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COMPLIANCE IN COMPARATIVE PERSPECTIVE

THE EU AND OTHER INTERNATIONAL INSTITUTIONS

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1. Introduction[1]

Although there are different notions of what legal norms sets apart from social norms, all concepts of law adhere to the principle of legal equality, according to which like cases are treated alike. Law thus requires that like cases are treated in a like manner. This, in turn, requires a high compliance rate with any given regulation. Without sufficient compliance rates, it is hardly possible to speak of law.

But can a high degree of compliance be realized beyond the coercive capacities of the nation-state? The sceptical formulation of Herbert Kelsen (1966: 4) is famous: "The antagonism of freedom and coercion fundamental to social life supplies the decisive criterion. It is the criterion of law, for law is a coercive order." This point of view is also reflected in Realism as a theory of international relations (Morgenthau 1964, Waltz 1979). For Realism, legal constraints beyond the nation-state are non-existent or, at best, very weak (e.g. Krasner 1999 on human rights). Furthermore, communitarianists point out that questions of law and justice can meaningfully be dealt with only in communities that share common values and ideas (Goodin 1988, Miller 1995) and are equally doubtful about the possibility for law beyond the nation-state. In this sense, it seems fair to describe the question of compliance as the *Achilles' heel* of *international* regulations (see Werksmann 1996: xvi, Young 1999a: Chap. 4).

This paper aims to shed doubt on the scepticism of Realism and Communitarianism. As opposed to the propositions of both theoretical strands we show that law beyond the nation-state is indeed possible and that compliance can even in a horizontal setting without centralized coercive capacities and without a single underlying social identity work sufficiently well. We furthermore show some of the building blocks of a successful elicitation of compliance beyond the nation-state and discuss if and in how far the EU is different from other international institutions in realising them. For developing this argument we start by introducing our research design and case selection (section 2). Section 3 introduces our empirical results, discusses their relevance for the analysis of compliance and draws some theoretical implications. This section is followed by a discussion of the relevance of the results for the study of European integration (section 4).

[1] This paper presents some findings from the research project on "Compliance in Modern Political Systems", sponsored by the Deutsche Forschungsgemeinschaft. Besides the authors, Christian Joerges and Dieter Wolf participated in this project. Although the authors are solely responsible for any shortcomings of this paper, it is based largely on these common efforts. We therefore owe many thanks to Christian Joerges and Dieter Wolf for advice and cooperation. The paper was first presented at the conference “Verfassungspolitik in der Europäischen Union” in Mannheim.

2. Conceptual Framework

On Compliance

Compliance needs to be distinguished from the concepts of implementation and effectiveness: As opposed to the latter two concepts, compliance neither focuses on the efforts to administer authoritative public policy directives and the changes of these policy contents during this administrative process (implementation)[2] nor on the efficacy of a given regulation in solving the political problem, which preceded its formulation (effectiveness).[3] Compliance research is primarily concerned with the degree to which addressees of a rule "adhere to the provision of the accord and to the implementing measures that they have instituted" (Jacobsen/Weiss 1998: 4).[4] Perfect compliance, imperfect implementation and zero effectiveness therefore are not necessarily mutually exclusive. Because compliance with commitments is a necessary condition for effective governance, however, compliance and effectiveness are nevertheless closely related to one another.

Any assessment of compliance starts with the identification of a rule. Without a rule entailing clear pre- or proscriptions, (non-)compliance is difficult to assess. In identifying such rules, the project abstains from analyzing implicit or tacit norms, which are not clearly codified and/or lack a more than marginal consent concerning their precise content. Such general rules are, for example, ”reciprocity” (Keohane 1986), ”fairness” (Franck 1995) or ”justice” (Gibson 1989). Although these norms are by no means unimportant for the achievement of collective well-being, they have too little intersubjective precision for defining a point of reference to assess compliance. Some would even argue that sufficient precision of a rule is a defining element of legal rules (Goldstein et al. 2000).

Even if rules are specific and clearly formulated, however, the assessment of the discrepancy between text and action is no easy undertaking. The intrinsic ambiguity of law always necessitates acts of application and interpretation. As a ”living being”, law is not constant over time, but subject to changing interpretations of its meaning and to new case law which interprets and changes the meaning of statutory law (Dworkin 1986). Any assessment of compliance therefore must be carefully weighed and take into account all available pros and cons and as much as possible sources of an addressees actions. Assessing compliance is furthermore complicated by the fact that it does not only refer to a difference between pre- or proscriptions and actions, but is also subject to institutional treatment and may change over time. We use four categories of (non-)compliance for integrating this procedural dimension: Rule-related actions of addressees will be categorized as

(1) ”compliance” if the difference between the pre- and proscriptions of a norm and an addressees behaviour is null or negligible and addressees do not publicly voice their discomfort with a rule;
(2) ”recalcitrant compliance” if the difference between the pre- and proscriptions of a norm and an addressees behaviour is null or negligible but addressees publicly voice their

[2] Cf. the research by Victor/Raustiala/Skolnikoff (1998), Mayntz (1980) and Siedentopf/Ziller (1988).
[3] Cf. Haas/Keohane/Levy (1993), Miles/Underdal (2001) and Young (1999b).
[4] Further research in this tradition can be found in Cameron/Werksman/Roderick (1996) and Chayes/Chayes (1995).

discomfort with a rule;

(3) ”initial non-compliance” if we observe both a significant difference between the pre- and proscriptions of a norm and an addressees behaviour, and a change in behavior of the addressee due to allegations and/or a decision of an authorized dispute settlement body or court;

(4) ”iterated non-compliance” if we observe both a significant difference between the pre- and proscriptions of a norm and an addressees behaviour, and no change in behavior of the addressee although the practice has been detected, alleged and/or outruled by a decision of an authorized dispute settlement body or court.

Case Selection

The project analyses compliance in a comparative perspective which sets European regulations in context to similar regulations in institutional settings on the national and the international level. A major challenge in designing this project has been to identify comparable cases from three different issue areas across three levels of political decision-making. The selection of issue areas is based on the distinction between policies termed by Lowi (1972) as constitutive (market-making), regulative (market-correcting) and (re-)distributive (market-braking),[5] each of them taking place at different levels. This ideal set of cases has been modified over time. We ended up with three sets of comparison.

- Our analysis of market-making policies focuses on subsidy controls and covers all three levels. At the national level, we looked into compliance with the regulation for preventing subsidized competition between federal states in Germany. This is chiefly based on two so-called subsidization codes issued by the economic ministers of the German states (Länder). The corresponding regulation at the European level is the European Commission Subsidy Control as laid down in Arts. 87-89 of the Consolidated Version of the Treaty Establishing the European Community (ex-Arts. 92-94) and the agreements regarding secondary law-making based on these Articles. Finally, for international subsidy control, the investigation includes Article XVI of the General Agreement on Tariffs and Trade (GATT) together with the agreement on the interpretation and the application of Article XVI, known as the "Subsidization Code" (GATT/26S/56). The international regulation was strengthened in 1994 by a separate agreement on subsidies.
- The two cases chosen for analyzing compliance with *regulative policies* focus on trade in foodstuffs. Both the European Union (EU) and the World Trade Organization (WTO) have developed exemption rules from the principle of non-discrimination and free trade that allow import restrictions imposed to protect human health and life as long as they cannot be considered an arbitrary discrimination or a disguised obstruction of trade among member states. Both of these regulations came at different occasions under severe pressure. Regarding foodstuffs, the EC Commission’s decision in 1999 to end the embargo on British beef and a decision of the Appellate Body of the WTO in 1998, declaring an EC ban on five growth hormones to be incompatible with WTO law, are especially telling. In both cases, a highly elaborate institutional design and a decision that is widely perceived as meeting the criteria of valid law, met with open non-compliance on the part of its addressees.

[5] See also Streeck (1998) for this distinction.

- The *redistribution* of financial resources between territorially defined political units is the object of our last comparison. Both the intergovernmental system of the German *Bundesländer* and that of the EC have developed a similar parallelism of market-making and redistributive market-correcting mechanisms. In both systems, redistribution is of constitutional importance and is explicitly codified as being an essential element of political order. Its realization, however, is in both cases the product of intergovernmental bargaining, and therefore heavily influenced by a variety of political concerns. Not only the legal principles and the political practice, but also the intensity of redistribution is quite comparable at both levels. Both mechanisms redistribute a similar amount of resources among a similar number of states.

This choice of cases is geared to react to recent objections against findings of remarkable compliance which have argued that the type and depth of the regulation in question are important factors for an institution‘s capacity to deal with compliance issues (see Underdal 2001, Downs et al. 1996, Raustiala and Victor 1998: 662). The regulations that we compare across levels are constant on both of these counts. They are very similar in content and type, and thus also in their underlying interest constellation. Moreover, they are, in general, very similar with regard to depth. For instance, the relative amount of money transferred in the German Länderfinanzausgleich is remarkably similar to the redistributive mechanism of the EU. The major net recipient of EU redistribution *via* EFRE Structural Funds and Cohesion Fund is Portugal with a net gain of 2,93% of GDP per year; the major recipient in the German *Länderfinanzausgleich* – Berlin – receives almost exactly the same relative amount, that is 2,89% of GDP per year. Though less quantifiable, it is agreed that European subsidy regulations are at least as "deep" as the agreement within the FRG, and the depth of intervention in the hormone case at the international level is similar to that of the BSE case at the European level.

3. Compliance and its Conditions

The most striking result of our cases is that in each set of comparisons the rates of compliance with EU regulations are better or at least as good as compliance with regulations at other levels.[6] As to *subsidy control*, the German regulation among the Laender is hardly complied with at all. Each of the Laender acts as it pleases and no coordinated effort at strengthening compliance can be observed. Compliance with WTO rules seem to be slightly better, but is likewise far from good. In the EU, however, subsidy control can be viewed a a major example of the EU’s capacity to discipline member states and has an impressive record of curbing member states subisidies. While the overall level of subsidies did further grow after the regulation among the Laender were agreed upon, this level decreased significantly after EU regulations were set (see Wolf 2001).

[6] For reasons of the limited space of this article we do not elaborate extensively on the three comparisons, but focues on the major findings. For more extensive accounts on subisides and relevant literature cf. Wolf (2001), on redistributive policy cf. Neyer (2001a) and on trade policy cf. Neyer (2001b).

The EU's record in eliciting *compliance with trade rules* is likewise impressive. Although its treatment of the recent BSE case also showed its vulnerability to political pressure, the EU is still far better at securing the rule of law than does the WTO. While compliance with European trade regulation is realized in most cases routinely and in disputed cases at least as the product of legal procedures, the WTO's record shows a number of cases of open non-compliance. The comparison of the BSE case with the hormone beef case is telling.

Even in the *redistributive case*, the EU shows a remarkabe capacity of eliciting compliance. Although the amount of resources to be distributed from the richer to the poorer member states is a matter of intense political bargaining, as the moves of the German government in early 2000 have clearly indicated, no member state has so far threatened to contribute its share or even openly rejected its financial obligation. In the German case, however, both Bavaria and Baden-Wuerttemberg openly threatened to put into question the sovereignty of poorer German Laender if they would not accept limited redistributions. These German Laender complied only recalcitrantly.

Table 1: Relatively Assessed Compliance Records

Subsidies	EU>WTO≥FRG
Foodstuffs	EU>WTO
Redistributional Mechanisms	EU≥FRG

In all three set of comparisons, the EU fares very well. Such a favorable finding for the EU is quite astonishing. It squarely contradicts the hypothesis that regulations that have been developed and established within a national setting do systematically show a better compliance record than similar regulations in other political settings.

Against the background of our findings, recently voiced concerns about the limited capacity of the EU to deal with compliance issues (Knill/Lenschow 1999, Tallberg 2000: 19) may be helpful for underlining that compliance in the EU is by no means self-enforcing but is often subject to political dispute or even open confrontation between the Commission and a member government. The insights provided by such studies, however, need to be put in perspective and take into account

- that compliance is often only a matter of time and improves as a product of political interaction between the Commission and the member states (cf. Neyer/Wolf 2001), and, even more generally,
- that high numbers on the amount of activities of monitoring and adjudicating bodies must also be interpreted as an indicator for a well functioning compliance enforcement system (Keohane et al. 2000: 474-475). Many of the figures provided as indications of compliance problems in the EU may therefore be seen as an indication of a well working compliance system.

The most important reason for not overestimating the compliance problems of the EU is, however, one that puts the EU in perspective. *Ours is a relative argument. The EU is more*

effective in eliciting compliance than other settings when similar policies are compared. Although it is certainly true that all modern political systems face compliance problems, these difficulties may vary systematically between different institutional contexts. According to our findings, the EU is a most successful case, and one to learn from.

3.1 Determinants and Dynamics of Compliance Beyond the Nation-State

How to explain this striking evidence? And how to acount for the variance in compliance over our set of cases? At least four theoretical perspectives for the explanation of compliance can be found in the literature. Following common usage, we label the four theoretical perspectives on compliance "rational institutionalism", "legalization", "legitimacy" and "reflexivity" respectively.[7] These four perspectives are not so much clear-cut theories of compliance, but rather point to a set of perspectives as well as a set of processes and variables that help to understand compliance issues. Each of the four theoretical perspectives are problem-driven attempts at theorizing with a grounding in compliance issues, drawing from and combining processes and factors emphasized by different theories and disciplines. In confronting the theoretical perspectives with the evidence from our cases, we do not aim at testing them thoroughly but to show that the relationship among the variables highlighted by the different perspectives is interactive and dynamic.

3.1.1 Rational Institutionalism

Rational Institutionalism especially highlights two determinants of successful compliance: effective monitoring and the institutionalization of enforcement so that the risks and costs are minimized for the complaining party.[8] Subsidy control and trade in foodstuffs demonstrate particularly well that these are indeed important aspects of successful compliance beyond the nation-state.[9] In compliance with subsidy controls the EU fares better than the WTO, which in turn does better than Germany. In eliciting compliance with trade in foodstuffs, the EU seems to be slightly more successful than the WTO. Rational Institutionalism thus expects monitoring and the institutionalization of horizontal enforcement to be most effective within the EU setting and least effective in Germany, with the WTO lying in-between. Our evidence supports this hypothesis.

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[7] For other categorizations of approaches explaining compliance see, among others, Haas (1998), Hurd (1999), Jacobsen/Weiss (1998), Underdal (1998).

[8] Important contributions along the lines of rational institutionalism are Mitchell (1994), Weiss/Jacobson (1998) and Tallberg (1999).

[9] With regard to redistributional regulations, monitoring seems to be no institutional problem. The receiver of resources notices immediately when he does not receive them. Moreover, sanctioning someone who is not willing to help oneself looks odd. For these reasons we shall not discuss this set of comparisons in terms of Rational Institutionalism.

Monitoring

The European Commission has many functions, and monitoring the conformity of member states with EU rules is certainly among its most prominent activities. On the one hand, the Commission itself invests a great deal of resources in systematically collecting and assessing information on compliance with EU rules. On the spot checks of national administrations and companies, and the demanding and processing of information on the application of EU law are most important instruments. On the other hand, the Commission also cooperates closely with firms, interest groups, consumer groups and national administrations to record and examine complaints about non-compliance. In this way, the Commission multiplies its resources devoted to monitoring. Especially the efforts of the Commission to fight illegal subsidies benefit crucially from the integration of societal actors. Companies generally have a strong interest that their competitors do not receive illegitimately resources which offset the market mechanism and, probably more important, put themselves at a disadvantage. Therefore, they may be seen as most important allies of the Commission in eliciting compliance with EU anti-subsidies law (cf. Tallberg 2000: 28). Equally important is the requirement for the member states to notify all relevant legislation to the Commission before they are domestically enacted. This provision leaves the Commission the option to outrule any measure which endangers the integrity of the European legal system. All these activities take place before the Commission files an infringement procedure.

As opposed to the EU, the WTO mainly depends on decentralized, intergovernmental monitoring. The WTO procedures encourage governments who suspect other governments of violating the WTO rules to report their suspicion to the WTO. This type of monitoring, in combination with a centralized dispute settlement procedure, seems effective as long as border-issues in trade relations are concerned. Exporters can be expected to realize quickly when border-tariffs and regulations increase. Now that the WTO also deals with behind-the-border-issues (see Kahler 1995), the development of more independent, centralized monitoring mechanisms which are open to complaints by companies appear to be necessary. While the WTO has by now developed some monitoring capacities (e.g. the Trade Policy Review Body), they are explicitly without legal consequence, rely on the goodwill of the Contracting Parties and are somewhat deficient when compared to the EU. Things look much different, however, when the WTO procedures in subsidies control are compared to the procedures of the FRG. In the German subsidy control case, finally, there is no institutionalized monitoring between the German *Länder* at all. Monitoring and the formulation of complaints against the actions taken by other Länder relies solely on unilateral action on the part of one Land with the effect that it basically does either not occur or, if it happens at all, does not enter the stage of legal dispute settlement. No surprise from this perspective that compliance with the German Laender regulations is so weak.

Sanctioning

Both the EU and the WTO have set up sanctioning systems that involve less costs for the complaining party than would be the case in a purely anarchical setting. Until 1993, the EU had no sanctioning mechanism at all. If states disregarded judgements of the European Court of Justice (ECJ), all the Commission could do was to start a renewed infringement procedure. Nor were states permitted to sanction each other. Only the Maastricht Treaty provided the Commission with the possibility to impose a lump sum or penalty payment on

those member states who disregarded ECJ judgements. So far, the Commission has solely relied on daily penalty payments and not used lump sums. In any case, member states do not carry the costs of sanctioning the violators.

In the WTO, the picture is rather mixed. On the one hand one may point out that Contracting Parties can rely on a dispute settlement mechanism which acts as a third party and autonomously decides on matters of legality and sanctioning. On the other hand however, it must be added that plaintiffs must be aware that complaints against any other Contracting Party may lead to legal retaliation and set off a chain-reaction of counter claims. Busch and Reinhardt (2000: 10) report that the average complaint increases the probability that the target of a complaint will file a retaliatory suit within one year by 55 times. Furthermore, because any authorization to enact the suspension of trade concessions is always limited to an amount which offsets the damage that has occurred to a plaintiff, Contracting Parties are factually free to chose between compliance and accepting the limited consequences of non-compliance. In this sense, the WTO has institutionalized a tit-for-tat mechanism which has neither a deterrent nor a punishing effect and is not without risk for the plaintiff. To the German Laender, even such limited sanctioning mechanisms are unavailable in the two cases we looked at. In subsidies policy, no sanctioning mechanisms whatsoever are foreseen and the only way for a Land to react to excessive subsidy payments by any other Land is to do the same. The sanctioning of a violator therefore creates substantial second-order costs for the sanctioning party.

The compliance patterns observed in the case studies matches the expectations of Rational Institutionalism.[10] Where monitoring and sanctioning functions are supported by centralized institutions that make full use of transnational non-governmental actors, as in the EU, compliance works best. Where monitoring and sanctioning remains an intergovernmental function, as in the WTO, compliance works reasonably well. Where all the second-order costs in monitoring and sanctioning must be borne by the complaining party, as in the case of the FRG, there is little compliance.

3.1.2 Legalization

Legalistic approaches see ambiguities and inconsistencies in rule setting and application as the major sources of non-compliance. [11] The solution is a process of legalization, so that the regulation in question becomes incorporated as deeply as possible into existing rule of law systems. Moreover, the degree of "preciseness" of norms and the need for the existence of so-called secondary rules that help in settling disputes about the content and the application

[10] With regard to redistributional regulations, monitoring seems to be no institutional problem. The receiver of resources notices immediately when he does not receive them. Moreover, sanctioning someone who is not willing to help oneself looks odd. For these reasons we shall not discuss this set of comparisons in terms of Rational Institutionalism. However, if one did, it would appear vital that monitoring costs and room for institutionalized sanctioning do not vary across the different levels, since they are largely determined by properties of the policy itself. Rational Institutionalism would therefore expect there to be no notable difference in terms of compliance across different political settings. This conclusion is clearly compatible with the findings of the study on re-distributional regulations.

[11] Highly stimulationg legalistic contributions are Koh (1997) and Raustiala (1995). Cf. also Keohane et al. (2000).

of the norms themselves is stressed.[12] It follows that the more a rule is considered part of a legal system, or, put differently: the more an international institution is legalized, the more likely compliance with the rule becomes. In this sense, legal rules possess a compliance pull of their own (Franck 1990).

For analysing legalization, we will in the following distinguish between the degree of legalization of a polity (such as the WTO, the EU or the FRG) and the degree of legalization of specific policies (such as subisidy policy or foodstuffs policy). While the former refers to the overall legal design of a polity and addresses questions such as the Kompetenz-Kompetenz or the status of individuals as legal subjects in a given political order, the latter refers to the concrete expression such overall designs have in specific policies. We furthermore distinguish among two elements which legalization comprises: juridification and internalization (cf. Zürn/Wolf 1999). Juridification refers to a process in which the settling of disputes over the application of regulations is delegated to a third party. The greater the independence of the members of the adjudication body, e.g. measured in terms of selection method and tenure (see Keohane et al. 2000: 461), and the more the members of these bodies apply legal reasoning (instead of bargaining), the higher the degree of juridification.

In terms of *juridification* of the polity, the ranking of our cases is straightforward. The ECJ has a high level of independence with a very long tenure of the judges and a sophisticated level of legal reasoning. Likewise, the German Constitutional Court (GCC) is of undisputed independence and a clear example of a highly juridified dispute settlement body. The new WTO follows somewhat behind on these two counts. As opposed to the old dispute settlement mechanism of the GATT, its new Dispute Settlement Body (DSB) is a highly independent and juridified mechanism, but still less autonomous than the ECJ.

When it comes to assessing juridification in a policy perspective, however, an important distinction must be made between the formal design of dispute settlement mechanisms and their factual competence to decide in specific cases: Although the GCC for example was over and over asked by plaintiff Länder to give an opinion on the constitutionality of the level of redistribution, it repeatedly argued that any such question was of a political nature and therefore beyond the scope of its competence. Likewise, the ECJ has no competence to decide on the level of redistribution realized in the EU but is – same as the GCC – limited to assessing whether member states fulfill their legal obligations. In the federal subsidies case too, the formally high degree of legalization did not translate into a policy-specific high degree of legalization due to the hesitancy of the Länder to use that option for fear of a resulting process of centralization. It is only in the European subsidies case and in the two foodstuffs cases, therefore, where a formal competence not only exists but also was factually executed and had an observable impact on the behavior of addressees.

The element of internalization is subdivided into legal and civil internalization. Legal internalization means here that inter- or supranational legal norms are accepted by national courts without national governments having the chance to veto them. In this way law beyond the nation-state is enforced by domestic courts. Civilly internalized means that those affected by the regulations have actionable civil rights, or to put it differently, access to inter- or

[12] The major work on this view is H. L. A. Hart's *Concept of Law* (1972). The classic formulation of Oliver Holmes's (1897) legal realism, "Law is what courts do", should also be noted.

supranational courts (cf. Koh 1997). Again, *legal internalization* is furthest developed in the EU and in Germany. The supremacy of European law over national law and the direct effect of ECJ case law through the preliminary-ruling procedure of Article 234 (ex-Art. 177) guarantees European regulations (and some directives) in the subsidies case and the foodstuffs case unquestionable legal validity in all member states. Likewise, the GCC claims a never challenged legal supremacy over all other national Courts and all actions taken by governmental authorities. Compared to the ECJ and the GCC, the DSB of the WTO lags behind in terms of legal internalization. Its rulings are neither accepted by the ECJ nor by domestic courts to constitute legal obligations. Although highly juridified, it therefore fares less well in terms of legal internalization.

In sharp contrast to the widely held conviction of a European administration, disentangled from its citizens, *civil internalization* is rather well developed on the European level and can almost compare with the national level. Although it may take years for a suit filed by an individual to follow all the way through the different national courts up to the ECJ (cf. Joerges 2001), it is at least possible for non-state actors to use European law for challenging a member state governmental action. To the contrary, the WTO shows no elements of civil internalization whatsoever. All legal actions must be initiated by the governments themselves who are the only actors who are granted legal standing. The settling of disputes therefore remains an undertaking which is heavily influenced by political considerations, intergovernmental bargaining.

These differences are reflected on the level of specific policies. In the subsidies and the foodstuffs case, individuals not only have a better access to dispute settlement bodies (via the Commission) than at the international level but also (in the subsidies case) as compared to the national level. Due to the purely intergovernmental character of federal subsidies policy, the formally high degree of juridification and legal internalization in the FRG could have no effect on the actual compliance record. Likewise, in the BSE case any affected citizen could have filed a legal suit against the actions taken by the German government and force the German government to comply with its obligations. Although it is true that civil internalization in redistributive policy is very low on the European level, the same applies to the German mechanism. Due to the German legal tradition that legal claims by individuals must prove a significant damage that has occurred to them (prohibition of a Popularklage), no individual claim against non-compliance of a Land with the provisions of the redistributive mechanism would have any chance to withstand legal scrutiny.

In sum, the compliance records observed in the case studies support the conjectures derived from the theoretical perspective of legalization, emphasizing juridification and internalization. In at least two of the three comparisons, it is the level with the higher degree of legalization which elicits the comparatively higher degree of compliance. The importance of legalization becomes especially clear in the comparison on subsidy controls but can also be observed in foodstuffs policy. In both cases, it is the comparatively highly developed legal mechanisms of the EU which account for much of the variance, whereas the comparatively lower legalization of the WTO shows serious functional deficiencies to cope with alleged cases of non-compliance. Moreover, the similarity in compliance regarding the redistributional cases reflects a parallel level of legalization in this policy area in the FRG and the EU. However, any unconditional optimism towards the functional effectiveness of law as a steering

mechanism for the pursuit of political order must take into account that compliance enforced by courts is a highly time consuming business which carries no guarantee of success. The limits of law as a steering mechanism are not only underlined by the failure of the WTO's DSB to make the EU comply with its decision on hormones but also by cases like the Alcan case (cf. Wolf 2001) in which it took 17 years to recover illegal subsidies, or the BSE case in which only a political compromise could put an end to the dispute. Any assessment of the independent power of the law therefore is well advised to take into account that its effectiveness presupposes its embeddedness in an institutional setting which follows the logic of Rational Institutionalism. We can thus point to a first *interactive effect*: the logic of Rational Institutionalism and the logic of legalization does support each other.

3.1.3 Legitimacy

Approaches to compliance which focus on questions of legitimacy are highly difficult to categorize, even more so to operationalize. Whilst some focus on a rule's material fairness and therefore on the outcome of a political process (Franck 1995), others concentrate on the procedures that have led to adopting a rule (Habermas 1992). For taking both elements on board, we follow the distinction between input- and output-legitimacy (Scharpf 1999). The former asks for the degree to which the procedures used in the making of a rule were in accordance with basic principles of good governance. Although there is no consensus in the literature about the substantial content of these principles, most authors would agree that the participation of addressees and affected parties is of crucial importance both inside as well as beyond the nation-state. Only if those who are expected to comply with a rule had a say in the making of the rule, a rule will be accepted as legitimate. Output-legitimacy focuses on the response that the pre- and/or proscriptions of a rule receive from its domestic affected parties. Output-legitimacy therefore asks whether a rule is viewed by its affected parties as adequate, just or fair, independent of the procedures that were used in its making.

The explanatory power of both variables, however, is rather mixed. On the one hand, there is only weak empirical evidence to support the hypothesis that all the addressees of a regulation must have a fair chance of co-determination of the formulation of the rules, as this was to a large extent given in almost all the cases we examined. One could even argue that the case with the lowest degree of inclusion of addressees and affected parties and with the broadest discretionary powers on the part of a third actor (European subsidies policy) shows an extraordinary high degree of compliance, while in the case of federal subsidies policy it was exactly the strong position of the Länder in the application of the rules which prohibited their effectiveness. On the other hand, however, the foodstuffs cases provide evidence for exactly the opposite finding: In the two foodstuffs cases it was essentially the disrespect of the authors of the respective rule (the Codex Alimenarius Commission in the hormones case and the European Commission in the BSE case) for the concerns of major addressees and affected parties which arouse their protest and led to open non-compliance. Neither the EU in the hormones case nor France and Germany in the BSE case were ready to accept the outcome of a narrow vote which refused to accept their concerns as being legitimate. Although the procedures according to which the decisions were taken could build on consented procedures, their outcome equaled a factual exclusion of concerns which the defeated parties viewed as being of utmost importance to them.

These two seemingly contradictory findings may be brought together, however, if we qualify the legitimacy hypothesis by setting it in context to the democratic character of the addressees of rules: in this perspective, democratic governments carry an inescapable responsibility for promoting those views which are domestically being viewed by a large majority as highly sensitive. Any refusal to take those concerns seriously would amount to a disrespect of domestic democratic procedures and have little chance to withstand public protest. Following this line of reasoning, a most basic difference between the subsidies and the foodstuffs cases is that the former can rely on a broad public acceptance of the necessity to limit governmental spending and arouses in case of enforcement only the protest of narrow interests (the affected company plus affected employees). The safety of foodstuffs, however, is of concern to far broader public circles and can build on unequivocal support for as stringent regulations as possible and a clear emphasis on the precautionary principle. It is therefore entirely plausible to assume that the satisfactory participation of all addresses of a regulation in the decision-making process is at least in cases of broad public concern a *necessary*, but by no means the *sufficient requirement* for good compliance rates.

Against this background, the relatively successful overall compliance rates of the EU as compared to the WTO may not the least be borne by the systematic integration of the targets of a regulation into the decision-making processes of the EU. No other political institution beyond the nation-state has developed such far-reaching procedures for involving non-state targets of regulation in the will-formation and decision-making processes. By the mid-1990s, 693 formal EU-level interest groups had been established and 3000 interest associations from every country and every conceivable sector had an office in Brussels (Aspinwell/Greenwood 1998: 3). Such openness to interest groups, that are frequently the targets of a regulation, distinguishes the EU. No such developments can be observed in connection with the WTO, even less so, of course, with the GATT. The more decisive argument, however, in our view relates to the social acceptance of a regulation by the broad, general public, which in the course of our studies emerged as the real weak point of compliance in horizontal settings. Even stable institutions built under the guidance of Rational Institutionalism and, furthermore, legally internalized, reach the limit of their capacity to bring about compliance if national publics refuse to associate themselves with the substantial demands of a regulation.

The decisive point is the following: If the content of a regulation (i) moves from the agenda of sectoral publics onto the agenda of different broad national publics, (ii) becomes fragmented, i.e. is discussed without reference to the other national debates, and (iii) opposing opinions of the regulation are formed, then substantial compliance problems are likely to arise. The power of such "public disturbances", which are due to the desire of governments to be re-elected will even prevail if the regulation has previously been under deliberative negotiation among transnational sectoral publics. Seen in this, a *second interactive effect* among our explanatory variables becomes evident. Legitimacy only becomes important when rationally designed institutions and legalization have created a strong compliance system. Then, the power of the courts will be countered from time to time by the power of the people.

3.1.4 Management

This theoretical perspective sees lacking material resources and the ubiquity of implementation problems as major challenges to compliance. Reflexive communications among the authors and the addresses of a rule and the provision of adequate material support for addressees is seen as the solution (cf. Chayes/Chayes 1995). Law is here considered as a process of permanent interactive adjudication based on legal reasoning (Joerges 2000). The focus of this perspective is thus primarily on the second dimension of compliance, that is, the way in which charges of non-compliance are dealt with after they have been put forward.

Although a lack of material resources does not help to explain the variance in our cases, it is not rejected either. The countries that we studied in our cases are usually considered as exceptionally rich in terms of financial, technological and administrative capacities, and a lack of resources is rarely a problem. Nor do the addressees of the regulations in question have resource problems. Moreover, it seems that shortages of resources are only relevant with respect to certain regulations. Only "positive" regulations require governments to undertake something rather than to refrain from doing something (negative regulations), and it is only when governments are expected to act that the problem of lacking resources is of significance. Refraining from doing something does not usually require huge resources (see Zürn 1998: chap. 6). When states are required to refrain from doing something, as in the case of subsidy controls, resources are no significant problem, whereas ambiguity and cheating gain in relative importance as causes of non-compliance. In these cases, juridification and even internalization are the means chosen to bolster compliance. Therefore, when states with highly developed market economies and well-functioning administrations agree to refrain from doing something, we do not expect compliance problems due to a lack of resources.

The second aspect of the management approach, the degree to which the application of rules is conducted by means of reflexive interaction, seems to be much more important for understanding the compliance records in at least two of our comparisons. Both in the foodstuffs and in the redistributive cases, deficient compliance was not the least motivated by the addressees perception that they had no fair chance to feed their concerns back into the adaptation of rules to changing needs. The effort by the German net-payers to the federal equalization scheme to adapt the redistributive mechanism towards a stronger emphasis on efficiency and fairness concerns was blocked by a majority of Länder (which, however, encompassed only a minority of the population) and left little option for deliberative reflections on the adequacy of the mechanism. Likewise, in the two foodstuffs cases, decisions were dominated by strategic voting (in the Codex Alimentarius Commission which decided for the WTO on the safety of growth hormones) or the bureaucratic rationality of the Commission and did not foresee any option to integrate either the concerns of important addressees or domestic affected parties. To be sure, the case of subsidy controls also underlines that reflexivity may impact negatively on the effectiveness of a rule to realize previously consented goals. However, this does not contradict the general argument of an important role of reflexivity in eliciting compliance: it might well be the case that the option to reinterpret rules when faced with new demands is an important element for the readiness of addressees to comply. Against this background, reflexivity can serve to some extent as a

buffer, balancing out the lack of social acceptance, adapting a rule to changing social preferences. This is a third interactive effect among our independent variables: reflexivity can substitute legitimacy to some extent. To be sure, reflexivity comes at a price, it may lead to a watering down of requirements for the sake of compliance, without improving effectiveness.

3.2 Theoretical Implications

These empirical results are relevant for a number of theoretical debates. They contribute to the general theory of compliance and implementation. Furthermore, they emphasize the importance of institutional design and of re-introduce the concept of legitmacy to the empirical study of politics beyond the nation-state.

First, our findings support well-established results of research inquiring into the conditions of implementation and compliance. Accordingly, a multi-causal research design is required to understand the conditions of implementation, because compliance can hardly ever be attributed to a single factor (cf. Mayntz 1980: 15). The diversity of possible factors of influence on the national, the transnational and the international level means that the reasons for a high degree of governmental compliance cannot be limited to any one of the three levels, but requires a broad analysis with a variety of explanatory variables. Each of the three levels can potentially prevent effective politics: At the international level, a high degree of juridification is necessary to ensure the settlement of interpretational differences on the application of legal obligations and provide international institutions with the means to enforce legal obligations. At the transnational level, the integration of public interest groups is required to enable domestic concerns to be effectively voiced in the process of post-national governance. This participation is crucial in order to relieve the tension between domestic and intergovernmental rationalities and to generate social acceptance for international regulations. Therefore, what counts in the process of shaping post-national governance is the search for a complex set of procedures which can bring about a continuous discursive process among international organisations, governmental addressees and affected domestic parties on collectively acceptable regulations and the modalities of their application.

Our results furthermore point to a far-reaching transformation of sovereignty in the EU. Sovereignty in the EU can no longer be perceived as a combination of the internal, legitimate monopoly on the exercise of power and the external freedom from legal constraints but must be understood as the freedom to engage in collective problem-solving (cf. Chayes/Chayes 1995: 123). This "new sovereignty" is based on obtaining the status of a trustworthy member of the international community and relies on at least four elements. First, the EU incorporates non-compliant member governments into a dense network of discussions and negotiations, avoids to affront it and, thus, gives it no chance to invoke the "sovereignty argument", since it would be the non-compliant government itself which would exclude itself from this network. Second, this dense network of discussions and negotiations not only clears the route for a common solution but it also defines all the necessary details to reach this solution effectively denying the non-compliant government any easy exit option but also offering it concessions and support. Third, this network of discussions and negotiations established over years inaugurated a specific common logic of appropriateness, a specific problem-solving rationality, which functions as a yardstick for the earlier promises the member governments

have to live up to. Fourth, the EU nevertheless uses domestic pressure to secure compliant behaviour of the member governments. This pressure, however, is canalised into specific administrative and judicial procedures, thus strengthening the adherence to European policies without invoking national, sovereign sentiments. It is this set of non-hierarchical, non-coercive instruments which made the European Union so successful in overcoming national barriers and in achieving a comparatively high degree of compliance.

The third theoretically relevant result is that concerns about a widening gap between national democratic discourses and international policy making cannot be empirically substantiated by this study. It is true, governments are able to utilise the international level to promote national political projects, as is particularly evident in European subsidizing policies. But it is also true that a democratic government's actions will always remain linked to national public discourses and that it is hardly possible to implement international regulations in the face of explicit public protest. Just like national governance, international governance also requires a high degree of acceptance, not only on the part of its governmental addressees, but also on the part of those affected by the regulation. International regulations which cannot be sufficiently legitimized on the national level stand little chance of being implemented if they meet with broad public opposition. Against this background, concerns about the emergence of New Raison d'Etat (Wolf 2000) seem highly exaggerated. What stands in fundamental contrast to the decoupling of international politics and national democracy is the necessity for public justification and the dependence of democratic politics on broad public consent.

4. Implications for the Study of European Integration

What is special about the EU? What are the key institutions of the European polity, what logic do they follow and how is legitimacy generated for this system? What is the driving force of European integration? What are the main features of the mechanisms by which decisions are made in this system? These are some of the key questions with which the study of European integration has dealt. Our study has implications for at least two of the most contested issues relating to European integration.

4.1 What Kind of Polity is the EU?

The EU is, above all, a political system that extensively utilizes law to create order and purpose. Law-making and law enforcement takes place within a structure that combines hierarchical and horizontal procedures. Whereas a central body with superior resources is clearly absent, the system has developed a well established legal hierarchy and consented authority relations. The EU is an authoritative system that works without having to wield the threat of *brute* force. It does, however, utilize mechanisms of horizontal enforcement which depend in their effectiveness on the nationally established shadows of brute force. The EU therefore is by no means detached from sanctions and force. To understand the constitutional features of the EU, it may be useful to rethink the concept of hierarchy. When lawyers and political scientists talk of hierarchy, they easily compound two aspects of the concept which do not necessarily go together and therefore must be distinguished: although

the EU does neither have coercive material capacities nor the means to deal with ultra vires conflicts, it certainly does display a significant degree of *legal hierarchy*, now identified by many as a "constitutionalization of the treaty system." (Stone Sweet/Caporaso 1998: 102). The phrase captures the transformation of an intergovernmental organization governed by international law into a multi-tiered system of governance founded on higher-law constitutionalism. The EU can therefore be characterized as a political system that has developed hierarchical legal relations independent of a material hierarchy and the means to resolve *ultra vires* conflicts. It thus becomes evident that legal hierarchy on the one hand and superior force by means of material hierarchy on the other hand do not belong together by logical necessity.

The *Achilles heel* of this system is not the absence of a superior force, but an insufficient degree of societal integration of all the member states. Political integration through law is clearly more advanced than societal integration, as indicated by a strong feeling of common identity and an existent public discourse. Even if a weak form of collective identity, in which people do have an interest in the well-being of the collectivity as a whole, existed, in the absence of a common political language and of an integrated mass media system it did not yet translate into an European public discourse about what is right or wrong for Europe. In this sense, law in the EU is deficient on one count especially. It does not sufficiently carry out the pivotal function of linking the normative framework of the social and political system on the one hand with the life-world conditions of the regulations' addressees and other affected parties (Habermas 1992: 78). To the extent that law cannot fulfill this function, it is vulnerable to the legitimacy challenge.

In the national setting, the law could serve its function as a transformer comparatively easy, because it could build on a historically established common language, a common media system and a dense system of associations which supported the exchange of positions, views and opinions. In the EU at least the first two of these social prerequisites are missing, and there is little evidence that this will change significantly in the near future. The challenge of the EU therefore is to embark on a historically new endeavor of promoting social integration, mediating between fragmented publics and realizing discursive interaction across boundaries without having the option to repeat the national experience. Its resources to do so are far from overwhelming. There is little reason, however, to be too skeptical either. On the one hand, it needs to be pointed out that broad public discourses in the national setting did likewise not precede the setting up of authoritative institutions but were a subsequent phenomenon which followed their establishment. Accordingly it has been argued that the ethical-political self-consciousness of citizens is not a constant but changes over time. Community-building in the national setting was not the product of a primordial "we-feeling" but only emerged as the product of a legal institutionalization of civil communication (Habermas 1997: 191). Therefore, it is not only possible but also probable that the building up of European institutions may trigger in the long run a similar effect of raising consciousness for cross-border affairs and may lead to the establishment of a true European public. Already today we can observe transnational sectoral and issue-specific publics which encompass not only governmental actors but also large parts of civil society, including interactive cross-border media coverage and a reflexive discourse among different national publics (Abromeit/Schmidt 1998, Eder/Kantner 2000, Schmalz-Bruns 1999).

These observations are compatible with an understanding of the EU as a multi-level governance system (cf. Jachtenfuchs/Kohler-Koch 1996, Marks et al. 1996, Jachtenfuchs 2001). Multi-level governance conceives the EC as a unique political system that is constituted by both nation-states and European institutions, each of them defined in relation to the other. Moreover, the nation-states are so deeply enmeshed in the system of multi-level governance that they can no longer be thought of as distinct political systems. This feature makes the EC a political system. Unlike many national political systems, the principal members of the EU multi-level-governance polity are not individual citizens but corporate actors working within highly organized and specialized subsystems (cf. Kohler-Koch 1999). States can – from this perspective – be seen as territorially defined interest organizations, functionally segmented and existing side by side with functionally defined interest organizations. Furthermore, the participation of the members is primarily motivated by an interest in problem-solving rather than a common identity. Members share the notion of upgrading the common interest rather than pursuing the common good. Third, the central authority typical to the national setting is substituted in the multi-level polity by a decision-mode which more closely approximates unanimity than majority rule. Precedence is thus given to bargaining and deliberation over public discourse and majority voting as a decision-making mechanism (Eriksen/Fossum 2000: Fn. 7) as well as an enforcement mechanism that is horizontalized and builds on legal internalization as a substitute for a legitimate monopoly of force.

While these constitutional principles are admirably successful in many respects, the still prevalent fencing-off of the people at the European level permanently harbors the danger of public protest at the national level. The lesson therefore is the same as in any national setting: If people are excluded from decisions, they will show on average a low readiness to accept their outcome. A necessary condition for the future integration of Europe therefore is not only to facilitate a clever institutional design which emphasizes monitoring, legalization and independent sanctioning, but also to bridge the still dominant divide between the EU's political system and its citizens.

4.2 What Drives Integration?

Our findings also have implications for theories explaining the causes and forces behind European integration. Since the onset of European integration, there have been mainly two answers to the question. One answer, neofunctionalism, emphasizes the unintended spill-over effects of early decisions in the development of the EU (Burley/Mattli 1993, Alter 2001, Stone Sweet/Caporaso 1998), while intergovernmentalism, the other answer, stresses the powers of member-state governments (Moravcsik 1998, Garrett 1992).

Our findings contribute to this debate. On the one hand, the role of legalization in eliciting compliance is central. Legalization indeed leads member states to do things they did not initially want to do. By taking part in legalized interaction in the EU or even the WTO, member states become participants in transnational legal discourses which cover not only governments but encompass parliaments, Courts and even individuals. Member States become slowly socialized in an intensifying network of transnational legal reasoning and even may, as some point out, undergo a redefinition of their political identity. It is no longer

the sovereign nation-state which is today the dominant paradigm of intergovernmental relations in the EU but the legally bound member state (Walter 1999) which must regard its legal obligations and respects external restraints for the sake of its long-term interests. Legalization therefore is not merely a means to correctly implement and comply with rules that have been agreed upon by member states but a process which impacts on the very identity of democratic states. In this sense, legal functionalism is right. Legalization contributes independently of the government's preferences to the dynamics of European integration.

On the other hand, however, the virtuous cycle can easily be broken. Compliance with European regulations is seriously put to the test if an issue comes on the *agenda* of a broader public discourse and different national public discourses on this issue are both *fragmented* in the sense that they do not relate to each other and *polarized* in the sense that they lead to completely different outcomes. Under these circumstances, national political systems have strong incentives to subordinate their long-term interest in a law-impregnated community to short-term domestic concerns and bring the functional dynamics of European integration to a halt. While these findings support the intergovernmental point of view to some extent, they also diverge from it. It is not the governments or dominant economic interests that orchestrate the national backlash against the virtuous cycle, but national public opinions. Issues of legitimacy and the still fragmented character of the public in Europe, rather than dominant economic interests endanger the system. Therefore, the most important source for the disruption of the virtuous cycle of legal integration and a disintegrative backlash may not necessarily be national governments or national high courts, but fragmented national publics.

The transformation process taking place in Europe from an intergovernmental system to a postnational multi-level governance system can thus be divided into different stages (Zürn 1999). The first stage can most plausibly be regarded as a more or less *unintended, indirect outcome* of deliberate political responses following (perceived) functional demands and national interests. The permanent deepening of some regulations so that they increasingly deal with positive interventions into the national societies and behind-the-border issues is part of this first stage. This creates the need for credible commitments to designing these more ambitious regulations and the development of supranational bodies to deal with collisions between different regulations. The second stage of the transformation is much more *reflective.* When society and political actors begin to comprehend the change, they begin to include issues of trans-boundary identity and trans-boundary ethics into their considerations. Pressures to improve the life conditions of people living thousands of miles away, as well as the debate on European identity and democracy are first signs of this reflective stage in the transformation process. Parallel to these developments, however, one can observe reactionary movements of a nationalist tendency and a growing awareness of the difficulties of designing democratic multi-level governance institutions. The outcome of this second stage of the transformation process has yet to be decided.

4.3 Political Implications

Although looking into the future is a business political scientists are not educated in, it follows from our analysis that an important factor of influence for the outcome of the second stage of the EU's integration will be its ability to establish an institutional design which goes beyond executive multilateralism and intergovernmental or even supranational legalism. In doing so, the EU (same as other international institutions) does not need to strive for full-blown hierarchy nor try to repeat the model of the nation-state. What is needed is a combination of the insights of rational institutionalism and legalism with a serious improvement of the social acceptance of the EU, mainly by increasing the participation of affected parties in the EU's political process. There is no reason to be too sceptical about the prospects of such an undertaking. If viewed over time, both European and international institutions are clearly in a process of developing new mechanisms of institutionalized cooperation, legal integration and social participation. A major reason for this process may well be the fact that most cases of open non-compliance are perceived by the EU, but also by the WTO, as institutional crises which trigger the search for new institutional solutions. Against this background, the increasing legalization of European and international politics, the extension of participation rights of the European Parliament and the search for new forms of participation for non-governmental actors in EU and WTO must also be understood as institutional learning processes which react to perceived deficits by attempting to eliminate them. Thus, economic and political globalisation may present a challenge to the institutional order of the national constellation, but it is at the same time a chance to meet this challenge constructively through a strategy of building up the institutional requisites of a working post-national political system.

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