Institutional Learning in the Shadow of the ECJ's Judicial Discourses. Argumentative Strategies and Compliance with European Norms

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- First Draft, Comments Most Welcome![*] –

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Abstract:
Although most states obey almost all international legal norms most of the time, non-compliance occurs frequently. This causes severe problems for the effectiveness of law beyond the nation state. In principle, with management, enforcement and adjudication, there are three institutional instruments for the transformation of observed non-compliance into compliance. Drawing on the European Union as an empirical extreme type for high legalization, this paper seeks to explore whether, how and under which conditions judicial discourses contribute to institutional learning as an increase of member-state compliance. The empirical analysis shows that judicial discourses before the European Court of Justice result in stable compliance, unstable compliance and continued non-compliance varying between and within member-states. However, neither of the prominent compliance approaches, the management school and the enforcement approach, can sufficiently account for the variation between and within states. Therefore, this paper aims at identifying explanatory variables, which account for the various patterns of institutional learning between and within member states.

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I. Introduction

Although states' compliance with law beyond the nation-state is generally high, non-compliance occurs frequently (Börzel 2001, Chayes and Handler-Chayes 1993, Reinhardt 2001, Tallberg 2002, Tallberg and Jönsson 2001). Compliance is a precondition for the effectiveness of law beyond the nation-state. Thus, it is crucial that non-compliance can be transformed into compliance during post agreement interactions. The EU cannot rely on the legitimate use of force as the last resort to restore compliance. Hence, post agreement interactions do rely on bargaining and argumentative strategies for the transformation of non-compliance. Bargaining allows stronger actors rather than weak actors to preserve their substantial interests, and decreases thus the effectiveness of international law to the advantage of the power of the strongest. Argumentative strategies, on the other hand, allow for transformations of non-compliance into compliance, which are unbiased by power disparities of states. Successful argumentative strategies increase, therefore, the effectiveness of international law in promoting the power of the law instead of the power of the strongest.

This paper explores the conditions under which argumentative and bargaining strategies for the transformation of non-compliance into two types of compliance (stable and unstable compliance) are successful during post-agreement interactions. The focus is on least likely cases for successful transformations of non-compliance into compliance. Cases challenging the effectiveness of international law most severely are to be found at the very end of post-agreement interactions (adjudication phase), since especially those cases of voluntary non-compliance are carried far, in which a state's substantial interests or strategic preferences are eminently strong. The outcomes of the EU's adjudication do not reveal a story of pure success, in spite of the remarkable high degree of legalization. Rather, the empirical pattern is characterized by variations in the extent of stable, unstable, and continued non-compliance *within* and *between* states (see at length II). Stable compliance is characterized by lasting transformations of non-compliance into compliance. Cases of unstable compliance are characterized by repeated norm-violations after the lessening of external constraints. Hence, the power of the law is already reduced for cases of unstable compliance. The effectiveness of law is not increased at all, when continued non-compliance occurs, in which non-compliance in not only transformed into compliance temporarily. In the light of the constant institutional design, it is puzzling why some cases are transformed into compliance successfully, while other transformations fail. Existing compliance theories, drawing on formal institutional and state-specific variables, cannot solve the empirical puzzle (III). Facing this problem, this paper seeks to explain the different results of the transformation within the adjudication phase of

the EU. Which variables account for the inner- and intra-state variation in stable compliance, unstable compliance and continued non-compliance? In order to provide an explanation of the empirical puzzle, this paper takes a 'compliance as process' perspective. The emphasis on processes has not only the advantage that unstable compliance (as repeated norm-violations) can be captured in addition to stable compliance and continued non-compliance (instead of merely conceptualizing compliance as a dichotomous variable: either compliance or non-compliance). Also the static perspective of dominating approaches can be transcendented and new insights on the interplay of process-related variables can be generated. The analytical focus of the 'compliance as process' perspective is on interactions and the variables that influence the dynamics of individual, collective and institutional learning during interactions. Learning processes influence the outcomes of interactions as stable compliance, unstable compliance or continued non-compliance. In interactions, argumentative and bargaining dynamics can evolve. While argumentative dynamics allow for reflexive learning and are conducive to stable compliance, bargaining dynamics allow for instrumental learning and are conducive to unstable compliance. Hence, a special emphasis is on the conditions under which argumentative and bargaining strategies for the transformation of non-compliance into two types of compliance (stable and unstable compliance) are successful or not successful (continued non-compliance).

Using the 'compliance as process' perspective, the impacts of highly legalized institutional platforms on the prospects for transformations of non-compliance are discussed (IV). Besides this top-down processes, the emphasis is on societal strategies in the shadow of judicial discourses aiming on the transformation of non-compliance (V). Top-down and bottom up forces influence state's learning dynamics. However, for the explanation of the three types of outcomes of interactions in the adjudication phase, it is crucial to include considerations on how individual and collective learning can be transformed into institutional learning (VI). This paper develops a theoretical framework, offering explanations for the conditions, under which strategies of persuasion bring about stable compliance, hypotheses on the conditions under which restricted transformations of non-compliance (unstable compliance) occur, and hypotheses for the absence of transformations at all (continued non-compliance). All hypotheses are illustrated by first empirical insights (see also appendix 2).

II. The Puzzle in Detail

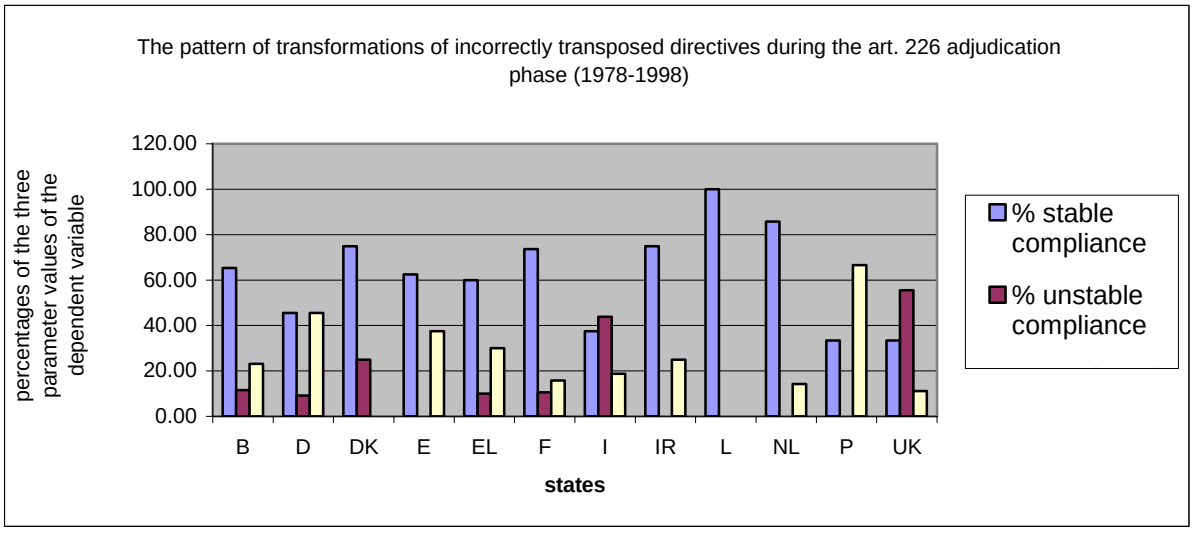
The European Union's infringement proceeding (Art. 226 ECT) combines management, adjudication and enforcement elements (Zangl 2001). Its purpose is the provision of an institu-

tionalized arena, in which governmental and European actors interact in order to clarify content and scope of European norms. Thereby state's non-compliance shall be transformed into compliance with European law during three different phases. Within the first phase (management), the European Commission interacts with the government of the accused state on a purely bilateral basis (Tallberg 2002). Only when the informal interactions are not brought to an end by either the conclusion that no norm-violation occurred or by the transformation of non-compliance into compliance, the formal phase is initiated by the Commission in sending a reasoned opinion to the respective state. When non-compliance is not transformed into compliance during the interactions between the national government and the Commission after the reasoned opinion has been sent, the Commission refers the case to the European Court of Justice. Thereby, the adjudication phase is initiated. The adjudication phase starts with a written procedure, in which the European Advocate General and national legal representatives exchange views on facts and legal aspects. The oral procedure foresees two open court settings: a public hearing and final statement of the Advocate General. As in the management phase, it is possible that consensual norm interpretations emerge and lead to the withdrawal of the case, after states abolished their norm violations. When this does not occur, however, the ECJ issues a binding ruling after the second oral hearing. Only when states do not comply with the judgment within the foreseen time, the adjudication phase is followed by an enforcement phase according to Article 228 ECT. This procedure is similarly designed as the article 226 procedure, but can end with a second court judgment, in which monetary sanctions are imposed, should non-compliance prevail.

Even though the vast majority of cases is solved during the management phase, (Mendrinou 1996: 4-6, Tallberg 2002, Tallberg and Jönsson 2001), for three reasons this paper focuses only on the interactions in the adjudication phase. Firstly, all cases referred to the ECJ have in common that states' substantial interests and/ or strategic preferences are extremely 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 processes of learning. How can it be explained that there are cases in which learning occurs nevertheless and strong preferences are transformed? Secondly, in the wake of the current trend towards increasing legalization of international institutions, it is interesting to explore the contribution of highly legalized institutional designs, such as the arena of the ECJ, to the effectiveness of law beyond the nation-state. Is a highly legalized institutional design a most likely setting for learning, even though substantial interests and/or strategic preferences of states are relatively rigid and therefore least likely

cases for further transformations? What insights can the European adjudication system as the empirical extreme type provide for international institutions with lesser degrees of legalization? Thirdly, an interesting empirical pattern (which cannot be explained by existing institutional design, management and enforcement approaches) can be observed regarding the transformative interactions in the phase between the referral to the ECJ and the pronunciation of a judgment by the European Court of Justice in regard to incorrect transformations of European directives into national law (see appendix 2). There are three different types of outcomes of interactions before the ECJ: stable compliance, unstable compliance and continued non-compliance (for the operationalization see appendix 1). In the adjudication phase continued non-compliance (no transformations qualifying as compliance), unstable compliance (non-compliance is only incompletely transformed into compliance) and stable compliance (non-compliance has been completely and lastingly transformed into compliance) can occur. The prospects for the transformation of non-compliance into stable compliance, unstable compliance and continued non-compliance differ enormously between states. Some states show an extraordinary high rate of continued non-compliance (such as Portugal, Germany and Spain) and others a percentage of stable compliance that is far above the average (such as Luxembourg, the Netherlands and France). The proportion of unstable compliance is highest for the United Kingdom, Italy and Demark. Why has Spain such a high rate of continued non-compliance, while a country with comparable low capacities like Greece reveals more cases of stable compliance? How can it be explained that a Euro-skeptical country such as Denmark shows a higher percentage of stable compliance than of unstable compliance, while continued non-compliance does not occur at all?

Figure 1 The distribution of the dependent variable



III. Approaches on the Transformation of Non-compliance into Compliance

The legalization literature offers insights on institutional provisions of adjudication systems, which are conducive to the successful transformation of non-compliance into compliance (Abbott et al. 2000, Abbott and Snidal 2000, Kahler 2000, Keohane, Moravcsik and Slaughter 2000, Mitchell 1996, Smith 2000a). Since institutional variables are constant, they cannot explain inter- and intra-state variations. Compared to the institutional legalization literature, management and enforcement approaches are going a step further in allowing for the deduction of hypothesis on transformative differences between states.

III.1 Enforcement Approaches: Accounting for the Power of the Strongest

The enforcement approach is based on rationalist assumptions, namely strategic rationality of actors and exogenous substantial interests. Accordingly, non-compliance is voluntary, resulting from strategic cost-benefit calculations (Martin 1992, Martin and Simmons 1998; Downs, Rocke and Barsoom 1996; Downs 1998).[1] These calculations and simultaneously the strategic preferences can be altered, when changes (in form and/ or substance) of external constraints take place. According to this reasoning, the probability for transformations of non-compliance into unstable compliance increases with augmenting external constraints (such as possible sanctions under Art. 228 proceedings). After external constraints diminish (e.g. because Article 228 proceedings are no longer a threat), repeated violations of the legal norm are to be expected. Consequently, cases of stable compliance, in which the same legal norm is not violated after the external constraints are weakened or disappearing, cannot be captured. External cost imposing constraints, as they might emerge in Article 228 proceedings, matter less for powerful states. With an increase of economic power, states are less inclined to alter the cost-benefit calculations and change their strategic preferences towards compliance in the wake of future material losses. Accordingly, the enforcement approach hypothesizes, that rates of continued non-compliance rise with increasing state-power. It provides, thus, a theoretical account for the pessimistic take on international law: the prevalence of the power of the strongest.

[1] In rationalist accounts, there are two reasons for the occurrence of non-compliance. (1) Theories of incomplete contracting point towards the uncertainties of the future (Garrett 1995: 172). The state's substantial interests and strategic preferences might change over time, either because of domestic changes or because of environmental changes. This, in turn, provides incentives for defection and thus for non-compliant action. (2) The impact of norms often goes along with a redistribution of costs and benefits among the actors. In all situations, in which an actor gains benefits, when other states reproduce a norm, while simultaneously avoids costs when compliance is refused, a free-rider problem emerges and states might pursue non-compliance as their strategic preference (Axelrod 1984, Hardin 1986).

III.2 Management Approaches: Accounting for the Power of the Law

Unlike enforcement approaches, management approaches rely on the premise that non-compliance is involuntary. Lacking or insufficient state-capacities, ambiguous definitions of norms, and inadequate disposition-timetables account for the occurrence of non-compliance in the first place (Chayes and Handler-Chayes 1993, Chayes and Handler-Chayes 1995). Management approaches provide hypotheses on variations in transformational successes between states and stages of infringement proceedings, emphasizing the power of the law instead of the power of the strongest. States are prevented from compliance, when resources are lacking that are required for the correct transposition, implementation or application of the respective norm. Contrary to enforcement theories, management approaches explain continued non-compliance not by opposing substantial interests or strategic preferences, but by lacking resources as the necessary and sufficient precondition for norm-reproducing action. According to this line of reasoning, the outcome of continued non-compliance increases, the lower a state's capacity is. This is because a bureaucratic dialogue between the non-compliant state and the Commission and a judicial dialogue between a state and the European Court of Justice is not suited to solve capacity problems. Likewise, the outcome of stable compliance increases, the higher the capacity of a state is.

III.3 The Theoretical and Empirical Limits of Management and Enforcement Approaches

Both prominent approaches do not solve the empirical puzzle. (1) Neither approach captures the full variation of the parameter values of the dependent variable nor can they be used in combination, because their presumptions (and thus their hypotheses) are incompatible. Enforcement approaches account only for continued non-compliance and unstable compliance in a theoretically consistent manner, because they conceptualize substantial interests as exogenous to interactions (see at length IV). Either there is no change of strategic preferences at all (which corresponds with continued-non-compliance), or strategic preferences are altered because of the external constraints (which corresponds to unstable compliance). Management approaches suffer from similar problems; they only insufficiently cover the parameter values of the dependent variable. They provide hypotheses for the prospects of the transformation of non-compliance into stable compliance and of failed transformation (continued non-compliance). Unstable compliance cannot be captured in a theoretically consistent manner, since it is assumed that states either have unclear substantial interests, because the content of a norm is ambiguous, or states have a substantive preference for compliance, but are prevented from norm reproduction by lacking capacities. (2) Management and enforcement approaches

do not provide hypotheses for the intra-state variations regarding the transformative outcomes. (3) Infringement data show that the hypotheses of both approaches do not hold. Enforcement approaches would expect that continued non-compliance is higher for powerful states. While this fits for Germany, Portugal and Spain are two important outliers. Neither does empirical evidence support the expectation that unstable compliance is higher for weak than for powerful states. Management approaches, by contrast, expect a high rate of continued non-compliance and a low rate of stable compliance for states with low political-administrative capacities (which e.g. holds for Portugal but not for Germany). Hence, neither management nor enforcement hypotheses do conform to the empirical evidence (compare to figure 1).

IV. The Top-Down Impact of Judicial Discourses

IV.1 The Transformation of Non-compliance and Types of Learning

Neither management nor enforcement approaches can solve the empirical puzzle. Enforcement approaches overemphasize the power of the strongest, while management approaches overestimate the power of the law. In order to develop a theoretical frame, which provides an adequate account of the empirical puzzle, the simultaneous conceptual coverage of stable, unstable and continued non-compliance is necessary. Because of its action-theoretical foundation constructivism is well suited to develop accounts for stable compliance and continued non-compliance, while rationalism allows capturing unstable compliance and continued non-compliance in a theoretically consistent manner. Hence, the theoretical frame underlying the 'compliance as process' perspective must fulfill two tasks. Firstly, it must combine rationalist and constructivist elements in a meta-theoretically consistent manner. Secondly, it has to provide hypotheses on contextual conditions, favoring characteristics in social interactions, which are either more adequately grasped by rationalist or by constructivist approaches.

The major difference between rationalism and constructivism is ontological in character and can be acuminated to the different takes on the impact of communicated ideas (varying between instrumental and reflexive learning). At its core, rationalism is based on a methodological-individualist concept of rationality. According to this conception, the actor is prior to and can be studied independent of a social structure. Human action is characterized by a strategic logic, according to which actors act on the basis of means-ends calculations. Recurring to the concept of strategic action, substantial interests can be deduced from observable action. Actor's substantial interests, in turn, must be conceptualized as exogenously defined and fix during interactions. During interactions, communicated new ideas about external constraints

can influence the means-ends calculations and lead thus to changes in preferences over strategies (instrumental learning). On the contrary, constructivism is based on the ontological assumption that the reality is a social construction and that intersubjective meaning is constitutive for intentional action (Wendt 1987). Thus, the actor is no longer the ontological prior, but agent and structure are mutually constitutive (Ulbert 2003, Wendt 1987, Wendt 1999). Intersubjective meaning, which in turn influences the selection and development of an actor's substantial interests, is constitutive for actor's substantial interests and can be changed during interactions. The possibility of changing intersubjective meaning, in turn, requires the conceptualization of endogenous substantial interests (reflexive learning).[2] From these ontological presumptions follows that communicated ideas are treated differently. In rationalist accounts, ideas communicated directly or indirectly through speech acts of bargaining (see below) can only lead to instrumental learning and thus to changes in strategic preferences. Constructivism claims that argumentatively communicated ideas (see below) can bring about reflexive learning and thus changes in substantial interests.

Table 1 Ontological assumptions

	Rationalist approaches	Constructivist approaches
Conception of identities, interests and substantial interests	Exogenous	Endogenous
Dominant speech acts within interactions	Bargaining	Arguing
Potential impact of communicated ideas	Instrumental learning about external constraints	Reflexive learning
Change of preferences/interests	Change of strategic preferences, maintenance of substantial interests	Change of substantial interests, irrelevance of strategic preferences

Rationalist approaches are best suited to capture the parameter value 'unstable compliance' in a theoretically consistent manner, because *unstable compliance* resembles instrumental learning. In the wake of external constraints (such as article 228 proceedings), non-compliance can

[2] This is because the intersubjective ideational structure is constitutive for actor's substantial interests in two regards. Firstly, substantial interests to be pursued in action plans are developed on the basis of a common conception of the situation in which actors find themselves. When the situational definition changes, the original action plans might not fit any more to the social construction and would thus prevent useful interactions. Therefore, a changing construction of a situation can lead to a redefinition of actor's substantial interests. Secondly, when the ideas underlying substantial interests change during interactions, a change in substantial interests might occur as the result of processes of reflexive learning. Such processes of reflexive learning might not only change substantial interests, but can also affect identities.

become costly. When the costs are higher than the benefit, states do not longer maintain their strategic preference of non-compliance. Instead a strategic preference change into compliance occurs and states engage in legal adaptations. However, since substantial interests are not altered, states shift back into their strategic preferences of non-compliance again, as soon as external constraints lessen. Public attention or the Commissions supervision declines, when the legal acts passed that do not obviously conflict with the ECJ's norm interpretation. Therefore states do *not* comprehensively incorporate the ECJ's norm interpretation and define only insufficiently what constitutes norm-reproducing and norm-violating action. Thereby, windows of opportunity for future norm-violations are created.

Constructivist approaches, on the other hand, offer accounts for *stable compliance*, which is characterized by a change of substantial interests, leading to stable outcomes of transformational processes, regardless of changes in external constraints. The transformation of continued non-compliance at the beginning of the adjudication phase into stable compliance during the judicial discourse can be explained by processes of reflexive learning. During interactions before the ECJ, in which new ideas can be communicated, participants might learn that their ideas and their interpretations of the content and/or scope of the disputed norm, underlying their original substantial interests, are less true, rightful or appropriate than the ideas communicated during the judicial discourse, the original ideas can be substituted by a process of reflexive learning. Such reflexive learning processes can culminate in altered substantial interests being now in accordance with the norm interpretations as developed consensually during the interactions before the ECJ. Such substantial interest changes remain stable regardless of changes in external constraints. Constructivist approaches are, therefore, best suited to conceptualize the parameter value 'stable compliance'.

The third parameter value, 'continued non-compliance' resembles the null hypotheses for instrumental and reflexive learning, since continued non-compliance occurs only in the absence of both: instrumental and reflexive learning.

Table 2 Types of learning and outcomes of transformations

reflexive learning	→ intervening variables (see IV.3, V and VI)	→ stable compliance
instrumental learning	→ intervening variables (see IV.3, V and VI)	→ unstable compliance
absence of learning	→ intervening variables (see IV.3, V and VI)	→ continued non-compliance

Under which conditions can the different types of learning be expected? In order to develop propositions about ideal scopes of rationalist and constructivist approaches it has to be distin-

guished between processes of *individual learning*, processes of *collective learning* and prospects for *institutional learning* (see also part VI).

Interactions are essential for both reflexive and instrumental learning, because interactions accelerate learning by increasing the flow of ideas. However, the flow of ideas alone is not sufficient for the deduction of ideal scopes of rationalist and constructivist theories, because it cannot account for the type of learning that might occur.

In order to distinguish between contexts which are either especially conducive for reflexive or for instrumental learning, a systemic perspective, avoiding the predominance of one-sided action theoretical assumptions, on interactions is necessary (see at length Panke 2002). A system is characterized by two necessary conditions. These are "(a) a set of units or elements is interconnected so that changes in some elements or their relations produce changes in other parts of the system, and (b) the entire system exhibits properties and behaviors that are different from those of the parts" (Jervis 1997: 6). A system of interaction is composed of the totality of all speech acts, [3] which were expressed by the participating actors, as the units of the system, during the interactions (starting after the referral to the ECJ and ending with either a withdrawal or a court judgment). In every system, structures can evolve. In systems of interactions, structures are the dominant pattern of speech acts, which influence the dynamics of ideational change (unconscious reflexive or instrumental learning). According to the systemic approach, *collective learning,* as learning processes of the participants in a system of interaction, is a systemic effect of interactions. Collective learning occurs only under specific conditions, conditions that constitute the two possible structures that can evolve within systems of interaction: arguing and bargaining. Structures of interaction are defined by certain *relationships between structure and content of the dominant pattern of speech acts* (Panke 2002).[4] Both elements structure and content of speech acts are elaborated in turn.

The structure of speech acts can take two different forms. It can either be an argument or a speech act of bargaining. An argument links a proposition to reasons related to the inter-

[3] Speech acts and logics of action can be distinguished analytically (see also Holzinger 2001, Müller 2002, Risse 2002). Whereas actors behaving according to the logic of communicative action can only use arguments, actors behaving according to the strategic logic of action or the logic of appropriateness can potentially use both types of speech acts, since the selection of the speech acts is subject to the type of rationality. It is, for example, strategically rational for an actor to use an argument instead of a speech act of bargaining, in order to pursue her preferences, when her bargaining power is perceived as too low and the changes for influence are expected to be higher through arguing. Hence, from the fact that actors use arguments it cannot be deduced the actors follow the logic of communicative action and are themselves consciously motivated to become persuaded. This analytical distinction fits well with the interactionist approach, since this approach links prospects for learning to the dominant pattern of speech acts in combination with systemic preconditions and **not** to logics of actions.

[4] From the criterion of a dominant pattern of speech acts, which are characterized through certain relationships between structure and content of speech acts, for a structure of interaction to exist, it follows that structures of interactions cannot exist at the same time. However, structural changes can occur during interactions.

subjective world.[5] A speech act of bargaining is characterized by a demand, a concession or a rejection, which can additionally be linked with a threat or reasons that are related to the subjective world. However, a dominant pattern of speech acts is not sufficient to bring processes of *collective learning* about. *Collective learning*, as learning processes of the participants in a system of interaction, requires meaningful communication. Communication is not meaningful when actors cannot relate to each other and talk cross-purposes. Meaningful communication presupposes that all participants share standards of how to evaluate the content of speech acts. Meaningful communication is characterized by the possibility that B (as well as the other participants) understands the content of the speech act of A, evaluates the quality of communicated ideas and replies to A in a manner that allows A (and also the other participants) to reply meaningful again. In interactions that are based on the mutual exchange of meaningful speech acts, results (compromises or consensus) can be achieved incrementally, to which all participants can agree (without voting or authoritative decision). Hence, *collective learning* can only take place when communication is meaningful. For meaningful interaction to evolve, it is necessary to have a consensus among the actors of how the content (not the intention!) of speech acts is to be understood. Only when this precondition is fulfilled, meaningful communication is possible. In order to initiate processes of *collective reflexive or instrumental learning* of the participants of interactions, the contents of the speech acts must therefore fulfill certain criteria. Which criteria for the quality of the content of speech acts can be defined in the abstract?

The possibility for processes of *reflexive collective learning* to take place, presupposes two elements. The necessary condition is that arguments are the dominant pattern of speech acts. The sufficient condition is that standards for the evaluation of the quality of ideas are shared among the actors. Such standards refer to what constitutes truth (causal ideas), rightness (normative ideas) or appropriateness (ideas on values) in a given context to a particular point in time (Habermas 1995b). When both conditions are fulfilled, I refer to this pattern of meaningful communication as ‘arguing as a structure of interaction’. Only when arguing as the structure of interaction has emerged, it is likely that argumentative speech acts lead the participants to question the ideas, which underlie their own substantial interests without having been consciously prepared or motivated before. When ideational change occurs, a change of substantive preferences is possible, when the ideas underlying the original substantial inter-

[5] Both concepts, the subjective and the intersubjective world, are social constructions. Whereas all actors are affected more or less equally by the intersubjective world, the subjective world refers to the internal conditions (domestic constellations such as positions and influence of organized interests) with which an actor is confronted. His own subjective world affects an actor more intensively than other participants of interactions (who themselves face their own subjective worlds).

ests are affected by the ideational change (*reflexive collective learning*).[6] Processes of *reflexive collective learning* can result in a consensus as the result of interactions.

Table 3 Two structures in systems of interaction

	Structure 'arguing'	Structure 'bargaining'
Pattern of dominant speech acts	Arguments (reasons related to the intersubjective world)	Bargaining acts (demands, threats, concessions, reasons related to the subjective world)
Shared standards for the evaluation of the content of speech acts	Common standard for truth or rightness or appropriateness	Common conception of what constitutes bargaining power AND shared attitude on the reputation of the speakers
Systemic effect: possible influence of communicated ideas on the majority of actors	Reflexive collective learning (allowing for ***stable compliance*** regardless of changes in external constraints)	Instrumental collective learning (allowing for ***unstable compliance*** when changes in external constraints occur)
Results of interactions	Consensus	Compromise

There is a second pattern of meaningful communication, to which I refer as 'bargaining as the structure of interaction'. For bargaining as a structure of interaction to evolve, it is not only required that acts of bargaining constitute the predominant pattern of speech acts, but also that actors share a standard for the evaluation of credibility. The standard of credibility has two components, incorporating a subjective and an intersubjective part. The intersubjective standard for the evaluation of a bargaining speech act refers to the bargaining power of an actor. Bargaining power is a complex social construct, which does not only entail formal vetoes but also such elements as the preference intensity and the alternatives of action. In regard to the subjective part, it is necessary that a positive attribution of a particular actor's reputation is undertaken by the other actors. Otherwise a threat, demand or concession is not meaningful, because the other actors cannot rely on its realization. Besides bargaining acts are the predominant pattern of speech acts, it is necessary that actors share a common conception of bargaining power and a common attribution of the reputation of each actor for bargaining as the structure of interaction to evolve. Within bargaining as the structure of interaction, *instrumental collective learning* about the distribution and nature of external constraints (such as the costs imposed by threats) is likely and can result in a compromise.

[6] Since reflexive learning is an unintentional process (see also Checkel 2001a, Checkel 2001b, Zukin and Snyder 1984: 629-630), it is also possible that short cuts lead some of the actors to accept an argument as true, right or appropriate, even though common standards are lacking, because they attribute authority to the speaker. However, short cuts do not contribute to the establishment or maintenance of any of the structures of interaction, because it is unlikely that all actors undertake similar short cuts simultaneously.

The systemic approach on interactions has the advantage of accounting for the coexistence of argumentative speech acts and speech acts of bargaining. This meta-theoretical frame and its concept of two structures of interaction is a heuristic yardstick with which the potential impact of ideas from reflexive to instrumental learning can be grasped. Since the systemic approach abstracts from logics of action, the gap between rationalist and constructivist theories with similar substantial foci can be bridged neutrally. This requires that ideal scopes of both approaches are examined with recourse to the contextual existence of the preconditions for the evolution or maintenance of any of the structures of interaction. Contextual conditions provided by the judicial discourse with impacts for the evolution and maintenance of the structures of interactions are discussed next.

Principally, actors are always free in choosing between arguments and bargaining acts as two types of speech acts. However, the power of the law, as opposed to the prevalence of the preferences of the stronger, can only be strengthened during interactions before the ECJ, when argumentative speech acts are successful. Only when *collective reflexive learning* takes place, actors alter their substantial interests according to the developed consensual norm interpretation, which allows for stable compliance.[7] When, on the other hand, bargaining dynamics evolve the power of the stronger could prevail over the power of the law in the longer run. This, however, would require that states accomplish their substantial interests against the ECJ's norm interpretation. Comparing the bargaining power, the ECJ possesses the threat of an article 228 proceeding, while states potential threats are severely reduced. Given this power disparities (among other reasons, see IV.2), it is unlikely that bargaining as a structure evolves, collective instrumental learning occurs and a compromise is achieved.[8]

IV.2 The ECJ as Platform for Argumentative Speech Acts

The ECJ serves as an institutionalized arena that is conducive to the development of arguing as the structure of interaction to the disadvantage of bargaining as the structure of interaction in various ways. (1) The existence of a third adjudicating party alone does not negate differences in bargaining power of the states as the constitutional actors in international institutions. When third parties are not highly independent of the states in regard to their composition, tenure, payment, and terms of recall, they might anticipate ex-post sanctions (in pre-

[7] It allows for but does not result in stable compliance, since collective reflexive learning has to be transformed into institutional learning, for stable compliance to be achieved (for the intervening variables see part VI).

[8] The extensive discussion of theoretical accounts for bargaining dynamics and processes of instrumental learning during interactions before the ECJ would be beyond the scope of this paper. With the shadow of financial sanctions (Article 228) and the shadow of external reputational losses, there are two sources that might increase

agreement interactions) in rulings favoring strong states (similar Abbott et al. 2000: 419; Keohane, Moravcsik and Slaughter 2000: 460). A highly independent third party reduces the success of a state's bargaining strategies, since potential threats decline. Institutional designs with low degrees of legalization (third parties are not independent and rulings are non binding), allow for threats and ex-post sanctions by states (such as the dismissal of individual judges). In such settings, third parties do more likely anticipate the power of and power differences between states in the contents of their rulings and strengthen, thereby, the power of the strongest. If, however, the degree of legalization is high, the resources required for bargaining are severely restricted and prevent states from extensive bargaining strategies. Hence, adjudication mechanisms, as installed in the infringement proceeding of the EU, reduce the possibility that a common standard for the evaluation of bargaining power prevails. (2) Within adjudication processes only arguments related to the world of the treaty and to the intersubjective world of truth are considered as legitimate speech acts (Alexy 1983, Onuf 1989). When speech acts of bargaining are not considered as contextual appropriate, their likely impact is reduced, since bargaining as a structure of interaction cannot evolve when only one of two actors recurs to bargaining acts, which, in turn, decreases the prospects for mutual instrumental learning. Hence, even for strong states, acting according to a strategic rationality, the use of argumentative speech acts becomes the better option. (3) The EU's infringement procedure combines management and adjudication mechanisms. Before the adjudication phase is started through the European Commission's referral of the case to the ECJ, political aspects of potential norm violations are in the centre of the debate (Tallberg 2002, Tallberg and Jönsson 2001). With the ECJ referral judicial aspects become increasingly important. Also heuristics for the interpretation of the content and scope of norms (wording, historical, teleological and systematic interpretations) are institutionalized. This allows for the reduction of subjectivism (Fiss 1982, Gulmann 1980). Moreover, each heuristic introduces an additional yardstick, on which the quality of arguments can be evaluated (see IV.3.2).

Because of the highly legalized design, judicial discourses before the ECJ strengthen arguing over bargaining. The institutional context is thus, especially conducive to reflexive collective learning. However, all actors acting within the context of the ECJ have strong substantial interests and/or strong strategic preferences pointing towards non-compliance. ECJ referrals are least likely cases for reflexive learning of states, because reflexive learning did not occur during the management phase, in which typically political aspects are in the center of interactions (Tallberg 2002, Tallberg and Jönsson 2001). When reflexive collective learn-

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the cost-imposing constraints during the adjudication phase. As argued elsewhere, both explanations suffer from

ing occurs during interactions before the ECJ, argumentative strategies between the referral to the ECJ and the withdrawal of the case must have been at work. However, the institutional design of the EU's adjudication phase is constant and cannot explain why some interactions lead to reflexive collective learning, while others fail.

IV.3 What Makes an Argument Convincing?

IV.3.1 Different Standards of Reference.

Even though institutionalized arenas such as the adjudication by the ECJ provide platforms for judicial argumentation, while simultaneously bargaining strategies are downgraded, the argumentative communication of ideas alone does not provide any yardsticks for the decision of what makes arguments convincing. Not every argument is per se good and thus not per se suited to persuade an actor. Therefore, the crucial question: What characterizes a good argument? Which ideas are likely to change actors' substantial interests?

In general, with truth, rightness and appropriateness, there are three possible standards on which the quality of arguments can be assessed (Habermas 1995b).[9] The standard of truth encompasses epistemological and methodological principles and also ontological elements. Argumentative interactions, in which the quality of arguments can be measured on standards of truth, are conducive to collective reflexive learning, when the actors share expertise on the subject matter. State's governments and parliaments are, albeit to varying extents, characterized by vertical and horizontal institutional differentiation, which allows for specialization of the actors. This is conducive to processes of reflexive learning in interactions in which technical arguments are dominating. For violations, concerning the incorrect transposition of European directives into national law, truth aspects are especially important, when the ECJ initiates fact finding commissions, in order to provide for additional insights of causal chains between the aim of a directive and the instruments for the effective fulfillment of the purpose of the disputed norm. Hence, the prospects for reflexive collective learning are increasing, when fact finding commissions are initiated and provide new ideas on cause-effect relationships with importance for the fulfillment of the norm's purpose (content and scope).

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 reflexive collective learning based on the argumentative communication of causal ideas is the existence of a consensus on the purpose of a norm among the actors. Norms are expression of a common interest of the norm-producing actors

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several theoretical shortcomings and are not supported by empirical evidence (Panke 2004).

(Habermas 1992, Habermas 1995a) 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 1995b: 42). For incorrect transpositions of European directives, however, content and/or scope of the respective norm is most likely to be disputed.

During interactions before the ECJ reflexive collective learning is in so far aggravated, as it is unlikely that a shared standard for rightness exists, on which the quality of normative ideas can be equally assessed. Nevertheless, actors are not trapped in the dilemma that reflexive collective learning can only occur when there is consensus of a norm's purpose, while the very fact that the case has been carried on to the adjudication phase indicates that such a consensus is not existent. The judicial discourse offers an expedient, since 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 heuristics are applied. With wording, historical, systematic and teleological interpretations, there are four different heuristics for interpretations. These instruments of judicial reasoning can serve as additional yardsticks, on which the quality of arguments can potentially be measured. Thus, the application of judicial heuristics provides opportunities for reflexive collective learning (which, in turn, is conducive to stable compliance), opportunities which are absent in the interactions prior to the initiation of the adjudication phase.

IV.3.2 Heuristics of Judicial Interpretation

Under which conditions are states likely to undergo processes of reflexive collective learning during judicial discourses? The ECJ has often been criticized for its dominant pattern of pro-Commission and thus pro-integration rulings (Garrett 1992, Garrett 1995, Garrett and Weingast 1993; see also Rasmussen 1986). Prominent cases, such as the Costa case, in which the ECJ developed the doctrine of supremacy of European law, reveal that ECJ rulings can have an enormous impact on further dynamics of European Integration. In such rulings, the ECJ goes beyond clarifying the status quo of European Integration, but strengthens the supranational character of the project. Many authors argue that such far reaching interpretations (Rechtsfortbildung) are only possible, since the ECJ uses foremost the teleological heuristic (Rasmussen 1986: 149, 173, 180, 264; Snyder 1993: 40; Gulmann 1980: 189, 199). Teleological interpretations allow for readings of norms in the light of the preamble, in which the aim of further integration is explicitly stated. Despite the tendency of the ECJ to side with the

[9] The standard of appropriateness is discussed in part V.3.3.

Commission in its rulings,[10] the teleological method opens broad windows of persuasion being conducive to *collective reflexive learning*. An empirical survey of the judgments of the employment and environmental directives in my data set (for the selection of this policies see annex 1), however, reveals that the ECJ does not apply the broad teleological heuristic (except for one case). Instead, it extensively relied on wording, often on directive-immanent teleological and rarely on historical methods of judicial reasoning. Unlike the application of the broad teleological heuristic (referring to further market integration in general) and to a lesser extent systematical method of interpretation (which the ECJ does not use at all),[11] directive-immanent teleological, wording and historical methods provide relatively small spaces for interpretations and thus for the argumentative development of consensual norm-interpretations. Hence, the prospects for reflexive collective learning are relatively restricted – compared to the broader teleological method. The lowest likelihood for reflexive learning provides the historical method of interpretation.[12] In using this heuristic, the ECJ defines scope and content of directives through reference to the will of the norm-creators. However, states and not the ECJ were prominently involved in European policy-making. Arguments related to 'the original will' of the norm creators are likely to be evaluated as 'not right', when the norm creators themselves have diverging memories of the 'original will'.[13] This *prevents* the evolution of arguing as the structure of interaction and thus *reflexive collective learning*. Although the wording heuristic is not as restrictive as the historical method, its space for consensual norm interpretation is restricted, while the directive-immanent teleological method allows for a slightly broader range of possible interpretations. Hence, chances for reflexive collective learning increase, when the directive-immanent teleological method is applied (either alone or supported by the wording heuristic). However, the possible space for consensual interpretations is heavily influenced by policy characteristics. In order to develop more fine grained hypotheses on the prospects for reflexive collective learning, it is necessary to introduce policy-related intervening variables.

[10] Only rarely do states win cases before the ECJ.
[11] Systemic interpretations put a disputed norm into the context of the whole legal document. Norm interpretations in the context of unchallenged primary or secondary law, provide insights on the scope and the content of the disputed norm, since the latter can be concretized through negative exclusions and positive contributions.
[12] This method was applied in only four cases. In all those cases, the outcome was continued non-compliance.
[13] Moreover, sometimes non-accused states join in the judicial discourse in order to support and help the accused state (institution of 'Streithelfer'). When also those states doubt the correctness of the reconstruction of the original will, reflexive collective learning is additionally unlikely.

IV.3.3 Policy-Variables

Policy characteristics influence the room for interpretations and are therefore very likely to influence the prospects for reflexive collective learning during the judicial discourse before the ECJ. The less clearly content and scope of a norm are defined, the more leeway for judicial reasoning exists. At the same time, the window for wording-based or teleological-directive-immanent interpretations become smaller, the clearer a norm's content and scope is already defined. Norms can be distinguished according to three criteria, namely the precision of the content, the complexity of the scope and their character as varying between highly value-laden and technocratic.

The degree of precision is often defined in regard to whether a norm qualifies as hard or soft law (Abbott and Snidal 2000, Cini 2000). Within the EU's infringement procedure only (primary and secondary) hard law is at stake. This paper focuses exclusively on the incorrect transposition of directives into national law (see appendix 1). Directives vary in the extent of their precision. While some directives define the content narrowly, others are more ambiguous. The ambiguity of a norm's content is highest, when the fulfillment of the content, as prescribed, includes intervening variables (such as exceptions or context specific, local standards/choices) and when the aim is predominantly procedural in character. On the other extreme, a norm is highly precise, when the fulfillment of the content is prescribed without the incorporation of intervening variables (such as context-specific exceptions) and when additionally the norm has a substantial aim.

Table 4 Precision

Content	Fulfilment of content prescribed *without* intervening variables	Fulfilment of content prescribed *with* intervening variables
Predominantly substantial aims	Highest	Second lowest
Predominantly procedural aims	Second highest	Lowest

Norms are not only distinguished with regard to their content (precision), but also with regard to their scope (complexity). The application of a norm is the least ambivalent, when its scope is closed (positive or negative enumerations) and vertical (includes only one issue, e.g. only one media such as air or water in environmental directives or only one sector in employment directives), while the complexity is highest, when the scope is openly defined (use of abstract definitions and concepts, judicial figures) and horizontal (includes several media or sectors at once).

Table 5 Complexity

Scope	Open scope of application	Closed scope of application
Horizontal (includes all media)	Highest	Second lowest
Vertical (includes only one media)	Second highest	Lowest

While highly precise and lowly complex directives restrict the number of possible interpretations during judicial discourses severely, the window for extensive interpretations (which also depends on the used heuristics) is higher for lowly precise and for highly complex directives. The hypothesis, thus, is*:*

The lower the precision and the higher the complexity of a norm is, the broader the space for interpretation and the higher the likelihood for reflexive collective learning becomes, especially when judicial heuristics are applied that allow for broad interpretations.

Regarding the environmental and employment directives of the data set, this hypothesis seems to be confirmed. 38% of all directives are highly precise and lowest complex and account for 50% of all 'continued non-compliance' cases. On the other hand are 25% of all violated directives least precise and highly complex and account for 49% of all 'stable compliance' cases.

Besides the clearness of a norm's content and scope, does the extent to which the norm is value-laden or technocratic influence the successful application of judicial heuristics (such as wording or directive immanent teleological). A norm is highest technocratic, when it contains predominantly procedural measures and aims in combination with a strong emphasis on market-matters (such as equality of market subjects, fairness or competition). On the other extreme are directives highly value-laden, when there are strongly related to maintenance of humankind or the equality or freedom of humans in combination with a strong emphasis on substantial aims.

Table 6 Technocratic/Value-laden

Character of the norm	Humankind – maintenance, equality and freedom	Market – equality and fairness (competition, market subjects)
Substantial aim	Highest value-laden Lowest technocratic	Second lowest value-laden Second highest technocratic
Instruments/means	Second highest value-laden Second lowest technocratic	Lowest value-laden Highest technocratic

The more extensive judge and state actors can draw on values, institutionalized in the broader lifeworld, in order to arrive at consensual interpretations of the content and scope of a norm, the higher are the prospects for successful transformation of non-compliance into stable compliance. However, the ability to incorporate values from a common lifeworld into the substance of judicial reasoning varies with the characteristics of the norm at hand. When the norm itself is already highly value-laden, the recurrence to other values is restricted, since value conflicts arise more easily. Such conflicts are not conducive for reflexive collective learning, since they cannot be resolved under arguing as the structure of interaction. The standard of appropriateness, as the evaluative standard for the quality of ideas relating to values, is itself constituted by axiomatic interpretations of values as authentically (Habermas 1995b: 41). The content of authentic interpretations of values is, in turn, diffused through socialisation (Habermas 1995b: 40-42). Hence, when a state's actors are socialised differently than the ECJ's judges, it is likely that they do not share standards of appropriateness. Thus, conflicts between the values, on which the disputed norm rests, and the values of the broader lifeworld, which where incorporated in order to reduce the subjective leeway of judges, cannot be resolved under arguing as the structure of interaction. The lack of a shared standard of appropriateness prevents actors from evaluating arguments in the same way. As a result, reflexive collective learning facilitating a consensual interpretation of the disputed norm becomes less likely. If, on the contrary, the disputed norm itself is less value-laden, value conflicts are less likely to arise, when judges or state actors incorporate values, institutionalised in the common lifeworld in the judicial discourse. Hence, the 'social dimension of law' can only favour reflexive collective learning, if the norm at hand is itself technical in character rather than distributive and re-distributive, since the latter are inherently value-laden in regard to questions of social justice (Saratzki 1996: 35-36).

The hypothesis, thus, is: *The higher the regulative character of a norm, the more likely is reflexive learning during the judicial discourse, if the ECJ applies broad teleological or directive-immanent teleological interpretational heuristics.*

The environmental and employment directives of the data set do not seem to confirm the policy-related part of this hypothesis. On the one hand, 19% of all directives are most value-laden but account for only 16% of all cases of 'continued non-compliance' (and for 50% of all unstable compliance cases and for 14% of all 'stable compliance' cases). On the other hand, 49% of all violated directives are most technocratic and account for 45% of all 'stable compliance' cases. At the same time, however, the ECJ draws extensively on the relatively restrictive wording heuristic (~70% of all cases), which prevents the incorporation of values from

the broader lifeworld. Alternative interpretations would take the strategies of societal actors (which could bring about both: reflexive and instrumental collective learning, see V) and the transformations of collective learning into institutional learning (VI) into consideration. Unfortunately, a final interpretation cannot be offered here, since this would require qualitative process-tracing case studies (which are in progress).

V. Judicial Discourses and the Differential Empowerment of Societal Actors

The 'top-down' impact of judicial discourses alone does not provide sufficient explanations of the variations in the outcomes of stable compliance, unstable compliance and continued non-compliance during the adjudication phase. This is not surprising, since the prospects for reflexive learning were discussed without the consideration of supporting and countervailing domestic forces, which might use the judicial discourse for influencing the dynamics of states' learning processes.

There is disagreement on whether the transparency of settings influences the likelihood that arguments matter. Approaches taking communicative logic of action as naturally dominant argue that transparency increases the impact of arguments, because the public serves as a third standard, allowing for the triadic structure of arguing (Saratzki 1996).[14] On the contrary, when the strategic logic of action is primary, it is argued that 'in camera settings' free actors from the public pressure of interest representation (Checkel 2001b: 563). According to this argumentation, in camera settings allow for processes of persuasion, because public constraints on changes of substantial interests can be side-stepped by pretending bargaining dynamics and restraints. The discrepancy of both assessments is grounded in the weight put on either the communicative or on the strategic logic of action, and cannot be solved on this level, because the logics are mutually exclusive since they are based on different conceptions of rationality (Panke 2002).

[14] The analytical distinction between speech acts and logics of action is an important progress, on which Risse's concept of argumentative self-entrapment is built (Risse 1999, Risse 2000 Risse 2003). According to his argumentation, the public forces actors to use argumentative speech acts, regardless of the underlying logic of action. Changes of positions occur not because the actors are intrinsically motivated to become persuaded, but rather because they become caught by their own arguments, which cannot be recalled in public without a loss of reputation. Thus, the public as a third standard brings about an argumentative dynamic (Risse 1999; 2003). However, this line of reasoning presupposes that the public appreciates arguing of their representatives more than bargaining. This implicit assumption is not generally valid, because in some situations the public might expect their representatives to push through the ‚national interest', or the preferences of organized interests through bargaining. Additionally, the concept of argumentative self-entrapment is not based on unitary assumptions about the level of strategic rationality. On the one hand, it presupposes perfectly strategic actors, calculating their reputational costs. At the same time, however, it is implicitly assumed that the actors are hardly rational regarding the selection of their speech acts, since they would otherwise anticipate the argumentative trap and eventually avoid the use of arguments at all. Because of these shortcomings, it can not generally be upheld that transparency allows the public to operate as a third standard which automatically favors arguing.

The systemic approach on interaction arrives at a different assessment of the impact of transparency. Such an approach does not rely on one-sided action theoretical assumptions because it makes a distinction between speech acts and logics of actions presuming that neither reflexive nor instrumental learning requires a conscious motivation of actors. Transparency would only promote reflexive or instrumental learning, if it had an impact on the selection of speech acts or on the standards to which actors can refer. The selection of speech acts is not influenced by the degree of transparency. While in some settings, arguing might be enforced through publicity of interactions, in others, the audience might expect the representatives to pursue given preferences via bargaining. Also, transparency is not in itself conducive to the reference of either one of the standards for the evaluation of ideas. It does not influence the likelihood that bargaining power is equally assessed, credibility is attributed, or actors share standards for what constitutes true, rightful or appropriate ideas. Hence, transparency has no influence on the likelihood of the evolution of either arguing or bargaining as structures of interaction (Panke 2002). In public as well as in in-camera settings, actors' speech acts can refer to argumentative or bargaining standards alike.[15]

Nevertheless, public attention might influence the directions and dynamics of learning of governmental and parliamentary actors and thereby the outcomes of transformations of non-compliance during the interactions before the ECJ. The public cannot be reduced to a passive audience, which state actors have to convince through argumentative means. Instead, actors belonging to the public sphere can have interests in certain results of the adjudication phase, and try, thus, to exert influence on national decision-makers. As it will be discussed next, the judicial discourse empowers some societal actors over others. Not only does it influence the resources of actors, but also the conditions for the success of some strategies.

In general, there are three types of resources, which can be used for various strategies, influencing governmental and parliamentary learning dynamics. These are channels of access to constitutional actors, bargaining power (potential threats and credibility) and ideas/ information. The importance of the resources varies with the strategies actors are pursuing. Among the strategies between which the actors can choose, there are strategies, operating according to a rationalist (shaming, i.e. internal reputation costs, and peer pressure, i.e. external reputation

[15] One could argue that the politicization of issues favors the use of rightness and appropriateness as standards for the evaluation of ideas, to the disadvantage of truth. This line of argumentation would lead to the hypothesis that public settings favor the development of bargaining as the structure of interaction. This argument, however, requires two additional assumptions. Actors must act in a strategically rational manner, since they wouldn't be sensitive to concerns of the electorate otherwise. Since politicization increases public attention, it would additionally be necessary that the public always expects their representatives fighting for their interests with bargaining strategies. While this might be true in some settings, it is certainly not valid for all cases, especially not when the interested and mobilized public opposes governmental action-plans.

costs) or a constructivist (arguing and (re)framing) mechanism. Strategies operating according to a rationalist mechanism are based on the communication of external constrains (explicit or implicit threats), inducing costs on the executive/ legislative actors, when they refuse to alter their strategic preferences. While peer pressure[16] is based on the imposition of costs, stemming from losses in a state's external reputation, shaming strategies are related to the threat of declining domestic reputation of governmental/ parliamentary actors. On the contrary, strategies of framing and arguing are based on a constructivist mechanism and focus on the far reaching impact of ideas: on reflexive learning.

Judicial discourses empower those societal actors, whose substantive preferences are in line with compliance (see also Kahler 2000). These actors cannot only draw on the legitimacy and authority of the ECJ but may also refer to the shrinking shadow of sanctions, in order to strengthen their claims. On the contrary, actors opposing compliance can no longer refer to ideas of appropriateness. Also it becomes increasingly difficult, to emphasize domestic costs of compliance and reinforce a state's strategic preference for non-compliance.[17] During ongoing judicial discourses, resource distributions for both types of strategies, persuasive and pressuring, are altered in favor of pro-compliance actors. Thus, depending on the strategies societal actors pursue, processes of reflexive or instrumental institutional learning favorable to the transformation of non-compliance can be reinforced.[18]

Neither pure arguing nor pure bargaining strategies of societal actors can be expected to be very successful. The judicial discourse could empower societal actors in providing them with new ideas, strengthening their substantive preferences. However, it is unlikely that societal actors can persuade governmental and parliamentary actors with the communication of these ideas, because the latter did not learn in the judicial discourse, when these ideas have been brought up in the first place. Rather, societal actors can be expected to influence decision-makers with argumentative means, when they engage in re-framing activities.[19] Under

[16] Within this paper, peer pressure strategies are not discussed at length. Their application is unlikely, because of (1) the institutionalization of European norms of secrecy (Smith 2000b: 615), (2) the institution of other member states as 'Streithelfer' before the ECJ and (3) all states are themselves confronted with ECJ referrals.

[17] When the state is willing to comply, ECJ rulings are supportive to the realization of new preferences for compliance. Because of their binding character, a convicted state can refer to moral, normative or factual obligations arising from the ruling and is, in turn, strengthened against domestic opposition (Abbott and Snidal 2000: 454).

[18] Without introducing assumptions on primary and secondary logics of action (which would lead to a rationalist or a constructivist bias (Panke 2002) and thus to a bias regarding the outcome), it is not possible to determine in the abstract, which strategies actors employ. Therefore, I analyze contextual variables regarding their influence the prospects of success of different societal strategies.

[19] Framing is the process of selecting, organizing, interpreting, and making sense of a complex reality (Rein and Schön 1993: 146). Through framing actors try to transfer a specific construction of a situation into an institutional arena, by highlighting ideational parallels between their conceptions and already shared ideas (Payne 2001). When a frame is launched successfully, some ideas are factored out and a part of the ideational asset is

which conditions can we expect frames to be launched successfully? Frames, targeting the government and the legislature, are especially conducive to reflexive learning, when the judicial discourse is reinterpreted, in a manner, increasing the compatibility of judicial arguments and domestically institutionalized ideas. 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 (Brest 1982, Dewey 1924, Fiss 1982, Habermas 1998, Klare 1998, Wheeler Cook 1927: 24). Secondly, subjectivity is introduced during the construction of the situation and the selection of relevant 'facts' (Brest 1982, Dewey 1924, Fiss 1982, Habermas 1998, Klare 1998). Hence, contrary to claims of judicial positivism, judicial interpretation is a process of social construction, which always leaves a space for subjectivism (Fiss 1982, Klare 1998, Rasmussen 1986, Wheeler Cook 1927). This subjective leeway of the judges is often reduced by recurring to broader values during the judicial discourse (Dewey 1924, Wheeler Cook 1927: 308). This 'social dimension of law' is important for the prospects of states' reflexive learning, since framing activities of societal actors can highlight the goodness of fit between judicial arguments and domestically institutionalized ideas (the domestic lifeworld) (for resonance arguments see further Checkel 2000, 2002 and Ulbert 1997). As already discussed, the ability to incorporate values from other lifeworlds into the substance of judicial reasoning varies with the characteristics of the norm at hand. When norms are already highly value-laden, the recurrence to other values is restricted, since value conflicts arise more easily. Hence, the 'social dimension of law' only favors framing strategies, if the norm at hand is itself technocratic in character.

The higher the technocratic character of a norm, the easier it is for societal actors to re-frame the judicial discourse and to provide grounds for reflexive learning of state actors.

The data seems to contradict this hypothesis, however, since 49% of all directives are the most technocratic but account only for 45% of all 'stable compliance' cases. There are alternative explanations for this empirical finding. (1) The number of re-framing strategies that societal actors conducted might have been relatively low. This, however, is an empirical question, which I have not inquired yet. (2) Re-framing activities leading to reflexive collective learning might be extremely difficult, since a system of interaction to emerge, requires a

accentuated. This reduces the ideational heterogeneity among the actors and provides an ideational environment, conducive to learning.

higher density of interactions than eventually achieved by re-framing activities. (3) Also, reflexive learning of governmental and parliamentary actors might take place, but cannot be transformed into institutional learning (see IV). Based on the aggregated data, however, no final conclusion on the plausibility of these interpretations can be drawn.

Successful bargaining strategies would presuppose that a concept of bargaining power is shared among societal actors and the national decision-makers. Societal actors do not possess per se potential threats, but must first create them, through shaming strategies. Strategies of shaming aim for an indirect influence on the primary addressees, in mobilizing the general public, who in turn can be used as an external cost-imposing constraint preventing continued non-compliance. The first step of a shaming strategy is the adoption of a frame, which highlights the inappropriateness of a state's non-compliance. This is the easier, the higher the value-laden character of a norm is. When a frame is applied successfully and resonates within the public discourse,[20] the public becomes mobilized against further non-compliance. This can be used in a second step by societal actors, in order to point towards the domestic reputational costs for the governmental and parliamentary actors, arising from future non-compliance. The cost-benefit calculations of decision-makers are more strongly affected by the threat of reputational losses, when the particular policy is of high relevance for the profile of the governing parties or when elections are coming up soon. Under these conditions, shaming strategies are probably successful and instrumental learning is likely to take place.

The hypothesis is: *The higher the value-laden character of a European directive is, the higher are the prospects of success of shaming strategies, which, in turn, are favorable to instrumental learning and, thus, to unstable compliance.*

The hypothesis seems to be confirmed. 19% of all employment and environment directives are highest value-laden and account for 50% of all unstable compliance cases. Thus, shaming strategies seem to be more successful than re-framing strategies. Alternatively it could be the case that shaming strategies are used more often than re-framing strategies. However, for confirmations of this hypothesis in a methodological correct manner, qualitative case studies are necessary.

VI. Institutional Learning

The debate on arguing and bargaining suffers from an underspecified concept of agency (Checkel 2000, Checkel 2001a, Checkel 2001b, Checkel 2002). In implicitly conceptualizing

states as unitary actors, there is no distinction drawn between individual, collective and institutional learning.[21] Institutional learning, as the learning processes of all actors who are prominently involved in the 'production' of legal acts (e.g. federal laws, decrees, state laws), however, is crucial for the outcomes of judicial discourses.

Institutional learning becomes increasingly difficult, the higher the number of institutional actors (national legislative, national government, ministerial bureaucracy, state legislatives), who are involved in the policy-making process, is. The higher the number of actors is, the more difficult the diffusion of learning processes from the judicial discourse within the state becomes. The diffusion, in turn, is necessary for the adaptation of national legal acts according to the norm interpretation as developed during the judicial discourse. When the absolute number of national legal acts for the transposition of a European directive is taken as a preliminary proxy for the number of involved actors, the hypothesis is:

The higher the number of legal acts for the transposition of European directives into national law, the *higher is the percentage of continued non-compliance that can be expected.*

There are enormous differences between the states and policies as regards the absolute number of legal acts for the transposition of the selected directives (for the selection see annex 1).

The first group with a total number of legal acts below the average (39) is composed of Luxembourg, Greece and Italy (between 23 and 35 legal acts). Together these states account for 15 % of all continued non-compliance cases. The Netherlands, Portugal, Ireland, France and Denmark have total numbers of legal acts that are above the average (ranging from 45-58). Germany, Belgium, UK and Spain needed more than twice as much legal acts (75-157) than the average of the twelve states. These four states account for 62,5 % of all continued non-compliance cases.[22]

The number of legal acts varies not only between states but also across policy-areas due to the allocation of competencies between different levels of government and 'policy-traditions'. For the transposition of the two environmental directives (wild birds and environmental impact assessment) there is an *average of 29,2 legal acts* per state for each of the directives, corresponding to *49% continued non-compliance,* 4% unstable compliance and 47%

[20] The media plays an important role for the success of public frames. However, the elaboration of this element is beyond the scope of this paper.

[21] Since especially the earlier debate strongly drew on action theories, the focus on individual learning is not surprising. However, when individuals undergo processes of reflexive or instrumental learning during interactions, they have to transform their altered strategic preferences or substantial interests into institutional learning, for policy change (as the original dependent variable, see Müller 1994) to occur.

[22] These group-based data provide only preliminary insights. It is not suited for falsifications of the hypothesis, since they do not control for the number of states in the groups, differences in the duration of membership, differences in the absolute numbers of ECJ cases, and for the distribution of the parameter values within the states.

stable compliance. On the average there are *2,8 legal acts* per state and per employment directive (on the principle of equal treatment for men and women as regards access to employment, vocational training and working conditions and on the safeguard of employees' rights in the event of transfers of undertakings, businesses or parts of businesses), The corresponding distribution of the parameter values is: *5% continued non-compliance*, 45% unstable compliance and 50% stable compliance. Hence, on the aggregate state- and on the aggregate policy-level the hypothesis seems to be plausible, albeit it is not yet confirmed by qualitative case studies.

The substantial interests and strategic preferences of the secondary addressees (ministerial bureaucracy) might have been an important source of non-compliance in the first place (Ringquist, Worsham and Eisner 2003). Through decrees ministerial bureaucracies are heavily involved in the production and adaptation of national legal acts for the transposition of European directives into national law (on the average more than 50% of all national legal acts regarding the selected directives). Therefore it may be worthwhile considering the role of secondary addressees for institutional learning in detail.

Learning processes cannot only be induced by the interactions before the ECJ but also by re-framing and shaming strategies of societal actors. Especially the shaming strategy is only directed towards legislature and government. While those actors are cost-sensitive, since reputational losses can result in ex-post sanctions in elections, the ministerial bureaucracy is not in general affected by such external constraints. It is therefore necessary to distinguish between highly politicized and not politicized ministerial bureaucracies. In highly politicized bureaucracies, high officials are selected according to their party affiliation,[23] while in non-politicized bureaucracies they are less affected by electoral losses, since their posts are not dependent on the governing party.

Hence, for states with a highly politicized ministerial bureaucracy[24], it can be expected that the ministerial bureaucracy is almost as sensitive to societal shaming strategies as the governmental and the majority of parliamentary actors. At the same time, a higher rate of continued non-compliance can be expected for states with a non-politicized ministerial bureauc-

[23] In addition, the potential for hierarchical diffusion of new ideas to the secondary addressees might depend on the primary addressees' ability for setting incentives and imposing sanctions (such as performance-related aspects in payment, see further: Auer, Demmke and Polet 1996). Despite the extended concept of 'politicization' seems to be very important, its discussion would be beyond the scope of this paper.

[24] Such states are Belgium (Molitor 1988), Germany (Derlien 1995, Siedentopf 1988b), Spain (Beltrán 1988), Italy (Cassese 1984, Cassese 1988), and Great Britain (Rose 1984). In Denmark (Bogason 1988) and in the Netherlands (Kooiman and Breunese 1988) the ministerial bureaucracy is almost non-politicized, but there is cooperation between the ministerial bureaucracy and organized interests in regard to policy-formulation that might operate as a functional equivalent.

racy[25], because such ministerial bureaucracies are less sensitive to shaming strategies. This, in turn, transforms instrumental learning of primary addressees into the outcome of continued non-compliance.

Table 7 Hypotheses on the role of ministerial bureaucracies

		primary addressees (national governmental and parliamentary actors)		
		reflexive learning	instrumental learning	no learning
secondaryaddressees (ministerial bureaucracy)	Politicized *and/or* not strongly involved	*Stable compliance*	*Unstable compliance*	*Continued non-compliance*
	Not politicized *and* strongly involved	*Continued non-compliance*	*Continued non-compliance*	*Continued non-compliance*

However, the extent of politicization of ministerial bureaucracies becomes only important, when they are strongly involved in the production of national legal acts for the transposition of a European directive. A first empirical study shows that the involvement of ministerial bureaucracies varies over policy fields. For both environmental directives 69.84% of all national legal acts necessary for the transposition in the twelve older member states were products of the ministerial bureaucracy (decrees), while only 38,81% of all national legal acts were decrees in regard to the two employment directives. Since the percentage of continued non-compliance is higher for the environmental (49%) than for the employment (5%) directives, the hypotheses on the policy-specific involvement seems to be plausible.

Additionally the activity of the national legislatures and the ministerial bureaucracies varies between the member states. The first group with the lowest involvement of the ministerial bureaucracy is composed of Italy, Luxembourg, the Netherlands and Ireland. Here, national laws account for 37-48% of all national legal acts. Thus, one would expect a lower amount of continued non-compliance cases than for the other groups (ceteris paribus). Countervailing forces for institutional learning are, however, the politicization of the ministerial bureaucracy. In the second group (Germany, UK, Denmark, Spain and France), 33-24% of all legal acts are national laws. The involvement of the ministerial bureaucracy is highest in Belgium, Portugal and Greece, where only between 8 and 18% of all national legal acts are laws.

[25] To this group of states belongs France (Mény 1988) and Ireland (Siedentopf 1988a).

Ceteris paribus one would expect a higher amount of continued non-compliance cases for these states. This seems to hold for Portugal, but not for Belgium and Greece (compare figure 1). However, final conclusions cannot be drawn on the aggregate level, but require qualitative case studies (controlling for the ceteris paribus condition).

As table 7 summarizes, institutional learning requires the consideration of learning processes of primary *and* secondary addressees, since institutional learning processes are crucial for the outcomes of the judicial discourse, as stable, unstable, or continued non-compliance. Stable compliance can be expected, when primary addressees underwent processes of reflexive learning and secondary addressees are either weakly/not involved or highly politicized. Continued non-compliance prevails, when neither of the actors underwent processes of collective learning during the interactions before the ECJ or in response to strategies of societal actors. Unstable compliance can be expected, when societal shaming strategies were successful and ministerial bureaucracies are politicized (or not politicized but not involved). The incentive to change their strategic preferences in the wake of shaming strategies is small for not politicized but heavily involved bureaucracies. Hence, the outcome of continued non-compliance can increasingly be expected when non-politicized ministerial bureaucracies are intensively involved in the production of legal acts. A series of qualitative case studies will show to what extent these expectations hold.

VII. Conclusion

Unlike states, the international system is characterized by the lack of an overarching authority with the right of the legitimate use of force. The effectiveness of law depends thus on the voluntary compliance of states. Although compliance rates with international norms are high on average, cases of non-compliance occur regularly. In order to transform such cases into compliance, almost all international regimes and organizations entail provisions for post-agreement interactions. The purpose of such institutional designs is to increase the power of the law to the disadvantage of the power of the strongest. In the wake of the recent trend towards increasing legalization (such as the WTO/GATT), this paper examined the empirical extreme type for high legalization: the infringement procedure of the EU. The focus of this paper is on the adjudication phase according to Article 226 ECT, since the transformation of non-compliance is increasingly difficult due to the rigid substantial interests and strategic preferences of states. The empirical analysis shows that the success of transformation varies even in highly legalized institutional arrangements: there is an enormous variation between and within states in the rates of stable compliance, unstable compliance and continued non-compliance. These findings are neither explained by legal institutional design approaches, nor by enforcement and management theories.

This paper aimed for a comprehensive explanation for the differing patterns of institutional learning in the shadow of judicial discourses. In order to avoid the shortcomings of enforcement and management theories, it takes a ‘compliance-as-process perspective’ and draws on a systemic approach on interactions, to specify conditions, under which the outcome of stable, unstable or continued non-compliance can be expected. So far, three groups of explanatory variables seem promising to account for the inter- and intra-state differences in instrumental, reflexive or the absence of learning. (1) Although all cases that the Commission refers to the ECJ are least likely cases for reflexive learning (since the strategic preferences and/or substantial interests of states are strong and relatively rigid), empirical evidence shows that reflexive collective learning can be achieved during the ongoing judicial discourse. The European Court of Justice offers an institutionalized arena, in which bargaining strategies are downgraded, while argumentative interactions are upgraded. This is, among other reasons, due to the application of judicial heuristics. But how do adjudication mechanisms operate? The ECJ draws mainly on wording and directive-immanent teleological reasoning in order to solve questions of rightfulness, necessary for the determination of the content and scope of a disputed norm. Judicial heuristics open an additional window for consensual interpretations. However, the size of the window is heavily influenced by policy-related aspects, such as the

precision, the complexity and the characterization as value-laden or technocratic of a norm. (2) Policy-related variables are also of high importance for the prospects of success of societal strategies. Shaming strategies exert pressure on the state from below, which, in turn, influences the dynamics of learning of governmental and parliamentary actors. (3) Top-down and bottom-up induced collective learning processes are not the end of the story. In addition to interactions before the ECJ and interactions with the society, it is necessary to theorize processes of institutional learning in order to explain the occurrences of the three parameter values or the dependent variables.

The developed ‘compliance as process’ perspective is based on an interactionist meta-theoretical frame, which allowed for the development of several hypotheses. All hypotheses were discussed in the light of first empirical insights. On the aggregate level, almost all of the hypotheses seem to be plausible. However, only a series of qualitative case studies will allow for the control of intervening variables and thus for falsifications and can show to what extent these expectations hold.

VIII. Appendix

1) Operationalization of the three parameter values of the dependent variable[26]

Continued non-compliance is characterized by the absence of national transpositions according to the authoritative norm interpretation of the ECJ. Therefore, in cases of continued non-compliance, the Commission initiates an Article 228 ECT proceeding. Hence, the parameter value 'continued non-compliance' is operationalized through the reasoned opinions, the Commission sends in the initial phase of an Article 228 proceeding.

The parameter value ***unstable compliance*** is characterized by insufficient national legal actions. Although a state's transposition of a European directive into national law does not obviously violate the European directive (otherwise an Article 228 ECT proceeding would have been initiated after an Article 226 court judgment), the transposition is insufficient for increasing the effectiveness of European norms. Such national legal acts do *not* comprehensively incorporate the norm interpretation of the ECJ and define insufficiently what constitutes norm-reproducing and norm-violating action. This provides the grounds for repeated norm-violations. The parameter value 'unstable compliance' is operationalized indirectly through the occurrence of preliminary rulings procedures, in which national judges refer legal questions regarding the compatibility of national law with European norms to the ECJ (according to Article 234 ECT), after the date of the court judgment (according to Article 226 ECT) or the withdrawal.

There are also preliminary rulings regarding directives that were subjects of Article 228 procedures. However, those cases are coded as 'continued non-compliance' and not as 'unstable compliance'. This is because the focus of this paper is on compliance as process (and not on compliance as a dichotomous outcome). The 'compliance as process perspective' allows to inquire how common norm interpretations evolve (or do not evolve) and (different types of) learning is accelerated even though the initial substantial interests and/or strategic preferences were strongly pointing towards non-compliance. Since the focus is on learning dynamics initiated during the judicial discourse in Article 226 proceedings, I do not focus on learning dynamics during judicial discourses of Article 228 procedures (as it would be the case, when 'continued non-compliance' cases would be recoded as 'unstable compliance', should a preliminary ruling occur after the end of this proceeding).

[26] The data for the dependent variable stem from the project 'Compliance with Law Beyond the Nation State', directed by Prof. Dr. Tanja A. Börzel and funded by the German Research Council (for further information see http//www.boerzel.uni-hd.de).

Since unstable compliance is characterized by insufficient definitions of a norm‘s content and/or scope, requests for preliminary rulings are to be expected in such cases. It is often argued that Article 234 ECT proceedings are biased by national legal cultures (see further Stone Sweet and Brunell 1997). There could be a bias in two regards. First, the more conflict-prone citizens are and the more often they solve conflicts in going to court, the higher would the likelihood be that incompatibility-questions emerge in regard to the relationship between national and European norms. This could cause a higher number of possible preliminary rulings in some states. A second bias could result from different inclinations of national judges in making use of the preliminary rulings. Again, this could lead to a country-specific bias. In order to test, whether such a bias exists, I counted all national court proceedings, in which the European directives of my data set (for employment and environmental policy) played a central role (the data are from the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union), since these proceedings are potential preliminary rulings. The fist finding is that the number of potential preliminary rulings varies over policies. According to the potential preliminary rulings, the likelihood of a preliminary ruling is 7,79 times higher for a employment (103,14 potential 234-cases/one directive) than for a environmental (13 potential 234-cases/one directive) policy directive. This already accounts for 50% of the variation of article 234 procedures between states. Furthermore a regression analysis showed that remaining differences in potential preliminary ruling procedures are accounted for by the size of the population (while the duration of membership does not matter). This difference in national numbers of court proceedings can be controlled for, when only states with approximately equal sizes of their population are selected for the qualitative case studies (to be conducted). Regarding the differences in the inclination of national judges to make use of the preliminary ruling procedure, there are two outliers. German judges make disproportional use of Article 234 (45% of all possible cases), while Danish judges employ Article 234 only in 6% of all possible cases (all other states between 17 and 27%). Nevertheless, this does not produce a bias for Denmark and Germany, because most of the German 234 procedures were related to directives that were counted as ‘continued non-compliance (reasoned opinion according to Article 228 procedures) and can therefore not be coded as ‘unstable compliance’ cases. In looking at the country-specific ratio between unstable compliance cases and potential preliminary rulings, the outliers disappear, since for all states only between 3 and 9% of all possible preliminary rulings lead to ‘unstable compliance’ cases. Although German judges invoke Article 234 procedures more extensively than their colleagues, they make disproportional use of it in regard to directives that were subject to reasoned opinions in Article 228 procedures (that I code as continued non-compliance). Hence, the differing inclinations of national judges to use preliminary procedures do not introduce a bias in the data in regard to the parameter value ‘unstable compliance’.

Stable compliance is characterized by national transpositions of European norms, which are precise enough to increase the effectiveness of European law in defining what constitutes norm-reproducing action. Stable compliance cases can appear early during the ongoing judicial discourse (leading to withdrawal cases) and late during the judicial discourse so that the ECJ issues a ruling before national transpositions were concluded. Stable compliance is operationalized through withdrawal cases and ECJ judgments (according to Article 226), for which neither Article 234 proceedings after the date of the withdrawal or of the court judgment nor a proceeding according to Article 228 were initiated.

2) Case selection

Time lag: The data set consists only of cases that where send to the ECJ (Article 226 ECT) between 1978 and 1998. The time lag is necessary for the possibility to observe the parameter values 'continued non-compliance' and 'unstable compliance' and distinguish them from 'stable compliance'. Continued non-compliance cases can be observed between one and two years after a court judgment according to Article 226 ECT. The observability of unstable compliance requires a longer time lag, since it often takes several years before a preliminary ruling on transposed directives is requested by national judges. Hence the data set does not include case, referred to the ECJ (according Article 226) after the year 1998.

Type of violation: For three reasons, the discussion is restricted to violations regarding the incorrect transformation of European directives into national law. Firstly, delayed transposition of European directives does not allow for the parameter value of unstable compliance in the phase between the referral to the ECJ and an ECJ judgment. This is because states have only two options: Either they transpose the directive (stable compliance) during interactions or they continue their refusal to transpose the directive into national law (continued non-compliance). Secondly, albeit states are the primary addresses of infringement procedures concerned with violations concerning the incorrect application of secondary and primary law, decentralized administrations are mainly responsible for non-compliance. Thus, the parameter values of stable and unstable compliance could not be examined on the level of executive/legislative action. Instead is would be necessary to look at the single administrations to observe stable, unstable and continued non-compliance. However, the detection of the three parameter values would require that each administration has the possibility of violating the same legal act more often than once. This precondition is problematic for many directives. Thirdly, executive and legislative are both exclusively responsible for violations concerning the delayed and incorrect transposition of directives into national

law. Since there is a 'personal union' between the norm violators and the addressees of the judicial discourse, it is easier to observe different types of learning.

Member states: After the accession of a member state, the amount of infringement procedures is extraordinary high, because they have to transpose the whole asset of European legal acts almost at once, which is likely to lead to temporarily capacity restrictions (Börzel, Hofmann and Sprungk 2004). While this introduces a bias for early stages of the EU infringement procedure (management phase), it does not affect the adjudication phase significantly. Often it takes several years before a case is referred to the ECJ. Therefore the member states acceding the EU in the eastern enlargement cannot be included in the data set. In general, the number of ECJ referrals is relatively low (only a total of 148 incorrectly transposed directives for the twelve older member states), compared to the number of cases in the management phase. In order to avoid biases regarding the newer member states, because of the low number of court cases, only the twelve oldest EU member states are selected for my data set.

Empirical plausibilization: The data set consists of all incorrect transpositions of directives of the twelve older member states until 1998. This data set is used for the mapping of the three parameter values of the dependent variable (III) and for the plausibilzation of the hypotheses in regard to the application of judicial heuristics (IV.3.2).

The data used for the first empirical plausibilizations of the developed hypotheses consists of all employment and environmental directives out of the complete data set. I selected environmental and employment policies, because both policy fields together account for the majority of violated directives in my data set. Both policies include directives which are the most and the least precise and complex, and include both highly technocratic and highly value-laden directives (and allow thus for most different system designs). Moreover, the policy fields are different in two regards. Firstly, environmental policy is a cross-cutting policy, while employment policy is not (hence the number of legal acts for the transposition of a directive into national law can be expected to be higher in environmental than in employment policy). Secondly, in federal and decentralized member states, employment policy is a national domain, whereas environmental policy is often dealt with on the federal as well as on the state level.

For first plausibilizations of the hypothesis on institutional learning, I did not look at all employment and environment directives out of the data set so far. Instead, I selected two employment and two environment directives (according to a most different systems designs regarding precision/complexity and the character of a norm as highly technocratic or highly value-laden).

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