



Article

# Opposition through the back door in the transposition of EU directives

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**Robert Thomson**

Trinity College Dublin, Ireland

## Abstract

Are member states less likely to transpose a European Union directive correctly if they disagreed with the directive at the decision-making stage? Existing research provides mixed answers to this question. Most of this research does not consider the role of the enforcement agent, the European Commission, and uses aggregate measures. By contrast, this study considers the impact of the Commission, and focuses on specific provisions in directives. It combines detailed information on states' disagreement with each provision at the decision-making stage and the quality of national transposition of each provision. The descriptive analysis shows that protracted non-compliance in national transposition is a rare event. The explanatory analysis indicates that states' policy preferences significantly affect the likelihood of transposition problems, and that this is conditioned by the behaviour of the Commission.

## Keywords

compliance, European Union directives, implementation, incentives to deviate, transposition

## Introduction

Before European Union (EU) directives are adopted, lengthy discussions take place in the Council of Ministers during which state representatives object to parts of the proposed directives. Not all of these objections lead to changes in the directives that are adopted. This leaves a gap between some states' revealed policy preferences and the contents of adopted directives. After adoption, national governments must

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### Corresponding author:

Dr Robert Thomson, Senior Lecturer in the Department of Political Science, Trinity College, 2–3 College Green, Dublin, Ireland  
Email: thomsor@tcd.ie

transpose these into national laws, raising the question of whether states' preferences during the decision-making stage affect their behaviour during the transposition stage. One of the cases examined later in this article is the German government's objection to part of the proposed working time directive that was adopted in 1993. The German government's objection did not result in a change in the directive that was adopted. In 2003, 10 years after adoption, Germany had still not transposed the part of the directive it disagreed with (Falkner et al., 2005: 111). Non-compliance following opposition to a directive during the decision-making stage can be seen as the continuation of opposition by other means; Falkner et al. (2004, 2005: 277–80) refer to this as 'opposition through the back door'.

'Opposition through the back door' relates to a general question in research on compliance: under what conditions do differences between political decision-makers and implementers' policy preferences affect variation in implementers' compliance. When implementers' policy preferences differ from the policies adopted by decision-makers, implementers have incentives to deviate, at least under certain conditions (McCubbins et al., 1989; O'Toole, 2000; Shepsle, 1992; Torenvlied, 2000). The distinction between political decision-makers and implementers is blurred in the EU, since national governments are among the decision-makers and are also responsible for transposing directives. In this respect, the transposition of EU directives is similar to states' compliance with international agreements, which may be explained at least in part by differences between states' policy preferences and the agreements they signed up to (Fearon, 1998).

I present evidence that states with incentives to deviate from part of a directive are more likely to transpose that part incorrectly, and that this effect is conditioned by the behaviour of the European Commission. Some existing studies find little or mixed evidence that states with incentives to deviate are less likely to comply (e.g. Falkner et al., 2004, 2005: 277–80; Mbaye, 2001: 263; Thomson et al., 2007). Other studies, by contrast, report evidence for such an effect (e.g. König and Luetgert, 2009: 187–8; Zhelyazkova and Torenvlied, 2009: 50).

There are four likely reasons for these mixed findings, aside from the fact that existing studies focus on different cases. First, most existing research supposes a simple direct influence of states' incentives to deviate on non-compliance. However, the effect is likely to be mitigated by the structure of the implementation process, in particular by states' perceptions of monitoring by the enforcement agent, the European Commission. Although scholars recognize the relevance of the Commission in the transposition of EU directives (Carrubba, 2005; Pollack, 2003; Tallberg, 2003), the Commission's role is seldom addressed (a partial exception that will be discussed later is the study by Zhelyazkova and Torenvlied, 2009).

Second, existing research generally conceptualizes and measures compliance at the aggregate level of directives as a whole. I argue that the appropriate level of analysis is the performance of each member state on each provision of a directive. Following standard procedures for coding legislative texts (Epstein and O'Halloran, 1999; Franchino, 2004), a provision is an article or numbered sub-article of a law. Directives are usually complex acts containing dozens of

provisions, and states typically comply (and agree) with some provisions more than other provisions. Focusing on provisions within directives also increases the number of observations and consequent statistical power. To illustrate, the 4 directives and 15 member states examined here yield a total of 60 observations if we consider each directive as a whole. However, these 4 directives contain a total of 97 provisions that have implications for the 15 member states' transposition performance, which yields a total of 1455 observations. This level of analysis is also more appropriate for describing the magnitude of transposition problems. Calling a state non-compliant with a whole directive if its national laws do not comply with one of several dozen provisions ignores the fact that its laws comply with most provisions.

The third reason for the mixed results is the frequent use of indirect measures of compliance problems, the dependent variable. Hartlapp and Falkner (2009) highlight the limitation of indirect measures of transposition failures, such as infringements and delays. Not all failures in transposition are the subject of infringements, and although a member state might report a national implementing measure, this does not necessarily mean that national legislation complies with the directive in question. In this respect, Falkner et al.'s (2004, 2005) research is commendable for its direct measures of transposition problems based on detailed case studies using primary sources. I use Falkner et al.'s (2004, 2005) direct measures of transposition problems. Their case studies identified 48 observations in which a member state failed to transpose a provision from one of four labour market directives they studied nine years or more after each directive was adopted. Given the large number of combinations of member states and provisions, this represents a small percentage, which I argue sheds important light on the actual magnitude of the transposition problem. Although these four directives are a small sample, Falkner et al.'s study is the only currently available source of information for provision-level information on transposition performance collected in an independent academic research project. Moreover, by focusing on transposition at the level of each provision, I analyse the information Falkner et al. gathered in a way that differs considerably from previous studies.

The fourth reason for differences among existing studies' findings concerns their measures of states' incentives to deviate. A direct measure requires detailed examination of the decision-making stage to establish which parts of each directive states disagreed with. Falkner et al.'s study did not provide such a detailed examination of the decision-making stage because 'establishing which governments actually resisted individual provisions of a draft Directive at some point in the negotiations is not an easy task' (2005: 278). The other studies cited above use indirect measures of states' preferences that are not linked to specific provisions. By contrast, in this study I use measures of the Commission's and member states' preferences on each provision. These measures are based on content analyses of all preparatory documentation from the discussions in the Council prior to the adoption of each directive. These measures are linked to states' transposition performance on the same provisions. This design allows a more direct test of the effect of states' preferences on non-compliance.

## **Member states' preferences in explanations of non-compliance**

The preference-based explanation of variation in transposition performance focuses on the discrepancy between states' policy preferences and the outcomes of the decision-making process. Similarly, theories of policy implementation in other political systems identify the difference between implementation agents' policy preferences and the decision outcomes they are charged with implementing as a key explanatory variable (McCubbins et al., 1989; Shepsle, 1992; Torenvlied, 2000). The standard preference-based explanation implies the following hypothesis:

H1: States with incentives to deviate from a directive's provision are more likely to transpose incorrectly than states with no incentives to deviate.

The European Commission's behaviour may condition the impact of states' incentives to deviate (Carrubba, 2005; Tallberg, 2003;). The Commission is responsible for monitoring compliance with European law and has considerable legal powers with which it can compel states to comply, ultimately by challenging states before the European Court of Justice (Pollack, 2003: 86). Zhelyazkova and Torenvlied (2009) find that, if states failed to transpose a directive before the deadline, they respond to a letter of formal notice from the Commission by transposing soon thereafter. This indicates that states respond to the Commission's actions. However, overt action by the Commission may be unnecessary. If national actors perceive that the Commission is monitoring their compliance intensely and willing to initiate infringement proceedings in the event of incorrect transposition, then states may comply even if they have an incentive to deviate. It is only when this perception is absent that a state's incentives to deviate have an impact on transposition.

One way in which the Commission can signal its intention to monitor transposition intensely is by the statements it makes prior to the adoption of directives. Commission representatives are present in all Council meetings, where they have ample opportunity to send signals about the provisions they are particularly committed to monitoring. As described in detail in the research design, the present study examines 97 provisions in four directives. The Commission intervened in the Council discussions on 23 of these provisions in a way that signalled its commitment to these provisions, either by supporting the provisions explicitly or stating that the law should preferably contain even higher standards. In the majority of these cases (for 16 of the provisions) these interventions were in response to statements made by one or more member states that indicated those states' preferences for lower standards than those mandated by the provisions. The Commission does not always intervene to express its commitment to a provision when one or more member states indicate that they have an incentive to deviate from it, as was the case on 31 of the provisions examined here. The Commission's interventions may

signal its commitment to monitor compliance in certain areas. The following hypothesis nuances the standard preference-based explanation:

H2: When the Commission does not explicitly support a directive's provision during the decision-making stage, states with incentives to deviate from that provision are more likely to transpose incorrectly than states without such incentives.

This second hypothesis implies an interaction between the Commission's support for a provision and states' incentives to deviate. But what of the direct effect of the Commission's signals of support? In other words, if a state does not exhibit an incentive to deviate, how will a signal of support from the Commission affect the likelihood of non-compliance? Here there are two competing expectations. First, following the above logic, states that do not express incentives to deviate may, like states that do express such incentives, perceive an increased intensity of monitoring and consequently increase their efforts to comply. This reasoning leads to the following hypothesis:

H3a: For states without incentives to deviate from a provision, an explicit signal of support for the provision by the Commission decreases the likelihood of incorrect transposition.

The second expectation recognizes that whether or not a state takes a position on a controversial issue is at least in part a strategic choice (König et al., 2005). States with incentives to deviate from a provision may be less likely to express these preferences if the Commission has already defended the provision in response to challenges from other states. The state representatives who remain silent about their states' incentives to deviate may believe that the Commission's monitoring will be directed toward other states that did express their preferences. If this is the case, we would expect to observe the following:

H3b: For states without incentives to deviate from a provision, an explicit signal of support for the provision by the Commission increases the likelihood of incorrect transposition.

There are several other variables that might gauge the effect of states' incentives, but the rationale and empirical evidence for these is less compelling. It might be that the effect of states' incentives to deviate is weaker in countries in which there was a change of government between the time of the decision-making and implementation. Indeed, changes in the partisan composition of governments have significant effects in many areas of policy (e.g. Huber and Stephens, 2001). In addition, Falkner et al.'s (2005) study provides examples in line with this possibility when referring to the different positions taken by the UK's Conservative government of the mid-1990s and the subsequent Labour government on labour market directives. However, research on decision-making in the Council of

Ministers shows that there is usually no consistent difference between the preferences of left- and right-wing governments (e.g. Heyes-Renshaw and Wallace, 2006: 250; Nugent, 1999: 474; Wright, 1996). This suggests that member states' policy preferences do not necessarily change as a consequence of changes in government at the domestic level. Moreover, Jensen (2007) did not find that changes in the partisan composition of governments affected the resolution of infringement proceedings, which is another relevant indicator of compliance. Therefore, although the analysis will explore the effect of changes in government, such changes may not gauge the impact of states' incentives to deviate on correct transposition.

The typology of worlds of compliance suggests that states' incentives to deviate may be a relevant explanatory factor in only some cultural contexts. Falkner et al. (2005: 319) suggest that there are essential differences among states regarding their 'specific national culture of digesting adaptation requirements'. This typology, which was originally formulated for the EU-15 and has subsequently been updated to the enlarged EU, aims to capture the essence of typical national responses to demands for adaptation by the EU (Falkner and Treib, 2008). In the EU-15 typology, which is relevant to the present study, each country is grouped into one of three worlds: law observance, domestic politics or neglect. In the world of law observance 'transposition is typically ... on time and correct'; in the world of domestic politics it is typically 'on time and correct only if there is no conflict with domestic concerns'; whereas in the world of neglect it is typically late and/or 'pro forma' (Falkner et al., 2005: 322). The proposition that domestic concerns feature prominently in the world of domestic politics suggests that states' incentives to deviate should have an effect on compliance in that particular cultural context, but not necessarily in others.

States' incentives to deviate are associated with policy misfit, another prominent explanation of variation in compliance. The effect of misfit is not tested in the present study, because measures of misfit are available only at the level of directives as a whole, not the major provisions of directives. However, misfit is relevant to understanding the effect of states' policy preferences. The misfit explanation refers to the level of fit between new European legislation and existing national provisions (e.g. Héritier et al., 2001; Risse et al., 2001). Existing policy practices often generate policy routines and entrenched interests that prevent policy change or make only incremental change possible. Therefore, European directives that require far-reaching adjustments to national practices are less likely to be complied with than directives that are more congruent with existing national arrangements. The linkage with states' incentives to deviate is that states tend to disagree with directives that require them to make radical changes to their existing policy practices. An official from a permanent representation of a member state in Brussels described the typical way in which states formulate their positions during negotiations: 'member states often try to give their national laws as a "gift" to the rest of Europe by arguing that everyone should do it their way' (interview, Brussels, July 2006). Similarly, a case study of the EU's air pollution regime illustrates how Germany and the UK attempted to fashion EU regulations in line with

their existing national arrangements (Héritier, 1995: 278–9). In addition, a quantitative analysis of 12 member states' preferences on six labour market directives (four of which are studied here) and the overall fit of those directives with their existing national policies revealed that states disagreed significantly more with directives that had a high level of misfit with their existing policies (Thomson, 2007: 1001). Although there are counter-examples in which national governments found it expedient to support EU directives that differed from their existing arrangements (e.g. Falkner et al., 2007: 399), these counter-examples do not refute the general pattern that states' incentives to deviate are positively associated with misfit.

Member states' preferences are also linked to discretion. Discretion refers to the powers given to implementers. In models of policy implementation, discretion refers to the range of policies an implementer may realize and still be within the boundaries set by principal decision-makers (Bendor and Meirowitz, 2004; McCubbins et al., 1989). Higher levels of discretion involve broader ranges of policies. Research on delegation in the EU concludes that, when member states' policy preferences diverge, EU laws tend to grant high levels of discretion to member states (Dimitrova and Steunenberg, 2000; Franchino 2004: 290). This may ameliorate the effect of states' incentives to deviate on non-compliance.<sup>1</sup>

A difference between a member state's preference and the decision outcome contained in a directive need not imply that the state has an incentive to deviate. Dimitrova and Steunenberg's (2000: 212–13) model of policy convergence distinguishes situations in which state representatives call for lower standards than those in a directive from situations in which representatives call for higher standards. Many directives set minimum standards that states must meet in order to comply. States that call for lower standards have incentives to deviate, whereas states that call for higher standards are ready to implement the minimum standards and even to exceed these.

Alongside preference-based explanations, much of the existing literature examines characteristics of member states, some of which are also included in the present study. In particular, states with weaker administrative capacity are expected to exhibit more compliance problems (e.g. Ciavarini Azzi, 2000; Pridham, 1994). Corporatist arrangements, whereby employers' and employees' organizations are embedded in national policy-making processes, may affect states' record of compliance, particularly in the area of labour market regulation (e.g. Börzel, 2003: 36; Héritier, 2001: 44). Another group of state characteristics refers to the extent to which national governments are constrained by lower levels of government. Levy et al. (1995) argue that centralized states typically exhibit fewer compliance problems.

## Research design

This study focuses on four labour market directives. Previous studies have provided detailed analyses of the decision-making stage (König and Pöter, 2001) and

the compliance stage (Falkner et al. 2005) with respect to these four directives, but an integrated analysis of both stages has not been carried out. The team of researchers involved in Falkner et al.'s (2005) study compared the content of each of the directives with the content of each member state's national laws and regulations. In doing so they gave us the most detailed set of information currently available on states' transposition performance on the specific provisions of several directives. The four directives included in the present study are the employment contract directive (91/533/EEC), the pregnant workers directive (92/85/EEC), the working time directive (93/104/EC) and the young workers directive (94/33/EC). Falkner et al.'s (2005) study also included two other directives, the parental leave directive (96/34/EC) and the part-time work directive (97/81/EC). These last two directives are not included in the present study. They were not discussed extensively in the Council, and as a result we have little information on state representatives' views on them. The two excluded cases are unique in that they both transposed framework agreements between the main European federations of management and labour into European law.

Following an established procedure for coding legislative texts, a provision is defined as a substantive unit of text within each law (Epstein and O'Halloran, 1999; Franchino, 2004). In this context, a provision is an article of a directive, or a numbered sub-article. I include all provisions that specify a standard required in states' transposition. Some provisions do not define relevant standards, for instance those that define procedures for updating the directive, and so are excluded from the present analysis. My current study is also concerned with the quality of transposition, rather than the timing of transposition. I therefore exclude provisions that refer to the deadline for transposition and the procedure for notifying the Commission of national transposition. Consider the following three examples of provisions included in the analysis. Article 16.2 of the working time directive is a provision stating that the maximum 48-hour working week could be averaged over a reference period not exceeding four months. Article 7.2 of the same directive is a provision stipulating that annual leave cannot be replaced with a monetary allowance. Article 4 of the pregnant workers directive is a provision obliging employers to conduct an assessment of the risks posed to pregnant women by their working conditions. As detailed in Table 1, the four directives contain between 12 and 33 relevant provisions, giving a total of 97 provisions with which to examine states' transposition performance.<sup>2</sup>

Falkner et al.'s (2005) case studies of states' transposition of these four directives were systematically coded to indicate whether or not there was a compliance problem on each relevant provision for each member state. The unit of analysis is therefore the member state–provision dyad. I focus on protracted non-compliance in the transposition of each relevant provision; that is, non-compliance nine years or more after the adoption of the directive. Falkner et al.'s (2005) case studies provide detailed information on which aspects of each directive were not complied with in each member state at the end of their study in April 2003. I matched this detailed information with my coding of each law, to identify those member states

**Table 1.** Incorrect transposition at the level of provisions within directives

	Employment contract	Pregnant workers	Working time	Young workers	Total
Total number of observed transposition problems	7 (3.9%)	12 (3.6%)	16 (3.6%)	13 (2.6%)	48 (3.3%)
Total number of observations	180	330	450	495	1455
Total number of relevant provisions in directives	12	22	30	33	97

Note: The total number of observed transposition problems refers to member state–provision combinations in which member states had not transposed correctly by the end of Falkner et al.'s (2005) study in April 2003. The total number of relevant provisions refers to the number of provisions in each law that had direct implications for the substance of national implementing measures.

and provisions that exhibited compliance problems. For example, the provision concerning the four-month reference period in the working time directive was not transposed correctly in Germany, since national legislation referred to a longer period (Falkner et al., 2005: 111). Portuguese legislation did not comply with the provision stipulating that annual leave could not be replaced with an allowance, because national legislation did not contain this rule (2005: 111). Spanish legislation did not comply with the provision requiring employers to conduct a risk assessment. In particular, Spanish legislation did not transpose the annex of the directive that specified dangerous substances and working conditions, without which the risk assessment could not be conducted as required (2005: 88).<sup>3</sup>

I add new information on member states' preferences that was not examined in Falkner et al.'s research. I collected all documentation from the working groups in which these four directives were discussed from the archives of the Council of Ministers in Brussels. A total of 136 documents in relation to these four directives were examined. These documents include summaries of meetings and drafts of the directives that detail each national delegation's statements during the negotiations in response to each provision. The documents therefore give detailed information on the positions of the 12 member states that were involved in these discussions (since these discussions took place prior to the 1995 enlargement). For example, during the discussions on the working time directive, the policy preference expressed by the German delegation indicated that it had an incentive to deviate from the reference period specified in the directive. The German delegation stated that this reference period should be left to national legislation or national collective agreements, instead of being specified in the directive. Similarly, the Portuguese delegation had a reservation on the provision requiring that annual leave could not be replaced with an allowance. During the discussions on the pregnant workers directive, the Spanish called for a more limited risk assessment and wanted one of the annexes deleted. These examples indicate that the member states in question had an incentive to deviate. As mentioned above, these three cases were followed by incorrect transposition.

The coding of the Council documents also identifies cases in which states' representatives called for higher standards than those contained in the provisions of the adopted directives. For example, the employment contract directive specifies a minimum set of information that employers must give their workers regarding their employment relationships. Article 3 of the employment contract directive is a provision stipulating that this information must be given not later than two months after the commencement of the employment relationship. Greece, Ireland and Italy explicitly supported a period of one month, which was the period specified in the Commission's original proposal. Greece, Ireland and Italy therefore called for a higher standard than the minimum standard set in the directive. By contrast, the UK is coded as having an incentive to deviate from this provision, since it called for a longer period of three months.

The Commission's support for each provision is also derived from a close reading of the Council documentation. The Council documents detail not only the member states' positions but also the Commission's positions on each article of the draft directives. The Commission is coded as explicitly supporting a provision every time it stated a position that corresponded to the outcome contained in the provision in the adopted directive or called for higher standards than those contained in the final outcome of the directive.

The measure of discretion is based on previous definitions of this concept (Epstein and O'Halloran, 1999; Franchino, 2004). As with the above-mentioned variables, discretion varies across the relevant provisions of each directive. A provision grants discretionary power if it allows states to decide among two or more actions when transposing a directive. For example, the young workers directive prohibits work by children, defined as young people of less than 15 years of age or who are still subject to compulsory full-time schooling under national law. Article 4.2 of that law, however, is a discretionary provision that allows member states to legislate that the prohibition of work by children does not apply in certain areas. For instance, children of at least 14 years of age may be allowed to perform light work.<sup>4</sup>

The following analysis also controls for several characteristics of member states and for differences among directives. These variables are not my main focus here. Indeed, research on the effects of country and directive characteristics should examine states' performance over a larger number of directives. Nonetheless, country characteristics are emphasized in the existing literature and the findings are stronger for taking these country characteristics into account. Lijphart's (1999) measure of federalism is applied to measure the extent to which authority is concentrated at the national level in each member state. Siaroff's (1999) quantitative indicator of states' degrees of corporatism is applied. Higher values on this index indicate that employers' and employees' organizations were more institutionally integrated into the policy-making processes of the states concerned. I also apply the measure of relative 'government effectiveness' in 1996 developed by World Bank researchers (Kaufmann et al., 2006). This measure refers to 'the quality of public services, the quality of the civil service and the degree of its independence from political

pressures, the quality of policy formation and implementation, and the credibility of the government's commitment to such policies' (Kaufmann et al., 2006: 4). The analysis also includes indicator variables to control for systematic differences among the four directives.

## Analysis

Table 1 gives the number of provisions to be complied with in national transposition and the number of observations in which a member state failed to comply with a provision. These four directives contain a total of 97 relevant provisions with which member states must comply. Falkner et al.'s (2005) case studies report the detail of non-compliance in 15 member states at the end of their study in April 2003; 97 provisions and 15 member states gives a total of 1455 observations. Of these, Falkner et al.'s detailed case studies report 48 cases of non-compliance. These 48 cases are just 3.3 percent of the observations.

Transposition problems are dispersed across a range of provisions and member states. This indicates that at least some of the variation in transposition performance may be explained by explanatory variables that vary at the level of member state–provision combinations, such as states' incentives to deviate. Table 1 shows that the four directives had similar sizes of transposition problems. In addition, most of the 48 transposition problems were dispersed across different provisions. Regarding 19 provisions, only one state did not transpose correctly. There are only five provisions on which three or more member states did not transpose correctly. The maximum number of states that did not comply with any single provision is four. Moreover, there is a modest amount of variation across member states regarding the degrees to which they had transposition problems. The average number of transposition problems for each state was 3.2 ( $SD = 2.4$ ,  $n = 48$ ), ranging from 0 in Denmark to 8 in France.

Despite the small number of transposition problems, most of these cases are substantively important deviations from EU law, certainly to those affected by them. Falkner et al.'s (2005) study describes these cases in some detail, but the examples mentioned above are illustrative in this respect. For instance, regarding the working time directive, the longer reference period contained in German legislation meant that some German workers may have been exposed to longer working hours than the limit set in the directive. The failure of Portuguese legislation to stipulate that annual leave could not be replaced with an allowance had the potential of shortening the duration of annual leave enjoyed by some Portuguese workers. An important part of the pregnant workers directive was to identify and reduce the risks posed to pregnant workers in the workplace. The deficiencies of Spanish legislation with respect to the risk assessment potentially exposed some pregnant workers to dangerous conditions. These transposition problems affect the most vulnerable groups of employees; these individuals may not have the resources to secure the rights that EU legislation gave them.

Table 2 presents the multivariate analysis of correct compliance using rare-events logistic regression (King and Zeng, 2001a, 2001b). Since only a small percentage of the observations exhibit protracted non-compliance in transposition, the application of standard logistic regression would yield biased estimates of the effects.<sup>5</sup>

When the Commission did not explicitly signal support for a provision, states with incentives to deviate had a higher likelihood of transposing incorrectly than states without incentives to deviate (Hypothesis 2). This coefficient associated with the main effect of states' incentives to deviate is positive and significant (Table 2). The exponent of this coefficient, 3.09, means that the odds of a state exhibiting a transposition problem are more than three times greater if it has an incentive to deviate than if it does not. The simulated risks of a transposition problem reported in Table 3 tell a similar story. The absolute risk of a transposition problem is 2.1 percent for states without incentives to deviate and 6.4 percent for states with incentives to deviate. In the realm of rare events, effects that imply substantial

**Table 2.** Rare events logistic regression analysis of transposition problems

	<i>b</i> (SE)	Exp( <i>b</i> )	<i>p</i> -value
Member state expressed incentive to deviate	1.13 (0.44)	3.09	.01
Member state called for higher standards	-0.94 (1.06)	0.39	.38
Discretion to member states	-0.74 (0.49)	0.48	.13
Commission signalled support for provision	0.84 (0.50)	2.32	.09
Interaction: 'Member state expressed incentive to deviate' and 'Commission signalled support for provision'	-0.83 (0.80)	0.44	.30
<i>Controls for country characteristics</i>			
Decentralization	0.32 (0.14)	1.38	.02
Corporatism	-0.52 (0.24)	0.59	.03
Administrative efficiency	0.00 (0.03)	1.00	.96
<i>Controls for differences among directives</i> (reference category: Employment contract)			
Pregnant workers	0.14 (0.67)	1.14	.84
Working time	0.47 (0.59)	1.60	.43
Young workers	-0.06 (0.63)	0.94	.92
Constant	-3.28 (2.91)	0.72	.26
Chi-square ( <i>p</i> )	27.46 (.00)		
Log pseudo-likelihood	-158.69		
<i>n</i>	1164		

Note: The dependent variable has a value of 1 for observations with transposition problems, and 0 otherwise. The coefficients were estimated with ReLogit (King and Zeng, 2001a, 2001b). Robust standard errors, clustered at the level of the 97 provisions, are in parentheses. *P*-values are from two-tailed tests.

**Table 3.** Effects of member states' incentives to deviate on the risk of transposition problems

	No incentive to deviate	Incentive to deviate
No signal of support for the provision from the Commission	2.11%	6.42%
Signal of support for the provision from the Commission	4.98%	6.32%

Note: Predicted risks of a transposition problem derived from the model in Table 2, calculated using Clarify (King et al., 2000).

risk ratios (or relative odds) can be associated with apparently small differences in absolute risks.

When the Commission did explicitly signal support for a provision, states with incentives to deviate were no more likely to transpose incorrectly than states without incentives to deviate. We obtain this estimate by adding the main effect of states' incentives to deviate and the effect of the interaction term with the Commission's signal, and calculating the relevant standard error of the estimate. The coefficient is 0.30 ( $1.13 + (-0.83)$ ), which does not differ significantly from zero ( $SE = 0.68$ ,  $p$ -value = .66). The exponent of 0.30 is 1.35, indicating that, in the presence of a signal of support for a provision from the Commission, the odds of a state with incentives to deviate transposing incorrectly were only 1.35 times those of states without such incentives. The simulated absolute risks reported in Table 3 increase from 5.0 percent to just 6.3 percent in the presence of a signal of support from the Commission.<sup>6</sup>

The main effect of the Commission's support for a provision is positive and marginally significant, in line with the strategic view of how member states take positions (König et al., 2005; Hypothesis 3b). Note, however, that this effect is not particularly robust; when the analysis excludes the working time directive, the effect does not differ significantly from zero.

Table 4 shows that the effect of states' incentives to deviate does not appear to be equally present in all countries. For instance, no transposition problem was reported in Denmark for any of the provisions of these four directives at the end of Falkner et al.'s (2005) study in April 2003. This is equally true of the 84 provisions from which Denmark did not have an incentive to deviate, as it is of the 13 provisions from which it did have an incentive to deviate. The two countries for which the relationship is strongest and in the expected direction are Germany and Spain. These findings might be interpreted as some evidence for the typology of worlds of compliance, according to which cultural characteristics mediate the effects of states' incentives to deviate (Falkner et al., 2005). However, for most of the other countries in the world of domestic politics, there is no effect of states' incentives to deviate.

Changes in government at the national level do not account for variation in the magnitude of the effects of states' incentives to deviate across countries. In all 12 countries there were at least some changes in the composition of national

**Table 4.** Effect of states' incentives on the likelihood of transposition problems, by member state

	No incentive to deviate	Incentive to deviate	Significance of difference
<i>World of law observance</i>			
Denmark	0.0% (84)	0.0% (13)	1.00
<i>World of domestic politics</i>			
Belgium	1.1% (90)	0.0% (7)	1.00
Germany	1.1% (88)	33.3% (9)	.00
Ireland	1.3% (79)	0.0% (18)	1.00
Italy	2.2% (93)	0.0% (4)	1.00
Netherlands	5.0% (80)	0.0% (17)	1.00
Spain	4.5% (89)	37.5% (8)	.01
United Kingdom	0.0% (64)	3.0% (33)	.34
<i>World of neglect</i>			
France	7.6% (92)	20.0% (5)	.36
Greece	2.3% (88)	11.1% (9)	.26
Luxembourg	2.1% (95)	0.0% (2)	1.00
Portugal	6.1% (82)	6.7% (15)	1.00
Total	2.8% (1024)	7.1% (140)	.02

Note: The percentages refer to the percentage of observations with transposition problems as defined in Table 1. The numbers of cases on which the relevant percentages are based are in parentheses. The *p*-values are from the two-tailed Fisher's exact test.

governments between the early 1990s when these directives were discussed in the Council and 2003 when the quality of transposition was measured. Moreover, there were considerable changes in the composition of the national governments in Germany and Spain, where the effect of incentives to deviate are strongest. In analyses reported in the supplementary Web appendix, I examined the effects of shifts in national governments' ideological positions using data from the Comparative Manifestos Project (Klingemann et al., 2006; Warntjen et al., 2008) with the same negative results.

States that called for higher standards were somewhat less likely to transpose a provision incorrectly than states that did not call for higher standards. However, the effect is not significant and appears to be weak.

The effect of discretion falls just short of statistical significance. Provisions that grant discretion to states were less likely to be transposed incorrectly than provisions that do not grant discretion. The odds of incorrect transposition of provisions with discretion are less than half (0.48 times) those of provisions without discretion. Again, whereas the difference in odds is substantial, the difference in absolute risks is small, which is typical of rare-events phenomena. The risk of incorrect

transposition for provisions that do not grant discretion is 3.6 percent, compared with only 1.7 percent for provisions that do grant discretion.<sup>7</sup>

The analyses also control for characteristics of member states and directives. The coefficients are broadly in line with expectations. Countries with decentralized systems were more likely to exhibit compliance problems. Countries with more corporatist systems of interest intermediation were less likely to exhibit compliance problems. By contrast, states' administrative efficiency does not appear to be associated with non-compliance. The coefficients associated with the directives show that there are no significant differences in the likelihood of incorrect transposition for the provisions from the different directives.

## Conclusions

Protracted non-compliance in national transposition is a rare event. Of 1455 policy performances examined here, only 48 (3.3 percent) exhibited transposition problems nine years or more after the directives had been adopted. Previous studies constructed higher estimates of the transposition problem by examining states' compliance with directives as a whole. If we consider the member state–directive dyads rather than the member state–provision dyads as the units of analysis, we could also construct a higher estimate of the transposition problem. Of the 60 policy performances by the EU-15 states in transposing the four selected directives, 28 (46.7 percent) exhibited some form of suboptimal transposition, whereby national transposition was not completely correct nine years or more after the directives had been adopted (Falkner et al., 2005: chapters 4–7). Similarly, Mastebroek (2003) reports that the Dutch government transposed 58 percent of directives after the deadline, and Borghetto et al. (2006) report that the Italian government transposed 75 percent of directives after the deadline. Given that some provisions of a directive may be complied with whereas others are not, such figures are overestimates of the true magnitude of the problem. Börzel (2001) also argues that the magnitude of the compliance problem is often overestimated.

Member states' incentives to deviate affect compliance. A state with an incentive to deviate would not comply with a decision if it implemented its preference rather than the decision. In the absence of explicit support for a provision from the Commission, states with incentives to deviate are three times more likely to exhibit protracted non-compliance than are states without incentives to deviate. Previous studies reported mixed results in relation to the impact of states' incentives to deviate (Falkner et al., 2005: 278; König and Luetgert, 2009: 187–8; Mbaye, 2001: 263; Thomson et al., 2007; Zhelyazkova and Torenvlied, 2009: 50). In contrast to previous research, my study includes the role of the Commission as the enforcer of EU laws, focuses on the detailed level of provisions, and uses direct measures of states' incentives to deviate and of transposition performance.

The number of cases in which states have incentives to deviate is far greater than the number of cases in which states fail to comply. This does not imply the effect is

weak; its magnitude is best represented by the risk ratio, which, as reported above, is substantial.<sup>8</sup> What this does imply is that there is a ‘paradox of compliance’ in the European Union: implementers with incentives to deviate usually comply. This phenomenon has also been observed in many other political systems (e.g. Gormley, 1989; Torenvlied, 2000; Weingast and Moran, 1983).

The structure of the implementation process contains a rich set of factors that mediate the effect of states’ preferences, and I examined some of these factors in this article. The European Commission plays a crucial role as the enforcer of EU laws in this respect (Carrubba, 2005; Pollack, 2003; Tallberg, 2003; Zhelyazkova and Torenvlied, 2009). The effect of states’ incentives to deviate is effectively reduced to zero when the Commission explicitly supports a directive’s provision. Such support signals the Commission’s intention to monitor compliance stringently in member states that express incentives to deviate. The Commission’s behaviour in this respect is a strategic choice worthy of further research. The Commission’s signals may be linked to the amount of opposition expressed by member states, as well as the likelihood of securing favourable rulings from the European Court of Justice in the event of protracted infringement proceedings. The Court is more willing to rule against member states when states are likely to comply with such a ruling and when the existing case law is clear (Garrett et al., 1998).

The findings indicate that, with an appropriate research design, there is scope for future enquiry into the linkages between the decision-making stage and the subsequent implementation stage. Research on these linkages should use measures of actors’ preferences and policy performances that are as direct as possible. This requires moving to a lower level of analysis than that currently used in most research on compliance in the European Union.

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### Notes

1. Empirically, there are few provisions that grant discretion and from which member states have incentives to deviate. Therefore, I do not examine the interaction between incentives to deviate and discretion (see Thomson et al., 2007).
2. The results are substantively the same if all provisions are included. There were no protracted transposition problems on any of the excluded provisions. Regarding the working time directive, I excluded the provisions stated in Article 1.1 (‘This Directive lays down minimum safety and health requirements for the organization of working time’) and Article 1.2 (‘This Directive applies to: (a) minimum periods of daily rest . . . ; and (b) certain aspects of night work . . .’). These are general descriptions of more detailed standards defined later in the directive. Similarly, I excluded the provision stated in

Article 14 ('The provisions of this Directive shall not apply where other Community instruments contain more specific requirements'), since this defines the scope of the directive, not the content of a standard.

3. I coded an observation as exhibiting a compliance problem in national transposition if Falkner et al.'s (2005) case studies indicated that national legislation did not comply with the specific provision in question at the end of their study in 2003. Falkner et al.'s distinction between essentially and completely correct transposition is not relevant to the present research design, because that distinction refers to a state's performance on the directive as a whole, whereas the present study refers to specific provisions. I did not include those cases that exhibited compliance problems after the deadline for transposition but that were resolved before the end of Falkner et al.'s study in April 2003. The coding of these cases is problematic, because Falkner et al.'s case studies are less detailed with respect to these resolved cases of non-compliance. The case studies often indicate the presence of a resolved compliance problem without detailing the specific provisions to which this non-compliance referred.
4. The measures of discretion used by Epstein and O'Halloran (1999) and Franchino (2004) also include information on different types of constraints to which discretionary provisions are subject. The present analysis does not include a measure of constraints because all of the discretionary provisions are subject to at least some kind of constraint. Although some discretionary provisions are subject to more severe constraints than others, a quantitative comparison has weak face validity. Therefore, the present analysis uses a dichotomous measure of discretion.
5. In Table 2 the standard errors are clustered at the level of the 97 major provisions of the directives. Similar results were obtained when the standard errors were clustered at the level of the 48 member state-directive dyads. I also tested the robustness of the results by running the model four additional times, each time excluding one of the four directives, to ensure that the results are not driven by one of the four cases. With the exception of the direct effect of the Commission's signal of support discussed in the text, the findings are robust.
6. We obtain a similar result if we partition the data into two sets of observations: a first set consisting of provisions for which there was no signal of support from the Commission, and a second set for which there was. With models similar to those in Table 2, the effect of states' incentives to deviate is significant in the first set ( $b = 1.26$ ,  $SE = 0.41$ ,  $n = 888$ ), but not in the second set ( $b = 0.06$ ,  $SE = 0.77$ ,  $n = 276$ ).
7. As with the risks in Table 3, these risks were calculated with Clarify (King et al., 2000).
8. To argue that the effect of states' incentives to deviate on non-compliance is weak because the majority of cases in which states have incentives to deviate are not followed by non-compliance is analogous to arguing that cigarette smoking has a weak effect on lung cancer because a minority of smokers contract lung cancer. What is at stake is relative risk, not absolute risk.

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