

Compliance under Controversy

Analysis of the Transposition of European Directives and their Provisions

Asya Zhelyazkova

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Analysis of the Transposition of European Directives and their Provisions

Compliance bij Onenigheid

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(met een samenvatting in het Nederlands)

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Chapter 1

General Introduction

“It is not always what we know or analyzed before we make a decision that makes it a great decision. It is what we do after we make the decision to implement and execute it that makes it a good decision.” William Pollard

1.1 Introduction

In the policy-making context, decisions are made by political actors in local and national governments. These decisions have direct consequences for both the actors participating in the decision-making process and the citizens of local and national communities. In the context of European Union (hereafter EU) decision making, the adopted policy decisions have an even greater impact than the outcomes of national decision making, as they target citizens of all EU member states. Regardless of their political scope, however, the effectiveness of policy decisions depends on their successful implementation in particular settings. European policies must be enforced and applied in practice to achieve their intended goals. The governments of the different member states are responsible for the incorporation, enforcement, and application of the European policies in a national context.

Consider, for example, the Consumer Sales Directive (1999/44/EC), which aims to harmonise member states’ legislation of legal guarantees issued by sellers regarding the conformity of consumer goods. Based on the guarantees, the seller should be held accountable for a period of two years following the delivery of the goods. If the goods are not delivered in conformity with the sales contract, consumers may ask for the goods to be repaired, replaced or reduced in price or for the contract to be rescinded. In addition, member states were permitted to adopt more stringent provisions that favored the consumer.

Member states were required to incorporate the directive into their national legislation by January 2002, a process that is often referred to as *transposition*. However, there were differences in the extent to which member states met this deadline. All countries, with the exception of Austria, Denmark, Finland, and Germany, experienced some delay in transposing the EU directive in a national context. Belgium and France adapted their national legislation to the directive’s requirements more than two years after the deadline’s expiration. As a consequence, the Commission sent a warning to the ‘laggards’ requesting that they notify the

Commission of any relevant national measures that closely reflect the directive's objectives.

Delayed transposition was not the only problem that the Commission detected in relation to the member states' implementation of the Consumer Sales Directive. Eight years after the deadline, the Commission cited Greece and Luxembourg for incorrectly incorporating the directive's provisions into their legal systems by failing to sufficiently protect consumers' legal rights. For example, based on Greek law, a consumer may lose all of her rights vis-à-vis a seller if she fails to reject a car for apparent defects immediately upon receiving it. Experts in the field identified additional problems in national laws, undetected by the Commission, that limited consumer protection in some member states. Based on art. 3(4) of the directive, for instance, a seller should provide a remedy for a defective product free of charge and, moreover, should bear the costs of postage, labour, and materials. The Dutch and Greek laws, however, did not specify the costs a seller should bear and thus gave sellers in these countries greater discretion to decide what 'free of charge' should entail. They could thus limit the level of consumer protection in a way that was contrary to the directive's prescriptions.

The divergence in member states' practices in the implementation of EU directives is a serious problem because the proper functioning of the EU depends on the existence of common rules and standards for all EU citizens (Knill and Lenschow, 1998). In particular, the harmonisation of national legislation is central to ensuring effective cooperation between member states by increasing the confidence of European citizens as they engage in economic activities outside their countries of residence. In the specific example of the Consumer Sales Directive, the former Health and Consumer Protection Commissioner David Byrne stated, "The rights set out in the Consumer Sales Directive are of fundamental importance to shoppers and the Internal Market. If consumers cannot be confident that their rights will be protected they are not going to shop across borders" (European Commission Press Releases, 2003).¹

¹ It should be noted that directives have a direct effect on European citizens, meaning that citizens may take their governments to court if they have failed to transpose a particular EU

1.2 Defining compliance problems in the EU

The above example illustrates different types of problems caused by member states during the implementation of EU policies. These problems are generally characterized as ‘compliance problems’ by scholars studying the implementation of EU policies. Compliance is a concept developed in international relations research that refers to “a state of conformity or identity between an actor’s behaviour and a specified rule” (Raustiala and Slaughter, 2002: 539). Thus, compliance focuses on the outcome of implementation and compares it to a particular norm (Torenvlied, 2000). In the EU context, a distinction exists between *legal* and *practical* compliance. The above example describes different types of *legal* compliance, wherein member states’ performance is evaluated with respect to the extent to which national legislation conforms to particular EU guidelines. The criteria that could be applied to evaluate member states’ compliance relate to meeting the transposition deadline while conforming to the goals of directives or meeting the requirements specified by a directive’s provisions. The practical aspect of compliance relates to the enforcement and application of EU policies, which generally means ‘translating policies into action’ by public and local authorities, private business actors, or the public in general (e.g., national courts and sellers and producers of consumer goods). In the context of the Consumer Sales Directive, the practical implementation could relate to the extent to which national authorities ensure consumer protection by regular inspection of the quality of consumer goods (enforcement) and the extent to which sellers abide by the national consumer laws (application).

The focus of the present study is on *legal compliance* with EU directives. First, both the enforcement and application of EU legislation are conditioned upon the adequate transposition of EU directives by national parliaments, governments or ministries. As a result, national transposition measures provide an important link between an EU law and the target groups it addresses (e.g., consumers and sellers) through enforcement and application. Second, cross-national research regarding member states’ practical compliance with EU directives is constrained by a general lack of information about the precise activities of all of the target groups in all EU

directive. However, it is disputable that citizens should need to bear the costs of litigation to benefit from services that their governments are obligated to provide.

member states. In the above example, it is extremely difficult to obtain information about the extent to which sellers of various consumer goods conform to the EU requirements in all EU member states, let alone apply such a research design to other EU policies with different target groups.

Focusing on the stage of legal incorporation of EU directives into national law entails making choices as to the most relevant indicators for compliance at the transposition stage. As the example of the Consumer Sales Directive's implementation demonstrates, member states may fail to comply with their EU requirements by either delaying the transposition process or incorrectly transposing certain provisions into their national contexts. The correctness of national transposition measures could be evaluated on the basis of various criteria that yield different indicators of correct transposition. For example, studies could rely on the European Commission's expertise in identifying the most relevant compliance problems regarding a specific directive in different member states. A more comprehensive approach would be to focus on all possible compliance problems introduced by member states rather than only the compliance problems that the Commission detects and chooses to pursue. In addition, the correctness of implementation outcomes may be assessed in terms of both the extent to which national legal measures reflect the goals of directives' provisions and the degree to which the EU provisions are adequately incorporated into the existing legal system. In the latter case, compliance entails both effectively translating the contents of a directive into national legislation and ensuring that existing domestic rules do not prescribe conflicting objectives.

1.3 Previous research on compliance

In earlier research, scholars in the field of EU policy implementation have incorporated only certain indicators of compliance. Most research has focused on two specific indicators: transposition delays and infringement procedures. First, many studies focus on the delays of transposing the EU directives (e.g., Kaeding, 2006, 2008; Mastenbroek, 2003; Thomson et al., 2007) using information on the transposition measures reported by member states to the Commission. Focusing on transposition delays is advantageous because the data are readily available, which enables cross-national research

across different policy areas and over time. However, transposition delays result in the loss of important information about the substantive actions taken by member states to bring domestic practices in line with the EU requirements. In particular, a timely incorporation of EU directives into member states' national legislation does not necessarily imply that it has been performed correctly.

Second, another commonly used indicator of compliance is the infringement procedures opened by the EU Commission against member states suspected of violating EU law. Art. 226 of the Treaty of the European Community grants the Commission the right to initiate infringement procedures against member states that have failed to fulfil their treaty obligations. Since 1984, the Commission has reported on the actions it took against violations of European legislation on a yearly basis. Infringement procedures formally consist of three stages. In the first stage, the Commission sends a 'letter of formal notice' to a member state informing it of a possible breach of its legal obligations and requesting information regarding its reasons for non-compliance. If the Commission considers the member states' response unsatisfactory and the matter is not settled, the Commission commences legal proceedings in the form of a 'reasoned opinion'. This second stage consists of a detailed account of the reasons for which the Commission believes that a member state is in violation of a particular piece of EU legislation. If the member state in question continues its actions in breach of the EU law, infringement procedures enter the third stage, wherein the Commission refers the member state to the European Court of Justice (hereafter ECJ).

Infringement procedures are useful indicators of member states' non-compliance with EU directives. First, the various infringement stages make it possible to distinguish between different levels of severity of implementation problems across member states. In addition, infringement procedures could be initiated because a member state failed to transpose an EU directive on time, because it implemented the respective directive incorrectly, or both (also illustrated in the example of the Consumer Sales Directive implementation). In other words, an important advantage of studying infringement procedures is that they combine different aspects of

non-compliance with EU legislation: transposition delay and incorrect transposition.

However, infringement procedures have important shortcomings, and EU scholars have criticized their use as indicators for non-compliance. The critique is based on the argument that the statistics issued by the Commission are biased because they rely on the willingness and capacity of the EU Commission to detect and punish violations by member states, which might not always be the case (Mastenbroek, 2003). First, the Commission has limited resources in terms of its working staff and its knowledge of the particular elements of different national legal systems. Thus, EU scholars argue that more attention is generally paid to monitoring and sanctioning transposition delays (which are easier to detect) than incorrect implementation (Börzel, 2001; Nugent, 2001). Second, the Commission could be viewed as a political actor with its own policy agenda. It might not be always strategically beneficial for the Commission to refer a powerful member state to the ECJ for incorrectly implementing certain provisions. As a result, a focus on infringement procedures is likely to capture only implementation problems that are easily noticeable and relatively uncontroversial, possibly overlooking other important implementation problems among member states.

In short, the widely used indicators of transposition delays and infringement procedures provide an incomplete picture of non-compliance in the EU, as they fail to account for the specific actions taken by member states during the implementation process. As a result, there is still a lack of understanding regarding the extent to which implementation outcomes reflect the goals of EU directives and the particular provisions of these directives. Whereas these issues pose a challenge to EU implementation research, more general policy implementation theory could provide solutions. Unlike EU policy implementation research, implementation studies focus on the substantive implementers' performance from the beginning of their development (Pressman and Wildavsky, 1973). Thus, many studies of implementation processes have used dependent variables such as the 'policy outcomes' resulting from the implementation process (Hill and Hupe, 2002). Rational choice explanations of implementation have generally applied spatial models that represent implementers' performance

as the distance between the policy decision prescribed by politicians and the strategic decisions of implementers. In the latter case, non-compliance is viewed as the degree of substantive deviation of implementation from the adopted policy decision (Torenvlied, 2000).

1.4 Explaining non-compliance in the EU context

The example at the beginning of this chapter clearly demonstrated that differences exist in the extent to which member states comply with the Consumer Sales Directive in terms of timely transposition and its specific provisions in terms of correct and appropriate transposition. The Commission databases demonstrate that the case of the Consumer Sales Directive is not exceptional. In 1991, the European Commission reported that only 35 % of all EU directives with a transposition deadline in that year were implemented on time by the member states. Variations in compliance exist between both different member states and directives related to different policy areas. First, studies report that Greece, Italy, and Luxembourg violate the EU rules more often than other member states (based on data on delays and infringement procedures) (Börzel, 2006; Pridham and Cini, 1994). In contrast, the Nordic countries (Finland, Denmark, and Sweden) rarely experience implementation problems (Sverdrup, 2004). Second, studies demonstrate that member states' transposition of EU directives varies across different policy sectors (Haverland et al., 2008).

In light of these findings, EU scholars have increasingly focused on explaining non-compliance with EU law. Member states' failure to meet the EU objectives is a peculiar phenomenon, given that member states are both the decision makers in the Council of the EU and those responsible for the effective incorporation of the EU directives into national laws. As a result, scholars have posed the question of "why states fail to implement measures that they previously agreed upon in the Council of the EU" (Mendrinou, 1996: 4). Attempts to answer this question have given rise to an extensive record of studies on EU policy implementation (Mastenbroek, 2005), which incorporate factors at multiple levels of analysis: (a) the directive level, (b) the member-state level, and (c) the level of the member state-directive dyad (e.g., Börzel, 2001; Haverland and Romeijn, 2007; Jensen, 2007; Kaeding,

2006, 2008; Linos, 2007; Luetgert and Dannwolf, 2009; Mastenbroek, 2003; Mbaye, 2001; Thomson et al., 2007).

At the directive level, studies have generally focused on factors related to the complexity and quality of directives (Collins and Earnshaw, 1992). Indicators of directives' complexity often include the number of obligations that member states need to fulfill during the implementation process (Haverland and Romeijn, 2007; Kaeding, 2006; Steunenberg and Kaeding, 2009). In addition, the novelty of an EU law (a new directive vs. a directive amending previous EU legislation) has also been used as an indicator for directive-level complexity (Luetgert and Dannwolf, 2009; Mastenbroek, 2003). The quality of a directive is often reflected in the ambiguity of the directive's goals (Mastenbroek, 2005).

To explain variation in compliance between different member states and within member states regarding particular EU directives, scholars generally make a distinction between state- and preference-based explanations (Chayes and Chayes, 1993; Mastenbroek and Van Keulen, 2005; Steunenberg, 2006; Thomson et al., 2007). *State-based* explanations are primarily defined at the member-state level and stress the importance of country-specific constraints—such as bureaucratic and government inefficiency, a lack of economic development, and corruption—that inhibit successful implementation (Haas, 1998; Jensen, 2007; Mbaye, 2001; Perkins and Neumayer, 2007). However, while state-based capacities and constraints could account for general patterns in member states' compliance records, they have very limited explanatory power when it comes to variation in a given member state's compliance with different directives.

Preference-based explanations, in turn, regard non-compliance as a purposeful action by member states, whose interests have been disregarded at the decision-making stage in the Council of the EU (Falkner et al., 2004; Thomson et al., 2007). Preference-based explanations focus on factors at the level of the member state-directive dyad and are thus better suited to explain the differences in a member state's compliance with various directives. In reality, however, few studies on the influence of preference-related factors on compliance have investigated the possibility of moving beyond aggregate country characteristics (Linos, 2007; Thomson et al., 2007). Thus, most studies refer to a 'general willingness' of member states to comply with the

EU directives and focus on societal and government support for EU integration or the economic benefits that countries are expected to gain as a result of their EU membership (Börzel et al., 2007; Kaeding, 2006; Lampinen and Uusikyla, 1998; Perkins and Neumayer, 2007). Only recently have scholars also focused on the extent to which member states' policy-specific preferences translate into implementation outcomes during the transposition of EU directives and directives' provisions (Thomson et al., 2007; Thomson, 2010).

Given its emphasis on the policy-making process, it is surprising that EU implementation research generally ignores the relationship between EU decision making and national policy implementation. The decision-making process at the EU level, however, is expected to affect implementation outcomes through (a) member states' compatibility with the specific EU obligations and willingness to adopt the EU decision outcomes in national contexts and (b) characteristics of the adopted EU decisions. Thus, national interests are likely to resurface during both the EU decision-making stage and the implementation process. For example, recent studies have demonstrated that member states' representatives in the Council of the EU take policy positions that reflect states' underlying preferences, which are defined by their national economic and political attributes (Thomson, 2011). In the example of the Consumer Sales Directive, one of the issues the Council took up related to whether consumers should be able to choose between different types of remedies (repair, replacement, reduction in price, or complete reimbursement). The Nordic countries, which are generally considered consumer-friendly, actually favored limited consumer choice due to particularities in their own domestic legislation on this particular issue. Similar findings were reported among the positions of the other delegations (Thomson and Stokman, 2003). Thus, there appears to be a linkage between existing national policies and expressed policy positions during the Council negotiations.

Existing national policies and institutional arrangements among the member states also directly influence the implementation process. The degree of compatibility between the adopted EU requirements and existing domestic legislation (also referred to as *technical fit*) is likely to incur adaptation costs for national authorities. Thus, member states are likely to

experience more problems in the implementation of EU directives and provisions if there is a discrepancy between the EU decision outcome and their underlying policy attributes.

In addition, studies of EU policy implementation have tended to disregard the fact that EU laws are often not adopted harmoniously but rather after intensive bargaining between Council ministers supporting divergent policy goals. As a result, the level of conflict in the Council of the EU is reflected in the adopted EU outcome and thus affects the implementation performance by member states. However, the effect of the level of conflict in the Council on the implementation of EU laws has not been studied systematically (Zhelyazkova and Torenvlied, 2009).

In contrast to EU compliance research, implementation theory recognizes the importance of conflict between decision makers in the implementation process. Implementation studies suggest a number of mechanisms responsible for the effect of conflict between decision makers on policy deviations by implementers: (1) implementers exploit conflict among legislators by manipulating a majority coalition to their own benefit (McCubbins et al., 1989), (2) contested policies are less coherent and more ambiguous in their goals (Ferejohn and Weingast, 1992), and (3) politicians tacitly or overtly approve of deviations by implementers if these deviations are congruent with the policies they support (McCubbins et al., 1989; Oosterwaal and Torenvlied, 2011; Torenvlied, 2000).

It is remarkable that EU policy implementation studies have not incorporated these developments of implementation theory into their research. One might expect that political disagreement in the Council has profound consequences for the national implementation process. On one hand, conflict in the Council could result in unclear implementation guidelines that constrain national authorities' efficiency. On the other hand, conflict between member state delegates could identify problematic areas and encourage the Commission and national authorities to locate solutions prior to implementation. As a result, it is important to specify the conditions under which political disagreement has a positive effect on compliance.

1.5 Research questions

This study contributes to current explanations of EU implementation by combining insights from the existing literature on EU compliance and implementation theory. First, it questions the assumption that a member state is likely to exhibit the same behaviour with regard to different directives and directives' provisions. Instead, it argues that member states are more likely to comply with some directives and provisions but not with others. Thus, it is necessary to formulate more precise explanations related to features of the EU directives, their provisions and characteristics at the member state-directive/provision dyad. As a result, the first explanatory research question that the chapters of the dissertation address is the following:

Explanatory question 1: *To what extent do member states' attributes in relation to particular EU requirements (directives and provisions) affect member states' compliance with directives and directives' provisions?*

Second, the study aims to account for the 'missing link' between EU decision making and national implementation. Thus, it focuses on characteristics related to both the process and the outcome of EU decision making to explain member states' compliance problems.

Explanatory question 2: *To what extent do characteristics of EU decision making (decision outcome and process) affect member states' compliance with EU directives and directives' provisions?*

In addition, the study seeks to improve our understanding of different types of compliance problems encountered by member states. As a result, we aim to provide insights into the following measurement and descriptive research questions:

Measurement question: *How can we measure member states' compliance with regard to EU directives and directives' provisions?*

Descriptive question: *Are there differences in member states' performance with regard to specific types of compliance problems, such as*

- a) transposition delay,*
- b) infringement procedures, and*
- c) correct transposition of directives' provisions?*

1.6 Theoretical framework and contributions

An important lesson from general implementation models is that policy implementation should be evaluated depending on the implementation context (Matland, 1995). In the European context, directives specify the general goals to be attained by member states, but they give member states freedom to manoeuvre in their specific means to attain these goals. Thus, directives allow member states to adapt the more specific EU requirements to existing national institutions, laws and practice. As a result, the transposition of EU directives by national authorities is not only a process of adopting the EU outputs into national legislation but also a process of adaptation that accounts for the particular national context. This study contributes to the EU implementation literature by incorporating the implementation context into the study of compliance of EU directives and provisions. Thus, member states' compliance with EU directives is evaluated based on the extent to which member states attain the goals prescribed in the EU directives and the extent to which the EU requirements are appropriately incorporated into the existing national legal system.

Moreover, the theoretical models in the present study account for the fact that member states may comply with some provisions of a directive and fail to comply with others (Thomson, 2010). EU directives are general laws that consist of a number of provisions that prescribe specific objectives to be attained by member states. As the example of the Consumer Sales Directive illustrates, member states may encounter compliance problems with only a few of a directive's provisions. Therefore, defining member states' transposition success with EU directives as a whole is inappropriate.

1.6.1 Member states' characteristics related to EU requirements

To address the first explanatory research question regarding the influence of member states' attributes to particular EU requirements on compliance, the

present study applies two general theoretical approaches: *enforcement* and *management*. The enforcement approach suggests that states voluntarily choose to defect from international agreements if the perceived *benefits of non-compliance* exceed the *costs of non-compliance* (Downs et al., 1996; Fearon, 1998; Tallberg, 2003). The *benefits of non-compliance* may be associated with either alternative priorities (given that compliance entails committing scarce resources that could be allocated to alternative uses) or policy preferences that differ from the contents of the adopted agreements. The *costs of non-compliance* refer to the probability of detection, perceived reputation loss, and the threat of sanctions that may be imposed on violators (Tallberg, 2003).

In contrast, the management approach assumes that non-compliance is involuntary and, hence, the result of states' inability to incur the *costs of compliance* with the EU directives and provisions. Complex and ambiguous international agreements could thwart effective government reactions. In addition, governments may lack the necessary resources or may be unable to garner sufficient bureaucratic support to enforce a particular international agreement (Chayes and Chayes, 1993; Tallberg, 2003).

The theoretical approach used in this study contributes to the EU compliance literature by combining both *enforcement* and *management* accounts of EU policy implementation. The general assumption is that both member states' capacity and willingness to comply are a function of *cost-benefit considerations* regarding the implementation of particular EU directives and provisions in domestic systems. This assumption also implies that the chosen approach significantly departs from recent accounts that attribute the poor performance of member states to endemic characteristics of their political cultures (Falkner, et al., 2005) and institutional and administrative systems (Mbaye, 2001). Nevertheless, the chapters of this dissertation control for certain aspects of these member-state level characteristics.

1.6.2 Characteristics of EU decision making

To address the second explanatory research question, the study applies theories related to the EU decision outcomes and the EU policy-making process. One important factor is the level of conflict between member states

during the decision-making stage. The implementation literature arrives at contrasting predictions regarding the effect of conflict between national legislators on the implementation performance of national and local agencies. On one hand, implementation models generally predict and find a positive effect of political conflict on implementers' deviations (Oosterwaal and Torenvlied, 2011). Applied to the EU context, implementation models would suggest that if member states do not share the same policy goals during the policy-making stage, the adoption of a single compromise solution will not be congruent with the policy preferences of one or more of the member countries. This lack of congruence would, in turn, lead to higher levels of non-compliance. In contrast, delegation models would generally predict a negative effect of political conflict on implementers' deviations when applied to EU policy implementation. This argument is based on the assumption that conflict between decision makers increases the transaction costs of devising detailed policies relative to those of delegation due to coordination costs. More precisely, when legislators have divergent policy goals, it is more difficult or even impossible to agree on the specific details that should constitute a policy (Ferejohn and Weingast, 1992; Hill and Hupe, 2002; Huber and Shipan, 2002; Thomson and Torenvlied, 2010). Thus, the option of offering implementers more freedom to choose appropriate actions becomes more attractive in the context of policy-making controversy. In the European context, delegation to member states' administrations implies an enlarged pool of possible implementation measures from which national implementers can choose to meet the EU's objectives. As a result, delegation models would predict that member states are more likely to accommodate the EU directives and provisions in a compliant fashion.

This study contributes to the literature on EU implementation by combining insights from both implementation and delegation models and applying them to the EU context. First, to improve predictions made by implementation models, the present study accounts for the possibility that the effect of political conflict on implementation is conditional upon the *intensity of monitoring by the Commission*. In particular, when EU directives are adopted under controversy, the EU Commission is likely to anticipate member states' incentives to deviate and constrain actual

deviations by *ex post monitoring and control* of the member states' governments and administrations (see Balla, 1998 and McCubbins et al., 1989 for an application of this model to the US context). Second, delegation models fail to take into account that the effect of discretion granted to national authorities at the implementation stage (i.e., the freedom of manoeuvring to implement a particular policy) may vary for different types of compliance problems. For example, while a higher level of discretion increases the probability that the selected measure will conform to the EU requirements, it could also lead to transposition delays (Kaeding, 2008; Thomson et al., 2007). The present study provides explanations for the contrasting effect of discretion for different types of compliance problems.

1.7 Outline of the dissertation

To answer the measurement and descriptive research questions, Chapters 2 and 3 present analyses of the two standard indicators of compliance with EU directives: delays and infringement procedures, respectively. The measurement of member states' correct transposition with EU directives is addressed in Chapters 4 and 5. In addition, the descriptive question is more explicitly addressed in Chapter 5, where member states' performance is compared with regard to different compliance indicators. Table 1.1 provides an overview of the chapters of the dissertation. The subsequent four chapters were written as independent articles. As a result, some overlap in the description of the theoretical approach, the main hypotheses and research design was unavoidable. Each chapter of the dissertation addresses the explanatory research questions from a different perspective.

Thus, in Chapter 2, *the level of conflict* between member states in the Council of the EU is introduced as a characteristic of the policy-making process that affects *delays in transposition (length of delay)*. The core hypothesis is that conflict in the Council induces member states to hasten the transposition of EU directives. Furthermore, we account for the mediating influence of *Commission monitoring* and the moderating effects of Commission policy disagreement and discretion level on the effect of political conflict on compliance with EU directives. Based on data regarding the policy positions of member-state representatives in the Council, we arrive at two alternative operationalisations of conflict, *heterogeneity* and

policy polarization, which take into account member states' power in decision making and the size of different policy coalitions. Finally, the analyses in Chapter 2 account for the fact that the effects of the variables may vary over time (i.e., time-dependent effects).

Table 1.1 Summary of empirical chapters in the present study

Chapters	Dependent variable	Theoretical mechanisms	Main factors	Data and level of analysis	Method of analysis
2	Transposition delay	Costs of non-compliance	Conflict in the Council; infringement procedures	15 member states * 23 directives	Cox regression analysis
3	Infringement procedures	Benefits and costs of non-compliance	Incentives to deviate; conflict in the Council; elections	15 member states * 21 directives * 3 infringement transitions	Cross-classified sequential odds model
4	Correct and adequate transposition	Costs of compliance and costs of non-compliance	Technical fit; discretion; infringement procedures; conflict in the Council	15 member states * 16 provisions from one directive; two time points	Cross-classified logistic regression
5	Correct and adequate transposition	Costs of compliance and benefits of non-compliance	Incentives to deviate; discretion; complexity; conflict in the Council	15 member states * 136 provisions; four EU directives from different policy areas	Cross-classified logistic regression

The hypothesis that conflict in the Council influences member states' implementation performance is tested using another indicator of compliance in Chapter 3: *infringement procedures*. The implementation context, however, differs from transposition delays because infringement procedures may be seen as both non-compliance indicators and enforcement tools employed by the Commission to punish persistent violations by member states. Thus, the escalation of infringement cases to later stages (e.g., from the stage of reasoned opinion to the stage of ECJ referral) is assumed to increase the pressure on member states to comply with EU directives. The core hypothesis is that the effect of conflict in the Council varies depending on the infringement stage: conflict between member states is more likely to lead to the initiation of infringement cases, but it diminishes the chance of infringement escalation to the point of Court referral. Chapter 3 also takes into account the fact that the resolution of infringement cases could be impeded by alternative priorities if the initiation of infringement procedures coincides with particular domestic events, such as general national elections. Finally, the analysis incorporates the reason for infringements (delays and incorrect transposition) and tests whether the effects vary for different types of compliance problems detected by the Commission.

In Chapter 4, the theoretical approach is applied to a novel dependent variable: *member states' transposition success* (i.e., the correctness of national implementation measures) with regard to all provisions of one directive: the Framework Equality Directive (2000/78/EC). This chapter also addresses questions regarding the progress made by member states in complying with EU provisions as it presents analyses of member states' transposition success at different time points (2004 and 2007). Hypotheses address the effect of member states' costs of compliance and non-compliance on the correct implementation of specific EU provisions. In particular, the core hypothesis in Chapter 4 suggests that member states comply with some provisions in a directive and not others because provisions are associated with different adaptation costs for national authorities. Thus, the study also arrives at a new conceptualization of the *costs of compliance* regarding particular issues by introducing the notion of *technical fit*: the legal compatibility between existing national laws and practices and the requirements laid down in the EU provisions (see Table

1.1). The effect of technical fit is also expected to depend on different levels of discretion granted to implementers. Furthermore, it is expected that member states respond to their perceived costs of non-compliance induced by infringement procedures and conflict in the Council.

The analysis in Chapter 4 is extended to the provisions of four directives in Chapter 5. These directives cover different policy areas: social policy, the EU internal market, immigration policy, and information society (copyright). The core hypothesis tested in Chapter 5 stipulates that member states are less likely to comply with provisions with which they expressed disagreement during the Council negotiations. In addition, Chapter 5 presents hypotheses regarding the effects of characteristics of the adopted EU decisions (e.g., discretion, complexity, and controversy) on the correct and adequate transposition of directives' provisions. Finally, the empirical findings and the contributions of the present study are summarized and discussed in Chapter 6.

1.8 Research design: data and analysis

The theoretical predictions of the present study are tested using the 'Decision making in the European Union' data set (hereafter DEU; Thomson and Stokman, 2003). The DEU data set is useful for the present study because it provides unique quantitative information on the policy positions taken by the member states' representatives and the EU Commission on particular issues. It also indicates that the decision outcome for each issue that was eventually adopted at the EU level. The data on policy positions were obtained on the basis of interviews with key informants. More than forty civil servants, working either for the Council or for the Commission, were asked to identify the most controversial issues in each proposal and the positions of each member state on these issues.

Figure 1.2 illustrates the means by which the issues were evaluated (Thomson and Stockman, 2003; Zhelyazkova, 2007). For example, 'The directive on the manufacturing, presentation and sale of tobacco products' was evaluated by four key informants who identified five controversial issues. One of these issues pertained to the form of the scientific committee that should update the directive. Subsequently, the informants were asked to rate each of the member states on a scale between 0 and 100 on the issue

continuum to represent the alternatives that member states favored the most. Experts were asked to first identify the extreme positions (0 and 100). A distinction can be made between different types of issues, *ranked ordering*, *dichotomous* and *continuous*, relating to the way that distances between the policy alternatives are conceived. Ranked ordering is the most common type of issues in the DEU data set, and Figure 1.2 presents an example of such an issue. The experts were asked to locate the policy alternatives and actors (member states, the Commission and the European Parliament) on the continuum so that the distances between them reflect the expert's view of the political distances between the actors. For example, on the issue presented in Figure 1.2, member states were divided into two extreme positions: some states wanted a more independent scientific committee positioned outside the Commission's sphere of influence (position 100), while others did not find it necessary to change the committee (position 0). The experts identified the outcome to be in the middle of the issue continuum, i.e., a new committee under the Commission's influence, on which the member states would be consulted (position 50).

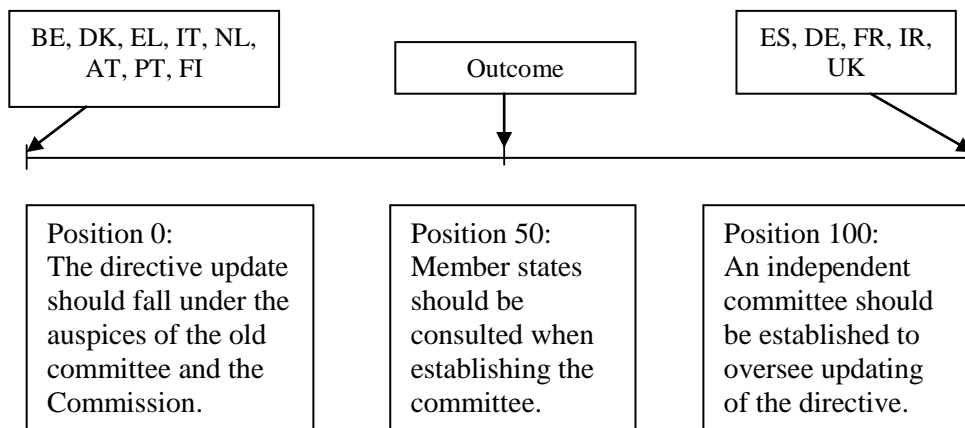
The second type of issue is described as dichotomous because only two alternatives exist and the outcome must be one of these alternatives. Finally, certain issues in the DEU data set are continuous because all points on the continuum have substantive meanings. An example of a continuous issue includes the size of a budget to be allocated to a particular program. All policy scales are standardized such that the end points correspond with the values 0 and 100 (Thomson and Stokman, 2003).

The DEU data set contains information regarding 66 EU proposals, of which 26 were proposals for directives. The limited number of EU legislative acts is due to the selection criteria that were applied by the principal investigators prior to the data-collection process. First, the selected proposals were subject to either the co-decision or the consultation procedure, and the procedure did not change after the Amsterdam Treaty came into force in 1999. Second, the proposals were discussed in the Council meetings between 1998 and 2001. Third, all proposals had to contain a minimum level of controversy. This requirement was reflected by the condition that the proposals must have been mentioned in *Agence Europe*, the main independent daily news service covering EU affairs. A

random sample would have led to the inclusion of a number of technical issues with marginal importance on which member states had taken similar positions. Hence, only proposals containing at least one controversial issue were included in the data set (Thomson and Stokman, 2003; Thomson et al., 2007).

Figure 1.1 The tobacco products directive (COD/1999/244), one of the issues specified by informants

Issue 1: What form should the scientific committee responsible for updating the tobacco products directive take?



Note: AT = Austria, BE = Belgium, DE = Germany, DK = Denmark, EL = Greece, ES = Spain, FI = Finland, FR = France, IR = Ireland, IT = Italy, NL = The Netherlands, PT = Portugal, SE = Sweden, UK = United Kingdom.

The present study focuses on 24 directives out of 26, given that two of the proposals were yet to be officially adopted by the EU before this study began. The directives in the present study cover different policy areas. The discussed policy areas, as defined by the relevant Council configuration that oversaw them, consist of internal market (nine directives), economic and financial affairs (five directives), agriculture (three directives), transport (three directives), justice and home affairs (one directive), employment (one directive), energy (one directive), and health (one directive).

This study employs various data sources regarding the dependent variables. The data for transposition delays were primarily obtained from

the Eur-Lex databases (Chapter 2). These data were supplemented with information from official national documents regarding the timing of the transposition process of particular directives. *The Annual Reports on Monitoring the Application of EU Legislation* provided the information on infringement procedures (Chapter 3). Finally, to obtain data on the level of compliance of member states with each directive provision, the analysis relied on extensive national evaluation reports (Chapters 4 and 5). These reports were generally part of large-scale cross-national projects organized by prominent academic institutions and networks that were funded by the European Commission. In several cases, the reports did not provide sufficient information about the implementation process in some member states, and thus, the data were supplemented by individual academic articles published in legal journals. In addition, interviews with legal experts in the relevant policy fields helped to ensure a proper understanding of the implementation process.

The chapters of the present study also differ with respect to the level at which non-compliance is analysed (see Table 1.1). In Chapters 2 and 3, the level of analysis is the member state's transposition outcome regarding a particular directive (member state * directive). In Chapters 4 and 5, the level of analysis is shifted to the country- provision dyad. Analysis of this type of data requires a statistical tool that controls for the fact that implementation outcomes are both nested in member states and in EU directives and directives' provisions. Thus, the two levels—member states and EU requirements (directives or directives' provisions)—are crossed. This study applies cross-classified multilevel analysis to account for the dependency in the observations. As a result, it improves on existing studies of EU implementation, which generally fail to account for the nesting structure of implementation data.

Chapter 2

The Time-Dependent Effect of Conflict in the Council on Delays in the Transposition of EU Directives²

² Zhelyazkova, A. and Torenvlied, R. (2009) 'The Time-Dependent Effect of Conflict in the Council on Delays in the Transposition of EU Directives', *European Union Politics* 10(1): 35 – 62.

2.1 Introduction

The implementation process in the European Union (EU) could be defined as the transmission of legislation adopted at the EU level into the actions of member states (Mastenbroek, 2007). In the first stage of implementation, member states are obliged to incorporate the EU law into their national legislation before a specified deadline; a process that is referred to as *transposition*. If a member state fails to meet the deadline, the delay in transposition is interpreted as a deviation from the EU law (Mastenbroek, 2003; Steunenberg, 2006; Thomson et al., 2007).

Most EU scholars focus on factors *at the national level* to explain member states' non-compliance with EU laws. Studies report evidence that delays in transposition are caused by constraints within member states, such as government and administrative inefficiency (see Haverland and Romeijn, 2007; Mbaye, 2001, for infringement procedures), a mismatch between existing domestic legislation and an EU law (Héritier, 1996; Duina, 1997) or the presence of domestic veto players (Steunenberg, 2006). Other studies focus on the characteristics of *EU legislation* and show that short deadlines and high levels of discretion granted to national authorities lead to longer delays (Kaeding, 2006, 2008; Thomson et al., 2007). However, most studies focus on characteristics of the adopted policy decision and disregard characteristics of decision-making, such as the level of conflict in the Council of the EU.

The present study aims to account for 'the missing link' between conflict in decision making and implementation by making four contributions to the study on delays in the transposition of EU directives. First, we introduce *the level of conflict* between member states in the Council of the EU as a characteristic of decision making that affects delays in transposition. Based on the literature dealing with enforcement and management in the EU, we predict that conflict in the Council speeds up the transposition process, which contradicts the predictions of standard implementation theories. In addition, we predict that (1) this positive effect of conflict is mediated by the instigation of infringement procedures by the Commission against member states, and (2) the effect of conflict is dependent upon (a) the level of disagreement of the Commission with a policy and (b) the level of

discretion granted to member states. Thus, our predictions are informed by the specific institutional context of decision making and transposition.

The second contribution of this study is the specific *operationalization* of conflict in the Council. In this study, we use a data set on ‘Decision making in the European Union’ (hereafter DEU), which provides information on the policy preferences of 15 member states in relation to 23 directives. Thus, we are able to measure conflict directly in terms of differences in policy preferences. The few studies that explicitly test the effect of conflict in the Council on discretion or delays in transposition either use imperfect proxies of conflict such as voting rules (Franchino, 2004), or derive estimates of member states’ policy preferences based on party positions in election manifestos (König, 2001; König et al., 2005; Franchino, 2007). The only exception is the study by Thomson and Torenvlied (2010), who also measure conflict directly. However, they apply it to the study of discretion and not transposition. In addition, our study employs two different measures of substantive preference-based conflict in the Council: heterogeneity and policy polarization.

The third contribution of this research is related to the *method of analysis*. Most studies on transposition disregard the multilevel structure of transposition data, when: (1) different member states are transposing the same directives, and (2) different directives are being transposed by the same member state. Neglecting the nested structure of transposition data produces unreliable estimates, because observations are not independent. By contrast, we introduce *shared frailty models* in our statistical analyses to account for the nested structure of the data.

Finally, we test how the effects of our independent variables change over time. Thus, we arrive at a more precise interpretation of the estimates of the time-dependent terms. Advanced techniques to interpret time-interacted variables have only recently been applied on EU decision making by Golub and Steunenbergh (2007). We apply these techniques to the study on transposition delay.

2.2 Theory

Theories of policy implementation study the problem of compliance by employing simplified assumptions about the underlying mechanisms that

explain variation between implementers and policy issues in compliance with policy objectives (Torenvlied, 2000). It is assumed that a difference in most preferred policies between legislators and implementers is a necessary condition for the occurrence of non-compliance (Pressman and Wildavsky, 1973). Spatial models of policy implementation and political control of bureaucracy map these most preferred policies in one or more issue dimensions as *policy positions*. Each *legislator* is assumed to strive for a collective *decision outcome* as close as possible to her own policy position. She does so under restrictions, such as relative bargaining power and access to institutional resources (Thomson et al., 2006). Each *implementer* is assumed to strive for a *policy performance* as close as possible to her own policy position. The distance between the policy position of an implementer and the decision outcome is an indicator for the implementer's *incentive to deviate*. Implementers choose to deviate under restrictions, such as their expected reputational loss and expected costs from policy deviations (Torenvlied, 2000). The application of different ex ante and ex post instruments for monitoring and penalizing policy deviations by 'oversight committees' affects the likelihood of costs and reputational loss by the implementer (McCubbins et al., 1987, 1989).

2.2.1 Conflict among legislators

The problem of compliance is intensified if we take into account the level of support for decision outcomes by legislators. If policy positions between legislators differ strongly —as an indicator of conflict—there is little agreement among legislators on the proper course of action. In various ways, theories of policy implementation incorporate the effect of conflict. First, decision outcomes reached under conflict are more likely to reflect (watered down) compromises. A collective outcome based on highly diverging positions will be potentially ambiguous and incoherent, which will constrain the efficiency of implementers (Hill and Hupe, 2002) and exacerbate the compliance problem (Ferejohn and Weingast, 1992). Second, decision-outcomes reached under conflict grant 'preference-induced discretion' to implementers, who are able to exploit disagreement between different majority coalitions in the legislature (McCubbins et al., 1987, 1989). Third, deviations from decision outcomes reached under conflict are

likely to be (tacitly) approved of by some legislators, thus reducing the costs and reputational loss associated with the policy deviation (Torenvlied, 2000). On the basis of these mechanisms, implementation theory predicts that legislative conflict negatively affects compliance.

In EU policy-making, member states are the legislators in the Council of the EU, but they are also responsible for implementing the EU policies within their national contexts (Falkner et al., 2005; Franchino, 2007; Thomson et al., 2007). Thus, if member states have widely divergent policy positions, they are likely to have an incentive to deviate during the implementation stage (dubbed ‘opposition through the back door’ by Falkner et al., 2004). Consequently, implementation model would expect longer delays for EU policies that were more contested in the Council (Falkner et al., 2004; König et al., 2005). However, based on this argument, the effect of conflict in the Council would be explained when controlling for member states’ incentives to deviate. In the present study, we argue that conflict in the Council leads to different behaviour from member states’ individual incentives to deviate, and has a positive effect on transposition timeliness.

2.2.2 The role of the Commission

EU policy-making combines intergovernmental decision-making in the Council with supranational policy preparation and oversight by the Commission. The Commission has extensive powers to monitor member state compliance with EU laws, to issue warnings to member state governments with a questionable implementation record, and to pursue formal infringement procedures before the European Court of Justice (ECJ) in cases of persistent non-compliance. The Commission even has the power to propose punitive fines to be issued against member states that violate EU law before the ECJ (Pollack, 2003: 86). Thus, there are strong parallels between the Commission in the context of EU policy making and ‘oversight committees’ in the U.S. Congressional setting.

The present article focuses on directives as a type of EU law. Directives leave open the choice for national governments of how to transpose their content into their own legislation. Nevertheless, directives bind member states in the sense that national governments are required to inform the

Commission before a specified deadline about the measures they took in transposing an EU directive. In addition, the Commission has the power to monitor and evaluate the transposition process by means of its own research and initiative. For instance, the Commission can oversee the transposition process through national or European parliamentary questions and petitions. In addition, the Commission responds to member states' non-compliance in reaction to complaints from citizens, civil society, enterprises and other member states that consider their rights to be violated according to an EU law (From and Stava, 1993: 63).

2.2.3 Council conflict and Commission oversight

Member states do not exclusively act upon their own interests. They also care about the transposition of an EU policy in all member states because unequal practices lead to negative externalities (Majone, 2001), which defeat the purpose of adopting an EU law (Franchino, 2007). Thus, member states could commit to the transposition of a directive if the expected costs of non-compliance outweigh the benefits of postponing the implementation process. In addition, conflict in the Council of the EU could *signal* imminent problems in transposition or national application to the Commission. In his study of EU compliance, Tallberg (2003) argues that the combination of rule enforcement by independent agents and the management of potential problems induces rule-conforming behaviour by member states. *Enforcement* is necessary when member states are not willing to bear the costs of transposing directives incompatible with national arrangements. We expect that more controversial directives are more likely to be enforced by the Commission (Tallberg, 2003; König et al., 2005) through increased oversight and a credible threat of sanctions. *Management* is necessary when member states are not able to solve problems because of differences in established policy practices, which lead to delays in transposition (Mbaye, 2001; Tallberg, 2003). We expect that more controversial directives are more likely to be subject to informal bargaining through management and dispute settlement strategies (Elgström and Jönsson, 2000). Because both enforcement and management are assumed to speed up the transposition process, we arrive at the following hypothesis:

Hypothesis 2.1: Conflict in the Council speeds up the transposition of EU directives.

The *enforcement perspective* shows that increased rigor in the Commission's monitoring is reflected by infringement procedures (Tallberg, 2003). Member states are expected to transpose faster after the instigation of an infringement case. We indeed observe a widening of the gap between the first legal step in the infringement procedure (the number of 'letters of formal notice') and the subsequent steps—often referred to as an indicator of rigorous monitoring by the Commission (Mendrinou, 1996: 16). The *management perspective* also embraces infringement procedures: the first EU infringement procedures (Article 226 of the EC Treaty) are interpreted in terms of a managerial dialogue between the Commission and the accused member state (Börzel et al., 2005). Thus, the Commission is expected to affect the transposition process directly by instigating legal procedures against violators of the EU law. These procedures impose costs on further delays in transposition and help member states communicate problems—resulting in a faster transposition of EU law³.

Hypothesis 2.2a: Member states will speed up the transposition of an EU directive after receiving a letter of formal notice with respect to their performance on this directive.

If the Commission responds to conflict in the Council and interprets it as a signal of potential non-compliance problems, we expect more monitoring and infringement procedures for controversial directives. Thus, we expect that the instigation of infringement procedures (i.e. letters of formal notice) mediates the relation between conflict and timely transposition.

Hypothesis 2.2b: Controlling for the instigation of an infringement procedure, the positive effect of conflict in the Council on the timeliness of transposition decreases.

³ We use infringement procedures as a proxy for the Commission's monitoring intensity after the formal adoption of a directive. Unfortunately, quantitative information about informal meetings between the Commission and a member state before an infringement instigation is generally lacking.

2.2.4 Conditions for enforcement and management

The enforcement and management of EU legislation by the Commission come at a price and are highly sensitive to the limited resources available to the Commission (Jensen, 2007). For example, monitoring is a time-consuming process that requires the mobilization of different sources of information. Thus, the two perspectives disregard the *scope conditions* under which conflict in the Council induces the Commission to prevent or respond to non-compliant behaviour by member states. Although conflict in the Council signals which directives are prone to potential transposition problems, specific Commission characteristics could moderate this relation (Börzel, 2001; Tallberg and Jönsson, 2001). Thus, implementation problems might arise because enforcing agents' policy priorities often diverge from the goals of decision-makers (Pressman and Wildawsky, 1973). This finding has been corroborated in studies on the implementation of EU policies by member states (Héritier et al., 1996; Falkner et al., 2005). In this study we apply this perspective to the Commission as an enforcement agent (Tallberg, 2003). Thus, a first scope condition for investment in enforcement and management is the Commission's level of disagreement with the outcome of decision making. The Commission is expected to put less effort into the enforcement and management of controversial directives that are further away from its own policy preferences. Thus, we expect a negative interaction effect between conflict in the Council and disagreement by the Commission on the timeliness of transposition.

Hypothesis 2.3: The positive effect of conflict in the Council on the timeliness of transposition is weaker, the more the Commission disagrees with an EU policy.

A second scope condition for effective enforcement and management by the Commission is the *level of discretion* granted to member states in a directive. The delegation literature shows that discretion is closely related to incomplete contracting and a lack of precision in the adopted policies (Franchino, 2007). Based on the management approach, directives that grant discretionary powers to member states are ambiguous and incoherent in

their policy objectives (Chayes and Chayes, 1993)⁴. Thus, discretion granted to member states creates non-compliance problems because states are uncertain about the specific actions that will meet the requirements of an EU law. Since highly ambiguous directives also limit the capacity of the Commission to respond effectively to member state non-compliance (Börzel et al., 2005), we expect a negative interaction effect between conflict in the Council and the level of discretion granted to member states on the timeliness of transposition.

Hypothesis 2.4: The positive effect of conflict in the Council on the timeliness of transposition is weaker, the more discretion is granted to member states in the transposition process.

2.3 Research design

We tested our hypotheses using data on 23 directives that were compiled by Thomson et al. (2007).⁵ The 23 directives cover a variety of policy areas: the internal market (eight directives), economic and financial affairs (five directives), agriculture (three directives), transport (three directives), justice and home affairs (one directive), employment (one directive), energy (one directive) and health (one directive).

The data set is based on several sources. First, information on delays in transposition was obtained from the EU databases EUR-lex and CELEX (Thomson et al., 2007). We searched for records and documents of national legislation to complement the data on the transposition records of member states and update the data set.⁶ Data on the policy positions of the Commission and the 15 member states were provided by the DEU data set (Thomson et al., 2006). The selection of proposals in the DEU data set was based on three criteria. First, the selected proposals had to be subject to either the co-decision or the consultation procedure, and the procedure should not have been changed after the Amsterdam Treaty came into force

⁴ However, see Héritier et al. (1996) and Knill (2001), who derive the opposite prediction that more discretion leads to more compliance.

⁵ The original sample in the study by Thomson et al. (2007) contained information on 24 directives. We excluded one directive from our analysis, because it contained only one issue, on which member states all took the same policy position.

⁶ Internet search terms included the directive's number, title and key words for content.

in 1999. Second, the selected proposals had to be discussed in the Council meetings between 1998 and 2001. Third, all selected proposals had to contain at least one controversial issue. A random sample would have led to the inclusion of issues with only marginal, technical importance, where member states would have taken similar positions (Thomson and Stokman, 2003; Thomson et al., 2007).

2.3.1 Dependent variable: transposition delay

The dependent variable in this study, delays in transposition, is measured as the length of delay in weeks from the deadline until the date of the earliest reported transposition measure by each member state (Thomson et al., 2007)⁷. Because information is available on 15 member states transposing 23 directives, we obtain 345 potential cases of transposition. In 129 cases, the member state had already transposed the directive before the deadline expired, so for these cases delay is 0 weeks. By the end of the present study, after extensive search, we were not able to obtain transposition reports for 49 cases. For these censored cases the length of delay is calculated as the number of weeks between the expiration date of the deadline to the end of the study (12 February 2007). Two cases were not relevant because one of the directives on economic and financial affairs did not apply to France, and because the Justice and Home Affairs directive includes an exemption for Denmark. Thus, we have 343 cases available for the analysis on delays in transposition. Table 2.1 provides information on the major variables in the analysis.

⁷ Thus, the findings of this study refer to the beginning to the transposition process rather than the completed transposition by member states.

Table 2.1 Descriptive statistics for the variables in the analysis

	N	Mean	Min.	Max.	S.d.
Dependent variable					
Delay in transposition	343	75.80	.00	424.14	127.58
Independent variables					
<i>Directive level</i>					
Heterogeneity	343	38.23	16.06	50.03	10.97
Policy polarization	343	10.46	3.06	16.57	5.32
Commission disagreement	343	37.24	.00	75.00	22.79
Discretion	343	18.21	.00	50.00	14.62
<i>Member state level</i>					
Member state incentive	337	45.37	.00	100.00	34.06
Member state distance from Commission	337	33.96	.00	100.00	33.00
Formal notice (TVC)	343	.33	.47	.00	1.00

2.3.2 Conflict: heterogeneity and polarization

This study employs two indicators of conflict: *heterogeneity* and *policy polarization*. The selection of these two conflict indicators is based on the fact that heterogeneity and policy polarization stress different properties of conflict.

Heterogeneity stresses alienation between member states in terms of their policy positions, and is measured by the standard deviation in member state policy positions. Under qualified majority voting (QMV), larger member states count more than smaller ones, since they are allotted more votes (Cini, 2003). Therefore, we weighted member state positions by their capabilities on the basis of their Shapley Shubik Index (SSI) score—thus incorporating the effect of the decision rule (Shapley and Shubik, 1954; Thomson and Stokman, 2003).

Policy polarization stresses both alienation between and identification within groups of member states: internally homogenous groups might be highly antagonistic towards each other even if their level of alienation is

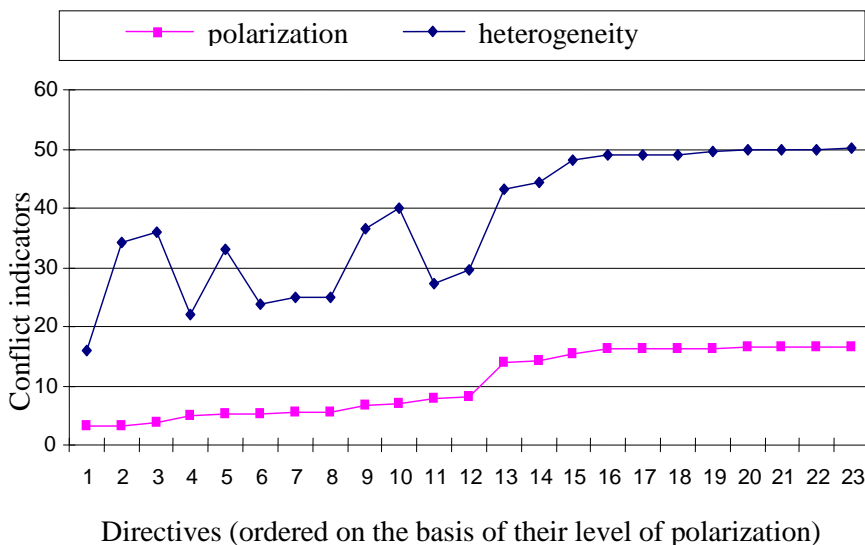
moderate. A polarization measure is based on the index developed by Esteban and Ray (1994)⁸. Alienation is measured by taking the absolute distance between groups of member states that share a different policy position. Identification is a function of the relative group size π , and a ‘polarization sensitivity’ parameter α , which is bounded between 0 and 1.6 to differentiate polarization from inequality (see Esteban and Ray, 1994). In the present study, α is set to 1.6. For the computation of relative group size π , we differentiated between directives decided under unanimity and those decided under QMV. For unanimity, we computed π as the proportion of member states supporting the same policy position relative to the total number of member states. For QMV, we computed π for each group as the aggregated member state SSI score (Shapley and Shubik, 1954; Thomson and Stokman, 2003).

The policy positions of member states were measured by Thomson et al. (2006) on the basis of interviews with key informants (see Thomson et al., 2006, and Thomson et al., 2007 for a full discussion and illustration of the construction of issue scales). Because issues are nested within proposals, we followed Thomson et al. (2007) by taking the maximum issue value of the conflict measures as the directive-level measure, thus assuming that the most debated issue gives rise to disagreement associated with the whole directive.

Figure 2.1 illustrates the empirical relation between the two conflict indicators in the data set. The major observation from Figure 2.1 is that heterogeneity and policy polarization are highly correlated. The most polarized directives are also the most heterogeneous ones. However, there exists more variation in heterogeneity for lower values of policy polarization. A more detailed look at the data uncovers the driving force behind this result: the most conflictive directives are those for which member states are equally distributed into two opposing policy groups. By contrast, directives with three or more policy groups supporting different policy positions reflect lower levels of polarization, but still relatively high levels of heterogeneity.

⁸ Esteban and Ray (1994) developed the following polarization measure and applied it to income distributions: $P(\pi, x) = K \sum_{id=1}^n \sum_{jd=1}^n \pi_{id}^{1+\alpha} \pi_{jd} |x_{id} - x_{jd}|$, where K is a scaling parameter, $K > 0$; α is a polarization sensitivity parameter: $0 \leq \alpha \leq 1.6$.

Figure 2.1 Heterogeneity and policy polarization for 23 Directives



2.3.3 Other independent variables

Infringement procedures were identified by reviewing the *Annual Report of the Application of Community Law* for each of the years between 1999 and 2006. The initiation of an infringement procedure against a member state is measured by a dummy variable (formal notice = 1). Since, in principal, letters of formal notice should have been sent to *all* delayed cases in the analyses, we introduce a time-varying covariate (a variable that changes values over time), which takes the value of 1 when a member state transposes a directive after receiving a formal notice.

Commission disagreement with the outcome is measured at the level of the directive as the average distance between the Commission’s position on an issue and a policy outcome. *Discretion* is computed by dividing the number of provisions granting powers to member states by the total number of provisions in a directive (i.e. discretion ratio) (Franchino, 2004; Thomson, et al., 2007). In addition, we controlled for a *member state’s incentives to deviate*, which is measured as the absolute distance between the policy position of a member state and the decision outcome. We took the

maximal value of the member state incentive on the issues (Thomson et al., 2007). We also controlled for a member state's *disagreement with the Commission*, which is measured by taking the absolute value of the distance between a member state's policy position and the policy position supported by the Commission.

2.4 Design of the analyses

Because we test hypotheses on the *timing* of transposition, we applied Cox regression analysis. Cox regression is an event-history modelling technique (also known as *survival analysis*) that allows us to study the probability that a particular directive will be transposed in any given week provided that it has not yet been transposed. Furthermore, the Cox model is especially useful since it allows us to estimate the effects of our independent variables on member states' transposition without having to assume a specific parametric form for the distribution of time until an event occurs (Cleves et al., 2002; Golub, 2007). In addition, this model easily allows for the inclusion of 'censored' cases (Mastenbroek, 2003; Thomson et al., 2007). These are the cases in which no transposition measure was reported before the end of the study (49 cases in this analysis). We included two recent methodological advances in survival analysis to our study: (a) we controlled for the multilevel structure in the data, and (b) we specified time-dependent effects.

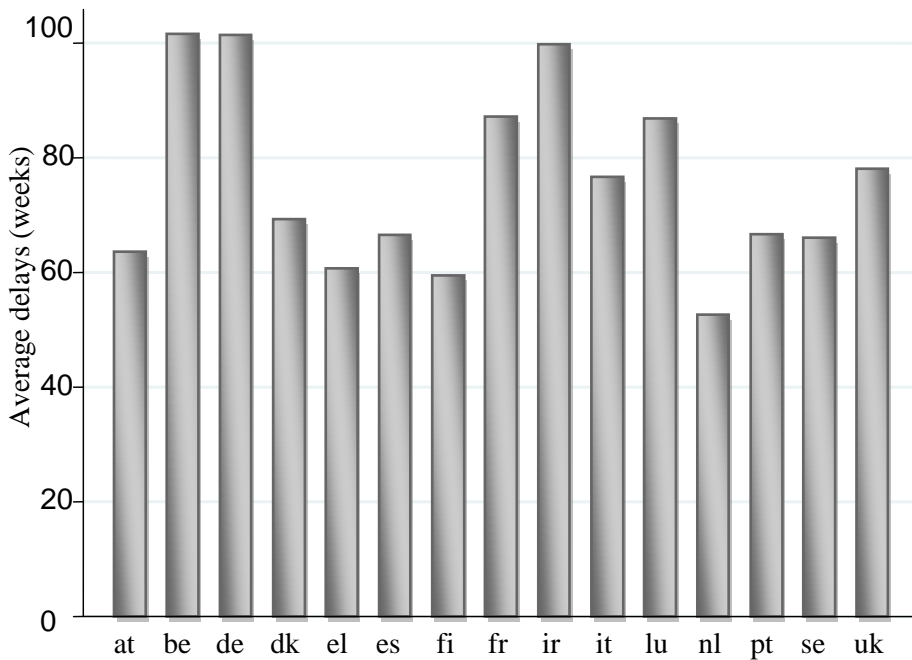
2.4.1 Shared frailty models

In this study, we applied a Cox regression model *with a shared frailty factor* to accommodate the multilevel structure of our data. Frailty models are the *survival data* analogy to regression models which account for heterogeneity and random effects. Shared frailty models account for the dependency between clustered events by introducing a 'cluster-specific random effect'—the frailty—which is common for the whole cluster. In this research, member states are 'clustered' within directives and thus shared frailty models allow us to control for unobserved random effects at the level of the directive. These unobserved effects are tested using a variance component *theta* (θ) and a likelihood ratio test for the hypothesis that this variance is zero. A shared frailty factor with zero variance implies that the events of

transposition by member states are not affected by the fact that 15 member states are transposing the same 23 directives. By contrast, a significant variance component of the shared frailty indicates that member states' transposition times are affected by unobserved directive-level characteristics (Wienke, 2003; Cleves, et al., 2002).

The nested structure of the data is even more complex: the different directives are also transposed by the same 15 member states. Figure 2.2 illustrates the average length of delay for each of the 15 member states.

Figure 2.2 Average delays of the 15 member states transposing 23 directives



Notes: at = Austria, be = Belgium, de = Germany, dk = Denmark, el = Greece, es = Spain, fi = Finland, fr = France, ir = Ireland, it = Italy, lu = Luxembourg, nl = the Netherlands, pt = Portugal, se = Sweden, uk = United Kingdom.

However, Cox regression does not allow us to fit two shared frailty models at the same time. Instead, we computed 15 country dummies and tested whether member states significantly differ in transposition performance. If member states transpose the directives based on country-level unobserved characteristics, we should see significant differences

between member states. Although we observe some differences between the member states' average transposition performance, the test of parameters for the country dummies showed that these differences are not significant ($\chi^2(14) = 11.10, p = .678$)⁹. Thus, in the following analyses we account only for the shared frailty at the level of directives.

2.4.2 The proportionality assumption and time-dependent variables

An important characteristic of the Cox model is the assumption that the effects are proportional over the different values of the independent variables. In essence, this implies that the effects of independent variables are constant over time. This consideration is important because estimation of proportional hazards models with non-proportional effects can result in biased estimates and flawed inferences about the substantive impact of relevant independent variables (Box-Steffensmeier and Zorn, 2001; Golub, 2007; Golub and Steunenberg, 2007). Thus, the proportionality assumption should be checked for all independent variables before any conclusions can be drawn about the effect of conflict on delays in transposition.

In this study, we apply the Grambsch and Therneau test for proportionality, the most widely accepted test. Those variables for which the test reports non-proportional effects should be interacted with a function (usually $\ln(t)$) of survival time (Box-Steffensmeier and Zorn, 2001).

Table 2.2 presents the results of the Grambsch and Therneau test. The table reveals that we should reject the null hypothesis of proportionality ($p < .05$) for most of the variables in the analysis. The proportionality assumption is met for only three of the variables in the model with heterogeneity as a conflict indicator. In the model with polarization, only member state's incentives for deviation and member state distance from the Commission have proportional effects on the dependent variable. Therefore, the appropriate model specification will include Cox models that account for changes in the effects.

⁹ We performed the test by comparing the hazard rates of the country dummies with the Netherlands (reference category). This is the country with the shortest average delay in transposition.

Table 2.2 Grambsch and Therneau test for the proportionality assumption

	Polarization			Heterogeneity		
	rho	χ^2	p-value	rho	χ^2	p-value
Conflict	.216	96.88	.000	.169	51.14	.000
Commission disagreement Conflict*	-.129	33.95	.000	-.159	51.22	.000
Commission disagreement Conflict*Discretion	.068	9.35	.002	.030	1.62	.204
Discretion	-.109	25.13	.000	-.075	10.96	.001
Member state incentive	.110	24.56	.000	.077	11.53	.001
Member state distance from Commission	-.070	1.71	.191	-.030	.31	.575
Formal notice (TVC)	.035	.43	.513	.006	.01	.907
Global test	---	192.45	.000	---	127.04	.000

2.5 Results

2.5.1 Conflict and delays in transposing EU directives

Before specifying the models, it is important to remark that the coefficients estimate the change in the *hazard* that a directive will be transposed at a particular week owing to one unit of change on the independent variable. Thus, a positive sign on the coefficient refers to an increase in the hazard ratio of transposition owing to an increase in the relevant independent variable. A negative sign refers to a decrease in the transposition rate. One minus the exponent of each coefficient represents the proportional change in the hazard rate based on a one-unit increase in the value of the relevant independent variable. Note that the tables present coefficient, whereas in the text we discuss hazard ratios.

Table 2.3 reports the estimates of three models testing the effect of conflict on delays in the transposition of 23 EU directives. Because heterogeneity and polarization are highly correlated, their effects are reported separately. Furthermore, we include the test for significance of the

shared frailty variance to detect whether the multilevel structure of the data matters. As Table 2.3 shows, the variance of the shared frailty factor (θ) is significantly larger than 0 in all models. This result implies that the transposition times by member states are significantly correlated when they are transposing the same directive. Thus, the hazard ratios should be interpreted conditional on the shared frailty (that is, the directive-specific random effects). For each model, we first discuss the model specification and subsequently the substantive results. The Preference Model tests Hypothesis 2.1 that conflict in the Council speeds up the transposition of EU directives. The Preference Model also controls for the member states' incentives for deviation, the Commission's disagreement with a directive, the discretion ratio and member state distance from the Commission. Additionally, all variables for which the proportionality assumption is not met are interacted with $\ln(\text{time})$ to correct for their non-proportional effects on delays in transposition.¹⁰

The results of the Preference Model show that conflict does not initially affect the timeliness of transposition, but that its effect turns significant and positive over time. Both heterogeneity and policy polarization increase the hazard of transposition of EU directives several weeks after the deadline has expired. Likewise, Commission disagreement with a directive has a negative effect on the hazard rate of transposition by member states as time has passed after the deadline (only the time-dependent effect is significant). The effects reported in Table 2.3 do not allow for a precise interpretation of the time-dependent coefficients, and we will elaborate on this later.

The discretion ratio negatively affects the timeliness in transposition. More precisely, with one-unit increase in the discretion ratio the hazard of transposing the directives decreases by 2.3 % (i.e. $1 - \exp(-0.0236423) = 1 - 0.97663499$). The time-dependent coefficient of discretion is positive but not significant. In addition, the distance between a member state and the Commission has a significant effect on the timeliness of transposition of EU directives. According to the analyses, when the Commission disagrees with

¹⁰ In the current analyses, interacting the variables with $\ln(\text{time})$ is better than interacting them with 'time', since the former produces a better model fit. In addition, most treatments of non-proportional effects apply $\ln(\text{time})$ as a function of survival time (Box-Steffensmeier and Zorn, 2001: 978). Once these interactions are included, the proportionality assumption is no longer violated.

the policy position of a member state, the latter is 0.4 % more likely to transpose the EU laws on time. A member state's incentive for deviation does not affect the hazard of transposition.

The Enforcement Model in Table 2.3 includes the behaviour of the Commission. We predicted in Hypothesis 2.2 that (a) member states speed up transposition after the instigation of infringement procedures, and (b) the positive effect of conflict on the hazard of transposition is mediated by the instigation of an infringement procedure (i.e. a letter of formal notice). Thus, we expect that including the effect of a letter of formal notice to the analysis should at least partly explain the effect of conflict in the Council on delays in transposition.

Because the instigation of a formal notice is a time-varying covariate, it addresses the question of whether the hazard of transposition is higher before or after a member state has received a letter of formal notice. The results in the Enforcement Model show that letters of formal notice initially have a negative effect on the hazard of transposition by member states. This finding is not surprising, since formal letters are mostly sent to member states after the deadline has expired and are largely the result of non-notification by national authorities about the undertaken transposition measures. For the purposes of this study, it is more interesting to find out how this effect changes over time. The analysis shows that, as expected, the initially negative effect of infringement procedures on the hazard of transposition decreases over time. It appears that member states speed up the transposition process after receiving a letter of formal notice. Later in this section we will return to discussing the precise changes of the coefficient.

Hypothesis 2.2b stated that the instigation of infringement procedures by the Commission should at least partly explain the effect of conflict on delays in transposition. In comparison with the Preference Model, both polarization and heterogeneity have smaller coefficients in the Enforcement Model. However, the time-dependent effects are still highly significant. Thus, we need to estimate how the conflict coefficients change over time once we control for the behaviour of the Commission. We will discuss this issue in the subsequent section.

Table 2.3 Cox-Regression analyses for heterogeneity (H) and polarization (P) models

	Preference model		Enforcement model		Full model	
	H	P	H	P	H	P
Conflict	-.006 (.017)	-.012 (.034)	-.003 (.015)	-.011 (.032)	-.005 (.013)	-.004 (.030)
Commission disagreement	.002 (.008)	.001 (.008)	.001 (.007)	.001 (.007)	-.001 (.007)	.0002 (.007)
Discretion	-.024* (.013)	-.024* (.013)	-.021* (.012)	-.022* (.012)	-.020* (.011)	-.020* (.012)
Conflict * Commission disagreement					-.001 (.001)	-.001 (.002)
Conflict * Discretion					-.001 (.001)	-.001 (.002)
Formal notice (TVC)			-1.760*** (.572)	-1.714*** (.561)	-1.773*** (.575)	-1.770*** (.566)
Member state distance from Commission	.004* (.002)	.004* (.002)	.004* (.002)	.004* (.002)	.003 (.002)	.004* (.002)
Member state incentive	.002 (.002)	.001 (.002)	.001 (.002)	.001 (.002)	.002 (.002)	.001 (.002)

Notes: Unstandardized coefficients; standard error s in parentheses; n = 337; ***: p < .01, **: p < .05, *: p < .10

Table 2.3 Continued

	Preference model		Enforcement model		Full model	
	H	P	H	P	H	P
Conflict * ln(t)	.014 ^{***} (.003)	.033 ^{***} (.007)	.008 ^{**} (.004)	.021 ^{***} (.008)	.007 [*] (.004)	.019 ^{**} (.007)
Commission disagreement * ln(t)	-.006 ^{***} (.002)	-.005 ^{**} (.002)	-.006 ^{***} (.002)	-.006 ^{***} (.002)	-.009 ^{***} (.002)	-.008 ^{***} (.002)
Discretion * ln(t)	.001 (.003)	.002 (.003)	.001 (.003)	.002 (.003)	.002 (.003)	.002 (.003)
Conflict * Commission disagreement * ln(t)					---	.0001 (.004)
Conflict * Discretion * ln(t)					-.001 ^{**} (.0003)	-.002 ^{***} (.001)
Formal notice (TVC) * ln(t)			.745 ^{***} (.169)	.695 ^{***} (.169)	.835 ^{***} (.171)	.782 ^{***} (.173)
Shared frailty directive-level θ	.537 ^{***} (.185)	.519 ^{***} (.179)	.404 ^{***} (.151)	.429 ^{***} (.158)	.250 ^{***} (.114)	.353 ^{***} (.143)
Wald χ^2	26.59 ^{***}	33.96 ^{***}	48.61 ^{***}	50.68 ^{***}	65.48 ^{***}	56.72 ^{***}

Notes: Unstandardized coefficients; standard error s in parentheses; n = 337; ***: p < .01, **: p < .05, *: p < .10

In the Full Model, we test the conditions under which the Commission will be most effective in monitoring and managing compliance. Thus, we add an interaction with the conflict indicators and the Commission's disagreement with a directive. However, Table 2.3 shows that the interaction is negative but not significant. Therefore, we do not find support for Hypothesis 2.3.

Finally, Hypothesis 2.4 predicts that the positive effect of conflict in the Council on the hazard rate of transposition should be weaker for policies that grant more discretion to member states. The analysis in the Full Model shows that this prediction is supported for the time-dependent interaction effects of both conflict indicators.

2.5.2 Interpretation of time-dependent effects

The results in Table 2.3 give only a general idea of the effects of the independent variables on delays in the transposition of EU directives. The interpretation of the variables with significant time-dependent effects is not straightforward, as the impact of these variables on the hazard rate is now a *combination of their time-constant and time-varying coefficients* (Golub and Steunenbergh, 2007: 556). A more precise interpretation of these coefficients would require the calculation of the magnitude of the combined effects at different time points. We could easily do that on the basis of the estimates in Table 2.3. However, a simple re-estimation of the combined effects could still be misleading, since it does not take into account the standard errors of the combined coefficients.

In Table 2.4 we do take into consideration the standard errors of the coefficients and show how the impact of our variables changes over time. For reasons of space, in the Full Model we present the results only for the model with polarization as a conflict indicator; the same conclusions apply for the effect of heterogeneity.

Table 2.4 shows that, in all three models, the positive effect of conflict (i.e. polarization) increases over time. Although the effect is not significant in the first weeks after the deadline has expired, it suddenly turns significant after the eighth week and increases in magnitude from that period on. In the Preference Model, 12 weeks after the deadline, a one-unit increase in the level of conflict in the Council increases the hazard of transposition by

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7.3%. In one year (52 weeks) the hazard in transposition is already 12.8% owing to an increase in polarization, and this percentage increases with the passage of time. Thus, Hypothesis 2.1 predicts conflict in the Council speeds up the transposition of EU directives, but this happens only several weeks after the deadline has expired. According to our interpretation, the signal of conflict to the Commission becomes relevant for enforcement and management only after some initial period of time. This could be explained by the existence of initial thresholds to the Commission (i.e. minimal costs) before enforcement and management become active.

In Table 2.4, we see that once we control for the effect of letters of formal notice in the Enforcement Model, the polarization coefficient turns significant only 35 weeks after the deadline has expired. At this time the hazard rate of transposition is 11.3% in the Preference Model, but only 6.6% in the Enforcement Model. However, the polarization coefficient is positive and highly significant in subsequent weeks. In addition, the effect of formal notice is also not significant in the first 35 weeks after the deadline has expired. Based on these observations we do not find support for Hypothesis 2.2b that the positive effect of conflict on transposition time is mediated by the instigation of infringement procedures by the Commission. The same holds for the effect of polarization in the Full Model.

Table 2.3 shows that instigating a letter of formal notice had a time-dependent effect on member states' transposition performance. The estimates in Table 2.4 show that letters of formal notice do not affect member states' transposition performance in the first weeks after the deadline has expired. However, 35 weeks after the deadline the hazard of transposition is 2.13 times higher for member states that have been officially warned by the Commission than for those without formal notifications until this week.¹¹ Based on these results, we find support for Hypothesis 2.2a.

¹¹ In the Enforcement Model, the hazard ratio of letters of formal notice 35 weeks after the deadline is equal to $\exp(.757)$, which is approximately 2.13.

Table 2.4 Polarization models. Weeks of transposition delay after the deadline

	12 weeks	22 weeks	35 weeks	52 weeks	75 weeks	120 weeks	165 weeks	210 weeks
<i>Preference model</i>								
Conflict	.071** (.033)	.091*** (.034)	.107*** (.036)	.120*** (.037)	.132*** (.038)	.148*** (.040)	.159*** (.041)	.167*** (.042)
Commission disagreement	-.011 (.008)	-.013 (.009)	-.016* (.009)	-.017* (.009)	-.019* (.010)	-.021** (.010)	-.023** (.011)	-.024** (.011)
<i>Enforcement model</i>								
Conflict	.041 (.032)	.054 (.033)	.064* (.035)	.072** (.037)	.080** (.038)	.090** (.040)	.097** (.042)	.102** (.043)
Formal notice	.013 (.281)	.435 (.274)	.757** (.294)	1.032*** (.325)	1.287*** (.363)	1.614*** (.419)	1.835*** (.462)	2.003*** (.495)
Commission disagreement	-.013* (.008)	-.017** (.008)	-.019** (.009)	-.021** (.009)	-.023** (.009)	-.026*** (.010)	-.028*** (.010)	-.029*** (.011)
<i>Full model</i>								
Conflict	.044 (.029)	.056* (.031)	.065** (.032)	.073** (.034)	.080** (.036)	.089** (.038)	.095** (.040)	.100** (.041)
Formal notice	.174 (.285)	.648** (.281)	1.010*** (.304)	1.320*** (.338)	1.607*** (.378)	1.974*** (.437)	2.224*** (.481)	2.412*** (.516)
Commission disagreement	-.019** (.008)	-.023*** (.008)	-.027*** (.009)	-.030*** (.010)	-.032*** (.010)	-.036*** (.011)	-.039*** (.011)	-.041*** (.012)
Conflict * Discretion	-.004** (.002)	-.005** (.002)	-.006** (.002)	-.007*** (.003)	-.007*** (.003)	-.008*** (.003)	-.009*** (.003)	-.009*** (.003)

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However, from Table 2.4 we can conclude that the effect of formal notice increases as time passes. This result suggests the operation of additional factors, such as the decision of the Commission to continue the infringement procedures against member states.

The discretion ratio weakens the positive effect of conflict on the hazard of transposition over time, as can be seen in Table 2.3. The results reported in Table 2.4 generally support this finding. The negative effect of the interaction term turns significant after the deadline has expired. 12 weeks after the deadline has passed the positive effect of polarization on the hazard of transposition decreases by 0.5% if directives grant more discretionary authority to member states. Thus, Hypothesis 2.4 is supported based on the analysis of time-dependent effects.

Finally, Table 2.4 offers support that the negative effect of the Commission's disagreement with a directive on the hazard of transposition increases over time. In the Preference Model, the effect turns significant again in the 35th week after the deadline. In this period, a unit increase in the Commission's disagreement with a directive decreases the hazard ratio of transposition by 1.6%. In all models, the effect becomes stronger as time passes. One interpretation of this result is that the Commission is impartial in enforcing compliance before the deadline has expired. However, when member states continue disobeying the EU directives, the Commission starts to discriminate between more preferred and less preferred policies. A different interpretation of this result is that, as time passes, member states learn that they can get away with further delaying transposition of directives, with which the Commission does not agree.

2.5.3 Why frailty models?

All three models show a significant shared frailty factor, implying that there is a dependency in the observations based on common unobserved directive-level characteristics. Table 2.5 shows the estimates of the time-dependent effects in the Full Model if the shared frailty factor is excluded from the analysis.

The most important difference from the results in Table 2.4 pertains to the effect of conflict. More precisely, the polarization coefficient is not significant once we control for the effect of formal notice, which contradicts

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the results in Table 2.4. In addition, if we disregard the dependency in the observations, letters of formal notice start having a significant effect much earlier. The results are similar, even if we simply adjust the standard errors for clustering. However, shared frailty models are more appropriate to account for the dependency in the observations than standard clustering techniques, since the former directly model the correlation in the transposition times of member states. Unlike standard techniques (such as adjusting the standard errors), the shared frailty factor explains the dependence in the sense that had we known the frailty, the events would be independent (Wienke, 2003: 2).

In sum, quantitative studies on EU implementation should account for the dependency of the observations that emerges when several member states implement the same directives. Failing to do so, might lead to faulty inferences about the effects of a few or more of the independent variables.

Table 2.5 Polarization models without the shared frailty factor: Weeks of transposition delay after the deadline

	12 weeks	22 weeks	35 weeks	52 weeks	75 weeks	120 weeks	165 weeks	210 weeks
<i>Full model</i>								
Conflict	.020 (.016)	.026 (.019)	.030 (.021)	.034 (.022)	.038 (.025)	.042 (.027)	.045 (.029)	.048 (.031)
Formal notice (TVC)	.663*** (.251)	1.206*** (.237)	1.621*** (.254)	1.976*** (.285)	2.304*** (.323)	2.725*** (.380)	3.011*** (.423)	3.227*** (.458)
Commission disagreement	-.023*** (.004)	-.029*** (.005)	-.033*** (.006)	-.037*** (.007)	-.041*** (.008)	-.045*** (.008)	-.048*** (.009)	-.051*** (.009)
Conflict * Discretion	-.006*** (.001)	-.007*** (.001)	-.008*** (.002)	-.009*** (.002)	-.009*** (.002)	-.010*** (.002)	-.011*** (.002)	-.011*** (.003)

2.6 Conclusion and discussion

This study contributed in four different aspects to the existing literature on the transposition of EU legislation. First, we introduced conflict among member states in the Council of the EU as a factor affecting delays in transposition. Based on theories of the enforcement and management of EU law, we predicted that conflict speeds up the transposition process of EU directives. Second, based on data on the policy positions of member states, we were able to construct two measures of conflict: heterogeneity and policy polarization. Third, we accounted for the multilevel structure of the transposition process by controlling for the *shared frailty* in the data on the transposition times of member states. Finally, we controlled for time-dependent effects in our analysis and arrived at precise estimates for the changes over time.

The first and most important result of our study is that preference-based conflict in the Council affects delays in transposition. Both heterogeneity and polarization have significant positive effects on the transposition performance of member states. We also found that conflict starts affecting transposition a couple of months after the deadline, with an increasing effect over time.

The finding that conflict in the Council leads to shorter delays in the transposition of EU directives is in accordance with arguments about the importance of enforcement and management for the implementation of EU legislation. (Tallberg, 2003). In this study, we tried to account for the Commission's monitoring intensity by controlling for the instigation of formal letters by the Commission against member states. We found that member states are more likely to transpose EU directives after receiving a letter of formal notice. However, we did not find support for the prediction that infringement procedures mediate the positive effect of conflict on transposition time. Thus, if the effect of conflict could be explained by the Commission's activities to solve compliance problems, discussions between member states and the Commission must operate at a more informal level than infringement procedures capture. We also found that the positive effect of conflict on transposition decreases over time, the more discretion is granted to member states in the implementation stage. One interpretation of this finding is that the Commission is not always capable of responding

effectively to signals of potential non-complaint behaviour by member states, especially if directives grant high discretion to member states.

The second important result of this study concerns the significant time-dependent effects in our analysis. We observed that the proportionality assumption is not met for a number of our independent variables, indicating that their effects on transposition change over time. Indeed, although the analyses showed non-significant time-constant effects, these effects turned out to be highly significant over time. Thus, the results of this study raise important theoretical questions regarding the dynamics of independent effects. More precisely, we need specific causal theories that explain how effects change over time and which mechanisms are responsible for triggering these changes (König, 2008).

Finally, we showed that the directive-level shared frailty factor has a significant variance for all analyses. The significant frailty factor on the directive level is in line with arguments from policy analysis and the implementation literature that cost implications vary significantly across policies (Lowi, 1964). The aim of this study was not to find all possible directive-level characteristics that influence transposition, and future research on member states' transposition performance could further explore variables at the directive level.

Owing to some data limitations, our results must be qualified. Although we controlled for the effect of infringement procedures, we could not take full account of other more appropriate measures of the enforcement and management of EU legislation, such as informal dialogues between the Commission and member states. It is the task for future research to find more adequate operationalizations for monitoring and managing compliance. Another limitation is that the dependent variable in this study captures delays only until the first transposition measure adopted by a member state. A more sophisticated operationalization of the dependent variable would be to measure delays until the first 'correct' measure of transposition (Falkner et al., 2005). However, information on the correct transposition measures of 15 member states for 23 directives would require an intensive and time-consuming data collection. It is a challenge for future research to extend the study of transposition with data on actual deviations and performance of member states.

Chapter 3

Escalating the Pressure to Comply: The Occurrence and Resolution of Infringement Cases¹²

¹² Zhelyazkova, A. (2011) 'Escalating the Pressure to Comply: The Occurrence and Resolution of Infringement Cases', under review.

3.1 Introduction

The EU policy-making process does not end with the formal adoption of a law. Member-state governments are obliged to incorporate and apply the EU policies correctly and on time. Failure to do so could result in the Commission's instigation of infringement procedures, which consist of three formal consecutive stages: (1) a letter of formal notice, (2) a reasoned opinion, and (3) a referral to the European Court of Justice (ECJ).

The Commission's infringement procedures are one of the most commonly used indicators for non-compliance in quantitative research on the implementation of EU law (Kaeding, 2006; Mastenbroek, 2005). Most scholars focus on the instigation of either reasoned opinions or ECJ referrals to describe implementation failures by member states (Mbaye, 2001; Perkins and Neumeyer, 2007; Thomson et al., 2007). Recent studies have focused on explaining which factors drive the resolution of implementation problems at earlier stages of the infringement procedure (Jensen, 2007).

The use of infringement procedures as an indicator of non-compliance by member states has been criticised (Börzel, 2001). The criticism rests on three arguments. First, infringements refer only to cases of observed non-compliance, which rely extensively on the monitoring capacity and the policy objectives of the Commission (Börzel et al., 2005). As a result, infringement cases present an incomplete picture of the overall implementation deficit in the EU and are thus rather imperfect proxies for member states' compliance with the EU policy requirements. Instead, studies suggest that infringement procedures should be viewed from the perspective of EU institutions, in which the capacities and the policy preferences of the enforcement agency play an important role in the decision to initiate and pursue cases (Steunenberg, 2010).

Second, studies overlook the fact that the costs of non-compliance with EU law vary at different infringement stages. Receiving a letter of formal notice from the Commission confers no costs to governments, as the letter is only intended to inform the Commission of a member state's implementation progress rather than to sanction behaviour. This is not the case at later stages of the procedure, when a member state is faced with the threat of losing a case at the ECJ. In other words, the threat of the Commission's continuation of infringement procedures increases the costs

of member states' defection from international agreements and is expected to have a positive influence on compliance in the long term. Based on the assumption that the pressure to resolve implementation problems varies across different infringement stages, it is logical to expect that the causes of the effective resolution of implementation issues differ depending on the infringement stage.

Third, analyses of member states' non-compliance do not generally take into account that infringement cases combine different types of implementation problems. An infringement case may be the outcome of a member state's failure to adopt and notify the Commission of national legislation that meets the goals of an EU directive before a specified deadline (delayed transposition). Even if a member state claims to have transposed an EU directive on time, its national legislation may incorrectly and incompletely transpose the EU law, or local authorities may apply the law incorrectly (Börzel, 2001). The combination of different forms of non-compliance enables a comparison of the various reasons for initiating and pursuing infringement cases and the possible causes of implementation issues.

The present study contributes to current research on EU enforcement and compliance with EU law by combining both the perspective on infringement procedures as (a) an indicator for non-compliance and (b) the Commission's enforcement tool to prevent persistent violation of EU law by member states. On the one hand, infringement cases reflect member states' failure to meet the EU requirements. The Commission does not open or pursue infringement cases against member states that have complied with their EU obligations. On the other hand, infringement procedures increase the costs of non-compliance and thus could affect a government's willingness to resolve implementation problems. In addition, conflict in the Council is expected to further increase the costs of non-compliance and result in the early resolution of implementation problems by member states. In contrast, national elections that coincide with infringement procedures increase the probability that infringements will escalate to later stages. The present study also tests whether predictions hold equally for infringement procedures as a result of member states' delayed and incorrect implementation of EU directives.

Finally, this study contributes to the literature on EU compliance by controlling for two types of dependency in the infringement data. First, the method of analysis takes into account that the escalation of the infringement cases to later stages is conditioned upon the Commission opening infringement cases. Dismissing the nested structure of the different infringement categories could bias inferences regarding the escalation from earlier to later stages of the infringement procedure. Second, the analysis also accounts for the dependence in the observations at the level of the directive and the member state. Thus, the present study improves upon the existing literature, which takes little account of the nested structure of infringement data.

3.2 Management, enforcement, and the infringement procedure

Member states are expected to react to both external (international) and internal (domestic) pressures to resolve compliance problems. Regarding external pressure, scholars generally refer to two theoretical approaches, *management* and *enforcement*, to explain states' defection from international agreements and to suggest possible solutions (Tallberg, 2003).

The *management* approach explains non-compliance in terms of states' capacity limitations and the complexity and ambiguity of international agreements. Capacity limitations can arise when a government lacks the necessary resources or cannot garner sufficient bureaucratic support to enforce an international agreement (Börzel et al., 2005; Tallberg, 2003). Furthermore, complex and ambiguous laws may be difficult to translate into member states' policy context (Chayes and Chayes, 1995). As a result, based on the management perspective, compliance problems are best addressed through problem-solving strategies, rule interpretation, and dispute settlement (Tallberg, 2003).

Unlike the management approach, proponents of the *enforcement* approach argue that states voluntarily choose to defect from international agreements if the perceived benefits exceed the costs of non-compliance (Downs et al., 1996; Fearon, 1998). The benefits of non-compliance can either be associated with alternative priorities (given that compliance entails the allocation of resources) or with policy preferences that differ from the contents of the adopted agreements (i.e., member states' incentives to

deviate). The costs of non-compliance refer to the probability of detection and the threat of sanctions that may be imposed on violators. Based on the enforcement approach, compliance problems can be remedied by increasing the costs of violations through monitoring and a credible threat of sanctions (Downs et al., 1996; Tallberg, 2003). This approach implies that the probability of breaches of international agreements should decrease as the costs of non-compliance increase.

Studies of non-compliance with EU law generally argue that the enforcement and management approaches in an EU context should be viewed as complementary, mutually reinforcing explanations and means for resolving compliance problems rather than as competing theories (Börzel et al., 2010; Jönsson and Tallberg, 1998; Tallberg, 2003). The first stages of the infringement procedure are usually designed to exclude those cases that have arisen due to legal uncertainty (Börzel et al., 2005). Within the formal framework of the infringement procedure, the Commission's enforcement increases the pressure on member states, making compliance an increasingly attractive option. Thus, the infringement procedure is viewed as a 'sanctioning ladder' that aims to induce member states' compliance by increasing the costs of violations.

The costs associated with the infringement escalation relate to a government's reputational loss and the threat of losing a case referred to the ECJ. Persistent non-compliance with EU law raises doubts about the credibility of the government's commitment to EU objectives. Infringement procedures signal to national legislators the possibility of reputational loss due to their continued non-compliance with the EU obligations, as member states' violations become more internationally visible with each consecutive stage. The procedures' effect is strengthened by official Commission reports regarding suspected and established infringements as well as public announcements of the continuation of infringement cases. Furthermore, once the Commission has decided to refer a member state to the ECJ, the threat of sanctions becomes imminent. Given that the Commission wins a majority of its court cases (Jönsson and Tallberg, 1998), member states are likely to anticipate the costs of litigation and resolve their implementation issues before reaching the ECJ referral stage.

3.2.1 Government priorities and incentives to deviate

Based on the enforcement approach, non-compliance is the outcome of member states' expectations of the costs and benefits of deviating from the EU legislation. Provided that non-compliance is voluntary, coercive enforcement is expected to increase the costs of defection and compel member states to rectify their behaviour (Downs et al., 1996). The escalation of infringement procedures raises the costs of member states' non-compliance with EU law. Enforcement theory would then predict that the benefits associated with persistent violations are likely to be lower than the risk of losing a case referred to the ECJ and the potential damage to a country's reputation as a reliable EU partner. As a result, the threat of escalation is likely to be more effective in cases in which member states voluntarily choose to deviate from their EU obligations than in cases in which member states fail to comply with EU directives because of their capacity limitations (i.e., involuntary non-compliance). In other words, the effect of the expected benefits of non-compliance depends upon the stage of the infringement procedure. As argued in the previous section, the benefits of non-compliance are associated with the priority that governments place on the implementation of EU directives and their incentives to deviate from the adopted EU policy. Thus, member states that place a low priority on the implementation of EU directives and disagree with the contents of the adopted decisions are expected to violate the EU law. Based on the assumption that the costs of non-compliance increase with each consecutive stage of the infringement procedure, the effect of member states' priorities and incentives is expected to be weaker at later stages of the process.

Hypothesis 3.1a: Member states that have diverging policy priorities and incentives to deviate from particular EU directives are more likely to be subject to Commission infringement procedure.

Hypothesis 3.1b: The positive effect of a member state's diverging policy priorities and incentives to deviate from particular directives decreases in later stages of the infringement procedure.

To understand member states' priorities and incentives to deviate from EU directives, this study analyses two factors: government support for the EU and a member state representative's disagreement with the adopted policy during the decision-making process at the Council of the EU. Government support for the EU is assumed to be related to the priority that governments place on implementing EU legislation. Thus, pro-European governments are more likely to exert pressure on national ministries or other relevant authorities to transpose the EU directives correctly and on time than governments with negative attitudes towards the EU. Furthermore, the extent to which a member state has attained its goals during the Council negotiations is likely to influence its incentives to deviate from the EU requirements at the implementation stage. In particular, member states whose policy preferences differ from the adopted decision outcome are likely to have incentives to deviate from their EU obligations *ex post* (Falkner et al., 2004; Thomson, 2010).

3.2.2 Conflict in the Council of the EU

The benefits and costs of non-compliance are also affected by directive-level factors, such as the level of conflict between member states during the decision-making process at the Council of the EU. EU directives are often adopted after extensive debate among member states' representatives during the Council meetings. The reason for such debate is that member states have different existing domestic policy practices and thus diverge in their policy preferences (Thomson et al., 2006; Thomson, 2010). As a result, member states signal their policy preferences during the Council meetings in an attempt to make the Commission attentive to their different policy objectives and incorporate these when drafting the proposals (Cini, 2003; Jordan, 1999). Heterogeneity in member states' policy preferences also signals the possibility of problems during national implementation. Given that uneven practices could lead to negative externalities, member states are likely to commit to the implementation of controversial directives if the expected costs of non-compliance outweigh the benefits (Franchino, 2007, Majone, 2001). In addition, given that divergent practices could defeat the purpose of adopting an EU law, the Commission is more likely to demand

compliance with controversial policies by monitoring and increasing the pressure on member states through the use of infringement procedures.

In Chapter 2, we saw that conflict in the Council has an increasingly positive effect on transposition after the implementation deadline has expired (Zhelyazkova and Torenvlied, 2009). While we can explain this result based on the Commission enforcement strategies, it is difficult to determine in which week of the transposition process higher levels of conflict begin to result in greater compliance with EU law. For the stages of the infringement process, by contrast, we have stronger theoretical grounds because they are specific events that convey the Commission's determination to increase the pressure for compliance. The present study tests the assumption that member states respond to Commission monitoring and the expected costs of the escalation of infringement cases. We thus posit the following hypotheses:

Hypothesis 3.2a: Directives adopted under higher levels of conflict during the Council meetings are more likely to result in infringement cases.

Hypothesis 3.2b: The positive effect of conflict in the Council on infringement cases decreases with later stages of the infringement procedure.

3.2.3 Domestic pressures: national elections and infringement cases

The success of the infringement procedures is not unconditional. For example, the probability of infringement escalation is less likely to be effective against those implementation issues that result from capacity limitations or unclear and complex rules. Particular domestic events are also likely to influence the success of infringement procedures. One such event is the timing of national elections. Past studies have identified a link between national general elections and transposition delays (Kaeding, 2008; Steunenbergh and Rhinard, 2010). The primary explanation for this phenomenon is that national elections act as disturbances in day-to-day policy-making because they divert the attention of politicians and administrators towards the electoral campaign. While the effect of national elections has generally been used to explain delays in transposition, it could

be applied to infringement cases, especially because the majority of infringement cases are instigated by member states' failure to notify the Commission of national transposition measures in a timely manner (Börzel, 2001).

In a recent study, Kaeding (2008) distinguishes between national elections that fall at the beginning and the end of the implementation process in a member state. His main argument is that elections that are scheduled near the transposition deadline increase the costs of late implementation because national measures that have not been implemented within the parliamentary term are again tabled in the new legislative term. As a result, politicians and administrators face the potential threat of infringement cases due to a transposition delay. Being aware of these infringement costs, member states are more likely to complete the transposition process at its early stages.

Hypothesis 3.3a: National elections scheduled near the deadline for the transposition period decrease the likelihood of infringement cases.

National authorities are less likely to experience domestic pressure to implement the EU requirements when national elections are scheduled at the beginning of the transposition process. The threat of infringements due to the non-transposition of EU directives is not imminent, and resources will be allocated to priorities other than EU compliance (Kaeding, 2008). In addition, national elections that take place soon after the adoption of the EU policy could cause problems of discontinuity because the new administration may have different policy objectives and lack information regarding the implementation process (König, 2007). This situation could lead to a delayed transposition and implementation measures that are inconsistent with the EU directive.

Hypothesis 3.3b: National elections scheduled at the beginning of the transposition period increase the likelihood of infringement cases.

Furthermore, infringement procedures may coincide with national general elections. Studies have not investigated the possibility that elections

coinciding with the infringement cases influence the probability of escalation in later stages. In this case, it is expected that elections diminish the effect of infringement procedures as an enforcement tool to induce member states' compliance. In particular, infringement cases are less likely to be resolved early because officials may be distracted by their political party's re-election efforts. Given the limited time that governments are given to respond to letters of formal notice and reasoned opinions, general elections are likely to impede the ability of national officials to resolve infringements before they escalate to later stages.

Hypothesis 3.3c: National elections that coincide with infringement cases increase the likelihood of infringement escalation to later stages.

3.2.4 Alternative explanations for infringement cases

Given that the instigation and escalation of infringement cases are the result of member states' non-compliance with EU laws, it is important to account for additional explanations for compliance problems. Thus, the present study controls for member states' capacity limitations to comply with the EU laws, the complexity of EU laws, as well as the Commission's policy preferences regarding a particular EU directive.

Member states with a greater bureaucratic capacity are less likely to encounter problems during the implementation process and thus experience fewer infringement cases. In a similar way, complex policies are likely to constrain the national implementation efforts and, consequently, lead to more infringement problems. It is also important to note that the effects of capacity-based factors on compliance are not expected to be moderated by the enforcement pressure exerted by the Commission. As a result, their influence on compliance should not vary depending on the stage of the infringement procedure.

Compliance problems also arise because enforcing agents have diverging policy priorities from the decision-makers. In the EU context, the Commission is the primary supranational enforcement agent (Tallberg, 2003; Thomson et al., 2007). Although infringement cases are automatically initiated when national authorities exceed the time allotted for the transposition of a directive, the Commission enjoys considerable discretion

over whether to initiate infringement cases against instances of the incorrect implementation of EU legislation and to pursue such cases to later stages (Nugent, 2001; Steunenberg, 2010). Thus, the extent to which the Commission demands compliance with a policy should also depend on whether it is in favour of a policy outcome, given that referring a member state to the ECJ entails litigation costs.

However, precise predictions for the effect of the Commission's disagreement with a policy on the initiation and escalation of infringement cases are difficult to derive. The reason is that enforcement and non-compliance cannot be disentangled in the infringement procedures. A lack of infringement cases may be the result of the Commission not monitoring compliance problems or member states' actual compliance with their EU requirements. In a similar vein, the early resolution of infringements could imply that a member state has remedied its behaviour or that Commission is not willing to pursue compliance with EU directives. As a result, different assumptions regarding the nature of the infringement procedure (an enforcement tool or an outcome of non-compliance) may lead to contrasting predictions. On the one hand, it might be assumed that if the Commission disagrees with the content of a directive, it is less likely to allocate resources to monitoring compliance problems (i.e., with less enforcement, fewer infringement cases will be opened). On the other hand, the Commission's disagreement with a policy could be (mis-)interpreted to mean that violations will not be sanctioned, which could increase the likelihood of member states' non-compliance and result in more infringement cases.

Nevertheless, given the crucial role that the Commission plays in the infringement procedure, it is important to incorporate its policy preferences into the analysis. Furthermore, the effect of the Commission's disagreement with a policy is expected to vary across different stages of the infringement procedure. More precisely, a letter of formal notice is something of an automated response to a country's non-notification of its transposition measures. By contrast, the decision to refer a member state to the ECJ implies litigation costs, which the Commission may not be willing to bear if its policy preferences diverge from the adopted decision.

3.3 Research design

The above hypotheses are tested using a data set that was constructed from several sources. First, information on infringement procedures was obtained from the *Annual Reports on Monitoring and Application of EU Law* published in the Commission databases. In addition, the EU Commission press releases were consulted to verify whether any infringement cases went unreported in the Commission databases. Based on the Commission reports and the press releases, I identified the stage of each infringement case and the member state against which it was issued.

Second, data regarding the policy preferences of the Commission and the 15 member states were provided by the ‘Decision making in the European Union’ dataset (hereafter DEU).¹³ The analysis is confined to proposals for directives, which include a variety of policy areas, such as the internal market, economic and financial affairs, agriculture, transport, justice and home affairs, employment, energy, and health. After a close reading of the directives’ content, several directives were excluded from the analysis because they did not require any action from member states but rather extended the validity of previous EU legislation. In total, information on 21 directives and 14 member states¹⁴ is available for analysis.

3.3.1 Dependent variable: infringement stage

The dependent variable in the present study is the ‘stage’ at which an infringement case closed, based on the EU Commission annual reports and press releases. In addition, a distinction is made between the instigation and the escalation of the Commission’s infringement cases by incorporating information from four categories: no infringement, a letter of formal notice, a reasoned opinion, and referral to the ECJ.

An important limitation of the Commission databases is that they rarely report cases of formal notice regarding the incorrect implementation of EU directives. Therefore, two separate analyses were conducted. The first analysis tests the effects of the independent variables on infringement cases that were initiated as a result of member states’ delayed transposition. For

¹³ See Thomson, et al. (2006) for further information on the selection criteria for the DEU data set.

¹⁴ Luxembourg has been excluded from the analysis due to missing information regarding one key independent variable: government support for the EU.

these cases, the Commission regularly reports information on the letters of formal notice, and it is thus possible to include them in the analysis. The second analysis covers all infringement procedures, and the dependent variable was computed based on information from three categories: no infringements, reasoned opinion and referral to the ECJ.

Figure 3.1 (a and b) displays the number of cases closed at a particular category of the dependent variable in both analyses. It shows that less than half of the cases were transposed on time (129 out of a total 290 cases), while the remainder experienced a delay during the national implementation process, which led to the instigation of infringement cases (Figure 3.1a). In addition, nearly half of the cases that received a reasoned opinion against delayed transposition were referred to the ECJ (42 cases out of 85 cases with a reasoned opinion).

Figure 3.1a Distribution of infringement cases across different categories: delayed transposition

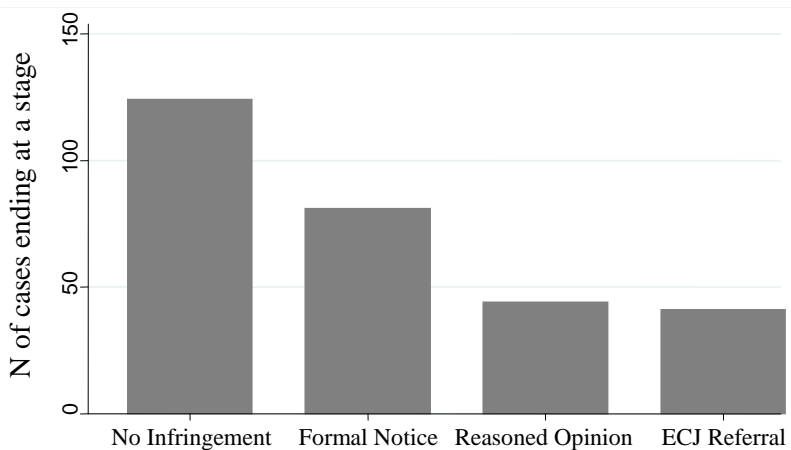
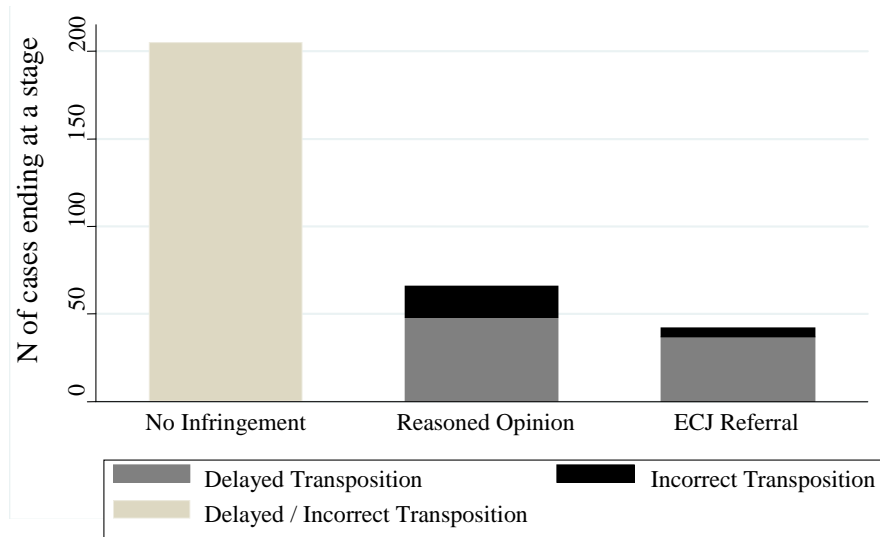


Figure 3.1 also shows that relatively few infringement cases were opened due to member states' incorrect transposition of EU directives. Of the 61 cases that concluded at the stage of reasoned opinion, only 18 were due to incorrect transposition and only 5 out of 47 cases were referred to the ECJ because the Commission discovered errors in the national transposition measures (see Figure 3.1b). Due to the small number of cases opened as a result of incorrect transposition (23 out of 313), it is more appropriate to

combine the analyses of infringement escalation for both delayed and incorrect transposition.

Figure 3.1b Distribution of infringement cases across different categories: all infringements



3.3.2 Measurement of independent variables

Information on government support for the EU was obtained from the Chapel Hill expert survey on party positions (Marks et al., 2006). The advantage of the Chapel Hill data set is that it contains information about party positions and parties in government for different time periods. Thus, the government's support for the EU varies across different infringement stages depending on the parties that were in power at the time a member state entered a particular stage of the infringement procedure. For coalition governments, the positions were calculated by weighting the score for each party participating in the government by its relative share of votes and adding these scores to arrive at the average government position.

The variable for a *member state's incentive to deviate* is computed based on the DEU data set of member states representatives' policy positions in the Council of the EU regarding particular issues (see Thomson et al., 2006 for a full discussion and illustration of the construction of issue scales). It is

measured as the absolute distance between the policy position of a member state and the decision outcome for a particular issue. Because the DEU directives often include more than one issue, I took the maximal value of a member state's incentive for the issues in a particular directive (Thomson et al., 2007).

The measure of conflict in the Council is at the directive level and is also based on information from the DEU data set. This study employs the standard deviation in member states' policy preferences as a measure of conflict (Zhelyazkova and Torenvlied, 2009). In addition, the measure is weighted by the member states' Shapley Shubik Index (SSI) score (Shapley and Shubik, 1954; Thomson and Stokman, 2003) to account for member states' differences in power during the decision-making process (under Qualified Majority Voting or QMV). To obtain information regarding the timing of national elections, I consulted the ParlGov database (Döring and Manow, 2010). Similar to the study by Kaeding (2008), the occurrence of an election was coded as 1 or otherwise as 0. The measure of elections coinciding with the instigation or the escalation of an infringement case also varies across different stages of the procedure. While most countries were affected by elections during the transposition of at least one of the directives in the study, only 6% were scheduled at the beginning of the transposition process, 7% fell close to a directive's transposition deadline and 4% coincided with the infringement stage. In one case, a member state experienced general elections both at the beginning of the transposition process and after the Commission had initiated the infringement procedure.

3.3.3 Controls

This study also considers the fact that non-compliance with EU laws may be involuntary. For example, the bureaucratic efficiency of a country is one factor often used to account for the general capacity of member states to comply with EU legislation. The measure was developed by World Bank researchers and includes a number of important government characteristics, such as the quality of public and civil services in policy formation and implementation, the degree of civil servants' independence from political pressures, etc. (Kaufmann et al., 2006). Policy complexity is measured by the number of recitals in a directive. Recitals precede the body of a directive

and provide the reasons motivating each provision (Kaeding, 2006). A high number of recitals indicates that a directive has an extensive scope of requirements and addresses a great number of important issues. In addition, recitals often include those issues that could not be resolved during the decision-making process. As a result, a high number of recitals also relates to significant political controversy over a directive, which may affect the difficulty of interpreting and transposing a directive (Steunenberg and Kaeding, 2009). Information on the Commission's disagreement with the outcome of decision-making is also obtained from Thomson et al. (2006). The level of disagreement is measured at the directive level as the average distance between the Commission position on an issue and the policy outcome (Thomson et al., 2007).

Finally, the analysis of all infringement cases includes a dummy variable indicating the reason for their instigation. This variable is coded as 1 for infringements initiated in response to a member state's incorrect implementation of an EU directive and 0 if the reason for an infringement case was delayed transposition. The majority of infringement cases relate to the delayed transposition of EU directives (89%).

3.4 Method of analysis

This study applies a *sequential odds model* to analyse the occurrence and escalation of infringement cases from earlier to later stages of the procedure. This statistical method is more appropriate for the purposes of this study than ordered logit regression, given the dependency in the different categories of the infringement procedure. More precisely, letters of formal notice are sent only if a member state is suspected of violating an EU law, and reasoned opinions cannot be initiated if the Commission has not previously sent a letter of formal notice to a member state. In a similar way, the Commission will refer a member state to the ECJ only if the country did not comply with the reasoned opinion regarding the implementation of a particular directive. Furthermore, a standard ordered logit model assumes that the odds of compliance are proportional across the different stages of the infringement procedure, and hence the effects of the independent variables do not vary across infringement stages. In contrast, the statistical technique employed in this study is useful in analysing sequential processes

that develop in stages, where the causes for transition may themselves vary between the stages. The model assumes a natural baseline category (no infringements), and the movement from one category to another denotes a shift from one stage to the next (Agresti, 2010; McCullagh, 1980).

Another particular advantage of the statistical model is that it can be easily generalised to account for the multi-level structure of the implementation data. In particular, member states' implementation outcomes are nested within both member states and directives because (1) different member states are implementing the same EU directives and (2) different EU directives are being implemented by the same member states. This nesting implies that an appropriate statistical model should control for the variation in member states' compliance created by the crossing of two random factors (directives and member states) (Raudenbush and Bryk, 2002).

To apply this model, the data set is restructured such that the unit of analysis is the transition from an earlier to a later stage of the infringement procedure by a member state regarding a particular directive (i.e., member state*directive*transition).¹⁵ The dependent variable is coded 1 if a case ended at a particular stage. If a member state continues to the next stage, the dependent variable is assigned the value of 0. In other words, the dependent variable is transformed into a simple binary variable that assumes different values (0 or 1) depending on whether a transition has occurred. If a member state has resolved its infringement issue at an earlier stage, the subsequent infringement stages have missing values, indicating that a transition is not possible. Table 3.1 illustrates how the dependent variable is coded depending upon whether an infringement case concluded or advanced to the next stage.¹⁶

¹⁵ Transition = infringement category – 1. Thus, if the analysis is applied to four infringement categories (no infringement, formal notice, reasoned opinion and, referral to the ECJ), member states can make at most three transitions regarding a particular directive.

¹⁶ The number of cases is higher for infringements arising from transportation delays because the information regarding cases that concluded at the stage of formal notice is only available for cases of delayed transposition (member state*directive*3 for delayed transposition vs. member state*directive*2 for all infringement reasons).

Table 3.1 A hypothetical example representing the data structure

Directive	Country	Stage	Resolution	Possible outcomes
1	at	1	1	<i>Outcome 1:</i> No infringement
1	at	2	.	
1	at	3	.	
1	be	1	0	<i>Outcome 2:</i> A case stops at a <i>formal notice</i>
1	be	2	1	
1	be	3	.	
1	de	1	0	<i>Outcome 3:</i> A case stops at a <i>reasoned opinion</i>
1	de	2	0	
1	de	3	1	
1	it	1	0	<i>Outcome 4:</i> A case is referred to the ECJ
1	it	2	0	
1	it	3	0	

3.5 Results

Before I present the results of the analysis, it is important to note that the parameter estimates represent the likelihood of a case concluding at a particular stage of the infringement procedure (including no infringements), given that a member state has reached that stage. Thus, a negative coefficient implies that a member state implementing a particular directive is more likely to transition to a later stage of the procedure. The model also takes into account that the odds of transition may vary across different infringement stages by directly incorporating the specific stage into the analysis.

Table 3.2 presents the *baseline models* describing the likelihood of a member state's transition from an earlier to a later stage of the infringement procedure. The models control for variation across different infringement stages as well as variation at the directive and member-state levels. The results indicate that the likelihood of a case concluding at a particular category of the dependent variable differs across infringement stages. Thus, cases initiated because of transposition delays are more likely to end at the stage of formal notice and reasoned opinion. However, member states are less likely to transition again after receiving a reasoned opinion by the Commission. When applied to both types of infringement cases (delayed

and incorrect transposition), there is no significant variation across the different stages regarding the likelihood of infringement escalation.

The baseline model also presents the variance components at both the directive and the member-state levels. Both analyses show that there is a significant variation between EU directives and between member states in terms of the likelihood of maintaining compliance or resolving implementation problems.

Table 3.2 Sequential odds analysis (baseline models)

<i>Variable</i>	Delayed Transposition		All infringements	
	Coef.	(S.E)	Coef.	(S.E)
<i>Infringement stages</i>				
FN	.901***	(.236)	---	
RO	1.362***	(.306)	.381	(.271)
<i>Random effects</i>				
σ^2 (Directive)	2.007	(.886)	1.964	(.929)
σ^2 . (Member state)	.157	(.123)	.313	(.244)
Wald χ^2	24.40***		1.98	
N	541		421	

Notes: FN = Formal Notice; RO = Reasoned Opinion ***: $p < .01$, **: $p < .05$, *: $p < .10$

3.5.1 Infringement cases owing to transposition delays

Table 3.3 presents the effects of the initiation and escalation of Commission infringement procedures initiated in response to the delayed transposition of EU directives. Model 1 includes interaction terms between government support for the EU, incentives to deviate, conflict in the Council, and Commission disagreement with infringement stages to test whether the effects of these factors vary across different infringement stages. The reference category is a case in which the Commission did not initiate infringement procedure against a member state.

Model 1 of Table 3.3 shows that the effects of government support for the EU and member states' incentives to deviate on infringement resolutions do not significantly differ across infringement stages. The effects related to member states' individual perceived benefits of non-compliance with the EU directives remain insignificant, even after excluding the interaction

terms from the analysis (Model 2). Thus, Hypotheses 3.1a and 3.1b are not supported by the data analysis.

In contrast, the negative effect of conflict in the Council on the likelihood of a country maintaining compliance with EU directives significantly decreases after the Commission issues a formal notice. The positive effect is even stronger at the stage of reasoned opinion, indicating that infringement cases are less likely to escalate to ECJ referrals in instances of high levels of conflict during the Council negotiations.

Table 3.3 Sequential odds model of the initiation and resolution of infringement cases (transposition delays)

<i>Variable</i>	Model 1		Model 2		Odds Ratios
	Coef.	(S.E)	Coef.	(S.E)	
Government EU support	.205	(.237)	.023	(.164)	1.023
Government EU support*FN	-.516	(.357)	-----	-----	-----
Government EU support*RO	-.064	(.427)	-----	-----	-----
Member state incentive	-.003	(.006)	-.004	(.005)	.996
Member state incentive*FN	.001	(.009)	-----	-----	-----
Member state incentive*RO	-.007	(.011)	-----	-----	-----
Conflict	-.024	(.021)	-.022	(.020)	.978
Conflict*FN	.057***	(.020)	.058***	(.017)	1.059
Conflict*RO	.070***	(.023)	.063***	(.020)	1.065
Elections near a directive's adoption	-1.150***	(.446)	-1.147***	(.442)	.317
Elections near a directive's deadline	-.472	(.374)	-.448	(.373)	.639
Elections near infringement cases	-.953*	(.494)	-.985**	(.488)	.374

Notes: FN = Formal Notice; RO = Reasoned Opinion; ***: $p < .01$, **: $p < .05$, *: $p < .10$

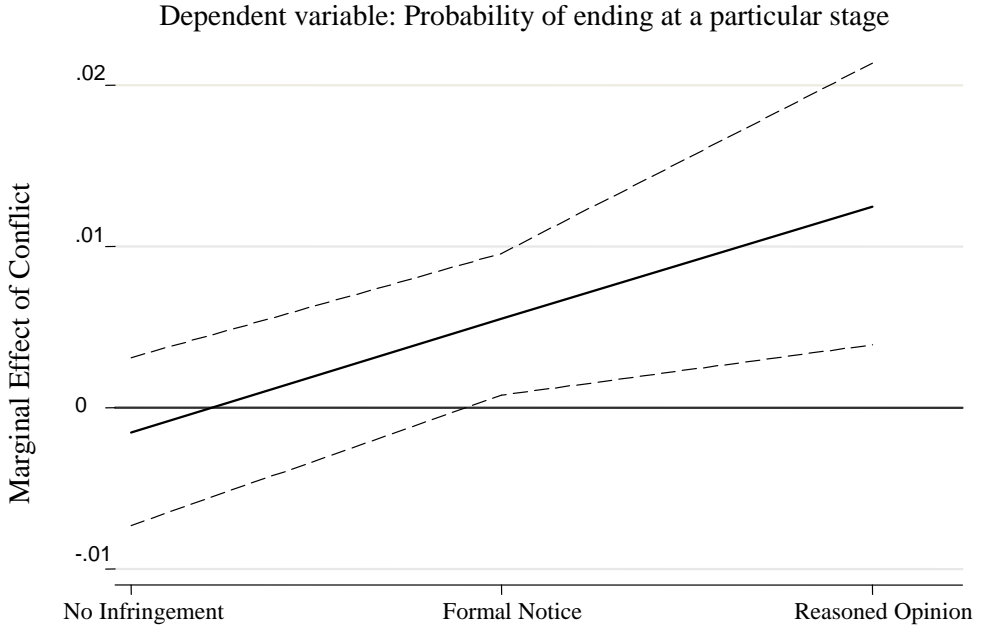
Table 3.3 Continued

<i>Variable</i>	Model 1		Model 2		Odds Ratios
	Coef.	(S.E)	Coef.	(S.E)	
Directive's complexity	-.068***	(.017)	-.067***	(.016)	.935
Bureaucratic efficiency	.769***	(.270)	.731***	(.261)	2.077
Commission disagreement	-.004	(.014)	-.004	(.014)	.996
Commission disagreement*FN	-.047***	(.015)	-.048***	(.015)	.953
Commission disagreement*RO	-.060***	(.020)	-.059***	(.019)	.943
<i>Infringement stages</i>					
FN	3.916*	(2.264)	.858	(.806)	2.358
RO	2.273	(2.686)	1.746*	(.971)	5.729
<i>Random effects</i>					
σ^2 (Directive)	1.064	(.508)	1.050	(.502)	
σ^2 (Member state)	.023	(.072)	.014	(.068)	
Wald χ^2	64.08***		62.64***		
N	541		541		

Notes: FN = Formal Notice; RO = Reasoned Opinion; ***: $p < .01$, **: $p < .05$, *: $p < .10$

The positive sign and statistical significance of the interaction terms between conflict in the Council and different infringement stages cannot be taken directly as evidence that the hypothesis is supported (Brambor et al., 2006; Norton et al., 2004). To provide a more meaningful illustration of this effect, the marginal effect of conflict in the Council was plotted against the various infringement stages in Figure 3.2. The confidence intervals (95%) around the line show the conditions under which the effect of conflict in the Council is statistically significant (i.e., whenever the upper and lower bounds of the interval are both above or below the zero line). Figure 3.2 reveals that the marginal effect of conflict is negative but not significant for the initial stage (i.e., no infringement). This finding implies that Hypothesis 3.2a is not supported by the analysis. However, higher levels of conflict in the Council increase the probability that the infringement procedures will be resolved at earlier stages. In particular, based on Figure 3.2, conflict in the Council increases the probability that infringement cases will end at the reasoned opinion stage and will not escalate to ECJ referrals. This result is in congruence with the prediction in Hypothesis 3.2b.

Figure 3.2 Marginal effect of conflict in the Council on infringement resolution at different stages.



Note: Estimations are based on a probit model controlling for clustering in directives.

Regarding the hypotheses on the timing of national general elections, the analysis finds that elections falling at the beginning of the transposition process are more likely to result in the Commission issuing an infringement case arising from delayed transposition. Thus, the analysis shows support for Hypothesis 3.3b. To assess the magnitude of the effect, the coefficient was transformed into an odds ratio. Odds ratios indicate the factor change in the odds of ending at a particular stage (relative to a transition to the next stage) due to changes in the values of an independent variable, holding all other variables constant.¹⁷ In the present study, elections scheduled at the beginning of the transposition process have a 0.32 odds of transposing an

¹⁷ Thus, given that β_x is the estimated coefficient for the effect of a variable x from the logistic regression model, for a change of δ in the values of x , the odds are expected to change by a factor of $\exp(\beta_x * \delta)$, holding all other variables constant (Long, 1997)

EU directive at an earlier stage. In percentage terms, this means that the odds of compliance are 68% smaller when national elections coincide with the beginning of the transposition process $((0.32 - 1) * 100)$. The effect of this variable does not differ across infringement stages. In contrast, Hypothesis 3.3a is not supported by the data. Elections coinciding with the deadline of the transposition process do not significantly influence the likelihood of maintaining compliance or resolving compliance problems by member states. Based on the results in Table 3.3, general national elections that coincide with the instigation of infringement cases are less likely to be resolved at an early stage, supporting Hypothesis 3.3c. The odds of ending at the stage of formal notice are approximately 63% smaller if a member state received a warning from the Commission during national general elections $((0.34 - 1) * 100)$.

The analyses in Table 3.3 also control for the effects of the capacity-based factors on the initiation and escalation of infringement cases. More precisely, a higher number of recitals significantly reduces the likelihood that compliance problems will be resolved at earlier stages of the infringement procedures. The odds of resolving infringements due to transposition delays decrease by 0.6% for each additional recital added to the body of a directive. Furthermore, member states with higher bureaucratic efficiency are less likely to have infringement cases opened against them and advance to higher infringement stages. The odds of compliance increase by 1.077 for each one-unit increase in the bureaucratic efficiency of a member state.

As expected, the effect of Commission disagreement on the likelihood of a case ending at a particular category of the dependent variable significantly varies across different infringement stages. The interaction term is negative, which means that an infringement case is more likely to escalate to higher stages of the procedure when the Commission expressed disagreement with the contents of the adopted EU directive during the Council negotiations. One possible interpretation of this finding is that member states regard the Commission's disagreement with a directive as a sign of the directive's reduced importance and thus place a lower priority on its timely transposition. Even if the Commission is not in favour of a directive's contents, the lack of notification of any transposition measure is an outward

violation of the EU law apparent to all member states and EU institutions. Under these circumstances, the Commission will be constrained by the behavioural norm and legal principle that they should be impartial and increase the pressure on member states that have not provided notification of any national measures transposing the directive.

3.5.2 Infringement procedures for delayed and incorrect transposition

Table 3.4 presents the effects of the independent variables on the likelihood of ending at an earlier infringement stage for both delayed and incorrect transposition. A new variable is added to the analysis that distinguishes between cases opened due to transposition delays or the incorrect transposition of an EU directive. Unlike the analysis in Table 3.3, the resolution of implementation problems does not vary across different stages of the procedure when the model is applied to all infringement cases. Based on the analysis in Table 3.4, the effect of a member state's incentive to deviate is negative and becomes significant under $p < 0.10$ ($p = 0.073$). Furthermore, conflict in the Council increases the likelihood of member states' early resolution of infringement cases (Model 1 of Table 3.4). However, the effect is also only significant under $p < 0.10$ ($p=0.059$) for the analysis of delayed and incorrect transposition. It is conceivable that the decrease in the statistical significance of the effect of conflict is due to differences between the two types of implementation problems: transposition delays and incorrect implementation. For example, it is generally assumed that the Commission places a higher priority on the timely transposition of EU legislation than its proper implementation in different national contexts. The rationale behind this assumption is that the Commission has limited resources to thoroughly inspect the quality of national laws (Jensen, 2007). As a result, the pressure on compliance with controversial directives may decrease.

Model 2 of Table 3.4 tests whether the effect of conflict varies for different reasons for the infringement procedure by adding an interaction term to the analysis. The results show that higher levels of conflict in the Council increase the likelihood of compliance with EU directives and the resolution of infringement cases at early stages only for those cases arising from transposition delays. The effect of conflict on compliance with EU

directives and infringement cases significantly differs for cases opened as a result of incorrect transposition

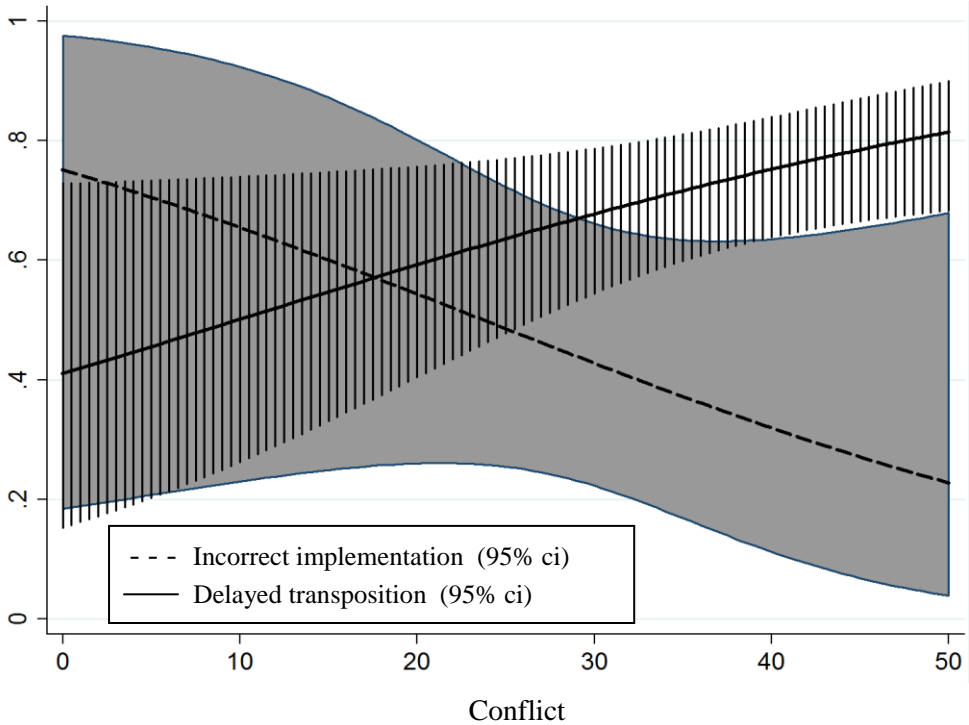
Table 3.4 Sequential odds model of the initiation and resolution of infringement cases (delayed and incorrect transposition)

<i>Variable</i>	Model 1		Model 2	
	Coef.	(S.E)	Coef.	(S.E)
Government EU support	-.035	(.204)	-.035	(.197)
Member state incentive	-.010*	(.005)	-.009*	(.005)
Conflict	.032*	(.017)	.037**	(.017)
Elections near a directive's adoption	-1.144**	(.504)	-1.129**	(.504)
Elections near a directive's deadline	-.215	(.449)	-.237	(.449)
Elections near infringement cases	-2.796**	(1.235)	-2.378*	(1.272)
Directive's complexity	-.064***	(.016)	-.066***	(.016)
Bureaucratic efficiency	.943***	(.340)	.904***	(.324)
Commission disagreement	-.026**	(.013)	-.029**	(.014)
Infr. reason	-.961**	(.422)	1.467	(1.212)
Conflict*Infr. reason			-.083**	(.040)
RO	.703**	(.290)	.684**	(.291)
<i>Random effects</i>				
σ^2 (Directive)	.671	(.367)	.707	(.383)
σ^2 (Member state)	.082	(.136)	.052	(.124)
Wald χ^2	38.64***		40.10***	
N	421		421	

Notes: RO = Reasoned Opinion; ***: $p < .01$, **: $p < .05$, *: $p < .1$

Figure 3.3 plots the predicted probabilities of member states' resolution of infringement problems for different values of conflict in the Council. The shaded regions represent the confidence intervals around the estimates.

Figure 3.3 Predicted probability of infringement resolution for different levels of conflict in the Council



The figure demonstrates contrasting effects of conflict in the Council on the occurrence and resolution of different types of implementation problems. Highly debated directives are more likely to be resolved before their escalation to Court referrals if the reason for the infringement is delayed notification. In contrast, higher values of conflict decrease the probability of the early resolution of problems due to member states' incorrect transposition. In the latter case, however, the effect of the conflict is not significant (also illustrated by the wide confidence intervals). The remainder of the results presented in Table 3.4 are congruent with the

findings regarding infringement cases that arise from delayed transposition.¹⁸

3.6 Conclusion and discussion

This study makes several contributions to the field of EU policy implementation. First, in line with the enforcement approach, it argues that factors related to the preferences of political actors could have different effects on the resolution of compliance problems depending on the pressure exerted by the Commission to comply with EU law. Thus, it is expected that as the benefits of non-compliance increase, an increasing number of infringement procedures will be initiated by the Commission. However, the influence of these factors on compliance depends upon the stage of the infringement procedure. Member states were thus expected to yield to the pressure exerted by the Commission under the threat of escalation of infringement proceedings to later stages.

The concept of stage-dependent effects is closely related to time-dependent effects. Although studies on delays in transposition indicate that the effects of different factors change over time, theoretical grounds are lacking in terms of the time point at which the change will occur. By contrast, the stages of the infringement procedures are specific events during which the Commission increases the pressure on compliance. The results indicate that while member states' priorities and incentives to deviate do not influence the initiation and escalation of infringement cases, the effect of conflict in the Council on infringement resolution varies between different stages. In line with the hypothesis, higher levels of conflict are more likely to result in the early resolution of implementation problems.

Second, this study analyses two different types of implementation problems: the delayed and incorrect transposition of EU directives. More precisely, the findings reveal that conflict in the Council encourages member states to remedy their behaviour if infringement cases were initiated as a result of transposition delays. However, it has the opposite effect on

¹⁸ I tested a separate model to analyse whether the effect of Commission policy disagreement varies for different stages of the infringement proceedings. However, the interaction effect was not significant.

compliance if infringement cases were initiated in response to incorrect transposition, although the effect is not significant.

Third, this study finds that the occurrence and resolution of compliance problems depends both on the timing of national elections and the timing of infringement cases (Kaeding, 2008; Steunenberg and Rhinard, 2010). The results show that infringement procedures that coincide with national general elections are more likely to escalate to later stages of the infringement procedure.

Finally, the results have implications for the relevance of capacity factors in explaining compliance problems. In particular, the analysis found that a country's bureaucratic efficiency and an EU policy's complexity significantly influence the occurrence and escalation of infringement procedures. This finding aligns with recent works indicating that a government's quality positively influences compliance (Berghlund, et al., 2006; Haverland and Romeijn, 2007; Lampinen and Uusikyla, 1998; Linos, 2007). In contrast, factors related to member states' willingness to implement EU directives do not affect compliance. This finding is surprising, as it is plausible to expect that national interests take precedence not only during the EU decision-making process but also when adopting the EU provisions at the implementation stage. The lack of statistical significance of member states' individual incentives to deviate could be the result of an imprecise specification of the dependent variable in studies on compliance and infringement procedures. The vast majority of infringement cases are initiated due to transposition delays. However, member states with incentives to deviate might find the transposition of a directive important and implement it on time while failing to comply with those provisions that diverge from their national interests. Thus, it could be argued that the quality of national legislation is a more relevant indicator of compliance with respect to testing preference-based explanations. Future research on compliance should attempt to address these issues.

Chapter 4

The Successful Transposition of European Provisions by Member States: Application to the Framework Equality Directive¹⁹

¹⁹ Zhelyazkova, A. and Torenvlied, R. (2011) 'The successful transposition of European provisions by member states: Application to the Framework Equality Directive', *Journal of European Public Policy* 18(5): 690 – 708.

4.1 Introduction

Policy implementation is generally understood as the transmission of the outcomes of collective decision making into implementers' actions. Ideally, a measure of compliance with European Union (EU) policies should include the appropriate actions by national policy-makers, and even the behaviour by street-level bureaucrats delivering services to citizens (O'Toole, 2000).

The present study aims to describe and explain variations in the *transposition success* of member states regarding *specific provisions* of an EU law for *different periods of time*. Transposition success is defined as the extent to which national implementation measures are in congruence with the requirements of EU policies. Currently, studies of EU compliance use multiple indirect indicators for member states' performance in the implementation of EU laws (Hartlapp and Falkner, 2009). Many studies use infringement procedures instigated by the Commission as an indicator for non-compliance (Mbaye, 2001; Perkins and Neumayer, 2007). However, this measure is subject to the strategic behaviour of the Commission and may be biased (Börzel, 2001). Other studies use delays in the transposition of EU directives as an indicator for non-compliance (Kaeding, 2008; König and Luetgert, 2009; Mastebroek, 2003). However, transposition rates refer to member states' notification reports to the Commission regarding national laws (Hartlapp and Falkner, 2009). There is no guarantee that the national laws reported transpose the directives correctly.

One important exception is the study by Falkner et al. (2005) on the implementation of EU social policy by member states. The authors apply the criterion of *correctly transposed* legislation to indicate the moment in time at which there exists a complete match between the policy goal as expressed in a directive and the actions of a member state. This approach has the advantage that the exact timing of transposition success can be verified for each member state. However, the timing of correct transposition does not inform us about national policy developments before member states fully complied with a directive. Moreover, their measure defines compliance with the entire directive. Yet, the prescribed activities of member states are specified in the different *provisions* of a directive, and member states might comply with certain provisions, while failing to

comply with others. Thus, a measure of compliance with EU provisions is more appropriate (Thomson, 2010).

In the present study, we introduce the concept of transposition success as a new indicator for compliance. We build on the work of Falkner et al. (2005) about the *correctness* of transposition measures by: (1) moving the analysis to specific provisions of a directive and (2) studying member states' policy developments at different point in time. We introduce a theoretical framework based on the expected costs of compliance and non-compliance with provisions of EU directives. We argue that costs do not only vary across member states and directives, but also across member states and specific provisions within a directive. For example, member states might have established laws and practices that are compatible with certain aspects of an EU law, but not with others. In addition, the provisions of an EU law could vary with respect to the discretion they grant to national implementers.

To test hypotheses, the present study combines qualitative data collection with a quantitative research design. More precisely, we rely on elaborate content analysis of numerous implementation reports about the transposition of the Framework Equality Directive (2000/78/EC) by 15 member states. Case studies on the implementation of this specific directive focus mostly on only one or few member states and their compliance with the directive as a whole (Casado Asensio, 2008; Dimitrova and Rhinard, 2005; Falkner and Treib, 2008). By contrast, we apply statistical models to a single case by moving to a lower level of analysis: the provision level. Such a research design allows for an in-depth comparison between different aspects of a directive and member states, while holding constant characteristics at the directive level – thus locating our research between large-n and case study approaches.

4.2 Theory

Member states' compliance record with EU requirements has attracted increasing academic attention over the last decades (Mastenbroek, 2005), giving rise to numerous hypotheses about possible explanatory factors. One main hypothesis, however, has received broad scholarly acceptance: the hypothesis that non-compliance is only a temporal phenomenon. Sooner or

later member states are supposed to transpose an EU law correctly due to supranational pressures by the Commission and the European Court of Justice (ECJ) and domestic influence by national (sub-)actors with vested interests (Héritier et al., 2001).

However, national policy-makers often experience problems when implementing specific EU requirements, which could be left unnoticed by supra(national) organizations. Transposition problems can become visible at the domestic level only after national court cases result in decisions that are inconsistent with the EU requirements. Furthermore, extensive supranational scrutiny of all national transposition measures is a time-consuming and costly process, which depends on the resources and policy considerations of the Commission (Hartlapp and Falkner, 2009). We view the successful implementation of an EU rule as a function of the costs for meeting an EU rule and the expected consequences of disobeying it. Thus, we use costs as a heuristic to introduce factors that affect the transposition of EU provisions across member states.

4.2.1 Goodness-of-fit

One of the most widespread hypotheses on EU implementation is ‘the goodness-of-fit hypothesis’: member states’ transposition success depends on the level of compatibility between the requirements in European directives and domestic policies and institutional arrangements. The logic is that the goodness-of-fit affects the costs of adaptation for member states to comply with the European requirements (Héritier, 1996) under the assumption that public authorities might not be inclined or able to bear these costs (Börzel, 2003; Falkner et al., 2005).

The goodness-of-fit hypothesis has been criticized by scholars on the grounds that it is under-theorized, lacks proper specification, and has limited explanatory power in empirical analysis (Knill and Lenschow, 1998; Mastenbroek, 2005). Some scholars have modified their theoretical arguments and claim that misfit is necessary, but not sufficient, to explain non-compliance. Thus, scholars include auxiliary factors, such as veto players (Haverland, 2000) or the preferences of domestic decision-makers (Steunenberg, 2006). Others have dismissed the misfit hypothesis as

irrelevant (Mastenbroek and Kaeding, 2006) because of lack of empirical support.

We follow the critique that the goodness-of-fit hypothesis is underspecified because scholars do not clearly spell out the nature of the costs that emerge from the incompatibility between European directives and domestic regulations. A European directive incurs different types of costs on member states and (sub)national actors depending on the objectives of the directive and the characteristics of member states. As a result, costs are contextual, and depend on the nature of the EU directive. For example, the implementation of EU anti-discrimination directives incurs normative costs on domestic actors who do not identify with the norms as stipulated in a directive (see Dimitrova and Rhinard, 2005). Another type of costs includes the legal-administrative costs for public authorities to design laws that are both compliant with the EU directive and do not disrupt related domestic structures. Such costs could be referred to as ‘technical misfit’²⁰ and are the focus of the present study.

In addition, by shifting the unit of analysis from the directive to the provision level, we specify the relation between ‘goodness-of-fit’ and compliance in two respects. First, the existing case studies on the relation between misfit and compliance often focus on only few important provisions of a directive and draw conclusions about the level of misfit for the whole directive (Haverland, 2000; Bailey, 2001). This approach is problematic as it leads to a selection bias, because the important provisions reflect the most politicized issues in a directive. Directives generally consist of numerous technical provisions that address different legal aspects and methods to achieve the goals of the directive. These provisions are not likely to be highly politicized, but could still lead to substantial differences in judicial interpretation.

Second, provisions contain more specific policy requirements than directives. A focus on the provision level helps specify the nature of the costs incurred on implementing actors in more detail. For provisions that refer to *concepts* and *definitions* of discrimination (e.g. direct and indirect

²⁰ More general indicators for adaptation costs can be derived from different conceptualizations of goodness of fit. A distinction is made between institutional or structural fit (Knill and Lenschow, 1998) and policy fit. Another distinction concerns the difference between formal and informal policy fit (Falkner et al., 2005).

discrimination) the costs are defined in terms of their legal compatibility with the existing definitions in domestic systems and whether these definitions are interpreted accordingly by national courts. Even the smallest adjustment of a definition in a national law could lead to major changes in numerous national documents. For provisions that refer to *sanctions* against discrimination and *procedures* to fight the existing discrimination practices, costs relate to the necessary changes in the practical implementation of directives by (sub)national actors (Bailey, 2001). These provisions might require changes in the legal procedures, practices, and routines of (sub)national actors if sanctions and procedures are not sufficiently *effective, proportionate and dissuasive* (Art.17 of the directive). In both cases, expert evaluation reports illustrate the legal consequences for member-state governments to introduce laws that comply with specific provisions. We formulate the following hypothesis:

Hypothesis 4.1: Member states are more likely to comply with provisions that are compatible with existing domestic legal documents, institutions, and practices.

4.2.2 Discretion

Member states' adaptation costs are also influenced by the level of discretion laid down in an EU provision. Executive discretion refers to granting of discretionary powers to national agencies charged with implementing a decision. Higher levels of discretion increase the discretionary boundaries around the decision outcomes contained in directives (Epstein and O'Halloran, 1999). Thus, when higher levels of discretion are granted to member states, wider ranges of policy performances are compatible with the decision outcomes contained in a policy (Steunenberg, 2006; Thomson et al., 2007). In other words, we expect that the level of discretion decreases the costs of adaptation to a specific EU provision and consequently increases the likelihood of compliance.

Hypothesis 4.2a: Member states are more likely to comply with provisions that grant discretion to national implementers.

Furthermore, one could expect that discretion affects the relationship between technical fit and transposition success. More precisely, provisions that allow for a number of implementation outcomes are expected to facilitate transposition especially because national implementers can introduce few or no changes and thus preserve existing legislation and practices. Thus, member states that lack established policies on a provision could choose to implement an alternative that is closest to the specific national context. As a result, discretion downplays the differences between lower and higher levels of technical fit on member states' transposition success. By contrast, the effect of technical fit is expected to be stronger for provisions that constrain the choice of national authorities.

Hypothesis 4.2b: The difference in compliance between lower and higher levels of technical fit is smaller for provisions granting discretion to member states.

Scholars generally predict a negative relation between discretion and delays in transposition by member states (Kaeding, 2008; Steunenbergh and Toshkov, 2009; Thomson et al., 2007). The argument is that higher levels of discretion oblige member states to choose between different policy alternatives to be implemented, which can give rise to domestic conflict and subsequently delays in the transposition process. However, in the long run at least, delays in transposition are not necessarily related to the correctness of transposition measures, which is the main focus of the present study.

4.2.3 The Commission and infringement procedures

Theories on *enforcement* view compliance as a function of the expected costs from the likelihood of detection and credible threat of sanctions. As a result, rigorous monitoring and formal sanctions are expected to increase the costs of non-compliance. In the European context, increased rigor in the Commission monitoring is reflected by the infringement procedure (Tallberg, 2003). The Commission has extensive powers to issue warnings to member-state governments with a questionable implementation record, and to pursue formal infringement procedures before the ECJ in cases of

persistent non-compliance. Given that the Commission has the power to propose punitive fines against member states that violate EU law, court litigations increase the costs of non-compliance for member states as the threat of sanctions becomes imminent. Studies also report a negative relation between the instigation of infringement procedures and delays in transposition especially after the initial stage of sending letters of formal notice (Zhelyazkova and Torenvlied, 2009).

Hypothesis 4.3: Member states that received a warning from the Commission are more likely to comply with the provisions of a directive.

4.2.4 Conflict in the Council

We expect that conflict in the Council affects the transposition success of national governments. Implementation theory stresses that debated issues can result in ambiguous and incoherent decision outcomes that constrain the efficiency of implementers (Hill and Hupe, 2002; McCubbins et al., 1989; Torenvlied, 2000). In addition, the more conflict exists during decision making, the more likely it is that the interests of some member states will not be incorporated in the decision outcome (König and Luetgert, 2009).

However, in the European context conflict in the Council increases the vigilance of the Commission with respect to problem-prone policy issues. As a result, the Commission could allocate resources to manage and enforce compliance by member states through informal bargaining, dispute-settlement strategies and credible threat of sanctions (Tallberg, 2003).

In addition, member states can commit to the transposition of controversial issues when unequal practices can lead to negative externalities to all member states (Franchino, 2007; Majone, 2001). Based on these considerations, Zhelyazkova and Torenvlied (2009) predict and find a positive effect of conflict in the Council on member states' compliance with EU directives.

Hypothesis 4.4: Member states are more likely to comply with provisions that were debated during the Council meetings.

4.3 Research design

The data set used in the present study was collected based on implementation reports that evaluate the transposition success of member states with each of the provisions of the Framework Equality Directive (2000/78/EC). This directive was adopted in November 2000 with the purpose to put in place a general framework to ensure equal treatment of individuals in the EU, regardless of their religion or belief, disability, age, or sexual orientation, as regards access to employment or occupation and membership of certain organisations (Official Journal of the European Communities, 2000). The Framework Equality Directive has a number of characteristics that make it highly suitable for the present study. First, it touches upon a controversial topic and thus had at least some potential to cause problems during the implementation process. Second, it covers different policy issues related to both policy content and enforcement mechanisms, which allows testing provision-level hypotheses.

In order to obtain information about the level of compliance of member states with each separate provision of the directive, we used information from three extensive reports published by the European Trade Union Institute (ETUI) at the end of 2004. The data in the ETUI reports are based on responses from trade unions in the member states to a questionnaire regarding the transposition of the directive in their national contexts. In addition, we supplemented the information with expert interviews with the authors of the reports to ensure a proper understanding of the implementation process (Schömann et al., 2004). The ETUI reports and expert interviews provide an important first step to assess the transposition performance of member states with the provisions of the Framework Equality Directive by the end of 2004.

The second major source of information consists of various publications from the European Network of Legal Experts in the Non-discrimination Field (ENLE). These publications consist of country-specific and more general comparative evaluation reports on member states' progress with the implementation of anti-discrimination directives. The reports cover the changes made to national law and the development of enforcement mechanisms in accordance with the directive requirements until 7 January 2007. Based on the information provided by ENLE, we were able to cross-

validate the data collected from the ETUI reports until the end of 2004 and supplement the existing data set with information on member states compliance until the end of 2006.

4.3.1 Dependent variable: transposition success

We identified the compliance problems that member states experienced during the implementation of the provisions of the Framework Equality Directive. In this study, a provision is defined as an entire article or a numbered sub-article of a directive with which member states should comply through appropriate national legislation. This encompasses almost all provisions in the directive with the exception of the standard provisions that relate to the deadline of transposition and the Commission report. We also excluded one specific provision pertaining only to Northern Ireland. In total, we obtained data on the transposition performance of 15 member states regarding 27 provisions of the Framework Equality Directive.

Member states' transposition performance is coded to indicate whether a member state fully complied with each of the provisions (coded as 1). If the reports explicitly mentioned and described a problem with the way a specific provision was transposed, transposition performance is coded as 0. For example, one provision relates to the partial reversal of the burden of proof, which states that 'it shall be for the respondent to prove that there has been no breach of the principle of equal treatment' (Art.10 of the directive) and not for the claimant. Based on the implementation reports, however, the Dutch legislation did not apply the shift in the burden of proof in cases of victimization by the employer. In the extreme case, Italy was criticized for failing to insert the provision on the shift of the burden of proof in its national legislation. Member-state compliance with EU provisions was coded for both 2004 and 2006.

4.3.2 Measurement of independent variables

For the operationalization of goodness-of-fit we used an approach similar to Falkner et al. (2005), who measured total misfit on an ordinal scale with three categories: 'low', 'medium' and 'high' misfit. In this study, the scale is reversed so that a higher value refers to a better technical compatibility. The goodness-of-fit scale was constructed on the basis of country reports for

each of the 15 member states on anti-discrimination legislation after the adoption of the Framework Equality Directive and before the transposition process had started.²¹

Based on the expert evaluations, we coded the level of fit as ‘low’ if no policy or practice exist in a member state corresponding to a provision of the Framework Equality Directive or the legal interpretation of the existing policy contradicts the objective of the provision. The level of technical fit was evaluated as ‘medium’ if one or more of the following conditions applied: (1) Some practice exists, but no general policy; (2) Some policy exists, but no general practice; (3) National policies or practices have limited scope or should be reviewed to check whether they meet the requirements of the provisions.

Technical fit was coded as ‘high’ if the country experts emphasized that few and not substantive legal changes were necessary to fully comply with a provision. Based on the data from the country reports, we were able to extract information on the goodness-of-fit for 16 out of the 27 provisions (240 cases)²².

The measure of discretion employed in this study is based on previous research that defines discretion as the number of provisions that grant powers to member states in the implementation process relative to the total number of provisions in a directive (Epstein and O’Halloran, 1999; Franchino, 2004; Thomson et al., 2007). In the present study, however, discretion is measured at the provision level. Therefore, a distinction is made between provisions that grant discretion to member states (coded as 1) and those that do not (coded as 0) (Thomson, 2010). A provision grants discretionary powers if it allows states to choose between different alternatives in the transposition process.²³ For example, while the directive

²¹ The reports were published by the European Monitoring Centre on Racism and Xenophobia (EUMC) in 2002 as part of the project ‘Implementing European Anti-Discrimination Law’.

²² The reports lacked information about the level of technical fit on the protection of disabled persons or anti-discrimination practices on age and other related provisions.

²³ Provisions that grant discretion are not necessarily associated with high level of technical. An example is the provision on positive action to favor disadvantaged groups. In this case, the level of technical fit is measured as the extent to which member states had existing practices on positive action. Greece and Finland, for instance lacked tradition in

requires that member states should introduce legislation against age discrimination, Art. 6 of the directive allows for differences in treatment under conditions such as occupational social security schemes or entitlement to retirement benefits. We excluded provisions that refer to delegating powers to the Commission. Thus, our measure of discretion is based on provisions relevant to the member states only.²⁴

Infringement procedures initiated by the Commission are measured at the member-state level, since the reasons for their instigation related to the whole directive rather than specific provisions (either non-notification or limited transposition). This variable is coded as 1 if the Commission started an infringement procedure against a member state. Because we want to study the effect of infringements on the likelihood of compliance after 2004, we focused only on those infringement cases that were closed after 1 December 2004.

Conflict in the Council is measured at the provision level. Data on this independent variable are taken from the “Decision making in the European Union” (DEU) data set, which contains information on issues in the proposal for the Framework Equality Directive that were debated during the Council meetings (Thomson and Stokman, 2003; Thomson et al., 2006). One additional report provided information on a number of issues that were debated before the Commission designed the proposal. We closely read the informants’ reports to match each controversial issue that caused debates during and before the Council meetings with the respective provision in the directive.²⁵ A provision was coded as 1 if there was conflict in policy preferences between the member-state representatives.

4.3.3 Controls: corporatism and government position

We controlled for member-state characteristics related to the context of social and labour law. For example, the level of corporatism is an important

positive action. The provision, however, gives a lot of flexibility to member states in the extent to which they can compensate disadvantaged groups.

²⁴ Since provision-level measures of discretion do not currently exist, we follow the logic of existing directive-level measures..

²⁵ For example, one particular point of debate concerned what approach should be adopted to tackle discrimination against disabled persons: ‘a generic approach’ vs. ‘reasonable adjustment’. Art.5 of the directive sets the requirements for ‘reasonable accommodation of disabled people’. Following the DEU reports, Art.5 was coded as controversial.

factor that could affect member-state compliance with EU provisions in the context of employment relations (Falkner et al., 2005). In more corporatist systems, the social partners are strongly embedded in national policy-making and could actively participate in the transposition process. It is generally expected that such corporatist arrangements can lead to more delays in the transposition process, since they increase the number of actors who can veto a policy proposal (Falkner et al., 2005). However, corporatist relations are also assumed to be conducive to the creation of policy networks with stable coordination of government and interest groups, which improve compliance (Lampinen and Uusikylä, 1998). The present study uses Siaroff's (1999) quantitative index of states' degrees of corporatism. The higher the values of the index, the higher the level of integration of employers' and employees' organizations into the policy-making process within a country.

Another important factor is the position of governments on the left/right dimension. The political ideology of a government could have an effect on transposition success, as it is generally expected that Centre-Left governments are more likely to support employment rights policies, while Centre-Right governments represent the interests of employers' organizations and business associations. Given that the provisions of the Framework Equality Directive increase employees' protection against dismissal and discrimination, it is plausible that Centre-Left governments identify with the objectives of the directive more than Centre-Right governments, which leads to better transposition performance of the former (Treib, 2003).

The variable left/right position of the member state government is computed on the basis of data from the "Party Policy in Modern Democracies" project (Benoit and Laver, 2006). For coalition governments the positions are calculated by weighting the score for each party participating in government by its relative share of votes and adding these scores to form the average government position.

4.4.1 Description of member states' transposition

Table 4.1 presents the distribution of the dependent variables employed in the analysis. It shows that member states did experience problems in

incorporating the EU provisions into their national legislation in 2004, when almost half of the cases were not transposed correctly. Little progress was made by the end of 2006, as one-third of the transposition cases were still incorrect.

Table 4.1 Member states' compliance with EU provisions

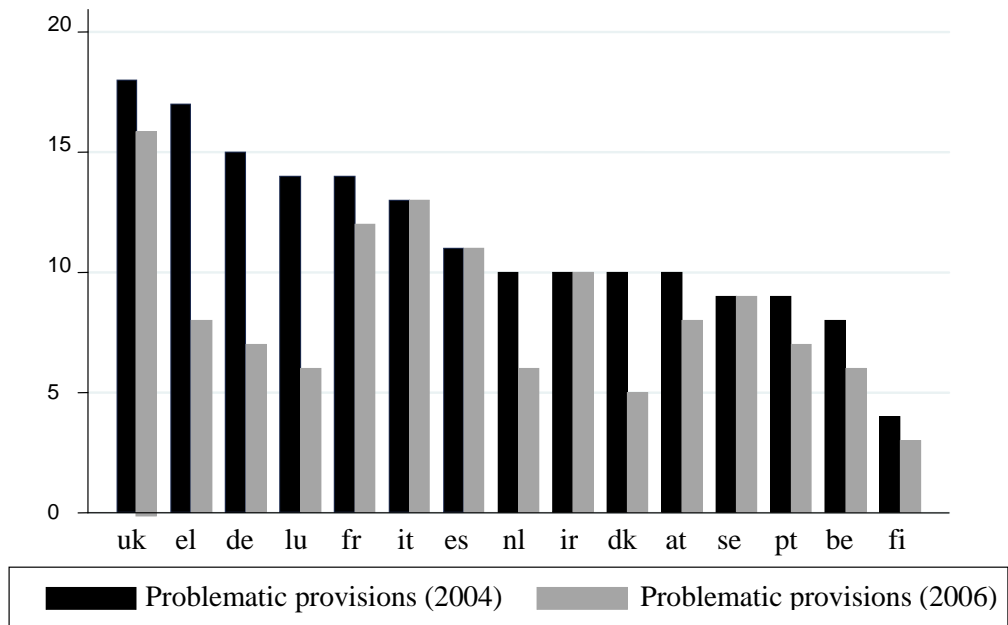
	Compliance 2004	Compliance 2006
None or incorrect transposition	174 (45%)	136 (34%)
Correct transposition	212 (55%)	261 (66%)
Total	386 (100%)	397 (100%)

Figure 4.1 provides a clearer picture of the differences in transposition success across different member states for 27 provisions of the Framework Equality Directive. It shows the number of provisions that a member state had failed to comply with by the end of 2004 (dark) and 2006 (light-grey). We observe some remarkable differences between standard measures of compliance such as transposition delays and infringement procedures, and our measure: transposition success with separate provisions²⁶. First, while the UK, France, and Italy did not experience any delay with respect to the initiation of the transposition process, they failed to comply with more than half of the provisions of the Framework Equality Directive. Second, Commission documents reported that member states had transposed all provisions by the end of 2006 (except for Sweden, which lacked legislation on the age provisions). However, based on Figure 4.1, we observe that correct transposition of all provisions of the directive was not achieved by any of the member states, even though they all had notified the Commission of transposition measures.

Thus, Figure 4.1 illustrates the advantages of using direct measures of compliance with separate provisions of a specific directive. It also lends support to the findings of carefully documented case studies on the difficulties experienced by national legislators when implementing the Framework Equality Directive (Bell, 2008).

²⁶ Note that transposition progress refers to the extent to which member states fully complied with the provisions of the directive. Adjustments that partially improved the level of compliance with an EU provision are coded 0 in the analysis, if the informants stated that transposition problems still existed.

Figure 4.1 Member state's non-compliance with EU provisions (2004 & 2006)



4.4.2 Analyses

Because the dependent variables are binary, we employ a binomial logistic regression analysis. In addition, we apply a cross-classified design to account for the dependence in the observations at the level of the member state and the provision level. Cross-classified design is appropriate for the analysis in the present study, because (1) different member states are transposing the same provisions and (2) different provisions are being transposed by the same member states. This implies that we should estimate the variation in member states' compliance created by the crossing of two random factors (provisions and member states) (Raudenbush and Bryk, 2002).²⁷

Table 4.2 presents the results from the analysis that tests our hypotheses on the likelihood of member states' compliance with the provisions of the Framework Equality Directive for both 2004 and 2006.

²⁷ A null model showed significant residual standard deviation on the dependent variables both between provisions and between member states.

Table 4.2 Cross-classified logistic regression on the likelihood of compliance with EU provisions

<i>Variable</i>	Compliance 2004				Compliance 2006			
	Model 1a		Model 1b		Model 2a		Model 2b	
	Coef.	(S.E)	Coef.	(S.E)	Coef.	(S.E)	Coef.	(S.E)
Low fit	-1.661**	(.683)	-1.409*	(.754)	-1.434**	(.636)	-1.138	(.709)
Medium fit	-.779*	(.468)	-.987*	(.526)	-1.098**	(.489)	-1.376**	(.552)
Discretion	1.893**	(.840)	1.391	(1.239)	1.272*	(.700)	.753	(1.108)
Infringement procedure	-----		-----		1.097***	(.404)	1.226***	(.427)
Conflict in the Council	-1.267	(.921)	-1.391	(1.239)	-.998	(.768)	-1.019	(.736)
Low fit * Discretion	-----		-.872	(1.658)	-----		-1.456	(1.444)
Medium fit * Discretion	-----		.782	(1.094)	-----		.903	(1.094)
Corporatism	.382**	(.173)	.408**	(.173)	.204	(.145)	.223	(.151)
Left/Right position	.025	(.073)	.023	(.073)	.058	(.060)	.058	(.062)
<i>Random effects</i>								
Provision-level	1.442	(.382)	1.410	(.394)	1.164	(.310)	1.094	(.311)
Member-state-level	.431	(.284)	.419	(.289)	.125	(.621)	.201	(.417)
Log likelihood	-120.271		-119.426		-126.851		-124.934	
Wald χ^2	15.66**		17.08**		16.83**		19.15**	
N	229				234			

Notes: High level of fit and High fit * Discretion are the reference categories; ***: $p < .01$, **: $p < .05$, *: $p < .10$.

The Successful Transposition of European Provisions

Models 1 (a and b) and 2 (a and b) test the effects on the two different dependent variables. Models 1b and 2b include the interaction effect to the analysis. The coefficients indicate the *average change* in the probability of correct transposition of a provision due to changes in the values of a given independent variable. A positive sign of the coefficients indicates that higher values of the independent variables increase the probability of correct transposition of a provision, whereas a negative sign shows that the probability of correct transposition decreases. The coefficients, however, do not indicate the precise size of the effect for a change in a given variable x_i , since the change in the probability due to an increase in the level of this variable depends on the levels of all factors in the analysis (Long, 1997).

We observe that the level of technical fit has a significant effect on the likelihood of correct transposition for both 2004 and 2006 (Models 1a and 2a). The categories of low and medium fit are compared to the reference category of high fit. As predicted, the likelihood of transposition success is significantly lower for cases with low and medium fit relative to high levels of technical compatibility with the provisions of the directive. To assess the magnitude of the effects, we transformed the coefficients into odds ratios. Odds ratios indicate the factor change in the odds of compliance (relative to failure to comply) due to changes in the values of an independent variable, holding all other variables constant.²⁸ In the present study, the odds of compliance for cases with low and medium fit over high fit are respectively 0.19 and 0.46 in 2004. In percentage terms, this means that the odds of compliance are respectively 81% and 54% smaller for cases with low and medium fit than for cases with high fit (e.g. $100 \cdot (0.19 - 1)$). At the end of 2006, the odds of transposition success were 0.24 (76% smaller for low fit) and 0.33 (67% smaller for medium fit) relative to high fit. The likelihood of successful transposition by member states also depends on whether a provision grants discretionary powers to national policy-makers or not. The odds of compliance in 2004 and 2006 are respectively 6.6 and 3.6 times

²⁸ Thus, given that β_x is the estimated coefficient for the effect of a variable x from the logistic regression model, for a change of δ in the values of x , the odds are expected to change by a factor of $\exp(\beta_x \cdot \delta)$, holding all other variables constant (Long, 1997)

greater for those provisions that grant discretion than the provisions that do not grant discretion to member states. Thus, member states are much more likely to correctly transpose provisions that give implementers opportunities to choose from than provisions that constrain the choice of implementers. This result is highly significant for both 2004 and 2006 and is thus consistent with our predictions. Models 1b and 2b test the prediction on the interaction effect between the level of technical fit and discretion. The reference category is the interaction between high fit and discretion.

The results on both dependent variables show significant differences between the effects of medium and high levels of fit on compliance when provisions do not grant any discretion to member states. We find significant differences between low and high levels of fit when discretion is zero only on the likelihood of compliance before the end of 2004. The coefficients in Table 4.2, however, do not give information on the effects of the different levels of technical fit, when discretion is granted.

To provide a full test to the hypothesis, we computed the effects and the standard errors of low and medium levels of fit relative to high fit for discretion equal to one. The effects show that the odds of compliance for low levels of fit decrease from 0.24 to 0.10 for 2004 and from 0.32 to 0.07 for 2006, as discretion moves on the scale from zero to one. This finding contradicts our hypothesis, because it suggests that granting discretion to national authorities additionally *impedes* member states' transposition success when there is a very low compatibility between national legal structures and EU requirements. The effect is significant for compliance in 2006. When we compare the effects of medium and high fit on compliance for different values of discretion, we arrive at the opposite conclusion. More precisely, the odds of compliance for medium fit in 2004 and 2006 are respectively 0.37 and 0.25, when discretion is zero, and 0.81 and 0.62, when discretion is one. This suggests that granting discretion to national authorities increases the odds of compliance when there is medium technical fit. The difference between the effects for medium and high levels of fit is no longer significant when discretion is granted, which is in congruence with our prediction. One possible interpretation of our findings is that very low levels of technical and legal compatibility are associated with lack of vital knowledge about the consequences of implementing a particular

provision. Granting discretion implies that member states have different transposition alternatives and some knowledge is necessary for national authorities to be able to select an appropriate transposition measure. If a member state must implement a provision that is missing in any of its national legislation, discretion may create ambiguity about the best transposition alternative that suits the particular national context.

To test the effect of the costs of persistent non-compliance by member states, we also incorporated the effect of infringement procedures in the analyses on compliance by the end of 2006. Based on the results from Table 4.2, the instigation of infringement procedures by the Commission increased the probability that member states would correctly incorporate the provisions of the directive before 2007 (Models 2a and 2b). The odds of compliance for member states, against which the Commission started formal procedures, are three times greater than for member states, which were not confronted with the threat of litigation. Infringement procedures seem to provide an incentive to those member states with alleged non-compliant behaviour to take measures to comply with the provisions of the Framework Equality Directive.

Contrary to our expectations, we do not find significant differences in the transposition of provisions that were debated in the Council and non-controversial provisions. The non-significant coefficient could be partly due to the limited variation of the variable, since only four of the provisions that were included in the final analysis were controversial. Thus, in the context of the Framework Equality Directive we do not find support for the hypothesis on the effect of the divergence of member states' policy preferences on the likelihood of member states' compliance with EU provisions.

Table 4.2 also presents the estimates on the effects of the control variables included in the analysis. The results show that more corporatist countries were less likely to experience compliance problems in 2004. The odds ratio of corporatism is 1.5, which means that a unit change in the scale of corporatism increases the odds of successful transposition by 50% ($100 \times (1.5 - 1)$). However, the effect of corporatism is not significant in the analysis on member states' transposition success at the end of 2006. The

variable for government position on the left/right dimension is not significant in any of the models.

4.5 Conclusion and discussion

The present study was designed to test hypotheses on member-state compliance with different provisions of an EU law. Thus, we relaxed the assumption that member states only transpose directives as a whole. Instead, they might comply with certain aspects of a directive while failing to comply with others. To explain provision-level variation in compliance we formulated hypotheses on member states' adaptation costs and their perceived consequences of non-compliance. We also focused on the correctness of transposition measures adopted by national policy-makers instead of the timeliness of transposition. Finally, we analyzed the transposition of the Framework Equality Directive at two different periods of time. This directive provided an interesting case to analyze provision-level differences because of its high level of controversy and numerous policy aspects. It also shows member-state compliance with provisions on a specific EU legislation that touched upon a salient and politically sensitive topic.

The analyses reveal a number of significant findings. First, we observed great variation in compliance both across different member states and different provisions of the Framework Equality Directive. Our measure of compliance indicated poor transposition of the provisions of the directive years after the deadline had passed, despite the fact that all member states had communicated transposition measures to the Commission. This result is in congruence with recent discussions on the methodological problems related to commonly used data from the Commission databases (Hartlapp and Falkner, 2009). It also supports the findings from case studies on the problems encountered by member states in the implementation of the Framework Equality Directive (Bell, 2008). While the majority of case studies focus on the problems encountered by the 'new' member states (Dimitrova and Rhinard, 2005; Falkner and Treib, 2008), our analyses showed that the 15 'old' member states did not perform better in transposing the provisions of the directive. We additionally improve on the existing case studies by systematically analyzing the variation that exists across all

relevant provisions instead of focusing on only few important aspects of a directive.

Second, our findings reveal that domestic costs of adaptation to the EU requirements play an important role in defining the choice and opportunities of national policy makers to comply with EU provisions. Thus, member states are more likely to comply with provisions that require only marginal changes to existing legal documents (Börzel, 2003). Furthermore, we find evidence that provisions granting discretion to member states are more likely to be successfully transposed than provisions that constrain the actions of national policy-makers. This finding supports the theory that discretion facilitates compliance (Knill, 2001).

The expectation that discretion downplays the difference between higher and lower levels of fit on member-state transposition success is only partially supported. We find that discretion facilitates member states' transposition success for medium levels, but not for low levels of technical fit. Given the small number of observations in the present study, future work should shed more light on the interplay between different levels of fit and discretion on compliance with EU provisions.

The findings of the present study show that the Commission behaviour affects member states' transposition success. More precisely, member states that received a formal warning by the Commission in 2004 achieved a better transposition record by the end of 2006 than member states that were not sanctioned. This finding supports theories on *supranational enforcement* of EU law that the infringement procedure forces member states to correct mistakes in the transposition process out of fear of litigation and subsequent sanctions (Tallberg, 2003). By contrast, conflict in the Council did not have a significant influence on member states' transposition success.

With a view to the goals of the present study, our findings should be put into a proper perspective. We studied member states' compliance with different provisions of only one directive. Ideally, it would have been better to test predictions on different provisions in several directives. However, given the nature of the dependent variable (transposition success), collecting such data is a complicated and time-consuming process. On the flipside, this research design allows us to focus on variation in compliance due to provision-level factors, without confounding effects from directive-level

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factors. As a result, the present study should be seen as a first attempt to uncover the mechanisms that drive compliance with separate provisions and the extent to which implementation models can be applied to a lower level of analysis. This point has implications for future research, since many of the common directive-level factors on compliance have no equivalent at the provision level. Further work should shed some light on whether alternative measures for goodness-of-fit and discretion could better explain the transposition success of member states with separate provisions. For instance, the measure of technical fit excludes member state's normative costs for implementing anti-discrimination policies, which are highly relevant for at least some of the provisions of the Framework Equality Directive (Dimitrova and Rhinard, 2005).

Chapter 5

The Successful Transposition of European Provisions by Member States: Analysis of Four EU Directives²⁹

²⁹ Zhelyazkova, A. ‘The Successful Transposition of European Provisions by Member States: Analysis of Four EU Directives’, under review.

5.1 Introduction

The success of the European (EU) integration project depends on the compliance of member states with EU legislation. In the EU context, compliance is defined as the extent to which national actors conform to the EU requirements by incorporating, applying, and enforcing EU laws into national context. The successful enforcement and application of EU laws is conditional upon the extent to which member states have adequately incorporated the EU requirements in their national legislation; a process that is referred to as transposition. For example, do national laws sufficiently protect employees against different forms of discrimination as prescribed by the EU provisions? To what extent can consumers rely on remedies against defective goods based on the national transposition of EU directives? Because such questions address implementation problems with specific issues of EU legislation, studies on compliance with EU laws should focus on a comparison between the substantive intentions of the provisions of an EU law and the activities of national implementers.

The present study aims to describe and explain variation in member states' correct and adequate transposition of *specific provisions* of different EU policies. Currently, many studies use infringement procedures initiated by the Commission against a member state as a formal indicator for non-compliance (Mbaye, 2001; Perkins and Neumayer, 2007). Infringement procedures, however, refer to cases that are both detected by the Commission and on which the Commission decides to take an action. There may be many other cases of non-compliance that do not show up in data on infringement cases either because of the Commission's limited capacity to monitor the actual performance of national bureaucracies or unwillingness to stir up conflict with national governments (Hartlapp and Falkner, 2009). Other studies use delays in the transposition of EU directives as an indicator for non-compliance (Kaeding, 2008; König and Luetgert, 2009; Mastenbroek, 2003). Likewise, data on transposition rates refer to member states' notification reports to the Commission regarding national implementing instruments. There is no guarantee, however, that the national laws reported transpose the directives adequately.

Moreover, studying member states' correct transposition of EU requirements has implications for the level of analysis at which compliance

should be defined. In particular, once the research focus has shifted to explaining member states' correct and adequate transposition, studying compliance with directives as a whole could be inappropriate. Directives consist of numerous articles and numbered sub-articles (i.e. provisions) prescribing specific requirements, with which member states should comply through relevant national legislation. Thus, recent studies have shown that there is variation in the extent to which member states comply with different provisions of EU directives (Thomson, 2010; Zhelyazkova and Torenvlied, 2011).

The present study contributes to current research on EU compliance by focusing on the correct transposition of separate EU provisions. First, it adopts a broader definition of compliance with EU provisions that incorporates both substantial deviations from the requirements of EU provisions as well as inconsistencies and ambiguities found in domestic laws that have the potential to lead to interpretation problems when applied by national courts. Implementation problems occur when member states fail to meet the objectives of EU requirements, but also when newly transposed EU provisions are not compatible with the existing legal system in a member state (e.g. conflicting objectives in the existing laws and practices).

Second, hypotheses are formulated on the relationship between characteristics of process and outcome of EU decision making and the transposition performance by member states. It is expected that member states are less likely to comply with an EU provision, if they expressed opposition to its contents during the Council meetings (i.e. incentives to deviate). In addition, characteristics of the adopted EU decisions, such as their level of discretion, complexity and controversy, are also expected to influence states' willingness and capacity to adequately comply with the EU requirements. Thus, the hypotheses aim to capture variation in the transposition performance induced by both provision-level characteristics and factors at the level of the country-provision dyad.

Third, the few existing studies on provision-level compliance focus exclusively on provisions from EU social directives (see Thomson, 2010; Zhelyazkova and Torenvlied, 2011). In contrast, the present study extends the analysis of directives' provisions from different policy areas. This

research design enables us to draw more general conclusions on the effects of factors influencing compliance with different EU provisions.

To test hypotheses, the present study combines qualitative data collection with a quantitative research design. Numerous implementation reports were extensively analyzed in order to gain better insight on the actual transposition performance of 15 member states with respect to all provisions (136) of four European directives. The four directives cover different EU policy areas such as employment, consumer protection, immigration, and copyright. Such detailed information cannot be obtained using the EU databases, but requires gaining understanding about the legal system of each member state.

5.2 Defining correct transposition in the EU context

A major point of discussion in implementation research is finding a proper definition of ‘implementation success’. While top-down models measure success in terms of “specific outcomes tied directly to the statutes that are the source of a program” (Matland, 1995: 154), bottom-up theorists focus on the general consequences from implementation actions. The present study argues that an appropriate definition of implementation success should reflect the specific policy-making and implementation context. Thus, in the context of EU transposition, EU directives represent general legal acts, which stipulate objectives to be attained by member states, but grant national authorities some degree of maneuver to choose the appropriate means. As a result, member states are expected to meet the goals of the directives by simultaneously ensuring appropriate adjustment of the EU requirements to domestic settings. Transposition measures that effectively copy out the directives, for instance, could create confusion when they coexist with earlier ‘general’ laws proscribing different standards (Expert Interview, 17 May 2010). Furthermore, because directives are general and contain different requirements that member states should fulfill, analyses of member states’ transposition success could benefit from a shift to the level of directives’ provisions (Thomson, 2010; Zhelyazkova and Torenvlied, 2011).

5.3 The correct transposition of EU directives and provisions

Quantitative research on EU compliance is abundant, but mostly focuses on member states' transposition delays (e.g. Kaeding, 2006, 2008; König and Luetgert, 2009; Linos, 2007; Mastenbroek, 2003; Thomson et al., 2007; Zhelyazkova and Torenvlied, 2009) and infringement procedures started by the Commission (e.g. Börzel et al, 2010; Jensen, 2007; Mbaye, 2001; Perkins and Neumayer, 2007; Thomson et al., 2007). Few studies have attempted to explain member states' correct transposition of EU directives and their provisions.

One important contribution to the literature on member states' correct implementation of EU directives is the study by Falkner et al. (2005). The authors introduce a direct measure of compliance with five EU labour directives by applying the criterion of *correctly transposed* legislation to indicate the moment in time at which there exists a complete match between the policy intent expressed in a directive and the actions of a member state. In subsequent publications, Thomson (2007, 2009, and 2010) develops Falkner et al's analysis by identifying new theoretically important factors, such as member states' incentives to deviate and the level of discretion granted in the labour directives and their provisions. As regards compliance with EU directives, Thomson's findings reveal that discretion contributes to more timely correct transposition performance by member states. However, a member state's disagreement during the decision-making stage does not influence the timeliness of correct transposition of EU directives (Thomson, 2007). In contrast, after shifting the level of analysis to the provision level, Thomson (2010) finds that member states' incentives to deviate have a positive effect on protracted compliance, provided that the Commission did not signal support for the content of a provision during the Council meetings. In other words, his findings suggest that member states act upon their policy preferences towards specific policy issues conditional on the perceived commitment of the Commission to monitor compliance and impose sanctions on violators. Based on his findings, provision-level discretion does not influence protracted compliance.

The study of Falkner et al. (2005) and the subsequent contributions by Thomson (2010) applied to their data set view non-compliance as a temporal phenomenon. Sooner or later member states are supposed to transpose an EU

law correctly due to supranational pressures by the Commission and the European Court of Justice (ECJ) and domestic influence by (sub)national actors with vested interests (Héritier et al., 2001). This is also illustrated by the finding that nine years and more after the adoption of the five labour directives non-compliance was a rare event, with only 3.3% of all cases experiencing transposition problems (Thomson, 2010: 591). In a different study, Zhelyazkova and Torenvlied (2011) demonstrate that member states' transposition success of EU provisions is, indeed, a dynamic process. In particular, their analysis shows that member states respond to infringement procedures to improve their transposition success regarding the provisions of the Framework Equality Directive at a later point in time.

The theoretical framework applied in the present study focuses on explaining the correct transposition of EU provisions rather than the time it takes for member states to comply with the EU requirements. National policy-makers often experience problems when implementing specific EU objectives, which could be left unnoticed by supra(national) organizations. Transposition problems can become visible at the domestic level only after national court cases result in decisions that are inconsistent with the EU provisions. Furthermore, given that in the long run compliance is predicated on the behavior of the Commission and domestic watch-dogs, (supra)national monitoring could confound the importance of factors related to member states' policy preferences and characteristics of EU provisions on the occurrence of transposition problems. This could also explain why Thomson (2010) finds that member states' incentives to deviate do not directly influence compliance, but the effect is conditional on the Commission support for an adopted provision. The same explanation could account for the lack of significance of the effect of discretion on protracted compliance with EU provisions.

To explain member states' correct transposition of EU provisions, the present study focuses on characteristics related to the outcome and process of EU decision-making. Similar to the study of Thomson (2010) hypotheses are formulated on the influence of states' incentives to deviate and discretion on member states' transposition success regarding particular provisions. In addition, the present study extends the analysis of Thomson (2010) to additional provision-level characteristics related to the complexity and

controversy of specific EU policy issues. Policy-level complexity and controversy have been included in recent analyses of transposition timeliness and infringement procedures (Kaeding, 2006; Zhelyazkova and Torenvlied, 2009). However, the influence of these factors on the correctness of adopted national legislation is yet to be tested.

5.3.1 Member states' incentives to deviate

One of the core hypotheses on policy implementation focuses on the discrepancy between the preferences of implementation agents and the policy goals of legislators (McCubbins et al, 1987). Applied to the EU context, the hypothesis states that member states are less likely to comply with international agreements if the adopted EU decisions differ from national policy goals (Downs., et al, 1996; Tallberg, 2003). However, research on EU policy implementation has found little support for the influence of member states' preferences on compliance with EU laws³⁰ (Falkner et al, 2004, Linos, 2007; Thomson, 2007, 2010; Zhelyazkova and Torenvlied, 2009). For example, studies have shown that there is no relationship between societal attitudes towards the EU and member states' implementation performance (Kaeding, 2006; Lampinen and Uusikyla, 1998). While government support for the EU is a more direct indicator of a member state's general willingness to adopt the EU rules, studies applied to data on the old 15 member states report no effect of this variable on compliance (Jensen, 2007; König and Luetgert, 2009; Linos, 2007). Other studies test whether a vote against a directive would result in transposition problems, but also find no effect (Falkner et al., 2004; Linos, 2007). When incentives are measured as the extent of a member state's disagreement with the contents of a directive, findings remain inconclusive (Thomson, 2007; Thomson et al., 2007).

The limited explanatory power of the preference-based hypothesis could be related to inappropriate specification of the theory in the EU context (Thomson, 2010). Member states are likely to experience implementation problems with only those provisions that depart from national interests and implement the rest of the provisions correctly. In addition, given that

³⁰ One exception is the study by Thomson et al (2007), who finds support for the effect of member states' incentives to deviate on infringement procedures.

compliance is a dynamic process, in the long run, the effect of member states' incentives to deviate could be downplayed by the Commission monitoring activities and threat of sanctions through the infringement procedure (Thomson, 2010).

Moreover, it is important to specify both the factors and the mechanisms that drive the effect of member state's preferences on compliance. The present study uses the objections expressed by national representatives to the content of a provision during the Council meetings as an indicator of member states' incentives to deviate from their EU obligations. An expressed objection to adopted EU decisions is assumed to tap two underlying mechanisms. First, member states expressing disagreement with an EU provision are likely to have existing national policies and practices that conflict with the EU requirements (Stokman and Thomson, 2003). For instance, expert reports on the EU decision-making process suggest that Council negotiations on proposals included in the present study were mostly driven by differences in existing legislation in the member states (Expert reports, DEU). In other words, expressed objections to decision outcomes reflect the concerns of country delegates about the necessary adaptation costs required to bring domestic laws into compliance with the EU provisions. Second, expressed objections also demonstrate the reluctance of national legislators to make changes to domestic laws. In the example of the Temporary Protection Directive (2001/55/EC), Austria was opposed to offering facilities to refugees, since the government did not favor integration for people seeking temporary protection in the country (Expert reports, DEU). Based on the arguments above the following hypothesis is formulated:

Hypothesis 5.1: Member states are less likely to comply with a directive's provision if national delegates objected to the content of this provision during the Council meetings.

5.3.2 Discretion

In addition to member states' incentives to deviate, characteristics of the EU decision outcomes are also likely to influence member states' transposition success of particular provisions (Thomson, 2010). One relevant factor is the

level of discretion laid down in an EU provision. Executive discretion refers to the granting of discretionary powers to national agencies charged with implementing a decision. Higher levels of discretion increase the discretionary boundaries around the decision outcomes contained in the directives (Bendor and Meirowitz, 2004; Epstein and O'Halloran, 1999). Thus, when higher levels of discretion are granted to member states, wider ranges of policy performances are compatible with the decision outcomes contained in a policy (Steunenberg, 2006; Thomson et al., 2007). In other words, the level of discretion is expected to reduce the costs of adaptation to a specific EU provision and consequently facilitates member states' correct transposition.

Hypothesis 5.2: Member states are more likely to comply with provisions that grant discretion to national implementers.

5.3.3 Policy complexity

Member states' adaptation costs are also influenced by the level of complexity of an EU provision. Public administration research on EU compliance shows that more complex directives impose higher demands on national implementers. As a result member states are more likely to delay the transposition of EU directives (Kaeding, 2006; Steunenberg and Kaeding, 2009; Toshkov, 2008).

The level of complexity is also expected to influence the quality of the adopted national measures. According to theories on delegation, complexity relates to decision-makers' uncertainty about the link between policies and outcomes (Epstein and O'Halloran, 1994; Franchino, 2004). Thus, more complex issues require more expertise and impose informational demands on legislators. As a result, legislators are more likely to delegate authority to implementation agents in cases of informationally intense policy issues. Based on Hypothesis 5.2, more discretion is expected to facilitate the transposition process and lead to fewer implementation problems.

In EU compliance research, however, complexity is a characteristic of the decision outcome rather than the process of decision making. The higher the number of obligations laid down in a provision, the higher the demands on national legislators to find an appropriate transposition measure and more

changes in national legislation might be necessary to meet the EU requirements. In addition, the complexity of provisions also relates to the extent to which they address abstract and normative topics (Chayes and Chayes, 1993). Unlike technical issues, normative considerations related to provisions could stir debates during national implementation and force legislators to adopt measures that fall short of their EU obligations.

Hypothesis 5.3: Member states are less likely to comply with provisions that display higher levels of complexity.

5.3.4 Conflict in the Council

Political controversy at the EU-level is another provision-level characteristic that is expected to affect the transposition success of national governments. Implementation theory stresses that debated issues can result in ambiguous and incoherent decision outcomes which constrain the efficiency of implementers by creating uncertainty about the objectives of policies and the problems they try to address (Hill and Hupe, 1992; Torenvlied, 2000; Staton and Vanberg, 2008). In addition, the more conflict exists during decision making, the more likely it is that the interests of some member states will not be incorporated in the decision outcome (König and Luetgert, 2009).

Contrary to general expectations, a recent study by Zhelyazkova and Torenvlied (2009) finds that conflict between member states in the Council has a negative effect on delays in the transposition of EU directives over time. The explanation for this puzzling finding is that conflict between decision-makers signals that deviations are likely to occur and the resultant monitoring by the Commission gives rise to shorter transposition delays. In addition, member states can commit to the transposition of controversial issues when unequal practices can lead to negative externalities to all member states (Franchino, 2007; Majone, 2001).

In contrast, conflict does not influence compliance, when applied to member states' correct transposition of the provisions of the Framework Equality Directive (Zhelyazkova and Torenvlied, 2011). One reason for the lack of support for this hypothesis on correct transposition could be the relatively small number of controversial provisions in a single directive. The

present study tests the hypothesis on all the provisions of four different directives.

Hypothesis 5.4: Member states are more likely to comply with provisions that were extensively debated during the Council meetings.

5.4 Research design

To collect data on the transposition performance of 15 member states with all relevant provisions of a directive, two selection criteria were applied. First, the present study focuses on directives that are part of the data set on “Decision making in the European Union” (hereafter DEU). These directives share characteristics that make them especially suitable for studying provision-level variation in member states’ compliance. For example, all directives in the DEU data set address important EU legislation, which were likely to attract the attention of legal scholars and, hence, increase the probability of available evaluation reports on the implementation process in member states. In addition, the DEU data were collected on the basis of expert interviews with EU officials, who had been present during the Council negotiations (Thomson and Stokman, 2003). As a result, the expert reports provide valuable qualitative information about the reasons why country delegates favored particular policy outcomes, as well as quantitative information about the most controversial issues.

Second, directives were selected on the basis of available country evaluation reports on the transposition performance of *each* of the 15 member states with respect to *all* provisions of a directive. To obtain the necessary information, the relevant Directorate Generals (DGs), associated European networks and organizations were contacted with questions about the availability of studies that address the goals of the present research. Finally, at least some of the provisions in a directive should have caused problems during the implementation process in order to be included in the study.

Based on the selection criteria described above, four directives containing 136 provisions were identified that meet the goals of the present study. The four directives included in the study are the *Framework Equality Directive* (2000/78/EC) on anti-discrimination at the work place, the

Consumer Sales Directive (1999/94/EC) laying down the rights of consumers in cases of non-conformity of purchased goods, the *Temporary Protection Directive* (2001/55/EC) on the minimum standards for providing protection for refugees, and the *Information Society Directive* (2001/29/EC) on copyright and related rights in the information society.³¹

Table 5.1 summarizes the topics covered by the provisions in the four EU directives. While analyses on only four directives could raise doubts about the generalisability of findings, the focus of the present study is on explaining provision-level variation in member states' transposition success. Thus, the provisions in the selected directives cover diverse topics, related to both policy content and enforcement mechanisms, protection of different societal actors (employees, refugees, consumers, copyright-holders), both technical (e.g. definition of technological protection measures in copyright law) and normative issues (anti-discrimination, family reunification). These characteristics make the policies suitable for testing provision-level hypotheses.

In order to obtain data about the level of compliance of member states with each separate provision of the four directives, two data sources were mainly used. First, most information was extracted from extensive national evaluation reports on the implementation of the separate provisions of the four directives. The second source is comparative (summary) reports on transposition success across all 15 member states usually prepared on the basis of the content of national reports. Both types of reports were generally part of large-scale cross-national projects organized by prominent academic institutions and networks and funded by the European Commission.

³¹ There are various reasons why information on the correct transposition is missing for the rest of the DEU directives. For example, some directives addressed technical topics, which made practical adaptation more relevant than legal adjustment. One example is the Laying Hens Directive (1999/74/EC), which fostered the Food and Veterinary Office of the EU Commission (FVO) to send missions to farms in different member states to monitor the application of the directive. However, information on the legal incorporation of the separate provisions is missing. Other directives transferred more responsibilities to the Commission than member states to adopt follow-up regulations and decisions (e.g. Dir. 1999/105/EC on marketing of forest reproductive material).

Table 5.1 Summary of topics addressed by the specific EU provisions

<i>Provision Topics</i>	<i>Directive initial</i>
Anti-discrimination: religion and belief	FED
Anti-discrimination: disability	FED
Anti-discrimination: age	FED
Anti-discrimination: sexual orientation	FED
Workplace facilities	FED
Litigation procedures and sanctions	ALL
Measures facilitating practical application (e.g. involvement of NGOs, MS cooperation)	FED & TPD
Conformity of products with the contract	CSD
Remedies against defective goods	CSD
Seller and producer liability	CSD
Harmonization of guarantees	CSD
Duration of temporary protection of refugees	TPD
Regulations on visas and residence permits	TPD
Integration of refugees (accommodation, employment, etc)	TPD
Asylum procedures	TPD
Family reunification	TPD
Unaccompanied minors	TPD
Conditions to refuse entry to refugees	TPD
Author's right of reproduction	ISD
Author's right of communication	ISD
Author's right of distribution	ISD
Copyright technological protection measures	ISD
Rights management information	ISD

Notes: FED = Framework Equality Directive; CSD = Consumer Sales Directive; TPD = Temporary Protection Directive; ISD = Information Society Directive; ALL = All four directives.

In few cases the reports did not provide sufficient information about the implementation process in some member states and, hence, the data were supplemented by individual academic articles published in legal books. Additional interviews and correspondence with legal experts in the relevant policy fields helped ensure a proper understanding of the implementation process. Table 5.2 provides a summary of the major data sources used for the content analysis of each of the four directives. While compliance is a dynamic process during which member states could remedy their behavior in

response to Commission monitoring, the data sources report member states' transposition outcomes before the Commission had opened infringement procedures against incorrect implementation. In addition, in the majority of cases, the reports provided a first insight on the implementation performance of member states after the adoption of the directives. As a result, the measure of compliance is not influenced by the subsequent actions of the Commission in sanctioning violations of EU law.

Table 5.2 Main data sources on member state's compliance

Directive Name	Main Data Sources
Framework Equality Directive (2000/78/EC)	<ul style="list-style-type: none"> - European Trade Union Institute (ETUI) (2004): reports - European Network of Legal Experts in the non-discrimination field (2004-2007)
Consumer Sales Directive (1999/44/EC)	<ul style="list-style-type: none"> - EC Consumer Law Compendium (2006) - EU Consumer Law Acquis Database - The Yearbooks of Consumer Law (2006-2008) - Commission report (2007)
Temporary Protection Directive (2001/55/EC)	<ul style="list-style-type: none"> - Odysseus Network : national summary datasheets; 15 extensive national reports - European Migration Network (EMN) (2009): e-mail correspondence
Information Society Directive (2001/29/EC)	<ul style="list-style-type: none"> - The Implementation of Directive 2001/29/EC in the Member States (2007): summary report by Dr. Guido Westkamp (Queen Mary Institute) - 15 extensive national reports on the implementation of Directive 2001/29/EC

5.4.1 Dependent variable: transposition success

The dependent variable records whether member states experienced any compliance problems during the transposition of the provisions of the four EU directives. A major provision is defined as a substantive item or text in the legislation (Epstein and O'Halloran, 1999; Franchino, 2004). In this study, a provision is either an entire article of a directive or a numbered sub-article with which member states should comply through relevant national legislation. Provisions, related to the transposition deadline and the

Commission report, were excluded from the dataset, since they relate to the timing and not the content of national transposition measures. In total, the data set contains information on the transposition performance of 15 member states regarding 136 provisions of four directives. Thus, the unit of analysis is at the level of the member state-provision dyad ($15 \times 136 = 2040$).

Member states' transposition performance was coded to indicate whether national authorities correctly and adequately transposed a particular provision (coded as 1). These are cases, for which the reports explicitly stated that a member state's legislation complies with a particular provision of a directive. If the reports described a problem with the way a specific provision was transposed, transposition success was coded as 0. For example, Art. 3(4) of the Consumer Sales Directive requires that a remedy of a defective product should be provided free of charge, and the seller has to bear the cost of postage, labor and materials. The specific elements, however, were not incorporated into the Dutch and Greek legal systems, which gives sellers in these countries higher discretion to decide what 'free of charge' should cover. Sellers could, thus, limit the level of consumer protection in a way that is contrary to what is prescribed by the directive. In addition, there is no right to family reunification in the Austrian legislation, which conflicts with the provisions of Art. 15 of the Temporary Protection Directive.

In total, information exists on 1979 cases of national transposition performance. Member states encountered problems in complying with the provisions of the EU directives in 24% of these cases.³²

5.4.2 Measurement of independent variables

For the operationalization of a member state's opposition to the requirements laid down in a provision we used an approach similar to Thomson (2010), who measured member states' incentives to deviate based on the expressed objections by country delegates during the EU decision-making process. The

³² The total number of cases on the dependent variable is less than 2040 (15 member states*136 provisions) due to missing cases: e.g., Denmark was not bound to transpose the provisions of Directive 2001/55/EC. In addition, in few cases the information was too limited to identify whether there was a compliance problem or not. These cases are identified as missing and are not included in the analyses.

databases of the Council of the EU in Brussels³³ (CONSILIUM database) provided documentation from the working groups in which the four directives were discussed. These documents include summaries of meetings and detailed drafts of minutes that specify each national delegation's statements during the negotiations in response to each provision. Based on this information, a member state opposition to a directive's provision is coded as 1 if a national delegation openly objected to the requirements laid down in this provision (coded as 0 otherwise). The coding of the Council documents identifies only cases in which member states' representatives called for lower standards than those contained in the provisions of the adopted directives.

The measure of discretion employed in this study is based on previous research that defines discretion as the number of provisions that grant powers to member states in the implementation process relative to the total number of provisions in a directive (Epstein and O'Halloran, 1999; Franchino, 2004). In the present study, however, discretion is measured at the provision level. Therefore, a distinction was made between provisions that grant discretion to member states (coded as 1) and those that do not (coded as 0) (Thomson, 2010). A provision grants discretionary powers if it allows states to choose between different policy alternatives during the transposition process. For example, while the Information Society Directive requires that member states grant authors an exclusive reproduction right, it also outlines a series of exceptions to the application of copyright in cases like educational uses and uses for the benefit of people with disabilities. In addition, member states were free to choose which exceptions to apply in their national context. Provisions that referred to delegating powers to the Commission were excluded from the analysis. Thus, the measure of discretion is based only on provisions relevant to the member states.³⁴

³³ Data were collected on a total of 130 documents in relation to the four directives in this study. Most of the documents are freely available at the CONSILIUM database. Additional documents were requested and obtained from the Council, since CONSILIUM did not contain sufficient information on the negotiations with regard to the Consumer Sales Directive (1999/44/EC).

³⁴ Since provision-level measures of discretion do not currently exist, I follow the logic of existing directive-level measures. While a binary variable sufficient to capture the differences between more and less restrictive provisions, further work is needed to show whether other measures are better suited to describe provision-level discretion.

The level of complexity in a directive's provision is measured in two different ways. First, it is generally assumed in the EU compliance literature that the complexity of a directive is captured by the number of recitals preceding the body of articles (Kaeding, 2006; Steunenberg and Kaeding, 2009). Recitals do not have a legal status, but are often used to state the purpose of the directive and describe each of the main provisions. Some recitals even describe additional obligations and normative considerations related to the separate provisions in a directive and are, hence, likely to impede the effective transposition of the respective articles or sub-articles. The first indicator of complexity was constructed by counting the number of recitals referring to a specific provision and addressing obligations in relation to the implementation of this provision.³⁵

Another indicator of policy complexity relates to the length of an EU directive, often measured as the number of articles or pages of a directive (Kaeding, 2006; Steunenberg and Kaeding, 2009). Given that this study focuses on the complexity of individual provisions of EU directives, the number of sentences was used as an indicator of the length of a directive's provision. Thus, provisions with a higher number of sentences are assumed to have a more extensive scope and address more issues.³⁶

Political controversy of the EU decision-making process is also measured at the provision-level. To distinguish this variable from member states' individual incentives to deviate from a provision, the present study uses information provided by the DEU data set (Thomson et al, 2006). After close reading of the informants' reports in the DEU data set, each issue that caused debates during the Council meetings was matched with the respective provision in a directive. Some of the identified controversial issues relate to the content of more than one provision (e.g. the issue on "fair compensation"

³⁵ Recitals that just repeat provisions on exceptions that member states are allowed to make in the transposition process are not included in the analysis. Higher number of recitals on exceptions are not likely to reflect a higher level of complexity in a provision. I did include, however, recitals that set additional conditions on the use of exceptions in member states.

³⁶ An alternative measure for the length of a provision would be the number of words in a provision. I chose to report the number of sentences in the analyses of this paper, since counting specific words would require a more sophisticated approach of selecting which words are relevant for member states and which not. By contrast, a provision's sentence always has a specific purpose or otherwise it wouldn't have been included in the directive. In addition the number of words is highly correlated with the number of sentences in a provision (0.78) and generally led to the same statistical results throughout the analyses.

for right-holders in the application of the different copyright exceptions). A provision was coded as 1 if the controversial issues described in the expert reports referred to specific issues addressed in an adopted provision.³⁷

5.4.3 Controls

Because the hypotheses capture provision-level differences only, the analysis should control for member-state and directive-level variation in the correct transposition of directives' provisions. In particular, member states could systematically differ in their capacities and willingness to comply with particular EU directives. For example, bureaucratic efficiency of a country is one factor that is often used to account for the general capacity of member states to comply with EU legislation (Thomson, 2009; Toshkov, 2008). The measure was developed by World Bank researchers and contains a number of important government characteristics such as the quality of public and civil services, as well as policy formation and implementation, the degree of independence of civil servants from political pressures, etc (Kaufmann et al., 2006).

To account for a member state's general willingness to comply with EU legislation, the present study also controls for the effect of government support for specific EU policy areas on member states' transposition success. The measurement of this variable is based on the Chapel Hill dataset (Marks et al, 2006), which contains information on party support for EU policies related to the internal market (Directives 1999/44/EC and 2001/29/EC), asylum (Directive 2001/55/EC), and employment (Directive 2000/78/EC). For coalition governments the positions were calculated by weighting the score for each party participating in government at the time of transposition by its relative share of votes and adding these scores to form the average government position. Finally, dummy variables were included to control for differences in compliance across the four directives.

³⁷ It is important to note that there are remarkable differences between the measure for member states' incentive for deviation and conflict in the Council on a particular provision. In particular, the DEU reports often contained different controversial issues from the ones identified in the Council minutes. One prominent example is the Consumer Sales Directive, where the interviewer admits that content analysis on Council documents would have led to identifying different issues, on which most of the national delegation took similar policy views (DEU Expert Report, 6.2.2001).

5.5.1 Descriptive results of member states' transposition success

Table 5.3 presents the distribution of the dependent variable: transposition success, across the four directives. It shows that member states did experience problems in incorporating the EU provisions into national legislation. However, there are differences between the four directives. More precisely, national legislators experienced more problems transposing the provisions of the Framework Equality Directive and Temporary Protection Directive than the provisions of the two internal market policies. This observation is not too surprising, given that social and immigration policies generally address politically sensitive topics and national legislators might not favor abolishing their established national laws in order to meet the EU requirements. However, given the small number of directives it is not possible to draw more general conclusions about directive-level differences.

Table 5.3 Member states' compliance with the provisions of four EU directives

	Framework Equality	Consumer Sales	Temporary Protection	Information Society
None or incorrect transposition	136 (34%)	42 (11%)	232 (35%)	61 (12%)
Correct transposition	261 (66%)	346 (89%)	437 (65%)	464 (88%)
Total	397 (100%)	388 (100%)	669 (100%)	525 (100%)
N. provisions	27	26	48	35

Figure 5.1 provides a clearer picture of the differences in transposition success across member states for each of the four directives separately. National transposition success (black) is compared to the length of delay until a member state notified the Commission of a transposition measure regarding a particular directive (gray).

Figure 5.1 Comparison between different compliance indicators across directive

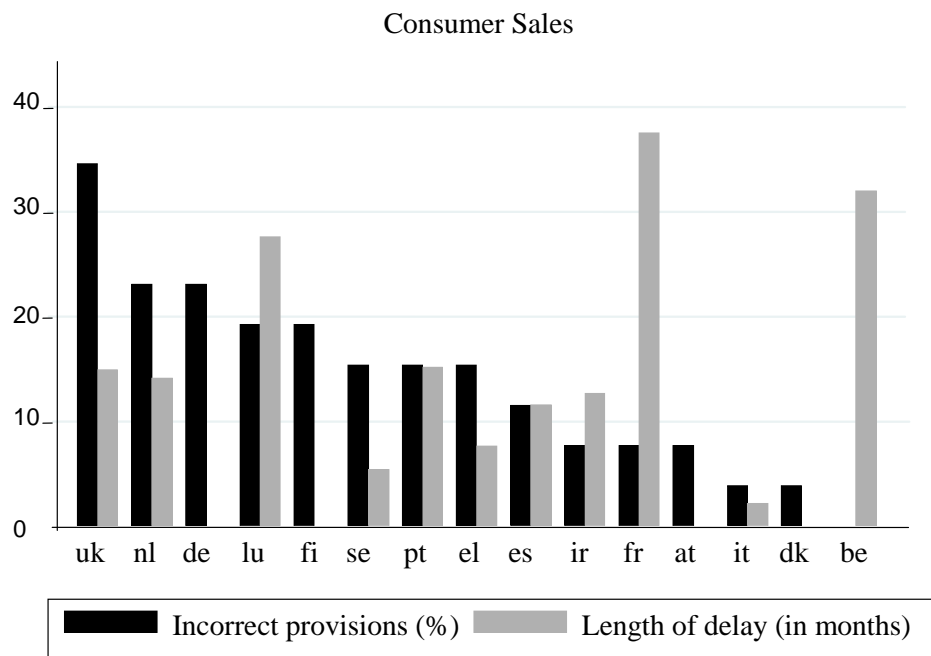
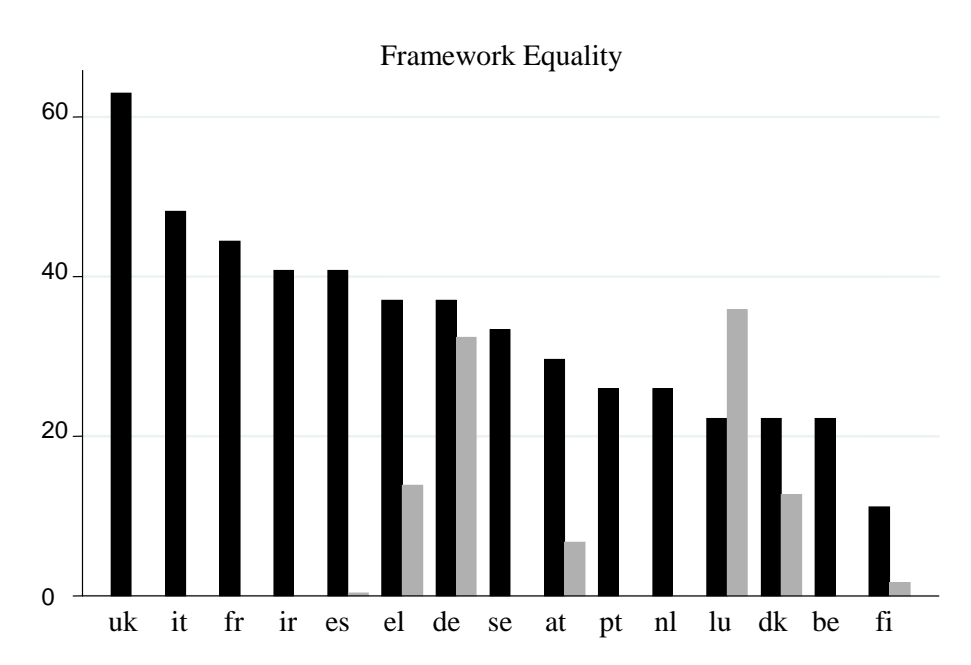


Figure 5.1 Continued

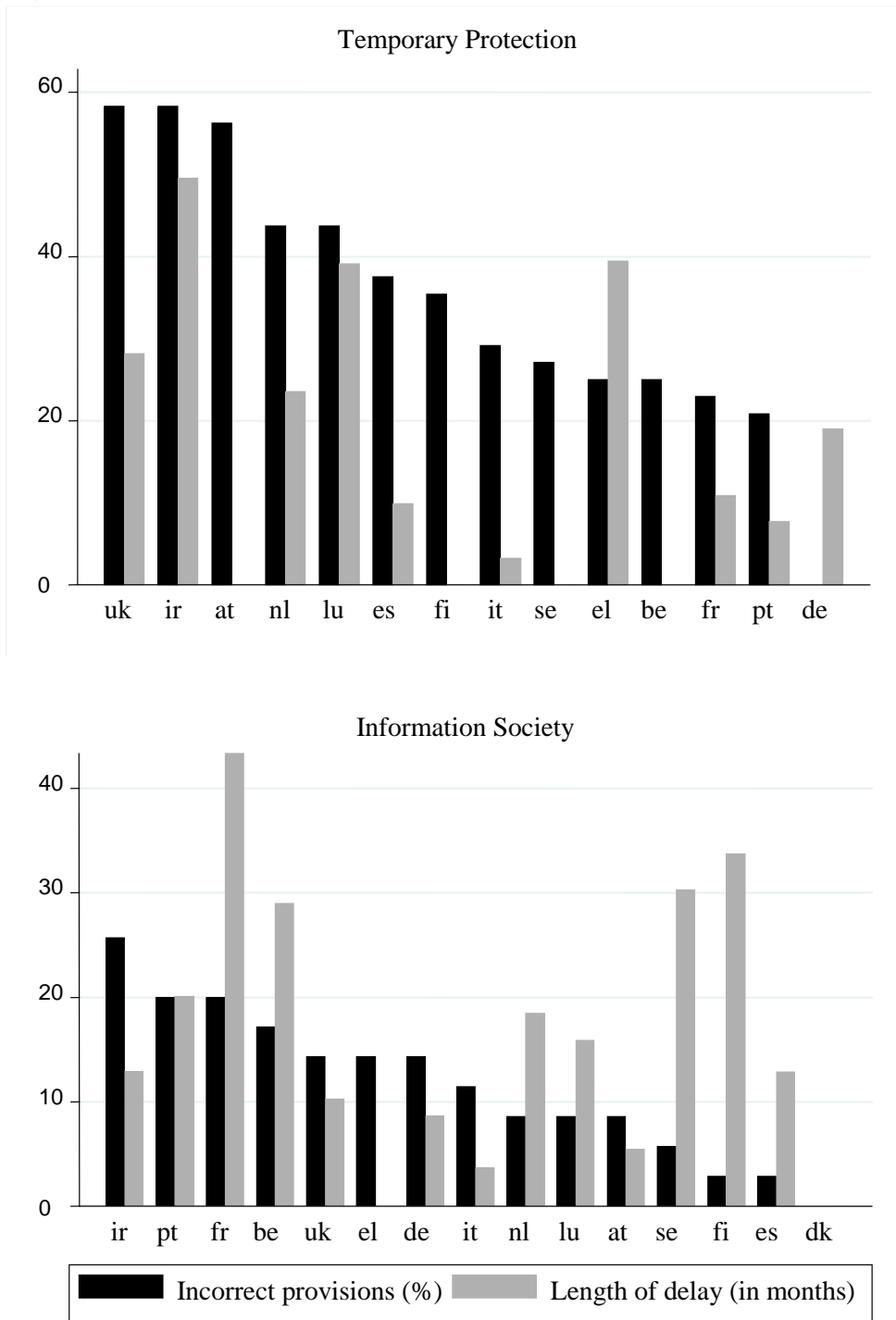


Figure 5.1 illustrates some remarkable differences between one of the standard measures of compliance (transposition delays) and incorrect implementation performance. On the one hand, while some countries did not experience excessive delays during the transposition process, national authorities encountered problems with a high number of provisions (e.g. UK, Italy, France, Ireland, and Spain for the Framework Equality Directive; Austria, and Finland for the Temporary Protection Directive). On the other hand, in some instances excessive delays were followed by zero or few transposition inconsistencies (Belgium and France for the Consumer Sales Directive; Finland for the Information Society Directive and Germany for the Temporary Protection Directive). In general, the relationship between transposition delays and actual compliance with the provisions of the EU directives appears to be weak.

5.5.2 Analysis

Because the dependent variable on compliance is binary, the present study employs logistic regression as the method of analysis. In addition, a cross-classified design is applied to account for the dependence in the observations at the level of the member state and the provision level. A cross-classified design is appropriate for the analysis in the present study, because (1) different member states are transposing the same provisions and (2) different provisions are being transposed by the same member states. This implies that an appropriate statistical model should control for the variation in member states' compliance created by the crossing of two random factors (provisions and member states) (Raudenbush and Bryk, 2002). Thus, the present research improves on most existing studies, which hardly incorporate the cross-classified design of implementation data in the analysis.

Table 5.4 presents the results on the likelihood of member states' compliance with the provisions of the four directives. Model 1 includes only the main variables in the analysis while controlling for directive-level differences. Model 2 also tests the effects of the control variables for bureaucratic efficiency and policy-specific government support for the EU on the likelihood of transposition success. In addition, the random-effect parameters show the estimated variance components both at the provision-

level and the level of member states. The coefficients indicate the *average change* in the probability of correct transposition of a provision due to changes in the values of a given independent variable. A positive sign of the coefficients indicates that higher values of the independent variables increase the probability of implementation success of a provision, while a negative sign shows that the probability decreases. The coefficients, however, do not indicate the precise size of the effect for a change in a given variable x_i , since the change in the probability due to an increase in the level of this variable depends on the levels of all factors in the analysis (Long, 1997).

Table 5.4 shows that a member state's incentive to deviate from an adopted provision has a significant negative effect on the likelihood of correct and proper transposition. As predicted, the likelihood of transposition success decreases if member states expressed opposition to the content of a particular provision during the decision-making process. To assess the magnitude of the effect, the coefficient was transformed into odds ratio. Odds ratios indicate the factor change in the odds of compliance (relative to failure to comply) due to changes in the values of an independent variable, holding all other variables constant.

The likelihood of correct transposition by member states also depends on whether a provision grants discretionary powers to national policy-makers or not. The odds of compliance are approximately 2.6 times greater for those provisions that grant discretion than the provisions that do not grant implementation freedom to member states. Thus, member states are much more likely to correctly transpose provisions that give implementers opportunities to choose from than provisions that constrain the choice of implementers. This result is highly significant and is consistent with the hypothesis. Higher number of recitals on specific provisions addressing member states' obligations decreases the likelihood of transposition success. However the effect is only significant under $p < 0.10$ ($p = 0.086$ in the full model). By contrast, based on the analysis the length of a provision significantly influences the likelihood of correct transposition of directives' provisions by member states. An increase of one sentence added to the text of a provision decreases the odds of transposition success by 16%

((1- 0.839)*100). Conflict in the Council has a negative effect on compliance, but the effect is not significant. Thus, I do not find support for the hypothesis that more debated provisions are more likely to be successfully transposed by member states. Based on analysis in Table 5.4, bureaucratic efficiency and government EU support do not influence the correct transposition of EU directives' provisions either.

Table 5.4 Cross-classified logistic regression on compliance with EU provisions

<i>Variable</i>	Model 1		Model 2		Odds ratios
	Coef.	(S.E)	Coef.	(S.E)	
Member state incentive	-1.495***	(.232)	-1.613***	(.240)	.199
Discretion	1.019***	(.210)	.955***	(.215)	2.598
N of recitals referring to obligations	-.184*	(.106)	-.186*	(.108)	.830
N of sentences in a provision	-.192**	(.086)	-.176**	(.088)	.839
Conflict in the Council	-.287	(.312)	-.282	(.320)	.754
Bureaucratic efficiency			.140	(.317)	1.150
Government EU support			.149	(.147)	1.161
<i>Directive controls</i>					
Framework Equality (2000/78/EC)	.116	(.251)	.075	(.263)	1.078
Consumer Sales (1999/44/EC)	1.723***	(.288)	1.713***	(.297)	5.546
Information Society (2001/29/EC)	1.708***	(.287)	1.626***	(.293)	5.084
<i>Random effects</i>					
σ^2 (Provision-)	.619	(.149)	.638	(.157)	
σ^2 (Member state)	.214	(.104)	.222	(.112)	
Wald χ^2	143.87***		139.21***		
N	1979		1843		

Notes: The reference category is the Temporary Protection Directive (2001/55/EC). Random effects estimated for 136 provisions and 15 member states; ***: $p < .01$, **: $p < .05$, *: $p < .10$.

5.5.3 Analysis of the effects across directives

Both the descriptive statistics (see Table 5.3) and the analysis in Table 5.4 show variation in member states' transposition success not only across

different provisions, but also between directives. More precisely, significant differences exist between directives related to social and immigration issues and the two internal market directives. In order to check whether the effects of the independent variables also differ across different policy areas, two separate analyses were conducted on social and immigration policy (directives 2000/78/EC and 2001/55/EC) and internal market (directives 1999/44/EC and 2001/29/EC).³⁸

Table 5.5 presents the results from the two separate models on transposition success. The most remarkable finding is that while the effect of provision length is significant for social and immigration policies, it is not significant in the analysis of the two internal market directives. Furthermore, the effects of conflict in the Council and number of recitals on compliance are significant for internal market policies but not for the other two directives. In addition, conflict in the Council has a negative effect on compliance, which is contrary to the prediction in Hypothesis 5.4. One explanation for this finding is that controversial provisions often address complex issues that constrain the effectiveness of national policy makers. For example, close reading of the contents of the directives reveals that controversial provisions are generally longer in text and their objectives are often elaborated in the recitals. Thus, the measure for provision-level conflict in the Council appears to be closely related to the two measures of complexity employed in this study.

In a similar way, the effect of provision length for the two internal market policies appears to be accounted by other provision-level characteristics, such as discretion, and number of recitals. These variables appear to be highly correlated for the two directives and they all seem to tap the same underlying factor related to the quality of a directive's provision. The situation is different for the Framework Equality Directive (2000/78/EC) and the Temporary Protection Directive (2001/55/EC), where

³⁸ Another possible way to check for the robustness of the effects across different directives is to conduct separate analyses for each of the four directives. However, in the present study such a research design is not appropriate given the high correlation between some variables for particular directives. One example is the Framework Equality Directive, where the number of recitals is highly correlated with the variable for political controversy ($r = .78$).

provision length takes prominence over the number of recitals and provision-level conflict. The Temporary Protection Directive, for example, includes a number of lengthy provisions extensively describing specific obligations of member states, while recitals often merely repeat the goals of the directive.

Table 5.5 Member states' transposition of EU provisions in separate policy areas

<i>Variable</i>	Social & Immigration Policy		Internal Market Policy	
	Coef.	(S.E)	Coef.	(S.E)
Member state incentive	-1.332 ^{***}	(.343)	-1.891 ^{***}	(.314)
Discretion	1.181 ^{***}	(.301)	.983 ^{***}	(.301)
N of recitals referring to obligations	-.226	(.178)	-.289 ^{**}	(.113)
N of sentences in a provision	-.398 ^{***}	(.132)	.172	(.116)
Conflict in the Council	.225	(.496)	-.766 ^{**}	(.338)
Bureaucratic efficiency	-.110	(.474)	.541	(.418)
Government EU support	-.337	(.277)	.135	(.369)
<i>Directive controls</i>				
Framework Equality (2000/78/EC)	-.138	(.313)		
Consumer Sales (1999/44/EC)			-.089	(.286)
Information Society (2001/29/EC)				
<i>Random effects</i>				
σ^2 (Provision)	.909	(.246)	1.02e-1	(5.81e-0)
σ^2 (Member state)	.546	(.295)	.276	(.208)
Wald χ^2	41.87 ^{***}		77.00 ^{***}	
N	991		852	

Notes: The reference category is the Temporary Protection Directive (2001/55/EC). Random effects estimated for 136 provisions and 15 member states; ***: $p < .01$, **: $p < .05$, *: $p < .10$

While the results in Table 5.5 reveal differences in the effects of some key provision-level variables across policy areas, the effects of member states' incentives to deviate and discretion remain stable in both models.

These results increase the reliability of the finding that member states are likely to act upon their incentives to deviate during the implementation process, and use their freedom of manoeuvre to achieve compliance with the EU requirements.

5.6 Conclusion and discussion

The present study was designed to test hypotheses on member-state compliance with different provisions of EU directives during the transposition process. Unlike directives, provisions contain specific legal requirements that member states have to meet. To explain provision-level variation in compliance, hypotheses were formulated on the influence of member states' expressed concerns and objections during the decision-making stage and characteristics of the decision outcomes of EU provisions.

Legal analysis provides essential information about 1) the extent to which national transposition measures meet the goals of EU provisions and 2) how appropriately the EU provisions are adapted to the peculiarities of a member state's existing legal system and practice. Finally, theoretical insights and research design were applied to the transposition of the provisions of four EU directives from different policy topics: employment, asylum, consumer rights and copyright protection. The few existing studies on compliance with EU provisions have focused on either one directive (Zhelyazkova and Torenvlied, 2011) or one policy area (Thomson, 2010). The directives in the present study are suitable for the analysis of provision-level differences since they contain numerous important requirements to which member states had to conform. They also illustrate member-state compliance with provisions on EU legislation that touched upon nationally salient and politically sensitive topics (anti-discrimination and immigration issues) as well as policy agreements that address important issues for all citizens of the EU (consumers, sellers, authors, producers and users of copyright work).

The analysis in the present study reveals a number of important findings. First, all analyses point out that national legislators are less likely to comply with a provision if their representatives in the Council expressed disagreement with obligations laid down in this specific provision. While the relationship between member states' incentives to deviate and actual

implementation performance seems to be intuitive, EU research employing aggregate measures for member-state policy preferences on compliance with EU directives has shown little support for ‘preference-based’ predictions (Thomson, 2010). In contrast, this study indicates that there is a strong relationship between the decision-making process at the EU level and subsequent implementation by member states, which cannot be accounted by characteristics of the decision outcome or member-state characteristics. More precisely, the Council documents and the DEU expert reports indicated that the objections expressed by national delegates often reflected differences between the EU requirements and domestic policy and practice coupled with government reluctance to make far-reaching changes.

Second, the findings of this research illustrate that characteristics of the decision outcomes influence member states’ transposition of directives’ provisions. Thus, we find evidence that provisions granting discretion to member states are more likely to be successfully transposed than provisions that constrain the actions of national policy-makers. This finding supports the theory that discretion facilitates compliance (Knill, 2001).

The analysis also provides interesting results on the influence of other provision characteristics on member states’ transposition success. While longer provisions seem to experience more compliance problems, this effect is not stable across different directives. In contrast, political controversy and number of recitals do not influence transposition success in the analysis on all four directives, but have a significant effect on compliance with the provisions of the two internal market directives. This finding suggests the existence of directive-level effects on the transposition performance of member states with separate provisions. Given the small number of directives in the present study, further work should shed more light on 1) the interplay between different provision-level factors and their influence on compliance with EU provisions and 2) the possibility of directive-level differences in member states’ correct transposition of EU provisions. Collecting quantitative data on compliance with many directives across different member states, however, is a general problem of EU implementation research due to both practical difficulties and developing a research design that is comparable across countries. Thus, a trade-off exists

between precision in defining implementation success and power in the analysis of compliance with EU directives.

With a view to the goals of the present study, the findings of this research should be put into a proper perspective. While an attempt was made to employ theoretical and empirical insights from the literature on EU policy implementation, many of the commonly used directive-level factors on compliance cannot be directly applied to the provision level. One example is the indicator for discretion, which captures the differences between provisions granting implementation alternatives and provisions do not provide such opportunities to member states, but the measure cannot account for the extent of member states' freedom of manoeuvre. Another example is the number of recitals, which is generally used in EU compliance research as a measure for policy complexity. Recitals, however, seem also to relate to additional theoretical factors, one of which is assumed to be political controversy (Steunenberg and Kaeding, 2009). Future research should try to disentangle these mechanisms by employing more precise indicators that capture the provision-level discretion and complexity.

Finally, it is plausible that member states will remedy their behaviour in the long term. Recent infringement cases for the incorrect transposition of provisions of the Framework Equality Directive and the Consumer Sales Directive show that the Commission has taken notice of at least some of the implementation problems in member states. However, legal analysis of member states' behaviour following these infringement proceedings is missing. In addition, the Commission reports show that infringement cases were not opened regarding all problems identified by the legal experts. Future work could look into the influence of Commission behaviour on member states' compliance as well as the conditions, under which the Commission chooses to start infringement proceedings in some instances, but not others.

Chapter 6

General Conclusion

6.1 Introduction

In the introduction to this dissertation, the implementation of the Consumer Sales Directive (1999/44/EC) was introduced to illustrate the different types of compliance problems by member states. The majority of member states experienced some delay in incorporating the directive into their legal systems. In addition, both the EU Commission and national consumer law experts identified problems in the ways in which the relevant national authorities transposed the Consumer Sales Directive. In some instances, national implementation fell short of the standards prescribed by the directive's provisions. In other cases, domestic law completely failed to account for the directive's key provisions.

The Consumer Sales Directive is not an exception. Past research has found that variation in compliance exists among different member states (Börzel et al., 2010; Mbaye, 2001; Pridham, 1994; Sverdrup, 2004), among different directives and policy areas (Haverland et al., 2008), and within member states regarding particular directives (Linós, 2007; Thomson et al., 2007). To explain variation in compliance, this study focused on features of particular directives and directives' provisions and on member-state attributes that are specific to the related directive or provision. Thus, the following explanatory research question was posed: *To what extent do member states' attributes in relation to particular EU requirements (directives and provisions) affect member states' compliance with EU directives and directives' provisions?* This study also aimed to fill the gap between EU decision-making and national implementation by posing a second explanatory research question: *To what extent do the characteristics of EU decision making (decision outcome and process) affect member states' compliance with EU directives and directives' provisions?*

In addition, the present study sought to improve our understanding of member states' level of compliance with the EU requirements. Thus, the following questions were also addressed: *How can we measure member states' compliance with regard to EU directives and directives' provisions?* and *Are there differences in member states' performance with regard to different types of compliance problems, such as transposition delay, infringement procedures and, the correct transposition of directives' provisions?*

In the following sections (Sections 6.2 and 6.3), the theoretical and empirical answers to the explanatory research questions are summarized and discussed. The measurement and descriptive questions are addressed in Section 6.4, followed by a discussion of the contributions of the present study (Section 6.5). The chapter closes with challenges that scholars face when studying member states' implementation of EU policy outputs and suggestions for future research on compliance in the EU context.

6.2 Theoretical answers to the explanatory research questions

The theoretical answers to the explanatory research questions are based on the core assumption that both the willingness and capacity of member states to comply with different EU requirements are a function of member states' *cost-benefit considerations* regarding the implementation of particular EU directives and directives' provisions in domestic systems. The present study combined two main theoretical approaches to explain member states' compliance with particular directives and directives' provisions: *enforcement* and *management*. Whereas *enforcement* stresses the importance of the *costs* and *benefits* of *non-compliance* (e.g., member states' unwillingness to comply with international agreements and fear of sanctions), the *management* approach focuses on the *costs of compliance* (e.g., capacity limitations, costs of domestic adjustment to required changes, and rule ambiguity) as primary explanations for member states' failure to meet the EU requirements.

In particular, the present study focused on characteristics related to both the process and the outcome of EU decision making in the Council of the EU. Regarding the EU decision-making process, the *level of conflict in the Council* and member states' *incentives to deviate* were expected to influence member states' compliance with EU directives and provisions. Member states' incentives to deviate were defined as the extent to which country delegates disagreed with the adopted decision. Thus, this factor was expected to result in compliance problems, based on the assumption that member states' incentives to deviate increase the benefits of non-compliance with the EU requirements. In contrast, conflict in the Council is assumed to increase the costs of member states' non-compliance by raising the Commission's vigilance with respect to potentially problematic EU

directives and provisions. As a result, one of the core hypotheses of the present study was that conflict between member states leads to greater compliance with EU directives and their provisions.

To capture the influence of the outcome of EU decision making on implementation, this study incorporated factors related to the complexity and the ambiguity of EU directives and provisions. Directive- and provision-level complexity and ambiguity are assumed to affect member states' costs of compliance with the EU requirements, given that they limit the effectiveness of national authorities to successfully adopt the EU requirements. These factors were expected to lead to greater compliance problems among member states.

Member states' perceived benefits and costs of (non-)compliance with particular directives and provisions may also be affected by factors unrelated to the process and outcome of EU decision making. For example, based on the enforcement approach, the existence of alternative priorities in domestic politics could influence both the willingness and the capacity of governments to follow the EU instructions (Tallberg, 2003). In particular, government attitudes toward the EU and the timing of national elections were expected to affect the priority that member states place on the implementation of EU directives. In addition, the study tested the hypothesis that Commission monitoring and enforcement has a positive influence on compliance. In particular, the initiation of infringement procedures by the Commission and the threat of their escalation are assumed to increase the costs of non-compliance and thus induce member states to fulfil their EU obligations in the long term. Finally, based on the management approach, it was expected that member states experience domestic costs of adaptation to the specific EU requirements during the national transposition process. Member states' costs of compliance were defined in terms of the degree of legal compatibility between the existing national domestic policy and practice and the specific requirements laid down in a directive's provision (also referred to as *technical fit*). Higher levels of technical fit were expected to increase the likelihood of compliance because fewer domestic changes are necessary to meet the EU requirements.

Table 6.1 Summary of predictions and findings regarding member states' timely and correct transposition of EU directives and provisions

Main factors	Timely transposition		Correct transposition	
	Expected Effect	Observed Effect	Expected Effect	Observed Effect
<i>Decision making</i>				
Member state incentive	–	0	–	–
Conflict in the Council	+	+	+	0
<i>Decision outcome</i>				
Policy complexity	–	–	–	–
Discretion	–	–	+	+
<i>Alternative priorities</i>				
Government EU support	+	0	+	0
Elections	–	–	---	---
<i>Commission monitoring</i>				
Infringement cases	+	+	+	+
Commission policy disagreement	–	–	---	---
<i>Domestic adaptation costs</i>				
Technical fit	---	---	+	+

Notes: 0: no significant effect (significance test: $p < .05$); +: significant positive effect; -: significant negative effect; ---: not tested.

6.3 Empirical answers to the explanatory research questions

In this study, the theoretical explanations were tested using different indicators for non-compliance, which led to three different dependent variables: transposition delay (Chapter 2), infringement procedures opened by the Commission (Chapter 3), and the correct transposition of directives' provisions by member states (Chapters 4 and 5). We observed variation in the effects of key factors on these dependent variables. Table 6.1 provides a summary of the expected and observed effects of these factors on member states' timely and correct compliance with EU directives and provisions. Infringement procedures are not included as a separate category in the table because they combine both member states' timely and correct transposition of EU legislation. As was illustrated in Chapter 3, because of the small number of infringement cases addressing the incorrect transposition of EU legislation, it was only possible to conduct a separate analysis on infringement cases initiated due to delayed transposition. Thus, in Table 6.1,

the results regarding infringement procedures included for timely transposition only. The empirical findings of the factors related to the decision-making processes and decision outcomes, alternative government priorities, Commission monitoring, and domestic costs of adaptation are discussed in the following sections.³⁹

6.3.1 Decision-making process

With regard to the influence of the EU decision-making process on compliance with EU directives and provisions, we found mixed evidence for the effect of member states' incentives to deviate on delayed and correct transposition. Incentives to deviate did not have an effect on non-compliance, as measured by transposition delays and infringement procedures initiated by the Commission (Chapters 2 and 3). However, the analysis demonstrated that member states expressing disagreement with a particular provision during the Council negotiations were less likely to transpose this provision correctly (Chapter 5; see Table 6.1). The latter finding implies that member states transfer their policy preferences from the decision making into the implementation stage. The limited explanatory power of member states' individual policy preferences on transposition delay and infringement procedures could be due to an improper specification of member states' incentives to deviate and transposition success. Member states that disagree with the outcome of a provision are not necessarily more prone to delay the transposition process. They may fulfil their obligations on time but may respond to incentives by transposing a measure that is closer to their policy preferences than to the EU decision. Furthermore, they may fail to introduce the provision into their law altogether. Therefore, defining member states' incentives with respect to directives as a whole may be inappropriate because member states fail to comply with only those provisions that contradict their policy preferences. They might still properly transpose the rest of a directive's provisions (Thomson, 2010).

³⁹ It should be noted that the following sections provide a general conclusion for the main empirical findings of the present study and are not designed to discuss all of the effects tested in the separate chapters. As a result, the effects of some factors related to controls or interactions are not discussed in the concluding chapter.

In addition to a member state's individual incentives to deviate, conflict between the member states' representatives in the Council is also significant in terms of compliance with EU requirements. In contrast to member states' incentives, however, conflict in the Council had an effect only on the length of transposition delay and not on the quality of the transposed measures (see Table 6.1). In congruence with our hypothesis, conflict in the Council had a positive effect on notifying a transposition measure to the Commission after the deadline had expired, even after controlling for the initiation of infringement procedures by the Commission (Chapter 2). In addition, the effect of conflict on transposition delay varied over time. In particular, higher levels of conflict in the Council resulted in shorter delays in transposition. Furthermore, conflict between member states' representatives also decreased the likelihood that infringements would escalate if they were initiated in response to transposition delays (Chapter 3). However, the effect was negative and insignificant when applied to the correctness of transposing EU directives and directives' provisions (Chapters 3, 4, and 5). The finding that conflict in the Council is only relevant in explaining the length of transposition delay may be due to the Commission's limited ability to scrutinize the quality of the transposition process. The Commission lacks expertise in the specific legal particularities in each member state. As a result, the assumption that conflict in the Council increases the Commission monitoring might not explain correct transposition by member states (Chapter 3).

The empirical analysis also found that the effect of conflict in the Council is conditional on specific directive-level characteristics. In particular, the findings in Chapter 2 demonstrate that the positive effect of conflict in the Council decreased over time for directives that granted more discretion to member states. This finding may be explained by the assumption that high levels of discretion are associated with higher ambiguity in the context of transposition delays (Thomson et al., 2007).

6.3.2 Decision outcome

The present study demonstrated that not only characteristics of the decision-making process matter but also features of the decision outcome may explain the timely and correct transposition of EU directives and provisions.

Thus, more complex directives (measured as the number of recitals in a directive) were more likely to result in the instigation and escalation of infringement procedures by the Commission (Chapter 3). Furthermore, the complexity of decision outcomes impeded the correct and adequate transposition of directives' provisions (Chapter 5). In particular, a higher number of sentences in a provision and recitals adding more obligations to member states decreased the likelihood of member states' transposition success with the provisions of four EU directives.

Another important characteristic of the decision outcome is the level of discretion that a decision grants to member states' authorities at the implementation stage. It was predicted and observed that discretion has a contrasting effect on different types of compliance problems (see Table 6.1). Thus, when applied to transposition delays, a higher number of possible transposition outcomes increased the likelihood of delays due to an increase in the workload of national authorities to find the most appropriate alternative (Chapter 2; see also Thomson et al., 2007; Kaeding, 2008). In contrast, the predictions and analyses of member states' correct transposition of EU provisions indicated that member states were more likely to comply with provisions that grant discretion to national authorities than with provisions that limit their implementation options (Chapters 4 and 5). In summary, while discretion increases the costs of timely transposition of EU directives, it decreases the costs of correct transposition of EU provisions.

6.3.3 Alternative priorities and Commission monitoring (enforcement)

Member states' perceived benefits of non-compliance may be affected by both the outcome of EU decision making and the existence of alternative priorities in domestic politics (Tallberg, 2003). In Chapter 3, it was expected that government attitudes toward the EU influence the priority that national governments place on the implementation of EU directives. However, the analysis found no significant relationship between government support for the EU and infringement procedures. In contrast, alternative priorities related to the occurrence of specific domestic events were shown to affect the initiation and continuation of infringement procedures. Thus, if an infringement case happened to coincide with national general elections, the

responsible government was less likely to resolve its compliance problems in a timely manner, i.e., before the case escalated to later stages of the infringement proceedings (Chapter 3).

This study also tested the effects of factors related to the costs of non-compliance induced by Commission monitoring and enforcement. In Chapter 2, the instigation of infringement procedures by the Commission was used as an indicator of its intensity in monitoring the transposition process. In line with the hypotheses, the results found that the initiation of infringement procedures by the Commission leads to quicker transposition by member states over time (Chapter 2). In addition, Commission monitoring positively influences member states' correct transposition of a directive's provisions. More precisely, member states that had received a warning by the Commission for delayed or incomplete transposition of the Framework Equality Directive in 2004 were more likely to display progress in correctly transposing the provisions of this directive in 2007 (Chapter 4).

The costs of non-compliance are also reflected in the different stages of the infringement procedure based on the assumption that later stages incur higher costs on member states than earlier ones. In Chapter 3, interaction effects with the infringement stage were included to test whether member states change their behaviour due to their fear of infringement escalation. The results show that the effect of conflict in the Council varies significantly across infringement stages. Higher levels of conflict had no effect on the initiation of infringement procedures but decreased the likelihood that infringements would escalate to Court referral (Chapter 3).

The effect of Commission monitoring on compliance may also be conditional on the Commission's policy preferences regarding particular directives. Monitoring member states' transposition activities requires allocating resources, which could be a costly endeavour if the Commission does not agree with the content of the directive in the first place. The empirical findings indicate that higher levels of Commission disagreement with the decision outcome in a directive led to longer delays in the transposition of EU directives by member states (Chapter 2). Commission disagreement with the decision outcome also had a positive effect on the initiation and escalation of infringement cases (Chapter 3). These findings imply that member states perceive lower costs of non-compliance when the

chief enforcement agent of the EU, the Commission, disagrees with the content of a directive.

6.3.4 Domestic costs of adaptation (management)

As discussed earlier in this chapter, based on the management approach, member states were expected to experience domestic costs of adaptation to specific EU requirements during the national transposition process. In Chapter 4, it was predicted that member states were more likely to comply with the provisions of the Framework Equality Directive, the higher the level of *technical fit* between a specific EU requirement and the existing domestic policy and practice. In line with this hypothesis, the empirical analysis found that member states respond to specific costs of adjustment (see Table 6.1). Existing national policies that were incompatible with the prescribed goals in the EU provisions were less likely to be correctly transposed than those that closely mirrored the EU requirements (Chapter 4).

Furthermore, the effect of technical fit was expected to be moderated by provision-level characteristics because the technical fit between existing national policies and the EU requirements is less likely to matter for provisions that provide many implementation alternatives from which national authorities may choose. The results indicate that this hypothesis is partially supported for medium and high levels of technical fit. In contrast, higher levels of discretion additionally increased the negative effect of low technical fit on compliance with EU provisions. While surprising, this finding provides new insights into the conditions under which discretion results in greater compliance. Granting discretion implies that member states have different transposition alternatives at their disposal and that some legal experience (technical fit) is vital for national authorities to select an appropriate transposition measure.

6.4 Measuring and describing compliance in the EU context

In addition to the empirical answers to the explanatory research questions, this study also provided insights into the implications of using different measures of compliance with EU directives and provisions. As discussed in the previous sections of this chapter, the study applied different indicators

for non-compliance with EU directives and provisions. Chapters 2 and 3 focused on the standard indicators of member states' implementation performance: transposition delay (Chapter 2) and infringement procedures initiated by the Commission (Chapter 3). In contrast, in Chapters 4 and 5, compliance was defined as the extent to which directives' provisions are correctly and adequately transposed in national legislation.

Two general conclusions can be drawn from the present study with regard to compliance measures in the EU context. First, directives consist of various provisions that prescribe separate obligations to member states. National authorities may comply with some of these obligations but fail to comply with others. For example, although Sweden correctly transposed the majority of the provisions of the Framework Equality Directive (2000/78/EC), it still had not incorporated the provisions on protection against age discrimination seven years after the EU adoption of the directive (Chapter 4). Thus, once the research focus has shifted to the correct implementation of EU policy outputs, compliance should be defined with respect to the separate provisions of directives and not the directives as a whole.

Second, the correct implementation of EU provisions implies that national transposition measures should reflect the goals of the specific provision. However, in some cases, member states transposed a provision literally but failed to abolish previously adopted national laws that prescribed conflicting standards. In other cases, the text of a transposed measure was ambiguous, potentially leading to interpretation problems by national courts and application issues for the groups that the legislation targeted (e.g., sellers, consumers, and employers). As a result, any appropriate measure of compliance should include both the extent to which a national legal implementation mirrors the goals of a directive or a provision and whether existing legal and administrative hurdles could impede the practical implementation of the EU requirements.

This study also sheds light on the descriptive research question. We observed profound differences between standard indicators for non-compliance (infringements and transposition delays) and correct and adequate transposition of directives' provisions. The majority of the infringement procedures initiated by the Commission referred to cases of

delayed transposition rather than the incorrect implementation of EU directives and their provisions (Chapter 3). In contrast, national expert reports identified numerous inconsistencies between requirements stipulated in the directives' provisions and the national implementation outcomes (Chapters 4 and 5). This finding lends support to past and current arguments in the EU implementation literature that infringement procedures are insufficient to describe member states' actual non-compliance. The Commission's lack of resources to monitor the behaviour of national authorities and its unwillingness to create conflict with powerful member states may mitigate the Commission's enforcement powers (Börzel, 2001; Hartlapp and Falkner, 2009; König and Luetgert, 2009).

We also observed differences between member states' transposition delays and the correct implementation of EU provisions. In Chapter 4, it was found that while the UK, Italy, France, and Ireland transposed the Framework Equality Directive on time, the majority of the provisions were incorrectly incorporated into their legislation. In other cases (Chapter 5), member states were slow in transposing the EU directives, but the resulting implementation outcomes contained few errors.

In summary, the results indicate that the speed and the quality of national implementation are not necessarily related. This finding has important implications for current research on EU policy implementation, which generally associates compliance with EU directives with the time it takes for a member state to transpose directives into a national context. In contrast, this study found that such a definition of compliance disregards more substantive questions, such as the extent to which the domestic laws actually conform to the EU requirements.

6.5 Contributions

The present study contributes to research on states' adherence to international agreements in general and EU compliance in particular. The multiple contributions of the present study can be divided into *theoretical* and *empirical* findings.

We contribute to theories on EU compliance in four ways. First, the study incorporates the 'missing link' between EU decision making and national implementation in explaining member states' compliance with the

EU requirements. Current research has focused on explaining decision making and implementation as two separate processes. In contrast, the core hypotheses of the present study emphasize (1) conflict between decision makers in the Council of the EU and (2) that member states' expressed incentives to deviate from the adopted EU decisions influence the outcome of national implementation. Thus, we predict and demonstrate that higher levels of political disagreement are more likely to hasten member states' transposition process, whereas individual incentives to deviate result in incorrect implementation of EU provisions. As a result, we also contribute to implementation and delegation models that emphasize the importance of decision making in explaining implementation (Franchino, 2007; McCubbins et al., 1989; Torenvlied, 2000) by applying these hypotheses in the context of EU policy making.

Second, this study's theoretical approach takes into account the importance of monitoring and enforcement as key factors that influence member states' transposition performance. Most studies ignore the fact that the activities of the Commission as an enforcing agent could have profound consequences for member states' compliance with their EU obligations (see Tallberg, 2003 and Steunenberg and Rhinard, 2010 as exceptions). In contrast, based on the assumption that Commission monitoring increases the costs of non-compliance, we derive and test hypotheses regarding the positive influence of infringement procedures on member states' proper and timely transposition of EU directives and provisions.

The third theoretical contribution of this study relates to the specification of member states' costs of compliance with EU directives and provisions. In particular, we use *technical fit* to define the costs of compliance as member states' legal compatibility with regard to particular EU provisions. Thus, we respond to the critique that the general *misfit hypothesis* is underspecified because scholars do not clearly describe the nature of the costs that emerge from the incompatibility between European directives and domestic regulations (Mastenbroek and Kaeding, 2005). We also develop hypotheses regarding policy-level costs of compliance, such as the level of discretion granted by a particular EU provision.

The fourth theoretical contribution refers to the conceptualization of compliance in the EU context. By incorporating different indicators of

compliance in one study, we contribute to theories aiming to explain variation in member states' implementation of EU directives and provisions. More precisely, it was predicted and illustrated that the effects of key factors on compliance vary depending on the implementation context. Factors explaining transposition delays do not affect the correctness of implementation measures (e.g., conflict in the Council) and vice versa (e.g., member states' individual incentives to deviate). In addition, factors inducing longer transposition delays are beneficial for correct transposition (e.g., discretion). The finding that some factors have different effects on member states' timely and correct transposition of EU requirements contributes to a recent review of the EU compliance literature reporting mixed results on the effects of incentives to deviate, EU conflict and discretion on compliance with EU directives (Toshkov, 2010). This study's findings suggest that an important contributor of these conflicting findings could be different specifications of the dependent variables. First, the two dependent variables are substantively different, as they focus on different aspects of member states' compliance with EU requirements and ignore others (e.g., meeting the transposition deadline vs. the goals of directives' provisions). Second, timely and correct transpositions differ with respect to the level of analysis at which compliance is measured (e.g., member state x directive vs. member state * directive's provision).

The empirical contributions of the study relate to providing a new data set and to the statistical analyses used to test hypotheses. In particular, extensive content analysis of expert country evaluation reports, comparative studies, and various legal documents provided detailed information about member states' correct transposition of the provisions of four EU directives. Questioning the assumption that member states comply with particular provisions of EU directives increases the number of observations and enables the use of statistical analysis to study compliance with a limited number of EU directives (Chapter 5) or even one (Chapter 4). In Chapter 4, member states' compliance with particular provisions was also studied at two different points in time, which enabled us to draw conclusions regarding member states' progress in successful transposition. The new data set also improves qualitative studies of the correct implementation of EU requirements, which draws conclusions about member states' compliance

with EU directives based on information about several important provisions (Bailey, 2001; Haverland, 2000). This approach is problematic, as provisions considered the most important by scholars reflect the most politicized issues in a directive and thus distort the actual implementation performance of member states.

The second empirical contribution of this study relates to the method of analysis used to study member states' compliance with EU directives and provisions. In particular, implementation research generally disregards the dependency in observations that emerges when (1) a particular member state implements various directives and provisions and (2) a directive or a provision is implemented by various member states. By applying a cross-classified multi-level analysis, this study accounts for the fact that transposition outcomes are nested at two different levels: decision outcomes (directives or directives' provisions) and member states. Thus, the method of analysis helps avoid overestimation of the statistical significance of the effects.

6.6 Future research

This study's findings give rise to new questions that should be addressed by future research. First, a major assumption of the present study was that conflict in the Council affects member states' compliance through Commission monitoring. While we found a positive effect of conflict on transposition timeliness, conflict had no effect on the correctness of transposed measures. Some analyses indicated that the effect of conflict on correct implementation might even be negative (Chapter 3), implying that conflict in the Council does not always give rise to better monitoring of compliance problems. The finding that EU conflict has a negative effect on compliance has been corroborated by other studies on the transposition of EU directives (e.g., Luetgert and Dannwolf, 2009). Future research should focus more explicitly on the link between decision makers' conflicts and the monitoring of member states' implementation process. It should also seek to shed light on the conditions under which conflict in the Council contributes to improved monitoring of compliance problems. Establishing the precise link between EU conflict and Commission monitoring would thus contribute

to our understanding of the differing results regarding the effect of EU conflict on compliance in various studies (Toshkov, 2010).

Second, the finding that conflict in the Council hastens the national transposition process raises questions about the effect of conflict in an enlarged Europe that has 27 member states instead of 15. While our finding leads us to expect additional efficiency in transposition within a more diverse context, this efficiency could be confined by the limited capacities of the Commission to monitor compliance in an enlarged Europe. In addition, it has been argued that the new Central and Eastern European member states differ substantially from their Western counterparts, which could lead to different patterns of compliance with the EU requirements (Kelley, 2004; Schimmelfennig and Sedelmeier, 2005). Future research should investigate how preference heterogeneity in decision making influences compliance in an enlarged Europe.

Third, the study found that the Commission's disagreement with an EU policy leads to longer delays and an escalation of infringement proceeding. This finding poses the question of whether the Commission is indeed a strategic actor that allows non-compliance to escalate in cases with which it disagrees. Another possible explanation for this finding is that member states disregard the authority of the enforcement agent if the Commission does not support a particular policy outcome. To disentangle these propositions, future research should directly investigate the link between the Commission's incentives and its monitoring activities.

Finally, this study's findings raise new questions regarding the influence of discretion on compliance. Whereas we predicted that higher levels of discretion facilitate the correct implementation of EU requirements, our findings show that this effect is conditional. In particular, if member states lacked a policy or a practice relating to a specific EU requirement (low technical fit), discretion further impeded implementation success. Future work should investigate the conditions under which discretion constrains the implementation success of national authorities and, more specifically, the interplay between discretion and the capacity of national implementers to comply with EU requirements.

This study's theoretical and empirical contributions should be put in a proper perspective by exploring questions that were not addressed herein.

For example, the concepts of ‘compliance,’ ‘implementation’ and ‘transposition’ were used interchangeably throughout the chapters of the study. However, as discussed in Chapter 1, transposition is only the first legal stage of the implementation process, which also consists of practical enforcement and application of the transposed EU directives and provisions. Given that one major goal was to derive and test predictions related to the EU decision-making process, it was appropriate to focus on the transposition stage, wherein national governments are the main actors. Practical application of EU requirements is conditional on their effective transposition, and the effect of EU-level factors is likely to be diluted at the subsequent implementation stages. It is the task of future research to improve our understanding of EU compliance by extending the analysis to the practical implementation of international agreements.

Moreover, while the effect of Commission monitoring was incorporated into the theory and analysis of compliance, further work should capture the enforcement activities of the Commission using more precise indicators than infringement procedures. First, infringements are both an enforcement mechanism used by the Commission to induce compliance by member states and a non-compliance indicator. Second, infringement cases are often initiated if discussions at a more informal level failed to convince member states to bring their national legislation in line with the EU requirements (Börzel, 2001; Tallberg, 2003).

In addition, Chapter 5 examined compliance with respect to the separate provisions of four directives. Ideally, a larger sample of directives would have allowed us to draw more generalizable conclusions regarding their effects on correct transposition. As a result, this research should be seen as first steps to the analysis of compliance with directives’ provisions.

Finally, the study of compliance was applied to only the 15 old member states. Thus, it was not possible to incorporate the twelve new member states, most of which joined the EU in 2004. Several recent studies suggest that different mechanisms may drive implementation in Central and Eastern European and Western European countries (Yordanova and Zhelyazkova, 2011). Future work should improve our understanding of the differences in compliance in an enlarged Europe.

Samenvatting (Summary in Dutch)

Inleiding

Beleidsprocessen eindigen niet met de formele goedkeuring van een wet: de aangenomen besluiten dienen tevens correct en doeltreffend uitgevoerd te worden door de aangewezen nationale en lokale overheden. Binnen de context van de Europese Unie zijn de regeringen van de verschillende lidstaten ieder afzonderlijk verantwoordelijk voor de nationale inpassing, toepassing en handhaving van het EU-beleid. Een specifieke vorm van EU-besluiten zijn EU-richtlijnen. Bij deze richtlijnen liggen enerzijds de doelstellingen voor de lidstaten vast, maar hebben de nationale autoriteiten anderzijds enige keuzevrijheid in de manier waarop zij deze doelstellingen bereiken. De verantwoordelijke overheden en nationale instellingen van de lidstaten dienen, alvorens de EU-richtlijnen toe te passen en te handhaven (de *praktische* uitvoering), eerst de bepalingen uit de EU-richtlijnen om te zetten in nationale wetgeving (de *juridische* uitvoering). Dit proces wordt aangeduid met de term *transpositie*.

Dit proefschrift richt zich op vraagstuk van de naleving van EU-richtlijnen en de bepalingen in deze richtlijnen. De prestaties van lidstaten worden beoordeeld aan de hand van de mate waarin de nationale wetgeving voldoet aan de specifieke EU-richtlijnen.

Naleving in EU-verband

Bij de analyse van de juridische inpassing van EU-richtlijnen in de nationale wetgeving dienen keuzes gemaakt te worden aangaande: (1) de meest relevante indicatoren voor naleving van EU-richtlijnen bij de omzetting in nationale wetgeving en (2) de meest relevante factoren die een verklaring bieden voor het niet omzetten van bepalingen van EU-richtlijnen in nationale wetgeving door lidstaten.

Ten aanzien van het eerste punt geldt dat lidstaten bepalingen van de EU-richtlijnen niet tijdig, of niet correct, in hun nationale wetgeving zouden kunnen omzetten. Bovendien kunnen de resultaten van de implementatie niet alleen beoordeeld worden aan de hand van de mate waarin de wettelijke aanpassingen in lijn zijn met de doelstellingen van de EU-richtlijnen, maar tevens aan de hand van de mate waarin de bepalingen van de EU-richtlijn

doeltreffend zijn geïntegreerd in de bestaande nationale wetgeving. In dit proefschrift worden daarom verschillende indicatoren gebruikt voor het niet naleven van EU-richtlijnen door lidstaten: *vertraging* bij de omzetting in nationale wetgeving (hoofdstuk 2), *procedures* geïnitieerd door de Europese Commissie naar aanleiding van een schending van Europese wetgeving door lidstaten (hoofdstuk 3), en de *correcte omzetting* van bepalingen van EU-richtlijnen in nationale wetgeving door lidstaten (hoofdstuk 4 en 5).

Ten aanzien van de keuze van factoren die een verklaring bieden voor naleving van EU-richtlijnen door lidstaten heeft bestaand onderzoek zich gericht op factoren op drie niveau's van analyse: (a) het niveau van de richtlijn, (b) het niveau van de lidstaat en (c) het niveau van de lidstaat-richtlijn dyade (Börzel, 2001; Haverland en Romeijn, 2007; Jensen, 2007; Kaeding, 2006, 2008, Linos, 2007; Luetgert en Dannwolf, 2009; Mastenbroek, 2003; Mbaye, 2001; Thomson et al., 2007). Het meeste onderzoek richt zich op factoren die betrekking hebben op de mogelijkheden en beperkingen van lidstaten of betrekking hebben op de 'algemene' bereidheid van lidstaten om een EU-richtlijn om te zetten in nationale wetgeving.

Onderzoek naar de naleving van EU-beleid gaat over het algemeen voorbij aan de relatie tussen de besluitvorming in de EU en de nationale implementatie van EU-beleid. In bestaand onderzoek naar de implementatie van EU-beleid wordt weinig tot geen aandacht besteed aan de notie dat EU-wetgeving vaak niet in harmonie aangenomen wordt, maar juist na intensieve onderhandelingen tussen de ministers van de Europese Raad met uiteenlopende, conflicterende beleidsdoelstellingen. Conflict in de Europese Raad kan zijn weerslag op de aangenomen EU-richtlijn en zou derhalve van invloed kunnen zijn op de prestaties van lidstaten bij de omzetting naar nationale wetgeving (Zhelyazkova en Torenvlied, 2009).

Onderzoeksvragen

Dit proefschrift combineert inzichten uit de bestaande literatuur over de implementatie van beleid en de naleving van EU-beleid. Ten eerste komt de assumptie aan de orde dat een lidstaat hetzelfde gedrag zou vertonen inzake de implementatie van verschillende EU-richtlijnen. In plaats daarvan kan worden gesteld dat lidstaten meer geneigd zijn om aan sommige EU-

richtlijnen en bepalingen te voldoen, maar niet aan andere. Daarom wordt de volgende onderzoeksvraag gesteld: *In welke mate zijn kenmerken van lidstaten—gerelateerd aan bepaalde EU-voorschriften (richtlijnen en bepalingen)—van invloed op de naleving van EU-richtlijnen en bepalingen door lidstaten?* Dit onderzoek heeft ook als doel de leemte aan kennis over de relatie tussen EU-besluitvorming en de nationale implementatie van EU-beleid te vullen door het vinden van een antwoord op de tweede onderzoeksvraag: *In welke mate zijn kenmerken van EU-besluitvorming (proces en resultaat) van invloed op de naleving van EU-richtlijnen en bepalingen door lidstaten?*

Dit onderzoek tracht ook ons begrip van het *niveau* van naleving van EU-richtlijnen door lidstaten te verbeteren door te kijken naar verschillende bepalingen van die richtlijnen. Dit komt aan de orde in de volgende vragen: *Hoe kunnen wij de naleving van EU-richtlijnen en bepalingen door lidstaten meten? Zijn er verschillen in de prestaties van lidstaten tussen verschillende soorten van problemen die optreden bij de naleving, zoals vertraging in de omzetting naar nationale wetgeving, procedures van de Europese Commissie naar aanleiding van schending van Europese wetgeving en de correcte omzetting naar nationale wetgeving van bepalingen van EU-richtlijnen?*

Theoretische benadering

De theoretische antwoorden op de verklarende onderzoeksvragen zijn gebaseerd op de veronderstelling dat zowel de bereidwilligheid als de capaciteit van lidstaten om te voldoen aan de verschillende EU-verplichtingen een functie zijn van kosten-baten overwegingen. Die afwegingen bestaan ten aanzien van de implementatie van bepaalde EU-richtlijnen en van bepalingen in nationale systemen. Dit onderzoek combineert twee theoretische benaderingen om de naleving van bepaalde EU-richtlijnen en bepalingen door lidstaten te verklaren: *handhaving* en *management*. Waar bij handhaving de nadruk gelegd wordt op het belang van de kosten en baten van het niet naleven (zoals andere prioriteiten, prikkels om af te wijken, en angst voor sancties) wordt bij management de aandacht gevestigd op de kosten van naleving (bijvoorbeeld capaciteitsbeperkingen, kosten van aanpassingen voor lidstaten, en

dubbelzinnigheid in de regelgeving) als voornaamste verklaringen voor het falen van lidstaten om aan de eisen van de EU te voldoen (Chayes en Chayes, 1993; Downs et al., 1999; Fearon, 1998; Tallberg, 2003).

Data

De onderzoeksvragen worden empirisch beantwoord met gebruik van de “Decision making in the European Union” dataset (hierna DEU, Thomson en Stokman, 2003). De DEU dataset biedt unieke kwantitatieve informatie over de beleidsstandpunten van de vertegenwoordigers van de lidstaten en de Europese Commissie over bepaalde kwesties gedurende het proces van EU-beleidsvorming.

Ten aanzien van de informatie over de afhankelijke variabelen maakt dit onderzoek gebruik van verschillende gegevensbronnen. De gegevens over vertragingen in de omzetting naar nationale wetgeving zijn voornamelijk verkregen uit de Eur-Lex databases (hoofdstuk 2). *The Annual Reports on Monitoring the Application of EU legislation* voorzagt in informatie over inbreukprocedures (hoofdstuk 3). Tenslotte zijn uitgebreide nationale evaluatieverslagen bestudeerd (hoofdstuk 4 en 5) om gegevens te verkrijgen over het niveau van naleving door lidstaten van afzonderlijke bepalingen van de EU-richtlijnen.

Theoretische en empirische bevindingen

Dit proefschrift biedt theoretisch en empirisch inzicht in de invloed van de EU-besluitvorming, de uitkomsten van de besluitvorming, prioriteiten van regeringen, toezicht door de Commissie, en de kosten van aanpassing voor lidstaten om EU-richtlijnen en bepalingen na te leven op de omzetting van de richtlijnen in de nationale wetgeving.

Het besluitvormingsproces

Voorspellingen over de invloed van het EU-besluitvormingsproces op de naleving van EU-richtlijnen en de bepalingen daarin zijn afgeleid van het effect van prikkels van lidstaten om deze niet tijdig en correct om te zetten naar nationale wetgeving. Deze factor zou (gebaseerd op de veronderstelling dat prikkels van lidstaten om af te wijken tijdens de besluitvorming een positief effect hebben op de voordelen van het niet voldoen aan eisen van de

EU) naar verwachting resulteren in problemen bij de naleving. Daarentegen kan worden gesteld dat conflict in de Raad ook kan zorgen voor een toename in de waakzaamheid van de Commissie met betrekking tot de potentieel problematische EU-richtlijnen en bepalingen. Deze waakzaamheid kan zorgen voor een toename van de kosten van het niet naleven van EU-voorschriften voor lidstaten en daarom tot een betere naleving van EU-richtlijnen en de bepalingen daarin. Het empirische bewijs hiervoor geeft echter een gemengd beeld. Prikkel om af te wijken hebben geen invloed op vertraging in de omzetting (hoofdstuk 2 en 3), terwijl ze een negatief effect hebben op de correcte omzetting van de EU-bepalingen (hoofdstuk 5). Conflict tussen de vertegenwoordigers van de lidstaten in de Raad heeft ook invloed op de naleving van EU-voorschriften. Conflict in de Raad heeft echter alleen een effect op de omvang van de vertraging bij de omzetting, niet op de kwaliteit van de omgezette maatregelen. Meer conflict in de Europese Raad leidt vooral tot minder vertragingen in de omzetting (hoofdstuk 2 en 3). Deze bevinding kan worden verklaard door de inzet van de (beperkte) capaciteit van de Commissie om de kwaliteit van het proces van omzetting naar nationale wetgeving nauwkeurig te onderzoeken. Maar, de aanname dat conflict in de Raad zorgt voor een toename van toezicht door de Commissie houdt mogelijk niet stand voor het verklaren van correcte omzetting door de lidstaten (hoofdstuk 3).

Uitkomsten van de EU-besluitvorming

Om de invloed van de uitkomst van de EU-besluitvorming op de implementatie van het EU-beleid vast te leggen zijn in dit onderzoek kenmerken van de EU-richtlijnen en bepalingen opgenomen factoren die betrekking hebben op de complexiteit en de meerdere interpretatiemogelijkheden ('dubbelzinnigheid') ervan. Complexiteit en dubbelzinnigheid op het niveau van de richtlijn en bepaling worden verondersteld het vermogen aan te tasten om de EU-voorschriften correct over te nemen. Daarom is de hypothese geformuleerd dat deze beide factoren zouden leiden tot meer problemen bij de naleving van de EU-voorschriften door de lidstaten.

Dit onderzoek heeft aangetoond dat meer complexe richtlijnen waarschijnlijk zullen leiden tot het instellen en verder escaleren van

inbreukprocedures door de Europese Commissie (hoofdstuk 3). Bovendien vormt de complexiteit van de besluiten ook een belemmering voor de correcte en doelmatige omzetting van de bepalingen van de richtlijnen (hoofdstuk 5).

Een ander belangrijk kenmerk van de EU-besluiten is het niveau van discretie dat een besluit verleent aan de autoriteiten van de lidstaten bij de implementatie. Er is voorspeld en waargenomen in empirische gegevens, dat discretie een negatief effect heeft op vertragingen bij de omzetting, maar een positief effect op de correctheid van de omzetting van EU-bepalingen.

Andere prioriteiten en toezicht (handhaving) door de Commissie

De aanwezigheid van andere prioriteiten in de binnenlandse politiek (Tallberg, 2003) zou ook van invloed kunnen zijn op de door de lidstaten waargenomen voordelen van het niet naleven van EU-voorschriften. De prioriteiten die lidstaten stellen aangaande de implementatie van EU-richtlijnen kunnen met name beïnvloed worden door het tijdstip van de nationale verkiezingen. Derhalve hebben we in hoofdstuk 3 de verwachting geformuleerd en geobserveerd dat nationale verkiezingen de dagelijkse beleidsvorming zouden kunnen verstoren en leiden tot een escalatie van problemen bij de naleving van EU-voorschriften.

In dit onderzoek zijn ook de effecten meegenomen van factoren die verband houden met kosten van het niet naleven van EU-voorschriften welke veroorzaakt worden door toezicht en handhaving van de Commissie. Met name de initiatie van inbreukprocedures door de Commissie en de dreiging van escalatie worden verwacht de lidstaten te bewegen om op de lange termijn te voldoen aan hun verplichtingen ten opzichte van de EU. De resultaten hebben aangetoond dat de initiatie van inbreukprocedures door de Commissie na verloop van tijd leidt tot een snellere omzetting door de lidstaten (hoofdstuk 2). Bovendien heeft toezicht door de Commissie een positieve invloed op de correctheid van de omzetting van bepalingen van een richtlijn door lidstaten (hoofdstuk 4).

Aangezien bij het toezicht op de activiteiten die lidstaten ontplooiën bij de omzetting naar nationale wetgeving middelen toegekend dienen te worden, kan het effect van toezicht door de Commissie op de naleving van richtlijnen mede afhankelijk zijn van de beleidsvoorkeuren van de

Commissie ten aanzien van de richtlijnen. De empirische bevindingen van dit proefschrift laten zien dat ontevredenheid van de Commissie met de besluiten van de richtlijn geleid hebben tot meer vertragingen bij de omzetting naar nationale wetgeving door lidstaten (hoofdstuk 2 en 3).

Binnenlandse kosten van aanpassing

Op basis van de managementbenadering was de verwachting dat lidstaten bij het proces van omzetting naar nationale wetgeving ook binnenlandse kosten van aanpassing aan de specifieke EU-voorschriften ervaren. In hoofdstuk 4 is voorspeld dat lidstaten meer geneigd zouden zijn om te voldoen aan de bepalingen van een richtlijn wanneer het specifieke EU-voorschrift in hogere mate aansluit bij het binnenlandse beleid.

De achterliggende gedachte is dat bij hogere mate van aansluiting minder nationale aanpassingen nodig zijn om te voldoen aan de EU-voorschriften. De empirische analyses hebben laten zien dat lidstaten reageren op specifieke kosten van aanpassing. Bestaand nationaal beleid dat onverenigbaar is met de doelstellingen van de EU-bepalingen wordt minder waarschijnlijk correct omgezet dan beleid dat meer in lijn is met de EU-voorschriften (hoofdstuk 4). Echter is de aansluiting tussen het bestaande nationale beleid en de EU-voorschriften waarschijnlijk minder van belang voor bepalingen, waarbij nationale autoriteiten veel keuzemogelijkheden hebben bij de implementatie.

Bijdragen

Het huidige onderzoek draagt op verschillende manieren bij aan bestaand onderzoek over de naleving van EU-beleid. Ten eerste bevat het de ontbrekende schakel tussen EU-besluitvorming en nationale implementatie bij het verklaren van naleving van EU-voorschriften door lidstaten. Als gevolg daarvan dragen we tevens bij aan implementatie en delegatiemodellen die bij het verklaren van implementatie de nadruk leggen op besluitvorming (Franchino, 2007; McCubbins et al., 1989; Torenvlied, 2000), door hun voorspellingen toe te passen binnen de context van de EU-beleidsvorming.

Ten tweede houdt de theoretische benadering van het huidige onderzoek rekening met het belang van zowel toezicht als handhaving als voorname

factoren die prestaties van lidstaten bij de omzetting in nationale wetgeving beïnvloeden. Veel bestaande onderzoeken besteden weinig aandacht aan de veronderstelling dat activiteiten, die de Commissie ontplooit in het kader van handhaving, aanzienlijke invloed kunnen hebben op de naleving van EU-voorschriften door lidstaten (voor uitzonderingen zie Tallberg, 2003, Steunenberg en Rhinard, 2010). Dit proefschrift toont aan dat de voorkeuren en het gedrag van de handhavende instantie een belangrijke rol spelen bij de prestaties van lidstaten bij omzetting in nationale wetgeving.

De derde theoretische bijdrage van dit proefschrift is gerelateerd aan de specificatie van de mate waarin EU-voorschriften aansluiten bij nationaal beleid om kosten van naleving voor lidstaten te omschrijven. Daarmee reageren we op de kritiek dat de algemene hypothese van gebrekkige aansluiting ondergespecificeerd is omdat wetenschappers de kosten van de onverenigbaarheid tussen EU-richtlijnen en nationale regelgeving niet expliciet maken (Mastenbroek en Kaeding, 2005).

De vierde theoretische bijdrage betreft de conceptualisering van naleving in EU-verband. De bevindingen van dit proefschrift tonen aan dat de tijdigheid en correctheid van omzetting inhoudelijk van elkaar verschillen, omdat ze gericht zijn op sommige aspecten van de naleving van EU-voorschriften door lidstaten en andere negeren (voldoen aan de uiterste datum voor omzetting versus voldoen aan de doelstellingen van de bepalingen van richtlijnen).

Tenslotte draagt het onderzoek in dit proefschrift empirisch bij aan de literatuur over de naleving van EU-regelgeving door te voorzien in een nieuwe en unieke dataset om hypothesen over de *correcte omzetting* van EU-richtlijnen door lidstaten te toetsen (hoofdstuk 4 en 5). Daarmee wordt een eerste antwoord geboden op de kritiek dat kwantitatieve analyses van implementatie van EU-beleid in het algemeen afhankelijk zijn van door de EU gerapporteerde direct beschikbare statistische gegevens, welke onvolledig zijn en vooringenomen zouden kunnen zijn (zie Hartlapp en Falkner, 2009).

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Curriculum Vitae

Asya Zhelyazkova was born on 31 January 1983 in Bourgas (Bulgaria). She completed her secondary education at the English Language School 'Geo Milev' in Bourgas. In 2002 she received a grant to study in International University Bremen in Germany (currently known as Jacobs University Bremen), where she obtained her BA degree in Integrated Social Sciences. In 2005 and 2006 she was granted the Utrecht Excellence Scholarship and the HSP Huygens Scholarship for her studies at the research master programme 'Sociology and Social Research' at Utrecht University, the Netherlands. After obtaining her Master degree in Sociology in 2007, she became a PhD candidate at the Interuniversity Center for Social Science Theory and Methodology (ICS) in Utrecht, where she completed this dissertation. In 2010, she was a visiting scholar for two months at the Mannheim Center for European Social Research (MZES) in Germany. As of December, 2011, she is employed as a postdoctoral researcher at the European Politics research group of the Center for Comparative and International Studies (CIS) at ETH-Zürich, Switzerland.

ICS dissertation series

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