

First draft – comments most welcome

Policy Matters – But How?
Explaining Success and Failure of Dispute Settlement in the
European Union

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Abstract:

The European Union's infringement procedure belongs to the most highly legalized institutional dispute resolution designs in the world. Nevertheless, within the European Union the transformation of non-compliance into compliance is not a story of pure success. Since the institutional design is constant, it cannot explain the empirical variance of dispute settlement outcomes. This paper argues that policy variables – although often neglected – are of high importance for the transformation of non-compliance into compliance.

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I. Introduction¹

The European Union's infringement procedure is one of the most highly legalized dispute resolution mechanisms in the world. But despite the extraordinary high degree of legalization, the transformation of member state non-compliance into compliance is not a story of pure success. The empirical pattern for the infringement procedures, which the Commission brought against the member states of the EC 12 between 1978 and 1999, reveals significant variation both between and within individual member states. This paper seeks to explain under which conditions the EU dispute settlement procedure (based on Articles 226 and 228 ECT) can successfully end non-compliance with EU Law. Why get some cases already settled at a rather early stage while for others not even a ruling of the European Court of Justice seems to be sufficient to bring about compliance?

Since the institutional design of the EU's infringement proceeding is constant, it cannot explain the empirical variance of dispute settlement outcomes. Prominent compliance theories (enforcement and management approaches) focus on state-centered variables such as state power and state capacity to explain the empirical variation observed. Our analysis reveals (section II), however, that these approaches suffer from explanatory gaps in regard to the transformation of member states' non-compliance into compliance during the European infringement proceeding. Since neither systemic institutional (dispute settlement design) nor sub-systemic institutional (state-related) variables account for the empirical patterns observed, this paper assumes that policy variables could be at work.

The compliance literature has largely neglected policy-related explanations. Therefore, we draw on the implementation literature and theories of international cooperation in order to identify potential policy variables (section III). In the last part of the paper, we seek to factor policy variables into prominent compliance theories. The paper concludes with the formulation of some first hypotheses to be tested in future research (IV).

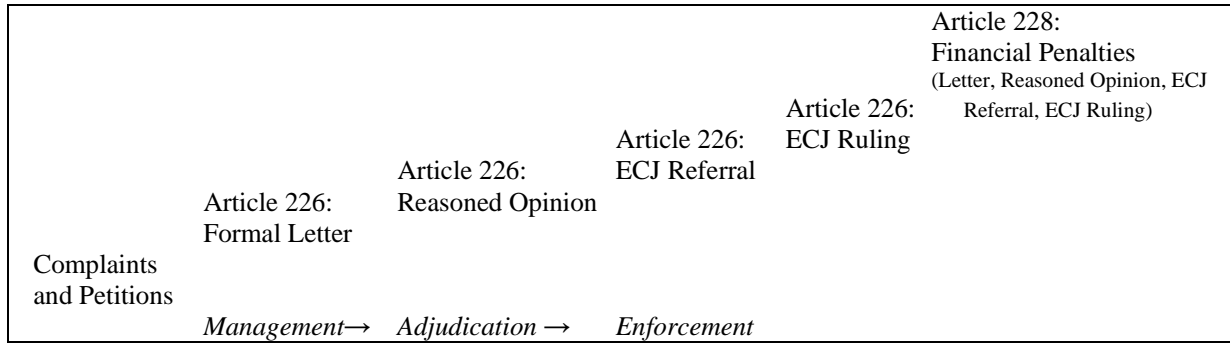
¹ We would like to thank Isabel Teusch for research assistance and Thomas Risse, Carina Spungk, and Tobias Hofmann for helpful comments on earlier versions of this paper.

II. EU-Infringement Procedures: Success and Failure

While the European Union (EU) has subsequently expanded its legislative competencies, the implementation and enforcement of European law firmly rests within the responsibility of the member states. Yet, as the guardian of the treaties, the European Commission has the right to bring legal action against member states not complying with European law. Article 226 (ex-Article 169) of the EC-Treaty entitles the Commission to open infringement proceedings against member states found in violation of European law. The proceedings specified in Article 226 consist of 10 subsequent *stages* (graph 1). The first two, suspected infringements (complaints, petitions etc.) and Formal Letters, are considered informal and treated largely confidential. The official Article 226 proceedings start when the European Commission issues a Reasoned Opinion and they end with a ruling of the European Court of Justice. If the member states still refuse to comply, the Commission can open new proceedings (Art. 228, ex-Art. 171), which may result in economic sanctions. Art. 228 proceedings consist of the same stages as Art. 226 proceedings but the ECJ has the possibility to impose a financial penalty (cf. Börzel 2001).

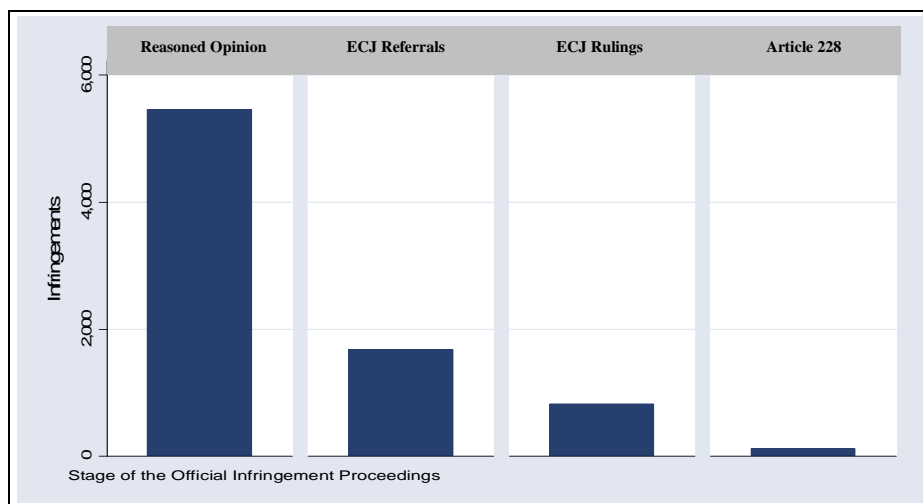
From a theoretical point of view, the EU's infringement proceeding (article 226 ECT) combines management, adjudication, and enforcement elements in order to transform member state non-compliance into compliance with European law (Tallberg 2000, Zangl 1999, Zangl 2001). Within the management stage, the European Commission interacts with the accused state on a purely bilateral basis. Only if the informal interactions do not settle the issue – either by concluding that no violation occurred or by the member state rectifying the instance of non-compliance – the Commission initiates the formal stage sending a reasoned opinion (based on article 226 ECT). When non-compliance is still not transformed into compliance, the Commission refers the case to the ECJ (adjudication phase). This phase is followed by an enforcement stage: in cases of non-compliance with a ECJ judgment based on article 226 ECT, the Commission can ask the ECJ to impose monetary sanctions (article 228 ECT) if non-compliance prevails.

Graph 1: Stages of the Infringement Proceedings and Compliance Mechanisms



Empirically, we find that the vast majority of infringement cases are solved during the management stage of the infringement proceedings (cf. Mendrinou 1996, Tallberg 2002, Tallberg and Jönsson 2001). Of the almost 17.000 infringement proceedings opened between 1978 and 1999, fewer than 6000 cases reached the adjudication stage of the official infringement proceedings (reasoned opinions). Less than a third of the cases, in which the Commission had sent a reasoned opinion, were referred to the ECJ. Of those 1675 referrals, the ECJ ruled on 822 – in 19 out of 20 times against the member states. Only about 100 cases became subject to a second infringement proceeding under Art. 228 for member states did not comply with the first judgment of the ECJ in accordance with article 226 of the EC treaty (cf. graph 2). In fewer than a dozen cases, the ECJ has imposed financial penalties²

Graph 2: Infringements at Different Stages, 1978-99



While the number of infringements drops sharply from stage to stage (graph 2), it still needs to be explained why some cases are settled during the adjudication phase while others cannot

² The data on the dependent variable stem from the project ‘Compliance with Law Beyond the Nation State’, directed by Tanja A. Börzel (for further information see <http://www.fu-berlin.de/europa>).

be resolved even in the enforcement phase. Solving this puzzle is all the more interesting since the EU presents an empirical extreme type of legalization, which may offer important lessons for the impact of the increasing legalization in world politics (move towards hard law and legalized dispute settlement) on compliance. In the following section, we explore to what extent state-related variables can account for the variation in outcomes of the EU dispute settlement procedure.

III. Compliance Theories and Their Empirical Limits

There are three prominent approaches for the explanation of how non-compliance can be transformed into compliance within international institutions. The legalization literature (Abbott et al. 2000, Abbott and Snidal 2000, Kahler 2000, Keohane, Moravcsik and Slaughter 2000, Mitchell 1996, Smith 2000) emphasizes institutional mechanisms such as mediation and adjudication by dispute-settlement bodies. The EU's institutional design is highly legalized.³ Yet, since institutional variables are constant, they cannot explain why some cases are settled in a particular stage while others are passed on. Compared to the legalization literature, management and enforcement approaches are going a step further in allowing for the deduction of hypotheses on transformative differences focusing on characteristics of the member states.

III.1 Enforcement Approach

The enforcement approach is based on rationalist assumptions, namely strategic rationality of actors and exogenous substantive policy interests. Accordingly, non-compliance is voluntary. It results from strategic cost-benefit calculations (Downs 1998, Downs, Rocke and Barsboom 1996, Martin 1992, Martin and Simmons 1998). Increasing external constraints can alter strategic cost-benefit calculations and preferences over strategies. While the benefits from non-compliance are constant over time, institutional provisions can raise the costs of non-compliance (e.g. shrinking shadow of sanctions, financial penalties, and losses of reputation). According to the enforcement approach, the probability for transformations of non-compliance into compliance increases with rising external constraints – such as possible sanctions. Therefore, the enforcement approach would expect the number of cases to decline

³ Due to the supremacy and direct effect of EU Law, the monitoring role of the European Commission, and the strong adjudication powers of the European Court of Justice, the EU presents an empirical extreme type for legalized international institutions.

towards the later stages of the infringement procedure. Transformational dynamics during the European infringement procedure cannot only be theorized on the aggregate level but also on the level of individual states. Since costs of non-compliance equally increase during the stages of infringement proceedings for all states, differences in state's action must be related to their sensitivity to external constraints. The enforcement approach puts emphasis on member states' power, which influences their sensitivity to external restrictions to their non-compliant behavior. Thus, material sanctions, imposed by the ECJ under Article 228 ECT, matter less to powerful states since they can either deter the Commission from initiating infringements or can afford to pay the penalties. As a result, enforcement approaches would assume economically more powerful states to be less inclined to alter the results of their cost-benefit calculations towards compliance in the wake of future material costs.

Regarding the transformational dynamics in European infringement proceedings, the enforcement approach offers two hypotheses. First, the overall rate of compliance increases, the further the infringement procedure proceeds and approaches the imposition of financial sanctions (H1). Second, since weak states are more cost sensitive than powerful states, non-compliance of weaker member states can be transformed into compliance more easily and at an earlier stage of the infringement procedure than in case of powerful states. The more powerful a state is, the longer it takes to alter its preferences over strategies and the further the infringement procedure is carried on (H2).

III.2 Management Approach

Unlike enforcement approaches, management approaches rely on the premise that non-compliance is involuntary since the states lack the necessary action capacity (resources) to comply. The management school names three sources of involuntary non-compliance: lacking or insufficient state-capacities, ambiguous definitions of norms, and inadequate implementation-deadlines (Chayes and Handler-Chayes 1991, Chayes and Handler-Chayes 1993, Chayes, Handler-Chayes and Mitchell 1998).

The incorporation of European norms into national law requires both political (e.g. low number of veto players) and administrative (e.g. bureaucratic efficiency) capacities.⁴ The higher the number of veto players (the lower the political capacity), the more difficult it is to introduce the legal and political changes necessary for compliance. Hence, higher rates of non-compliance can be expected in states with low political capacities. In addition, non-compliance caused by a lack of sufficient political capacities cannot be transformed into

⁴ For the operationalization of capacity and power see appendix 1.

compliance during infringement procedures if the number of veto players remains constant over time. While political capacity is of importance regarding the timely, correct, and complete legal transposition of European legal acts into national laws, administrative capacities are more important for the legal implementation of EU law via executive decrees and for the practical implementation of European norms.

Too restrictive deadlines for the transposition of European norms into national law are a second source for involuntary non-compliance. However, time constraints do not deploy explanatory power of their own. Rather, the causal mechanism between implementation deadlines and (non-) compliance operates through political and administrative capacities. The lower the administrative and political capacities of a state and the tighter the deadlines for transposition are, the higher is the number of non-compliance cases and the lower are the prospects for a successful transformation of non-compliance into compliance during the different stages of the European infringement proceeding.

The third source for involuntary non-compliance to which the management school refers are interpretational differences resulting from the ambiguity of norms. There are several reasons why norms are inherently ambiguous and open windows for diverging interpretations. First of all, European norms are most often compromises between member states, the Commission, and the European Parliament. Second, norms must be applicable to a range of different circumstances. Third, uncertainties of the future might require adaptations (incomplete contracting). For all those reasons, norms are formulated in the abstract and are inherently ambiguous. Interpretational differences between the European Commission and a member state can be resolved during the managerial stage in which the Commission and the respective state act on a purely bilateral basis in order to clarify the content and scope of the norm at hand and the characteristics of the case. Also, interactions before the ECJ allow for the clarification of a norm's content and applicatory scope (Panke 2005). Hence, the further infringement proceedings are carried on, the higher is the likelihood that non-compliance is transformed into compliance.

In sum, management approaches provide two hypotheses to explain variations in the transformational success between states and stages of infringement proceedings. First, the prospects for transforming non-compliance into compliance increase during ongoing infringement proceedings because the dialogue with the European Commission and the ECJ reduces ambiguity and helps to clarify the meaning and scope of norms (H3). On the aggregate level, the number of successful transformations increases from stage to stage of the infringement proceedings because states have more time to comply. While the infringement proceedings can address two out of three sources for involuntary non-compliance, lacking

administrative and political capacities are not altered as quickly. On the level of individual states, the transformation of non-compliance into compliance is the more likely the higher the administrative or political capacities of a state are (H4).

Table 1: Overview of Enforcement and Management Hypotheses

| | Causal mechanism and prospects for the transformation of non-compliance into compliance |
|--|--|
| H1 enforcement – aggregate level (stage to stage) | <i>The later the stage of the infringement procedure, the higher the costs for non-compliance become, the higher is the transformation-rate of non-compliance into compliance</i> |
| H2 enforcement – level of the individual state | <i>The more powerful a state is, the longer it takes to alter its preferences over strategies and the further the infringement procedure is carried on</i> |
| H3 management – aggregate level (stage to stage) | <i>The longer an infringement proceeding takes, the more likely transformation into compliance is because the dialogue with the European Commission and the ECJ reduces ambiguity and helps to clarify the meaning and scope of norms</i> |
| H4 management – level of the individual state | <i>Transformation of non-compliance into compliance is the easier, the higher the political and administrative capacities of states are</i> |

III.3 Quantitative Analysis⁵

On the *aggregate level*, the hypotheses of management and enforcement approaches give rise to the same expectations: the further the infringement proceedings advance, the lower the number of non-compliance cases becomes. This is in line with the empirical pattern observed for the EU (see graph 2). However, the finding neither confirms the management nor the enforcement hypothesis (H 1, H3), because the hypotheses rest on different (and – due to the different micro-foundations – mutual exclusive) causal mechanisms, which cannot be disentangled on the aggregate level. In other words: it is unclear whether lack of power or insufficient administrative and political capacities are responsible for the observed transformational pattern (see graphs 2 and 3).

On the *level of individual states*, the enforcement hypothesis suggests exactly the opposite of what management approaches would expect since high capacities empirically often go hand in hand with high state power. The more resources a state has, the more powerful it is and, hence, the more it can afford to resist compliance. At the same time, resources shape the capacity of states to comply. As a result of this, more resources lead to higher capacity and a decreasing probability of non-compliance.

⁵ For a summary of the methods employed see Annex 2. For an extended version see Börzel/Hofmann/Panke 2005 at <http://userpage.fu-berlin.de/~europe/forschung.htm>, accessed on August 17, 2005.

If capacity and power were related to the persistence of non-compliance as hypotheses 2 and 4 expect, there should be a significant effect on the percentage of cases which are not settled at the reasoned opinion stage but carried on to one of the subsequent stages. As we can see in the table below, none of the power variables has any significant effect on whether cases are referred to the ECJ or not. Member states with few votes in the Council of Ministers and low GDPs are almost as unfaltering in the face of ECJ referrals and judgments as member states with many votes. Since the lack of power does not translate into being afraid of the ECJ (extremely low R^2), hypotheses 2 is not confirmed.

In order to test the management hypothesis on the individual state level, we used bureaucratic efficiency, expenditure, and veto players as a proxy for administrative and political capacity (for the operationalization of the variables see the appendix). The overall impression is that member states with qualified and motivated civil servants are in a better position to transform non-compliance into compliance before cases reach the ECJ or an ECJ judgment is given. Nevertheless, capacity at best explains 6 % of the observed inter-state variation. As the enforcement hypotheses on individual states (H2), the disaggregated managerial hypothesis (H 4) has also little explanatory power.

Table 2: Infringements Carried on to Subsequent Stages

| | Management | Enforcement | Management | Enforcement | Management | Enforcement |
|----------------------|--------------------------|----------------------|------------------------|----------------------|--------------------------|-------------------|
| | ECJ Referrals (Art. 226) | | ECJ Rulings (Art. 226) | | ECJ Referrals (Art. 228) | |
| CAPACITY | | | | | | |
| Expenditure | 0.249 (0.646) | | 0.077 (0.535) | | -0.179** (0.070) | |
| Efficiency | -6.348*** (1.581) | | -0.311 (1.200) | | -0.762** (0.296) | |
| Veto Players | 0.440 (0.685) | | 0.636 (0.516) | | 0.234 (0.170) | |
| POWER | | | | | | |
| Votes | | 0.749* (0.453) | | 0.367 (0.296) | | 0.055 (0.089) |
| GDP | | -0.004 (0.003) | | -0.000 (0.002) | | 0.000 (0.001) |
| Constant | 35.516*** (9.700) | 25.352*** (3.203) | 12.889 (8.185) | 11.889*** (2.278) | 4.501*** (1.179) | 1.035* (0.578) |
| Observations | 180 | 245 | 180 | 245 | 180 | 245 |
| R² | 0.062 | 0.012 | 0.007 | 0.015 | 0.056 | 0.010 |
| AIC | 8.788 | 8.742 | 8.156 | 8.007 | 5.541 | 5.387 |

Dependent variables are % of infringements reaching the indicated stage of the official infringement proceedings. OLS regression with two-tailed t-test, PCSEs in parentheses. *** = $p < 0.01$, ** = $p < 0.05$, * = $p < 0.1$.

The quantitative analysis reveals that neither of the prominent approaches explains sufficiently why some cases are resolved already during the early stages of the infringement proceedings, while the transformation of non-compliance into compliance fails in others. Since state-centered variables explain only poorly why cases are resolved or transferred to subsequent stages, it might be fruitful to bring policy-variables back in the compliance research.

IV. A *Carte Du Jour* of Policy-Research

Since country-related variables cannot account for the observed variation, we have to look for alternative explanations that focus on policy specific factors. Theories of international cooperation and the implementation literature provide a fruitful starting point since they tend to be less state-centric than the compliance literature.

Approaches incorporating policy as explanatory factors tend to focus on three dependent variables: state preferences for international cooperation, factors shaping decision-making, and the effectiveness of implementation. The discussion is organized according to the three stages of the policy-circle: (1) problem-definition/agenda-setting, (2) decision-making, and (3) implementation.

IV.1 Problem-Definition (and Agenda-Setting)

Realism (Morgenthau 1948) and neo-realism (Waltz 1979) explain the cooperation between states as a result of alliance formation (Gilpin 1981) or the hegemonic-induced cooperation (Keohane 1980, Keohane 1984). While those theories used to dominate the field of international relations theories until the 1970ies, liberal theories on international co-operation began to mushroom in the 1980s, when the hegemonic decline of the US did not result in a break down of post-War international institutions (Keohane 1984, Keohane and Nye 1989). In order to account for “cooperation after hegemony” (Keohane 1984), liberal theories of international cooperation distinguish between external and internal explanatory variables. Since internal independent variables refer to the type of political system (e.g. democracy vs. authoritarian regime; see Atkinson and Coleman 1989, Bremer 1993, Brown, Lynn-Jones and Miller 1996, Bueno de Mesquita and al. 1991, Hasenclever 2002, Layne 1994, Maoz and Abdolali 1991, Mesquita, J. and al. 1991, Oneal and al. 1995, Owen 1994, Owen 1996, Russett 1993, Stein 2001) or economic power of states (e.g. LDCs vs. industrialized countries), external variables are related to the broader environment in which states operate

and in which policy factors can be more easily incorporated than in the internal dimension. External variables are related to environmental attributes or changes in the systemic environment that, via anticipation of consequences after the norm creation, become part of the governmental considerations. Most prominent for external variables is the functional regime theory with its focus on situational structures. There are different types of situational structures: suasion games (rambo), cooperation games (prisoner's dilemma, stake hunt, and chicken game), coordination games (consensual end, disputed means; e.g. battle of the sexes), or merely assurance games (Stein 1983, Zürn 1992; Hasenclever, Mayer and Rittberger 1997: 53). The underlying hypothesis is that cooperation between states is the easier, the less demanding the situation is. Conflicts over means (coordination games) can be solved relatively easily. Cooperation games, such as a non-iterative prisoners' dilemma, are not conducive to cooperative solutions. Suasion games, finally, are most likely to result in non-cooperation. The underlying causal mechanisms explaining the propensity of regime formation lie in problems of distribution, monitoring, and sanctioning (Zangl 1994). Those variables can further be endogenized: while distributional effects are policy-related, problems of monitoring and sanctioning relate to questions of institutional designs. For assurance and coordination games, distributional elements are relatively unimportant, because means are disputed rather than ends. Cooperation problems are mainly about the selection and distribution of ends and concern another prominent distinction in game theory on the character of cooperation-gains (zero-sum character of a game and positive-sum games). The hypothesis that can be drawn from these theoretical considerations is that the higher anticipated losses and the lower the potential gains are, the less likely cooperation among states becomes. Regarding the extraction of policy variables, the crucial question is: how can potential losses and gains be determined in the abstract? What variables further specify the anticipated costs and benefits?

The most prominent suggestion for cost-implications rest on the extent of sovereignty restrictions, indicating that cooperation is the easier, the less a state's sovereignty is compromised (Efinger, Rittberger and Zürn 1988: 90-91, 97; Zürn, Wolf and Efinger 1990). Additional variables with implications for the costs and gains of cooperation are in example the tangibility of means and ends (Rosenau 1966, Rosenau 1967).⁶

⁶ Through the distinction between tangible and intangible means and ends, Rosenau arrives at a 2x2 matrix. The boxes are filled with four distinct issue areas: status area (means and ends are intangible), human resource area (tangible means intangible ends), territorial area (intangible means, tangible ends, and nonhuman resource area ends and means are tangible) (Rosenau 1966: 86). Since the tangibility of ends allows for various compromises between the actors, those conflicts can easier be solved in a cooperative manner.

Problem or issue typologies additionally provide yardsticks for the assessment of policy-type specific cost-implications. Prominent examples are the distinctions between constitutional, redistributive, distributive and regulative policies (Lowi 1964), between issue areas welfare, rule-making, and security (Czempiel 1981), and between positive (market creation) or negative (market regulation) integration (Scharpf 1996b). Another more extensive listing of policy fields distinguishes between defense, economy, information, environment, human rights, borders, spheres of influence, and diplomacy (Efinger, Rittberger and Zürn 1988: 90-91, 97). The causal mechanisms of these issue typologies rest on the intensity and degree of centralization of distributional conflicts (Lowi's distinction, Scharpf) and on the underlying structure as a positive or a zero-sum game (Czempiel, Rosenau). Cooperation is the easier, if the game has a zero-sum character and the less distributional the conflict is.

Other policy variables specify scope conditions for the emergence of cooperation and serve, thus, rather as intervening than as independent variables. Such policy factors are the divisibility of the issue (Hucke 1980: 142), the degree of interdependence (Keohane and Nye 1977, Windhoff-Héritier 1980), and the problem intensity (Hermann 1978; Hucke 1980: 145-146). With increasing divisibility of an issue, the number of potential solutions increases and the more likely is successful cooperation between states. Prospects for successful cooperation are also influenced by the degree of interdependency. The higher the interdependency is the less effective are non-cooperative solutions. As a consequence, high interdependency increases the incentives of states to cooperate. Another prominent intervening factor is the intensity of a problem. The causal mechanism behind this variable is the following: With increasing urgency of a problem, the awareness rises. This is conducive to an overlap of perceptions, which, in turn, increases the prospects for cooperation.

Table 3: Policy-Based Hypotheses Related to Problem-Definition

| Policy variable | Proposed causal mechanism | Parameter value leading to high prospects for cooperation |
|--|--|--|
| Sovereignty costs | Losses matter because the future maintenance of the state might be jeopardized | Low |
| Divisibility of the issue | Number of potential solutions are increased | High |
| Precision of means and ends | High precision increases the actor's motivation for negotiations | High |
| Problem intensity | Increasing awareness, overlapping perceptions | High |
| Degree of interdependence | Effectiveness of solutions | High |
| Constitutional, redistributive, distributive and regulative policies | Regulative politics – low and decentralized distributional conflicts | Regulative politics |
| Issue areas welfare, power, and security | Welfare as positive sum game, power and security matter because the future maintenance of the state might be jeopardized | Welfare |

IV.2 Decision-Making

While much has been written on regime variables and decision-making, policy variables play a less prominent role in this regard. Nevertheless, policy matters for governmental decision making and the content of domestic legal acts, because it influences the relevance attributed to some issues over others and the number and strength of formal and informal veto players. As intervening and even independent variables, policy is important for the speed of decision-making and/ or for the substantive content of legal acts.

A first variable with influence on the number of veto players is the distinction between dual and cooperative federal systems. While dual federalism is defined by a mutually exclusive distribution of competencies between the different levels of government, there are policies with concurring or shared competencies in cooperative federal systems (such as Germany) (Benz 1998, Börzel 2000, Lehmbruch 2000, Mayntz 1978, Reissert 1976, Scharpf, Reissert and Schnabel 1976). Hence, policies fields which are not under the exclusive competence of either the federal level or the states are characterized by structures of interlocking politics and joint decision-making. Given the higher number of potential veto players in such policy fields, federal decisions can be delayed, blocked or substantially altered (Scharpf 1985, Scharpf 1988a).

Another starting point of how policy matters as intervening variable for decision-making is the distinction between corporatism, pluralism, and statism (Berger 1981, Kohler-Koch 1996, Streeck and Schmitter 1991). Empirical studies point out that labor/employment

policy tend to be characterized by corporatist arrangements and extensive consultations – even in states (such as UK), in which pluralism dominates in other policy areas (Treib 2004, Falkner et al. 2005: 237-239). Like cooperative federalism, corporatist arrangements introduce additional actors operating eventually as veto players.

While the number of formal veto players within a state is constant (with a few exceptions such as corporatist arrangements or currency policy in states with an independent central bank), the strength of informal domestic actors varies across policies. This is exactly the approach underlying the typology of James Wilson (Wilson 1980: 366). It distinguishes policies according to their perceived costs and benefits and proposes hypotheses on the existence and degree of organization of domestic proponents and opponents (see also Windhoff-Héritier 1980: 37-41), who, in turn, influence the governmental decision-making process. There are interest group, client, entrepreneurial, and majoritarian politics (Wilson 1980: 367-370). Interest group politics are characterized by highly organized groups on both sides: winners and losers (Wilson 1980: 368), because benefits and costs are concentrated. Concentrated benefits and diffuse costs provide incentives for winners but not for losers to organize themselves (client politics e.g. subsidies) (Wilson 1980: 369). Vice versa, losers but not winners have strong incentives for organization in case of entrepreneurial politics (e.g. environmental regulations for industry: diffuse benefits and concrete costs) (Wilson 1980: 370). Finally, majoritarian politics are characterized by diffuse costs and diffuse benefits, blurring the distinction between losers and winners, which causes a very low degree of self-organization on both sides (Wilson 1980: 367).

Policy variables are not only intervening variables with influence on the existence and strength of formal and informal veto players and, in turn, the speed of decision making and the substantive content of legal acts. They are also important as variables for internal dynamics of governmental decision-making processes.

Issue salience can serve as an independent variable influencing delays and contents of decisions (Ringquist, Worsham and Eisner 2003). Governments and parliaments are in most democracies strongly influenced by party politics (the USA being a prominent exception) (Linz 1991, Steffani 1983). Since political parties are constituted alongside issue-cleavages (left-right, and materialist- postmaterialists c.f. Inglehart 1990) they differ in the attention and importance they attribute to different issues (e.g. environmental concerns are less important for a right-center party than economic concerns). Depending on the governing party or party coalition, the relevance of policies for governmental decision-making varies. Given restricted capacities and terms of office, a low prioritization of a policy can lead to delayed or even to no decisions.

Politicization draws less on party politics and more on the role of the broader public. It is a policy-related, but contingent factor, since politicization is always subject to actors' strategies (Ward 1993). Especially the framing literature highlights that already institutionalized pathways are increasingly followed by policy-makers, the higher the goodness of fit between a new issue and already institutionalized ideas is (Rein and Schön 1993, Fischer 2003, Payne 2001, Snow and Benford 1992). This suggests that exerting substantive influence on decisions via politicization of policies is the easier, the better it fits into established policy, polity or politics traditions.

Domestic decision-making is also influenced by external, environmental policy-related variables. One such example are norm cascades (Finnemore and Sikkink 1998). The basic idea behind this concept is that the wide spread and deep institutionalization of some policies (e.g. human rights) on the international level empowers proponents (states, non-governmental actors, and the domestic opposition), since they can conduct shaming campaigns leading to reputational costs for resting states, which 'pulls' them into compliance with international norms (Franck 1990). Hence, domestic decision-making can be substantially influenced by norm cascades in cases where policies became a widely shared and deeply institutionalized matter of appropriateness on the international level.

Table 4: Policy-Based Hypotheses Related to the Governmental Decision-Making

| Policy variable | Proposed causal mechanism | Parameter value leading to influence on decision-making |
|--|---|--|
| Federalist distribution of competencies | Increasing number of formal and informal veto players in policies with cooperatist arrangements | High number of veto players are conducive to delays and substantive influence on the content of decisions |
| Labor/employment policy | over-proportional number of corporatist/ consultative arrangements influences the number of veto players | Higher number of actors, substantive on legal acts influence possible |
| Cost benefit expectations in policy areas | Concentrated (as opposed to diffuse) costs/benefits as incentive for organization, this influences the number of veto players | High organization additional 'veto' players, substantive influence on legal acts possible |
| Issue salience | Relevance of policies prioritization | Inconclusive, depending on party, coalitions, and content of the issue; speed of decision-making |
| Politicization | High politicization through framing increases public attention; scope condition: high goodness of fit | Inconclusive, depending on public opinion and institutionalized ideas; substantive influence possible |
| Widely accepted norms on the international level | Norms cascades: shaming and external reputational losses | Substantive influence on legal acts depending on the stage of the norm cascade and the power of resistance |

IV.3 Implementation

While the comparative politics literature on political steering and implementation regards the problem-definition and agenda-setting phase not as essential and only rarely sheds light on the decision-making stage, it is rich in offering policy variables as regards the last stage of the policy cycle. Policy factors are traditionally regarded as crucial for the selection of programs of political steering and the conditions of success. This is not the least due to the fact that variation in the success of implementation and political programs are observed, even though the institutional framework of the state remained constant. Nevertheless, institutional variables are not disregarded. Rather, the bulk of the literature on implementation and political steering is implicitly based on an actor-centered neo-institutionalist paradigm (Knill and Lenschow 2000; Mayntz 1980). Accordingly, institutional structures and actors mutually influence each other: institutions define, empower, and restrict actors and their capacities, and actors, in turn, try to shape institutions according to their interests and preferences (Hall and Taylor 1996; Immergut 1996, Immergut 1998; Scharpf 1997). Most of the implementation research engages in questions of how implementation contributes or hinders the effectiveness of political steering (Mazmanian and Sabatier 1981). As a starting point it is often noted that the number of actors affected by and involved with the implementation is an important factor with influence on the effectiveness of political steering (Grunow 1980: 144). In addition, the distribution of preferences among actors is taken into consideration. A prominent hypothesis is: the lower the number of actors and the less adaptations are required, the lower the number of decisions required during the process of implementation, the lower the likelihood that conflicts arise and interdependencies matters, the higher the prospects for successful implementation (Grunow 1980: 162, Windhoff-Héritier 1987; Mayntz 1983).

This core hypothesis is further specified by several policy-related variables, which are part of the contextual pre-conditions (pre-existing policies, politics, or polity factors; available resources for implementation) or of the political program itself (depth of required changes, resource intensity – depending on the instruments chosen for political steering, affected and involved actors, precision and complexity of the issue at hand).

Pre-existing context conditions are important for successful implementation, since they – together with the content of the political program – define the scope and depth of required changes and adaptations. Misfit can arise as regards to policy, politics (e.g. administrative procedures), and polity (organizational aspects) dimensions (Börzel 2003, Liefferink and Jordan 2004) and varies in the depth of required changes (e.g. whether core principles or less important aspects are effected, c.f. Knill 2001). A second contextual element

concerns the resources available for implementation. The more actors are affected and the higher the misfit, the less likely is successful implementation. Possible countervailing forces are administrative or financial resources (Montjoy and O'Toole 1979) and capacities for hierarchical steering, steering through redistribution (Kelman and Warwick 1978: 16), or steering via state investments (Schmid 1980). Since problem structures (time horizons, social aspects and policy contents) influence which types of political steering can successfully be applied (e.g. integrative steering is incompatible with re-distributive issues), steering mechanisms are regarded as policy-related variables (Schmid 1980: 110-112).

The political program itself also influences the prospects of successful implementation. It defines the required adaptations and influences the seizure and depth of misfit, which might lead to resistance and eventually causes delayed or incomplete implementation (Kelman and Warwick 1978, similar Lowi 1972). Vaguely defined policies require negotiations during the implementation stage (Bohnert 1980: 210; Feick 1980: 211). This might reduce the success of implementation, if affected actors substantially change the content of programs.⁷ High precision facilitates the implementation process, but goes hand in hand with higher resource intensity (Montjoy and O'Toole 1979: 468-471). As a consequence, the impact of the policy variable 'precision' on the success of implementation is indeterminate (but can be further influenced by the provision of new resources; Montjoy and O'Toole 1979: 466). Similar to low interdependencies to other policy areas, a low complexity facilitates successful implementation, because it reduces the number of involved actors/organizations (Feick 1980: 212, Windhoff-Héritier 1980).

⁷ At the same time, implementation can be smoothened by negotiations with private actors, since participation can increase incentives as well as the general willingness to comply (Héritier 2002).

Table 5: Policy-Based Hypotheses Related to the Stage of Implementation

| Policy variable | Proposed causal mechanism | Parameter value conducive to effective implementation |
|---|--|---|
| Interdependency with other policy areas | Low interdependency reduces the number of affected actors | Low interdependency |
| Scope and depth of misfit | The higher the misfit, the more difficult change is; the more resources must be invested to alter policies, politics or polity | Low misfit |
| Structures of: the problem (time horizons, social aspects, contents of policy), the program (content of policy) | Different types of political steering (regulative, integrative, cognitive steering and production of collective goods) influence flexibility, effectiveness and resource-intensity of implementation | Inconclusive |
| Precision of legal acts | Low precision requires negotiation, high precision facilitates implementation process, but requires more resources | Inconclusive |
| Complexity | High complexity increases the number of affected actors/organizations | Low Complexity |

V. Bringing Policy Back In

Although the reviewed “policy literature” mainly focuses on the evolution of cooperation, on governmental decision-making and on implementation, it is extremely rich in offering potential non-state variables that can be related to the transformation of state’s non-compliance into compliance with European policies. Our empirical findings have demonstrated that neither the management nor the enforcement hypotheses can sufficiently account for the transformational pattern over the phases of the infringement procedure and over time. Therefore, it might be fruitful to redefine the management and the enforcement hypotheses by introducing policy variables.

V.1 Modified Enforcement Hypotheses

The causal mechanism of *enforcement approaches* basically rests on the assumption of strategic rational actors. Based on cost-benefit calculations, they adapt their action-plans (including the selection of means) according to altered external constraints. So far, our reasoning was implicitly based on two assumptions. First it was assumed that the cost-benefit curves were constant for all cases within a state. Second, the only variation was to arise from the different stages of the infringement proceedings, over which reputational costs or anticipated costs of financial penalties increase. This line of reasoning neglects that policies

might differ in their respective compliance costs and benefits for a state. Thus, due to variations in cost-sensitivity, the pattern of transformations of non-compliance into compliance can vary within a single state, depending on the policy at hand. The refined enforcement hypothesis is based on the insight that high benefits of non-compliance regarding a certain issue go hand in hand with a low cost sensitivity of the respective state. The new core hypothesis, thus, states: *The lower the **cost sensitivity** regarding an issue is, the more stages of the infringement procedure are required, until costs for non-compliance exceed the benefits for non-compliance.*

Cost-sensitivity is a term, which is itself influenced by various policy related variables. The importance of a policy, in turn, can be determined by governmental considerations on environmental elements and on domestic gains and losses. Environmental policy variables are theorized by the cooperation literature, while policy-related domestic gains and losses belong to the domain of decision-making approaches.⁸

The precision of means and ends of a policy might influence the cost-sensitivity of a state. The higher a norm's precision, the more restricted is the room for potential compromises between the member state and the European Commission (in the management phase) or the ECJ (in the adjudication phase). This could *ceteris paribus* lead to a higher cost sensitivity for policies of high precision, since the alternative to continued non-compliance is complete acceptance, whereas a low precision of means and ends allows for a third option: a compromise. Hence, high precision prevents compromises on the scope and/or content of norms, which would be conducive of transforming non-compliance into compliance during the infringement proceeding.

A second intervening policy variable affecting states' cost-sensitivity is the degree of interdependence. External reputational losses arising from non-compliance matter to a stronger extent in highly interdependent policy areas as compared to policy areas with low interdependence. This is because high interdependency is very likely to require future cooperation between states in the respective policy field. If a member state's non-compliance is detected and becomes public (subject to the European infringement procedure), the respective free-riding state very likely loses some of its external reputation and, in turn, some of its credibility, when non-compliance is not transformed into compliance. Since credibility is an essential ingredient of bargaining power, states maintaining their preference for non-compliance over different phases of the infringement procedure, can lose influence

⁸ Discussing all possible extensions of the core-enforcement hypothesis at length, would be beyond the scope of this paper. So far only those policy variables are further discussed, whose causal mechanisms seem to be the most plausible.

in future pre-agreement negotiations. This is especially problematic in policy fields with a high density of norm-negotiations, which very likely correlate with high interdependency. Hence, the cost sensitivity of states should be influenced by the extent of interdependency of a policy area. The revised hypothesis is: The higher the interdependency of a policy field, the higher the cost sensitivity for non-compliance, the more likely it is that strategic rational actors transform non-compliance into compliance (*ceteris paribus*).

The influence of the policy-variable issue salience on the cost-sensitivity is almost obvious. The higher the issue salience of a policy, the higher is the benefit of non-compliance, while arising or anticipated the costs matter less. Non-compliance is only transformed into compliance if the costs of non-compliance exceed the benefits of non-compliance. As a consequence the third reformulated enforcement hypothesis states: the higher the issue salience of a policy, the less are states inclined to transform non-compliance into compliance during the infringement procedure (*ceteris paribus*).

Another policy factor discussed in the decision-making literature are cost benefit expectations depending on differing concentrations of costs and benefits across policy fields. This variable draws on approaches, according to which well organized societal groups are more likely to exert influence on the contents of governmental decisions than unorganized groups. The cost-sensitivity of a government is not only influenced by considerations of external factors (such as external reputational losses), but also by domestic factors. Since democratic governments usually aim for re-elections, they avoid electoral ex-post sanctions in being responsive to societal groups. The government's cost sensitivity is not increased for interest group politics and for majoritarian politics, since compliance opponents and proponents balance each other in both cases. By contrast, the cost sensitivity is very strongly influenced regarding client and entrepreneurial politics. Incentives for self-organization are very high for winners but not for losers in client politics, while it is the other way round for policies belonging to entrepreneurial politics. Hence, governments are positively cost sensitive and, in turn, inclined to transform non-compliance into compliance for policies belonging to the category of client politics (diffuse costs and concrete benefits). For policies belonging to entrepreneurial politics (diffuse benefits, concrete costs), governmental costs sensitivity is influenced in a negative manner: the transformation of non-compliance into compliance becomes less likely (*ceteris paribus*).

V. 2 Modified Management Hypotheses

Policy aspects matter to the *management approach*, too. The core management hypothesis focuses on resource restrictions and the absence of interpretational ambiguities as necessary (but not sufficient) conditions for compliance. *The fewer resources are available and the more ambivalent a norm is, the less likely the transformation of non-compliance into compliance becomes.* As for the enforcement hypotheses, the following section introduces policy variables as intervening factors and refines the hypothesis.

Norms can vary with respect to their precision. The less precise a norm is, the more difficult it is and the more time-consuming it can become to develop a consensual interpretation during the infringement procedure. Hence, the first redefined management hypothesis states: the more ambiguous a policy is, the longer it takes until a consensual norm interpretation is reached and the further an infringement proceeding is carried on (*ceteris paribus*).

A second policy-related concept prominent in implementation research is misfit. Misfit relates to the scope and depth of required adaptations in regard to a certain norm. Since adaptations call for the investment of various resources (e.g. administrative, financial), the resource intensity increases the higher the misfit or incompatibility of a policy with domestic policies, institutions and processes is. A state's resources are limited. Hence, the prospect of transforming non-compliance into compliance during the infringement proceedings differs in accordance with a norm's requirements for adaptation. Therefore, the higher the misfit, the higher the adaptational requirements of a norm, the more resources a state must invest to transform non-compliance into compliance during infringement proceedings.

Besides administrative and financial capacities, political capacities are of high importance for the transformation of non-compliance into compliance during the infringement procedure. On a first glance, the number of veto players seems to be a state-centered variable, not influenced by policies. As the literature on decision-making shows, however, policy matters strongly in cooperative federalist regimes. Depending on the affected policy, the number of veto players increases and the political capacity of a state declines. As a consequence, changes in legal acts are additionally slowed down or even completely blocked. The lower the political capacity, the more difficult it is to transform non-compliance into compliance during the infringement procedure. The more policies in cooperative federal regimes fall into the area of competencies shared between both levels of government, the lower is the political capacity and the less likely becomes the transformation of non-compliance into compliance during ongoing infringement procedures.

The field labor and employment policy is special, since it is often characterized by corporatist arrangements. Corporatism introduces additional ‘veto players’, which, in turn, reduces the political capacity for issues in this field. As a consequence, the transformation of non-compliance into compliance becomes increasingly difficult in this field. Accordingly, the stronger employment and labor policy decrease the political capacity, the less likely becomes the transformation of non-compliance into compliance during ongoing infringement procedures.

VI. Conclusions

In the wake of the current trend towards increasing legalization of world politics, it is important to explore how infringement proceedings contribute to the transformation of member states’ non-compliance with EU directives into compliance. The European Union is an empirical extreme type for high legalization. Non-compliance occurs nevertheless and becomes – if detected by the Commission – subject to an infringement procedure based on Article 226 ECT. An empirical analysis of the European Union’s infringement procedure reveals an interesting variation of transformational prospects, which cannot be explained by state-centred approaches. Therefore, this paper advanced the claim that policy-variables matter. But how exactly can policy make a difference in the transformation of state’s non-compliance into compliance?

Due to a lack of policy-based compliance approaches this paper reviewed different bodies of literature (on international cooperation, on decision-making, and on implementation), which attribute explanatory value to different policy variables. We extracted those variables resting on clear causal mechanisms,⁹ and integrated them into the enforcement and the management hypotheses on the transformation of non-compliance into compliance. (see table 6). So far, the hypotheses have not been systematically tested, yet. Future studies will have to collect the quantitative and qualitative data necessary to evaluate whether policy really matters.

⁹ We do not regard all policy variables as important, since some causal mechanisms between policy and our dependent variable (the transformation of non-compliance into compliance) are extremely thin. An example for a thin causal mechanism is the distinction between positive and negative integration (Scharpf 1996a). The assumption that this distinction impacts the emergence of non-compliance in the first place (Zürn 1997) has been empirically falsified (Börzel, Hofmann and Sprungk 2003). This finding is not the least due to lacking causal mechanisms between the distinction of negative/positive integration and the emergence of compliance.

Next to the empirical challenge, there is also still a theoretical caveat. Our paper has treated policy factors only as intervening variables. Drawing on constructivist approaches, however, they can even be regarded as independent variables influencing the success of transforming states' non-compliance into compliance (c.f. Panke 2005).

Table 6: Bringing Policy Back In: Enforcement and Management Approaches Redefined

| | Management Theory | Enforcement Theory |
|----------------------------------|---|---|
| Core hypotheses | <i>The fewer resources are available and the more ambivalent a legal act is, the less likely the transformation of non-compliance into compliance is.</i> | <i>The lower the cost sensitivity regarding an issue is, the more stages of the infringement procedure are required, until costs for non-compliance exceed the benefits for non-compliance.</i> |
| Refinement 1: Policy variable | Degree of precision | Degree of interdependence |
| Refinement 2: Policy variable | Seizure and depth of misfit | Precision of means and ends |
| Refinement 3: Policy variable | Employment policy | Issue salience |
| Refinement 4: Policy variable | Cooperative federalism | Concentration of costs and benefits |

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Appendix 1

Operationalization of the Enforcement and the Management Hypotheses

I. The enforcement approach

The power of member states to resist the transformation of non-compliance into compliance during infringement proceedings is operationalized by two elements: the votes a state has in the Council of Ministers and the GDP.

The variable *gross domestic product* ("GDP") is an indicator for the financial resources of a member state. We assume that wealth is a proxy of the power to resist external constraints (such as financial penalties). The data for the variable "GDP" in thousand constant US dollars comes from the World Development Indicators of the World Bank (World Bank 2004). Another indicator for state power is the proportion of *votes in the Council of Ministers* ("votes") (c.f. Börzel et al. 2003). External reputational losses can decrease the credibility and, in turn, the bargaining power of states in upcoming negotiations. We assume that states are less sensitive to external reputational losses, the more votes a state possesses.

II. The management approach

There are two different manners of how capacity is understood in management approaches. These are human and financial resources ('administrative capacities') and political resources ('political capacities').

The number of actors having the possibility to block political decisions is important for the efficiency of legal transpositions (Scharpf 1988b, Tsebelis 2002). A high *number of veto players* decreases the political capacity of a state. In order to include whether potential veto players have incentives for turning into actual veto players, we use the veto player index developed by Beck et al. 2001), which allows for the interests of veto players in such a way that interdependences between veto players and the respective political system are taken into consideration.

For the effective application and enforcement of legal acts, states require sufficient and adequately qualified personnel (administrative capacity). First, we assume that state spending on civil servants relative to the gross domestic product ("*expenditure*"), are strongly related to human resources for implementation and enforcement. The data for both quantitative indicators of human resources were collected by Cusack (Cusack 1998). The second qualitative variable for the analysis of the importance of human resources follows Mbaye (Mbaye 2001), who used data from Auer et al. (Auer, Demmke and Polet 1996) to create an index of bureaucratic efficiency and professionalism of the public service ("*efficiency*"). This index consists of three components of bureaucratic efficiency: performance related pay for civil servants, lack of permanent tenure, and public advertising of open positions.

Appendix 2

Statistical Methods for Testing the Hypotheses

In order to test our capacity and power models, we use pooled regression. Pooled models entail a number of pitfalls (Hsiao 1986, Kittel 1999, Maddala 2001) which become manifest in violations of some assumptions of the classical linear regression model (Greene 2000). We employ the Beck and Katz technique to counteract problems of panel heteroscedasticity (Beck and Katz 1995, 1996, Beck 2001). This technique consists of a pooled OLS-regression with panel corrected standard errors (PCSEs). Autocorrelation is another frequent problem of pooled analyses and it is not addressed by Beck and Katz (1995, 1996). However, this does not affect us because we primarily use infringements per European legal act in force – rather than the absolute number of infringements – as the dependent variable. The main advantage of this variable is that it controls for the growing number of legal acts that can potentially be infringed on and the political events that spark this development. It helps us to escape problems of time trends and structural breaks. Therefore, there is no need to use additional controls for serial correlation in the residuals and suchlike (Gujarati 2000, Banerjee et al. 1993, Enders 1995). Furthermore, we can do without a lagged dependent variable as theory does not suggest the probability of current infringements being dependent on the number of past infringements. As to fixed effects, we decided against the use of country or year dummies in accordance with Plümper et al. (2005). The simultaneous use of dummies and other categorical variables amongst the independent variables causes problems of multicollinearity. Our indicator for bureaucratic efficiency belongs to this group of variables. In addition and aggravating, fixed effects cannot explain why countries or years vary with respect to their constants. They statistically “explain” that part of variance which is most interesting from a comparative point of view without being able to give substantial explanations of the differences. Last but not least, fixed effects consume degrees of freedom on a big scale.