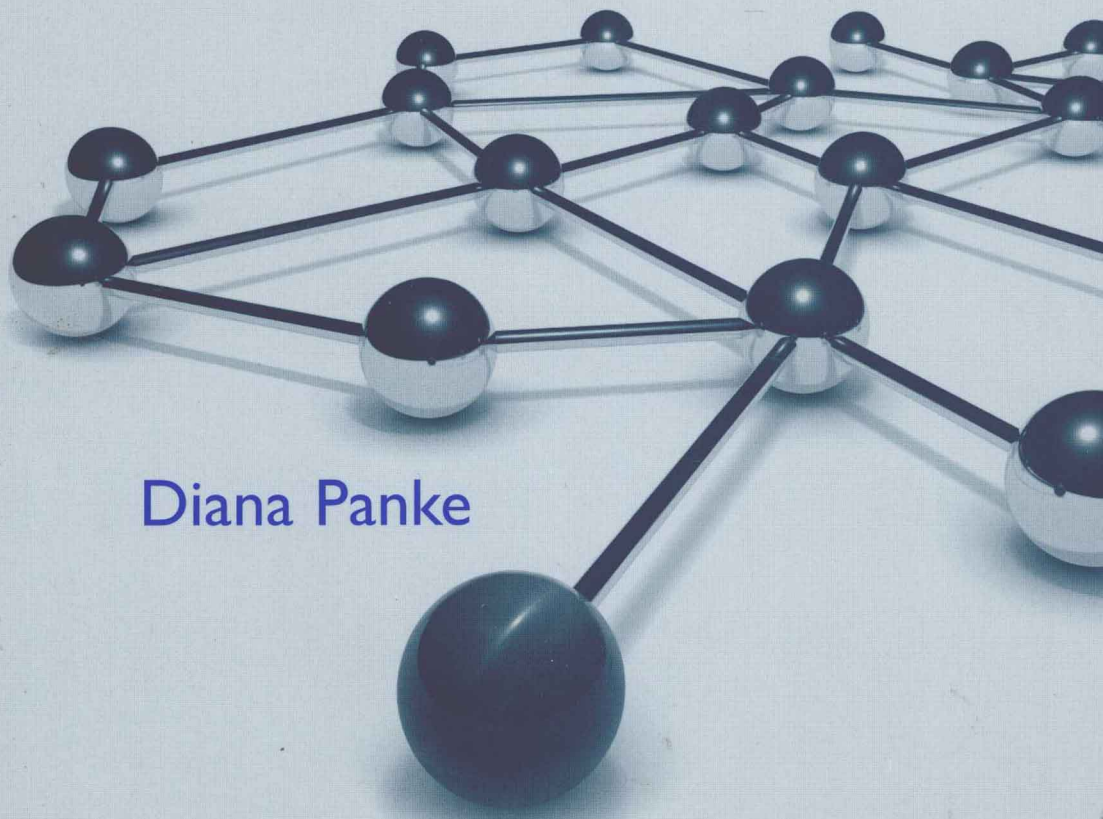
The effectiveness of the European Court of Justice

Why reluctant states comply



Diana Panke

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Preface

This book is based on my PhD dissertation. It would have been written completely differently without the socialization I obtained in the process of getting the degree. After having written a non-empirical master thesis, I planned to write a purely theoretical PhD dissertation as well. When I first started to work with my supervisor, Prof. Tanja Börzel, I expected that I wouldn't have to bother about empirics at all and could spend all my energy in the theoretical realm – even if I ran the risk of theorizing 'unimportant stuff'. This resulted in a theoretically coherent but 'slightly' over-determined research design, with not less than 36 hypotheses. After Tanja invested a lot of energy in talking me out of a purely theoretical thesis (including the manipulation of my screen saver's slogan), empirics hit me. I searched for an empirical puzzle, developed a research question, reduced the number of hypotheses and, most importantly, adopted a theory-driven, methodological, sound empirical understanding of political science, which I am convinced of now and which this book reflects. Thus, I am extremely grateful for Tanja's commitment in acting as an agent of socialization.

Acknowledgements

In more than one respect, I am very much indebted to my supervisor Tanja Börzel. I profited tremendously from her highly dedicated supervision, her continuing support and optimism, her almost supernatural energy in pushing the project further and motivating me even in the wake of long empirical 'to do' lists and – of course – from her immense expertise. I would also like to thank Jeffrey Checkel and Thomas Risse. Their constructive comments on earlier versions of the manuscript and to papers on various conferences and workshops helped greatly to situate the work and sharpen the argument.

Moreover, I am grateful to my friends and former colleagues, in particular Nicole Bolleyer, Evelyn Bytzek, Carina Sprungk, Vera van Hüllen, and Tobias Hofmann for their support with quantitative, empirical, and general issues. I owe thanks also to Suzanne Mulcahy, Niall Morris and Michael Anderson who helped with language editing.

I presented parts of this study at various colloquia, conferences, and workshops. I would like to thank the participants and commentators for their sometimes 'nasty' questions which greatly helped to develop my argument and from which my work benefited enormously. These are: Karen Alter, Karen Anderson, Andrè Bächtiger, Tanja Brühl, Lisa Conant, Thomas Christiansen, Nicole Deitelhoff, Klaus Eder, Gerda Falkner, Anna Holzscheiter, Christoph Humrich, Markus Jachtenfuchs, Peter Katzenstein, Mareike Kleine, Andrea Liese, Altetta Mondré, Jürgen Neyer, Christine Reh, Martin Rhodes, Shawn Rosenberg, Frank Schimmelfennig, Jonas Tallberg, Daniel Thomas, Cornelia Ulbert, Antje Wiener, Bernhard Zangl, and Michael Zürn.

Last but not least, I would like to say thank you to my friends, and especially to Nicole and Tanja, for always being there for me and for cheering me up whenever necessary.

Abbreviations

ASEAN	Association of Southeast Asian Nations
ASF	Arbeitsgemeinschaft Sozialdemokratischer Frauen (German social-democratic women's forum)
BAA	British Agrochemical Association
BDA	Bund Deutscher Arbeitgeber (German Employer Association)
BDI	Bund Deutscher Industrie (German Industry Association)
BGA	Bundesgesundheitsamt (German Federal Health Authority), responsible for drinking water quality (now UBA)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGBL	Bundesgesetzblatt (federal publication of legal acts)
BSE	Bovine Spongiforme Enzephalopathie
BUND	Bund Naturschutz Deutschland (German environmental organization)
CACM	Central American Common Market
CBI	Confederation of British Industry
CDU	Christdemokratische Partei Deutschlands (German Christian Democrats)
COM	European Commission
COMESA	Common Market for Eastern and Southern Africa
CRD	Collective Redundancy Directive
DEFRA	Department for Environment, Food and Rural Affairs
DFG	German Research Council
DGB	Deutscher Gewerkschaftsbund (German Trade Union Association)
DNR	Deutscher Naturschutzbund (German environmental organization)
DVU	Deutsche Volksunion (German Peoples Party)
DWD	Drinking Water Directive

DWP	Drinking Water Provision
DWR	Drinking water regulation
EAC	East African Community
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECT	European Communities Treaty
EFTA	European Free Trade Association
EG	Europäische Gemeinschaft (European Community)
EIA	Environmental Impact Assessment
EOC	Equal Opportunity Commission
EPA	Employment Protection Act
EqD	Equal Access Directive
EU	European Union
FDP	Freiheitliche Demokratische Partei (German Liberals)
FKST	Fachkommission Soforthilfe Trinkwasser (Drinking Water Task Force)
FoE	Friends of the Earth
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GP	Green Party
IACHR	Inter-American Commission of Human Rights
ICC	International Criminal Court
IMF	International Monetary Fund
IR	International Relations
MAFF	Ministry of Agriculture, Fisheries and Food
MERCOSUR	Mercado Común del Cono Sur (Southern Common Market)
NABU	Naturschutzbund (German environmental organization)
NAFTA	North American Free Trade Agreement
NFU	National Farmers' Union, UK
NitD	Nitrates Directive
NPD	Nationaldemokratische Partei Deutschlands (German National Democrats)
NVZ	Nitrates Vulnerable Zone
OFWAT	Office of Water Services, UK
POST	Parliamentary Office of Science and Technology
RFWD	Residence of Foreign Workers and their Families Directive
SDA	Sex Discrimination Act, UK
SPD	Sozialdemokratische Partei Deutschlands (German Social Democratic Party)

TUC	Trade Unions Congress
TURERA	Trade Union Reform and Employment Rights Act
UBA	Umweltbundesamt (Federal Environmental Office)
UGB	Umweltgesetzbuch (German environmental code)
UN	United Nations
UVPG	Umweltverträglichkeitsprüfungsgesetz (German Environmental Impact Assessment Law)
WFD	Water Framework Directive
WIA	Water Industry Act
WSR	Water Supply Regulations
WTO	World Trade Organization
WWF	World Wide Fund for Nature

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Part I
Introduction

1

Relevance and research question

After the Second World War, states increasingly cooperated in international institutions. This brought about a rich and ever-increasing body of law beyond the nation-state. Although 'almost all states comply with almost all international norms almost all the time' (Henkin 1968), non-compliance is a common problem of international institutions, affecting all states and taking place in all policy areas. Violations of international law delimit its strength, undermine the precondition for its effectiveness, and eventually thwart the very purpose of cooperation among states. Thus, international institutions have reacted to compliance deficits with various compliance management systems. Hard cases of non-compliance, in which member states persist in their initial positions and continue to violate law, are frequently referred to international courts. Unlike domestic courts, however, they cannot resort to the legitimate use of force as a last resort to abolish norm violations. Yet international courts can talk states out of non-compliance. To this end, they can apply judicial discourses, judgments, and threats of penalties. These instruments are widespread, as the increasing number of recently created or strengthened international courts, such as the European Free Trade Association (EFTA) Court, the European Court of Human Rights (ECHR), the International Criminal Court (ICC), the Court of the Economic Community of West African States (ECOWAS), the European Court of Justice (ECJ) or the Court of the Common Market for Eastern and Southern Africa (COMESA), demonstrates (Smith 2000).

Despite the empirical relevance of non-compliance and the wave of international legalization, we know very little about how these courts operate and under which conditions they succeed in effectively restoring the power of international law. While a growing body of literature investigates why states comply and why they violate international law,[1] studies

[1] Examples are Börzel 2000, Börzel 2001, Börzel 2003b, Cameron, Werksman and Roderick 1996, Checkel 1999, Fearon 1998, Fisher 1981, Hill 1997, Jönsson and Tallberg 1998, Krämer 1989, Mitchell 2003, Raustiala and Slaughter 2002.

rarely focus on how detected rule violations can be transformed into compliance (for exceptions see Tallberg 2002).

This book seeks to close these gaps. It analyzes how and under which conditions international courts can successfully end norm violations, and thereby, induce domestic changes – even against the initial resistance of affected states. This study basically shows that judicial discourses, judgments and threats of penalties are only sometimes effective in talking states into compliance. The presence of an elaborated toolbox of compliance instruments is only the necessary, but not the sufficient condition for international courts to abolish detected instances of norm violations. Issue-variables, such as the interpretational scope of the disputed issue, the fit between court judgments and domestically institutionalized norms, the compatibility of policy frames, and the seriousness of the infringement, crucially influence the prospects to transform detected norm violations into compliance. The book further shows that the success of judicial discourses, judgments and sanction-threats is not determined by states' characteristics such as political and economic power, financial, administrative, or political capacities, or judicial and legal cultures as prominent theories would predict.

This study draws on the European Union (EU) as an example of an international institution with a legalized compliance management system, encompassing the very prominent compliance instruments of judicial discourses, judgments and sanction-threats. As with any other international institution, member states are responsible for the legal and practical implementation, so that the EU faces non-compliance problems that hamper the effectiveness of European law (e.g. Mastenbroek 2003). Once cases are referred to the ECJ, the latter can apply judicial discourses, judgments, and sanction-threats, in order to talk states into compliance. Some infringements are very quickly settled after they reach the ECJ. The German drinking water or the UK collective redundancy cases show that the governments incorrectly transposed EU law in the first place in order to save expenses, but adapted legal acts during the ongoing judicial discourse. Others, such as the German and the UK equal access cases, require considerably more time and a judgment, before compliance is achieved and the discrimination of women can be stopped. For yet another group of cases judicial discourses and judgments fail to further compliance and the states continue the norm violations at the expenses of others. In these instances of severe resistance to the ECJ, sanction-threats can help to achieve compliance, as shown by the British nitrates case in which the government shied away from a penalty.

In all these instances, non-compliance severely interferes with the effec-

tiveness of supranational law. This is all the more severe if it persists for long periods of time. Yet norm violations cannot always be resolved very quickly through judicial discourses or quickly through judgments, particularly if states strongly resist further legal adaptations to EU demands. In some cases, member state governments are very reluctant to introduce domestic changes even after ECJ judgments so that sanction-threats come into play. Penalties are the last resort in restoring compliance and have since their introduction in 1993, up to 2009 been exercised in only nine cases. Among those nine cases, there are only four instances in which member states incorrectly legally transposed EU law.[2] The other five cases are instances of incorrect implementations.[3] This indicates that the EU infringement procedure is a story of success, since sooner or later all member states can be talked into compliance. However, this might take a total of 19 years as in the British drinking water case, during which states save considerable compliance costs at the expense of affected individuals and of other member states. Thus, it is important to investigate why not every applied compliance instrument is equally successful. Why can states only sometimes be talked into compliance during a judicial discourse? Why are some judgments effective, while others fail to induce domestic changes? Why must the threat of sanctions sometimes be looming before states abolish non-compliance?

This study analyses how international courts operate and under which conditions they facilitate compliance – even against the strong resistance of states. The following questions are crucial in this regard: Under which

[2] The cases are: Case C-304/02 in which France incorrectly transposed fishing regulations (Council Regulations (EEC) No 2057/82, No 2241/87, No 2057/82, No 2847/93) and was ordered in 2005 to pay a lump sum of €20,000,000 as well as €57,761,250 for each period of six-month delay; Case C-177/04 in which the ECJ ruled in 2006 that France had to pay a daily penalty of €31,560 for the incorrect transposition of the product liability directive (85/374/EEC); Case C-121/07, in which France incorrectly transposed the directive on genetically modified organisms (directive 2001/18/EC) and was ordered in 2008 to pay a lump sum of €10,000,000; Case C-109–08 in which Greece incorrectly transposed the information directive (98/34) and was ordered by the ECJ in 2009 to pay a daily penalty of €31,798.80 as well as a daily lump sum of €9,636 for each day of continued non-compliance.

[3] These cases are: Greece had been issued with a penalty of €20,00 per day in 2000 for violating the waste framework directive (C-38791); Spain got a daily penalty of €45,600 in 2003 for incorrectly implementing the bathing water directive (C-278/01); Italy violated Article 48 (C-119/04) and got a daily penalty of €309,750 in 2006; Germany incorrectly implemented the waste disposal directive in two instances and got daily penalties of €31,680 and €123,7204 in 2007 (C-503/04); and the ECJ penalised Greece in 2009 for granting unlawful aid to Olympic Airways with a daily penalty of €53,611 and a lump sum of €10,512 for each of the days in which non-compliance continued (C-369/07).

conditions are judicial discourses successful? When do they fail? How and under which conditions do judgment instruments facilitate compliance? Why are states sometimes willing to transform non-compliance and introduce domestic legal changes after ECJ rulings and sometimes not? How do sanction-threats operate? Under which conditions can they deter states from continuing non-compliance?

1.I Non-compliance in the EU: the empirical puzzle

International institutions all face instances in which states violate laws. Since this reduces the effectiveness of the law and juxtaposes in the very extreme the initial purpose of cooperation between states, international institutions seek to transform detected norm violations into compliance. To this end, they apply argumentative means, such as bilateral dialogues between the parties or judicial discourses, and bargaining means, such as threats of judgments or financial penalties (Keohane, Moravcsik and Slaughter 2000, Smith 2000). However, it is unclear under which conditions these instruments succeed. In order to shed light on this often neglected issue, this study draws on the EU as an empirical example of a highly legalized international institution and investigates the operation of compliance restoring instruments. The EU is a good institution to study in order to learn something about the function of judicial discourses, judgments and sanction-threats, because the European Commission collects and disseminates comprehensive infringement data. In the EU, as in any other international institution, member states are ultimately responsible for the legal implementation of law beyond the nation-state. Thus, the insights that this book presents on the operation of the three compliance instruments and their scope conditions for success are also applicable to other international institutions with a similarly high degree of legalisation (see also section 8.V).

The EU infringement procedure consists of several steps. If the European Commission suspects a violation of primary or secondary European law, it initiates an infringement proceeding against the respective state, during which several compliance instruments are subsequently applied. Firstly, parties engage in a bilateral dialogue. If cases cannot be settled, the Commission refers them to the Court. The ECJ starts judicial discourses, which are followed by binding judgments and, if non-compliance still prevails, by financial penalties. While threats of penalties take place in about ten per cent of all ECJ cases, up to now, the ECJ has imposed financial penalties in only three instances (Commission of the European Communities 2005).

Given the possibility of pre-judicial settlements, ECJ referrals are among the least likely cases for the prospect of ending norm violations. In these instances, states' resistance to compliance is extremely strong, otherwise a common understanding regarding the interpretation of the disputed norm would have been developed in earlier stages and the case would already have been closed. Such instances of persistent non-compliance severely threaten the effectiveness of European law, since states safeguard their constituency and save high amounts of domestic compliance costs at the expense of other private and public actors within and beyond the affected state. Hence, studying how the ECJ operates and under which conditions non-compliance is quickly abolished through judicial discourses, after some time through judgments, or even more slowly through sanction-threats, is important. This study focuses exclusively on Court cases and inquires into the following research questions: How does the ECJ succeed in talking states out of norm violations? When are judicial discourses, judgments, and sanction-threats effective in facilitating compliance?

An empirical analysis of 1,792 ECJ cases on incorrect legal transpositions of EU law between 1978 and 2000 reveals an interesting pattern. On the aggregate level, the more compliance restoring instruments are applied, the more inclined all states are to give in and shift towards compliance. Yet neither the mere presence of compliance instruments, nor their application, can explain the transformational dynamics. When it comes to ECJ cases, there is no clear leader-laggard pattern, since there are rather few differences between states, but significant variation within each state. Every member state has successful and failed judicial discourses, judgments and sanction-threats. A judicial instrument is sometimes effective and sometimes not, even against the same government and even within the same policy field. From the perspective of prominent compliance theories, which would expect that success of individual compliance instruments depends on country-specific variables, such as power, capacities, or culture, the high intra-state variation poses an empirical puzzle that these theories cannot sufficiently explain.

1.II The argument

In order to cope with problems of persistent norm violations, international institutions possess several compliance instruments. In the last fifteen years, we observe a wave of legalization on the international level, with many international institutions either strengthening existing international courts and tribunals or creating new ones (see also Busch and