



Universiteit  
Leiden  
The Netherlands

## **Between politics and administration : compliance with EU Law in Central and Eastern Europe**

Toshkov, D.D.

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## **CHAPTER 3**

### **LITERATURE REVIEW**

The previous chapter presented the historical context of the adoption of EU law in Central and Eastern Europe. I traced the beginnings of legal approximation. I also showed the embeddedness of rule transfer in the process of European integration of the post-communist region, and in the accession negotiations in particular. In this chapter I will review the existing studies of transposition and implementation of EU law in Central and Eastern Europe. As only a few works directly relate to the topic, I will expand the literature review in two ways – first, I will discuss the studies that focus on the Europeanization of the former communist states more generally, and second, I will review the rich literature on transposition in the ‘old’ member states of the EC/EU. The more general literature on compliance and implementation will be discussed in the next chapter presenting the theoretical argument of the book.

#### **3.1 Studying the incorporation of EU law in the candidate countries**

Relatively few studies directly address the question of transposing/implementing EU rules in the new member states<sup>10</sup>. Studies that are built on a comparative approach or a systematic empirical analysis are even harder to find. One of the few exceptions is the study by Hille and Knill (2006) who construct a measurable indicator of implementation performance in CEE for the period 1999-2003 and try to match the resulting patterns with the bureaucratic strength of the governments and the national political constraints. The authors conclude that “the functioning and the quality of the domestic bureaucracy constitute crucial preconditions for effective alignment with EU policy requirements” (p.549). The study, however, employs a rather indirect measure of implementation performance – an indicator measuring “the frequency, direction and intensity of criticism or approval of the candidate countries’ performances” as expressed in the European

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<sup>10</sup> This section of the chapter is partly based on Toshkov (2008).

Commissions' reports on the progress towards accession. A further shortcoming is the possible endogeneity of the dependent variable and the major explanatory factor – bureaucratic quality as measured by the expert ratings collected for the World Bank governance indicators. While the use of the expert scores of various aspects of governance is not problematic as such, the analysts' assessments are likely to stem at least to some degree from the criticisms or approvals contained in the Commission reports.

The adaptation in the social policy field has been also a subject of in-depth analysis in the cases of Poland (Leiber, 2007) and Slovakia (Dimitrova and Rhinard, 2005). Leiber notes the good performance of Poland in terms of legal implementation and emphasizes the power of accession conditionality as a major driving force. The new member states do not form a separate 'world of compliance', according to the study. Extensive EU monitoring is highlighted as the main explanation for the high transposition performance in Poland. Leiber concludes, however, that in the face of political opposition, the Commission can do very little to ensure the proper transposition (p.357) and that the instrument of conditionality is 'too crude to enforce the implementation of individual policy measures' (p.357).

Interpreting the Slovakian case, Dimitrova and Rhinard (2005) find evidence for the impact of norm compatibility. The Slovakian government struggled with the transposition of EU anti-discrimination legislation. Preparation took more than two and a half years and the proposed law led to heated debates in the Parliament. Moreover, after its adoption the transposing law was challenged in the Constitutional Court, found unconstitutional, and as a result repealed. Ultimately, all these complications resulted in a serious transposition delay. Dimitrova and Rhinard conclude that the delay can be explained by the conflict between the EU norm and a highest order domestic norm about (anti)discrimination.

Comparative case studies possess clear advantages to address the issue of cross-sector and cross-country differences in implementation performance. Andonova (2004) examines the impact of the EU on the environmental policies in Bulgaria, the Czech Republic and Poland. Analyzing the performance in several sub-sectors, the author highlights the crucial role of domestic industry interests for successful adaptation and the role of the political institutions in furthering or constraining the change.

Exploring the variation in a single country over time is another possibility of addressing the causal structure behind transposition/implementation performance. Working with transposition data from Poland for the time of accession, Zubek (2005) finds out that the crucial factors speeding up the process of adopting the *acquis* are the centralization of authority in the executive, manifested in the exercise of strong political leadership, the centralization of co-ordination structures, and the improving administrative capacity. In addition, the dominant role of the executive vis-à-vis the legislature has enhanced the performance in Poland. In a later text, Zubek (2008) compares the Polish case with the experience of the Czech Republic and Hungary. The major explanatory variable used in the study is the core executive. The core executive is operationalized as rules used to 'mobilize and monitor line ministries in the area of EU rule adoption' (p.8). For the operationalization of the dependent variable (compliance) in the cases of the Czech Republic and Hungary, however, Zubek relies on the aggregate measures of (non)transposition rates published by the European Commission. These indicators, while useful in order to get a first impression of the state of rule adoption, provide but limited information and constitute rather crude measurements of compliance. Nevertheless, on the basis of evidence gathered through numerous interviews, Zubek convincingly argues that the adoption of EU rules has been a considerable challenge (p.153) for the CEE core executives and that domestic variables related to the institutions of the core executive have had an effect on the success of legislative alignment (p.155).

The works reviewed so far provide some analytical leverage in regard to the problem of explaining the adoption of EU law in CEE. The strong positive impact of bureaucratic quality / administrative efficiency and the focal role the executive plays seem to be corroborated by most studies. Political preferences and the institutional structure are rarely found important, at least at the aggregate level. The main shortcoming of the literature is the limited ability to provide a generalizable picture. In turn, the failure to generalize beyond policy sectors, countries and rather short time-periods can be traced to the lack of a comparable, reliable and valid measure of transposition performance.

### 3.2 Studying policy change in the candidate countries

The specific question of adopting and implementing EU law is part of the broader theme of formal and informal institutional change produced by the EU in the post-communist countries (Mattli and Pluempner, 2004; Schneider et al., 2006). The literature on Europeanization East (for a review see Sedelmeier, 2006a) features various studies of the impact of the EU on societal and political reforms in CEE. The main theoretical focus of the literature has been the influence of accession conditionality: the power of the EU to demand reforms in exchange for the prospects of accession to the Union (Dimitrova, 2002; Grabbe, 2003; H  ritier, 2005; Schimmelfennig et al., 2003; Schimmelfennig and Sedelmeier, 2005). It is a particular feature of the negotiations between the EU and applicant countries that the prospective members should adopt the EU legislation before actually joining; transposition (legal implementation) is regarded as a condition for a successful bid to get into the club (Preston, 1997; Ruano, 2002). Disagreements over the explanatory mechanism behind the power of conditionality splits the research into studies that emphasize the power asymmetry (Iankova and Katznelson, 2003; Moravcsik and Vachudova, 2003), positive and negative incentives (Schimmelfennig, 2008; Schimmelfennig et al., 2003) or socialization, lesson-drawing and norms (Dimitrova and Rhinard, 2005).

Heather Grabbe (2001, 2003) identifies five types of Europeanization mechanisms: provision of legislative and institutional templates, transfer of aid and technical assistance, benchmarking and monitoring, advice and twinning, and gate-keeping the access to negotiations and further stages in the accession process. These mechanisms range from soft (assistance provision) to hard (gate-keeping) and involve different pressures for reform. We could also classify them as mechanisms for reinforcement by reward (Schimmelfennig et al. 2003) and enforcement by negative sanctions. The typology of mechanisms is based on a deeper distinction between material bargaining and social influence as the channels for influence of the CEE governments (Schimmelfennig et al. 2003).

The distinctions between types of change mechanisms are mirrored by a division of the Europeanization process in five phases: first contacts, European Agreements, pre-accession, membership negotiations, post-accession (Lippert et al., 2001). Although it is not entirely clear whether these five stages are empirically derived or theoretically

proposed we can see a vague correspondence between the change mechanisms and the temporal structuring of the relations between the EU and the applicants.

Taken together the mechanisms and the temporal aspects build up a special mode of governance - governance by conditionality (Grabbe 2001, Dimitrova 2002, Schimmelfennig et al. 2003)<sup>11</sup>. The crucial feature of the conditionality model is that the relationship between the EU and the applicants is asymmetrical. This gives the EU agents a lot of discretion and potential powers to affect the actions of the candidate countries' policies. The asymmetrical nature of the relationship arises from the gate-keeping role of the EU and increases with the room for interpretation left in applying the accession conditions.

The conditionality framework however has its drawbacks as an analytical tool for understanding Europeanization in CEE. First, in a way it explains too much: we can no longer be surprised that the applicant countries comply with the EU demands whatever they are. Clearly, a limit should exist to the potential European influence (Schimmelfennig, 2004). Next, the emphasis on the asymmetrical nature of the relationship creates 'blind spots' like the concessions the EU makes in the process of negotiations (like the numerous derogations from the *acquis*, temporal adjustments periods, financial assistance packages). This can readily be seen in one attempt to formalize in a game theoretical model (Schneider, 2007) the accession negotiations because while the model does a great job in explaining why the EU grants discriminatory membership to new member states it cannot take into account the basic empirical fact that also the new member states gained some concessions during the enlargement.

The fluid nature of conditionality, the inconsistencies in its application by the EU authorities themselves, and the difficulties in finding empirically a clear-cut causal relationship between conditions and policy outcomes (Hughes et al., 2004) all point out that the power asymmetry model has to be modified or enriched in order to account for the complex relationships between the EU and the applicant states. One way to do so is to try include the costs of domestic adaptation as variables in the analysis. This makes the pressure for compliance relative and can account for both the successes and drawbacks of

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<sup>11</sup> The conditionality model has been applied in empirical studies of administrative reform by Dimitrova (2002) and Olsen (2002), regionalization (Hughes et al., 2004), decision-making structures (Lippert et al., 2001), public administration education and training (Verheijen and Connaughton, 2003) and general constitutional design (Malová and Haughton, 2002; Pridham, 2008). Dimitrova (2004) collects several studies of the broader impact of enlargement on various aspects of governance in CEE.

EU influence. Costs are also relative to the benefits of enlargement. The importance of credibility of conditionality and the size of costs receive sound empirical support. Taking up on the issue of credibility, Steunenberg and Dimitrova (2005) conclude that setting a date for accession actually erodes the effectiveness of conditionality (p.29). Furthermore, looking at the different incentives implied by the EU proposed policy changes for the various national actors and the domestic opportunity structure shed light on how EU stimuli for reform feed in the national political process. Actually, a common point emerging from the Europeanization East literature is that the best way to approach the question how EU matters is to investigate the interplay of exogenous and endogenous sources of policy change and focus on the domestic political process instead of assuming it away. The fact that EU enlargement has proceeded following a sectoral logic requires attention to sector-specific interactions between political actors (Vachudova, 2001), the administrative organizations (Goetz and Wollmann, 2001) and interest groups (Borragán, 2004) through which the influence of the EU is transmitted.

In summary, the literature on conditionality has generated a number of insights about how the context of enlargement negotiations influences the relationships between the EU and the former communist countries from CEE. As transposition is an essential part of the negotiations for future membership, this thesis directly benefits from the findings and, as a next step, offers new testing ground for the conditionality framework.

### **3.3 Studying transposition and compliance in the EC/EU**

Research on transposition and implementation of EC law has been burgeoning over the last few years. Numerous studies, relying both on qualitative and quantitative research have appeared and a multitude of arguments have been explored. Since these studies tackle essentially the same research question as this thesis tries to answer, albeit in a different setting (existing member states), it is necessary to review the existing scholarship, to identify the main conclusions reached, and to point out the possible shortcomings. It is a formidable task to review in detail the literature on transposition/ implementation/ compliance in Europe in its entirety. I would rather focus on studies using large-N analysis and comparative case study designs since their findings are more likely to be of broader relevance. Moreover, the insights of case studies is often incorporated and

developed in these large-n studies. I will also pay more attention to summarizing the causal inferences the literature proposes and evaluates than to the descriptive inferences and the theoretical reasoning why a certain factor should have an effect. The review first looks into the different explanatory factors analyzed by the literature. After that, I draw several conclusions from the overview of transposition studies. It is highly instructive to summarize and analyze in detail the empirical findings of the existing studies in order to locate the points of consensus, to identify the assortment of proposed explanations, and to establish a context for comparison of the finding of the current thesis. In the next section I will review the causal inferences made by quantitative analyses of transposition and implementation.

### *Macro-institutional factors*

The cross-country variation in compliance performance is well established. How systematic the differences between the states are is not so clear. Nevertheless, much effort has been put into trying to account for the cross-national variation. Macro-institutional factors related to the fundamental setup of the nation-state have attracted the bulk of the academic attention. Despite the numerous attempts to establish a link between the main features of the national political/administrative systems and compliance, the evidence we have for such links is inconclusive.

Constitutional constraints on decision-making and the closely related concept of veto players are hypothesized to exert major impact on transposition and implementation performance. More actors with power to veto legislation are expected to slow down the legislative process. The chance of a grid-lock also increases as more players can halt the process. Despite the theoretical and intuitive plausibility of this argument, however, empirically the evidence for such a relationship is mixed. A comparison of the results of the numerous studies is difficult due to the various definitions and operationalizations used, but we can still note the inconclusive nature of the findings. First, scholars that test the impact of federalism independently from the rest of the political constraints report a negative effect – Thomson (2007), Haverland and Romeijn (2007). Similarly Linos (2007) using Hooghe and Marks' (2003) regional autonomy index finds a negative relationship, as well as König and Luetgert (n.d.). Giuliani (2003), however, finds no effect although he



also uses Lijphart's index of federalism, as well as Thomson (2007). Jensen (2007) finds no effect employing Beck et al. 2001 index of regional autonomy).

Using the more general veto players concept, the link between constraints on the decision-making and compliance appears even more precarious. Toshkov (2007a) finds no effect of the number of veto players using data on EU-15 for the period 1998-2005. Similarly, Jensen (2007) and Mbaye (2001) conclude that there is no effect. On the other hand Giuliani (2003) finds a negative relationship between the number of veto players and national adaptation to EU law. Kaeding (2006) finds no effect of veto players using Huber's 1993 index of political structures but a negative effect using Schmidt 1996 veto points. Perkins and Neumayer (2007) find a negative relationship testing Heinz's (2002) index of political constraints. With the same operationalization, however, Börzel et al. (2007) find no effect.

In addition to federalism and veto players, several other institutional factors have been tested. Government composition (which is also usually part of the calculation of the number of veto players) has been investigated separately by Linos (2007) who finds a negative effect of multiparty governments on compliance, by Bergman who finds no difference between minority and majority governments, and Giuliani (2003) who reports negative influence of the effective number of parties. Steunenberg and Rhinard (2006) employ a directive-specific procedural veto player index that takes into account the decision-making level for the transposition measures and adjusts for the number of actors involved. Transposition patterns shed some support for the effect of this variable (Steunenberg and Rhinard, 2006).

The institutional relationship between the executive and the legislature add another line of inquiry. Giuliani (2003) finds an effect of the 'executive party dimension' using Lijphart's index of democracy types. He also finds positive effect of the executive control of agenda-setting power on compliance. Siegel (2007), on the other hand, concludes that the executive control of the legislature has a negative impact, while policy centralization does not matter at all. Some policy-specific institutions have been analyzed as well. Jensen (2007) classifies the Labor Inspectorates in the different member states according to the type of oversight they employ (policy patrol vs. fire alarm) and concludes that the type is related to compliance.

Further, institutionalized state-society relations feature often in the explanatory models of implementation scholars. The empirical results show no influence, however. Corporatism does not have an effect on transposition delay according to Kaeding (2006), Lampinen and Uusikylä (1998), Mbaye (2001), Thomson (2007). All these studies use the index of corporatism developed by Siaroff (1999). Using Lijphart's index of interest group representation König and Luetgert (n.d.) find a negative relationship.

The extent of parliamentary scrutiny, or the involvement of Parliament in EU affairs is another (meso)institutional factor often analyzed. Bergman (2000) develops an index of Parliamentary scrutiny, and he finds a significant positive effect of this variable on compliance. Using a different operationalization Giuliani (2004) also uncovers a positive effect. Haverland and Romeijn (2007), however, conclude that there is no influence of Parliamentary involvement (measured by a dummy for strong involvement) for the social policy sector. König and Luetgert (n.d.) report a positive effect on compliance. Mixed results are also found by Linos (2007) who shows that there is no effect on the probability of timely transposition, but a small effect on delay. Overall, there is weak support for the hypothesis that a Parliament more involved in EU affairs is beneficial for the transposition of EU laws.

### *Capacity*

Government capacity, or effectiveness, is a country-level variable that varies slowly over time with changing cabinets and reforms of the public administration. Almost everybody who attempted to explain compliance patterns turned in one way or another to the possible influence of (constraints on) government capabilities. It is sometimes difficult to disentangle macro-institutional from capacity-related explanations. Veto players, for examples, affect compliance through restricting the opportunities for reform, thus decreasing capacity for change. Despite the links between institutions and capacity, I will focus in this section on the findings about the effect of capacity, conceptualized and measured directly and without the help of macro-institutional factors.

The positive effect of government efficiency (usually measured with the World Bank 'Governance Matters' indicators) and the quality of the civil service (assessed by Adler et al. in 1996) is very well established. Evidence in its favor is brought by Berglund et al. (2006), Börzel et al. (2007), Haverland and Romeijn (2007), Lampinen and Uusikylä

(1998), Linos (2007), Mbaye (2001), Perkins and Neumeyer (2007), and Siegel (2006) (only Thomson (2007) finds no evidence for the 6 social policy directives he analyzes). As expected, the level of corruption which decreases bureaucratic quality has a negative effect on compliance (Kaeding, 2006). Mbaye (2001) finds no effect but this might be a result of multicollinearity problems (since she uses bureaucratic efficiency and corruption in the same model). More specific aspects of government capacity, like the national coordination capacity also exert a positive effect (Giuliani finds that the size of the COREPER has no influence, while the centrality of the foreign affairs ministry in the coordination of EU affairs has a negative effect) (Giuliani, 2004). Co-ordination problems decrease capacity and in turn lead to more transposition troubles (Haverland and Romeijn, 2007; Kaeding, 2006; Mastenbroek, 2003). Steunenberg and Rhinard (2006) also establish that transposition performance deteriorates in election years as control over the administration decreases and resources are channeled away from implementation of EU policies. In the case of Italy, administrative reforms have had a positive impact on transposition success (Borghetto et al., 2006). In fact, capacity shows no effect only if we operationalize it with some rather general concept like GDP, GDP per capita (Börzel et al., 2007; Perkins and Neumayer, 2007), or available fiscal resources (Mbaye, 2001).

### *Preferences*

One major line of inquiry focuses on the influence of the preferences of political actors and the broader public on compliance. Societal attitudes towards the European Union are probably the factor that has received the most attention by scholars of compliance so far. Interestingly, it is one of the few factors for which evidence is almost unequivocal: there is no relationship between the EU attitudes of the broader public and the level of compliance of EU law (Börzel et al., 2007; Kaeding, 2006; Lampinen and Uusikyla, 1998; Siegel, 2006; Steunenberg and Rhinard, 2006). Bergman (2000) and Mbaye (2001) actually do find a significant effect, but in the opposite direction than expected – positive attitudes towards Europe are correlated with less compliance.

Investigating the impact of the political and ideological preferences of *governments* is more theoretically interesting but it leads to rather inconclusive empirical results. Starting with government EU attitudes, Jensen (2007), Linos (2007) and Koenig (2009) find no relationship. Trying to approximate government preferences through the use of EU trade

Siegel (2006) concludes that there is no effect, while Perkins and Neumeyer (2007) report a positive and significant effect. Looking into net receipts from the EU, Perkins and Neumeyer (2007) find a negative and significant effect.

Thomson et al. (2007) have attempted to measure government preferences (or incentives to deviate) in regard to specific pieces of legislation. They find a significant influence on transposition delay and the likelihood of infringement procedures. For the subfield of social policy, however, Thomson (2007) finds that disagreement with provisions of the directives does not lead to more problems during the transposition stage. Haverland and Romeijn (2007) also conclude that there is no effect of member state preferences (for the social policy field again). Similarly, Linos (2007) tests whether a vote against a directive would result in transposition problems and finds no support for this argument. Analyzing the social policy field, she also finds that approximating government preferences through the level of labor costs and unemployment does not provide any explanatory leverage.

Finally, there is mounting evidence that the general ideological and socio-economic government positions do not affect compliance. Sigel reaches this conclusions focusing on the ideological center of gravity (of governments). Toshkov (2007) reports no effect of party family. Similarly, Jensen (2007) and König and Luetgert (König and Luetgert, n.d.) conclude that there is no relationship. Linos (2007) finds that left parties are no different than the rest in transposing EU social policy.

### *Political and legal culture*

Various aspects of national culture have also been proposed as explanations of compliance. Domestic political, policy-making and legal cultures have been analyzed. Mbaye (2001), for example, finds that approval for democracy is positively related to the level of compliance. Similarly, Lampinen and Uusikyla (1998) conclude that stable political culture (using 'trust' as an indicator) is beneficial for compliance with EU rules. Bergman (2001) also finds a positive effect of political culture, using the percentage of Catholic vs. Protestant population as a proxy. Berglund et al. (2006), find that no relationship exists between another aspect of political culture – respect for the rule of law, and transposition performance. Accordingly, Börzel et al. (2007) also find no effect for the rule of law.

Policy-making culture is not related to implementation according to Giuliani (2004) who looks into the impact of anticipatory and inclusive policy styles. He does find evidence, however, for influence of the national networking style in the EU on the application of EU laws. The impact of legal culture has been analyzed by Perkins and Neumeyer (2007) who conclude that the Scandinavian legal tradition is more conducive for compliance.

The most forceful argument for the explanatory power of culture so far comes from the study of Falkner et al. (2005). They discover three different ideal-typical ways of how member states handle the duty of complying with EU law: a world of law observance, a world of domestic politics, and a world of neglect. The constitutive factor behind the three clusters is the 'national culture of digesting adaptation requirements' (p. 319). Compliance results tend to depend on different factors in the three types of countries: culture in the first, fit with preferences in the second one, and administrative non-action in the third group. A causal mechanism linking culture with performance is presented (p. 328-9). The mechanism is self-enforcing as when society expects compliance, elites feel pressure to comply and 'public discourse stresses long-term gain for all of respected rules of law' (figure 15.1: 329). Attitudinal factors in the broader public are translated into law abidingness in the administrative and political systems, which in turn distinguish the different worlds of compliance.

The culture-based typology has been challenged both in terms of its theoretical underpinnings and its empirical fit. Toshkov (2007) finds that the typology fails to demonstrate its explanatory potential when applied even to the social policy dataset from which it is generated (or 'inspired'). The three 'worlds of compliance' are not significantly (in the statistical sense of the word) different from each other in terms of average transposition delay. The variability of compliance in the three clusters also fails to match the empirical implications of the typology. Toshkov (2007) also demonstrates that the 'worlds of compliance' cannot explain the ups and downs in transposition performance in the different countries and policy sectors in the period 1998-2005. Thomson (2007) also finds that the typology is not helpful for explaining the transposition delay of a sample of directives representing a broad spectrum of EU policies.

### *Features of the directive*

Another avenue for research has led scholars to look into the correlation between features of the European directives and the probability of timely compliance. Borghetto et al. (2006) find Commission directives to be significantly more likely to be transposed on time in Italy. The same conclusion is reached for the Netherlands by Mastenbroek (2003). Steunenberg and Rhinard (2006) confirm this finding for a number of member states. Kaeding (2006), however, reports no relationship for the transport sector (EU-15).

Amending directives are also more likely to be transposed on time in Italy (Borghetto et al., 2006), in the Netherlands (Mastenbroek, 2003) and in the transport sector (Kaeding, 2006). Amending directives are less likely to be transposed on time according to Steunenberg and Rhinard (2006). Haverland and Romeijn (2007) find no effect at all. The voting rule used for the adoption of a directive has an effect on compliance according to Mbaye (2001) (she finds that qualified-majority voting is beneficial), Kaeding (2006) and König and Luetgert (n.d.).

The complexity of directives, measured by the number of recitals, is beneficial for compliance according to Kaeding (2006), but detrimental according to Steunenberg and Rhinard (2006). Haverland and Romeijn (2007) find no effect. The length of directives (the number of articles) has a negative effect on compliance (Thomson, 2007). The discretion granted by directives seems to have an effect for the social policy sector (Thomson, 2007), but not in the general case (Thomson et al., 2007).

The amount of time allotted for transposition has a positive effect on the probability of timely transposition in the case of the Netherlands. Steunenberg and Rhinard (2006) support this finding and extend it to several other member states. Borghetto et al. (2006) and Kaeding (2006), on the other hand, report no significant effect of this variable.

Since some of these different variables are highly correlated with each other and probably capture different facets of more general concepts, Steunenberg and Kaeding (2008) use factor analysis to collapse several directive-level features into two variables – complexity and specialization. They conclude that complexity decreases while specialization increases the probability of compliance.

### *Features of the national legislative process*

Since features of the directives show some (although limited) potential to account for the variation in transposition performance, researchers have turned attention to formal features of the national legislative process transposing the directives as well. The type, number and novelty of national implementing measures have all been scrutinized for a possible relationship with delay.

Quite surprisingly, more transposition measures are correlated with a better chance of a timely transposition according to Borgheto (2006), Kaeding (2006), and Mastenbroek (2003). Steunenberg and Kaeding (2008) and König and Luetgert (n.d.) report the opposite, more intuitive result. If the transposition measure is a new act rather than an amending one, compliance is more likely according to the results of Kaeding (2006), Linos (2007), Mastenbroek (2003) and Thomson et al. (2007) (although they find different effects when looking into the likelihood of infringement procedures and into transposition delay).

The conclusions about the effect of the type of implementing legislation (1<sup>st</sup> order, 2<sup>nd</sup> order, 3<sup>rd</sup> order) are even more contradictory. Berglund et al. (2006) find no effect. Borghetto et al. (2006) and Mastenbroek (2003) report a decrease in transposition timeliness with a higher order legal instrument. Kaeding (2006) finds exactly the opposite.

### *Power, learning, and enforcement*

The hypothesis that state power is (negatively) related to implementation performance receives curiously contradictory evidence. Börzel et al. (2007), Giuliani (2003), and Siegel (2006) find a negative effect. On the other hand, Jensen (2007) (for the social policy sector), Mbaye (2001), and Perkins and Neumeyer (2007) report a positive effect.

Routinization, experience, and learning appear related to transposition performance. Since they are usually measured using the length of membership, it is difficult to give much credence to these results since they might reflect simply a time effect and not necessarily learning. Berglund et al. (2006) find a positive effect. However, Mbaye (2001) and Perkins and Neumeyer (2007) agree that membership length matters but in the opposite way - it decreases compliance levels. Giuliani (2003) reaches practically the same conclusion as he finds a positive effect of recent entry to the EU. Curiously, Perkins and Neumeyer (2007) check whether the first two years of membership are different from the rest (a period of grace) and find a lower number of infringement procedures started.

Finally, Steunenberg together with Kaeding (2008) and Rhinard (2006) applies a measure for experience that varies with individual directives (and not only with time). The authors conclude that there is a positive relationship between experience and the probability of timely transposition.

The last concept investigated is ‘enforcement’. Given the obvious importance of enforcement for compliance, it is awkward that only two studies try to control for the effects of enforcement intensity. Steunenberg and Rhinard (2006) look into the issue and, contrary to what they expect, the intensity of Commission enforcement, measured by the number of infringement procedures started in a year, appears negatively related to the probability of timely transposition. Thomson et al. (2007) record the extent of disagreement of the Commission with the final version of a directive as an indicator of the likely zeal of the Commission to enforce the legislation. They find an effect on the likelihood of an infringement procedure being initiated, but no influence on transposition delay.

### **3.4 Conclusions**

Compliance performance has a large number of possible explanations. This is the first conclusion one immediately gets from an overview of the literature. The amount of variables tested by existing studies is immense. The range of possible explanations is equally extensive, encompassing power, preferences, institutions, organizations, culture, learning, etc. The second conclusion is that these variables operate at several analytically distinct levels – European, national, policy sector, etc. The typical explanatory account of compliance is multivariate, and multi-level. The third conclusion is that almost all studies are rather eclectic in the intellectual traditions they borrow from – no clear line between rational choice, sociological, or historical-institutionalist studies can be drawn. With very few exceptions the literature is strongly empiricist in its background, methods and objectives.

Despite the multitude of explanations proposed, theorizing compliance in Europe remains weak. Too often, studies present a list of variables to be tested without specifying clearly the causal links between the cause and the outcome. Although the proposed explanations are multivariate, causal diagrams and other visual representations of the



explanatory models are not used at all, despite their obvious added value in clarifying and illustrating complex theories. Theoretical arguments are very rarely formalized using the tools of game theory, spatial models, etc. (for exceptions see Dimitrova and Steunenberg, 2000; Steunenberg, 2006). No scope conditions of the proposed explanations are given, although the causal process behind compliance varies in different policy sectors, countries and time. The multilevel structure of the explanations makes interaction effects between the variables quite likely. Interactions are, however, rarely tested or even considered. Hypotheses about the joint, multiplicative effect of some factors are seldom investigated, since the author assume linear, independent effects of the explanatory factors on compliance.

The reviewed literature presents a wide range of possibilities how to conceptualize and operationalize compliance. Compliance, as the most general phenomenon investigated in these studies, is captured through a reference to transposition time (or transposition delay) or the occurrence of infringement procedures. Few qualitative studies also create measures of performance based on observing the actual implementation of EU laws. The timing of adoption of national transposition measures either in relation to the publication of the EC directive, or in relation to the transposition deadline (delay) is the dependent variable in many studies of compliance in Europe. Using transposition time/delay as a measure of compliance has some obvious drawbacks (the temporal aspect of compliance is not necessarily the most interesting in theoretical or normative terms). Nevertheless, it provides a relatively straight-forward, reliable and valid measure. The variable is continuous, which is an additional methodological advantage<sup>12</sup>. The occurrence of infringement procedures provides an arguably more reliable (and more readily observable) indicator of compliance. However, as the start of an infringement procedure is not an automatic process, but a result of a political decision, using infringement procedures introduces an additional ‘filter’ between the explanatory model and the outcome. Most studies using infringement procedures as a dependent variable fail to explicitly consider the discretion of the Commission in handling infringement procedures. The omission certainly introduces a non-systematic bias in the measurement of domestic compliance since the Commission *strategically* decides which cases to open and which cases to pursue. On the other hand, studies based on measures of transposition

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<sup>12</sup> Kaeding (2008) and König and Luetgert (n.d.) have also used a categorical variable based on the length of the delay.

time/delay very often fail to consider the impact of Commission enforcement efforts for the timing of national implementation efforts (for exceptions see Steunenberg and Rhinard, 2006).

Transposition time and infringement procedures are, in principle, possible to measure at the level of the individual directive. But because of data availability issues, the information is usually aggregated to a country, country/year or infrequently to a policy sector/country/year level prior to the analysis. Aggregation comes at a cost, decreasing the number of observations and losing potentially interesting detail. At the very least, it forgoes any opportunity for testing directive-level independent variables. Aggregation on a yearly basis is also rather arbitrary since transposition and compliance are continuous processes that do not follow annual cycles. The one advantage of aggregation is convenience, since aggregated compliance data is available directly from several public EU sources. In cases where directive-level information is available, aggregation is rarely justifiable (consider for example Falkner et al. 2005's decision to aggregate the measure of misfit on a country-level before analyzing the relationship with compliance).

Yearly measures of non-transposition or the number of infringement procedures per country are also non-independent observations since the values for any particular year are likely to be affected by the levels of the variable in the previous year(s). This problem leads us into a discussion of the methodological choices and shortcomings of the compliance literature. Many different statistical methods and techniques have been used: an incomplete list features ordinary OLS regression, parametric and Cox proportional hazards survival models, logit and probit models, bivariate and stepwise regressions, Poisson and negative binomial models for count data, etc. The choice of statistical method is very much constrained by the precise operationalization of the dependent variable (duration, occurrence of a certain events, rare events counts) and offers certain opportunities and constraints for the analysis.

The multilevel structure of the data-generating process is arguably the most serious methodological challenge. So far, it remains largely ignored. Observations of the transposition of individual directives within a country are treated as independent observations even in studies using explanatory variables that vary across countries only. Yearly observations of performance are considered independent cases although the independent variables do not vary over time. The failure to address the multilevel nature

of the data inflates artificially the strength of the conclusions of the analysis. Correlations might appear statistically significant while due entirely to chance. Inferences about substantial effects of some factor might be entirely misplaced if our effective number of observations is much smaller because of non-independence. Ideally, the method of analysis should control for individual directives being nested in policy sectors, which in turn are nested in countries. Time adds yet another dimension as mentioned. Event history models that disaggregate a single directive into many observations over a time-period in which transposition either happens or not should also cluster these 'observations' in regard to the directive. Clustering accounts for correlation within units. In general, negligence of the multilevel nature of data leads to 'significant' results that might be totally spurious.

The *multivariate* nature of causal explanations leads to a further complication. Accepting that compliance performance is affected by a multitude of factors renders bivariate analyses of limited value. Many of the independent variables used in compliance studies are correlated with each other since they track either (institutional) factors that developed in similar patterns across countries, or variables that follow similar trends over time. Excluding variables that are correlated to some extent with our main causal variable and do have an effect on the outcome leads to an omitted variable bias (King et al., 1994, 168). This bias might lead to serious errors in the estimation of the effect of the independent variables, inflating or diminishing the 'true' effect. For example, given the relatively broad consensus about the effect of government capacity on compliance (see below), it would seem appropriate to include control variables for government capacity as a robustness check of the statistical models, even if the researcher is not primarily interested in the effect of capacity. The omitted variable bias is not restricted to quantitative analyses only. In fact, the bias is even more characteristic of qualitative research and comparative case studies which often consider the relationships between different explanatory factors and the outcomes separately, variable by variable (see for example Falkner et al., 2005). As a consequence, we might conclude that a certain variable does not have an effect while in fact the 'true' positive or negative effect is visible only after we control for another factor. In extreme cases, even the direction of the estimated causal effect can switch after previously omitted independent variables have been included in the model.

Variables correlated with each other and with the outcomes should be included in the statistical model. At the same time, once the correlations get too big, the analysis is exposed to multicollinearity threats. Multicollinearity leads to indeterminate research designs: no causal inference whatsoever can be made. Several clusters of variables in compliance studies are suspect of multicollinearity. Macro-institutional factors usually develop in clusters. The number of veto players for example is almost completely collinear with the number of parties in government, since the latter is a major part in the computation of the former. Similarly, federalism is also very closely related to the number of veto players. Further, the number of parties in government is very much related to the majoritarian - consensual democratic type, which in turn follows closely the type of corporatism. As another example, measures of corruption, government efficiency, bureaucratic effectiveness, and regulatory quality vary so closely together that they should not be used simultaneously in any analysis. Another example of high co-linearity is presented by Thomson (2007) who, after convincingly demonstrating that preferences and misfit are very much related, proceeds to use both as independent variables in the analysis. Using variables which follow a linear trend in time (for example regulatory quality improving steadily over the study period) and some other variable that essentially measures time (like 'learning' and 'experience' - see below) obviously leads to multicollinearity problems as well.

Since institutions change only slowly, if at all, many of the analyses allow for limited variation in the independent variables. Similarly, when we have only one measure of a variable that in principle is not static (like preferences), the analysis is based on *variables* that do not *vary*. This problem leads to the need for more observations as the power of the analysis diminishes. We might conclude that some (actually irrelevant) variable has an effect on compliance (as demonstrated by Steunenberg and Rhinard, 2006). Furthermore, the estimation suffers from inefficiency (see Pluempert and Troeger, 2007).

The assumption of unit homogeneity has been challenged by the work of Steunenberg and Kaeding (2008). They conclude that a few variables actually exercise influence on a difference scale and in a different direction during the transposition 'life cycle' of directives. Estimation of time-varying effects is, however, very demanding in terms of data requirements for estimation. While certainly plausible, hypotheses about

changing impact of explanatory factors are extremely hard to evaluate, especially if we take into account the multi-level data structure as well.

Several of the (earlier) studies also assume normal distribution for the dependent variable. This assumption is severely violated when we take the number of infringement procedures or 'the percentage of transposed directives in a year as outcome variables. Models for count data are much more appropriate, and increasingly used. Selection bias on the dependent variable also might decrease our confidence in some of the reviewed studies. For example, models that estimate the duration of transposition delay restrict their sample to the directives that are delayed. The conclusions they offer are phrased, however, in terms of transposition time more generally: entirely inappropriate phrasing since directives transposed on time have been completely ignored by the analysis (cf. Linos, 2007).

Looking at the entire population of compliance studies, a strong preference for some sectors is visible. Analyses of social policy legislation comprise  $\frac{1}{4}$  of all studies while this policy sector is not very characteristic for the EU as a whole. A lot of what we know about compliance in the EU is based on research in the social policy setting: a fact with uncertain but potentially severe consequences for the broader relevance and generalizability of the compliance literature findings.

Partly as a result of the methodological shortcomings highlighted above, we can find very few systematic findings replicated and supported by different researchers and datasets. Causal inferences we can be reasonably certain about are few and far between. Little systematic knowledge has been accumulated despite the burgeoning attention to the topic of compliance. Operationalization, measurement, and methodological flaws might account for some of this distressing state of affairs. For example, Falkner and Hartlapp (Falkner and Hartlapp, 2007) make a strong case for measurement and operationalization flaws in transposition studies relying exclusively on data provided by the CELEX database in particular. It could also be that the systematic component in compliance performance is rather feeble vis-à-vis the nonsystematic random variability in the data. A high degree of natural variability is consistent with the fact that certain effects seem confined to a specific country, sector, time-period, or a dataset. Using the right methodological techniques is even more important when the effects of explanatory variables are relatively small.

Overall, the findings of the literature are quite inconsistent. The field of transposition studies has become much more methodologically advanced since the first efforts to analyze quantitatively compliance. The methodological sophistication raises ever higher the bar for any subsequent analysis. The review of the existing research on compliance in EC/EU also shows that there is a very wide range of possibilities for specifying the dependent variable, choosing a statistical technique and selecting explanatory factors to test. The extensive number of relationships tested and variables analyzed is, however, indicative of the insufficient state of theorizing about the determinants of compliance in many studies. In the next chapter I will build a theoretical model of compliance in the EU based on several insights from the existing literature and the tools of spatial decision-making analysis.