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

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CHAPTER 7

COMPARATIVE CASE STUDY DESIGN AND CASE SELECTION

The previous chapters looked into the general patterns of transposition and compliance in the CEE countries. This part of the book takes a closer look at transposition and implementation in several, carefully selected policy fields. The chapter also changes the focus from transposition delay to infringement procedures as an indicator of compliance. The main purpose of the case studies is to complement the quantitative analyses by illuminating the causal mechanisms between exogenous and dependent variables, by looking beyond the phase of formal implementation, and by triangulating the findings from the quantitative studies. In addition, qualitative case studies offer new ways to operationalize the theoretical hypotheses. For a example, while the influence of interest groups has been theorized to affect policy-making capacity and, in turn, implementation outcomes, the quantitative analyses could not measure and test the impact of a variable related to interest group involvement. The rich contextual information offered by the case studies crease opportunities to explore the impact of interest-group involvement, specific EU-related administrative capacity, directive specific policy salience and government preferences. In order to maximize the analytical leverage of the case studies, however, they have to carefully selected. The approach I choose is to select intentionally on the dependent variable in order to maximize the variation in outcomes. This chapter presents a new operationalization of compliance based on the number of infringement procedures started after accession and discusses in detail the case selection strategy.

7.1 Infringement procedures and compliance with EU law in CEE

So far, transposition timeliness and the total number of non-transposed directives served as indicators of compliance. Using infringement procedures improves our estimates of compliance levels in a number of ways. First, the start of an infringement procedure

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incorporates a qualitative assessment by the Commission on the adequacy of the notified national implementing acts in addition to the mere presence of any notified acts³⁶. Infringement procedures also reflect problems with the practical implementation of directives, so they give a glimpse beyond the formal-legal aspects of compliance. Conveniently, data on infringement procedures is available at a low level of aggregation. Before I describe how I use infringement procedures in order to select case, it is necessary to explain in more detail how do infringement procedures actually work.

Infringement procedures are the main vehicle for the EU to detect and punish non-compliance. They are the pillars of the European enforcement system. There are three types of breaches of EU law that may give rise to an infringement procedure: non-notification of transposition measures, incorrect transposition, and non-application. As EU directives are binding only to the result to be achieved and require transposition (legal implementation) into the domestic legal orders, a failure to transpose correctly directives within the deadlines set apparently constitutes a compliance failure, and is targeted by the infringement procedure. Even though national implementing measures have been adopted, however, incorrect or insufficient application of these measures can still give rise to an action against the member state. The infringement procedure is not confined to the (non)application of directives and can be initiated in regard to failure to comply with Treaty obligations directly.

The European Commission, as guardian of the Treaties, plays the leading part in the procedure. Once the Commission suspects a failure to comply it establishes first an informal contact with the responsible member states authorities. There are several ways through which the Commission detects possible infringement. First, member states have

³⁶ Let us assume that we detect compliance either by (A) the absence of an infringement procedure, and (B) the presence of notified transposition measures. The indicator (A) will provide more valid estimates than indicator (B) if the Commission is more likely to (1) start an infringement procedure in case of notified measures but no real compliance than to (2) start an infringement procedure when there is compliance and notification. Situation (2) is not so implausible, as it seems at first, if the member state complies, fails to notify right away, the Commission starts an infringement procedure, and only after that the member states notifies the transposition measure. The researcher looking back at the process will assess correctly the level of compliance by looking at the notified measures rather than by looking at the existence of an infringement procedure. Nevertheless, these cases should be few and far between since member states have interest in reporting truthfully when they do comply. On the other hand, relying on infringement procedures can help us detect cases where a member state has not in fact complied but claims the contrary by submitting transposition measures (situation 1). These cases are quite probable given the incentive structure faced by member states. I assume that the Commission starts an infringement procedure automatically if no notification is posted (the assumption is justified by numerous interviews with Commission officials; it can take up to three months after the transposition deadline, however, to start the infringement procedure).

the obligation to report on a regular basis the national implementing measures they have adopted for a directive which deadline has expired. Obviously, when no such measures are reported, the Commission has grounds to suspect that the transposition has not been finalized by the deadline. Second, the Commission has its own investigative units that look into the application of EU law³⁷. Third, citizens can send complaints either directly, or through the European Parliament, to the Commission in which they report alleged cases of non-application of EU law (Ibanez, 1999).

If the preliminary informal stage of information exchange fails to convince the Commission that the member state does comply, it can send a letter of formal notice, hence entering the formal part of the procedure. If the member state persists in its alleged non-compliance, the Commission sends a reasoned opinion, in which it elaborates its position. If the national authorities still do not comply, the actual adjudication phase of the infringement procedure is initiated, with the Commission formally registering a case at the ECJ. The ECJ then decides the case. Even if the case is decided against the member state, no sanctions apply at this stage.

During previous enlargements the Commission has applied a period of grace (extending to two years in the case of Greece according to anecdotal evidence). The first infringement procedures targeted at the new post-communist member states started 3 months after the date of Accession. The grace period with respect to compliance has been applied towards the new member states. The EU made clear before the accession that there will be no special treatment: 'Candidate countries will be subject to fines and penalties under a strict monitoring mechanism that will be stepped up once enlargement negotiations have been completed.'³⁸

Table 7.1 presents the number of infringement procedures opened against each of the 8 new members from CEE from May 2004 until the end of 2006. The highest number(s) in each row is underlined.

A great degree of diversity across sectoral and national lines is evident in the table. The compliance performance is much more sector-specific than previously assumed. Some countries seem to have problem concentrated in one field only: for example, Hungary has an above average number of infringement procedures in the field of

³⁷ The Commission has in-house investigators in fields like Fisheries.

³⁸ 'EU candidates face strict monitoring after completion of enlargement talks', Financial Times, 26 July 2002.

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Environment, while Slovakia performs particularly bad in Transport and Estonia in the field of Internal Market.

Table 7.1 Infringement procedures against the member states from CEE (2004-2006).

	CZ	EE	HU	LI	LV	PL	SK	SV	TOTAL
Agriculture	0	0	0	0	<u>11</u>	0	3	3	17
Competition	<u>6</u>	1	1	1	0	3	4	0	16
Employment	<u>25</u>	3	0	3	4	2	1	4	42
Enterprises	<u>38</u>	20	16	3	<u>36</u>	30	24	27	194
Environment	<u>23</u>	14	<u>17</u>	4	4	<u>17</u>	11	14	104
Information society	8	<u>9</u>	5	4	7	<u>9</u>	7	3	52
Justice	<u>8</u>	6	4	4	<u>8</u>	4	5	5	44
Internal market	<u>41</u>	<u>39</u>	17	22	36	33	24	28	240
Health and food safety	<u>76</u>	45	27	3	<u>63</u>	20	39	29	302
Taxation	6	6	7	0	4	<u>10</u>	7	5	45
Transport	<u>35</u>	21	24	13	24	21	<u>59</u>	17	214
Other	0	1	2	2	3	3	2	<u>4</u>	17
Total	266	165	120	59	200	152	186	139	1287

Although the Czech Republic has the highest number of infringement procedures in a number of policy areas, it scores relatively well in Agriculture and Taxation. Some countries, like Lithuania and Slovenia have consistently high performance. On the other hand Latvia is top of the league in Competition and Environment while at the same time trails the other countries in Agriculture and Health and Food safety. Overall, the number of infringement procedures started indicates levels of non-compliance similar to the EU-15.

Table 7.2 traces the different stages reached by the infringement procedures in regard to the individual countries. On average, approximately 21% of all letters of formal notice sent are followed by a reasoned opinion (implying that the problem has not been resolved) (see also Sedelmeier, 2008).

Table 7.2 Different stages of the infringement procedures reached (2004-2006)

	Letters of formal notice	Reasoned opinions	ECJ referrals
Czech Republic	266	58 (22%)	12 (4.5%)
Estonia	165	30 (18%)	4 (2.4%)
Hungary	120	28 (23%)	3 (2.5%)
Lithuania	59	10 (17%)	1 (1.7%)
Latvia	198	31 (16%)	3 (1.5%)
Poland	149	40 (27%)	7 (4.7%)
Slovakia	188	38 (22%)	7 (1.4%)
Slovenia	139	31 (20%)	2 (3.7%)

Poland (and to a lesser extent Hungary) appear more reluctant than the rest of the group to comply with the demands of the Commission at this early stage of the infringement procedure. Lithuania and Latvia on the other hand have a larger than average tendency to close the case before a reasoned opinion is received by their

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governments. Cases are referred to the European Court of Justice in close to 3% of all procedures initiated. Poland and the Czech Republic are most likely to be referred to the court, while Slovakia, Lithuania, and Latvia are most cooperative of all.

A comparison of these patterns with the EU-15 shows that the CEE newcomers are more likely to end the infringement procedures at an early stage, because in 2003 around half of the letters of formal notice led to a reasoned opinions, and 1/5 of all letters ended up in a court referral (Börzel et al., 2007; Tallberg, 2002). It is too early to compare the outcomes of ECJ court cases. Until the end of 2006, the ECJ had not decided against a CEE member state in an infringement procedure (until March 2008 the Court has ruled only against the Czech Republic on 6 occasions).

So far, the overview of infringement procedures has provided fine-grained data on compliance with EU law in the post-communist countries. The data has further re-enforced the impression that while in general the new member states have incorporated successfully the bulk of EU directives, there is significant variation in the performance across countries and sectors. Existing studies and the quantitative analyses presented earlier in this book do not completely explain the patterns. Administrative efficiency, the main causal factor highlighted by the literature, cannot account why a country like Hungary would have problems confined to the Environment sector, for example. The ‘stubbornness’ of Poland in the face of enforcement action by the Commission also is hard to explain by a reference to bureaucratic capacity. Despite its greater government efficiency than Lithuania and Slovakia (according to the World Bank Governance indicators) the Czech Republic has consistently poor results both in terms of transposition and responsiveness to the infringement procedures. In order to gain more explanatory leverage I extend the quantitative analyses presented earlier with a cross-country cross-sector comparative study. The study combines some of the strengths of large-N study (like Hille and Knill, 2006), studies of one country (e.g. Dimitrova and Rhinard, 2005; e.g. Zubek, 2005) or one policy sector (e.g. Andonova, 2004; Leiber, 2007). In this part of the book, I present the design of the comparative case study and the case-selection strategy targeted at capturing the range of variation in the outcome variable of interest (compliance performance).

7.2 Research design of the comparative case studies

The remaining chapters of the book are based on a comparative case study design. Large-N studies of transpositions have provided valuable insights. Case studies might complement quantitative research by shedding light on the causal mechanisms linking independent and dependent variables, and by validating and triangulating the conclusions reached on the basis of the large-N analyses. In this book, the comparative case studies also look into slightly different aspects of the overarching questions of compliance: while quantitative studies have explored the cross-national and directive-level variation in formal implementation, the qualitative part of the research will look into the stage of practical implementation as well.

At the same time, single case studies suffer from poor generalizability of the findings. Even if a case study of one policy area includes observations on several countries, the findings are not very likely to be representative of the broader spectrum of EU activities (especially if a rather peculiar in institutional terms sectors like social policy is chosen). Comparative case studies offer an approach that, if applied properly, may increase the validity of measurements while providing more analytical leverage than a single case study. Since my intention is neither to test rigorously a deductive theoretical model, nor to investigate comprehensively the impact of one central causal variable, but to *explain* the patterns of compliance in CEE, an inductive comparative case study approach seems well-suited for this part of the analysis.

The level of analysis is defined as a sub-sector in a country. A sub-sector is a cluster of closely related directives regulating a relatively distinct set of issues. Practically, a sub-sector corresponds to the lowest level of aggregation at which directives are classified in the official EU databases. For example, the Environment policy sector is divided into the sub-sectors Air, Chemicals, Climate, Impact Assessment, Nature protection, Noise, Waste, and Water.

The case-selection strategy is based on an intentional selection on the dependent variable (compliance). It is well-known that selection on the dependent variable presents problems (King et al., 1994). However, when the number of cases is small, when a strong

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predictive theory³⁹ is not available, and provided that the range of variation in the dependent variable is preserved, selection on the outcome can be a productive research strategy (King et al., 1994). Hence, the aim of the case selection is the preserve the range of variation in the dependent variable as much as possible and along as many axes of variation as possible. In order to fulfill these requirements I propose the following strategy.

Three constraints govern the case selection. First, the cases should include instances of poor *and* instances of good compliance by each of the countries. Second, the cases should include instance of poor *and* instance of good performance in the policy (sub)sectors selected. Third, a policy (sub)sector with an overall good and a (sub)sector with an overall bad performance should be selected. Fourth, these objectives should be satisfied with the least number of cases possible in order to keep the research manageable. The approach I develop is original in its proposed solution to capturing variation in the dependent variable in a multilevel data structure.

Table 7.3. Number of infringement procedures in selected subsectors and countries

	CZ	EE	HU	LT	LV	PL	SK	SL
Information society	8	9	5	4	7	9	7	3
Environment (nature protection)	1	1	5	1	1	3	3	0
Employment (working conditions and safety at work)	16	3	1	3	6	3	3	5

Starting with a modified (with the addition of sub-sector information) version of Table 7.1, I identified the following combination of cases that satisfies the selection requirements: Information society policy in the Czech Republic, Estonia, Lithuania,

³⁹ The theory presented earlier in this book is sound and offers numerous hypotheses based on comparative statics analysis. The theory, however, does not predict specific outcomes with a level of precision allowing for straightforward tests.

Poland, and Slovenia; Nature protection in the Czech Republic, Estonia, Hungary, Latvia, and Slovakia; and Working conditions and safety at work in Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia.

Table 7.3 presents the number of infringement procedures opened against each country in the three subfiles: these numbers approximate the compliance performance which is classified as ‘bad’ if the number of infringement procedures against a country is higher than the average for the (sub)sector, and ‘good’ if it is above average. The cases are referred to as ‘bad’ and ‘good’ only for convenience and the qualifications do not imply a normative judgment: they should be read only as relative ranking of performance in regard to a specific set of directives. Table 7.4 focuses only on the cases that *have* been selected. We can easily check that each country features twice: once with a result above and once with a result below average (the exception is Lithuania but there is simply no subsector where Lithuania has a higher-than-average number of infringement procedures). We also have several cases of good and poor compliance in each of the three sectors.

Table 7.4 Case-selection strategy

	CZ	EE	HU	LT	LV	PL	SK	SL
Information society	Bad	Bad	-	Good	-	Bad	-	Good
Environment (nature protection)	Good	Good	Bad	-	Good	-	Bad	-
Employment (working conditions and safety at work)	-	-	Good	Good	Bad	Good	Good	Bad

We also have a sector like information society that spurs a considerable number of infringement procedures given the amount of total legal acts in the area, and a sector like working conditions where the number of infringement procedures seems low given the larger number of directives in the policy field (if we exclude the obvious outlier Czech Republic from the calculation). With only two main directives in the nature protection

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subfiled, a total of 15 infringement procedures is a rather big number. The three policy sectors also cover a core area of EU action (the de-regulation of electronic communications), an area of positive integration like Environment, and an atypical but well established area of EU activity like Working conditions and safety at work.

The chapter outlined the case selection strategy focusing on infringement procedures as an indicator of compliance, the aims of the case selection and the practical identification of suitable cases for further analysis. The resulting selection of 16 cases cover all post-Communist member states and three sectors of EU activity. More importantly, the cases capture much of cross-national and cross-sectoral variation observable in the compliance data.

The moderate number of cases allows the collection of in-depth data on each case from official policy and legal documents, and from interviews with national and EU public officials working in these policy fields. The next chapters will present an overview of the results from the qualitative empirical research. Each of the three chapters that follow will present the collection of country cases within a single policy field. These chapters deal primarily with the description of the cases and the within sector comparisons. Following the three policy-focused chapters, I will present the major cross-sectoral and within-country comparisons from the comparative study in Chapter 11.

