

Part A Introducing the Debate on Implementation

This first part of the thesis introduces the debates on implementation given by European policy actors and political scientists. It also establishes the general framework for an evaluation of the efficiency of implementation in the subsequent parts.

Chapter 2 presents how implementation is understood by the European Commission, and how this institution discusses the issue of an implementation gap. The European Commission holds a primarily legal view on the implementation issue, which aims at minimising the size of an implementation gap in European policy. This view is reflected both in the Commission's definition of implementation and in the implementation statistics, which this institution publishes regularly. Based on dissatisfaction with the statistics, which allow only a limited assessment of the size of the implementation gap and, more importantly, with this institution's legal view, the chapter develops an alternative, efficiency-based view on implementation. Instead of focusing on the mere size of a potential implementation gap, this view leads us to study the efficiency properties of policy implementation. Drawing on the subsidiarity principle, one of Europe's guiding policy principles, we suggest that European policies that do not allocate policy decisions to the adequate policy level are likely to involve inefficient policy objectives, which may theoretically be mitigated during implementation. The idea is that where policy decisions are taken at a European level, although the subsidiarity principle suggests that the national levels should have discretion in formulating objectives, and where countries reintroduce discretion on a national level by not complying with the centrally formulated objectives, potentially leading to an implementation gap, this may theoretically restore the efficiency of the inefficient policy.

Subsequently -and before entering into an empirical analysis of the implementation of one specific European environmental policy in the second part of the thesis- chapter 3 investigates a broad set of possible sources of an implementation gap in European environmental policy making, as discussed by political science scholars, one discipline which studies implementation of environmental policy in a European context. One of the guiding questions in this chapter is whether there is reason to believe that there are specific difficulties inherent in the implementation of European (environmental) policy. Amongst other things, the chapter shows why implementation in an EU context is more complex than the implementation of policy in a national context. We also study the literature with respect to lessons that can be drawn for a study of the implementation of the Council Directive of 21 June 1989 on the reduction of air pollution from existing municipal waste-incineration plants (89/429/EEC).

Chapter 2 Towards an Efficiency View of Environmental Policy Implementation in a European Context

1 Introduction

This chapter has several objectives: on the one hand it aims at presenting the legal rules behind the implementation and enforcement of EU environmental policies, as well as the political processes that have led to provisions made to better deal with specific implementation problems. On the other hand it aims at evaluating the consequences these may have for implementation processes, their outcomes and assessment in practice. For this, the chapter focuses on the implementation of environmental policy. It does not aim to evaluate whether the discussed issues would be different in other policy areas.

The chapter presents the view of the European Commission on the implementation and enforcement of environmental policy and highlights the fact that the phenomenon of implementation deficits is closely linked to the allocation of competencies between Community institutions and Member States when it comes to implementation and enforcement. Based on the primarily legal view, which the European Commission takes towards implementation and the implementation gap, the Commission's statistics on implementation outcomes across the Member States are investigated in order to evaluate what exactly this information allows us to say about the size of an implementation gap in the EU context. Owing to various problems inherent in the data published by the Commission and based on an analysis of what environmental policy implementation is in practice -as opposed to what the legal definitions might suggest- this chapter shows that implementation of EU environmental policy comprises much more than simply putting into practice objectives defined at an EU level, and much more than monitoring and control. Based on this we suggest to take an alternative, more general view on the efficiency of implementation and the implementation gap, which is related to the subsidiarity principle, one of the European Union's guiding principles for policy-making.

The chapter is divided into three parts. The first part asks what implementation is in the EU context when taking a traditional view on implementation as suggested by the European Commission. The second part investigates the European Commission's assessment of implementation outcomes. Looking critically at the Commission's assessment of, and its view on, the implementation gap, the third part of the chapter studies what the subsidiarity principle means for policy implementation and the potential efficiency of an implementation gap.

Part I Environmental policy implementation in an EU context

Environmental issues attract an important portion of European Union policy efforts, with more than 200 pieces adopted in the period between the 1970s and the mid-1990s. European environmental policy faces the double challenge of not only covering practically all environmental issues (atmospheric pollution, water quality, waste management, soil protection and noise) but also of accommodating very heterogeneous national situations of different Member States (regarding administrative and legal systems, pre-existing legislation and standards, organisation of economic sectors such as productive capacities, etc.). Implementation of EU environmental policy is a subject that has attracted increasing interest.

This first part focuses on the definition given to implementation by the European Commission and on the enforcement tools available at a European and national level to put European policy into effect. It describes the legal framework and rules, analyses the political processes that have led to certain adjustments of the framework and evaluates what this implies for environmental policy implementation in practice.

2 Implementation according to the Commission's definition

There is no doubt that implementation is of central importance to the effectiveness of policy making. But what exactly does implementation consist of in an EU context, which activities does it comprise? A first understanding of what implementation is can be gained by considering the Commission's own definition. Note that this definition depends on the actual *policy instrument* chosen. The instruments available to carry out the European Union's tasks in accordance with the provisions of the European Union's Treaty are defined in article 189 (new numbering 249).¹ Since the EU environmental policy is generally issued in the form either of regulations or directives, in what follows the focus will be on these two instruments.

According to article 189 a '*regulation* shall have general application', 'it shall be binding in its entirety and directly applicable in all Member States'. A *directive*, on the other hand, 'shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

Throughout this chapter a focus is put on directives, as the EU policy studied in later chapters is of that type. In its communication 'Implementing community environmental law' to the Council of the European Union and the European Parliament, of 22 October 1996 (COM(96)500), the Commission defines implementation, depending on whether Council Regulations or Directives are concerned, as comprising two or all of the components presented in Box 2.1 respectively (COM(96)500, Annex I).

Box 2. 1: The European Commission's definition of implementation

Transposition, i.e. 'any legislative, regulatory or administrative binding measure taken by any competent authority of a Member State in order to incorporate into the national legal order the obligations, rights and duties enshrined in Community environmental directives. Transposition thus includes not merely the reproduction of the words of a directive in national law, but also any additional provisions, such as the amendment or repeal of conflicting national provisions, which are necessary in order to ensure that national law as a whole properly reflects the provisions of a directive. In some Member States transposition measures have to be adopted at national/central level only, while in some others, regional authorities have exclusive competence in certain fields of environmental policy [...] It may also happen, that both levels have to take transposing measures in case of shared competencies.'

Practical application, i.e. 'incorporation of Community law by the competent authorities into individual decisions, for instance when issuing a permit or devising executing a plan or programme. Community legislation is directly applied by national authorities in case of regulations and directly applicable provisions of directives. However, once a directive is correctly transposed, it is applied through the national transposing measures. It also includes providing the infrastructure and provisions needed in order to enable competent authorities to perform their obligations under Community law and to take the appropriate decisions.'

Enforcement, i.e. 'all approaches of the competent authorities to encourage or compel others to comply with existing legislation (e.g. monitoring, on the spot controls, sanctions and compulsory corrective measures) in order to improve the performance of environmental policy [...]'

This definition follows a top-down logic. It starts with the adoption of a policy and follows the chain of actors successively responsible for applying the policy. This logic leads to the determination of implementation steps. Whereas in the case of directives implementation of European environmental policy consists of three steps, transposition is not necessary in the case of council regulations, which are directly applicable in Member States. However, although directly applicable, council regulations may sometimes need national legislation to supplement them. Competent authorities may have to be created or

¹ On a general level, the following instruments are distinguished: regulations, directives, decisions, recommendations and opinions.

sanctioning systems to be developed. This is then considered as part of practical application. Although the definition is restricted in its scope to actors formally part of the implementation chain and the regulated agents themselves, it gives an idea of the complexity of implementation processes. Not only, as far as practical application is concerned, also the transposition of legislation may involve and concern various actors and administrative levels.

Given that compliance is generally costly for the regulated agents, it may be necessary to apply coercion to ensure that policy objectives are met. In line with this the European Commission's definition of implementation suggests that within the implementation process, enforcement is of crucial importance. This suggests taking a closer look at enforcement measures available for EU policies.

3 Three channels for the enforcement of EU environmental policy

With the above given definition of implementation, the Commission establishes shared responsibilities between the supranational bodies and the Member States. This is also reflected in the Treaty of the European Union:

The prime responsibility for implementation is allocated to the Member States (article 130s, new numbering 175), but the EU is indirectly involved in implementation. This is laid down in article 155 (new numbering 211) establishing the Commission's duty to act as 'guardian of the Treaty' and to ensure that measures adopted under the Treaty are applied.

While, with respect to the above given definitions, transposition and practical application are solely in the Member States' responsibility, both European and national institutions share responsibilities and are involved in enforcement activity. The formal division of EU and national enforcement tasks is the following: EU institutions control the Member States and to this end dispose of enforcement tools against Member States who fail to correctly transpose or apply legislation (cf. sub-section 3.2). They do however not dispose of enforcement tools directly towards competent authorities and regulated agents. Enforcement towards the latter two is the domain of the Member States themselves (cf. 3.1). Finally, there exist also two enforcement channels that can be used by individuals in the Member States (cf. 3.3) and which are a complement to the EU's enforcement tools against Member States.

3.1 Enforcement by Member States – an enforcement channel not specific to EU policy implementation

Member States are responsible for enforcement once the EU legislation has become nationally binding law. In the case of directives this is the case once transposition is achieved. In the case of regulations, directly applicable in national law, the Member States are responsible for their enforcement from the day they come into force. Note that this first enforcement channel is not EU policy specific, but applies similarly to the implementation of domestic policies.

In case of environmental directives directed at industrial pollution, enforcement of practical application within Member States takes place at least at two different levels. Enforcement may, firstly, be directed at competent authorities responsible for the correct practical application of the legislation. This may concern issues such as drawing up plans, following procedures, granting information, correctly incorporating requirements in operation permits, making assessments, providing reports (Haigh, 1997/1998) and controlling (monitoring and enforcing) compliance with the law in daily operation. Enforcement of this step of practical application is, generally, fulfilled by higher level administrative or political bodies against lower level authorities. Secondly, enforcement is directed at the regulated agent himself, ensuring, for example, that individual plant requirements specified in operation permits or over-arching targets laid out in plans are complied with. This is generally the task of enforcement authorities themselves, which, depending on the country, can be situated at a central or local level.

Commission attempts to increase the homogeneity of approaches

In practice, monitoring and enforcement effort taken and mechanisms applied at a Member State level differ between countries. This is not astonishing, given the heterogeneity of national traditions, policy styles and administrative systems in the Member States, an issue taken up again in chapter 3. While this disparity actually seems to be in line with the European Treaty's article 5 (new numbering article 10), which, according to the Court of Justice's interpretation², binds Member States to make whatever provision for enforcement is effective, proportionate, and equivalent to that for Member State's national laws, the Commission showed discontent about this heterogeneity across Member States (COM(96)500).

A similar view is taken by other Community institutions. The Council, in its resolution 'on the drafting, implementation and enforcement of Community environmental law' (97/C 321/01) of 7 October 1997, gives central importance to appropriate monitoring and sanctioning schemes. It considers that 'inspection is an essential prerequisite to achieve the objective of an even practical application and enforcement of environmental law in all Member States' (97/C 321/01, paragraph 15). The finding that an even enforcement, so far, has not been the rule led to a suggestion by the Commission to develop *Community-wide minimum criteria and/or guidelines for inspection tasks* to be carried out by Member State authorities (COM(96)500; 97/C 321/01). Guidelines for inspections were eventually set up in a Council Recommendation (COM(1998)772 final) adopted by the Commission on 16 December 1998, based on a study prepared by the European Network of the Implementation and Enforcement of Environmental Law (known as IMPEL network). Guidelines relate to both the organisation and carrying out of inspection tasks and follow-up and publicity for the results of inspections. They concern environmental inspections of industrial installations and other controlled installations whose air emissions, water discharges or waste activities are subject to authorisation, permit or licence under Community law (excluding nuclear inspections) (European Commission, 2000: 9).

The creation of a *European implementation and enforcement network* itself actually was a second response to the finding that the effectiveness of application and enforcement differs across the Member States. This network, originally known as 'Chester Network', was created in 1992 (COM(96)500). It was established as a network of representatives of national authorities and the Commission in the field of enforcement, primarily aimed at the exchange of information and experience in the field of compliance and enforcement, and at the development of common approaches at a practical level. As the Community's Fifth Environmental Action Programme (OJ C 138) called for a similar body, the Commission and Member States agreed in 1993 to give the network a wider mandate for the application and control of legislation. The modified network became known as IMPEL (SEC 1999/592: 15). The network deals with technical, procedural and legal aspects of permitting, compliance monitoring and inspection, and the management of enforcement processes³. It provides a forum for professional regulators to exchange information about enforcement methods used and has, amongst other things, the task to ensure better implementation and enforcement by regional and local bodies (SEC 1999/592: 15).

² Judgement of 21.09.1989, case 68/88 (1989) ECR 2965, points 23 and 24 (COM(96)500).

³ More precisely, until 1997 it focused on the regulatory chain in connection with industrial installations and their impact on the environment, reflecting the fact that its founding members were inspectors and enforcers in the Member States. In 1997, in line with the Commission's 1996 communication on implementation and related Council and Parliament resolutions, IMPEL took on a wider role and scope (European Commission, 2000: 27).

3.2 Top-down control of implementation by EU institutions

In cases where EU legislation is not properly implemented by Member States -be it that a law is not (correctly) transposed or, despite transposition, not correctly applied- the Commission may hold Member States liable for the lack in implementation. The formal power of the Commission to exercise its responsibility of ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied (article 155, new numbering 211) is provided by article 169 (new numbering 226). It gives the Commission power to bring infringement procedures against Member States and to involve, where necessary, the Court of Justice. Following Börzel (2003), one can distinguish five types of possible non-compliance relevant to the context of EU environmental policy (cf. Box 2.2).

Box 2. 2: Five types of possible non-compliance with EU legislation

Violations of regulations: given that regulations are directly applicable, non-compliance takes the form of not, or not correctly, applying and enforcing European obligations, or not repealing contradictory national measures;

Non-transposition of directives: non-compliance is reflected in a total failure to issue the required national regulation;

Incorrect legal implementation of directives: non-compliance manifests itself in a wrongful transposition of a directive, through either incomplete or incorrect incorporation into national legislation;

Improper application of directives: non-compliance in practical application can relate to active violation of EU requirements, the application of conflicting national requirements or the passive failure to invoke obligations of a directive, for example failures to effectively enforce European legislation or to make available adequate remedies to the individual against infringements which impinge on his rights; and

Non-compliance with EU judgements: which refers to a failure by Member States to execute European Court judgements, once found guilty by the Court of Justice for infringement of European law.

The article 169 procedure - a lengthy enforcement process initially lacking power

Where the Commission considers that a Member State fails to fully comply with the provisions of Community legislation, it initially had recourse to a *formal four-stage procedure* (article 169, now article 226)⁴ as presented in Box 2.3.

Box 2.3 The European Commission's formal enforcement procedure against Member States before the adoption of the Maastricht Treaty

- It sends a **Formal Letter** informing the Member State about its believe that an obligation under the Treaty has not been met and gives the concerned State the opportunity to submit its observations. This step can be considered as formal notification of the infringement, but primarily serves the purpose of information and consultation, giving the Member State the opportunity to regularise its position.
- Depending on the answers received, the Commission decides whether to further proceed or not. If still dissatisfied, it sends a **Reasoned Opinion** to the Member State, setting out the legal justifications for commencing legal proceedings. The reasoned opinion also defines the deadline by which the Member State has to rectify the matter, and allows Member States one month time to respond.

⁴ A comparable procedure can also be initiated by a Member State, which considers that another Member State has failed to fulfil an obligation under the Treaty, and brings the matter before the Commission. The Commission is supposed to apply a procedure similar to the one described below. If however it does not take any action within 3 month, the Member State may bring the matter before the Court of Justice (article 170, new numbering 227).

Box 2.3 continued

- If the state does not comply with the opinion within the period laid down by the Commissions, the Commission may bring the matter before the Court of Justice. This *Referral to the European Court of Justice* is the Commission's last means to resort to in cases of persistent non-compliance.

Enforcement processes in the past, however, have seldom started directly with the 'article 169 procedure' (now article 226). Collins and Earnshaw (1993: 228) note that the Commission generally only embarks in this formal procedure once all other means have failed, meaning that extensive bilateral exchanges and negotiations with national authorities generally take place before the Commission starts to send out article 169 letters. Moreover, in cases other than those concerning a lack of notification of national measures towards the Commission, the formal enforcement procedure requires specific Commission decisions to proceed at each formal stage of the process (CEC, 1991: 206)⁵. This explains one problem related to the enforcement procedure, namely that it used to be rather lengthy and formal,⁶ a fact that was also acknowledged by the Commission itself (COM(96)500). In general, as court cases tend to be long, put a burden on the Commission's resources and endanger the goodwill of states, decisions to take cases to court are not easily taken. This may explain why 80% (or more) of proceedings are settled before they go to court, as claimed by Jordan (1999: 81)⁷. This fact is supported by Commission statistics on cases under examination in 1998, 2000 and 2001 (cf. Table 2.1). According to Table 2.1, only around 8% to 9% of cases had reached the court stage in the first two years, while their number reached 13% in 2001.

Table 2.1: Cases under examination as of 31st December 1998, 2000 and 2001 in the environment sector

	Cases under examination	Cases for which the infringement procedure has been opened		Cases for which a reasoned opinion has been sent		Cases brought to the European Court of Justice		Cases for which the article 171 (new numbering 228) procedure has been opened		Cases for which an enforcement proceeding was applied
		Total	Nbr. of cases	% of total	Nbr. of cases	% of total	Nbr. of cases	% of total	Nbr. of cases	% of total
1998	772	321	41.58	203	26.30	58	7.51	14	1.81	77.20
2000	1113	406	36.48	193	17.34	80	7.19	13	1.17	62.17
2001	1378	505	36.65	323	23.44	149	10.81	33	2.39	73.29

Source: COM(1999)301, Annex I, Table 2.4; COM(2001)309 final, Annex I, Table 2.4; COM(2003)669, Annex II, Table 2.5; own calculations

More recently, however, the Commission has reported that measures taken to improve and speed up the handling of cases were successful. Not only did the number of proceedings increase, also the speed with which decisions were taken increased. In a two-year comparison the Commission emphasises that 48% of the Article 169 letters and 19% of the reasoned opinions sent out in 1998 (all sectors) concerned cases which started in the same year, whereas the shares were 25% and 1% respectively in 1997 (COM(1999)301 final)⁸.

⁵ Cited by Collins and Earnshaw (1993): 229.

⁶ Collins and Earnshaw (1993: 233) state that several months can pass between a decision on a proceeding and the actual start of the procedure and that more than 3 years can elapse between the decision to proceed against a country and a judgement by the Court of Justice. Jordan (1999: 80), quoting Krämer (1995), even mentions an average delay of 6 years between the Commission first receiving a complaint and a judgement by the Court.

⁷ This author quotes reports that the Commission generally only resorts to court proceedings when diplomatic channels are exhausted (Jordan, 1999).

⁸ The Commission explains the improvements as follows. While previously all but the most urgent infringement cases had been considered in 4 periodic reports per year, since April 1998 fortnightly meetings,

A further problem, until recently, was posed by a lack of sanctions. The Court of Justice's judgement, following after the third step of the Commission's formal infringement procedure, had only declaratory effect and could at most have an effect on the country's political reputation. Moreover, the pressure Court judgements could exert via reputation effects until the 1990s was quite low given that infringement measures were frequently kept away from the view of the public. In a resolution adopted in November 1991, the European Parliament requested the Commission to henceforth forward Formal Letters sent to Member States also to the Parliament for information (OJ C 326, 16/12/91: 189)⁹. As far as decisions to issue reasoned opinions or referrals to Court are concerned, since 1996, they are published by means of press releases, in order to increase transparency (COM(1999)301 final).

Evolution in the procedure - the introduction of penalties

Changes to the European Union's enforcement means came with the Maastricht Treaty, which, in an attempt to improve the European Union's effectiveness of enforcement, introduced fines (lump sum or penalty payments) against Member States failing to comply with judgements of the Court of Justice under article 171 (new numbering article 228). The process applying to sanctions is summarised in Box 2.4, which illustrates that applying sanctions is a lengthy process.

Box 2. 4: The European Commission's formal enforcement procedure after the adoption of the Maastricht Treaty

The process of applying such sanctions requires that the article 169 procedure has been followed as described in Box 2.3 and the case dealt with by the European Court of Justice (ECJ) in an *ECJ Judgement*. In this judgement, according to article 226, the Court decides whether to dismiss the legal action of the Commission in favour of the Member State or whether to grant the Commission's legal action.

If a country was judged by the ECJ to violate European law, and the Commission's legal action is granted, and if the Member state refuses to comply with the ECJ judgement, the Commission can open an *Infringement Proceeding for Post-Litigation Non-Compliance*, as set out in article 228 and can ask the Court to impose financial penalties. However, before opening a post-litigation infringement proceeding, the Commission has to re-initiate the article 169 (now 226) procedure. And only if a Member State then still fails to comply within a defined time can the Court decide to apply a sanction.

As an example, consider the sanction according to article 171, which was applied to Greece in July 2000. The country was condemned to pay a sanction of 20,000 € per day of non-compliance starting from the date of the judgement. The infringement Greece was punished for was related to non-compliance with two landfill directives dating back to the mid-1970s¹⁰, which required Member States to bring landfills into compliance by 1 January 1981! This case is also an example of the delay possible between the Commission taking knowledge of an infringement case and the end of such a procedure. It was back in 1988 that the Commission had first gained knowledge about the existence of the illegal landfill which is in the centre of this infringement procedure (Le Monde, 5 September 2000). 12 years had thus elapsed between taking notice of the case and the court decision.

devoted specifically to the application of Community law, were introduced, which the Commission believes has increased efficiency in dealing with cases. Furthermore, correspondence prior to the sending of article 169 letters declined, by restoring article 169 letters to their genuine function of seeking observations. Finally, in 1998, internal Commission rules were amended so that decisions relating to article 169 letters and reasoned opinions are notified in the week they are taken. Prior to this, the time required for such notification could be measured in months (COM(1999)301).

⁹ Cited by Collins and Earnshaw (1993: 229).

¹⁰ Directive 75/442 of 15 July 1975 and Directive 78/319 of 20 March 1978.

Limited resources and powers force the Commission to rely on Member States' and societal reporting

Other than the previous lack of sanctions and the lengthy procedure, the Commission itself points to further difficulties related to the Community's enforcement channel via articles 169 and 171. Given the variety and number of actors involved in the daily application of regulations and directives, the Commission and the Court of Justice claim they would be under too great a strain if they had to deal with all legal issues arising from implementation on a Member State level. Furthermore, it would be impossible for the Community judicial enforcement system to take into account the legal and administrative structures at all Member States' national, regional and local levels, through which Community policy is implemented. Finally, the Commission considers its ability to monitor correct implementation as restricted, stating that it is unable to monitor correct application on a local level (COM(96)500). Firstly, given the number of individual decisions involved in practical application, monitoring these in each Member State would be a sheer impossible task for a single (supranational) enforcement agency. Secondly, the Commission has no inspection powers in the field of the environment and has therefore to rely on Member States reporting deficiencies in implementation (COM (96) 500; Collins and Earnshaw 1993: 231). Given that Member States' governments may not find it in their interest to communicate information that may result in proceedings against them, the Commission relies increasingly on complaints of individuals and non-governmental organisations signalling the failure of Member States to correctly implement Community environmental policy in practice (Collins and Earnshaw, 1993: 231; COM(1999)301 final: 62).

It is frequently assumed that monitoring a lack in transposition -facilitated by the requirement of Member States to notify transposition, i.e. to communicate the laws and measures taken to transpose a directive- and detecting non-compliance of Member States with other reporting requirements, poses less problems to the Commission. However, notification and checking the completeness and correctness of transposition are more complicated than it seems on first sight. Firstly, Member States are required to communicate to the Commission the texts of the provisions of national law which they adopt to implement a Directive. But different texts may be required where, for reasons of federal or administrative structure, competence for introducing legislation is shared between the regions and the national government. National laws may also have to be supplemented by administrative documents (circulars, technical advice). This complexity is also mentioned as a possible explanation for why Member States frequently fail to communicate texts on time (Haigh, 1997/1998). Secondly, also the detection of non-compliance with other reporting requirements is not free of difficulties, as national reports on implementation apparently remain partial (see for example Collins and Earnshaw, 1993).¹¹

Table 2. 2: Suspected infringements and their origins (all sectors)

	1988	1994	1996	1998	2000	2001	2002
Complaints	929	1145	819	1128	1225	1300	1431
Cases detected by Commission	842	288	257	396	313	272	318
Of which:							
Parliamentary questions	82	5	22	18	15	5	30
Petitions received by Parliament	8	6	4	7	5	1	20
Non-communication	NA	NA	1079	610	896	607	607
Total	1771	1433	2155	2134	2434	2179	2356

NA= no data available, the totals of the years 1988 and 1994 are therefore not comparable to those of later years. Source: Jordan, 1999: 80; COM(1999)301, Annex I, Table 1.1; COM(2001)309 final, Annex I, Table 1.1; COM(2003)669, Annex I, Table 1.1

¹¹ In order to improve the possibilities of evaluating policy outcomes and the effectiveness of directives, a Council Directive (91/692/EEC, OJ L 377 of 31 December 1991) was adopted in 1991 to standardise and rationalise reporting requirements.

The fact that the European Commission increasingly relies on complaints of individuals and non-governmental organisations is reflected by the data given in Table 2.2. It shows, for the period 1988 to 2001, an increase in complaints brought towards the Commission, while cases detected by the Commission itself decreased. Even when adding up the cases where Member States failed to communicate required information to the Commission and the other cases detected by the Commission, their overall number has clearly been outweighed by that of complaints brought towards the Commission.

There may however be a disadvantage to the complaints system, as noted by Haigh (1997/1998), in that it may distort the selection of infringements the Commission deals with. The Commission may be tempted to focus its attention to those infringements complained about and neglect possibly more important ones. Furthermore, countries with well-developed non-governmental organisations (NGOs) tend to be subject to more complaints than other countries, whose infringements may be more serious¹². Finally, there is also a risk that complaints may focus primarily on 'visible' pollution and not necessarily on the most important cases of non-compliance in terms of related pollution and health hazards.

3.3 A complementary enforcement channel: bottom-up enforcement by individuals

There exists yet a further problem with respect to the top-down channel. Despite the fact that any person may complain to the Commission of suspected infringements of Community law by Member States and request the Commission to act according to article 169, individuals have no power to compel the Commission to do so. Instead, the Commission has complete discretion in this matter. As the provisions of articles 169 and 170 proved insufficient on their own to ensure the effective enforcement of EU law it was left to the Court to provide alternative routes whereby individuals' Community rights might be protected, and Community obligations challenged, in actions before national courts.¹³ This was achieved through a number of principles introduced in the Community law. The two most important ones are the *principles of direct effect* and of *state liability in damages* (the latter based on the principles laid down in *Francovich vs. Italian State*) (Steiner, 1995). They constitute a bottom-up enforcement channel, which is led by individuals initiating complaints and investigation procedures that involve national courts.

The principle of direct effect

The principle of direct effect refers to Community law, which may be invoked directly by individuals before their national courts. Its objective is both to protect individuals' Community rights and to further the enforcement of Community law against Member States failing to correctly implement legislation (Steiner, 1995: 14). While regulations are defined as directly applicable (article 189, new numbering 249), not requiring transposition into national law but instead being directly effective -exactly what is required by the principle of direct effect- this is less obvious in the case of directives which leave discretion with respect to how to incorporate the policy objective into domestic law. Directives are frequently addressed to the Member State only, without directly conferring rights (or obligations) to citizens. Still the non-implementation of a directive, by this failing to reach its objective, may entail disadvantages for individuals. To prevent such disadvantages, the Court of Justice has determined that a citizen can plead that a directive has direct effect in actions in the national courts to secure the rights

¹² As Jordan (1999) claims, the number of such complaints is highly influenced by factors such as national complaints traditions of citizens and NGOs and media approaches towards environmental issues.

¹³ Community law is capable to give rise to rights and obligations for individuals, which may be invoked before Community courts and, to a lesser extent, before domestic courts. Although national courts are in principle not obliged to provide special remedies and procedures based on EU law, they are obliged by their general obligation under EC law and by European Court rulings to ensure judicial protection for individuals' Community rights (Steiner, 1995: ix).

conferred by it. The Court of Justice defines 'direct effect' in case of directives as presented in Box 2.5.

Box 2. 5: The principle of direct effect

According to the Court of Justice's definition direct effect of directives can be pleaded, provided that

- the provisions of the directive lay down the rights of the EU citizen/firm with sufficient clarity and precision;
- the alleged rights are not conditional;
- the national authorities may not be given any room for manoeuvre regarding the content of the rules to be enacted; and
- the time allowed for implementation has expired.

Source: Borchardt, 2000

The principle of direct effect in the case of directives is thus based on the Court's view that a Member State is acting unlawfully when failing to adapt existing laws to requirements of an EU directive. Once the period for transposition expired, directives acquire full legal force and effect. All state bodies are then obliged to interpret and apply national law in accordance with the directive, i.e. interpret law in line with Community law. In practice, the Court has applied the principle only in cases between a citizen and a Member State ('vertical direct effect'), and only if the directive was for the citizen's benefit¹⁴ (Borchardt, 2000: 67).

The principle of state liability

While, according to the principle of direct effect, the state may be held liable to individuals for breach of directly effective Community law, there was, until 1996, no general principle of state liability in damages for breaches of Community law in the absence of direct effects (Steiner, 1995: 20). In its judgement of the case 'Francovich versus Italian State' (Joint Cases C-6/90 and C-9/90 (1996) ECR I-5357; cf. Box 2.6), the European Court went a step further. It established that Member States are liable to pay damages caused by failure to (correctly) transpose a directive.

Box 2. 6: The Francovich case

In the case concerned Italy was accused -by Andrea Francovich and several other Italian workers who were owed arrears of wages and sought compensation, and whose employers were insolvent- of non-implementation of Directive 80/987/EEC on the protection of employees in the event of the employer's insolvency. This Directive required Member States to set up guarantee funds, funded by employers, the public authorities, or both, to guarantee the employees' rights to remuneration in the event of their employer's insolvency.

There were several reasons why the right of continued payment of the guarantee fund for unemployed workers established by the directive could not be given direct effect and thus not be enforced against national authorities. The directive had not been transposed, the guarantee fund not been established and the debtor could not clearly be ascertained. Therefore, the Court decided that by having failed to implement the directive, Italy had deprived the workers of their right and thus was liable to damages.

Source: Steiner (1995); Borchardt (2000)

With this decision, the Court created a precedent for obtaining compensation for deprivation of rights when Member States fail to implement Community law. However,

¹⁴ It has not applied this principle between citizens themselves ('horizontal direct effect'), on the grounds that private individuals cannot be held responsible for consequences of the State's failure to act.

the legal basis is far from being assured, and according to Steiner (1995: 22) many questions remain open, for example: whether the principle of state liability only applies to cases concerning the non-implementation of directives, or whether it applies to any breach of EC law for which a Member State is responsible; and whether the breach must be culpable.

Uncertainties in enforcement procedures

In practice, uncertainties exist with respect to the application of both the direct effect and the state liability principles. A restriction to the application of the *direct effect principle* lies in the requirement that the concerned law must be sufficiently clear and precise in laying down the rights of the EU citizens. Although some directives on environmental protection specify objectives in such a detailed way as to leave the Member States with scant room to manoeuvre, this is not always the case. Frequently directives establish rather programmatic objectives, in which case the Member States are left with a large degree of discretion.

With respect to the *principle of state liability*, evidence on the real impacts to invoke EU law before national courts is limited except for the UK. For this country Chalmers (2000) has established a comprehensive review of the cases where EU law was invoked before British courts. For the period 1971 to 1998 EU law was invoked before British courts in 1088 cases, out of which only 39 fell in the field of the environment. Although one finds a recent acceleration, with 31 cases having occurred between 1995 and 1998 (cf. Chalmers, 2000: table 2), the numbers draw a pessimistic picture of the genuine impacts of these legal possibilities. This is even more so as environmental law was successfully invoked before British courts only in 8 cases (cf. Chalmers, 2000: table 5).

Commission suggestions for the improvement of enforcement and implementation

In order to improve the basis for enforcement and thus for successful implementation, and hoping that this would also help relieve the work load of European Courts, the Commission (COM(96)500) suggested two complementary means for the handling of environmental complaints at a Member State level. One aims at improving non-judicial complaint (investigation) procedures in Member States, the other at improving access to justice of NGOs and the general public.¹⁵

With respect to the former, the Commission considered making recommendations for the establishment of minimum criteria for the handling of complaints and carrying out of environmental investigations in Member States. By this it aimed to make a quick and low cost settlement of complaints accessible to citizens without any need for legal assistance. With respect to the latter approach, the Commission considered guidelines for the access to national courts by representative organisations. These suggestions have been dealt with in the UN/ECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (the Århus Convention), which, in 1998, was signed by all EU Member States. However, before being able to ratify the Convention, the Community had to ensure that all relevant Community legislation was aligned to the provisions of the Convention (European Commission, 2000). The main instrument to align Community legislation with the provisions of the Århus Convention on public participation and which introduces rules on access to justice is Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003.¹⁶ It provides for public participation in the drawing up of certain plans and programmes relating to the environment and amends Council Directives 85/337/EEC and 96/61/EC with regard to public participation and access to justice.

¹⁵ In this context the Commission states a preference for non-judicial complaint investigation procedures over judicial litigation in order to avoid costs and delays involved in the latter approach.

¹⁶ OJ L 156 of 25.6.2003.

Summing up, the top-down and bottom-up enforcement procedures against Member States involve various uncertainties and problems: delays in proceedings and necessary reliance on complaints for the article 169 (now 226) procedure, and insecure legal bases for procedures initiated by individuals. One might hence wonder whether this has an impact on implementation. Is the fact that enforcement is limited reflected in the implementation outcomes? And how are these assessed by the European Commission?

Part II The European Commission's assessment of implementation outcomes

Based on the identified problems inherent in the available enforcement channels, part II reviews the type of data and information published by the European Commission. It analyses which conclusions these data allow us to draw with respect to the compliance of Member States with EU environmental policy and hence with respect to an implementation gap. Prior to this, we also shortly trace the evolution of the implementation gap issue as a political concern in its historical context.

4 Concern about an implementation gap

In its early phase of environmental policy making, the Community emphasised rule-making over checks on policy implementation by Member States. Only in the mid-1980s the phenomenon of an 'implementation deficit' did become obvious and the interest consequently turned to policy implementation. Currently, the European Commission puts a strong emphasis on implementation measures. This is reflected in two citations with which the Commission starts its 1996 Communication on implementing Community environmental law (COM(96)500): 'The credibility of the European Union itself rests in part on its ability to implement and enforce legislation' and 'Implementation is a fundamental issue for the protection of the environment ...'¹⁷. This has not always been recognised so clearly, as discussed below.

4.1 Delayed recognition of the importance of implementation and enforcement

Although the Community began to issue environmental legislation in the 1970s and by the mid-1980s had adopted more than 200 environmental statutes (Jordan, 1999: 75), it is widely acknowledged that the importance of implementation and enforcement, as opposed to simply having the laws in place, was recognised only recently (HOLSCEC, 1997/98). Throughout the first decade of EU environmental policy making, not much attention was paid to its implementation. Consequently, the first three Action Programmes on the Environment (adopted in 1973, 1977 and 1983)¹⁸ did not recognise the importance of implementation. It was only in the 1980s that concern about implementation rose and that the EU policy's implementation became a political issue (Haigh, 1997/1998). Since then, discussions have centred on the issue of an 'implementation deficit' or 'gap'.

The term 'implementation gap', in the language of the Commission, describes a shortfall between the objectives established in a particular policy -laid down in directives for example- and its practical effect in Member States (Jordan, 1999: 72).

In a simple way, mirroring the legal view adopted by the Commission, the term 'implementation gap' describes therefore a discrepancy between objectives and implementation results.¹⁹ With this, the Commission takes a legal view on implementation which focuses on the size of the implementation gap.

¹⁷ The first citation quotes Ken Collins, Chairman of the European Parliament's Environment Committee, the second quotes Ritt Bjerregaard, European Commissioner for the Environment.

¹⁸ OJ C 112, 20.12.1973, OJ C 139, 13.6.1977 and OJ C 46, 17.2.1983 respectively.

¹⁹ The extent to which implementation outcomes equal policy objectives is in later chapters sometimes referred to as effectiveness. We use the term effectiveness in the sense of goal attainment or compliance with a policy's objectives, and not in the sense of an evaluation of a policy's objectives themselves.

4.2 How implementation became a political issue

Today, implementation deficits are an issue high on the policy agenda. What can explain this increasing attention paid to implementation? And why was implementation no central political issue before? Jordan (1999: 75-76) suggests several explanations. A first set of factors is related to policy making or the political cycle itself. By the mid-1980s a body of binding legislation had been established and the environmental agenda between Member States had become increasingly common. Both factors allowed actors to turn their attention to policy outcomes. In this context it is also important to note that the deadlines for implementation of many (water) directives adopted in the 1970s were set in the mid-80s. A further factor was related to an accident -the Seveso catastrophe- that gained the media political headlines. The disappearance of several drums of chemical waste from the Seveso factory, following the catastrophe, led to the establishment of the first European Parliament's inquiry committee, which in turn pushed the Commission to take a tougher line with respect to implementation of policies.²⁰ Members of the European Parliament forced the Commission to develop an improved surveillance apparatus and to publish reports on implementation²¹.

In parallel, as a third set of factors, academic, public and industrial interest in implementation increased. As far as industry circles are concerned, there was an increasing belief that comparable regulatory effort was a precondition for fair competition in the Single European Market. Growing public concern led to complaints by individuals and NGOs. Environmental campaigning also increased, with environmental groups starting to publish suspected breaches. Finally, academic interest in the impact of policy increased as well. A last factor is based on legal developments: Court rulings in the 1960s and 1970s with respect to the principle of direct effect established that directives were to be considered as real legal obligations giving rise to potential legal action both before national courts and the European Court.

4.3 Official documents reflect the rising concern for implementation issues

The rising attention paid to implementation issues is reflected in a series of publications documenting implementation efforts (including statistics on infringement proceedings) and outcomes. Amongst these are the Commission's annual reports to the Parliament on the application of Community law²², and the Commission's annual surveys 'on the implementation and enforcement of community environmental law', published since 1997²³. Also the European Parliament is reported to having taken an increased interest, since the end-1980s, in questions of implementation (HOLSCEC, 1997/98).

The importance of the implementation issue was verbally mouthed, and implementation was given increasing room, in official policy programmes. In 1987, the Council expressed the 'particular importance it attaches to the implementation of Community legislation' in the Fourth Action Programme on the Environment (1987-1992; OJ C 328/7.12.1987)²⁴, in which implementation became a cornerstone. A whole chapter was

²⁰ The Parliament adopted a Resolution in 1984 (OJ C 127/67 14.5.1984) censuring the Commission for having failed to perform properly its role as guardian of the Treaties, and for the failure to take the necessary measures vis-à-vis the Member States to implement the Directive on toxic waste (Directive 78/319; OJ L 84 of 31 April 1978) (Haigh, 1997/1998).

²¹ In a European Parliament resolution of 9 February 1983 the Commission was requested to draw up reports on the monitoring of the application of Community law (COM(1999)301 final).

²² The first of these, (COM(84)181), was published in 1984. These reports include an environment chapter, which, amongst other things, presents country and directive specific information on infringement procedures.

²³ They contain supplementary information on questions of policy and procedure and on the state of application of Community environmental law (SEC 1999/592). These surveys give detailed information on deadlines for required transposition of directives as well as details of Member States' transposing measures, including information on missing notification. While a majority of items mentioned refers to failures in transposition, failures in practical application are reported as well (see for example European Commission, 2000; COM(1999)301 final).

²⁴ Cited by Haigh (1997/1998).

devoted to this subject in the Fifth European Community Environment Action Programme (OJ C 138/17.5.1993; Jordan, 1999: 77; Collins and Earnshaw: 214). Finally, implementation is still considered as one of the main avenues for action in the Sixth Environment Action Programme of the European Community of 22 July 2002 (OJ L 242/10.9.2002). A further commitment was made by the heads of government in the European Council, in June 1990 at Dublin, through the 'Declaration on the Environmental Imperative' (Haigh, 1997/1998), acknowledging that Community environmental legislation will only be effective if it is fully implemented and enforced by Member States. In this declaration, the Council called for transparency, comparability of effort and information to the public, and the Commission was asked to conduct regular reviews and publish detailed reports on its findings.

Against this background, the Commission published its communication 'Implementing community environmental law' in October 1996 (COM(96)500), in which it acknowledges the existence of an implementation deficit. The Commission draws attention to two issues. Firstly, that notification of implementation measures by Member States was incomplete: in 1995, Member States had notified implementing measures for only 91% of the Community's environmental directives, implying an assumed non-transposition into national law of 9% of the directives²⁵. Secondly, complaints from the public, Parliamentary questions and petitions and cases detected by the Commission implied 265 suspected breaches of Community environmental law, amounting to more than 20% of all infringements registered by the Commission (in all sectors) in that year. Related to this, the Commission has, since 1997, additionally published the above mentioned annual surveys 'on the implementation and enforcement of community environmental law'. The Commission is also reported to having increased DG Environment staff dealing with implementation and to have become more vigorous in bringing cases before the Court of Justice.

It would be interesting to know what all this has changed in practice, whether the publishing of implementation data and the verbal commitments have resulted in improved implementation, and whether it is possible to assess how implementation and the stated implementation gap have evolved over time. Doubts in improvements may arise when considering statements made in a recent Commission publication, the 'Second annual survey on the implementation and enforcement of Community environmental law' (European Commission, 2000: 37). Based on an assessment of the results of the Fifth Environment Action Programme, the Commission points out that despite 30 years of environmental legislation the quality of the environment in general was not improving and that therefore a key focus should remain on implementation of environmental legislation. But what can the available implementation data tell about this issue?

5 What is the available evidence on an implementation gap and its size in environmental policy?

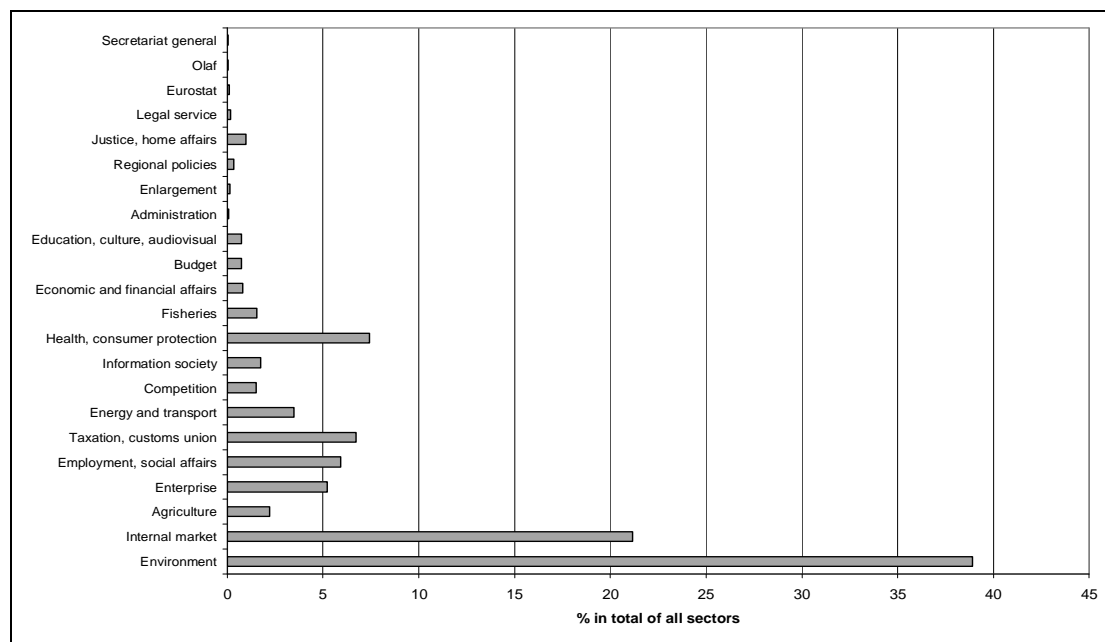
After the above discussion, it seems in order to identify which are the main implementation problems, to get a clearer view on which steps of the implementation process exhibit the largest implementation failures. One might assume that transposition of European law into national legislation might be less problematic than practical application on a local level and in day to day operation. Is this supported by official data? Are there differences between countries and if yes, do the countries show clear patterns of successful or unsuccessful implementation? What counts in the end for a legal view on implementation is obviously compliance in terms of practical application, as it is here where environmental objectives are met or not.

²⁵ This, however, is not necessarily true. As stated in the Commission's 1998 monitoring report (COM(1999)301 final: 59), enacted transposition measures are frequently notified with delay, leading to infringement proceedings even though there is no real need for them.

5.1 Indications of the relative importance of a gap in environmental policy implementation

With the focus of this chapter being on environmental policy implementation, it should first be assessed whether the implementation deficit is particularly large in the environmental area. The data provided by the European Commission suggests that this is the case. The environment and the internal market are the two sectors where by far the highest number of infringement cases is found (cf. Figure 2.1 and Table 2.3).

Figure 2. 1: Infringement cases in motion at 31st December 2002, percentage in total cases, by sector



COM(2003)669, Annex II, Table 2.4, own calculations

The proportion of cases under examination which belong to the environment sector was also the highest of all sectors in 2000, followed by the internal market sector (cf. Table 2.3).

Table 2. 3: Percentage of infringement cases in total cases of all sectors

	Cases under examination	
	1998	2000
Environment	25.91	32.94
Internal market	25.18	22.79

Source: COM(1999)301, Annex I, Table 2.4; COM(2001)309 final; Annex I, Table 2.4

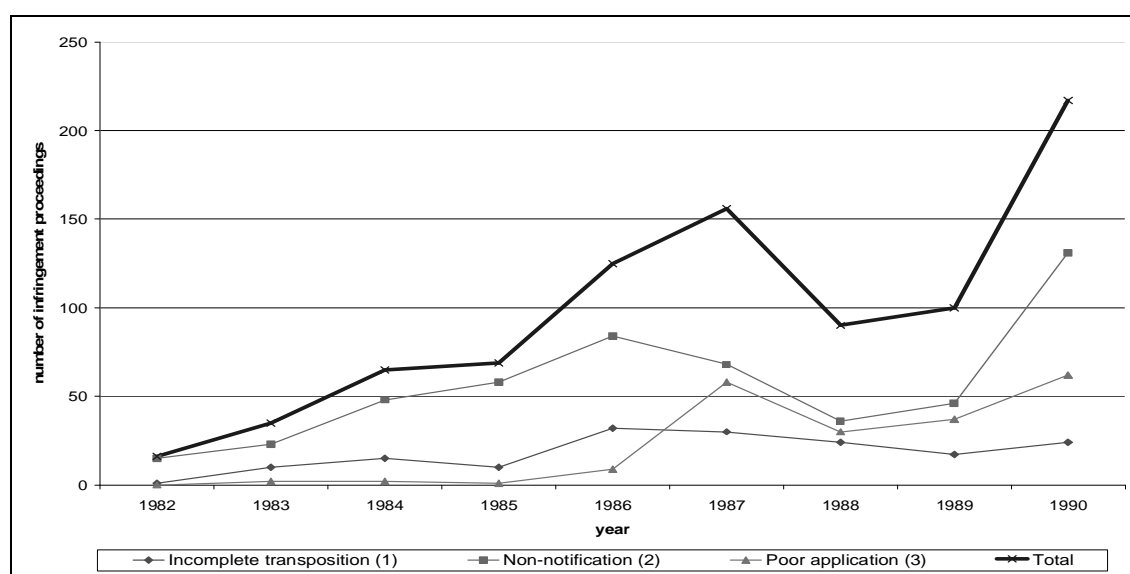
When it comes to formal proceedings taken against Member States, in 1998 more infringement proceedings had been opened in the internal market sector while more reasoned opinions had been sent, and more cases were brought to the ECJ, in the environment sector. In the year 2000, the number of all formal steps of the infringement procedure taken in the environment sector outweighed those taken in the internal market sector (COM(1999)301), Annex I, Table 2.4; COM(2001)309 final; Annex I, Table 2.4). That non-compliance with European environmental law is rather high relative to other policy areas is also supported by Börzel (2003), based on a data base including all infringement procedures which was put at her disposal by the European Commission in the framework of a European research project. According to this author, the average transposition rate of environmental Directives -91.9% in the period of 1978 to 1999- is close to the Community average of 92.5%, but a quarter of all complaints received by the Commission refer to the environment.

These findings established, below we only consider those data that relate to the environment area and, more specifically, to a gap in environmental policy implementation.

5.2 Which steps of policy implementation pose the largest problems?

To start with the issue of the main implementation failures, Figure 2.2 below presents data reflecting the steps of policy implementation which appear as most problematic. The Commission's data on three types of implementation failure which led to infringement proceedings in the period of the 1980s²⁶ indicates, firstly, a steep rise in all infringement proceedings (those due to incomplete transposition, to non-notification and also to poor application; denoted as 'total' in the figure). One might be tempted to readily conclude that throughout the 1980s Member States increasingly delayed implementation of European legislation. Secondly, the data seems to suggest that non-notification presents a greater problem than poor application.

Figure 2.2: Infringement proceedings commenced against Member States in 1982 to 1990 in the environment sector



(1) Cases where the measures introduced at the national level do not fully incorporate Community law, (2) Cases where Member States have failed to notify the Commission of their national measures, (3) cases where shortcomings in implementation in practice occurred. - Source: OJ, C338, 31 December 1991, presented in Collins and Earnshaw, 1993

Caution is however necessary when interpreting the data. First of all, they only present cases that led to infringement proceedings, but not the total number of suspected infringements of each type²⁷. One might wonder whether the Commission used to be less reluctant to proceed against easily verifiable failures, like those of non-notification, than against suspected failures that are more difficult for it to examine. Secondly, as noted above, the Commission is in a relatively better position to detect non-compliance with notification requirements. In order to detect poor application it frequently has to rely on complaints by Member States themselves, citizens or NGOs. Failure to detect poor application is thus more likely than failure to detect non-notification and the higher

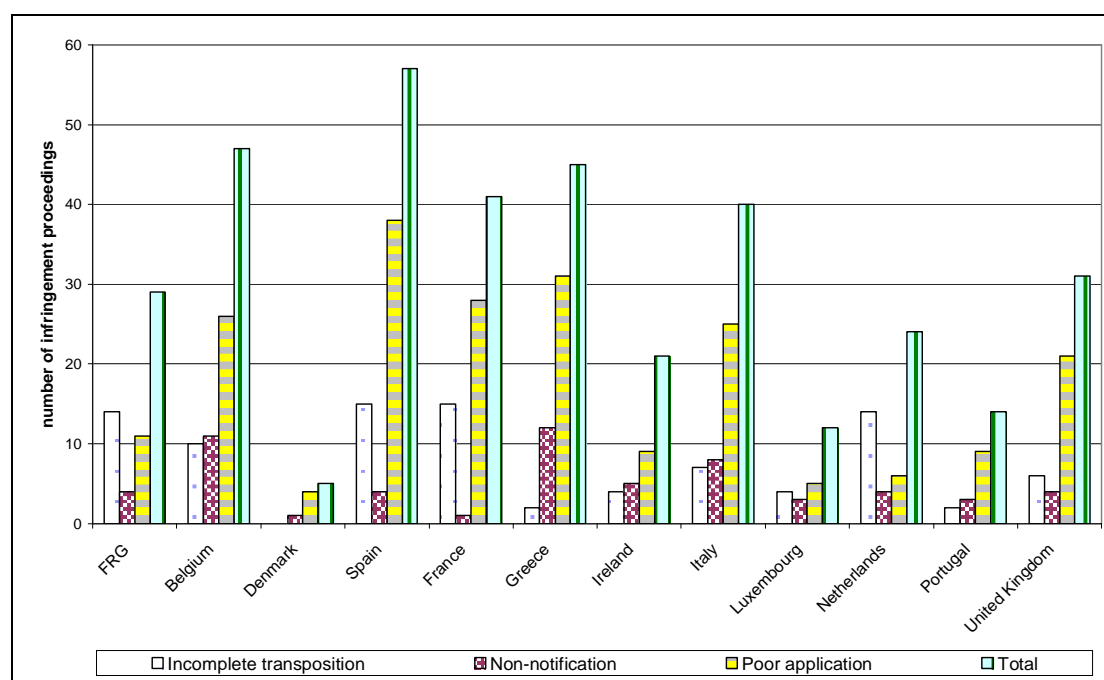
²⁶ More recently, the Commission has no longer published data on infringement proceedings in the environment sector and disaggregated to implementation steps.

²⁷ As noted before, the Commission relies on bargaining before entering into the formal enforcement procedures, and such informal channels do not appear in the statistics. As far as enforcement measures are concerned, the Commission's statistics are therefore likely to be incomplete (Jordan, 1999). This author furthermore claims that the Commission does not treat all cases alike, but tends to adopt tougher approaches in relation to high-profile cases. According to Jordan, there is no guarantee that these are the most serious or urgent cases.

number of non-notification proceedings may be due to this. Finally, there may also be a bias in the increasing number of infringement proceedings. As Jordan (1999: 81) suggests, it is unwise to rely on the Commission's data when searching for trends and patterns in implementation. The rise in infringement proceedings may better reflect the Commission's determination to increase enforcement than increasing implementation failures in Member States.²⁸ Börzel (2003) gives a number of reasons for why infringement procedures may rise even if the level of non-compliance does not increase: the number of legal acts in force, new Member States joining the European Union, more rigorous approaches to Member State non-compliance adopted by the Commission, and policy changes, such as the increased number of Formal Letters sent after 1996, issuing these as requests for information and no longer as warnings.

A consideration of data disaggregated by countries draws a different picture (Figure 2.3). These data seem to indicate that overall effective practical implementation of Community environmental legislation, for the majority of Member States, poses more difficulties than notification of transposition and correct transposition. According to Collins and Earnshaw (1993: 220), this has also been acknowledged by the Commission. Adding up the number of infringement cases per implementation failure across countries indicates a great importance given by the Commission to practical application issues. At the end of 1989 the majority of infringement proceedings commenced concerned poor application (213 out of 362 cases), while there were 60 infringement proceedings for non-notification and 90 for incomplete transposition.

Figure 2. 3: Infringement proceedings decided upon and current by 31 December 1989, by Member State



Source: Collins and Earnshaw, 1993, presenting the Commission report on implementation of EC environmental legislation, Commission of the European Communities, Feb. 1990

Börzel (2003) lists several examples of inconsistencies in the Commission's infringement data. Firstly, the Commission has several times changed the way in which it reports data, for example with respect to suspected infringements. To give just one example, between 1982 and 1991 it published data on complaints and on own investigations, between 1992 and 1997 it provided only one figure which did not relate to either of the previous two categories, and since 1998, the Commission has been reporting 3 figures: complaints,

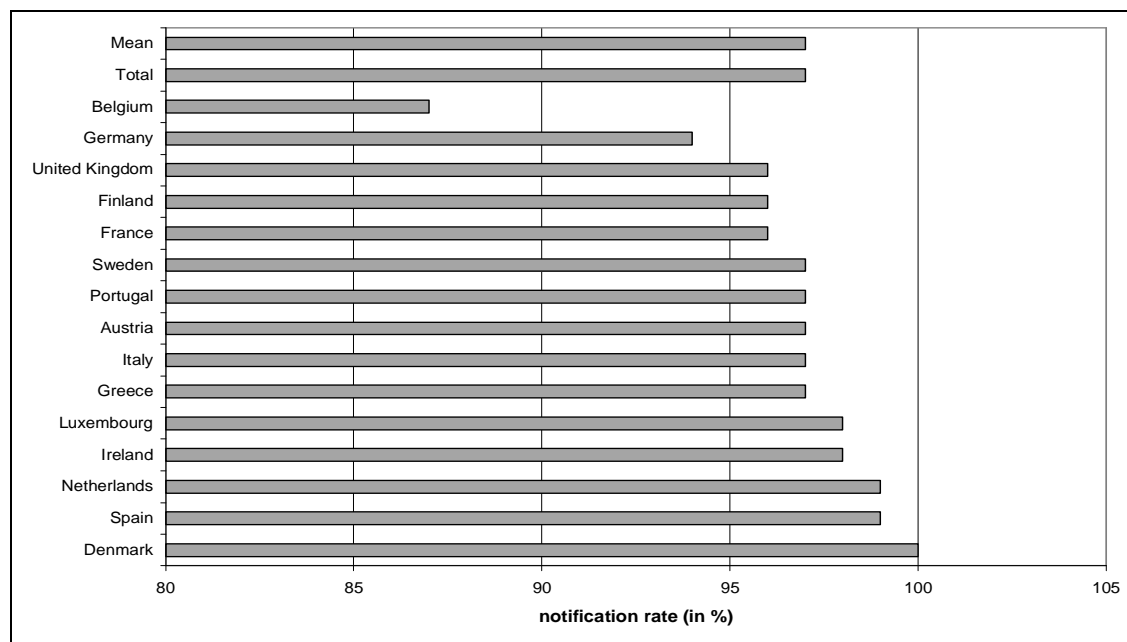
²⁸ A similar logic may also apply to the increasing number of complaints (cf. Table 2.2 above).

own investigations and non-communication of transposition. Whether the latter category was included in the earlier data or not remains unclear. Furthermore, transposition rates for Directives have not been published before 1990; since 1998, figures for suspected infringements are only given by Member State, while in previous years they had also been provided by sector; and established infringements are jointly reported by Member State and sector only in the 10th annual report for the years 1998 to 1992. And finally, the Commission stopped publishing Court Judgements in 1992. Inconsistencies are furthermore found between different types of data published by the Commission: aggregate data -summarising infringement proceedings by stage, Member State, sector or type of infringement- and raw data -listing individual infringement cases- which should make up the aggregate, but do show mismatches. Analysing the database on infringement cases the European Commission has put at her disposal, Börzel (2003) states as a reason for the latter inconsistency that the raw data, unlike the aggregate data, list only those infringement cases that are still open at the end of the year reported.

5.3 What are the patterns of Member States' implementation records?

Moving on to consider the performance of different Member States, it is worth noting that in its 'first annual survey on the implementation and enforcement of Community environmental law (1996/97)' (SEC 1999/592), the Commission presents statistics giving a general comparative view on Member States' notification records in 1997 for applicable directives in the environment sector (cf. Figure 2.4). In that year, Denmark, with 100% of notification, was the leader, whereas Belgium, with only 87% of implementation measures notified, was at the lower end of the spectrum. Furthermore, for the countries studied in chapters 5 to 7, the table indicates that Germany, the United Kingdom and France, in 1997, remained slightly below the European average, while the Netherlands showed an above average notification record.

Figure 2.4: Notification of implementation measures for environmental directives applicable by 31 December 1997



Source: SEC 1999/592, Table 2.8, adjusted

Interestingly enough, the ranking of countries indicates that the north-south divide generally assumed as valid, with southern (or Mediterranean) countries showing a less favourable compliance record, is not confirmed by the data on notification records. Some countries, generally assumed to be environmental policy laggards and/or with a low environmental policy record such as Greece, Spain and Portugal show a high rate of notification, comparable to that of Sweden. The rates are actually even higher than Germany's notification rate and this despite the fact that Sweden and Germany are

generally considered as countries where environmental protection is quite advanced. This, however, is not necessarily astonishing. Countries generally considered as environmental leaders and having a good reputation for environmental concerns may see no urgent need to formally comply with transposition requirements. It is possible that such countries comply or even over-comply with EU environmental standards, even though their formal national provisions may not be in line with EU directives. More specifically, if national legislation is more demanding, such countries may see no need to formally transpose the respective EU policies. To come to more telling conclusions one would rather need to compare the practical application of standards. On a more negative note, it would also be imaginable that countries considering themselves as environmentally pro-active may consider their approaches as superior over Community regulation, even if domestic standards do actually not meet EU requirements.

Although not coming to similar results for each single Member State, the finding of the invalidity of a generalised north-south divide is supported by Börzel (1999), who compares average transposition data over a 5-year period (1990 to 1995). Additionally, this author provides empirical evidence that both leaders and laggards face problems in complying with European environmental law. Her empirical evidence is based on data comparing the average percentage of suspected infringements, article 169-letters, reasoned opinions, references to the Court of Justice and judgements by country during the period 1988 to 1992.

For the year 1989, Figure 2.3 (above) underlines the differences not only between but also within Member States. An interesting example for the latter fact is Greece. While it was amongst the leader countries when it comes to correct transposition of laws -despite transposition frequently being late- its practical application record was rather poor. Unlike Greece, Germany, France and the Netherlands showed quite good notification records but rather bad records for correct transposition. And while the Netherlands had a good record for practical application, this record was rather medium in Germany and even worse in France. The only country showing similarly good records for all implementation steps was Denmark. These examples underline the fact that it is dangerous to deduce correct practical compliance from swift, or even from correct, transposition of EU legislation and *vice versa*. The case of Germany further supports the above finding that countries generally considered as environmental leaders do not necessarily comply with all EU environmental legislation. Summing up, the Commission data show no clear patterns across, and hardly any within, countries, at least not in a north-south divide. This finding suggests that in order to understand what drives implementation and implementation failures across Member States it is insufficient to resort to legal measures of implementation and enforcement. Rather one has to study countries and their specific implementation paths in detail, in order to explain implementation outcomes.

5.4 Why an assessment of the size of the implementation gap based upon the European Commission's data is difficult

While the Commission's data give some evidence for an implementation gap, the data is not sufficient to provide a clear measure of its exact extent. When coming back to the question of whether implementation has improved over time, Table 2.1 might suggest that this was not the case, and that instead implementation problems rose over time. Such an interpretation would however jump to conclusions. Firstly, the Commission data presents absolute numbers of infringement cases and no relative measures. Given that the number of environmental regulations has considerably increased over time, and without any information to which regulations implementation failures refer, it is impossible to judge how the relative implementation performance has evolved over time.²⁹ Furthermore, it is

²⁹ In its 'Reports on monitoring the application of Community law' the European Commission publishes information on specific infringement cases with respect to Treaties, regulations and decisions, stating the

conceivable that the increasing importance given to implementation has resulted in an amelioration of the knowledge about infringement cases. It is hence possible that it is not the number of infringement cases which has increased, but rather the number of infringement cases which actually have been detected.

When considering practical application more in detail, its evaluation is difficult not only because of a likely gap in infringement cases known to, and reported by, the Commission, or because of the inconsistencies within the European Commission's data set. In addition, the Commission statistics focusing on infringement procedures or breaches do not necessarily give an indication of whether the breach is widespread or a rare event. As Haigh (1997/1998) notes, for example in the case of a directive setting emission standards covering many installations and requiring authorisation and monitoring of each individual installation (such as the 1989 municipal waste incineration Directive studied throughout chapters 4 to 7), failure to meet the standard at any one plant on one occasion constitutes a formal failure of implementation by a Member State and could lead to an adverse judgement of the Court of Justice. This author therefore claims that an overall assessment of the practical application of environmental Directives is impossible and that practical application can only be effectively considered when examining each Directive in every Member State on a case by case basis.³⁰ Indeed, the Commission has proposed to launch and co-ordinate case studies to better 'evaluate the transposition, application and enforcement of selected provisions of Community environmental law' (COM(96)500).

Summing up, there is a large level of imprecision in the Community data and it is therefore impossible to exactly evaluate the size of the implementation gap problematic. This implies that it is difficult to assess implementation with respect to the Commission's legal and hence gap-size oriented view, which focuses on the discrepancy between objectives and outcomes, and that it is impossible to come to clear conclusions about the state of implementation in this institution's sense. This constitutes a first point of dissatisfaction. A second point has to do with the fact that the finding of implementation deficiencies has so far primarily been countered by Community attempts to strengthen traditional enforcement tools. But is an increase in enforcement really the central question? Or, posing the question in a different way, is this vision of implementation not maybe too much focused on reducing the size of the gap? We claim that this is the case and elaborate in the following part the background to this claim.

Part III Implementation and subsidiarity

Based on dissatisfaction with the traditional view on implementation and the corresponding evaluation of implementation problems, this last part of the chapter suggests a more general view on the efficiency of implementation, related to what implementation is in practice. It is claimed, firstly, that policy making and implementation are not as clearly separated as the legal definitions presented above might suggest, and secondly, that considering implementation from the angle of the subsidiarity principle by assessing whether a given directive efficiently allocates policy making and implementation tasks between the EU and the national level can change the view on the implementation gap.

country and legal basis concerned as well as the infringement step taken. Nevertheless, it is not obvious to match these cases with the more comprehensive quantitative data otherwise provided on infringements.

³⁰ He suggests that next to the technical subject matter, knowledge about the administrative structure and culture of a country implementing a Directive is required as basis for a discussion which might help improve practical application.

6 Towards a more general view on the efficiency of implementation

6.1 The scope of a Directive determines what implementation consists in

The Commission's definition of implementation given in section 2 above suggests a narrow view, focusing on the putting into practice of objectives defined at a Community level, and does not seem to foresee objective-setting on a decentralised level. With this it suggests a clear dividing line between policy making on a Community level and policy implementation on a Member State level. In how far does this reflect what implementation is in reality? When taking a closer look at EU environmental policy it becomes obvious that in reality implementation is more heterogeneous than implied by the Commission's definition. How much more heterogeneous it is depends, however, on the policy instruments (regulations, types of directives) chosen, which actually define the scope of implementation in the sense of which decisions are to be taken at a central or decentralised level, and how powers are shared between the centralised and the national level.

A first distinction can be made between *council regulations and directives*. As was noted before, regulations are generally and directly applicable and binding in their entirety. Unlike this, directives are binding as to the results to be achieved but shall leave to the national authorities the choice of form and methods.³¹ With this, directives leave more discretion to the national and local level in order to apply European policy to local conditions (Steiner, 1995: 9; Collins and Earnshaw, 1993: 226). But in practice the scope of what implementation comprises also differs between *different types of directives*. One can largely distinguish three broad types of Directives: those setting highly specific targets to be met by the regulated agent and those defining only overall country targets but leaving to the Member State level the allocation of reduction efforts to specific regulated agents and the means to meet the targets. A third type of directive defines both a general framework and certain specific requirements, and leaves some scope of decision making to the country level. Some empirical examples, outlined in Box 2.7, should help to clarify this.

Box 2. 7: Examples for the three broad types of directives

Directives setting highly specific targets

An example of this type is the European Directive on the reduction of air pollution from existing municipal waste incineration plants (89/429/EEC). The Directive is presented in more detail in chapter 4 and serves as empirical example for an in-depth study of implementation processes throughout this thesis. What is important here is that the directive defined emission limit standards (concentration standards), slightly differentiated according to capacity classes of municipal waste incinerators, for a number of atmospheric pollutants that were to be met by a specified date by all such plant. Next to these standards, the Directive established clear monitoring provisions for plant and competent authorities. The legal freedom left to Member States concerned the choice between a limited number of abatement technologies capable of meeting these targets, plant closure, and the possibility to apply emission standards stricter than those defined by the European policy. There was however no legal freedom to apply weaker standards or to extent the implementation deadlines, be it for economic or other reasons. In this, the foreseen decision making power left to the decentralised level was quite limited.

³¹ It should be mentioned that this choice may however be limited. The case studies presented in chapters 6 and 7 give evidence on this with respect to transposing instruments. In fact, in the case of the transposition of the municipal waste incineration directives, the Commission did not accept the original policy instruments Germany (technical instruction) and the Netherlands (guideline) had chosen.

Box 2.7 continued

Directives defining only aggregate national targets

In contrast to directives of the first type, one finds other types that leave Member States more discretion to find their own strategies. An example of this type is Directive 88/609/EEC (OJ L 336, 7.12.1988) regulating emissions to air from new and existing large combustion plant. The approach it takes with respect to 'existing' plant (defined as those plant licensed before 1 July 1987) was very flexible, establishing staged aggregate national reduction targets (or national emission ceilings) for SO₂ and NO_x for each Member State. Not only were these targets differentiated to take into account variations in national circumstances, including abatement costs, what is more, the choice of policy instrument to achieve these targets was left to Member States. Furthermore, Member States were free to allocate the national reduction targets to pollution sources, i.e. they were free to choose the level of reductions to be achieved in specific industry sectors. With this, Member States clearly had to make policy decisions.

Framework directives

Next to these types of directives the Community has developed the concept of framework directives which can, with respect to the freedom they leave for Member State choices, be positioned somewhere in between the first and the second type of directives presented above. They generally establish overall principles and deadlines for compliance but leave Member States some room to draw up programmes that are adjusted to local conditions and to define the specific means to meet the articulated objectives. Furthermore they sometimes allow for adjustments in meeting the deadlines where Member States can prove the necessity for economic or other reasons. By this, as Axelrod (1999) notes, they make a two-speed Community possible, although in the long run established standards must be met. Lastly, framework directives sometimes also set specific standards and monitoring requirements, while frequently leaving the choice of other standards to the Member State level. All in all, therefore, framework Directives leave Member States more discretion to find their own strategies to meet EU goals than do directives of the first type.

Directive 2000/60/EC (OJ L 327, 22.12.2000) establishing a framework for Community action in the field of water policy, the so-called Water Framework Directive, may serve as an example of this type of directives. It takes account of the variety of conditions and needs in the Community which require different specific solutions by establishing that decisions should be taken as close as possible to the locations where water is affected or used. Priority should be given to action within the responsibility of Member States, which are to draw up programmes of measures adjusted to regional and local conditions to meet the general environmental objectives established under the directive. In contrast, the task of the Community should be to provide common principles and the overall framework for action. But next to these provisions, which are kept rather general and allow decision making by Member States, subsequent Community legislation is to lay down environmental quality standards and emission limit values for priority substances. And while standards for pollutants not belonging to this group are left to the definition by the Member States, the Directive nevertheless prescribes the procedure for the setting of such standards. Finally, the Water Framework Directive specifies clear monitoring requirements.

The previous discussion implies that there is indeed room, even within EU policy making, for decision-making power at a national or local level, which can considerably vary between different types of policy instruments. It is obvious that the more specific the targets defined by a directive, the less room for policy decisions and adjustments is left to the Member State level. The Commission's definition of implementation, therefore, applies more directly to the type of highly specified directives, which do not leave much scope for decision making at a Member State level. However, with the coexistence of framework directives and of directives defining overall country objectives, leaving scope for discretion to the Member States and, thus, allowing for decentralised policy making, the scope of what implementation comprises, in practice, can considerably vary.³² This implies that the dividing line between the Community and Member State levels in policy

³² For the sake of completeness it should furthermore be mentioned that article 176 (older numbering article 130t) allows for decentralised decision making by giving Member States the possibility to apply *stricter* measures than applied on the EU level. Such measures must be compatible with the Treaty, meaning that they must not impose barriers to trade.

making, in practice, is not that clear-cut, and one can conclude that implementation is clearly more than putting into practice objectives set at a centralised level, and more than monitoring and enforcing these objectives.

There are two further important findings in this context:

- First, decentralisation of policy is the issue of the principle of subsidiarity. An obvious question is therefore whether one can establish a link between subsidiarity and implementation. This is the issue of the following sections.
- Second, there is a connection between implementation deficits and the decentralisation of decision-making power.

When talking about de-/centralisation of decision-making in an EU policy context the focus has so far been on a level of decentralisation foreseen by specific Directives. But this is not the only form of decentralisation of policy decisions. By not complying with objectives, Member States can effectively try to regain or introduce additional decision making power, even in cases where decentralisation of decision making is initially not foreseen. One might therefore alternatively interpret an implementation gap as re-introduction of unforeseen decentralisation of decision-making power by the Member States themselves.

6.2 The subsidiarity principle and its impact on preferred policy instruments

The principle of subsidiarity was introduced as a guiding principle into EU policy making under the Maastricht Treaty (Treaty on European Union), which came into force on 31 December 1993.³³ This principle applies to areas which do not fall within the exclusive competence of the Community. This means that it applies to EU policy more in general, and not only to environmental policy. Nevertheless, for the purpose of this thesis, in what follows we discuss the principle only with respect to environmental policy. The definition of the subsidiarity principle as given by the European Treaty is summarised in Box 2.8.

Box 2.8: The European Treaty's definition of the subsidiarity principle

Generally, subsidiarity defines the legally acceptable outcomes in the distribution of decision-making powers among different levels of the government. It aims at guaranteeing a degree of independence for lower (or local) authorities in relation to higher (or central) authorities.

In the EU context, the Treaty establishes that 'the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community' (article 3b, new numbering article 5). A further paragraph is added, which is often referred to as the principle of proportionality: 'Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty' (ibid.).

The principle therefore pursues two objectives. On the one hand, it establishes a legal basis for the Community to act if an issue cannot be adequately settled by the Member States on their own. On the other hand, it gives authority to the Member States in areas that cannot be dealt with more effectively by Community action (Source: http://www.europarl.eu.int/factsheets/1_2_2_en.htm; 7/10/2001).

What guidance can be drawn from the subsidiarity principle? With the definition of the principle remaining rather vague and open to interpretations, a general problem lies in how to determine when objectives cannot be 'sufficiently' achieved by the Member States and can be 'better' achieved by the Community. The authors of the Maastricht

³³ Prior to the Maastricht Treaty, article 130 (4) under the Single European Act of 1986 had already included a form of the subsidiarity principle for the environment area. This article laid down that 'the Community shall take action relating to the environment to the extent to which the objectives can better be attained at Community level than at the level of the individual Member States'.

Treaty did not put forward any guidelines for judging the effectiveness and necessity of a particular action. The principle of subsidiarity at the level of the Community therefore remains a general political principle rather than a source of explicit guidance (Begg at al, 1993: 22). When guidance is sought with respect to specific actions and cases, the principle needs to be filled with evaluation criteria³⁴.

Nevertheless, on a more general level, as a legal concept, the subsidiarity principle defined in the EU Treaty has clear implications. It can generally be interpreted as a presumption to decentralise policies, unless a clear case can be made for centralisation. Note that subsidiarity is not the same thing as decentralisation, but rather a principle for allocating power upwards as well as downwards. It nevertheless aims at decentralised decision making wherever possible, which is reflected in the fact that the burden of proof is put on the central level: whenever the EU wishes to issue a policy or to deal with a policy problem, it must prove that the Member States cannot deal with the issue more effectively, and that the EU level is better suited to effectively deal with it. According to Begg at al. (1993: 4) this also implies that in case of doubt, whenever such a proof cannot be given, policy competence should remain on a decentralised level. A preference for the decentralisation of policy, in general, is based on the assumption that within the overall policy process local circumstances and necessities are better known to lower than to higher level authorities.

The principle's aim to decentralise policy is further reflected in the Preamble of the Treaty on the European Union, where the signatories pledge 'to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity'.³⁵ And the Treaty of Amsterdam emphasises that 'Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty' (Protocol No 30, 7th paragraph, as added in 1997 to the EU Treaty).

How is the subsidiarity principle reflected in EU policy making in practice? On first sight one finds that the different policy levels are responsible for different stages within the regulatory chain. It could be said that while the EU level adopts policies, the Member States level is responsible for their implementation. But, as was shown above, the allocation of powers between central and decentralised levels is not that clear-cut. Policy making does not only take place at a centralised level, but reaches into the implementation step, where the degree of decision making power left to the Member State level depends on the type of policy instrument chosen.

It is worth stating that council regulations have rather been ruled out with respect to the subsidiarity principle both by discussions from political science and law scholars and by official Community statements, whereas there is a clear policy statement for an increased use of framework directives. Steiner (1995: 9) and Collins and Earnshaw (1993: 226) suggest that directives are better suited than council regulations to fulfil the subsidiarity principle. This is directly linked to their legal definition, implying that directives leave more discretion to the national and local level, in order to apply European policy to local conditions. From the side of the Community, the 1996 Treaty of Amsterdam established in its protocol 'on the application of the principles of subsidiarity and proportionality', that '[O]ther things being equal, directives should be preferred to regulations and framework directives to detailed measures' (Protocol No 30, 6th paragraph, as added in 1997 to the Treaty). The Commission's own interpretation of the subsidiarity principle, as reflected in the 'Fifth European Community Environment Action Programme' (1993 to 2000, OJ C 138/17.5.1993), follows the same reasoning. It suggests a move away from traditional

³⁴ In chapter 4 such criteria are presented and applied to a discussion of the Council Directive of 21 June 1989 on the reduction of air pollution from existing municipal waste-incineration plants (89/429/EEC).

³⁵ Source: <http://www1.worldbank.org/wbiiep/decentralization/Topic03.2.htm> (2/10/2001).

command and control type policy (establishing comprehensive and detailed quantitative standards, which leave little room to move for Member States) towards a more extensive use of 'framework' Directives and 'soft laws' (such as voluntary agreements).³⁶

6.3 The subsidiarity dimension of implementation in European environmental policy

In the literature, subsidiarity is generally discussed with respect to policy making, and generally not with respect to implementation. But the preceding discussions show that there are types of broadly drafted and framework directives which, within the overall policy process, leave decentralised decision-making power to the implementation step. This establishes a direct link between implementation and subsidiarity. We therefore suggest to discuss subsidiarity with respect to policy implementation. To push this argument further, one could say that when remaining in the context of EU policy, necessarily to some degree defined at a central level, the sole locus where decentralisation can actually take place is the implementation step.

This would suggest that when studying EU policy making from the point of view of the subsidiarity principle, the adequate locus to investigate is the implementation step. Studying a specific policy from the point of view of the subsidiarity principle means to evaluate whether a given directive efficiently allocates the tasks between the EU and the national level. When a policy is not optimal in that sense, when it does for example not leave sufficient room for decision making to decentralised policy levels, what are the implications for an implementation gap? Given that an implementation gap was identified as an alternative way of introducing discretion to decentralised policy levels, this view actually opens the possibility that such a gap may imply policy outcomes that are superior to the initial policy objectives.

This, firstly, implies that for cases in which a decentralisation of decision making in EU policy is desirable, there are two alternative ways of how decision-making power can be given to the local level. One can be directly foreseen by policy making in that directives are issued which set only global targets and which leave large room for local discretion. The other is left to the initiative of the countries, which can try to regain decision power by not complying with the objectives set by a more narrowly specified directive. Secondly, this has implications for an evaluation of the Community's enforcement policy (cf. section 3 above), including those approaches which were more recently suggested and/or developed with the aim to improve implementation and enforcement. Approaches primarily aimed at preventing implementation gaps may only be considered as reliably good approaches and systematically desirable in cases where the initial policy actually is optimal.

The Community approaches towards implementation and the implementation gap generally aim at minimising the width of the gap. This is to a large extent mirrored in the enforcement tools. Approaches that aim at an ever-increased standardisation and harmonisation of monitoring and sanctioning remain in the same logic as the previous ones, in that they try to ensure a more comprehensive application of the traditional tools. This holds for example for the introduction of Community-wide minimum criteria and/or guidelines for inspection tasks, which aim at a further restriction of decentralised decision making and in this may run counter to subsidiarity. With this, such approaches are likely to narrow down the more open view that seems to have been introduced with the subsidiarity principle.³⁷ A judgement of those approaches which try to strengthen the

³⁶ Source: <http://www.europa.eu.int/scadplus/leg/en/lvb/l28062.htm>, (5/10/2001). It is not the aim of this chapter to evaluate in how far these objectives have actually been put into practice.

³⁷ This might to some degree have been acknowledged by the Commission's, and also by the Council's rejection (in its common position adopted on 30 March 2000) of the Parliament's amendment to change the form of the proposal from a recommendation to a directive (European Commission, 2000: 10-11). A recommendation is a non-binding instrument and the rejection could hence be justified -although this was not the official argumentation- from the perspective of the subsidiarity principle, because it took account of the

bottom-up enforcement channel has to remain ambiguous. Even though these approaches follow the same objective of quantitatively minimising the number of infringement cases, they nevertheless introduce a way to bring decision making closer to the local level. They do this by involving local actors, individuals and interest groups in implementation and by increasing the opportunity for environmental cases to be dealt with by national courts, which may allow taking better account also of the different legal systems of the Member States. Contrary to these approaches, the increased recourse to framework legislation - sometimes claimed to having been motivated by the wish to improve the implementation of European legislation (cf. Axelrod, 1999)- and to 'soft laws', are more reconcilable with a decentralisation of decision making.

7 Conclusions

A frequent claim with respect to EU environmental policy concerns the existence of an implementation gap. Generally, this is linked to the legal view that the Commission takes towards implementation which defines an implementation gap as a discrepancy between policy objectives and implementation outcomes. While the data available suggest that such a gap does indeed exist, data restrictions make it difficult to assess the exact size of this gap and therefore to actually evaluate policy outcomes according to the Commission's view. This concerns a first point of dissatisfaction with a view that focuses primarily on the size of the implementation gap. Furthermore, the Commission's legal perspective on implementation implies that an implementation gap is always undesirable. We suggested in this chapter that an evaluation of the efficiency of implementation should take a more general view.

It was established that implementation in an EU context can have a quite heterogeneous scope, and frequently involves more than putting into practice and enforcing centrally pre-defined objectives. In fact, depending on the contents of a directive, decision-making can reach more or less into the implementation step. Put differently, the contents of a directive determine the foreseen level of decision-making, i.e. the allocation of tasks between the European and the national level. Frequently, therefore, there is a certain level of decentralisation of policy-making even within the context of EU policies. Three findings are important here.

Firstly, decentralisation of policy making in an EU context can have two sources: It may be foreseen and be directly built into the policy instrument, or it may be re-introduced by the Member States, possibly constituting non-compliant behaviour and resulting in an implementation gap. Secondly, one of the EU-Treaty's guiding principles for policymaking -the subsidiarity principle- is, in legal terms, the statement that the vertical allocation of tasks between the EU and the national level -and with this the decision about the level of discretion left to the national level- should be based on efficiency considerations. This directly leads to a third finding: if the allocation of tasks between the EU and the national level is not efficient -because the policy decision-making is more centralised than would be desirable and because the discretion left to the national level is insufficient- an implementation gap re-introducing further discretion at a Member State level may be efficient. The inefficiency of the allocation of tasks between the European and national levels is of course only a necessary condition for the potential efficiency of an implementation gap. For an implementation gap to be efficient, the sufficient condition also has to apply: i.e. that the implementation itself is in fact efficient.³⁸

wide disparity in the inspection systems and mechanisms among Member States, and left the choice of the administrative structure and systems and the level at which these are established (national, regional, local) to the Member States.

³⁸ For the empirical case studied in this thesis, the 1998 municipal waste incineration Directive, chapters 4 and 5 investigate whether the necessary condition for the efficiency of an implementation gap applies, while chapter 6 assesses whether the actual implementation processes in four countries were cost-effective.

It should finally be mentioned that there is also an explanation based on economic efficiency considerations as to why implementation gaps may be justified, which was first suggested by Becker (1968). This is dealt with in chapter 8.

Chapter 3 How Do Political Science Studies of EU Environmental Policy Explain an Implementation Gap?

1 Introduction

The previous chapter established the finding of an only limited effectiveness of European policy. This is true for EU policy in general and also more specifically for European environmental policy. The questions which arise from these findings concern the factors which may explain the limited degree to which the formal transposition and the practical application of EU measures at the national level correspond to the objectives defined in European legislation. Is there reason to believe that there are specific difficulties inherent in the implementation of European policy? More specifically, would one expect the implementation gap of EU policy to be larger than the implementation gap of domestic policy? And is there reason to believe that there is a specific problem linked to implementation in the domain of environmental policy?

This chapter reviews the explanations for an implementation gap in an EU context given by empirical and theoretical studies of policy science scholars. Indeed, over the last three decades, not only policy-makers, but also political scientists have turned their interest to the study of implementation. This is also true for economists, whose normative view and empirical studies are dealt with in the third part of this thesis. But, whereas economists in theoretical works have not specifically focused on the European context, political science and public policy literature has dealt both with implementation in general and implementation of environmental policy in an EU context. While primarily focussing on the more specific literature dealing with implementation of environmental policy in an EU context, the more generic literature will be referred to when it supports findings of the specific literature or when it is believed to yield results which are valid also with respect to the domain of EU environmental policy.

The outline of the chapter is as follows. Section 2 deals with aspects of the institutional architecture of the European Union and with decisional procedures underlying policy-making as possible explanation for inadequate policy formulation or a lack of control at the local level, which may result in implementation gaps. Sub-section 2.1 investigates reasons for implementation gaps which are to do with the separation between policy-makers and implementers; while sub-section 2.2 takes a closer look at decisional procedures within the EU institutions. Section 3 focuses more on the Member State level and hence puts a stronger emphasis on the challenge of designing policies to be implemented in different local contexts at a Member State level. It presents models which, based on empirical case studies, theorise the impact of the heterogeneity of national contexts on implementation outcomes. While sub-section 3.1 focuses on the initial 'administrative fit' model first developed for EU environmental policy at the end of the 1990s, sub-sections 3.2 and 3.3 present suggestions for adaptations of this model. Section 4, finally, reviews the role International Relations literature gives to both state and private actors in reaching compliance. This section remains more theoretic and applies more to questions of compliance in general than specifically in an EU context. Section 5 concludes.

2 Explanatory factors related to the institutional architecture and decisional procedures in the European Union

This section is based on literature which cannot easily be subsumed under a specific school of thinking or under specific modelling approaches. It covers the argumentation of authors who primarily look into implementation data published by the European Commission and investigate legal and policy documents and other literature on policy making, implementation and enforcement. From a wide range of publications they assemble reasons inherent in EU environmental policy making which, independent of specific cases, try to explain why implementation problems arise (e.g. Collins & Earnshaw, 1993; Jordan, 1999; Chalmers, 1999). These authors are partly involved in

national governmental or EU institutions. The arguments taken forward in this stream of literature are of a general, descriptive nature and not condensed into theoretical explanatory or predictive models. Where not otherwise stated below, the authors present their findings without explicit reference to own empirical case studies that might underlie their argumentation. The reasons for an implementation gap this strand of literature brings together focus primarily on two issues: problems inherent in specific policies themselves, and a limited control over those actors responsible for policy implementation on the ground. Focusing on factors capable of explaining the reasons that may lead to EU policy inherent problems, this section, furthermore, covers publications studying decisional procedures within and across the EU institutions, as well as the possibilities of, and likelihood for, Member State representatives to influence decisions taken by these institutions in line with the preferences of their own country (e.g. Eichener, 1997; Liefferink and Andersen, 1998).

On a general level, this literature supports a warning issued by early implementation studies, such as Pressman and Wildavsky's (1984) investigation of a federal development project aimed at the employment of long-term unemployed in Oklahoma³⁹ which put a strong emphasis on the negative implications poorly drafted regulations may have, leading to subsequent problems during the implementation phase. The attribute 'poorly drafted' can refer to various characteristics of the policy. Policies may, for example, define ambiguous objectives, not clearly state responsibilities, or neglect the costs related to their implementation. The latter may also be the case if legislation defines over-ambitious objectives. Poor policy formulation, the fact that proposals are not always as well drafted as they might be, may be explained by several factors that are outlined throughout the following sub-sections.

Next to the quality of the policy design, limits to enforcement and the discretion of local actors can hamper implementation. One may assume that these issues are mutually reinforcing. The less policy is designed with a view to implementation issues and the poorer the quality, the more important is the role of enforcement to assure compliance with policy objectives and the more problems will be encountered by local implementers. The eventual policy outcomes will then depend on the level of discretion and the resources the latter have at hand.

2.1 Decision making on a centralised policy level: separation of competences furthers an implementation gap

This first sub-section focuses specifically on the set of reasons in which an implementation gap may be rooted that refers to the institutional structure of the EU and to the distance between the European Union institutions making policy and those actors that are responsible for EU policy implementation at a national or local level.

2.1.1 Limited control of EU policy makers and discretion of local implementers

A first issue related to a separation of competences within the overall EU policy making and implementation structure was discussed in more detail in the previous chapter: the *limited top-down control* of EU institutions over national and local implementers with respect to EU environmental policy. It is characterised by a lack of inspection power within Member States and hence a lack of control in terms of monitoring of implementation measures as well as their enforcement. This holds especially with respect to practical application. While a formal lack of control has been more pronounced before the introduction of fines under article 171 (now article 228) of the Maastricht Treaty, which came into force in December 1993, a lack in human resources, in particular within DG Environment, is further thought to weaken the Community's monitoring and enforcement capacity (Collins and Earnshaw, 1993: 223). Based on a report of the House

³⁹ First published in 1973, this investigation belongs to the early studies. Because of its enormous impact on the first generation of implementation research it is generally considered as a starting point to implementation study by political scientists (see for example Sabatier, 1986).

of Lords Select Committee on the European Communities these authors note that in the early 1990s only 10 officials were responsible for both providing general advice on legislative drafting and for monitoring and implementation in 12 Member States. Legal weaknesses applying particularly to Directives, the preferred environmental policy tool, limit the effectiveness also of the *bottom-up enforcement channel*. This is specifically the case in situations where directives have a general and programmatic character, and thus do not grant non-ambiguous rights to individuals, which these might otherwise claim before national courts. This feature of the EU architecture, leaving the Commission with insufficient political resources and legal competence to substantially intervene on a national level, and thus with insufficient capacity to achieve its objectives, has been described as an inbuilt 'pathology of non-compliance' (Mendrinou, 1996).

The flipside of the coin of limited enforcement is discretion of the Member States in implementation. In this respect political science theory, which does not primarily deal with environmental policy, has assigned a predominant role for implementation outcomes to the street-level bureaucrat (Lipsky, 1980). This term describes the agents directly interacting with the target group of a policy; in the case of environmental policy these are usually pollution control inspectors. Street-level bureaucrat's discretion relates for example to whether or not they apply sanctions and how much and to whom, whether they delay decisions or withhold information. The literature suggests that these actors enjoy considerable power due to discretion and are thus of central importance for policy outcomes (Hudson, 1989). In this line of argumentation, discretion is considered as unavoidable not only because it is impossible to completely control behaviour but also due to a frequent lack in resources of implementation actors, be it financial means, information or time. It is also unavoidable due to uncertainties with respect to reactions of the regulated actors. Implementers must therefore deal with ambiguous situations, weigh up alternatives and they are likely to develop routines of coping with their work.

The relevance of this general statement of discretion at the local level -not only of street-level bureaucrats but also of Member States more in general- was recognised by several authors studying EU environmental policy implementation. Jordan (1999: 71) argues that for example by controlling the speed and scope of implementation, Member States may find a way to fine-tune EU legislation to domestic political and economic exigencies. By this they regain some sort of discretion which was not foreseen in the policy. And Chalmers (1999: 673) interprets Member States behaving in such a way as voicing their dissonant national interests not at the law-making stage of the policy process but rather at the implementation stage. Where discretion of local actors allows adjustment of policies during the implementation phase policy outcomes risk to diverge from the original policy objectives. Under a legalistic compliance view as that suggested by the European Commission such adjustments may well be interpreted as an undesirable gap in implementation.

The separation of competencies between policy making and implementation in EU environmental policies implying a limited control of EU institutions over implementers and regulated actors at a Member State level is one reason for why there may be difficulties inherent in EU policy implementation, which are not necessarily reproduced in domestic policy implementation.

2.1.2 *Neglect of implementation issues in the policy design phase*

Implementation problems, however, do not always have their origins in the assignment of control competencies and in the weakness of control. A structural institutional factor, the institutional separation of EU policy-making from its implementation and its implications for the design of policies, is frequently made responsible for implementation deficits as well.

As Collins and Earnshaw (1993: 213) note, decision makers and public authorities frequently tend to neglect policy implementation as they become inevitably absorbed in the legislative process itself. This is a general problem. But it is considered as particularly

acute at the European Community level, where powers are shared out unevenly between the main actors, where Community institutions have only a limited role in implementation and are geographically and politically dissociated from what goes on at the ground level (Jordan, 1999: 71). As Pressman and Wildavsky (1984) found for the American context, implementation is conducted at arm's length from the legislative process, with many decision points existing between agreement of a legislation and its implementation at the local level. This institutional separation may have contributed to a situation in which policy makers, at the Community level, concentrated on policy making and on getting laws adopted at the expense of implementation, as suggested by Macrory (1992: 350), and without worrying much about problems built in the text and may, according to Jordan (1999: 79), also explain the absence of comprehensive compliance cost assessments as basis for proposed legislation. This is exactly what Pressman and Wildavsky (1984) warned of: that implementation must not be considered as a process that takes place after, and independent of, the design of policy. Instead, implementation needs should be considered already when legislation is drafted in order to avoid poorly drafted policies.

A neglect of implementation requirements is reflected by, and may also be due to, an insufficient consultation with affected parties by the Commission during the preparation of proposals. It has been reported that authorities responsible for practical implementation were rarely involved in discussions with the Commission during its preparation of proposals. Likewise, the organisations and individuals affected by the implementation of a specific EU legislation are said to generally not be aware of planned legislation in early stages of the drafting process (Collins and Earnshaw, 1993: 224). In this context it may also be important, as Jordan (1999: 71) claims, that the Commission, charged with the task to secure agreement between the various actors in the EU policy process, may have little incentive to point out the full implications of a proposal.

When considering the structure of decision making within the Community one should also note that several Member States have federal and quasi-federal systems of government (e.g. Austria, Belgium, Germany). Generally, a large number of implementation functions is performed by sub-central actors (at regional and local levels) whereas it is the central government which is responsible for negotiating legislation at the EU level (Collins and Earnshaw, 1993: 217; Chalmers, 1999: 657). The existence of an institutional separation also within countries, where national governments are not directly responsible for implementation, may therefore explain a neglect of implementation requirements by these governments when they negotiate legislation at the EU level. Local considerations may, hence, not be sufficiently taken into account in the process of policy negotiation, and implementation difficulties may, thus, be neglected. This may also to some extent explain why governments might agree on laws which they will find difficult to implement afterwards.

In the literature it is also suggested that implementation problems may be built in the policy owing to the fact that specialist legal drafts people are not always involved as early or intensively as necessary in order to prevent poorly drafted and prepared legislation (Jordan, 1999: 78)⁴⁰. Insufficient consultative procedures have been made responsible for both a questionable scientific and legal basis of draft legislation (Collins and Earnshaw, 1993: 223), although it has been reported more recently that the role of scientists within the policy making process has been enhanced in the 1990s (Chalmers, 1999: 676). Nevertheless, in a recent report within its Better Legislation Project, the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL, 2003) states as one key finding the need to involve more individuals with practical experience in the law making process and to engage technical experts at various levels to advise on feasible and effective options to achieve the proposed aims of a legislation.

⁴⁰ Citing Macrory and Purdy (1997: 46).

Finally, Jordan (1999: 71) also argues that the combination of the supranational actors' specific tasks and interests together with the fact that they are neither formally nor financially in charge of implementation may lead to a further reason why implementation issues are likely to be neglected in the European context: the fact that EU institutions can afford to focus on their own interests. More in detail he argues that their role allows institutions such as the Commission and the European Parliament to follow their own interest and, in an attempt to further integration at a high level, to propose deliberately ambitious legislation. Such legislation imposes its primary costs on the Member States and private organisations charged with the implementation task. Next to integration objectives, the Commission's, but also the European Parliament's and the Economic and Social Committee's incentives to create regulation at a high level may also be based on their self-interest in achieving a profile as a political actor (Eichener, 1997). Taking the example of Parliament, whose members' careers are largely independent from national political careers, this author claims that they can improve their own political profile only by increasing the weight of the European Parliament. Moreover, as a result of their role and interests, the Commission, European Parliament and the committees will often go hand in hand with the mutual aim of achieving regulation at a high level. This directly brings up a further question, that of the decisional procedures within and between EU institutions, which allow the European Commission and Parliament to further their own interests.

2.2 The impact of decisional procedures within and between EU institutions

And indeed, the literature assumes the reasons for why poor policy formulation is a frequent problem of EU legislation not only to be rooted in structural factors, such as a limited interest of the Commission in problems encountered by lower level actors owing to its responsibility for proposing legislation but not substantially for its implementation. It also identifies reasons built in procedures of the EU policy making process itself. Particular interest is paid to the formally increased power of certain EU institutions in law making and to the negotiation processes taking place in the Council of Ministers. However, the interpretation of these factors remains more controversial.

2.2.1 *Does a reduced power of the Council of Ministers further ambitious legislation?*

It is sometimes argued that the decision power of the Council of Ministers relative to other EU institutions has been increasingly reduced since the adoption of the Single European Act and the Maastricht Treaty and that this may explain why regulation clearly going beyond the level of the least common denominator amongst the Member States may be adopted. Based on a study of regulation in two areas of European policy, health and safety at work and environmental protection, Eichener (1997) furthermore makes the hypothesis that even where policy proposals still depend on the Council to pass them, decision-making involves more than intergovernmental bargaining and tends to lead to the adoption of relatively more ambitious regulations. In order to clarify these arguments, it makes sense to first present evolutions in the formal power given to EU institutions in policy making. Four periods can be distinguished: the period before 1986, between 1986 and 1992, between 1992 and 1997, and after 1997.

Before the adoption of the Single European Act in 1986, the Council of Ministers was the main arena of decision making, where national governments were the key players. In fact, while having to consult the European Parliament, the Council was not legally obliged to account of this institution's opinion or suggested amendments. The role of the supranational actors of the European Communities, in particular the Commission, the European Parliament and the Economic and Social Committee, was strengthened with the *Single European Act* in 1986 and with the *Maastricht Treaty* in 1992, while the Council's power was reduced. While the *Single European Act* introduced the co-operation procedure (art. 252, formerly 198c), the *Maastricht Treaty* extended the use of this procedure and introduced the co-decision procedure (art. 251, formerly 198b). Requiring unanimity in the Council, these procedures created a barrier with respect to Council

attempts to amend Commission proposals (article 250, formerly article 189a). They also introduced a barrier with respect to decisions taken in the European Parliament. While under the co-operation procedure the Council of Ministers can still ultimately adopt a policy against a rejection, or proposed amendment, of the Council's common position by Parliament, this requires unanimity in the Council. Under the co-decision procedure the Council can no longer override Parliament's view. Instead, the European Parliament can reject a common position if it reaches absolute majority and by this end the legislative process. If Parliament suggests amendments which are rejected by the Council, or if they are rejected by the Commission and the Council cannot obtain unanimity to adopt the Commission's decision, a conciliation procedure is started. The Conciliation Committee's joint draft can be confirmed by the Council (with qualified majority) and by Parliament (with absolute majority). If Council and Parliament do not reach agreement in this conciliation procedure, the legislative process is at its end. For the area of environmental policy these developments became even more important with the *Amsterdam Treaty of 1997*, which extended the co-decision procedure, previously reserved for measures relating to the internal market, to environmental concerns.

Eichener (1997) argues that it is this increased power of EU institutions other than the Council of Ministers⁴¹ which allows them to follow their own interests, such as the interest of securing their existence, increasing their weight and maximising resources and power. Furthermore, the fact that Parliament can only act with absolute majority creates a tendency to build broad coalitions within this institution. As a result, so this author's reasoning, the Commission and Parliament often go hand in hand with the common aim of achieving a high-level regulation.

A second argument by the same author concerns possible reasons as to why the Council may pass regulation stricter than under pure intergovernmental bargaining and going beyond the least common denominator amongst the member countries. To illustrate this, Eichener (1997) focuses on the pivotal government in the decision making process and distinguishes between unanimity and qualified majority voting rules. His argumentation is as follows: if the conditions under which decisions are taken were pure intergovernmental bargaining, a unanimity decision rule, on the one hand, would favour regulation reflecting the least common denominator amongst the countries involved, because each country could block the policy altogether. A qualified majority decision rule, on the other hand, would favour a higher regulatory level: the level preferred by the pivotal government, which is in the position to decide whether to form a blocking minority or to join a qualified majority. The conditions provided in the EU since the Single European Act, however, diverge from pure intergovernmental bargaining. If the Commission proposal and/or Parliament opinion suggest regulation at a higher level than what is preferred by the pivotal government, so the author, the latter can only choose between blocking the regulation altogether or accepting the proposal as it is. Then, as long as acceptance is preferred to no regulation at all, the Council will pass a regulation which is stricter than it would have been under pure intergovernmental bargaining.

Eichener's (1997) general claim with respect to the Council of Ministers' difficulties in resisting amendments by the European Parliament, which are backed by the Commission under the co-operation and co-decision procedure, are supported by some authors (e.g. Liefferink and Andersen, 1998) but rejected by others. Those rejecting his view insist that the real power within European policy making still lies with the Member States. Not only because it is often Member States that are at the source of Commission proposals for environmental policy or because Member State representatives are present in various

⁴¹ National representatives are, of course, not only found in the Council, but also in various committees preparing the Commission's proposals. Nevertheless, Eichener (1997) argues that these are generally technical experts, with an interest in sound drafting work and in a high technological level. Therefore, according to the author, they tend to share more interests than political actors do, which adds to regulation on a high technical level. Furthermore, the Commission has been reported to strategically involve those national level NGOs in committees that are in favour of higher regulatory levels.

expert committees, but also because the Member States, through the Council of Ministers, so De Bruijn's (2003) argumentation, make the ultimate decision of whether to adopt a legislation. Indeed, as was shown above, the Council has the ultimate power to veto legislation under the co-operation procedure, and can also end the legislative process under the co-decision procedure by rejecting the Conciliation Committee's joint draft. Although De Bruijn (2003) does not make his point explicit, this author's view seems to imply that the Council of Ministers does not -because of fears to block regulation altogether as suggested above- refrain from using the bargaining power given to it by its ultimate vetoing right, and that institutions such as the European Parliament are sensitive to such power.

Taking these arguments together, it seems not so sure *a priori* that EU institutions, such as the European Commission and Parliament, will always be able to push through high level environmental policy, which, in the eyes of the Member States, is over-ambitious and results in excessive implementation costs. An evaluation of these contradicting arguments would require in depth implementation studies assessing in how far an implementation gap in the past was effectively driven by over-ambitious legislation.

Finally, it is worth mentioning that there are also claims that link Member State discretion to Member States' negotiation behaviour. The reasoning is that the possibility to resist implementation might in some cases explain why Member States do not oppose themselves to legislation, with which they do not agree, at the policy making step. Eichener (1997: 605) suggests that Member States' agreement to EU legislation on a high level may be furthered exactly by the possibility to soften the regulation's impact of high requirements through weak implementation. This argument on its own is questionable though. Given that Member State support in the Council of Ministers is needed to adopt policies it is not immediately clear why they should not try to oppose or at least weaken, at the policy making stage, the policy objectives which they consider as too stringent, instead of risking to face infringement proceedings brought against them for non-compliance. The argument should therefore rather be seen in connection to the possibility that national central governments, which negotiate legislation at an EU level, lack knowledge about local conditions as discussed throughout the previous sub-sections. It should also be seen in connection to arguments rooted in the decision making procedures discussed below.

2.2.2 *Decision making within the Council of Ministers - a counterproductive search for consensus?*

The Single European Act (SEA) and the Maastricht Treaty also brought about evolutions in the decision making rules for the Council of Ministers with respect to environmental policy making. The time before the adoption of the SEA was marked by the unanimity requirement for decisions taken by the Council of Ministers and it was in principle possible for a single Member State to block the adoption of an EU policy by veto. Qualified majority voting (QMV) was introduced under the Single European Act for the Council for environmental decisions based on article 100a (market harmonisation). Under the Maastricht Treaty it was extended to the entire environmental policy field, except for measures of a fiscal nature (article 130s, now 175), measures relating to land use planning and the management of water resources, and measures significantly affecting a Member State's choice of energy sources and the structure of energy supply.

It is sometimes suggested that an alternative explanation for the adoption of regulation stricter than what some countries are willing or able to implement may be rooted in the rule of qualified majority voting⁴² within the Council of Ministers (Collins and Earnshaw,

⁴² The qualified majority voting system is a weighted voting system, where Member States have a number of votes differing according to their size. The number of states that can be outvoted depends, therefore, on coalitions between Member States on certain issues.

1993)⁴³. In contrast to the view outlined in the preceding paragraphs, which focused on the inability of the Council to prevent strict legislation proposed by other EU institutions as long as it prefers this to no regulation at all, this view would suggest a tendency also within the Council itself to adopt legislation stricter than in the interest of certain Member States. Put differently, this author's concern is that owing to QMV, Member States might more frequently be obliged to adopt and implement policies to which they are opposed. The concern obviously relates to the possibility that -because a single Member State can no longer block decisions in the Council by veto- a qualified majority of pro-environmental countries, possibly disposing of advanced environmental legislation, might outvote countries that are aiming at lower standards.

Liefferink and Andersen (1998) examine the related question of the extent to which the group of more environmentally progressive 'green' Member States -to which they count Austria, Denmark, Finland, Germany, the Netherlands and Sweden- are able to push stringent regulation at a European level. Although together these countries hold sufficient votes to block QMV decisions and therefore are in principle in a position to block the lowering of standards under negotiation, the authors warn of overstating the impact of this blocking minority on the stringency of regulation. Firstly, a 'green' blocking minority is not necessarily stable. If either Germany or two other countries of the above group leave a 'green' alliance it loses its formal impact. Secondly, the power of these six countries under the QMV rule is only negative: while they can in principle block legislation they consider unsatisfactory, they cannot force the adoption of environmentally progressive proposals without support of a considerable number of further Member States.

Finally, it is sometimes claimed that despite clear differences in Member States' preferences, negotiation in the Council could frequently be characterised as a 'search for consensus' (Collins and Earnshaw, 1993: 225). Liefferink and Andersen (1998: 260) even claim that voting in the Council rarely takes place at all. Instead, negotiations are reported to be, usually, carried on until consensus is reached, so that voting is no longer relevant. While before the entry into force of the Single European Act (SEA) in 1987 proposals for environmental legislation had to be taken unanimously, and the search for consensus was thus inevitable, this changed with the SEA. Nevertheless, the tendency to seek consensus is reported to have persisted in the Council.⁴⁴ It is exactly this consensus seeking which is frequently considered as counter-productive as it can create a different type of problem for implementation. It is argued that the Council's tendency to reach consensus makes vague, superficial and ambiguous legislation with incoherent or contradictory objectives likely (Collins & Earnshaw, 1993; Jordan, 1999).

And indeed, poor policy design has been identified as a further reason for implementation failures specifically in the EU context. Haigh (1997/1998), for instance, states several examples of Directives whose poor design has led to differences in interpretation between Member States and the Commission: The Drinking water Directive (80/778/EEC, OJ L 229 of 30.08.1980) establishing numerical standards to be met by a certain date without specifying what should be done if standards are not met by the deadline; and the Environmental Impact assessment Directive (85/337/EEC, OJ L 175 of 05.07.1985) as an example that contained no transitional provisions dealing with developments authorised after the date set in the directive but for which the authorisation procedure had started before. Further inconsistencies of the Drinking Water Directive are mentioned by Knill (1997a): the measurement technology prescribed by this Directive was outdated by the

⁴³ Citing Wilkinson (1992: 14).

⁴⁴ However, based on interviews with policy makers belonging to the six 'green' Member States, Liefferink and Andersen (1998: 261) report that the possibility of a 'green' block under QMV has led to 'green' standpoints being taken more seriously and that it has refined the consensus-seeking process. The idea is that the mere possibility of voting in case of a deadlock furthers the pressure to make concessions for the sake of reaching compromise.

time it was adopted and, furthermore, found incapable of performing the measurement of some fine values called for. Additionally, Haigh (1997/1998) claims that irreconcilable views have sometimes been incorporated in EU legislation, thus leaving disputes unresolved but temporarily settled. He refers to Directive 76/464/EEC on pollution caused by dangerous substances (OJ L 129 of 18.05.1976), which includes specific uniform emission standards for discharges to the aquatic environment as well as quality objectives allowing for a range of standards, and which gives Member States the possibility to choose between the two, thus disregarding one approach for the other. Finally, he argues that agreeing ambiguous wording, which he suspects being a strategy to secure agreement, sometimes follows a practice where explanatory statements are recorded in unpublished Council minutes. This, so the author, sometimes resulted in secretly modifying language in the minutes⁴⁵ and, consequently, in Member States relying on different sources when interpreting implementation requirements.

Such problems seem to persist, given that the issue of poor policy design has recently been acknowledged by IMPEL (2003). While suggesting that sometimes it will be better to adopt compromises and, therefore, laws which are less than perfect than to agree no law at all, the network emphasises that even compromises should not close their eyes to practicabilities and should be clear, precise and consistent.

3 Explanatory factors related to the heterogeneity of national contexts

The argumentation presented so far has primarily dealt with the Community level, with factors capable of explaining why policies may be developed and adopted which create problems for implementation, and with a legally restricted enforcement power of EU institutions. By this, an important aspect inherent in the implementation of EU policy was left aside: the heterogeneity of national contexts and its impact on implementation. A second strand of explanations for implementation gaps focuses on this issue, on the challenge of designing one and the same policy, adopted at a supranational level, for, and implementing it in, different local contexts at a Member State level.

Factors that have to do with the heterogeneity of Member States and which may explain implementation problems in the respective countries have been reviewed by the literature presented in the previous section. In this context, Collins and Earnshaw (1993) identify five major features of EU policy implementation in relation to national heterogeneity: Firstly, the range and *complexity of existing national laws* may lead to difficulties when these need to be adapted to the requirements of EU legislation and when frequently more than one legal text need to be changed. It is also possible that an EU environmental legislation cuts across different sectoral and jurisdictional areas at a Member State level. Secondly, differences in implementation may also result from the *variety of national and sub-national administrative structures* when Member State's legislative and administrative processes need to fulfil objectives set on a European level. A third factor that may impact particularly on the speed of implementation is the national *legislative culture*. Of particular importance in this respect may be cultures aiming at consultation and consensus building or at legal certainty, which encourage highly detailed legislation. Concepts contained in directives, fourthly, may result in *different definitions* when given effect by Member States. And finally, *federal or quasi-federal government systems within Member States* may entail problems in implementation, for example where EU legislation leads to tension between central and local level governments.

Next to this literature assembling those nationally heterogeneous factors which are possible sources of differences in implementation outcomes across Member States and potentially of implementation failures, a number of authors attempt to deal with the

⁴⁵ However, this practice having been criticised by Parliament already in 1984, a 'Code of Conduct on Public Access to the Minutes and Statements in the Minutes of the Council acting as a legislator' was adopted by the Council in 1995 (Haigh, 1997/98).

impact of national factors rather in a model approach, which is presented throughout the next two sub-sections.

3.1 ‘Administrative fit’ as central explanatory variable for implementation outcomes - the initial model

A group of researchers around Christoph Knill (cf. Knill, 1997a) has developed a model in which the heterogeneity of national administrative structures and the adaptation pressure on national administrations, created by an EU policy in cases of an incompatibility between national administrative approaches and the EU approach, are considered as particularly important for implementation outcomes.⁴⁶ These authors attempt to provide evidence for their ‘administrative fit’ model from a number of empirical case studies on the implementation of European environmental Directives and Regulations across different Member States.

The initial empirical basis the model was built upon comprises the study of European environmental policy implementation in 5 countries, Germany, Britain, France, Italy and Spain. The policies studied are the 1980 Drinking Water Directive (80/778/EEC), the 1985 Environmental Impact Assessment Directive (85/337/EEC), the 1990 Access to Environmental Information Directive (90/313/EEC), the 1993 Environmental Management and Audit Scheme Regulation (EEC Regulation 1836/93), and the 1988 Directive on Large Combustion Plants (88/609/EEC) together with the 1984 Framework Directive (84/360/EEC) on emissions of industrial plants (Knill, 1997a)⁴⁷. With this choice of countries and EU environmental policies the authors aimed to cover a broad spectrum of different regulatory approaches and national administrative systems. Selected examples, which give an indication of the variety of regulatory approaches and a short description of policy approaches covered by the EU policies studied, are presented in the two following tables.

Table 3. 1: German and British administrative traditions in environmental policy

	Germany	Britain
Regulatory approach	- precautionary - technology-oriented - emission-based	- sound scientific evidence - cost-benefit calculations - local quality
Regulatory style State intervention	- ‘interventionist ideal’ - hierarchical - substantive - low flexibility/discretion	- ‘mediating ideal’ - more self-regulation - procedural - high flexibility/discretion
Administrative interest intermediation	- formal - legalistic - more adversarial - closed	- informal - pragmatic - consensual - closed
Regulatory structure	- functional decentralisation - sectoral fragmentation - hierarchical coordination	- sectoral decentralisation - sectoral fragmentation - lacking hierarchical coordination of local activities

Source: Knill and Lenschow (1997), table 1

The British and German administrative traditions (Table 3.1) are often considered as two extremes, between which those of a number of other European countries can be situated. There are however also countries whose administrative approaches are not well developed.⁴⁸ Comparing regulatory approaches, styles and structures prevailing in a

⁴⁶ The approach was developed in the research project ‘The Impact of National Administrative Traditions on the Implementation of EU Environmental Policy’ carried out at the Robert Schuman Centre of the European University Institute in Florence, Italy, and funded by the European Commission, DG Environment.

⁴⁷ OJ L 229 of 30.8.1980; OJ L 175 of 5.7.1985; OJ L 158 of 23.6.1990; OJ L 168 of 10.7.1993; OJ L 336 of 7.12.1988; and OJ L 188 of 16.7.1984 respectively.

⁴⁸ Examples are: The *French* regulatory approach which is frequently characterised as multi-dimensional, combining elements of both the British and German philosophies. This feature is thought to make France less prone to core contradictions as a result of EU policies. *Spain*, on the other hand, is considered as having a rather low administrative capacity, with no dominant regulatory approach towards environmental problems.

specific country (Table 3.1) with the regulatory implications of specific EU environmental policies, i.e. with the regulatory approach, style and structure inherent in the policy (Table 3.2), provides first indications of adaptations required during the policies' implementation.

As far as regulatory approaches are concerned, the substantive Directives (LCP and Drinking Water) are thought to *a priori* be more in line with the German than with the British approach. With respect to regulatory style, the LCP and Drinking Water Directives, reflecting more the interventionist ideal type, might again more easily correspond to the German regulatory style, while the Information Directive and Eco-Audit Regulation, corresponding rather to the mediating ideal, might more easily correspond to the British style. Finally, only two policies are expected to have potential effects on the regulatory structure: the EIA Directive and the EMAS Regulation. But while the EIA Directive may require changes in existing structures, the EMAS regulation requires to build up new ones. Because of this feature, EMAS is assumed to have a lower potential of being in contradiction with existing structures in the Member States.

Table 3. 2: Administrative implications of selected policies

EU policy	Regulatory approach	Regulatory style	Regulatory structure
Large Combustion Plants (LCP)	- precautionary - technology-based - emission-based	Intervention type - hierarchical - uniform - substantive - low flexibility Interest intermediation - formal - legalistic	- neutral (organisational rather than structural implications)
Drinking Water (DW)	- precautionary - technology-based - quality-based	Intervention type - hierarchical - uniform - substantive - low flexibility Interest intermediation - formal - legalistic	- neutral (organisational rather than structural implications)
Access to Information (AI)	- dimension not affected by the policy	Intervention type - procedural Interest intermediation - transparency	- neutral (organisational rather than structural implications)
Environmental Impact Assessment (EIA)	- integrated; cross-media	Intervention type - hierarchical - procedural - high flexibility Interest intermediation - (limited) public participation	- concentration and coordination of administrative competencies
Eco-Audit (EMAS)	- dimension not affected by the policy	Intervention type - self-regulation - procedural - high flexibility Interest intermediation - not directly affected	- building up new administrative structures

Source: Knill and Lenschow (1997), table 2; Knill (1998), table 1

A number of authors have tested the model against the implementation performance of European countries with respect to other Directives and/or have suggested adaptations of the initial model (e.g. De Bruijn, 2003; Börzel, 1999; Haverland, 1999; Smith, 2000; cf. sub-section 3.2 below).

Patterns of interest mediation are little developed and opportunities for third parties access are limited. Moreover, the decentralised regulatory structure is highly fragmented, and resources are lacking (Knill, 1997b).

One major aim of these models is to explain -and to some extent also to predict- implementation failures and successes not only between countries, but also across different policies within one country. By combining European and domestic factors, this line of literature attempts to avoid the flaws of the literature which focuses only on national features of political and administrative systems and which encounters difficulties in explaining varying implementation performance with respect to different directives and regulations within one country (see for example Pridham, 1996)⁴⁹. Arguing that it is the interplay of policy requirements and national approaches that create adaptation pressure on national administrations, Knill and his colleagues expect that adaptation pressure in a specific country will differ between policies.

Knill and his colleagues' approach places national administrative traditions in the foreground to explain successes or failures in EU policy implementation (Knill, 1997b) and by this takes a rather narrow view. The authors justify this focus by arguing that it is national administrations, which are mainly responsible for formal and practical implementation of EU policy, and that in this respect the Commission depends highly on co-operation of Member States, who decide on the necessary organisational, legal and institutional arrangements to implement a policy. Because of the allocation of implementation tasks to national administrations, Knill (1997b and 1998) suggests that transposition and practical application of EU policies will be shaped by prevailing administrative traditions which may significantly differ between policy fields and Member States.

Implementation effectiveness here is defined as 'the degree to which both the formal transposition and the practical application of supranational measures at the national level correspond to the objectives defined in the European legislation' (Knill and Lenschow, 1997: 1). Implementation is considered as effective when all regulatory and administrative measures are enacted in order to fully incorporate European legislation into national law (transposition) and if administrative styles, structures and practices are appropriate to achieve -and actually do achieve- the objectives defined in the policy (Knill, 1997b). It is worth mentioning that despite this comprehensive definition of implementation, the regulated actors themselves only play a subordinate role in this explanatory approach.

3.1.1 The 'objective' adaptation pressure: constellations of national traditions and the content of European policies

Knill's (1998) central hypothesis is that the 'fit' between national administrative systems and the requirements of an EU policy decisively affect the effectiveness of policy implementation. In principle, the smaller the degree of 'fit', i.e. the less national arrangements are adapted to European requirements, the greater the required adaptation and hence the adaptation pressure exerted by an EU policy. The greater the mismatch, therefore, the more difficulties are to be expected during implementation. In analysing the initial match between a policy's requirements and national administrative arrangements, the authors investigate content and design of the EU legislation, on the one hand, and the regulatory style, structures and administrative capacity prevalent in the Member States, on the other hand (Knill, 1997a). These are the variables explaining the implementation outcome. They are presented in more detail in Box 3.1.

⁴⁹ For example approaches trying to establish a direct correlation between the compliance records of specific countries and their political/structural, administrative/procedural, economic, or cultural/attitudinal characteristics. The heterogeneity of compliance records between but also within countries presented in chapter 2 suggests that compliance problems cannot be explained by either European or domestic factors alone. Rather, they result from the interplay between European and domestic factors.

Box 3. 1: Variables explaining ‘objective’ adaptation pressure

Explanatory variables related to the policy side

Policy content refers to the objectives and requirements of the legislation. This comprises the overall problem-solving approach (e.g. end-of-pipe approach based on emission standards or a quality based concept), the policy instruments (substantive, legally binding standards versus procedural approaches; command-and-control based versus self-regulation), the extent to which the policy affects patterns of interest intermediation between administrative and societal actors (formal versus informal, closed versus transparent modes of interaction), and requirements with respect to administrative structure (e.g. creation of new authorities; shifts of competencies).

Policy design encompasses the regulatory scope of the policy (restricted to one policy area, e.g. clean air policy, versus addressed at various policy areas), to its regulatory density (containing detailed or vague regulatory provisions), and regulatory consistency (clarity and internal logic of the measure).

Explanatory variables related to regulatory traditions prevalent in different Member States

Regulatory style refers to the mode of state intervention (e.g. emission- versus quality-orientation; precautionary principle versus sound scientific evidence; technology-orientation versus cost-benefit calculations; command-and-control versus self-regulation; substantive versus procedural regulation; flexibility and discretion given for practical application) and patterns of interaction between administrative and societal actors (interventionist, legalistic, formal, adversarial and closed relationships versus mediating relationships characterised by pragmatic bargaining, informality, consensus, transparency; and access for third parties).

Regulatory structures comprise the vertical (de-/centralisation) and horizontal (concentration/fragmentation) distribution of administrative competencies and patterns of administrative co-ordination and control.

Administrative capacity, finally, is assumed as high where a consistent and generally accepted regulatory approach exists, an elaborated and differentiated set of policy instruments and legal rules, stable patterns of administrative interest intermediation and an effective administrative structure to implement policy.

Source: Knill (1997a)

Based on the degree of match between the regulatory requirements and the national administrative arrangements the authors distinguish three levels of pressure to which they link expected implementation results:

- **High adaptation pressure:** Pressure is classified as high when EU policy contradicts core elements of national administrative arrangements. In such cases, effective implementation is unlikely.
- **Low adaptation pressure:** If Member states can rely on existing administrative provisions to implement EU legislation adaptation pressure is low and effective implementation is likely.
- **Moderate adaptation pressure:** Adaptation pressure is classified as moderate where EU policy requires changes only within the core of national administrative traditions but does not challenge the core factors themselves. In cases of moderate adaptation pressure the variable ‘administrative traditions’ is not considered sufficient to predict implementation effectiveness. Instead, the impact of institutional factors and the policy context on *perceived* adaptation pressure -and hence an actor-centred perspective- are additionally to be taken into consideration (see 3.1.2 below).

Based on the ‘objective’ variables the authors develop *ex ante* hypotheses about the implementation effectiveness of the 5 EU environmental policies in the 5 Member States studied. These are summarized in the following table (Table 3.3) together with actual *ex post* implementation results.

Table 3. 3: Initial ‘objective’ administrative pressure and implementation effectiveness

Country	Directive/ regulation	Initial administrative mismatch/pressure	Implementation effectiveness	
			Predicted by the model	Found in practice
Germany	LCP	Low	High	High
	DW	Low	High	Delayed, eventually quite high
	AI	High	Low	Low
	EIA	High	Low	Low
	EMAS	Moderate	No prediction possible	High
Britain	LCP	High	Low	Rather high
	DW	High	Low	Rather high
	AI	High	Low	High
	EIA	Moderate	No prediction possible	Low
	EMAS	Low	High	High
France	LCP	Moderate	No prediction possible	Rather high
	DW	Moderate	No prediction possible	Low (1)
	AI	Low	High	High
	EIA	Moderate	No prediction possible	Rather low
	EMAS	Moderate	No prediction possible	High
Italy	LCP	Moderate	No prediction possible	Rather high
	DW	Low or moderate (2)	No unambiguous prediction possible	Eventually high? (2)
	AI	Unclear	No prediction possible	Low
	EIA	Not studied	-	-
	EMAS	Not studied	-	-
Spain	LCP	High	Low	First low, eventually improving
	DW	Low	High	Unclear: no apparent problems but possibly simply not revealed due to lacking monitoring capacity
	AI	High	Low	Low
	EIA	Moderate or high (3)	No unambiguous prediction possible	Rather low
	EMAS	Moderate	No prediction possible	Formally incorporated, (but limited uptake by enterprises)

(1) Note that there are contradictions in the assessment of the implementation outcome between the below stated publications. In contrast to the other four sources, Knill (1997a) actually considers the implementation of the Drinking Water Directive in France as effective. (2) Judgement of adaptation pressure and implementation effectiveness remains ambiguous throughout Knill (1997a). (3) Cf. previous note. Ambiguity here in Börzel (1999). - Source: Knill (1997a); Knill (1997b); Knill (1998); Knill and Lenschow (1997); Börzel (1999)

It should be mentioned that not all case studies are similarly well exploitable for assessing the external variables’ predictive value on implementation outcomes. Firstly, the authors do not in all cases explicitly attribute a value on the scale of low to high adaptation pressure to specific case studies. Moreover, where they do, their evaluations sometimes vary across different publications. Secondly, also implementation results are not always unambiguous and some case studies have not been finished (for examples see the notes to Table 3.3). Given that these problems are specifically pronounced in the Spanish and Italian case, the remaining description of the model is exemplified primarily on the basis of the results the authors present for France, Germany and the UK.

Table 3.3 indicates that a restriction to the initial constellations of national traditions and the content of European policies is not always sufficient to correctly predict the performance of implementation. In fact, so far unexplained implementation results were found in 4 cases for which adaptation pressure was initially qualified as high (low) and for which the actual -unexpected- outcome was effective (ineffective) implementation. This holds for Germany for the Drinking Water Directive and for the UK for the LCP, Drinking Water and Access to Information Directives. Because of such ‘*ex post* surprises’, or put differently, the limited explanatory capacity of ‘objective’ matches or

mismatches between policy and national administrative structures for implementation results, the authors introduce a further variable into the analysis: the 'subjective' dimension of *perceived* adaptation pressure. As mentioned before, this dimension is also believed to shed light on the cases of moderate adaptation pressure which, according to the model assumptions, are insufficient to predict, based on 'objective' explanatory variables alone, the effectiveness of implementation.

3.1.2 *Taking policy actors into account: the impact of institutional factors and policy context on perceived adaptation pressure*

The introduction of the subjective variable 'perceived adaptation pressure' accounts for the role of policy actors involved in the implementation process. It is based on two assumptions. Firstly, that adaptation pressure perceived by policy actors may diverge from the 'objective' adaptation pressure.⁵⁰ Secondly, that the perception of adaptation pressure is ultimately decisive for the performance of implementation (Knill and Lenschow, 1997). It is furthermore expected that the extent to which national policy actors perceive European requirements as a fundamental challenge will depend on the degree of institutionalisation, or institutional stability ('institutional embeddedness') of administrative traditions in the specific policy field, on the one hand, and on the policy context, on the other hand (Knill, 1997b). Box 3.2 presents these variables in more detail along with their expected impact on the perceived pressure for adaptation.

Box 3.2: Variables explaining 'perceived' adaptation pressure

Institutional embeddedness

This variable is defined by the extent to which institutional arrangements are ideologically rooted in paradigms (institutional depth) and by the number and strength of intra- and inter-institutional links that need to be changed if the institutions in question were to be changed (institutional breadth). The higher the institutional embeddedness, so the argument goes, the more existing arrangements present core rather than peripheral parts of administrative traditions; and the more EU legislation challenges such core patterns of regulatory approaches, style and structure, the higher the adaptation pressure perceived. If adaptation is thought doable within the context of the regulatory core, the perceived pressure will be moderate, and it is assumed to be low when the actors believe that they can rely on existing provisions to implement the respective EU policy (Knill, 1997b; Knill and Lenschow, 1997).

Policy context

This variable includes aspects such as the importance given to, and the contestedness of, the policy or environmental issue in question. Political salience, i.e. the importance given to a political issue, is assumed to depend on the existence of an objective problem (e.g. the environmental situation or the applicability of an EU policy), on the environmental capacity of the administration and societal actors (available resources for monitoring, public environmental awareness, strength of environmental organisations, etc.) and on whether the EU legislation is, or can be, linked to more general debates which are high on the policy agenda (e.g. deregulation).

It is worth noting that the variable policy context is only considered relevant in cases where adaptation pressure is perceived as moderate owing to institutional factors. In such constellations, low political salience is assumed to shift perceived adaptation pressure from a moderate to a low level, which does not necessarily imply effective implementation, though. The picture is more complex when political salience is high. Here the authors suggest that the perceived adaptation pressure will shift to a high level when the policy meets with a conflicting interest constellation amongst societal actors, while the moderate perception level will be confirmed if there is a general political consensus or acceptance on the need of administrative changes to comply with the EU policy.

Source: Knill, 1997b

⁵⁰ Sometimes the authors denote 'objective' adaptation requirements also as the 'quantitative dimension of adaptation pressure' and 'subjective' adaptation requirements as the 'qualitative dimension of adaptation pressure' (Knill, 1997b).

Applying the variable ‘perceived’ adaptation pressure to the case studies leads to the results presented in Table 3.4. As can be seen, in some cases the additional, actor related explanatory variables were sufficient to explain actual implementation results, while in others they were not. The table summarises how eventual implementation results were explained in cases of ‘objective’ moderate adaptation pressure in France, Germany and the UK. Furthermore, the concept of perceived as opposed to ‘objective’ adaptation pressure allowed the authors to identify the drivers in two cases of unexpected implementation performance. This is, firstly, the delayed implementation of the Drinking Water Directive in Germany. Secondly, also the highly successful implementation outcome of the EMAS Regulation in Germany was considered as a surprise because of Germany’s initial objection to this policy.⁵¹

⁵¹ It is also worth noting that in some cases where expected implementation effectiveness was in line with actual performance the concept of perceived adaptation pressure allows the authors to strengthen their argumentation, but to not make the presentation longer, these cases are not included in the below table.

Table 3. 4: Perceived administrative adaptation pressure and implementation effectiveness

Country	EU Policy	'Objective' adaptation pressure	Perceived adaptation pressure owing to:		Implementation effectiveness found
			'Institutional filter'	'Policy filter'	
France	LCP	Moderate	Low to moderate (*) (prior to the Directive legally binding standards generally negotiated at the regional level instead of uniform national standards)	Moderate (positive policy context: due to nuclear-dominated energy sector LCPs played only a minor role; requirement perceived as unproblematic)	Rather high
	DW	Moderate	High (*) (cf. explanation for LCP; plus the fact that emission values based on precautionary principle were perceived as too strict for the French approach considering regional environmental conditions based on sound evidence)	High (*) (conflictive policy interests between water companies, French authorities and agricultural sector)	Low (cf. note (1) in Table 3.3).
	EIA	Moderate	Moderate	Low (low political salience because EIAs existed already; policy actors not forced to adapt existing procedures as would have been necessary)	Rather low
	EMAS	Moderate	Moderate (new instrument; no changes of, but only addition to, the regulatory framework)	Low (positive policy context, consensus on usefulness of regulation; support by industry)	High
Germany	DW	Low	Moderate (because of regulatory ambiguities in the Directive, i.e. emission limit values that could not be measured by the defined monitoring requirements; delay of implementation until solutions to the technical problem were provided)	Low (high political salience, hence a positive policy context)	Delayed; eventually high
	EMAS	Moderate	Moderate (new instrument; no changes of, but only addition to, the regulatory framework)	Low (high political salience, hence a positive policy context, resonating with objectives of deregulation and unburdening the state)	High
Britain	LCP	High	Not yet explained; outcome due to a change in the institutional framework and policy context (see sub-section 3.1.3).	in the institutional framework and policy context	Rather high
	DW	High			Rather high
	AI	High			High
	EIA	Moderate			Low (low political salience, policy actors not forced to adapt existing procedures as would have been required)

(*) Knill (1997a and b) does not qualify the perceived pressure as either low, moderate or high but uses qualifications such as 'perceived as rather unproblematic', 'perceived no particular pressure' in the case of LCP, and 'requirements perceived as contradicting existing arrangements' in the case of the Drinking Water Directive.

- Source: Knill, 1997a; Knill, 1997b; Knill and Lenschow, 1997

As noted in Table 3.4, the explanatory variables presented so far were not considered sufficient to explain the implementation surprises of the Large Combustion Plant, the Drinking Water and the Access to Information Directives in the UK. For these, the proponents of the 'fit' approach suggest having recourse to a more dynamic view of institutional and regulatory arrangements.

3.1.3 *The dynamic view: the impact of institutional and regulatory reforms*

The variables explaining adaptation pressure and effectiveness of policy implementation have so far only been applied in a static view. The need to view implementation also from a dynamic point of view is acknowledged in the 'fit' approach by the introduction of a further variable which takes account of the fact that what is perceived as regulatory core features may change in the context of general reforms. This variable is the structural stability of institutions, or the structural reform capacity at the national level, since the institutional background behind administrative arrangements may itself be subject to dynamic developments. Their pace and scope are assumed to depend on the structural capacity for reforms. With this the institutional background is considered as a trajectory along which, depending on the reform capacity, more or less far reaching developments may take place.

Box 3. 3: Explanatory variable reform capacity

The reform capacity of a country is assumed to depend on the structure of the state in terms of de-/centralisation and on the relative strength of the position of government with respect to other political, societal and administrative actors in the execution of leadership. The structure of the state is considered important insofar that it affects the number of institutional veto points (administrative) actors have at their disposal to block reform initiatives.⁵²

While decentralisation may reduce reform capacity as it offers more veto points to interested actors, it may also improve reform capacity by strengthening opportunities for societal actors to bring about policy innovation. Furthermore, the number of veto points accessible to societal actors may depend on the extent to which administrative activity is based on legal and formal requirements and on the degree to which administrative structures are comprehensive and fragmented.

Source: Knill, 1997b and 1998

As far as the case studies presented here are concerned, Knill and Lenschow (1997) consider national reform developments as particularly important in the UK. According to these authors, the reform developments that took place in the early 1990s aimed at increasing the efficiency and effectiveness of the administration, at reducing the public sector involvement and at making agency performance more transparent and accountable to the public. They resulted in administrative reorganisation through the creation of independent regulatory bodies and the establishment of performance-oriented regimes. Also, for public services the publishing of explicit performance standards was required. Finally, public services (energy and water supply industries) were privatised. All this led to a tendency towards more formal, legalistic and open patterns of administrative interest intermediation and to a formalisation of intra-agency coordination. These did however not completely replace the previous administrative traditions but rather led to the coexistence of traditional and reform developments. The authors explain this mixture of change and persistence by the coincidence of national dynamics and EU implementation pressure. Furthermore, they explain the high capacity for reform developments in the UK with the initially low number of institutional veto points and the strong position of the central government within the political system.

The changes that explain the eventually rather effective implementation of the Large Combustion Plant, Drinking Water and Access to Information Directives in the United

⁵² The term 'veto points' generally refers to all stages in a decision making process on which agreement is required for a policy change (see for example Haverland, 1999).

Kingdom despite initially high ‘objective’, and partly also perceived, adaptation pressure are summarised in Table 3.5.

Table 3. 5: Perceived administrative adaptation pressure in the UK after policy reforms

Directive	Initial 'objective' adaptation pressure	Reform developments resulting in changes in		Perceived adaptation pressure after reform	<i>Ex-post</i> implementation effectiveness
		Regulatory patterns	Other		
LCP	High	More substantive orientation of state intervention; numerical objectives to be achieved (evident in establishment of national plan defining annual reduction targets and the issuing of plant authorisations) next to flexible procedures (evident in company-bubbles concept setting allowable maximum yearly emissions and leaving the allocation of emissions between plants to company)	Privatisation and deregulation of energy sector increased mix of fuel types used and allowed meeting standards without applying specific abatement technologies	No longer considered as challenging existing core patterns	Rather high
DW	High	More substantive orientation of state intervention; numerical objectives to be achieved (evident in establishment of legally binding quality standards) next to more flexible handling of improvements towards meeting the quality objectives (considering the local situation and the practicability)	Flexible handling of improvements provided regulatory flexibility in the context of a substantive framework and increased economic certainty which was seen as prerequisite of successful privatisation	No longer considered as challenging existing core patterns	Rather high
AI	High	General attempts to increase transparency and accountability of the public sector led to establishment of public registers containing permitting and operational data and emissions monitoring results and to granting of right of access to information; partly exceeded requirements of EU Directive	Unintended side-effects of reforms reduced the scope of the Directive and hence the perceived adaptation pressure: - the privatisation of water and energy utilities allowed them to classify themselves as falling out of the Directive's scope - the increasing fragmentation and separation of regulatory functions increased coordination requirements between regulatory bodies, these are sometimes declared as internal and hence fall under exemptions of disclosure	Remaining rather minor legal adaptations were considered as acceptable	High

Source: Knill and Lenschow, 1997

3.1.4 *Pros and cons of the initial fit approach*

What makes the fit approach attractive is the attempt to identify a limited number of variables that are observable and that make predictions about the smoothness of implementation outcomes of specific policies in specific countries possible. However, the general limits of an approach largely narrowing down the implementation problem to easily observable administrative traditions are obvious and to some extent acknowledged by Knill himself when introducing a second more actor centred level of analysis. With the introduction of the actor related variables and those relating to policy reforms and reform capacity, the information requirements increase considerably. Hence, the number of explanatory variables necessary to study in order to predict implementation results is not as limited as it seems on first sight.

One may question the restriction of the approach mainly to administrative actors. Although this is in line with Knill's approach focussing primarily on the costs implementation causes for the administration, and even though administrative actors have responsibility for implementation, they are clearly not the only actors trying to shape implementation. A number of broadened versions of the 'fit approach', which pay more attention to actors other than administrative ones, are presented below.

A more serious problem of the approach is related to the fact that both the assessment of administrative fit and of implementation effectiveness remain somewhat vague and seem to rely highly on personal judgement (cf. the examples of a varying or ambiguous judgement of fit or misfit above). As far as the effectiveness of implementation is concerned there seems to be a certain laxity in its assessment and this despite a clear initial definition of what implementation effectiveness comprises. Sometimes the authors seem to focus primarily on whether the structures for implementation and enforcement are in place and sometimes more on the actual compliance behaviour of the regulated community. Sometimes they seem to focus on goal attainment relative to a policy's objectives, while sometimes the reference point becomes variable. An example of the latter statement is the case of the Drinking Water Directive where some countries installed more sensitive monitoring equipment than demanded by the Directive, which resulted in these countries detecting cases of non-compliance that would not have been detected with the prescribed monitoring technology. As a result, implementation in these countries sometimes was considered as effective only to a limited extent, while sometimes it was considered effective. Another example where the assessment of implementation remains confuse concerns EMAS, a case which is specific in so far as firm participation in the scheme is voluntary. Here the ambiguity relates to the authors sometimes qualifying implementation as effective where countries put the necessary structures in place, and sometimes judging the scheme's uptake by firms alongside the establishment of the structures.

Finally, the 'administrative fit' approach seems to be contradicted by an interesting empirical statement made by Haigh (1997/1998). This author considers the theoretical case of directives which require practices that have long been carried out in one Member State, while they are new in another. He suggests that it should be easy to implement the Directive in the first Member State, while the second might encounter more problems, having to introduce completely new structures to ensure implementation. In practice, however, as Haigh (1997/1998) argues, a Member State which already has a comparable procedure before a directive is adopted sometimes has more difficulty in correctly implementing the directive than another Member State which starts freshly on the subject. He explains this by the fact that a competent authority which has already developed its traditions may not be convinced of the necessity to make (in its perception maybe unnecessary) changes to existing practices in order to implement fully a legislation. To a certain extent this empirical phenomenon is admitted by Knill (1997a), arguing that in cases of low adaptation pressure, where implementation requires only slight adjustments, there is a danger that these reform requirements will be overlooked or ignored.

3.2 Variations to the Fit-Model

Several authors have suggested adaptations to the fit model, based on empirical studies either within Knill's (1997a) project or on case studies of the implementation of other environmental EU directives. While the models and explanations of three authors differ from the initial approach primarily in the relative importance that they give to certain explanatory variables (cf. De Bruijn, 2003; Börzel, 1999; Haverland, 1999), the approach of another author suggests a change in perspective, away from explaining implementation gaps and to studying environmental performance (cf. Smith, 2000).

3.2.1 Do policy structure and style matter more than policy contents?

While not questioning the 'fit' model itself, De Bruijn (2003) argues that it matters in which component of a policy a misfit occurs. Based on a study of the implementation of the Integrated Pollution Prevention and Control Directive (IPPC, Council Directive 96/61/EC), the EMAS Regulation (Regulation (EC) No. 761/2001)⁵³ and the Commission Communication on Environmental Agreements (COM(96)561 Final) in Denmark, Germany, the Netherlands, Spain and the United Kingdom, he suggests that adaptive pressure resulting from misfit in policy content meets less opposition than misfit consisting in policy style and/or structure. Furthermore, while identifying policy style as an important variable for understanding difficulties countries may encounter in integration with European policies, this author warns of looking at the influence of policy style in isolation. He argues that a fit on style is not sufficient for a smooth implementation where the structure does not accommodate the use of a specific policy instrument. He also believes policy style and structure to be closely connected, arguing that the institutional structure reflects the policy style, and the style gives meaning to the structure.

Table 3. 6: Major misfits between EU policy and Member state traditions

		DK	D	NL	ES	UK	Implementation outcome
IPPC	content		x				DK: transposed, trying to insulate itself from IPPC D: transposed, trying to increase fit
	structure	x	x		x		NL: transposed, no implementation problems E: transposed, implementation highly difficult
	style	x					UK: transposed, no implementation problems
EMAS	content						DK: implemented, relatively high participation D: implemented, high participation
	structure						NL: implemented, limited participation E: implemented, low participation
	style		(x)		x		UK: implemented, limited participation
Agreements	content						DK: scarcely used D: widely used
	structure	x				x	NL: widely used E: scarcely used
	style		(x)		x		UK: scarcely used

x: indicates adaptation pressure. (x) indicates a missing fit with style in environmental policies but a fit with the corporatist structure of the country. - Source: Table taken from De Bruijn, 2003, table 13.1: 299; adapted

The author's analysis of the misfits and his interpretation of the implementation outcomes on which he bases his argument are summarised in Table 3.6. Given that his empirical basis only identifies one case where policy content was in contradiction to traditions at the national level and which showed furthermore also a misfit in policy structure, it is difficult to evaluate De Bruijn's hypothesis without studying a larger set of cases.

⁵³ OJ L 257 of 10.10.1996 and OJ L 114 of 24.4.2001 respectively.

3.2.2 *The Pull-and-Push Model – a stronger role given to societal actors*

Also Börzel (1999) starts from the same assumptions as Knill (1997a). However, this author pays more attention to all those actors that may be in favour of compliance even when a policy misfit occurs. In line with the initial model she assumes, firstly, that compliance problems cannot be explained by either European or domestic factors alone but rather by the interplay between European and domestic factors. Secondly, that compliance problems only occur if a policy implies pressure for adaptation, i.e. if an EU policy challenges existing domestic policies. The difference between this author's and Knill's initial (1997a) model lies in the central role Börzel attributes to pressure for effective implementation of EU policies exerted by domestic societal actors upon public authorities. Furthermore, this author more explicitly translates the notion of adaptation pressure into the notion of administrative implementation costs: where a policy creates pressure for adaptation, its practical application and enforcement will imply considerable costs, which the public administration might not be willing to bear. Being part of the research group around Christoph Knill, the author's empirical case studies cover the directives and regulation which are described in section 3.1 above and apply to their implementation in Germany and Spain.

While Börzel (1999) considers a policy 'misfit' as a kind of necessary condition for compliance problems, she does not consider it as a sufficient condition for implementation failure. Instead, the mobilisation of domestic actors pressuring the public administration to bear implementation costs and to effectively apply the EU policy may significantly improve implementation and compliance. This is what the author calls domestic pressure for adaptation from below, thus 'pulling' an EU policy down to the domestic level. The 'pull' pressure may be exercised through various channels. Examples are political parties, raising concerns about the proper implementation of policies; or environmental organisations, acting as 'watchdog' and drawing the attention of (national or European) public authorities and the public opinion to cases of non-compliance with EU legislation. Also media coverage can bring public attention to an environmental issue and thus help to gain support for domestic mobilisation; and, finally, business and industry may mobilise in favour of compliance with a specific policy. Börzel (1999) furthermore argues that external pressure for compliance can be increased if such domestic mobilisation triggers additional pressure for adaptation from above, resulting in the European Commission initiating infringement procedures against the non-complying Member State. This creates an additional 'push' from above.

Summing up, the interplay of the 'pull-and-push-factor' (Börzel, 1999: 14) -i.e. public authorities getting in between adaptation pressure from above (EU) and below (domestic factors)- gives EU environmental policies a good chance of being effectively implemented even when implementation involves high costs due to policy misfit. This given, one can argue that the model considers a policy misfit implied by an EU policy and an insufficient domestic mobilisation to implement the policy as the most important reasons for implementation failures.

Turning to her empirical case studies, Börzel (1999) indeed finds implementation problems for all those policies that did not show a complete fit between European requirements and national approaches (all policies except for the Air Framework and the LCP Directives in Germany). Those policies that caused adaptation pressure can be classified according to whether or not the author found evidence for the mobilisation of domestic pressure (including complaints to the European Commission about non-compliance) and for infringement procedures filed by the Commission as shown in Table 3.7 and Table 3.8. Information is also given on the author's assessment of the respective implementation records before and after pressure mobilisation.

Table 3. 7: Pressure Mobilisation and implementation outcomes in Germany

Germany	Push (without pull)	Pull (without push)	Neither pull nor push	Pull and push	Implementation outcome	
					Before pressure mobilisation	After pressure mobilisation
DW	X				Delayed and incomplete transposition	Revision of transposition reached formal compliance; but enduring temporary exemptions in practical application
EIA				X	No transposition	Incomplete transposition, eventually revised, but practical compliance limited
AI				X	Late transposition	Revision but still incomplete; infringement procedures pending at the time the article was published and the second revision under preparation; some problems in practical application
EMAS		X			Effective implementation (opposition had mainly existed before the regulation was adopted; afterwards industry got strongly involved in its implementation; the identified 'pull' was therefore not a reaction to non-compliance)	

Table 3. 8: Pressure Mobilisation and implementation outcomes in Spain

Spain	Push (without pull)	Pull (without push)	Neither pull nor push	Pull and push	Implementation outcome	
					Before pressure mobilisation	After pressure mobilisation
DW			X		Spain anticipated the Directive; regulative and administrative structures had been in place; but unclearness remains about practical compliance as monitoring is ineffective	
EIA				X	Incomplete transposition; practical implementation little effective	Promise to correct transposition (not done until the date of publication of the study); some successes of practical application
AI				X	No transposition	Incomplete transposition; first revision remained incomplete, second revision complete; practical application restricted
EMAS			X		Merely incorporated in existing structures; partly necessary changes to system not made; little interest in system by industry	
AFD			X		Not transposed	
LCP		X			Transposed but practical application incomplete	Significant emission reductions obtained, despite non-application of BAT requirement

In those cases where European environmental policies required adaptations to the *German* administrative approaches, the author finds that the mobilisation of pressure from domestic actors -mostly environmental organisations and citizen groups, but also industry in the case of EMAS- generally improved compliance, although slowly (Table 3.7). In those cases where domestic actors tried to mobilise the Commission this resulted

in infringement proceedings which led to an additional push from above. Only in the case of the Drinking Water Directive did the Commission take action that was not preceded by NGO complaints. Combined push and pull also explain the slowly improving compliance with the Environmental Impact Assessment and Access to Information Directives in *Spain*, while domestic pressure led to increased environmental performance with respect to LCP (Table 3.8). In the three remaining cases where the Spanish government faced neither push nor pull to implement European policies, the effectiveness of implementation seems to remain low.

All in all, while the mobilisation of pressure from above and below on national administrations to change existing approaches was shown to correspond to (slow) improvements in implementation, domestic pressure was often considered as too low to be fully successful. In this respect the author primarily argues with restricted resources of environmental and citizen groups or a diffuse mobilisation of domestic pressure. From this approach one can therefore retain the following reasons for an implementation gap in EU environmental policy making: a misfit between the EU policy and national traditions; and insufficient pressure both on a national level by interested actors ‘from below’ and by the European Commission from ‘above’.

Summing up, there are three major differences between the initial ‘fit model’ and Börzel’s (1999) variant of the model. Firstly, while in Knill’s initial model an actor centred approach was only considered relevant in cases of moderate adaptation pressure, and while Knill consequently expected ineffective implementation in all cases of high adaptation pressure, Börzel suggests that domestic pressure for implementation is important in any case of policy misfit and that it may lead to effective implementation also in cases of initially high adaptation pressure. Secondly, while Knill is primarily interested in the perception of adaptation requirements that result from EU policies by domestic actors, Börzel studies the actions undertaken by these actors. And finally, while Knill focuses primarily on administrative actors and to some extent on the target group of the policy, Börzel considers all societal actors and the actions they undertake.

Nevertheless, one can argue that Börzel’s explanation remains strongly in the narrow logic of the ‘fit approach’. While arguing how implementation may be facilitated through domestic societal pressure mobilisation, she says little about how regulated actors who considered abatement costs as unfeasible managed to influence domestic administrative decisions. At best the reader gains the impression that in the Spanish cases industry and the administration were similarly opposed to strict standards or that the simple threat of industry opposition was sufficient to make the government refrain from implementation. Furthermore, given that domestic pressure mobilisation is considered an important factor for successful implementation, one might wonder about the theoretical possibility of cases of a good administrative fit, but strong local opposition and about the outcomes to be expected in such cases. Having defined a policy misfit as precondition for implementation problems, Börzel has however excluded this situation *ex ante*. The possibility of domestic opposition despite an apparently good fit, which results in implementation problems, is discussed in the next sub-section. All in all, there seems to be a certain degree of tautology in this model. In essence, it is argued that when administrative and abatement costs of an EU policy are high and when the environmental benefits of the policy which are perceived by the public are insufficiently high implementation will cause problems. From an economist’s point of view this is the same as saying that a highly inefficient policy leads to ineffective implementation.

3.2.3 *A predominant role given to institutional ‘veto points’ in explaining implementation effectiveness*

Also between the initial ‘fit model’ and Haverland’s (1999) argumentation there is only a shift in emphasis. In fact, while studying the same set of variables as Knill (1997), this author argues that the ultimate factor shaping the pace and quality of EU policy implementation are the institutional veto points central national governments face when imposing European policies on their constituencies. Haverland (1999) claims that the

institutional opportunity structures are decisive for implementation effectiveness, and this regardless of degrees in the goodness of fit. As a major difference to Knill (1997a and 1998) and Börzel (1999), this author consequently suggests that compliance problems may arise even if there is a good fit between an EU policy and national structures and practices, provided that the institutional opportunity structure provides domestic opposition with an institutional veto point which enables them to modify the outcome.

Haverland's (1999) argumentation is based on a study of the implementation of the European Packaging and Packaging Waste Directive (94/62/EC)⁵⁴ in Germany, the Netherlands and the United Kingdom. Based on the pre-existing national approaches towards recycling of household waste (UK), or of packaging and packaging waste more in general (Germany and the Netherlands), the author argues that both with respect to the degree of formalisation and the strictness of standards, Germany faced the lowest and the UK the highest pressure for adaptation. Adaptation pressure in the Netherlands was considered low as far as the strictness of recycling standards is concerned, but medium with respect to the degree of formalisation. While the initial 'fit' approach would therefore predict low implementation effectiveness in the UK, high effectiveness in Germany and an open outcome in the Dutch case, Haverland (1999) finds that Germany faced the biggest problems in the implementation of the Packaging and Packaging Waste Directive, a medium result for implementation effectiveness in the Netherlands and the highest effectiveness in the UK. The essence of this author's argumentation, explaining un-/problematic implementation by focussing on the existence of veto points, is presented in Box 3.4.

Box 3. 4: Explaining implementation outcomes of the Packaging and Packaging Waste Directive in three Member States

Missing veto points in Britain

In the *UK*, recycling capacity was low prior to the Directive's implementation, the Directive's recycling targets therefore presented a challenge for this country. Furthermore, the British government opted for standardised recycling obligations in implementing the Directive which was in opposition to both the prior domestic regulatory policy and style. And finally, the British industry was strongly opposed to the Packaging and Packaging Waste Directive. However, the business sector did not have the capacity to engage in coordination and to achieve common objectives, and, even more important, domestic opposition had no effective veto point at which it could substantially delay the implementation or influence the outcome of the Directive's implementation. Therefore, as Haverland argues, the institutional structure sheltered central government from societal demands and eventually led to agreement by representatives of leading companies. In the end, the UK transposed the Directive with 8 months delay.

Missing formal veto points in the Netherlands

Contrary to Britain, *the Netherlands* already met the EU Directive's recycling quota envisaged for 2000 in 1993. The adaptation pressure here was therefore not rooted in substantive targets, but rather in the formalistic approach introduced by the Directive. In fact, the pre-existing Dutch approach was based on a covenant in which mainly large companies participated and which did not set enforceable obligations for individual companies. Business opposition here was therefore primarily directed at the rigid approach, while smaller firms not participating in the covenant feared being made part of the mandatory recovery and recycling system. The author argues that because opposition in the Netherlands had no formal institutional veto point, central government was able to reconcile European and domestic demands in a flexible way. This, so the argument, explains why government and industry eventually agreed on a compromise which consisted in legislation requiring the EU Directive's maximum recycling standards in parallel with a new covenant entailing substantially higher targets than the Directive, but which were still lower than the previous covenant's.

⁵⁴ OJ L 365 of 31.12.1994.

Box 3.4 continued

The German *Bundesrat* as institutional veto point

In *Germany*, finally, neither the recycling targets nor the formalistic approach were in contradiction to the domestic approach. The problem here resided in the German quota for refillables which, by the Commission, was considered as discriminating trade. The decisive effect on the late and ineffective implementation of the EU Directive in Germany despite the only incremental changes required, according to Haverland, was brought about by the fact that even though the German government was willing to weaken or even abolish the refillable quota, it was met by strong resistance of the *Länder* in the *Bundesrat*, either for environmental reasons or in order to protect local business (breweries) from competition. The necessary approval of the Directive's transposition by the *Bundesrat* therefore constituted an institutional veto point, which resulted in a transposition of the Directive which was delayed by two years and even then did not find the approval of the Commission.

Next to qualifying institutional veto points as decisive variable for implementation effectiveness, Haverland (1999) broadens his findings to a more general hypothesis by suggesting that institutional capacity for policy change might be higher for centralised states than for states with a decentralised institutional structure. Apart from the restricted empirical basis this author builds his argumentation on, one might wonder whether the relative shift in the importance of explanatory variables compared to Knill's (1997a) approach is not simply based on the fact that Haverland does not make the distinction between 'objective' and 'perceived' adaptation pressure. This holds especially for the explanation in the German case. Moreover, some vagueness is also found in this author's argumentation: In discussing the incentives of the Dutch government to negotiate with industry, the author explains that the united and representative Dutch trade and industry associations enjoyed 'almost an informal veto position' (Haverland, 1999: 8). But he does not explain which factors led to the Dutch industry's behavioural change from initial opposition to an eventually problem-oriented, consensual approach. This study highlights the trade-off between the elegance of an approach narrowing down explanatory factors to one major variable and a consistent analysis of how implementation solutions came about.

The qualitative assessment of the degree of 'fit' or 'misfit' between a Directive and national arrangements, which seems to leave at least some room for personal judgement, despite quite clear evaluation criteria, is a point which the previously presented variants on the 'fit' model have in common. This obviously has an impact on an evaluation of the approach itself, namely of its ability to correctly predict implementation results. A broader approach to a study of implementation which rather focuses on *ex post* explanations of implementation outcomes than on *ex ante* predictions is presented below.

3.3 From a study of compliance to a study of factors determining environmental performance

In a study of the implementation of the 1991 Urban Waste Water Treatment Directive (UWWTD; 91/271/EEC)⁵⁵ in England and Wales, Smith (2000) explores the notion of 'fit' in greater detail by changing the view from 'simple' conformance with a Directive to a study of the influence of different actors on the performance of implementation outcomes. In essence he criticises the fit approach for taking too narrow a view by shedding only little light on the processes by which an accommodation is reached between an EU policy and the Member States. For Smith it is the processes themselves by

⁵⁵ OJ L 135 of 30.5.1991.

which the national administration changes to fit Directive requirements which are interesting analytically.⁵⁶

Aiming to take a broader perspective by taking such dynamic aspects into account, the author starts from two important assumptions which are linked to an issue discussed in section 2 of this chapter: the role of discretion in implementation. But while discretion in that discussion was seen as the result of limited control, Smith considers discretion as an aspect built into Directives. To be more concrete, Smith's assumptions are, firstly, that practical directive requirements, generally, are not set out in detail *a priori*, but that they leave some discretion, and are hence open to a degree of bargaining, at national and local levels. Secondly, such areas of discretion will be interpreted to accommodate priorities of relevant domestic (policy) actors, which may themselves be unstable and subject to wider domestic pressures. In order to explain implementation outcomes, and to understand which actors will be able to influence policy outcomes, Smith invites to step outside the administrative unit responsible for implementation. He suggests to take into account inter-organisational dynamics in the domestic policy sector, resources and resource interdependencies, the interactions of actors within networks and with third parties, and dominant beliefs⁵⁷. The author's expectation is that resource interdependencies will draw different actors into the implementation process, and that the dominant policy belief will influence the interpretation of those requirements of a directive over which there is discretion. Requirements are thus likely to be reinterpreted due to the influence of events and activities that go beyond the immediate implementation task.

Because of the openness of directives to a certain degree of discretion Smith suggests that the 'administrative fit' approach should be complemented by a second process: Next to the adaptation pressure exerted (top-down) from the directive imperative upon a national administration to provide the necessary administrative arrangements to deliver Directive requirements on the ground, there may be an influence of interested sub-/national policy actors from the bottom upon interpretation of the directive. The revised hypothesis is that 'the inevitable discretion in Directive requirements allows domestic interests and policy beliefs to influence national implementation of a Directive, subject to associated resource interdependencies' (Smith, 2000: 5).

Consequently, from Smith's perspective implementation depends on both the *ability* and *willingness* of actors to adapt. The author assumes that the ability to adapt depends upon the capabilities and resources of involved actors, such as information, economic resources, organisational capacity, authority to take decisions, legitimacy, and support. The willingness to adapt depends upon how the involved actors perceive the adaptive pressure, which will be influenced by the context of existing rules and the dominant policy beliefs. This also implies that the national understanding of what a specific Directive requires will be influenced by national circumstances. While both Haverland (1999) and Börzel (1999) argue with the influence of local actors on policy implementation, Smith (2000) introduces a stronger emphasis on national and local actor-interactions and studies how the priorities and influence of interested actors evolve over time. Consequently, the two major questions this author wants to investigate in his empirical study of the implementation of the UWWTD are, firstly, what influenced the national implementation of the Directive and, secondly, how these processes shaped the final implementation outputs.

⁵⁶ A further reason given by this author for focussing in particular on the processes of adaptation is his suggestion that where fit is good, Directives may not be necessary in the first place. He claims that they are rather important to move laggard countries ahead, and that these can be expected to be subject to at least moderate adaptation pressure.

⁵⁷ Policy beliefs are generally defined as a set of basic values, causal assumptions, normative beliefs and problem perceptions, concerning a specific policy issue, such as for example air pollution control (see for example Sabatier, 1988).

Smith explains how the implementation approach with respect to the UWWTD in England and Wales changed over time from a minimalist to a more precautionary approach, and how implementation met with an unstable national regulatory system and changing administrative traditions following the privatisation of the water industry in 1989 (cf. Box 3.5). This makes the case study suitable to an investigation of processes whereby the implementation of Directive requirements and national circumstances co-adapt. As the author shows, the Directive's implementation can only be explained by analysing the economic regulatory framework and, therefore, the influence of a non-environmental regulatory regime. With this the case study is also an example in which resource interdependencies between the economic regulator, the environmental regulator, the water companies and the government explain the involvement and influence of each.

Box 3.5: The implementation of the Urban Waste Water Treatment Directive in England and Wales

When the English and Welsh water companies were privatised, a framework of economic and environmental regulation was created to prevent monopoly abuse. In this context, two institutions were created: The Office of Water Services (OFWAT) responsible for the independent economic regulation of industry and the charges it makes to customers, and the National Rivers Authority (NRA), administering environmental regulations by issuing discharge consents, monitoring performance and enforcing compliance. In 1996, the latter was replaced by the Environment Agency (EA). To oversee UWWTD implementation, and to negotiate the translation of Directive requirements into operation criteria, the Department of the Environment created a technocratic group including regulators from OFWAT and NRA/EA and representatives of the water industry trade association. This group issued guidelines for implementation, but having no statutory force, a degree of consensus amongst all parties was necessary for these to become operational. UWWTD implementation took place against this background, a process the author separates in two phases.

The first phase

In the early 1990s the expectation of escalating control costs resulted in limiting treatment as far as possible by exploiting flexibility which was left by the Directive. Indeed, the Directive sets different standards for discharges from sewage treatment works depending upon the population served and the type of receiving water into which the treatment plant discharges. The stringency of discharge limit, and the abatement capacity of the respective treatment technology required, decrease with the three types of receiving water defined: Sensitive Areas, Normal Areas, and Less Sensitive Areas. The Directive is vague on criteria for classifying receiving waters according to the three types. This discretion has proven an important bargaining space in England and Wales and resulted in minimising treatment inland by restricting the designation of Sensitive Areas, and coastal treatment by a widespread use of Less Sensitive Area designation. While the NRA opted for applying strict environmental limits, the OFWAT, pressured by consumer representative groups and influenced by high implementation cost estimates and the alarming forecast of a first periodic review of regulated water charges, was primarily interested in keeping water prices low. Environmental NGOs, Parliamentary Select Committees, local communities and consumer groups were all trying to influence the policy. Eventually, Treasury and Prime Ministerial intervention pressuring for cost control stroke the balance. After an unsuccessful attempt to renegotiate deadlines and other Directive requirements at an EU level, a minimalist implementation strategy was pursued. The cost-adverse policy belief hence proved stronger than the environment-oriented one.

The second phase

A revised and more precautionary approach was followed after a second review of regulated water charges in 1998. Controversy over the designation of a number of Less Sensitive Areas had continued and local authorities had challenged the decision in court. High Court judged that government had been bending the interpretation of the UWWTD too far. Furthermore, some water companies experienced local and environmental criticism, and media campaigns encouraged the demand for the installation of more efficient abatement technology in plants. Environmental arguments were boosted by the decision of one Welsh company that full-treatment was an affordable option, and by the recommendation of the House of Commons Environment Select Committee to apply tertiary treatment at all sewage plants. Additionally, the second periodic review of water charges indicated that revenues from water charges were generating profits that were judged as excessive.

Box 3.5 continued

The finding gave reason to believe that there was financial room for tighter UWWTD implementation or cuts in water charges to customers, with the EA opting for the first, and OFWAT for the second alternative. Both lobbied the government and for this used results of public opinion poll carried out by the trade industry association, the EA and the National Customer Council. The newly elected Labour government eventually issued guidance to OFWAT in 1998, deciding to take a more precautionary approach. Tightening the interpretation of the Directive seemed feasible without upsetting cost-averse policy-beliefs. All Less Sensitive Areas were revoked and secondary treatment required for all coastal plants.

Source: Smith, 2000

From his empirical analysis, Smith (2000: 20) concludes that ‘fit is pliable, not preordained’. In his example implementation has been conform with the Directive (except for two plants) under both interpretations, the minimalist and the more precautionary one. But the understanding of what conformance requires has changed at the national level and has had an impact on actual performance. While in Smith’s case study not only ‘fit’ but also compliance has been pliable, this may be to a lesser extent the case for Directives which foresee less room for decision making at a Member State level. Nevertheless, his approach which focuses on the influence of different actors and wider societal contexts and events on implementation outcomes might yield valuable explanations also for environmental performance with respect to policies that were ineffectively implemented.

The major difference of Smith’s (2000) approach compared to the previously presented ones is that it gives up the attempt of identifying one or a few central actors and explanatory factors based on which *ex ante* predictions about exact implementation outcomes can be made. Instead, this author focuses on one case of EU policy implementation and investigates *ex post* the complex processes of actors having interacted over time, and of policy areas other than the environmental area having impacted on implementation outcomes.

4 Actor centred explanations for a lack in compliance

Actors are also the focus of publications from a number of authors who investigate and survey the International Relations (IR) literature with respect to the role of actors for compliance with international rules. Although the ultimate aim of these authors is to explain non-/compliance with EU legislation in general, and European environmental legislation more specifically, the literature remains rather theoretic. Tests of hypotheses derived from the IR literature about factors determining the behaviour of actors in an EU context are at a preliminary stage. The following two sub-sections focus on the behaviour of two distinct actor types: the state and private actors. As far as state behaviour is concerned one issue addressed by Smith (2000) is also discussed in the IR literature: the fact that compliance may require both the willingness and the necessary capacity to actually comply. As far as the role of private actors is concerned, the focus is both on the influence these may exert on state actors and on factors driving the compliance behaviour of private targets of legislation themselves.

4.1 Explaining state behaviour: non-compliance owing to inability or to unwillingness?

Börzel et al. (2003) review International Relation theories with the aim to explain non-compliance with international agreements in general, and EU legislation more specifically. Focusing on the behaviour of the state as an actor by himself they define compliance primarily with respect to the legal and administrative measures necessary to put a policy into practice. Consequently, compliance behaviour of the target actors is only considered where the policy targets are state actors.

While not entering into the details of different theoretical IR approaches, it makes sense to extract from Börzel et al.’s (2003) analysis the major explanations for non-compliance

they distinguish in this literature. These authors classify IR based approaches, firstly, by the source of non-compliance behaviour, distinguishing between voluntary and involuntary non-compliance. Secondly, they classify them by the logic of how non-compliance behaviour can be influenced, distinguishing between approaches which argue with the need to change the actors' pay-off matrices and those which argue with the need to change the actors' preferences. Cross-tabulating these leads to four situations which are believed to correspond to different explanations for what drives non-compliance (cf. Table 3.9). These are a lack in enforcement, i.e. monitoring and sanctioning mechanisms; a lack in litigation where countries develop diverging problem perceptions or interpretations of a specific legislation; a lack of internalisation of the respective norm; or a lack in financial and technical capacity.

Table 3. 9: Theoretical approaches in the IR compliance literature

Compliance mechanism	Voluntary non-compliance	Involuntary non-compliance
Sanctioning (negative/positive)	'sticks' monitoring and sanctions compliance through enforcement	'carrots' capacity building and rule specification compliance through management
Socialisation	persuasion and learning compliance through persuasion	legal internalisation compliance through litigation

Source: Börzel et al. (2003), Table 3; adapted

Turning first to *voluntary non-compliance*, the authors identify two major factors that drive non-compliance behaviour of states: the costs of compliance (resulting in cost-avoidance motivated non-compliance) and a lack of norm internalisation. *Enforcement* is considered as crucial for reaching compliance when states violate international norms and rules voluntarily because they are unwilling to bear the *costs of compliance*. This case is assumed to be often due to international norms and rules being incompatible with national arrangements and thus requiring substantial changes on the national level (cf. the 'fit' argumentation above). IR scholars here see mitigation primarily in increasing the costs of non-compliance. The literature identifies different actors able to punish non-compliant states and hence to affect the non-compliance costs: hegemonic states, international institutions, or trans-/national social mobilisation generating pressure for compliance. Unlike the previous explanation which focuses on material costs of compliance, an alternative explanation given by the IR literature for voluntary non-compliance focuses on a *lack of internalisation of a norm* as socially accepted or appropriate behaviour. In order to bring about compliance in this situation, the IR literature recommends to rely on socialisation aiming to change the actors' preferences, i.e. on initiating processes of *social learning and persuasion* in order to make actors internalise the norm.

With respect to *in-voluntary non-compliance*, the authors firstly identify two possible reasons for why states that are basically willing to comply with international rules they once agreed on may in practice not be able to do so. These are, on the one hand, a *lack in the capacity* (for example technology, expertise, administrative manpower, financial resources) or, on the other hand, *unclearness about the required compliance behaviour* where the rule is imprecise or ambiguous. As primary means to help states comply in these cases, the IR literature suggests *capacity building*, which can consist in financial or technical assistance ('carrots'), helping to reduce the costs of compliance, and *rule specification* by offering procedures to clarify and specify obligations. Secondly, states may not be unable to comply, and also not refuse the norm in general, but *diverge in the exact interpretation of its meaning and applicability*. In such cases, states will be convinced that their behaviour does not constitute a violation of the rule in the first place. Such situations are the more likely to occur, the more ambiguous and imprecise a rule or norm is. In order to further compliance, the IR literature points at the need of unambiguous rules but also considers that dispute settlement procedures are required to strike the balance between contesting interpretations of a rule. Legal dispute settlement may help internalise international norms into the domestic legal system. Here, compliance is also thought to be furthered by socialisation of actors until they take the

respective norms for granted. But the dominant *socialisation mechanism is litigation and legal dispute*, rather than social learning and persuasion.

Having identified the above set of reasons for non-compliance by states in the IR literature, Börzel et al. (2003) test IR theory based explanations against non-compliance with European policy. Restricting themselves to the compliance mechanisms enforcement and management (see Table 3.9 above) they derive hypotheses about when states would be expected to comply or not and use these in ordinary least squares regressions (OLS) over non-compliance cases (the dependent variable) that have given rise to reasoned opinions within European infringement proceedings between 1978 and 1999. The data is drawn from a database the European Commission provided the authors with in the framework of a research project.

Table 3. 10: Tests on compliance hypotheses in the EU

	Compliance mechanism	Hypothesis	Explanatory variables	Result
1	Enforcement	The less power a state has, the more it complies	GDP	No correlation found
2	Management	The less action capacity a state has the less it complies	GDP	No correlation found
3	Management	The less political capacity a state has, the less it will comply	Veto players; GDP/capita	Significant but weak relation, positive for veto players, negative for GDP/capita
4	Management	The less specified a rule is, the less it will be complied with	Regulations (more specified), Directives (more discretion)	Regulations are less frequently violated than Directives
5	Management	The less precise and legally embedded a rule is, the less it will be complied with	Regulations (more embedded because they deploy a direct effect); Directives (need transposition)	Regulations are less frequently violated than Directives

All in all, the authors find significant results only for their hypotheses 3 to 5. Results are strong only for their fourth and fifth hypothesis (cf. Table 3.10), for which they actually did not use OLS regressions but only compared the shares of regulations and directives in European Legal Acts with these instruments' shares of infringements in the total number of infringements. These two hypotheses, however, yield identical predictions although they specify different causal mechanisms. It remains therefore unexplained whether Directives are less obeyed because they are more vague and ambiguous or because trans-/national actors can only directly litigate against Directives once they have become effective (i.e. once they have been transposed) or when they are sufficiently specified to deploy direct effect. With this it remains unclear whether compliance is rather to be achieved through capacity-building or by facilitating litigation.

The main conclusions Börzel et al. (2003) draw from their analysis are a need for further statistical analysis, which defines hypotheses for all four compliance mechanisms and uses multivariate regression analysis. Furthermore, they suggest that monocausal explanations prominent in IR literature are unlikely to account for observed variations in compliance. Instead of being mutually exclusive, they believe the different causal mechanisms to interact with, and relate to, each other, and to sometimes also undermine each other.

A possible explanation for the lack of significant results for Börzel et al.'s enforcement hypothesis might be provided by Haas (1998) who similarly studies IR literature (and additionally comparative politics) to identify reasons for states' choices to comply or not with EU directives. This author rejects the enforcement hypothesis as an explanation for compliance in the EU arguing, on the one hand, that unilateral efforts at enforcement between states are improbable and, on the other hand, that the EU as an institution is not able to unilaterally enforce compliance. Although the latter argument seems imprecise, one may imagine that the author's point is that EU enforcement on its own is not able to explain differing patterns in compliance across policies and Member States. All in all, he

suggests that institutional channels of influence and of national conviction affecting concern and capacity are more likely to directly influence a state's compliance than enforcement.

Arguing that compliance is a matter of state choice, this author, finally, also tries to explain why states may find it in their interest to sign an EU commitment irrespective of their subsequent compliance. He suggests, firstly, that signing a treaty and subsequent compliance are two distinct and different decisions. As to the question of a state's possible reasons to sign up to supranational legislation if he does not expect to comply, Haas (1998: 19) lists the following examples: states which are unable to comply may sign out of a hope that others will help them to comply⁵⁸; states may sign in order to signal commitment in related issues of national importance, to strengthen a leader's political potential for implementing at home later, or because signing is part of a broader diplomatic culture with which they wish to be associated. Pointing to the case of the UK which implemented the Drinking Water Directive with a delay in order to create a more favourable climate for the privatisation of their water industry, also Collins and Earnshaw (1993) suggest that late or non-compliance sometimes may be politically expedient. And Mitchell (1996: 11-12), in a publication not specifically dealing with EU policy but with international treaty compliance in general, suggests that actors may wish to participate in the political benefits of membership without ever intending to comply, or that they may sign because of domestic or international pressure. In this context it is also worth recalling Eichener's (1997) argument discussed in section 2 and according to which Member States can afford to agree to EU legislation which they do not support because they can hope to get away with weak implementation.

4.2 The role of private actors for compliance

While the previous argumentation focused on the behaviour of state governments, partly the same authors have also studied the International Relations literature for approaches that allow for private actor based explanations of non-compliance. Especially Börzel (2000) argues that state-centred explanations are too simplistic to account for the variations in compliance with Community Law. This author develops hypotheses about the influence of private actors on state compliance with inconvenient national rules with the ultimate aim of testing these with respect to EU policy implementation. However, she has not yet provided any results and her arguments so far are purely theoretical. Two further points should be noted: firstly, when developing hypotheses on the potential role of private actors for compliance, the author does not specifically focus on private regulated agents. Instead, by 'private actors' she understands all non-state actors, be it for-profit, economic actors, such as corporations and interest groups, or non-for-profit, societal actors, such as voluntary organisations or social movements. Secondly, she does not only and primarily study compliance of the target group of a policy, but also the influence private actors may have on state compliance.

Börzel (2000) identifies room for private actor influence on compliance, firstly, in IR approaches which derive state preferences from domestic interests. Under these approaches, pressure from domestic actors against state compliance is to be expected where distributional concerns are at stake, i.e. where international rules impose significant compliance costs on powerful domestic actors. The influence private actors can exert on the state is, furthermore, supposed to increase with the number of veto players, such as interest groups, parties, etc. In this context Haas (1998) discusses the influence of private actors on a state's will to comply with environmental legislation and argues that the power of environmental interests may be decisive for the political will to comply and implement a specific policy. He suggests that the degree of political will may depend on the anticipated degree of resistance, which itself may vary with the identity, number and influence of the actors who have to change their behaviour. Finally, pressure from private

⁵⁸ There are several sources of Community funds available to environmental projects: funding under Life, the Cohesion Fund and Structural Funds (COM(96)500; Haigh, 1997/98).

actors on governments is not restricted to the national level but may also be exerted on a trans-national level, for example through international NGOs mobilising support from international organisations involved in monitoring (Börzel, 2000; cf. also the ‘pull and push’ approach above). A practical example for the EU is given by Haas (1998) who argues that NGOs are becoming capable of monitoring environmental quality and national compliance and that they are becoming involved as a source of shadow verification of government obligations in the EU.

But not only the power and number of actors pressuring the state are considered as relevant for state compliance. Börzel (2000) also identifies arguments that link the political influence of private actors to the domestic structures of the state. Influence of private actors on the state requires their access to the political system (veto points) and it decreases with the state’s autonomy vis-à-vis society. But the easier the access to the political system and to the implementation process, the more important it is that the actors are able to build coalitions in order to gain influence. Under this approach a more cooperative political culture is assumed to further coalition building.

Turning finally to the compliance behaviour of private target actors of a policy, the IR literature argues with the need of domestic actors internalising international norms to achieve compliance. Social-learning and persuasion processes are consequently considered as necessary for actors to internalise a norm and to change their behaviour accordingly. An aspect discussed earlier is taken up under this strand of literature as well: the advantages of involving not only state actors but also the target actors of a rule into rule-making and rule-implementation. This could increase the legitimacy of a rule, thus motivating voluntary compliance. Legitimacy is further expected to result from dialogue: actors arguing amongst each other, justifying their views and appealing to collectively shared norms and values instead of appealing to their power and economic interests.⁵⁹

Parts of the arguments presented above are found in Haas (1998) who discusses the role of private actors also with respect to a different question: whether compliance could depend on the policy area regulated. Comparing different policy sectors, this author suggests that a key-source of potential non-compliance may have to do with both the issue being regulated and the actors whose activities a policy is seeking to influence. In more detail his point is that compliance will depend on the regulated actors’ self-interest as well as on the distribution of costs and benefits entailed by a policy. In this respect, so the author’s argumentation, environmental policy may be subject to a disadvantageous position. He suggests that in the environment sector, in the past, domestic factors have tended to rather militate against strong compliance because of a concentration of costs on, and a high degree of political representation by, industry compared to a more diffuse concentration of benefits on more poorly organised and represented individuals. According to Haas, the same arguments might also explain differential compliance within the environmental sphere between pollution control regimes with potential economic rewards (e.g. highly competitive pollution control technologies opening market opportunities) and areas which offer more limited economic rewards in terms of limited opportunities for the private sector (such as conservation regimes). The following statement made by the House of Lords Select Committee on the European Communities in 1992⁶⁰ can be seen in the context of Haas’ argumentation. They claim that because interests fighting for public goods -such as environmental quality- are often politically weak and geographically dispersed, and because powerful and committed vested interests in environmental politics are thus often absent, resistance by actors subject to environmental regulation may be stronger than the interests fighting for its implementation.

⁵⁹ It should be noted that this hypothesis to some extent contradicts explanations assuming that an increasing number of participants increases the number of veto points which may hinder compliance.

⁶⁰ HOLSCEC (1992: 5); cited by Jordan (1999).

5 Conclusions

Irrespective of isolated monocausal explanations of compliance there is a general trend in political science to develop more complex approaches to implementation and compliance studies. Considering the factors discussed throughout this chapter and which are believed to influence implementation outcomes, an interesting feature of the political science literature emerges: the wide array of variables studied, and the broad spectrum of reasons given, which, in a complementary way, may explain problems in policy implementation and the occurrence of implementation gaps. A further striking feature of this literature, however, is the comparatively restricted emphasis it puts on one of the key-actors in implementation: the actor regulated by the policy, which in European environmental policy-making frequently consists of private or public industrial firms. Retained from this literature for the subsequent study of the 1989 municipal waste incineration Directive's implementation is the need to take a broad view of the processes taking place during implementation. This calls for investigating the costs the policy implies for the actors involved; the actors' perceptions of both the policy and the environmental problem at stake; the context factors influencing these (possibly including policy domains other than the environmental one); and the interactions taking place between all relevant actors in order to understand the implementation processes that took place. However, compared to the majority of political science approaches reviewed in this chapter, a stronger focus will be placed on the actors regulated by the policy as well as on the local regulatory agencies -as opposed to the central government- which are responsible for implementation on the ground.

A recurrent argument in the literature studied here is the claim that, in order to avoid implementation problems, implementation issues have to be considered during the design phase of a policy. In a larger sense, this can also be applied to the administrative fit argument, suggesting that the compatibility between European and national policy approaches determines the effectiveness of a policy's implementation. Considering the heterogeneity in European national policy approaches and contexts, and the difficulty in designing one highly specific policy to fit all, this argument may be seen to support policies that leave discretion to the national level. The interesting question then is how the discretion will be used. Smith (2000) presents the case of a Directive, which gives flexibility at national level, and whose implementation in the UK was characterised by the application of increasingly strict standards which led to clear improvements in environmental performance over time. How discretion was used, and what it meant for the efficiency of the policy's outcomes, will be studied in the case of the municipal waste incineration Directive (89/429/EEC) below.

