

Comparing transposition in the 27 member states of the EU: the impact of discretion and legal fit

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Abstract

Transposition performance differs significantly across countries and policy sectors in the European Union. In this paper we analyze the transposition efforts of all 27 member states in respect to four EC directives expected to create considerable difficulties for compliance at the national level. Using Cox proportional hazards regression, we find that discretion and legal fit are significant factors in explaining transposition. Furthermore, we discover that the new member states from Central and Eastern Europe are not doing worse than the rest of the EU in terms of transposition timeliness. Surprisingly, government effectiveness has a negative relationship with compliance, while periods of absence of functioning government do not increase transposition time. Our findings emphasize the importance of legal-administrative factors for compliance with EU law.

Introduction

EC directives are decided in Brussels but implemented by the individual member states. This decentralized system of implementation opens opportunities for significant ‘diversity in unity’ in the application of European legislation. How and when do the member states of the European Union (EU) implement EC directives? Which countries are more likely to comply on time with the demands of European legislation? How can we account for the diversity of implementation patterns? Addressing these questions, we offer a comparative analysis of the transposition of four EC directives in the 27 member states of the EU.

Focusing on four directives adopted in 2005 selected because of their high estimated propensity to cause transposition problems, we trace in detail the timeliness and content of transposition. In order to achieve a high validity of the data, we rely on information from the European Commission and the national implementing authorities. As our research indicates, the often used EURLEX database is an insufficient source of data on national transposition measures (Falkner and Hartlapp, 2007).

The dataset we assemble allows us to conduct one of the first systematic comparisons of compliance patterns in all of the 27 EU member states. So far studies have either focused on the EU-15 member states (Falkner et al., 2005; König and Luetgert, n.d.; Steunenberg and Rhinard, 2006; Thomson, Torenviold et al., 2007), or on the group of newcomers (EU-10) that joined in May 2004 (Falkner and Treib, 2008; Toshkov, 2007b, 2008; Zubek, 2005, 2008). This paper gathers information on old and new member states (for the period after accession). Transposition performance differs significantly across sectoral lines in addition to the cross-national diversity (Steunenberg and Rhinard, 2006; Toshkov, 2008), so the directives we study represent four different domains of EU activity: internal market (intellectual property law), health protection, social policy and justice and home affairs.

In search of an explanation of the observed transposition patterns, we turn attention to the impact of discretion and the fit between European law and the national legal architecture. Although the influence of both these factors has been studied before (see Falkner et al., 2005; Kaeding, 2006; König and Luetgert, n.d.; Thomson, Torenviold et al., 2007) we offer new interpretations and develop new measures of these concepts. The measure of discretion takes an article in a directive as a starting point and counts the extent to which member states are restricted in the

implementation of the contents of these articles. The measure of legal fit we employ explicitly tries to disentangle the impact of formal-legal fit from the impact of domestic preferences, and combines information from several variables to increase the validity of the measure. Our findings are that discretion and legal fit are important determinants of transposition duration. Furthermore, we also find that the new member states do no worse than the old and more experienced member states in transposing directives on time. Surprisingly, in our sample government effectiveness is positively related to the time used for transposition and the duration of transposition delays. On the other hand, government changes during the period of transposition do not affect significantly transposition time.

The paper is structured as follows: the next section reviews part of the rich literature on implementation and compliance in the EU. Subsequently, the theory section focuses on the hypothesized impact of discretion, legal fit, and a number of other factors. Next, we present the research design strategy and the measurement of our concepts. The following section contains the results of the quantitative empirical analysis. Several cases are also presented to illustrate our main arguments. Finally, the conclusion summarizes the findings and draws out the major implications of our work.

Transposition research

Nevertheless the explosion of studies of EU transposition/implementation/compliance¹ there are still relatively few systematic findings corroborated by different research projects. While by now we have a much better grasp of the size, scope, and dimensions of the implementation problem in the EU, the quest for a comprehensive explanation of the observed patterns is still open.

Empirical research on compliance has established that there are systematic shortcomings in the timing and correctness of transposition and implementation of EC directives (cf. Börzel, 2001). The data from the European Commission contained in

¹ An incomplete list of quantitative studies includes: Berglund et al., 2006; Bergman, 2000; Borghetto et al., 2006; Börzel et al., 2007; Giuliani, 2003, 2005; Haverland and Romeijn, 2007; Hille and Knill, 2006; Jensen, 2007; Kaeding, 2006, 2008; König and Luetgert, n.d.; Lampinen and Uusikyla, 1998; Mbaye, 2001; Perkins and Neumayer, 2007; Siegel, 2006; Steunenberg and Kaeding, 2008; Steunenberg and Rhinard, 2006; Sverdrup, 2002; Thomson, 2007; Thomson, Torenviold et al., 2007; Toshkov, 2007a, 2007b, 2008. Important qualitative work on compliance includes Bursens, 2002; Dimitrakopoulos, 2001; Dimitrova and Rhinard, 2005; Duina, 1997; Falkner and Treib, 2008; Falkner et al., 2005; Leiber, 2007; Siedentopf and Ziller, 1998; Versluis, 2007. For more extensive reviews see Mastenbroek, 2005; Sedelmeier, 2006; Treib, 2006.

the Internal Market scoreboards and the ASMODEE II database already provide an indication of the scope of the problem. Currently, around 1.5% of all EU directives in force are not transposed within the deadlines. The size of the transposition deficit ranges from 0.2% for Denmark and Slovakia to 3.5% in the case of the Czech Republic, according to the Internal Market Scoreboard (Commission, 2008). These figures most probably underestimate the size of the problem. For example, in the case of the Netherlands, Mastenbroek (2003) found that close to 60% of the EC directives are not transposed on time. In Italy, one research project reports that more than 75% of all transposition is delayed (Borghetto et al., 2006). Drawing on a large scale research project, Steunenberg and Rhinard (2008) estimated that the median duration of a transposition process is about 76 weeks, while the median value for the deadline of transposing the directive is 57 weeks. When an implementing measure is adopted after the deadline, the median delay is 37 weeks (about 9 months).

The problems with the transposition of EU law are only surpassed by the extent of practical implementation difficulties. Falkner and others provide a glimpse at the scope of the implementation gap on the basis of their in-depth study of compliance with 6 social policy directives (Falkner et al., 2005). Versluis also gives evidence that practical implementation often trails the formal incorporation of EU rules in the domestic legal orders (Versluis, 2007).

All these studies improve in important ways our knowledge of the nature of the compliance problem in the EU. The descriptive inferences they draw are still sketchy but provide enough evidence for significant and intriguing differences in the implementation of EU law. How systematic these differences are, and how to account for the systematic component of the variation are questions we still know relatively little about.

Much of the explanatory effort so far has been targeted at demonstrating the influence of national (macro) institutional factors. 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 Haverland and Romeijn (2007). 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, the empirical 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. Scholars who test the impact of federalism independently from the other political constraints report a negative effect – Thomson (2007), Haverland and Romeijn (2007), Linos (2007) and Koenig and Luetgert (n.d.). Giulliani (2003) and Jensen (2007) however, find no effect.

Using the more general veto player concept, the link between constraints on decision-making and compliance appears even more precarious. Toshkov (2007a) finds no effect of the number of veto players using data on the EU-15 for the period 1998-2005. Similarly, Jensen (2007) and Mbaye (2001) conclude that there is no effect. On the other hand Giulliani (2003) finds a negative relationship between the number of veto players and national adaptation to EU law. Kaeding (2006) finds contradictory effects using different indicators. Perkins and Neumayer (2007) report a negative relationship. Börzel et al. (2007) find no effect.

A possible reason for these mixed and contradicting results is that the number of players is not sufficient to cause compliance problems. The preferences of these players may matter, as suggested by Steunenberg (2006), since many players who prefer the same policy may effectively act as one player. Furthermore, the various national decision making processes on transposition may substantially differ with regard to the number and preferences of the *de facto* veto players, such that the use of a measure based on the structure of the national political system is not sufficient or even inappropriate. Steunenberg together with Kaeding and Rhinard (2008; 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 Kaeding, 2008; Steunenberg and Rhinard, 2006).

While institutional factors have little success in explaining compliance, state capacity does significantly better. Government capacity, or effectiveness, is a country-level variable that varies slowly over time with changing cabinets and public administration reforms. The positive effect of government effectiveness (usually measured with the World Bank Governance Matters indicators) and the quality of the civil service is very well established. Evidence in their 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. Coordination problems decrease capacity and in turn lead to more transposition troubles (Haverland and Romeijn, 2007; Kaeding, 2006; Mastebroek, 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 measure 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).

Not content with the small explanatory power of institutional and capacity-related factors², Falkner et al. (2005) have recently proposed that implementation of EU law actually works according to different logics in 3 clusters of member states. A typology consisting of a world of law observance (the Nordic countries), a world of domestic politics, and a world of neglect captures the differences in how implementation duties are regarded and performed across Europe, according to the authors. This analytical scheme, however, is based neither on deductive reasoning, nor on inductive data analysis: it is derived from a mixture of both. The strength of the empirical fit of the typology has been questioned (Thomson, 2007; Toshkov, 2007a) as well as the theoretical underpinnings of the idea (Toshkov, 2007a). Propositions that some kind of compliance culture explains implementation outcomes have been raised before (Bergman, 2000). Unless we inquire what accounts for the different ‘cultures’ of digesting EU law, we do not gain much explanatory leverage. A typology based on national cultures also presupposes that the primary axis of variation in compliance is across nations. We have no compelling evidence, however, that cross-sectoral or temporal differences are smaller than cross-national ones.

² While veto players and administrative effectiveness have been two of the most-often used variables for explaining compliance, many more causal factors have been employed in empirical studies of transposition and implementation, for example corporatism, Parliamentary involvement, preferences (measured in a number of different ways), power, conflict, culture, learning, experience, features of the EU decision-making process and the national transposition measures, etc. Some of these factors are discussed further in the text, but it is beyond the purposes of this article to review all proposed explanations.

Clustering the member states into three or four ‘worlds’ without clear criteria for group membership risks masking rather than revealing patterns in the data. For example, we are tempted to isolate the new member states that joined in 2004 into a special cluster although there is no study that shows the new entrants process implementation duties any differently than the EU-15. The few empirical studies investigating transposition in the newcomers from Central and Eastern Europe actually find general success with transposing EU law, and indicate that administrative effectiveness (Hille and Knill, 2006; Toshkov, 2008), centralization of collective decision-making within the executive (Zubek, 2005) and to some extent political preferences (Leiber, 2005; Toshkov, 2008) have had an effect on the timing and pace of incorporation of EC directives.

A comprehensive explanation of compliance in Europe should ideally include state, policy sector and directive level factors in the causal model (see Kaeding, 2008; Steunenberg and Rhinard, 2006; Thomson, Torenvield et al., 2007), and in addition take account that these effect might change over time. Unfortunately, such multi-level models pose very serious demands on the data from which the proposed effects can be estimated. These demands are more readily visible in quantitative analyses, but they are by no means less severe for qualitative case studies. The multi-level nature of the causal process also implies the need for data at the lowest level of aggregation.

An explanation of transposition patterns also has to be multivariate. In terms of methodology, this implies that factors we suspect to be relevant should be included in the model even if we are not substantially interested in their impact, since failing to do so might result in omitted variable bias and wrong inferences for our main causal variables. On the other hand, we should be careful to avoid problems of multicollinearity when using many variables that closely co-vary together (for example country-level institutional features, or measures of conflict, legal fit and discretion).

Finally, we should be more careful about the intended domain of generalizability of our research findings. The scope of EU activities is great. The range of EU legislation is tremendous covering utterly trivial as well as highly salient issues. We should be able to recognize and acknowledge the trade-offs we face in terms of internal and external validity of our studies.

The impact of discretion and legal fit

In this part we discuss the two main factors we explore – discretion and fit with the national legal architecture. Attention towards the potential influence of these two variables on transposition performance has been suggested from several corners of implementation studies. Social scientists and legal scholars alike are interested in the impact of discretion and legal architecture (i.e. the way in which the national legal order is structured). The discussion of discretion and legal fit tends to emphasize the administrative, or technical, part of the compliance process. A focus on discretion and legal fit is based on the idea that in order to explain implementation outcomes we have to look deeper into the legal-administrative details of the process of compliance. The political context still needs to be considered, but the administrative context is at least as important. Singling out the influence of legal and administrative factors represents, in fact, a resurgence of some of the earliest perspectives on implementation in the EC/EU (Ciavarini Azzi, 2000; Haas, 1998; Pappas, 1995).

The first factor we consider is the discretion given to member states in implementing European policy. What is interesting is that the impact of discretion on transposition is somewhat contested. On the one hand, it can be argued that more discretion makes transposing a directive easier since the domestic policy actor can adapt the European requirements to national or regional differences. In addition, discretion is expected to speed up the decision making process since national policymakers are able to tackle possible national or local concerns. This line of reasoning following the classical arguments of spatially restricted benefits of social goods and regulation from the fiscal federalism literature (see, for instance, Oates, 1972, and Musgrave and Musgrave, 1989: 446-50), corresponds with Thomson's (2007) empirical finding that discretion has a positive impact on a member state's compliance with European law. This is based on the data from Falkner et al. (2005) who analyzed the transposition of six social policy directives.

On the other hand, discretion can also be expected to complicate matters according to a more political approach. If a requirement does not provide any leeway to the national policy actors, these actors cannot quarrel over the way in which this requirement should be interpreted. However, if member states have leeway, national policymakers may disagree on how to transpose and implement a policy. Having *de facto* veto player power, decision makers in either the transposition or the implementation phase of the policy process may block any further action (see

Dimitrova and Steunenberg, 2000; Steunenberg, 2006: 304). Of course, these possible deadlocks can be unfrozen or avoided by redefining the issues at stake, adding new issues to the political agenda, linking the issues with other decision-making processes, or trying to change the preferences of the opponents (see H eritier, 1999: 16–7). Still, a process leading to a compromise solution may take time and therefore delays transposition. In this way, discretion is expected to have a negative impact on a member state’s compliance with European law, at least from the perspective of transposing a directive on time. This expectation corresponds with the findings of Thomson et al. (2007), who report a negative relationship with compliance. It also relates to an observation made by Versluis (2007) who notes that less discretion helps to properly implement a European policy. In this paper we prefer to follow and test this hypothesis since it is based on a political, interest-based logic in contrast to the competing, alternative hypothesis from public finance.

The compatibility, or fit, between an EC directive and the national legal system is the second major factor we explore. We propose that directives that disturb only to a limited degree the national legal architecture have higher chances to be incorporated on time than directives which do not easily fit into the existing system of domestic rules (see also Falkner et al., 2005, pp. 294-6). Transposition is to a large degree an administrative exercise, insulated from the broader political process. As long as this is the case, ‘technical’ difficulties are expected to play a significant role in the timing of drafting and adopting of national implementation measures. It is important to emphasize that the ‘legal fit’ hypothesis works independently from, and maybe in addition to, any misfit between the *preferences* of domestic actors and the European directive. The legal fit refers to the formal side of the rule transfer. The expected problems are formal and not substantial. National politicians and public officials might be fully supportive of the purpose and content of a particular EC law; nevertheless, the law might generate a high degree of misfit with the existing normative framework in the country³. As a result, a serious transposition delay might occur even if all relevant actors approve of the EU directive simply because it takes a lot of time to identify and sort out the legal ‘mess’ created by the new piece of legislation to be downloaded.

³ The interpretation of legal fit we propose differs substantially from the idea advanced by Dimitrova and Rhinard (2005) because we define ‘norms’ in legal terms and not as the prevailing value orientations in society.

The domestic legal systems consist of interrelated components. Some parts of the system are more central than others. Changing the entire law on postal stamps has only a very limited impact in regard to the number and scope of other legislation affected. Changing a single definition of a term like ‘domestic economic entity’ on the other hand might have repercussions across a wide range of subfields within the legal system. Some policy areas have accumulated legal rules for hundreds of years. The consistency of these rules has been painstakingly guarded by lawmakers and the legal experts in the public administration. Many of these norm clusters are quite idiosyncratic and different across countries. A new EC directive changing even a relatively minor piece of such a construction will lead to the need to reform the entire corpus of related legislation. The European law need not be politically controversial. It only has to target a part of the legal system where localized intervention is not possible.

Our concept of legal fit differs significantly from the general goodness-of-fit argument proposed in studies of Europeanization (Bailey, 2002; Börzel and Risse, 2000; Duina, 1997; Falkner, 2001; Green Cowles et al., 2001; Héritier et al., 2001; Knill and Lenschow, 1998; Mény et al., 1996; Treib, 2003). First of all, we do not look at the discrepancy between the existing policy legacy or status quo and the EU proposed change. For example, a new EU directive might require a five-fold increase in the values of noise protection standards. As long as the only legal changes concern the noise protection figures in the domestic legal text, the legal fit is high although the policy discrepancy in terms of substance might be great. In practice, scholars have often lumped together the different shades of meaning of the goodness-of-fit idea: misfit as a divergence from the preferences of important national actors⁴, misfit as the difference between the existing and the European policy, misfit as technical incompatibility (Duina, 2007; Mastenbroek and Kaeding, 2006). We propose to disentangle the different semantic components and to focus on the disturbance caused by EU law on the existing national legal order. Note that the concept is directive-specific as well as country-specific. Variables like national legal culture or tradition come somewhat close to the meaning of legal fit, however, they operate at the system level, and they vary only across countries (see Perkins and Neumayer, 2007).

⁴ In addition, some authors have conceptualized misfit primarily in institutional terms, focusing on the compatibility with national-level institutions (Giuliani, 2003).

Although legal misfit and discretion are the two key causal variables we focus on in this research, several additional factors are included in the analysis. We take account of the possible influence of government effectiveness. The finding of a positive impact of government capacity on compliance is corroborated by most empirical studies, and if we do not consider this variable we might introduce omitted variables bias in the analysis if government capacity is related to any of our explanatory variables.

Furthermore, we consider the impact of government and cabinet changes during the time of transposition on the likelihood of timely compliance and the duration of the delay. A primarily political perspective on implementation⁵ leads us to expect that during times of legislative and executive turnover, attention to transposition will be at its lowest and as a result the time need for adapting to a European directive will increase. In times of interregnum, when there is no functional cabinet or legislature, national implementing measures cannot be approved. In addition, the lack of (attention from the) political leadership will likely reduce the efforts of civil servants to achieve timely and proper adaptation to the European requirements.

Another potential determinant of transposition time according to a political perspective on compliance is the potential conflict at the national level in regard to the substance of the policy adaptation required by the European legislation. The number of ministries involved in the transposition process has often been used as an indicator of domestic conflict (Haverland and Romeijn, 2007; Kaeding, 2006; Mastenbroek, 2003), although, theoretically, involvement of more than one actor is only a necessary and not a sufficient condition for domestic conflict over transposition. Koenig and Luetgert (n.d.) employ a sector-specific measure of domestic conflict that focuses on the maximum ideological distance between any two parties in parliament. It is unclear, however, why all parties in Parliament are considered relevant for the transposition of EU legislation which more often than not is adopted by the cabinet, or a ministry, and even in the cases when it reaches the legislature it rarely requires supermajorities.

The final factor we consider is the allotted time for transposition of a directive. The time until the deadline that the member states have is an important determinant of

⁵ Several existing case-studies hint in that direction as well: Mastenbroek, 2007; Steunenberg, 2007.

the amount of time they use (Borghetto et al., 2006; Kaeding, 2006; Mastenbroek, 2003; Steunenberg and Rhinard, 2006). While as such this hypothesis is rather trivial, failing to control for this factor might bias the estimated effects of the variables of substantial interest.

Research design

In this section we discuss the research design of the study, the data sources used and the measurement of the variables. First, the sample selection strategy requires some explanation. Since we are interested primarily in legislation which has at the very least the potential to lead to delays and problems, we selected 4 directives that according to existing studies have the potential to be troublesome. We started by identifying all directives with deadlines for transposition in 2005. The selection resulted in a sample of 101 directives. We chose the year 2005 in order to have a sufficient period of time after the transposition deadlines as to be able to register delays, while at the same time selecting a time period when the Eastern Enlargement has already been completed. Next, we evaluated each directive in terms of its propensity to cause problems. The propensity was estimated on the basis of previous research. In their study, Steunenberg and Rhinard (2006) find that the negotiation period, the number of recitals, the decision-making mode and the type of directive are all related to the probability of timely compliance. Using the estimated size effects of these variables from Steunenberg and Kaeding (2008), we ranked the sample of directives and focused on the directives at the top of the list. Since we aimed to cover several areas of EU activity, we selected one directive at most per policy sector. In practice, this resulted in the omission of several social policy directives and the inclusion one justice and home affairs and one health policy directive (which were still in the top 8 of the list). The four directives selected for further study are Directive 2001/84/EC on the resale right for the benefit of the author, Directive 2003/33/EC on advertising and sponsorship of tobacco products, Council Directive 2003/109/EC on the status of third-country nationals, and Directive 2002/44/EC on exposure of workers to vibration⁶.

⁶ Full references of the directives: Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13.10.2001, p. 32–36. Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (Text with EEA

We are aware that the selection method might introduce a selection bias if we wanted to generalize our findings for the entire body of EU directives. However, our empirical focus is on directives that do have at the very least the potential to cause transposition and implementation problems. A large number of European directives are either delegated, implementing legislation adopted solely by the Commission, or routine, and often trivial (amending) acts adopted by the Council. By restricting our universe of potential cases to important legislation adopted after lengthy negotiations we make sure that our findings have greater societal and practical significance.

The dependent variable we use is transposition time, defined as the time in days between the adoption of the directive and the adoption of the national transposition measure. We take into account the dates of *adoption* of the transposition act because we are interested in the preparation and approval of the national laws and not in the date they enter into force. We also track the *last* implementation measure reported. Relying on the first notified measure would underestimate the transposition time (and the delay) since it only signifies the start of the transposition process.

In order to establish the national transposition measures and their timing, we contacted the desk officers for the specific directives at the European Commission. With their co-operation we were able to acquire information from the internal database of transposition measures that the Commission officials use. This database is in practice much more reliable and up-to-date than the publicly available EURLEX. Why this is the case is unclear, since the information from the internal Commission database should be the same as the information in EURLEX. As a next step, we also contacted each national implementing authority responsible for the transposition of the four directives in the 27 member states with requests for further information and validation of the transposition measures we had identified⁷. Therefore, we believe our

relevance) OJ L 152, 20.6.2003, p. 16–19. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L 16, 23.1.2004, p. 44–53. Directive 2002/44/EC of the European Parliament and of the Council of 25 June 2002 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (vibration) OJ L 177, 6.7.2002, p. 13–20.

⁷ For example, in the case of the transposition of the Tobacco directive in Spain, EURLEX reports that Spain completed the transposition in December 2005 (5 months after the deadline) by means of the law *LEY 28/2005, de 26 de diciembre, de medidas sanitarias frente al tabaquismo y reguladora de la venta, el suministro, el consumo y la publicidad de los productos del tabaco* entering into force on the 1st of January 2006. In reality, however, compliance was not achieved until the 13th of January 2007 with amendments of the Spanish legislation following an infringement procedure pursued against Spain by the European Commission. Relying only on the EURLEX database we would have underestimated the transposition delay in Spain by more than a year.

dataset has a high degree of reliability and validity. Next, we turn to a discussion of the measurement of the explanatory variables we employ.

Discretion

Discretion has been measured in different ways using the initial work of Epstein and O'Halloran (1999: 275-84) on US legislation. Franchino (2004: 293) adapted and modified this approach to EC legislation by including several additional ways in which the European legislator can constrain the behavior of the European Commission or the member states the moment it delegates these actors some policy making or implementing power. Based on his approach Franchino (2004: 283) distinguishes between a *delegation ratio*, which is the proportion of major provisions that delegate policy authority to member states, and a *constraint ratio* which equals the weighted proportion of constraints imposed on member states in implementing a policy. Thomson et al. (2007: 694) propose a different measure—although they claim it to be the same as Franchino's delegation ratio—which consists of the proportion of provisions that grant discretionary executive power to the member states.⁸ The new measure is called the *discretion ratio*. The discretion ratio is a further specification of the delegation ratio since it only counts those provisions in which the member states are delegated implementing power *and* have some freedom of choice (as often indicated by words like 'may' instead of 'shall'). At the same time, the discretion ratio does not take into account the *extent* to which member states are restricted by a provision. This depends at least on the number of constraints the European legislator imposes on member states in order to limit their leeway.

In this paper we propose to follow a different way to measure discretion. First, we determined for each directive the number of substantive articles and subarticles that are relevant to member states. More specifically, these articles provide requirements or guidelines to the member states about how to implement the policy specified in the directive. The article as the unit for our count fits to how legal texts are drafted in Europe. Based on current drafting each article covers a topic that is regulated by the European legislator. We left out the commonly used final provisions on issues like the addressees of the directive, the entry into force of the directive and transposition. Especially for directives having a relatively small number of substantive

⁸ A similar measure is used in Thomson (2007).

articles (like the tobacco advertisement directive in our sample), the inclusion of these rather closed, technical legal provisions would disproportionately reduce the discretion score. Second, we classified each (sub-) article on whether it contains a closed or a more open statement on what a member state has to do (order) or cannot do (ban). An example of a closed statement is that “[a]ll forms of radio advertising for tobacco products shall be prohibited (Article 4.1 of the tobacco advertisement directive). Non-closed or ‘open’ statements allow for a choice by the implementing authorities in the member states. These statements include examples such as “[i]t shall be for the Member States to set a minimum sale price from which the sales... shall be subject to resale right” (Article 3.1, resale right directive) or “...the daily exposure limit value standardised to an eight-hour reference period shall be 1,15 m/s² or, at the choice of the Member State concerned, a vibration dose value of 21 m/s^{1,75}” (Article 3.2(a), protection from vibration directive) or “Member States may require third-country nationals to comply with integration conditions, in accordance with national law” (Article 5.2, third-country nationals directive).

Using differently classified statements in a directive, which refer to the obligations of the member states under European law, we propose the following index:

$$d_i = \frac{O_i}{C_i + O_i},$$

with d_i as the discretion to member states based on directive i , and C_i as the number of closed and O_i as the number of open statements referring to member states in directive i . This ratio differs from Franchino’s constraint ratio (2004: 283) in two ways. First, Franchino focuses on the relative frequency with which the European legislator uses different types of constraints in a directive. Even if the same type of constraint is used several times within a directive, Franchino will count it as one. Our index goes one step further and also accounts for the *intensity* with which different constraints are used.⁹ Second, Franchino limits his index to 12 different types and gives the proportion of different types that are used in a directive to this total, while we do not

⁹ In the case of the resale right directive we applied Franchino’s coding scheme and calculated a delegation ratio for the member states of 0.25 and a constraint ratio for the member states of 0.21. The latter is based on two different constraints used in this directive out of Franchino’s list of 12 constraints. The discretion index, as proposed in this paper, has a score of 0.43, which is based on 21 statements relevant to member states of which 12 are classified as closed and 9 as open. The score of our discretion index suggests that the directive is relatively open, while Franchino’s measure suggest limited discretion.

limit the number of possible constraints. In our view, the European legislators, if they wish, can put an endless list of constraints on the member states.

Based on this index, discretion has a value between zero and one. The higher this value the more discretion a member states has. Furthermore, in measuring these values for the directives we analyzed in this paper, we note that these values fit to the more general impression of our interviewed respondents about how restrictive the directives are. The directive on tobacco advertisement is regarded as a very restrictive one, while the directive on vibration is seen as the least restrictive.¹⁰

Legal fit

The measurement of legal fit presents a formidable challenge. Several indicators have been used in transposition research to measure general (policy) misfit. For example Mastebroek (2003), Kaeding (2006), Linos (2007) and Thomson et al. (2007) use the difference between adopting new and adopting amending national legislation¹¹. All these authors propose that new legislation is indicative of lower goodness-of-fit. Koenig and Luetgert (n.d.) measure the goodness of fit with the number of national implementing measures. Falkner et al. (2005) create a categorical variable taking into account the costs and a qualitative assessment of the policy and polity misfit of a directive. While these operationalizations might be useful to capture the concept of policy misfit they do not address adequately legal misfit as outlined in this article.

In order to improve the validity and reliability of our measure of legal misfit, we opted to combine into a single measure several indicators that relate to various aspects of the national legal architecture disturbance caused by a directive. The main features to consider are the novelty and the scope of the legal change. The scope can be captured by the number of national transposition measures required, and the status of these measures in the national legal order (laws, regulations, ordinances – first, second and third order legislation). The novelty of transposition acts is captured through the distinction between new and amending acts.

On the basis of these indicators we create a categorical variable with four categories - High, Moderate, Limited, and Small misfit. High misfit is registered when

¹⁰ These judgments are based on interviews with Commission officials on the directives researched in this paper. Following our method, we computed the following discretion scores: 0.09 for the directive on tobacco advertisement, 0.43 for the directive on the resale right, 0.44 for the directive on the long term status of third country nationals, and 0.52 for the directive the protection from vibration.

¹¹ Feature of the national implementing measures have been used as variables also by Börzel et al. (2007) and Haverland and Romeijn (2007).

a directive requires the adoption of many (more than 2) legislative acts, when these acts are of a higher order (laws and regulations) and when the transposition measures are mostly extensive amendments rather than new acts. A moderate degree of misfit is observed when many, high order acts are adopted but the acts are new and do not replace existing legislation. A limited misfit is present when no more than 2 transposing acts of second or third order (regulations and ordinances) have been adopted and when these acts are amending existing norms. If two or less transposition acts have been adopted which are new and are not primary legislation, we have a small legal misfit.¹² This four-fold classification is naturally a compromise between the precision of the measure and the efforts needed to collect the required data. Any further distinctions would demand a much more detailed knowledge of the national transposition processes than we are able to acquire in the course of a single research project.

Control variables

Government effectiveness, the first control variable we use, is measured with the help of the World Bank Governance Indicators for 2006. These indicators aggregate information from several data sources (primarily expert surveys) on government quality and have been employed extensively in transposition research (Berglund et al., 2006; Hille and Knill, 2006; Siegel, 2006; Thomson, 2007; Toshkov, 2008).

In measuring the domestic conflict we follow the existing literature and count the ministries involved in the transposition of a directive. The allotted time for transposition is measured as the difference in days between the adoption date of the directive and the transposition deadline¹³.

The time of government interregnum has been measured as the number of days between the end of one cabinet and the inauguration of its successor. Depending on the circumstances, the end of a cabinet has been taken to be one of the following: the date of the general legislative election, the date of announcing a date for

¹² For example, the resale right directive was transposed in Belgium by a law and by a royal order that concentrates on the enforcement, the practical aspects and the administrative matters. Since more than one legal act was used, and at least one of the acts is a law, the misfit in the Belgium case was ranked as 'high'. The same directive was transposed in Ireland with a (new) government regulation. Since the subject matter of the directive had not been regulated in Ireland before, the transposition of the directive did not have to supplant any existing legislation. Given that only one lower-level legal instrument was used in the transposition, the legal misfit was considered 'small'.

¹³ The effective deadline in the cases of Bulgaria and Romania has been taken to be the 1st of January 2007 – the date of accession of these countries.

extraordinary legislative election, the date of resignation of the prime minister, or the date of a successful vote of no confidence. The assumption is that once the cabinet resigns, schedules new elections, or loses its parliamentary support, its political mandate is over. The starting date for a new cabinet is relatively more straightforward to determine and is usually marked by the parliamentary sanction of the new government. The number of days of government interregnum during the transposition process have been summed together to produce the final measure.

Dataset

Table 1 presents the mean values and some descriptive statistics of transposition time and delay, and the explanatory variables used for the four directives we study. Where appropriate, the values have been given for two groups of countries – the ‘old’ member states which were part of the EU from the time before 2004 and the ‘new’ member states which joined in 2004 and 2007. The directive on the ‘resale right’ took the longest to get transposed followed by the directive on third-country nationals. The national adaptation to the rules on third-country nationals also registers the longest delays with a mean of more than a year for the old member states and almost 6 months for the new members. Four cases have not been completed at the time of completion of the data-collection (April 2008). Three cases have been excluded from the dataset because all notified transposition measures were adopted prior to the publication of the directive¹⁴.

While the new member states have taken only slightly less time on average to transpose the sample of 4 directives, their mean delays is significantly shorter than the delay of the old member states. The measure of discretion is positively related to the average delay. The ranking of the directives in terms of discretion follows closely the ranking in terms of delay, with the exception of the directive on ‘vibration protection’ which offers a lot of discretion but has been transposed relatively fast. It could be that the special status of European rules in this sub-field of social policy (minimum standards directives) accounts for the discrepancy.

¹⁴ In addition, Denmark, Ireland, and the United Kingdom have opted out from the directive on third-country nationals.

Table 1. Mean values of the variables for the different directives and groups of member states.

	Directive							
	resale right		tobacco advertisement		protection from vibration		third-country nationals	
	old MS	new MS	old MS	new MS	old MS	new MS	old MS	new MS
Transposition time (in days)	1818	1618	916	912	1293	1189	1227	1014
Delay (in days)	260	0	16	-40	186	-8	437	167
Legal misfit (1=law, 4=high)	2.36	2.33	3.00	3.18	2.00	1.33	3.30	3.25
Discretion	0.43		0.09		0.52		0.44	
Time to deadline (in days)	1584		924		1147		818	
Government interregnum (in days)	63		32		52		35	
Government effectiveness	1.14 (min = -0.05, max= 2.29)							
Number of ministries	1.11 (min=1, max=2)							

Notes: $N=102$. 'Old MS' are the 15 states members from before 2004. 'New MS' are the 12 member states that joined in 2004 and 2007. The full names of the directives are available on [page XX](#). Note that a negative delay means transposition before the deadline.

Results from the Cox proportional hazards analysis

Following the discussion of the research strategy and the data set, we present the results from the empirical analysis based on a Cox proportional hazards regression. Survival analysis (Mastenbroek, 2003; Toshkov, 2007a) and Cox proportional hazard (CPH) models in particular (Borghetto et al., 2006; Linos, 2007; Steunenberg and Kaeding, 2008; Steunenberg and Rhinard, 2006; Thomson, 2007; Thomson, Torenvlied et al., 2007) have been widely used in research on transposition.

CPH models offer the advantage of leaving the particular distributional form of the duration times unspecified. In CPH models the set of exogenous variables predict the time a certain event occurs (transposition in this case). CPH estimates relative risk (or hazard ratios), the risk being the likelihood of an event (transposition) taking place. We estimate three models. Models 2 and 3 use the same set of independent variables, while Model 1 includes also a dummy variable for the new member states. In comparison with Model 2, Model 3 transforms the time until the

deadline and the government interregnum as time-varying covariates (TVC). TVC are variables, the values of which change across the span of the observation period. In order to estimate Model 3 (TVC) the original dataset is rearranged. Each time period (at weekly interval) for each directive in the 27 member states becomes an entry (observation) if during that week the directive is at risk of being transposed (it has been adopted and it has not been transposed yet). The outcome variable then is 1 if the directive has been transposed in that particular time-period in a country and 0 otherwise.

Table 2 present the results from the analysis. The coefficients reported refer to the hazard of transposition: positive signs imply increasing hazard of transposition (hence, decreasing hazard of delay). Before we turn to the discussion of the effects of individual variables, we should note that the overall fit of the models is satisfactory, with the likelihood-ratio test disconfirming the null hypothesis that all coefficients are equal to zero. Both models pass the test of the proportional hazards assumption at the global level and for each covariate. A graphical inspection of the scaled Schoenfeld residuals against transformed time also does not reveal any violations of proportionality.

Since the transposition data is multilevel, we considered including shared frailties to account for any unobserved subgroup heterogeneity. Specifications of the models with the addition of shared frailties at the directive and country level, however, did not prove significant improvements of the models, as indicated by the likelihood-ratios tests. Inclusion of the shared frailties also did not change substantially the estimated coefficients and standard errors of the covariates.

The final specifications of the models, as reported in Table 2, do not include shared frailties, but still control for the non-independence of observations at the country level (in the case of Models 1 and 2) and at the case level (Model 3 TVC).

Next, we turn to a presentation and interpretation of our findings with regard to the individual explanatory variables. There is no difference between the performance of the old and the new member states¹⁵. The coefficient for the variable is not significant and the inclusion of the variable does not improve the fit of the

¹⁵ Furthermore, we look into the ‘worlds of compliance’ hypothesis. With the world of dead letters as a reference category, only the world of law observance (Sweden, Denmark, and Finland) is significantly different that the rest. No differences in performance in regard to the world of domestic politics (p=0.61) and to the world of neglect (p=0.38) can be noted

model. Legal misfit is negatively related to the hazard of transposition¹⁶. The coefficient is statistically significant in Model 2, and it remains so in the TVC version. Holding the other variables constant, one unit increase in legal misfit (e.g. from Limited to Moderate) reduces the hazard of transposition by a factor of 0.686..

Table 2. Determinants of transposition time (Cox proportional hazards regression).

Variable	Model 1	Model 2	Model 3 (TVC)
	Coefficient (st. error)	Coefficient (st. error)	Coefficient (st. error)
New member states	0.050 (0.18)	-	-
Legal misfit (1=low, 4=high)	-0.38* (0.18)	-0.38* (0.17)	-0.44*** (0.15)
Discretion	-2.07* (0.82)	-2.10* (0.83)	-2.19* (0.87)
Time to deadline in days/ weeks remaining to deadline	-0.003*** (0.001)	-0.003*** (0.000)	0.021*** (0.003)
Government interregnum in days/Interregnum	-0.003 (0.002)	-0.003 (0.002)	0.19 (0.48)
Government effectiveness	-0.65** (0.23)	-0.67** (0.26)	-0.72*** (0.22)
Number of ministries	-0.18 (0.40)	-0.19 (0.40)	-0.34 (0.38)
N	98	98 ¹⁷	17573
Log likelihood	-317.9	-318.0	-318.8
Likelihood ratio test	66.5***	66.4***	64.8**

Model 2: Dependent variable: transposition time in days; robust standard errors, clustering at the country level; model 3 with time-varying covariates (TVC): Dependent variable: transposition in a week; Clustering at the case (directive/country) level; * = $p < 0.05$; ** = $p < 0.01$; *** = $p < 0.001$.

Discretion is negatively, and significantly, related to the hazard of transposition as well. The effect is consistent in both models. A directive with the maximum discretion score of 1 has an 88% lower hazard of being transposed than a directive granting no discretion (score of 0). For the observed range of variation on this variable (from 0.091 to 0.520) the hazard is 62% lower. To repeat, directives granting more discretion are less likely to be transposed earlier. This is in line with the

¹⁶ In a separate model (not reported here), we use the individual variables part of the measure of legal fit instead of the composite measure. The individual variables are all in the expected direction although not statistically significant. This finding highlights the added value of combining several indicators in order to create a better measure of legal fit.

¹⁷ Four cases are excluded due to missing observations. These are the four censored cases since we cannot measure the degree of misfit, and the number of ministries involved.

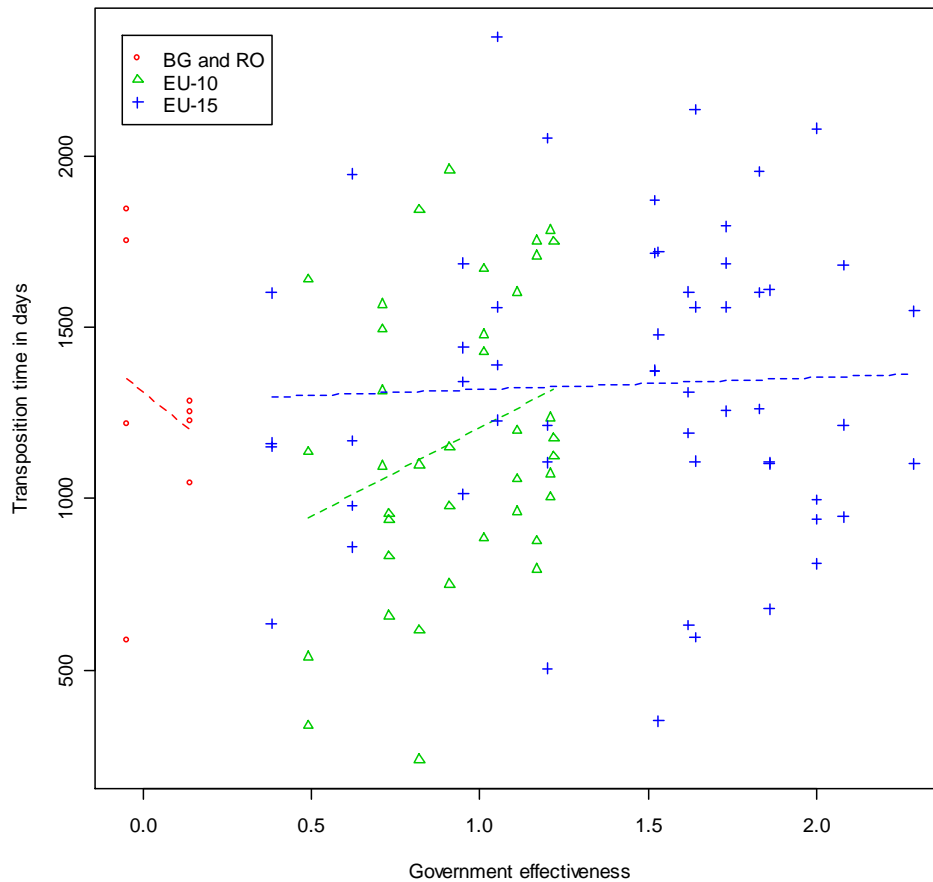
expectation that discretion complicates transposition, which is based on the notion that the pace of decision making slows the moment political actors disagree and need to find ways to accommodate their mutual concerns. At the same time, this also suggests that the heterogeneity of preferences of these actors is important as an additional, necessary condition. We did not include this factor in our quantitative analysis, but this should be done in further work.

The time until the deadline, measured as a directive-level variable registering the allotted time for transposition in days, is negatively related to the hazard of transposition. Directives granting more time for transposition are transposed longer. Although the size of the coefficient appears small, one more year available for transposition to the national authorities decrease the hazard by 65%. In Model 3 the time until the deadline is operationalized as a time-varying covariate. Its values decrease as the observation period gets closer to the deadline (in weeks intervals). For example, at the time of adoption of the directive on the status of long-term residents the value for the variable is -113, it grows to 0 at the time of the actual deadline, and continues to rise until a member state transposes the directive. The positive sign of the coefficient in Model 3 means that the closer a member state gets to the deadline, the more likely it is to transpose. The findings are highly statistically significant in both models.

Surprisingly, the time lost due to government interregnum is not significantly related to the hazard of transposition. Contrary to insights coming from qualitative research (including suggestions offered during the interviews conducted for this project) at the aggregate level the number of days lost due to cabinet changes and elections is not correlated with the likelihood of transposition. Model 2 specifies this variable simply as the number of days during the observation period for which no functional government has been in place. In Model 3, we record whether a government has been in place in each particular week over the observation period. Looking at the sign of the coefficient, the conclusion we might come to is rather counterintuitive (the likelihood of transposition increases in times of government interregnum). Checking the confidence intervals and the lack of statistical significance, however, reveals that no conclusion whatsoever may be drawn from the data about the impact of this variable.

The influence of government effectiveness also runs counter to our expectation and the findings from existing literature. For the sample of directives we analyze, government effectiveness is *negatively* related to the hazard of transposition.

Figure 1. Government effectiveness and transposition time.



Furthermore, the finding is statistically significant and the size of the coefficient is substantive. We suspect that this result might be due to the fact that the new member states which tend to have lower values of ‘government effectiveness’ perform slightly better as a group. Plotting government effectiveness against transposition time separately for the different groups of countries, however, reveals that the effect is negative within the clusters as well (with the exception of the group comprising the two latest newcomers Bulgaria and Romania). For the ‘old’ EU-15

there is a very slight negative relationship, while for the 10 countries that joined in 2004 the link is in the same direction and rather strong¹⁸.

The last variable that we analyze – the number of ministries involved in the transposition process is not significantly related to the hazard of transposition. The lack of evidence for any effect might be due to the fact that this variable has only a very limited range of variation (it is de facto a dummy whether one or two ministries have been involved; furthermore, 2 ministries have been involved in less than 10% of the cases).

Conclusions

In this paper we analyzed the determinants of transposition duration in the European Union of 27 member states. Using recently adopted directives, we explored the various transposition patterns for different directives and ‘old’ and ‘new’ member states. Since we selected directives with a high likelihood of causing domestic problems, our analysis emphasizes possible causes of differences in the national performance on transposition. In addition, our sample presents a hard test for finding influence of discretion and legal fit: if these two variables have an effect with regard to the transposition of the 4 most problematic cases in 2005, it is likely that their effect is even larger for other, less problematic directives, which are not in our sample.

Our analysis reveals a number of interesting observations. First, we find in line with earlier research that discretion is important to transposition duration. Discretion has a negative impact on duration indicating that a national discussion on how to transpose and implement a directive may cause delay. This finding is based on a new measurement of discretion which differs from existing indices. For instance, Thomson (2007) and Thomson et al (2007) use a discretion ratio, which appears to have a positive as well as a negative impact on member states’ compliance with EC law. This ratio does not account for the extent to which member states are constrained. We used the proportion of open substantive provisions from the total number of substantive provisions relevant for member states as a measure of discretion . Still, further

¹⁸ Testing for the effect of federalism (by using a dummy variable for federal countries) reveals that although federal countries use more time to transpose than unitary states the effect is not statistically significant ($p=0.34$). Similarly, using the recently-developed by Gary Marks, Liesbet Hooghe, and Arjan Schakel (2008) index of regional autonomy we find that countries with a higher degree of regionalism transpose slower, but the effect is not significant ($p=0.37$).

research is needed to calibrate and fine-tune this measure, and to find a more solid theoretical underpinning of why discretion prevents a smooth transposition process. As argued in this paper, a prominent line of reasoning is to relate the delaying effect of discretion to preference heterogeneity within the domestic arena. The interdependency of these factors is important since only if domestic players can make a choice, which is a result of discretion, the possibility of conflict may arise. If, in addition, domestic players have different and opposing preferences, the domestic decision making process will be characterized by conflict. This conflict and the attempts to negotiate or mediate between the different players will result into delay.

A second finding in this paper is that the legal architecture in the member states is an important but under-researched issue. With legal architecture we mean the structure of the national legal order in which the requirements of a directive need to be included or elaborated. This ‘legal fit’, which needs to be distinguished from political, policy or administrative fit, appears to have an important impact on transposition. In our study we find that legal misfit decreases the likelihood of transposition. In other words, whether a directive requires substantial change of the national legal order is an important cause of delay

Legal architecture as a source of transposition delay deserves further attention in future work. This includes specifying the legal techniques used in the various member states to transpose European law. These techniques, which vary between copying to extensive elaboration, and may include adding national priorities in the new national regulation (i.e. gold plating), may relate to national normative views on how ‘good’ law is made. It also relates to national legal doctrines and administrative traditions, which are not yet affected by the forces of Europeanization.

A third finding in this paper is that new member states do not systematically perform worse than old member states, which was an often stated fear in the process leading to enlargement with countries from Central and Eastern Europe. In this paper we find proof of the opposite. New member states do better than many of the more experienced and older member states. Of course, the number of directives we analyzed is limited and we are fully aware of this. Furthermore, transposition does not equal actual implementation, which is the next step in the policy process (see, for instance, Versluis, 2007). If we would focus on implementation the comparison between ‘new’ and ‘old’ member states may lead to rather different findings. Still, transposition is a necessary condition for successful implementation. Old member

states which did not transpose a directive on time will have a delay with regard to the implementation of this policy as well. Having transposed directives on time, new member states might be in a good position to implement these directives to the best of their capabilities. Again, further work is needed to shed more light on these issues, but we hope to have made a first step in this paper.

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