

# Non-conformable, partial and conformable transposition: A competing risk analysis of the transposition process of directives in the EU15

**Thomas König**

University of Mannheim, Germany

**Lars Mäder**

Mannheim Centre for European Social Research (MZES),  
Germany

## Abstract

Although member states are obliged to transpose directives into domestic law in a conformable manner and receive considerable time for their transposition activities, we identify three levels of transposition outcomes for EU directives: conformable, partially conformable and non-conformable. Compared with existing transposition models, which do not distinguish between different transposition outcomes, we examine the factors influencing each transposition process by means of a competing risk analysis. We find that preference-related factors, in particular the disagreement of a member state and the Commission regarding a directive's outcome, play a much more strategic role than has to date acknowledged in the transposition literature. Whereas disagreement of a member state delays conformable transposition, it speeds up non-conformable transposition. Disagreement of the Commission only prolongs the transposition process. We therefore conclude that a stronger focus on an effective sanctioning mechanism is warranted for safeguarding compliance with directives.

## Keywords

Competing risk analysis, compliance, conformable transposition, enforcement, EU directives, European Union

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## Corresponding author:

Thomas König, University of Mannheim, Postbox 103462, D-68131 Mannheim, Germany.

Email: [koenig@uni-mannheim.de](mailto:koenig@uni-mannheim.de)

## The transposition process of directives in the member states

A central issue in the literature on compliance with directives of the European Union (EU) concerns the factors that determine their transposition into domestic law (for an overview, see Luetgert and Dannwolf, 2009; König et al., forthcoming). Over the past decade, increasingly theoretical and statistical models on the transposition duration of directives have been applied to large datasets (for example, Falkner et al., 2005; König and Luetgert, 2009; Luetgert and Dannwolf, 2009; Mastenbroek, 2003; Thomson et al., 2007; Zhelyazkova and Torenvlied, 2009). Importantly, however, these quantitative studies have largely refrained from evaluating the conformity of the transposition outcome in this process. Upon closer inspection, we can distinguish fully conformable from partially conformable and non-conformable transposition according to the extent to which the goals of a directive are correctly transposed into domestic law. A major handicap for evaluating the level of conformable transposition is that the official data on the member states' transposition notifications do not contain any substantial information, i.e. whether the notification of a specific transposition activity only partially or fully completes the transposition process in a conformable manner (Hartlapp and Falkner, 2009: 287).

Because member states frequently report more than one transposition activity, missing information on the level of conformable transposition forces scholars to make a strong assumption about the completion of this transposition process by the date of either the first (Berglund et al., 2006; Borghetto et al., 2006; Kaeding, 2008; Mastenbroek, 2003) or the latest notified activity (König and Luetgert, 2009; König et al., 2005) as the relevant transposition activity for terminating the process. The correct identification of this relevant activity, however, is a precondition for the evaluation of the transposition duration and the level of the transposition outcome. Whenever a directive is only partially transposed into domestic law or when it is transposed in a non-conformable manner, the explanatory power of the factors influencing the duration of this process may change. This implies that, in order to make statistical inferences about the transposition of directives, one must know which activity transposes a directive into domestic law.

The answer to this question is important not only for the statistical analysis of the transposition process, but also for our understanding of compliance in the EU, which is the most significant regional organization among sovereign countries with a complex legislative framework for the enforcement of Community law. In addition to decisions and regulations, directives are the most important binding and enforceable legislative acts of the EU, which member states have committed to transpose on time and in a conformable manner. Most often, the Commission, the European Parliament and the member states in the Council have commonly approved these legislative acts by super-majorities after long deliberations. Furthermore, directives provide some discretion and, on average, a two-year transposition period in which member states have time to transpose them into domestic law. This process is supervised by the Commission, which – in the case of the

deadline being exceeded or of non-conformable transposition – may open an infringement proceeding with possible sanctioning by the European Court of Justice. And yet, although this enforcement process offers additional time, scholars know remarkably little about the level of conformable transposition and the reasons for the delay in this process because neither official transposition notifications nor infringement statistics can satisfactorily clarify the level of compliance by the member states.<sup>1</sup>

In this article, we argue that a stronger focus on the transposition outcome with a common statistical framework for the transposition process is warranted to understand the determinants of transposition duration. For this purpose, we introduce a procedure that allows us not only to identify the relevant activity that completed the transposition process, but also to evaluate whether and to what extent this activity transposed a directive into domestic law in a conformable manner. Methodologically, the ignorance of partial or non-conformable transposition can lead to inconsistent explanations of this process in a broad range of circumstances. For example, the existing literature identifies preference-related and directive- and member state-specific factors for transposition duration – independently of the question of whether the directive has been transposed in a conformable manner (for example, Berglund et al., 2006; Borghetto et al., 2006; Kaeding, 2008; König et al., 2005; Mastenbroek, 2003). Compared with this very general perspective, we ask whether the factors influencing duration differ in their explanatory power for partial and/or non-conformable transposition. To answer this question, we propose to apply a competing risk model for comparing the general perspective with the duration of three different outcomes: conformable, partially conformable and non-conformable transposition.

In making our argument, we draw on and contribute to an extensive literature on transposition duration, which has already tested several explanatory factors for member state compliance. The more recent studies especially focus on preference-related factors, which explicate transposition duration by either domestic preferences (Falkner et al., 2005; Treib, 2003) or disagreement of the member states and the Commission with a directive's outcome (König and Luetgert, 2009; Thomson et al., 2007; Zhelyazkova and Torenvlied, 2009). Following this literature, we use issue-specific preference estimates for the member states and the Commission on 36 contested issues of 21 directives. In addition to preference-related factors, this research also acknowledges directive-specific factors, such as the level of delegated transposition authority (Haverland and Romeijn, 2007; Kaeding, 2008; Thomson et al., 2007) and the type of directive (amending) (Borghetto et al., 2006; König and Luetgert, 2009; Mastenbroek, 2003). Finally, country-specific factors, such as the pre-existence of domestic legislation (regarding misfit see for example, Börzel and Risse, 2003; Duina, 1997; Knill and Lenschow, 1998) and the efficiency of the domestic bureaucracy (Borghetto et al., 2006; Falkner et al., 2005; Giuliani, 2003; Hille and Knill, 2006; Mbaye, 2001), are particularly emphasized in the management school of thought. Testing these arguments for the different levels of transposition outcomes of 21 directives in 15 member states, we attempt to

provide insights into various aspects of these arguments for each transposition outcome.<sup>2</sup>

One of the central conclusions of our study is that preference-related factors, in particular disagreement between member states and the Commission, play a much more strategic role for the transposition process than is acknowledged in the literature. Overall, we observe that member states rarely fail to comply with directives in terms of conformable transposition, but that their disagreement with the outcome of a directive negatively affects the speed of this process: the more a member state disagrees with a directive, the more conformable transposition is delayed. Perhaps more importantly, disagreement among the member states only increases the duration of conformable transposition, whereas disagreeing member states more quickly notify non-conformable transposition; the Commission's disagreement prolongs this process. These findings suggest a more strategic perspective on transposition and a stronger focus on an effective sanctioning mechanism that can safeguard compliance.

## **Preferences, types of directives and country factors**

Directives must be transposed into domestic law on time and in a conformable manner. Except for a few studies (for example, Falkner et al., 2005, König and Luetgert, 2009), most empirical transposition studies focus only on the timeliness of the transposition process by generally considering the official transposition notifications of member states without asking for the level of conformable transposition. In our view, it is important to know whether and to what extent the transposition process has been completed in order to study the factors influencing the duration of this process. In order to outline the differences between existing research and our research, we distinguish between hypotheses on transposition in general, i.e. whenever a member state officially notified a transposition activity, and three different levels of transposition outcomes (conformable, partially conformable and non-conformable) for evaluating preference-, directive- and country-related arguments on transposition duration.

### *Preference-related explanations*

A common finding of recent transposition studies is that the preferences of legislative actors have a significant effect on the occurrence of transposition delay and compliance failures. In spite of their diverging methodology, several studies (Falkner et al., 2005; König and Luetgert, 2009; Thomson et al., 2007; Zhelyazkova and Torenvlied, 2009) report that a member state's willingness to transpose a directive is determined by (dis)agreement with a directive's outcome. In a nutshell, it is assumed that each member state evaluates the costs and benefits associated with transposition, in particular with respect to highly contested issues that will cause significant political backlash from constituents (Carrubba, 2005). As far as conformity and timeliness of transposition are concerned, member states

decide to defect in cases where the costs of compliance are higher than the benefits from it (Luetgert and Dannwolf, 2009). Falkner et al. (2005) call this strategy 'opposition through the back door', thereby referring to non-compliance as a means to protest against the outcome of a directive. In a simple spatial model, this suggests that the larger the distance between a member state's preference and the outcome of a directive, the more incentives exist for non-compliance through late and/or non-conformable transposition. These non-strategic considerations suggest a relationship between the duration of the transposition process and disagreement of a member state:

**H1:** Transposition duration increases with the extent of member state disagreement with the outcome of a directive.

This general expectation neither distinguishes between the levels of the transposition outcome nor accounts for a strategic interaction between the Commission and the member states in the transposition process. Because the Commission can start an infringement proceeding, a disagreeing member state may change its official notification behaviour by considering the Commission's ability or willingness to prosecute non-compliance. This draws our attention to the preferences of the actors involved, which early transposition studies measured by using public opinion data as a proxy for the political costs of compliance (Lampinen and Uusikyla, 1998) or macroeconomic indicators, according to which membership benefits come from inter-EU trade and fiscal transfers (Perkins and Neumayer, 2007). More recently, scholars within the Decision-Making in the European Union (DEU) project have compiled a dataset on the issue-specific outcomes and preferences of the actors involved in EU legislative decision-making (Thomson et al., 2006). We will use the preference estimates of this dataset and calculate (the natural logarithm of) the absolute distance between the issue-specific positions of every member state and the outcomes of the 36 issues that were contested in the 21 directives included in the DEU dataset. When a directive contains more than one issue, we use the sum of the absolute distances as the total distance to a directive for approximating each member state's level of disagreement. Compared with the mean or the maximum distance across all issues of a directive, the sum of the absolute distance treats each issue equally and thus indicates a member state's overall disagreement with the outcome of a directive.<sup>3</sup>

The monitoring activities of the Commission are seen as another important element in guaranteeing and supporting enforcement (Tallberg, 2002). The Commission is responsible for ensuring the functioning of the *acquis communautaire* and has established a monitoring system for oversight of the transposition process (Mbaye, 2001; Versluis, 2004). In this system, the member states must officially notify their transposition activities for each directive (Prechal, 2005). Jensen (2007: 453) argues that the Commission can influence the member states' behaviour by imposing reputational and financial costs on them. This perspective is supported by several empirical studies, which report positive effects of

supranational monitoring and enforcement mechanisms on transposition (Borghetto et al., 2006; Dimitrakopoulos, 2001; Sverdrup, 2004; Tallberg, 2002). However, these studies also note that the Commission has only limited monitoring resources and may pursue its own interests in EU legislative decision-making, which can affect the Commission's monitoring activities in practice. To examine this argument we identify the Commission's preference with respect to the issues of a directive and also calculate the absolute distance between the Commission's position and the outcome of a directive (see also Bailer, 2004). Like the measure of a member state's disagreement, we use the sum of the absolute distances of the Commission for those directives that contain more than one issue. For the duration of the transposition process, Commission disagreement is expected to influence the length of the process in the following way:

**H2:** Transposition duration increases with the extent to which the Commission disagrees with the outcome of a directive.

This general view of the Commission's behaviour considers neither the (un)willingness of the member states nor the different levels of transposition outcomes. Formally, the Commission's enforcement activities should not follow its own preferences because its legal status provides the Commission with the role of a supranational supervisor of the treaties, who should be committed solely to the conformable and timely transposition of directives into domestic law. In some cases, however, the question may arise whether the Commission prefers a conformable against a timely transposition, which means that the Commission is willing to grant more time to a member state to achieve its goal. Making concessions could be a function of the Commission's own preference for a directive's outcome, which can, however, signal to a non-complying member state that the Commission is less interested in enforcing compliance.

In the absence of third-party enforcement by the Commission, compliance is explained by the ability to structure incentives in ways that make non-compliance too costly. Hence, self-enforcing agreements do not depend on third parties but are not without sanctions. According to Simmons (2009: 116), the sanctions of self-enforcing agreements derive from the nature of states' interaction itself, which provides incentives for them to stick to their agreements. As a consequence, reciprocity, reputation and interest in benefiting from ongoing cooperation are considered to promote compliance. For the transposition process of directives, several studies report that this mechanism, which is promoted by the heterogeneity in states' interests, can help the Commission to collect information about (non-)compliance by lodged complaints of other member states (Tallberg, 2002). In this vein, Carrubba et al. (2008) find that the Commission is more successful in infringement cases when only a few member states support the plaintiff. Not only should the risk of complaints increase with the heterogeneity in member states' preferences; but also the likelihood of a supermajority, which might support a non-complying member state in an infringement conflict with the Commission, should decrease

with this heterogeneity in preferences. In general, heterogeneity of member states' preferences should therefore reduce transposition duration.

**H3:** Transposition duration decreases with the heterogeneity of states' preferences in the Council.

Heterogeneity of member state interests constitutes a trade-off between the time to transpose a directive into domestic law in a conformable and a non-conformable manner. When member states commonly agree on a directive's outcome, there is no reason to expect non-conformable or late transpositions. In this respect, some level of heterogeneity is a necessary condition for late transposition because disagreement increases with heterogeneity of interests. At the same time, the probability of third-party intervention also increases with heterogeneity of interests, which means that a member state must fear sanctions when other member states pursue other interests and are interested in the transposition of a (contested) directive by all member states. In the extreme, however, third-party interventions are less likely when member states' interests are fully heterogeneous.

For measuring the heterogeneity of member states' preferences in the Council, we follow Zhelyazkova and Torenvlied (2009) and calculate the standard deviation of all member states' positions for each of the 36 issues included in the 21 directives of our sample. For those directives containing more than one issue we use the sum of the standard deviations. Increasing values of this measure indicate increasing heterogeneity of the member states' preferences.

### *Directive-related explanations*

In addition to the preferences of the actors involved, the characteristics of the directive itself can influence the transposition process (Borghetto et al., 2006; Kaeding, 2006, 2008; Mastenbroek, 2003). According to Franchino (2004), directives delegate more powers to the member states in those areas in which the link between policy goals and policy outcomes is more uncertain owing to the difficulty of the related legal matter. For these cases, member states can achieve conformable transposition more easily but must also collect more information for transposing a directive's outcome in order to reduce uncertainty, which is time-consuming.<sup>4</sup> To approximate the directive-specific level of delegation, Thomson et al. (2007: 694) apply Franchino's (2004) adaptation of the measure by Epstein and O'Halloran (1999), which uses the number of major provisions and classifies each of these provisions by the level of delegation of power to the member states. This measure of delegation is finally calculated as the proportion of major provisions of each directive that delegate policy authority to the member states. The more provisions are delegated to the member states, the longer the transposition duration should last.

**H4:** Transposition duration increases with the delegation ratio.

Although the number of delegated provisions should prolong the transposition process in general, it can also go along with less conformable transposition. Closely related to the delegation of transposition authority is the type of directive, which distinguishes between a new and an amending legislative act (Borghetto et al., 2006; König and Luetgert, 2009; Mastenbroek, 2003). Compared with amending legislation, new legislation bears a higher level of uncertainty, which is associated with higher administrative costs and therefore is expected to prolong the transposition process (Luetgert and Dannwolf, 2009).

**H5:** Transposition duration is lower for amending directives than for new ones.

### *Member state-related explanations*

Apart from preference- and directive-related characteristics, management in the member states is a factor that can affect the transposition outcome (Luetgert and Dannwolf, 2009). Most importantly, administrative capacity is needed to provide information about transposition (Borghetto et al., 2006; Ciavarini Azzi, 2000; Falkner et al., 2005; Hille and Knill, 2006; Mbaye, 2001). Such information can reduce uncertainty about implementation effectiveness and, in some cases, transposition requires coordination within the bureaucracy (Steunenberg, 2006). This requires substantial bureaucratic and administrative resources and expertise at the national level (Siedentopf and Ziller, 1988). For measuring administrative capacity we use a numerical index of relative 'government effectiveness' developed by the World Bank (Kaufmann et al., 2006). This index captures important aspects such as the quality of 'public services, civil service, policy formulation and transposition' and the degree of independence from political pressures, as well as the credibility of the government's commitment to such policies. Values range from 0.38 for Italy to 2.29 for Denmark, with higher numbers indicating higher administrative capacity. These considerations raise the expectation that bureaucratic efficiency generally affects the duration of the transposition process.

**H6:** Transposition duration decreases with the bureaucratic efficiency of a state's administration.

Until now, transposition studies have had to apply strong assumptions about the relevant activity notified by the member states (Hartlapp and Falkner, 2009). Kaeding (2008), for example, presupposes that transposition delay is relevant only for notifications six months after the deadline's expiration. Others have used the transposition activity first officially reported by each member state as a proxy for the completion of the process (see Thomson et al., 2007; Zhelyazkova and Torenvlied, 2009). Again, others have identified any form of timely defection as an occurrence of non-notification (König and Luetgert, 2009). In our view, it is important to identify whether and to what extent an activity transposed a directive

into domestic law. Because member states frequently notify more than one activity, a challenging task for the evaluation of the transposition process is to identify the relevant transposition activity. With the identification of the relevant activity, we can evaluate whether and to what extent this activity transposed a directive into domestic law in a conformable manner. For this purpose, we introduce an approach using the keywords of the directives' issues for identifying the relevant transposition activity in the documents of all notified activities by the member states. This procedure is complemented by a legal evaluation of the extent to which a directive has been transposed into domestic law in a conformable manner.

### **Conformable, partial and non-conformable transposition**

Because member states often notify various transposition activities, cases of non-conformable transposition are more difficult to detect than cases of non-notified transposition (Börzel, 2001: 808). For the analysis of conformable transposition, we introduce a procedure that combines tools from document analysis with standardized expertise from legal scholars. In our view, a major challenge for the evaluation of conformable transposition is the comprehensive paperwork that member states usually produce by officially notifying various legal activities for transposing directives into domestic law (Hartlapp and Falkner, 2009). In order to reduce the enormous number of these documents, we propose to focus only on those issues and outcomes that were controversial in the legislative decision-making process of a directive.

Information on these issues is available from the dataset of the DEU project, which generated estimates for the preferences of every member state and the Commission with respect to each contested issue by expert interviews (Thomson et al., 2006).<sup>5</sup> Briefly summarized, the DEU interviews began by identifying the content of each issue, which was negotiated among the actors involved in each legislative procedure. For each issue, interviewees were asked to locate the ideal positions of the member states and the Commission, and the outcome on a scale from 0 to 100. These data (21 directives times the number of contested issues) define our sample, for which we need to collect information on the transposition outcome in every member state. This sample allows us to restrict our analysis to a textual search of issue-specific regulations in all notified documents.

For this purpose, we use the description of each issue's content to establish a keyword list for a computer-based search. This search tags each sentence in every document of a member state's notified transposition activity, in which a reference (keyword) to an issue is made.<sup>6</sup> All tagged sentences are then evaluated through cross-validated expertise by asking graduate law school students to fill in a standardized questionnaire. The coders assessed whether and to what degree the content of the regulation conformably reflects the need for transposing the goal of each issue.<sup>7</sup> This procedure of legally evaluating transposition outcomes is accordingly based on the identification of issues and preferences, followed by a

search for the issues' contents in all transposition documents, which identifies the relevant regulation.

In order to exemplify our approach, the transposition process of the issue on the length of temporary protection for asylum seekers, which was negotiated within directive 2001/55/EC, should serve as an example. Some member states were in favour of a short protection period of only 18 months, whereas others preferred a much longer period, arguing that the events creating a mass influx of refugees are rarely controllable and foreseeable. Italy, for example, favoured an unlimited period of protection, whereas Belgium and Germany preferred a protection period of 36 months for refugees. A large group of member states, supported by the Commission, were in favour of a period of 24 months, which was opposed by the Netherlands and Austria, which preferred a maximum period of protection of only 18 months. The eventual outcome for this issue was specified in article 4 of directive 2001/55/EC and clearly constituted a compromise, defining a temporary protection period of two years with the possibility of an extension of one extra year. Furthermore, article 32 of the same directive stated that the member states had to bring into force the laws, regulations and administrative provisions necessary to comply with this directive by 31 December 2002.

In Germany, directive 2001/55/EC was transposed into domestic law by means of the Immigration Law of 2004. Paragraph 24 of this law refers to article 4 of the directive and states that the period of protection shall be specified according to the directive's standard. We can thus say that transposition has occurred in a conformable way, even though the actual transposition process took longer than was prescribed by article 32. Austria – the other German-speaking member with a similar legal tradition – notified an amendment of its Foreigner Law of 1997 (BGBl. 126/2002) which had already come into force on 13 August 2002. A closer analysis of the Austrian document, however, reveals that the notified activity does not change paragraph 29 of the Austrian Foreigner Law of 1997 (BGBl. 75/1996), which defines the time period for a right of residence for refugees in the following way: 'in cases of an armed conflict, the federal government of Austria together with the main committee of the Austrian parliament may adopt regulations that grant refugees temporary residence status. These regulations shall also define the duration of the temporary residence status.'

This provision neither refers to article 4 of the directive nor specifies a minimum or maximum time period for the temporary protection of refugees because it effectively delegates the task of decision-making to the central government and the main committee of the Austrian parliament. In December 2005, the Austrian government officially notified that the Foreigner Law of 1997 had been replaced by the Foreigner Rights Package of 2005 (BGBl. 100/2005), which came into force on 1 January 2006. The new law, however, also failed to change paragraph 29 and simply restated the former (non-conformable) regulation in paragraph 76. Hence, the new law again allows the Austrian government and parliament to specify the duration of temporary protection, whereas directive 2001/55/EC prescribes a common minimum length of temporary protection for refugees of at least one

year across all member states. Because the Austrian provision fails to specify a minimum period, the transposition of the issue in question has to be classified as non-conformable, even though two Austrian laws were adopted in a relatively short period of time.

The example demonstrates two advantages of our procedure: it helps to evaluate the level of the transposition outcome and it provides the necessary information to identify the relevant activity from the list of often multiple transposition notifications by the member states. Admittedly, a shortcoming is that we consider only the set of contested issues that had previously been adopted at the EU level. Other issues and concerns, possibly arising only once the transposition process has started, are excluded from this research design. Since the dynamics of any negotiation process are shaped by the preferences of the member states, the importance of the content is defined by endogenous viewpoints. This implies that we consider temporary defection only if it mattered during the negotiation process at the EU level.

Our approach, with a specific focus on contested issues, is distinct from more qualitative approaches, which may provide a somewhat deeper measure of transposition conformity by considering and evaluating the whole content of a directive. However, existing qualitative studies are still limited to very few directives from a single policy area (for example, Falkner et al., 2005). We evaluate the transposition outcome for each of the 37 contested issues (included in the 21 directives of our sample) in the 15 member states and distinguish between conformable, partially conformable and non-conformable transposition. When the goals of all issues of a directive have been completely transposed into domestic law, we classify the transposition process as conformable; otherwise, if transposition completely failed for all issues, we classify it as non-conformable. In the case where the transposition failed for only some issues of a directive, we classify the process as partially conformable. Table 1 summarizes our results on the transposition outcomes and the timing of the transposition processes by member state.

Out of a total of 314 directives, 279 were conformably transposed by the member states; while only 15 cases were partially conformably transposed and 20 cases were non-conformably transposed. Closer inspection suggests that the extent to which transposition has occurred in a conformable manner varies among the member states. For example, Germany shows a perfect compliance record, whereas Portugal is responsible most often for compliance deficits. We furthermore observe that the length of the transposition process varies considerably among member states, with a mean duration of almost nine months. Compared with conformable transposition, our findings on timely transposition present a different picture of the transposition process. Only 90 of the 294 conformably transposed directives were on time, with Germany, Italy and Belgium performing worst.

This relationship between conformable and timely transposition may already provide some stimulus for the ongoing discussion about the transposition process and compliance record among scholars using infringement data (Börzel, 2001),

Table 1. Conformity and timing of transposition processes

Member state	No. of directives	No. of issues	Timing of the conformably transposed directives				Partially conformable	Timing of the partially conformably transposed directives				Non-conformable	Timing of the partially non-conformably transposed directives			
			Timing of the conformably transposed directives					Timing of the partially conformably transposed directives					Timing of the partially non-conformably transposed directives			
			Conformable	Timely	Delay	Mean		Timely	Delay	Mean	Timely		Delay	Mean	Timely	Delay
Austria	21	37	20	8	12	30	0				1	1	0		0	
Belgium	21	37	20	4	16	53	0				1	0	1		22	
Denmark	20	36	17	9	8	6	0				3	2	1		82	
Finland	21	37	19	11	8	-1	1	0	1	6	1	1	0		0	
France	21	37	20	5	15	47	0				1	0	1		64	
Germany	21	37	21	4	17	33	0				0					
Greece	21	37	18	7	11	26	2	0	2	57	1	0	1		261	
Ireland	21	37	18	4	14	25	2	2	0	-27	1	1	0		-162	
Italy	21	37	19	4	15	28	2	0	2	66	0					
Luxembourg	21	37	18	8	10	52	1	0	1	4	2	1	1		15	
Netherlands	21	37	20	5	15	48	0				1	0	1		153	
Portugal	21	37	14	4	10	15	4	0	4	69	3	0	3		37	
Spain	21	37	19	5	14	8	0				2	0	2		73	
Sweden	21	37	17	4	13	32	2	1	1	18	2	1	1		12	
United Kingdom	21	37	19	5	14	32	1	0	1	44	1	0	1		26	
Total	314	554	279	87	192	29	15	3	12	30	20	7	13		45	

transposition notifications (König and Luetgert, 2009) and case evidence (Hartlapp and Falkner, 2009). Overall, the findings suggest that compliance deficits seem most pronounced if compliance is being defined as timely transposition: in 204 out of the 294 directive-country cases, member states did not meet the deadline in transposing the relevant issues. In our view, however, both criteria – conformity and timeliness – must be taken into account when evaluating the explanatory power of the factors that determine the transposition process of conformable, partially conformable and non-conformable outcomes in the 15 member states.

Our data cover the transposition activities of 15 member states for 21 directives across different policy fields from the late 1990s until the early 2000s. Because the deadline usually stipulates a two-year period for transposition, we focus on the length of the delay in the transposition process by investigating the time-span between the prescribed deadline of the particular directive and the date of enactment of the relevant transposition activity (measured in weeks) as the dependent variable. Compared with a general view on transposition duration, our data-generation process allows three transposition outcomes to be distinguished, for which we investigate the factors influencing duration separately. This will show whether and to what extent these factors unfold a different explanatory pattern for the duration of each transposition outcome.

## **Analysing the delay in transposition**

Our analysis reveals that only a small number of cases of partially conformable and non-conformable transposition exist, while member states transpose the vast majority of cases in a conformable manner. We also find a substantial degree of variation in the delay in the transposition process, which recent studies explore with new techniques of event history analysis for solving multi-level clustering effects and considering non-proportional effects that may arise in proportional hazard (Cox) models, while either dropping non-conformable cases or assuming conformable transposition (Kaeding, 2006; Mastenbroek, 2003; Thomson et al., 2007; Zhelyazkova and Torenvlied, 2009).

To compare our findings with existing research, we start by presenting the results for a general transposition model, which does not distinguish between the three levels of transposition outcomes. This general model pools the three different transposition outcomes and specifies the completion of the transposition process by considering a directive to be transposed when a member state officially reports a relevant transposition activity. Note that this model already specifies duration by the relevant activity and hence does not require strong assumptions to be made about the first or latest notified activity.<sup>8</sup> Since we are able to distinguish between different transposition outcomes, we continue by applying a competing risk event history model that treats time as a function of some underlying risk of multiple transposition outcomes occurring at each point in time (Box-Steffensmeier and Jones, 2004). In this statistical framework, each directive is at risk of experiencing a transition to (1) conformable transposition, (2) partially conformable transposition and (3) non-conformable

transposition. For each of these outcomes, we estimate a model where the other two competing outcomes are treated as randomly censored.<sup>9</sup>

Our results for the general pooled model and the three separate Cox models (Table 2) show the coefficients that report the change in the risk that a particular outcome will happen in a specific week owing to one-unit changes in the respective covariate. Thus, negative values indicate a decreased risk or longer transposition delay, whereas positive values express an increased risk or a shorter transposition delay. All of these models are estimated with robust standard errors, taking into account a possible clustering effect.<sup>10</sup>

The general pooled transposition model indicates significant effects of several explanatory variables, which are in line with the theoretical arguments formulated in the hypotheses that were derived from the literature. Overall, a member state's disagreement with the outcome of a directive has a significant negative effect on the relevant hazard rate: the more a member state disagrees, the longer the transposition delay. The pooled model furthermore reveals a significant positive effect for the heterogeneity of states' interests: the more the member states' interests diverge, the shorter the transposition delay. Amending directives also have significant

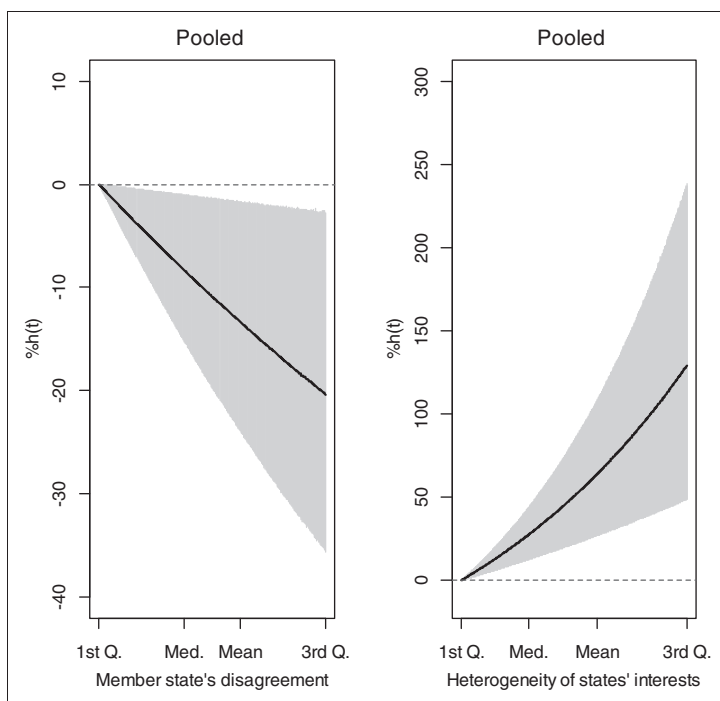
**Table 2.** Analysis of transposition delay

	Pooled (transposed)	Conformable	Partially conformable	Non- conformable
State's disagreement	-0.058** (0.026)	-0.082** (0.031)	-0.007 (0.056)	0.225** (0.105)
Commission's disagreement	-0.060 (0.037)	-0.041 (0.045)	-0.285 (0.253)	-0.325** (0.138)
Heterogeneity of states' interests	0.162*** (0.042)	0.162** (0.049)	0.721** (0.255)	-0.076 (0.123)
Amending (1 – amended)	0.591*** (0.144)	0.492** (0.185)	1.835** (0.641)	0.914 (0.744)
Delegation ratio	-4.015** (1.454)	-4.431** (1.623)	-9.975 (6.911)	2.586 (6.106)
Delegation ratio * ln(t)	0.678** (0.341)	0.780** (0.362)	1.811 (2.005)	-1.192 (1.107)
Bureaucratic efficiency	0.518** (0.205)	0.327 (0.218)	2.567 (2.405)	3.345 (2.400)
Bureaucratic efficiency * ln(t)	-0.174** (0.069)	-0.093 (0.067)	-1.171* (0.658)	-0.977* (0.562)
N	314	314	314	314
Failed	312	279	15	20
Censored	2	35	299	294

Note: \* Significant at 10%, \*\* significant at 5%, \*\*\* significant at 1%.

effects, indicating that these directives have a significantly shorter transposition delay than new directives. Considering the two covariates with effects that violate the proportional hazard assumption – the delegation ratio and bureaucratic efficiency – we also detect significant effects for the constitutive and interaction terms. Regarding the delegation ratio, we find a significant negative effect on the hazard rate that, however, increases substantially over time and becomes insignificant: the longer the transposition process lasts, the less pronounced the effect. The model further reveals a significant positive effect of bureaucratic efficiency: the more effectively the bureaucracy works, the shorter the transposition delay. Similarly to the delegation ratio, the initially significant effect of bureaucratic efficiency becomes insignificant over time. The pooled model shows a non-significant effect only for the Commission's disagreement, which supports the formal role of the Commission as the supervisor of the treaties.

We display the substantial effects graphically in Figure 1, which shows the percentage change in the hazard rate for increasing values of a state's disagreement

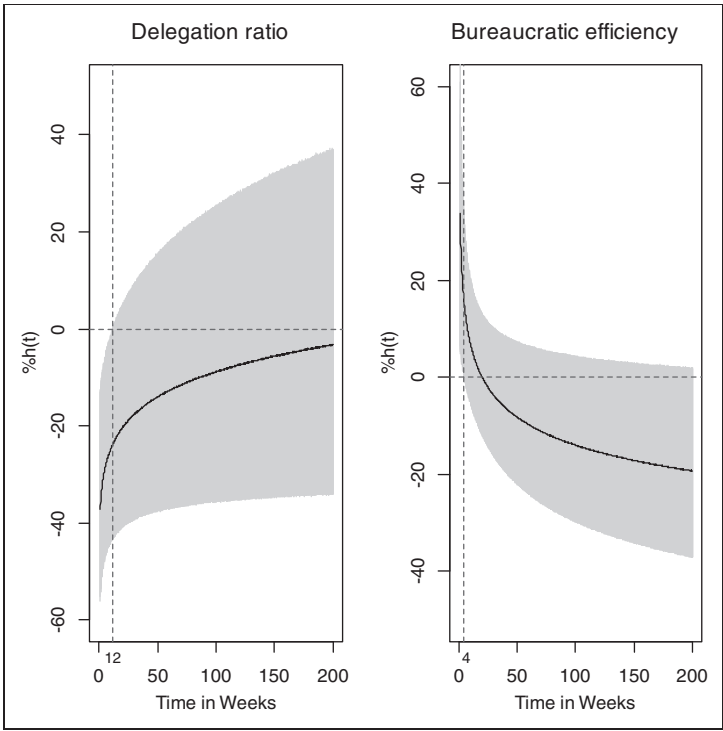


**Figure 1.** Effect of member state's disagreement and heterogeneity of member states' interests in the pooled model.

*Notes:* The solid lines show the mean percentage change in the hazard rate resulting from a change in the respective independent variable holding the other independent variables at their mean values. The grey shaded areas indicate 95% confidence intervals based on 100,000 draws from the estimated parameters of the pooled Cox model.

and the heterogeneity of states' interests (Box-Steffensmeier and Jones, 2004: 60). Accordingly, the hazard rate of transposition decreases substantially, the more opposed a member state is to a directive. For instance, an increase in the member state's disagreement from the first to the third quartile leads to a decrease in the hazard rate of more than 20 percent. The heterogeneity of member states' interests exerts an even larger effect: an increase in the heterogeneity of states' interests from the first to the third quartile increases the hazard rate by almost 130 percent.

Figure 2 shows the effect of an increase from the first to the third quartile in the two PHA-violating covariates on the hazard rate over time (Licht, 2011). Substantively, the model reveals an almost 40 percent lower hazard rate for directives that delegate substantial transposition authority to the member states. However, this negative effect is significant only in the very early stage of transposition delay (<12 weeks). Figure 2 also illustrates that the positive effect of



**Figure 2.** Effect of delegation ratio and bureaucratic efficiency over time in the pooled model.

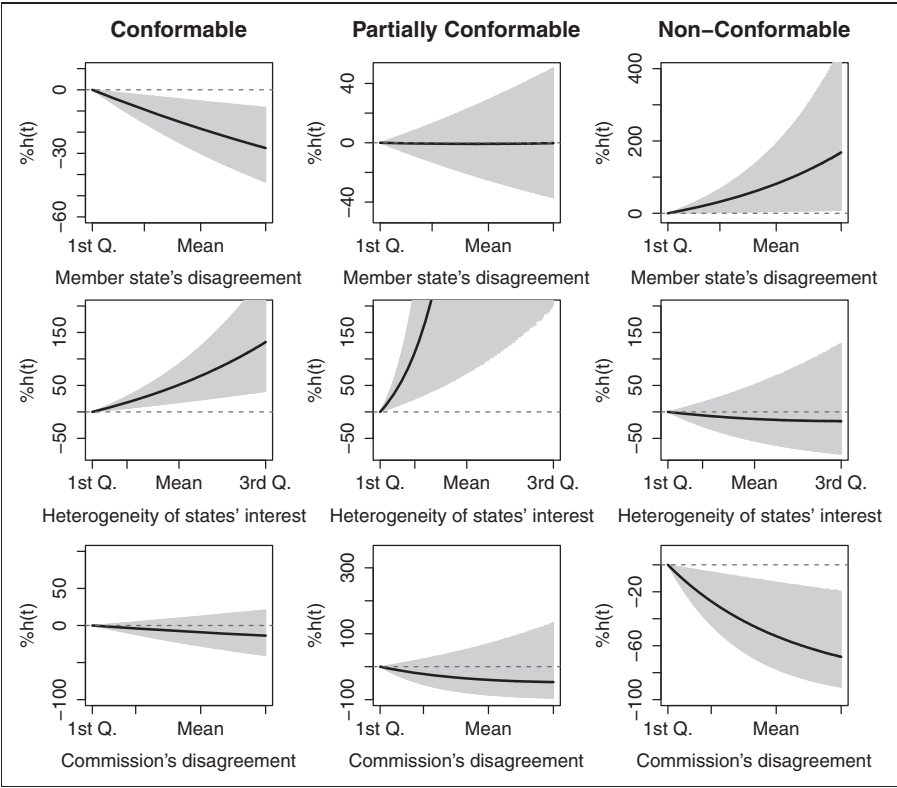
Notes: The solid lines show the mean percentage change in hazard rate resulting from a change from the first to the third quartile of the respective independent variable over time holding the other independent variables at their mean values. The grey shaded areas indicate 95% confidence intervals based on 100,000 draws from the estimated parameters of the pooled Cox model.

bureaucratic efficiency on the risk of transposition is non-significant, except for the stage of the first four weeks of transposition delay.

Compared with the general pooled model, we are mainly interested in whether these effects also exist for the three different transposition outcomes. Although our sample contains a large number of conformable outcomes, we find some insightful differences. For the conformable transposition process, a member state's disagreement shows a similar effect in comparison with the general pooled model, indicating that the duration increases with the preference distance of a member state from the outcome of a directive. However, the coefficient for this disagreement is not statistically significant in the partially conformable model – suggesting that the timing of partially conformable transposition is not influenced by a member state's preference. Furthermore, we find a significant positive effect for this variable in the non-conformable model. The risk of non-conformable transposition increases significantly, the more a member state disagrees with the outcome of a directive and, thus, decreases the duration until such a non-conformable transposition outcome is officially notified. For the substantial interpretation of the different effects of member state's disagreement we again plot the percentage change in hazard rate for increasing values of our independent variable, this time for the three separate Cox models (Figure 3).

The top three graphs of Figure 3 clearly show the different effects of member state's disagreement on the three transposition outcomes. Whereas an increase in the member state's disagreement from the first quartile to the third decreases the hazard rate by almost 30 percent for conformable transposition, it leads to an increase of 168 percent for non-conformable transposition. In contrast to these significant opposite effects, member state's disagreement has no effect on the risk of partially conformable transposition, indicated by the inclusion of the zero value in the 95 percent confidence interval for the entire range of the independent variable. In our view, this finding illustrates the advantages of the competing risk approach, which helps to specify the effects of factors for each transposition outcome.

Turning to the effects of the heterogeneity of member states' interests, we find significant positive coefficients for the conformable and the partially conformable models, indicating that the risk of conformable and partially conformable transposition increases with the divergence of preferences of the member states. However, according to the results of the non-conformable model, the heterogeneity of states' interests, has no statistically significant effect on the duration of this outcome. This finding is illustrated in the middle three graphs of Figure 3, according to which more heterogeneity of member states' interests leads to a substantive increase in the risk of conformable and partially conformable transposition processes, whereas it has no significant effect on the risk of non-conformable transposition. This means that the hypothesized effects of reciprocity, reputation and interest in benefiting from ongoing cooperation are not relevant for the duration of non-conformable transposition, but they are particularly important for the partial transposition process.



**Figure 3.** Effect of the main independent variables in the separate models.  
Notes: The solid lines show the mean percentage change in the hazard rate resulting from a change in the respective independent variable holding the other independent variables at their mean values. The grey shaded areas indicate 95% confidence intervals based on 100,000 draws from the estimated parameters of the conformable, the partially conformable and the non-conformable Cox models.

Regarding Commission disagreement, we find a significant negative effect only in the non-conformable model, and the variable has no influence in all other models. Commission disagreement thereby decreases the risk of non-conformable transposition and, thus, prolongs the transposition process until non-conformable transposition occurs. This result is illustrated in the bottom three graphs of Figure 3, in which the 95 percent confidence interval of the Commission's disagreement includes the zero value for the entire range of the independent variable in the conformable and partially conformable models, whereas the Commission's disagreement has a substantial negative effect on the hazard rate of non-conformable transposition.

According to the results of our three models, amending directives have a significant effect only on the processes of conformable and partially conformable transposition, whereas they have no effect on non-conformable transposition duration.

Amending directives increase the risk of both conformable and partially conformable transposition outcomes and, thus, speed up the domestic transposition process for both outcomes. Finally, considering the two covariates with PHA-violating effects, only the delegation ratio fulfils the 5 percent significance criterion in the conformable model. Similarly to the results of the pooled model, the significant negative effect of the delegation ratio, however, considerably reduces over time.

## **Conclusion**

This study has set out to evaluate three different levels of transposition outcomes and the factors explaining their underlying processes. For this purpose, we introduced a procedure that helps to identify the relevant transposition activity officially notified by each member state and its level of conformable transposition into domestic law. This allowed us to specify the duration of the transposition process and to distinguish between three transposition outcomes, namely conformable, partially conformable and non-conformable transposition. For the empirical evaluation of the factors influencing the duration of these outcomes, we applied competing risk models, which show that individual and collective preference-related factors, in particular the disagreement between member states and the Commission regarding a directive's outcome, affect each transposition process differently. The findings suggest that a more effective sanctioning mechanism is warranted for promoting compliance with directives.

A quick comparison of our findings for each transposition outcome with similar studies using the DEU data may illustrate our contribution. The two general studies by Thomson et al. (2007) and Zhelyazkova and Torenvlied (2009) find a significant negative effect for the delegation ratio, which in our model matters only for conformable transposition. We also confirm the finding on the generally positive effect of the heterogeneity of member states' interests on transposition delay found by Zhelyazkova and Torenvlied (2009), but only for conformable and particularly for partial transposition. Furthermore, we show that a member state's disagreement with an outcome plays a strategic role in the transposition process. The risk of delay for conformable transposition increases significantly when a state has a strong incentive to deviate from the outcome of a directive. At first sight, the finding on conformable transposition may confirm Tallberg's argument that the EU is 'exceedingly effective in combating detected violations, thereby reducing non-compliance to a temporal phenomenon' (2002: 610). Upon closer inspection, our analysis reveals that whenever a member state strongly disagrees with the outcome of a directive, the risk of delay for non-conformable transposition decreases significantly.

Our general pooled model – which does not distinguish between the level of transposition outcomes – confirms most hypotheses found in the transposition literature where a member state's disagreement prolongs the duration of the process, the heterogeneity of states' interests reduces it, and the Commission's

disagreement does not matter. The results for conformable transposition confirm these findings, but partial and non-conformable transposition present a different picture. In the case of non-conformable transposition, disagreeing member states seem to follow a 'quick and dirty' strategy and notify non-conformable measures earlier, whereas disagreement of the Commission matters only for prolonging this process. Both factors disappear for partial transposition, where the heterogeneity of member states' interests speeds up this process enormously. The impact of collective preferences suggests that reciprocity, reputation and interest in benefiting from ongoing cooperation indeed stimulate the transposition of directives but only partially and not fully. In our view, this calls for a reform of the EU's sanctioning mechanism to prevent disagreeing member states from strategically early but non-conformable transposition notification.

## Notes

1. Infringement data measure the Commission's activities in a reliable manner but these data provide only indirect and perhaps biased information on severe cases of non-compliance (Börzel, 2001). A detailed analysis of the data on the notification records of member states reveals that the Commission does not fully exploit the sample of suspect cases and takes action against a member state only in clear cases of non-compliance (König and Luetgert, 2009). However, a major problem of using the notification records is that they do not indicate conformable transposition. Some authors therefore refer to the first activity found in the records for the study of the transposition process, while others consider only legislative instruments in their analysis of the duration of the transposition (Giuliani, 2003; Kaeding, 2006; Mastenbroek, 2003).
2. Because the conventional deadline for transposition is two years, we investigate the record only of the 15 'old' member states; the transposition record of the member states that joined the EU in 2004 and 2007 is still incomplete and hardly comparable.
3. In the following statistical analysis we also considered the maximum and the mean values for the variables of member state's disagreement, Commission's disagreement and the heterogeneity of states' interests. The regression models showed essentially identical results in terms of the direction and significance of the resulting coefficients.
4. These theoretical expectations are in contrast to previous studies (Thomson, 2007; Thomson et al., 2007), which assumed that an increase in discretion should lead to less delay owing to the member states' additional room for manoeuvre.
5. The original DEU dataset consists of 70 Commission proposals, of which 30 were directives, 33 regulations and 7 decisions. For our transposition study we focused on the 30 proposals for directives. From this sample, however, we had to exclude two directives that were not adopted and one directive that was adopted but that specified a deadline that was still pending at the time when we assessed transposition. Furthermore, we disregard four directives that contain only issues that do not explicitly require transposition into domestic law. Finally, we dropped two directives because the domestic law of all member states was already in accordance with the content of these directives and therefore no further transposition was required. Accordingly, our final sample comprises 21 directives, which include 59 controversial issues in their original version. These issues, however, vary widely in their transposition requirements: non-mandatory issues that prescribe only an optional transposition obligation; issues that are related

only to the deadline of the directive; issues for which transposition is impossible because the content of the issues relates to some legal EU matter; and issues that do not change the status quo and therefore do not need to be transposed by the member states. For our purposes, only issues of the first type are relevant because none of the others entails a transposition obligation for the member states. This considerably reduces the number of issues to be studied: from the original 59 issues of the 21 directives, 9 issues are optional and do not explicitly require transposition, 8 issues refer to legal EU matters that cannot be transposed into domestic law, 3 issues are merely concerned with the deadline of the directive, and 2 issues do not imply any policy change but maintain the status quo. As a consequence, we evaluate conformable transposition for 37 out of the 59 issues, amounting to 554 transposition cases (the number of issues multiplied by the number of member states) because one of the issues does not apply to Denmark.

6. We checked the reliability of our computer-based textual search procedure in several tests for several member states. A comparison between computer-generated lists of tagged sentences and lists of sentences identified by a human reader of all notified transposition activities showed essentially identical results.
7. Approximately 50 graduate law students from these countries were trained with respect to the evaluation of the country-specific transposition process. In the first weeks, students studied the formal rules and goals of legal transposition, followed by a period in which they worked out the transposition characteristics and processes of their respective countries (depending on their language skills). Finally, they learnt about the contents of the 21 EC directives and were asked to interpret the formulation of each standard in comparison with the outcome, using a standardized questionnaire. For some countries, i.e. Austria and Germany, more than five students evaluated the record of the issues, with an overall inter-coder reliability of almost 95 percent.
8. We also replicated the studies by Thomson et al. (2007) and Zhelyazkova and Torenvlied (2009), who also used the DEU dataset but with alternative statistical designs. Our replication analysis shows similar but not identical results. However, differences can be attributed to the diverging number of directives and controversial issues selected from the DEU dataset (see note 10 for a detailed discussion of the sample) as well as to a different censoring date for the evaluation of transposition outcomes.
9. A central assumption of these models is independence of competing risks, which means that, when an outcome occurs, the particular transposition process is removed from the risk set of the other competing outcomes. Technically, the cases are considered as right-censored when a competing outcome is not observed for a particular risk model. Even though the remaining failures are lost to observation, they nevertheless are assumed to exist, that is, if the observation fails owing to one risk, it could have experienced one of the other outcomes had the transposition process lasted long enough. Thus, there are potential failures associated with each of the three transposition outcomes. This assumption of conditional independence is reasonable for our sample because none of our transposed cases has been subject to any further transposition efforts by the member states.
10. For the initial pooled model specification we also estimated different parametric models (Weibull, Gompertz, lognormal, log-logistic and exponential models), which show almost identical results to the semi-parametric Cox model. We further examined the model fit of these models graphically through an analysis of the Cox–Snell residuals where the plots revealed significant differences in terms of model fit: compared with the lognormal, log-logistic and exponential models, the Weibull and especially the Cox

models provide a significantly better fit of the data. Following Keele (2010), we decided on a final specification of our models before checking whether any relevant interaction effects between our covariates existed. Since we did not find any relevant interaction effects, we continued by including smoothing spline fits for checking the correct function form of our continuous covariates. The likelihood ratio tests did not indicate any improvement with the spline models, which confirms that the correct function form of our continuous covariates is linear. We finally applied the standard Therneau–Grambsch test for non-proportionality, which revealed significant results for the covariates delegation ratio and bureaucratic efficiency in all four models (Grambsch and Therneau, 1994). We therefore corrected for non-proportionality by including interactions between these covariates and the natural logarithm of time. The repeated Therneau–Grambsch test shows that non-proportionality is no longer present.

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