1. Introduction

As the European Union has expanded its radius of action throughout the 1990s beyond construction of an international market, studies on European integration have taken notice of the profound political changes in the Member States. Thus, Europeanisation has become one of the most widely researched topics since the 1990s.

Europeanisation studies have focused primarily on ‘goodness of fit’. According to this proposition (Börzel and Risse 2000; Cowles, Caporaso and Risse 2001), the greater the difference between the policy chosen at the European level and the existing policy in a Member State, the harder pressed is the Member State to change the policy and the greater is the difficulty facing the Member State. From this perspective, it is expected that Member States fail or delay the transposition of European Union directives when the ‘fit’ is worse.

Acknowledging its value as a first step and initial stimulation for Europeanisation studies, it has become also commonplace to point out the analytical and empirical weaknesses of goodness of fit and to illuminate the way forward. This study, too, starts from the standard ‘goodness of fit’ viewpoint and compares the transposition of anti-discrimination directives in Germany and Austria based on the ‘most similar’ case design. Through this comparison, I aim to show two types of lacunae in the ‘goodness of fit’ model.

First, most Europeanisation studies have chosen the ‘policy’ level as the empirical foundation. Several scholars such as Vivien A. Schmidt have also attempted to examine Europeanisation at the ‘polity’ level. However, there are few works on the Europeanisation of ‘politics’. This paper tries to fill the gap, specifically by showing that domestic political time is now constrained by European-level political time, and the incumbent is forced to deal with issues that they would otherwise want to shelve (cf. Ekengren 2002).

Second, ‘goodness of fit’ does not explain the differences between Germany and Austria in the transposition of anti-discrimination directives. Contrary to the usual expectation, the German ‘left’ red-green government failed to transpose the directives, while the Austrian ‘right’ blue-black government, including the right-populist Freedom Party, transposed them with less delay. To explain this puzzle, we should include the ‘politics’ dimension in the analysis, especially political time and the transposition strategies of governments (cf. Treib 2003). In other words, domestic actors do not simply react to Europeanisation pressures on the basis of economic or technical cost-benefit calculations. Rather, Europeanisation pres-
sures occasionally serve as a political resource, and this complicates the domestic process of Europeanisation.

In the following section, I review briefly why and how the anti-discrimination directives were enacted at the European level. Then, I examine the ‘failure’ of transposition under the Schröder red-green coalition government (1998–2005) in the third section, which is the main part of the paper. In the fourth section, I present a shorter analysis of the transposition process in Austria. Throughout the comparative reconstruction of the political processes of transposition, I focus on how the two governments locate the directives in their overall political strategies. In the last section, I summarise the empirical evidence and the arguments.

2. Emergence of the ‘anti-discrimination policy field’ at the European level

In June 1997, the Treaty of Amsterdam, a revision of the Treaty on the European Union (Maastricht Treaty), was signed, and it came into effect on May 1, 1999. This treaty marked a significant advance in the social policy domain, mainly by incorporating the Social Protocol, which was agreed and signed by all Member States except the United Kingdom during the Maastricht Treaty negotiation.

One of the most notable changes is found in the anti-discrimination policy. Article 13 of the Consolidated Version of Treaty Establishing the European Community (97/C 340/03) now confers Union competence prohibiting discrimination, stating

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

This article was an innovation in European social policy, for it not only expanded Europe-level social policy competence beyond the Maastricht Treaty but also far exceeded the Social Protocol, which covered merely “equality between men and women with regard to labour market opportunities and treatment at work” (Article 2 of the protocol on social policy) and specifically obliged the eleven Member States to “ensure equality between men and women with regard to labour market opportunities and treatment at work” (Article 6).


Among these policy proposals, the Racial Equality Directive was very important, as Bell (2002: 384) says, “[i]t does not seem an overstatement to describe this instrument as one of the most significant pieces of social legislation recently adopted by the European Union”. In addition, it is noteworthy that the directive passed quickly through the complicated EU legislative machinery, which was remarked upon as ‘world-record adoption’ by Geddes and Guiraudon (2004: 334).

Why was it possible? Several factors led to
swift adoption (Geddes and Guiraudon, 2004). First, it was enacted when the democratic value of the Union was questioned by participation of the Austrian Freedom Party (FPÖ), headed by Jörg Haider, in the Government. The other fourteen Member States warned Austria by declaring that they would not accept any bilateral official contacts at the political level with an Austrian government including the FPÖ, which had no effect on coalition formation. In addition, the French, Belgian, and Italian Ministers issued a joint position paper calling for swift adoption of the Commission’s anti-discrimination proposals. Given the link between the anti-discrimination directives and the Austrian populist right, it was not possible politically for the Austrian and the German red-green governments to slow down the legislative process, and France became a motor of the legislation, although the ‘fit’ between the proposal and her own policy paradigm was bad. It should also be added that the composition of the Council was exceptionally ‘left’-leaning at the time (Manow, Schäfer and Zorn 2004), after establishment of the Labour Government (May 1997) in the UK, electoral victory of the Parti socialiste in the 1997 French National Assembly election (June 1997) and the end of the sixteen-year-long Kohl Government and its succession by the Schröder red-green coalition government (October 1998) in Germany.

Second, Non-governmental Organisations (NGOs) have played an important role in pushing for and framing the anti-discrimination directives. Among them, Starting Line Group (SLG), a network of more than 250 pro-migrant NGOs with strong Anglo-Dutch intellectual influences, was active in Amsterdam Treaty negotiations for inclusion of the anti-discrimination article. On the contrary, the French and the German pro-migrant organisations showed little interest in EU-level developments. Thus, the arguments pressing for anti-discrimination policy proposals at the EU level drew inspiration and guidance mainly from British and Dutch experiences.

Third, although these directives were legislative acts exploring a new area, it was possible to make use of existing policy assets (Tyson 2001). The Equal Treatment Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Council Directive 76/207/EEC); the Burden of Proof Directive (Council Directive 97/80/EC) and the case-law of the Court of the European Commissions (ECJ) had served as solid bases of negotiation and clarified several conceptual problems in advance. The Member States could negotiate with technically accustomed terms and arguments.

Yet, legislation of this magnitude was not easy. One of the controversial issues was the material scope of application (Tyson 2001, 207-209). There was broad agreement on the need for anti-discrimination regulations concerning employment relations, but the proposal further dealt with other areas usually covered by the Civil Code. Especially debated was Article 3 concerning provision and access to goods and services. A few noted that community competence was limited to transnational situations, while others insisted that the directive should not cover situations such as a person privately selling a bicycle to a neighbour. This problem was solved in the COREPER (Committee of Permanent Representatives) negotiation by limiting application of the directive to those goods and services ‘which are available to the public’. As will be shown below, this clarification did not suffice to prevent the attack on the German transposition process.

The legislative process reviewed above illuminates two points. First, because the anti-discrimination directives were framed under Anglo-Dutch influences, ‘fit’ between the directives and the existing policies was not good either in Germany or in Austria. Second, such European legislation was possible with exceptional political moment concerning the political situation in Austria.
These points lead us to expect difficulty in transposition, both in Germany and in Austria. The next two sections examine the actual legislative processes and the results of transposition.

3. Transposition ‘failure’ in Germany

3-1. Contextual background of German domestic politics: red-green initiatives on minority protection and their political repercussions

(1) Policy positions of Coalition Government

As is shown above, the anti-discrimination directives were modelled on British legislations. In Germany, gender equality had been an important issue both politically and legally, but other types of discrimination were rather neglected and received no specific legal or political treatment. Except for a few clauses in the Works Constitution Act (Betriebsverfassungsgesetz), discrimination was covered only by the general clauses in the Civil Code, based on the Article 3 of the German Basic Law stipulating equality before the law (EIRO 2004a). This article prohibits discrimination on grounds other than gender, stating “[n]o person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability”. It means that the transposition of the directives had to break new ground in Germany’s system of laws.

The directives were to be transposed under the Schröder red-green government, which had defeated the Christian Democrats—Free Democrats alliance in the September 1998 election. The former can be called the first ‘leftist’ government in Germany, composed of the Social Democrats and the Greens, in comparison with the previous Social Democrats-led governments with the Free Democrats as the junior partner.

If we consider the general ideological affinity of the directives and partywise-political composition of the governments, leftist governments are, ceteris paribus, supposed to be better suited for implementing such a policy. In fact, both parties, Social Democrats and the Greens, presented a proposal on minority protection in 1998. To analyse the political process of transposition, however, we have to determine the actual policy positions at that time. To this end, I first examine the electoral programmes of both parties.

The electoral programme of the Social Democrats (Arbeit, Innovation und Gerechtigkeit. SPD-Programm für die Bundestagswahl 1998) emphasised the need to revitalise the economy, as is evident from its title ‘Work, Innovation and Justice’. As for anti-discrimination policy, it merely touched upon gender equality. In addition, a section was dedicated to the immigration issue, declaring that “the core of successful integration policy is the enactment of modern citizenship law”.

In contrast, the Greens paid more attention to the issues at hand. In its electoral programme ‘Green is the Change’ (Programm zur Bundestagswahl 98. Grün ist der Wechsel), a section ‘Self-determination’ dealt with the issue. Here, not only gender equality but also equal treatment of disabled people, foreign nationals and asylum seekers were aimed at, based on the principle of self-determination in one’s life. Under the heading ‘empowering minorities’, discrimination against homosexuals was criticised and introduction of same-sex marriage or equal treatment of non-marriage partnership were proposed. Moreover, the need for a specific anti-discrimination law was stated explicitly, in anticipation of development at the European level.

Overall, it is safe to say that anti-discrimination was the Greens’ issue. Then, how was it reflected in the policy of the red-green Coalition Government?

The Coalition Agreement of October 20, 1998, reflected the stance of the Greens. In Chapter 9 ‘Security for All, Empowering Citizenship’, revision of the existing citizenship law was agreed upon with concrete conditions for
acquiring citizenship (Section 7). Furthermore, the chapter had a separate section on ‘Minority Rights’ (Section 10), where it was declared that

We will set out a law against discrimination and to encourage equal treatment (especially by introduction of the legal instrument of registered life-partnership with rights and obligations). The recommendations of the European Parliament for the equal treatment of lesbians and gays is given consideration.

It is remarkable that anti-discrimination issues beyond gender equality were recognised formally as a task for the new government. Moreover, the link to European-level policy development is stated clearly.

The Agreement showed the Greens’ influence in this field. Nevertheless, the post of Minister of Justice, who deals with the issue, went to a Social Democrat, Herta Däubler-Gmelin, who was seconded by another Social Democrat as State Secretary.

(2) ‘Trauma’ of citizenship law reform

As is expected from the analysis of the electoral programmes and the Coalition Agreement, among minority protection issues, the new government first tackled the issue of citizenship law (Hell 2005). The draft revision of citizenship law, released by the Ministry of Interior, was path-breaking. First, it proposed conferring German citizenship on children born in Germany to non-German parents, which is a departure from the jus sanguine principle followed since 1913. Second, with introduction of the jus soli principle, the draft revision officially accepted dual citizenship for the first time.

The Christian Democrats, now going to the opposition bench and anticipating this move, had already presented a proposal in the Federal Council (Upper House) on restricting the number of immigrants in November 1998. Against the proposal of the Government and with a view to electoral exploitation of the issue in the approaching Hesse state election (February 1999), the Christian Democrats launched a massive signature campaign against the revision proposal, which was quite exceptional for the Christian Democrats, who are generally hesitant to employ such ‘direct democratic’ methods. They focussed their attack on the dual-citizenship issue and gathered 400,000 signatures in three weeks.

The result of the election on February 7 was literally shocking. The opinion polls at the last minute had predicted 41-2% for the Social Democrats and 8.5%-10% for the Greens, against 36-9% for the Christian Democrats and 5.5%-8% for the Free Democrats, which meant clear victory for the incumbent red-green Government Coalition. Nevertheless, the Christian Democrats obtained 43.4% of the vote and formed a coalition government with the Free Democrats, which barely exceeded the electoral threshold with 5.1% of the vote. The Social Democrats with 39.4% gained 1.2% against the previous election, but the Greens suffered a heavy loss of 4% to 7.2%. This election was shocking not only for its unexpected result but also for its implication of federal politics. With the turnover of government in Hesse, the Schröder Government lost its majority in the Federal Council only after four months since its investiture. Now the government had to solicit the assent of the state government, including the opposition parties at the federal level.

In the case of citizenship law, the Government decided to negotiate with the Free Democrats, which had formed a coalition government with the Social Democrats in Rhineland-Palatine. In concession to them, the ‘option model’ was introduced, which obliges the holders of dual-citizenship to choose one by their 23rd birthday. Through this concession, non-recognition of dual-citizenship was maintained, and the practical impact of the reform was halved. The revised law was adopted with the vote of the Social Democrats, the Greens, a part of the Democratic Socialists and the Free Democrats.
The reform of the citizenship law should be the first innovation of the new Government showing its distinctiveness from the previous Kohl Government. It was also expected that non-Germans, mainly Turks, who had newly acquired citizenship, would become the reservoir of left voters. In the end, however, both calculations turned out wrong. The defeat in Hesse was a severe blow to the Government both symbolically and substantially. With this negative lesson, the Social Democrats' became more cautious in handling of the minority protection issue, which was agreed upon in the Coalition Agreement.

3-2. Lacking political time and avoidance of legislative acts: The first Schröder Government

As is shown above, two initial minority protection initiatives by the Schröder Government faced sheer opposition by the Christian Democrats, and settlement of the issues took a long time. Political time remaining for further initiatives in this area, namely transposition of anti-discrimination directives, was already scarce. It was all the more so because the anti-discrimination issue would likely arouse intense opposition from the Christian Democrats and the Churches, and political complication was almost unavoidable.

The Ministry of Justice distributed the first draft of the anti-discrimination law in December 2001. This draft was an ambitious one, going beyond mere implementation of the directives and applying the Racial Equality Directive to other grounds of discrimination than race or ethnic origins. By this expansion, the draft aimed to respond to criticism against the directive itself.

The draft was criticised heavily by lawyers\. For example, Franz-Jürgen Säcker, Law Professor at the Free University of Berlin, wrote an article entitled 'Reason instead of Freedom: The Republic of Virtue by the Jacobins'. In it, he stated that securing civic liberties through separation of State and Society was one of the most important achievements of modern West-
ern civilisation and attacked the draft law as an intrusion to the freedom of contract, which reminded him of the ‘new puritan regime of virtue’. Concretely, he raised several hypothetical questions. Is a Muslim family allowed to rent a room to other Muslims by way of newspaper inserts? Can a believer of a religion prohibiting homosexuality refuse to rent a house to a homosexual? Citing these examples, he criticised the draft law as an intervention in the ‘plurality of lifestyles and traditions’ (Säcker 2002). In the same vein, Eduard Picker, Professor at the University of Tübingen, criticised the fact that the draft poured morals into law and that a certain degree of ‘discrimination’ was inevitable as the other side of private autonomy (Picker 2003). Furthermore, Karl-Heinz Ladeur, a well-known post-modernist public law Professor, attacked draft saying it discriminated against the ‘majority’ by ignoring the legal rationality of liberal society and that it was not only unconstitutional but also against common sense and the rule of law (Ladeur 2002).

All of these criticisms were aimed at the directive itself, although they did attack the expanded scope of application by the German government on the surface. Although the extension aimed by the Government was, first, personal scope of application, which included discrimination based not only on race but also religion and sexual orientations, and, second, the responsibility of employers in the case of discrimination against an employee, most fundamental criticisms were directed at such points as shifting the burden of proof, intervention of support groups in legal actions and state intervention in the sphere of the Civil Code itself. However, these elements were already included in the original Racial Equality Directive. In fact, critics such as Picker attacked the explicitly the directive itself saying, “against such directive that sticks to the legislation of a certain law under the hegemony of Europe, we should counter with all legal measures” and “the people who get accustomed to appeal to the Federal Constitutional Court in case of unwanted legislation, should not train themselves in fatalism to the European directives, which do not suit them” (Picker 2003).

Although Picker was an extreme case, most German lawyers’ negative reactions were rooted in the bad ‘fit’ of the directives with Germany’s system of laws. In their understanding, the anti-discrimination problematique could be handled properly by the existing laws and judgements, as Picker wrote, “Special legislation for anti-discrimination is, in fact, unnecessary for the German Civil Code. European criteria are already achieved in Germany, in the proper interpretation of laws”. They thought that the legal instrument of indirect application of the basic rights clauses in German Basic Law was sufficient. Furthermore, the cognitive schema of state-society division, in which ‘society’ is the sphere of freedom logically prior to the state, has been influential in German legal discourse. With this schema, it is only natural that the lawyers were discomforted by state intervention in the sphere of Civil Code.

The lawyers’ criticism played a role in the opposition to the anti-discrimination law. The main sources of opposition were employers and

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2 For the arguments against the anti-discrimination laws, see Ladeur (2002), Picker (2003), Reichhold (2003), Säcker (2002), Schiek (2003), Wiedemann (2002). For the arguments favouring said laws, see Baer (2002), Stoltzing (2003), Vennemann (2002) and various articles in Loccumer Protokolle, 40/03 (2003), 71/03 (2003), 79/04 (2004) among others. See also the discussion at the 2004 Congress of German Public Law Scholars (Veröffentlichungen der Vereinigung der Deutschen Staatsrechtler, 64(2005), 298-435).

3 Herms and Meinel (2004) wrote “The fundamental problem in Germany lies in the collision of the implementation of European laws and the highly differentiated labour law. For the nature of the draft law is rooted the criteria of the European laws, those who insist on the mitigation of anti-discrimination regulations can only raise their voice to influence the political institutions at the European level”.

churches. Especially, both Catholic and Evangelical churches objected actively, as they perceived the law to infringe upon their self-determination rights (http://www.ekd.de/aktuell_presse/news_2002_05_17_2_antidiskriminierung.html; http://www.ekd.de/aktuell_presse/news_2002_05_27_5_antidiskriminierung.html). They had a practical reason, too. They feared that under the anti-discrimination law, they could not give priority to believers when hiring workers for church-related organisations and institutions.

After all, the first draft could not be put on the cabinet agenda before the Schröder Government finished its first term. Actually, the Minister of Justice prepared the second draft in February 2002. Moreover, a few people in the Government still expected its enactment before the 2002 Election by deleting grounds of discrimination such as age, world-view and religion from the scope of the law. However, the opposition to this law was very fierce (taz, 18.03.2002; SZ, 09.04.2002; Stork 2005).

In addition, federal politics was in turmoil over another minority issue, namely, immigration law reform. Following the report drawn up by the Government Consultative Committee (‘Süssmuth-Commission’) in July 2001, the Government issued a draft bill in August and struck a cabinet-level agreement in November. Both the content, which aimed at change in the immigration regime by systematically introducing highly-skilled labour, and the decision process, in which the head of the Consultative Committee was deliberately chosen from the opposition, had been controversial from the start. Furthermore, the Social Democrats dared a high-handed act at the vote in the Federal Council, which elicited further criticism from the opposition. It was not possible to pass any more controversial bills under these circumstances.

In view of the approaching 2002 Federal Diet Election, the Social Democrats gave up on sending the bill to the Federal Diet, and transposition of the anti-discrimination directives was postponed (Pressemitteilung Nr. 297 der Bundestagsfraktion Bündnis 90/ Die Grünen; SZ, 09.04.2002).

3-3. Hesitation of Social Democrats: The second Schröder Government

In the Federal Diet Election in September 2002, the Social Democrats barely maintained the position of the largest party by a he margin of three seats, six thousand in terms of votes, against the Christian Democrats, but the red-green coalition secured a majority in the Federal Diet. Therefore, the second Schröder Government continued the effort to transpose the directives in the fifteenth legislative period (2002–2006). The new Coalition Agreement, entitled ‘Renewal, Justice and Sustainability’, also included a corresponding clause stating, “Based on the preparation in the fourteenth legislative period, the Government Coalition will send the anti-discrimination law to the Diet and transpose the EU directives” (Koalitionsvertrag 2002–2006: Erneuerung–Gerechtigkeit–Nachhaltigkeit).

The Greens remained committed to the issue. In their election programme, there was a section called ‘Removing Discrimination’, in which described their intention to legislate an anti-discrimination law by using the directives was clearly discernible in the following: “We want a comprehensive anti-discrimination law. With its help, those who suffered can defend themselves against every-day discrimination by means of a civil case” (Grün wirkt! Unser Wahlprogramm 2002–2006).

By contrast, the electoral programme of the Social Democrats treated the minority issue not as an agenda item for the next period but as one of the achievements of the previous period. While the same-sex life-partnership, new citizenship law and immigration laws were referred to proudly as evidence of their reform capacity, only the gender equality issue was cited as one of the aims of the next period. Politically, the minority protection issue was almost finished from their viewpoint.
Transposition Strategy and Political Time in the Europeanisation of Social Norms

Reflecting this stance, the newly designated Minister of Justice Brigitte Zypries took a more negative stance towards the anti-discrimination law than her predecessor Däubler-Gmelin. In March 2003, Zypries was reported in one of the quality papers to be negative towards legislating an anti-discrimination law (FAZ, 07.03.2003). In fact, she reiterated such statements as “the Civil Code is the land of private autonomy” or “civic freedoms in the liberal state includes ...making distinctions and treating unequally” on official occasions (Zypries 2003a; 2003b; 2004).

Thus, the legislative work proceeded only grudgingly. While the Ministry of Family and the Ministry of Economy were pushing for transposition, a substantial part of the Social Democrats and, most importantly, the Ministry of Justice, were negative (Edathy and Sommer 2004).

In addition, immigration law continued to occupy the political timetable. In December 2002, the Federal Constitutional Court annulled the March vote in the Federal Council and, therefore, the law itself. The Government was forced to restart the entire process. After the draft was agreed upon by the cabinet in January 2003, the Federal Diet passed the bill, but the Federal Council vetoed it again, and negotiations began in October 2003. The law was finally enacted in July 2004.

In the meantime, the due dates for transposition of the Racial Equality Directive and the Employment Equality Directive, 19 July 2003 and 2 December 2003, respectively, had passed. Although the Ministry of Justice issued the new bill in May 2004 and the Government Coalition agreed on their final bill in December 2004, the European Commission initiated an infringement procedure and sued Germany in the ECJ (EIRO 2004b; 2004c).

The Diet debate began in January 2005. The revised bill, too, expanded the scope of application, which was in line with the Greens’ policy. The Parliamentary Group of the Greens convened an expert conference “Tailwind from Europe’ and projected the directives as providing an opportunity for developing German anti-discrimination policy.

However, the opposition’s attack remained as fierce as before. They criticised the bill as posing an uncalculated risk to employers and making undue state intervention possible with slogans such as ‘intervention in the freedom of contract’ or ‘unnecessary bureaucratic monster’. Their principled opposition was backed up by business-oriented and conservative press outlets (FTD, 21.1.2005; FAZ, 21.1.2005). The Federal Association of Employers held a symposium ‘Secure the freedom of contract!’, inviting Picker as a speaker (BDA 2005). The conservative newspaper Frankfurter Allgemeine Zeitung attacked the bill as pushing for the ‘leading culture (Leitkultur) of the left’ (FAZ, 20.1.2005).

Furthermore, the Government continued to be divided on this issue. Renate Künast, the Minister of Consumer Protection from the Greens, defended the bill, insisting that the bill was already aimed at minimum realisation of the requests from the EU and that further delay would invite substantial penalty from the EU. On the contrary, a few Social Democratic Ministers were reluctant to the enactment itself and were ready to revise the bill to incorporate the requests of the opposition (FTD, 4.3.2005; 5.3.2005).

Here again, electoral concern played a role. The harshest criticism of the bill came from North Rhine-Westphalia, the largest state in Germany, where the State Diet election was due in May 2005. The Social Democratic Minister President of North Rhine-Westphalia Peer Steinbrück suggested that he would not vote for the bill in the Federal Council because it would harm the competitiveness of the firms in his State (FTD, 5.3.2005). Harald Schartau, the Chairman of the state’s Social Democratic Party and the Minister of Social and Labour Affairs, also argued against the bill, pointing out “Currently, the main concern of the people is the insecurity of the jobs and whether they have the chance to find a new job...
discrimination law] would not help our electoral campaign but damage us” (Die Zeit, 8.3.2005, 10/2005).

Thus, a heated debate was inevitable, and smooth passage of the bill was unlikely. However, the political situation in Germany changed dramatically. The Social Democrats lost the State Diet Election, and the coalition of the Christian Democrats and the Free Democrats took over the State Government, as was expected. Then, Schröder opted for a gamble. After an hour, he declared at a press conference that he had decided to trigger dissolution of the Federal Diet and call for an early election. This decision was made personally by Schröder, and only a few leaders in the Coalition, namely, Steinbrück, Vice Chancellor and the Foreign Minister Joschka Fischer, and the Federal Chairman of the Social Democrats Franz Müntefering, were notified before the press conference.

The focus of public opinion shifted. Admissibility of the dissolution was first debated; then, economic issues such as unemployment, economic reflation and budget deficit became the central themes of the electoral campaign. The anti-discrimination law disappeared completely from the political foreground.

Now it was possible for the Social Democrats and the Greens to pass the bill without fear that they might lose voters at the centre. Rather, they should care about the interest of core constituencies of both parties. Therefore, the Government Coalition passed the bill at the Federal Diet with some amendments to accommodate the objections from the Churches in June. The Federal Council vetoed the bill in July, and the Conciliation Committee was held. Both sides were not prepared to make concessions, and the negotiation was stopped in September. The anti-discrimination directives were not transposed again.


4. Transposition ‘success’ in Austria

Similar to Germany, there was no special anti-discrimination law in Austria. Only Article 7 of the Federal Constitution prohibited discrimination based on religion or disability (EIRO 2004a).

In contrast to Germany, transposition of the anti-discrimination directives was borne by the rightist Government composed of the Christian-conservative People’s Party and the right-populist Freedom Party. After the 1999 election of the National Council, the People’s Party leader Wolfgang Schüssel ventured to embrace the Freedom Party. Since the 1980s, the Freedom Party turned right under populist leader Jörg Haider and took an anti-immigration stance. Thus, we can say that ideological affinity between the directives and the Austrian government was rather low.

Before transposition of the directives was put on the agenda, the anti-discrimination issue had been already discussed in a certain circle (Krickler 2003; Solla 2003). The UN year of human rights in 1998 accelerated the activity of NGOs and the six main NGOs, including the Ludwig Boltzmann Institute for Human Rights, began drafting the anti-discrimination law, which resulted in a comprehensive legislative proposal in March 2001.

However, the Austrian Government ignored this draft. Its own bill was one of minimum transposition, with several articles adopted literally from the directives. Although a special committee was established in the National Council, the Government Coalition was said to retard the discussion (ECHO 2003). The final Government bill was issued only four days
before the transposition deadline, as if it were an alibi, and sent to the Parliament on 11 November 2003. This retardation reflected the intention of the government to minimise politicisation and put the opposition under the severe time constraints to make fundamental revision impossible. The NGOs, Social Democrats and Greens protested this tactic.

At the same time, the Government was flexible enough to incorporate a few of the criticisms of the opposition and to break the force of an objection. Among the 11 points requested by the Social Democrats, the Government accepted seven points in full and two in part. For example, the original bill contained no clause concerning the intervention of NGOs in lawsuits. Responding to a request from the opposition and the NGOs, a special umbrella organisation called ‘the Litigation Association of NGOs against Discrimination’ was established and given permission to intervene in lawsuits (http://www.klagsverband.at/news.php?nr=3890). This flexibility was explained partly by the fact that a part of the bill required constitutional amendment, for which two-thirds majority was necessary. The Government needed the assent of the Social Democrats.

Based on these concessions, the Government Coalition urged the Social Democrats to vote for the bill. The Social Democrats insisted that incorporation of the requested 11 points was the minimum requirement for complete transposition of the directives and further requested the expansion of legal intervention by the NGOs and a more complete shift in the burden of proof. Although they maintained their position and voted against the bill, they were made to be defensive. This is partly because Vienna City Government, governed by the Social Democrats, passed its own anti-discrimination law, which also amounted to minimum transposition of the directives. Therefore, homosexuality-related NGOs in Vienna criticised the Social Democrats as untrustworthy (http://hosiwien.at/?page_id=102). In sum, the tactics of the Government were very effective, at least against the Social Democrats.

Although the deadline was not met, the Federal Anti-discrimination law was passed in May 2004. Yet, given the delay in enacting State-level legislation for implementing the directives, Austria, too, was sued by the Commission. However, Austria avoided the blame for lack of transposition of the Employment Equality Directive.

5. Comparative Assessment and Theoretical Implications

Transposition of the anti-discrimination directives ‘failed’ in Germany and was relatively ‘successful’ in Austria, in the sense that federal-level measures were enacted, albeit with a slight delay. How can we explain these results?

In the case of Germany, three factors were important. First, the mismatch between the directives and the existing legal system contributed to the ‘failure’. Because of the mismatch at the fundamental level, lawyers in Germany attacked the transposition bills and the opposition took a firm stance, making the transposition politically difficult.

Second, the abovementioned mismatch was amplified by the transposition strategy of the Government. The Government, ideologically close to the directives and mainly pushed by the Greens, tried to take a giant step by using the opportunity of transposition, which intensified the resulting confrontation with the opposition.

Third, given the political explosiveness of the issue and head-on confrontation, a relatively long negotiation was inevitable. However, the political timetable was overcrowded and already occupied by other minority-protection issues such as citizenship law and same-sex marriage. The Social Democrats could not find a time when they would not have to worry about the effect of passing the bill on the Hesse Election.
In the case of Austria, there was an objective mismatch. Because of common legal traditions, the fundamental legal culture there was similar to that in Germany, and Austria, too, lacked any specific anti-discrimination legislation. However, this matter was not politicised.

This difference between the two countries arises from the fact that the Austrian Government, ideologically distant to the directives but unable to refuse them, chose the strategy of minimum transposition and was flexible in making tactical concessions to the opposition. Thus, the opposition found it difficult to push for expansive transposition. Furthermore, the Government controlled the political timetable skilfully and made fundamental revision difficult by tabling the bill after the transposition deadline.

Now we move on to comparative assessment. First, I examine the factors raised by standard Europeanisation models, which are focussed on structural variables. The ‘goodness of fit’ was low in both Germany and Austria at both the fundamental level (legal culture) and the concrete level (lack of any anti-discrimination law). General ideological affinity was high in Germany (leftist government) and low in Austria (rightist government). Another structural variable, which measures relative ease of policy change, is the number of veto points (cf. Tsebelis 1995). According to the veto-player index by Schmidt (2000), both countries scored very high (Germany: 8, Austria: 9). Thus, from the structural variables, we can expect transposition to be easier in Germany than in Austria.

However, in reality, the transposition results were quite the contrary. Here, political variables have a role. The ‘goodness of fit’ variable alone does not suffice for predicting the political difficulty of transposition. It should be considered in combination with the transposition strategy of governments, which is determined not only by policy considerations but also by electoral concerns.

In addition, Europeanisation of political time has its own independent effect. In the case of Germany, the Social Democrats were torn between the transposition deadline and the scheduling of the domestic agenda. On the contrary, the Austrian Government Coalition used the transposition deadline as an asset, forcing the Social Democrats to choose minimum transposition or (further) transposition delay.

The result of the comparative assessment is summarised in Table 1 below.

Table 1. Summary Score of Variables and Results

<table>
<thead>
<tr>
<th>Structural Variables</th>
<th>Germany</th>
<th>Austria</th>
</tr>
</thead>
<tbody>
<tr>
<td>goodness of fit</td>
<td>low</td>
<td>low</td>
</tr>
<tr>
<td>ideological affinity</td>
<td>high</td>
<td>low</td>
</tr>
<tr>
<td>veto points</td>
<td>high (8)</td>
<td>high (9)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Political Variables</th>
<th>Transposition strategy</th>
<th>Germany</th>
<th>Austria</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>expansive</td>
<td></td>
<td></td>
</tr>
<tr>
<td>political time</td>
<td>scarce (the government cannot find the proper timing for fear of electoral loss)</td>
<td></td>
<td>controlled (the government can strengthen time constraint to minimise the opposition)</td>
</tr>
</tbody>
</table>

| Transposition Results | failure | success |
This paper was a preliminary attempt to include the ‘politics’ dimension in ‘Europeanisation’ research. Further research including greater numbers of countries and cases is necessary to evaluate the impact of European Integration on the ‘politics’ in Europe.

* An earlier version of the paper was presented at the 2005 Annual Meeting of the Japanese Political Science Association and the 2007 Conference of the European Consortium for Political Research.

Newspapers
FAZ: Frankfurter Allgemeine Zeitung
FTD: Financial Times Deutschland
SZ: Süddeutsche Zeitung
taz: tageszeitung

Bibliography


