Limits of (the) Community:

Compliance in the European Union - The Example of BSE

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Compliance as an Object of Integration Research

With the completion of the Single Market in 1992, the question of the effectiveness of European law has achieved primary importance for integration research.¹ In the view of the European Commission, deficiencies in compliance on the part of member state governments are one of the greatest challenges to the proper functioning of the Single Market. The problem has been on the Commission's agenda since 1985². It indicates the Commission's concern that member states react to the intensifying integration process with a strategy of selective implementation of European regulations. Snyder (1993: 22) terms this process a "new challenge of compliance" which threatens to

¹ This paper presents some preliminary results of a research project funded by the German Research Foundation (DFG) at the Centre of European Law and Politics (ZERP) at the University of Bremen: Compliance in modernen politischen Systemen. Zur Charakterisierung der Europäischen Union anhand eines Vergleichs mit nationalen und internationalen Regelungen”. Any shortcomings of this article are, however, the sole responsibility of the author. A (slightly different) German version of the paper can be found in Integration 1999 (22:2), 1-14 („Grenzen der Gemeinschaft. Folgebereitschaft am Beispiel BSE“).
undermine the normative foundations of the EC as a legal community as well as the credibility of the ECJ. Deficient compliance is directly linked to questions of constitutional practice regarding the relationship between member state and supranational competences i.e. the task of the Community to legislate and the duty of member states to administrate and enforce. It therefore can be analysed in the context of the vagueness of Article 10 (ex 5) and must be sensitive to institutional provisions which aim at overcoming these costs. Compliance, however, is not only a constitutional issue but also a matter of domestic public discourse: for both analytical and normative reasons, democratic governments need to take seriously domestic concerns and the interests of affected parties. Analysing compliance therefore is intimately connected to assessing the degree to which these concerns and interests are reflected in supranational law.

The new focus on questions of compliance does not only react to the Commissions concern about the integrity of European law but also reflects a broader shift in political scientists approaches to the EU. Whilst the theoretical debate was long-time primarily a battlefield for international relations theories (neo-functionalism vs. realisms) about the sources of integration and its future, the nineteennineties have witnessed a new emphasis on questions of legitimacy, governance and the search for ways to bridge the „great divide“ (Caporaso 1997) between theories of domestic politics and international relations theory. The current debate on the extent and the factors influencing member state compliance with European law is a core aspect of this theoretical realignment.³

It is not the aim of this contribution to draw up a systematic inventory of the extent and reasons of compliance deficiencies on the part of the member states. Instead, the paper will confine itself to pointing out the specific strengths and weaknesses of the

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2 In its current fifteenth annual report on the monitoring of the application of Community law the Commission reports – similar to previous years – a ”substantial increase in appeals and treaty violation procedures“ (COM(98)317 final, XI).

3 For a recent survey of this debate see Underdal 1998.
EC in promoting compliance of a member state. The example chosen, the implementation of the Commission's Action Plan to Eradicate BSE, is most interesting for this purpose. Since it was not only a technical matter but a highly politicised issue in which both parties, the Community and the British government, were motivated by strong pressure on part of their constituencies (the Member states vs. British public opinion), it can be analysed as a hard case for the problem-solving capacity of the European Community. Studying its implementation therefore promises to provide important lessons in the possibilities and limitations of the Communities political structure in dealing with openly antagonistic interests.

Implementation in the Political Administration of the Community

Generally speaking, the term compliance refers to the extent to which the member states of the European Union implement supranational regulations, i.e. the extent to which these regulations are incorporated into national law, and are applied and enforced by member state administrations. Implementation deficiencies can thus take the form of deficient incorporation, deficient application or deficient enforcement. Further analytical differentiation asks, whether deficiencies of implementation are intentional or unintentional, take place before or after a reasoned opinion or a judgment delivered by the ECJ, and whether legislature, executive or jurisdiction are responsible (cf. Krislov et al. 1986: 61-85).

Probably surprising for students of domestic politics, the increasing importance of deficient compliance did not yet resonate in significant political demands to restructure the administrative competencies of the EU in analogy to the hierarchical model of its member states. On the contrary, the Amsterdam Treaty underlines that the European Union neither is nor will become in the foreseeable future anything comparable to a nation-state. Institutional reforms foreseen in the draft treaty are not part of a process of reinventing hierarchical governance on a supranational level.

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4 Printed in Agence Europe, 21.6.96.
After Amsterdam, the European project still is what it always has been: an effort to develop institutions and decision-making procedures which enable the Community to cope with transnational economic interdependence, mainly by means of horizontal policy deliberation. Neither hierarchical enforcement nor centralized decision-making is its regulatory philosophy. On the contrary, its essential cornerstone is the belief in the binding force of legalized interaction (Burley/Mattli 1993), its legitimation by means of scientific expertise (Joerges 1997) and the facilitation of interadministrative discourses for developing a commonly shared understanding about how to define, identify and solve problems (Everson 1998).

In this context, the issue of the extent and conditions of compliance to European law has lately resulted in a number of contributions emphasising the processual nature of implementation. It has been pointed out that the implementation of policies has to be regarded as a "recursive and circular" process (Snyder 1993: 26) which also comprises the discovery of restrictions and a corresponding modifications of objectives (Majone 1996). Particularly in the multi-level system of the European Union with its division of political competencies between supranational, governmental and sub-national levels, recurring bargaining processes about the specific implications of a legal norm and its successive concretisation must be considered structural elements of the implementation process. Contrary to the technocratic assumption that policy implementation merely means the application of a legal norm on the basis of such criteria as appropriateness or justifiability, empirical studies point out that implementation is an intrinsically political business: its main objective is the reconciliation of divergent interests, perceptions of problems and problem-solving philosophies (Héritier et al 1994) against the background of – often coexisting – majoritarian and deliberative procedures (cf. Joerges/Neyer 1997). It has also been pointed out that the Commission's central function is to create a framework for the continuous discourse on questions of implementation and enforcement, through informal structural reforms (Snyder 1993), the promotion of interadministrative networks (Wessels 1997) or an intensive exchange of information with member state
administrations (Mendrinou 1996).

The factors mentioned are not only theoretical reflections of singular empirical findings. Taken together they can be condensed into a picture of the implementation process which deviates significantly from the traditional perception of a hierarchically structured administration. Policy implementation in the Community has to be understood as a mixture of majoritarian and deliberative elements which together form a peculiar European combination that can be conceived as a "political administration". The description of its functioning, and thus its specific strengths and weaknesses, is one of the major research issues on the current agenda of European integration.

**Political Administration at Work:**

**The Implementation of the Action Plan to Eradicate BSE**

In many respects, the BSE crisis is an excellent example for the investigation of the EC's political administration. Its origin sheds light on the vulnerability of the Community's risk regulation to political interests and emphasises the need to ensure independent scientific expertise (European Parliament 1997). At the same time, it shows that the Community's institutional structure is open for innovation and that the European Parliament is capable of constructively meeting the challenge of responding to deficiencies in regulatory performance on the part of the Commission (Neyer 1999). The BSE crisis, however, can also be used to exemplify the strengths and weaknesses of the Community in dealing with explicitly antagonistic interests and ensuring compliance without enforcement. Such an approach to the BSE crisis does not begin with the first press reports on the appearance of BSE in 1990; it starts six years later with the ban on British beef, focusses on the negotiations between the
Commission and the British government about how to combat BSE, highlights the struggle between the two about adequate measures and ends with the Commissions acknowledgment of their successful implementation at the end of 1998.\footnote{For detailed chronologies of the BSE crisis see the webpage on the BSE Inquiry (http://www.bse.org.uk) and also the Report of the BSE Investigation Committee of the European Parliament (EP 1997).}

The beginning of the story is rather puzzling: After the Florence summit in June 1996, which led to the adoption of the Action Plan for the Eradication of BSE, the British minister of agriculture Hogg personally declared Britain's intention to implement it. In the autumn of 1997 and again in the spring of 1998, however, the Commission saw reasons to complain about the insufficient implementation of the plan on the part of the British government, and in two instances it opened treaty violation procedures according to Art. 226 against the United Kingdom.\footnote{Cf. Final Consolidated Report to the Temporary Committee of the European Parliament on the Follow-Up of Recommendations on BSE, 21.10.97, comm/dg24/health/bse03-fin_en.pdf., 52-53 and 72.} What is the reason for the British government's hesitant implementation of the Action Plan even though it had not opposed it in Florence? More specifically: How significant are the particular interests of the actors involved, their perceptions of legitimacy and the institutional structure of the Community for explaining the discernible degree of compliance?

Telling the story of the implementation of the Action Plan (and trying to solve the puzzle), the paper will focus on three main issues: in its first part, the British government’s disposition not to implement the Action Plan will be explained by underlining the high economic as well as political costs for the British government. In the second part, it will be argued that the hesitant implementation did not only reflect the interests of the Action Plan’s addressee (the British government) but also those of the parties affected in the last instance, namely owners of British slaughterhouses, farmers and the wider public. Despite this strong opposition, implementation was finally realised to a successful degree. How this was facilitated is the subject of part three. In its concluding remarks, the paper will draw some general lessons from the
The Interests of the British Government

The British government has always made it perfectly clear to the Community that the ban on British beef, decided on by the competent Standing Veterinary Committee on 25.3.1996 and shortly afterwards confirmed by the Council, as well as the Community measures to combat BSE (within the next five to seven years, slaughtering of all cattle over 30 months old and destruction of the carcasses) were running contrary to its national interest. In particular, the British government fiercely criticised the fact that the measures agreed did not contain any binding commitments or a time schedule regarding the lifting of the ban. Britain's disapproval became most evident in the obstructionist policy which the British government announced on 21.5.1996, one day after the Standing Veterinary Committee had refused to lift the ban even partially.

The fierceness of the British reaction reflected the concern that the Community measures agreed would result in estimated costs of 500 million £ per year; it must also be seen, however, against the background of the upcoming general election in Britain, of the disunity within the Tory Party, and of the hope to be able to use the conflict with the EU as a means to strengthen party unity and to increase their chances for re-election. The government was extremely susceptible to these pressures because at the time of the decision against a partial lifting of the ban its majority in the House

7 The head of the International Affairs division at the Commission: "The British Government saw the ban as a draconian measure which would cause great economic damage to the British beef and beef product markets." (Westlake 1997: 13). See also Foreign Minister Rifkind in the Sunday Times, 12.5.96.
8 Cf. Minister of Agriculture Hogg on 3.4.96 in Luxembourg (Agence Europe 4.4.96).
9 John Major stated in the House of Commons on 21.5.1996: "without progress towards lifting the ban, we cannot be expected to co-operate normally on other Community business ... the European Union operates through good will. If we do not benefit from good will of the partners, clearly we cannot reciprocate. Progress will not be possible in the intergovernmental conference or elsewhere until we have agreement on lifting the ban on beef derivatives and a clear framework in place leading to lifting of the wider ban." (quoted in Westlake 1997: 16).
of Commons was reduced to one vote, and a number of backbenchers seemed ready to bring down the Major government if it failed to take a hard stand against the Community. In its attempt to use the EU conflict for its own domestic purposes, the government was assisted by a large part of the conservative British media. Newspapers such as the Sun, the Telegraph, the Daily Express or the Daily Mirror gave the impression that the conduct of the other member states was only partly to do with public health concerns; that they were at least equally motivated by the intention to rid themselves of an unwanted competitor.\(^{10}\) Headlines of the Daily Mail and other conservative mass-circulation papers\(^ {11}\) portrayed the conflict with the EU as a question of national pride, not as the search for adequate measures to reduce public health risks, and they were not above using military terminology to describe the conflict.\(^ {12}\)

This lack of willingness to acknowledge the potential danger of BSE-infected cattle for consumers was reinforced by the statements and behaviour of the British government between 1990 and early 1996. In May 1990 John Gummer, then Minister of Agriculture, said about the quality of British beef: "It is delicious. I have no worries about eating beefburgers. There is no cause for concern."\(^ {13}\) In 1994 the British chief veterinarian Keith Meldrum declared in the same vein: "To hint or suggest that BSE could enter the human food chain is totally and completely irresponsible."\(^ {14}\) And as late as October 1995 John Major announced: "I should make it clear that humans do not get mad cow disease."\(^ {15}\) With such statements the British government had manoeuvred itself into a position that it could not back down from without risking a

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\(^{10}\) For a detailed survey of the British media reaction to the BSE affair see [http://www.airtime.co.uk/bse/news2.htm].

\(^{11}\) The Sun of 21.5.: "Humiliation of Britain"; in comparison see the Financial Times of 4.9.1996: "BSE not only makes cows mad. It is causing an epidemic of irrational behaviour across Europe".

\(^{12}\) Headlines in the Telegraph of 20.6.96 read: "How Britain capitulated on BSE" and "Surrender by Britain over beef ban"; in the Daily Express of 22.5.96: "Major goes to war at last"; in the Observer of 23.6.96: "How the beef war was lost".

\(^{13}\) The Guardian, 21.3.96.

\(^{14}\) Night and Day / Mail on Sunday Review, 12.5.96.

\(^{15}\) Daily Mirror, 21.3.96.
major loss of face and a subsequent setback in popularity with the electorate. It was not until the Tory government was voted out in May 1997 that this knot, resulting from a mixture of internal pressures and a powerful "shadow of the past", could be untied. Unlike the Tory government, the new British government under Tony Blair had enough domestic room for manoeuvre to be able to leave the course of open confrontation followed by Major's cabinet.

**Legitimacy Problems of the Action Plan**

All decisions on the treatment of the BSE crisis have been taken according to consented Community decision-making procedures and on the basis of state-of-the-art scientific knowledge; however, the British approval of the measures does not necessarily mean that the British government was convinced of the appropriateness and necessity of such measures. Instead, Britain regarded the Community's BSE activities as an illegitimate interference with the organisation of the British beef market, and for years this was a source of conflict between the Community and Britain: As early as June 1990, after the final sitting of a Commission inspection group which criticised inadequate check-ups on the part of the British administrative agency, the head of the competent central veterinary office, Keith Meldrum, reacted "very angrily" and "in an extremely arrogant and aggressive manner".\(^\text{16}\) In the course of the dispute, he declared that the handling of BSE was a political, not a technical question and that the Commission's inspectors were not authorised to make investigations in the first place.\(^\text{17}\)

The entire bargaining process between the British government, the other EU member states and the Commission mirrors this fundamental position of the British government. After bilateral talks with Commissioner of Agriculture Fischler on

\(^{16}\) Statements of two participants of the meeting (Niederberger and Kairis) during the EP hearing on the investigation of alleged violations of Community law in connection with BSE(PE 220.544/part A/final/ANL, Encl. 32).

\(^{17}\) Ibid.
29.3.1996, the British Minister of Agriculture Hogg still thought "to have recognised a willingness to show true solidarity on a number of financial consequences" (Agence Europe, 30.3.1996). After the meeting of the Standing Veterinary Committee on 20.5.96, however, this hope turned into "embarrassment and fury". Although the British government had proposed measures for the eradication of BSE, which had been judged as appropriate by the Commission, the majority of member states refused to agree to a partial lifting of the ban. The legitimacy of the ban therefore was never really accepted by the British government. After a meeting of the Agrarian Council of 3.4.96, Douglas Hogg called the decision "unjustified, scientifically unfounded and disproportionate."

On the continent, however, such allegations and the British resistance against a swift implementation of the Action Plan often met with utter incomprehension and was taken as a sign that Britain was recklessly pursuing a policy of single-minded interest maximisation. Without trying to defend the British behaviour, it has to be pointed out, however, that a more conciliatory stance of the British government would have met with broad public opposition in the United Kingdom: As late as November 1998, government inspectors were faced with strong resentment in the slaughterhouses they had to inspect. According to an investigation conducted by the British trade union Unison, 75% of all inspectors reported attempts of intimidation or even physical assault by slaughterhouse operators, and 10 % had been threatened with weapons.

Not surprisingly, the Action Plan was only consented after massive political pressure from the other member states and the Commission. When the final conclusions drawn by the Council were put to the vote in Florence in June 1996, Britain was the only member state that did not explicitly agree to them, but abstained from voting. Although it rejected the embargo and considered the measures proposed by the Action

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20 Agence Europe of 4.4.96.
Plan as unfounded and exaggerated, the British government always made a point of refraining from illegal actions and keeping within the frame of what was laid down in the European Treaties. Immediately after the announcement that the Standing Veterinary Committee had rejected a partial lifting of the ban, the British Foreign Minister Malcolm Rifkind, in preparation of the policy of obstruction to be announced the next morning, laid down the options that were now available to Great Britain. The idea was, according to Rifkind, "to give our EU partners a jolt without bringing the whole European house down." Thus the British government would be pursuing the strategy of making full use of all available legal means to lift the ban, without, however, risking the head-on collision with the Community that was openly demanded by some backbenchers.

In spite of greatly differing interests and the British refusal to accept the legitimacy of the ban, the British government's basic disposition was not to question the supranational legal order: It tried to fight the ban not only by diplomatic pressure, but also by taking legal action at the ECJ against the EU’s alleged lack of competence to place a global ban. With this approach, the British government acknowledged that the ECJ (and thereby: the EC) was in fact competent to decide on the validity of the British accusations. This move therefore can also be interpreted as a peace offer to the Community in that respect that Britain refrained from extra-legal pressures to achieve a lifting of the ban. This parallel approach of open political opposition on the one hand and adherence to legal procedures on the other hand indicates that even in cases of extremely antagonistic interests the legitimacy of the European legal system as the basis of member state co-operation is undisputed.

Institutional Ressources to Promote Compliance

The EC is a non-hierarchical system of governance, which cannot rely on police force

21 Cf. The Independent 30.11.98, 5.
22 Daily Telegraph 22.5.96, "The Day Major finally got tough on Europe".
to sanction non-compliant behaviour on the part of a member state; it is basically a legal community which functions only to the degree that its law is accepted by its constituent units, the member states. Besides, its competence to sanction non-compliant behaviour has to be seen against the conflicting background of the powers it derives from Art. 226 (recourse to the ECJ by the Commission) and Art. 228 (effectiveness and enforcement of judgments, administrative fines) on the one hand, and the political regard it is required to pay to overriding member state interests on the other hand. Consequently we can assume that in cases of conflict the formal sanctioning powers held by supranational institutions do not automatically fully translate into the discharge of these powers; particularly in politically sensitive matters the integrity of European legal norms has to be weighed against possible political damage (cf. Garrett 1995).

In dealing with the BSE crisis, the Community was, however, in the favourable position to be able to counter the firm stand that Britain took with an equally firm coalition of all remaining 14 member states, the Commission and the vast majority of the European Parliament. Here, member states, European Parliament and Commission joined forces, with the result that the gap between the formal powers of the European institutions and the de facto use of the powers was relatively small. Thus, the agreement that was reached during the Florence European Council, closely reflected the problem-consciousness within the Community without having to show too much consideration for the British opposition to effective Community measures.

However, the agreement only meant that a satisfactory solution for the BSE problem had been found on the level of intergovernmental politics. At the same time, the agreement therefore initiated the second phase of implementation of the Commission's Action Plan, in which the British government was in charge of the implementation, which was to be supervised by the Commission. This division of tasks reflected the Community's general philosophy of regulation, according to which
the supranational level legislates and the member states administrate and enforce. Basically, this division of tasks is built on the assumption that the competent member state administrative body will do everything possible to see to a *mutadis mutandis* implementation, but the Community also has a number of measures at its disposal with which to respond to inadequate compliance. In particular this includes the Commission's power to function as the guardian of the treaties, i.e. "to ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied " (Art. 211). In order to assert these powers the Commission has been given a wide range of instruments aimed at promoting adequate implementation of Community law by member states. Three of these instruments are particularly relevant with regard to the implementation of the Commission's Action Plan: the control of member state controllers, the initiation of the treaty violation procedure and the conditional linking of financial compensation with discernible progress in the implementation of the Action Plan.

*Control of the Controllers*

One of the Commission's main instruments, which is frequently used especially in the veterinary field, is to carry out on-the-spot checks in order to verify the application of Community measures. Such checks were carried out by Commission experts and members of the newly founded Food and Veterinary Office in April and July 1996, between September and October 1996, in June 1997 and in June 1998. During these inspections, the Commission experts are to be given access to all concerned persons, information and documentation. If the Commission discovers deficiencies, the respective member state has to thoroughly investigate the general situation in the area

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concerned and to notify the Commission within the time set by the latter of the results of the checks and of the measures taken to remedy the situation\textsuperscript{26}. If the corrective measures are found to be insufficient, the Commission may take all the measures which it deems necessary.\textsuperscript{27} This is, however, subject to the Comitology procedure (IIIa), i.e. it requires a qualified member state majority in the committee, or, in the case of recourse to the Council (if the Commission cannot secure a majority for its proposals) the measures must at least not be rejected by the Council.\textsuperscript{28}

\textit{Treaty Violation Procedure}

Because the comitology procedure involves the risk of a renewed politicisation of the BSE affair (possible involvement of the Council regarding the decision on appropriate measures) it is not the Commission’s most favoured option. Fortunately, it has a second option for counteracting non-compliant behaviour of a member state, the initiation of a formal treaty violation procedure according to Art. 226. This is a three-stage procedure; in the first stage the Commission sends a „letter of formal notice“ and demands a statement from the member state, in the second stage a „reasoned opinion“ by the Commission has to be submitted, and only the third and final stage entails reference before the ECJ. Thus the treaty violation procedure is not so much a classic court procedure, primarily concerned with determining the difference between the specific implications of a certain legal norm and the actual behaviour of the respective addressee. Instead its central characteristic is that it provides a formalised framework aimed at solving interpretational disputes and accomplishing co-operation between Commission and member state (cf. Snyder 1993, Mendrinou 1996).\textsuperscript{29} When

\textsuperscript{26} 98/139/EC, Art. 7 para 3.
\textsuperscript{27} 98/139/EC, Art. 7 para 4.
\textsuperscript{28} In this context, 98/139/EC, Art. 7 para 4, refers to the procedure laid down in 89/395/EC, Art. 17, which is identical with procedure IIIa of the Comitology Decision (87/373/EC). For a detailed discussion of Comitology, see Neyer 1999.
\textsuperscript{29} Only a small percentage of all treaty violation procedures instituted are brought before the ECJ (third stage of the procedure). The vast majority of disputes are settled through negotiations between Commission and member state. In 1997 the Commission instituted a total of 1422 (1996:
inspection missions carried out in September/October 1996 and June 1997 brought to light serious deficiencies in the border control system\(^{30}\), the Commission initiated the first stage of the treaty violation procedure on 8 July 1997 by demanding a statement from the British government. The British authorities concerned (Minister of Agriculture, Fisheries and Food) reacted by adopting new administrative regulations for a stricter control of the enforcement of the embargo (introduction of border controls for lorries) three weeks after the Commission's letter. This induced the Commission to declare a postponement of the treaty violation procedure and to arrange for a further inspection (29.9.-3.10.97) in order to verify the effectiveness of the British measures. In their report the inspectors stated that the new border controls, although no doubt an extended, flexible and useful measure, could only be expected to yield limited results, since only a small number of lorries were actually checked on crossing the border.\(^{31}\) Furthermore the Commission found inspections of meat-processing factories in Great Britain to be still inadequate. As a result, it initiated a new treaty violation procedure against Great Britain on 22 September 1997.\(^{32}\) On 12.11.97 it sent a reasoned opinion to the British government (stage II of the procedure), declaring that the veterinary checks in British meat cutting and cooling facilities did not meet the standard demanded by EU legislation.\(^{33}\) Besides, so it continued, the British government had in its reply to the Commission's first letter declared its intention to co-operate with the Commission, but its answer had also revealed that because of a distinct shortage of veterinary surgeons Britain was unable to meet the requirements set by EU legislation regarding the frequency of inspections by public veterinary surgeons. The Commission pointed out in its reasoned opinion

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\(^{30}\) Final Consolidated Report, 11.


\(^{32}\) Final Consolidated Report, 72.

\(^{33}\) Here, the Commission referred to Directive 64/433/EC.
that such shortages did not relieve Great Britain of its responsibilities deriving from the relevant legislation. This reasoning of the Commission seems appropriate considering that the normative point of reference of the Commission's letter is a directive which is more than 30 years old.\textsuperscript{34}

\textit{Financial Sanctions}

A third option of sanctioning insufficient compliance lies in the conditional linking of discernible progress in the implementation of the Commission's Action Plan and the (partial) lifting of the ban. With the drafting of its proposal of 14.1.1998 regarding the lifting of the ban for beef and beef products from Northern Ireland\textsuperscript{35} – not, however, from the rest of Britain – the Commission made it clear that it was ready to reward compliance by being accommodating itself, but that it had no qualms about being selective and upholding the embargo for a longer period of time in case of insufficient implementation ("carrot and stick policy"). Thus the Commission has the possibility to sanction inadequate compliance if Great Britain should persistently refuse to adhere to the measures laid down in the Action Plan or even if it should ignore an imposed fine (according to Art. 256, fines imposed on member states cannot be enforced).

The sanctioning power of the Community is further increased by the fact that it may make compensation payments to British farmers, although already consented, subject to discernible progress in the implementation of the Action Plan. As a parallel measure alongside the Action Plan the Council agreed in the same sitting to make available 650 million ECU (plus a reserve of 200 million ECU) in support of European cattle owners seriously hit by the BSE crisis. Formally these funds represented compensation payments for individual economic damages incurring in connection with the implementation of Community measures to eradicate BSE and

\textsuperscript{34} Agence Europe of 13.11.997, 12-13.

\textsuperscript{35} Commission Proposal for a partial lifting of the export ban for beef from the United Kingdom, to authorise the export of beef and beef products under the Export Certified Herds Scheme (ECHS) in Northern Ireland (http://europa.eu.int/en/comm/spc/cp4pleb_de.html).
were not territorially specified. It has to be taken into account, however, that at the
time when these payments were agreed upon, 99 percent of all known BSE cases had
occurred in British herds.\textsuperscript{36} The nexus between the Action Plan and financial
assistance was on the Community agenda from the very beginning of the BSE crisis:
As early as 29 March 1996 there were bilateral talks between the Commissioner for
Agriculture Fischler and the British Minister for Agriculture Hogg concerning the
financial implications of "Community-wide solidarity"\textsuperscript{37} with Great Britain. During
the special session of the Council for Agriculture on 2 to 3 April 1996 the member
states developed a Action Plan for the Eradication of BSE, which in its first point
stressed the need for Community solidarity and also declared the fundamental
willingness of the member states to financially assist Great Britain in combatting
BSE.

In its report to the European Parliament of October 1997, however, the Commission
openly threatens "to draw financial consequences from its findings on these BSE-
eradication measures as it does for all other schemes, should this be justified by any
failures by the UK authorities to respect the Community regulations."\textsuperscript{38} And in the EP
plenary meeting on 18.11.1997, Commission President Santer emphasised that non-
compliance with the Community regulations for the eradication of BSE would be
taken into account in the next adjustment of EAGGF accounts.\textsuperscript{39}

\textbf{Implications for the Analysis and Explanation of Compliance}

The BSE case points to a number of factors which are theoretically relevant for the

\textsuperscript{36} Commissioner for Agriculture Franz Fischler before the European Parliament in Strasbourg, cf.
Agence Europe 20.6.1996.

\textsuperscript{37} Afterwards Hogg said: "I think I have discerned the willingness to show true solidarity on a certain
number of financial consequences." (Agence Europe 30.3.96). Commissioner of Agriculture
Fischler on 3.4.96: "What was needed here was solidarity of the member states in the EU, and we
have shown it, and will also try to show it in future. We have never intended to exclude the United
Kingdom; basically our decisions amount to the EU extending a hand." (Agence Europe 4.4.96).

\textsuperscript{38} Final Consolidated Report, 65.

\textsuperscript{39} Agence Europe, 19.11.1997, 13.
description and explanation of compliance: First and foremost, it must be seen as a warning against over-simplifying approaches which restrict the analysis of European integration to the level of the creation of legal acts, equating these with factual co-operation. Instead, what is needed is an understanding which differentiates between the adoption of a legal act at the supranational level and its implementation by the member states. In the BSE case, intergovernmental co-operation and supranational adoption was achieved, at the latest, after the Florence summit in June 1996 when the Commission's Action Plan was consented. In the meantime, the implementation of this agreement and thus its factual realisation has progressed considerably, but the present level of implementation is the result of an arduous and time-consuming bargaining process between the Commission and the competent British authorities.\footnote{COM (1998)598 final, Second Bi-Annual BSE Follow-up Report, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions.}

In the "integration through law" approach (Krislov \textit{et al.} 1996) it has been pointed out that analytically the European integration process must be understood not so much as a political process of member state democracies growing together, but rather as a process of the harmonisation of national legal provisions which relies heavily on judge-made case law. The BSE case supports this approach insofar as it shows that the discourse about the setting and application of law is not simply the result of intergovernmental bargaining but takes place within the framework of law itself. The example of BSE shows that governance without enforcement can be achieved through legally binding procedural regulations even in cases in which governmental actors have strong incentives not to comply.

However, the BSE case also emphasises the limitations of governance by law: The isolation of the European discourse on risk regulation (Veterinary Committee, Agrarian Council, European Council) from those groups of society (i.e. the British) which were most affected by the Community measures, was an important factor for provoking the fierce resistance not only by the British government, but also by the
British public. Therefore, for both normative and analytical reasons, a uniting Europe cannot restrict itself to the harmonisation of member states legal systems and the coordination of member state preferences. Not only for reasons of democracy but also for practical reasons European integration has to strive for a stronger transnational integration of diverging societal problem-consciousness in its member states.

This leads one to question the optimism of institutionalist and legalistic approaches which claim that all problems of intergovernmental co-operation in the area of the implementation of agreements can be solved by devising an intelligent institutional and/or legal design. As the BSE crisis clearly shows, even the most intelligent and best devised institutional design threatens to fail or at least provokes fierce resistance in cases where the member state political discourse leaves limited scope for a cooperative governmental attitude. It finally shows that European institutions (same as legal norms) neither determine nor programme government action, but merely restrict it by imposing additional costs on certain options, thereby making them improbable but by no means impossible.

Furthermore, the BSE case reveals the necessity of analysing the process of implementing law with more regard to the aspects of co-operation and conflict within national and European political processes. The behaviour of the British government can be conceived as a balancing act between the aim to accommodate national public opinion and the realisation that Britain must not antagonise the other member states too much and must not risk an open breach of the law. Thus, the BSE case can also be understood as a warning against analytical approaches which either conceive foreign policy in Europe as a mere extension of domestic politics or which completely disregard the dimension of domestic politics and public discourse. The BSE case emphasises the need to regard compliance as a process which is shaped by political as well as legal means and develops through the tension between supranational legal norms, governmental interests and sub-national interest groups.

All this points to the theoretical as well as practical necessity to find a form of
European governance that is at the same time effective and tied to public discourse. Under conditions of high transnational interdependence and far-reaching national consequences of supranational law, European politics can only be effective if it is embedded in and supported by public discourse.

References


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