

Compliance and styles of conflict management in Europe

By

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Abstract

Why and to what extent do states differ in their implementation of international norms? Furthermore, why and to what extent do states differ in their mode of resolving conflicts regarding non-implementation of international norms? In this article the empirical focus is on implementation of Community legislation by the member states of the European Union (EU) and the European Free Trade Association (EFTA). Over time there has been an overall reduction in the deficit in transposition, but the number of conflicts regarding non-implementation has increased in the same period. While states converge on transposition, they diverge regarding their mode of handling conflicts related to non-implementation. In general, the larger member states use more frequently court rulings to settle such conflicts. By contrast, the smaller states, and in particular the Nordic states pursue a more consensus seeking style, with limited use of courts. These observations indicate that domestic traditions and styles of decision making are more important for explaining variation than the enforcement capacity of the European institutions, and the extent of participation and power in decision making at the European level.

Europeanization and implementation of Community legislation

This article examines how and to what extent domestic institutions comply with international rules and legislation. Moreover, it examines how and to what extent states settle disputes regarding non-implementation of international norms. The empirical focus is on how member states in the European Union (EU) and the European Free Trade Association (EFTA) comply with and resolve conflicts regarding community norms.

There is a long-standing tradition in the general political science and law to examine implementation. Numerous studies in organizational theory and public administration have demonstrated that implementation processes have significant effects on the policy outcomes and that institutional arrangements impact on implementation processes (Pressman and Wildavsky 1973; Palumbo and Calista 1990). The current literature on the Europeanization of institutions and policies is related to this, since it examines how domestic institutions and policies are adapted and changed in order to handle the responsibilities following from European integration (Hanf and Soetendorp 1998; Goetz and Hix 2001; Green Cowles, Caporaso et al. 2001, Olsen, 2002). Although many of these studies examine implementation in a qualitative manner in case studies, there is an increasing interest in examining implementation from a quantitative and comparative perspective (Siedentopf and Ziller 1988; Tallberg 1999; Azzi 2000; Dimatrakopoulos 2001; Mbaye 2001, Bursens, 2002). This article follows this latter current.

By increasing our understanding of the dynamics of implementation in general, and the patterns of conflict resolution in particular, the article contributes to our understanding of the dynamics of Europeanization and the how the European level institutions and domestic institutions co-operate and mutually adapt in the European unification process. The term implementation refers to the transposition of European norms into domestic legislation, as well as the adherence and enforcement of such legislation so that it forms part of the political, legal and social environment. If the European monitoring bodies discover that implementation at the domestic level is incorrect, an infringement proceeding is opened. Such instances are defined as cases of conflicts between the European level and the domestic level. The modes of settling conflicts are labelled modes of conflict resolution.

The research design is comparative. The empirical focus is on implementation and conflict resolution in the member states of the EU and the EFTA between 1995 and 2001, the period since the last enlargement of the EU and the creation of the European Economic Area (EEA). Examining these countries and this time period is justifiable, since there have been few previous attempts to make systematic comparisons of all the member countries, and between the EU and the EEA countries. In addition, we have limited prior knowledge of implementation in the Nordic countries. For instance, in a recent study on implementation these countries were excluded from the sample (Börzel 2001).

The article is organized as follows. First, three theoretical models for explaining implementation and conflict resolution are outlined. Second, the basic principles governing implementation and conflict resolution in the EU/EEA are described. Third, the rate of transposition of Community legislation over time is analysed. Fourth, a set of recent attempts to improve implementation through the strengthening of the European level institutions is discussed. The fifth section examines the variation between the states in how they resolve conflicts with the European level institutions. The analysis shows that over time all states have improved their transposition of Community legislation. A pattern of convergence in transposition has emerged. However, simultaneously an increasing number of conflicts have occurred related to non-implementation of community legislation. While the states converge regarding transposition they diverge in how they resolve conflicts. In general, the larger member states pursue a more confrontational style and use more frequently court rulings than the EU average. The smaller states, and in particular, the Nordic states, by contrast, pursue a more consensus seeking approach where conflicts are resolved at an earlier stage and through the use of 'sounding out' approaches, rather than court rulings. These observations support the conclusion that distinct institutional traditions and styles of decision making are more important in accounting for variation in conflict resolution, than the enforcement capacity of the European regime, and the preferences and powers of the member states.

Dynamics of implementation and conflict resolution

In the general literature on implementation and compliance we can identify (at least) three models that explain implementation and conflict resolution. These models fit the general ideas about the dynamics of European integration.

The supranational (or enforcement) model:

This model is related to the idea of implementation as a top-down process.

Discrepancy between goals and actual implementation is primarily perceived as a matter of unclear goals and inadequate monitoring and control capacity (Pressman and Wildavsky 1973; Palumbo and Calista 1990). Elements like hierarchy, command and control are seen as important to ensure implementation and resolve conflicts. The basic mechanism is that the more capability to monitor implementation the more implementation. The stronger the financial and legal tools to secure implementation, the more implementation and the more rapidly are conflicts resolved.

In this model, variation in implementation is primarily regarded as a result of the changing enforcement capability at the European level. Such capability can vary across time or space. Variations across *time* indicate that the European institutions improve and advance new methods for monitoring, increase their staffs and capacities, or that they expand their competences and instruments for sanctioning non-compliance. Such instrument can be the softer methods of 'shaming' and 'blaming', or the introduction of the 'harder' means of economic sanctions and fines. It follows from the model, that increased capabilities at the European level will over time result in improved implementation and conflicts regarding non-implementation will be resolved at an earlier stage.

Variation across *space* indicates that there are differences in the enforcement capability between the EU and EFTA. Within the supranational model of implementation, it is assumed that states that are under the most capable regime will have a higher implementation rate than the states that are under a less capable regime. Through the EEA agreement, the EFTA countries are obliged to implement and act according to the same directives, with some exceptions, as the member states.¹ Formally, the EFTA states are subjects to monitoring and sanctioning by EFTA institutions that have relatively equal

competence and are designed in similar ways as the EU institutions. In EFTA, the monitoring and sanctioning capacity is delegated to the EFTA Surveillance Authority (ESA). Formally, ESA has more or less equivalent competences as the European Commission. The EFTA Court has more or less the equivalent competencies to the European Court of Justice, but the EFTA Court has fewer possibilities to impose fines. Consequently, since the EU is more established, has longer traditions and skills, and has more advanced methods for sanctioning non-compliance, than the EFTA countries, it is expected that the EU states will be better at implementing, and that they will resolve conflicts earlier than the EFTA states.

The intergovernmental model:

This model is rooted in the idea that effective implementation is dependent upon participation in the decision making process of the rule that is eventually supposed to be implemented. The preferences and powers of the member states are the driving mechanism of European integration and domestic adaptation (Moravcsik 1998). Two mechanisms are particularly important for implementation: knowledge and influence (Van Meter and Van Horn 1975). First, increased knowledge and awareness of a new legal initiative is believed to ease implementation and reduce conflicts in implementation. Through participation actors get knowledge of new rules, they often associate more strongly with the rules, and they are more competent when interpreting the rules. Consequently, the most experienced and knowledgeable states will be better at implementing and have fewer conflicts. Second, participation allow for influence. Through participation the most powerful actors will be able to shape and influence the legislation in manners that are consistent with their preferences and positions. It has for instance been argued that Germany has been able to model the legislation of the EU in manners fitting the German interests (Bulmer 1997).

This model therefore assumes that the larger member states, with more voting power in the EU, will have a stronger possibility to influence decisions in the EU than the smaller states.

² The larger states can model the legislation in their image and secure a better ‘fit’ between new Community legislation and domestic legislation, thus, experience less

¹ In November 2002 where 1470 valid directives for the EU states and 1392 directives for the EFTA states.

² This is an analytical distinction. However, in certain aspects participation and power is not always correlated, small states can for instance be influential participants in certain areas, like for instance Denmark and the Netherlands have been in environmental issues.

conflicts and rapid resolution of conflicts. Conversely, since the smaller states have less voting powers, fewer possibilities to shape the Community legislation, hence less good 'fit', it is assumed that they will experience more difficulties when implementing, and resolve such conflicts later.³

The institutional dynamics model:

The third set of ideas assumes that patterns of implementation and conflict resolutions are primarily a result of institutional factors. The model is rooted in a tradition emphasising institutional dynamics and the importance of traditions, policy styles and identities (March and Olsen 1989; Knill 1998). It is believed that certain institutional structures and traditions facilitate distinct modes of handling problems and solutions. One such institutional factor is the traditions and styles of resolving conflicts (Richardson 1982). In general, there are (at least) two ideal models for conflict resolution; a confrontational model and a consensus seeking 'sounding out model' (Olsen 1972).⁴ The terms confrontation and consensus are not meant as a normative concepts, but points to two distinct mechanisms.

The confrontational model is based on the idea that voting or court rulings are key components and often the preferred conflict resolving mechanism. Within this style it is assumed that the actors meet with fairly predetermined and definite decisions about what they can accept and tolerate in relation to implementation and conflict resolutions. It is assumed that there is little communication between the actors and that the situation is characterised by clear stands and positions. The model puts emphasis on preferences and powers, clarity in arguments and principles and it often leaves to majority voting processes or court rulings to produce winners and losers.

The consensus or 'sounding out' model is based upon a different perception of conflict resolution and views decision making less as hierarchical processes. Within this style

³ Differences in aspiration level between various states can account for variation, but this is not included in the analysis.

⁴ This perception of consensus should not be confused with the 'consensus model' of Lijphart (1999). His model rest upon factors such as the executive power-sharing in broad coalition, the executive-legislative balance of power, the multiparty system, proportional representation, federal government and so on. While, here the focus is upon policy styles rather than structures. However, since Lijphart argues that the EU is a consensus political system or configuration, it could well be that the consensus policy- and administrative style that I am concerned with here are mutually enforcing and provides a good 'match' or 'fit'.

majority voting and court rulings are not the preferred mode. Instead, it is believed that parties often seek to avoid the ‘discovery’ or creation of disagreements and conflicts of interests. The emphasis is put on the gradually building of acceptance and consensus. Actors follow a problem-solving approach, making power structures and interest conflicts less visible, in order to generate trust and strengthen social and political relationships (Olsen 1972; March and Simon 1993). Through voluntary and informal co-operation and exchange of information, which might be time consuming, acceptance of certain alternatives as preferred solutions are developed?

These two ideal types can be linked to different states. For instance, it has been argued that there is a distinct Nordic model of public administration and for conflict resolution.⁵ Historically, the Nordic states have been more consensus oriented than other European countries. They constitute a fairly culturally homogeneous area and they form a distinct family of legal traditions and principles (Olsen and Sverdrup 1998). In this tradition, the courts and formal rules have played a far less important role in the daily life of politics than in many other European countries. When resolving conflicts the Nordic countries frequently use ‘sounding out’ techniques. Voting and legal confrontation is sought avoided. However and perhaps seemingly paradoxical, Nordic countries have a high level of trust in the legal system and the support for the rule of law (Gibson and Caldeira 1996). There is some evidence supporting the idea of a Nordic model regarding implementation of other kinds of international reforms. For instance, when the Nordic states have responded to international trends in public administration, the implementation of these reforms have been less ideological and more pragmatic and step-wise in the Nordic countries than in other countries (Lægreid and Pedersen 1994; Olsen and Peters 1996; Christensen, Lægreid et al. 2002). For sure, this is not always a perfect match, but it is believed that some states follow one style more often than other states.

Within this institutional dynamics model, it is therefore expected that variation will result from various domestic styles and traditions for conflict resolutions. States pursuing a confrontational style will have more conflicts and more frequently use courts to settle them. By contrast, states pursuing a ‘sounding out’ style will have fewer conflicts and tend

⁵ I am well aware that there is also a discussion in social policy and welfare state studies on a Nordic model (Esping-Andersen 1985; Mjøset 1992). This is not the kind of ‘Nordic model’ referred to in this article.

to resolve conflicts without using the courts. It is expected that the Nordic states will have fewer conflicts and will more frequently resolve conflicts without the use of the courts, than the non-Nordic countries.

In the following sections these three models will be examined empirically. But first, let me make a brief note on the methodology.

A note on data and methodology:

Data has been collected from the European Commission and ESA. In addition, document analysis and interviews have been used to collect data on the enforcement capabilities power of the European institutions. The European Commission and ESA collect data and report data according to similar methods and procedures, enabling healthy comparisons. There are some limitations regarding the data, but at present they are the best we can get.⁶ Even if the data are weaker regarding implementation, they are even more telling about the level of conflicts and the stages and modes of conflict resolution between the domestic level and the European level. Each state has one set of legislation that they have to adapt to new community rules, making it possible to compare states. There are no reasons to assume *a priori* that the larger state, because of larger economies and populations, have more difficulties in implementing. Particularly so, since this study is limited to implementation of rules that are binding for the state and is not addressing issues regarding for instance competition between firms. The study examines the total number of cases, removing any potential sampling errors.

In order to analyse these models, data has been stratified. From the *enforcement model* it is expected the main cleavage to be between the EU and the EFTA states. The EU average is calculated as a mean of the 15 member states. The EFTA average is calculated as a mean of Norway, Iceland and Liechtenstein, which are the EFTA states members of the EEA. From the *participation model* it is expected that the main cleavage would be between the large and the small member states. By large states, it is meant the states that have the

⁶ For instance, data only measures transposition and not actual implementation. These data also treats directives as discrete units, ignoring that some directives are much more laborious and demanding to implement than others. When non-implementation is reported it is impossible to tell if there is a small, insignificant fraction that is not transposed, or whether it is the whole or significant parts of the directive that is not transposed (Börzel 2001: 804). However, as data on conflicts resolution they are better. Since the whole population is analysed we do not have sampling errors.

largest voting power in the EU (Germany, France United Kingdom and Italy). All the non-large states are coded as small. From the *institutional dynamics* model it is expected that the main cleavage would be between the Nordic states and the other EU states. By Nordic states, it is meant Denmark, Sweden, Finland, Norway and Iceland.

Each of the three theoretical models; supranational, intergovernmental or institutional dynamics are plausible, but they should not be regarded as mutually exclusive, nor the only dynamics explaining implementation and conflict resolution. For instance, in a recent effort to explain compliance Mbaye (2001) examined the impact of state power and economic strength when explaining patterns of implementation. In addition, it is argued that major cleavages run between unitary and federal states (Levy 1995), Southern versus Northern European (La Spina and Sciortino in Börzel 2001), or institutional factors such as the ability to allocate attention, energy and resources. In fact, one of the main problems regarding implementation studies have been that the list of factors impacting implementation is extremely long and complex, making empirical investigation difficult (Van Meter and Van Horn 1975; Kjellberg and Reitan 1997). This article is therefore one attempt to contribute to these attempts at explaining the dynamics of implementation and conflict resolution.

Principles of implementation of Community legislation

Compared to other forms of regional integration, European integration is still characterized by the strong role of formal institutions and the rule of law. However, in spite of recent attempts to increase voluntary co-operation and to reduce governance by law, for instance the Lisbon-process, the role of the law play is fundamental.

When implementing Community legislation, the European Union is dependent upon the domestic institutions. In most cases Community legislation are administered and enforced by domestic bodies. The role of the institutions on the European level is primarily to act as the guardians of the treaties and to ensure that the Member States and Contracting Parties apply legislation correctly. Through the EEA, Iceland, Liechtenstein and Norway, are linked to the formal institutions and the rule of law in the EU. The EEA Agreement lacks the supranational traits of the EU. Nevertheless, the EEA Agreement has been

authoritatively characterised as "an international treaty *sui generis* which contains a distinct legal order of its own that is less far-reaching than under the EC Treaty, but the scope and the objective of the EEA Agreement goes beyond what is usual for an agreement under public international law".⁷

The basic principle in the EU and the EEA is that Community law should be ‘applied with the same effectiveness and rigor as the application of national law’ (European Commission 1993). This follows from article 10 EC which states that: “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks”.

In order to secure uniform implementation, the Treaty establishing the European Community delegates competence to European institutions to monitor and sanction non-compliance. In the EU, the European Commission and the European Court of Justice (ECJ) hold this competence. The European Commission shall according to Article 211 EC “ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied”. If the State concerned does not comply with the opinion of the Commission, the latter may bring the matter before the Court of Justice (Article 226 EC). Under the EEA agreement (and the EFTA Surveillance and Court Agreement (SCA)), the ESA (EFTA Surveillance Authority) and the EFTA court, hold more or less the equivalent enforcement competence. In order to ensure the proper application of the EEA Agreement, the ESA shall monitor the application of the provisions of the EEA and SCA agreements by the EFTA States and bring actions before the EFTA Court (Articles 22 and 31 SCA).

The European institutions initiate investigation on the basis of complaint cases and own-initiatives. There are basically five types of breaches that can occur: i) violations of treaty provisions, regulations and decisions, ii) non-transposition of directives, iii) incorrect legal implementation of directives, iv) improper application of directives, v) non-compliance with European court decisions. (The latter type of breach does not apply in the EEA). If the

⁷ EFTA Court Case E-9/97 *Erla María Sveinbjörnsdóttir and The Government of Iceland* paragraph 59.

European Commission or the ESA detect mismanagement or failures in implementation they can initiate a wide set of informal and formal procedures for securing correct implementation. While the opening of cases for inspection is mandatory, the European institutions enjoy discretion in terms of when and whether it should close proceedings.

The infringement procedures cover basically three formal steps, Letters of formal notice (LFN), reasoned opinion (ROP) or refer to court (RTC). The procedure is simple. When an infringement case is opened a Letter of Formal Notice is sent to the member state. The state then gets the opportunity to present its view. If the European institution still considers the state to breach the obligation it sends a Reasoned Opinion. If the state fails to comply with the Reasoned Opinions within a specified time period, the European level institution may refer the matter to the court. The Maastricht Treaty gave the EC Court the power to impose fines on a Member State that fails to take the necessary measures to comply with the Court's judgments was introduced (Article 228). The ECJ has now started to impose financial penalties on member states for failing to implement EU directives.⁸

Patterns of implementation

The issue of implementation is at the core of the development of the EU and it raises issues of administrative and constitutional character. On the one hand, failure to implement the European directives challenges the effectiveness and the legitimacy of the European integration process.⁹ In principle, non-compliance contests the core goal in European integration, namely the creation of an area of legal homogeneity. It thus hinders the potential economic and political benefits of creating a single market. Non-compliance creates advantages for some and disadvantages for others. It increases the transaction costs and imposes difficulties for citizens and businesses when relating to several sets of rules. In the longer run, non-compliance can reduce the respect for legal obligations and the attractiveness of creating shared rules within the frames of the European institutions. Prevailing patterns of non-compliance therefore threatens the very sustainability of the European unification process.

⁸ Case C-387/97 Commission vs. Greece 2000 ECR p. I-5047.

On the other hand, non-compliance can function as a domestic ‘safety valve’ and increase the legitimacy and the effectiveness of the European integration process (Dimitrova and Steunenbergh 2000; Sverdrup 2000). Ambiguous rules create difficulties for homogeneous implementation, but they often ease negotiations and reduce pressure or adaptation (Haas 1958). If the member states have discretion in implementation it could be, at least in principle, easier to reach agreements on new rules in the EU and the EEA institutions. Non-compliance also reduces the pressure on the member states to allocate energy, time and resources to new areas and enables them to exploit slack resources in the administration. Finally, flexibility and tolerance from the European level institutions towards the domestic institutions could potentially reduce the level of conflict between the European and the national level, and thereby also increase the legitimacy and support of the European integration process.

Historically, the EU has been careful and reluctant in imposing strict interpretations of legislation on the member states out of such concerns (Tallberg 1999). The European level institutions have demonstrated tolerance towards non-compliance. The European level institutions have been careful when exploiting its powers vis-à-vis the member states, and they have been reluctant in demanding increase in its monitoring and sanctioning powers. The European Commission has often sought informal solutions with member states rather than opening proceedings in cases, or letting all initiated cases run the full course (Tallberg 1999:40-41). Equally so, the member states have demonstrated reluctance towards giving strong enforcement powers to the European institutions, and they have carefully monitored whether the European institutions act within their competencies (Dehousse 2002).

There has been an increased interest in examining implementation. However, scholars disagree on the existence and the scale of an “implementation deficit” in the EU. Early studies argued that the deficit in the EU was high and that this was systemic to the EU (From and Stava 1993). More recent studies challenge this view, questioning the methods for drawing such conclusions (Börzel 2001). Rather than limited implementation, data indicate that the states have been surprisingly willing to transpose Community legislation, in spite of the fact that there have been relatively

⁹ See White Paper on European Governance: “Late transposition, bad transposition and weak enforcement all contribute to the public impression of a Union which is not delivering” (European Commission 2001).

weak monitoring and sanctioning mechanisms in the EU/EEA. Figure 1 show that over time, the member states have become significantly better to transpose the European directives.

Figure 1 here

The average deficit in transposition of Community legislation into national legislation in the period between 1997 and 2001 has decreased, indicating that all the states transpose more directives now than before. The EU average has been reduced from 7,5 per cent in November 1997 to 2,1 per cent in November 2002. The EFTA average has dropped from 7,8 per cent in November 1997 to 2,9 per cent in November 2001. A pattern of *gradual convergence* has emerged, understood as the reduction of variation among the member states in their transposition deficit (in November 1997 the standard deviation was 2,1, in November 2002 it was 1,0).

There is still variation. The ‘worst’ performing country in the EU (France) had a deficit of 3,8 per cent in November 2002, the ‘best’ performing countries (Sweden, Finland and Denmark) had a deficit of close to 0,5 per cent. Only Finland, Denmark, Sweden, the Netherlands and Spain met the ‘deficit target’ for the spring of 2002 set by the European Council (European Commission 2001d). Some states have acted more rapidly than others in reducing their deficit. Sweden, Finland, Netherlands and Denmark reduced their deficit at an earlier stage than the EU average, and have maintained a consistently lower deficit than the EU average. The larger EU states have been slower in implementing than the smaller states. France score above the EU average throughout the period, Germany performs above the average in the beginning and the end of the period, and UK performs under the EU average in most of the period. The EFTA states have been slower on reducing their deficit than the EU states, and until mid 2001 they had most of the time a transposition deficit above the EU average.

When examining the data more closely, we observe some other features. First, there are more problems with new legislation than with older. The deficit in transposition is

primarily related to the most recent EU and EEA directives.¹⁰ Also in this respect we can observe variation among the member states. The larger states have a significantly larger backlog of non-transposed directives than the smaller states. Moreover, the Nordic states, Finland, Denmark and Sweden are among the countries with the shortest backlog. Norway and Iceland have a similar performance as their Nordic neighbour countries. Second, there are more problems with legislation in certain sectors than in others. For instance, the transposition of directives related to transport policy seems to be more problematic than directives related to consumer policy, social policy and telecommunications. A measurement on the level of transposition across the sectors is the so-called ‘fragmentation factor’, that is the share of the total number of directives that are not transposed by all the member states. The fragmentation factor has been reduced throughout the period, from a level of 26,7 in November 1997 to 10,0 per cent in November 2001 (European Commission 2001b). These data show that the fragmentation factor is more than halved, and that that the difficulties are primarily related to a backlog of the most recent directives, indicating that there is no systemic feature in EU or in the EEA structure creating legal insecurity. Nevertheless, the satisfaction among businesses on the functioning of the single market is still limited. Only 49 per cent of the businesses report that they feel that the obstacles restricting their own company within the EU have disappeared or been significantly reduced, while 26 per cent claims that it has increased their obstacles (Europe 2001)¹¹

To summarize, transposition data indicates a development of reduced implementation deficit. There is a gradual pattern of convergence, in the sense that the variation among the member states in their transposition rate has been reduced throughout the period. Data also indicate that the larger states implement slower than the smaller states, and the Non-Nordic countries implement slower than the Nordic states.

¹⁰ For instance, of the 79 directives that were launched in 1995, 6,6 per cent of them were still not transposed by all of the EU member states by the spring of 2000. More than 60 per cent of the directives whose deadline for transposition expired in 1998, and more than 90 per cent of the directives with a deadline for 1999 were not transposed by the Spring of 2000 (European Commission 2000a). In 2001, the average delay in the transposition of a directive was 13 months (European Commission 2001c).

¹¹ Such data are problematic; they are perhaps more measures of aspiration level of the businesses rather than measures of actual changes. It is interesting to see that in Sweden and Denmark, the businesses are far less satisfied than the EU average, even though these countries have a higher transposition rate. However, when asked about whether they regard obstacles to trade as a result of the fact that rules are applied differently, all of the Nordic countries put less emphasis on this aspect than the average, indicating that they are satisfied with implementation in their own country.

Strengthening of the monitoring and sanctioning capacity

In the EU and the EEA there has been increased intensity in order to reduce the implementation deficit. This development is not resulting from poorer performance among the states. In fact, the renewed interest in implementation has appeared in spite of a general tendency towards improved implementation.¹² There are three approaches that the European institutions have taken; improved monitoring capacity, shifting attention, introduction of new instruments.

First, the European Commission and the ESA have increased their *capacity* to monitor implementation and to sanction non-compliance. The European institutions are in large part dependent upon national administrations for information on implementation. Throughout the period the EU and ESA has strengthened their efforts to improve the methods and means of processing information on implementation in the member states. They have developed organizational instruments such as data based systems, rules and procedures, in order to monitor and sanction non-compliance by the domestic administrations. Member states are now obliged to routinely report their transposition efforts, and failure to do this is leading to an opening of infringement cases. Increased capacity has created an obligation on the member states to report on their efforts, and reduced the costs for the European level institutions to monitor implementation. Another effort has been to make it easier for various groups to report on and deliver complaints, for instance by easing access to complaint schemes and providing professional assistance on formulating and completing such complaints.

There are extensive parallelism between the European Commission and the ESA in this respect. According to Article 108-110 of the EEA agreement ESA are supposed to co-operate and consult each other in cases in order to secure homogeneous interpretation. ESA has also systematically copied the rules and procedures used by the European Commission. In general, ESA has put considerable energy and effort in to securing a good and regular relationship with the European Commission (Martens 2001). When the EU enters a new field, ESA is doing the same. In addition, ESA also

regularly consult the Commission on specific cases and issues. The expertise and knowledge in the European Commission is systematically exploited, and ESA regularly gets advice and hints regarding how they should proceed in relation to specific directives and in interpreting specific issues. The parallelism between the ESA and the European Commission is also evident in the way they report their activity. For instance, ESA publish their data on their activities according to the same formats and they do it simultaneously.

Second, *attention* in the EU has shifted from the creation of new rules towards the proper application of existing rules. This is partly a result of the fact that the legislative framework for the internal market is close to being completed, in fact now the issue is more of reducing the number and complexity of the rules. In addition the EU has initiated their efforts to develop soft rules and creating mechanisms for non-rule based adaptation. For quite some time now the EU and the European Commission have been less occupied with the creation of new rules and more concerned about sound and efficient management of the current rules (Craig 2000 Metcalfe, 1999). For instance, in the recent White paper on Governance the European Commission states that it will take measures that enable them to improve on their monitoring and sanctioning policy and that they will pursue infringements with ‘vigour’ and they have indicated certain rules of priority in this process (European Commission 2001d). A parallel development can be observed on the EFTA side. ESA has been expressing similar concerns regarding monitoring and sanctioning. ESA has argued that the ‘EFTA states have lost considerable momentum in their efforts to incorporate EEA legislation into their legal systems’, and that ‘their implementation deficits are not improving, and the relative performance of these states compared to the other EEA states is deteriorating’ (EFTA Surveillance Authority 2000a). There are similarities between the European Commission and ESA. By design they share the same procedure, exchange information and are shaped in manners reducing any dissimilarity between the two. However, here there are still some differences. For instance, a higher share of cases is opened as a result of complaints in the EU than in ESA. More than 50 per cent of the cases opened by the European Commission are resulting from complaints, while the similar figures for ESA is less than 30 percent. A

¹² In principle there is nothing paradoxical about this. Consider fraud fighting. Here the mechanism

minority of the cases opened by the European Commission are own initiative, while in ESA such cases are the majority.¹³ Nevertheless, due to the parallelism between the two, ESA and EU should not, at least formally, be regarded as two distinct regimes. However, there has been some criticism in Norway that ESA has been stricter than the European Commission, but a systematic analysis found little data supporting this argument (Graver and Sverdrup 2002).

Third, related to this development, the European Commission and the ESA have intensified its work on developing alternative and non-legal *instruments* for improving implementation by developing a wider repertoire of organizational instruments involving national administrations. Such attempts involve improving information, stimulating training in European law, developing networks of national administrators, creating databases, developing methods for resolving cases without using legal instruments, and extending the use of scoreboards and benchmarking etc. There is an ongoing search for ‘excellence’ in organizing implementation. Some solutions have already been suggested. For instance, the European Commission recommend to the member states that they establish a central unit for coordination of the application of Community law in the Head of Government’s department and create a ‘one stop shop’ for rapid information and coordination on any given case (European Commission 2001b: 4). Other initiatives involve the so-called ‘twinning arrangements’ between national administrations, a method initially developed for the applicant countries, allowing the national administrations to share best practices within particular sectors. Another initiative is to promote the awareness of Community law among national courts and lawyers in order to make sure that national actors interpret and treat EU law as an integrated part of the national legal order (European Commission 2001d: 44-46).

These developments are part of the general development of a more thorough and *encompassing public administration policy* in Europe, which has so far been lacking.

seems to be that the more resources used to unveil fraud, the more fraud will be detected-

¹³ Since the EEA is younger it is expected that the knowledge is limited, thus leading to fewer complaint cases. If so, one should expect the number of complaints increased over time. This is not the case. Another factor explaining variation is the fact that many cases, which started as complaints are, reported as own initiative cases. Some of the complaining firms are sceptical to having its name attributed to a complain cases and feel more comfortable with their complaint being handled as a own initiative case by the ESA.

The enlargement of the EU and the EEA stimulate this development further. There is a risk that enlargement can increase fragmentation further (European Commission 2001e), and the applicants are therefore put under considerable pressure to adapt and alter their legislation so that it complies with Community legislation. It is therefore, at least by some, seen as a matter of fairness that the new applicants are not put under a stricter compliance regime than the current member states (Friis and Murphy 1999; Goetz and Wollmann 2001).

Modes of conflict resolution

While we observed convergence in transposition, the patterns of conflict resolution are diverging. In the period 1995-2001 there has been a slight increase in the number of infringement procedures. Let us examine the various steps in the infringement procedures, and how states respond to such conflicts.

Figure 2 ‘Letters of Formal Notice’ here

Figure 2 shows that the numbers of Letters of Formal Notice has increased slightly throughout the period. The total number of Letters of Formal Notice in EU and EEA has increased from 1,106 in 1995 to 1,412 in 2000, while dropped in 2001. The EU average per state increased from 68 in 1995 to 88 in 2000. The equivalent numbers for the EFTA countries is an increase from 13 per state in 1995 to 32 per state in 2000, indicating a more rapid increase in the Letters of Formal Notice for the EFTA states. It is not much variation among the states in the number of Letters of Formal Notice, indicating that the European institutions distribute them fairly equally among the states.¹⁴ However, the larger states receive more letters than the smaller states. All the Nordic states receive far less Letters of Formal Notice than the EU average. (In 1996, Finland received 290 Letters of Formal Notice, making it a statistical anomaly). The EFTA states have throughout the whole period received a smaller number of Letters of Formal Notice than the EU average.

¹⁴ One should expect that the countries with a lowest transposition rate should receive the highest number of Letters of Formal Notice. This is not so. When running a test (Pearson), we find a

These data give some support for the fact that there is a Nordic model. The Nordic states have modes of co-operation and organization at the domestic level that enables them to resolve disputes at a level prior to opening a formal infringement case. One should take into account that a majority of all cases in the EU and the EEA are settled after informal exchange of views before a case is formally opened.

When examining the numbers of Reasoned Opinions the pattern becomes clearer.

Figure 3 Reasoned Opinions here

Figure 3 shows that the number of Reasoned Opinions has increased throughout the period. In absolute numbers the EU average has increased dramatically from 13 ROP to 37 ROP per year per state. In total, the absolute number of Reasoned Opinions has increased from 192 in 1995 to 569 in 2001 in the EU. Although there has also been a marked increase in the number of Reasoned Opinions sent to the EFTA states, the number is still significantly smaller. For the EFTA states the level has increased from 2 to 12 in average per year per state.

The larger states receive more Reasoned Opinions than the smaller states. The Nordic states perform at a significantly lower level than the EU average. These findings support the observations made regarding the Letters of Formal Notice. There seems to be striking differences between the small, and in particular the Nordic member states, and the other EU states in their handling of disputes related to infringement cases.

One could expect that the number of reasoned opinions received was a function of the number of Letters of Formal Notice. However, when controlling for this we find that this is not valid. The ratio between Reasoned Opinions and Letters of Formal Notice (lagged by the one year) for the EU average is around 0.45. For the larger states the ratio is above the average. The Nordic states have a ratio consistently lower than the EU average, with less than 0.25 throughout the period. These findings indicate that when a dispute relating to

correlation of 0,52 for EU and only 0,12 for EFTA. When lagged by one year the correlation drops to 0,35 for the EU and to -0,31 for EFTA.

implementation appears, the Nordic states resolve such conflicts earlier than the Non-Nordic states.

This diverging pattern of conflict resolution become even more visible when examining cases referred to the courts.

Figure 4: Referrals to Court here

Figure 4 show a gradual increase in the number of cases that have been referred to the courts. The total number of cases has increased from 72 cases in 1995 to 155 in 2001. This growth indicates that there is an overall increase in the number of disputes between the European level institutions and the states, and that the courts are increasingly settling such conflicts. During the period 1995-2001 the average number of cases for the EU member states increased from five to about 11 per year per state. Also in this respect we observe considerable variation among the states. The large states, an in particular France and Italy, but also Germany, has more cases than the smaller states. UK has less than the EU average but there are is increasing number of cases involving UK as well. Again, the Nordic states are radically departing from this pattern. Very few cases from the Nordic states end up being settled in the courts. Taken together there were only a total of 19 instances were Denmark, Finland and Sweden was referred to the courts in the time period between 1995-2001, which is less than Italy has for one single year. For the EFTA states this pattern become even more striking. The EFTA states have even less cases in the court.

How then, do these observations fit with the theoretical models? Table 1 lists the analysis of the relative importance of the three models.

Table 1 Relative importance here

The *supranational or enforcement model* assumed that implementation would result from the capacity of the European institution to impose changes at the domestic level. This model seems to fit to some extent. The fact that states are becoming gradually better at

transposing community legislation over time and the emergence of a converging pattern regarding implementation indicate this. The increased effort to develop competence and capability at the European level has increased the will and ability at the European level to open cases and investigate issues of non-implementation. Through diffusion of formal procedures the two regimes, EU and EFTA, are acting according to similar rules, making it difficult to explain variation between the EU and the EFTA states. However, as table 1 indicates this model is suitable to explain variation regarding the stage when conflicts are resolved, but less so regarding the fact that a conflict has appeared.

The intergovernmental (or participation) model assumed that the larger states would be best at implementing community legislation because they were able to shape the EU legislation in manners that were consistent with their interests. In the table participation is measured as voting power, where the EFTA states have none. The fact that the larger states are less good at implementing does not fit with this hypothesis. In fact, the data support the opposite hypothesis, indicating that larger states are more willing and capable of delaying implementation and postponing adaptation until after a case has been referred to the court. The analysis in table 1 shows that participation and power are not the most important factor for explaining variation in the number of letters of formal notice or reasoned opinions, but are more important when explaining number of cases brought before the court. After all, this finding is perhaps not so surprising. The bargaining power of a state should be reformulated from being concerned about voting power, to the ability to refrain from making adaptations and to delay them.

The institutional dynamic or policy style model assumed that variation could result from domestic traditions and styles for resolving conflicts. It was expected that the Nordic states, with a more consensus seeking approach, would resolve conflicts at an earlier stage, than the states pursuing a more confrontational style. The data analysis shows that the Nordic states are performing more or less at the similar level regardless of their various formal organizational ties to the EU, and regardless of that fact that some states have more experience as member states than others (Denmark versus Sweden and Finland). These findings indicate that there is a distinct Nordic model in implementing legislation and in modes of resolving conflicts regarding implementation. When assessing the relative importance of the Nordic model, we observe that it is less important in relation to the earlier stages of the infringement proceedings, but it is more important when accounting

for variation regarding Reasoned opinions and court rulings. Such findings challenge the argument that there is not fruitful to talk about a ‘North-South’ division Börzel (2001), and suggest that it could be fruitful to divide between Nordic and Non-Nordic countries.

Conclusions

This article has examined implementation and conflict resolution regarding Community legislation. The analysis has showed a gradual increase in the level of conflict regarding implementation. There is an increase in the number of Reasoned Opinions and the number of cases refereed to the Court. Rather than adapting before a formal procedure is opened, the states increasingly postpone the adaptation until after a case has been opened. This increase is partly resulting from intensified efforts to secure implementation and actual application of the Community legislation.

There is variation among the states in how they respond to the various steps in the infringement procedures. On the one hand, the larger states, and in particular Italy and France, to a lesser extent Germany, and to some extent UK, receive a higher number of Letters of Formal Notice, they receive a higher share of Reasoned Opinions, and they have a higher number of cases referred to the Court than the EU average. The Nordic states, on the other hand, act differently. They receive fewer Letters of Formal Notice, they receive fewer reasoned opinions, and they have a fewer cases referred to the Courts than the Non-Nordic countries and EU average. These findings indicate that the larger states adapt less willingly and at a slower rate than the smaller states and the EU average, while the Nordic member states adapt more willingly and at an earlier stage than the Non-Nordic countries and the EU average. The EFTA states are deviating. Although their transposition deficit has been higher than the EU average in most of the period, they receive fewer Letters of Formal Notice. When conflicts arise, the EFTA states show a pattern that is corresponding to the Nordic EU states. They receive a low number of Reasoned Opinions, and the number of cases referred to the court is lower than the EU average. These findings indicate that there is a small state effect in the EU, and that the Nordic effect seems to work in addition to this small state effect.

This analysis indicates that the policy style and institutional dynamics in the Nordic countries seems to produce a lower number of infringement cases and when such instances appear, they are resolved at an earlier stage than for the EU average. The focus of the analysis has been to identify patterns of implementation, and less so explain such patterns. The list of factors impacting upon implementation seems to be long, and the relative importance is difficult to determine.

As shown, different theoretical models help to explain various aspects of implementation and conflict resolutions. These findings indicate that we should *enrich* our theoretical repertoire when examining processes of Europeanization. Another lesson to be learnt is that there is a need to improve our understanding of the administrative *interaction* between the European level and the domestic level, and the modes of conflict resolution the various states apply. Such an effort would then involve examining over time and space the tension and interplay between enforcement, participation and power and the domestic institutional traditions and styles. Understanding the scope conditions and the interplay between domestic and European level institutions, require that we shift our focus away from static variation studies towards a better understanding of the processes. Finally, there is a need to improve our understanding of the dynamics of implementation for developing good *explanations*; such factors could include administrative style and capacity, co-operative culture, legal culture and even religious tradition etc. When taking these three factors seriously it is likely that studies of implementation will contribute in important ways to our understanding of the dynamics of Europeanization.

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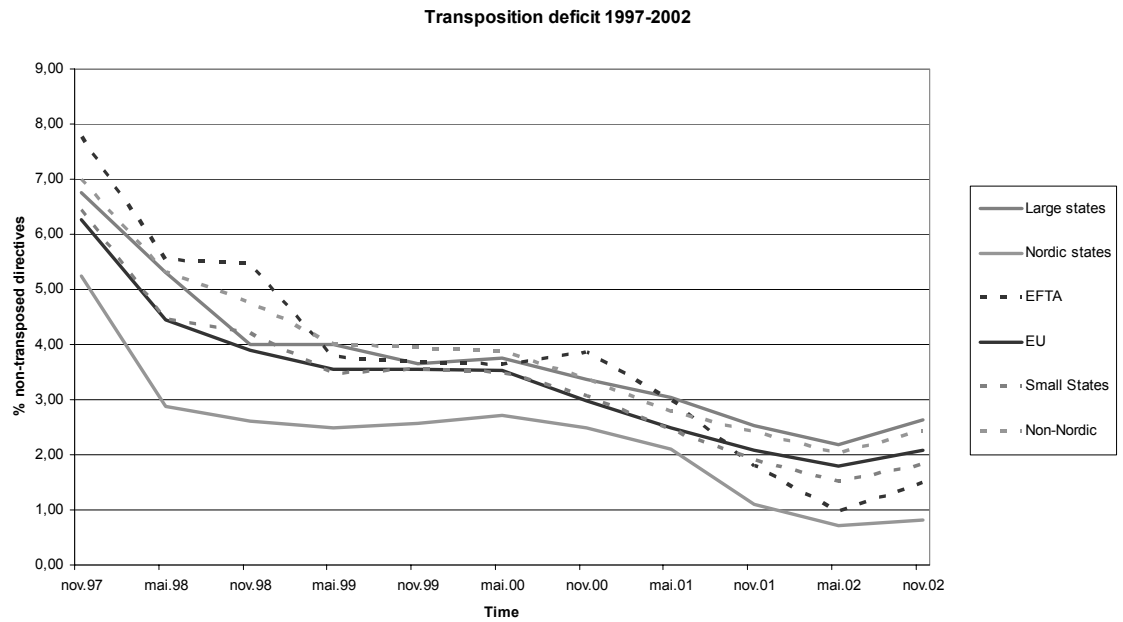
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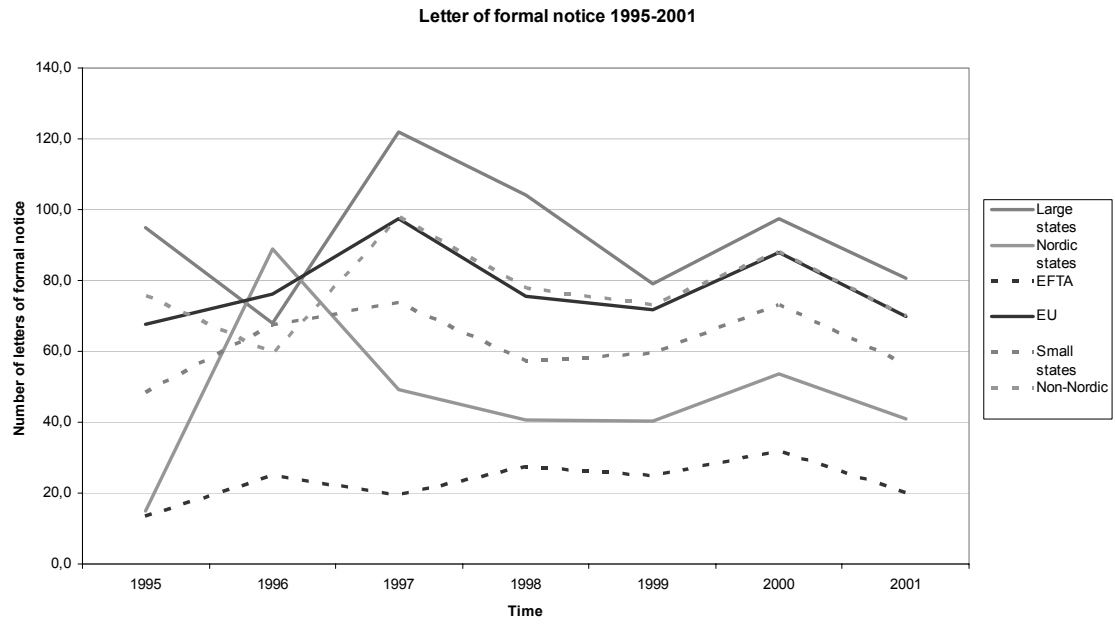
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Figure 1: Transposition of directives (1997-2002)



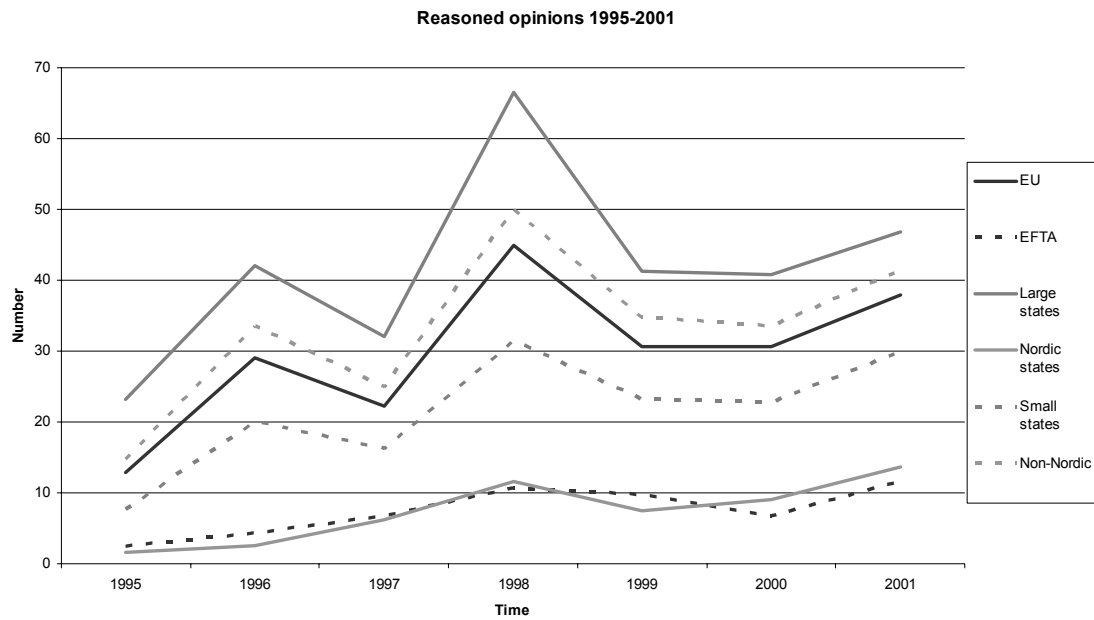
Sources: (EFTA Surveillance Authority 1997-2002ab; European Commission 1997-2002ab)

Figure 2: Letters of Formal Notice (1995-2001)



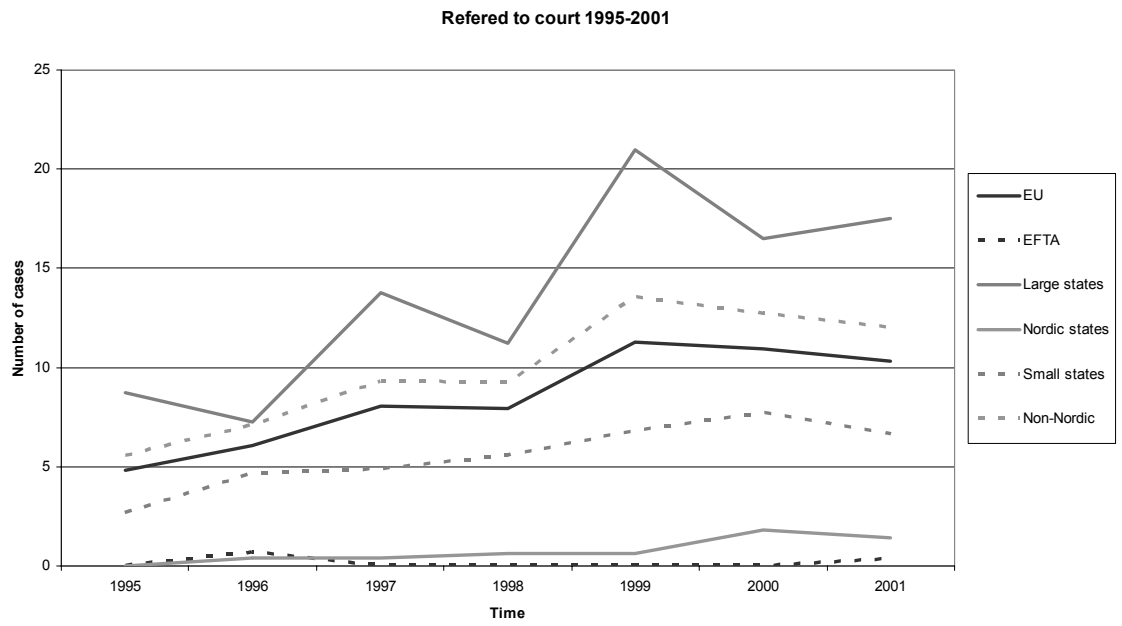
Sources: EFTA Surveillance Authority 1997-2002c, European Commission 1997-2002c);

Figure 3: Reasoned Opinions (1995-2001)



Sources: EFTA Surveillance Authority 1997-2002c, European Commission 1997-2002c);

Figure 4: Referrals to Court (1995-2001)



Sources: EFTA Surveillance Authority 1997-2002c, European Commission 1997-2002c);

Table 1: Measuring relative importance

	LFN	Correlation LFN-ROP	Significance	ROP	Correlation ROP-RTC	Significance	RTC
Supranational model:							
EFTA states	23	0,10	0,68	7,42	-0,34	0,88	0,38
EU states	76,4	0,23	0,01	29,76	0,7	0,01	8,95
Intergovernmental model:							
Votes:							
0	23	0,1	0,68	7,42	-0,34	0,88	0,38
2	62,71	-0,17	0,71	28,71	0,77	0,04	10
3	65,33	-0,04	0,86	14,29	0,77	0,01	3,9
4	68,57	0,43	0,12	18,14	0,73	0,01	2,64
5	80,96	0,24	0,21	35,92	0,6	0,00	11,03
8	78,85	-0,28	0,53	27,71	0,59	0,15	8,28
10	86,89	0,21	0,29	41,78	0,53	0,01	13,71
Institutional dynamic model:							
Nordic	46,34	-0,13	0,46	7,42	0,52	0,01	0,74
Non-Nordic	75,64	0,40	0,01	33,2	0,64	0,01	10,13