

# **The Unbearable Lightness of Complying with European Immigration Policies? Germany's First Mover Advantage**

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## **Abstract**

The last decade has seen an increasing interest on the domestic repercussions of the European Union polity, politics and policies on its member states. Despite the fact that Justice and Home Affairs in general and immigration policies in particular have become the most expansive and rapidly developing EU policy in the post-Amsterdam era, only little attention has been directed to the Europeanization of member states policies in this area. To address this shortcoming the paper analyses the implementation and compliance of member states with European immigration policies. Focusing in particular on Germany and the national implementation of the European policy on detention and removal of illegally staying immigrants, the paper demonstrates Germany's overall good record of compliance transposing European measures into national legislation. Furthermore, a clear quantitative imbalance between different European modes of governance emerges, with propositions focusing on the operation of policies far exceeding measures aiming at the harmonization of legal norms. The European policies adopted so far help to complement the already existing national policies, increase their efficiency and support border-crossing cooperation. Regulations addressing the harmonization of legal norms, however, are opposed and member states show little interest for more far-reaching common European regulatory policies. The lightness of complying becomes unbearable in a sense that consequentialist thinking and the logic of intergovernmental cooperation still dominate this policy area. Nevertheless, the European integration of immigration policies and its first mover strategy is a German success story because the costs have been minimal but the benefits Germany reaped by influencing the immigration policies of its neighbouring countries by making the detour over Brussels are likely to be substantial. It will be the task for future analysis to address the compliance of other member states with this new European policy in greater detail.

## 1 Introduction

The last decade has seen an increasing interest on the domestic repercussions of the European Union (EU) polity, politics and policies on its member states. Despite the recent progress in the research on Europeanization from an “attention-directing device” (Olsen 2002) to a conceptually and theoretically more ambitious programme, the empirical studies are still hampered by its small empirical basis. In a recent review article, Kohler-Koch and Rittberger (2006: 32) point out that first-pillar issues still dominate the agenda of policy-oriented research. So far, comparatively little attention has been directed to second and third pillar policies including Justice and Home Affairs (JHA) in general and immigration policies in particular. This is even more surprising if one notes that JHA has become the most active field for meetings convened in the Council of Ministers during the late 1990s and that today almost a fifth of all legislative proposals of the Commission originate from the area of freedom, security and justice. In the words by Monar (2006b: 4) “it seems hardly exaggerated to regard the JHA domain as the most expansive and rapidly developing EU policy area in the post-Amsterdam era”.

The reasons for the comparatively little interest by Europeanization scholars in JHA are fairly clear and linked to four main facts: First, competencies in this area are relatively recent and they have secondly tended to have a strong intergovernmental basis with limited scope for supranational action. A third reason concerns the fact that in many member states EU JHA policies have only a marginal role to play in national political discourses. Finally, a fourth explanation is linked to the conceptualization of Europeanization. The bulk of studies interested in the European impact on its member states focus on national policy changes. The dependent variable in these studies is domestic policy change and the approach aims at an explanation under what conditions the EU leads to national adaptation. Cases where national policy change is not clearly attributable to the EU or where EU policies do not necessarily lead to policies to change are likely to be under-represented in academic analyses. From the perspective of European governance, however, it is negligible whether EU policies cause domestic changes. What is more important is whether the member states comply with the common European policies (for the differences between implementation and compliance studies on the one hand and the concept of Europeanization on the other see also Treib 2006). In consequence, the main interest of this paper is on the broader picture of member states complying with EU policies – which sometimes includes domestic changes but which is not necessary for compliance. In particular the paper asks whether member states actually implement and comply with European immigration policies.

Next to this general interest in the compliance of member states, the paper is motivated by two further aspects: The first concerns the fact that below

the success story of the European integration of one of the last resorts of national sovereignty – namely asylum and immigration – the last years have also seen regular criticism of this process. Following the updates on JHA policies by Monar (e.g. 2004; 2006a) and Peers (e.g. 2001; 2003) during the last years, the thorny negotiation processes at the European level, the many minimum standard compromises and flexibility clauses become obvious. Despite the quickly developing *acquis communautaire* in this policy area there is little knowledge about the level of implementation at national level; a problem which is also addressed by the European Commission in its 2006 Communication “Implementing The Hague Programme: the way forward”. The second motivation concerns the changes in the European governance in this policy area. Most studies on the Europeanization of national immigration policies focus on the 1990s when cooperation in this policy area was still based on intergovernmental negotiations resulting in ‘soft law’ only and almost no binding supranational requirements. The years since the Amsterdam Treaty, however, have changed this mode of cooperation and the European immigration policy becomes increasingly codified in legally binding legislation. The paper’s second interest focuses therefore on the implications of this change in the European modes of governance for member states compliance.

The empirical analysis of this paper focuses on only one aspect of the European immigration policy and only one member state, namely the compliance of Germany with the European policy on detention and removal of illegally staying immigrants. This procedure is in contrast to many others who regularly focus on a number of major Directives without taking into account how these European measures affect a policy area as a whole. Although detention and removal received a great deal of attention at the European level, the academic debate has largely abstained from this discussion. This is surprising because the policy area – which is euphemistically called “return migration” in the EU discourse – has serious human rights implications and emerged during the past decade as a critical element of many governments’ migration policy. Many European governments refer to it today as an integral part of an effective migration management, alongside strong border management and timely and fair asylum procedures. Concerning the selection of Germany, the empirical analysis of the paper addresses a country with a high likelihood of complying with European policies. It therefore functions as a benchmark for member states where compliance performance can be expected to be lower. The reason to consider Germany a most-likely case is found in the country’s initiatives during the 1990s in developing the European asylum and immigration policy (Monar 2003; Prümmer and Alscher 2007). This “first-mover advantage” (Héritier 1996) throughout the 1990s allowed Germany to forcefully shape the European policies and uploading many of its national policies or policy proposals.

The structure of the paper is as follows: In the next section we provide an overview about three different research approaches focusing at the multi-level interactions between the European and national immigration policies. The review of literature clearly shows that there exists a lack of research on the compliance of member states with the European immigration policies as well as on the actual role of EU policies for its member states. In section three we will develop an analytical framework able to contain the compliance of member states with different modes of governance. Concerning the empirical analyses of the paper we will briefly describe the European return migration policy before section five discusses the compliance of Germany with the developing European policy. The paper concludes with a discussion about the compliance of national with European policies and the rationalities of Member States in participating in the European immigration policy.

## **2 Three Approaches Analysing Member States Compliance with European Immigration Policies**

Before we present a conceptual framework to analyse the compliance of member states with European policies, the following section provides a brief overview about the domestic repercussions of the developing European immigration policy. The available scholarship can be grouped into three broadly defined approaches: (1) neo-functionalism, (2) intergovernmentalism and (3) Europeanization approaches. The first view is rooted in international relations theories of interdependence and argues that in an increasingly global world, states seek international solutions to domestic problems (Keohane and Nye 1977). In this line of thinking, EU cooperation on immigration matters is caused by the decreasing ability of states to control immigration because of the self-preserving nature of immigration, the constraining impact of economic imperatives and international legal norms (Faist 2000; Sassen 1999; Soysal 1994). These arguments resemble those of scholars working in a neo-functionalism tradition, where 'spillover' and 'unintended consequences' from other EU policies provide rationales for common EU policies on immigration. In their line of thinking, the construction of the internal market of the EU with its free movement of goods and persons encouraged compensatory measures to maintain public order across the EU (Geddes 2000; Lavenex and Wallace 2005: 460). Although these approaches successfully provide rationales to understand the European integration of this policy area they have little interest for the role of member states in this process. Concerning the national implementation of European measures these approaches share an uncritical and optimistic view expecting that policies once decided at the supranational level will subsequently be put into practice at lower levels of governance.

The second group of analyses share a state-centric and intergovernmental perspective. Here, the starting point is the nation state which indeed has the power to manage international migration and control the national territory (Zolberg 1999). The most basic argument in this tradition runs like this: Exogenous pressures stemming from growing international migration and crime cause convergence of national preferences and therefore establish a precondition for cooperation. From this perspective the EU provides the framework for member states to cooperate with the aim of reducing negative externalities and transaction costs (Hix 2005: 359-364; Moravcsik 1993). Within this tradition, however, domestic rather than exogenous factors received most attention. Scholars within this group argue that domestic political constraints caused nation states to cooperate on the supranational level. Public opinion, parliamentary opposition, extreme right-wing parties and constitutional courts have been singled out as major actors which have led to the loss of control over the immigration agenda (Freeman 1995; Joppke 1999; Lahav 2004; Thränhardt 1993). From this point of view, the development of a common EU immigration policy is explained by the opportunity afforded to national bureaucrats and governments to circumvent national political constraints by shifting legislative processes to the European level and developing European support and discursive frames for national policy proposals (Geddes 2003; Guiraudon 2003; Huysmans 2000). Studies working within this intergovernmental tradition tackle the impact of the EU on member states much more directly than neo-functional studies discussed above. However, their focus is in particular on the Europeanization of the politics of immigration with the EU offering alternative venues for national policy-making. The impact of common European policies and the compliance by member states are only rarely discussed.

Only more recent studies in the context of the Europeanization approach have started to conduct detailed studies about EU influences on domestic policies of immigration. Most available studies, however, are overly descriptive, focus mainly on the 1990s only and provide few insights about the factors shaping national implementation and compliance with European provisions. Next to a number of juridical studies which offer detailed information concerning the legislative absorption of Europe (see Carlier and De Bruycker 2005; Higgins 2004) mainly single-country studies exist. Examples include studies of the UK (Geddes 2005), the Netherlands (Vink 2005), Spain (Kreienbrink 2004) and Germany (Tomei 2001) as well as of non-member states like Switzerland (Fischer, et al. 2002) and a number of other countries (Lavenex and Uçarer 2002). Comparative analyses are rare but show the great diversity of the role of Europe on national immigration policies (Faist and Ette 2007; Geddes 2003). They all miss, however, an explicit explanatory framework to account for the national patterns of complying with Europe and only little is known about the role of the changing modes of European governance in this policy area.

### 3 A Governance Approach for Analysing Compliance of Member States with EU Policies

The focus of the paper is the analysis of member states compliance with European immigration policies and the role the increasing codification of EU immigration policies plays in this process. The following section develops a conceptual framework building on the recent flurry of research on governance within the EU. Most generally, governance can be defined as a process of governing which departs from the traditional model where collectively binding decisions are taken by elected representatives within parliaments and implemented by bureaucrats within public administrations. Instead, governance takes into account a change in the actor constellation and refers to societal steering as a process of co-ordination within networks (cf. Treib, et al. 2007: 3). The increase of policy related governance research within the EU is mainly linked to the risk of deadlock in Community decision-making during the 1990s and the subsequent introduction of alternative steering modes. These “new modes of governance” depart from the hierarchical Community method of legislating through regulations and directives in at least two aspects: First, they make use of non-binding measures which are not equipped with sanctioning mechanisms against non-compliance. And second, new modes of governance leave the effective policy choice to each individual Member State providing them with more discretion. Following Monar (2006b) modes of governance are best defined as “different types of instruments (legislative or non-legislative) used for the steering and coordination of interdependent actors through institution-based internal rule systems.” Basically, they describe different characteristics of policies concerning their steering instruments they use to achieve particular policy goals.

Taking these different forms of government into account when explaining member states compliance seems of particular relevance in a policy area like immigration which is characterized by Monar (2006b) as a “laboratory of EU governance”. Following Monar (2006b), this multiplicity of different modes of governance is caused by at least four different factors: First, until quite recently intergovernmental cooperation dominated this policy area which resulted in most cases in Council recommendations without any legally binding effect. Despite the move towards more supranational forms of cooperation soft modes of governance are therefore partly remnant of the past in this particular policy area. Second, the domain is comprised by rather diverse policy fields like asylum, immigration and border controls where different regulatory and non-regulatory instruments are needed and ‘one-size-fit-all’ modes are practically impossible. A third point accounting for the importance of soft next to hard law is the importance of immigration for national sovereignty and related reservation to shift too much power to the EU. Finally, the importance of different modes of governance is also due to the fact that not all member states are full par-

ticipants in the European immigration policy which adds to the multiplicity of modes of governance.

To assess how this multiplicity of different modes of governance results in different patterns of compliance, the work by Cini and Rhodes (2007) provides a helpful starting point. For them particular modes of governance are provided with varying capacities to effectively force member states to comply with common objectives. In the edited volume by Faist and Ette (2007), different modes of governance have already been applied to account for the differential impact of the EU on national immigration policies. Here, the contributors differentiated between legal bindingness versus soft law, arguing that with the move towards the legal codification of EU policies their policy convergence capacity should increase. In this paper we extend this original approach by focusing on the type of regulation as a second dimension characterising modes of governance applied in the European immigration policy. The resulting more precise typology of modes of governance (see Figure 1) is in line with the work by Treib et al. (2007) who also argue that the type of regulation or norm is an important dimension to understand the governance capacity of certain policies.

**Figure 1: Four Ideal-Typical Modes of Governance**

		Legal Instrument	
		Binding	Non-Binding
Type of Regulation	Operation of Policies	Operational Harmonization	Supporting Operational Practices
	Legal Norms	Legal Harmonization	Supporting Legal Standards

The additional differentiation between governance instruments focusing on legal norms on the one hand side and the operational aspects of policies on the other hand follows two important characteristics of European immigration policies: First, the fact that member states have shown a “strong preference for focusing EU action on reinforcing coordination of and cooperation between the national systems rather than interfering with those and forcing major change on them through any real attempt at integrating them into a single system with a strong set of common rules and institutions with cross-border operational capabilities” (Monar 2006b: 6). The second characteristic of EU immigration policies is their strong operational dimension with its focus on information exchange and the carrying out of joint operations. This is in contrast with EU integration in general which has traditionally been strongly linked with an extensive use of legislation for setting common rules. In the following the four modes of governance are discussed in relation to the kind of measures they are used to regulate and the capacity to force member states to comply.

### *Operational Harmonization*

The first mode of governance – operational harmonization – is concerned with national re-regulation in cases where the EU prescribes institutional models for domestic compliance. It is a form of coercive governance, defined as legally binding European legislation which leaves little or no discretion to the national implementer. Member states are required to make sure that these supranational policies are put into practice. Concerning the type of regulation, policies belonging to this mode focus on the operational aspects of policies trying to establish same practices. The focus is therefore on the everyday operation of a policy. Policies using this form of steering instrument normally have a rather narrow focus on particular aspects of the implementation stage of a policy. Here, the EU tries to introduce and to spread the same methods and best practices of policies. Furthermore, it tries to allow for smooth working of co-operation between member states by making policy practices interoperable throughout the Union. In practical terms this mode of governance includes aspects of legally binding Regulations, Council Decisions and Directives. Overall, it can be expected that measures belonging to this mode of governance show the best national compliance record because the EU exerts high coercive pressures on member states and the policies introduced tackle only practical issues of policy problems without affecting the overall national policy approach.

### *Legal Harmonization*

The second mode shares with the first its focus on binding legal instruments. It is therefore also a form of coercive governance which leaves comparatively little discretion for the member state by implementing the European measure. However, it clearly differs from the first by its focus on the legal norms and aspects of policies. Whereas the first mode tries to establish same practices, this second mode aims at common legal standards throughout the European Union. The EU attempts to harmonize national legal norms and aims at the convergence of legal standards throughout the Union. In practical terms, the legal harmonization mode includes aspects of EC regulations applied in the first pillar fields as well as formal Council Decisions and Directives in the first pillar and Framework decisions in the third pillar areas. Compared to the first mode, we expect greater difficulties of member states to comply with European guidelines. This is caused by the fact that legal norms are more deeply inscribed into national policy approaches and consequently are more difficult to change than the operational tools and instruments of policies. Nevertheless, because both modes make use of legally binding measures compliance should still be high compared to the other two modes discussed below.

### *Supporting Operational Practices*

With their focus on softer forms of governance, the final two modes of governance differ widely from the steering instruments discussed before. Whereas the rationality of member states to comply with policies in the first two modes follows the logic of consequences in the sense of the work by March and Olson, the latter two modes are characterized by the logic of appropriateness. Here, ideas and collective understandings, socialization and social learning are the dominant rationalities of complying with European policies. In these cases, the EU does not possess the power to prescribe legally-binding policies for domestic compliance. Typical examples of this mode include the Open Method of Coordination but also other mechanisms of spreading certain policy ideas. Another motivation for the application of this mode is to reduce the costs of adaptation of the national systems to EU regulatory objectives by wider margins of implementation. Nevertheless, it is the attempt to construct a shared European policy based on voluntarism. Its focus is on operational aspects of policies where European policies offer non-binding suggestions for national policy-makers to guide the search for regulatory solutions to certain policy problems. The chance for compliance is largely reduced in both modes building on non-binding legal instruments but similar to the discussion above, the reduced focus on practical aspects without addressing more far-reaching problem solutions provides those policies greater chances to be implemented into national policies than the ones discussed in the fourth mode.

### *Supporting Legal Standards*

Finally, the fourth mode is similar to the third by its focus on non-binding legal instruments but differs with its attempt in harmonizing legal norms between the member states. In practical terms it includes non-binding texts which spread legal standards by trying to establish certain definitions, common guidelines or legal procedures. Concerning its chances for compliance it is clearly the mode with the least capacity.

## **4 Developing Common European Policies on Detention and Removal**

The framework developed above conceptualises compliance as a top-down process. Therefore, the following section will provide some information about the developing European *acquis* on detention and removal. Detention and removal policies describe in this paper what the European Commission regularly calls return migration. In general, return migration means going back from a country of presence to the country of origin or to a country of previous transit. Concerning the way it takes place, different sub-categories of return migration can be differentiated: voluntary, assisted, or forced return (International Organization for Migration 2004). In

the case of voluntary return migrants decide at any time during their sojourn to return home on their own volition and cost. Assisted return includes organizational and financial assistance by the government or other programmes for persons at the end of their temporary protected status or rejected for asylum or staying legally or illegally and choosing on their own volition to return home. Forced return or deportation, in contrast, results as a consequence of a failure of legal status in the country and where the authorities decide on forcing and escorting the migrant to their country of origin or transit. Further sub-categorizations can be drawn along the lines of who participates. Here, we can differentiate between return migration relating to persons staying legally in a third-country and those people staying illegally. Despite the broad meaning of return migration in general, the European acquis on return migration refers to migrants subject to forced return, asylum applicants whose application has been rejected, illegal immigrants and migrants whose behaviour is regarded as a threat to public or national security only. Furthermore, the European policy in this area focuses almost exclusively on forced return which is why we use in this paper 'return' as well as 'detention and removal' or 'expulsion' as synonymous (cf. Cassarino 2006).

Overall, the European detention and removal policy developed in line with the European integration of immigration policies in general. Andrew Geddes (2003) differentiates four periods of the slowly increasing European integration of immigration policies with the first period ranging from 1957 to 1986 and being characterized by *minimal immigration policy involvement* in national immigration policies. Immigration policies at that time fell under national control, and initiatives by the European Commission towards closer EU cooperation within the traditional Community method of decision-making were regularly declined. Nevertheless, the period witnessed significant cooperation in this policy area outside the EU's traditional structures. Examples of such cooperation include in particular the Schengen Agreement from 1985 concerning cooperation on the mutual abolishment of internal border controls and the development of compensating internal security measures. The Schengen Agreement and the belonging Convention applying the Schengen Agreement (1990) mark also a first important step towards a common European return policy with the development of the Schengen Information System (SIS, operational since 1995) being relevant for monitoring attempted re-returns of persons expelled or deported. Furthermore, the Schengen Acquis obliges Member States to expel foreigners without permission to remain. The second period, from 1986 until 1993, was characterized by *informal intergovernmentalism* during which representatives of the administration of the member states engaged in a process of closer cooperation. Examples are the Ad Hoc Working Group on Immigration which was established in 1986, as well as the Dublin Convention. This latter example marks a next milestone in the European initiative to develop a common policy on expulsion. For

the first time it included the obligation to readmit rejected asylum seekers who have entered the territory of another Member State. The third period, from 1993 until 1999, was then shaped by the Maastricht Treaty and its structure of *formal intergovernmental cooperation*. The three-pillar structure of the EU integrated immigration policies under the EU umbrella but ensured cooperation remained strictly intergovernmental. Concerning the development of return policies it included a number of non-binding recommendations. In 1992, for example, member states discussed best practices in expulsion and common rules for transit for the purpose of expulsion and in 1994, EU states agreed upon a common standard travel document (*laissez-passer*) for the expulsion of third country nationals. Furthermore, during that time the EC's 1994 Communication on Immigration and Asylum Policies (COM/94/23 Final) also identified the removal of those in irregular situations as one of the key elements in combating irregular migration and therefore provided a frame of reference marking the importance of return policies in a concerted European immigration strategy.

For the development of the European immigration policy in general as well as its return policy in particular, the Treaty of Amsterdam marks the most important catalyst and the so far final period. The Treaty brought immigration policies into the Community pillar and incorporated the Schengen Acquis into the *acquis communautaire*. Furthermore, the European Council summit in Tampere in 1999 defined a five-year action programme on the central measures of a common European immigration policy. Concerning detention and removal the Tampere Action Plan states that in the field of immigration within two years after the entry into force of the Amsterdam Treaty, the EU should "establish a coherent EU policy on readmission and return" and within five years it should look for an "improvement of the possibilities for the removal of persons who have been refused the right to stay through improved EU coordination implementation or readmission clauses and development of European official (Embassy) reports on the situation in countries of origin" (Commission of the European Communities 1999: 8-9). In line with these ambitious objectives, the years since 1999 have seen an enormous output by the European Council including soft law as well as binding legislation focusing on return migration. Furthermore, the years after the Amsterdam Treaty also shaped the importance the Commission addresses to a common detention and removal policy. In its Communication in 2002 the Commission argued that "forced return and its subsequent enforcement send a clear message to illegal residents in the Member States and to potential illegal migrants outside the EU that illegal entry and residence do not lead to the stable form of residence [...] The possibility of forced return is essential to ensure that admission policy is not undermined and to enforce the rule of law, which is a constituent element of an area of freedom, security and justice. A credible policy on forced returns helps to ensure public acceptance for

more openness towards persons who are in real need of protection, and for new legal immigrants against the background of more open admission policies, particularly for labour-driven migration " (Commission of the European Communities 2002a: 8). Overall, return migration has developed during the 1990s and in particular during the last years towards one of the main pillars of a common European immigration policy and with the adoption of 'The Hague Programme' in late 2004 the attention for common European return policies will continue during the next years.

## **5 Germany's Compliance with European Policies on Detention and Removal**

Focusing on the developments since 1999, the following applies the framework developed above to the case of Germany's policy on detention and removal. As already pointed out, Germany traditionally attaches great importance to its return policy and was keen to upload its national policy approach in this policy area to the European level. The German understanding of the role of detention and removal in an overall migration management system closely resembles the perspective of the Commission presented above. The 2001 report by the 'Independent Commission on Migration to Germany' argues that with the granted right of asylum enabling the refugee to stay in Germany in case of a positive asylum decision we find the connected duty of the individual refugee and the state that in case of a negative asylum decision the person in case has to leave Germany. The asylum system would lose its justification, the practice of authorities and courts would lead astray if the (forced) removal would not be enacted. Remaining illegally staying immigrants would cause unwanted immigration and would reduce the discretionary to use immigration for demographic or economic national interests. The remaining of illegally staying migrants would have a knock-on effect on those people which already had decided to return on a voluntary basis. Finally, this type of conduct would diminish the willingness of the population to afford protection to those who genuinely need it, enhances general resistance towards foreigners and strengthens extreme political forces (cf. Independent Commission on Migration to Germany 2001: 146). Comparing this definition of the problem with the one offered by the Commission in its Communication quoted above shows first indications for the conformity of Germany's policy with the European propositions. The following sections will provide a more detailed analysis of Germany's compliance with individual legally binding European policies as well as non-binding proposals for policies and more general suggestions for solutions to national policy problems.

### *Operational Harmonization*

Following the typology of different modes of governments developed above, *operational harmonization* describes measures which are legally binding and focuses on the practical aspects of enacting policies and cross-border cooperation. Because of the fact that these policies have to be transposed by member states but normally include only minor policy changes we expect compliance to be highest in this mode of governance. Altogether three measures have been adopted by the EU since 1999 consisting out of five individual legal acts. The first measure concerns Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals and the connected Council Decision 2004/191/EC correcting for the financial imbalances of this Directive. Those two acts which have been adopted in 2001 and 2004 respectively were the first legally binding steps towards the improvement of European cooperation in the area of detention and removal policies. The Directive aims at increasing the efficiency of carrying out return measures by facilitating the mutual recognition of an expulsion decision issued in one member state against a third country national present within the territory of another member state. Furthermore, the connected Decision sets out criteria and practical arrangements for the compensation of any financial imbalances which may result from the application of the Directive by defining the criteria and practical arrangements for the compensation of the affected member state. Concerning the implementation of the Directive into German law, Germany originally met the prescribed deadline of December 2002 with transposition being part of the immigration law published in June 2002. The implementation of the Directive did only add some additional legal grounds enabling the state to carry out expulsion orders (Residence Act, § 58, 2 nr. 3). The withdrawal of the new law by the Federal Constitutional Court in December 2002, however, delayed the transposition. With the immigration law finally being passed by parliament in July 2004 and enforced in January 2005 the primary transposition regulation discussed above was adopted. Germany profits from these European instruments because they clearly reduce problems in transferring the person to the originally responsible member state that issued the removal order.

The second European measure concerns the Council Decision 2004/573/EC on the organisation of joint flights for removals of third-country nationals who are subjects of individual removal orders and Council Decision 2005/267/EC establishing a secure web-based Information and Coordination Network for Member States' Migration Management Services. The purpose of those two Decisions is to coordinate joint removals by air and installing a device which allows member states to detect whether other member states are also planning to remove persons to similar countries of transit or origin. Similar to the instrument discussed

above, the Decision was easily adopted into Germany's return policy. The possibility for joined removal flights was already common practice on behalf of the Federal Police and the German Länder on a bi- and trilateral basis. Nevertheless, Germany clearly benefits from both Decisions because it makes it much easier to get and distribute information on such flights among member states. Thus, the Information and Coordination Network (ICONet) increases the efficiency of individual member states return policies by decreasing the costs of individual removal orders (cf. Commission of the European Communities 2006: 10-11).

The third European instrument making use of the operational harmonization mode is Council Directive 2003/110/EC on assistance in cases of transit for the purposes of removal by air. Again, its focus is on increasing the cooperation of member states with respect to return flights. In particular the Directive defines measures on assistance between the competent authorities at member states airports of transit because the experience showed that despite the efforts of member states to preferentially use direct flights cases of transit through airports of other member states is not always avoidable. This is due to the fact that not always non-stop flights are available or just because of economic reasoning. For those cases of transit the Directive requires member states to make arrangements to facilitate short-term transit and providing the necessary material assistance to facilitate transit operations. The Directive is not entering new subject areas but pursues non-binding recommendations from the 1990s. Explicitly, the Directive refers to the Council recommendation of 22 December 1995 on concerted action and cooperation in carrying out removal measures and the decision of the Schengen Executive Committee of 21 April 1998 on cooperation between the Contracting Parties in returning third-country nationals by air, (SCH/Com-ex (98) 10). The member states are obliged to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 6 December 2005. In Germany, transposition into national law is delayed because a bill transposing altogether thirteen European measures (Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union) has been postponed because of dissolution of parliament and new elections in 2005. Although with considerable delay, the bill has passed the Cabinet in March 2007 and arranges transposition of Directive 2003/110/EC by allowing the transit of third country nationals for removal actions of European Member States as well as other third countries (Residence Act (draft), § 74a). In case the bill becomes law in its present state, it clearly overimplements the European propositions – what has become known as goldplating – because the new article is not restricted to the European member states alone but allows for transit for removal actions by air and also overland, which were two supplements demanded by the Federal Police as the operating and responsible authority (Hitz 2006: 227). Again, the European legislation does not alter Germany's policy in a fundamental

way but increases the national problem solving capacity by increasing the predictability of legal decisions for transit situations in case of removal actions which so far were carried through on a non-binding and bilateral basis between Member States. Overall, the compliance record of Germany with measures of operational harmonization is neat and clean and in correspondence to the theoretical expectations. Although not every measure has been transposed in time, after all Germany made sure that its legislation correctly implements all the European provisions.

### *Supporting Operational Practices*

Compared with the good record of compliance in the case of binding measures focusing on operational and practical aspects of policies, we would expect less interest of member states in implementing non-binding instruments. In the German case, the opposite is the case. This mode of governance covers the largest number of European proposals to address certain policy issues on detention and removal. They include the European Return-Programme, the proposal to operate joint seminars for officials of different member states responsible for executing the return policies, the European support for national voluntary return programmes and for negotiating bilateral readmission agreements. In all cases Germany fully complies with the European proposals. In the paper, however, we focus only on the latter two examples.

The considerations of the Commission concerning integrated return programmes and their support for voluntary return programmes mark the first example. Without being able to hierarchically direct these programmes on the member states, the Commission decided to promote these measures by collecting and disseminating best practices. Germany is in line with these considerations and activities of the EU. Early on, Germany started to establish voluntary return programmes and considers voluntary return generally as a more humane and financially more attractive alternative to forced removal actions. The most important target group of voluntary return programmes in Germany are refugees having not been able to obtain permanent residence rights. Two programme lines have been set up: the 'Reintegration and Emigration Program for Asylum-Seekers in Germany' (REAG) and the 'Government Assisted Repatriation Program' (GARP). The programmes have been established in 1979 and are organized by the International Organization for Migration and ordered by the German Federal Ministry of Interior as well as the ministries of the Interior of the Länder (Hemingway and Beckers 2003). Until the end of 2005 approximately 520,000 persons have received assistance by those programmes (International Organization for Migration 2004: 154). In addition to these national activities Germany is actively involved in the European measures supporting voluntary return. In line with the conceptions by the Commission which are partly more ambitious and more comprehensive

than the German REAG/GARP-Programme, Germany has expanded its voluntary return policy by using European financial support for new projects. Programmes of this kind are financed by the European Refugee Fund. In Germany these European financed projects include information services on the countries of origin, vocational training as well as other economic, social or legal support improving the integration in their countries of origin. As Germany has already implemented voluntary return programmes before the EU has supported this particular operational practice, compliance can therefore be regarded as high. Nevertheless, Germany is happily using the new European programmes as an additional venue providing infrastructure, experience and above all financial support in times of budgetary restrictions (Schröder 2006).

A second example concerns the cooperation with countries of origin and transit. The EU regularly argues for bilateral readmission agreements between member states of the EU and countries of origin and transit (Commission of the European Communities 2002b). Many years ago, Germany has started to establish an extensive net of readmission agreements but it continues with widening the countries addressed and up-dating the agreements already established. Originally, these agreements focused solely on citizens of the respective countries but when it became clear that these countries are also important countries of transit the agreements adjusted to the new situation. In the meantime the agreements have been also amended to cover foreign citizens as well (Schneider 2006: 75-77). Currently Germany has concluded bilateral readmission agreements with 28 states. Information by the German Federal Ministry of the Interior show, that between 2000 and 2006 alone thirteen agreements have been concluded. Furthermore, negotiations with, Lebanon, Georgia, Syria, Ghana and Azerbaijan are under way. Overall, Germany considers readmission agreements as a necessary instrument for an effective return migration policy and the compliance with European proposals is large. Furthermore, Germany is supporting the European initiatives to support bilateral readmission agreements while there are no Community agreements. Following a recent evaluation of the German immigration law from 2005, the Federal Ministry of the Interior argues that readmission agreements should be as similar as possible between the European member states to prevent potential countries of origin or transit to play individual European Member States off against each other (Bundesministerium des Innern 2006: 167).

### *Supporting and Harmonizing Legal Standards*

Compared to the large number of European measures focusing on operational and practical aspects of a common European immigration policy, only very few European provisions exist which focus on the integration of legal norms – irrespective of their legal status as being binding or non-

binding. Actually, only the Common Guidelines on Security Provisions for Joint removals by Air and the proposal for a Directive on common standards and procedures in member states for returning illegally staying third-country nationals fall into either of those two modes of governance. From the theoretical considerations of both modes of governance we would expect that compliance will be minimal in cases of measures best characterized as 'supporting legal standards' whereas an orderly implementation record could be expected for instances of 'legal harmonization'.

The 'Common Guidelines on Security Provisions for Joint removals by Air' which are attached to Council Decision 2004/573/EC is the only measure which focuses on legal norms but uses a non-binding legal instrument. Their aim is to set minimum standards which have to be fulfilled in the case of removing illegally staying immigrants. Although we would expect low levels of compliance, Germany fully complies with this European proposal. The main reason concerns the fact that the procedures of the Federal Police in Germany concerning removal by air (Best.-Rück Luft) already set comparatively high standards. These standards have already been set in 2000 because of public pressure occurring after the death of a person subject to a removal measure in 1999 (cf. Mesovic 2005). For the redraft the applicable measures of physical force as well as the procedures and the accountability of participating authorities have been reviewed. Furthermore, the "Guidelines on Deportation and Escort" by the International Air Transport Association (IATA) from 1999 as well as further provisions of international conventions (Chicago Convention, Tokyo Convention) have been included. Complying with the European instrument is therefore output of the higher standards set in Germany already before. Nevertheless, Germany clearly benefits from the European standards because the German Federal Police has to demand from other member states that they have to comply with standards that are at least the German minimum standards in cases of joined return flights. Finally, similar standards throughout the EU would also add to more level playing fields by raising standards in other member states in an area where the German government is tied because of national public opposition.

Concerning binding policies focusing on the harmonization of legal norms no European measures have been adopted. Although the Commission has regularly argued for the establishment of common legal standards concerning the ending of legal residence, preconditions for expulsion decisions, detention pending removal, removal, the mutual recognition of return decisions and proof of exit and re-entry (Commission of the European Communities 2002b) only preliminary steps towards these ends have been conducted. These include the Directives 2001/40/EC and 2003/110/EC but their focus was on the operational harmonization and the integration of legal standards concerned only those necessary for practical cooperation. Nevertheless, what does exist is a proposal by the Euro-

pean Commission published in September 2005 on these common standards and procedures in member states for returning illegally staying third-country nationals which exactly aims at harmonizing legal norms in this policy area. The content of this proposal, the national discussion about it in Germany and the initiatives by the recent German Council Presidency will therefore allow to draw some conclusions about the implementation of measures aiming at legal harmonization in Germany.

The objective of the proposed Directive is explicitly to respond to this need for common legal standards concerning return, removal, use of coercive measures, detention pending removal and re-entry. The proposal promotes the principle of voluntary return by establishing a general rule that a 'period for departure' should normally be granted; establishes a harmonised two-step procedure which involves a return decision as a first step and, if necessary, the issuing of a removal order as a second step; provides for a minimum set of procedural safeguards; limits the use of detention pending removal and establishes minimum safeguards for the conduct of it (Commission of the European Communities 2005).

The Commission proposal has triggered in-depth political discussions in Germany. The German Federal Conference of the Ministers of Interior and the Bundesrat, Germany's Upper House, have argued that the proposal by the Commission is going too far, does not support the aim of fighting illegal immigration and falls behind already established measures in national legislation (Bundesrat 2005; Innenministerkonferenz 2005: 18f.). Critical statements have also been voiced by German legal scholars criticizing in particular new legal rights which would be established by the proposed Directive. In particular, Hailbronner (2005: 353-360) argues that the obligatory two step procedure would most likely contradict the aim of speeding up the process of removal; that the proposal does even increase international standards concerning the removal of minors and that the restriction of detention to six months at most is in contrast to Germany's experience which allows for up to 18 months. Finally, he questions whether the harmonization of different national traditions concerning detention in particular and return policy in general is actually necessary. Criticisms concerning the proposal have also been voiced by non-governmental organizations and international organizations in Germany, arguing in contrast, that the proposal is not going far enough (cf. Amnesty International 2006; Marx 2006; UNHCR 2005). This discussion has received more attention with the German Council Presidency presenting a redraft of the original proposal in February 2007 which would "rid the Directive of nearly all its content, including in particular the human rights safeguards against expulsion, the procedural rights of individuals, protection against and during detention, and safeguards against starvation pending expulsion and brutality during expulsion" (Peers 2007). In consequence, the two left opposition parties in German parliament - Die Linke and Bündnis 90/Die

Grünen – have presented motions in parliament criticising the German government for their activities on the European level. It seems probable that a final Directive (if it will come through) would not include serious steps towards the integration of legal standards in this policy area. Such a watered down Directive would eventually be transposed into German law without major complications. Nevertheless, the political turbulence in Germany shows that the German government has no interest in complying with the present proposal and a more extensive common policy.

Overall, the analysis of measures focusing on legal norms shows, that the good compliance record in the policy area as a whole is to some degree arbitrary. In cases where Germany was able to upload its policies or where European proposals are in the interest of the German government compliance is the obvious result. Instead, in cases where the government fears that national interests are at risk, Germany is not prone to shift sovereignty to the EU.

## 6 Conclusions

The main aim of the paper was to analyse the compliance of member states with European policies in the Justice and Home Affairs area. In particular the paper focused on the consequences of the Amsterdam Treaty and the Tampere Action Plan for the European immigration policy and how it is enacted on the national level. These consequences include on the one hand side the sheer amount of legislative initiatives. On the other hand they include also the legal quality of European measures with the last years witnessing an increasing use of different modes of governance – some still being restricted on non-binding steering instruments but others making regularly use of legally binding legislation.

The empirical analysis of the paper was concerned with the compliance of Germany with the developing European policy on detention and removal of illegally staying immigrants. Based on an analysis of all relevant European measures adopted since 1999, the paper was able to show that during the last years the EU used binding and non-binding instruments in roughly equal shares. Furthermore, we could demonstrate that compliance of Germany with the European measures and legislation is almost complete. Although Germany was not able to transpose all European measures in time, at the end no real transposition backlog, incomplete or flawed transposition remained. This result applies equally to all European measures irrespective of the legal instrument – binding or non-binding – used. This *lightness* of Germany in complying with European requirements is mainly explained by the country's role played during the 1990s as the main promoter of the European immigration policy. At that time Germany was able to successfully upload its national policy approaches to the

European level. Nevertheless, the exhaustive compliance even in cases of non-binding measures is surprising. Future analyses should therefore spend more attention to those countries which showed only little interest in a common European immigration policy during the 1990s and did only partially participate in the emerging new European policy area.

More important than the small variation on the compliance of Germany with the European measures are the results on the use of different types of regulations and their implementation in Germany. Here we find a clear imbalance with propositions focusing on the operation of policies far exceeding measures aiming at the harmonization of legal norms. It is obvious that the main interest of member states is on the operational and cooperation aspects of policies. Concerning Germany we were able to show that the European policies help to complement the already existing national policies, increase the efficiency of policies and supporting border-crossing cooperation. The enthusiasm in compliance changes, however, if we concentrate on regulations addressing the harmonization of legal norms. Although we are not able to conclude on this point because no binding measures of this sort are in place, the effort by the German Council Presidency clearly shows that the German government (amongst others) would not be inclined to comply with a text like the present proposal by the Commission for a return directive. The procedural proposals of the Directive would counteract the efforts of succeeding German governments in streamlining its detention and removal policy. The example shows that member states are still attached to their own national approaches and show little interest for more far-reaching European regulatory policies. The *lightness of complying* becomes *unbearable* because it addresses only cases where European policies are not in opposition to consequentialist logic of national preferences. Instead, European proposals which attempt to introduce new statutory rights for migrants are opposed and those European policies which would change national status quos had and will have hard times (cf. Walter 2006). Most likely, the recent discussions in the Council will therefore fundamentally alter the substance of the Directive. Nevertheless, the Return Directive is not the only example where German governments have substantial objections against European proposals and some already argue that Germany feels “haunted by its Europeanized past” (Hellmann, et al. 2005: 154). This is certainly true and applies equally to the lightness of compliance as well as to the difficulties with European proposals which are detrimental to German interests. The interest in the Europeanization of operational aspects of policies but the retreat from more fundamental harmonization efforts will most likely continue in the years to come. The deepening of integration in this policy will experience difficult times and it is likely that the substantial decisions in this policy area will continue to be decided in the national venue alone. For Germany, however, the European integration of this policy area was a success story because its costs have been minimal but the impact Germany had on its

neighbouring countries by making the detour over Brussels are likely to be substantial. It will be the task for a future paper to address the compliance of the other member states with this new European policy.

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