First Draft – Comments Most Welcome!

Why Big States Cannot Do What They Want. International Courts and Compliance

Diana Panke, Free University Berlin
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Author:
Diana Panke, M.A.
Research Associate
Center of European Integration
Otto-Suhr-Institute for Political Science
Free University of Berlin
Ihnestr. 22
D-14195 Berlin

Email: panke@zedat.fu-berlin
http://www.fu-berlin.de/europa

I Introduction

The legalization literature stresses the importance of delegating competencies to independent judicial authorities in order to restore states' compliance with international law. The European Court of Justice (ECJ) is highly legalized. An empirical analysis of the judgments reveals that more often than not, member states comply with ECJ's rulings (see part II of the paper). Yet, is this really good news for compliance? The ECJ could as well be an agent of big states, while small states lack the power to resist the court.

In analysing big states, part III of the paper theoretically and empirically shows that powerful countries like Germany, France or Great Britain cannot escape ECJ rulings. Equally important, powerful states do not influence the contents of ECJ rulings to a higher extent than weak states. Moreover, financial penalties for continued non-compliance with European law do not matter for weak more than for powerful states. Thus, highly legalized international courts truly mitigate power asymmetries between states. Instruments operating on the basis of states' power resources, (bargaining power, power of recalcitrance, or financial power), have not proofed to be effective in inducing compliance. But why are big states as compliant with ECJ rulings as small states?

In the fourth part, this paper argues that judicial discourses rather than power politics are crucial for whether compliance is restored or not. Yet, an empirical analysis reveals that not every judicial discourse solves compliance problems within the European Union. This paper advances the theoretical claim that the effectiveness of judicial discourses in restoring compliance strongly depends on the interpretational problem at hand and its fit to the applied judicial heuristic. When the fit between both is high, a judicial discourse is an effective mechanism for restoring compliance with and, thereby, increasing the effectiveness of law beyond the nation-state.

In the fifth and final part, a comparative case study on two infringement cases regarding the incorrect legal transposition of two EU social policy directives in the UK illustrates the differential impact of judicial discourses on compliance with EU Law. While the judicial discourse was effective in restoring compliance in one case, it failed in the other. Yet, this was not due to the power of the UK, but rather to the very restrictive scope conditions for the success of judicial discourses.

The paper concludes with an outlook on ideal scope conditions for two rival accounts of international relations: the idealist power of the law and the realist might of the strongest.

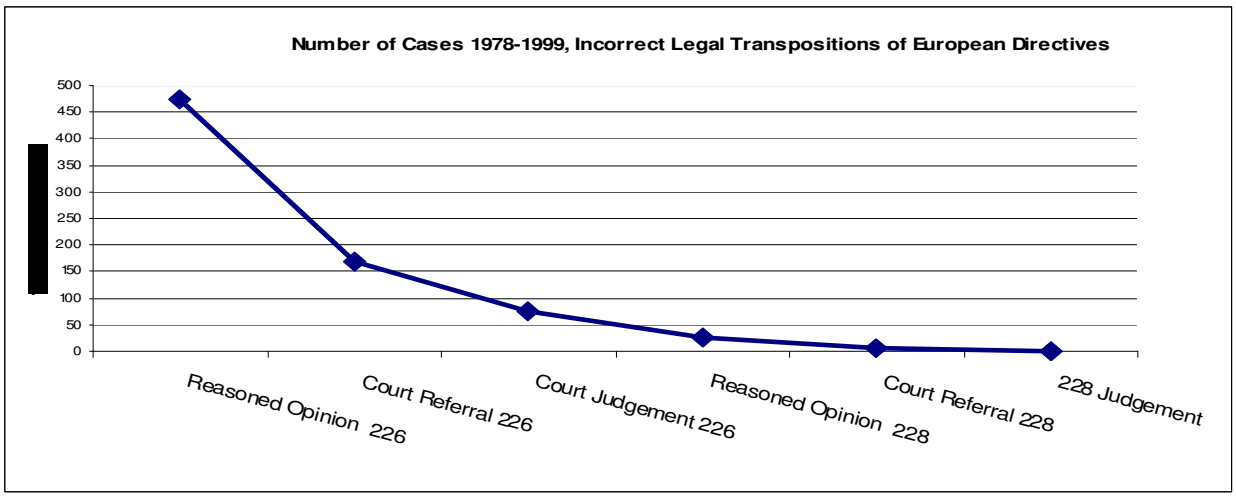
II. Legalisation matters!

Legalization approaches focus on the role of legal institutions (such as hard vs soft law, monitoring institutions, dispute settlement procedures, etc.) in inducing or restoring compliance with law beyond the nation state (Lutz and Sikkink 2000, Smith 2000, Peters 2003, Abbott 2000, Abbott et al. 2000, Keohane, Moravcsik and Slaughter 2000, Goldstein et al. 2000). Informed by neoliberal theory, legalization approaches regard the free-rider problem as central obstacle for international institutionalized cooperation. While some states comply with law beyond the nation-state, others profit from the effects of an international norm, without themselves bearing compliance-costs. In order to prevent non-compliance, legalisation approaches point to hard law with high obligation and precision (Abbott et al. 2000: 408-412; Goldstein et al. 2000: 386-7) and to institutional transparency-creating mechanisms such as centralised or decentralised monitoring systems (Mitchell 1996: 17-20, Smith 2000: 139-140). Yet, empirical insights show that non-compliance cannot be completely prevented. Hence, legalization approaches focus on the importance of infringement and dispute settlement procedures. Infringement procedures are highly legalized, if third parties (instead states only) have the right to fill complaints (Reinhardt 2001, Keohane, Moravcsik and Slaughter 2000: 460), if dispute settlement is obligatory and not voluntary (Busch 2003a, Busch 2003b, Busch and Reinhardt 2000, Garrett and Smith 2002, Kelemen 2001, Steinberg 2002), if third parties can issue binding rulings (Abbott et al. 2000: 401-416, Zangl 2001, Smith 2000: 142-143), and if the independence of third parties is high (e.g. tenure, payment) (Keohane, Moravcsik and Slaughter 2000: 461-462).

According to the criteria discussed above, the European Union's (EU) infringement proceeding is highly legalized. Nevertheless, unlike states, the European Union lacks a legitimate monopoly to recur to the use of force as a last resource for restoring compliance. In the EU, implementation and enforcement of European law firmly rests within the responsibility of the member states, while the European Union has subsequently expanded its legislative competencies. 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 highly ambivalent 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 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). If the European Commission as guardian of the treaty suspects a member state of violating EU law, it 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 'management phase', in which the European Commission and the respective government informally discuss the case. If the Commission maintains its accusation of failed or incomplete domestic change, it 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 thereby 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 social policy and environmental directives into national legal acts between 1978 and 1999[1]



[1] The data stem from the Annual Reports of the European Commission.

Empirical insights on the incomplete legal transposition of social policy and environmental policy directives into the national law of the twelve oldest EU member states reveal that the number of cases decreases over the stages (figure 1, similar for all EC directives see Mendrinou 1996: 4-6). Is this good news for compliance?

Firstly, the empirical data at hand reveal that the institutional design of EU infringement proceedings makes a difference. It allows transforming instances of non-compliance with EU law into compliance. Already between the first and second stage of the EU infringement proceeding, the number of open cases drops by more than 50 percent. This can be explained by extending time horizons for legal implementation, capacity building measures and interactions allowing for the clarification of the obligatory elements of the norm at hand (Chayes and Handler-Chayes 1993, Börzel, Hofmann and Panke 2005).

Secondly, sooner or later all open infringement cases are closed. In each subsequent stage of the infringement proceeding, the number of open cases drops. The last stage, ECJ judgments imposing financial penalties on non-compliant states has been reached seldom (see IV). Although it can take several years (in some cases more than 15) until a state finally complies with EU law, in the end states completely legally transpose EU directives into national law.

Yet, does this tell us anything on prospects of restoring compliance with law beyond the nation state? One should be cautious in drawing conclusion based on aggregate data. Obviously legalization matters – but it could well be the case that legalization matters more for some states than for others. Powerful states as opposed to small states could be less often infringed upon. Cases concerning big states could be less often referred to the ECJ. The ECJ could less often issue rulings against these states, and the content of ECJ rulings could be more favorable for strong than for weak states. Finally, financial penalties could deter weak states more than strong states.

The next step examines differences in prospects for restoring compliance within the EU between member states. Although less than 50 percent of all opened infringements are referred to the European Court of Justice, for two reasons this paper focuses on the role of the ECJ and consequently only on cases referred to the Court (based on Article 226 ECT). Firstly, all cases referred to the ECJ have in common that states' resistance to compliance with law beyond the nation-state is very strong, since a consensus or compromise regarding the interpretation of the disputed norm would have emerged during the management phase otherwise. In this sense, all cases transferred to the ECJ are least likely cases for future domestic change. Secondly, compliance with EU law is a precondition for its effectiveness. Only when Euro-

pean 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 cooperation beyond the nation state. Since the effectiveness of European law is most severely restricted, when member states' non-compliance prevails for a long time, this paper focuses on cases carried to the adjudication stage. It examines the role of the ECJ in inducing domestic changes against rigid state's interest.

III. Does Legalization Matter for All States? OR: Does Realism Strike Back?

The competition between idealism and realism is never completely off the table in International Relations. The current trend of increasing hard law and strengthening dispute settlement procedures (e.g. the new WTO/ GATT) reflects the idealist proposition of the power of the law (as a means for ensuring peace between states). Although most of the states obey most of international law most of the time, non-compliance occurs (Henkin 1968). This might indicate that realism is not outdated since the power of the strongest could prevail over the might of the law.

Enforcement theories heavily draw on realist assumptions. Accordingly, states are important strategic rational actors in international relations, in which there is no ultimate arbiter with a legitimate monopoly of force to facilitate compliance (Morgenthau 1948; Mearsheimer 1994, Waltz 1959, Waltz 1979). In line with rationalist action theoretical foundations, states' substantial policy interests are assumed as exogenous to interactions, while they are capable of adjusting preferences over strategies to changes in the external context. Consequently, enforcement approaches claim that non-compliance with law beyond the nation-state is due to rising compliance costs (e.g. from the differences between substantial policy interests or domestic legal acts on the one hand, and international norms on the other hand; for misfit arguments see Börzel and Risse 2003) combined with states' lack of willingness to bear these costs (Martin 1992b, Martin and Simmons 1998; Downs, Rocke and Barsoom 1996; Downs 1998). Yet, non-compliance can be transformed into compliance, when external cost-imposing constraints for non-compliance rise (and, in turn, the benefits for non-compliance decline) and induce adaptations of states' strategic preferences from non-compliance into compliance.

The literature on international cooperation theorizes various pathways of how external constraints can prevent the prevalence of non-compliance. Neo-realists highlight how he-

gemons ensure compliance in deterring weaker states (Fearon 1998, Kindleberger 1973, Gilpin 1981: 210, Keohane and Nye 1977: 44), while neoliberal institutionalists emphasize institutionalized monitoring mechanisms and dispute settlement and sanctioning procedures (Keohane 1989, Keohane and Nye 1989, Powell 1994, Victor, Raustiala and Skolnikoff 1998). Especially highly legalized international institutions increase the transparency and render non-compliance less attractive, because they induce external non-compliance costs such as centralized penalties (EU and WTO) or coordinated sanctions (UNO, IMF) (c.f. Abbott et al. 2000: 415-418, Goldstein et al. 2000: 401, Kahler 2000: 663, Keohane, Moravcsik and Slaughter 2000: 457- 462).

Due to its high degree of legalization, neoliberal institutionalism is better suited as a starting point for theorizing external cost-imposing constraints within the EU than actor-centered theories of hegemonic cooperation. While legalization approaches cannot account for differences in compliance and non-compliance records of states, but only explain variation over stages (see table 1)[2] or variation concerning different international organizations (e.g. between the EU and the WTO, Zangl 2001), enforcement approaches are on a lower stage of the ladder of abstraction. They content that states differ in their power, and assume that power differences are crucial for dynamics of adapting preferences over strategies to external constraints and for choices in strategies available for safeguarding national substantial policy interests. Accordingly, enforcement approaches provide for two basic propositions. Firstly, powerful states (in contrast to weak states) are less sensitive to rising costly external constraints than weak states, because they are less vulnerable in political or economic terms. Ceteris paribus, strong states do not easily shy away from the shadow of rising external cost (Martin 1992a). Secondly, compared to weak states, powerful states are better equipped in deterring international actors responsible for compliance-monitoring and sanctions from opening infringements, issuing rulings, or threatening with financial penalties (Hurne and Cutlip 2002: 301, Reiss 1984). Consequently, enforcement approaches suggest answering the following three questions in the positive:

[2] The respective hypothesis would state: The more likely of a court judgment and financial penalties (based on Article 228 ECT) become, the higher are the prospects that states transform non-compliance into compliance. Hence, we would expect that the number of open cases declines over the stages of the EU infringement process. As figure 1 reveals, this is indeed the case. Yet, the curve cannot be counted as confirmation of the legalist enforcement branch, because management approaches as an alternative prominent theory, could likewise explain the decline of cases. Management theory assumes that non-compliance is involuntary and caused by misunderstandings as regards the aim and scope of norms, to strict transposition time-tables, or insufficient administrative or political capacities for compliance (Chayes and Handler-Chayes 1991). Accordingly, management approaches would argue that cases are settled as time passes by, because ambiguities of norms are solved in interactions, capacity-building and policy learning can take place and there is additional time for transpositions (Chayes and Handler-Chayes 1993).

a) Do powerful states deter the ECJ from rulings stronger than small states?
b) Do powerful states influence the content of ECJ rulings stronger than small states?
c) Does the threat of financial penalties deter weak states rather than powerful states?

This paper abstains from applying quantitative regression analysis as method for testing the explanatory value of the above hypotheses, because the number of ECJ referrals in the data set on the incorrect legal transposition of EC environment and social policy directives in the twelve oldest member states from 1978-1999 is very low for the adjudication stage (n= 143). Rather, this paper applies a combination of correlation based analysis and qualitative process tracing case studies (the directives are selected based on the most different systems design) of a (most likely) outlier state in order to provide a plausibility probe for the advanced claims.

Within a highly institutionalised and legalised setting such as the European Union, power resources of states are either economic or political in character, but not military. Economic strength is often measured by the GDP. Economic capacities might serve as a power resource, since they influence the financial vulnerability of states on the one hand, and quantity and quality of alternative actions (e.g. unilateral) to future institutionalised cooperation within the EU on the other hand. Within the EU political power of states is most likely exerted in the Council of Minister. Hence, the number of votes a state has in the Council provides a proxy for its political strength. As regards political and economic power differences, the twelve oldest EU member states constitute the following groups (see appendix 1): Germany, France, Italy and the UK are powerful states; Denmark, Ireland, Luxembourg and Portugal are weak states, while the remaining states (Belgium, Spain, Greece, the Netherlands) form an intermediate group.

Do powerful states deter the ECJ from rulings stronger than small states?

The deterrence branch of enforcement theory expects that powerful rather than weak states successfully deter actors such as the ECJ from issuing rulings, because they possess bargaining power to threat the ECJ in its role and competencies in the longer run (Hurne and Cutlip 2002). If strong member states would indeed pre-empt ECJ rulings after the European Commission already referred the case to the Court, we would expect that powerful states have a much higher share of withdrawal cases (cases are settled without ECJ rulings) as compared to weak states. A glance on the data, however, reveals that this is not the case. Rather the opposite is true: strong states such as Germany, France, Italy and the UK reveal an under proportional share of withdrawal cases (14-32 %). Weak states, by contrast, reveal a considerably

higher share (70-80% of all cases, with the outlier of Portugal) of withdrawals than the average of 40%. These correlations do not support the enforcement hypothesis.

Table 1: Number and percentage of withdrawals after ECJ referrals based on Article 226 ECT[3]

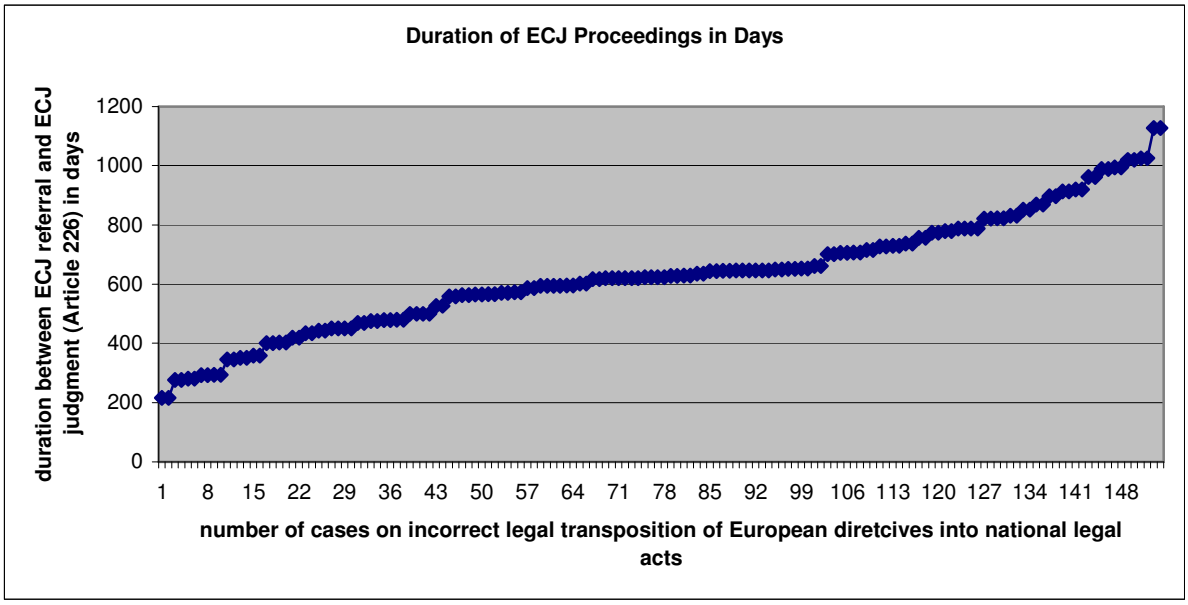
State	number of ECJ referrals	number of withdrawals	percentage of withdrawals
B	26	9	34,62
D	31	5	16,13
DK	4	3	75,00
E	8	0	0,00
EL	10	5	50,00
F	19	6	31,58
I	15	3	20,00
IR	4	3	75,00
L	6	5	83,33
NL	7	5	71,43
P	6	1	16,67
UK	7	1	14,29

An alternative operationalization of the deterrence branch of enforcement theories focuses on the time judicial proceedings take before the Court issues rulings (based on Article 226 ECT). For cases referred to the ECJ, substantial policy interests and strategic positions of states are rigid and point towards non-compliance (the case would most likely have been settled in earlier stages otherwise). As a consequence, legal transpositions of European directives go hand in hand with costs for governments. Delaying ECJ rulings could be worthwhile for non-compliant states. The longer they can maintain their compliance adverse legal landscape, the more domestic compliance costs can be avoided (in continuing free riding). If powerful rather than weak states were able to deter the ECJ, we would expect that the ECJ proceedings take longer before the ECJ finally issues rulings. On average, it takes about 620 days from an ECJ referral to the ECJ ruling based on Article 226. The enforcement hypothesis would find confirmation, if the average duration of Court proceedings is higher for powerful than for weak states. The average duration for ECJ cases is 750 days for Germany (including two outliers with more than 1000 days), 660 days for the UK, 590 days for France, and 530 days for Italy. While Germany is line with the expectation of the deterrence hypothesis, UK, France and Italy are very close to the average time (or even below). As regards the group of weak states, Ireland is an outlier with more than 1000 days and Denmark is close to the average (560 days). Luxembourg (450 days) and Portugal (470 days) are clearly below the average of 620

[3] The dataset contains all cases of incorrect domestic legal transposition of European social policy and environmental directives into national legal acts between 1978 and 1999 for the oldest 12 member states. The data are from the annual reports of the European Commission.

days. Taken together, the results are mixed; Germany, Luxembourg and Portugal are the only states that are in line with the deterrence hypothesis, while the average duration of cases in UK, France and Italy is shorter than expected and longer than expected for Ireland and Denmark. Since there are more outliers than 'regular' cases (especially if one would disregard the two outlier cases for Germany), the deterrence hypothesis is not confirmed.

Figure 2: Average duration of ECJ proceedings from the referral to the judgement (Article 226)[4]



Do powerful states influence the content of ECJ rulings stronger than small states?

Although there is no empirical evidence that powerful states succeed in deterring the ECJ from issuing rulings more often than weak states, this branch of the enforcement theory is not necessarily falsified. It could well be the case that powerful states successfully deter the ECJ, but that the ECJ reacts in issuing state-friendly rulings rather than in dropping cases with withdrawals. If powerful member states successfully deterred the ECJ, ECJ rulings would acknowledge the claims advanced by the respective governments and dismiss the positions of the European Commission. An analysis of the ECJ judgments of the data set, however, indicates that the ECJ almost never sides with the states (there is only one exception, Italy won the case number 1980/0130 on the incorrect legal transposition of the equal treatment directive (76/207)). As for the first operationalization, the deterrence branch of enforcement approaches is not confirmed by the correlations. Yet, the number of cases in with states loose before the ECJ can only serve as a first proxy. It could be the case that strong states success-

[4] The dataset contains all cases of incorrect domestic legal transposition of European social policy and environmental directives into national legal acts between 1978 and 1999 for the oldest 12 member states. The data are from the annual reports of the European Commission.

fully deter the ECJ in regard to some issues at stake, but not for all. The case studies in the next paragraph examine in detail whether strong states (rather than weak states) succeed in deterring the ECJ and influencing the content of judgments in their own favour.

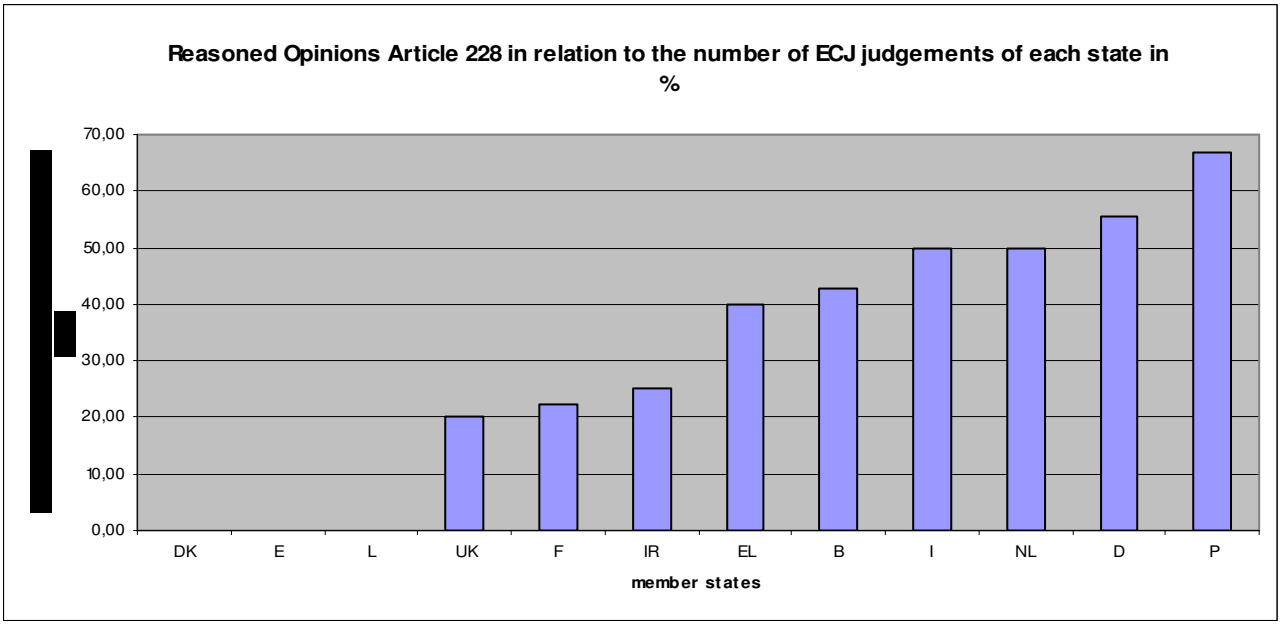
Does the threat of financial penalties deter weak states rather than powerful states?

The recalcitrance hypothesis expects that powerful states are less sensitive to rising external compliance costs than weak states. If non-compliance prevails after the first ECJ ruling (based on Article 226 ECT, the European Commission can issue a second reasoned opinion (based on Article 228) in the EU infringement procedure. At the end of this second procedure, the ECJ can impose financial penalties for non-compliant states. The enforcement approach would expect that smaller states shy away from the financial penalties, while powerful states can afford rising non-compliance costs and continue non-compliance. So far, however, the compliance instrument of financial penalties has rarely been used. Only Greece (C-1991/045 on the environmental directive 1975L0442; 1978L0319 in 2000) was penalised based on Article 228 regarding incomplete legal transposition of environmental or social policy directives. The number of instances of ECJ 228 rulings is too small for inferences. We cannot conclude that less powerful states are more likely to be convicted, while powerful states shy away form 228 rulings.

A second operationalisation of the recalcitrance hypothesis is more promising. It starts from the consideration that the threat of financial penalties already increases after the second reasoned opinion of the European Commission. Therefore, the recalcitrance hypothesis would expect that weak states shy away from RO 228 and comply more often with ECJ 226 judgments than powerful states, which can more easily afford to be reluctant to the costs of a second infringement proceeding. A glance in the percentage of RO228 of each state in relation to its number of ECJ judgements reveals a mixed record. While the percentage of RO 228 cases is relatively high for Germany (more than 50% of all ECJ judgments regarding incomplete legal adaptation of EU directives in the field of social policy and environmental policy between 1978 and 1999), it is relatively low for UK and France (~ 20%). The percentage of RO 228 of Germany is in line with our expectation. Yet, the UK and France are also powerful states. Consequently, the hypothesis would have expected a high share of RO 228 for these states, too. Other outliers are Portugal, the Netherlands, and Belgium, which reveal higher shares of RO 228 cases than expected from weak (Portugal) and medium strong states (the Netherlands and Belgium). The correlations indicate that weak states are not more easily de-

terred by a threat of financial penalties. Likewise, strong states are not more recalcitrant. Due to the high number of outlier cases and the low number of 'correct' predictions, the recalcitrance branch of the enforcement theory is not confirmed.

Figure 3: Percentage of RO 228 ECT per state and judgement[5]



IV. Explaining the Differential Impact of the European Court of Justice

The above discussion revealed that neither idealist nor realist accounts of IR adequately explain compliance dynamics within the EU. While legalization approaches emphasize the (idealist) power of the law, enforcement approaches highlight the might of the strongest. Yet, both theories cannot explain transformational dynamics of non-compliance into compliance within the EU infringement proceeding. Institutional legalization approaches cannot explain differences between states, while enforcement theories overstate the impact of power differences and reveal a low explanatory value.

Empirical data indicate (see table 1, figure 3) that big states are as compliant with ECJ rulings as small states. At the same time, however, there is variation regarding the impact of ECJ rulings. In some cases the ECJ restores compliance after its first ruling (based on Article 226 ECT), while in other cases the ECJ fails to be successful at that stage. In addition, in these cases the ECJ must threaten the respective state with a RO 228 (c.f. figure 3). How can we explain the (varying) impact of the ECJ?

[5] The dataset contains all cases of incorrect domestic legal transposition of European social policy and environmental directives into national legal acts between 1978 and 1999 for the oldest 12 member states. The data are from the annual reports of the European Commission.

After cases are referred to the ECJ, the European Advocate General and the Parties engage in a 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). The judicial discourse takes place in all cases referred to the ECJ. Yet, more often than not, the ECJ fails in talking states into compliance (see figures 1, 3). The application of the instrument 'judicial discourse' as such cannot explain whether it is successful in restoring compliance with EU law or not (Panke 2006). Therefore, it is necessary to develop a hypothesis that formulates conditions for the success of judicial discourses in restoring compliance. Why do judicial discourses sometimes facilitate compliance and sometimes fail to do so?

The ECJ is a highly legalized institutional arena (e.g. it is independent of the member states with regard to composition, tenure, payment, and terms of recall) and offsets differences in bargaining power of the states. In line with the empirical findings concerning (and disconfirming) the enforcement approach, the ECJ is not deterred in rulings against strong states (similar Abbott et al. 2000: 419; Keohane, Moravcsik and Slaughter 2000: 460). Interactions before the court are not characterized by bargaining dynamics (mutual threats). While arguments are considered as legitimate speech acts (Alexy 1983, Onuf 1989), bargaining is perceived as contextually inappropriate (interview ECJ #2). The highly legalized design of the ECJ is conducive to arguing. It is, therefore, not surprising that enforcement approaches (which all rest on the assumption that power differences matter for prospects of successful bargaining) revealed a low explanatory value (see III). However, the success of the judicial discourse varies (see shares of RO 228), which indicates that not every judicial argument is per se good and persuades states to comply with a European norm. Therefore, the crucial question is: What characterizes a good judicial argument? Or put differently: Which judicial arguments are likely to change states' compliance-adverse attitudes in order to promote compliance?

Judicial positivism claims that there is always one correct and authentic interpretation of a norm, which judicial reasoning has to uncover during adjudicational interactions. However, the 'true' interpretation of a norm is not just out there. Firstly, objectivism is prevented by the value laden character of judicial reasoning itself, stemming from the hierarchy of heuristics and the necessity of recurring to other values and norms of the legal document in systematic and teleological interpretations (Klare 1998, Rasmussen 1986, Wheeler Cook 1927). Secondly, subjectivity is introduced during the construction of the situation and the selection of relevant 'facts' (Brest 1982, Dewey 1924, Fiss 1982, Habermas 1998). Hence, contrary to

claims of judicial positivism, this paper assumes that judicial interpretation is a process of social construction (Dewey 1924, Fiss 1982, Habermas 1998). But how and under what conditions can consensual norm interpretations emerge during judicial discourses and when do they fail?

In general, with truth, rightness and appropriateness, there are three possible standards to assess the quality of arguments (Habermas 1995a). If actors share standards for the evaluation of communicated arguments, they can develop consensual perspectives, because they can commonly factor out good from less compelling ideas and finally arrive at a consensus (Panke 2002, Panke forthcoming 2006). The standard of truth encompasses epistemological and methodological principles and also ontological elements. Argumentative interactions, in which the quality of arguments can be measured based on standards of truth, are conducive to a consensual norm definition, when the actors share expertise on the subject matter. However, truth-related reasoning becomes meaningless, when there is no consensus of whether an effect reproduces or reinforces the norm, proper to its content and scope. Thus, a necessary but not sufficient condition for consensual norm funneling is the existence of a consensus on the purpose of a norm among the actors[6]. For incorrect transpositions of European directives, however, content and/or scope of the respective norm are most likely to be disputed. Yet, actors are not trapped in the dilemma that they can only develop a consensual norm definition when they consent on the purpose of a norm, while the very fact that the case has been carried on to the Court indicates that such a consensus is absent. The judicial discourse offers an expedient: It aims at the clarification of the content and scope of a disputed norm and thus of the standard of rightness itself. In order to identify and clarify a norm's content and scope, judicial methods of interpretation are applied (e.g. wording, systematic or teleological heuristics) and can serve as additional yardsticks to measure commonly the quality of arguments.[7] Although judicial discourses take always place, their success in restoring compliance varies. The judicial discourses can only be effective and induce compliance, if actors share common standards for the evaluation of communicated arguments. Shared judicial methods of interpretation (judicial heuristics, e.g. wording, historical, systematic, teleological) serve as additional

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

[7] 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?

evaluative standards (which were not present in the management phase). During judicial argumentation, a shared judicial heuristic serves as a common evaluative standard on which the goodness of ideas on how to interpret a norm's content and scope can be commonly evaluated. If actors equally factor out good from less compelling ideas, they can finally arrive at a consensus (Panke 2002, Panke 2006). Hence, if actors share them, judicial 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.

Yet, 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. 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. Successful judicial discourses require firstly that actors share a judicial heuristic and secondly that the shared heuristic has a high goodness of fit to the interpretational problem at hand. If both conditions are met, the consensual funnelling of a norm definition in regard to aim, procedures and the scope of application can be developed. During successful judicial discourses actors become persuaded that the new consensual norm definition is better (or more adequate) than a previously upheld norm definition. These processes of persuasion facilitate compliance: if states changed their attitudes regarding the obligation (regarding aims, procedures and applicatory scope) inherent in a certain norm (which were responsible for non-compliance in the first place or were used to publicly justify non-compliance), they have no longer incentives for non-compliance with the newly acquired norm definition and can no longer justify non-compliance.

In a nutshell, the application of judicial heuristics provides opportunities for consensual norm funneling (and restoring compliance), which were absent in the interactions prior to

the ECJ referral. Yet, judicial discourses are only effective in inducing compliance, if a consensual norm interpretation can only be developed, which, in turn, requires that actors share a judicial heuristic, suitable to the interpretational problem at hand. Only if both preconditions are present, actors do not talk cross purposes but commonly sort good and convincing judicial arguments from less convincing arguments, which, in turn, facilitate processes of mutual persuasion (leading to a consensus). The hypothesis on conditions for the success of judicial discourses states: *Consensual norm interpretations leading to compliance are very likely, if actors share a judicial heuristic (necessary condition) that reveals a high goodness of fit to the interpretational problem at hand (facilitating condition).*

The previous paragraphs argued that legalization matters: non-compliance can be transformed into compliance during the EU infringement procedure. Yet, based on the aggregate data we cannot judge whether this is indeed good news for compliance and for the effectiveness of law beyond the nation-state. On the contrary, enforcement approaches suggest that institutional structures restrict weak states to a stronger extent than powerful states. Yet, this paper showed that the claim 'powerful states can do what they want – small states must suffer what they must' does not hold true. However, a glance on the outcomes of the adjudication phase of the EU infringement procedure indicates that there is variation in compliance with ECJ rulings. In some instance big and small states alike comply with the ECJ ruling, while it requires the threat of a reasoned opinion based on Article 228 in other instances. This paragraph offered a theoretical account of the variation in the ECJ's success of transforming non-compliance into compliance in analysing the operation of judicial discourses and the contextual conditions for their success or failure. The next paragraph presents a plausibility probe of the conditional success of judicial discourses in restoring member states' compliance with EU law.

V. The European Court of Justice: Talking (Big) States into Compliance

The European Court of Justice is a highly legalized institution. Yet, as the distribution of RO 228 ECT cases indicates, not all cases of non-compliance with EU law, for which the Court issues rulings, are transformed into compliance. Nevertheless, this paper argues that judicial discourses rather than power politics are crucial for restoring compliance. This section aims for a plausibility probe with two qualitative case studies on the incomplete legal transposition of two social policy directives in the UK. In the perspective of the recalcitrance branch of enforcement approaches, the UK as a powerful state is a least likely case for further transformations and the effectiveness of judicial discourses. One case is on the collective redundan-

cies directive (75/129), the other on the directive on equal access of men and women to employment, occupational training and carrier (76/207). Both cases have in common that the misfit between domestic legislation in force and the EU directive was high, the UK (conservative) government (and its clientele) had strong and rigid interests against compliance, the cases were referred to the ECJ (based on Article 226 ECT) and the Court issued rulings against the UK in both instances (Case C-237/90 and C-165-82). The case selection is based on a most different systems design. While actors shared a judicial heuristic with a high goodness of fit to the interpretational problem in one case (collective redundancies), the other case is characterised by a lack of shared heuristics fitting to the interpretational problems at hand (equal treatment case). The hypothesis on conditions for the effectiveness of judicial discourses as compliance-restoring instrument would expect consensual funnelling of the norm and compliance in the collective redundancy case, while dissent on the proper norm definition and non-compliance prevails in the equal treatment case.

The impact of the judicial discourse is operationalised in the responses of actors to the judicial discourse before the ECJ: Do governments accept the judicial arguments and which language games do they choose in parliamentary debates concerned with legal adaptations?

If judicial discourses achieve a consensual norm funnelling and induce compliance, we expect changes in substantial policy interests (now incorporating the ECJ norm definition and fitting to compliance), respective changes in language games (no blame shifting to the ECJ or the EU in order to justify policy changes, but references to the rightfulness and appropriateness of the EC directive as defined in the judicial discourse), and legal change (allowing for the complete and comprehensive reproduction of the EU directive, in avoiding ambiguous and underspecified concepts or avoiding overlapping incompatible legal acts).

If judicial discourses fail to provide a consensual norm definition, we do not expect changes in governmental substantial policy interests (but the repetition of the arguments made before the ECJ referral), no change of language games in favour of compliance (but blame shifting to the ECJ or the EU at best), no legal adaptation in response to the ECJ judgement. Non-compliance can then lead to an RO 228, if legal adaptations are delayed too long. Yet, due to scope restrictions this paper only focuses on the immediate response of the UK governments to the ECJ discourse (a period of three years).

Directive 75/129 on collective redundancies is characterized by a narrow interpretational scope. Aim and scope of this directive are relatively precise, new concepts are explicitly defined and there are no broad and underspecified exceptional clauses. The collective redun-

dancy directive is part of the EC's social policy and protects employees in the event of collective redundancies in prescribing consultations with employee's representatives and official protective procedures. The collective redundancy directive entered into force in February 1975.[8] 15 years later, the Commission prepared a report on the experiences with the collective redundancy directive (1975/129), and noticed that the UK's legal implementation (the Employment Protection Act (EPA) of 1975) had been substantially altered in 1985 by the conservative government (European Commission 1991). The European Commission suspected the 1985 EPA as incompletely legally transposing the directive and issued a reasoned opinion in March 1991. Yet, the Conservative government uphold its claim of not violating EU law. Accordingly, the European Commission referred the redundancy case to the ECJ in October 1992. Before the Court, four issues were at stake concerning scope (all redundancies or only redundancies for economic reasons), procedures (compulsory or voluntary recognition of trade unions by employers, prohibitive penalties for non-compliant employers), and aims (agreement between employer and employee representatives or mere information) of the directive.[9]

The UK and the ECJ consented on applied heuristics, which in all four cases fitted well to the interpretational problems at hand. Due to scope restrictions, this paper illustrates the impact of the judicial discourse with the debate on whether consultations between employers and employee representatives shall aim for agreements. The issue, of whether an employer could easily reject the worker representative's attitudes during the consultation procedure or whether the worker representation has real bargaining power and enforceable rights points at the very heart of the directive's protective purpose. The employee protection would be much weaker in collective redundancies, if their representatives had a voice, which employers might de facto ignore. Such a broad reading of the collective redundancies directive would jeopardize the directive's protective purpose according to a broader and more demanding reading. Prior to the ECJ referral, the Conservative Party opposed collective protection

[8] Its validity expired at the end of August 1998. The old directive 1975/129 was substituted by a new one (398L0059), in which workers rights were extended compared to the 1975 directive.

[9] First, the Commission accused the UK for the failure to provide a mechanism for the designation of workers' representatives in an undertaking where the employer refuses to recognize such representatives (transposition of Articles 2 and 3 of the directive). Second, there was dissent on the scope of application as either encompassing collective redundancies in general or only certain collective redundancies (Article 1(1)(a) of the directive). Third, the parties disputed whether the aim of consultations with employee's representatives shall be inclusion and information or whether "the directive requires the workers' representatives to be consulted "with a view to reaching an agreement" and Article 2(2) lays down that such consultations must "at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and mitigating the consequences"."(Article 2(1) and (2) of the directive) (European Court of Justice 1994). The forth issue concerned the size of financial penalties for employers violating the directive (directive and under Article 5 of the EEC Treaty). For all four issues, the ECJ concluded in its judgment in Jun, 1994 that the UK's legal transposition only incompletely legally transposed the directive on collective redundancies (European Court of Justice 1994).

rights of workers, because they did not fit to the conservative liberal economic approach (House of Commons 1989: 475, House of Commons 1991: 476, House of Commons 1992: 172, Ashford 1981: 101-114). Already early in the judicial discourse, the actors shared the wording judicial heuristic with a high goodness of fit to the interpretational problem (aim of the directive as defined in the Articles 2 I and II).[10] Accordingly, the UK accepted a broader reading of the directive. Even before the ECJ issued its ruling, the government introduced legal changes in the Trade Union Reform and Employment Act (TUREA) (Advocate General 1994: 34). Although the TUREA abolished several elementary trade union rights,[11] the conservative government explicitly incorporated the agreement between employer and worker representatives as an aim of consultations in cases of collective redundancies and, thereby, extended collective protective rights (House of Commons 1993). Employers' associations such as the Confederation of British Industry (CBI) opposed the transfer of rights to trade unions. Nevertheless, the conservative government pursued this legal change without blame shifting to the EU or ECJ, although this would have allowed to justify the extension of collective rights against the preferences of their clientele (House of Commons 1993; House of Commons 1994: 432). Moreover, the government did not highlight costs for the economy resulting from newly introduced protective rights regarding redundancies (House of Commons 1993: 327). This indicates that the conservative government changed their substantial policy interests on matters of collective redundancies.

As expected by the hypothesis on the top-down impact of judicial discourses, the UK government altered their compliance adverse substantial policy interests also in regard to the other three issues at stake. Already during the ECJ discourse, the UK government started to legally transpose three out of the four issues with the 1993 TUREA. The remaining issue was legally transposed via a regulation soon after the ECJ ruling of 1994. Thereby, the conserva-

[10] The wording interpretation of the collective redundancies directive and the British legal act revealed that Article 2 I of the collective redundancies directive precisely prescribes the end of information and consultation endeavours of employee representatives and employers as reaching an agreement (European Court of Justice 1994: 34-36). The subsequent paragraph (Article 2 II) states that consultations "shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and mitigating the consequences". However, section 99 VII of the British Employment Protection Act was less demanding since employers could reject the positions of employee representatives as long as he stated his reasons. The wording instrument fitted well to the interpretational problem. Regardless of whether one would start with Article 2 I or with Article 2 II of the directive, the wording heuristic would suggest that the directive clearly stated aims for information and consultation procedures (European Court of Justice 1994: 35).

[11] The TUREA fitted well to the conservative's economic approach of restricting collective rights. Accordingly, the TUREA restricted legal rights and practical influence of trade unions. "The Bill will, for the first time, give the individual citizen the right to go to court to get an order requiring an unlawful strike to be called off. The Bill contains another measure to safeguard the economy and employment from the damaging consequences of industrial action. It provides for seven days notice of strikes to enable employers to take the measures necessary to protect their businesses and the jobs of their employees from the threat of industrial action. The measure has been widely welcomed." (The Secretary of State for Employment (Mrs. Gillian Shephard) House of Commons 1992: 175).

tive government framed the redundancy issue as rightful. “We reached a point of considerable uncertainty where it looked as though an employer had to consult in cases of collective redundancy only if there were a recognised trade union. If there were no recognised trade union, the employer was apparently under no obligation to consult anyone, which cannot be right. The European Court of Justice must be supported in its judgment. Tonight we are trying to ensure that, in the case of collective redundancies, everyone is consulted, either through a recognised trade union or through an election.” (Minister for Competition and Consumer Affairs (Mr. John M. Taylor) in House of Commons 1996: 205). The conservative government did not engage in blame shifting to the ECJ and also abstained from highlighting the compliance-cost and -benefit implications of legal changes. In addition, they defended changes as compatible with their deregulative macro economic approach and their skepticism vis-à-vis trade unions. Both legal acts, the 1993 TUREA and the 1995 regulation together resemble complete compliance with the collective redundancy directive. The government avoided overlaps with other bodies of legal acts, abstained from exceptions, and did not introduce ambiguity in relying on undefined, underspecified or completely new and complex concepts. Hence, in 1995 the collective redundancies directive was completely legally transposed and could finally be completely reproduced.

While the judicial discourse was effective in the collective redundancies case, it failed in the case on equal treatment of men and women in the UK. Directive 76/207 on the equal access of men and women to employment, occupational training, promotion, and working conditions is characterized by a broad interpretational scope. While the aim of this directive is relatively precise (‘equal treatment of men and women’), interpretational ambiguities arise from the definition of the scope, since exceptions are principally allowed (for matter of which a certain sex is an ‘indispensable prerequisite’).

After the EC directive on equal access entered into force in February 1976, the British Government notified the Commission of its legal transposition via the already existing Sex Discrimination Act of 1975 (and the Sex Discrimination Order of 1976, which affected only Northern Ireland). After the transposition deadline exposed in 1978, the European Commission issued a reasoned opinion. As in the collective redundancies case, the UK government maintained their compliance-averse interests and insisted that they completely and correctly legally transposed EU law in this early stage of the infringement procedure. In June 1982, the Commission referred the case (165/82) to the European Court of Justice. Three issues were at stake. First, the Commission and UK dissented on the directive’s scope regarding the inclu-

sion of non-binding collective agreements. Second, it was unclear whether member states are generally permitted to exclude certain occupational activities (employment in private households and small undertakings) from the directive's equal access principle. Third, the Commission and the British government disagreed on whether activities of certain professions such as midwives may be excluded from the directive's scope (European Court of Justice 1983). One and a half years later, the ECJ ruled on November 8th, 1983 that the British legal transposition insufficiently transposed the directive on equal access regarding the first and second issue.

For the first two issues the UK, the European Advocate General, and the ECJ dissented on the applied heuristic. As regards the scope of application of the equal treatment directive, the UK did not engage in interpreting the European legal act at all (but exclusively focused on the 1975 Sex Discrimination Act). By contrast, the ECJ applied to the wording heuristic in combination with a directive-immanent teleological heuristic (European Court of Justice 1983: 11). As a consequence the ECJ concluded that the equal access directive's purpose was violated by excluding the common non-binding collective agreements, as well as the independent professions and rules of undertakings from the directive's scope (European Court of Justice 1983: 21). A shared heuristic was also lacking as regards the exceptional clause. The UK justified the exclusion of small undertakings and private households with the wording of the exceptional clause (Article 2 II) of directive 76/207 (European Court of Justice 1983: 12). However, the narrow wording heuristic had a low goodness of fit to the interpretational problem at hand. This is because the wording of the exceptional clause was silent on what is meant by the 'nature of the context in which sex is a determining factor'. Against this background, it is not surprising that the ECJ abstained from the wording heuristic and only recurred to the directive-immanent teleological method, based on which the ECJ argued that British legal acts reduce the effectiveness and, in turn, the very purpose of the equal access directive (European Court of Justice 1983: 16). In both instances, the hypothesis on the effectiveness of the judicial discourse as a compliance-instrument does not expect a consensual norm-definition, but the maintenance of non-compliance. Debates in both Houses indicate indeed that the compliance-averse attitude of the British (conservative) government was maintained after the ECJ ruling of 1983. As early as in 1975, the Conservatives argued against a wide applicatory scope (House of Commons 1975b: 1448). Accordingly, they suggested that undertakings with less than 25 employees shall not be subject to the Sex Discrimination Act (House of Commons 1975a: 530) and that voluntary agreement would be a better instrument for fighting discrimination of women than conciliation and compulsion (House of Commons 1975a: 567, 570). Conservatives in Government and Parliament upheld their compliance-

averse substantial policy interests after the judicial discourse. The government opposed a broad scope of application: "we still question whether it is really appropriate to seek the objective of equal treatment by applying to all small firms a law designed to meet the circumstances of larger employers." (The Minister for Employment, Mr. Kenneth Clarke in House of Commons 1986: 571). Other arguments were that small firms lack the administrative resources to deal with complex legislation (House of Commons 1986: 617). The government also maintained its compliance adverse position concerning the exclusion of private households from the directive's scope of application: "we have no wish to bring the law governing public employment relationships into people's private living arrangements." (House of Commons 1986: 570, 617, c.f. Fritzpatrick 1987: 938-939). Such statements reveal that the conservative government maintained their compliance-averse policy interests. In addition to normative statements, the government justified their scepticism against equal treatment measures with reference to a liberal economic frame: "we want them to be able to concentrate on making their business grow with the minimum of rules and regulations." (House of Commons 1986: 571).The conservative government also referred to practical arguments in defending scope restrictions, since employers could "make the life miserable until he chooses to leave" (see House of Commons 1986: 607). Even three years after the ECJ judgment, the government persisted on its compliance-adverse positions, which indicates that the judicial discourse was not effective in restoring compliance.

Both case studies confirmed the hypothesis on the effectiveness of judicial discourses. Consensual funneling is unlikely if actors do not share a judicial heuristic or if the shared heuristic is too broad or too narrow to solve the interpretational problem. This is because processes of mutual persuasion (leading to a consensus) require that actors do not talk cross purposes but commonly sort good and convincing judicial arguments from less convincing arguments. If no consensual definition on how the content and the scope of a European directive should be understood is developed, the ECJ issues an authoritative interpretation. In such instances, states become not persuaded by exchanged judicial arguments and do not consider the ECJ's interpretation as better than their own. As the equal treatment case illustrates, if consul funneling fails, states will maintain their compliance-adverse positions.

Consensual funneling of a norm definition takes only place, if the actors share a judicial heuristic with a high goodness of fit to the interpretational problem at hand. Shared judicial heuristics serve as yardstick, on which the quality of arguments on the interpretation of the norm can commonly be evaluated. If the shared heuristic fits to the interpretational prob-

lem, actors undergo processes of mutual persuasion and arrive at a new norm definition, which they regard as rightful and as superior to their old definitions. As the collective redundancy case illustrated, such processes of judicial argumentation result in the transformation of non-compliance into compliance.

Within judicial discourses, even powerful states such as the UK are talked into compliance. Yet, the plausibility probe and the distribution of RO 228 indicate that the conditions for *successful* judicial discourses are only seldom present.

VI. Conclusion – Legalization as Good News for Compliance?

From the very beginning of IR as an academic discipline, realist and idealist accounts competed with one another. Realism assumes that states are the most important actors and distinguish each other mostly by power differences. The more powerful states are, the higher their freedom in conducting their affairs on the international level. In the era of international cooperation in IOs or regimes, international relations are still organized anarchically, since there is no overarching authority with the legitimate monopoly for the use of force. Accordingly, realism basically contents that big states can do what they want as regards to (non)compliance with law beyond the nation-state. Idealist accounts, by contrast, assume that power differences between states are mitigated by institutional means, especially since institutionalised cooperation is beneficial for actors seeking absolute rather than relative gains. Yet, incentives for non-compliance with law beyond the nation-state arise from free-rider considerations of big and small states alike. Therefore, idealist approaches highlight the merits of institutional safeguards (such as monitoring and transparency creating measures) for preventing non-compliance, and dispute settlement mechanisms (such as third party mediation of binding adjudication) for restring compliance and, in turn, the very precondition for the effectiveness of international law. Such legalization approaches hypothesize that the level of compliance increases, the higher the level of legalization of the dispute settlement design is (Smith 2000: 146). Indeed, an empirical analysis of the European Union's infringement procedure revealed, that the number of non-compliance cases drops with each additional feature of legalisation. While more than 50 percent of all cases of non-compliance, detected through the European Commission's monitoring activities are resolved before their were referred to the ECJ, additional 30 percent were resolved before the ECJ as highly independent third party issues rulings. As the degree of legalization increases once more, and the ECJ issues binding rulings (that can be enforced by a second infringement procedure and financial penalties), the number of non-compliance cases declines additionally. On the aggregate level, legalization seems to be a success. Yet, by realists informed enforcement approaches would highlight that the aggregate data do not allow for such an optimistic conclusion, since it could as well be the case that small states give in, while big states maintain non-compliance (ceteribus paribus). Therefore, this paper examined three realist hypotheses on the role of state power in later stages of legalized infringement proceedings. It focused on instances in which states' preferences for non-compliance are rigid; in order to do not built a straw man against which the enforcement approach is tested. The discussions revealed that there are no differences between powerful and weak states in regard to their transformational dynamic after Court referrals. Powerful

states cannot deter the ECJ from rulings or the European Commission from issuing reasoned opinions based on Article 228 ECT if non-compliance prevails after the first ECJ judgment. Likewise, powerful states are not more recalcitrant towards the ECJ than weak states. This finding indicates that legalization matters. Yet, the idealist legalization theories can only explain variation over phases of the infringement proceeding. They cannot explain why some cases are settled immediately after ECJ rulings, while others additionally require a threat of financial penalties (RO 228 ECT). In order to solve this puzzle on the differential impact of legalization, this paper developed a theoretical account for the varying prospects of success of judicial discourses. Although judicial discourses take place in all instances, in which cases of non-compliance are referred to the ECJ, they are not always successful in transforming non-compliance into compliance with European law. In drawing on the Habermasian theory of communicative action, this paper argued that states can only be talked into compliance, if the actors before the Court share a judicial heuristic with a high goodness of fit to the interpretational problem at hand. This theoretical claim was illustrated by two court cases of the UK. These findings suggest that the might of the law prevails even over the power of (strong) states – but only under very restrictive conditions.

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Appendix

1) Operationalization of Member States' Power

Country	Votes in the Council	economic power[12]
B	5	222054017317,00
D	10	2378391130697,00
DK	3	146147210094,00
E	8	433586943063,00
EL	5	91428003385,00
F	10	1230615901915,00
I	10	863620677632,00
IR	3	40134592731,00
L	2	10618615960,00
NL	5	310331186030,00
P	5	76877808640,00
UK	10	886607474103,00

[12] The data stem from the Worldbank (NY.GDP.MKTP.KD---GDP at market prices (constant 1995 US$)).