PARTICIPATION THROUGH LAW ENFORCEMENT

THE CASE OF THE EUROPEAN UNION*

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Abstract

This article provides a comparative framework for understanding processes of decentralized law enforcement in the European Union (EU). In particular, the analysis proposes how decentralized EU law enforcement mechanisms can increase opportunities for participation of citizens and firms, but only if they possess domestic courts access and sufficient resources to use it. The article undertakes a systematic analysis of non-compliance with EU environmental law to examine this dynamic. The findings reveal a major paradox for the enforcement of EU law: the empowerment of the already powerful. This paradox has major implications for the potential of expanding judicial power in the EU and at the international level to bring more democracy to international politics.

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Introduction

Most states comply with most international law most of the time (Koh, 1997). Yet, non-compliance still occurs. Unlike states, international organizations have no means to force states into compliance with their norms and rules. However, states have deferred monitoring and adjudicating powers to non-majoritarian institutions, such as the European Commission or the dispute-settlement panels of the World Trade Organization. Moreover, with the progressing legalization of international politics, courts rather than expert or administrative bodies are increasingly assigned the task of ensuring compliance with international law (Keleman, 2001; Cichowski, 2001, Börzel, 2003a, see also Alter in this Issue). Many authors, including some of the contributors to this volume, see expanded judicial power as a chance to improve the prospects for democracy in world politics (cf. Cichowski, Stone Sweet, 2003). Using the case of legal compliance in the European Union, this article presents some more sceptical reflections on the proliferation of international courts and its effects on democratic governance.

The European Union is a most likely case for courts to enhance democratic participation in international governance. First, the fragmentation of political authority in the EU has led to *increasing power of non-majoritarian organizations*, such as the European Commission and the European Court of Justice, to ensure the enforcement of the more than 10.000 pieces of European legislation (Tallberg, 2003; Börzel, 2003a). Second, *EU rules and regulations*, such as the supremacy of European Law and its direct effect, provide citizens, firms and societal groups with the legal opportunity to plead in national courts for the enforcement of European Law (Conant, 2002; Cichowski 2006). Thus, two of the three institutional variables, which the introduction of this Special Issue hypothesizes to increase individual participation in supranational and international governance, clearly hold. The literature indeed presents ample evidence of how individuals and groups have successfully employed increased opportunities for EU law enforcement and rights claiming (Harlow, Rawlings, 1992; Burley, Mattli, 1993; Alter, 2000; Börzel, 2003a; Cichowski, 2006; Conant, 2002). But research on litigation and participation in the EU tends to suffer from a selection bias on the dependent variable. Cases in which citizens and groups fail to bring claims against their governments for non-compliance with international law are hardly considered. In concurrence with hypothesis 3 of the introduction, I will argue in this article that supranational rules and regulations (H 1) and non-majoritarian organizations (H

2) only increase opportunities for participation through law enforcement, rights claiming and expanded protection for those individuals and groups who possess court access and the necessary resources to use it (H 3). While the first two institutional variables are constant within the EU, access and resources vary significantly across and within member states.

In order to develop the argument, the article proceeds in the following steps. I will start with formulating some theoretical expectations about when EU legal institutions are likely to increase opportunities for participation through law enforcement, rights claiming and expanded protection. Drawing on the social movement literature and domestic structure approaches, I will argue that international courts are only likely to increase opportunities for participation if the latter are capable of exploiting the legal opportunities offered to them. If, by contrast, individuals lack court access and the resources necessary for using it (person power, expertise, money), they should not be expected to gain broader participation in legal and political processes. I will use the enforcement of EU environmental law in Germany and Spain to depict the paradox that may arise from EU legal institutions increasing opportunities for participation: the empowerment of the already powerful. I will show that the EU enforcement system is most likely to empower those actors that do already actively participate in domestic and European politics. This paradox results in a major dilemma for the enforcement of European Law. Non-compliance is the highest in member states where societal actors are the weakest, and vice versa. The article concludes with a summary of the main findings and discusses their implications for the potential of expanding judicial power in the EU and at the international level to bring more democracy to international politics.

LAW ENFORCEMENT AND PARTICIPATION

With international law firmly rooted in the principle of state sovereignty, it could neither be adopted nor enforced against the will of states. Yet, the legalization of international politics has started to perforate state sovereignty. International law has been increasingly penetrating national law (Chayes, Chayes Handler, 1995; Koh, 1997). With an ever growing body of international norms and rules, non-majoritiarian organizations have been put in charge of settling disputes on the interpretation and application of international norms and rules at the domestic level (see Alter in this Issue). Moreover, international courts and legal dispute-settlement bodies

have given access to individuals who want to press charges against their governments if the latter deny them their international rights (ibid.).

The vertical integration of the international and national legal systems creates new opportunities for participation through law enforcement, rights claiming and expanded protection. The legal institutions of the European Union (EU) are a prominent example. Through its judicial activism, the European Court of Justice (ECJ) turned the international Treaty of Rome, which founded European Community, into a supranational constitution granting citizens new rights (Weiler, 1981, 1991; Alter, 2001; Cichowski, 1998, Cichowski, 2004). The ECJ has not only created new rights, it has also helped to enforce them. Through its doctrines on the supremacy and the direct effect of EU Law, the ECJ has developed rules and regulations that provide citizens, firms and societal groups with the legal opportunity to plead in national courts for the enforcement of European Law (Conant, 2002; Cichowski 2006). Moreover, through the Article 234 preliminary ruling procedure, national courts are allowed (and sometimes obliged) to ask the ECJ to adjudicate between conflicts of European and national law. Thus, as hypothesized in the introduction of this Special Issue, non-majoritarian organizations, such as the ECJ, can increase opportunities for participation through law enforcement, rights claiming and expanded protection if they are given review power and jurisdiction (H 2) over formal, sufficiently precise and judicially enforceable rules and regulations (H 1). Yet, whether such increased opportunities, actually lead to more participation crucially depends on the degree of access and the amount of resources supporting individual access to political and legal processes (H 3). Theories of social mobilization and domestic structure approaches would lead us to expect that both access and resources are not equally distributed among individuals and groups. Moreover, they should allow us to specify which actors are most likely to benefit from increased opportunities for participation.

Theories of social mobilization remind us that “weak”, less resourceful actors, who have limited opportunities to pursue their interests in the policy process, should benefit most form the opportunities for participation offered by international courts and legal institutions (Imig, Tarrow, 2000; Marks, McAdam, 1996). Conversely, “strong” resource-rich actors with ample domestic opportunities have less to gain from the international legal opportunity structure.

Domestic structure approaches emphasize that political institutions can significantly constrain the ability of individuals and groups to exploit the increased opportunities for participation offered by international courts and legal institutions (Epp, 1998; Conant, 2002; Alter and Vargas, 2000). Individuals and groups must be able to exploit new legal opportunities. First, they require court access (legal standing). This is increasingly less an issue at the international level. Traditionally, only states used to have access to international courts. This has started to change, though. The European Court of Human Rights, for instance, now makes individual complaints compulsory for all Contracting States (see Cichowski this Issue). In the European Union, citizens and firms have always had access to the European Court of Justice (ECJ) if they exhausted domestic legal recourse, and domestic courts referred the case to the ECJ, respectively. But even if individuals and groups have their claims confirmed by an international court, the ruling needs to be implemented back home. National governments are not necessarily prepared to engage in the required political and legal changes due to the costs involved. Individuals and groups can resort to domestic courts to have the rulings of international courts enforced. But this requires legal standing, i.e. the right to plead in domestic courts for the enforcement of international law, and the rulings of international courts, respectively.

Second, individuals and groups need a certain action capacity, i.e. resources such as person power, information, expertise, and money, to litigate before national and international courts. The resources of actors are to a large extent dependent on the domestic opportunity structure in which they operate (Kitschelt, 1986; Kriesi, Koopmans, Duyvendak, Giugni, 1992; Tarrow, 1998). The formal and informal institutions of a political system do not only offer domestic actors access points or venues (Baumgartner, Jones, 1991) through which they can participate in legal and political processes. They can also strengthen their action capacity, e.g. by offering legal advice or providing financial support (Galanter, 1974, pp. 140-144).

If we accept that the domestic structures of states can significantly mitigate the effect of international courts, we can refine hypotheses 3 of the Introduction in the following way:
As judicial institutions with a wider scope of review powers increase in accessibility for individuals, we would expect increased opportunities for participation through law enforcement, rights claiming and expanded protection *if the domestic structures of a state*

provide individuals with domestic court access (legal standing) and sufficient resources to use it.

If this hypothesis holds, it points to a major paradox similar to the one identified by Marc Galanter more than thirty years ago (Galanter, 1974). In his study on the redistributive effects of litigation, Galanter found the "haves" tend to come out ahead. In a similar vein, I will argue in this article that domestic actors who could benefit most from the legal opportunities provided by international courts are the least likely to exploit them since they may have domestic court access but lack the necessary resources to use it. This is particularly true if individuals have to act as "repeat players" in order to get international law and the rulings of international courts enforced at the domestic level.

The next section will use the case of legal compliance in the European Union (EU) to explore the extent to which the paradox identified above holds. The EU is a most likely case for increased opportunities for participation through law enforcement, rights claiming and expanded protection. Given the fragmentation of political authority in the EU, the European Commission and the European Court of Justice have received ample powers to ensure member state compliance with the comprehensive body of formal, sufficiently precise and judicially enforceable EU rules and regulations. Moreover, the EU's legal institutions provide citizens, firms, and public interest groups with the opportunity to seek enforcement of EU law before national courts. As the next section will demonstrate in more detail, two of the three institutional variables, rules and regulations as well as non-majoritarian organizations, which the Introduction to this Special Issue hypothesizes to condition how courts might serve as arenas for citizen participation, are strongly present.

MAKING MEMBER STATES COMPLY: ENFORCEMENT THROUGH LITIGATION

Centralized Enforcement through the Commission and the European Court of Justice

In order to ensure compliance with European Law, European institutions provide different enforcement mechanisms (Tallberg, 2003; Börzel, 2003a). The backbone of the EU compliance system is Article 226 EC-Treaty (ECT), which grants the Commission the right to monitor and sanction member state non-compliance. The Commission can press charges before the European Court of Justice against any member state it suspects of violating European Law. But before the

Commission opens proceedings, it needs to find sufficient evidence. In order to monitor compliance and disclose violations, the Commission follows a 'two-track approach' (Tallberg, 2002). With regard to legal compliance (transposition of Directives into national law), Commission officials systematically collect and assess data through 'in-house' monitoring. Monitoring whether European law is properly applied within the member states (practical compliance) is most difficult. The Commission carries out its own investigations. Occasionally, it sends out inspectors to visit a member state. Yet, such on-the-spot checks are labour intensive, tend to be time-consuming, politically fraught, and can be blocked by member states. Due to its limited possibilities, the Commission heavily relies on monitoring by external actors. It maintains numerous contacts with national implementation authorities, non-governmental organizations, consultancies, researchers, and corporations in the member states. The most important source of information is complaints lodged by citizens, firms, and public interest groups as well as petitions to and queries of the European Parliament. Once the Commission believes to have sufficient evidence, it officially opens infringement proceedings. If the member state is not willing to revoke the violation, the Commission can bring the case before the European Court of Justice, which may impose financial penalties if the member state refuses to bend to its ruling (cf. Börzel, 2001: 803-824).

The Commission has made ample use of its compliance powers. Since 1978, the Commission has opened more than 20.000 infringement proceedings against the member states. The number of infringements drops sharply from stage to stage (Figure 1). Two-thirds of the almost 17.000 established infringements between 1978 and 1999 got settled during the first stage, which the Commission and the Member States treat as confidential. The proceedings become official once the Commission sends a reasoned opinion and member states start to reinforce their efforts to remedy the matter. Experience shows that once a case is referred to the ECJ it faces a high risk of getting a negative ruling. Between 1978 and 199, the Commission referred only ten per cent of the opened cases to the European Court of Justice. Of those 1619 referrals, the ECJ ruled on 672, in 95 per cent against the member states. The fact that the member states delayed compliance with about 500 negative ECJ rulings underscores how serious the incidents of non-compliance are that reach the ECJ. The longest delay lasted 13 years (Conant, 2002: 71). At the same time, there is not a single case in which a member state did ultimately not comply.

-------- Figure 1 about here --------

While Article 226 ECT provides an effective mechanism of centralized enforcement, it has hardly any potential of increasing opportunities for participation of individuals and groups. Unlike member state governments, they have no legal standing (access) in the infringement proceedings. They can only induce the Commission to open cases by lodging a complaint. But the Commission is neither always able nor willing to pursue them. It has considerable discretion in deciding whether and when to open official proceedings. Given its limited resources, the Commission strategically selects cases that are promising on legal grounds and serve its political and institutional interests (cf. Conant, 2002, pp. 74-79).

Decentralized Enforcement through Litigation before National Courts

The doctrine of supremacy[1] and direct effect[2] of EU law, which the ECJ established in the early 1960s, laid the foundation for a decentralized enforcement mechanism. With EU Law having direct effect at the domestic level, the so-called preliminary ruling procedure under Article 234 ECT became a means by which citizens, groups and firms can sue member state governments or other public authorities in national courts for violating EU Law (cf. Stein, 1981; Conant, 2002). The supremacy of EU Law prohibits public authorities to rely on national law to justify their failure to comply with EU law, and requires national judges to resolve conflicts between national and EU law in favour of the latter. Since the early 1990s, domestic actors are also entitled to financial compensation. The ECJ ruled that member states are liable for damages caused by their failure to comply with their obligations under EU law (Craig, 1993, 1997).

Recognizing the limitations of centralized enforcement, the Commission encourages citizens and firms to bring actions against member state non-compliance before national courts. If the Commission does not have the resources or interest to pursue a complaint, it advises citizens, firms, or interests groups who lodged the complaint to litigate before national courts (Conant 2002). In its ‘Citizens First’ initiative, the Commission sought to inform citizens, firms, and public interest groups of how to go about safeguarding their rights under EU Law and be awarded compensation if member states violated these rights. In a similar vein, the Commission launched the Robert Schuman Project to improve awareness and knowledge of EU Law among national judges, prosecutors and lawyers (Conant 2002, p. 81).

The EU's decentralized enforcement mechanism provides increased opportunities for individual participation through law enforcement. Yet, the case study on the enforcement of EU environmental law in Spain and Germany will show that the empowering effect of the opportunities offered by the EU's compliance system is differential and mitigated by the domestic structures which provide individuals and groups with differing degrees of court access and resources to use it. German citizens and groups have been able to make ample use of increased opportunities for participation through the enforcement of EU law. But since domestic structures already grant German individuals and groups access to legal and political processes, they have not gained much from increased participation. Domestic structures in Spain, by contrast, are rather closed and provide only limited opportunities for citizen participation. Thus, Spanish individuals and societal actors could substantially benefit from increased participation through EU law enforcement. Yet, hampered by their weak action capacity they have been far less able to litigate before domestic courts, as a result of which they have hardly been empowered.

ENFORCING EU ENVIRONMENTAL POLICIES: WHY THE "HAVES" COME OUT AHEAD

EU environmental law contains several policies that aim at empowering and creating democratic opportunities for individuals and groups vis-à-vis their governments. The Access to Environmental Information Directive and the Environmental Impact Assessment Directive are two cases in point. They grant citizens and environmental groups new rights in the licensing of environmentally damaging projects and activities by providing them with access to relevant information and by obliging public authorities to take their concerns into account in the decision-making process. Yet, member state governments have been very reluctant to comply with these policies as a result of which their effects on participatory politics have been limited. As we have seen in the previous section, the EU's compliance system provides citizens and groups with the opportunity to litigate against their governments in order to help enforce EU law. But the comparative case study on the enforcement of the two environmental directives in Germany and Spain presented in the next section will show that citizens and groups have made uneven use of these legal opportunities to enforce their rights.

Spain and Germany have been selected for the comparative case study because they differ significantly with regard to their domestic opportunity structures. In Spain, public participation in the policy process is restrained. Authoritarian state interventionism kept civil society weak. The degree of societal self-organization used to be low, and policies have been made without any substantive participation of societal actors. This remains true also for the time after Spain's transition to democracy. Institutional channels for consultations with the different stakeholders have been largely absent. Economic interests have been enjoying some informal but discontinuous relations with the public administration, particularly at the implementation stage. Environmental authorities also regularly consult specialist agencies and policy experts. Societal actors, by contrast, are still largely excluded from the policy-making process (cf. Aguilar Fernández, 1997). The environmentalist movement only started to form in 1973 mobilizing against nuclear power station projects. While movement organizations were largely characterized by local activism and ideological diversity, some environmental groups became more stable and less radical. They started to finance themselves through membership contributions and public grants. Some of them organized themselves in a national federation, the *Coordinadora de Organizaciones de Defensa Ambiental (CODA)*. Together with the Spanish sections of transnational environmental organizations, such as Greenpeace, WWF, or Friends of the Earth, they have gained increasing voice in the political process.

In 1994, the Spanish government established the Advisory Council for the Environment (*Consejo Asesor de Medio Ambiente/CAMA*), which for the first time provides some institutionalized participation of societal interests in central state environmental policy-making. CAMA represents a variety of interest groups, including business, trade unions, consumers, agriculture, hunters, scientists, and environmentalists. It has the right to make recommendations on policy proposals put forward by the central government and to bring up own policy initiatives. Yet, economic and societal representatives alike agree that CAMA has little influence on environmental policy-making. In 1996-97, two environmental organizations, Greenpeace and AEDENAT, walked out of CAMA, protesting against its 'window dressing role' as a mere instrument of public legitimacy for the Minister of Environment. In the absence of a viable Green Party, environmental interests are not effectively represented in the legislative process either. With the assistance of the German Greens, *Die Grünen*, several Green parties emerged in the

early 1980s. But they have faced great difficulties in presenting themselves as a single Green list in national and regional elections. Many local and regional groups have resisted attempts of centralization within the Green movement. Electoral support for environmental concerns is still low. While the majority of the Spanish public deems environmental protection necessary, Spaniards are reluctant to support a party consequently prioritizing environmental issues. Consumerist values still prevail.

While the institutionalization of environmental policy has broadened the political opportunities for environmental demands and served to some extent as a catalyst for political action, access to the policy process is still limited. Legal action of environmentalists is discouraged by high economic costs on the one hand, and the lack of sensibility and technical training of public prosecutors and judges, on the other hand. The judicial system has served to repress rather than encourage environmental activism by charging environmental activists for committing offences during demonstrations, boycotts and other political actions (Jimenez, 1997). The new Criminal Code, which was enacted in 1996, significantly expands the sanctions for environmental offences. It is complemented by a revision of administrative law imposing a system of compulsory fines and remedies against infringements of administrative ordinances (Weale, Pridham, Cini, Konstadakopulos, Porter, Flynn, 2000, pp. 312-313). But it is still too early to say whether the new legislation will empower societal actors in their fight against environmental pollution.

In Germany, by contrast, citizens and environmental groups have multiple access points to the policy process. There is a strong corporatist tradition of institutionalized cooperation between government and industry, regulator and operator (Héritier, 1996). Public authorities also maintain informal relations with regulated parties in order to ensure the effective application of rigid legal standards. Such patterns of 'cooperative administration' (Voigt, 1995) grant economic interests privileged access to public policy-making. Likewise, the powerful German Farmers' Union (*Bauernverband*) has exercised significant influence on environmental policy-making. Public authorities also rely on the technical and scientific expertise of private actors in the formulation and implementation of environmental policies. For instance, technical standards often draw on regulations developed by non-governmental organizations including the German Standards Institute (DIN) or the Association of German Engineers (VDI). Compared to industry,

farmers and scientific experts, environmental interests have more limited, albeit substantial access and influence in the policy process. Organized societies for nature conservation go back to the 19th century while new types of environmental organizations emerged in the 1970s. Parallel to the anti-nuclear movement, citizens' initiatives (*Bürgerbewegungen*) formed as a result of tensions between citizens and planning authorities at the local level. They organized themselves at the federal level in the Federation of Citizens' Groups for Environmental Protection (BBU). The groups gained political importance through the mobilization of candidates in elections and played a major role for the breakthrough of the Greens into the party system in the 1980s, as a result of which established parties became more responsive to environmental issues. Alongside the growing number of citizens' initiatives, there are a large variety of local, regional, and national environmental organizations. They have around four million members (Weale, Pridham, Cini, Konstadakopulos, Porter, Flynn, 2000, p. 258). The ongoing professionalization of the environmental groups has helped them to establish continuous relationships with both public authorities and industry (Pehle, Jansen, 1998). The latter have come to accept the expertise and legitimacy, which environmental groups may offer when embracing a more lobbyist approach in their political interaction. Accessibility for environmental groups has also improved since the Green Party entered a coalition with the social democrats to form the federal government in 1998.

The comparison between Spain and Germany demonstrates how closed domestic opportunity structures can significantly constrain the empowering effect of the EU's decentralized enforcement mechanisms in Spain, as in the other southern European member states (cf. Börzel, 2003). While citizens and groups have much to gain from the opportunities offered by the EU legal system, they often lack the capacity to exploit them. German citizens and groups, by contrast, have more resources to exploit the EU's legal opportunities for participation through law enforcement but they have also less to gain since they have alternative venues to access legal and political processes.

The distribution of Article 234 ECT preliminary references across countries confirms that citizens, groups and firms in countries with open opportunity structures, such as Germany and Austria, have made much greater use of the EU's legal opportunities than in other member states, including Spain, Greece, and Portugal. This variation is not necessarily related to the compliance

performance of the member states as the comparison of the number of Article 234 references with the number of cases brought before the ECJ under the Article 226 centralized enforcement proceedings shows (Figure 2). The Northern European countries tend to score much higher on Article 234 references than on Article 226 rulings. For the Southern Europeans, it tends to be the reverse, with the exception of Italy, where civil society is rather active, particularly in the North (Koutalakis, 2004).

-------- Figure 2 about here --------

Data and Methods

Tracing the implementation of the Access to Environmental Information (AI) and the Environmental Impact Directive (EIA) Directives in Spain and Germany provides a good illustration of the opportunities and constraints faced by individuals and groups in the enforcement of their new rights. Unfortunately, there are no statistical data on the degree to which individuals, groups and firms have used increased opportunities for participation through EU law enforcement. The website of the European Commission, however, provides access to a database compiling all law suits filed before member state courts involving EU law, including preliminary references under the Article 234 ECT procedure. A search of the database for the AI and EIA Directives subject to Spanish and German law suits yields some first empirical evidence that broadly confirms the expectation of my research hypothesis (see table 1).

-------- Table 1 about here --------

While German individuals, groups and firms made repeated use of the increased opportunities for participation through law enforcement, particularly regarding the Access to Information Directive, we only find one case in Spain, where a Basque coalition of environmental activists and citizen groups sought to invoke the EIA Directive to oppose the construction of a major dam in Itoiz in the Spanish courts (see below). There is one more case, where Greenpeace filed a law suit against the incorrect transposition of the AI Directive into Spanish law (see below). The law suit is not included in the database, supposedly because the Directive as such is not mentioned in the court ruling.

The findings are corroborated by a qualitative case study that draws on a comprehensive research evaluating the implementation of six EU environmental laws in Germany and Spain,

including the Access to Information and the Environmental Impact Directives. Next to the analysis of secondary literature and primary documents (legal texts, policy papers, court rulings, government files, newspaper articles), the empirical study draws on more than 100 interviews with representatives of Spanish and German citizen groups, environmental organizations, companies, public authorities, policy institutes as well as members of the European Commission, DG Environment between 1996 and 2002(cf. Börzel 2003b). The findings do not only confirm that German individuals, groups and firms have made much greater use of litigation in national courts seeking to enforce EU law than their Spanish counterparts. They also reveal the reasons for why actors have or have not used increased opportunities for participation through law enforcement.

The Access to Environmental Information Directive

The Access to Environmental Information (AI) Directive[3] adopted in 1990 is in itself a means to promote the decentralized enforcement of EU environmental law. It shall broaden public access to environmental information as to increase transparency and openness thereby encouraging citizens and groups to participate more actively in the protection of the environment. Its procedural regulations require any public authorities holding information on the environment, or bodies with public responsibility for the environment, to make such information available to any natural or legal person at his or her request without having to prove "direct effect".

Spanish legal provisions and administrative practices grant access to information only in justified cases and are thus in sharp contrast with the AI Directive, which demands general access to information for anybody only to be refused in justified cases. As a result, the implementation of the AI Directive requires legal and administrative changes that impose significant costs. Broader access to information provides the public with an effective means of controlling administrative behavior such as monitoring compliance with environmental legislation. It also allows for more transparency in administrative decision-making. Not surprisingly, Spanish administration, not being used to public scrutiny, has shown little enthusiasm in complying with the AI Directive.

Environmental groups have sought to mobilize against both the flawed transposition and the ineffective application of the AI Directive. Greenpeace has filed three complaints with the

Commission for incorrect transposition, which resulted in the opening of two infringement proceedings.[4] It also challenged in the Spanish High Court the decision of public authorities to exclude information on fisheries from the definition of information on the environment, and obtained a favourable judgement.[5] Spanish environmental organizations, by contrast, have refrained from taking any legal action. Instead, AEDENAT and CODA launched nation-wide campaigns providing information brochures, which explain the rights of access to information including standardized forms by which information can be requested as well as appeals against refusal be made. Documentation centres collect cases of non-compliance with the AI Directive requirements (Sanchis Moreno, 1996). The mobilization of (trans)national environmental organizations, both at the EU and the national level, has significantly contributed to the effective legal implementation of the AI Directive in Spain. But with the exception of Greenpeace, which is a resourceful, transnational organization, even groups like CODA or AEDENAT that might have the action capacity for litigation, have not resorted to courts but focused on political means to promote the enforcement of the AI Directive.

This is even more the case when it comes to the practical application of the AI Directive on the ground. Local environmentalists and citizen groups have hardly the resources to push their rights to information against the resistance of public administration. They have been too weak to litigate for enforcement of the AI Directive in national courts. Suing public authorities takes about three years and involves high costs, also because citizens often need legal assistance. As a result, no law suits have been brought before Spanish courts against the enduring resistance of public authorities to correctly apply the AI Directive and grant access to environmental information in individual cases. At best, environmental organizations have occasionally lodged administrative appeals. Instead of taking legal action, individuals and groups have been turning to the Commission, which keeps receiving complaints about the flawed practical application of the AI Directive in Spain. But rather than taking action under the Article 226 ECT infringement proceedings, the Commission has referred most complainants to national appeals procedures.

In sum, Spanish individuals and groups have not made use of the increased opportunities offered by the EU's decentralized enforcement mechanisms. They simply lack the necessary resources to litigate against the enduring non-compliance of Spanish authorities with the AI Directive.

In Germany, public authorities equally resisted the implementation of the AI Directive. The comprehensive right to access to environmental information which the Directive grants irrespective of interest and procedural context completely contradicts the German administrative tradition based on the confidentiality of information in possession of public authorities. The principle of 'restricted access to records' grants the public access to information only in justified cases. Consequently, German authorities have very much opposed the implementation of the AI Directive.

German environmental groups have strongly mobilized against the ineffective implementation of the AI regulations. Unlike their Spanish counterparts, they have not only organized information campaigns, issued publications, launched several series of systematic requests for information, and broadly documented cases of refusal. They also sought to invoke the direct effect of the AI Directive in German courts as long as the German government delayed transposition.[6] After the AI Directive had finally been incorporated into national law, individuals, often supported by environmental organizations or citizen groups, which do not have legal standing, but also companies continuously lodged administrative appeals and filed altogether seven law suits, all but one went into several rounds of appeals, against the flawed practical application by the German administration (see fn. 15). Court appeals can take even longer than in Spain, particularly if the plaintiffs appeal (up to six years until an administrative court ultimately decides the case). Moreover, German courts have often adopted an equally restrictive interpretation of the AI legislation as public authorities as result of which litigation has not always advanced enforcement. Finally, the open opportunity structure of the German political system provides alternative means to get access to environmental information. While gains seem to be limited, German individuals, groups and firms have made repeatedly use of increased opportunities for participation through EU law enforcement. Why do they invest their resources in and lengthly and costly litigation activities? On the one hand, the AI Directive can still provide access to information which is otherwise difficult to obtain, particularly when individuals, firms and groups (the latter of which do not have legal standing) cannot claim a legitimate interest to receive access to information because nobody is directly affected in her individual rights. On the other hand, environmental organizations view their support for the litigation activities of individuals as a socialization exercise by which they hope to change the German administrative

culture of secrecy and restricted public access to decision-making processes (for a similar finding in social policy see Liebert 2003).

The Environmental Impact Assessment Directive

Environmental Impact Assessment (EIA)[7] constitutes an instrument of procedural regulation, which assesses in a systematic and cross-sectoral way the potential impact of certain public and private projects on the environment. Any project which is likely to have significant effects on the environment is subject to an environmental impact assessment prior to authorization by the competent authority, in which the concerned public may participate and whose results have to be made public. Like the AI Directive, the EIA Directive is also meant to improve compliance with EU environmental regulations by increasing public participation in environmental decision-making.

In Spain, different sectoral regulations required the assessment of certain environmental impacts of a planned project. But the Spanish EIA provisions lacked the explicit precautionary approach of the Directive. The requirements for information to be provided by the developer were much less demanding. The period of public information and consultation was shorter. Requirements for corrective measures were lax to non-existent. Cross-media effects were not systematically considered. Due to these incompatibilities between European and Spanish EIA regulations, Spain implemented the EIA Directive by a proper law.

Yet, the new Spanish law did not correctly transpose the EIA Directive. The Commission repeatedly reprimanded Spain for not defining conditions under which projects listed in Annex II of the Directive have to be made subject to an EIA. After the Commission had sent a Reasoned Opinion in 1992, the Spanish government finally agreed to remedy the matter by 1994. But the Spanish EIA legislation was not modified as a result of which the ECJ convicted Spain in 2002.[8]

Practical application has not been effective either. Administrative changes have been limited. The EIA procedure was incorporated into the existing administrative procedures. Consequently, there has been a lack of sufficient manpower and expertise. Environmental authorities do not ensure the good quality of Environmental Impact Studies, which the promoter of a project has to provide (discussion of alternatives e.g.) Nor are the competent authorities investing the necessary resources to ensure the adequate assessment of the Environmental Impact

Studies and the enforcement corrective measures. As a result, most solicited projects receive a positive EIA, and many still proceed without any authorization, or only ask for it when they are already implemented. Local authorities, in charge of monitoring, often cover up for this 'circumvention' of authorization procedures in order to avoid socio-economic disadvantages.

Domestic actors have been mobilizing against the ineffective application of the EIA Directive trying to pressure public authorities into compliance. Yet, like in case of the AI Directive, Spanish individuals, groups and firms have not resorted to courts in order to enforce their rights. There is only one case, in which the *Coordinadora de Itoiz*, a coalition of environmental activists and citizen groups, invoked the EIA Directive in a law suit against the construction of a major dam in the Basque Country.[9] While the Spanish Supreme Court confirmed the favorable ruling obtained by the *Coordinadora* from the lower court,[10] the construction of the dam went ahead. In 1999, the Ministry of the Environment approved the Environmental Impact Declaration. When it became clear that legal action was futile, the environmental activists started to resort to political means, including more radical actions of civil disobedience, which delayed the constructions works by over a year.

The domestic mobilization against the Itoiz Dam is truly exceptional. Spanish individuals and groups have generally employed moderate political strategies to promote the enforcement of the EIA Directive. For instance, denouncements and petitions made to the Spanish parliament with respect to infringements of the EIA regulations account for about 30% of the total number in the environmental sector (cf. Börzel, 2000). Together with the Habitat and the Wild Bird Directive, the EIA Directive also represents the highest number of Spanish complaints to the European Commission, which makes Spain one of the top laggards among the member states regarding the effective implementation of the EIA (Commission of the European Communities, 1996). Unlike in case of the AI Directive, the Commission has been more responsive to Spanish complaints and opened altogether four infringement proceedings against Spain for the incorrect application of the EIA Directive,[11] one of which resulted in a conviction by the ECJ in 2004.[12] Protest activities have largely focused on the national and EU level. Domestic mobilization on the grounds, by contrast, has been limited. Individuals and groups simply lack the necessary manpower, expertise, and money to oppose the non-application of EIA regulations such as a cross-media assessment of the potential environmental impact or the elaboration of corrective

measures. As a result, domestic mobilization has been confined to a relatively small number of issues which seriously affect the 'backyard' of a large group of people at the local level. Moreover, it has not involved legal action. Rather, environmental organizations and citizen groups, often in coalition with local governments, seek to mobilize the public to exert political pressure on public authorities responsible for the licensing of projects.

German authorities have been equally reluctant to comply with the EIA Directive. The highly sectorized German legislation does not fit the integrated, cross-media approach of the EIA Directive. Nevertheless, German administrators have considered the transposition of the Directive unnecessary claiming that existing legislation already covered all the provisions of the Directive and even went beyond some requirements. When the German government delayed the transposition of the EIA Directive, German environmental organizations and citizens immediately started to mobilize. Next to launching a series of complaints to the European Commission, they filed several court cases trying to invoke the direct effect of the EIA Directive, i.e. demanding an environmental impact assessment for the authorization Annex I projects despite the lack of a national law implementing the EIA Directive in Germany.[13] The combined legal pressure from German environmental organizations and the European Commission, which had opened infringement proceedings under Article 226, led the German government to finally enact an EIA law in 1990, two years after the transposition deadline had expired. Yet, legal implementation was still incomplete as more than one third of the Annex II projects were omitted. Upon continuing complaints of German environmental organizations, the Commission opened infringement proceedings for the incomplete transposition of the Directive in 1990. The German law also exempted projects from an EIA, if they had been publicly announced before its enactment in 1990. When Bavarian authorities licensed the construction of two new sections of motorway in Bavaria in 1991 without EIA, the *Bund Naturschutz in Bayern*, one of the larger environmental organizations in Germany, appealed this provision before the Bavarian Administrative Court. The Bavarian Court referred the case to the European Court of Justice under the Art. 234 ECT preliminary ruling procedure.[14] The ECJ confirmed the direct effect of the EIA Directive.[15] Again, the combined legal pressure from "below" (litigation of German environmental groups) and "above" (ECJ ruling) helped to advance the enforcement of the EIA Directive in Germany, even though it took another five years to bring Germany in full legal

compliance with EU regulations and practical application is still deficient. As result, domestic mobilization has continued. Directly affected individuals have organized themselves in local citizen groups (*Bürgerinitiativen*). But like in Spain, they have often not sufficient staff-power, expertise, and money to systematically appeal against the deficient application of EIA regulations. Moreover, German jurisdiction tends to support the restrictive interpretation of the EIA followed by the public administration in the practical application of the Directive (cf. Heinelt, Malek, Staeck, Töller, 2001). Nevertheless, legal action continues, and albeit scatchy slowly moves Germany toward a more effective implementation of the EIA Directive.

To sum up, while domestic litigation has played a prominent, albeit not always successful role in the attempt of German individuals, groups and firms to enforce the AI and EIA Directives in Germany, Spanish citizens and environmental organizations have hardly ever made use of their increased opportunities for participation through EU law enforcement. The comparative case study reveals an important dilemma of the EU's decentralized enforcement mechanisms. While litigation before national courts provides an important lever of participation through EU law enforcement, it is mostly the (German) "haves" rather than the (Spanish) "have nots" that have been able to make use of these legal opportunities. This is particularly problematic in those member states, where non-compliance abounds while individuals and groups have only limited resources to push their EU rights against the resistance of public authorities. Figure 3 contains member state non-compliance rates in the area of EU environmental law between 1979 and 1999. As the distribution of infringement proceedings across the member states indicates, non-compliance with EU environmental law is most pronounced in the southern member states (Italy, Greece, Portugal, Spain). At the same time, their closed domestic opportunity structures seriously constrain the capacity of societal actors to mobilize in favour of compliance. While the need for enforcement in the southern member states is higher than in the North, the prospects of citizens and groups litigating their governments into compliance are lower.

-------- Figure 3 about here --------

CONCLUSION: COURTS AND THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL LAW

The decentralized enforcement of EU Law through litigation before national courts offers an important lesson for students interested in the transformative effects of expanded judicial

power on democracy. The EU's legal compliance system gives significant review power and jurisdiction to the European Commission and the ECJ over more the thousands of formal, sufficiently precise and judicially enforceable norms and rules that make up the body of EU Law. Moreover, the supremacy and the direct effect of EU Law provide citizens and groups with the opportunity to litigate in order to get their EU rights enforced against the resistance of their governments. Thus, the EU's legal compliance system has led to increased opportunities for participation through law enforcement as predicted by hypotheses 1 and 2 of the introduction to this Special Issue. However, the study on the implementation of EU environmental law in Germany and Spain also provides supporting evidence for the third hypothesis: The EU's legal institutions only increase opportunities for participation for those individuals and groups who possess court access and sufficient resources to use it. In other words, it is mostly the "haves" who benefit – those actors that already command considerable resources that enable to them to broadly participate in political and legal processes, like German citizens and environmental groups, or that are supported by domestic institutions, such as the Equal Opportunities Commissions in Britain and Northern Ireland, which assist working women and women rights groups in litigating for their EU rights (Caporaso, Jupille, 2001). Actors poor of organizational and resources capacities, by contrast, such as Spanish environmental groups or third country nationals seeking to obtain social rights in the Single Market (Givens, Luedtke, 2003), so far stand little chance to benefit from the increased opportunities for participation through EU law enforcement.

Citizens and groups should not be treated as if they were equally endowed with the resources necessary to exploit the opportunities offered by the expansion of judicial power in international and domestic politics. As a result, the transformative effects of courts on democracy and participation may be less pervasive as expected. They are at least mitigated by domestic opportunity structures that determine to a large degree the extent to which citizens and groups benefit from increased opportunities for participation through law enforcement, rights claiming and expanded protection.

If international and regional legal institutions tend to empower the already powerful, they face a serious dilemma: they are least effective in states where they are most needed, i.e. in states with a poor compliance record and close opportunity structures for participation in political and

legal processes. If one accepts that non-compliance with International Law and closed opportunity structures are in many cases linked to the same cause, namely a comparatively low level of socio-economic development (resulting from both late industrialization and democratization), the international legal institutions and courts will do little to enhance either the effectiveness (through improving compliance) or the legitimacy (through democratic participation) of International Law by providing increased opportunities for participation.

Finally, the German case indicates that even if individuals, groups and firms are able to make use of increased opportunities for participation through law enforcement, this does not necessarily result in policy change (Rosenberg 1991; Conant 2002). While German citizens and environmental groups have repeatedly resorted to domestic litigation for the enforcement of their rights under the AI and the EIA Directives, German courts have not always been inclined to apply EU Law to their advantage – particularly if the enforcement of EU laws and ECJ rulings would impose substantial changes in German law and administrative practices, e.g. by broadening citizens' participatory rights in public decision-making.

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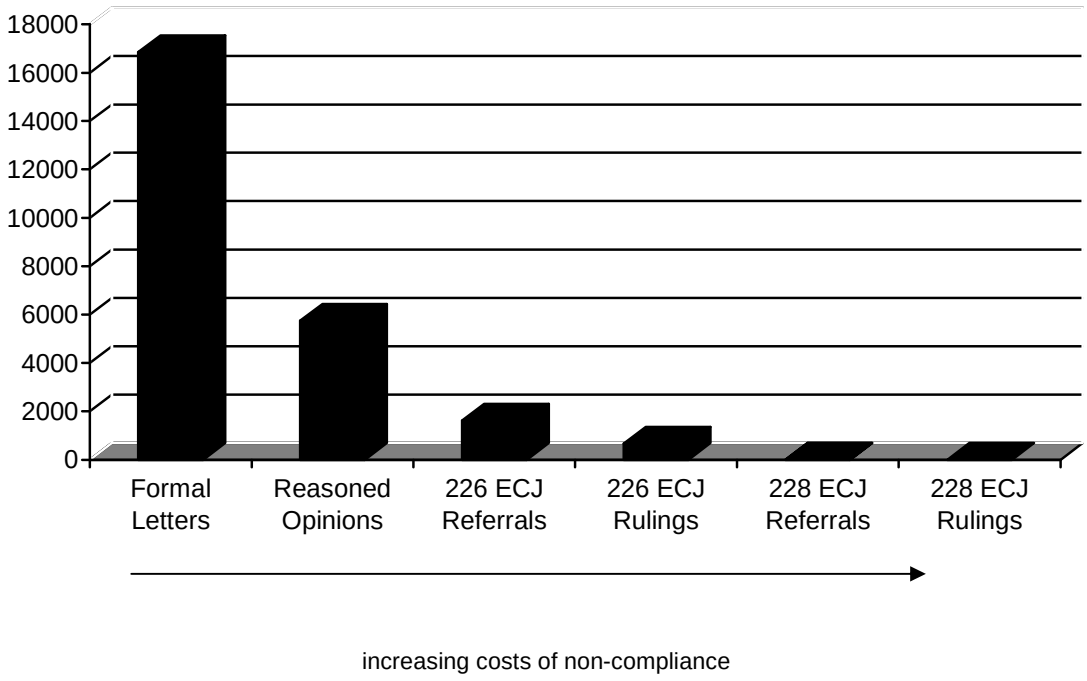
TABLE 1 ***NUMBER OF LAW SUITS FILED BY CITIZENS, GROUPS AND FIRMS AGAINST THE INEFFECTIVE ENFORCEMENT OF THE AI AND EIA DIRECTIVES IN GERMANY AND SPAIN***

	Access to Information	Environmental Impact Assessment
Germany	8[16] (incl. two Art. 234)	13[17] (incl. one Art. 234)
Spain	1[18]	1[19]

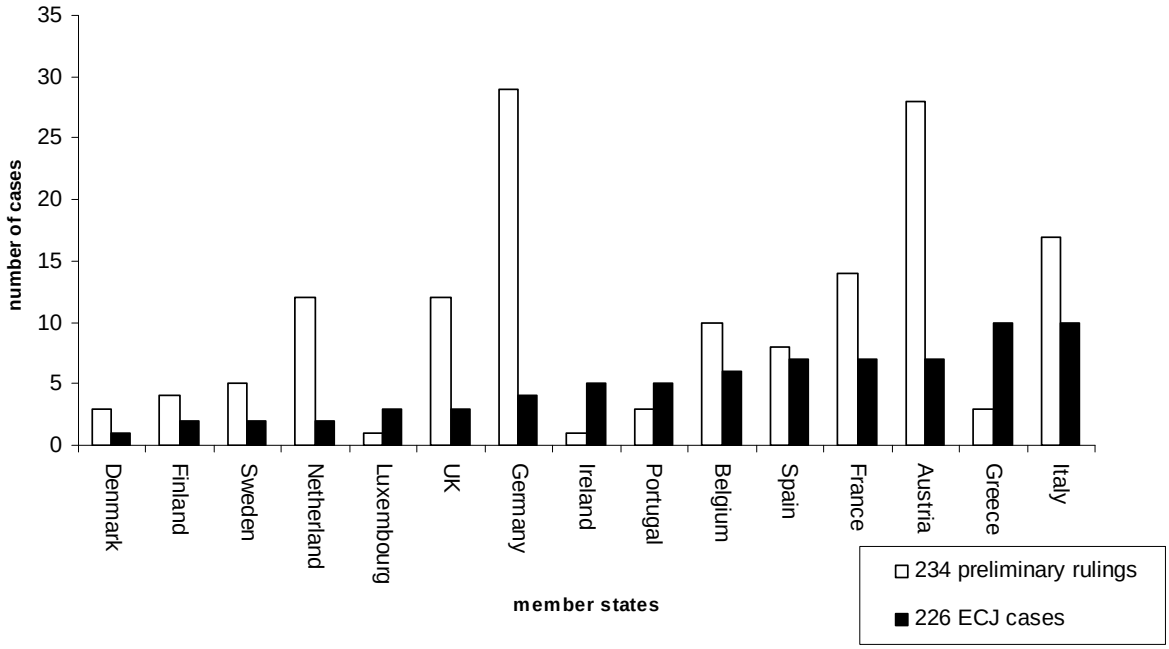
Source: http://193.191.217.21/en/home_en.html, accessed August 8, 2005.

FIGURE 1 ***NUMBER OF ART. 226 INFRINGEMENTS BY STAGES OF THE PROCEEDINGS, 1978-99***



Source: Commission of the European Communities, 2000; EUI Database on Member State Compliance with Community Law http://www.iue.it/RSCAS/Research/Tools/, accessed April 8, 2005.

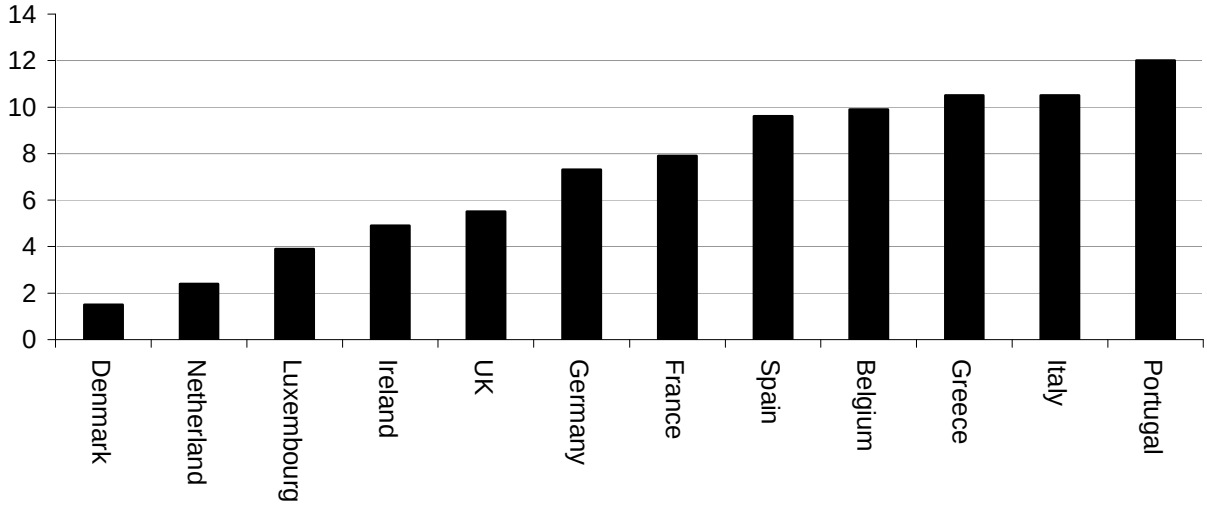
FIGURE 2: ***ART. 234 PRELIMINARY RULING CASES AND ART. 226 NON-COMPLIANCE CASES BEFORE THE EUROPEAN COURT OF JUSTICE BY MEMBER STATE, 1952-2003***



Note: The data are standardized to account for varying accession dates to the EU. Member state totals are equal to the total number of ECJ cases divided by the years of membership in the EU. This is calculated for each of the different types of cases. Preliminary Ruling Cases are those brought under Art. 234 EC (N = 5044). Non-Compliance cases are brought under Art. 226 EC (N = 2304).

Source: European Court of Justice, Annual Report 2003, http://www.curia.eu.int, accessed April 8, 2005. .

FIGURE 3: ***CASES OF NON-COMPLIANCE WITH EU ENVIRONMENTAL LAW FOR WHICH THE COMMISSION SENT A REASONED OPINION BY MEMBER STATE, 1979-99***



Note: Non-compliance is measured by the average number of Art. 226 infringement proceedings opened officially (reasoned opinions sent) against the member states between 1979 and 1999 (N = 144). The data are standardized to account for varying accession dates to the EU. Member state totals are equal to the total number of ECJ cases divided by the years of membership in the EU.

Source: www.iue.it/RSCAS/Research/Tools/, accessed April 10, 2005; Commission of the European Communities, 2000.

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[1] ECJ *Costa*, C-6/64.

[2] ECJ *Van Gend en Loos*, C-26/62.

[3] 90/313/EEC, OJ L 158, 23.6.1990.

[4] Infringement Nr. 1993/2197 and 1995/4678.

[5] *Sentencia 106/91 de la Audiencia Nacional de 30 de junio de 1993.*

[6] See *Verwaltungsgericht Stade, 7. Kammer Lüneburg, Urteil vom 21.4.1993, 7A 79/92.*

[7] 85/337/EEC, OJ L 175, 5.7.1995.

[8] C-474/99, 13.6.2002

[9] *Sentencia del Tribunal Superior de Justicia de Madrid de 30 de Junio de 1997.*

[10] *Sentencia del Tribunal Supremo de 17 de Noviembre de 1998.*

[11] Infringement Nr. 1996/4361, 1997/4442, 1999/4495.

[12] C-227/01, 16.9.2004.

[13] See *Verwaltungsgerichtshof Bayern, Urteil vom 24.8.1990, 8 A 89/40037; Bundesverwaltungsgericht, Beschluss vom 5.6.1992; 4 NB 21/92; Hamburgisches Oberverwaltungsgericht, Beschluss vom 5.6.1992, BS II 103/91 P; Verwaltungsgerichtshof Baden-Württemberg, Urteil vom 7.8.1992, 5 S 2378/91; Verwaltungsgerichtshof Baden-Württemberg, Urteil vom 11.6.1993, 8 S 1995/92.*

[14] *Verwaltungsgerichtshof Bayern, Vorlagebeschluss vom 5.11.1992, 8 A 92.40017, 8 A 92.40019, 8 A 92.40061, 8 A 92.40062, 8 A 92.40066, 8 A 92.0068.*

[15] C-396/92, 9.8.1994.

[16] *Verwaltungsgericht Stade, Urteil vom 21.4.1993, 7A 79/92;*
Oberverwaltungsgericht Nordrhein-Westfalen, Urteil vom 27.9.1993, 21 A;
Verwaltungsgericht München, Urteil vom 26.9.1995, M 16 K 93;
Oberverwaltungsgericht Schleswig-Holstein, Urteil vom 10.7.1996, 4 L 222/95 (Art. 234 preliminary ruling C-321/96, 17.6.1998);
Bundesverwaltungsgericht, Urteil vom 6.12.1996, 7 C 64/95;
Bundesverwaltungsgericht, Urteil vom 28.10.1999, 7 C 32/98;
Oberverwaltungsgericht Nordrhein-Westfalen, Urteil vom 28.7.1997, 21 A 4985/94 (Art. 234 preliminary ruling C-296/97, 7.10.1998);
Bundesverwaltungsgericht, Urteil vom 27.3.2000, 7 C 25/98.

[17] *Verwaltungsgerichtshof Bayern, Urteil vom 24.8.1990, 8 A 89/40037;*
Bundesverwaltungsgericht, Beschluss vom 5.6.1992; 4 NB 21/92;
Hamburgisches Oberverwaltungsgericht, Beschluss vom 5.6.1992, BS II 103/91 P;
Verwaltungsgerichtshof Baden-Württemberg, Urteil vom 7.8.1992, 5 S 2378/91;
Verwaltungsgerichtshof Bayern, Vorlagebeschluss vom 5.11.1992, 8 A 92.40017, 8 A 92.40019, 8 A 92.40061, 8 A 92.40062, 8 A 92.40066, 8 A 92.0068 (Art. 234 preliminary ruling C-396/92;
Verwaltungsgerichtshof München, Urteil vom 26.1.1993, 8 A 92/40143;
Verwaltungsgerichtshof Baden-Württemberg, Urteil vom 11.6.1993, 8 S 1995/92;
Bundesverwaltungsgericht, Beschluss vom 18.5.1994, 4 NB 15/94;
Bundesverwaltungsgericht, Beschluss vom 25.1.1996, 4 C 5/95;
Bundesverwaltungsgericht, Beschluss vom 23.4.1996, 11 B 96/95;
Bundesverwaltungsgericht, Urteil vom 14.5.1997, 11 A 43/96;
Bundesverwaltungsgericht, Urteil vom 22.9.1997, 4 B 147/97;
Bundesverfassungsgericht, Beschluss vom 11.6.2003, 1 BvR 1796/02.

[18] *Sentencia 106/91 de la Audiencia Nacional de 30 de junio de 1993.*

[19] *Sentencia del Tribunal Supremo de 17 de Noviembre de 1998.*