Cambridge University Press.

Liefferink, Duncan and Andrew Jordan (2004) Measuring Europeanization of Policy Convergence. National Baseline Conditions. In Andrew Jordan and Duncan Liefferink (eds.), Environmental Policy in Europe. The Europeanization of National Environmental Policy. London: Routledge.

Mitchell, Ronald (1996) Compliance Theory: An Overview. In J. Cameron und J. Werksman und P. Roderick (ed.), Improving Compliance with International Environmental Law. London: Earthscan.

Onuf, Nicholas Greenwood (1989) World of Our Making: Rules and Rule in Social Theory and International Relations. Columbia: University of South Carolina Press.

Panke, Diana (2006a) The Differential Impact of Communicated Ideas. Bridging the Gap between Rationalism and Constructivism, hamburg review of social sciences, 1, 3, 312-42.

Panke, Diana (2006b) Why Big States Cannot Do What They Want. International Courts and Compliance. In Paper presented at the Law & Society Conference, Baltrimore USA 2006. http://web.fu-berlin.de/europa/team/PankeD/Diana+Panke+big+states+and+compliance+LSA+2006.pdf.

Panke, Diana (2007) The European Court of Justice as an Agent of Europeanization? Restoring Compliance with EU Law, Journal of European Public Policy.

Select Committee on Environment, Food and Rural Affairs (2002) Select Committee on Environment, Food and Rural Affairs. Select Committee Report. Memorandum submitted by Department for Environment, Food and Rural Affairs, Examination of Witnesses. 11 December 2002.

Select Committee on Environment, Food and Rural Affairs (2003) Select Committee on Environment, Food and Rural Affairs. Select Committee Report. Appendices to the Minutes of Evidence. 12 March 2003.

Smith, James McCall (2000) The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts, International Organization, 54, 1, 137-80.

TAZ (1999) Der Sachverstaendige Gerd Winter zur weiteren Verschiebung des Umweltgesetzbuches. "Den Interessen der Industrie nachgegeben". In TAZ. Frankfurt.

The Daily Telegraph (2000) EU Red Tape 'Is Ruining Our Farmers' Task Force Blames 'Over-Zealous' Britain. In The Daily Telegraph. London.

The Daily Telegraph (2001) Farmers Are Hit by European Curb on Muck Spreading. In The Daily Telegraph. London.

The Express (2001a) GBP 1BN Clean-Up Cost of Water Pollution by Farm Pesiticides. In The Express. London.

The Express (2001b) GBP 50M Pollution Price. In The Express. London.

Trittin, Jürgen (1999) Perspektiven der deutschen Umweltpolitik. In Speech in the German Bundestag, 29.09.1999. Berlin: Speech in the German Bundestag, 29.09.1999, 18th Session of the Committee on Environment, Nature and Nuclear Safety.

Trittin, Jürgen (2000) Die ökologische Erneuerung der Bundesrepublik. Speech at the Heinrich Böll Foundation. In. Berlin: Heinrich-Böll Stiftung.

Western Daily Press (2002) Bid to Cut River Pollution. In Western Daily Press. Plymouth.

Wilson, James Q. (1975) Political Organization. New York: Basic Books.

Wilson, James Q. (ed.) (1980) The Politics of Regulation. New York: Basic Books.

Wurzel, Rüdiger K.W. (2004) Germany. From Environmental Leadership to Partical Mismatch. In Andrew Jordan and Duncan Lieferink (eds.), Environmental Policy in Europe. The Europeanization of National Environmental Policy. New York: Routledge.

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