



## Misfits and compliance patterns in the transposition and implementation of the Habitats Directive—four cases



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### ABSTRACT

This paper investigates the transposition and implementation of the Habitats Directive in four European member states, namely Denmark, the Netherlands, Greece, and Romania, and the role that institutional misfits have played in more or less successful implementation processes. Departing in the 'Worlds of Compliance' literature, it also explores if this typology can be useful for understanding the ways member states address institutional adaptation pressures in the implementation steps following the transposition phase. The requirements in the Habitats Directive expanded most member states' nature conservation frameworks, especially in the obligation to introduce pro-active conservation, and it also laid down a number of steps to be taken for creating the European Natura 2000 network. It was found that the transposition did mostly follow general compliance types, but that these types also helped understand the extent and adequacy of adaptations and changes to the institutional framework in the implementation processes following the directive's adoption. Implementation challenges were different for different countries. They showed a need to align institutional frameworks for a) Natura 2000 in areas with several existing types of landscape protections and ensuing spatial and institutional overlaps; b) clarifying the roles and responsibilities of various authorities involved in implementation; c) ensuring coordination with the other sectorial policy areas that interact with the Habitats Directive (such as the Nitrate Directive and the Water Framework Directive). It turned out that there could be a need for more flexible and less-top-down European legislation, providing a larger room-for-manoeuve for integration with domestic approaches.

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### 1. Introduction

The development of European landscapes is driven by the complex interaction of many different factors. Urban development and transport infrastructure affect the structure and composition of the landscape by seizing and fragmenting an increasing share of largely agricultural land in Europe (EEA, 2013; Hersperger and Bürgi, 2009), while agriculture and forestry drives structural development

through processes of expansion, homogenisation, and abandonment (Verburg et al., 2010). European environmental policies aim to steer these processes to counteract unwanted development pathways, but policies are not always implemented in ways that lead to the desired outcomes in the member states.

Greening – understood as integrating environmental concerns in sector policies – was introduced to the European policy agenda in later decades, and became institutionalised with the adoption of the Single European Act (1987), which forms the legal basis for environmental policies (Matthews, 2013). Since then, a number of environmental policies have been approved for the management of the land area, such as the Nitrate Directive, the Habitats Directive and the Water Framework Directive, as well as various

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agri-environmental schemes under the Common Agricultural Policy. The importance of these policies for the European landscape development depends on their appropriate implementation in the member states.

However, EU policies are not always adequately transposed and implemented, and particularly in the environmental policy field, poor implementation performance has been documented by the large number of infringement procedures within this policy field (Etherington, 2006). Inadequate implementation has been ascribed to various causes, including in the literature on institutional aspects. Some of the more persistent explanations provided here are a lack of fit between European and domestic institutional frameworks (Knill and Lenschow, 1998), domestic opposition (Treib, 2003; Mastenbroek, 2005), and different domestic approaches to compliance and Europeanisation (Falkner et al., 2007; Liefferink et al., 2011).

The Habitats Directive aims to protect European habitats and species. It is one of the older environmental directives, with more than 20 years of implementation history, and it has contributed importantly to protection and conservation of European biodiversity, both for habitats and target species of the Directives (McKenna et al., 2014; Trochet and Schmeller, 2013) and non-target species (van der Sluis et al., 2016), though highly variable across Europe (McKenna et al., 2014). The implementation however has been afflicted by numerous delays in domestic responses (e.g. Lasén-Díaz, 2001), as also demonstrated by the frequent involvement of the European Court of Justice (ECJ). Though the directive was initially perceived as a model of effective nature protection law, its implementation and enforcement have not been entirely successful (e.g. Ferranti et al., 2010; Apostopoulou and Pantis, 2009) – even deemed a ‘performance of failure’ (Beunen et al., 2013). It has also been argued that legally bound procedural issues in day-to-day implementation of the directive seem to become more important than the substantial requirements – improvements to habitats and species (Wandesforde-Smith and Watts, 2014). Hence, it presents an appropriate case for studying institutional aspects of policy transposition and implementation.

### 1.1. Implementation insights

Lack of compliance and implementation failures and successes related to EU policies have been studied extensively, and reviews of the field have been carried out (Mastenbroek, 2005), and with a specific focus on environmental policy (Etherington 2006). In the late 1990s, studies were increasingly inspired by theories of Europeanisation and neo-institutionalist theory, focusing on the nature of the domestic administrative structures and the complexity of the legislation, as well as the extent to which the EU policy approach ‘fits’ the domestic institutional set-up – factors which were seen as critical to a smooth implementation process (Mastenbroek, 2005).

The *goodness of fit* theory guided a number of studies, with the key hypothesis that a lack of fit between European policy requirements and existing domestic institutional frameworks, leads to a large adaptation pressure, i.e. adaptation to core elements of the institutional framework, and less effective policy implementation (Knill and Lenschow, 1998; Bailey, 2002). This theory was later criticised for the lack of acknowledgement of domestic interest constellations and how they play out in different phases of implementation (Treib, 2006). Knill and Lehmkuhl (2002) suggested that the type of mechanisms used in an EU policy intervention would influence the role that national interest constellations and opportunity structures could take. They distinguished between three Europeanisation mechanisms with decreasing prescriptive power; one that prescribed a specific institutional model for implementation; another which aimed at changing domestic opportunity structures, and the third and weakest mechanism which aimed at

re-shaping domestic beliefs and expectations. Further, they suggested that the prescriptive model provided less space for domestic interest constellations than the latter two, and that in cases of requirements for fundamental changes in domestic institutions this might provoke lack of compliance. In cases of smaller adaptation needs, or the use of less prescriptive mechanisms, the outcome would be more open to the influence of domestic interest constellations. Etherington (2006) observed that EU environmental policy primarily works through the prescriptive type of institutional compliance mechanisms, and this might suggest that the arena for domestic politics was smaller than for other policy areas.

The *goodness of fit* argument has also been criticised for disappointing empirical verification (Mastenbroek, 2005; Falkner et al., 2007). Based on studies of the transposition of six European Union labour laws, Falkner et al. (2007), Falkner and Treib (2008) were not able to verify the misfit hypothesis, and found that comparatively small necessary legal adaptations could still be heavily delayed in some member states, while larger misfits were in some cases relatively smoothly transposed. Based on a more aggregated level analysis, they identified clusters of member states representing what they call ideal types of transposition styles. They introduced the idea of specific national cultures – *Worlds of Compliance* (WoC) – of appraising and processing adaptation requirements, which would emerge as combinations of neglect or obedience by administrative systems and policy actors respectively, and found examples of this in their studies. These so-called compliance types were characterised as follows: 1. Worlds of law observance: the compliance goal typically overrides domestic concerns (Denmark, Finland, Sweden); 2. Worlds of domestic policies: EU law observance is one priority amongst many (Austria, Belgium, Germany, the Netherlands, Spain, UK); 3. Worlds of transposition neglect: compliance is not a goal in itself, and without powerful supranational action transposition obligations are not recognized (France, Greece, Luxemburg, Portugal); 4. Worlds of dead letter: systematic contestation at transposition stage but timely transposition, and non-compliance in enforcement and application (Czech Republic, Slovakia, Hungary, Slovenia). The latter category differs from the first three, in the sense that they are all accession countries since the turn of the century, and that the high compliance in transposition in spite of political contestation could to some extent be understood as a response to conditionality vis-à-vis accession, while the later lack of enforcement was mainly found to be based on weak economies and insufficient enforcement systems, rather than reluctance or resistance in political and administrative systems. Hence, the WoC approach does not see institutional legacy as the main impediment to transposition, and does not find certain adversarial aspects of domestic institutional frameworks. Rather, it observes at an aggregate level that transposition follows different patterns in member states.

A third comment to the misfit approach derives from studies arguing for a supposed shift in policy style represented by ‘a new generation’ environmental directives (Beunen et al., 2009; Liefferink et al., 2011), characterised by long-term and substantial goals and more process-oriented obligations, with choice of approaches and instruments left to national discretion. In their study of the implementation of the Water Framework Directive (WFD), Liefferink et al. (2011) found that the misfit approach was less adequate for this policy style due to the considerable room for nationally defined pathways to the goals. The Habitats Directive represents an earlier period of EU policy, and in some ways it represents an in-between type of policy, prescribing a set of obligations related to general instruments and corresponding deadlines, while reaching its ultimate objective of reaching and maintaining a ‘favourable conservation status’ for habitats and species of European interest, leaves considerable domestic discretion in instruments and measures applied within the general framework.

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