

Moving beyond legal compliance: innovative approaches to EU multilevel implementation

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ABSTRACT

Research on implementation in the European Union (EU) is characterized by a strong focus on legal conformance with EU policy. However, this focus has been criticized for insufficiently accounting for the implications of the EU's multilevel governance structure, thus providing an incomplete picture of EU implementation, its diversity and practice. The contributions of this collection represent a shift towards a more performance-oriented perspective on EU implementation as problem-solving. They approach implementation fundamentally as a process of interpretation of superordinate law by actors who are embedded within multiple contexts arising from the coexistence of dynamics of Europeanization, on the one hand, and what has been termed 'domestication', on the other. Moving beyond legal compliance, the contributions provide new evidence on the diversity of domestic responses to EU policy, the roles and motivations of actors implementing EU policy, and the 'black box' of EU law in action and its enforcement.

KEYWORDS Customization; domestication; Europeanization; implementation performance; multilevel implementation.

Introduction

This collection moves beyond legal compliance in European Union (EU) multilevel implementation research to shed light on alternative responses to superordinate law, practical implementation patterns and mechanisms to ensure compliance in the EU. In response to increasingly complex and transboundary shared regulatory challenges, multilevel governance systems like the EU centralize steering tasks and delegate decision-making and/or execution competencies to different levels of territorial tiers – supranational (global and regional), national, regional (domestic) and local (Levi-Faur 2011: 11; Majone 1999). As Thatcher and Coen (2008: 806) point out, the 'implementation of public policies always raises questions of discretion and diversity'. Multilevel

systems calibrate integration with member state discretion in order to implement common solutions to shared policy problems, tailor-made to specific local contexts (Kissling-Näf and Wälti 2007; Pülzl and Treib 2007). This in turn should enhance the acceptance of centralized policies and, possibly, member state performance (Börzel and Hosli 2003; Elmore 1979; Keman 2000). The impact of such multilevel structures on policy outputs, outcomes and impacts is the subject of multilevel implementation research ever since Pressman and Wildavsky (1974) studied 'How Great Expectations in Washington Are Dashed in Oakland'. Its currently dominant line is the rich body of literature on implementation in the EU and Europeanization.

In the quest to connect EU and domestic politics, seminal works on multilevel governance in the EU have amply scrutinized the EU's problem-solving capacity in terms of the impact of the EU on domestic institutions and policies at the national and local level (e.g., Featherstone and Radaelli 2003; Graziano and Vink 2008; Héritier 1999; Richardson 2012; Scharpf 1997). This collection contributes to this discussion. Its basic premise lies in understanding implementation as a core process in the problem-solving cycle. Hence, what is of interest here is the actual solutions to shared problems in the EU regulatory space (Knill and Tosun 2012). Implementation research has always held contradictory views on the role of discretion for policy success (Knill 2015; Pülzl and Treib 2007; Thomann *et al.* 2016). Accordingly, the question of what constitutes successful problem-solving is approached very differently by top-down and bottom-up implementation perspectives (Hill and Hupe 2014).

On the one hand, 'conformance implementation' refers to the degree to which the centrally decided blueprint is implemented from top to bottom (Barrett and Fudge 1981). This top-down school, which dominates Europeanization research, is primarily interested in comparing the intended and actually achieved outcomes of implementation, where the degree of the goal attainment serves as an indicator for implementation success (Knill 2015). Implicitly or explicitly, top-down perspectives tend to view discretion and the resulting deviations from the centrally decided rule as a control problem (Thomann *et al.* 2016). Alternatively, 'performance implementation' denotes whether a policy achieves outcomes that resolve the original policy problem at stake (Barrett 2004; Barrett and Fudge 1981; Mastop and Faludi 1997). This process-oriented bottom-up perspective emphasizes the role of policy implementers as problem-solvers, whose closeness to the source of the policy problem enhances their ability to achieve policy success (Elmore 1979). Hence, it is expected that policy instruments and goals may undergo context-sensitive modifications during the process of policy implementation. Implementers should have flexibility and autonomy for adjustment to facilitate learning, capacity-building and support-building in order to address policy problems. Ultimately, effective implementation is measured by the extent to which the perceived outcomes correspond with the preferences

of the actors involved in the implementation process (Knill 2015). From this perspective, diverse approaches of problem-solving are actually an intended result of the decentralized implementation structures of multilevel systems (Joachim *et al.* 2007: 7).

However, we have very little systematic knowledge about this diversity of policy solutions (see, however, recently Bondarouk and Liefferink 2016; Sager *et al.* 2014; Thomann 2015a). Multilevel implementation research – in the EU and beyond – retains a strong top-down focus on member state compliance with central state decisions. A telling illustration is the title of a recent study which reads: ‘You Can’t Make Me Do It’ (Haeder and Weimer 2013; see also Whitford 2007). This holds especially for Europeanization research, which is in its vast majority concerned with the question of whether EU directives are transposed into domestic law as required (see Angelova *et al.* 2012; Töller 2010; Toshkov 2010; Treib 2014). Accordingly, the past 25 years of EU compliance research have produced a fair amount of knowledge on the full or partial (non-) compliance with EU directives, the timeliness and correctness of transposition, the amount of non-compliance and transposition rates (Angelova *et al.* 2012; Töller 2010; Treib 2014). While undoubtedly relevant, several insights suggest that research on legal compliance gives us an incomplete picture of EU implementation.

Indeed, the emphasis on conformance implementation in EU research faces increasing critiques as it ‘insufficiently captures the implications of member states being part of a multilevel system’ (Schmidt 2008: 299), and ‘tends to prejudge the EU as the main source of domestic change’ (Börzel and Risse 2012: 2). As Knill (2015) highlights, this perspective relies on a highly simplified model of political steering and insufficiently takes into account the role, relevance and capacities of actors involved in the execution of a certain policy programme. The compliance concept captures the degree of conformance implementation, but does not necessarily help us to understand performance (Thomann 2015a). Or, as Bondarouk and Liefferink (2016: 2) put it, the ‘approach, by which compliance is juxtaposed to non-compliance, masks potentially great variance in responses between authorities and does not tell much about the extent of the domestic efforts to implement the policy’. In fact, there is growing evidence that under certain circumstances, legal compliance with EU law may be unrelated to its practical application (Falkner *et al.* 2005; Versluis 2003, 2007; Zhelyazkova *et al.* 2016). Accordingly, Treib (2014: 29) highlights that ‘we have as yet comparatively little evidence on the extent to which there is non-compliance beyond transposition and on the factors that are conducive to effective application and enforcement’. However, if we accept the notion that any policy is only as good as its practical implementation (Hill and Hupe 2014; Thomann 2015b), then this leaves us with unsatisfactory knowledge about the actual problem-solving capacity of the EU (Scharpf 1997).

In summary, after decades of legal compliance research, much is known about the conformance at the legislative stage in the EU, but much less is known about performance in practice. Analysing multilevel implementation beyond legal compliance has a high practical relevance, not least because in the vein of economic modernization and globalization, policy problems have become increasingly complex transboundary and cross-sectoral. This has resulted both in an increased demand for regulation and in a blurring of the distinction between the global and the national (Levi-Faur 2011). Take, for instance, the enormous transformation of EU regulation in the past 20 years (Richardson and Mazey 2015). The latter has considerably expanded from a concentration on competition policy to coverage of many sectors (Thatcher and Coen 2008), and toward 'softer' governance modes (Newig and Koontz 2014; Radulova 2007). Notwithstanding the growing empirical relevance of EU rules, many aspects of EU implementation remain a black box, and 'the tendency to neglect issues of enforcement and application has even increased' (Treib 2014: 15). Against this background, it is vital to gain better empirical and theoretical understanding of the degree to which such multilevel systems are actually able to address the problems they are intended to solve *in practice* (Sparrow 2000). Not only Europeanization scholars, but also practitioners can benefit from such insights to improve policy outcomes.

Contribution to the state of the art

To fill these gaps, this collection presents innovative approaches to EU implementation that follow recent quests to move beyond legal compliance (Schmidt 2008). Therefore, the studies in this collection scrutinize other stages of the implementation cycle and adopt a more performance-oriented approach to EU implementation, from various angles. What unites them is their reassessment of the relative importance of EU policy, on the one hand, and domestic factors and actors, on the other, in explaining the outcomes of EU implementation. Rather than focusing on compliance, they embrace the notion put forward by Bugdahn (2005: 177) that

the implementation of EU policies is best conceptualized as a blend of effective EU influence over domestic policy choices in a given policy area – defined as Europeanization – and of domestic choices of non-prescribed or non-recommended policy options in the same policy area – which is termed domestication.

The contributions of this collection understand Europeanization and domestication as complementary forces, which jointly explain the multiple embeddedness of actors (Beyers 2005) involved in EU implementation. In this sense, the interplay between Europeanization and domestication is a central

explanation for performance implementation. Furthermore, the contributions have as their entry point the notion that the ‘transposition of European Economic Community directives is – to a very large extent – an act of interpretation’ (Voermans 2009: 81). Emphasizing problem-solving and performance, these studies hence analyse implementation fundamentally as a process of interpretation of superordinate law by actors who are embedded within distinct and multiple contexts. In this vein, the collection addresses three closely intertwined sets of salient questions that research on legal compliance has left unaddressed.

A first crucial interest of this collection is to gain a better understanding of the *different responses to superordinate law in the complex EU multilevel systems, apart from legal compliance*. This entails two aspects: transposition outcomes other than conformance; as well as the question of how policy-makers address the complexity of this system when deciding over implementation modes. Beyond legal compliance, very little is known about other possible transposition outcomes. Recent research suggests that member states differ notably in the substantial similarity of domestic policies (e.g., Bondarouk and Liefferink 2016; Steunenberg 2007; Sager *et al.* 2014) and that fully compliant member states go beyond the minimum requirements of superordinate law (Voermans 2009). Thomann (2015a) highlights the prevalence of the legitimate ‘customization’ of EU law and its implications for understanding member states as bottom-up problem-solvers. However, we still lack a systematic picture of the diversity of the ‘European experience’ (Majone 1999) – not least because research has hitherto invested little in the systematic conceptualization and operationalization of such transposition outcomes. It is only then that we can find out: what are the more fine-grained patterns of implementation in Europe, and can we identify underlying logics in this diversity (Thomann and Zhelyazkova 2017)?

Analysing the diversity of EU implementation is crucial in order to understand trade-offs between the well-explored conformance implementation and the more neglected performance implementation. This is all the more important as a single model of implementing structure does not exist in the EU (Peters 2014: 136; Richardson and Mazey 2015). Capturing the possible facets of multilevel implementation outcomes requires an analytic focus on the management of and responses to the complexity of such systems (Hooghe and Marks 2003; Sanderson 2006). While this ‘multi-layer problem’ (Hill and Hupe 2003) has long been recognized by implementation research, analytical solutions to it still need further development. In this context, several contributions have emphasized the potential for cross-fertilization between theoretical perspectives on EU implementation, on the one hand, and on policy implementation and comparative federalism, on the other (e.g., Barrett 2004; Börzel and Hosli 2003; Hill and Hupe 2014; Hooghe and Marks 2003; Keman 2000; Kissling-Näf and Wälti 2007; Knill 2015; Knill and Tosun

2012; Ongaro *et al.* 2010; Pülzl and Treib 2007; Sabatier and Mazmanian 1980; Whitford 2007; Winter 2003). Notwithstanding this, attempts at connecting Europeanization theory with policy implementation theory are still rare (see recently Knill 2015). Taking this agenda further, Heidbreder (2017) draws from implementation theory in order to identify different implementation types that are responsive to the complexity of the EU multilevel setting, depending on functional characteristics of the policy and the domestic setting at hand (Heidbreder 2011; Matland 1995).

After shifting the focus to performance at the legislative stage of implementation, the second interest of this collection lies in moving further down the implementation chain and *opening the 'black box' of EU law in action* (Versluis 2003, 2007). As individuals implementing public policies effectively act as decision-makers in their own right, understanding domestication implies to look at the practical implementation and enforcement of EU policy (Hill and Hupe 2014; Lipsky 1980/2010; Thomann 2015b). Our present knowledge on the practical implementation of EU law is scattered (e.g., Beunen *et al.* 2013; Falkner *et al.* 2005; Hartlapp and Falkner 2009; Héritier 1999; Versluis 2007). The most conclusive result so far is that the 'law in the books' is not necessarily the same as the 'law in action' (Treib 2014: 16; Versluis 2003) – a lesson which is also drawn in federalist settings (Kissling-Näf and Wälti 2007; Sager 2007). Previous results suggest that legal compliance levels sometimes tell us little about the degree and quality of the practical implementation of centralized law (Beunen *et al.* 2013; Falkner *et al.* 2005; Hartlapp and Falkner 2009; Zhelyazkova *et al.* 2016). This insight has important implications for practical implementation in terms of the patterns, mechanisms and actors involved that need exploration. However, accounting for practical implementation adds additional layers of complexity to implementation analyses, and implies a focus on the interaction of different governance levels (Egeberg and Trondal 2009; Exadaktylos and Radaelli 2012; Hill and Hupe 2003; Knill and Tosun 2012; Kuhlmann and Wayenberg 2016; Mavrot and Sager 2016). It also requires a systematic policy evaluation, which is resource-intensive, underdeveloped in many countries and needs improvement in the EU (Knoepfel *et al.* 2011; Mastenbroek *et al.* 2016; Sabatier and Mazmanian 1980; Treib 2014). As a result of these obstacles, a crucial question remains to be explored: How does practical implementation – in terms of conformance and/or performance – look like in the EU multilevel system, and how can we explain it?

The current state of the art suggest that there are situations in which member states might decide to resolve problems independently of superordinate law (Barrett and Fudge 1981; Mastop and Faludi 1997). How do they perform such shifts from Europeanization to domestication in practice? To tackle this question, Dörrenbächer (2017) analyses the frontline implementation of EU immigration policy and uses insights from the behavioural

public administration literature (Grimmelikhuijsen *et al.* 2017; Lipsky 1980/2010). Moreover, we hardly know how varying capacities for resilience determine member states' responses to problems, specifically if the latter are pronouncedly transboundary, such as air pollution which lack 'spatial fit' (Young 2002). While the potential of multilevel governance for improving policy implementation (rather than being an obstacle to it, see Leventon [2015]) has been acknowledged in implementation theory (Hooghe and Marks 2003), the empirical question of whether this is actually the case on the ground has hardly been addressed in the EU literature. As Gollata and Newig (2017) demonstrate, understanding these capacities implies taking a closer look at the horizontal and vertical co-operation and co-ordination between different levels of governance, with additional layers of governance being added in a federalist setting (see also Kuhlmann and Wayenberg 2016; Mathieu *et al.* 2016).

Jensen (2007) highlights that the effective practical implementation of EU policy is also a question of oversight and enforcement (Sager 2009). Simultaneously, as the EU has traditionally delegated these tasks to member states (Jans *et al.* 2015; see also Joachim *et al.* 2007; Perkins and Neumayer 2007), monitoring and enforcement can be expected to be a major source of domestication. The scarce existing evidence suggests that (the possibility of) oversight and enforcement is crucial for practical application in the EU, and that its absence leads to compliance deficits (Garoupa 2012; Jensen 2007; König and Mader 2014; Zhelyazkova and Yordanova 2015). Scholten and Ottow (2014) also made first, sector-specific steps toward a typology of EU enforcement mechanisms (see also Heidbreder 2015). However, Tosun (2012: 445) highlights the 'need for detailed descriptions of how these activities are actually pursued'. One reason why this is still missing is that the EU traditionally lacks enforcement competencies, and hence little encompassing data are available (Jans *et al.* 2015). Interestingly, however, recent years have witnessed a growing focus on the role of EU agencies and networks for improving the practical implementation of EU law, who formulate implementation guidelines for national agencies, inspect the implementation practices of national agencies, and provide training to national inspectors (see e.g., Egeberg and Trondal 2009; Groenleer *et al.* 2010; Versluis and Tarr 2013). Scholten (2017) points to an ongoing trend toward Europeanization in this regard. The growing role of the EU in the field of direct enforcement can be explained by the problems that indirect enforcement faces; if the 'traditional' implementation of regulation by national authorities is failing, enforcement at the community level is likely to follow in the same policy area (Scholten and Scholten 2016).

In order to understand the mechanisms underlying patterns of diversity, practical implementation and enforcement, it is necessary to address a third question, namely that of the *different roles and motivations of national*

actors implementing EU policy. Europeanization theory has a long tradition of assuming different logics of action – rationalist or norm-driven – underlying implementing actors' behaviour (Jupille *et al.* 2003; Mastenbroek and Kaeding 2006; March and Olsen 1998). Concurrently, it has been noted that actors implementing EU policy are also multi-hatted (Egeberg and Trondal 2009) in that they are expected to be loyal both to EU policy and to national policy. The discussion about a European administrative space has given rise to the question of whether there is such figure as the European public servant (Sager and Overeem 2015). As Mastenbroek (2017) notes,

individual politicians and civil servants involved in compliance processes may vary in their propensity to comply with EU law ... These individuals' stances towards EU law are likely to have consequences for their behaviour, and thus for the functioning of the larger political-legal system in which they operate – in this case the European Union.

National implementation processes often serve the purpose to correct for what implementers perceive to be an inadequate balance between the two (e.g., Thomson 2010).

However, little is known about how the multiple embeddedness of actors in the EU multilevel system (Beyers 2005) creates diverse identities and problem perceptions, affects the interplay of these logics, and ultimately leads actors to lend different priorities to Europeanization and domestication respectively. Part of the problem is that the focus on legal compliance in EU implementation research has also implied that the processes of administrative rule-making, as well as the frontline implementation of EU rules, have been neglected (Treib 2014). As a result, our empirical knowledge about the importance of EU policy for implementing actors, relative to domestic policy, is limited. Empirical analyses of actors' motivations in the practice of EU implementation are urgently needed for a better understanding of the potentials and limits of Europeanization (Woll and Jacquot 2010). In this vein, Mastenbroek (2017) analyses an often neglected category of actors, namely legislative drafters and other EU-related legislative tasks, and the considerations that may or may not lead them to act as 'guardians' of EU law. Dörrenbächer (2017) looks at the different motivations driving actors in referring to EU policy and domestic law respectively when implementing EU migration policy at the frontline.

This collection explicitly seeks to move beyond the 'universe' of Europeanization research (Treib 2014) in order to benefit from the insights from different strands of literature. We intend to show that doing so can contribute importantly to overcoming the lack of cumulative, generalizable theoretical knowledge on the problem-solving capacity of multilevel systems (Hill and Hupe 2014; Pülzl and Treib 2007). In this vein, the contributions of this collection draw from neighbouring fields, including general frontline and multilevel

implementation theory (Dörrenbächer, 2017; Heidbreder 2017), the literatures on regulatory change (Thomann and Zhelyazkova 2017), legislative ethics (Mastenbroek 2017), social psychology (Dörrenbächer 2017), multilevel governance (Gollata and Newig 2017) and regulation (Scholten 2017). Finally, the empirical studies presented here not only involve cross-sectoral comparison (Mastenbroek 2017; Thomann and Zhelyazkova 2017), they also explore neglected policy areas beyond environmental and social policies (Treib 2008; Töller 2010; Angelova *et al.* 2012), namely immigration policy (Dörrenbächer 2017) and air quality policy (Gollata and Newig 2017).

Structure and content of the collection

Following the different stages of the policy cycle, the collection begins by *moving beyond legal compliance as a transposition outcome*. Thomann and Zhelyazkova (2017) set the stage by discussing conceptual considerations and empirical challenges facing researchers engaging in the systematic comparative analysis of the ‘customization’ of EU law to depict diverse interpretations of EU rules beyond compliance. By conceptualizing this as a phenomenon of vertical regulatory change, they propose a generalized definition of customization and offer a flexible scheme for measuring customization, both in quantitative and qualitative comparative settings. Their empirical analysis provides the first large-scale mapping of the customization of EU environmental and justice and home affairs policies in 27 member states. Next to revealing the considerable diversity of compliant transposition, they find that customization follows pronounced policy-specific EU regulatory logics.

The contribution by Mastenbroek (2017) sheds light on the roles and strategies of administrative actors responsible for EU compliance. She scrutinizes the multiple roles of legislative drafters who are responsible for preparing the transposition of EU directives at the national level, and guarding the compatibility with ‘autonomous’ national legislation with EU legal injunctions. Specifically, she analyses how these actors deal with their multiple roles resulting from their double-hattedness as guardians of EU law, on the one hand, and politically loyal national civil servants, on the other. Based on qualitative interviews with legislative drafters and their superiors in diverse Dutch ministries, she paints a nuanced picture of the role conceptions of these actors which guide their reinterpretation of EU law so as to integrate EU legal requirements with national policy objectives, and prioritize one over the other in case of incompatibilities.

The next two contributions deal with the *practical implementation of EU policy*. Gollata and Newig (2017) empirically test the proposition underlying theories of polycentric governance, that multilevel governance is conducive to effective policy-making and delivery. This expectation is based on the

arguments about the role of decentralization, spatial fit and participation, combined with a central planning and oversight mandate also known as 'mandated participatory planning'. Using the understudied case of the implementation of EU air quality legislation, they study all 137 air quality and action plans established since 2004 in German municipalities and agglomerations, as a case of a transboundary policy with a lack of spatial fit. Their analysis highlights the horizontal and vertical co-operation between different levels of government and administrative layers within the same policy arena. While this case does not suggest that multilevel governance improved policy delivery, it points to learning and capacity building between local implementers.

Moving further down the implementation chain, Dörrenbächer (2017) 'zooms in' on individuals. Using concepts from social psychology, her analysis specifically focuses on the question what instrumental and normative motivations drive frontline bureaucrats to use EU law to solve the legal ambiguity arising from placing implementers between domestic and EU regulatory frameworks. Drawing on qualitative interviews with 21 frontline bureaucrats in 10 German immigration agencies, Dörrenbächer's analysis provides rare insights into the concrete interplay of Europeanization and domestication when EU law is practiced next to national law. Her results suggest that these actors use EU law in situations when national regulations remain unclear. This reliance on EU law at the frontline can even correct for problematic transposition.

The contribution by Scholten (2017) shows that while the power to enforce EU law has traditionally been the responsibility of EU member states, the enforcement stage of the EU policy cycle has been moving towards 'Brussels' via the proliferation of EU entities with direct enforcement powers, EU enforcement networks and the use of EU hard, soft and case law. As Scholten highlights, this development raises the question of what role there is to play for the EU in the traditionally national field of EU enforcement. She discusses the implications for the EU's problem-solving capacity, as well as challenges posed for the legitimacy, accountability and practical effectiveness of EU enforcement.

The final contribution by Heidbreder (2017) adopts a conceptual, bird's eye perspective that connects the dots between the complexity of EU implementation beyond compliance and general implementation research. Drawing on the distinction between top-down and bottom-up implementation and Hooghe and Mark's (2003) two types of multilevel governance, Heidbreder identifies four implementation types with distinct logics in the EU multilevel system: centralization; agencification; convergence; and networking. Based on Matland's (1995) ambiguity-conflict model of policy implementation, this enables her to derive causal expectations about which implementation type is functionally linked with strategic choices of policy-makers. Based on

empirical illustrations, she discusses the descriptive and integrative capacity of her framework to systematically structure the different implementation practices in the EU and gain a better understanding of the potential pitfalls of its multilevel structure.

In the end, we wrap up the findings of the different studies and discuss their implications in view of the benefits of turning toward a more performance-oriented perspective on EU implementation as done in this collection (Thomann and Sager 2017). We draw preliminary conclusions about the interplay between Europeanization and domestication beyond compliance, while also formulating scope conditions, avenues for future research, and implications for practitioners.

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