Chapter 7:
Determinants of transposition delay


7.1 Introduction

The focus of this chapter is to understand the correlational effects of the explanatory variables for timeliness of national transposition processes. In this chapter, I first operationalise the complementary variables. The subsequent sections present the research methods and the results. Herein, the existing arguments in the literature are confirmed, challenged, and extended. Finally, I summarise and discuss the findings and conclude with some comments that bridge to a second step of analysis.

7.2 Operationalization Of Theoretical Framework

7.2.1 EU directive specific features:

Transposition deadline set in directive

It is not problematic to test the argument that a comfortable transposition timeframe increases the positive probability of the adoption of the national implementing measure around the deadline. The lengths of granted transposition time, i.e., the time set in the EU directive fixing the period for notification of the national implementing measure to the Commission, are calculated by subtracting the deadline, set in the directive, from the date of publication of the EU directive in the Council of Ministers. The more time a member state has to transpose a directive, the lower the perceived costs of transposition, and therefore, the less likely that transposition delay will occur. Celex provides the full texts of the directives where the last but one article always includes the reference to the deadline, phrased as follows: ‘Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by …’. The timeliness for transposition deadlines set in the directives varies. In some exceptional cases, like the Council Directive 97/26/EC on driving licenses, the EU directive enters immediately into force (time to transpose equals zero). In other rare cases, transposition deadlines are much more generous. For example, the Council Directive 96/35/EC on the appointment and vocational qualification of safety adviser for the transport of dangerous goods by road, rail and inland waterways provided 3.5 years for the complete transposition.
Amount of discretion

In principle, directives should specify, in the words of Article 249 of the Treaty, ‘the result to be achieved’ but leave ‘to the national authorities the choice of form and methods.’ The leeway of interpretation, hence, represents a core characteristic of a directive. Over the last decade, however, directives have become more and more detailed, to the point where they could be viewed as regulations (Bellis, 2003: 3-12). The Maritime Directive 2001/53/EC, for example, consists of only 4 articles printed on 1 page, but its Annexes include a full 26 pages. The Annexes cover 184 equipments, for which detailed international testing standards already exist, and leave little room for interpretation.

To test the ‘discretion-matters’ hypothesis, this study relies on the discretion ratio, that is defined as the number of major provisions in a legislative act that grant discretionary executive powers to member states, divided by the total number of major provisions in the act. In line with Franchino (2004) and Thomson et al. (2005), who also identify the number of major provisions of each legislative act that grant discretionary executive power, I rely on the information provided by Celex and Eurlex. Coding every provision according to whether member states may be left with some sort of discretion, the rate varies in principle on a scale from 0 (no discretion) to 1 (full discretion). The rate for all 67 directives including all articles but the first (purpose) and the last (addresses) ranges between 0 and 0.7 accordingly. Note that I substracted the first and last articles from the denominator. This was because they, by definition, serve the formalities of a directive only; furthermore, I wanted to minimize the potential inclusion of any discretion given to member states.

7.2.2 National level specific features

Number of veto players

When fewer actors are involved in the making of a legal instrument, the transposition process is faster. This is because there is less discussion about the allocation of the perceived costs and benefits of the adoption of new national legislation. Hence, the number of transposition actors is linked to the selected national transposing measure. Information on the national legal instruments for all member states is drawn from the list of measures notified to the Commission, Celex, and the national legal databases. For example, the Greek legal system is composed of a number of legislative instruments: legislative acts (Νόμος), presidential decrees (Προεδρικό Αιτήμα) and ministerial orders (Κοινή Υπουργική Απόφαση). In Germany, the EC directives are either implemented as legislative acts (Gesetze) or ministerial orders (Rechtsverordnungen). Note that until the mid-1990s, circulars (Εγκύκλιος, Verwaltungs- vorschrift, Circulaire, Resolución, Instrucción, Circular, Föreskrift) were also widely used to transpose EU legislation into national law in a lot of member states.
Table 7.9: Categorization of national legal instruments in 9 member states.

<table>
<thead>
<tr>
<th>Legislative act</th>
<th>Government decree</th>
<th>Ministerial order</th>
<th>Circular</th>
</tr>
</thead>
</table>
| Germany         | Gesetz            | -                 | Verordnung | Verwaltungs-
|                 |                   |                   | vorschrift |
| UK              | Act of Parliament | Order in Council  | Ministerial Order | - |
| France          | Loi, DDAC, Ordonnance | Décret | Arrêté ministériel | Circulaire |
| Italy           | Legge, legge communitaria, decreto legge, decreto legislativo | - | Decreto ministeriale | - |
| Spain           | Ley ordinaria, real decreto-ley, real decreto-legislativo | Real decreto | Orden | Resolución, Instrucción, Circular |
| The Netherlands | Wet | Algemene Maatregel van Bestuur | Ministeriële regeling | - |
| Greece          | Νόμος (Nomos) | Προαιρετικό Διάταγμα (Proaidriko diatagma) | Κοτνή Υπουργική Απόφαση (Kini ipurgiki apofasi) | Eγκλήματος (Egiklios) |
| Ireland         | Act of Parliament | - | Order | - |
| Sweden          | Lag | - | Förordning | Föreskrift |

Source: Steunenberg and Voermans (2005) endorsed with additional information on Italy, Sweden, Greece, Ireland and Sweden.

Compared to a government decree, a ministerial order, and a circular a legislative act involves more transposition actors. Table 7.9 summarizes the hierarchical ordering of national legal instruments for every member state under investigation according to these four categories.

Member states typically transpose EU legislation via non-legislative measures, in which the parliament is not involved. This study goes one step further than the normal veto-player indexes (Tsebelis, 2001) by building its own

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29 Spain 80%, the Netherlands 69%, France 60% and Denmark 28% (Steunenberg and Rihard, 2005; Steunenberg and Voermans, 2005)
veto-player index varying for each directive and member state respectively (Steunenberg and Rhinard, 2005: 15). It will account for legal instrument specific veto player configurations. If transposition requires a ministerial order, the number of ministries involved is counted, with the assumption that they may have different agendas. In the event that we come across an additional junior minister (Müller and Strom, 2004) who represents a different party group than the minister, we add this junior minister to the number. If transposition is decided by the national government, a score that is based on the autonomy of the prime minister is added to the index (Strom, Müller and Bergman; 2003). Finally if transposition is handled by adopting a bill, the national legislative veto player index, by Tsebelis, is added. The veto player index ranges on a scale from 0 to 16. In the end, this index accounts for potential veto players in non-legislative national transposition processes, such as ministerial orders. The veto player index can account for the number of ministries involved and the role played by junior ministers. Furthermore, it better differentiates among legislative acts. For example, in one case, France notified the Commission of a Legislative Act in 2001 (Tsebelis veto player index = 5) with the signature of ‘eight’ different ministries to transpose Directive 99/62/EC on charging heavy goods vehicles for use of certain infrastructures during a period of cohabitation. In addition, in this case, there was a relatively high political autonomy by the then French Prime Minister Lionel Jospin under the French President Jacques Chirac. This more nuanced measurement of potential veto players in the national transposition context resulted in a veto index of 16 instead of 5.

National transposition package approach
To recall through a transposition package a number of EU directives are grouped together for transposition purposes because they cover similar policy issues. In a transposition package, a number of directives, with varying deadlines are transposed at once. The so-called first directive in the package is the one with the earliest deadline, and the so-called last directive in the package is the one with the deadline furthest into the future. Due to the perceived transposition costs of directives yet to be transposed, the national package approach increases the probability of a delayed settlement of the first directive to be transposed, but accelerates a settlement for the last directive in the national transposition package to be transposed. Member states dif-

30 Tsebelis legislative veto player index would be a very crude measure since only few national implementing instruments are legislative acts.
31 In Germany, for example, the most important actors at the federal level in transport are the Minister of Transport and the Minister of Economic Affairs. The two ministries, however, hold diverging conceptions regarding sectoral regulations. Whereas the Ministry of Transport has often taken a pro-regulatory stand, the head of the transport division in the Ministry of Economic Affairs defined its role through ensuring that liberal views about transport counterbalanced those of the Ministry of Transport (Teutsch, 2001: 139).
32 For the missing data on Greece, I am grateful to Frank Häge who provided me with the necessary figures.
fer in applying package approach. Whereas Germany (39%), France (31%), and Spain (26%) often use this method in the transport sector, Greece hardly transposes EU transport directive in form of packages (2%). Furthermore, we see also differences in terms of transport sub-sectors. Regarding inland waterways, we hardly find transposition packages across the member states. But maritime, rail, and road directives account for 75% of the data set that were grouped in packages including 2 to 8 EU directives.

On the European level, on occasion, the Commission decides upon directives by also using the package approach, as in the transport sector (air and railway packages, Erika I and II (see Transport Chapter). These events may have facilitated member states to transpose those same directives in packages accordingly covering similar policy issues. Distinct from the EU packages of directives, however, in most cases, national transposition packages are the result of member states deciding to transpose a number of single EU directives with one national implementing measure. In Germany, for example, the Seeschifffahrtsanpassungsgesetz, on 18 September 1998, transposed eight maritime directives that had been adopted in the Council of Ministers between 1996 and 1998. Italy, on the other hand, used the package approach four times to transpose maritime directives between 1995 and 2004; these packages ranged in size from two directives to four directives. The information on 82 packages of the 367 notified national implementing measures, which represents 23% of all cases, was derived from Celex and the national databases. Controlling for decelerating and accelerating effects, we introduce dummies for those EU directives that represent the first or last directive in national transposition package.

Timing of national general elections
General elections may accelerate or delay national transposition records, depending on when they occur. If a general election falls within the last six months of a set transposition period, it has an accelerating effect. But a general election scheduled within the first six months of the official transposition period invariably slows the national transposition process. The argument is that a policy that is not adopted before the end of the legislative terms must be reintroduced, and by this reintroduction, raises the costs to the extent that transposition becomes more opportune. An overview of all national parliamentary elections can be accessed through the website on parties and elections in Europe by Wolfram Nordsieck. I coded the variables with the number 1 for the occurrence of a general election, otherwise 0. Fifty-one percent (189) of the 367 national transposition processes were affected by general elections during the national transposition process. Only a few transposition processes experienced general elections both at the beginning as well as at the end of the transposition process (2%).

33 http://www.parties-and-elections.de/
7.2.3 Transport related accidents:

The previous Transport Chapter in this book highlighted the accident-driven approach behind EU transport policy. Driven by European transport accidents the Commission, member states and the Parliament have adopted new European transport legislation in the different sub-sectors by addressing the reasons for often devastating ecological disasters. The ‘accident-matters-hypothesis’ in the context of EU implementation argues two points. First, transport related accidents that occur during the national transposition period increase the perceived costs of non-transposition of the new EU legislation. Second, accidents facilitate problem-free and timely settlements in the transposition bargaining. A summary of transport related accidents in Europe from 1995-2004 can be found in the Transport Chapter of this book. In the end, I assigned a ‘1’ for the occurrence of an accident and 0 for no accident in the years during of the national transposition process. In 25% (94 out of 367) of the cases, mode-specific accidents are recorded.

7.2.4 Summary of descriptives:

Data limitations- notably missing data on key variables- reduce the effective sample to 361. Table 7.10 presents descriptive statistics of all the variables, and provides means, standard deviations, and min/max values for all the independent variables in the sample. (See appendix for correlation tables).

<table>
<thead>
<tr>
<th>Variable</th>
<th>Minimum/ Maximum</th>
<th>Mean</th>
<th>Standard deviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discretion rate</td>
<td>0/0.7</td>
<td>0.07</td>
<td>0.13</td>
</tr>
<tr>
<td>Transposition time set in the directive (in weeks)</td>
<td>6/184</td>
<td>46.57</td>
<td>36.71</td>
</tr>
<tr>
<td>Number of veto players</td>
<td>0/16</td>
<td>2.59</td>
<td>2.98</td>
</tr>
<tr>
<td>First directive in national transposition package</td>
<td>0/1</td>
<td>0.08</td>
<td>0.27</td>
</tr>
<tr>
<td>Last directive in national transposition package</td>
<td>0/1</td>
<td>0.11</td>
<td>0.32</td>
</tr>
<tr>
<td>Start of transposition in election year</td>
<td>0/1</td>
<td>0.28</td>
<td>0.45</td>
</tr>
<tr>
<td>End of transposition in election year</td>
<td>0/1</td>
<td>0.31</td>
<td>0.46</td>
</tr>
<tr>
<td>Transport related accidents</td>
<td>0/1</td>
<td>0.35</td>
<td>0.48</td>
</tr>
</tbody>
</table>

7.3 Method

As mentioned previously, almost 70% of the data set was transposed using only one national implementing measure. This fact, taken with other earlier considerations, induced me to use the first implementing measure to calculate
delay. Bearing in mind that only a few time-varying variables are present in the transposition data set, I checked for the likely amount of directives that would be eliminated by a potential binary dependent variable. This research would lose only 5% of its complete information. In the analysis of the missing values I could not find any significant pattern.

Ordered multinomial logistic model
This study runs an ordered multinomial logistic model. Two considerations were in mind when running it. First, the model was run in order not to lose a lot of information by collapsing the dependent variable to a dichotomous measure that merely indicates if the transposition was timely or not – a very legalistic concept of delay. Second, the earlier recorded discrepancy between mean/median in the previous chapter hints at the necessity to account for different groups of transposition outcomes. Whereas the mean transposition delay in the transport sector was 26 weeks (six months), the median was zero weeks, i.e. on time. In addition, interview partners and scholars (Falkner et al., 2005: 267) dealing with transposition on a day-to-day basis agree that a ‘psychological’ threshold lies at six months. Delays within six-month margin occur regularly. The Commission does not normally take any formal infringement procedure with regard to delays in this time period, due in part to its lack of resources to allow an examination of all national implementing measures for timeliness and correctness (IP15). Consequently, the study identifies three ordered outcomes: non-delayed transposition, transposition delay less than 6 months, transposition delay more than six months. Whereas 50 per cent fall under category 1 (on time), 15 per cent fall under category 2 (less than 6 months delay) and 35 per cent fall under the last category (more than 6 months delay). An ordered multinomial logistic model can account best for the three groups of outcome. Long (1997), Long & Freese (2003) and Borooah (2002) provide the reference points of nominal data with multiple outcomes and the interpretation of multinomial coefficients.

34 Normally, this study would be predestinated to apply a hazard rate model to test the hypotheses about delay in the transposition process of EU directives. Alas, this is not the case. One of the advantages of event history over standard ordinary last squares (OLS) regression is its ability to handle what is referred as censoring (Box-Steffensmeier and Bradford, 1997; 2004; Golub, 1999: 747; Schulz and König, 2000; Schimmelpfennig, 2000; Box-Steffensmeier, Reiter and Zorn, 2003; Collier, Hoeffler and Soderbom, 2004; Fearon, 2004). A duration model, for example, allowed Mastenbroek (2003) to treat the not yet transposed directives as right-censored avoiding selection bias by eliminating directives on which the member states have taken no final action yet (see also Borghetto et al., 2006). Specifying the baseline hazard rate, however, is very time-consuming and cumbersome because it involves speculation about the effect of the passage of time on the probability that an event will occur. Especially with time-varying covariates, the calculation of the survival functions is quite complicated because one needs to specify a path or trajectory for each variable.
7.4 Results

Before calculating a statistical model for transposition delay, I conducted three tests to assess collinearity. I visually inspected the matrix of correlations amongst the independent variables (see Annex). I checked the tolerance and the variance inflation factors, the second of which relates to the amount that the standard error of the variable has been increased because of collinearity, but found no evidence of major concern.

Ordered multinomial logistic regression

Based on earlier findings of this study, I assume that the conditions that lead to long delays are likely to be different from those that lead to relatively short delays. The results of the analysis are presented in Table 7.11. In the first column, the coefficients for timely transposition, which also represent the baseline model, are displayed. Furthermore, table 7.11 distinguishes between two different kinds of transposition delay: short and long delay. In the second column, I look at the factors that predict delay of less than 6 months. In the third column, the study focuses on the more serious delays: those that take longer than 6 months. The multinomial coefficients must be interpreted in the context of the base category (timely transposition), and in the context of the other coefficients for that variable, as well.

The model fit of the ordered multinomial logit regression, with a $R^2$ of 0.35 is relative satisfactory. All factors in either column indicate in the predicted direction. The results in table 7.11 hint that there are some potentially important differences between the three types of transposition delays.

Transposition delays of more than six months were apparently more of a problem in national transposition settings with numerous veto players. On the other hand, there are certain indicators that matter more for shorter delays, such as the discretion ratio and the transposition time guaranteed in the directive. The strongest predictors of transposition performance are, again, the timing of general elections and the external shock related indicator. Whereas transport-related accidents are the most highly significant in explaining longer delays, it is the timing of general elections that can either slow or accelerate national transposition processes significantly. Depending on whether national general elections fall at the beginning or the end of a national transposition process, the procedure is slowed or accelerated respectively.

7.5 Discussion and summary

In summary, most findings of both analyses are in accordance with our expectations, and support the theoretical framework. All indicators are related in ways that were expected, and most of the explanatory variables are significant. Furthermore, the findings of the ordered multinomial logit regression
show that there are specific sets of variables that explain shorter delays better than longer delays, and vice versa. Interestingly, it is the EU directive specific characteristics that explain short delays, and national level explanatory variables best account for delays of more than 6 months. Very long transposition delays may be ascribed to two factors: the selection of the transposing legal instrument, and the decision of whether to use the national transposition package approach or not.
EU directive characteristics that determine delays of less than six months

The findings uncover that member states face more problems when transposing EU directives with a limited transposition time set in the directive, in general – it accounts significantly for short delays. Consequently, sufficient transposition time is important, especially as the number of directives increase. Despite the growing number of directives to be transposed over the years (+84%), however, the mean transposition time agreed upon in the Council has decreased by 24%. Whereas the average guaranteed transposition time in the 1970s was 11 months, it increased to 17 months in the early 1980s. Then, it steadily decreased over the late 1980s and late 1990s (from 15 to 13 months). Only recently, this trend has been reversed. A directive adopted after 2000 guaranteed, on average, 18 months for full transposition. In periods of high legislative output, thus, short-term transposition delays seem inevitable.

Furthermore, the amount of discretion provided by the EU directive is a significant determinant of short transposition delays. The more discretion the more likely delay.

It is only a small conceptual step from the amount of discretion to the level of detail in the directive. Normally, the higher the level of detail, the smaller the amount of discretion. The amount of discretion provided decreases with the complexity of a directive. Bellis (2003) argues that because the definitions, specified conditions, and specified services were extremely detailed, they were obviously intended to be applicable in their own terms in all member states. In this respect Kaeding (2006) tested the EU directive’s level of detail, as embodied by the number of recitals. He finds that the number of recitals has a considerable negative effect on transposition delay. The higher the amount of recitals, the more likely transposition delay. In line with Bellis (2003), it seems that the several recitals used by the member states or the Commission to add a number of points, that were not agreed upon during the negotiations, interferes with a swift transposition. They further increase the detail of the directive, which is strongly linked to the level of discretion allowed in a directive’s interpretation. The more detail a provision has, the less discretionary power the member states have in transposing the directive.

National level factors that determine delay of more than six months

At the national level are explanatory factors of long transposition delays. The veto player coefficient indicates that the fewer actors involved in the making of the legal measure, the faster the transposition process, which is in line with research by Haverland (2001), Giuliani (2003) and Franchino (2004). To a large extent, the number of actors involved in the transposition process depends on which type of transposition instrument is selected by the member states. Types of national legal instrument differ in the amount of relevant actors involved. In the Netherlands, for example, Mastenbroek (2003) argues that directives often fall between the jurisdictions of more than one ministry,
resulting in communication and coordination problems, conflicts of interests, and competence issues that may cause problems. Dimitrakopoulos (2001: 616) also links differences in tradition, structures, and culture in the transposition process within the ministries to member states’ transposition performance.

Furthermore, the selection of a national package approach may also have a considerable delaying effect on the first EU directive in the transposition package to be transposed. Different institutions decide which national legal instrument to use and whether the use of a transposition package is called for; it is worth noting that both these decisions affect the timeliness of national transposition processes. Note that such problems arising from these two explanatory factors are homemade, and therefore can only be solved at the national level.

Timing of general elections
Indeed the timing of general elections in a member state play strong. At the end of a legislative term, the costs of continued inefficient policies increase dramatically. Future payoffs shadow on the bargaining and the benefits from new policy are comparatively higher than the costs of delay. The opposite effect happens when general elections occur in the beginning of a transposition process. Here, the coefficient highlights the retarding effect of a general election. In this case, future payoffs are valued less. In addition, a change in domestic political setting lead government leaders to see new potential gains from alternative policy options. This could happen when, for example, a political party with stronger commitments to liberalizing railway undertakings come to power or the implementation of the new drivers’ licenses generates new domestic political pressures.

Transport-related accidents
Situational changes in the internal and external environment require responsive decisions by the incumbent decision-makers. They are also strong determinants of transposition delay, in general, and longer delays, in particular. While transport policy itself is a crisis-driven EU policy area, transport-related accidents accelerate national transposition processes significantly. Consequently, crises and emergencies affect the decision making situation, leading to a different equilibrium. When continuous bargaining conflicts imply that a member state has settled in a pareto-inferior equilibrium, radical changes are often needed to break the stalemate and put the existing national policy on a welfare-superior path. The extreme welfare losses (by devastating ecological disaster and numerous fatalities in car, train, and aircraft accidents) dwarfs the costs associated with a major policy change.
7.6 LIMITATIONS AND CONCLUSION

What are the concluding implications of these findings? While the previous chapter clearly hinted at a serious transposition problem across EU member states, the first set of analysis shows, that, first, delay is a multifaceted event. The results of the model provide strong support for the assertion that distinguishing between the outcomes of transposition process (on time, short, and long delay) is a useful method of investigation. Second, the study identified European level and national level factors that have different affects on the length of delay, but which overshadow each other. If governments perceive that transposition is complex and may require the introduction of a legislative act, for example, they must take this into account while negotiating with the Council of Minister. Furthermore, the timing of general elections in a member state and transport-related accidents influence the timeliness of national transposition processes.

All in all, we identified ‘effects of a cause’, i.e. factors that determine delays when transposing EU internal market directives. However, even with the most complex techniques ‘correlation is not causation’ (though causation is only possible with correlation). The statistical analysis has uncovered relationships between variables: to explain a dependent variable from a range of possible independent variables.

To identify ‘causes of the effect’ there is a strong argument in favour of case study analysis. Following a clear comparative logic it allows for the development of a more detailed analyses and possible theoretical innovation (if focusing on well-predicted and deviant cases derived from the statistical analysis) (Yin, 1993; George and Bennett, 2005). Here, especially comparative case studies are useful. Compared to a single case study, a comparative approach can overcome some of the single case study problems, such as inference and representativeness.

But, the comparative logic is contested. In fact, there is disagreement as to which type of comparisons are the most relevant. There are, two main types of comparison in the field of comparative politics: the most similar and the most different case design (Przeworski and Teune, 1970). Based on the ordered multinomial logistic regression, the following chapter will be entirely devoted to the case selection in order to, then, analyse well-predicted and outlying cases accounting for robustness and possible slight refinements of the theoretical model on the timeliness of national transposition process across member states.