Summary

What conditions shape the transfer and reception of laws, and how? “Explaining Legal Transplants” develops a theoretical analytical framework enabling to define conditions that shape legal transplantation. The developed framework is then applied in the analysis of transplantation of EU competition policy and state aid control rules to Central Eastern Europe during the accession process.

Currently, there is no single theory that would be capable of providing a satisfactory explanation of legal transplantation phenomena. The literature on legal transplantation is very varied in its interpretations of the phenomenon itself as well as in regards to the conditions that shape or determine the course of legal transfer. The political science literature is also divided in its conceptualisations of phenomena similar to legal transplantation. There are competing, and even conflicting, approaches on the same phenomenon, resulting in a diversity of possible explanations. This book contributes to the meta-judicial literature on legal transplants and political science studies on diffusion, social learning, lesson drawing, and policy transfer by developing analytical lenses that combine a variety of those valuable insights without altering their original claims.

Furthermore, this book contributes to the theoretical literature on the European integration process by offering a theoretically-informed explanation of under-researched aspects of the enlargement process – the transplantation of EU legal rules. In that way, this research links the literature on EU enlargement with studies on public policy, diffusion processes, regulation, and legal change. Finally, by including a strong comparative element into the research design, this research not only contributes to the still relatively scarce comparative literature on EU enlargement, but also creates prospects for making further generalisations.

The book consists of twelve chapters and is arranged into four parts. The first part introduces the analysis of existent knowledge on legal transplants and similar phenomena. The second part develops the theoretical analytical framework and drafts the empirical research strategy. The third part contains four empirical case studies: one on the process of transfer, one on the object of transfer, and another two on selected recipient countries. The fourth part includes three analytical-interpretative concluding chapters.

Chapter 1 introduces the research problem and the research strategy to address it. The main research focus lies on finding context-specific legal, economic, and socio-political conditions that facilitated or impaired the process of transplantation of EU regulatory models to aspirant countries, as well as describing the causal processes involved. The research approach followed is close to the modern critical realism perspective. The inquiry is built upon both the analysis of the existent theoretical
knowledge as well as the analysis of the empirical case studies. The presumption followed is that in order to explain social reality, it is indispensable to attain not only the understanding of this reality, but also how it is conceptualised by others. Just like any research within the modern critical realism, this research too should be regarded as an evolving study of a reflexive agent that interprets the studied social structures with reference to the acquired theoretical knowledge about the world. As a result, the outcome of this research is unavoidably influenced by existing as well as by newly constructed conceptualisations of legal transplantation phenomena.

The research strategy encompassed all steps needed for the development of the explanatory theory: (1) a preliminary description of phenomena for drafting the research strategy, (2) an analysis of the existent conceptualisations of legal transplants, (3) development of an integrated analytical framework, (4) development of a research strategy for empirical investigation, (5) external comparative analysis, (6) cases studies, (7) analysis of case studies using the analytical framework, (8) qualitative comparative analysis, (9) development of theoretical explanation about transplantation phenomenon.

The first part of the book presents the analysis of the existent knowledge: Chapter 2 focuses on legal transplants in meta-juridical literature, whereas Chapter 3 discusses insights on similar phenomena in political science literature. The review of the legal transplants literature also deals with a number of issues related to the legal transplants debate, such as the (im)possibility of legal transplants; the link between law and society in the explanation of a legal change; and, the possibility of social theory on legal change. The greatest value of the legal transplants literature is in conceptualising the legal transplants. The value of discourse on legal transplantation lies not in its theoretical expression, but in the questions raised and the call for an interdisciplinary approach. The review of the dominant approaches on diffusion, policy transfer, lesson drawing and social learning in the political science literature revealed a considerable overlap in conceptualisations that lead to competing explanations. The few attempts to integrate different accounts on transplantation phenomena into one explanatory framework were still reductionist, as they obscured the important differences in conceptualisations.

The second part of the book includes two chapters: one on the analytical framework and one on the research methodology. Chapter 4 develops a theoretically-informed analytical framework for the analysis of legal transplantation. The framework is built on a compiled list of theoretical assumptions about possible conditions and their effect on legal transplantation and similar phenomena. Each theoretical claim is classified using the typology for mapping the explanatory arguments (Parsons, 2007) into four categories: (1) structural arguments underlining the importance of proximity and interdependence forces, (2) ideational arguments underlining the importance of pressure and opposition forces, (3) institutional arguments underlining the significance of path dependence and other institutional features, and (4) psychological arguments emphasising the importance of psychological wires.
Chapter 5 defines the research strategy for empirical investigation and describes the selection of cases for comparative qualitative analysis. The chosen empirical research strategy of a case study matches the type of inquiry, the research question, the level of control an investigator had over actual behavioural events, and the type of studied phenomena. The choice for an explanatory case study directed the empirical inquiry towards answering how and why questions, as guided by theoretical propositions, rather than finding answers to the basic questions of who, what, and where. The research design meets the criteria of (1) construct validity, (2) internal validity (important only for explanatory or causal case studies), (3) external validity, and (4) reliability. The rigour of the research design permitted the use of analytical generalisations. The process of selection of cases for comparative analysis enhanced the credibility and the effectiveness of empirical research findings. The choice of EU competition policy and state aid control was guided by its regulatory nature and importance in the common market. With regard to selecting country cases, only Central Eastern European countries that joined the European Union on the 1st of May 2004 were considered. It was decided to choose the most representative countries in the group, which were also the most different from each other. A comparative analysis made the distinction of necessary conditions from contingent ones possible, which is usually more difficult to establish in a single case analysis.

The third part of the book contains four explanatory case studies: one on the process of transfer, one on the object of transfer, and two on selected recipient countries. Chapter 6 presents the study on the process of transfer, which is a part of a more general socio-political and economic process of integration to the European Union. It reveals the determining importance of two elements of EU enlargement policy: the approximation requirement and the system of ‘control and support’. These two conditions had to ensure the desired course of legal transplantation through a number of generated causal mechanisms. Chapter 7 introduces the case study on the object of transfer – EU competition policy and state aid control rules. It followed from this case study that qualities of EU competition policy and state aid control in fact do not facilitate the reception of legal transplants, but, on the contrary, impede it. Chapters 8 and 9 present in-depth studies on the reception of EU law and the approximation of national legislation in Poland and Lithuania. Both chapters have an almost identical thematic structure. First, the integration to the EU and the general process of legal approximation is examined by looking at three phases of integration: the early period, pre-accession, and accession. Then, approximation in the field of competition policy and state aid control, including the development of approximation commitment in this policy area, is discussed. Next, follows an overview of what was actually transplanted in the field of competition policy and state aid control. Finally, a discussion of conditions that determined the legal transplantation process in each phase of the integration is presented.

In the early period of integration both countries opted for the American legal transplants, and not the European ones. The main reasons identified were: the specific
qualities of the American legal transplant matched the existent economic policy goals better than the European rules; there was an active external advocacy for the American legal transplants, while there was none for the European models; and technical assistance smoothened the incorporation of the American legal transplants. Based on these findings it was concluded that: (1) external advocacy increases the chances that the recipient country will opt for the advocated legal transplant; (2) the specific qualities of the legal transplant, like the match with the current policy needs of the recipient country, make it more desirable for the governing elite; (3) the availability of technical support provides that even legal transplants with low structural proximity are successfully incorporated and applied.

In the pre-accession period, Poland, as well as Lithuania, opted exclusively for the European legal transplants, even though some European competition rules could not be even applied in the market of that time. At the same time, legal discourses had developed about the scope and need of approximation in both countries. The case study on Poland revealed that approximation of national law was rather selective. Due to the effectiveness of the existent national competition policy and the low payoffs associated with the policy change, the full approximation of national competition law with Acquis Communautaire and transplantation of the EU state aid control rules was postponed till the very last moment. Moreover, in its economic policy, Poland continued to apply a number of export aid schemes. These findings show the importance of domestic institutional and, especially, ideational conditions, despite the growing structural proximity with the EU.

The case study on Lithuania revealed shortcomings in the organisation of approximation activities during the pre-accession period. The political struggle between two ministries, the ministry of European Affairs and the Ministry of Foreign Affairs, for the key role in the coordination of integration process, as well as the political intricacies around the Ministry of European Affairs, hindered the coordination of approximation activities and delayed the start of PHARE projects aimed at translation services. The embedded case study on approximation in the area of competition policy and state aid control uncovered the limited political and financial independence of the national regulatory authority. Lithuanian Government continued to provide direct and indirect aid to different industries and even used to overrule the decisions of the national competition authority. These findings confirmed the weakness of the structural argument: neither the geographical proximity, nor the recipient country’s transplant bias, nor the growing interdependence between the transplants exporting system and the recipient country really mattered. Everything changed dramatically with the start of the accession period. However, speeding up the approximation process brought own disadvantages, such as trade-offs with quality or erection of Potemkin villages.

The fourth part of the book presents several qualitative comparative analyses and an interpretation of the findings. Chapter 10 establishes differences in the patterns and contexts of transplantation of EU law to Poland and to Lithuania. The analysis
disclosed that differences in the patterns of transplantation were mainly the result of domestic developments within the recipient countries. These developments represent specific aspects of the changing social reality, such as: (1) the expansion of political and economic relations with the European Union; (2) the establishment of national institutions for the coordination of integration and approximation activities; (3) the progress of approximation activities; and (4) the development of national discourses and interpretations about the approximation requirement. The first two processes are external to legal transplantation, whereas the other two are internal. Each development represents dynamic sets of specific conditions (structural, institutional, and ideational) whose effect change over time in both their character and strength, as the social reality changes.

The comparison revealed six differences in the conditional contexts of the two countries.

First of all, there was a general “delay” in Lithuania, as compared to Poland, in the establishment of a political and economic relationship with the European Union. This “delay” in the establishment of structural proximity between the transplants exporting legal system and the recipient country was resolved only during the accession period. Second, the “delay” in the development of structural proximity also caused the “delay” in the creation of external and internal institutional settings for the legal transplantation. All that hindered the start of the approximation activities. Third, Lithuania, as compared to Poland, designed a different institutional structure for the coordination of integration and approximation activities. As the comparison disclosed, the Lithuanian institutional structure appeared to be less effective and even caused problems that impeded the approximation of national legislation. Fourth, the development of approximation activities in Lithuania was not only delayed because of a general delay in development of economic and political relationships with the European Union, but was also burdened by institutional impediments that were both external and internal to the legal transplantation process. Fifth, the national discourses on the scope and content of the approximation requirement and the related national commitment to approximate the legislation hampered the process of legal transplantation at the beginning in both countries. However, Poland was able to mitigate the weakness of the approximation requirement under the Europe Agreement by providing strong national reasoning for the need to approximate, whereas Lithuania did not develop such reasoning. Sixth, with participation in the Accession Partnerships most of institutional deficiencies in Lithuania were resolved; whereas a lack of strong national reasoning for approximation in the context of association agreements lost its importance as a result of the approaching membership of the European Union. Two general conclusions about the shaping conditional contexts in the recipient countries were made. First of all, these contextual developments are causally interlinked with each other, forming a complex causal mechanism that rests on several logics and actions. Thus, the expansion of political and economic relations with the European Union not only increased the structural proximity between the recipient country and the transplants importing system, but also promoted establishment of coordinating institutions, which, in turn, furthered approximation.
activities, as soon as a supporting legal discourse developed. Second, this causal mechanism did not work in Lithuania the way it did in Poland. The comparison of the country-specific contextual developments revealed that there were intervening institutional and ideational conditions that hampered its functioning.

Chapter 11 focuses specifically on the differences between the transplantation of EU competition policy and state aid control rules to Poland and to Lithuania. The chapter provides the answer to the question pertaining to the importance of policy area-specific differences in explaining legal transplantation conditioning forces. In addition, the importance of particular qualities of the legal transplantation object – EU competition policy and state aid control rules – in determining the patterns of legal transplantation in Poland and Lithuania is discussed. The analysis led to the conclusion that in both countries legal transplantation in the field of competition policy and state aid control was shaped by area specific contextual conditions. Due to the very regulatory nature of competition policy and the importance attributed to state aid in the post-transitional economies, the main conditions were associated with pressure forces guided by beliefs. It was revealed that some conditions, which contributed to furthering approximation in general, constrained approximation in the field of competition policy and state aid control. For example, in Lithuania, a greater involvement of government in the approximation process improved the coordination of approximation activities; however, in the field of competition policy and state aid control, the government’s activism was hindering the enforcement of transplanted rules. In addition to the importance of policy area-specific conditions, implications of country specific differences were established. For example, the Lithuanian government, when drafting the negotiations position in the competition policy chapter, carried almost no consultations with social and corporate parties, mainly due to the time pressure. It is not surprising that negotiations in this policy area were closed already at the beginning of the accession process. Differently from Lithuania, Poland extensively consulted various social and corporate groups and was the last to close the concerned policy chapter in the negotiations.

Chapter 12 provides a general theoretical explanation of transplantation of EU law to aspirant countries by identifying the decisive events, the necessary conditions, and the underlying causal mechanisms. It then looks at the deviant case of Lithuania, in which the workings of these causal mechanisms were constrained, and goes on to discuss the causes of deviation. The first of the two identified decisive events is the national ratification of the Europe Agreement – the act that established a formal approximation commitment under the national law of the aspirant country. The second decisive event is associated with the launching of the Accession Partnerships, which incorporated aspirant countries into a highly institutionalised and structured process furthering the required approximation of national legislation.
The two decisive events created necessary conditions that promoted the approximation of national legislation through several generated causal mechanisms. For example, as the first event, the national ratification of the Europe Agreement, established the formal approximation commitment, national governments were obliged to initiate and to organise approximation activities. That included establishing of responsible institutions and agencies, drafting of secondary legislation, introducing adjustments to the legislative procedures, assigning the needed financial means, and forming supervision and control arrangements for approximation process. Here the formal approximation commitment is the necessary condition that promoted transplantation of EU legal rules during the pre-accession period.

With the start of the accession period, another condition became more important than the formal approximation commitment: the participation in the Accession Partnerships, which is the second necessary condition that promoted transplantation of EU legal rules during the later stage of integration to the EU, the accession period. The participation in the Accession Partnerships brought a qualitative change to the process of transplantation of EU law through bringing more order and control as well as a better focused technical assistance.

The effect of these two necessary conditions should be primarily associated with an institutional logic of the explanatory argument, which explains the behaviour of an ‘actor’ as shaped by man-made institutions. However, the effect of these necessary conditions and the causal mechanisms triggered by them was obstructed in Lithuania, which is the deviant case in the suggested explanation. Four causes explain the deviation in Lithuania: (1) problems of understanding and communication, (2) existent legal culture and practice, (3) shortcomings in organisational and administrative structure, and (4) ‘the stress of accession’. These four causes generated a number of ideational and institutional constraints that limited the effectiveness of the national approximation commitment. As a result, the causal mechanism for approximation, as generated by the establishment of the national approximation commitment, was levelled by a number of typical for Lithuania’s case ideational and institutional constraints.

The deviant case of Lithuania shows that importance of individual domestic qualities should not be underestimated, particularly, when explaining the patterns of legal transplantation. Similarly, as the case study on transplantation of EU law in the field of competition policy and state aid control disclosed that there might be policy area-specific deviations.

Finally, the value of the suggested theoretical analytical framework in developing a wieldier explanation of the legal transplantation phenomenon is emphasised. The framework effectively integrates a variety of theoretical insights from different literatures and disciplines about conditions shaping the legal transplantation process into a single analytical tool for analysis and explanation of legal transplantation in general, but, in particular, for describing the patterns of transplantation, including the complex picture of interactions and developments, as it was the case in this research.
CHAPTER 1

INTRODUCTION