

EU RULES AND WHY COUNTRIES DON'T COMPLY

How institutions shape the process of transposition of EU directives

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1. The research problem

European Union Member States are still taking too long to implement agreed directives into national law. There are also far too many infringement cases where Member States are incorrectly applying the requirements laid down in the directive. While recognised as a major problem that seriously obstructs further European integration, national governments' diverging attitude towards their obligation to comply with Community legislation is still poorly understood. By establishing how institutions matter in the process of transposition, it is my aim to offer a better theoretical explanation than those advanced thus far for the varying degree to which EU Member States deal with Community legislation. So as to achieve this objective, I seek to systematically test the rival new-institutional theories to the speed and completeness of transposed Community directives. Prior to explaining why Member States deviate from the deadline and contents set in a directive, I seek to assess the extent to which such deviations have occurred over time. Though academics and EU officials share the view that the EU countries' transposition performance is highly inadequate, Member States' long-term transposition records have hardly been evaluated. Accordingly, the main research questions my research seeks to answer read

- (1) To what extent do Member States fail to transpose Community directives timely and completely?
- (2) What new-institutional theory is best able to explain why Member States fail to transpose Community directives timely and completely into national law?

1.1 Transposition deficit: a matter of interpretation

Article 249 of the EC Treaty lays down that the European Parliament acting jointly with the Council, the Council and the Commission shall, in order to carry out their task and in accordance with the provisions of the EC Treaty, make regulations and issue directives, take decisions, make recommendations or deliver opinions¹. Amid these formal legal methods for developing Community policy, the directive is of particular interest. Being binding as to the result to be achieved by each Member State to which it is addressed, but leaving to the

¹ A decision is binding in its entirety upon those to whom it is addressed. Recommendations and opinions have no binding force (Consolidated version EC Treaty, 2002).

national authorities the choice of form and methods², a directive is most suitable for bringing about the necessary changes in national laws while respecting as far as possible the national legal systems (Prechal, 1995: chap 1). The degree to what Member States actually implement agreed Community directives into national law, is monitored by the Commission. The implementation deficits these six-monthly monitors display, stand for the percentage of Internal Market directives, which, at the time of monitoring, have not yet been notified as having been transposed, in relation to the total number of applicable Internal Market directives. Hence, these monitors fall short if the aim is to get a sound grasp of Member States' performance in the long run. A recent publication of Mastebroek (2003), who was the first in challenging the EU Internal Market scoreboard outcomes by seriously evaluating the transposition performance of the Netherlands, proves that the Commission highly underestimates the transposition deficit in terms of timeliness. While the Autumn '98 Internal Market scoreboard assures that no Member State has a transposition deficit exceeding 6.2 per cent, herewith presenting The Netherlands (with a deficit of 2.1 per cent) as one of the better performers, Mastebroek's evaluation shows otherwise. Her assessment of the implementation of all (229) EC and Euratom directives enacted from 1995 through 1998 demonstrates that - in the case of the Netherlands - almost 60 per cent of the directives that were enacted in that period, were transposed late. The length of these delays varies, but may run to several years (Mastebroek, 2003: 371). By focusing on all directives in an entire policy field, and by evaluating the long-term transposition records of five EU Member States instead of one, I aim to contribute to a better understanding of the transposition deficit.

1.2 Non-compliance: As many explanations as studies

Secondly, and more importantly, my research is aimed at explaining why it is that Member States don't comply with a directive's transposition deadline or fail to meet up with the directives' original intentions. Thus far, scholarly efforts to account for the varying degree to which Member States comply with EU legislation have not resulted in an unequivocal explanation. Most comparative studies on Member States' adaptation to Community legislation took the form of the case study method. Some were especially interested in environmental policies (Héritier, 1995; Knill and Lenschow, 1998; Haverland, 1998), whereas

² It does not mean that directives are vague. The ends to be met by Member States are set out in considerable detail, whereas the consequentiality of this instrument has been enforced by ECJ decisions² (Craig & De Burca 2003, p 114-15).

other scholars have been focusing on directives in the area of equal treatment (Caporaso and Jupille 2001; Duina 1999; Eyllenbosch and Verreth, 1996; Ostner and Lewis, 1995; Van Vleuten, 2001), health and safety at work (Eichener 1995; Gier 1991), European work councils (Geyer and Springer 1998; Streeck 1997), and labour law (Falkner et al. 2002, 2003). Though most of these studies include the transposition and implementation stage, their empirical theoretical focus, looking at just a few directives and/or concentrating on just a few countries, is rather narrow. Hence, empirical research on EU Member States' responses to EU law imposed on them, has led to ad hoc explanations, varying per issue or policy area. Some emphasis is found on studies in which adjustment processes are expected to be more problematic if the degree of misfit between European rules and existing institutional and regulatory traditions is high. Caporaso and Jupille, for instance, assessed the goodness of fit³ between Europe and domestic provisions, hereby focusing on the adaptation of France and the United Kingdom to the EU equal pay and equal treatment legislation. Their study shows that European policies and institutions run up against domestic structures, often creating confusion and conflict. The resulting process of adaptation is highly political, an outcome broadly supportive of historical institutionalism (Caporaso and Jupille, 2001). Mastenbroek, who chose for a quantitative approach using survival analysis, concludes that there are - apart from the goodness of fit - other important explanatory variables that substantially increase the conditional probability of transposition. These are the legal instrument used, the lead ministry, the EU-decision making procedure, and finally the mere passage of time and the prospect of the deadline being missed⁴ (Mastenbroek, 2003: 391). Another extensive comparative program has been realised by the project group headed by Falkner (2002, 2003), whose analyses concern the implementation of six labour law directives in fifteen Member States. The results presented by Falkner et al challenge the misfit thesis' expectation that national actors deliberately offer resistance during the transposition phase if European directives require significant changes to the pre-existing national arrangements. Their findings indicate that opposition is not the only factor that explains Member States' non-compliance;

³ Here fit is "good" to the extent that substantive equality (e.g. pay equality between men and women) in the Member States satisfies the expectations and requirements of European policy and law. Other indicators concern how European and national levels define terms such as "equal", "pay", "treatment", "work", and "value". To the extent that they are defined similarly in the two spheres, fit is good and adaptational pressure will be relatively low. Another indicator concerns the extent to which domestic procedures (avenues for legal recourse to perceived victims of discrimination, job-evaluation schemes facilitating the comparison of the value of different jobs and provisions) satisfy the requirements of European law.

⁴ The residual analysis performed by Mastenbroek indicates that the applied model tells only part of the story. The model fails to explain those cases with a large delay, which may be either due to a variable that is omitted (f.e. political opposition) or by the weak operationalisation of (presumably) the goodness of fit (Mastenbroek 2003).

administrative shortcomings, interpretation problems, and issue linkage should be taken into account as well. Treib⁵ (2003) on the other hand stresses the importance of domestic party politics when it comes to the causal conditions for correct and timely transposition of these directives.

2. Trial of strength: comparing the explanatory power of new institutionalist theories

Considering the lack of convergence in explaining Member States' varying compliance records, it is my aim to test the explanatory power of hypotheses deriving from two rival new-institutional strands - sociological institutionalism and rational choice institutionalism. All new-institutionalist approaches share the core assumption that institutions affect the outcomes of political processes. Yet, different scholars perceive the influence of institutions on social action in seemingly incompatible ways. In the sociological view policymaking is seen as driven by rules of appropriate or exemplary behaviour, organized into structures of identities and institutions. Its basic principle is that institutions are defined by behaviour and subsequently institutions shape behaviour assuming that individuals "internalise" the institution(s) (Peters 1999, chap 6). Interests and identities are considered to be endogenous to the processes of interaction that institutions represent. The rational choice perspective, on the other hand, argues that individuals have a fixed (exogenous, determined prior to participation) set of preferences (Peters 1999, chap 3). Its adherents maintain a relatively thin theory of human rationality. They assume that the behaviour of actors is driven by a strategic calculus so as to maximize the attainment of these preferences, which will be deeply affected by the actor's expectations about the behaviour of others. One could argue that such a theoretical distinction fails to fully represent reality. For instance, March and Olsen (1998: 952) point out that political actors are constituted both by their interests, by which they evaluate their expected consequences, and by the rules embedded in their identities and political institutions. However, from an analytical perspective, such an over-encompassing approach would fail to bring to the light the relative weight of the rational and sociological institutional approaches.

3. Research design

⁵ Case studies in which the transposition of six labour-law directives in four Member States⁵ were at the centre (Treib 2003).

For answering the central research questions, my research will concentrate on the transposition records of five Member States in the field of European social policy. The selection of the policy field as well as the selection of countries - Germany, Greece, the Netherlands, the United Kingdom, and Spain - is based on their contrasting institutional features. Variations between the different policy issues addressed by European social policy, and variations between the institutional settings of the Member States allows for testing contrasting predictions that can be derived from the sociological and the rational choice perspectives.

The data that have been collected through official EU and national sources include details of all (over hundred) social policy directives that have been enacted since the establishment of the EC, as well as official transposition statistics of the five countries. Hence, the data allow for an evaluation of the individual transposition records of EU Member States over time, in terms of timeliness and completeness of transposition. Moreover, the data allow for a quantitative testing of hypotheses. The data collection method as regards the explanatory variables highly depends on the operationalisation of hypotheses that I choose to test, but may involve document studies, interviews, and/or structured surveys.

Hence, the first step towards a theoretical trial of strength is to make an inventory of the quantifiable implications of (a) sociological institutionalism and (b) rational choice institutionalism. Hypotheses deriving from both theories will be tested by means of multivariate analysis methods. In a later stage, elements deriving from the historical institutional strand may be added to improve the explanatory capacity of the former two theories. Finally, and subsequent to establishing which theory proves to be most successful in answering the main research question, I aim to examine by means of case studies the atypical conditions of cases which are left unexplained by the theory, and whether or not these special cases give cause for refining the theory.

4. Sociological Institutionalism and its Logic of Appropriateness - possible hypotheses

I conclude this paper with a selection of hypotheses, which I consider most capable of relating the sociological institutional “logic of appropriateness” to the transposition process.

While assessing possible hypotheses proposed in literature (f.e. Checkel, Beyers and Trondal, I took a particular interest in inferences of which it is reasonable to expect that the institution

assumed to be in force indeed varies within the research population. Moreover, such causal inferences should contain explanatory variables that allow for a quantitative approach. Apart from these criteria, an equally decisive factor giving ground for adopting a hypothesis is its accurate coverage of the theoretical core assumptions. In other words, those hypotheses that I considered relatively less accurate in doing so, have been abandoned. Moreover, if reasoning from the sociological perspective, I expect that national key actors' preference change towards an increased compliance with EU-norms, and consequently towards timely and complete transposition of EU law, is founded on a process of successively

- Institutional embeddedness, which implies in this case: getting embedded in a EU institution;
- Identification with the EU institution
- Social learning, and subsequently internalisation, acceptance and diffusion of EU norms⁶
- Adoption (by national key actors) of a predominant preference for EU norms and consequently preferential acceptance and treatment of EU norms, as opposed to possible contradicting norms that rule the national institutions in which they are embedded as well.

Considering the importance of these subsequent phases, and following the selection criteria I discussed earlier in this section, the set of hypotheses that I intend to test read as follows:

H1 A directive is likely to be transposed timely and completely if the department is not divided along functional or professional lines but has a flexible structure of coordination allowing officials who negotiate in Brussels to participate in transposition domestically, provided that

- These officials participate in a group that meets repeatedly or [if] there is high density of interaction
- Apart from this department, no other domestic departments (with a less flexible structure of coordination) are involved in the transposition process

H2 The more the domestic political environment is featured by distrust in the domestic polity, the more likely national officials will adopt a predominant preference for EU norms and consequently seek to transpose directives timely and correctly

6

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