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Transposition Beyond Policy Legacies and Veto Players? The Case of Anti-Discrimination Policy in Austria*

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Summary

The transposition of European Union directives involves the reconciliation of domestic and European interests. More often than not, domestic politics overrule European requirements to comply in a timely and correct manner. This domestication of the transposition process has often been observed in states belonging to the "world of domestic politics", one of the least researched country clusters in the "worlds of compliance" typology developed by Falkner *et al.* (2005). This paper provides additional empirical evidence on how domestic politics overrule European demands once a conflict between both levels occurs. This is done with the study of the transposition of two EU Anti-discrimination directives in Austria. There, transposition had to overcome two types of conflict. On the one hand, a policy legacy diametrically opposed to anti-discrimination; on the other hand, an actor constellation ideologically contrary to anti-discrimination law. Based on the empirical material presented here, the paper suggests a number of strategies on how to further extant theoretical contributions in the field of transposition studies.

Key words: anti-discrimination, Austria, domestic politics, European Union, transposition studies

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Introduction

The transposition process refers to the measures governments undertake to translate external legal commitments into domestic laws and policies (Underdal, 1998: 26). In the European context transposition refers to the domestic process of adaptation of a policy and/or organisational component to the binding pressures of European integration. It constitutes the first step in the implementation of European law and policy and is divided into an administrative and a political phase (Falkner *et al.,* 2005: 324). During the administrative phase, reform requirements are identified and the process leading towards adaptation is initiated. The political phase involves politicians, interest groups and other domestic actors.

The timing and final outcome of transposition falls under the competence of EU supranational actors (i.e. the European Commission and the European Court of Justice), which react against transposition delays and evaluate outcome correctness. This is why transposition is usually modelled as a "two-level game" between Member States and EU organisations (Putnam, 1988). Twice before the transposition deadline, the European Commission reminds the Member States of their obligations to transpose and to specify which national measures have been taken. This reminder function of the Commission is meant to put pressure on the Member States to proceed further with their duties and may impact upon the process and outcome of transposition. In addition to this, when a directive is not properly transposed (e.g. if delayed and/or incorrectly transposed), the Commission has other dissuasive legal tools (Tallberg, 2002: 609). These may lead to the imposition of financial penalties by the European Court of Justice (see Börzel, 2001).

Despite having such mechanisms, domestic politics often overrule the requirements embodied in a European directive. This is especially true in some Member States (Falkner *et al.,* 2005). According to the "worlds of compliance" approach, Member States belong to a country cluster with a typical domestic pattern of reacting to EU induced reform requirements (*Ibid.,* 318). In the "world of law observance", transposition is generally correct and on time, determined by a strong culture of compliance. In the "world of transposition neglect", timely and correct transposition is rare and transposition is often triggered by supranational pressure. Finally, states in the "world of domestic politics" fluctuate between these "worlds" in terms

of transposition performance.[1] In this "world", complying with EU requirements does not constitute a priority and is largely dependent upon domestic actors, and in particular the ideology of political parties in government. These are usually the only actors with the right of veto over the process and/or outcome of transposition (see Tsebelis, 1995, 2002; Haverland, 2000). Importantly too, domestic policy legacies – measured by the classical misfit hypothesis – also matter most in this country cluster.[2]

The "world of domestic politics" is the most inconclusive of all "worlds of compliance", and as such requires additional empirical investigation. This paper provides additional empirical evidence on how domestic actors overrule European demands once a conflict emerges between both levels in this "world". This is done with the study of the transposition of two anti-discrimination directives in Austria, namely the Race Directive (RD)[3] and the Employment Framework Directive (EFD).[4] Transposition in Austria had to overcome the double burden of a diametrically opposed anti-discrimination policy legacy, and a constellation of veto players ideologically contrary to the comprehensive reform demanded by the anti-discrimination directives. The case of Austria provides interesting clues on how to proceed with the theoretical filling of this cluster in future research endeavours.[5]

The Anti-discrimination directives (ADDs) regulate several grounds of anti-discrimination at once, expanding the levels of protection to numerous, potentially vulnerable communities in employment, occupation, vocational training, membership of employer and employee organisations, social protection, including social security, health care and education. In addition, for the RD, rights were extended to the access to goods and services available to the public, including housing. While the EFD covers the grounds of age, belief, disability, religion and sexual orientation, the RD covers the grounds of ethnicity and race.[6] The RD had to be transposed by July 2003 and the EFD

[1] In addition, there is a "world of dead letters", where transposition is generally correct and on time, but the later stages of application and enforcement that belong to the broader implementation process are deficient (Falkner, Treib, 2007). For transposition, however, states classified under this country grouping behave as in the "world of domestic politics".

[2] The misfit hypothesis looks at how much domestic policy legacies fit with incoming European requirements (for a review see Casado Asensio, 2008).

[3] Directive 2000/48/EC, *OJ L 180, 19.07.2000, 22*.

[4] Directive 2000/43/EC, *OJ L 303, 2.12.2000, 16*.

[5] The empirical material presented here is based on expert surveys on the basis of semi-structured questionnaires, as well as the use of process tracing through a variety of secondary sources (e.g., ministerial documents, party programmes, parliamentary debates, newspaper articles).

[6] A deeper and more sophisticated analysis of the ADDs can be found elsewhere (Waddington, Bell, 2001).

by December 2003, except for the grounds of age and disability, which could be transposed until December 2006 upon Member State's request. The ADDs are two directives in the field of EU social policy and labour law that have hitherto received scant scholarly attention. They go beyond traditional conceptions of supranational social policy and labour law. Indeed, the European Commission placed ideational and social citizenship logics ahead of the economic logic of correcting market externalities for an area that is not directly linked to the creation of a single market (Bell, 2002). The Commission emphasised timely and correct transposition and more resources than usual in monitoring Member State developments. Thus, supranational organisations were expected to follow transposition closely and, if required, to intervene domestically to rectify deviance.

The formation of a coalition government between the Austrian People's Party (ÖVP) and the Austrian Freedom Party (FPÖ) in the year 2000 triggered "exceptionally strong [European] reactions" (Leconte, 2005: 620) against Austria. It was the first time that an extreme right party entered government in Western Europe since the end of World War II. Although Austria was threatened with sanctions, it was never denied its position as a legitimate member of the Union. These events had a decisive impact on supranational decision-making of European anti-discrimination legislation, on the pipeline at that time in Brussels. The EU was indeed negotiating an anti-discrimination package, consisting of these two directives and a Community Action Programme. Although the EU covered anti-discrimination from the labour law perspective, these initiatives were meant to constitute unique additions to the European legislative landscape. Yet, given domestic events in Austria, its representation in Brussels was unable to influence the negotiating process, fearful of appearing as European "brakeman" on this sensitive issue (Geddes, Guiraudon, 2004). Domestically, anti-discrimination legislation was, by and large, a foreign affair and the governing parties had not put forward autonomous plans to pass anti-discrimination legislation. As a result, the transposition process was expected to be "spirited" and "complex" (Interview AT2), and the role of the Commission to be "intrusive" and "meticulous" (Interview AT5).

This paper investigates these issues in four sections. It *first* presents a brief review on how Austria transposes EU legislation. The *second* section depicts the state of anti-discrimination legislation and policy in Austria before the transposition process kicked off. This overview of the domestic policy legacy will illustrate the first type of conflict that Austria had to overcome during transposition. *Third*, the paper looks at the formal transposition process and outcome attained, with particular emphasis placed on the role of domestic veto players and their ideology, the second conflict encountered during transposition. The *final*, concluding section discusses how the empi-

rical findings presented here can assist in future theory-making in the field of transposition studies.

Transposition of EU law and the Austrian political system

Austria is a country with a strong legal positivism. Article 18 of the Constitution prescribes that all acts of the public administration be based on law (Jenny, Müller, 2005: 4). The Constitutional Court enforces this Article rigorously and all EU directives, therefore, take the form of a law passed by the Austrian Parliament. The Parliament consists of two chambers, the directly elected *Nationalrat* and the indirectly legitimised *Bundesrat*, which is made of representatives of the nine Austrian *Länder*. Although being constitutionally federal, rulemaking in Austria has been increasingly centralised. The *Länder* have only limited powers, which have been further reduced after accession to the EU (Falkner, 2001: 3; Hegeland, Neuhold, 2002: 1).

The national division of tasks in transposition of EU law, as laid down in the Constitution and the Federal Ministries Law, establishes responsibilities at Ministerial and *Länder* level. The Federal Ministries Law was amended in 2003 to better coordinate ministerial and regional competences with the Federal Chancellery (*Bundeskanzleramt*). As a result, the Chancellery became an active part in most transposition processes, which supposed a tighter oversight of the work of the ministries during transposition (Interview AT4). One of the first results in this respect was a reduction in over-implemented laws. In addition, *Länder* governments also have to implement parts of EU directives, notably those concerning the labour law of their bureaucracies and civil servants.

Austria is a strong corporatist state with over sixty years of history of social dialogue (EIRR, 2006: 3). Its corporatist system has a "distinctive capacity to mobilize political consensus for change [by providing] for a politically safe release of political tension (…) and a means for containing escalating conflicts" (Katzenstein, 1984: 136). This system is well-developed both structurally with an extensive social partner set up, and procedurally through the involvement of these interest groups at different stages of domestic policy-making and transposition (Falkner, 2001: 6; Falkner *et al.,* 2005: 250). There are several hierarchically organised chambers where membership is obligatory, the most important being the *Wirtschaftskammer Österreich* (WKÖ, Chamber of Commerce), the *Industrielle Vereinigung* (IV, Federation of Austrian Industry), the *Arbeiterkammer* (AK, Chamber of Labour), the *Landwirtschaftskammer Österreich* (Conference of Presidents of the Chambers of Agriculture), and the *Österreichischer Gewerkschaftsbund* (ÖGB, Austrian Trade Union Confede-

ration). These organisations cooperate formally and informally on a daily basis and are used to draft all legislation related to the management of capital and labour. The output of these meetings is then negotiated in a tripartite manner with the relevant ministry before it is handed over to the Parliament. Even the two largest political parties, the *Sozialdemokratische Partei Österreichs* (SPÖ, Austrian Social Democratic Party) and the *Österreichische Volkspartei* (ÖVP, Austrian People's Party) have subsidiary organisations representing the interests of labour and business, thus completing a relatively dense social partnership picture. With EU accession, social partners lost part of their influence as some of their domestic policy-making competences were transferred to the EU level (Falkner, 2001: 6). Their powers have since then further eroded, notably after the arrival of the coalition formed by the ÖVP and the *Freiheitliche Partei Österreichs* (FPÖ, Austrian Freedom Party).

This government ended the stable "grand coalition" politics that had hitherto characterised the Austrian political scene (Kritzinger, Michalowitz 2005: 4; Pelinka, 2005). Indeed, since 1955 the ÖVP and SPÖ had been relatively often in a "grand coalition" government, which also explains the Austrian consensual culture and its tradition of coalition discipline (Falkner, 2001: 8). The arrival of the ÖVP-FPÖ coalition in the year 2000 was traumatic for Austrian labour unions and social policy advocates. The government changed around 120 laws to restructure and cut back the welfare state. They also merged the ministries of economy and labour, circumvented and deliberately obstructed workers' organisations (Obinger, 2002: 29). The coalition had declared its hostility to the Austrian social partnership system (Falkner, Leiber 2004: 251). As a member of the Austrian Green Party declared, the obligatory period of consultation or *Begutachtung* for domestic actors to give an opinion on draft laws, and "the possibility of negotiating as it were, at the tripartite level, now depends on how much the government is willing to involve [them]" (Interview AT3). The reality also deteriorated for civil society and the NGO community who had never been guaranteed a formal supply of information or consultative rights in the past, thus making it harder for them to have a real impact upon legislative outcomes. The transposition of EU directives constituted, nevertheless, an area where domestic public-private cooperation remained relatively intense compared to other areas of domestic policy-making. Thus, the arrival of the ADDs coincided with a "unique [context] in the history of the Second Republic [of] retrench[ment] and restructuring [of] the Austrian welfare state" (Obinger, 2002: 27), and in terms of changing domestic politics.

Lastly, in terms of general transposition patterns, the European Commission ranks Austria among the best performers in the EU. Yet, this overzealousness has recently been questioned by Falkner *et al.* (2005). Their study showed that Austria belonged to the "world of domestic politics", typically

implementing EU legislation on time and correctly when domestic concerns do not override European requirements. In fact, "compliance with EU law is not a very high-ranking political goal" in Austria (*Ibid.,* p. 333). Experience often proved that the obligation to initiate the transposition process was not always sufficient to make individual ministries and *Länder* governments act in a timely and correct manner.

Anti-discrimination policy in Austria: the policy legacy

What was the Austrian policy legacy in the area of anti-discrimination? Anti-discrimination was a relatively foreign policy area in Austria before the arrival of the Anti-discrimination directives. The main legal tool existing in this area was the Austrian Federal Constitution, which protected all citizens equally and requested equal treatment for all citizens before the law (Article 2 of the Basic Law of the State of 1867 and Article 7 of the Federal Constitutional Act of 1929). The concept (and word) of *discrimination* does not have a long-standing tradition in Austrian legal terminology (Davy, 2004: 3). The Constitution, for example, does not use the term when reviewing grounds covered under its own equal treatment clauses.

Another tool in place is the Constitutional Act of 1964/59, whereby the European Convention of Human Rights (ECHR) and its protocols are made part of the Austrian Constitution. In addition to this, ECHR judgements are also legally binding upon Austria. In terms of more specific anti-discrimination policy, Austria only protected explicitly against gender discrimination in the workplace with the Equal Treatment Act of 1979. This law came into being after the International Labour Organisation gave a negative opinion on the Austrian collective bargaining system concerning equal payment for men and women. Additionally, Austrian jurisprudence banned discrimination on the basis of race, religion, descent and ethnic origin.

Accession to the European Union in 1995 improved this situation. *First*, because by joining the Union, Austria was forced to respect and uphold the Union's basic principles as laid down in Article 6 of the Treaty of the EU, including respect for human rights and fundamental freedoms, and the rule of law. *Second*, Austria had to incorporate the *acquis communautaire* and subsequent case law from the ECJ, thus improving its own gender laws and introducing nationality anti-discrimination legislation. These changes introduced some of the key concepts in the area of anti-discrimination. Namely, those of direct and indirect discrimination, harassment, victimisation, the instruction to discriminate, and the existence of an equal treatment body.

However, these efforts never culminated in a comprehensive anti-discrimination act or in the provision of protection rights to any vulnerable societal group, save the disabled. Consequently, many concepts were also

absent and significant segments of the population were not legally protected against discrimination in employment or the access to goods and services. Concerned about these issues were the 16 per cent of the Austrian population who had a religion other than the dominant Roman Catholicism; the ten per cent homosexual population and the nine per cent of people living in Austria who did not have Austrian or EU nationality (Statistik Austria, 2001 in Frey, 2004; Schindlauer, 2004a). Discrimination is commonplace in the realm of employment, social affairs and access to goods and services, and was often reported and denounced by Austrian civil society. Surprisingly, Austrian public perception in the area of anti-discrimination does not consider discrimination to be a particularly worrying issue. In a 2006 Eurobarometer, sixty-one per cent of all Austrians interviewed by the European Commission considered that enough efforts were being made to fight all forms of discrimination. This was even the case for areas like gender discrimination, which have traditionally received more governmental attention. Yet, Austrian women still face increasing difficulties to enter the labour market compared to men and are often relegated to take less decent "McJobs" (EIRR, 2005: 3). A detailed break-up of domestic measures for each of the grounds further illustrates the extent of the domestic gap in this policy area.

Age

A study conducted in 2002 scanned the Austrian legal system in search for the available means to protect "older" workers, concluding that there was no single instrument in place, other than the general ban against discrimination found in the Constitution. Discrimination for youth workers was never considered an issue that required specific legislation. Age, understood in a wide sense, was mainly a domestic issue with regards to "older" workers. Yet, domestic policy discussions had not featured on the structural changes that could affect this type of workers (e.g. de-industrialisation, globalisation), and therefore solutions lacked. This gap also reflected the social and consciousness dimension of the problem, in a period when the number of "older" workers in unemployment, and especially in long term unemployment, steadily increased since the 1990s.

There were only a handful of legal regulations in place covering employment and working conditions of older employees, the most important being the Works Constitution Act and the Employment Contract Law Adaptation Act. Both provided for specific protection for older workers, in particular regarding unjustified dismissals, reduced standard working hours, the use of the "partial pensions" scheme, and agreements on "normal" working time reductions. In January 2000, measures were introduced to facilitate part-time work for older employees. Also, in the context of the National Action Plan for Employment of 2002, and before transposition of the ADDs had begun,

the government introduced a programme to raise awareness of the various forms of discrimination faced by "older" workers, targeting public, businesses and social partners.

The ground of age was politically linked to the Senior Advisory Committees of the largest political parties, the *Pensionistenverband* (SPÖ), the *Seniorenbund* (ÖVP) or the *Seniorenring* (FPÖ). On the 8th of March 2001, they agreed to push for a total ban on age discrimination to be included in the Austrian Constitution. A draft was circulated at the ministerial level. The political senior unions' proposals were supported by the *Bundesministerium für Gesundheit, Familie und Jugend* (BMSG, the Austrian Federal Ministry for Health, Family and Youth Affairs) but before this initiative could reach the survey period, new elections in November 2002 halted the process. The issue was then transferred to the *Österreich-Konvent*, a forum dealing with reforms of the Federal Constitution (Interview AT8). However, the debate was not reopened in this forum or thereafter, which explains why transposition in this area was minimal. On the 11th of June 2003 the government introduced a series of legal measures (*Budgetbegleitgesetz*) aimed at supporting the labour market opportunities of older employees. Finally, the government made "active" labour market policy funds available for the training of older employees in precarious employment situations. In order to create incentives for employers to recruit additional older employees, the part-time scheme for such employees was amended and distributed more flexibly. Subsidies for enterprises were also introduced.

Disability

Discrimination on disability grounds was the most protected element prior to the arrival of the ADDs, even though no specific legislation on disability discrimination existed in Austria. Protection in this field started with the *Disabled Persons Employment Act of 1969* (*Behinderteneinstellunggesetz*), which introduced quotas for disabled and established a fund for their support and training. This was complemented with "timid" attempts to intervene in welfare issues during the 1980s, e.g. by creating special companies (*Integrationsbetriebe*) that hired disabled people in higher proportion (Obinger, 2002: 32). Disability was explicitly mentioned in the law on social security (*Sozialversicherung*) or the law on compensation for special sacrifices or efforts (*Versorgung*), and on the regulation of dismissal of disabled employees (*Behindertenausschuss*). At the State level, there were additional laws on public assistance (*Sozialhilfe*) and on the rights of people with disabilities (*Behindertenrecht*). There was even case law dealing with the "reasonable accommodation" of disabled people in the workplace, even though jurisprudence did not lead to a specific policy or practice to regulate work environments systematically. In 1997, the Federal government inserted a

new clause in the constitutional catalogue of human rights prohibiting discrimination of people with disabilities (Article 7(1), sentences 3 and 4). The clause even provided for the establishment of sanctions system.

However, legal experts considered these "utterly vague" changes insufficient because private behaviour was not regulated (i.e. non-state actors were not included) and sanctions were rarely applied (Davy, 2004: 1). A common understanding was reached in 1997 between all parties and the disability NGOs to do more in the field. Two bills were drafted but the legislative could not agree on what to do, despite widespread discrimination in the field (*Ibid.,* p. 5). The arrival of the right-wing coalition in 2000 brought an inconsistent strategy for this ground. The government cut social welfare schemes for disabled people and the termination of several promotion measures to support their employment. At the same time, it introduced special employment and training programmes for people with disabilities (*Behindertenmilliarde*). In the context of the 2003 Vocational Training Act (*Berufsausbildungsgesetz*), it also gave disabled apprentices the opportunity to enter apprenticeship-based occupations; and in the context of the 2002 Austrian Action Plan for Employment, it introduced a programme to overcome prejudice. This programme was targeted towards schoolchildren, parents, schools, and NGOs. All in all, even though policy and discourse for the disabled had gradually developed in Austria, discrimination on this ground was "not effectively prohibited" until the ADDs (*Ibid.,* p. 2).

Race and ethnic origin

Austria had a law transposing the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The ICERD was ratified in 1972 and modified the Austrian Constitution to introduce penal provisions in criminal and administrative law against the incitement to racial hatred, racist insult and discrimination in the supply of goods and services. In Austria, nationality is difficult to acquire, yet it was a condition for public sector employment. In the private sector, third country national workers could vote for the Works Council but could not be elected to it. Furthermore, when reducing their workforce, employers were obliged to give priority to non-nationals in redundancies. Also, it is crucial to note that regardless of the length of residence, the right to reside in Austria was tied to the ability to generate a sufficient *per capita* income. Most foreign workers were entitled to around 30 weeks of unemployment benefit, after which they had to be self-sufficient or risked losing residency rights.

In practice, however, these laws had a relatively limited impact (Schindlauer, 2004b: 2). As Bell notes, this created a situation where foreign employees were highly dependent on their employer, were vulnerable to

exploitation and were systematically allocated to the worst occupations without upward mobility in time to better jobs (2002a: 179). The legal discrimination operating against migrant workers through national policy was so comprehensive that it overshadowed any discrimination that might have operated at the informal level. This is probably why protection against discrimination based on race and ethnicity was considered far more pressing than that afforded to other types of discrimination (*Ibid*., p. 1). Race and ethnic origin have been highly politicised issues and a constant source of emotional debates among domestic political forces, especially since the rise of Haider's FPÖ in the mid-1990s. There were notorious public scandals in recent years on how immigrants were treated by police forces or on how access to municipal housing was persistently blocked to foreigners (Interview AT9).

Religion and belief

The Constitutional texts (Article 7) and the ICERD were the only specific equality clauses for the protection of religious freedom and the prohibition of discrimination on religious grounds. The Penal Code also had a Chapter on "crimes against religious peace and the peace of the death", which protected the free exercise of religious freedom. Roman Catholicism was the dominant religion in Austria counting 74 percent of the population (Schindlauer, 2004a: 1). In addition, 4.7 per cent of the population was Lutheran, 4.2 per cent Muslim, 2.2 per cent Eastern Orthodox, and the other 12 per cent atheist (Statistik Austria, 2001 in Frey, 2004). Some of these religious groups were granted a long standing history of recognition and their own legal framework, notably for the Jewish and Islamic Communities or the Lutheran and Christian Orthodox Churches.

Employment discrimination on religion or belief grounds was rarely reported and was usually difficult to disentangle from cases of race and ethnicity discrimination. Nonetheless, the Austrian Islamic Faith Community, one of the worst integrated communities, stressed the fact that due to a longstanding tradition of respect, Islamophobic outbursts are not as common in Austria as in other European countries. Recently, however, the debates on headscarves in France and Germany sprung over to Austria and NGOs reported a surge in troubles for Islamic women and girls in schools and the workplace.

Sexual orientation

This is probably the most controversial and emotion-loaded ground covered by the ADDs, particularly given Austrian history in the field. Austria

was the first country in the world to abolish its death penalty for homosexual relations in the late 18th century. By the mid-19th century, however, Austria had become one of the most repressive states in Europe. It was only in 1971 that the total ban on homosexuality was repealed. In exchange for the repeal, Austria introduced four anti-homosexual provisions in its Penal Code. *Firstly*, Article 210 prohibited male same-sex prostitution. This was repealed in 1989. *Secondly*, Articles 220 and 221 banned positive information about homosexuality and their associations. This was again abolished in 1997. *Thirdly*, Article 209 stipulated a higher age of consent for gay male relations. This provision took a longer time to abolish. Under Article 209, about 70 investigations and approximately 35 convictions were undertaken each year (ILGA-Europe, 1999: 4). In 2002, the Austrian Constitutional Court struck it down, and by 2003 the ECHR ruled in cases *L. and V. v. Austria* and *S.L. v. Austria* that Article 209 violated Article 14 of the European Convention on Human Rights, and therefore had to be abolished anyway.[7] Despite this, Austria replaced Article 209 by a new restrictive law that also discriminates against the homosexual youth (Article 204). Indeed, the apparently gender-neutral law has hitherto only been used for male-male relations (Graupner, 2004: 54).[8] In this context, Austria has again been taken in front of the ECHR, which issued a further negative ruling for the case *Ladner v. Austria* of October 2004, denouncing these issues[9].

At the federal level, there were no provisions explicitly mentioning sexual orientation (*Ibid.,* 56). The provisions on sexual harassment in both the Federal Equal Treatment of Women and Men Act and the Act on Equal Treatment of Women and Men in Working Life (for the private sector) could have been used for the case of sexual orientation. However, case law never developed (*Ibid.,* 64). Additionally, harassment and verbal abuse were not explicitly protected, despite constituting a frequent form of discrimination. There were some minor exceptions to this panorama (e.g. non-binding Decree of Guidelines (*Richtlinienverordnung*) for police behaviour; a symbolical and non-binding declaration in Bludenz; the Vienna Youth Protection Act in 2002; the 2000 Data Protection Act).

From this discussion, it is only fair to say that the Austrian anti-discrimination panorama before the ADDs was relatively empty for most of the grounds covered by the Directives. In classical misfit terms (see Falkner

[7] Case *L. and V. v. Austria* has Application nos. 39392/98 and 39829/98, case *S.L. v. Austria* has the Application no. 45330/99.

[8] Case *Ladner v. Austria* has Application no. 18297/03.

[9] The applicants in the case *Woditschka and Wilfling v. Austria* (Application nos. 69756/01 and 6306/02) were awarded compensation because Austria had not amended its law in violations of Articles 8 and 14 of the ECHR.

et al. 2005 for a detailed operational definition), this scenery constitutes a medium to high level of misfit for the various grounds of discrimination covered by the ADDs. For example, while the grounds of race, ethnicity and sexual orientation implied a moderate level of misfit, other grounds such as disability-generated high expected costs and a high level of misfit (Casado Asensio, 2008). In the presence of a conflict between the domestic policy legacy and EU demands, the misfit hypothesis predicts severe delays and outcome incorrectness. As will become obvious in the section immediately below, this type of conflict was not always sufficient to explain transposition in Austria. This is not a surprising finding, fitting well with most studies of transposition in the European Union (e.g., Mastenbroek, 2005: 1111). Other explanatory variables might be more convincing. For the „world of domestic politics", Falkner *et al.* (2005) pointed at the study of domestic actor behaviour during transposition. The following section looks at their role in transposition.

The formal transposition process and its outcome

Which domestic actors influenced transposition in Austria? An endogenous anti-discrimination movement had already taken place in Austria in 1997, a few years before the Anti-discrimination directives took shape. On the occasion of the 1998 United Nations year of human rights, Austrian interest groups proposed a comprehensive list of demands to anchor the respect of human rights in the state (*Forderungskatalog der österreichischen NGO's zu strukturellen Verankerung der Menschenrechte in Österreich*). Among other things, NGOs demanded the creation of a national committee for human rights, the active involvement of NGOs together with government and social partners in the application of anti-discrimination law and a constitutional clause enshrining the principle of non-discrimination (Lambda Nachrichten, 1998: 21). Although domestic left-wing parties welcomed the measure, the draft law was only ready after the 1999 elections and the newly formed ÖVP-FPÖ government did not act upon this (Frey, 2004).

Domestic change in the field of anti-discrimination had to wait until the passing of the ADDs. After the directives were passed at the supranational level, it was the responsibility of the ÖVP-FPÖ coalition government to transpose them into national law. As will be seen, these were the only two veto players able to derail or accelerate the transposition process, and to influence its outcome in a decisive manner. The responsibility to draft the new law fell within the competences of the Ministry of Economy and Labour, the *Bundesministerium für Wirtschaft und Arbeit* (BMWA, Federal Ministry of Economy and Labour), controlled by the ÖVP. There were four other ministries involved in the transposition of the ADDs, namely the Federal

Chancellery, the Ministry of Justice, the BMGF, all controlled by the ÖVP, and the *Bundesministerium für Soziale Sichercheit, Generationen und Konsumentenschutz* (BMSGK, Federal Ministry of Social Security, Generations and Consumer Protection), led by the FPÖ.

On the 15th of July 2003, a few days before the deadline of the RD and five months before that of the EFD, the BMWA presented a draft proposal to implement both directives, published it on its website and started a *Begutachtung* process until the 8th of September 2003. Around 120 invitations to comment on the legislation were sent away by the Ministry (Interview AT4). The Ministry received several positions or *Stellungnahmen,* sent by social partners including the IV, the WKÖ, the AK and the ÖGB, as well as various NGOs, such as *Homosexuelle Initiative* (HOSI, Homosexual Initiative), *Zivilcourage und Anti-Rassismus Arbeit* (ZARA, Organisation for Civil Courage and Anti-Racist Work) or the *Österreichischer Gehörlosenbund* (ÖGB, Austrian Federation for the Deaf).

After the consultation phase ended, the draft legislation was accepted by the Council of Ministers (*Minsiterrat*) on the 4th of November 2003. Domestic debates among the NGO community, social partners and opposition parties were heated at this time because the government did not change the draft laws as much as other actors had suggested during the consultation period. As a result, on the 18th of March 2004, the ÖVP agreed that the Parliamentary Committee on Equal Treatment (*Gleichbehandlungsausschuss*) holds an expert hearing to comment on the draft legislation.[10] Again, the hearing did not lead to significant changes to the draft laws, and on the 17th of May 2004 the drafts were handed over to the plenary of the National Council. On the 26th of May 2004, the *Nationalrat* passed the text with the votes of the governing coalition without further amendments, even though intense negotiations with all parties were held until the last moment. The governing parties failed, however, to get the required two-thirds majority to pass a Constitutional law to safeguard the independence of the newly established Equal Treatment Commission and Equal Treatment Office. This had more to do with a general deception among opposition parties with the contents of the laws and the way the process of transposition had been conducted, than with having independent bodies *per se* (Interview AT5). In the end, the *Bundesrat* gave its consent to the laws on the 9th of June 2004.

[10] Committees in the *Nationalrat* are significant but rarely charged with devising legislation. When this is the case, the full parliament is virtually certain to accept the committee's recommendations (Gallagher *et al.,* 2005: 67). This explains why committees are not always effective in Austria and why, despite interest groups' efforts to "colonise" them, committees rarely offer an access point into the political system. Austrian committees can invite individual citizens and experts and can highlight governmental errors, yet, in the end its conclusions may not change anything.

In total, three legal acts were passed to transpose the ADDs, covering all grounds. The ground of disability, however, was covered by a separate Federal Act. The Acts were published in the Federal Law Gazette (*Bundesgesetzblatt*) on the 23rd of June 2004, entering into force on the 1st of July 2004. *First*, for private employment and areas outside the employment field covered by the RD came the Act adopting the Federal Equal Treatment Act (*Gleichbehandlungsgesetz – GlBG und Änderung des Bundesgesetzes über die Gleichbehandlung von Frau und Mann im Arbeitsleben*),[11] which also amended the Act to create the Equal Treatment Commission and the Office for Equal Treatment. For public employment at the federal level, came an Act amending the Equal Treatment Act (*Änderung des Bundes-Gleichbehandlungsgesetzes*).[12] In addition, the government passed an Act on the Equal Treatment Commission and the Equal Treatment Office (*Bundesgesetz über die Gleichbehandlungskommission und die Gleichbehandlungsanwaltschaft*)[13]. This happened almost a year after the deadline of the RD and seven months after the deadline of the EFD. Thus, Austria was substantially delayed in the transposition of both Directives.[14]

Austria also passed a separate Federal Disability Act (*Bundes-Behindertengleichstellungsgesetz*).[15] The so-called "disability package" consisted of a bundle of amendments to existing legislation and a new "Disability Equality Act" (*Behindertengleichstellungesetz*) passed by the National Council on the 6th of July 2005 and by the Federal Council on the 21st of July 2005. In addition, new amendments to the Act on the Employment of People with Disabilities (*Behinderteneinstellungsgesetz*), the Federal Disability Act (*Bundesbehinderengesetz*) and the Act on Federal Social Service (*Bundessozialamtgesetz*) were passed between November and December 2005. The "package" entered into force on the 1st of January 2006. Although Austria had not formally requested an extension of the official deadline for this ground (or that of age), the Commission did not act upon it given the inherent difficulties in legislating for this particular ground. Thus, it can be considered that Austria transposed this ground (and that of age) in a timely manner. The new Disability Act and other amended Acts went beyond the requirements of the EFD, including the definition of the concept of "reasonable accommodation", the creation of a separate Ombudsperson (*Behindertenanwalt*), and the

[11] BGBl. I Nr. 2004/66

[12] BGBl. I Nr. 2004/65

[13] BGl. I Nr. 2004/66

[14] The use of Federal Law to transpose EU directives is not uncommon in Austria. Around 41 per cent of EU directives passed between 1995 and 2003 are implemented through Federal Law and 59 per cent through governmental decrees (Jenny, Müller, 2005).

[15] BGBl. I Nr. 2005/82

establishment of compulsory conciliation and mediation procedures in cases of discrimination before an applicant brings a case to court. These procedures would be conducted by the regional offices of the Federal Social Service (*Bundessozialamt*). During the transposition process, NGOs were also consulted several times, albeit without any meaningful impact.

The Austrian *Länder* usually wait for the implementation at the federal level before initiating their transposition processes. Taking together state and federal laws, there were a total of 21 new or amended laws in Austria. The *Länder* and federal laws differ at times substantially from each other, as regional legislation often afforded more protection than federal laws. This is a normal development in Austrian federalism. Since the 1970s, social welfare laws vary considerably and keep drifting apart between the *Länder* and the central levels (Obinger, 2002: 18).[16]

The European Commission followed the Austrian transposition process and referred it twice to the ECJ. *First*, after following the normal infringement procedures for not transposing the RD on time, it issued a Reasoned Opinion on the 5th of February 2004. Austria replied it would transpose during the second quarter of 2004. The Commission, having heard nothing more from the Austrian government, decided to take the case to court. The ECJ stated that Austria had taken important steps at the federal level but that certain aspects falling under the competence of the *Länder* were still missing. On the 4th of May 2005, the ECJ ruled that Austria had breached EU legislation and was ordered to pay trial costs.[17] *Second*, in December 2004, the Commission also referred Austria to the ECJ for failing to transpose the EFD on time in some states. The ECJ ruled against it on the 11th of June 2005 for the specific case of disability, and again for the whole Directive at the regional level.[18] Austria was again forced to pay trial costs. Another negative ruling in February 2006 followed this for the EFD at the Federal level.[19] All these cases referred to the regional level and, as seen before, had no impact upon the federal transposition process.

In terms of correctness, legal observers considered the final outcome to be essentially correct. Some elements were unsatisfactory. The establishment of one piece of legislation to combat discrimination against a variety of dif-

[16] The *Länder* are indeed significant providers of social protection, social advantages and education, and have developed their own set of social legislation. For more details on the *Länder* transposition processes and outcomes see, for example, the work of Frey (2006: 53-5).

[17] Case C-335/04: *European Commission v. the Republic of Austria*, OJ 9.7.2005/ C 171/5.

[18] Case C-133/05: *European Commission v. the Republic of Austria*, OJ 11.6.2005/ C 143/20.

[19] Case C-133/05: *European Commission v. the Republic of Austria*, OJ 23.2.2006/ C 143/20.

ferent social groups was considered inappropriate by some experts, since the practices of discrimination against groups – and their solutions – differ widely. The overall provisions planned by the government complied formally with the EU Directives (e.g. partial reversal of the burden of proof; limited independence of specialized bodies; insufficient involvement of civil society during transposition and beyond; sanctions not deterrent enough). Over-implementation only took place for the ground of disability and in the extension of the equal treatment bodies to all grounds included in the EFD. All in all, the Austrian anti-discrimination laws had a strong emphasis upon individuals seeking redress, also known as the "individual rights strategy" (Niessen, 2003: 255). This renders practical application relatively problematic because in cases of discrimination, a long, uncertain and expensive process starts for the most vulnerable side in a discrimination case. This has been contested by several observers as being against the general spirit of the ADDs (e.g., Frey, 2004; Schindlauer, 2004b).

In sum, domestic actors and their political behaviour were determinant in explaining the process and outcome of transposition in Austria. The right-wing coalition government, formed by two veto players, was "hesitant" and "over cautious" in transposing the ADDs. The coalition was ideologically against the extension of anti-discrimination policy, which leads to delays and incorrectness for most of the grounds covered by the directives. The empirical material presented here also suggests that this is not a definitive explanatory variable for all the issues raised during transposition. Indeed, the previously described gap in the domestic policy legacy also had a role in explaining transposition. Hence, a way forward in the development of the "worlds of compliance" typology, in particular with respect to the "world of domestic politics", would explore further both explanatory variables and, where possible, attempt their combination. The final section below discusses some strategies on how to do so.

Discussion

The empirical material presented here illustrated a complex case of conflict between domestic level interests, enshrined in domestic policy legacies and domestic veto player ideologies, and European requirements, embodied in a directive. The case of Austria analysed here belongs to one of the least researched "worlds of compliance", namely the "world of domestic politics". This is the country cluster where such conflicts tend to be resolved in favour of domestic interests, rather than by resolute compliance with EU demands. Though expected to monitor transposition accurately, supranational actors did not act against Austrian delays and incorrect transposition. Indeed, the European Commission only opened cases for the regional level. With this relative void in supranational monitoring, domestic actors had little external

pressure to transpose correctly and in a timely manner. As a result, domestic politics took over. The empirical study still begs the question *which domestic politics and conflicts explained transposition process and outcome?*

The explanatory variables highlighted by the "worlds" typology were useful in understanding transposition of the two anti-discrimination directives in Austria. The review of the *status quo ante* panorama of Austrian legislation and policy revealed that transposing the main provisions of the ADDs would not be an easy task. What is more, the ADDs constituted two pieces of legislation that went against the ideologies of a domestic right-wing coalition government. These players would have not created such laws had it not been for the EU impulse and were not eager to transpose them on time and correctly. Both perspectives were described here for the case of Austria. The empirical study thus suggested that in order to further refine the "worlds of compliance" typology, in particular the "world of domestic politics", policy legacies and political ideologies need to be brought together. Furthermore, both approaches would be even more useful if combined.

Bringing domestic actors to the forefront raises the question of which actors actually matter during transposition (Treib, 2003: 524). Among all relevant actors, governments and political parties in government ought to be analysed since they are legally responsible for transposition – either as "key translators" (Laffan, 2005) or "norm takes" (Archarya, 2004). The inclusion and analysis of other domestic actors depends on the domestic power structure, which usually varies across policy areas (Steunenberg, 2007: 25) and over time (e.g. as elections modify incumbent actors). Hence, domestic as well as supranational actors have to be considered in terms of their formal or informal leverage during the transposition process. That is, the study of domestic actors has to be based on whether an actor has a veto player status or not (e.g. Tsebelis, 1995, 2002; Haverland, 2000); as was done in this paper. In addition to this analysis, and following the recent work of Steunenberg (2007), a distinction could be drawn among veto players and agenda setters. Agenda setters possess the right of initiating transposition and so are likely to influence the outcome of transposition in different ways than other veto players do. The interaction between agenda setters and veto players could then be brought together with the typology of political ideologies developed by Treib (2003; see also Falkner *et al.*, 2005), applied here for the ÖVP-FPÖ coalition. In doing so, a richer account of domestic behaviour would be attained for the study of transposition. In turn, more interesting (and accurate) predictions could be derived regarding the process and outcome of transposition.

Bringing back the controversial policy legacy perspective, commonly studied under the label of the misfit hypothesis, may seem less pressing. Several works have shown that the hypothesis is static and inaccurate, and so

unable to predict transposition processes and/or outcomes (see Casado Asensio 2008). Nonetheless, a deep analysis of the policy legacy before transposition kicks out is necessary to understand the situation *ex ante*. What is more, a certain level of misfit is necessary to have a transposition process and outcome for researchers to analyse. In bringing back this perspective, it would be interesting to look at the impact of deeper ideational elements, essential in the study of social policy, labour law and anti-discrimination legislation (*Ibid.*, p. 9), and to combine this with the classical analysis of material-organisational costs, as developed by, e.g. Falkner *et al.* (2005). A thorough account of the policy legacy thus obtained, could be then integrated as one more variable in the analysis of domestic actor behaviour alongside their ideology.

These suggestions are bound to generate new research questions in the field of EU transposition studies – and beyond, to the areas of implementation and Europeanisation. Novel theoretical models and fresh empirical data generated through carefully selected case studies will then have to speak about whether policy legacies and veto players ought to remain as separate analytical frameworks, or whether further efforts should be devoted to their integration.

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