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BUILDING EFFICIENT MODELS OF GLOBAL GOVERNANCE:
THE ROLE OF THE EU REGIONAL TIER

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*Building Efficient Models of Global Governance:
The Role of the EU Regional Tier:
A Case Study Analysis of Compliance with State Aid Agreements in France, the
United Kingdom and Switzerland*

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Abstract

States have increasingly engaged in international regulatory agreements in a wide range of issue areas. In game-theory terms, global models of governance reduce uncertainty and can improve policy coordination, bargaining and predictability. However, despite voluntary commitment to such agreements, certain states are tempted to defect and free ride. Failure to comply is particularly damaging for international regulatory regimes that, derive their efficiency and credibility from compliance. In this context, the EU has become a regulatory state (Majone, 1996) and developed an extensive set of functional institutional mechanisms to overcome such temptations to defect. The EU regional tier is based on a model of delegation of enforcement power to supranational institutions, access for private actors to enforcement mechanisms and international law embedded in the rule of the regional organization.

This research tests the role of the EU regional tier as an efficient model of governance to improve compliance rates. It provides an empirical investigation of the variables shaping compliance in Europe and bridges the gap between constructivism, enforcement and management schools. Through contrasting case study of the compliance performance of EU states with the compliance performance of comparable non-EU advanced, industrialised democracies it seeks to identify the determinants of compliance. More specifically through process tracing of infringement proceedings in France, the UK and Switzerland in the area of competition policies this qualitative empirical investigation provides an analysis of the causal relationship between the regional tier model of governance and observed compliance rates.

The main findings show functional institutional designs can improve compliance. The regional tier model of governance addresses determinants of compliance ranging from constructivism to management and enforcement and locks states into compliance with a whole legislative package they cannot easily opt-out from rather than allowing more flexible patterns of compliance to emerge

Keywords

State compliance, regional tier model of governance, functional institutional designs, state aid and competition policies

Introduction

International regulatory agreements have become a central mode of governance across policy sectors. In an increasingly connected world, the coordination of decisions has become crucial for the conduction of policy-making and provides numerous advantages. Coordinating policy choices and agreeing on international regulatory frameworks can improve the pace of achieving specific goals such as reducing environmental damage, protecting refugee rights or guaranteeing free-flows of international trade. Collective agreements also facilitate burden sharing and can reduce the cost of action for rational states if a stable equilibrium is achieved. The externalities of environmental damage or the cross border protection of refugees for example cannot be solved by individual states alone and require a global-level mode of commitment.

The efficiency and credibility of such supranational modes of governance are rooted in the compliance by states with the international regulatory frameworks to which they adhere. Despite voluntary treaty ratification and even among cooperative minded states are tempted to renege on their commitment and to rely on other players to bear the cost of action while enjoying the benefits of international regulations. Understanding the factors determining observed levels of compliance and the efficiency of functional institutional frameworks is thus crucial to improve models of global governance.

This research tests the determinants of compliance and develops the concept of a regional tier model of governance as established in the European Union as a functional institutional design to improve compliance rates.

The regional tier model of governance is based on delegation of enforcement and management powers to supranational institutions, access for private actors to legal mechanisms and international rules legally embedded in the regional organisation and combines enforcement and management tools as paths to compliance (Tallberg, 2002) The participation of supranational and private actors in regional governance combined with an additional tier of coordination and socialization among states can lead to the emergence of shared norms and a legitimate regulatory output which in turns pulls states into compliance.

Understanding the variables shaping compliance rates requires a precise and detailed analysis of the role of functional institutional designs and the tools available to build an efficient regulatory framework. Untangling the puzzle of compliance would not be complete without a focus on the role of supranational institutions, private actors and norms pulling states into abidance with their legislative commitments.

The empirical investigation is carried out through an in-depth case study analysis of compliance with the principle of prohibition of state aid in comparable developed, industrialised and democratic EU and non-EU countries. More specifically, through process tracing of infringement proceedings initiated by the Commission and national court cases initiated by non-state actors this paper tests the causal relationship between the establishment of a regional tier model of governance and compliance rates in France, the United Kingdom and Switzerland.

The creation of a single market in the European Union has led to the transposition of internationally shared agreements into community law and extended the principles of restrictions on trade and free competition through detailed regional level legislation. Government support to a company can damage competition and is regulated by the WTO regime under the WTO rules on Subsidies and Countervailing measures. The objectives of state aid control applied in the European Union are laid down in the founding Treaties of the European Community and a series of legislative acts complementing the fundamental rule (Article 107 on the Treaty of the Functioning of the European Union). The European Union has extended the principle of state aid control and European Free Trade

Agreements with European neighbouring countries such as Switzerland through bi-lateral agreements. The legitimacy and efficiency of the single market is derived from its ability to achieve satisfactory compliance rates and limit the temptation of players to renege. Legalization in the European Union has increased the access for supranational institutions and private actors in regional governance.

The goal of this research is to propose a preliminary analysis of the impact of a regional tier model of governance on regulatory regime efficiency and compliance. Problems of endogenous compliance are a valid concern throughout this research. Differences in compliance rates for states belonging to a regional tier of governance can be explained by the cooperative values shared by states who decide to coordinate at the regional level; rather than the impact of efficient functional institutional designs. Endogeneity concerns are addressed by comparing compliance rates with similarly costly agreements, for similarly cooperative minded states in EU and comparable non-EU states.

The findings of this research suggest the regional tier; through the establishment of enforcement and management tools as well as shared norms and legitimacy of the regulatory output; is an efficient model of governance to improve compliance rates among member states. The regional tier locks member states into compliance with a whole legislative package they cannot easily opt-out from and pulls member states into higher compliance level than would have been achieved otherwise.

Further research is necessary to evaluate the extent to which the regional tier model of governance is replicable cross-sector and outside the EU borders. However, in the specific area of competition policies the findings of this research demonstrate the establishment of a regional tier model of governance can improve compliance rates.

Section one briefly locates the argument of a regional tier and clarifies the empirical predictions in terms of compliance of the regional tier model of governance. Section two empirically assesses the compliance performance at the regional and domestic level in France, the United Kingdom and Switzerland. Section three evaluates the causal relationship between the establishment of a regional tier model of governance and compliance through process tracing of infringement proceedings in the area of competition policies in France, the United Kingdom and Switzerland.

1. Empirical Predictions: What we expect to observe

1.1. Functional institutional design: the regional tier model of governance

The use of international law has proliferated in different issue areas. The policing role of law in world politics is not however homogenous. Legally binding agreements vary in the degree of precision, constraint and delegation actors chose to adopt (Abbott, 1990; Keohane, et al, 2000).

The establishment of the Single Market has led to a vast legislative output in the European Union to clarify the rules of the game eliminating restrictions between member states on trade and free competition. The rules governing international trade prohibit state intervention if it distorts competition and trade among trading partners. Physical, technical and tax-related barriers have been abolished and the establishment of an economic community extended to policies areas such as the environment and education.

In the process of European integration the European Union has transposed international agreements into European law and constructed a detailed and obligatory set of binding directives and institutional mechanisms like the ECJ or the Commission to ensure state compliance is effective and monitored.

The literature on state compliance at the supranational level has developed theoretical frameworks and empirical predictions covering variables such as capacity limitations and state incentive structure to understand the process of compliance (Tallberg, 2002).

At the domestic level we expect the set of variables determining the level of state compliance to be three-fold: rational choice to comply, capacities at the domestic level and perceived legitimacy of the regulatory output.

The enforcement school argues states are rational actors weighting the costs and benefits of complying with international regulatory agreements before modifying their behavioural choices. States have an incentive to evade their commitments so as to gain from an agreement by obtaining all the benefits without contributing their own efforts. Punitive strategies and sanctions are thus essential to achieve compliance (Fearon, 1998).

From a management school perspective levels of organizational and technical capacities such as an efficient bureaucracy, fiscal resources or treaty clarity are determinants of state compliance. The failure of states to comply is not intentional, it can be caused by administrative breakdowns and is a problem to be solved through assistance rather than sanctions (Chayes & Chayes, 1993).

Constructivist theories have also analysed the importance of shared norms and identities in creating cooperative behaviours. Through the process of bargaining and socialisation at the supranational level, actors involved in the policy-making process can build a shared commitment to the rule of law and the specific norms it translates. Furthermore, procedural legitimacy can arise from supranational coordination and create a compliance pull which; will in turn limit defection. Social learning and persuasion leads to logic of appropriateness and improved compliance rates (Börzel et al, 2004; Checkel, 2001; Finnemore and Toppe, 2001).

Functionalist theorists argue that variations in the institutional set-up will affect political outcomes and the behaviour of actors within the political game at the supranational and domestic level. The interaction between law and politics is reciprocal, mediated by institutions. An increase in delegation to neutral third parties in the process of dispute resolution will increase the efficiency and observed level of compliance with international laws (Alter, 1998; Hooghe & Marks, 2000; Keohane et al 2000; Weingast, 1989). Political competition and increased participation in the policy-making process of third parties will also enforce the efficiency and legitimacy of supranational political systems such as the EU for example (Hix, 2008).

The establishment of a regional tier model of governance as observed in the European Union is functionally established to address the determinants of compliance. The regional tier enables greater access to non-state actors through delegation of enforcement and management powers to supranational institutions. It provides access for private actors to supranational legal mechanisms which; can in turn legitimize the legislative output and create a system of detection of cases of non-compliance through fire-alarm mechanisms. Finally legally embedding the international rules in the rules of the regional organisation can help clarify and legitimise commitments with international law through coordination and rule precision. What are the consequences in terms of compliance and regime efficiency of a regional tier model of governance? What is the impact of contrasting levels of delegation on state compliance?

We can expect the establishment of a regional tier model of governance will improve the efficiency of regulatory governance and compliance. The regional tier provides an addition layer of functional institutions. Enforcement and management powers are delegated to supranational institutions to ensure the coordination game is maintained.

The European Union with its regional level of coordination has established procedures to ensure that rule clarity is observed and access to non-state actors facilitated. An increase in the clarity of legal requirements limits the ability to misinterpret the law. The increased participation of private actors and coordination among states at the regional level can lead to shared norms and if successful legitimate regulatory outputs. Finally the perceived legitimacy and benefits derived from the regional tier for a growing number of actors can lock states into increased compliance and shape state preferences

1.2. Regional tier and expected compliance rates in France, the UK and Switzerland

In terms of organisational capacities, as mapped out by Knill (1998) the United Kingdom has a high potential for adapting to supranational policies due to a dynamic administrative tradition. The United Kingdom political system is characterised by a low number of institutional veto points (actors whose agreement is required for a change in the status quo, Tsebelis (2002)) and a strong position of the central government creating the conditions for high capacity to initiate and implement administrative reforms. In addition, the organisation of public administration is not based on centralised authority but delegated role to autonomous, transparent agencies held accountable to the public (Maloney and Richardson, 1995). Public consultation is widely used and the policy culture largely based on decentralised, consensual and flexible mechanisms. The institutions, procedures and regulatory tools in the United Kingdom are efficient, transparent and accountable providing a solid set of organisational mechanisms to achieve satisfactory compliance rates (OECD, 2006).

Switzerland has a strong institutional framework promoting respect for the rule of law and participatory democracy. Federalism and citizen participation are pillar mechanisms in the constitutional order. The federal decision making process is divided between the Confederation, the cantons and municipalities. The existence of numerous veto-players creates a consensual political system with transparent procedures and high levels of citizen participation. Political consensus and political participation by the citizens facilitates legitimacy and good understanding of agreed policies in turn enabling high levels of compliance to be achieved once laws are adopted (OECD, 2006).

In contrast, autonomous and powerful bureaucracies are in place in France. The institutional set-up can reduce the flexible adaptation capability as soon as requirements exceed the scope of moderate adaptation and challenge administrative core arrangements. French administration is led by a tradition of strong and powerful bureaucracy leading society from above. The administration is characterised by a highly centralised and professionalized elite benefiting from an autonomous position within the French political system. The French tradition of “enlightened bureaucracy” and its considerable autonomy limits the ability of the organisational structure to reform and adapt to challenging policy requirements (Knill, 1998). France has however engaged in a process of institutional reform through decentralisation to facilitate regulatory change. The process of decentralisation and simplification of policy-making procedures has however not led to an increased participation of citizens. The division of power between the central state and territorial authorities increased imposing more challenges on regulation reform (OECD, 2006).

All things being equal, in terms of organisational capacities we would thus expect compliance performance to be higher in Switzerland and the United-Kingdom than France.

A regional tier has however been established among European Union member states. Private actors have access to the judicial process and international laws are legally embedded in the regional organisation. To solve unintentional problems of non-compliance, the Commission has been mandated to control and enforce the implementation of primary treaty articles and secondary legislation. The Commission acts as an independent agent monitoring the implementation and execution of adopted legislations (Hix, 2005; Majone, 1996; Moravcsik, 1993; Pollack, 1996). If the regional tier model of governance is determinant in locking states into compliance we can expect compliance rates with complex agreements to be higher in France and the UK than Switzerland.

Rationalist theorists argue compliance is based on an incentive structure alone. States will instrumentally calculate the level of interest derived from compliance with specific legislative agreements. Downs et al (1996) identify the depth of cooperation as a determinant of state compliance and measure the extent to which states have to depart from their original intended actions in its absence. If the depth of cooperation is high and requires an important departure from current behaviour, compliance is less likely to be high in terms of timing and quality. Other factors, such as the pressure of specific interest groups, reputation concerns and economic benefits derived from collective agreements, will also determine the decision to comply made by utility maximizing member

states (Mbaye, 2001; Moravcsik, 1998). The fact states will calculate the costs and benefits of alternative behaviours and wilfully decide not to comply implies that sanction and enforcement mechanisms are efficient strategies to achieve satisfactory levels of compliance. As such we can expect states will fail to comply when legislative agreements require costly adaptation and can conflict with the domestic interest. Given the delegated role of the commission in assisting states to comply and the role of private actors in detecting cases of non-compliance we can expect compliance rates to be higher in European Union member states when agreements require complex departure from the status-quo.

Finally, the process of coordination and socialization at the supranational level can lead to the emergence of shared norms and legitimate regulatory output. Granting access to the policy-making process to private actors can shape the preferences of states to reflect domestic level preferences and lead to improved compliance at the domestic level. Legally embedding international rules at the regional level also pushes for further rule clarification and precision. Through the process of regional level governance and cooperation, agreed regulatory frameworks are likely to be better understood and perceived as legitimate for private actors participating in the implementation process which can in turn lead to improved compliance rates. The law-abiding tradition of countries will shape the observed compliance performance with international law. Countries with a high rule abiding tradition will perform better than countries where support for the rule of law is lower. However support for the rule of law can only be achieved if the legislative framework is considered legitimate. As such, we expect Switzerland and the United Kingdom to perform better than France in terms of compliance with legitimate regulatory frameworks. If the regional tier improves the perceived legitimacy of international law we can expect compliance rates to be higher in France and the United Kingdom than in Switzerland.

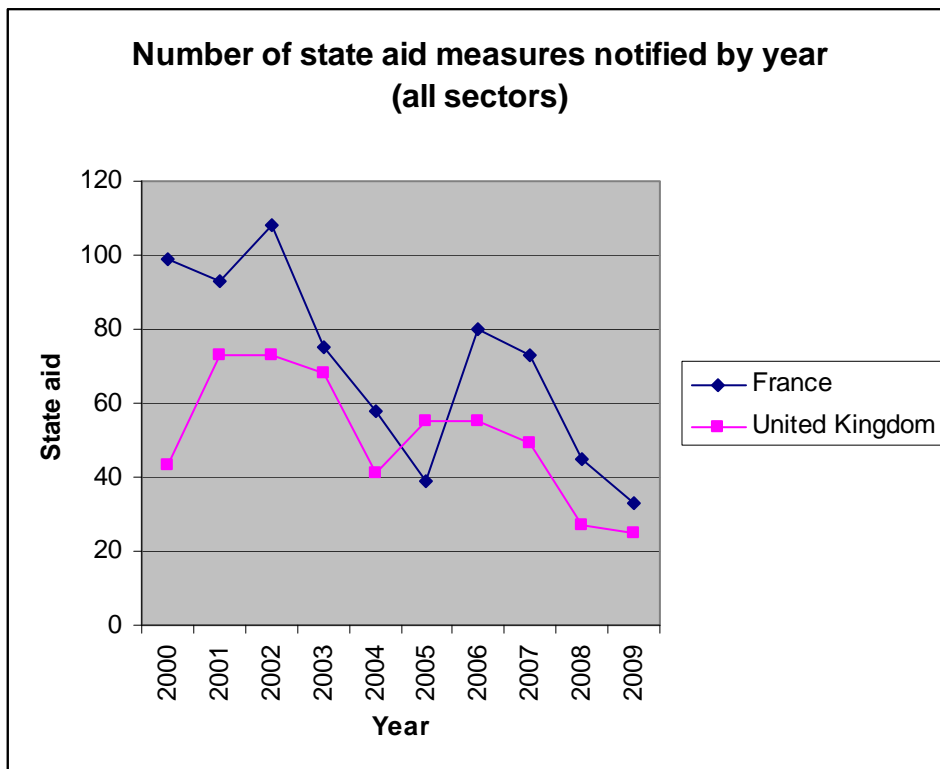
2. Empirical evidence: leaders and laggards

This research analyses variation in compliance with similarly costly agreements between states where a regional tier model of governance is established (France and the United Kingdom) and comparable non-EU states (Switzerland). More specifically it investigates the role of the regional tier model of governance and its impact on observed compliance rates.

2.1. Compliance performance

Figure 1 maps out the number of state aid measures notified by year for France and the United Kingdom in all sectors between 2000 and 2009. While there is an overall decline of the number of state aid measures notified by the commission between 2000 and 2009, the scoreboard shows France has been notified of over twice as more cases of non-compliance by the Commission over the whole period. In 2000 the Commission notified 99 cases in France and 43 in the United Kingdom. By the end of the period of analysis, France was notified of 33 cases and the United Kingdom 25.

Figure 1: Number of state aid notification per year in France and the United Kingdom between 2000 and 2009



Source: Europa, DG Competition (2010)

Similarly since 1997 the cases of state aid notified by the Commission have led to substantially more infringement proceedings in France compared to the United Kingdom. The United Kingdom was sent four orders in 2009 for the same case. In contrast France was sent ten Opinions, two orders and nineteen judgements. Cases of state aid notified by the Commission are solved more rapidly in the United Kingdom with less cases leading to infringement proceedings and subsequent judicial procedures.

Switzerland is not a member of the European Union as such no comparative scoreboard of EU performance is available. Through referendum Switzerland rejected the ratification of the EEA in 1992 and developed a set of bilateral agreements with the European Union to reconcile both the state willingness to benefit from EU integration and the reluctance to delegate sovereignty to supranational institutions. As a result the relationship of Switzerland with the European Union is based on intergovernmental cooperation and mirrors an “a la carte” system whereby Switzerland can join and comply only with agreements; which do not conflict with its national interest.

Table 1 illustrates the “a la carte” nature EU-Switzerland relationship and participation in the Single Market. It maps the agreements Switzerland has accepted to ratify, special arrangements negotiated and agreements Switzerland has refused to sign completely. No other country has as many bilateral agreements with the European Union. The process of adoption of EU norms, regulations and laws has brought Switzerland closer to the EU while restricting the delegation of power to supranational institutions.

The process of monitoring the “acquis helveto-communautaire” is less sophisticated than for the European Economic Area since no supranational institutions have been delegated formal power to oversee the implementation of agreements. Implementation rests on the “good faith” principal of international law except for the air transport agreement which assigns competences to the European Commission and European Court of Justice. Arising disputes are solved through joint committees and sector experts through sectoral DGs rather than DG External Relations (Lavenex et al, 2008).

The establishment of EU/Switzerland bilateral agreements and absence of a regional tier leads to three compliance patterns: compliance with agreements, reluctance or failure to comply entirely leading to negotiation procedures through joint committees. The EU-Switzerland “a la carte” approach contrasts with the requirements imposed on member states where the regional tier model of governance locks states into compliance even with costly agreements that can conflict with domestic level interests.

Table 1: EU Switzerland ‘a la carte’ menu:

Agreement	Signature date	Special arrangements	Rejection date
Free trade	1972		
Insurance	1989		
Customs facilitation and security	1990 and 2009		
European Economic Area			1992
Free movement of persons	1999		
Technical barriers to trade	1999		
Public procurement	1999		
Agriculture (liberalisation and simplification)	1999		
Overland transport	1999		
Civil aviation (freedom of choice in terms of destinations and tariffs)	1999		
Research	1999		

Processed agricultural products	2004		
Pensions	2004		
Taxation of savings	2004		
Environment	2004		
Media	2004		
Statistics	2004		
Schengen/ Dublin	2004		
Direct tax offences	2004	Opt out option without the need to withdraw from Schengen cooperation if future provisions revoke the principle of double liability	
Fight against fraud/ Indirect taxes	2004	Swiss legal system remains. Reciprocal cooperation in cases involving serious offences	
Banking secrecy	2004	Protected at all times (eased in 2009)	

Source: Europa, 2010

Through process tracing of infringement proceedings initiated by the Commission or national level court cases initiated by non-state actors this research seeks to untangle the causal relationships between the establishment of a regional tier model of governance and compliance performance in comparable EU and non-EU states.

For EU member states I focus on the cases where openings of infringement proceedings have led to rulings by the European Court of Justice. Such cases are likely to be the result of incapacity or unwillingness to comply rather than inadvertence and will help identify the determinants of non-compliance.

In the case of Switzerland I investigate the role of the EU regional tier and the ‘a la carte’ nature of EU-Switzerland agreements. I focus on a case where Switzerland is reluctant to comply with its EU commitments as notified by the Commission and the Swiss specific outcome of joint committee negotiation.

3. Understanding variances in compliance

3.1. Compliance and the EU regional tier

3.1.1. France: A “laggard” locked in a regional tier

Inadvertence or lack of resources to achieve the Treaty requirements in due time are identified causes of non-compliance. However in the case of France and its failure to comply with the competition requirements the causal determinants identified by the management school alone do not have sufficient explanatory power.

Firstly in terms of rule precision, the EC Treaty clearly prohibits any form of state aid which; is likely to distort competition or affect trade between member states. State aid can be allowed if it is established for reasons of general economic development. For cases where state aid has damaging consequences on competition, the Commission plays an active role as a competition watchdog and rule clarifying institution. Since 2000 over 5000 cases of state aid were under examination by the Commission. The notification procedure enables the Commission to monitor and assist states in complying with their commitments through detailed notices on the actions required to respect the legal framework.

In the case of France and France Telecom a decision was sent by the Commission on the 2nd of August 2004 to inform the French government of suspected infringement to state aid rules. The Commission notified France Telecom had to repay the amount of state aid received between 1994 and 2002 (evaluated between 798 and 1140 million euros). The Commission decision is open to negotiation if the member state provides the information necessary to prove the notified aid does not constitute state aid. Alternatively if the notification constitutes a case of inadvertent state aid, member states can follow the Commission notification to comply with Treaty requirements and avoid the initiation of infringement proceedings.

France took none of the expected cooperative paths after it had been informed of suspected non-compliance. For two years France neither recovered the unlawful state aid nor provided information to evaluate and improve the Commission’s proposal on the amount to be paid back by France Telecom. While France was informed of unlawful tax regime and given sufficient time to recover or provide information on the nature of the tax aid no action was taken.

The set up of the Telecommunication industry in France is prone to potential blockages to recover from unlawful state aid. Up to 1988 France Telecom was a division of the Ministry of Post and Telecommunications. It became autonomous in 1990 and was privatised under the Left government of Lionel Jospin in 1998. The direction of France Telecom is still in part under French government control. As of 2004 France held 54.4% of the company’s shares. France Telecom has a high proportion of civil servants as employees (86%) and the Conseil of Ministers appoints the CEO. In 2002 Thierry Breton was appointed CEO and later became Minister of Finances and Industry. The late privatisation of France Telecom combined with the on-going privileged relationship between the company and the French government can lead to administrative constraints and actors blocking the process of recovering of state aid.

In addition there is limited separation of power between the government as the core shareholder of France Telecom and its role as a regulator. A sector regulator (ART) with economic and technical powers was set up in 1996. The regulator has shared powers with the Minister responsible for Telecommunication and provides recommendations in the drafting of laws. Law limits the power of the regulator; since its decisions require the approval of the Ministry in charge of Telecommunication before they can be published in the Official Journal. The ability of the regulator to act and promote competition is limited unless it is requested to adjudicate in settling a case. The insufficient distance between policy-makers in the industry and their role in the company limits the implementation of

competition and EU policies since no independent domestic level regulator has the power to sanction breaches of international and regional commitments.

The management tools available to assist states comply were thus insufficient and led to the second stage of adjudication and sanctioning. In 2006 the Commission brought the case to the European Court of Justice declaring France had failed to fulfil its Treaty obligations and give effect to the Commission decision regarding the recovery of the state aid granted to France Telecom. Meanwhile, France brought the Commission to the European Court of Justice and contested the Commission decision regarding state aid. France claimed the court should annul the Commission decision of 2nd August 2004 regarding state aid on the grounds that the Commission made an error of assessment and the tax regime in place does not constitute state aid. France Telecom also brought the case to the ECJ to annul the Commission decision of August 2002. Beyond the administrative constraints and cultural setting shaping the patterns of obedience with supranational law, compliance with the Commission decision is costly for France hence the decision to bring the case to the court. France Telecom is the largest telecommunication company in France and the sixth largest fixed telecommunications operator in the world by 2001. Until the late 1990's modernisation of the telecommunication sector was supported by state funds rather than demand. Opening the gates to competition and limiting state aid could have damaged the dominant position of France Telecom on the domestic market and international scene hence the absence of industrial support for increased competition in the telecommunications market.

From a constructivist perspective and as identified by Falkner et al (2005), France belongs to the "world of transposition neglect"; a cluster of countries where obedience with EU law is not a goal in itself. A posture of "national arrogance" prevails where domestic standards are considered superior to international law. The cultural framework limits efficient compliance with EU law unless supranational actors take powerful action. The typical reaction observed to EU law implementation is inactivity. The process occurred in France with no efforts to negotiate or comply with Commission decisions were established for two years. At the end of the recovery period the Commission decided to initiate an infringement procedure and bring the case to the European Court of Justice on the basis of a negative Commission decision with no recovery from France. ECJ ruling was necessary to achieve compliance in France.

The process of liberalisation of the Telecommunications sector also received limited domestic support and was met by strong opposition from labour union. France scores amongst the most sceptical EU countries towards liberal policies. In 2006 free trade was considered a good thing by 62% of the population; 5 point below the EU average. Competitiveness was considered a good thing by 59% of the population in 2006 and declined to 56% in 2007. The public opinion support for competitive policies in France was 7 point below EU average in 2007 (Eurobarometer, 2010). In early 2000 French administration was also sceptical of the benefits competition could bring. As a result of limited governmental, industrial and citizen pressure the process of liberalisation was mainly driven by EU initiatives and France often lagged behind in terms of implementation of the EU framework for telecommunication liberalisation. The preferences of economic and political actors have shaped the pace of compliance with EU agreements to open the telecommunications sector to competition. The resistance to EU legal requirements is manifest in the decision by both France and France Telecom to oppose the Commission decision and bring the case to the court.

In October 2007 the European Court of Justice ruled in favour of the Commission in the case against France. The ECJ declared France had failed to fulfil its Treaty obligations by failing to give effect within the prescribed period of the Commission decision ordering France Telecom to repay the state aid. The ECJ ordered France to repay the costs. In November 2009 the ECJ dismissed the actions initiated by France and France Telecom to annul the Commission decision regarding the recovery of state aid and ordered France and France Telecom to repay the costs.

The regional tier thus locked France into further compliance than the state would have been willing to achieve otherwise. The delegation of enforcement and management powers to the Commission

watchdog enables the identification of cases of non-compliance and initiation of infringement proceedings when no recovery is achieved. The access to private actors to supranational legal mechanisms facilitates the legitimisation of the regulatory output. France Telecom had the opportunity to contest the Commission decision through ECJ case referral. Foreign competitors such as Vivendi also called on the Commission to notify against the French monopoly and unfair competition. The participatory system and access of private actors improves the detection of unlawful practises and legitimises the recovery at the regional level.

The independence of the European Court of Justice creates a system of credible commitments. France was reluctant to follow the Commission decision regarding state aid. The ECJ found France had failed to recover the money after the recovery period in 2006. France and France Telecom tried to annul the original Commission decision through an appeal through the Court of First Instance in 2007 but once against the ruling ordered France and France Telecom to recover the state aid. France could seek to appeal further to the ECJ but only if it believes there are outstanding points of law. In 2007 the company started putting aside funds to potentially pay back the French government (Financial Times, 2009) in anticipation and signalling ECJ ruling would be followed. Failing to comply with ECJ ruling could damage the credibility of the regional regulatory system (Alter, 1998). Since the long term gains from an efficient regulatory system are higher than the short term costs of compliance with the state aid decision it is likely the state aid will be recovered without further appeal from the state. Private actors however have different set of interests than states. France Telecom appealed against the Court judgement in February 2010.

3.1.2. United Kingdom: cooperation and efficiency

Notifications of suspected state aid by the Commission rarely reach the final stage of adjudication in the case of the United Kingdom. In most cases the United Kingdom complies with EC regulations after being informed by the Commission of suspected breach. In cases where the Commission decided to initiate formal infringement proceedings notifications are withdrawn after a letter of formal notice has been sent to the United Kingdom. In only one case has the infringement proceeding led to European Court of Justice ruling regarding the tax system in Gibraltar. The European Court of Justice ruled in favour of the defendant and the case did not constitute non-compliance. The United Kingdom is thus a leader in terms of compliance with state aid agreements and tends to comply with EU regulations as soon as notifications or Letters of Formal Notices have been sent.

Since 2000 France had 32 Commission cases with related court cases while the United Kingdom only had nine for the same period. In none of the cases did the United Kingdom fill the case against the Commission decision neither was the state the defendant. In all court cases over that period the applicant has always been the private actor benefiting from suspected state aid or contesting Commission decision regarding state aid. Cases brought to the court in the case of state aid in the United Kingdom are not due to non-compliance with Commission decision as observed in the French example but rather a judicial appeal against Commission decisions from private actors. This signals the unwillingness of the United Kingdom to take cases to the adjudication stage or the fact the United Kingdom complies at an early stage of the infringement proceedings as will be observed in the case of Channel 4.

The case of the United Kingdom's financing of capital costs of digital switchover of Channel 4 is revealing of the state's effort to both comply with the EU state aid regulations and follow the rules of governance of the regional tier. In August 2006 the Commission received a complaint by unnamed UK commercial broadcaster regarding potential state aid towards Channel 4 on the grounds that the channel already had sufficient cash reserves to meet the costs of digital switchover without additional need for public support. In October 2007 the United Kingdom notified the Commission of a proposed grant of £14 million of aid to Channel 4 to meet the capital costs of digital switchover. The operating profits of Channel 4 declined by £14.5 million in 2006, the UK argued governmental aid would help

the Channel overcome the challenges of digital switchover and provide a public service. The United Kingdom acknowledged the notified measure constitutes an aid but claimed it was compatible with the EC Treaty Article 86(2) regarding the particular applications of state aid rules in relation to public service broadcasting. The information provided by the United Kingdom was not sufficient to evaluate the impact on competition.

In November 2007 the Commission requested the UK authorities provided additional information to clarify a number of aspects of the notification. The UK authorities submitted their reply in January 2008. The Commission still had serious doubts whether the proposed aid met the criteria of state aid regulations. Fears the financial assistance would overcompensate Channel 4 and distort competition in the Single Market led the Commission to launch a formal investigation under EC Treaty state aid rules in April 2008. The formal investigation procedure would assess the subsidy threats and evaluate whether the proposed state support would distort competition.

The Commission concluded the notified state aid to Channel 4 from the United Kingdom raised doubts on its compatibility with the Common Market and called on interested parties to submit their comments. The Commission reminded the UK authorities that all unlawful state aid would have to be compensated by the recipient. The United Kingdom submitted its observations on the 4th July 2008. Sky and ITV submitted their comments on the 15th July 2008 and 22nd September 2008.

Finally in the letter of 26 November 2008 the United Kingdom informed the Commission the notified measure which; had not yet been implemented had been withdrawn. The United Kingdom informed the Commission a new plan to support the digital economy (Digital Britain Project) was being considered with a total review of broadcasting funding under analysis. The future plan modified the present governmental position regarding state aid to Channel 4 which; would be included in the new wider ranging proposal to support the sector. The UK authorities also confirmed that any new proposal that would involve state aid would be notified to the Commission in advance to ensure it was compatible with Treaty requirements.

In the case of the United Kingdom, two variables are at play in the compliant behaviour of the state to EU regulations: the cooperative attitude of actors with the EU supranational institutions and the efficiency of domestic institutions. Domestic interests were at stake in the state decision to assist Channel 4. The UK plan to grant aid to Channel 4 was designed to anticipate the coming negative profitability of the group. According to the report of LEK the financial consultancy group in charge of assessing the viability of Channel 4, declining advertising revenues and higher prices for acquiring programming could mean the group would likely cease to be profitable by 2010.

The United Kingdom was in favour of assisting Channel 4 arguing the financial pressure implied by digital switchover was significant and state aid compatible with the Treaty would alleviate some of the pressure faced by the channel. The temptation to protect domestic interests could have led the United Kingdom to ignore the Commission concerns over potential state aid. Yet at all stages of the infringement proceedings and opening of formal investigation procedures the United Kingdom and private actors responded in due time to the request for clarifications on the proposed aid to Channel 4.

The Commission called for additional information in the process of formal investigation through an official letter addressed to the United Kingdom and broadcasting agents. Within five months Sky, ITV and the United Kingdom submitted their comments to help advance the Commission investigation rather than ignoring the calls for cooperation and negotiation as observed in the case of France.

Finally in November 2008 the United Kingdom informed the Commission the notified measure had been withdrawn and future plans to adapt to the evolving nature of the broadcasting market were under review at the domestic level. The United Kingdom clearly stipulated future plans would be sent for review by the Commission hence signalling a willingness by the state to comply with regulatory rules in the area of competition.

Compliance with EU competition regulations is also facilitated in the United Kingdom by the efficient and transparent domestic regulatory regime. The institutions, procedures and other regulatory tools in the UK are transparent and accountable and guarantee high quality regulatory reform and application of the rule of law. Essential mechanisms such as public consultation, appeals mechanisms and independent regulatory actor facilitate both the decision-making process and application of regulations (OECD, 2005). OFCOM is the single regulator for communications covering content and economic regulatory frameworks for broadcasting, radicomunications and telecommunications. During the public service broadcasting review of 2006 OFCOM found no strong evidence of a short term funding gap for Channel 4. OFCOM expressed no opinion on the notified aid but the position of the independent regulator was that it would take time to identify and implement long term intervention for Channel 4 and that there was a case for transitional measures to support the Channel.

Finally from a constructivist perspective, the regulations promoted by the EU in the area of competition are coherent with the process of liberalisation adopted by the UK since the early 80's. The United Kingdom liberalised its telecommunication market in 1980 ahead of all OECD countries except the United States and always favoured pro-competition measures. The UK is thus in favour of establishing a fully competitive market in the area of telecommunications and tends to lead liberalisation measures in Europe and scored very highly in terms of timely implementation of EU directives (OECD, 2002). Citizens in the United Kingdom are also more in favour of policies supporting liberalisation and competition than other EU countries. In 2006 to the question of whether free trade was the best guarantee towards economic prosperity 65% of citizens in the UK answered positively while 52% did in France and 64% in the EU total. The United Kingdom continued to be supportive of such policies French total in 2008 with 58% positive respondents while France had 54% and the EU total 61%. The process of compliance with competition policies is thus facilitated in the United Kingdom by efficient domestic institutions and support for the agreed policies by state and private actors.

3.2. Compliance in the absence of a regional tier model of governance

3.2.1. Switzerland: an "a la carte" approach to agreements and compliance

In the absence of a regional tier model of governance, the supranational institutional mechanisms available to lock states into compliance are absent. What we have instead is an intergovernmental model of compliance with "a la carte" agreements and compliance determined by cost benefit calculations.

Switzerland is not part of the European Union; it has however established several agreements with the EU and neighbouring countries to regulate the conduction of free trade and competition. In 1960 Switzerland joined the Economic Free Trade Association (EFTA) an intergovernmental association set-up to promote free-trade among Iceland, Lichtenstein, Norway and Switzerland. In 1972 Switzerland also signed a Free Trade agreement with the European Economic Community to promote free trade. Through referendum in 1992 Switzerland rejected the accession to the European Economic Agreement.

To overcome the Swiss rejection and continue promoting the EU/Switzerland economic and political partnership several bilateral agreements have been established between both parties through intergovernmental negotiations. In addition to the WTO agreements Switzerland is thus committed to compliance with EU bilateral agreements to promote free trade and competitive markets with the EU and neighbouring countries.

In terms of organisational capacities Switzerland is in very good position to comply efficiently with its international commitments. Switzerland has a strong institutional framework which; promotes abidance with the rule of law and participatory democracy. Strong federalist principles and frequent

consultation of the voters highly influence the administrative and regulatory environment. The Swiss political system is characterised by power sharing and involvement of all actors in the policy-making process. The Federal system limits the coercive power of the federal centre to push for implementation of federal programs. Cantons are the main implementing agencies and are highly integrated in the political system while the Confederation only has authority in areas granted by the constitution.

The division of labour of the compliance process is also facilitated by various supervision mechanisms ranging from citizen involvement to a dense network of media enterprise which; denounces deviations from the rule of law by private and state actors. Finally low levels of corruption facilitate compliance and a high number of possibilities to apply a veto in the decision-making process push for political consensus. The consultative and participatory nature of the political systems facilitates the adoption and implementation of legitimate agreements (OECD, 2005).

However, despite a set of efficient domestic institutional mechanisms and Commission notification of suspected non-compliance with its 1972 Free Trade Agreements, Switzerland did not adopt the Commission requested behavioural change to comply. Following complaints by member states, the European Parliament and businesses the Commission assessed the compatibility of some of the Swiss cantonal tax regimes and informed Switzerland in February 2007 of its unilateral decision regarding certain tax modalities applied by the cantons. The special tax regime differentiates between domestic and foreign sources of incomes for companies and was considered a form of state aid by the EU Commission. Tax regimes similar to those in Switzerland are not allowed inside the EU under the state aid provision of the Treaty.

Switzerland is in a strong position to comply with its international and European treaty commitments due to efficient organisational capacities, low corruption and a culture of law abidance. However, the process of law abidance is achieved with regulatory framework deemed legitimate. Switzerland rejected by referendum its ascension to EEA. Voters clearly signalled their choice not to extend the participation of Switzerland into a Single Market with the 27 EU member states through a set of same basic governing rules. The legitimacy of EU rules thus does not have supremacy over domestic law and efforts to comply with a set of secondary rules will be less efficient unless they are beneficial at the domestic level.

Modifying the tax regime in the cantons would decrease the competitiveness and attractiveness of Switzerland as a business location. The costly nature of compliance with Commission requirements limits the state incentive to comply with Commission requirements. The Federal Council immediately rejected the EU's interpretation as unjustified and refused to enter into negotiations. Dialogue with the EU was however envisaged to clarify the respective positions of the EU and Switzerland. The issue was referred to a Joint Committee established under the Agreement in 2005 and further discussed during three expert meetings in 2006. Similar action had been taken against member states and other EFTA countries however in the case of Switzerland no agreement was found. Instead the Commission decision faced a strong rejection in Switzerland.

EU supranational institutions such as the Commission or the European Court of Justice cannot impose direct decisions to Switzerland. The regional tier mechanisms available to lock states into further compliance than would have been achieved otherwise are absent. The Commission can only notify its decision and negotiate with the state suspected of infringement with Treaty agreements. If states fail to cooperate or no agreements is achieved it is impossible to initiate an infringement procedure and rely on the sanctioning capacities of the ECJ.

The fear of losing the benefits of privileged economic relationship with the EU and potential blaming from EU partners has however pushed for Switzerland-EU negotiation and signals a willingness to find an agreement. In 2008 Switzerland informed the EU the next corporate tax reform (CTR III) would envisage adjustments to the cantonal tax status to both strengthen Switzerland as a tax location and take some of the EU concerns into account (Confederation Suisse, 2009). The reform sought to ensure domestic and foreign companies were treated in the same way by including

adjustments to the treatment of mixed companies as well as abolition of the “domiciliary company” status. The Commission received the planned reform and adjustment to the cantonal statuses as a step in the right direction but EU concerns remain regarding the envisaged adjustments to holdings and mixed companies.

The absence of a regional tier has a significant impact on the compliance performance of Switzerland to state aid. Similarly to France and the United Kingdom, modifying the tax regime in the cantons would conflict with the domestic interest of Switzerland who benefits from favourable tax regime for foreign companies.

While for EU member states the establishment of a regional tier locks states into compliance with costly requirements, the bilateral nature of agreements between Switzerland and the European Union implies Swiss legislative autonomy is, to a large extent, preserved. Switzerland can refuse to comply with EU Commission decisions or negotiate special arrangements through intergovernmental procedures. The position of Switzerland remained clear, no international agreements exist between Switzerland and the EU requiring Switzerland to harmonise its corporate taxation with the EU. According to Switzerland the Free Trade Agreements only govern trade in specific goods and services and does not constitute a sufficient foundation for evaluation of corporate taxation under the aspects of distortion of competition. In addition Switzerland argued neither the rules on state aid nor the code of conduct on corporate taxation agreed among EU member states are applicable to Switzerland.

In the absence of a regional tier compliance with Treaties and bilateral agreements is less efficient than when states are locked into the regional layer. What we have instead is an intergovernmental “a la carte” process of interpretation of legislative agreements rather than through judicial interpretation by independent international courts. Cost benefit calculations and state willingness to comply appear as the main determinants of compliance. Instead of developing a full-blown regulatory regime as established among EU member states, Switzerland has established a more flexible and “a la carte” approach to cooperation with interpretation of the rule of law ultimately remaining sovereign and compliance limited when requirements impose severe costs and are not supported at the domestic level.

Conclusion

In conclusion, the case-study analysis of compliance with state aid agreements in comparable EU and non-EU states highlights the efficiency of the regional tier as a model of governance to improve compliance rates.

The establishment of a Single Market has led to the creation of a common area for free movement of capital, person, goods and service. The sustainability of the Single Market requires enforceable regulations to ensure no barriers to competition are in place. Without an effective set of institutional mechanisms the compliance objectives are difficult to achieve.

The combination of enforcement and management mechanisms solves both the rational temptation of states to renege on their commitments and the domestic level lack of capabilities. Through delegation of enforcement power to credible supranational institutions the regional tier can successfully lock states into compliance even with costly agreements. The regional tier also clarifies international legislative commitments by legally embedding international law in the regional organisation. In addition it can help legitimise the international and regional regulatory output through the participation of private actors and the establishment of a unified interpretation of the law applicable to all member states.

Switzerland in contrast through bilateral agreements and preserving its sovereignty through limited delegation of enforcement powers to supranational institutions mirrors a more “a la carte” approach to agreements. Switzerland will ratify bilateral agreements which are not damaging to its domestic

interests while member states are required to comply with the whole EU legislative package even in cases where the requirements are not beneficial for the domestic interest.

Through qualitative research this paper empirically tests the role of the regional tier model of governance on compliance rates. Domestic level independent variables do not fully capture the compliance mechanisms that will drive compliance levels up. The European Union regional tier has developed an efficient set of functional institutional designs to improve the effect of the rule of international law.

The mechanism of delegation and legalization of international politics opens the policy-making process and implementation cycles at the national level to non-state actors such as NGOs and citizens who can pursue their interests and enforce compliance through courts. Legalization also clarifies the treaty requirement and can assist member states in their efforts to comply by reducing the complexity and information gaps of adaptation. The European Union provides a forum to reach a stable equilibrium through coordination and rule clarification. Delegation of enforcement and management capacities to credible institutions reduce the temptation of states to renege on their commitments.

As observed in the case of France the regional tier model of governance can help improve compliance rates with agreements which; are costly and not highly supported by domestic actors. Compliance is thus not solely endogenous. Legally embedding international law at the regional level and delegating enforcement powers to legitimate supranational institutions helps improve compliance rates with costly and potentially less popular policies. In countries such as the United Kingdom where domestic level variables support the rule of law and compliance; the regional tier can assist states reach their Treaty commitments through monitoring, detection of inadvertent cases and rule clarification.

In contrast when the regional tier is absent, the avenues to overcome compliance are more limited. Even among cooperative minded states, if states have not voluntarily committed to delegating credible power to supranational institutions the ultimate interpretation of international law remains at the domestic level and can lead to more flexible patterns of compliance. Bilateral agreements established between the EU and Switzerland do not delegate legislative competencies to supranational organs. Switzerland is not allowed constitutionally to receive direct decision by the Commission or the European Court of Justice. Compliance will ultimately be determined by the willingness or capacity of states to cooperate as observed in the case of Switzerland.

A regional tier model of governance locks states into compliance with a whole regulatory framework they cannot easily opt-out from, including even costly agreements. Further research is required to investigate the extent to which the regional tier model of governance is replicable across policy areas and can help improve compliance rates with international agreements in the EU and outside the European borders through soft power mechanisms.

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