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Journal of European Integration

Publication details, including instructions for authors and subscription information:

<http://www.tandfonline.com/loi/geui20>

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Available online: 10 Feb 2011

To cite this article: Carina Sprungk (2011): How Policy-Shaping Might (Not) Affect Policy-Taking: The Case Of National Parliaments in the European Union, *Journal of European Integration*, 33:3, 323-340

To link to this article: <http://dx.doi.org/10.1080/07036337.2010.546843>

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ARTICLE

How Policy-Shaping Might (Not) Affect Policy-Taking: The Case Of National Parliaments in the European Union

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ABSTRACT There is an increasing literature which traces non-compliance with European Union (EU) law back to the decision-making stage. Yet, little attempts have been made to theorize on how and why the phase of shaping EU policies has an effect on their implementation, and to empirically demonstrate if there is a causal link between the two stages. This article seeks to fill this gap by first developing a theoretical framework which identifies three causal mechanisms linking policy-shaping and policy-taking: assertiveness, fairness and information. Second, it empirically tests their explanatory power by drawing on the case of national parliaments. The case studies of the *Assemblée Nationale*'s and the *Bundestag*'s involvement in the negotiation and transposition of the *Water Framework Directive* show that a causal link between policy-shaping and policy-taking is most likely if (1) actors remain identical, (2) little time elapses and (3) the involvement of implementing actors in policy-shaping focuses on providing information.

KEY WORDS: Compliance, national parliaments, transposition, enforcement, management, legitimacy

Introduction

The literature on non-compliance with European Union (EU) law has grown tremendously in the last decade. More recently, there is an increasing number of studies which argue that non-compliance can be traced back to features of the decision-making process (Mastenbroek 2003; Kaeding 2007; Toshkov 2008). Generally speaking, this literature argues that the complex nature of

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ISSN 0703-6337 Print/ISSN 1477-2280 Online/11/030323-18 © 2011 Taylor & Francis
DOI: 10.1080/07036337.2010.546843

the EU decision-making procedure is likely to produce sub-optimal outcomes which subsequently constrain the effective implementation of EU policies at the national level. As the debate on ‘better lawmaking’ as a means to prevent non-compliance in the EU demonstrates (Commission 2002a), this assumption is also reflected in political practice. This article investigates the alleged link between policy-shaping and policy-taking by drawing on the case of national parliaments in the EU, and thereby seeks to address two important gaps in the literature.

First, we know surprisingly little about *how* and *why* policy-shaping should have an effect on policy-taking. References to the underlying theoretical assumptions are only very scattered in the literature, and range from the lack of capacity of implementing actors as a result of the ambiguity of the EU legal act (Mastenbroek 2003) to their political opposition to implementation due to the high costs entailed in the legislation (Toshkov 2008). Second, little attempts have been made to analyse empirically *if* there is a causal link between the two stages. Moreover, the few existing studies have different empirical findings as to the presence of such a link. Some quantitative studies find that policy-shaping at the EU level matters for policy-taking at the domestic level given significant correlations between the two (Mastenbroek 2003; Kaeding 2007), while others clearly reject the presence of such an effect (Börzel et al. 2010). However, these studies conceptualize the scope and features of the pre- and post-decisional stages in different ways and draw on different indicators, respectively. Other quantitative analyses reveal that the EU law-making process suffers from a high level of discontinuity in terms of actors in power and their preferences (König 2007). The lack of personal continuity has also been discussed in qualitative studies as one of the reasons for non-compliance problems in the EU (Falkner et al. 2005). Yet, overall, there is no consensus in the existing literature as to if and how far policy-shaping affects policy-taking in the EU.

This article seeks to address these shortcomings by first developing a theoretical framework which links policy-shaping and policy-taking. Starting from the assumption that implementing actors have to be involved in policy-shaping for expecting a direct effect on policy-taking, it explores which causal relevance three prominent compliance approaches — enforcement, legitimacy and management — assign to this involvement. Second, the explanatory power of the different assumptions will be tested by drawing on the case of national parliaments in the EU. As a reaction to the ‘democratic deficit’, they have been given various incentives to become more actively involved in the phase of shaping EU policies. At the same time, they have a policy-taking role which includes the transposition of directives into national law. The findings of case studies on the Assemblée Nationale’s (AN) and the Bundestag’s (BT) involvement in the negotiation and transposition of the Water Framework Directive (WFD) show that there is hardly any causal link between the shaping and taking of EU policies. If any, the effect of parliamentary involvement *ex ante* on the subsequent transposition of the directive relied in capacity-building by providing information on the contents and goals of the policy. It thereby confirms the assumption of management

approaches, which draw on the capacity-building effect of policy-shaping, while rejecting the assumptions of enforcement and legitimacy approaches that involvement in policy-shaping generates the acceptance of policies and increases the willingness to comply with them.

The article is structured as follows. The next section will introduce in the literature on policy-shaping and non-compliance in the EU and discuss its shortcomings. In the following, the theoretical framework linking the two stages will be developed. The third section discusses the role of national parliaments as policy-shapers and policy-takers in the EU. Next, the relationship between the involvement of the AN and the BT in the negotiation of the WFD and its subsequent transposition will be analysed. The article concludes by summarizing the findings and discussing its implications.

Non-compliance with EU Law and the Role of Policy-shaping

Since the early 1990s, the Commission has been denouncing a growing compliance deficit with EU law. It encompasses both the transposition of EC directives into national law and the application of Community law, though the former accounts for the vast majority of non-compliance problems (Mastenbroek 2003; Falkner et al. 2005; Kaeding 2007).

The Commission has therefore initiated various reforms for improving compliance with EU law throughout the last decade, with some of them specifically addressing the stage in which policies are shaped (Commission 2001, 2002a, 2002b, 2007). A recent Commission communication explicitly states that compliance problems can be prevented by increased attention to implementation throughout the policy cycle (Commission 2007, 5–6). On the one hand, activities at the pre-decisional stage should help to anticipate compliance problems by setting up legislative networks between EU institutions and member states, making impact assessments and involving implementing actors at an early stage (Commission 2002a; 2004). On the other hand, these measures should aim at preventing implementation problems by ‘better lawmaking’ in the first place, which involves consulting a wide range of implementing actors for identifying interests, simplifying legislation and providing explanatory memoranda (Commission 2002a). In sum, all measures taken at the EU decision-making stage require a closer association of national implementing actors.

The activities of the Commission are mirrored by a growing body of literature on (non-)compliance with EU law (Tallberg 1999; Versluis 2003; Falkner et al. 2005; Kaeding 2007), which has identified three major explanatory approaches for non-compliance with law beyond the nation-state: enforcement, management and legitimacy (Hurd 1999; Tallberg 1999; Checkel 2001; Hartlapp 2007; Börzel et al. 2010). Both enforcement and legitimacy approaches assume that states deliberately and voluntarily violate EU law. However, they draw on different causal mechanisms. Enforcement approaches assume that states choose to violate law because they are not willing to bear the costs of compliance. From this rationalist perspective, non-compliance can only be prevented by increasing the costs of non-compliance

(Martin 1992; Downs et al. 1996). Legitimacy approaches assume that states choose to violate law because they are not convinced that compliance represents appropriate behaviour (Franck 1990; Checkel 2001). In other words, states comply out of a normative belief that a rule ought to be obeyed rather than because it suits their instrumental self-interests. This sense of moral obligation is a function of the legitimacy of the rules themselves or their sources (Hurd 1999; Börzel et al. 2010). In contrast, management approaches assume violations to occur involuntarily as a result of a lack of capacities required to ensure compliance, stemming from insufficient capacities of states themselves, an ambiguous definition of norms, or inadequate timetables (Chayes and Handler Chayes 1995; Haas 1998). Here, compliance can only be restored by engaging in capacity-building. However, little attempts have been made so far to systematically integrate the assumption that implementation problems might result from specific features of the decision-making stage in these explanatory approaches.

Several studies distinguish between explanatory factors at the *EU level* and at the *national level* and thereby analytically separate pre- and post-decisional variables (Dimitrakopoulos 2001; Bursens 2002; Mastenbroek 2003; Kaeding 2007; Toshkov 2008). Sources of implementation problems located at the EU level include structural variables such as the complexity and the regulatory style of the decision-making process, which is prone to producing sub-optimal policies (Dimitrakopoulos 2001; Bursens 2002). Other variables relate to features of the specific legal act, such as their ambiguity or complexity, the inclusion of a short time span for transposing directives, or whether they only have an amending character or regulate a new topic (Mastenbroek 2003; Kaeding 2007; Toshkov 2008). The findings vary largely depending on the selection of case samples and the aspects of the policy-shaping stage. Generally though, studies assuming that the quality of the negotiation outcome affects the policy-taking stage seem to implicitly refer to the *capacity* of implementing actors to effectively implement the adopted policies. However, this causal mechanism is hardly made explicit. Similarly, the assumption that implementing actors have difficulties in coping with negotiation outcomes implicitly presumes that they have not been sufficiently involved *ex ante* in order to anticipate the outcome.

Other studies refer more explicitly to the role of agency in policy-shaping and stress the importance of involving national implementing actors as a mechanism for ensuring effective implementation (Krislov et al. 1986; Siedentopf and Ziller 1988; Ciavarini Azzi 2000). This is first and foremost true for national governments as the main 'shapers' and 'takers' of EU policies. The main assumption here is that governments which could successfully upload their preferences in the decision-making stage will better comply with the adopted policies afterwards. However, the literature cautions us against the assumption of stable preferences over time by demonstrating that both governments and their preferences frequently change between policy adoption and implementation (König 2007). Recent large N studies do also find no evidence for this link when analysing infringements of EU law (Börzel et al. 2010). Other authors assume that the involvement of actors beyond the core

executive, such as decentralised authorities and national parliaments, will generate a more 'positive attitude' towards the implementation of Community law (Ciavarini Azzi 2000, 59–60), without providing reasons as to why that is. Others refer to domestic veto players which might block the effective implementation of EU policies as a result of not having been sufficiently involved in the policy-making stage (Haverland 2000; Mbaye 2001). While the lacking willingness of actors to comply is the focus here, it is not made explicit whether it stems from legitimacy considerations or from the high costs entailed in legislation.

In sum, the literature hardly explains *why* and *how* features of the policy-shaping phase have a sustainable effect over the policy cycle and induce (non-)compliant behaviour of implementing actors. While the three different explanatory approaches do not explicitly distinguish between the two stages of the policy cycle, elaborating on their causal mechanisms allows us to identify causal links between policy-shaping and policy-taking.

Linking Policy-shaping and Policy-taking: Three Mechanisms

Yet, given that the literature conceptualizes the scope and features of the two stages in different ways and focuses on different elements for examining the presence of a link between them, we have to first define our understanding of what constitutes policy-shaping and policy-taking, respectively. Starting with policy-shaping, it broadly encompasses the phase of policy formulation, which begins after the agenda-setting and ends with the adoption of a policy. In the EU, it captures the phase after which the Commission has initiated a legislative proposal upon which a range of different actors both at the EU level (Council, Parliament, advisory bodies, interest groups and civil society) and at the national level (ministerial departments, parliaments, subnational authorities, interest groups and civil society) react in order to shape the final outcome. The policy-taking stage, on the other hand, encompasses the implementation phase, which begins after the adoption of a policy and ends after it has been put into practice (May and Wildavsky 1978). This *practical* implementation is usually preceded by the *legal* implementation of the policy in the existing body of legislation in a jurisdiction. In the EU, policy-taking captures the stage after the adoption of the policy, in which member state authorities transpose directives into national law before applying them in practice, or immediately start to practically implement directly applicable legal acts. Whereas the focus of policy-taking is clearly on national actors, the Commission is endowed with the task of monitoring and enforcing the effective implementation of EU policies.

Given the partly overlapping agency, some scholars assume that a clear distinction between different policy stages is generally misleading (Barrett and Fudge 1981; Hjern and Hull 1982). However, more moderate approaches suggest developing syntheses between the two approaches for better capturing the conditions under which policies are successfully implemented (Elmore 1979; Sabatier 1986). Thus, rather than explaining implementation outcomes after a policy has been adopted, it is useful to analyze

whether they result from the features of preceding stages. From this perspective, it is crucial to focus on the role of national implementing actors in these stages.

Assertiveness results in substantial acceptance. First, enforcement approaches would assume that the involvement of implementing actors in the policy-shaping stage affects their willingness to bear the costs of compliance. In this perspective, it is the ‘power of assertiveness’ (Börzel et al. 2010) of implementing actors in the decision-making stage which affects the implementation of policies. Actors infringe on EU policies less frequently since they have been able to decrease the costs of compliance by shaping them according to their preferences. Generally speaking, however, this line of reasoning implies that implementing actors are involved in the decision-making stage in a way which allows them to have a substantial impact, and that they actively defend their interests.

Fairness results in procedural acceptance. Second, legitimacy approaches would look at how the involvement of implementing actors in the policy-shaping stage is suited to generate legitimacy. Franck argues that rules which have been adopted ‘in accordance with right process’ (Franck 1990, 706) are more effectively implemented and complied with. This procedural legitimacy can be generated by including those actors in the decision-making stage that are potentially affected by the policy. These actors will effectively implement the decisions because of the perceived fairness of the procedure, regardless of the contents of the rule and the extent to which it reflects their preferences (Franck 1990; Hurd 1999). Here, we would assume that implementing actors are involved in a way which allows them to be at least consulted¹ and to assess which interests are reflected in the contents of the rule and why.

Information results in capacity-building. Third, management approaches focus on how the policy-shaping stage can provide implementing actors with capacities. This can include ‘better lawmaking’, by defining norms unambiguously, providing for adequate implementation timetables and, if necessary, including provisions on financial and technical assistance. Yet, these aspects primarily allow for capacity-building in the implementation stage only. Capacity-building in the policy-shaping phase, however, involves providing implementing actors with information on the contents and goals of a policy early in the policy cycle in order to enable them to adequately prepare the implementation. Unlike the enforcement and legitimacy approaches, the purpose of involving implementing actors at an early stage is less about enhancing their willingness to comply rather than enabling them to do so. Compared to the other two mechanisms, we would therefore assume that they have to be constantly, but less actively involved in shaping policies.

In sum, the analysis provides us with three different ways on how and why the inclusion of implementing actors in the phase of policy-shaping might positively affect policy-taking: it can promote the willingness of implementing

Table 1. Compliance approaches and the role of policy-shaping

	Source of non-compliance	Mechanism linking policy-shaping and policy-taking	Required level of active involvement of implementing actors in phase of policy-shaping
Enforcement	Lack of willingness to bear the costs of compliance	<i>Assertiveness</i> Decreases costs and provides for <i>substantial acceptance</i>	High
Legitimacy	Consideration that rule or its sources are not legitimate	<i>Fairness</i> Generates legitimacy and provides for <i>procedural acceptance</i>	Medium
Management	Lack of capacities to bear the costs of compliance	<i>Information</i> Reduces ambiguity of norms and provides for <i>capacity-building</i>	Low

actors to comply as a result of substantial or procedural acceptance, and it can enhance their capacity to effectively implement it. As Table 1 shows, the three mechanisms also require different levels of active involvement of implementing actors in the phase of policy-shaping.

While the analysis of the role of policy-shaping in the different compliance approaches provides us with the mechanisms theoretically linking the two stages of the policy cycle, little attempts have been made so far to provide systematic empirical evidence of their presence and causal relevance. Do implementing actors actually refer to the phase of policy-shaping and their (lack of) involvement when implementing policies? And if yes, is it a high level of active involvement and the actual assertiveness of implementing actors which is most likely to have a sustainable effect over the policy cycle? What all three mechanisms have in common is that they suppose actors to be identical throughout the legislative procedure. This relates to another implicit assumption: an effect is most likely if little time elapses between policy-shaping and policy-taking. This personal continuity and brevity of the policy cycle are, however, frequently constrained by the length and discontinuity of EU decision-making procedures (König 2007). This is why we have to analyse cases in which actors who are involved in the decision-making stage are also responsible for the implementation of EU policies. Apart from national governments and their officials, national parliaments are the only implementing actors who may regularly participate in EU policy-making across all policy sectors. Being involved in the transposition of EU directives, they also come to the fore at the first stage of the implementation procedure.

National Parliaments in the Shaping and Taking of EU Policies

Compared to the effect of EU membership on other domestic institutions, national parliaments are unequivocally considered as the 'losers' of the

European integration process because of their severe loss of competencies (Maurer and Wessels 2001; O'Brennan and Raunio 2007). As a result, several mechanisms for strengthening parliamentary participation in EU policy-making were introduced in the 1990s both at the national and at the EU level, including the current Lisbon Treaty. They mainly consisted of providing additional resources and new powers for controlling the government in EU affairs. Thus, the policy-shaping role of national parliaments refers to the oversight of the national government and the potential impact on its negotiation behaviour in EU policy-making.

The policy-taking role of national parliaments in the EU, on the other hand, is twofold. First, they have to ratify treaties and treaty amendments. Second, they transpose EU directives into national law. Directives can be incorporated into national legislation by adopting executive decrees, or transposition can take the form of a law, thereby involving parliaments. While the former accounts for the majority of transposition acts (König 2007), parliamentary transposition matters in qualitative terms, as it is usually required for directives with a far-reaching impact on domestic legislation. Given the intention to adopt more framework directives (Commission 2001), parliamentary transposition is also likely to increase in the future.

The literature frequently refers to parliaments as a source of the severe transposition problems in the EU (Krislov et al. 1986; Siedentopf and Ziller 1988; Ciavarini Azzi 2000; König and Luetgert 2009), arguing that they are more likely to transpose directives both untimely and incorrectly than executive acts are. This is because parliaments are new actors at the end of the EU policy cycle, which yet require information on the contents of the directive and on their leeway in the transposition stage in order to correctly transpose it. Moreover, parliamentary procedures are cumbersome and involve substantial committee work as well as several readings in the plenary. Finally, as parliaments are political institutions, the salience of the issue regulated by the directive might trigger political opposition (Dimitrakopoulos 2001; Versluis 2003; Falkner et al. 2005). Thus, Members of Parliament (MPs) might be inclined to block or delay the transposition of highly politicized directives such as the Genetically Modified Organisms (GMO) or the services directive. Recent reform strategies of the Commission suggest that the early involvement of national parliaments in the policy cycle is not only a means for mending the democratic deficit, but is also likely to improve transposition (Commission 2004). However, the few studies on the relationship between the two types of parliamentary involvement in the EU (Szukala 1998; Bergman 2000; Martin 2000) do not only have very different empirical findings as to the presence of a positive impact. They also fail to systematically analyse the underlying causal mechanisms.

When looking at Table 1, we find that the act of parliamentary scrutiny of EU policies *ex ante* involves by nature acquiring *information* on the contents and goals of the legislative proposal, and on the corresponding position of the government. Moreover, receiving information at the policy-shaping stage is more conducive to effective transposition than afterwards: not only does it prevent delays in transposition because information on how to interpret

certain provisions is (still) needed *ex post*. It might also prevent that directives are transposed in an incorrect way as a result of a wrong assessment of what effective transposition implies. The involvement of national parliaments in the phase of shaping EU directives can therefore contribute to *capacity-building* and thereby improve parliamentary transposition.

Moreover, during the decision-making process, members of parliament (MPs) can also actively develop a position vis-à-vis a legislative proposal and submit it to government. There are several reasons why the government will then try to consider the parliamentary position during Council negotiations, such as the presence of a formal mandate, its use as a 'diplomatic weapon' or because it does anyway pursue similar objectives, as mainly in the case of majority governments. Moreover, for avoiding the problem of being explicitly outvoted, most parliaments will usually leave a broad room for manoeuvre for their governments and not issue tight instructions (Benz 2004). Overall, the consideration of parliamentary interests is more likely if frequent interaction with the government takes place. This could generate *substantial acceptance* in the transposition stage, even though the parliament could not itself defend its interests during the negotiation process. This assertiveness might, in turn, facilitate the effective transposition of that directive by pre-empting political opposition.

Finally, we might see a similar effect even if a government which had defended the parliamentary position was outvoted or not sufficiently assertive. Thus, a close interaction with the government throughout the legislative procedure informs MPs about the different positions of Council members and the corresponding likelihood that their position will prevail. In addition, an early and continuous involvement of parliaments before the adoption enhances the credibility of governmental reports about the negotiation outcome. Mere *ex post* government reports on the course of negotiation are less likely to trigger *procedural acceptance* than regular *ex ante* information. In sum, governmental scrutiny during policy-shaping might generate trust in the fairness of the policy-making procedure for MPs, since they had a chance to participate and raise their voice. Thus, directives are accepted and effectively transposed even though they do not (entirely) reflect the interests of the parliamentary majority. In the following, we will analyse to which extent the various causal mechanisms are present by drawing on specific case studies.

The Role of the Assemblée Nationale and the Bundestag in the Shaping and Taking of the Water Framework Directive

The role of the French AN is a crucial case for exploring the link between policy-shaping and policy-taking for several reasons. First, despite its rather weak position in domestic affairs, it became significantly empowered throughout the 1990s (Szukala and Rozenberg 2001; Sprungk 2007). Thus, Art. 88-4 of the French Constitution provides for the parliamentary right to participate in EU affairs and entitles it to adopt corresponding resolutions — a right which it did not have in domestic affairs. Moreover, the standing committee on EU affairs (known as *Délégation pour l'Union Européenne*

[DUE] up to 2008) has evolved into a major player in this scrutiny process. Within the EU-15, the EU-specific empowerment as compared to domestic politics has arguably been the biggest for the French parliament. Yet, despite this empowerment, transposition records in France have most dramatically deteriorated over time in the late 1990s and the early 2000s compared to the other EU-15 member states. These problems also refer to parliamentary transposition, which concerns about 30 per cent of all cases (Printed Matter (PM) 12/1709; 12/2447; 12/3239). In a nutshell, the French case suggests that there is no significant effect of policy-shaping on policy-taking and therefore invites for an analysis of why that is. The Water Framework Directive (WFD, No. 2000/60/EC) can serve as a plausibility probe for several reasons. First, the AN was both involved in the scrutiny process and in the transposition of the directive. Second, with the adoption of a parliamentary resolution on the WFD, its level of active involvement in the decision-making stage was high. Finally, the transposition of the WFD by the AN was overall effective.

Generally speaking, the WFD is considered to be a major piece of legislation in EU water policy, aiming at streamlining the hitherto piecemeal water legislation (Kallis and Butler 2001; Kaika 2003). The AN became involved at an early stage of the legislative procedure and approved the draft legislation in its parliamentary resolution. However, it also identified a number of shortcomings, which the French government should address throughout negotiations (PM 11/926). The WFD was eventually adopted on 23 October 2000, and its transposition was due on 22 October 2003. The AN's proposal for a new water law incorporating the transposition of the WFD was already published in France in June 2001, but the actual transposition was then nevertheless delayed, since the Sénat still had to approve the proposal. After having received a letter of formal notice by the Commission in January 2004 for not notifying transposition measures, the WFD was eventually transposed by a specific parliamentary law in April 2004. Thus, despite a change of government in 2002, the part of the transposition involving the AN was overall effective. It was actually promoted by the AN by a quick deliberation once it received the proposal, and by ensuring the conformity of the transposition law with the WFD. To which extent is this related to its prior involvement in the shaping phase?

Starting with *assertiveness* as the mechanism in enforcement approaches, we find that many (though not all) changes of the final WFD version in 2000 correspond to the AN's requests made in its parliamentary resolution in 1998. This concerns the inserted principle of water management based on river basins, the extended deadline for achieving good ecological status of waters to 2015, the strengthened role of member states in the full recovery of costs principle or the creation of international river basins. The conditions for the 'substantial acceptance' of the directive are therefore generally met. The parliamentary transposition debates also show that MPs largely approved the contents of the directive (AN Plenary Protocol (PP) 11/104). However, there is no evidence that this acceptance stems from the previous involvement of the AN and the fact that the parliamentary resolution was

largely reflected in the WFD, as neither of it is explicitly referred to during ex post deliberations. In general, the transposition debates both within the standing committee and in the plenary mainly focus on the domestic reform of water policy and hardly discuss the transposition of the WFD or mention the parliamentary resolution (PM 11/3205; PP 11/104). Moreover, not even the aspects in which the AN had not been successful are referred to and seemingly have not negatively affected the transposition of the directive. Finally, the contents of the directive were even accepted by MPs of the new majority after the change of government in 2002, even though former opposition MPs had hardly been actively involved in the phase of policy-shaping (PM 11/37, 11/926). In sum, there is no evidence that the extent to which parliamentary requests made in the policy-shaping stage had been considered mattered for the transposition of the WFD.

The same holds true for the *fairness* of the decision-making procedure as the causal mechanism identified in legitimacy approaches. This would require French MPs to have insights on the course of the negotiation procedure. However, the government did neither provide information about the actual course of the decision-making procedure nor did the parliament formally request it. There were no auditions of the Environment Minister Dominique Voynet on ongoing negotiations or on the consideration of the parliamentary resolution during the meetings of the DUE or of the standing committee on production and trade.² Moreover, none of the written or oral questions by individual MPs inquired explicitly about the stage of negotiations or the consideration of the parliamentary position.³ The course of the decision-making procedure was never referred to in the AN's transposition debates. Moreover, given the low involvement of opposition MPs in the WFD shaping phase, the course of the decision-making procedure is even less likely to matter for the new parliamentary majority after 2002. Thus, the fairness of the decision-making procedure was not relevant for the effective transposition of the WFD.

Finally, management approaches predict that participation in policy-shaping *builds capacities* to effectively implement rules by providing information on the policy to be adopted. Throughout committee and plenary debates in the transposition stage, both majority and opposition MPs frequently referred to the contents of the WFD (PM 11/3205, PP 11/104). Moreover, there were no complaints of opposition or majority MPs about a lack of information on the directive throughout ex post deliberations, neither before nor after the change of government. However, it is not clear whether this information stems from the parliamentary involvement ex ante, as it is never explicitly referred to. What is more, the two-tier system of the AN's involvement, with the DUE being the primary actor ex ante and the standing committee being exclusively responsible for the transposition of directives ex post, while only being moderately involved ex ante, constraints the effective flow of information. Yet, in the case of the WFD, this constraint was partially overcome by the personal continuity of MP Daniel Marcovitch. He was both the rapporteur of the standing committee for the DUE's resolution proposal on the WFD in 1998 and for the AN's legislative proposal for transposing

the WFD in 2001. Moreover, he had been very active in the preparations of the domestic water policy reform since Mai 1998, and could thus help clarifying how certain provisions of the WFD had to be interpreted (PM 11/3205). However, his role cannot explain the effective transposition of the WFD by the new parliamentary majority in 2004. In fact, in the light of government changes throughout the legislative procedure, the transport of information also requires the involvement of majority *and* opposition MPs in at least the standing committee deliberations *ex ante*. Yet, as shown above, the latter were not actively involved at that stage. Thus, the capacity-building effect of involvement in the policy-shaping phase can only partially account for the effective transposition of the WFD.

In sum, the analysis of the French parliament's role throughout the legislative procedure of the WFD has shown that active involvement of implementing actors in the policy-shaping stage hardly affects policy-taking. The policy-shaping stage was never explicitly referred to, and MPs of the new majority after 2002 had hardly been involved *ex ante*, but nevertheless transposed the WFD effectively. The good information of all MPs on the contents of the directive can be better attributed to the fact that the WFD legislative procedure was running parallel to the domestic reform of water policy. This issue linkage also provided for a more frequent reference to the WFD outside the DUE as the key player *ex ante*. The acceptance of its contents, on the other hand, can be explained by the overall compatibility of the WFD with pre-existing national water legislation, with the latter being approved across all political parties. Thus, even an active involvement in the policy-shaping stage and the assertiveness in the negotiation procedure hardly positively affect the subsequent transposition of directives.

However, a causal link between policy-shaping and policy-taking requires that actors are identical throughout the legislative procedure. This was partly constrained in the French WFD case since the *ex ante* involvement in EU affairs was centralized in the DUE, and opposition MPs were hardly involved at that time. Thus, for knowing whether active involvement in policy-shaping can be a sufficient condition for effective policy-taking, more empirical evidence is needed.

In this perspective, the German BT is an appropriate 'test case' for several reasons. First, it has been empowered for participation in EU affairs *ex ante* to a similar extent as the French AN. Art. 23 Grundgesetz (GG, Basic Law) provides for a constitutional right for the parliament's involvement in the EU by stipulating that it may adopt politically binding resolutions which the Federal government has to take into account when negotiating. Art. 45GG also provides for the creation of a European Union Affairs Committee (EAC). Second, in contrast to the AN, the internal legislative organization of participation in EU affairs in the BT differs substantially. In contrast to the AN, the BT provides for a strong involvement of standing committees in parliamentary scrutiny *and* transposition, respectively. What is more, it also allows for a more systematic involvement of opposition MPs, since the scrutiny of an EU policy usually requires the designation of rapporteurs from each political party. Finally, not only is the BT involved in nearly all cases of

transpositions, the German transposition record is also much better than the French one. For reasons of comparability, we will draw on the WFD as a case study as well.

The Commission's WFD proposal was officially submitted by the Federal government to the BT in June 1997, i.e., in the 13th legislature. However, the major scrutiny activities took place in the 14th electoral term. Given that the WFD was a sector-specific issue, the committee on environment, nature conservation and nuclear safety had the lead in the deliberations. The EAC was not involved at all in the scrutiny process. The former drafted a resolution on the WFD proposal, which the plenary formally adopted in December 1998 (Plenary Protocol [PP] 14/14). Overall, compared to the AN's resolution, the BT's requests were very detailed and gave the Federal government precise instructions on what to negotiate for. The German parliament then promoted the effective transposition by a quick deliberation of the government's legislative proposal and a swift adoption of the transposing law in March 2002. Thus, the parliamentary transposition of the WFD at the Federal level was finished both before the official deadline and within the same electoral term in which the BT's scrutiny *ex ante* had taken place.

Starting with *assertiveness*, we find that as in the French case, the conditions for the substantial acceptance of the WFD are met. Many (though not all) of the BT's requests were taken up in the final version of the directive, such as the provision on preventing the further deterioration of water quality, the insertion of additional criteria for the designation of 'heavily modified' water bodies, or the provision stipulating the phasing-out of discharges, emissions and losses of dangerous substances into waters. In the transposition stage, the contents of the WFD were also generally accepted. Yet, despite the overall assertiveness of the BT's requests *ex ante*, it is difficult to discern a causal impact on the subsequent transposition of the WFD — even though policy-taking occurred right after policy-shaping and was undertaken by the same implementing actors. In general, MPs did not refer to prior scrutiny activities during the transposition stage. Moreover, the parliamentary debates in the environment committee and in the plenary hardly focussed on the same issues in the two phases. Thus, while the provisions of the parliamentary resolution focus on the adoption of more stringent water quality provisions, on constraints for granting exceptions and extending deadlines (PM 14/154), the issues raised during the transposition debate focussed on specific issues related to the requirements of transposition and the corresponding amendments of domestic legislation (PM 14/8621). The same holds true for the plenary debates on the transposition of the WFD (PP 14/228), during which the role of the public in consultation processes for river basin management plans is highlighted — an aspect which had not been mentioned in the *ex ante* stage. In sum, assertiveness did not matter for the WFD's effective transposition by the BT.

The *fairness* of the decision-making procedure did not matter for the WFD's transposition either. Here, the attempt of the government to consider parliamentary interests (regardless of the outcome) would result in the acceptance of the directive. The necessary condition is again the information about

the negotiation procedure. Compared to the AN, the BT was actually provided with detailed information about the stage of negotiations and how and why certain requests were (not) considered in the final version of the directive by a report of the Federal government (PM 14/5305). However, there is no evidence that the effective transposition of the WFD is causally related to the prior parliamentary involvement and the government's attempt to take the BT's position into account. During transposition debates, MPs never referred to the governmental behaviour in the decision-making stage or to their own involvement for, e.g., explaining the approval of even those contents of the WFD which did not reflect the BT's previous requests. Even though this does not preclude that MPs considered the decision-making phase as having been fair, the lack of an explicit reference does at least not allow for identifying a clear causal impact of policy-shaping on policy-taking.

We find more explanatory power for the role of policy-shaping in *management approaches*. First, MPs did acquire abundant information on the contents of the directive in the shaping phase. Thus, not only had the proposal of the Commission been frequently deliberated on in parliamentary committees, but the government had also provided information about the stage of negotiation at several occasions. Moreover, unlike in the French case, the transport of information over the stages of the legislative procedure was not constrained: not only was the same committee involved ex ante and ex post; a high level of information was even given in the case of opposition MPs, since members from each party group were nominated as rapporteurs for the WFD proposal. Second, it is also likely that MPs reverted to this specific information in the transposition stage. In contrast to the AN, there was no issue linkage with national legislative activities which could have provided information as well. Moreover, information on the WFD could also hardly have been acquired ex post only given the short time elapsed between policy-shaping and policy-taking.¹

In sum, the findings of the German case study point as well to the fact that the extent to which the government has taken parliamentary scrutiny into account is not the decisive factor for the effective parliamentary transposition of directives. MPs did neither refer to the requests which have been considered nor to the aspects in which they have not been assertive during the transposition stage. The link between the roles of the parliament in the two stages of the legislative procedure seems to be rather related to the flow of information than to the course and outcome of negotiations.

Conclusion

The purpose of this article was to explore if and how policy-shaping might affect policy-taking of EU law. More specifically, it aimed at analysing whether the involvement of implementing actors at an early stage of the EU policy cycle positively affects the subsequent implementation of EU policies. In a first step, a theoretical framework was developed by exploring which role three prominent compliance approaches — enforcement, legitimacy and management — assign to the stage of policy-shaping. While enforcement and

legitimacy approaches predict that involving implementing actors in the negotiation phase generates acceptance of the policies to be adopted by the mechanisms of assertiveness or fairness, management approaches assume it contributes to capacity-building by providing the information required for effective implementation. The explanatory power of these assumptions was then explored by drawing on the case of national parliaments in the EU.

The case studies of the role of the AN and the BT in the negotiation and transposition of the WFD have shown that there is hardly any causal link between the shaping and taking of EU policies. Even though both parliaments were very actively involved in the shaping of the WFD, and were also largely assertive in that the final version of the directive reflected many of their requests, this did not matter in the transposition stage. The contents of the WFD were accepted even beyond the aspects in which the parliamentary position was assertive and without relating to them. The same holds true for the fairness of the negotiation procedure: the course of the procedure was never referred to as a reason for transposing the WFD effectively. If any, the effect of parliamentary involvement *ex ante* on its subsequent transposition of the directive relied in capacity-building by providing information on the contents and goals of the policy rather than in the generation of acceptance.

The weak evidence for the links between policy-shaping and policy-taking predicted by enforcement and legitimacy approaches can be explained by various factors. First, the sustainable effect of the acceptance generated at the end of the policy-shaping phase on the phase of policy-taking might be hampered by a change of actors between the two stages, as shown by the French case study. Second, it might be constrained if a considerable amount of time elapses between policy-shaping and policy-taking, which is frequently given in the case of the EU legislative procedure (König 2007). Yet, the German case study demonstrates that assertiveness in or fairness of the policy-shaping procedure does not even matter for policy-taking if actors remain identical and if only little time elapses. A third reason for these 'missing links' between policy-shaping and policy-taking might therefore be that enforcement and legitimacy approaches both have the *willingness* of actors to comply as their starting point. Yet, interests are dynamic and can therefore change over time and within different contexts. In other words, actors might have specific interests during the decision-making stage, but these may change once they enter the implementation phase. As the German case study demonstrated, there were completely different issues at stake for MPs in the two stages. The different nature of shaping a future policy at the EU level as opposed to implementing an adopted policy 'on the ground' implies that different issues become salient during the policy cycle, and might therefore require that actors shift their focus and/or even formulate new interests. The capacity of implementing actors as the cornerstone of management approaches, on the other hand, is a more static concept which is more likely to survive the EU policy cycle. Thus, the information on the contents and goals of an EU policy acquired *ex ante* does not change between the two stages and can contribute to capacity-building of implementing actors

regardless of changing contexts. Hence, in line with management approaches, involving implementing actors in the stage of policy-shaping is meaningful if they are willing but not fully able to effectively implement a policy.

These findings have several implications. Theoretically, management approaches will have to conceptualize the role of policy-shaping more prominently. While assertiveness has played an important role in the enforcement literature, and the fairness of the decision-making procedure has been debated in legitimacy accounts, the role of policy-shaping has been discussed less explicitly in management approaches. Empirically, the findings suggest that given the different nature of the two policy stages, *voluntary* non-compliance with EU law cannot be necessarily improved by involving implementing actors *ex ante*. Thus, efforts to generate acceptance of policies have to continue in the implementation stage. For the case of national parliaments in the EU, a positive effect of participating in the shaping of EU directives on their transposition by legislatures is most likely if the latter occurs quickly after the adoption of the legal act, if the same committees and opposition MPs are involved in both stages, and if parliamentary scrutiny focuses on acquiring information on the contents of the directive. However, in order to make more generalizable statements on the link between policy-shaping and policy-taking, more empirical evidence is needed. In this perspective, it would be fruitful to study the role of other implementing actors and other types of implementation.

Notes

1. The legitimacy approach does not necessarily require that implementing actors are actually consulted. The primary causal mechanism at work refers to the chance of implementing actors to participate and to have a voice in the process.
2. See the summaries of DUE meetings in the 11th electoral term on <http://www.assemblee-nationale.fr/europe/comptes-rendus-11leg.asp>, and of the committee on production and trade meetings in the 11th electoral term on <http://www.assemblee-nationale.fr/11/cr-cpro/01-02/liste.asp> (accessed 27 August 2010).
3. See the questions relating to 'water' and 'directives' between May 1998 and October 2000 in the search engine on questions <http://questions.assemblee-nationale.fr/questions.asp> (accessed 27 August 2010).

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