

**Europeanization in the Domain of Social Policy.
The European Court of Justice as an Agent of Domestic Change?**

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Europeanization as the adaptation of states' legal landscapes to EU law is an incremental process. Europeanization approaches often focus only on immediate responses to EU law and are too static. In addition, they do not theorize the scope conditions for successful agency of actors such as the ECJ. This paper, by contrast, develops a compliance as process perspective and argues that the ECJ can serve as an agent of 'catching-up Europeanization'. Yet, it can do so only under very restrictive scope conditions. Judicial discourse is a very demanding compliance instrument, which is ineffective more often than not. Financial sanctions imposed from above are not effective in the field of social policy, if domestic resistance of trade unions and employer associations is strong. Through its rulings, the ECJ creates publicity and differentially empowers societal compliance proponents. If domestic contexts are conducive, empowered societal proponents can push their governments into compliance via shaming and re-framing strategies and finally induce domestic changes.

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I. Introduction¹

The Europeanization literature identifies several pathways of how the European Union influences Member States' policies, politics, and polities. Among others, compliance with European law is regarded as important impetus for domestic changes. Yet, there are instances of Member States' incorrect and incomplete legal transposition of European directives into national legal acts. Some of these cases are quickly resolved after the European Commission opens infringement proceedings. Others require referrals to judgements of the European Court of Justice (ECJ), or even threats of financial penalties based on a second court judgement before domestic changes take place. When Member States strongly resist European law, the ECJ turns into an agent of Europeanization.

This paper argues that the current Europeanization literature has so far neglected the role of the ECJ. It seeks to explore the conditions under which the Court can successfully act as an agent of Europeanization and promote domestic legal changes. First, this paper presents an empirical analysis of all infringement proceedings between 1978 and 2000 and shows that the ECJ's record of success is mixed for all policy fields in general and for social policy directives in particular. Second, it develops a theoretical framework, explaining how and under what conditions the ECJ is a successful agent of Europeanization. The most important instrument, which restores compliance through inducing domestic changes, is judicial discourse. Yet, judicial discourse only induces compliance, if there is a fit between the interpretational scope of the disputed norm and the judicial heuristic applied by the ECJ. The paper claims that the second instrument, the threat of financial penalties, is not relevant at all for promoting domestic change in the field of social policy. Due to the highly organizational degree of societal actors in this policy area, governments consider domestic costs as more important than costs induced from above. Differential empowerment of societal norm proponents to the disadvantage of norm opponents is another compliance mechanism at the ECJ's disposal. It seems to be particularly promising for the field of social policy because of the high organizational degree of societal actors. This paper argues that differential empowerment is only effective, if the European norm either resonates well with domestic norms or is of low complexity. A comparative case study testing the developed hypotheses comprehensively would be beyond the scope of this paper. Instead, this paper presents a single case study as a plausibility probe. It illustrates the conditions under which the ECJ turned into an agent of Europeanization in the regard to the legal transposition of the equal access directive in Germany. Despite Germany's persistence of non-compliance, the ECJ could not serve as an agent of Europeanization, facilitating domestic change top-down. Yet, the ECJ provided a window of opportu-

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nity for societal bottom-up strategies, which finally brought the German legal social policy acts on the equality of men and women into conformity with EU law.

II. Europeanization – The ECJ as a Neglected Agent?

Europeanization is a Janus-faced phenomenon. In the first sense, the concept of Europeanization applies to instances, in which member states influence EU policy-making (Lodge 2006: 65) or participate in widening and deepening the jurisdictional scope of the EU (Harmsen 2000: 51-52). Second, Europeanization refers to the impact of EU policies on member states' polity, politics and policy (Börzel and Risse 2003: 57, Featherstone 2003: 7).

While the evolution and operation of the EU multilevel system is ultimately only grasped by combining bottom-up and top-down dynamics of Europeanization, the focus on just one of the two possible dependent variables is worthwhile for analytical purposes. This paper only deals with Europeanization in the second sense. The dependent variable is domestic legal change, induced by EU policies as independent variable.

The Europeanization literature offers several answers to the question how the EU affects its member states. They all start from the empirical puzzle that European norms facilitate domestic change but no convergence of national polities, politics or policies (Börzel 2002b; Cowles, Caporaso and Risse 2001, Héritier 2001, Liefferink and Jordan 2004, Olsen 1996). EU policies as an impetus of domestic change are constant for all states. Approaches of 'old institutionalism' (Bagehot 1962 (1872), Loewenstein 1959) would have hypothesized that EU institutions as independent variable exerts an identical impact on all states. While old institutionalist approaches cannot explain the empirical puzzle, drawing on neo-institutionalism is more fruitful as various Europeanization theories explicitly (Börzel and Risse 2000) or implicitly state (Schmidt 2002, Caporaso and Jupille 2001, Knill and Lehnkuhl 1999). Institutions and actors are in an interdependent relationship according to the neo-institutionalist ontological core (March and Olsen 1984, March and Olsen 1989; Immergut 1998; Wind 1997). As a consequence, the same institution might facilitate different responses due to variation in actors' properties, on the one hand. On the other hand, there are functional equivalents: identical actions can be attributed to actors' responses to quite different institutions. But how do institutions induce actions? In order to theorize the missing link between institutions and actors, neo-institutionalism assumes that institutions facilitate only those actions, which are in line with the underlying actors' rationality.

Rational choice institutionalism assumes strategic rationality of actors as homo oeconomicus. Actors pursue their exogenously defined and fix policy interests in either minimizing the costs of means or maximizing their interests. Institutions are regulative in charac-

ter. They are external cost-intensive constraints to strategic-rational actors (e.g. monitoring and sanctioning mechanisms prevents free-riding) or enable certain actions (e.g. they minimize transaction costs for cooperation) (Scharpf 1997, Tsebelis 1990). Knill and Lehmkuhl claim that the EU facilitates domestic change via positive integration and negative integration (as well as cognitive change), which alter opportunity structures of member states (Knill and Lehmkuhl 1999). While Knill and Lehmkuhl do not systematically explore mediating factors, Schmidt identifies three perceptions generated in domestic discourses that potentially explain pattern of national variation: economic vulnerability, political capacity and misfit (Schmidt 2002). Börzel and Risse develop the concept of mediating factors a step further and distinguish between necessary conditions and facilitating factors for domestic changes (Börzel and Risse 2000). Top-down Europeanization can only take place, if there is a misfit between the EU and domestic norms. Member states' responses to EU's demands for adaptation are then shaped by cost-benefit calculations of domestic actors, whose interests are at stake. According to rational choice institutionalism, domestic change is facilitated, if member states' mediating institutional characteristics (low number of veto points and supporting formal institutions) allow exploiting new opportunities or avoiding new constraints (Börzel and Risse 2003: 64).

Sociological institutionalism rests on the ontological assumption of actors as homo sociologicus. Actors are embedded in institutions that are not only regulative in character, but also constitutive for their identity and interests. As a consequence, actors' interests are shaped (but not determined) by the norms embedded in the institutional context. They act according to a logic of appropriateness – even in instances in which their interests conflict with institutionalised norms (March and Olsen 1996). Part of the rich Europeanization literature draws on sociological institutionalism in order to specify mechanisms of top-down Europeanization. Knill and Lehmkuhl identify cognitive processes as a pathway for domestic change (e.g. Knill and Lehmkuhl 1999). Yet, the independent variable of this approach is not EU policies but preceding framing activities (Knill and Lehmkuhl 1999: 4). Likewise, changes in states' believe-systems and not domestic legal adaptation serves as dependent variable (Knill and Lehmkuhl 1999: 3-4). Although sociological institutionalism differs ontologically from rational choice institutionalism, several authors demonstrated that it reveals the same applicatory scope as its rationalist counterpart (Finnemore 1996, Wind 1997; March and Olsen 1998, March and Olsen 1994). Consequently, sociological institutionalism can provide insights regarding dynamics of domestic legal change. In accordance with this, Börzel and Risse develop a second causal mechanism of how and under what conditions top-down Europeanization translates into domestic changes (Börzel and Risse 2003). Again, misfit is the necessary, but not sufficient condition. If normative or cognitive misfit is present, mediating factors such

as domestic norm entrepreneurs (epistemic communities or advocacy networks) or cooperative informal institutions (e.g. legal culture) facilitate processes of learning and socialization cumulating in domestic change (Börzel and Risse 2003: 66-69).

The Europeanization literature has finally developed various sophisticated theoretical explanations for the variation in member states' responses to EU demands. Yet, there are two gaps in the Europeanization literature, which this paper tries to close.

First, Europeanization approaches focus on the immediate response of member states to changes in the EU *aquis communautaire*. Thereby, their dependent variable is dichotomous: either there is domestic change or not. Yet, an analysis of the infringements data (1978-1999) as published annually by the European Commission reveals that non-compliance due to the absence of domestic change as well as incomplete legal domestic change are sooner or later transformed into complete compliance (see also figure 2). In contrast to prominent Europeanization approaches, this paper introduces a 'compliance as process' perspective, which distinguishes between three instead of two parameter values of the dependent variable. These are complete compliance (domestic norms allow for correct and complete reproduction of the European norm), incomplete compliance (domestic norms are highly ambiguous or overlapping in scope and content, which facilitates incorrect and incomplete reproduction of the European norm), and continued non-compliance (no legal changes are undertaken despite a misfit between domestic and European norms) (see Panke 2004, Panke 2005).

Second, instances of prevailing domestic resistance to changes demanded by the European level are often under-theorized (for an exception see Bugdahn 2005). Europeanization approaches seldom go beyond developing hypotheses on the likelihood (Knill and Lehnkuhl 1999, Schmidt 2002, Radaelli 2000) and degree (Börzel and Risse 2003, Börzel and Risse 2000) of immediate domestic changes induced by EU legal acts. Non-compliance (absence of or incomplete legal transposition of European law into national legal acts) is an instance of delayed Europeanization, because sooner or later member states abolish non-compliance and undergo processes of domestic change. Yet, most Europeanization approaches do not systematically theorize how member states' non-compliance can be transformed into compliance in the longer run and which domestic and European actors are participating in the process of "catching up-Europeanization". Rather, the quest for facilitating factors of most Europeanization theories is restricted to the national level. Implicitly the EU is regarded as a structure that is constant for all cases that, in turn, cannot contribute to the explanation of differences in domestic change across states and issues. By contrast, this paper highlights the "actorness" of European institutions. It claims that European institutions such as the European Court of Jus-

tice can be both, facilitating structural features inducing domestic change in cooperation with domestic actors as well as actors in their own right, pursuing own interests during infringement proceedings against non-compliant member states, thereby turning non-compliance into complete and correct domestic change.

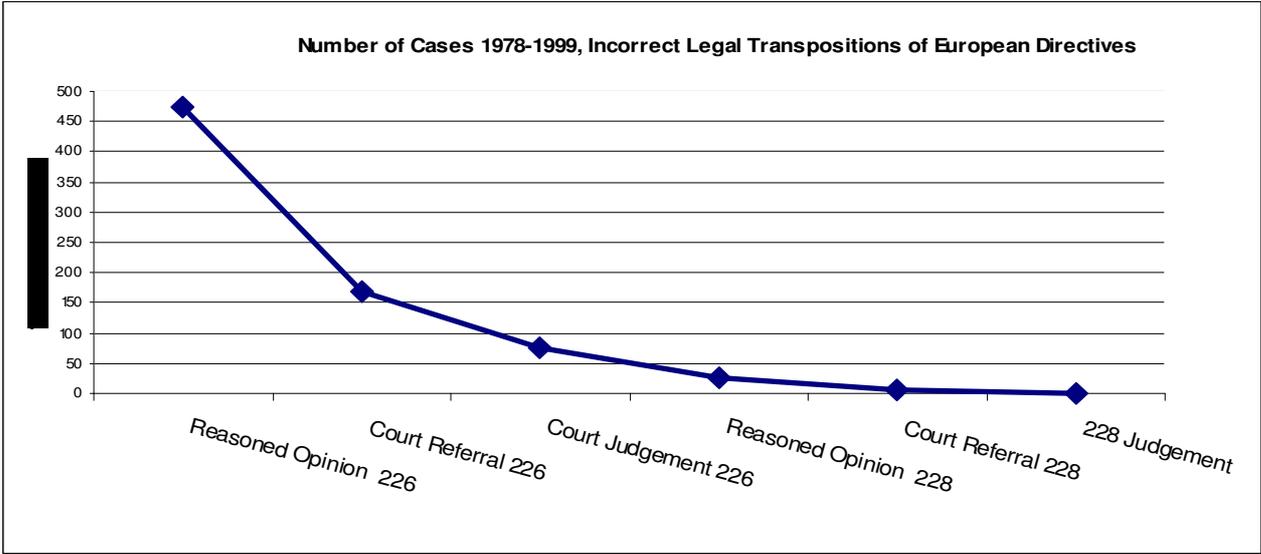
In order to narrow or even close the theoretical gaps of prominent Europeanization approaches, the next section theoretically examines the ECJ's role as an agent of Europeanization. It develops hypotheses on the ECJ's toolbox and on conditions for the successful application of compliance-restoring instruments, fitting to rational choice institutionalism or to Europeanization approaches drawing on the sociological branch of neo-institutionalism (III). A subsequent section (IV) undertakes an empirical plausibility probe concerning the hypotheses on how and under what conditions the ECJ turns into a successful agent of Europeanization during the legal transposition of a European social policy directive (76/207 equal access of men and women to employment, vocational training and career) in Germany.

III. EU Infringement Proceeding and Prospects for Domestic Change

While the European Union (EU) has subsequently expanded its legislative competencies, the implementation and enforcement of European law firmly rests within the responsibility of the member states. European norms' degree of obligation varies from highly precise regulations (regarding aim, means and applicatory scope) over directives (relative precise aims combined with wide margins regarding the choice of means) to often highly ambiguities treaty provisions (aims). Although directives are often more ambivalent than regulations, they pose an obligation for complete and correct legal transposition and application on member states. Regulations and directives are means of Europeanization. They formulate demands for domestic changes regarding policy and politics, sometimes even encompassing the polity. Despite states' legal obligation to facilitate domestic change by formally transposing European law into domestic legal acts and despite the fact that the EU's infringement procedure is one of the most highly legalized dispute resolution mechanisms in the world (Neyer 2005, Zangl 2001, Abbott et al. 2000), non-compliance occurs (see Börzel 2001; Börzel and Panke 2005; Börzel, Hofmann and Sprungk 2003). If the European Commission as guardian of the treaty suspects a member state of violating EU law, she initiates an infringement proceeding against the respective state (Art. 226 ECT). The Infringement procedure combines management, adjudication and enforcement elements (Zangl 2001). The proceeding starts with the so called 'management phase', in which the European Commission and the respective government in-

formally discuss the case. If the Commission maintains her accusation of failed or incomplete domestic change, she sends a reasoned opinion to the respective state, thereby starting the first formal stage. When non-compliance prevails after the state responded to the reasoned opinion, the Commission refers the case to the European Court of Justice and initiates the adjudication phase. The judicial proceeding starts with a written procedure, in which the European Advocate General and national legal experts exchange views on facts and legal aspects. The subsequent oral procedure consists of two open court settings: a public hearing and final statement of the Advocate General. Afterwards, the ECJ issues a binding ruling on the correct interpretation of content and scope of the disputed European legal act. Should a state still resist domestic change after the Court judgment, the Commission sets off the enforcement phase based on Article 228 ECT. This procedure is similarly designed as the Article 226 procedure, but ends with a second Court judgment, in which monetary sanctions are imposed, should non-compliance prevail.

Figure. 1: Number of proceedings on incorrect domestic legal transposition of European directives into national legal acts between 1978 and 1999²



Even though the vast majority of cases is solved during the management phase (figure 1, also Mendrinou 1996: 4-6, Tallberg 2002, Tallberg and Jönsson 2001), for three reasons this paper focuses on the role of the ECJ for processes of Europeanization rather than on the role of the Commission. Firstly, the adjudication phase is of high interest, because all cases referred to the ECJ have in common that states' resistance to domestic change is extremely strong, since a consensus or compromise regarding the interpretation of the disputed norm would have

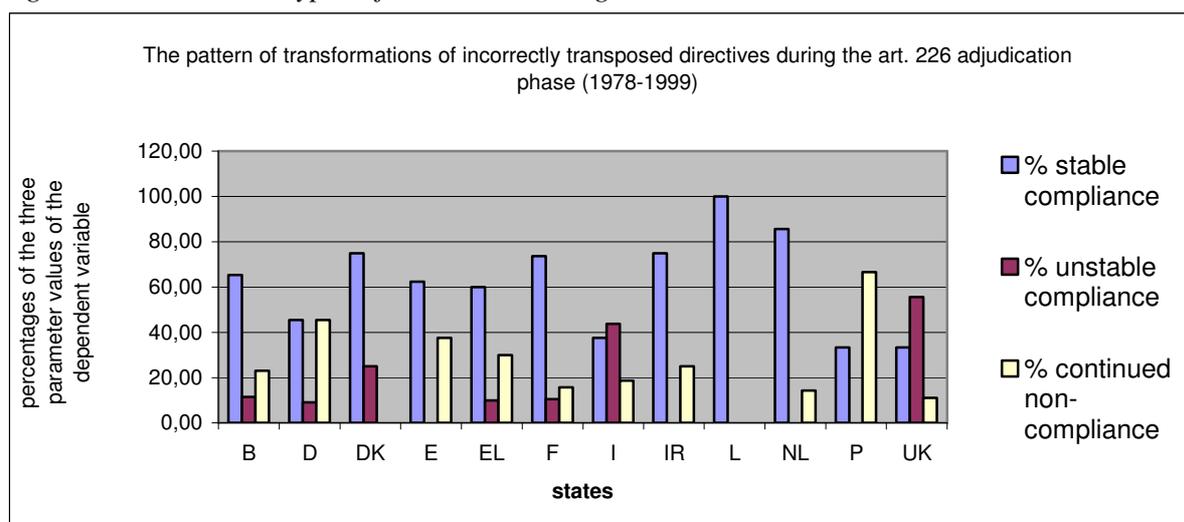
² The data stem from the Annual Reports of the Commission.

emerged during the management phase otherwise. In this sense, all cases transferred to the ECJ are least likely cases for further domestic change.

Secondly, compliance with EU law and domestic adaptations to the misfit between domestic and European legal norms is a precondition for its effectiveness. Only when European law is transposed completely and correctly by all member states, a prior agreed rule can develop its full effect as intended by the Council of Ministers, the European Parliament, and the European Commission. Non-compliance prevents law from being effective and undermines, thereby, the very purpose of intergovernmental or supranational cooperation. The effectiveness of European law is most severely restricted, when member states' non-compliance prevails for a long time. Since this is the case for all cases carried to the adjudication stage, this paper focuses on the role of the ECJ rather than on the role of the Commission for inducing domestic change against rigid state's interest.

Thirdly, an empirical analysis of cases of incorrect legal transposition of European directives into national law reveals that the success of the ECJ in restoring member states' compliance varies between states and within states (see figure 2). There are three different types of outcomes: complete compliance, incomplete compliance and continued non-compliance (see Panke 2004). Continued non-compliance is characterized through the absence of any domestic changes after the ECJ judgment and is operationalized by reasoned opinions according to article 228 ECT. Incomplete compliance occurs, if domestic change takes place, but only incompletely transforms non-compliance so that future norm violations are likely. Since vague or overlapping norms create conflicts and future interpretational demands, incomplete compliance is operationalised by subsequent preliminary references to the ECJ (based on Article 234 ECT). Complete compliance occurs if domestic change took place and national legal acts facilitate the correct and complete reproduction of the European norm. The prospects for the transformation of non-compliance into complete compliance, incomplete compliance and continued non-compliance differ enormously within and between states. Some states show an extraordinary high rate of continued non-compliance (such as Portugal, Germany and Spain) and others a share of complete compliance that is far above the average (such as Luxembourg, the Netherlands and France). The proportion of incomplete compliance is highest for the United Kingdom, Italy and Denmark. How can it be explained that there are some cases in which the ECJ is successful in facilitating domestic changes into complete or at least into incomplete compliance ("catching-up Europeanization") and others in which non-compliance continues?

Figure 2: *Three Types of Domestic Change*³



IV. The ECJ's Toolbox

The newest state of the art on Europeanization emphasises that misfit creates not adaptational pressure per se, but only if European or domestic actors have interests at stake (Börzel and Risse forthcoming; Jacquot and Woll 2003). This branch of research identified several important actors such as the European Commission and the European Court of Justice, as well as domestic actors such as individuals, interest groups or companies and analysed the role of their interests in various case studies (Börzel and Risse forthcoming, Börzel 2006, Cichowski 1998). While opening the Europeanization research agenda for less static perspectives is important, the presence of European or domestic actors alone does not facilitate domestic change. Nevertheless, the literature has not yet developed theoretical scope conditions for the success of top-down or bottom-up agency. This paper seeks to contribute to the Europeanization research in closing this particular gap. It focuses on the instruments of the EJC as an agent of Europeanization and develops hypotheses on the contextual conditions for their successful application. The mere presence of the ECJ (just like the Commission or like domestic actors) or the application of the ECJ's compliance instruments cannot turn misfit between European and domestic norms into pressure for adaptation, which induces domestic change. In order to highlight why and how catching-up Europeanization via the ECJ works only under certain conditions, this section inquires into the ECJ's compliance instruments and develops hypotheses on the type of domestic change (complete or incomplete) they can facilitate under certain scope conditions.

³ The data set used in this paper contains all cases of incorrectly legally transposed directives from the policy fields 'social policy' and 'environment' (a total of ~160 cases).

Compliance approaches theorize the occurrence of non-compliance and its transformation during infringement proceedings. However, they conceptualize compliance as a dichotomous variable: either there is domestic change (compliance) or not (non-compliance). In addition, prominent approaches hardly ever develop scope conditions for the success of various instruments, but implicitly assume that they are effective as soon as they are applied. In order to detect compliance instruments, the next paragraph briefly brief reviews the state of the art.

Financial penalties are an often mentioned compliance instrument by rational choice approaches. The enforcement theory assumes that non-compliance is voluntary and results from strategic cost-benefit calculations (Downs 1998, Downs, Rocke and Barsoom 1996, Martin 1992, Martin and Simmons 1998). Only if non-compliance costs exceed benefits, states alter preferences over strategies from non-compliance into domestic change. A shrinking shadow of financial sanctions (based on a second reasoned opinion (Article 228)) influences states' strategic cost-benefit calculations in increasing costly external constraints.

A second compliance instrument is the judicial discourse. Based on the assumption that non-compliance results from interpretational difficulties of ambiguous norms, management and legalisation theories hypothesize that interpretational differences are solved by means of judicial discourse (Chayes and Handler-Chayes 1991, Chayes and Handler-Chayes 1993, Chayes, Handler-Chayes and Mitchell 1998, Abbott et al. 2000, Abbott and Snidal 2000, Kahler 2000, Keohane, Moravcsik and Slaughter 2000, Smith 2000).

Other instruments rest on domestic implications of ECJ rulings. Court rulings create additional publicity and facilitate normative change (Dai 2005, Finnemore and Sikkink 1998). Differential empowerment effects of societal compliance proponents to the disadvantage of norm opponents because certain arguments against the norm can no longer be made effectively or legitimately. Societal actors can either persuade their governments in talking them into compliance argumentatively (re-framing), or threaten them with losses in reputation and electoral sanctions should non-compliance prevail (shaming).

Some instruments rest on rationalist (financial sanctions; shaming strategies that increase reputational costs) and others on constructivist (arguments in judicial discourses; re-framing strategies) action theoretical foundations. There is one major difference between rationalist and constructivist compliance instruments.

Rationalist instruments are conducive to incomplete compliance. As rising external constraints (top-down or bottom-up induced costs for non-compliance), they facilitate strategic adaptations. Since governmental substantial policy interests remain unchanged and point towards non-compliance, rational actors engage only in minimal legal changes. Ambivalent,

vaguely defined norms or overlapping scopes serve as built-in windows of opportunity for future norm violations – e.g. in the application phase (incomplete compliance).

On the contrary, constructivist instruments are conducive to complete compliance. Processes of effective arguing have two impacts. They funnel the development of consensual norm definitions and they facilitate chances of governmental policy interests. Once actors change their substantial interests, non-compliance is no longer regarded as rightful or appropriate, regardless changes in compliance costs and benefits. In order to induce complete reproductions of the consensual norm, governments pursue demanding changes in domestic legal acts (complete compliance).

Table 1: Four Compliance Instruments – An Overview

	Top-Down	Bottom-up
Constructivist Variant (fitting to sociological institutionalism)	H1a – arguing dynamics in the judicial discourse facilitate changes in substantial policy interests (conductive to stable compliance)	H2 b – differential empowerment re-framing facilitates changes in substantial policy interests (conductive to stable compliance)
Rationalist Variant (fitting to rational choice institutionalism)	H1b – bargaining threats with potential financial sanctions facilitate adaptations of strategic positions (conductive to unstable compliance)	H2 a – differential empowerment shaming facilitates adaptations of strategic positions (conductive to unstable compliance)

Compliance instruments are always applied in the same order: judicial discourse, threats of potential sanctions, judgement and differential empowerment. However, their success varies (c.f. figures 1, 2). A judicial discourse takes place in all cases referred to the ECJ. Yet, more often than not, the ECJ fails in talking states into complete compliance (see figure 1). The application as such cannot explain whether instruments are successful or not. Therefore, the next step develops hypotheses on contextual success conditions of the four compliance instruments. In order to develop scope conditions for rationalist and constructivist hypotheses without biases towards the success of either rationalist or constructivist instruments,⁴ it is necessary to overcome one-sided action-theoretical assumptions of rationalism and con-

⁴ Bridge-building approaches often regard one action-theory as superior and inquire foremost into hypotheses related to the primary action-theory (c.f. Panke forthcoming 2006). A study biased towards rationalism would only inquire financial sanctions, although augmentative judicial discourses take place at the same time. In a rationalist reconstruction, changes in action-plans would be attributed to changes in external constraints. On the contrary, a study with a constructivist bias would hypothesize only the impact of argumentative judicial discourses and neglect that bargaining acts highlighting potential sanctions take place simultaneously. Similar to the rationalist interpretation, a constructivist reconstruction would attribute changes in actors' properties to exchanged arguments.

structivism (Panke 2002). Different action theories cannot be reconciled by an overarching rationale, but are by their nature mutually exclusive. Instead of action-theoretical assumptions, the following approach is based on a behavioural premise: actors automatically filter communicated ideas as to whether they are relevant for the actor and her conduct. There are different types of ideas (Habermas 1995a). Ideas on external constraints are relevant for the development and adaptation of strategic positions (what actors' pursue in interactions). Ideas on truth, rightfulness or appropriateness, by contrast, are important for the development and change of substantial policy interests (what actors really want). However, not every idea is per se good and persuasive, leading to changes of strategic positions (incomplete compliance) or substantial policy interests (complete compliance). There are also ideas with no impact on the actors' strategic positions and substantial policy interests at all (continued non-compliance). According to the compliance as process approach, ideas can only exert influence, if actors share common evaluative standards for assessing the quality of ideas. Similar to Habermasian discourse theory (Habermas 1992, Habermas 1995a, Habermas 1995b), it is argued that a consensual norm interpretation leading to complete compliance can only be reached, when actors share evaluative standards for the quality of causal, normative or moral ideas. When actors share a common conception of what constitutes an external cost-imposing threat (shared standard for bargaining power), unstable compliance can be achieved. Without a common standard for the evaluation of the quality of ideas, no change of strategic positions or substantial policy interests takes place and continued non-compliance prevails.

In judicial discourses, judicial interpretational heuristics (such as wording, systematic or teleological) are applied. The wording heuristic aims at solving interpretational differences by analysing 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 analysing the paragraph or article in question in the context of the whole legal norm: Are new concepts introduced in other paragraphs 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 analysing the broader legal context: What is the purpose of the treaties and how does it relate to the norm in question? Interpretational heuristics allow for the development of new insights on how the content or scope of a norm has to be understood and contribute to the funnelling of consensual norm interpretations. Although judicial discourses are always applied, their success varies. The above theoretical consideration suggests that judicial discourses can only be effective and

induce stable compliance, if actors share common standards for the evaluation of communicated arguments. Shared judicial heuristics can serve as additional evaluative standards (which were not present in the management phase), on which the goodness of ideas on how to interpret a norm's content and scope can be measured. But not every judicial heuristic is suited to solve every interpretational problem. In order to funnel 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.⁵ Consequently, the mechanism 'judicial discourse' is only effective and a consensual norm interpretation is only developed, if actors share a judicial heuristic, suitable to the interpretational problem at hand.

H1a: Consensual norm interpretations and substantial changes of policy interests are the more likely, if actors share a judicial heuristic (necessary condition) and if the goodness of fit between the heuristic and the interpretational scope of the directive (facilitating condition) is high.

A second instrument is the ECJ's threat of imposing financial sanctions, should non-compliance prevail after the first judgement. Financial sanctions are effective, if not only the ECJ but also the respective government regards them as a serious cost-imposing constraint (shared conception of what constitutes bargaining power). This requires, firstly, an implicit or explicit bargaining threat, in which the ECJ points to the shadow of financial sanctions, and, secondly, that the affected government perceives the costs for future non-compliance (due to a shrinking shadow of sanctions) as exceeding domestic benefits for non-compliance (Fearon 1998, Horne and Cutlip 2002).

H1b: Strategic adaptations of governmental positions are likely, if the bargaining power of the ECJ is perceived as sufficiently high to threaten the government with future sanctions (which is the case when financial sanctions exceed domestic non-compliance benefits).

The third and fourth compliance instruments rest on bottom-up dynamics, in which societal actors are agents of "catching-up Europeanization". Through court rulings, the ECJ creates publicity and differential empowerment effects take place. In distributing new ideas on the interpretation of the disputed norm and in strengthening existing logics of appropriateness, norm proponents are empowered to the disadvantage of norm opponents. Whether norm proponents exist, how strong they are and whether they push their government into compliance is

⁵ A narrow interpretational heuristic (such as wording) might not produce a single interpretation, for all norms 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). Norms with broad interpretational scopes are better dealt with broader heuristics (teleological, systematical), because they allow developing a comprehensive reading of the whole norm. Narrow interpretational scopes of norms are best dealt with by narrow heuristics, since they allow best, dealing with problems of detail. 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.

contingent and not theorized by this paper. Rather, the focus is on the gestalt of contextual conditions for the success of compliance-inducing societal strategies. Societal norm proponents can push their governments into stable compliance (re-framing strategies, which are successful if the complexity of the issue is low and the old frame is degenerating) or unstable compliance (shaming strategies, which are the more successful, the higher the goodness of fit between the new norm and existing logics of appropriateness), if certain contextual conditions are present (similar Dai 2005, Finnemore and Sikkink 1998). When none of the societal instruments is successful, the respective government has no incentives to change legal acts and continues non-compliance.

H2a: ECJ rulings strengthen societal norm proponents to the disadvantage of opponents in creating publicity. This is conducive to successful shaming strategies (and strategic adaptation of governmental positions), if the ECJ's judgement resonates well with domestically institutionalised ideas and believes.

H2b: Societal re-framing strategies facilitate changes in substantial policy interests and are the more successful, if the complexity of directives at hand is low and the reference system to which a new frame refers is deeply institutionalized (or the old reference system is degenerated).

Table 2: Overview of Hypotheses

Hypotheses	Causal Mechanism	Independent and dependent variables
H1 a (top-down process): Judicial Discourse - arguing	Consensual norm interpretations and substantial changes of policy interests are the more likely, if actors share a judicial heuristic (necessary condition) and if the goodness of fit between the heuristic and the interpretational scope of the directive (facilitating condition) is high.	Shared heuristics, goodness of fit (IVs), No change / change of substantial policy interests (DV)
H1 b (top-down process): Financial Sanctions – bargaining threats in the judicial discourse	Strategic adaptations of governmental positions are likely, if the ECJ threatens the government with future sanctions through bargaining dynamics and if financial sanctions exceed domestic non-compliance benefits.	Bargaining dynamics and high bargaining power of the ECJ (IV); No change / strategic adaptations of governmental positions (DV)
H2 a (bottom-up process): Differential empowerment of societal actors Shaming	Societal shaming strategies facilitate changes in strategic positions and are the more successful, if the goodness of fit is high between the ECJ judgment and institutionalized standards of appropriateness in the member state.	Resonance between domestic norms and the disputed norm (IV); No change / strategic adaptations of governmental positions (DV)
H2 b (bottom-up process) Differential empowerment of societal actors Re-Framing	Societal re-framing strategies facilitate changes in substantial policy interests and are the more successful, if the complexity of the norm is low and the reference system to which a new frame refers is deeply institutionalized (or the old reference system is degenerated).	Low complexity of the norm and degenerating old frames or fit to popular frames (IV); No change / changes of substantial policy interests (DV)

The European Court of Justice is both an agent and a facilitating structure, enabling compliance strategies of societal norm proponents. While the ECJ is an agent regarding the instruments judicial discourse and financial penalties (H1 a and b), the court is rather passive concerning the societal shaming and re-framing instruments (H2 a and b) – except for issuing the ruling, which, in turn, creates publicity and differential empowerment. In its daily operation, the ECJ strictly adheres to formal and informal procedural rules (e.g. always applies the same hierarchy of heuristics, interview ECJ March 2005) and with fixed imperatives (almost all rulings favour demanding norm interpretations as suggested by the European Commission, see Garrett 1992, Rasmussen 1986).⁶ The ECJ is not a structure only because it acts quite similar across the single cases. Sticking to formal statutes and informal routines is an important source of the ECJ's legitimacy. Although the ECJ's conduct is constant for almost all cases (and can in itself not explain differences in the success of compliance instruments), it nevertheless has the capabilities and competencies to introduce variation.

The next section serves as a plausibility probe for both: (1) the hypotheses on immediate Europeanization as formulated by the approach of Börzel and Risse (Börzel and Risse 2003), and (2) the hypotheses on the success of the four compliance instruments in inducing 'catching-up Europeanization'. It demonstrates how prominent Europeanization approaches can easily be extended beyond immediate domestic changes. Including cases of strong resistance provides not only a more fine grained picture of top-down Europeanization, but might also point towards a stronger convergence of member states' policy, politics and polity than observed by currently prominent approaches.

V. The ECJ in Operation

The European Union's jurisdictional scope is very restricted for social policy as compared to other fields such as market integration, transport and energy, or environment. One of the directives belonging to the first generation of European social policy is the 1976 directive on equal access of men and women to employment, occupational training, promotion, and working conditions (short 'equal access directive'). The directive aims to promote equal treatment

⁶ Prominent cases, such as the Costa case, in which the ECJ developed the doctrine of supremacy of European law, reveal that ECJ rulings can have an enormous impact on further dynamics of European Integration. In its rare history-making decisions, the ECJ goes beyond clarifying the status quo of European Integration, but strengthens the supranational character of the project (Alter 2000, Alter 2001). Such far reaching interpretations (Rechtsfortbildung) are only possible, if the ECJ uses the teleological heuristic (Rasmussen 1986: 149, 173, 180, 264; Snyder 1993: 40; Gulmann 1980: 189, 199) and puts a directives in the light of the preamble, in which the aim of further integration is explicitly stated.

of men and women in work-related matters. While the aim is precisely defined, interpretational ambiguities arise from the definition of the applicatory scope.

All hypotheses rest on the assumption that non-compliance occurred voluntary in the first place and was caused by opposing substantial policy interests or strategic positions of governments. This implies, first, that there is misfit between state's legal acts and European directives (demand for future legal change) and, second, that states principally possess sufficient resources for legal changes (administrative capacity). Based on these considerations, Germany is selected as a single case study serving as a plausibility probe of the above hypotheses on Europeanization and 'catching-up Europeanization'.

Without a misfit as necessary condition, domestic changes cannot be facilitated by the EC (Börzel and Risse 2002). While some consider the misfit regarding EC directive 76/207 as high (Kodré and Müller 2003: 84, Lewis and Ostner 1994), due to the German legal landscape and established customs, a closer look on the legal dimension reveals only a medium policy misfit for Germany. Sex equality is a familiar idea in Germany's primary law. Article 3 of the constitution ('Grundgesetz') establishes the principle of general equality between men and women.⁷ Not the least because of the strong normative claim in the Grundgesetz, there was no secondary law regulating equal treatment issues for the private sector prior to the legal transposition of directive 76/207 via the 1980 EC-adjustment law (c.f. Socialdemocrats in the Bundesrat 1979: 300). At the same time, there was no codified law (but customs) allowing unequal treatment of sexes concerning employment matters (Gehrhart 2004, Hörburger and Rath-Hörburger 1988: 42-48).

Four years after its creation, the equal treatment directive (76/207) was legally transposed via the 'Arbeitsrechtliches EG Anpassungsgesetz' aligning labour legislation with Community law on equal treatment of men and women at the workplace in 1980. The EG Anpassungsgesetz of 1980 basically introduced two new paragraphs into the German civil code (the Bürgerliches Gesetzbuch, short BGB). Paragraphs 611 a) and b) and § 612 BGB regulated the equal treatment regarding access to private sector employment, educational training, and promotion as well as for job postings. Debates in both federal chambers (Bundestag and Bundesrat) revealed several differences between the political parties. While the social-democrats (SPD) principally supported sex equality in employment matters in a

⁷ However, Article 3 Grundgesetz embodies a broad exceptional clause, since only equal issues must be treated equally (Arndt and Rudolf 1996). This means that inequalities in labor and employment issues are lawful, if reasons for the differential treatment can be provided. Due to the low precision and high complexity of this norm, it is up to judicial interpretation what qualifies as good reasons for different treatments of the sexes.

normative sense (e.g. Federal Minister of Employment (Mr. Ehrenberg) in the Bundestag 1979: 14928-14929)⁸, they were skeptical from a strategic point of view. The SPD's major clientele, trade unions, adhered to traditional role model of male breadwinner and female caregiver (Kodré and Müller 2003: 96), and opposed the draft 1980-EC adaptational law in Bundestag's Committees (Bundestag 1980: 18238). The conservative (CDU) and the liberal party (FDP) opposed demanding legal transpositions of the equal access directive and sided with employers associations (Bundestag 1979: 14932, Bundestag 1980: 18238, Bundesrat 1979: 303), who highlighted the enormous costs for employers, the unwarranted restriction of the freedom of enterprise (Bundesrat 1979; 303), and interferences into the autonomy of the social partners (Bundestag 1979: 14932).

Employers associations and trade unions opposed the principle of equal treatment. At the same time, societal Europeanization proponents were rare. Throughout the 1970ies and early 1980ies women movements were few and unorganized compared to trade unions and employers associations (interview organized interests #3 (DGB), interview organized interests # 10 (Deutscher Frauenrat), see also Kodré and Müller 2003: 97). One of the few exceptions is the Deutsche Frauenrat, a grass-root organization promoting women's rights. They lobbied the Bundestag and had access to the Committee for Labor and Social Policy. Thereby they argued that discrimination on the basis of sex should be as costly as possible for employers (see Bundestag 1980: 18243, organized interests '4 , # 8 (Deutscher Juristinnenbund)). However, their proposals concerning a broad interpretation of the directive's scope and aim, as well as the creation of an anti-discrimination commission failed in winning a majority (Kodré and Müller 2003: 97). Another compliance proponent was the social-democratic women consortium ASF (Arbeitsgemeinschaft Sozialdemokratischer Frauen, founded in 1973) an organization of women within the governing party SPD (Gröner 1999). The ASF promoted a broad interpretation of directive 76/207, encompassing general anti-discrimination clauses combined with enforcement mechanisms (Kodré and Müller 2003: 95-96). This position, however, found no majority in the SPD, which sided with the trade unions.

Given the compliance adverse strategic environment, the weakness of the few societal norm proponents, and the lukewarm normative commitment to gender equality of the SPD/FDP government in 1980, limited Europeanization is not too surprising. Indeed, the Eu-

⁸ The federal minister of labour and social policy, Dr Ehrenberg, framed equal treatment even as an important part of the SPD's ideology: the social-democratic founding father August Bebel put emphasis on equal liberation (in 1863) and the program of Erfurt (1893) likewise pushed for abolishing all women-discriminating laws (Bundestag 1979: 14928-14929). His speech goes on in putting this storyline in context of the recent European social policy. Ehrenberg argues that "the European Commission supports the current federal government's aspirations as regard the equal treatment of the sexes" (Bundestag 1979: 14928-14929).

Europeanization approach of Börzel and Risse predicts a low to medium level of domestic change ('absorption' – 'accommodation') for medium adaptational pressure (medium misfit) combined with the absence of facilitating institutions (Börzel and Risse 2003: 69-71).

The low level of Europeanization did not satisfy the European Commission, who issued a reasoned opinion on 29th October 1982 and accused the Federal Republic of Germany of incomplete legal transposition of directive 76/207. According to the Commission, the EG-Anpassungsgesetz of August 1980 only transposed equal treatment provisions for private matters, and left the public administration as well as free professions aside (European Court of Justice 1985: number 3). In addition, the Commission claimed that scope and aim of directive 76/207 were further restricted by the inadequate legal status of some of the German provisions (European Court of Justice 1985: 3).

On 9th November 1983, the Commission referred the case to the ECJ. One issue at stake was how and to what extent Member States are permitted of excluding single occupational activities from the directive's scope based on Article 2 II of directive 76/207 (European Court of Justice 1985: numbers 3, 32). This complaint went together with the dispute on the requirements of Article 9 II regarding the transparency of granted exceptions from the directive's scope. As regards the permission of exceptions (Article 2 II), the Commission and the European Advocate General criticized that § 611 a) BGB enclosed no enumerative list of possible exceptions (European Court of Justice 1985: 32). Based on the directive-immanent teleological heuristic, Germany argued that enumerations of exceptions in laws or regulations are no precondition for the Commission's ability to exercise its monitoring and control function (European Court of Justice 1985: number 33). In order to solve the question on the legal preconditions for efficient control of granted exceptions, the ECJ applied the wording and the directive-immanent systematic heuristic to both affected Articles (2 II and 9 II) (European Court of Justice 1985: number 35). The Court stated that Article 9 II requires a two step review for granted exceptions: the Member States and the Commission supervise exceptions and examine whether they are justified by Article 2 (European Court of Justice 1985: number 37). Based on this line of reasoning, the ECJ ruled on May 21st 1985 that Germany failed to fulfill its obligation as defined in article 9 II of directive 76/207 and, in turn, 'prevented the Commission from exercising effective supervision' (European Court of Justice 1985: numbers 39, 40).⁹

⁹ In accordance with its informal rules, the ECJ specified no further how Article 9 II combined with Article 2 should be legally transposed in order to guarantee efficient control of granted exceptions (European Court of Justice 1985: numbers 37-40, interview ECJ March 2005).

Hypothesis 1a expects that the German conservative/liberal government (who came into power in 1982) maintained its substantial policy interests pointing towards non-compliance during the judicial discourse,¹⁰ because Germany and the ECJ did not share a judicial heuristic. The SPD initiated on June 1983 a proposal for a law, securing the equal treatment of the sexes regarding occupational activities (Social Democratic Party (SPD) 1983). This proposal contained several extensions of the equal treatment principle, such as the prohibition of mediated discrimination (marital status), the complete reversal of the burden of proof, higher penalties for violations of the equal treatment principle, and the duty to make the EG Adaptation law public in all enterprises (Social Democratic Party (SPD) 1983: 2, 3). It was referred to the Bundestag's Committee on Employment and Social Policy, where a majority of CDU and FDP rejected the proposal in January 1986 (Ausschuss für Arbeit und Soziales 1986: 2). The proposal was also rejected in the Bundestag (Bundestag 1986). The SPD defended a demanding reading of the directive, while the CDU and the FDP wanted a restricted applicatory scope of the equal treatment principle and opposed almost all suggestions of the SPD (Ausschuss für Arbeit und Soziales 1986: 4). Hence, in line with hypothesis 1a, the judicial discourse did not induce a substantial policy change in the federal government favouring the transformation of non-compliance into compliance.

Hypothesis 1b expects the conservative government to change its strategic preferences in anticipating possible financial sanctions (based on Article 228), if their costs exceed domestic non-compliance benefits. After the ECJ judgment, CDU and FDP explicitly claimed that the 1980 EG adaptational law sufficiently transposed the directive and brought improvements for women (Ausschuss für Arbeit und Soziales 1986: 4). Yet, the CDU/FDP government did not remain completely inactive. In 1987 they collected empirical data together with the Länder (states) and affected associations and communicated the result to the European Commission (Bundestag 1990).¹¹ The government also drafted a proposal for revising the

¹⁰ At the end of March 1983 before the case was referred to the ECJ, the federal government issued a report on the experiences with the EG-adaptation law and the empirical reality of equal treatment in Germany. The federal government concluded "the EG-adaptation law is better than its reputation" so that "based on hitherto experiences, it would be premature changing the law after the such a short period of time" (Bundesregierung 1983: 19). In the annex of this report, the CDU/FDP government referred to the ongoing infringement procedure and stated "after the reasoned opinion on October 29th 1982, the government once more communicated the Commission its belief that the directive is already completely legally transposed into national law" (Bundesregierung 1983: 20). This attitude also concerned the issue of whether exceptions can only be granted on the basis of a legal act, containing an enumerative list of valid grounds. The CDU/FDP government stated explicitly that German legal acts guarantee sufficient legal protection and that that the directive itself requires no enumerative listing (Bundesregierung 1983: 20).

¹¹ The first report concluded that granted exceptions cannot be listed enumeratively in legal acts, since job descriptions are subject to incremental change (Bundestag 1990: 16). In 1990, the CDU/FDP government explicitly stated that legally binding enumerated exceptions to the equal treatment principle would not do justice to the empirical variety of occupational activities (Bundestag 1990: 16). As a consequence, the government argues that it is the task of German courts to subsume disputes on the appropriateness of exceptions to the equal treatment principle under existing legal acts and thereby concretize the latter (Bundestag 1990: 16).

rules on working hours of women (*Arbeitszeitgesetz*).¹² Both governmental actions were due to strategic adaptations, nevertheless, they were not induced by the ECJ's shadow of sanction. If the instrument of sanctions had deterred the government from resisting domestic change, we would expect governmental action going hand in hand with references to the ECJ ruling and potential financial penalties. Through reference to the ECJ, the government could have justified legal changes to its electorate (which might have noticed that the governmental action is somewhat inconsistent with the CDU's and FDP's substantial policy interests pointing towards non-compliance). However, in 1987 neither the government, the governing factions in the Bundestag, nor CDU/FDP state governments in the Bundesrat referred to the possibility of financial penalties based on an ECJ Article 171 (now: 228 ECT) ruling at all (see also interviews March 2005).

The draft of the *Arbeitszeitgesetz* and the data collection on granted exceptions and the report to the Commission in 1987 prevented the latter of further pursuing the case and sending a reasoned opinion to the German government. Yet, the governmental adaptations of strategic positions were most likely not induced by the shadow of possible financial penalties, but by differential empowerment effects. In the Europeanization literature, interest groups are often regarded as mediating factors for legal change in EU Member States and the implementation of EC norms (Caporaso and Jupille 2001, Börzel 2000a, Börzel 2000b, Börzel 2002a, Knill and Lehmkuhl 2002, Greenwood, Grote and Ronit 1992). However, scope conditions for their influence and causal mechanisms are often underspecified or even completely lacking. Hypotheses 2 a and b theorize the role of societal proponents and opponents for processes of "catching-up Europeanization". The field of social policy is a good ground for testing these hypotheses. It serves as a least likely case for bottom-up compliance strategies, because the organizational degree of societal actors opposing the European norm such as trade unions and employer associations is very high.

In general, there was little support for the *Arbeitsrechtliches EG Anpassungsgesetz* among all societal interests groups, including trade unions and employer organizations,¹³ before the in-

¹² The law was framed as legally transposing directive 76/207 (Bundesregierung 1987: 1-2, 16). Yet, its changes were minimal and the reason given for the changes not related to changed causal or normative ideas. Rather, the federal minister for labour and employment (Mr. Blüm) highlighted countervailing economic concerns: the legal rules should not intervene into the autonomy of social partners (Bundestag 1988: 3736-3739). Since the draft law of 1984 was postponed and the working hours were not altered until 1994, although no formal veto players in Bundestag or Bundesrat blocked or delayed the position, a change of substantial policy interest of the federal government in reaction to the ECJ ruling was very unlikely.

¹³ The policy field of labour and employment is characterized by strong corporatist arrangements in Germany (Berger 1981, Lijphart and Crepaz 1991, Siaroff 1999, Streeck and Schmitter 1991). Hence, trade unions and employers associations are highly organized and represented by peak associations on the federal level (Streeck

fringement procedure was opened by the Commission (Hoffmann 1980, interview organized interests #2, #9; Kodré and Müller 2003: 98, Bundestag 1980: 18248). Even norm proponents such as the Deutsche Frauenrat or the social-democratic women consortium 'ASF' opposed the German 1980 EG adaptation law due to its restricted purpose.¹⁴

Between 1980 and 1986 the context was neither conducive for successful shaming nor re-framing strategies. Before the ECJ ruling, the few norm proponents could not refer to the legitimacy of the ECJ or the ruling in order to create and reinforce a pressure for governmental action. In addition, the publicity was low. The contextual conditions for success of re-framing strategies were likewise unfavorable. Not only was the norm at hand highly complex, but also were gender related role models deeply institutionalized.

The ECJ judgment in 1987 increased the publicity and (together with several preliminary rulings of the ECJ) reinforced a logic of appropriateness, according to which discrimination of women can no longer be accepted. In addition, arguments against equal treatment could no longer be made legitimately by reference to countervailing economic considerations (such as the freedom of enterprise). In line with hypothesis 2a, this empowered societal norm proponents and created an environment, conducive to successful shaming strategies. Women organizations, most prominently the Deutsche Frauenrat, blamed the government for passively supporting the continuation of discrimination (interview organized interests #10). With every preliminary ruling of the ECJ and every national court ruling, grass root organizations highlighted the insufficiency of German legislation regarding the equality of men and women and the dropping behind EC standards (interview organized interests # 10, #3). In order to circumvent reputational losses, hypothesis 2a expects the federal government to change strategic positions. In 1987 the federal government collected data on granted exceptions to the equal treatment directive and drafted a law on women working hours (*Arbeitszeitgesetz*), which was framed as transposing directive 76/207 (even though this aspect was not issue in the Article 226 proceeding) (Bundesregierung 1987: 1-2, 16). The federal government abstained from blaming the ECJ for pressuring them towards legal adaptation. Blame-shifting would not have been a rational strategy for the federal government, because it would have

1999). The employees are represented by the DGB (German Trade Union), while the BDA (Bundesvereinigung Deutscher Arbeitgeberverbände) and the BDI (Bundesverband der Deutschen Industrie) represent employers. Throughout the process of legal change all those associations represented dominantly male perspectives as male workers and employers were (and are) their main clientele. BDI and BDA (employers association) opposed a broad interpretation of directive 76/207 and highlighted the importance of countervailing values such as the freedom of contract and enterprise or countervailing factors such as administrative costs introduced through procedural provisions by legislation on gender equality throughout the process of legal change. The DGB (employees association) was less partisan, but still not in favour of a broad reading of the equal access directive (Bundestag 1980: 18238/9, Kodré and Müller 2003: 96).

¹⁴ Before the ECJ ruling women organizations such as the Demokratischer Frauenbund were most often not interested in legal changes, which is not the last due to the perceived gap between legal rules (such as Article 3 of the Grundgesetz) and their effectiveness (Gehrhart 2004: 309, interview organized interests #7, #9).

thwarted the very purpose of avoiding domestic reputational losses. The governmental conduct seems to be in accordance with the hypothesis on shaming strategies. In order to avoid reputational losses of women organizations and losses in the upcoming federal elections, the government instrumentally adapted its strategic positions and engaged in executive action. The CDU drafted a proposal improving the equality between men and women in the economic sphere ('Gesetz zur Verbesserung der Gleichbehandlung von Männern und Frauen am Arbeitsplatz') that was introduced almost at the end of the legislative term in 1990. This move minimized the political costs for the government. They avoided reputational costs and eventual electoral losses, while they were aware that the proposal could not be turned into a law and change the German legal landscape due to a lack of time.¹⁵ Would the legislative term not have been over in fall 1990, catching-up Europeanization could have been observed in a domestic legal change, reflecting incomplete compliance.

Between 1991 and 1994 the societal context changed once more and became conducive to successful re-framing strategies. The issue salience of gender equality increased severely. Newspapers covered the topic extensively, and the public opinion shifted towards strong support for equal treatment of men and women (Bundestag 1994a: 15444, Kodré and Müller 2003: 112, Liebert 2003: 270). Even in plenary debates in the Bundestag, arguments in favour of gender equality were backed up by references to the broader public and their support for the value of equal treatment (see Nolte, CDU Bundestag 1993: 15444). The high complexity of directive 76/207 is not conducive to successful re-framing strategies. It is, however, only one out of two 'ingredients' conducive to the adoption of new frames. In the late 1980s the old reference system degenerated gradually (interview federal ministry #6, Limbach 1993, Puelsch 1993, Eigener Bericht der Süddeutschen Zeitung 1993b, Koenig 1993, Eigener Bericht der Süddeutschen Zeitung 1993a). The old frame rested on a reference system according to which equal access was related to the liberation from role models (male bread winners and female care givers). Re-framing strategies of the Deutsche Frauenrat, terre des femmes, the ASF, the Deutsche Juristinnenbund, the Bundesverband für die Frau im Freien Beruf und Management and the Deutsche Frauenring recurred no longer extensively to role models but linked the aims of the directive equal access to employment, occupational training, promotion, and working conditions to the concept of gender equality. Gender equality was more than the liberation from role models (which no longer adequately reflected the societal reality, since women increasingly contributed to the family income), but strongly linked to basic human

¹⁵ Counterfactually, if the government would have changed its substantial policy interests and not merely its strategic position, one would expect that the draft would have either been introduced earlier in the legislative period or that it would have been reintroduced immediately after the re-election. Neither of the two 'alternatives' took place. Hence it is very likely that the 1990 draft was a reaction to shaming strategies and perceived reputational losses.

rights and the standing of women in different public sub-systems (economic, societal, political). Gender equality was relevant for all spheres of political activity. Within the *new frame* speech acts or written contributions referred to truth (causal ideas on how to improve the standing of women in the economic, the societal, and the political sub-system)¹⁶, to rightfulness (line drawing between discrimination and positive action)¹⁷, or to appropriateness (equality of human beings) but not to the liberation from traditional role models (as in the old equal treatment frame). As a response to the re-framing activism at the beginning of the 1990s, the CDU/FDP federal government underwent a change towards support of the new frame of gender equality (for the FDP see *Sueddeutsche Zeitung* 1994). For example, Angela Merkel (CDU) stated in a plenary speech that the draft equal treatment law is intended to abolish all structural discriminations of women and recurred to human rights as well as truth related arguments for the justification of the proposal (Bundestag 1993: 15432-15433). Unlike under the old frame, Mrs Merkel did not frame the issue as liberation from traditional role models and engaged not in blame shifting from the political to the economical and societal sphere. The same development can be observed for the political fractions in the Bundestag. In the plenary debate on the equal treatment law in the Bundestag in September 1993, all parties argued within the new frame of gender equality, emphasized the cross-cutting character of gender issues and justified the necessity for legal action through recourses to human rights (e.g. Bundestag 1994c, Bundestag 1993: 1545). The male breadwinner and female caregiver role models were widely regarded as inappropriate and as old-fashioned not longer sufficiently reflecting the empirical reality (interview federal ministry #5, organized interest #3). As a consequence, minimalist interpretations of the European equal treatment directive aiming for liberating woman from the care-givers image were no longer pursued (interview organized interests #8). The renunciations from the minimalist approach concerning equal treatment measures found expression in two legal acts. First, the reform of the law on working hours (*Arbeitszeitgesetz*) was passed in June 1994, after it was first initiated in 1986 and again in 1987. Second, the law improving the equal treatment of women and men was also passed in June 1994 (*Gleichberechtigungsgesetz*). The discussions regarding both legal acts indicate that the new frame was widely adopted and that the CDU underwent a change of substantial policy interests from sceptical towards gender equality into a proponent of the concept (see Bundestag 1993, Bundestag 1994a). Accordingly, they abandoned the narrow reading of equal treatment directive and the restrictive policy in expanding legal entitlements of women. During debates on the comprehensive legal reform of 1994 (the *Gleichberechtigungsgesetz*),

¹⁶ See Limbach 1993, Puelsch 1993, or Holzamer 1994.

¹⁷ See *Eigener Bericht der Süddeutschen Zeitung* 1993b, Koenig 1993, *Eigener Bericht der Süddeutschen Zeitung* 1993a.

arguments referring to economical concerns or external pressures were no longer be made (Bundestag 1993, Bundestag 1994a, Bundestag 1994b). Instead, the CDU repeatedly emphasised the necessity of “combating the structural discrimination of women” (Bundestag 1993). As a consequence of successful re-framing strategies, domestic legal change took finally place and transformed non-compliance into complete compliance.

Catching-up Europeanization in the German equal access case was not due to the ECJ’s agency. Neither the judicial discourse, nor the threat of potential sanctions induced legal change. In line with hypotheses 1 a and b, both instruments remained ineffective, because of lacking contextual conditions. With its judgment, however, the ECJ increased publicity and empowered societal proponents to the disadvantage of the formerly strong opponents (trade unions and employer associations). Women organization engaged in successful shaming, later on in re-framing strategies as expected by the scope conditions formulated in hypotheses 2 a and b. Thereby, societal norm proponents facilitated incomplete compliance in 1990 and complete compliance in 1994.

VI. Conclusion

Europeanization is a Janus-faced phenomenon, on which almost whole libraries were written. This paper exclusively focused on top-down dynamics and defined Europeanization as the process by which member states adapt incompatible legal rules to European law. It argued that the focus of the current literature is too often on immediate Europeanization. In analysing member states’ responses to legal EC rules, many approaches neglect the incremental nature of domestic changes. This paper, by contrast, adopted a compliance as process perspective which distinguishes between continued non-compliance (no legal changes despite a misfit between domestic and European legal norms), incomplete compliance (domestic legal acts are highly ambiguous or overlapping in scope and content, which facilitates incorrect and incomplete reproduction of the European norm) and complete compliance (domestic legal acts clearly and unambiguously prescribe content and scope of a legal act and allow for correct and complete reproduction of the European norm). Member state’s infringement data reveals that non-compliance occurs frequently. While many cases are solved during early stages of the infringement proceeding, we know relatively little about the adjudication phase. This blind spot of the Europeanization scholarship is the more surprising, since only hard cases of resistance to domestic change (cases in which states’ interests are rigid) are referred to the ECJ. In order to contribute to current research, this paper examined whether and under what conditions the ECJ serves as an agent of ‘catching-up Europeanization’. The ECJ has two top-

down instruments at its disposal: judicial discourses and the threat of financial penalties. Judicial discourse is an important instrument for ‘catching-up Europeanization’ because it facilitates complete compliance. Financial Sanctions are less important, since they at best induce incomplete compliance. Additionally, the ECJ creates differential empowerment effects with its rulings. In this regard it is a facilitating structure, which societal norm proponents can use to push their governments into complete (re-framing) or incomplete (shaming) compliance.

Rationalism and constructivism are not substantial theories, but differ in their action-theoretical assumptions. They capture parts of the social reality – albeit different ones. This paper illustrated that immediate responses to EU law can be explained by rational-choice institutionalism or its constructivist counterpart (sociological institutionalism), while incremental change can only be explained by combining both, rationalist and constructivist hypotheses. The ECJ can recur to instruments operating according to a constructivist logic (judicial discourse, re-framing) and to instruments operating according to a rationalist logic (financial penalties, shaming). Although the ECJ as an agent for catching-up Europeanization applies its instruments in every case in the same order (judicial discourse and threats followed by differential empowerment), its success varies. In order to grasp when and under which conditions the ECJ turns into an agent of Europeanization, this paper developed scope conditions for competing rationalist and constructivist hypotheses. Judicial discourses are always applied, but only successful in facilitating compliance, if there is a high goodness of fit between the interpretational problem at hand and the shared judicial heuristic. The threat of financial sanctions is always present, but only effective if domestic resistance to change is weak. Shaming and re-framing strategies could have been conducted before and after all ECJ rulings – yet, only in some cases did societal norm proponents succeed in pushing their government into compliance. Shaming strategies are only successful, if the fit between the norm in question and an existing logic of appropriateness is high, while re-framing strategies are the more successful the less complex the norm at hand and the more degenerated the old frame is.

The plausibility probe based on the German legal transposition of the equal access directive (76/207) illustrated that judicial discourses are a demanding instrument. Indeed, other case studies (UK 76/207, D 85/337, D 90/364, see Panke 2005) also revealed that the contextual conditions for *judicial discourses* (high goodness of fit between the interpretational problem at hand and the commonly applied judicial heuristic) are only seldom present. One example where the fit between the interpretational problem and the shared applied heuristic was present is the German drinking water case. The drinking water directive (80/778) very precisely sets out a series of quality standards for water intended for human consumption and prescribes in

detail the procedural instruments for their measurement. The first German legal transposition resembled incomplete compliance since they only transposed the health related elements of the directive (Kromarek 1987: 43), while broader environmental aspects (e.g. the complete communication of transgressed parameters) were left out. Accordingly, the Commission accused Germany for incorrectly transposing the directive into national law. The first reprehension on the interpretation of ‘states of emergency’ as an exceptional clause to the quality aims was already solved by the day of the judgment, since Germany adopted a decree, which no longer considered events such as thunderstorms as qualifying for exceptions according to the directive. The second criticism of German law by the Commission was on the communicational requirements of departures. While article 9 I of the directive demands a wholesome communication of failed parameters, German law only required communications of some parameters, if the cause for the failure was geogen in nature. The German advocate and the ECJ shared the wording heuristic and concluded that the German transposition was inadequately, since article 9I requires complete reports (European Court of Justice 1992). Although strong substantial interests were pointing towards non-compliance the beginning of the infringement procedure,¹⁸ the German government changed its substantial policy interests in response to the judicial discourse. They no longer referred to costs for the water supplying industry, or denied the importance of the environmental aspects (interviews BGD February 2005, NGO# 12 February 2005). The government even threatened the BGA (German Health authority) with dismissals, in case they should continue to undermine the EC drinking water directive (interviews Health Ministry March 2005, BGA February 2005). Also, Germany quickly and comprehensively adapted the drinking water law after the ECJ ruling in accordance with the consensually defined norm. The new drinking water regulation resembled complete compliance. It was highly precise, minimized overlaps with other legal acts, and allowed for complete and comprehensive reproduction of the European drinking water directive.

If the ECJ fails in facilitating domestic change via judicial discourses, the ECJ as agent can recur to a second instrument, the *threat of financial penalties*. The case study illustrated that governmental strategic positions were not altered in anticipating potential financial sanctions – the ECJ remained a weak agent, since its threatening potential was extraordinary weak. This

¹⁸ A staff member of the BGA (a high authority on health matters; Bundesgesundheitsamt) commission formerly working on drinking water exclaimed that “incorrect and incomplete transpositions are better options for all cases (such as the drinking water case), in which European directives do not correspondent with German thoroughness. Since the drinking water directive lacks detailed descriptions of the evaluation methods, it opens windows for lax application and derogates the high German standards through the back door” (interview UBA #2). “German authorities justified the delayed and incomplete transposition of the drinking water directive with the high quality of drinking water, which Germany had enjoyed since more than 100 years” (Börzel 2003: 82):

instrument proved as ineffective for several reasons. First, bargaining dynamics and implicit or explicit threats are no legitimate speech acts in the adjudication phase (see interviews ECJ March 2005 and European Commission February 2005) and there is no empirical evidence for references to potential sanctions during judicial procedure. Second, it is the European Commission who is in charge of the infringement proceeding. Hence, the Commission and not the ECJ can send a second reasoned opinion (based on Article 228) to states, who maintain non-compliance after ECJ judgments (based on Article 226). The ECJ itself cannot threaten states with financial penalties. Third, the very fact, that the ECJ turned not in an agent of 'catching-up Europeanization' because its bargaining power could not induce domestic changes is not too surprising in the field of social policy. Due to a highly organizational degree of societal norm opponents (trade unions and employers associations), governments consider domestic costs as more important than costs induced from above.

In Germany, as in the UK, trade unions and employer associations opposed the principle of equal treatment, since they feared stronger competition on the labor market and higher employment costs, respectively. Against this background, the ECJ was important in facilitating 'catching-up Europeanization' and legal domestic change – albeit the ECJ did not turn into a successful agent. Through its ruling, the ECJ differentially empowered compliance proponents (women's organizations), while societal compliance opponents (especially trade unions and employer associations) could no longer make certain arguments within a frame of appropriateness. Differential empowerment equipped societal proponents such as the Deutsche Frauenrat with new ideas on the case, additional arguments referring to appropriateness, and publicity. The presence of societal norm proponents capable of collective action is only a necessary condition for legal changes induced from below. In order to exercise successful compliance strategies, contextual conditions are of high importance. In the period after the ECJ ruling (1985), a logic of appropriateness was strengthened, according to which sex discrimination could not be justified. The Deutsche Frauenrat made use of this window of opportunity in *shaming* the government for continuing non-compliance. As a reaction, the government adapted strategic positions and engaged in minimalist legal change (incomplete compliance). Between 1991 and 1994, the old frame on equal treatment (equal access as liberation from role models of male breadwinner and female caregiver) degenerated and was incrementally substituted by ideas on gender equality. This opened another window of opportunity for societal compliance strategies. Norm proponents *re-framed* the judicial discourse and the equal access issue and lobbied the German government since the beginning of the 1990s. Finally,

substantial policy interests changed and the government introduced a comprehensive legal reform (the 'Gleichberechtigungsgesetz') in 1994, which resembled complete compliance.

From the very beginning, Europeanization research was widely interested in the question of whether the EU ultimately leads to the convergence of national policies. While the focus on immediate Europeanization pinpointed the persistence of national differences, the approach to catching-up Europeanization highlights the incremental nature of domestic changes and comes to a slightly different assessment. Comparing the catching-up processes in the UK and Germany as regards the equal treatment issue reveals that there are nationally distinct paths towards convergence of policies. In both cases it took more than 15 years to finally reach complete compliance. Yet, after directive 76/207 was completely and comprehensively transposed, aim and scope of UK and German legal acts converged.

VII. Literature

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