Using the Supremacy of European Law through National Courts:
Legal Reality, but Empirical Reality?

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Abstract
Several studies have recently highlighted the importance of European courts for EU integration, democratic governance and the implementation of EU law. At the same time, however, policy-oriented analyses have repeatedly shown that such litigation may have quite diverse effects on the implementation of EU law. How can such differential effects of national litigation be explained? In this paper, I try to tackle this question by presenting a theoretical account supported by new empirical evidence. I argue that differential effects of public interest group litigation can be explained through a ‘stage model’ that focuses on three interconnected ‘stages’: (1) public interest group litigation; (2) interpretation of national courts; (3) reaction of the competent authorities. As these elements differ widely across Member States, the possibilities to enforce European law through courts vary considerably. In order to illustrate the theoretical argument, the paper presents empirical evidence from an in-depth study on public interest group litigation in the field of EU nature conservation law in Germany, France and the Netherlands.

1 Introduction
Since the middle of the 1990s, the European court system – the European Court of Justice (ECJ) and the courts of the EU’s Member States – has attracted considerable scholarly attention.¹ Three distinct but interlinked strands of research have put forward new perspectives on how we should perceive the European courts: First, legal scholars repeatedly emphasize the potential of remedying compliance problems with European law through a system of decentralised law enforcement. Based on the supremacy of European law, the courts of the Member States are under the obligation to apply directly effective provisions, even if they are in contradiction with national legislation. Private actors may therefore litigate before their national courts in order to enforce European law that has not been transposed by their governments (see e.g. Micklitz/Reich 1996). Second, and building on this reasoning, neo-functionalist scholars argue that the cooperation of the ECJ with national courts is at the

¹ This paper is part of a doctoral project that I am pursuing as Scholar at the Institute for Advances Studies and as doctoral student at the University of Vienna. More detailed empirical information will be made available soon on my website (http://www.ihs.ac.at/index.php3?id=440&hr=409).
heart of understanding European integration as such. As litigation before national courts gave private actors the possibilities to bypass reluctant governments, the process of European integration could be pushed forward, both horizontally – to new issue areas due to the integration friendly interpretation of the ECJ – and vertically – to guarantee the enforcement of existing European rules (Mattli/Slaughter 1998; Stone Sweet 2004; Fligstein/Stone Sweet 2002). Third, the contributors to the special issue of Comparative Political Studies on “Courts, Democracy, and Governance” agree that giving greater access to courts to societal actors is in principle a promising way to enhance democratic governance as it strengthens accountability, transparency, and individual participation in political processes. In the introduction to the special issue, Cichowski (2006) identifies three general institutional variables – the nature and scope of rules, the possibilities of courts to perform judicial review, and the access points and resources of societal actors to use litigation – that condition the potential of enhancing democratic governance through courts. For the context of the EU, Börzel underlines the importance of the third variable in her study on enforcement of European environmental law through courts in Germany and Spain. She concludes that “[t]he EU’s legal institutions only increase opportunities for participation for those individuals and groups who possess court access and sufficient resources to use it. In other words, it is mostly the ‘haves’ who benefit – those actors that already command considerable resources that enable them to broadly participate in political and legal processes” (2006: 147).

I argue that this seminal research suffers from a major flaw that has not yet been dealt with so far: it builds on the assumption that the courts of the Member States will apply European law faithfully and equally in general. Yet whether this assumption holds true has not been analysed empirically, not least due to problems of data collection. At the same time, however, more policy oriented research reports differential effects of litigation aimed at the enforcement of directly effective European provisions. Whether private actors enjoy access to the courts and dispose of the necessary resources is certainly a key variable to understand such differential effects, yet it seems that other factors are relevant as well (see e.g. Blom et al. 1995; Tesoka 1998). Unfortunately, however, we lack empirical studies using clear-cut theoretical models that try to explain such differential effects of public interest group litigation in the European Union.

With this paper, I contribute to narrowing this gap in the research. Focusing on public interest groups, I present a theoretical model that seeks to explain the differential effects of litigation started by such groups on the implementation of European law.

I argue that the differential effects of public interest group litigation can be explained through a ‘stage model’ that focuses on three interconnected ‘stages’: (1) public interest group litigation; (2) interpretation of national courts; (3) reaction of the competent authorities. I then report the empirical results of an in-depth comparative study on the differential effects of public interest group litigation on the Natura 2000 Directives in France, Germany and the Netherlands. These countries are particularly appropriate to assess the explanatory power of the stage model, as they offer sufficient variance of the independent variables. The empirical findings are based on 24 expert interviews conducted with various environmental organisations and key senior officials of the competent authorities, an extensive analysis of primary and secondary literature as well as the relevant national jurisprudence on the issue. Although public interest litigation took place in all these countries, my research shows that it resulted in differential effects: In France, a bizarre ‘game’ was played for years between the administrative authorities and environmental organisations, where each year the authorities issued hunting permits clearly not in conformity with the European obligations and each year the

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2 By ‘public interest group, I refer to any group claiming to represent an interest that is shared by a large number of people, but individually only to a limited extent. This constellation leads to freerider problems, which means in turn that the safeguard of such a ‘diffuse’ interest is to an overwhelming extent dependent on its representation by collective action, in particular by interest groups.
environmental organisations contested them successfully before French administrative courts. Litigation on the Natura 2000 Directives’ site protection regime, however, failed overall. In contrast to France, Dutch court rulings had a positive effect on both the formal transposition and the practical application of the Directives in the Netherlands. In Germany, the effects were also positive on the transposition of the Directives’, but they have not ameliorated the administrative practice as regards the application of the Directives’ protection regime. I show that these differential effects of public interest group litigation are the result of differences in the various stages of the theoretical model. I conclude that these national differences between the Member States limit the potential of enforcing European law through public interest group litigation and thus to enhance democratic governance through courts in the European Union.

The paper proceeds as follows: First, I present the stage model and discuss the causal connections between its three stages. Second, after a very brief justification of why France, Germany and the Netherlands are used as cases to assess the explanatory value of the stage model, I report the effects of public interest group litigation in these cases. Third, I apply the stage model in order to explain these differential effects. I conclude with a brief discussion of the wider consequences of my empirical results.

2 The Stage Model

How can the differential effects of public interest group litigation on the implementation of European law be explained? In order to answer this question on a theoretical level, I combine different existing and well-established theories with a ‘stage model’. My argument runs as follows: In order to explain the differential effects of public interest group litigation aimed at the correct implementation of European law, three causally connected stages need to be considered (1st stage: litigation – 2nd: interpretation – 3rd: reaction). On each of these stages, the focus is on the behaviour of one key actor (1st stage: public interest groups – 2nd: national courts – 3rd: competent national authorities). The potential for enforcing European law through public interest group litigation of each stage is largely determined by the characteristics of its preceding stages. The stages are gone through repeatedly over time, until either the correct implementation of the European legislation is achieved, or public interest group litigation stops at the first stage (see Figure 1). For each stage, I identify independent variables and derive hypotheses regarding the expected effects of interest group litigation. I derive these independent variables from state of the art theories for each of the respective stages (1st stage: interest groups and social movements theory – 2nd: judicial politics – 3rd: compliance theory) in order to combine with a model that is able to explain the dependent variable, i.e. the differential effects of public interest group litigation. Based on this reasoning, it needs to be emphasised that I do not intend to test alternative theoretical accounts within a stage, such as different theories of compliance. As a consequence, I only rely on broadly shared assumptions of these theories.

3 For the focus of this study, I use the term implementation following Raustiala/Slaughter as the “process of putting international commitments into practice” (2002: 539). It covers two distinct aspects: the legal transposition and the practical application of EU law. Transposition means the establishment of the necessary legal requirements in order to apply the European law into practice. Application means the faithful practical application of the European law. If a European provision is correctly transposed and applied, it is fully implemented, and full compliance has been achieved.

4 In order to use public interest group litigation, three general preconditions need to be satisfied: First, the European law needs to be directly effective and thus in principle enforceable through national courts. Second, implementation problems have to have occurred. Third, public interest groups must enjoy at least a limited access to the courts.
2.1.1 Stage 1: Litigation of Public Interest Groups

The first stage concerns the general possibilities for national public interest groups to contest administrative decisions that breach European law before national courts. It is not the purpose of this paper to explain the individual decision of a given public interest group to litigate or not. On the contrary, my point of departure is that public interest litigation already has occurred, yet with differential effects. As a result, my focus is at this stage more on overall differences between national public interest group movements than on the individual behaviour of a particular interest groups.

Literature on interest group theory and social movements emphasise two aspects that are of particular importance for the explanation of differential effects of public interest group litigation. First, it is argued that the institutional context – understood broadly – in which interest groups operate has a decisive impact on their behaviour. Second, and related to this, it is shown that the structure of interest groups and in particular the resources at their disposal heavily influence the strategies they pursue in order to reach their policy objectives (Greenwood 2003; Kriesi 1993; Cigler/Loomis 1995).

Based on this literature, I identify two independent variables for this first stage: the ‘organisational capacity’ and the ‘access to courts’ of public interest groups. The organisational capacity refers to the available resources at their disposal. For litigation, two resources are essential. The first is information, both regarding the relevant national and European provisions as well as the situation on the ground. Obviously, if public interest groups are simply not aware of the fact that they could potentially turn to national courts in order to enforce European law, no litigation – or at best very little litigation at a comparably late point in time – will occur. In addition to the relevant legal information, interest groups sometimes need to possess detailed information about the current situation on the ground that may be difficult to obtain. To give an example, it is far easier to find out whether the national legislation on gender equality is in compliance with the European obligations than to empirically assess whether women are actually equally treated compared to their male colleagues when it comes to promotions. As a result, problems of information caused by a low organisational capacity may be somewhat restrictive for using litigation, depending on
the legal issue. In other words, the legal issue area public interest group litigation is aimed at
determines to a large extent whether a strong or weak organisational capacity is necessary to
effectively use litigation.
The second important resource for litigation is money. It is needed to pay legal fees, lawyers,
scientific studies to support arguments, etc. The money necessary for litigation itself is in turn
determined to a large extent by national procedural law for public interest group litigation.
This leads to the second key variable of this first stage, namely access to courts. Such access
does not only refer to the mere legal standing of public interest groups before the courts. It
also covers a whole bundle of issues that can make the access to court more open or
restrictive, such as whether new claims can be added to an ongoing proceeding, whether the
presence of a lawyer is obligatory, or whether the procedural costs for litigation are
refundable.

Based on these two variables, I derive the following two hypotheses:
H.1: The stronger the organisational capacity of public interest groups, the more positive
effects public interest group litigation will have on the implementation of European law.
H.2: The more open the access to courts for public interest groups, the more positive effects
public interest group litigation will have on the implementation of European law.

Two additional remarks need to be made. First, the variables of ‘organisational capacity’ and
‘access to courts’ are not always independent of each other, as a low access costs to the courts
can mitigate weak organisational capacity. Note, however, that this mitigating effect only
applies to the costs of litigation and not to the available knowledge of the practical situation
on the ground or the general issue areas open for litigation. In addition, even comparatively
rich public interest groups will not be able to totally compensate for high litigation costs.
Second, although this study is not about explaining the decision of public interest groups to
litigate, this should not suggest that the frequency of litigation is not assumed to have a
decisive impact on the effects of public interest group litigation. On the contrary, the more
often national law is successfully challenged before national courts for being not in
compliance with directly effective European provisions, the more pressure will be generated
to uphold the national law, the more possibilities are given to the national courts to develop
their jurisprudence, and the more publicity will be generated on the issue of non-compliance.

2.1.2 Stage 2: Interpretation of the National Courts
The literature on judicial politics makes two strong arguments for assuming that the
interpretation of European law by national courts is likely to differ significantly across the
Member States. First, it is the very cornerstone of judicial politics research that courts need to
be considered as political institutions whose decisions are not derived from some sort of
abstract and constant ‘legal truth’ but from the interaction with other political institutions
(Shapiro 1981). In view of the very different historical developments of the various court
systems of the Member States, the prima facie assumption that European courts should come
to the same conclusions when interpreting European law is hard to sustain. Related to this,
European law is often not self-explanatory and requires an interpretation in order to be
applied in a specific case. Not surprisingly, it has been observed that this interpretation can
differ significantly, even if the same European provisions are concerned (see e.g. Hallo 1996;
Tesoka 1998; Glasson/Bellanger 2003; Heinelt et al. 2001; Somsen 1996). Second, it is
crucial to remember that the acceptance of European law by national courts was – and maybe
still is – a cumbersome process (Alter 2001; Slaughter et al. 1997). For example, the supreme
administrative court in France did not accept the supremacy of European law before 1989. In
addition, there are still reports that national courts did not apply directly effective European
What will be the consequence if European law is differently interpreted by national courts? If the national courts – for whatever reason – decline the direct effect of a European provision, public interest group litigation aimed at the enforcement of European law will logically fail. Yet even if the courts accept the direct effect, there remain considerable possibilities for more or less strict interpretations of European provisions. This concerns in particular those provisions that give the competent authorities some leeway when taking a decision. If, for example, the European law requires that the alternatives to a construction project have to be considered before an authorisation is given, an answer needs be found to the question of what exactly such an appropriate assessment of the alternatives is. Depending on how strictly the national courts will interpret the European provisions, the competent administrative authorities will enjoy considerable leeway in taking their decisions. As a result, by interpreting the European law in a more or less strict way, the national courts delineate the margin of manoeuvre that the competent national authorities enjoy when taking their decisions.

The foregoing reasoning leads to the following hypothesis:

H.3: The stricter the interpretation of European law by national courts, the more positive effects public interest group litigation will have on the implementation of European law.

2.1.3 Stage 3: Reaction of the Competent Authorities

At the third stage, the focus is on the behaviour of the national competent authorities and their reaction to public interest group litigation. The question of how the national authorities will react in general to the obligation to implement European law is at the heart of compliance research that also offers important insights for understanding differential effects of public interest group litigation. Applied to the focus of this study, actor-centred compliance theory clarifies the mechanism whereby public interest group litigation may lead to the correct implementation of European law. In addition, it helps to understand why national competent authorities may still try to evade a strict interpretation of European law given by their national courts.

Although there remains disagreement in the literature on compliance theory whether the degree of ‘goodness of fit’ between European and national rules will automatically lead to implementation problems, there seems to be consensus that the preferences of central national actors are a decisive element in explaining correct implementation (see Börzel 2003; Falkner et al. 2005; Haverland 2000; Treib 2003; 2006). This actor centred approach can be linked to the more general literature on institutional change (see Pierson 2000; Streeck/Thelen 2005; Hacker 2004). In a nutshell, it is assumed that institutional change will occur if the explicit or implicit support for an institution falls below a certain threshold. If this happens, the institution will change and the result will be the fading away of the institution, its replacement, its rearrangement, or some other form of change. Broken down to the focus of this study, public interest group litigation can be considered as one mechanism among others to decrease the support for a national institution to be changed by European law over time.

On a general level, the more administrative decisions are annulled by the courts due to conflicting European law and, as a consequence, the greater the legal uncertainty, the more costly it will become to uphold the national institutions. This does not necessarily mean that the support for the new European provisions to be implemented has increased over time, but that the costs caused by public interest litigation are likely to lead ultimately to a situation where the competent authorities – maybe grudgingly – accept to ‘swallow the bitter pill’.

The strong support for an existing national institution may even result in more or less explicit non-compliance with European rules already applied by national courts. Although the rule of

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5 Here, an ‘institution’ is understood broadly, meaning a formal or informal system of rules. Examples of institutions range from very formalised ones, such as law, to rather informal ones, such as traditions or normative understandings of ‘how things should be done’. 

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law is a deeply entrenched element of European democracies, such instances of non-compliance with national court judgements should not be ruled out from the outset. I am not aware of any research on this issue, yet there are examples regularly appearing in the media. Based on this, the following hypothesis can be formulated:

H.4: The larger the support an existing national institution to be changed by European law enjoys, the more limited the effects of public interest group litigation on the implementation of European law.

In the second part of the paper, I assess the explanatory value of the stage model against the background of public interest group litigation on the Natura 2000 Directives in France, Germany and the Netherlands.

3 Examining the Differential Effects of Public Interest Group Litigation: Natura 2000 in France, Germany and the Netherlands

In order to analyse the differential effects of public interest group litigation, the research design of a small-N study on this issue is of prime importance. First, it should be noted that I decided from the outset to focus on environmental protection as an example of an interest whose safeguard depends to an overwhelming extent on the actions of public interest groups, in this case environmental organisations. Second, by focusing on France, Germany and the Netherlands, I can systematically assess the stage model, as its independent variables vary sufficiently in these three cases (see Table 1). Third, in the context of the EU, the focus on environmental protection and public interest group litigation leads directly to the Natura 2000 Directives – the Birds and Habitats Directives – the cornerstones of EU’s nature conservation policy. The Birds Directive of 1979 aims at the protection of endangered wild migratory birds in the territory of the Member States. The Habitats Directive was signed in 1992 and extends the logic of the Birds Directive to other endangered species and their habitats.

Table 1: Characteristics of the stage model’s independent variables for France, Germany and the Netherlands (based on existing literature with particular focus on environmental organisations)

<table>
<thead>
<tr>
<th></th>
<th>France</th>
<th>Germany</th>
<th>Netherlands</th>
</tr>
</thead>
<tbody>
<tr>
<td>Organisational capacity</td>
<td>Weak</td>
<td>Strong</td>
<td>Strong</td>
</tr>
<tr>
<td>Access to courts</td>
<td>Open</td>
<td>Restrictive</td>
<td>Open</td>
</tr>
<tr>
<td>‘EU-law acceptance’ by national courts</td>
<td>Restrictive</td>
<td>Friendly</td>
<td>Friendly</td>
</tr>
<tr>
<td>Overall implementation record of European law</td>
<td>Rather negative</td>
<td>Average</td>
<td>Positive - Average</td>
</tr>
</tbody>
</table>

For the focus of this study, three protection mechanisms established by the Directives are of particular importance. First, the Member States are obliged to designate protection areas, both for the Birds and Habitats Directive. The way such Natura 2000 sites are identified varies significantly. In a nutshell, the Birds Directive requires the designation of the most suitable territories by the Member States, whereas the Habitats Directive requires first the reporting of the most appropriate sites to the European Commission that then creates with the Member States a coherent network of protection areas. The ECJ gave very strict rulings on this issue:

To give an example, the competent authorities of the Austrian province of Carinthia have for several years ignored a ruling by the Austrian constitutional court to erect bilingual place-name signs.

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6 To give an example, the competent authorities of the Austrian province of Carinthia have for several years ignored a ruling by the Austrian constitutional court to erect bilingual place-name signs.
if scientific evidence proves that a site is suitable for the inclusion in the Natura 2000 network, it must be designated.\(^7\)

Second, for designated protection areas, the site protection regime of the Habitats Directive now applies to all Natura 2000 sites. In the beginning, however, the Birds Directive contained a separate protection regime. Yet after the ECJ had given a strict interpretation on the possibilities to allow the deterioration of protection areas for birds, the Member States used the negotiation process on the Habitats Directive to amend the Birds Directive.\(^7\) The then adopted Article 6 of the Habitats Directive obliges the competent national authorities to assess the effects of any plan or project that could negatively affect a protected site. If the realisation of the plan or project will have negative consequences on the site, it must only be authorised if no alternatives to the plan or project exists and if it can be justified on the basis of imperative reasons of public interest, including economic and social interests.

Third, the Birds Directive obliges the Member states to limit the hunt on protected birds. It demands the complete protection of wild and migratory birds, and prohibits hunting them during their rearing seasons or their various stages of reproduction.

### 3.1 Differential Effects of Public Interest Group Litigation in France, Germany and the Netherlands

The implementation of the Natura 2000 Directives in France, Germany and the Netherlands was a very cumbersome process. The Birds Directive was – with the exception of hunting issues – essentially a dead letter as regards the obligation to designate sites and to guarantee their conservation. This only changed when the Habitats Directive entered into force and the whole process of creating a European wide network of protection areas started.

According to the Directives, the site protection regime of Article 6 should have been transposed by June 1994. All sites for endangered birds should have been designated at the entry into force of the Birds Directive in 1981. All potential sites that would qualify under the Habitats Directive should have been sent to the Commission by June 1995 and the latter should have presented a coherent network of sites by June 1998. Irrespective of the clear timetable, not a single Member State was able to comply with the Directives in time (See European Commission 2003).

Table 2 summarizes the transposition of the Natura 2000 Directives in France, Germany and the Netherlands. The transposition of hunting dates for Germany and the Netherlands is not discussed here, as the issue of hunting dates has not attracted much attention from German and Dutch environmental organisations. As a result, no instances of public interest litigation occurred, as opposed to the situation of France where the setting of hunting dates was one of the most important issues for environmental organisations.

| Table 2: Transposition of the Natura 2000 Directive in France, Germany and the Netherlands |
|---------------------------------|-----------------|--------------|--------------|-----------------|
| **Transposition site protection regime** | June 1994 | April 2001 (insufficient) | April 1998 (minor problems) | October 2005 |
| **Transposition of hunting dates** | 1981 | July 2000 | No interest group activity | No interest group activity |

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\(^8\) ECJ C-57/89 [1991] Commission v Germany.
The European Commission has reacted to these huge implementation problems by taking its role as ‘guardian of the Treaties’ very seriously by bringing all of these countries before the ECJ several times for not having transposed the Natura 2000 Directives.\(^9\) In addition, the Commission threatened to link the payment of money from the structural funds with the realisation of a complete national Natura 2000 network. In view of the huge problems regarding the transposition of the site protection regime as well as the designation of sites, it is not surprising that the European Commission focused predominantly on pursuing these instances of non-transposition rather than alleged cases of wrong application.\(^10\)

Seen merely from the perspective of the research design of this study, the effects of the Commission’s activities on enforcing the Directives was equally strong in all countries. Given this situation, differences in the transposition processes between the three countries need to be caused by other factors than the Commission’s enforcement activities. As I will try to show below, the decisive explaining factor was public interest group litigation and the differential effect caused by it.

Finally, the effects of public interest group litigation aimed at the implementation of the Natura 2000 Directives in France, Germany and the Netherlands must be considered. In France, the restriction of hunting dates demanded by the Birds Directive was at the centre of hundreds of instances of public interest group litigation since the late 1980s. Over years, environmental organisations successfully challenged the setting of opening and closing dates for hunting on wild birds before French administrative courts. This had, however, only limited effects, as the administrative authorities continued to set the dates for the hunting season not in conformity with the Birds Directive. In addition, the French legislator adopted two amendments of the national hunting regulations in the 1990s with the explicit aim of making it impossible for environmental organisations to contest the setting of hunting dates.

The protracted transposition of the Birds Directive also had important repercussions on the implementation of the site protection regime and the creation of the Natura 2000 network. In fact, France was the only country where a coherent anti-Natura 2000 group consisting of agricultural and forestry organisations emerged that tried to prevent the implementation of the Directives by various means, including litigation before national courts. Although environmental organisations turned to the courts to enforce the Directives, their activities had practically no effects on either the transposition of the site protection regime, or the quality of its application, or the creation of the Natura 2000 network.

In Germany, the transposition of the Directive’s site protection regime was carried out during a major revision of the German nature conservation law, whose legislative preparation had already begun at the beginning of the 1990s. As German environmental organisations did not turn to the courts before 1998, public interest group litigation could logically have no effects on the transposition of Article 6. However, the fear of economic decline led to strong resistance when it came to the creation of the Natura 2000 networks. As the nature conservation law only applied to already designated sites, German environmental organisations started to successfully challenge authorisations for projects in ecologically sensitive areas that should have been designated. This had positive effects on the creation of the German Natura 2000 network, although the pressure from the European Commission was still essential to guarantee the network’s completion. As far as the quality of applying the site protection regime is concerned, the annulled administrative decisions helped to increase the

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\(^9\) For Germany, see ECJ C-83/97 [1997], ECJ C-71/99 [2001] and ECJ C-98/03 [2006]. For France and hunting issues, see ECJ C-252/85 [1988] and ECJ C-38/99 [2000]. For France and the issue of site designation and site protection, see ECJ C-166/97 [1999], ECJ C-96/98 [1999], ECJ C-256/98 [2000], ECJ C-374/98 [2000], ECJ C-220/99 [2001] and ECJ C-202/1 [2002]. For the Netherlands, see ECJ C-3/96 [1998] and ECJ C-441/03 [2005].

\(^10\) French, German and Dutch environmental organisations have sent hundreds of complaints on the wrong application of the Directive’s site protection regime to the European Commission, yet none of them led to a referral to the ECJ.
awareness about the Directives’ site protection regime, at the beginning in particular. In the end, however, the conducted expert interviews suggest that litigation did not increase the quality of how potentially environmental harmful projects are evaluated. Similar to Germany, the resistance against the Natura 2000 Directives in the Netherlands was also due to fear of less economic competitiveness caused by the costs of stricter nature protection measures. Although public interest group litigation also had positive effects on the creation of the Natura 2000 network, its main impact was on the application of the site protection regime. Even though the latter was only transposed in October 2005, it was in practice already applied by the competent administrative authorities before that date. In addition, my expert interviews show that the quality of its application rose considerably over time. Table 3 summarises the above.

Table 3: Effects of public interest group litigation in France, Germany and the Netherlands

<table>
<thead>
<tr>
<th>Effects of litigation on:</th>
<th>France</th>
<th>Germany</th>
<th>Netherlands</th>
</tr>
</thead>
<tbody>
<tr>
<td>Creation of the Natura 2000 network</td>
<td>No effects</td>
<td>Positive effects</td>
<td>Positive effects</td>
</tr>
<tr>
<td>Transposition: site protection regime</td>
<td>No effects</td>
<td>(No effects possible)</td>
<td>Positive effects</td>
</tr>
<tr>
<td>Quality of application: site protection regime</td>
<td>No effects</td>
<td>Limited effects</td>
<td>Positive effects</td>
</tr>
<tr>
<td>Hunting dates</td>
<td>Positive effects only on transposition</td>
<td>No interest group activity</td>
<td>No interest group activity</td>
</tr>
</tbody>
</table>

In the next section, I apply the stage model in order to explain the differential effects caused by public interest group litigation.

4 Explaining Differential Effects of Public Interest Litigation through the Stage Model

4.1 France

In France, the environmental movement has been traditionally weak in terms of members, resources and influence compared to other European countries. Based on the long established, open and cheap access to the courts for interest groups, French environmental organisations started already in the mid-1980s to try to enforce the species protection regime of the Birds Directive through courts. In addition, even very weak and loosely structured environmental organisations could easily obtain the necessary information on hunting dates, as they had to merely compare the hunting dates set by the administrative authorities with existing studies on the dates of the rearing seasons of wild and migratory birds. As they could not pursue their policy objectives differently, they started to contest the setting of hunting dates. Already in December 1984, the Conseil d’État – the French supreme administrative court – annulled the opening date for hunting of a protected species for not being in conformity with the Birds Directive. Over time, and following a strict interpretation given by the ECJ in 1994, the Conseil d’État limited the hunting dates progressively. From at least 1997 on, it was clear that the French administrative courts would annul administrative decisions allowing hunting before the 1st of September and after the 31st of January. This strict interpretation given by

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11 Conseil d’État, 7 décembre 1984, Fédération française des sociétés de protection de la nature et autres; n°41971, 41972.
the French administrative courts generated even more litigation by environmental organisations on the issue. Nevertheless, the French authorities continued to set the hunting dates in non-conformity with the Directives. The reason therefore is that the regulation of hunting has become a symbol for the unjustified intrusion of urban technocrats into deeply rooted rural traditions (Alphandéry/Fortier 2001). Yet as the administrative decisions were continuously annulled, the competent authorities engaged in legislative activities aimed at making the contestation of their acts impossible. On the European level, France succeeded in bringing the European Commission to introduce a proposal for the amendment of the Directive. The initiative failed, however, due to the strong opposition of the European Parliament to codifying ex post an obvious instance of non-compliance with European law. On the national level, two amendments were adopted that had the explicit goal of making the contestation of the hunting dates impossible. Given the fact that the French legal doctrine rejects any contestation of laws by administrative courts – a tribute to Rousseau’s idea of the ‘volonté générale’ – the French legislator set the hunting dates itself in the law without granting any discretion to the lower administrative authorities. The environmental organisations, however, found a legal loophole and could continue to contest the hunting dates before the courts that also continued to annul them. Only in 2000, when the European Commission threatened to refer France a second time to the ECJ to obtain penalty payments, the correct transposition of the Birds Directive was achieved by copying the latter’s site protection regime verbatim into French law. Notwithstanding the achieved legal compliance, there remain doubts regarding the faithful application of the protection measures in practice. Given the long experience with the Birds Directive and litigation, one could expect that French environmental organisations should have used the courts as actively as in the case of hunting dates in order to enforce the Directives’ site protection regime. Yet enforcing the site protection regime through courts demands from the beginning on a far stronger organizational capacity: it is not simply sufficient to compare the national with the European provisions, but it is indispensable to have detailed information about planned projects in ecologically sensitive areas as well as the situation of the concerned protected species. In addition, following long and complex administrative authorisation procedures demands a certain degree of ‘professionalisation’. French environmental organisations, however, possessed too limited resources in terms of information – both regarding the potential of the Directives’ site protection regime and the situation on the ground – and active members in order to use litigation on this issue effectively. Yet also the French administrative courts rejected to apply the site protection regime directly. Although lower administrative courts accepted that the inclusion of a site in the Natura 2000 network could prove the ecological value of the site, which could trigger stricter national protection measures, they never obliged the competent authorities to follow the authorisation procedure as set up by Article 6 of the

14 In 1999, two French environmental organisations – the ‘Ligue ROC’ and the ‘Association pour la protection des animaux sauvages’ – claimed to have contested more than 200 administrative decisions in ten years and more than 400 in 15 years respectively (Le Monde, 3.09.1999, cited in Lagrange (2000: 13).  
16 See the recommendation for the second reading by rapporteur Mr. Muntingh (European Parliament, A3-0245/94/Part B).  
Habitats Directive. Consequentially, public interest group litigation aimed at the enforcement of the site protection regime had practically no effects on its implementation.

4.2 Germany

German environmental organisations had to face strong opposition regarding the implementation of new environmental protection measures during the 1990s as they were widely perceived as an obstacle to economic development in a tense situation of rising unemployment. Although the transposition of the Directives’ site protection regime had already been achieved in 1998, the Länder tried to minimise the size of the German Natura 2000 network as much as possible. As a result, the national law did not protect areas that would qualify as Natura 2000 sites. German environmental organisations reacted in two ways: First, based on their tight network of voluntary members, they created shadow lists that contained all sites in Germany that would qualify as Natura 2000 sites. Second, in the end of the 1990s, they started to contest authorisations for projects in areas that should have been included in the Natura 2000 network, but whose authorisation procedure had not followed the provisions of Article 6. Already in 1998, the Bundesverwaltungsgerichtshof – the German supreme administrative court – accepted the direct effect of Article 6 of the Habitats Directive for sites that would qualify as sites under the Habitats Directive. For sites under the Birds Directive that had not been designated, it even held that the stricter site protection regime of the Birds Directive would still apply, meaning that economic reasons could not justify the authorisation of a project that could lead to a significant deterioration of the area. This jurisprudence gave German environmental organisations the possibility to enforce the Directives’ site protection regime through litigation, even if a site has not been designated. At the same time, however, environmental organisations were restricted in using litigation as the comparatively high costs for litigation and the restrictive access to the courts made it impossible to use litigation extensively. As a consequence, they focused more on big projects, such as the deepening of the river Ems or the construction of highways. Another reason why environmental organisations were rather careful in using litigation was the fact that such legal activity had a rather negative image in the public opinion and risked therefore incurring a negative backlash on the broader goals of these organisations. Nevertheless, the risk of judicial review had one main effect: it created legal uncertainty for investors that tried to pursue their projects at calculable costs. Given the fact that the Natura 2000 Directives do not intend at all to ban every kind of economic activity in ecologically sensitive areas, but to establish a procedure setting up minimum criteria for evaluating projects with negative effects on endangered species, investors preferred the complete designation of sites in order to obtain legal certainty, even if that could mean more costs for assessing and mitigating the negative effects. In addition, the first annulled authorisations for important projects significantly raised the awareness of the competent authorities on issues of Natura 2000. It became clear that an Article 6 assessment was not simply a more detailed ‘normal’ environmental impact assessment, but required particular justifications. At the same time, however, public interest group litigation did not have significant effects on the quality of how

19 See for example Tribunal administratif de Nantes, 13 juillet 1994, Association Estuaire Écologie et autres c/ communes de Donges, n° 94763, 94764, 94781 et 94782; Tribunal administratif de Nice, 24 avril 1997, Association de défense de la plaine et du massif des Maures et autres, n° 93-882 ; Cour administrative d’appel de Bordeaux, 19 juin 1997, Comité de défense de Vingrau et autres; Conseil d’Etat, 6 janvier 1999, Société pour l’étude et la protection de la nature en Aunis et Saintonge (Sepronas), n° 161403.
20 See Bundesnaturschutzgesetz 1998 §19a-f..
22 To give a rough idea, the Deutscher Naturschutzbund – one of the main German environmental organisations – of Lower-Saxony reported that they contest about one to three authorisations for plans or projects per year.
such an assessment is carried out. The reason for this is twofold: First, German environmental organisations did not contest enough administrative decisions to have obliged the competent authorities to change their praxis of assessing potentially negative effects. Second, the administrative courts did still leave a considerable margin of manoeuvre to the competent authorities when it came to the assessment of whether significant negative effects would occur or alternatives to the project would exist.  

4.3 The Netherlands

Similar to Germany, the implementation of stricter nature conservation provisions met strong opposition in the Netherlands. Given the importance of the Netherlands as a breeding and resting area for wild and migratory birds and the very high density of population, the Natura 2000 Directives were accused of putting the country 'under lock'. Therefore, the various Dutch governments tried to limit the size of the Dutch Natura 2000 network. They also argued during the 1990s that the Directives’ site protection regime would already be satisfied by existing Dutch legislation.  

Convinced that the opposite was true, Dutch environmental organisations started from about 1997 to turn to administrative courts in order to challenge authorisations for projects that could lead to the deterioration of potential Natura 2000 sites. They could profit, first, from their strong organisational capacity that allowed them to collect the necessary bio-geographical information on potential Natura 2000 sites as well as to pursue complex authorisations proceedings. Second, they could rely on long experience with using litigation as the access to the courts for interest groups has been traditionally well-established and open – both in terms of issue areas for litigation and costs. As a result, once they had realised the potential of the site protection regime, they started to litigate in order to enforce it. Although lower Dutch administrative courts outrightly accepted the direct effect of Article 6 already in 1998, the Raad van State – the Dutch supreme administrative court – was in the beginning very sceptical. Yet it gradually applied Article 6, starting in 2000 with the general obligation to examine any potential significant negative effect on Natura 2000 sites, in particular protection areas for birds, to the obligation to follow the authorisation procedure as prescribed by Article 6 in 2005. Over time, the Raad van State became more and more strict on the Directives’ site protection regime and annulled numerous administrative decisions contested by environmental associations. As in Germany, this led to a situation of legal uncertainty that gradually increased the support for a complete and correct transposition of the Directives, both regarding the Natura 2000 network as well as the site protection regime. It also raised the awareness of the administrative authorities on Natura 2000 issues. Contrary to Germany, however, the administrative authorities also had to take the threat of judicial review for small projects very seriously. In addition, given the fact that the Raad van Staate conducted sometimes very thorough analysis of the reasons brought forward by the competent authorities to justify their authorisation for ecologically harmful projects, they

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23 To give an example, Dutch courts require that the deterioration of a Natura 2000 sites can only be justified if no alternatives to the project’s goals itself exist. German courts are already satisfied if it can be shown that there are no alternative locations for the project.  
24 See e.g. the “Nota van Antwoord” – an informational brochure on the Birds Directive by the Dutch Ministry of Agriculture (http://www.minlnv.nl/cdlibpub/servlet/CDLServlet?p_file_id=14158 [02.04.2007]).  
25 Rechtbank Leeuwarden 17 July 1998; 97/40-45 WET.  
26 Afdeling bestuursrechtspraak van de Raad van Staate (ABRvS) 31 March 2000; E01.97.0178.  
27 ABRvS 24 July 2002; 200103706/1 and in particular ABRvS 26 January 2005; 200307350/1.  
28 From 1997 to 2005, 59 judicial decisions resulting from legal actions started by Dutch environmental organisation aimed at the enforcement of the Directives’ site protection regime were published by Milieu en Recht, the main Dutch legal journal on environmental law (own counting).  
tried to anticipate the critique in order to pass the certain phase of judicial review. As a result, the administrative authorities started already from about 2003 on to apply Article 6 even though the official transposition law entered into force only in October 2005. In addition, also the quality of how they evaluated projects that could have negative effects on Natura 2000 sites rose considerably compared to the initial assessments.

4.4 Linking the Empirical Results to the Stage Model

The reported empirical findings support the expectations derived from the stage model. The differential effects of public interest litigation are the result of different characteristics of the independent variables on the various stages. Yet individually, they do not yield much explanatory power. Only through their combination is it possible to explain the differential effects of public interest group litigation.

In France, the effects of public interest group litigation on hunting dates was limited to the formal legal transposition of the Birds Directive as the competent authorities tried to shirk from applying the strict European protection regime. Although the other variables – the organisational capacity, access to courts and the interpretation of French courts – were conducive to enforcing the hunting dates through litigation, the reaction of the competent authorities to the rulings limited the effects. This provides strong support for Hypotheses 4, even though such an outright example of non-compliance with court rulings may rather be the exception.

Although the weak organizational capacity did not pose a problem for litigation on hunting dates in France, it limited from the outset the potential to use litigation on the designation of sites and the site protection regime of the Natura 2000 Directives. Ultimately, however, the neglect of the Directives in the French courts proved to be fatal, as it made the use of litigation to enforce the European requirements practically impossible. The open access to the courts could not alter this situation, and the French competent authorities were not restricted in taking their decisions on environmental impact assessments on Natura 2000 sites. Both Hypothesis 1 and 3 are thus supported.

In Germany, the environmental organisations were able to start litigation on the Directives’ site protection regime due to their strong organisational capacity, but the restrictive access to the courts – due to procedural rules and negative public image – limited the frequency of how often they could use litigation. In addition, compared to the interpretation given by Dutch courts, the German jurisprudence on the site protection regime was less strict. As a result, the competent authorities enjoyed more leeway when taking their decisions. Again, this constellation of the independent variables explains why the effects of public interest group litigation in Germany was limited to the designation of sites, with only initial effects on the application of the site protection regime. Therefore, support is given to Hypothesis 2 and 3.

The positive effects of public interest group litigation in the Netherlands can be traced back to the conducive characteristics of all the four independent variables: Dutch environmental organisations had both the resources as well as open access to the courts to use litigation frequently; the administrative courts interpreted the site protection regime of the Directives over time strictly; and the competent authorities reacted to the threat of judicial review by transposing Article 6 correctly and by improving their assessments of projects that could affect Natura 2000 sites.

To give an example, for the construction of the Westerschelde Container Terminal, the competent authorities outrightly declared themselves that the project could only be authorised if it would satisfy the criteria of Article 6 of the Habitats Directive. See also the informational brochure “Werken aan Natura 2000 - Handreiking voor de bescherming van de Vogel- en Habitatrichtlijngebieden” issued in 2004 by the Dutch Ministry of Agriculture, where it is clearly said that Article 6 has to be respected, even if it had not been transposed into Dutch law (http://www.minlnv.nl/cdlpub/servlet/CDLServlet?p_file_id=13737 [2.04.2007]).
These empirical results provide support for each of the four individual hypotheses on the differential effect of public interest group litigation. Most of all, however, they show that the three stages are gone through one after another, each stage being contingent on the preceding precedent stage. Thus, explaining the differential effects of public interest group litigation depends on the characteristics of all variables at the different stages.

5 Conclusion: The Importance of National Differences

In this paper, I have presented a theoretical model to explain the differential effects of public interest group litigation. The model builds on existing theories and links them to a coherent model. It identifies three stages (public interest group litigation – interpretation by national courts – reaction of the competent authorities) and identifies independent variables for each of them. It argues that different constellations of the variables will lead to differential effects of public interest group litigation. I then empirically assessed the model against the background of litigation on the Natura 2000 Directives in France, Germany and the Netherlands. I have shown that public interest group litigation on hunting dates in France only had effects on the formal transposition as the competent authorities tried to contain the court rulings. The conducive characteristics of the other variables for public interest group litigation – sufficient organisational capacity, open access to and strict interpretation by the courts – could not alter this. Yet in the case of litigation on the site protection regime of the Natura 2000 Directives, however, the same weak organisational capacity limited from the outset the possible effects of litigation. However, even if French environmental organisations had had the possibilities to litigate more often, the denial of the direct effect of Article 6 by the French administrative courts would have blocked any possible effect of litigation – as it actually did. In Germany, the restricted access to the courts limited the possibilities to use litigation, even though German environmental organisations had a strong organisational capacity. In addition, the less strict interpretation given by German courts gave the competent authorities more leeway when taking their decisions. As a result, the effects of public interest group litigation was limited to the creation of the Natura 2000 network, yet with only limited effects on the application of the Directives’ site protection regime. In the Netherlands, all variables were conducive to using public interest group litigation. The combination of the strong Dutch organisational capacity, the open access to judicial review, the strict interpretation given by the courts and the obedient reaction of the competent authorities to the rulings resulted in positive effects of public interest group litigation on both the transposition as well as practical application to the Natura 2000 Directives. These empirical findings support the hypotheses derived from the stage model, yet most of all underline that the whole stage model needs to be considered in explaining the differential effects of public interest group litigation.

What are the wider consequences of these empirical results for the strands of research on the European courts mentioned in the introduction of this paper? Above all, they cast doubt on the assumption that the courts of the Member States are faithfully applying directly effective European law. As has been shown, different and idiosyncratic interpretation of European law – ranging from its full embracement to its complete neglect – were not the exception, but the rule in all countries under examination. This has, first, a decisive impact on the potential of enforcing European law through national courts, as we should expect a rather uneven pattern of application of EU law. As has been seen, enforcing European law through courts only worked effectively in the Netherlands due to particular national circumstances. As these national differences determine the possibilities of remediing compliance problems with European law through litigation, one should be sceptical in putting too much hope in the potential of this instrument of law enforcement. Therefore, the supremacy of European law is only a necessary, but by far not sufficient factor for the enforcement of European provisions through national courts. Second, in view of the fact that both neo-functionalist approaches to
European integration as well as work on the enhancement of democratic governance through courts implicitly assume the faithful application of EU law by national courts, such an uneven pattern of interpretation has important repercussion on them: On the one hand, we should expect that the ‘depth’ of European integration will differ significantly depending on the various interpretations given by national courts. On the other hand, the potential for enhancing democratic governance through courts is further limited as another factor – the interpretation of European law by national courts – needs to be taken into consideration.

6 References


