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

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CHAPTER 4

THEORETICAL FRAMEWORK

What affects the timing, timeliness, and content of transposition and implementation of EU law at the national level? The literature review presented in the previous chapter suggested numerous answers to this question. None of the theoretical arguments reviewed, however, fits completely the specific context of transposition during accession negotiations. Moreover, as the literature review showed, there are a number of shortcomings of most existing theories of compliance, as applied in empirical research. This chapter introduces a theoretical model that is specifically geared towards explaining compliance patterns during periods of enlargement conditionality. The model integrates several extant theoretical arguments about the impact of preferences and institutional constraints together with a novel discussion of administrative and policy-making capacities. While relevant to legal compliance in any multi-level system of governance, the causal arguments are tailored to the institutional features of the European Union, and to the context of enlargement negotiations. The logic and consistency of the theory are analyzed with the help of formal decision-making modeling (Dimitrova and Steunenberg, 2000; McNollgast, 2005; Steunenberg, 2006). The chapter proceeds to presents the empirical implications derived from the theory and discusses the causal logic justifying the hypothesized relationships between preferences, institutions, and capacities, and implementation timing. In order to ease the presentation of the theoretical argument, the mathematical proofs and derivations are left out of this chapter and presented in Appendix II. This chapter focuses on the logic and intuitions behind the hypotheses advanced by the theory.

4.1 Introduction

Theorizing the adoption of EU law at the national level is rooted in two social science traditions: studying compliance with international norms (International Relations) and

studying public policy implementation (Public Administration). Inherited from these intellectual predecessors is a fundamental distinction between theories that emphasize the *will* and theories that highlight the *abilities* of states to comply/implement. The distinction emerges times and again as the dividing line between the ‘enforcement’ and ‘management’ schools in IR¹³, between ‘top-down’ and ‘bottom-up’ implementation theories¹⁴, between rational-choice and sociological institutionalisms¹⁵. Under the ‘enforcement’ view, non-compliance stems from an ‘incentive structure in which the benefits of shirking exceed the costs of detection’ (Tallberg, 2002, 611). A coercive strategy of monitoring and sanctions is needed to remedy the problem of insufficient compliance, according to enforcement theorists. In contrast, under the managerial view compliance is the normal behavioural reflex of the administrative system as ‘efficiency dictates considerable policy continuity’ (Chayes and Chayes, 1993, 178). Non-compliance, when it occurs, is a result of misinterpretation of the norms, or insufficient resources to implement them.

Usually, these theories are pitched against each other (Börzel et al., 2007; Bursens, 2002; Haas, 1998; Jonsson and Tallberg, 1998). My argument is that this need not be the case¹⁶. A theoretical model that carefully integrates both preferences and capability arguments is more realistic, more comprehensive, and, as I hope to illustrate in this book, more useful in explaining compliance with EU law. Preferences and capacities for change do not operate in isolation. They are closely, and complexly, connected. My proposal is to integrate the impact of preferences and capacities with the help of a decision-making model under institutional constraints. The model makes use of the tools of rational choice, and more specifically, spatial analysis. Here I do not present a full mathematical formalization of the model (see Appendix II) but focus on its causal logic and empirical implications.

¹³ For the management approach see Chayes and Chayes (1998). For related constructivist approaches see Franck (2002), Raustiala and Slaughter (1995). For the enforcement approach see Downs and Rocke (1998), Simmons (1996), Downs et al. (2005), Dai (2007). For a recent overview see McLaughlin and Hensel (1999)

¹⁴ For public policy implementation theories see Sabatier and Jenkins-Smith (1997), Mayntz (1995). For applications see Pappas (1998), Siedentopf and Ziller (2001a), Dimitrakopoulos (2001).

¹⁵ For sociological institutionalism and its application in studies of Europeanization see Checkel (2002), Risse (2005), Dimitrova and Rhinard, Berglund et al. (2006). For rational choice applications see (Dimitrova and Steunenberg, 2000; Steunenberg, 2006, 2007).

¹⁶ Attempts to provide an integrative account have been made before (Beach, 2005; Knill and Lenschow, 2005; Tallberg, 2002; Zürn and Joerges, 2005). The challenge is, however, to develop a theory that intricately and organically links preferences, capacity and power-based arguments instead of simply admitting that all these forces work simultaneously.

4.2 Decision-making model under institutional constraints

A fundamental trade-off between the time used for transposition and the amount of policy interpretation and calibration possible to apply to the EU directive is at the core of this theory of legal implementation. The further away actors want to move from a literal interpretation of the directive, the more time it takes to analyze, prepare, adopt and justify the changes.

The actors considered in the model are the governments in power. The governments are treated as unitary actors. We can compare the positions of different governments synchronically and diachronically. The exclusive focus of the model on governments is justified as the cabinets and the governing political parties in particular are the most important domestic actors in the European parliamentary systems in terms of policy making and implementation. Especially in the case of ongoing accession negotiations to the EU, the executive branch controlled by the political parties in power is by far the most influential actor (Agh and Rozsas, 2003; Zubek, 2008). The theory does not model strategic interactions; it focuses on the options presented to a government that unilaterally decides when and how to transpose¹⁷. The choices are, however, crucially shaped by the institutional capacities and constraints faced by the government.

This basic set-up of the model is illustrated in Figure 4.1. The horizontal axis represents policy space (for example, left/right, more or less regulation, the strictness of some environmental standard, etc.). The most preferred position of a government (ideal point) and the EU directive (policy) can be attributed values on this line. Let $P_j(x_i)$ represent the location of the policy j to be transposed, and $G_i(x_i, y_i)$ represent the ideal point of the government i . The closer the positions are on the line, the less preference distance between the government position and the law to be transposed. The vertical axis represents time. Hence, each dot in the plane stands for a particular combination of content and timing of transposition measures. The further the outcome is from a literal interpretation of the directive, the further it is from point P_j . The further the outcome is from the X-axis, the more time will be used for transposition. In effect, the choice of parties is not a binary decision to transpose or not, but a choice over a continuum of

¹⁷ The influence of the Commission and of domestic actors enters the theory through the discussions of the influence of policy-making and administrative constraints and the relative importance of the substantive policy dimension vis-à-vis the time dimension. See below.

combinations of points in time at which to transpose and the exact policy content. The choice of content and timing of transposition is limited by three features: the discretion set, the policy-making and the administrative constraints.

First of all, only a certain range of interpretations of the EU policy are possible. Every directive allows for a specific amount of discretion (leeway). The discretion is not, however, unlimited. We can denote the discretion set by $(x_i \pm d)$.

An interpretation that goes too far is not sustainable since it is going to be challenged by the EU. The discretion set contains all possible interpretations of the directive. The range is different for every directive: some are very strict in their provisions, while others allow for a great degree of flexibility (Dimitrova and Steunenberg, 2000; Franchino, 2005; Steunenberg, 2007). The discretion sets need not be symmetric around the literal interpretation (Steunenberg, 2006). An assumption of symmetric discretion, however, simplifies the presentation of the model.

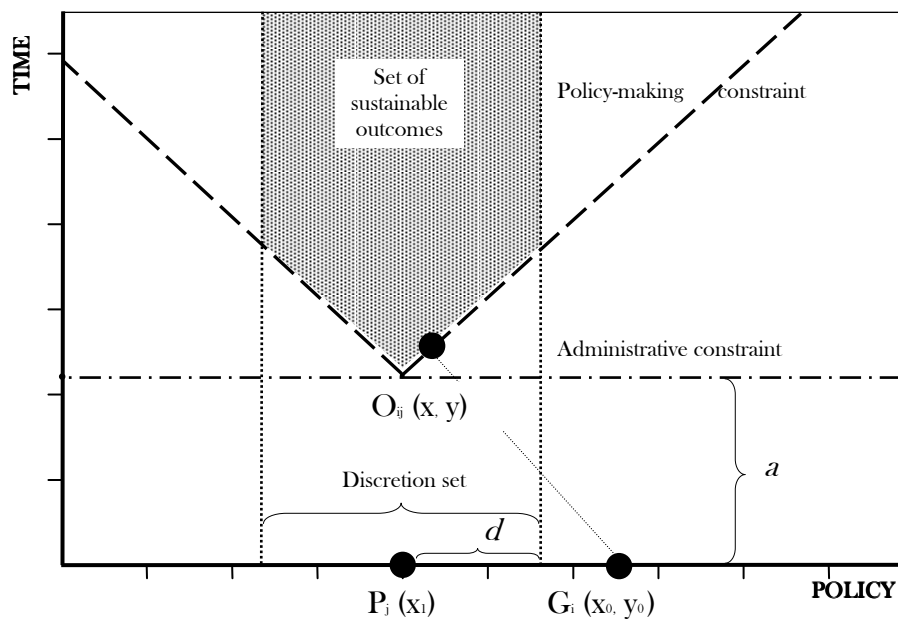


Figure 4.1 Decision-making under constraints and the set of sustainable proposals

The second limitation on the choice is represented by the policy-making constraint. Moving away from the literal interpretation of the directive comes at a cost. And the cost is reflected as additional time needed for transposition. There is a trade-off between drawing the original directive closer to your preferred point (within the acceptable limits set by the discretion set) and the time it takes to transpose it. This additional amount of time is accumulated because governments need to discover what is possible to change in the directive and how much deviation is admissible; to assess the impact of the amendments on the domestic situation; to co-ordinate the changes with the different parts of the public administration and the legislature; to perform hearings; to engage in reasoning, to request and assess scientific evidence, etc. The constraint is linear and symmetrical – a move to the right requires as much time as a move to the left. On Figure 4.1 the policy-making constraint is represented by a line with a certain slope¹⁸ s . The capacity for policy making determines the exact slope. Less efficient policy making will be reflected as a steeper line since less policy interpretation will be possible to accomplish for the same amount of time.

The third limitation is the administrative capacity constraint (Dimitrakopoulos, 2001b; for an application of the concept in a different context see Huber and McCarty, 2005). Even if countries (and governments respectively) are willing to go with a literal interpretation of a directive they still need to spend time working on transposition. Purely technical, or administrative, phases of the process are still required such as translating and editing the directive, identifying the national legislation it is relevant to, drafting the transposition measures and processing them through the rule-making machinery of the state. It is important to note that this type of capacity is different than the policy-making capacity discussed above. The administrative capability refers only to the ‘technological’ time needed to complete a certain transposition cycle. The policy-making capacity refers to the potential of the political system to steer and co-ordinate policy change and to accommodate policy preferences in a legal text. The administrative constraint is comparable to ‘fixed’ costs and policy-making costs are comparable to the ‘variable’ costs common in economics. As the transposition of each directive necessarily goes through the administrative part of the process but not all directives go through the policy-making part, the additional time needed for amending the original text comes on top of the time spent

¹⁸ The parameter s is restricted to be strictly positive meaning that the time used for transposition can never decrease with increasing policy shift.

for the technical preparation of the national implementing measures. On Figure 4.1 the administrative constraint is represented by a horizontal line of a certain height a . The higher the line, the greater the administrative constraint, the lower the administrative capacity, and the more time needed to transpose a certain directive.

4.3 Solving the model

In this part of the chapter, the theoretical model described above will be analyzed in order to derive an explicit solution to the optimization problem faced by the actors in the model. All possible outcomes (combination of timing and content of transposition measures) that an actor can attain are contained in the region defined by the three constraints. The set of sustainable outcomes is represented by the shaded area. Which outcome from all the possible combinations of timing and content will be selected?

Before I present the solution to the model it is necessary to formalize the discussion in order to shed light on the underlying assumptions. Actors are assumed to have two-dimensional weighted Euclidean preferences over policy and time. The preferences satisfy the usual requirements of transitivity and completeness¹⁹. The preferences are symmetric, separable and the two dimensions may have different weight (salience)²⁰, driven by the parameter w . The utility function $u(x, y)$ is:

$$u(x, y) = -\sqrt{(x - x_0)^2 + w(y - y_0)^2}$$

That is, utility strictly decreases with time and policy distance. Hence, the utility function is maximized by minimizing the distance:

$$\sqrt{(x - x_0)^2 + w(y - y_0)^2}$$

¹⁹ Completeness means that the actor either prefers A to B, or prefers B to A, or is indifferent between them (Shepsle and Bonchek, 1997) (the actors can compare and evaluate the utility of each of the possible alternatives). Transitivity means that if actors prefer A to B and B to C they also prefer A to C (Shepsle and Bonchek, 1997).

²⁰ Symmetric preferences imply that a move in one direction from the ideal point decreases utility by the same amount as the same move in the opposite direction (Hinnich and Munger, 1997). 'Separable preferences' mean that the actors' preferences on the x-dimension do not depend on the level of the values of y-dimension (Hinnich and Munger, 1997). Equal weight of the dimensions implies that actors value the same amount of change on the different dimensions (Hinnich and Munger, 1997), while different weight (salience) implies that actors value differently the two dimensions. For the utility function described above, if w is greater than 1 the y dimension is more important than the x dimension. Correspondingly, if w is less than 1 the x dimension is more salient.

between the ideal point $G(x_0, y_0)$ and the outcome $O_i(x, y)$, subject to the constraints:

$$(1) \quad y = a + s |x_i - x|$$

$$(2) \quad (x_i - d) \leq x \leq (x_i + d)$$

where x_i is the location of the EU policy P_i . Equation (1) represents the policy-making and the administrative constraints and equation (2) represents the discretion set. In addition, d , s , and a are strictly positive. From this moment onwards and without loss of generality I will consider only the case when the government's ideal point is to the left of the EU policy. Let's also set x_0 and y_0 equal to zero (again without any loss of generality) in order to ease the exposition. How do we solve the model? Mathematically, we are faced with a constrained optimization problem which can be solved using the Lagrange multiplier method. Applying the appropriate technique we can find that the two variables of interests x and y (the coordinates of the outcome) can be expressed as:

$$x = \frac{s(a + sx_i)}{s^2 + 1}$$

and

$$y = \frac{a + sx_i}{s^2 + 1}$$

For the moment w is equal to one (both dimensions have the same salience). The formulas present the policy position and the time used for transposition as a function of the distance of the EU policy x_i from the ideal point x_0 and the two parameters a and s which define the administrative and policy-making constraints²¹. The proofs for the solution are found in the appendix. Expressing the outcome as a function of preference distance and the constraint parameters allows us to examine how a change of the parameters affects the outcome in terms of time and policy position (comparative statics) and to derive explicit hypotheses from the model.

²¹ Strictly speaking, these results are only valid for values of $(x_i \geq s^*a)$ and $(x_i \leq s^*(a+sd) + d)$ because of the discretion set constraints. See the discussion below and the appendix.

4.4 The impact of preferences

Preferences and the preference distance between the governments' ideal points and the EU policy play important role for the level and timing of compliance. In general, and all other factors being equal, decreasing preference distance leads to less time used for transposition and results in less policy shift from the original text of directives. This result can be easily demonstrated²² in Figure 4.2 if we move point G_1 to the right to G_2 (so that the ideal point of actor 2 G_2 is closer to the policy to be transposed P). The outcomes change correspondingly from O_{1j} to O_{2j} , with actor 1 using more time for more interpretation (policy shift). Hence, the first hypothesis states:

H1a: The greater the substantive preference distance, the more time used for transposition.

H1b: The greater the substantive preference distance, the greater the policy shift.

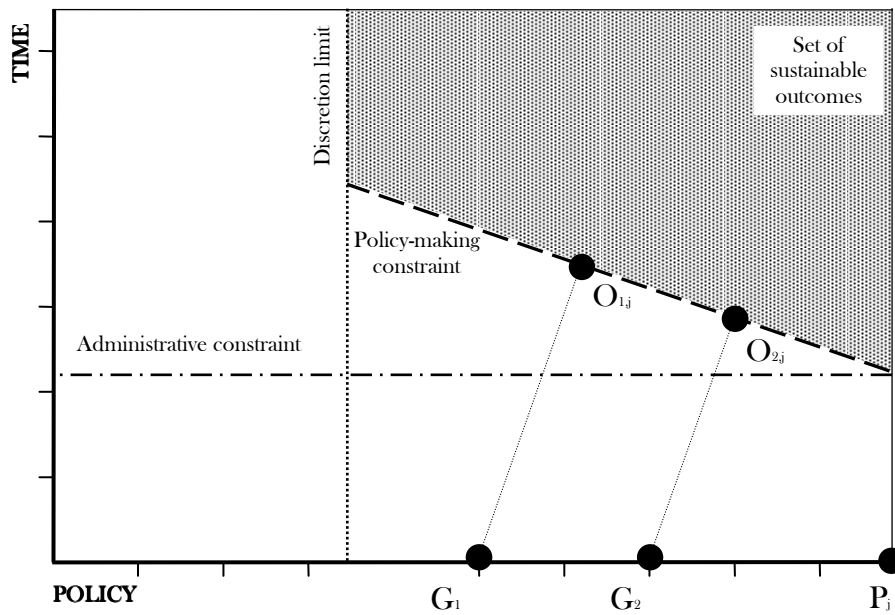


Figure 4.2 The impact of changing preferences

²² Formally, the impact of policy distance is examined through taking the first derivative of x and y with respect to x_1 (giving s' and s respectively). Since the first derivatives are positive, we can conclude that the effects of policy distance on transposition time and policy shift are positive and linear (they do not depend on the level of change in x_1).

These general hypotheses have to be qualified, however. First of all, for governments sufficiently distant from the EU policy, any further increase in preference distance has no effect on the time used: these governments would have taken all the time they need to explore to the fullest the interpretation possibilities offered by the directive anyways.

The relationship between preference distance and outcomes can be traced on Figures 4.3 and 4.4 which examine how a change in the substantive policy distance changes the outcome in terms of speed and policy shift. At first, as long as the government's ideal point is sufficiently close to the EU directive P , the outcome is simply the literal interpretation P_l . The size of this region depends on the height of the administrative constraint and on the slope of the policy-making constraint. Next, increasing the policy distance moves the outcome more and more closer to the ideal point until it reaches the limit of the discretion set $P-d$. At this point the policy distance is defined by $(s(a+sd)+d)$. The outcome remains $P-d$ even if we continue to increase the policy distance.

Figure 4.4 focuses on the influence of policy distance on the time used for transposition. Again, for very small policy divergence the outcome is simply a (the least amount of time possible to complete the transposition as defined by the administrative constraint). Once the policy divergence grows greater than (sa) , the time used increases linearly with increasing policy distance. Lastly, when we reach the discretion limit and we have exhausted all the potential to move the policy closer to our ideal point, increasing further the policy distance does not have an additional effect on the time used for transposition which remains $(a + sd)$. The discussion and Figures 4.1a and 4.1b show that time and policy shift increase only weakly with policy distance. So far I analyzed the impact of policy distance and derived a hypothesis about its impact on time and policy shift (policy interpretation). Next, I will turn to the effect of changing the administrative constraint.

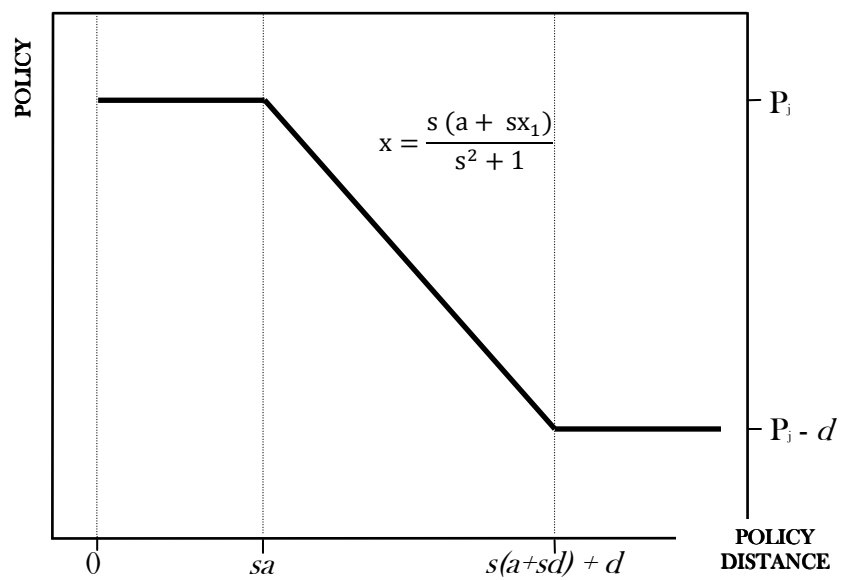


Figure 4.3 Policy distance and the corresponding policy outcome

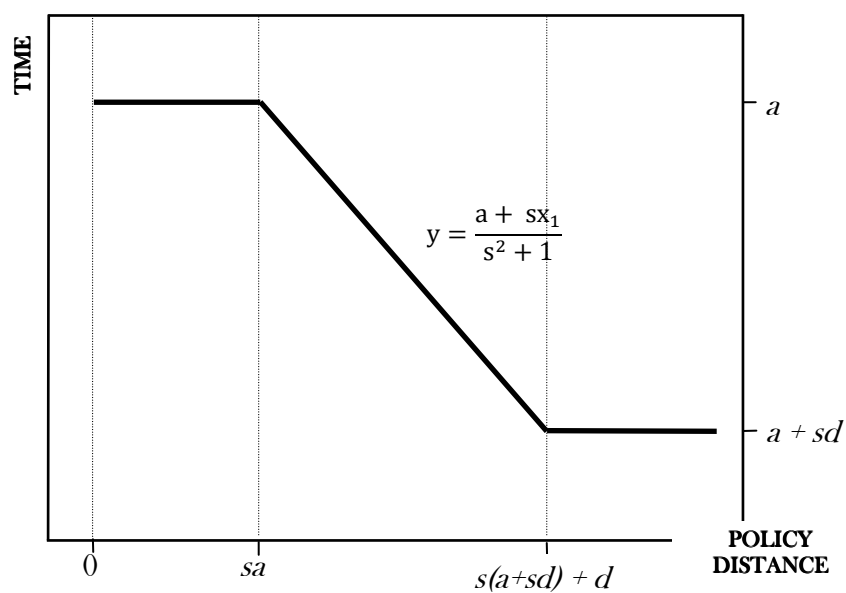


Figure 4.4 Policy distance and the corresponding time outcome

4.5 Administrative constraint

How does increasing administrative capacity influence the timing and content of transposition according to our theoretical model? Graphically, this would correspond to a drop of the horizontal constraint line²³.

More points in the plane (combinations of content and timing) will become attainable to the governments. The national actors will be able to achieve more (in policy change) in less time. Looking at Figure 4.5, the outcome has been moved from O_{1j} to O_{2j} . Interestingly, the decrease in time used is not as large as the increase in capacity since some the time has been used to draw the policy closer to the ideal point of the government.

H2a: The greater the administrative capacity, the less time used for transposition.

H2b: The greater the administrative capacity, the greater the policy shift.

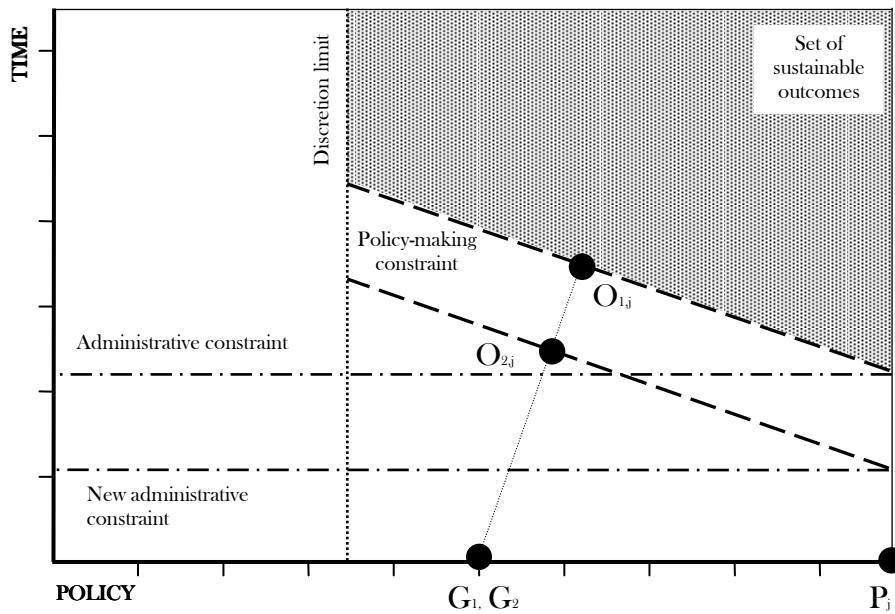


Figure 4.5 Impact of changing the administrative capacity

²³ Formally, the derivatives of x and y with respect to a are s and l respectively. As they are both positive, we can conclude that the effect of a on x and y is linear and positive in both cases.

These hypotheses capture the partial effect of releasing/tightening the administrative constraint. The effects are rather straightforward to describe. Next, I turn to an exploration of the impact of changing the policy-making constraint which proves to be much more complex.

4.6 Policy-making constraint

How does the policy-making capacity influence the speed and content of transposition according to our theoretical model? Figure 4.6 illustrates the effect of a decrease in the policy-making capacity. The slope of the constraint line is changing, reflecting the fact that less policy interpretation is possible for the same amount of time. Indeed, comparing outcome O_j with the new outcome $O_{j'}$, we notice that the adopted transposition measure in the second case has been pushed further from the ideal point of the government. The time used for transposition has also increased, however. This example and its graphical representation in Figure 4.6 do not represent the whole picture about the link between changing the policy-making capacity and the resulting changes in transposition time and policy shift. In order to analyze more systematically the impact we have to go back to the algebraical representation of the problem. Taking the partial derivatives of x and y with respect to s produces the following expressions²⁴:

$$\frac{\Delta y}{\Delta s} = \frac{2s(a + sx_1) - (s^2 + 1)x_1}{(s^2 + 1)^2} = \frac{x_1 s^2 + 2as - x_1}{(s^2 + 1)^2}$$

and,

$$\frac{\Delta x}{\Delta s} = \frac{2s(sa + s^2 x_1) - (s^2 + 1)(a + 2sx_1)}{(s^2 + 1)^2} = \frac{as^2 - 2x_1 s - a}{(s^2 + 1)^2}$$

²⁴ See Appendix II for proofs and derivations.

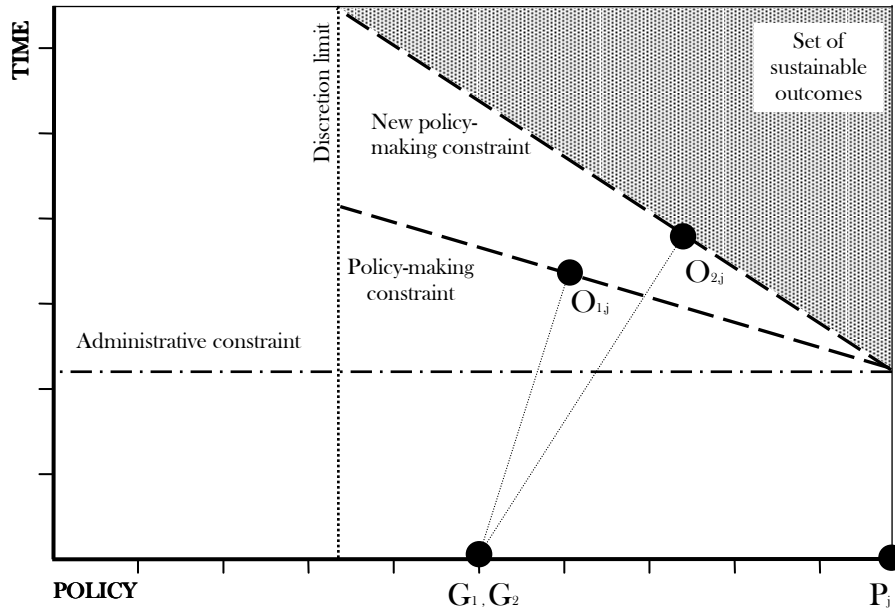


Figure 4.6 Impact of changing the policy-making capacity

The relationship between the parameter s (which controls the slope of the policy-making constraint) and time and policy shift is complex. The best way to explore the relationship is to plot the effect of changing s on x and y . The slope parameter is allowed to vary from 0.1 to 4.0 on Figure 4.7. On the y-axis the corresponding change in y (transposition time) is represented. The different lines represent different combinations of values of a and x (the administrative constraint and the policy distance).

We can see that in the beginning y (the time used for transposition) increases until a local maximum is reached (see Appendix II for the precise location of the maximum). After this critical point, time decreases with higher values of the slope parameter. The most important feature of the graph is the shape of the function. The differences in the height of the local maximum and the value of s at which it occurs are due to the different combinations of parameters.

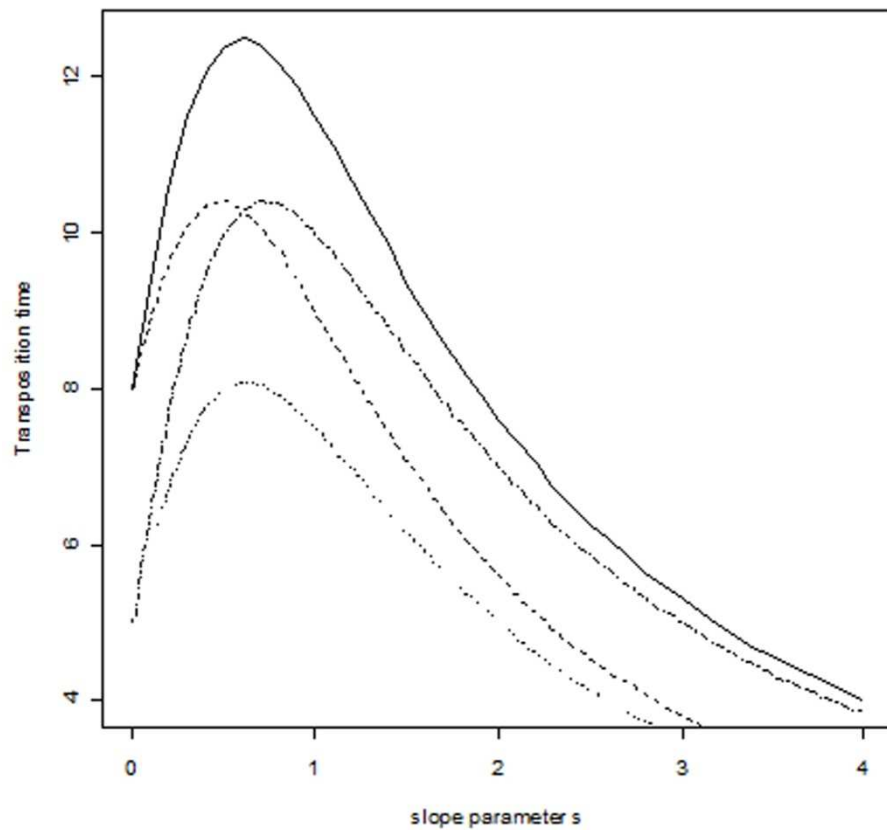


Figure 4.7 Policy-making capacity and transposition time

The next Figure 4.8 present the effect of the policy-making constraint on the policy shift (the amount of interpretation used in transposition). The slope parameter varies from 0.1 to 10 and the corresponding change of the policy shift is represented on the y-axis for different combinations of a and x_i . The functions again grow until they reach a local maximum (for the precise locations see the appendix) and then decrease. Hence, in the beginning the policy shift increases while later it decreases with increasing policy-making constraint.

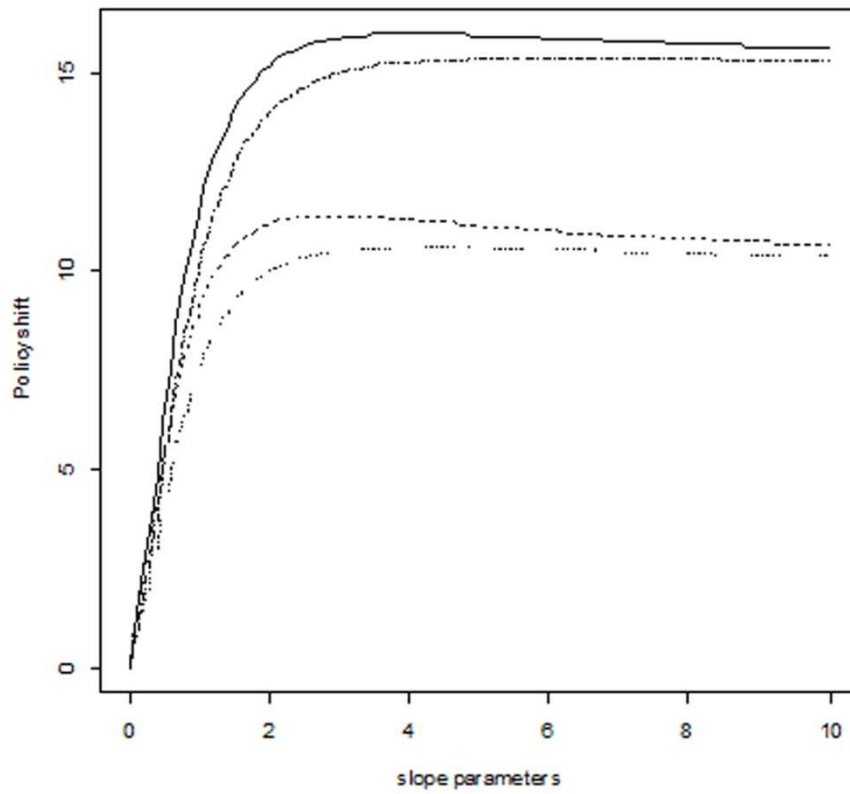


Figure 4.8 Policy-making capacity and policy shift

H3a: Decreasing policy-making capacity at first increases the time used for transposition but for sufficiently low values of policy-making capacity, decreasing further the capacity decreases the transposition time.

H3b: Decreasing policy-making capacity at first increases policy shift but for sufficiently low values of policy-making capacity, decreasing further the capacity decreases slightly the policy shift.

If the administrative constraint is severe, or the preference distance is negligible, the effect of changing the policy-making constrain will be less pronounced or non-existent at all. Simply, some governments can hardly manage with the administrative phase of transposition on time, so they are not sensitive to the policy-making constraint.

4.7 Preference salience

The discussion so far assumed that the two dimensions on which preferences and utility functions are defined have equal weight (salience). That is, we assumed that actors care as much about time as about policy content. This assumption is rather restrictive. For different governments, and for the same governments in regard to different directives, time might not be an issue of the same importance as policy distance. . In some cases EU norms are simply not worth the trouble to spend much time on. In other cases, the potential benefits from interpreting the European policy are not significant enough to justify the additional time needed, and the opportunity costs. Yet in other situations transposition delays are justified if a government can pull the EU policy closer to its preferences. In the context of EU decision-making and implementation the timing of adaptation might receive a higher intrinsic value in itself: candidates and member states might derive utility from implementing EU legislation within the deadlines, and this utility might outweigh the potential (substantive policy) gains from interpreting and calibrating the text of the directive.

The utility function defined in this chapter can accommodate different salience of the two dimensions. By varying the parameter w (short for ‘weight’) we can manipulate the relative importance of the time dimension vis-à-vis the policy dimension. For values of w less than 1 the time dimensions has lower salience and as a result actors will be less sensitive to changes in the timing of transposition measures then to the substantive policy content. In the limit, time does not matter at all: all the actors care about is substance. On the other hand of w is greater than 1, the time dimension weights more heavily in the utility calculation: in the limit actors case only about the timing of transposition and not about the content.

$$u(x, y) = -\sqrt{(x - x_0)^2 + w(y - y_0)^2}$$

Re-calculating for y and x we get

$$y = \frac{a + sx_1}{w(s^2 + 1)}.$$

and

$$x = \frac{s(a + sx_1)}{s^2 + 1} * \sqrt{1 + w - \frac{1}{w^2}}.$$

The first derivative of y with respect to w is negative (see Appendix II) which implies that the function is decreasing. Hence, for higher values of w (higher salience of the time dimension), the values of y (time) decrease. Substantively this makes sense since the more your care about the timing, the faster you are going to complete the transposition. Turning to the effect on policy shift, the derivative of x with respect to w is positive. Hence, the function is increasing. The more salient the time dimension, the more policy distance between the ideal point of the government and the outcome, all other factors being equal. Figure 4.9 illustrates the effects. In the first case, Government 1 attaches equal weight to both the time and the policy dimension. The resulting outcome is 0_1 . Government 2 has the same ideal point. The administrative and policy-making constraints remain fixed. However, for Government 2 the salience of the substantive policy dimension is greater ($w < 1$). The dotted lines represent the indifference curves in both cases. For actor 1 the indifference curve is a circle, while for actor 2 the indifferent curve is an ellipse. As a result, the outcome shifts to 0_2 with more time used for transposition and less distance between the ideal point and the outcome on the x -dimension. The above discussion leads to the following hypotheses:

H4a: The greater the salience of the substantive policy dimension, the more time used for transposition.

H4b: The greater the salience of the substantive policy dimension, the greater the policy shift.

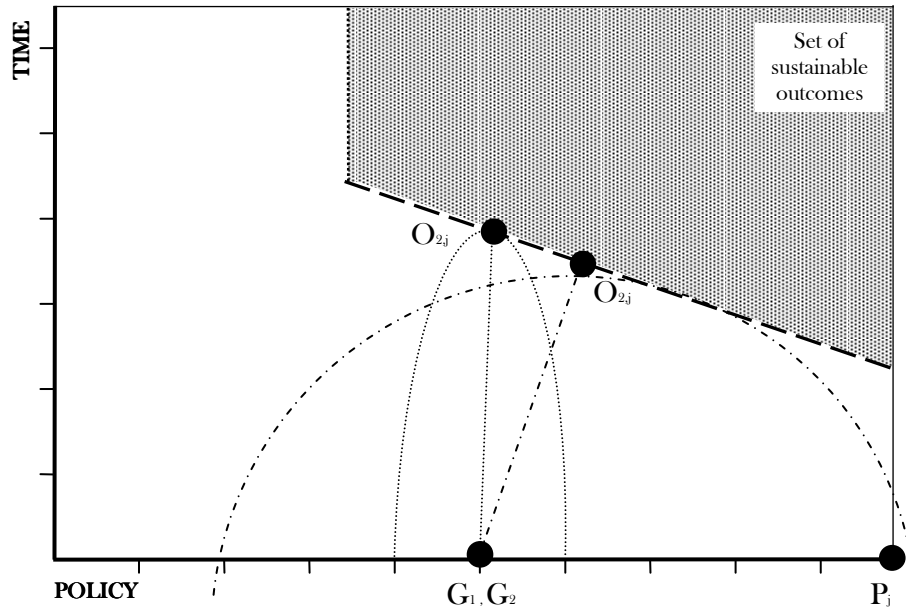


Figure 4.9 Changing the salience: an illustration

This set of four hypotheses captures the main insights of the theoretical model about the speed and content of transposition at the national level. The model does not explicitly deal with the phase of practical implementation following transposition. Nevertheless, making a few additional assumptions we can derive an implication about practical implementation as well. The closer the transposition measures are drawn from the literal interpretation towards the ideal point of the actor, the easier the implementation should be. Through the political process of amending (within limits) the text of the directive, the country assesses the impact of the directive, its fit with the existing regulatory environment, its potential effects and side effects, etc. All these activities should ease the practical implementation²⁵. However, a literal transposition, quick or nor, would not have been subjected to political discussions and policy assessment, and implementation might suffer as a result. Also the process of interpreting the directive involves the interaction

²⁵ In the case when the ideal point of the government perfectly coincides with the EU policy, the amount of policy interpretation (policy shift) will be null, but no implementation problems will necessarily follow. Such cases should be, however, rare since the CEE governments have not participated in the adoption of the EU laws they had to implement.

between different actors within the cabinet or across governmental levels and if these actors are later involved in the implementation they would be more likely to properly enforce the policy (Barrett, 2004; Sabatier and Jenkins-Smith, 1999). Further, if the discussions involve interest groups, like sectoral business associations, the provisions of a directive targeting these sectors will be more readily implemented by the companies as they would have been involved in the preparation of the national implementing measures. The mere process of changing the content of the directive means that the directive is adjusted to the local situation, taking account of specific capabilities, institutions, etc. However, the time taken for transposition should not necessarily be a good predictor of implementation success because the additional time used could be a result of lower administrative capacity and not of efforts to adjust to the directive. The discussion leads to the following hypothesis:

H5: The closer the transposition measures are to a literal interpretation, the more implementation problems.

4.8 Expected transposition patterns

The set of 5 hypotheses presented above is based on comparative statics analysis of the model: how does manipulating any of the parameters affect transposition outcomes. The hypotheses derived in this manner are useful for tracing the impact of specific variables related to the preferences, and to the administrative and policy-making capabilities. Another possibility for generating insights from the theoretical model is to ask what kind of transposition patterns can we expect given a certain, generally defined, configuration of preferences and capacities. Table 4.1 presents the type of transposition patterns suggested by the model for different combinations of factors.

The matrix lists the possible outcomes under conditions of high/low preference fit (the preference fits aggregates the information of the preference distance and the salience – see below), high/low administrative capacity, and high/low policy-making capacity. For each of the combination of factors, the expected outcome is specified in terms of the speed of relative speed of transposition, and the amount of interpretation applied to the

EU law (no, or very little, interpretation – ‘Literal’, or ‘Policy shift’ – a substantial amount of changes made to the original text of the directive).

Table 4.1 Expected transposition patterns

Preference fit	Administrative capacity			
	<i>High</i>		<i>Low</i>	
	Policy-making capacity		Policy-making capacity	
	<i>High</i>	<i>Low</i>	<i>High</i>	<i>Low</i>
<i>High</i>	Fast & Literal		Slow & Literal	
<i>Low</i>	Fast & Policy shift	Slow & Policy shift		Very slow & Policy shift

The preference fit is related, but is not directly derived to the preference distance discussed in the theoretical discussion above. Preference divergence is only a necessary but not a sufficient condition for preference fit. The European law has to have also high salience or imply high costs in order to trigger the effect of preference distance. For legislation which is not important or costly in any way, it does not really matter what the governing parties think about it, since the government is not going to spend its valuable resources discussing and interpreting the law. Commission enforcement efforts can also act to offset the impact of preference fit. Apart from the factor ‘preference fit’, the other concepts included in Table 4.1 follow closely the interpretation suggested in the rest of this chapter. Hence, in situations where there is a high preference fit (domestic actors either like or do not care about the legislation), administrative capacity is the only constraint that matters (there is not much of policy making since there is no desire to change the EU policy). In countries with sufficiently high administrative capacity transposition will be fast, timely and (almost) literal. If administrative capacity is low, transposition will still be literal but slow.

The situation is more complicated in cases where preference fit is low (when domestic actors dislike a policy they care about). In these cases, both the administrative and the policy-making constraint exercise influence. Countries with high administrative capacity will embark on changes (interpretation) of the original text of the directive. If policy-making capacity is high, transposition can still be fast, although the amount of interpretation will be high. If policy-making capacity is low, due to a number of possible reasons discussed earlier in the chapter, the amount of changes will come at the expense of speed, and transposition will be slow. Finally, in countries with low administrative capacity in situations of preference misfit, transposition will never be speedy. It will be slow even if the policy-making capacity is high, but it will be even slower, if gridlock in the policy-making process confounds the low bureaucratic capacity to process legislation. What Table 4.1 clearly conveys is the combinatorial nature of the influence of the different factors, and the possibility to observe similar outcomes (in terms of speed, interpretation, or both) under very different conditions.

Importantly, the table underscores the message that none of the factors discussed can be regarded as necessary or sufficient conditions for speedy transposition. Transposition delay might result from poor administrative capacity, or from a combination of low preference fit and low policy-making capacity even if administrative capacity as such is not limited. In addition, for some combinations of administrative capacity and preference fit, actors are insensitive to changes in the policy-making capacity (see the discussion and the derivation of the hypotheses above and the appendix). As a result, the empirical test of the model is faced with the challenge of uncovering weak causal relationships.

4.9 Overview

This chapter of the book elaborated a theoretical model of compliance. The decision-making under institutional constraints model explains the timing and content of legal implementation in a multi-level system of governance. Starting with the assumption that transposition outcomes are related to the governments' substantive and timing preferences, I added institutional features – the administrative and policy-making capacity of the states and the discretion set.

Table 4.2 Hypotheses

Variable	Operationalization		
	Chapter 5	Chapter 6	Chapters 8-10
Policy distance	-	socio-economic left-right government positions	policy and directive specific government preferences
Administrative capacity	year of adoption of civil service legislation	-	-
	World Bank governance indicators	World Bank governance indicators	-
	-	-	size of units dealing with transposition, etc.
Policy-making capacity	institutions	federalism index	-
		presidentialism index	-
		bicameralism index	-
		type of EU co-ordination structure	-
		-	involvement of interest groups
	government type	-	inter-government conflicts
		-	-
Salience	enforcement	-	use of infringement procedures
	policy salience	societal EU support	government EU support
		-	directive-specific salience

Taking all the elements together, the model predicts different outcomes both in terms of timing and content, depending on the specific configuration of preferences and constraints. The hypotheses are summarized in Table 4.2. The implications of the model are captured in four general hypotheses that are going to be evaluated in the empirical part of the research project.

The leftmost column of Table 4.2 lists the factors suggested by the theory at the greatest level of abstraction: policy distance, preference, salience, administrative, and policy-making capacities. These general concepts are unpacked in the subsequent columns to the right. The last three columns give an idea how the concepts have been operationalized in the empirical analyses presented in Chapters 5, 6, and 8 to 10 of the book. The details of the operationalizations (like the precise definition of the indicators and the data sources) can be found in the corresponding chapters. Table 4.1 gives only a broad overview of the interpretation of the concepts in order to translate the abstract entities like policy distance and capacity into more tangible concepts. In the remainder of this section I will briefly discuss the conceptualization and operationalization of each of the main variables.

Policy distance plays center stage in the theoretical model. Substantively, policy distance refers to the closeness between the most-preferred policy of a government and the EU law (for the different flavors of preference-based accounts of transposition see the previous chapter). In principle, policy distance is a directive-specific variable. That is, policy distance takes different values for different directives, policy-sectors, and countries. The qualitative empirical research reported in chapters 8 to 10 operationalizes policy distance at this low level of aggregation using various sources of information (official government positions, interviews with experts, etc.). In the large-N quantitative analysis contained in Chapter 6, preference distance is operationalized at a higher level of aggregation. It is assumed that socio-economic Left-Right policy positions provide a way to approximate the mean distance between government positions and EU legislation.

Preferences are important but they do not alone determine the timing and content of transposition measures. The capacity of the public administration for law and policy making limits the speed and swiftness of the reforms. The concept of administrative constraint and its inverse – administrative capacity – refers to the ability of the bureaucracy to process input from the political system into policies, normative acts, and decisions.

The administrative constraint is especially important for compliance during the period of enlargement. The transposition of each and every directive requires at least a little bit of efforts by the administration. The simultaneous transposition of the entire *acquis* creates an enormous pressure. It puts the entire administrative system, and each individual organization to the test. In addition, in the case of the CEE countries the adoption of the EU rules coincides with the upshots of the process of creation of the fundamental rules of market economy and democratic politics. Finally, the adoption of European law came at a time when the public administration themselves were in the midst of a process of profound change.

Government efficiency and bureaucratic quality are closely related notions. Competent, adequately staffed public administrations with high expertise are able to process faster and better European directives. Professional civil service is a necessary condition for high administrative capacity (OECD, 1998; Peters, 2001; Simon and Ben-Gera, 2004). Proper organization and co-ordination of the bureaucracy further release the grip of the administrative constraint. Accountability and responsiveness of the civil servants to the political leadership of the country also influence the capability and work of the administration (Bossaert and Demmke, 2003; Dimitrova, 2005; Meyer-Sahling, 2004). Accordingly, in Chapter 5 I use the number of years since the adoption of civil service legislation as an indicator of general administrative capacity. An alternative indicator is provided by the Governance expert scores published by the World Bank. These scores are used as alternative indicators of general administrative capacity in Chapters 5 and 6.

In the context of transposition and implementation, administrative capacity can be understood in a wide, and a narrow sense. In a wide sense it refers to the quality of the bureaucracy as a whole, as discussed above. In a narrow sense, it refers to the capacity of the organizations engaged with managing relations with the EU and with aligning policies with the *acquis*. As a result, I use the number of people and organizations working on the transposition of specific (set of) directives as an indicator of EU-specific administrative capacity in the qualitative phase of the research (Chapters 8-10). In addition to the number of people involved in transposition I add information about any training courses, study visits, twinning projects, etc. that have been conducted in support of legal alignment in that particular policy area in order to arrive at a more valid assessment of specific administrative capacity.

In addition to the administrative capability, policy-making constraints limit the possibilities of government to transpose and implement EU legislation swiftly, properly and on time. The policy-making constraint refers to the ability of government to accommodate diverse interests in the process of adapting the EU rules to the national context. The associated activities include information and consultation with stakeholders, negotiation between the actors affected by the legislation, adapting the directive to the objectives and instruments of the existing domestic policy.

Two main factors influence the policy-making capacity: government type and the institutions of the broader political environment. The idea of policy-making capacity and constraints is related to the concepts of veto players and veto points (Haverland, 2000; Steunenberg and Rhinard, 2006; Tsebelis, 1999; Tsebelis and Chang, 2004). The constitutional framework of a country determines the main institutions and actors that participate in the policy-making process. Federalism increases the number of actors whose agreement is necessary for policy change. Two-chamber legislatures also limit the capacity for policy change since they increase the time it takes for legislation to be adopted, and increase the chance of a gridlock over a reform proposal. Strong presidents with real veto power over legislation also affect the possibilities for policy change in a negative way. Since the consent of one more actor is needed, the speed and likelihood of reform decreases (cf. with the veto points/veto players literature (Haverland, 2000; Tsebelis, 1999)). The impact of these institutional variables is explored in Chapter 5.

The status, composition, and ideological diversity of governments are probably the most important factors affecting the policy-making constraint. More parties in government limit the capacity for reform. More ideologically distant parties governing together make it even more difficult to agree on a specific interpretation of EU rules. Minority governments have less potential to steer through successful reforms than majority governments since they have to negotiate individually the adoption of each important law. Coalition governments may also exacerbate existing tensions between sectoral interests (and ministers) making policy change less likely, and more time-consuming. The effects of government ideological composition and the number of parties in power, which are alternative ways of operationalizing the type of government, are analyzed in Chapter 6.

Strong, centralized policy co-ordination (general and in relation to EU affairs) works to attenuate the negative effects of many veto players and ideological diversity on the

policy-making capacity. Strong prime-ministers are able to overcome resistance from different parts of the political system (Blondel et al., 2007; Zubek, 2008). EU co-ordination systems located close to the prime-minister and the government are expected to increase the policy-making capacity because they can arbitrate inter-ministerial conflicts and impose solutions backed by the power of the prime-minister or the government office. On the other hand, co-ordination systems located in the Foreign Affairs ministry have less capability to demand speeding up of the implementation process and to supervise the work of sectoral ministries. This specification of policy-making capacity is used in Chapter 5.

Looking beyond the formal politico-administrative system, institutionalized relationships with interest group further affect the policy-making capacity of states. Compulsory and wide-ranging consultation with many interest groups slows down and might impede the implementation process altogether. On the other hand, if the state does not involve business associations, union, NGOs and the broader civil society in policy making, the policy-making constraint is lessened. The impact of interest groups on transposition is traced in the qualitative case studies.

The last main hypothesis tackles the influence of changing salience of the substantive policy dimension vis-à-vis the time dimension. The major conjecture about salience that I make is that governments that care more about European integration and are more eager to join the European Union will put more emphasis on the timing vs. the substantive aspects, and as a result will use less time to comply (all other things being equal). Party and societal positions over European integration are expressed in relation to the speed and timing of integration and not so much as supporting or opposing the process as such. That is even more the case in the new member states, and during the Enlargement process, because Euroscepticism has been chiefly expressed as a desire to slow down the integration rather than reject it completely. Hence, parties and societies that are neutral about 'Europe' will favor neither too fast nor hasty transposition, nor overly protracted transposition. The more delayed the process of transposition is, the more a country 'loses face' in Europe. Apparently, for pro-integrationist parties and for parties giving more weight (higher salience) to European considerations, losing credibility on the EU arena will be much more important.

Increasing the pressure of conditionality works very much in the same way: it raises the relative weight of completing quickly the transposition at the expense of calibrating the provisions of each directive. The impact of conditionality is most visible in the general picture of transposition in CEE, but more specifically, the effect of conditionality, operationalized as the backlog of directives outstanding for transposition, is explored in Chapter 6. Once the candidate countries join the club and escape the threat of conditionality, the EU enforcement efforts (e.g., the use of infringement procedures) works according to a similar mechanism: they increase the importance of the timing aspects vs. the substantive considerations. The use and response to infringement procedures is analyzed in the qualitative case studies. The same effect can also be achieved by reducing the policy salience of the directives to be downloaded (for previous attempts to theorize salience see the detailed discussion in the literature review). For legislation the member states do not bother to care, the timing is more important than the substance. For governments sufficiently close to the implied policy position of the directive (and especially when the administrative capability is low) only the minimum possible time for transposition is utilized despite the loss of any opportunity for policy fine-tuning. Furthermore, the effects of conditionality, EU support, and salience are cumulative. Pro-EU governments will be more susceptible to the pressures of conditionality, for example.

Concluding the overview of the theoretical model, it is worth emphasizing what is new about this model. First, the model applies a constrained optimization framework in order to account for the decision-making process of governments processing EU legislation. Defining the problem as one of constrained optimization, I was able to explore in a transparent and rigorous manner the empirical implications of the theoretical argument. Second, I posit two-dimensional preferences for the actors: scholars have focused only on the policy dimension so far and have excluded from consideration the additional independent utility derived from the timing of implementation measures. Introducing two-dimensional preferences with varying salience allows for a more realistic model closer to the complexity of real-life decision-making. It also makes explicit the trade-off between time and substantial policy shift. Third, the model makes a distinction between administrative and policy-making capacities. This distinction has been ignored so far in the literature on EU implementation/compliance. But as hypotheses 2 and 3 demonstrate

the effects of these two constraints on transposition time and policy shift differ in important ways.

This chapter presented a theoretical model of transposition in the EU. A number of hypotheses were identified, and several typical patterns of compliance were suggested on the basis of the model. In the next chapters, I turn towards exploring and testing the insights of the model. First, in two chapters I will try to explain using quantitative methods the country and directive-level transposition data for the eight CEE member states. After that, several chapters will present and discuss the findings from a comparative case study which complements the research design by looking into some of the hypotheses which are not amenable to quantitative analysis.