

Chapter 1

Introduction: The Challenge of Implementation Research in the New Member States

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This chapter begins by outlining the theme of the book: the practice of European Union (EU) social legislation in Central and Eastern European countries (CEECs). We highlight the importance of studying policy implementation as a crucial phase of the policy cycle. We outline the empirical and methodological approach we chose to shed light on how accession countries attempt to translate EU social policies into domestic practice. We also give an overview of the state of the art in EU implementation research, and of the EU legislation pertaining to our study. The chapter closes with a brief description of the structure of the book.

The Theme of the Book: How Does EU Social Law Work in Practice in Central and Eastern Europe?

On 1 May 2004, ten new member states from Central and Eastern Europe and the Mediterranean joined the European Union. They had to align their policies and their administrative and legal systems with the requirements of the *acquis communautaire* (i.e., the approximately 80,000 pages of EU law representing the status quo of European integration) even before joining and although their policy legacies were in some areas far behind the EU standards. Further, their legal and administrative systems were in need of major reforms to allow the proper enforcement and application in practice of the huge body of EU law.

We aim to take stock of this process. If there are shortcomings in transposition, enforcement or practical application, what are the reasons and how could they eventually be mended? The EU directives on working time, employment equality, and the equal treatment of women and men in employment will serve as our practical examples.

Implementation as Crucial but Difficult Phase of the Policy Cycle

The aforementioned questions are of vital importance for the functioning of European integration: there is no use for the EU in adopting intricate rules for a unified market, if they remain dead letter in large parts of the Union.

A recent study revealed that non-respect of jointly adopted rules and policies has already been a significant problem in the 15 'old' member states of the EU (Falkner, Treib, Hartlapp and Leiber 2005, chs 14 and 15). Only 11 per cent out of 90 implementation cases studied represented correct and timely transposition into domestic law, and 69 per cent were delayed for at least two years or more. Based on these empirical data, implementation problems can certainly no longer be characterized as a 'statistical artefact' (Börzel 2001).

Already during the period preceding the 2004 enlargement, the European Commission made compliance with EU policies a priority (see official statements such as, for example, the Governance White Book 2001). Indeed, with Malta, Cyprus, and (most importantly, in this respect) eight Central and Eastern European countries now being part of 'the club', the issue of compliance with EU law is ever more pressing. The CEECs are transition states with a view to not only economics but also to their political and legal systems. Many of them had a long way to go to become full-fledged democratic systems with stable institutions. The early academic literature on the implementation performance of those CEECs that joined in 2004 indicated that transposition was rather dutiful during the pre-accession period. At the same time, scholars expected that 'the absence of these incentives should significantly slow down or even halt the implementation process' (Schimmelfennig and Sedelmeier 2005a, 226; see also Schimmelfennig, Engert and Heiko 2005, 29; 2005b, 28; Linden 2002, 371). Prospects appeared to be even worse: pre-accession studies on Europeanization in the CEECs highlighted failures during the phases that follow after the transposition of EU directives into domestic law. This suggests a need for post-enlargement studies on the practical effects of EU law.

The accession of Bulgaria and Romania, two countries with even graver problems in the field of court systems and the rule of law, yet again increased the exigency of compliance with EU rules. Despite vast preparatory work in the candidate countries, the European Commission had to express great concerns in its 2006 monitoring reports on Bulgaria and Romania: 'Bulgaria needs to demonstrate clear evidence of results in the fight against corruption, in terms of investigations and judicial proceedings. It also needs to further reform the judiciary' (European Commission 2006h, 1). The Commission also pressed for more efficient and systematic implementation of laws fighting fraud and corruption. Romania, too, was said to need to 'demonstrate further results in the fight against corruption. It also needs to consolidate the implementation of the ongoing justice reform and further enhance the transparency, efficiency and impartiality of the judiciary' (ibid., 3). Alarming assessments of similar nature may be found in the Commission's progress reports on Croatia and Macedonia – the two candidate countries that currently appear to be furthest advanced in their rapprochement with the EU (European Commission 2006c, 7–8; 2006f, 7–11).

Problems with the domestic fulfilment of EU legislation will thus remain a hot topic in the years to come.

To sum up, we aim to close a gap in existing literature by studying compliance in CEECs not only during the pre-membership phase but also following accession. Additionally, we look at the whole process of EU legislation implementation, hence including the difficult aspects of application and enforcement of laws. This is a demanding task (see below on our methods), but it is crucial to go beyond the analysis of available data on transposition rates or infringement proceedings, which prior research has all too often used as – rather poor – indicators for compliance. In the end, we believe, the analysis of different types of implementation problems and the identification of their causes can improve the situation in the new member states (in particular in Slovenia, Hungary, Slovakia and the Czech Republic) and avoid similar problems in forthcoming EU enlargements.

Policy Focus: Labour Law and Equality

For our complex study of practical implementation processes and adaptation results, it is indispensable to select a number of cases for in-depth qualitative analysis. Our *specific focus will be the implementation of EU social policy*, a policy area whose fate is of essential interest for the viability of the welfare state in Europe (for an overview of the EU's social dimension, see, for example, Leibfried and Pierson 1995; Shaw 2000; Falkner 2003). Eastern enlargement has revived debates about 'social dumping' within the Internal Market. Many of the new member states have low corporate tax rates, low wage levels, low non-wage labour costs due to low levels of welfare-state development, and relatively flexible labour markets with little employment regulation. With their accession to the European Union, other countries, where companies have to cope with higher production costs, are potentially exposed to competitive pressures leading them to lower their tax rates and social standards in order to remain attractive for investors. One of the remedies for this 'regime competition' is the creation of common social standards at EU level.¹ Properly implemented, these provisions could counter social dumping tendencies, and they could significantly improve the living and working conditions of many citizens in the accession countries.

It is to be expected that the EU's social policy directives should actually have a *substantial impact* in the new member states. A survey on the working conditions in the ten acceding countries plus Bulgaria and Romania, carried out by the European Foundation for the Improvement of Living and Working Conditions between 2000 and 2002, revealed that weekly working hours are on average much longer than in the EU15, with an average working week of 44.4 hours compared

1 We thus restrict our analysis to the realm of compulsory social legislation. Whether and to what extent the soft coordination techniques of the Open Method of Coordination (OMC) impact on the new member states is hence up to further research. For an overview of previous analyses on the OMC, see, for example, de la Porte and Pochet (2002); Zeitlin and Pochet (2005).

to 38.2 hours in the latter (Paoli and Parent-Thirion 2003, 45). Moreover, the share of workers who work very long hours is much higher than in the EU15; 38 per cent of the workers in the 12 acceding and candidate countries regularly work between 45 and 80 hours per week, whereas only 20 per cent of all workers do so in the EU15 (Paoli and Parent-Thirion 2003, 49). In addition, night and shift work are fairly widespread in the new member countries (Paoli and Parent-Thirion 2003, 52–7). This indicates that the implementation of the Working Time Directive, but probably also the other directives to be studied, will indeed make a noticeable difference there.

In addition to the Working Time Directive, a highly contested piece of EU social legislation (the Council of Ministers seemed unable to agree on its redrafting in 2006), we also study EU rules in the fields of equal treatment prohibiting discrimination between men and women, and a set of provisions fighting discrimination against individuals based on religion or belief, disability, age or sexual orientation. This is an important issue for the EU far beyond 2007, the European Year of Equal Opportunities for All. It should be added that there is, so far, hardly any reliable information at all on the fate of EU law in the fields of non-discrimination and labour law in the new member states.

Covering this *wide array of sub-fields within EU social policy*, we will be in a situation to draw some generalizations from our findings for the policy field as a whole. The conclusions will discuss in how far the results can be generalized across EU policies, at large. This choice of directives also allows us to link up to an existing qualitative study on compliance with EU standards. It should be mentioned that few analyses of this kind exist to date, as opposed to many recent studies of a quantitative character, based on official statistics and databases on transposition of EU directives. In any case, we can build on a study that has been praised as ‘arguably the best available information on compliance’ (Thomson 2007, abstract; von Falkner, Treib, Hartlapp and Leiber 2005) for the EU15. It included six labour law directives, most importantly also the Working Time Directive. What matters here is that choosing again cases from the social realm in its widest sense, and particularly also the working time issue, allows us to compare our new case studies from Central and Eastern Europe to the prior ones from the EU15. This was one of our concerns when choosing the policies and directives, in addition to the considerations of general policy interest and economic importance outlined above.

Our country selection includes *Slovenia, Hungary, Slovakia and the Czech Republic*. While it was not feasible to include all new EU members that joined the EU in 2004, these cases comprise one of the socio-economically least developed member states among the new entrants (Slovakia) as well as one that is comparatively advanced in economic terms (Slovenia). This assortment of empirical studies allows us to test whether the degree of economic development and, by implication, the expected adaptation costs for these countries, have an impact on the quality of implementation, as parts of the recent literature on the implementation of EU law suggest. Since qualitative research and, in particular, our approach aimed at evaluating implementation in its full sense demands a lot of travelling for interviews, contacts with practitioners and field research in the

widest sense, it should be mentioned here that we also had to take into account the practicalities and budgetary capacities of our project.

This and considerations of the timing of membership explain why we could not include countries such as Bulgaria and Romania in our study. Part of our team is considering a follow-up project in these regions for the future.

Methods and Transdisciplinary Approach

Studying the domestic implementation of EU policies in an encompassing manner requires the accumulation of in-depth knowledge: firstly, about the conformity of national law with EU demands; secondly, about the effectiveness of domestic systems of law enforcement; and thirdly, about the quality of application of the law in practice. Therefore, complex and intricate empirical case studies were indispensable.

Our analysis proceeded in the following steps (for each country and directive studied, in turn):

- 1) *Semi-structured interviews* with the Ministry officials responsible, with experts from trade unions, employer's organizations and NGOs, and, at times, also with politicians in the member state on the reform requirements created by the directives and the state of implementation (including collection of domestic transposition laws and statistics).²
- 2) Analysis of the domestic *transposition law(s)*, statistics, and secondary literature (where available).
- 3) *Focus group sessions* involving representatives from a wide range of civil society representatives with in-depth knowledge about the cases studied. Such groups were held in each of the four countries. In order to foster conditions conducive to an atmosphere of trust and open discussion of potentially sensitive information, members were selected according to similarity of interests. In each country studied, three different focus groups engaged in a discussion, divided mainly according to the separation of interests between employers and employees but also other potential conflict lines where useful. Each focus group brought together between four and twelve local experts plus members of our research team for three to four hours. The themes discussed in the focus group sessions included the question of whether the participants considered the transposition laws satisfactory in light of the EU directive's goals and of their own ambitions and, most importantly, whether there were problems in the application and enforcement of the transposition law in practice, and why.

2 Since we guaranteed our interview partners anonymity, we refer to information garnered from our interviews with codes, which include a country abbreviation and a consecutive number. For example, the first interview conducted in the Czech Republic has the code Interview CZ1. Similarly, the focus groups held in the four countries have a code (e.g. Focus Group CZ1).

Focus group discussions allow for the gathering of high quality information that is indeed very reliable evidence compared to other sources. It is not just individual knowledge and related opinions that become evident in these facilitated sessions. Interaction within the group based on the input statements and questions also reveals shared experiences and potentially conflicting views, as much as joint understandings of everyday life and relevant background information that would be almost impossible to disclose in other ways (see the path-breaking article by Merton and Kendall 1946; see also Powell and Single 1996; Morgan 1997). We chose this method to gather information particularly about the state of affairs with regard to application and enforcement. At the same time, the group discussions also allowed the participants to learn more about the legal rights and opportunities offered to them and their clientele by EU law so that they could use this information to improve their situation. Hence, the flow of information in focus groups is two-way, and both the participants and the researchers can benefit.

- 4) *Strategy workshop*: a crucial event during our project was the final transnational workshop aimed at developing concepts for improving social rights in practice. Interest groups from the countries studied and Austria, representing those negatively affected by non-implementation (unions, works councils, feminist groups, etc.), and researchers discussed remedies for implementation gaps. The best target points for relevant lobbying were shared between countries; and strategies involving the European Commission and other – multi-lateral – actors, including NGOs, were discussed.

This workshop, which involved between four and five participants from each of the four countries, lasted for one day and was divided into three specialized working groups (on our three main issue areas) for a couple of hours.

The transnational character of this workshop allowed the participants to share insights and information with one another directly, across all countries studied in this project, and to jointly formulate strategies fighting potential discrimination and non-respect of social standards.

It should be mentioned here that this book targets a specific interface between disciplines – political science, law – and between theoretically informed research and practitioner knowledge. Our research questions underline that a large number of pressing social problems cannot be tackled by individual academic disciplines separately. Rather, a joining of forces and instruments in *transdisciplinary* research is of vital importance. Moreover, our object of study, implementation processes, especially the stages of application and enforcement, requires intense interaction between researchers and practitioners.

Clearly, the evaluation of implementation (or non-implementation) of EU law in the member states requires *legal expertise*. Hence, the first step involved the comparison of the standards set out by each directive with the provisions in each of the countries. However, the written word of legal texts transposing EU directives into national laws is but one facet of the wider process of ‘implementation’. This process also includes the – potential shortcomings of – information on the part of

those concerned; actions by public authorities needed to ensure proper application and enforcement; pre-existing and parallel national laws and routines that may not fit sufficiently well to allow for smooth adaptation; social and political conditions in particular areas or sectors that may depart from those expected in the context of law creation. All of these aspects, and others, can crucially impinge on the practical implementation of EU law.

Here, *political scientists* can add a number of decisive aspects to the traditional repertoire of lawyers. In addition to the aspects already mentioned above, explaining why a norm is applied in practice – or not – has been of great interest in this academic discipline. Attention to political structures in any country – such as federalism, parties or interest groups – is also one of its strengths. Another is moving beyond the study of formal rules and including in systematic studies the existence of unwritten joint understandings or social norms that may counteract positive law. Hence, co-operation of legal and political science scholars is the most promising approach if we want to find out how EU law is put into practice.

Among the different forms of disciplinarity as formulated by Sum and Jessop (2003), our approach is part of the area of transdisciplinarity. We support a far-reaching concept, namely addressee-oriented research with the aim of improving the action competencies of those individuals (and, more directly, their representatives) who in theory have been granted certain rights that may not always be respected in practice. In fact, scholarly analyses on implementation issues require the knowledge of practitioners and norm addressees if more than a legalistic comparison of legal texts is at stake. At the same time, however, citizens and their representatives in NGOs need detailed information about their rights in order to make full use of their potential. In transdisciplinary research, scientific knowledge should be ‘contextualized so that it becomes part of the actors’ problem resolution competencies and can be applied in their conflicts of interest and value’ (Küffer 2001).

EU Implementation Research: State of the Art and Research Desiderata

As has already been outlined above, the implementation of policies enacted at the EU level is a particularly challenging task. The EU is marked by a highly decentralized implementation structure that leaves responsibility for policy execution to the member states. Like in some federal polities, the lower level of governance is in charge of administrative enforcement. If we focus on the implementation of EU directives, one of the major legal instruments of the EU, it also becomes apparent that even parts of the decision-making process are delegated to the domestic level. The standards laid down in directives have to be incorporated into national law by member states within a certain period of time. Only after this process of transposition is completed may the rules be applied by societal target groups and enforced by administrations and the legal system at the domestic level (see Figure 1.1).

Given the heterogeneity of interests among the actors involved in EU decision-making and the high consensus requirements, EU policies often contain fuzzy

concepts and leave certain issues to the discretion of member states in order to facilitate agreement. What applies to implementation in general is thus particularly true for the domestic execution of EU policies: Crucial decisions that may be decisive for the success or failure of a given policy are regularly taken at the implementation stage.

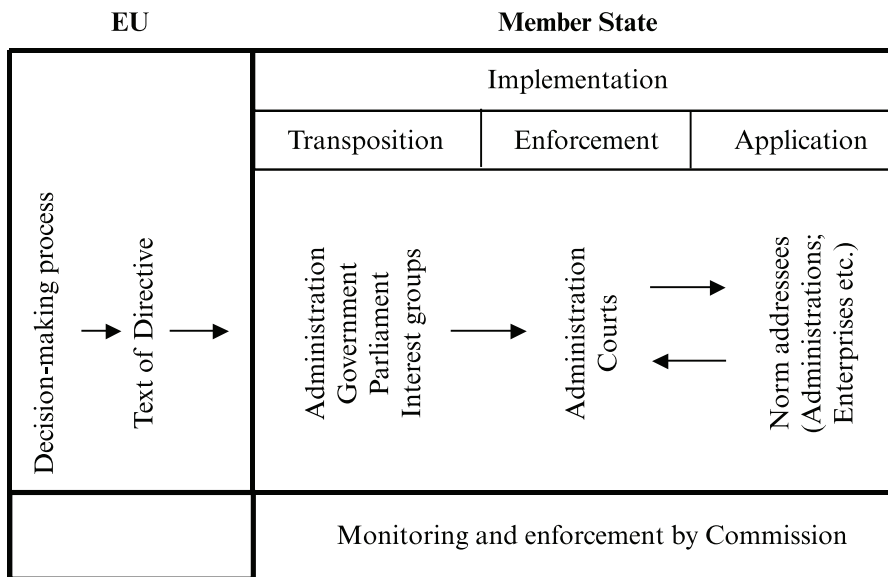


Figure 1.1 Stages and actors of the implementation process

It was not until the mid 1980s that EU scholars discovered compliance as an interesting issue, but since then the field has developed into one of the growth industries within EU research. The development of this area of research proceeded in three phases.

*The Evolution of the Field: From Bureaucratic Problem-solving to the Worlds of Compliance*³

The Single Market Programme acted as a stepping-stone to the *first phase of EU-related implementation research*. The programme involved a raft of legislative measures whose even implementation was seen as a precondition for the completion and smooth functioning of a Europe-wide market until 1992. In theoretical terms, the main inspiration came from domestic implementation studies, most importantly from the top-down school (Pressman and Wildavsky 1973; Van Meter and Van Horn 1975; Mazmanian and Sabatier 1983). Studies in the first phase thus portrayed the domestic implementation of European law as

3 For a more extended analysis, see Treib (2006).

a rather apolitical process whose success primarily depended on clearly worded provisions, effective administrative organization, and streamlined legislative procedures at the domestic level. At the same time, they also absorbed some of the insights of the bottom-up camp (Lipsky 1980; Hjern and Porter 1981; Elmore 1982), stressing the need for involving all relevant domestic actors (such as parliaments, important interest groups, or subnational entities) in the preparation of the countries' European negotiating position and for coordinating the negotiation and implementation tasks within domestic administrations, ideally by attaching responsibility for both phases of the policy cycle to one person (Ciavarini Azzi 1985; Krislov, Ehlermann and Weiler 1986; Siedentopf and Ziller 1988; Schwarze, Govaere, Helin and Bossche 1990; Schwarze, Becker and Pollack 1993; From and Stava 1993).

In the late 1990s, a *second phase* of research set off to analyse the 'Europeanization' of domestic political systems (Börzel 1999; Börzel and Risse 2000; Cowles, Caporaso and Risse 2001; Goetz and Hix 2001; Schmidt 2002a; 2002b; Featherstone and Radaelli 2003). In this context, scholars also returned to the narrower question of the domestic impact of European policies, as witnessed by the national implementation of European policy measures. Focusing mainly on environmental policy, many of the second-wave scholars pointed to the degree of fit or misfit between European rules and existing institutional and regulatory traditions as one of the central factors determining implementation performance (Duina 1997; 1999; Duina and Blithe 1999; Knill and Lenschow 1998; 2000a; Börzel 2000; 2003a). The emphasis thus moved from administrative and procedural efficiency to the degree of compatibility between EU policies and domestic structures.

The basic rationale behind the misfit argument was to reduce the complexity of analysing implementation processes by exploring how far the 'institutional filter' (Knill and Lenschow 1998, 610) provided by the compatibility between EU demands and domestic policy traditions *alone* could explain the implementation of particular pieces of EU legislation (Knill and Lenschow 1998, 610–11; 2001, 121–4). The main problem with this approach was that only few cases could actually be explained by an exclusive focus on the 'goodness of fit' (see the results of Knill and Lenschow 1998). Later studies confirmed its limited explanatory power (see, for instance, Haverland 2000; Héritier et al. 2001; Falkner, Treib, Hartlapp and Leiber 2005). In the end, therefore, it turned out that most cases required 'a lower level of abstraction, namely the independent analysis of the given interest constellations and the strategic interaction of domestic actors' (Knill and Lenschow 2001, 126).

Among the most important additional factors offered to explain successful implementation even in the face of high adaptation costs was the pressure of supportive interest groups, probably combined with outside pressure from the Commission (Börzel 2000; 2003a). This model assumed an unwilling state machinery that needed to be forced into compliance by societal or EU-level actors. An alternative view started from the implicit assumption that high degrees of misfit would spur resistance not primarily by governmental or administrative actors, but by negatively affected societal groups. Whether or not governments

and administrations would be able to push through the required reforms thus it was seen to depend on institutional decision-making structures marked by low numbers of veto players or, alternatively, a consensual decision-making culture that facilitated compromises (Risse, Cowles and Caporaso 2001; Héri-tier 2001; Héri-tier and Knill 2001). These approaches still subscribed to the basic idea that the degree of misfit was an important determinant of implementation outcomes. In contrast, Haverland (2000) deemed the institutional reform capacities of domestic political systems to be even more important, arguing that the number of veto players in domestic political arenas *alone* could explain implementation outcomes *irrespective* of the ‘goodness of fit’.

A growing uneasiness with the relatively narrow theoretical and empirical focus of earlier research gave rise to the *third phase* of EU implementation research. It is marked by a plurality of theoretical and methodological approaches. What ties the different contributions together is a desire to broaden the theoretical and empirical perspective in order to get a fuller picture of the conditions that drive domestic implementation processes. A first new development was that especially qualitative researchers began to discover the importance of domestic politics in determining the speed and correctness of legal adaptation to European directives. Along these lines, Treib (2003; 2004) showed that party political preferences of governments may have a decisive impact on transposition outcomes. In particular, he showed that party political preferences of governments may well override the ‘misfit logic’ according to which domestic governments should always try to defend their existing policy traditions. Similarly, Mastenbroek and van Keulen (2006, 38) argued that favourable government preferences ‘may work wonders in overcoming misfit’.

The second remarkable development in the third wave was the growing popularity of quantitative studies. Thus, more and more scholars have come to use the easily available data on the Commission’s infringement proceedings against member states to measure the amount of non-compliance with EU law (Mbaye 2001; Börzel 2001; 2003b; Börzel, Hofmann and Sprungk 2004; Tallberg 2002; Sverdrup 2004; Beach 2005). A second type of quantitative studies based their analyses on the transposition measures that member states officially notify the Commission of. One strand of this literature used transposition rates (Lampinen and Uusikylä 1998), sometimes also in combination with infringement data (Giuliani 2003). These rates, which represent the share of transposed directives against all applicable directives at a certain period of time, are regularly reported in the Commission’s annual monitoring reports on the application of Community law. Another group of scholars used the transposition instruments reported in the Celex database (Borghetto, Franchino and Giannetti 2006), in domestic legal databases (Mastenbroek 2003), or in a combination of both (Berglund, Gange and van Waarden 2006), to determine when a particular directive was incorporated into national law.

In theoretical terms, most of these quantitative contributions are informed by compliance approaches developed in the international relations literature.⁴ These approaches revolve around the dichotomy between voluntary and involuntary non-compliance. Scholars stressing problems of voluntary non-compliance argue that the willingness of states to comply with international commitments depends on the domestic costs and benefits of adaptation and on the costs of defiance. Where the costs outweigh the benefits, states will try to evade these burdens by non-compliance. Therefore, effective monitoring and sanctioning by international supervisory authorities is required to force unwilling states to comply. Therefore, this approach is known as the enforcement approach (see e.g. Downs, Rocke and Barsboom 1996). The management approach, in contrast, considers lacking administrative and financial capabilities at the domestic level or ambiguous norms to be the main sources of non-compliance. International organizations thus need to assist their members, by organising training programmes, by providing financial aid and the like (see e.g. Chayes and Handler Chayes 1993).

The theoretical insights of these statistical studies have hitherto been rather inconclusive. Some support the argument that structural properties of domestic polities, such as the number of veto players, have a significant impact on legal compliance (Lampinen and Uusikylä 1998; Giuliani 2003; Linos 2007), others do not (Mbaye 2001; Börzel, Hofmann and Sprungk 2004; Borghetto, Franchino and Giannetti 2006). Some conclude that support for European integration is an important factor that facilitates compliance (Mbaye 2001 with regard to public opinion; Linos 2007 with regard to government parties), others do not (Lampinen and Uusikylä 1998); while still others find a statistically significant *negative* correlation between these two variables (Börzel, Hofmann and Sprungk 2004). Some find a significant effect of indicators meant to measure the degree of changes required by the policies to be transposed (Borghetto, Franchino and Giannetti 2006; Linos 2007), others argue that misfit is a variable that cannot be operationalized adequately for the use in quantitative studies (Börzel, Hofmann and Sprungk 2004), and so on. The only factor that seems to be sustained in most quantitative analyses so far is various aspects of administrative capabilities (Mbaye 2001; Börzel, Hofmann and Sprungk 2004; Berglund, Gange and van Waarden 2006; Borghetto, Franchino and Giannetti 2006; Linos 2007).

This presents us with an interesting paradox: While qualitative studies in the third wave of research have increasingly come to embrace the political character of transposition, the results of quantitative research seem to point back to the arguments of the founders of EU implementation research, who had highlighted the importance of efficient and well-coordinated administrations.

As a first step towards solving this puzzle, Bernard Steunenberg has recently begun to develop an interesting formal model of the transposition process, which encompasses both a politicized and a more bureaucratic mode. He conceptualizes the process of incorporating a directive as a strategic game among several domestic players with distinct policy preferences (Steunenberg 2006; see also Dimitrova

4 It has to be noted, however, that there are also important qualitative studies that use this kind of framework (for example, see Zürn and Joerges 2004).

and Steunenberg 2000). Crucial factors in this game are the type of instrument that needs to be adopted to transpose a directive and the preferences of the actors whose agreement is required for the adoption of this instrument. The type of legal instrument (legislation, decree, etc.) decides on whether the actor constellation comprises the broad set of ministries, political parties and interest groups usually involved in enacting a piece of legislation ('horizontal coordination') or whether the process is determined by a smaller set of actors, or even by a single ministry, as is sometimes the case if a ministerial decree is sufficient to transpose a directive ('hierarchical coordination').

This model goes a long way towards a realistic conceptualization of the variegated political constellations to be found in individual cases of transposition. However, it does not allow for theoretical expectations as to how typical processes of transposition in a given country and in a given policy sector might look like. Are there country- or sector-specific patterns of the typical transposition instruments used? Does this result in typical patterns of rather politicized or rather bureaucratic transposition processes? And does a multi-actor constellation necessarily have to imply more problems than a single-actor constellation, or is it also possible that serious delays occur even if only one ministry is in charge of transposition?

An earlier study on the implementation of six EU social policy directives in the fifteen 'old' member states, which involved two of the authors of this book, offered an answer to these questions. The results of this inquiry demonstrated that simple causal arguments, such as the misfit or veto player hypotheses, or the first-wave focus on administrative and procedural factors, cannot explain the observed implementation processes. Instead, it is a complex web of administrative, institutional and actor-based factors that determines transposition outcomes (Falkner, Hartlapp, Leiber and Treib 2002; 2004; Falkner, Treib, Hartlapp and Leiber 2005, 277–316). Up to this point, the argument is not very different from Steunenberg's model or from the heterogeneous results of quantitative studies.

However, the empirical results of this comparative research suggested that there are huge inter-country disparities, but strong similarities among members of different groups of countries in the way they typically fulfil their EU-related duties.⁵ This resulted in a typology of three 'worlds of compliance'. The three country clusters are characterized by ideal-typical procedural implementation styles. In the world of law observance, which comprises primarily of the Nordic countries, the presence of a culture of respect for the rule of law among political and administrative actors usually ensures fast and correct transposition (Falkner, Treib, Hartlapp and Leiber 2005, 317–41; see also Leiber 2005). In the world of transposition neglect,⁶ the typical reaction to a EU-derived implementation duty is

5 This contrasts sharply with the findings of Dimitrakopoulos (2001), who identifies one single 'European style of transposition' across all the member states.

6 Originally, this country cluster was labelled the 'world of neglect'. Building on the empirical research presented in this book, we now suggest to slightly reformulate the label of this world in order to account for its crucial characteristic: neglect at the transposition stage. See Chapter 6 for a detailed discussion of the implications of our new empirical insights on Central and Eastern Europe for the worlds of compliance typology.

inactivity as the bureaucracies fail to initiate adequate responses. Characteristic are long phases of bureaucratic inertia and rather apolitical transposition processes. Greece, France or Portugal conform with this pattern (Falkner, Treib, Hartlapp and Leiber 2005, 317–41; see also Hartlapp 2005a). In the world of domestic politics, finally, administrations usually work dutifully, but successful transposition of EU law is typically a matter of conflict and compromise, and depends on the fit with the political preferences of government parties and other powerful players in the domestic arena. This is the largest cluster, involving countries like Austria, Germany, the Netherlands or the UK (Falkner, Treib, Hartlapp and Leiber 2005, 317–41; see also Treib 2003; 2004).

This typology contends that the controversial political interactions between political parties, powerful interest groups and other important political actors, which were described by scholars like Treib, or by Steunenberg's mode of 'horizontal coordination', are only typical for a certain group of countries. In other member states, transposition is usually a rather apolitical, bureaucratic process, as in Steunenberg's mode of 'hierarchical coordination' or as suggested by some of the quantitative findings. And in a third group of countries, the actor constellation may be similar to Steunenberg's multi-actor coordination, but it does not give rise to deadlocks and delays since all of these actors are culturally inclined to complying with the law no matter what the short-term disadvantages may be. This also suggests that many of the existing theoretical propositions are only 'sometimes-true theories' (Falkner, Hartlapp and Treib 2007), which are relevant in certain countries, but not in others. Political variables such as party political preferences, interest group pressure and veto players should have a major impact in the countries belonging to the world of domestic politics. Administrative factors should be particularly important in the member states forming the world of transposition neglect. And collectively shared cultural dispositions towards respecting the law should be able to explain the raft of transposition processes in the countries belonging to the world of law observance.

It remains to be established empirically whether and to what extent these country patterns can be confirmed beyond the specific areas studied by Falkner, Treib, Hartlapp and Leiber (2005). In particular, it will be interesting to find out how the new member states from Central and Eastern Europe will fit into this typology. The case studies presented in this book will shed light on this question.

Enforcement and Application: A Neglected Area of Research

Many of the previous studies have focused heavily on the process of incorporating EU provisions into domestic legislation. This is not to say that the stage of enforcement and application has been totally neglected. Yet, the specific logic of transforming the transposed EU provisions into practical policy has seldom been at the heart of EU implementation research. Moreover, especially recent quantitative research has ignored almost completely the practical side of implementation.

In the first phase of research, those who actually addressed issues of enforcement and application did not draw a sharp distinction between legal incorporation and the later stages of the implementation process. Instead, the main explanatory variables for all stages were clearly stated policy objectives and the availability of a well-organized state apparatus. With regard to enforcement and application, the main conclusion was that 'Community law, once it has been incorporated, is applied neither better nor worse than national law' (Ciavarini Azzi 1988, 199) because lower-level bureaucrats and target actors are often unaware of the European origins of a particular transposition law.

Contributions in the second phase of EU implementation research, to the extent that they analysed not only legal but also practical implementation (see, for example, Knill and Lenschow 1998; 2000b; Duina 1999; Börzel 2003a), did not systematically distinguish between factors that influence transposition and causal conditions that have an impact on enforcement and application, either. Typically, these contributions tended to treat the whole process of implementation as if it were following a single theoretical logic in which the 'goodness of fit' often played a crucial role. Therefore, little could be learned from this literature about the *specific* problems associated with transposition, enforcement and application, respectively.

Compared to earlier research, studies covering enforcement and application are a small minority in the third wave of research. One reason for this seems to be methodological: As more and more scholars have turned to quantitative approaches, enforcement and application issues have taken a back seat since there are simply no appropriate quantitative data for analysing the 'street-level' aspects of implementation.

Among the few exceptions is a study by Versluis (2003; 2004), whose explicit focus is on the enforcement of two directives from the field of chemical safety in four countries. She discovers major enforcement problems in some of her cases and argues that issue salience is crucial in determining whether domestic inspectors take a particular directive seriously or whether they ignore it (Versluis 2004). Also, the study of Falkner, Treib, Hartlapp and Leiber (2005; see also Hartlapp 2005a; 2005b) included not only transposition but also enforcement and application. Informed primarily by the insights of the top-down school in domestic implementation research, these studies present a set of institutional conditions that determine the effectiveness of domestic enforcement systems ('coordination and steering capacity', 'pressure capacity' and 'availability of information'), and they distinguish between different types of enforcement for different types of norms (Falkner, Treib, Hartlapp and Leiber 2005, 33–40). Applied to the fifteen member states included in their study, they find that the shortcomings of the domestic systems of enforcing labour law in four countries (Greece, Ireland, Italy and Portugal) 'are so significant in overall terms that we regard these countries as neglecting their duty to ensure not only legal transposition, but also a reasonable level of practical compliance' (Falkner, Treib, Hartlapp and Leiber 2005, 275).

One of the main goals of this book is to counterbalance the recent trend in EU implementation research towards neglecting what used to interest domestic implementation scholars from the early 1970s onwards: the process of 'translating

policy into action' (Barrett 2004). We will thus study, in a detailed manner, the processes and problems of transforming EU legislation not only into domestic law but also into everyday practice on the ground. How will the new member states from Central and Eastern Europe perform in this respect? Did Eastern enlargement increase the group of countries with insufficient enforcement systems, and if so, what should be done about this?

Background and Contents of the EU Directives on Working Time and Equal Treatment

The empirical focus of this book is the implementation of three of the most significant pieces of EU legislation in the field of social policy and employment rights: the Working Time Directive, the Employment Equality Directive and the Equal Treatment Directive on discrimination between women and men in employment. These three directives cover a wide array of sub-fields within EU social policy. It should thus be possible to draw some generalizations from our findings for the policy field as a whole (see Table 1.1 for a summary of the three directives).

Table 1.1 The three sample directives

	Date of adoption	Transposition deadlines for CEECs	Main goals
Employment Equality Directive (2000/78/EC)	27.11.2000	01.05.2004 02.12.2006 (age and disability)	To prohibit discrimination based on religion or belief, disability, age or sexual orientation as regards access to employment, vocational training and promotion, and working conditions
Amended Equal Treatment Directive (2002/73/EC)	09.02.1976 (original v.) 23.09.2002 (cons. v.)	01.05.2004 (original v.) 05.10.2005 (cons. v.)	To prohibit direct or indirect gender discrimination as regards access to employment, vocational training and promotion, and working conditions
Amended Working Time Directive (2003/77/EC)	23.11.1993 (original v.) 04.11.2003 (cons. v.)	01.05.2004 (original v.) 02.08.2004 (cons. v.)	To improve the health and safety of workers by laying down maximum working time limits and minimum rest periods as well as annual leave entitlements

The three directives furthermore involve different types of law enforcement. The two equal treatment directives function primarily on the basis of individual enforcement: individuals who feel that their rights under the directives are violated are expected to take legal action. To this end, the court system must work in a reasonably effective way, individuals should have easy access to courts and they

should have adequate information about their rights. In the field of working time, by contrast, administrative enforcement by labour inspectorates plays a more decisive role. These must be equipped with sufficient resources, must be well-organized and must have effective sanctions at their disposal to punish non-compliers.

The following sections will introduce the regulatory contents of these three directives.

Working Time

The Working Time Directive was originally adopted in 1993.⁷ It was amended in 1999, 2000 and 2002 in order to cover the sectors and occupations that had been excluded in the 1993 directive.⁸ Subsequently, it was re-introduced in a consolidated form in 2003.⁹ The directive is certainly among the most controversial legislative projects within EU social policy. At the time of writing, a revision of the directives is in process at the European level. The negotiations have proven to be so controversial that the updated directive repeatedly failed to be adopted by the Council of Ministers (see below for more details).

The *general aim* of the directive is to improve the health and safety of workers by laying down minimum standards for the organization of working time (Article 1 of the 2003 consolidated version). To this end, it lays down maximum limits of daily and weekly working hours and defines minimum daily and weekly rest periods. The directive also regulates the protection of night workers and guarantees employees a minimum period of paid annual leave.

The Working Time Directive is thus based on a very wide interpretation of occupational health and safety, which assumes that working long hours is harmful to workers' health and therefore has to be limited. This framing gets to the core of the controversies surrounding the adoption of this directive. It was introduced in the pre-Maastricht era, when the only area in EU social policy where majority votes were achieved was the field of health and safety. In order to facilitate agreement among member state governments, the Commission thus strategically used its agenda-setting power and tabled the directive as a health and safety measure. This 'treaty-base game' (Rhodes 1995, 99) was criticized especially by the Conservative British government, which refuted this proposal not only because it confronted the UK with major reform requirements entailing considerable economic costs, but also on ideological grounds. After the adoption of the directive, the UK government even initiated action before the European

7 Council directive 93/104/EC, 1993 O.J. (L 307) 18.

8 Council directives 1999/63/EC, 1999 O.J. (L 167) 33; 1999/95/EC, 1999 O.J. (L 014), 29; 2000/34/EC, 2000 O.J. (L 195), 41; 2000/79/EC, 2000 O.J. (L 302), 57; 2002/15/EC, 2002 O.J. (L 080), 35.

9 Council directive 2003/88/EC, 2003 O.J. (L 299), 9.

Court of Justice, seeking to annul the directive on the grounds of its allegedly wrong legal basis. The Court, however, rejected all major claims of the UK.¹⁰

Underlying the debate on the directive was an even more fundamental controversy between the principles of worker protection on the one hand and flexibility for employers on the other. Not only the UK government had problems with the relatively rigid approach of the first draft directive. In many countries, working time debates at the time pointed towards increasing flexibility in order to allow for diverse work patterns, e.g. in the context of shift work or seasonal employment. Therefore, many governments sought the directive to allow for more flexibility instead of rigidly protecting the safety and health of workers.

Main standards and exemptions As a result, the directive that was finally adopted in 1993 included a raft of individual exemptions and derogations. While the sectors and activities originally excluded from the scope of the directive, especially seafarers, transport workers, and doctors in training, were later covered by several amending directives (see above), these amendments even increased the range and diversity of the derogation options meant to account for the needs of individual sectors. In the end, therefore, the Working Time Directive certainly belongs to the most complex, some would even say arcane, pieces of legislation of EU social policy. The most important provisions are as follows:

As a general rule, workers may not work longer than 48 hours per week, including overtime (Article 6 of the 2003 consolidated version of the directive). However, the maximum weekly working time may be averaged out over a period of four, six or 12 months, depending on the type of occupation and, in the case of annual reference periods, on an agreement between both sides of the industry. Every worker has to be granted a consecutive daily rest period of 11 hours (Article 3), a consecutive weekly rest period of 35 hours (Article 5) and a break if the working day is longer than six hours (Article 4). However, these provisions may also be adapted to the needs of individual branches or activities. Night workers on average may not work more than eight hours per day. However, an absolute daily working time limit of eight hours applies to hazardous night work (Article 8). Again, derogations from night work limitations are available for specific branches. Furthermore, employers have to keep records on the regular use of night workers so that these may be monitored by labour inspector(ate)s (Article 11). Night workers are entitled to free health assessments (Article 9), and night workers suffering from health problems have to be transferred 'whenever possible' to suitable day work (Article 9). Finally, employees are entitled to at least four weeks paid annual leave, which may not be replaced by an allowance (Article 7).

Two general derogations have to be highlighted, as they represent core compromise solutions found in the course of the controversial negotiations. First, most of the basic provisions of the directive may be adjusted on the basis of an agreement between both sides of the industry. The question of the level at which

10 Judgement of the Court of 12 November 1996, Case C-84/94, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*.

these agreements may be concluded was a highly contested issue touching upon crucial features of domestic systems of industrial relations. Most trade unions and a number of governments pressed for centralized agreements involving trade union and employers' representatives. Employers' organizations and several governments, in contrast, wanted the directive to support the decentralization of collective bargaining by allowing for agreements at company level. In prolongation of its anti-union strategy, the Conservative UK government even insisted on workforce agreements that did not require union participation. In the end, the UK got its way: the directive allows for a wide array of adjustments of the basic provisions on the basis of an agreement between the management of an individual company and its workforce, without trade union involvement (Article 18).

Even more far-reaching is the individual opt-out from the 48-hour week (Article 22). In order to mitigate the expected costs arising from the directive, the UK government secured this opt-out possibility, which allows employees to work longer than an average of 48 hours per week if they voluntarily agree to do so.

ECJ case law on on-call duties Finally, we need to highlight the ECJ's case law on on-call duties. In a preliminary ruling originating from a claim of a Spanish trade union of physicians, the ECJ decided that, contrary to practice in most European countries, on-call duties have to be treated as working time.¹¹ As a consequence of this doctrine, which the ECJ subsequently reaffirmed in a German case,¹² many member states had to fundamentally rearrange the shift systems in hospitals, emergency medical services and similar workplaces. Due to the considerable costs of these reforms, a process of revising the directive is currently underway at the European level to change the definition of working time to the effect that on-call duties would no longer be treated as working time. At the time of writing, however, the controversial debates among governments have precluded the revision from being adopted.

In sum, the Working Time Directive is a very complex piece of legislation, which regulates issues that are politically and ideologically highly salient and, in economic terms, may involve significant costs for employers.

Equal Treatment

The two further directives studied in this book form an important part of a broader anti-discrimination policy at the European level. The last decade has witnessed a significant proliferation of – prohibited – grounds of discrimination on different levels of EU law. Article 13 of the EC Treaty enumerates eight such grounds, empowering the Council to take suitable action to combat discrimination based thereon. The Charter of Fundamental Rights of the European Union lists even more grounds of discrimination as illegitimate (sex, race, colour, ethnic or

11 See Judgement of the Court of 3 October 2000, Case C-303/98, *SIMAP v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana*.

12 See Judgement of the Court of 9 September 2003, Case C-151/02, *Landeshauptstadt Kiel v. Norbert Jaeger*.

social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation, nationality; see Article 21 (1, 2)).¹³ The recent Racial Equality Directive,¹⁴ the Employment Equality Directive,¹⁵ and the Equal Treatment Directive fighting discrimination between women and men in employment,¹⁶ which was amended in 2002¹⁷ and re-enacted in a consolidated version in 2006,¹⁸ now provide rather diverse levels of protection for people with the features covered by the respective grounds. In our project, we have focused on the implementation of the Equal Treatment Directive, and of the Employment Equality Directive with respect to *sexual orientation as well as religion and belief*.

Generally the idea of EU anti-discrimination law is to provide a basis for the development of ‘a coherent and integrated approach towards the fight against discrimination’ (European Commission 2004c, 5–6). It is supposed to allow ‘for common legal and policy approaches covering the different grounds, including common definitions of discrimination. While recognizing the specific challenges faced by different groups, this integrated approach is based on the premise that equal treatment and respect for diversity are in the interests of society as a whole’ (ibid.).

The Commission claims to have ‘one of the most advanced legal frameworks to be found anywhere in the world’ and stresses that innovations in national law must be implemented in all member states, requiring changes to national law in some and ‘the introduction of an entirely new, rights-based approach to anti-discrimination legislation and policy’ in others (ibid., 6). This chapter will provide a non-exhaustive overview of the two directives studied in order to lay the basis for an analysis of the extent to which the EU member states have indeed changed their legal systems in the manner envisaged by the Commission.

We will begin by highlighting a few commonalities and differences of the EU’s provisions against discrimination, focusing on their aims, scope, exceptions, the role of positive action and of specialized bodies.

Purpose and concept The purpose of the two directives is to ‘put into effect’ the ‘principle of equality’ (Article 1 Employment Equality Directive), respectively that of ‘equal treatment for men and women’¹⁹ and ‘equality between men and women’ (Article 1 (1)(a) Equal Treatment Directive). Article 2 Equal Treatment Directive rhetorically expands the purpose to mean ‘full equality in practice’, and

13 Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) 1.

14 Council directive 2000/43/EC, 2000 O.J. (L 180) 22.

15 Council directive 2000/78/EC, 2000 O.J. (L 303) 16.

16 Council directive 76/207/EEC, 1976 O.J. (L 39) 40.

17 Council directive 2002/73/EC, 2002 O.J. (L 269) 15.

18 Council directive 2006/54/EC, 2006 O.J. (L 204) 23.

19 The terms ‘man’ and ‘woman’ also include transsexuals in their newly ascribed sexes after sex change surgeries; Judgement of the Court of 30 April 1996, Case C-13/94, *P v. S and Cornwall County Council*.

it further establishes an ambitious goal that distinguishes it from the Employment Equality Directive: According (only) to Article 1a Equal Treatment Directive, ‘member states shall actively take into account the objective of equality between men and women’ in all their political, administrative, and legislative activities within the scope of the Equal Treatment Directive. This can be regarded as an implementation of the principle of mainstreaming, which is also enshrined in Article 2, 3 (2) EC Treaty.

The EU has decided to use one *common definition* of equal treatment and discrimination, direct and indirect, in all directives covering discrimination. This is fortunate and will certainly be conducive to achieving coherence of anti-discrimination law in practice. Uniformly, *direct* discrimination is defined as the treatment of a person that is less favourable than the treatment of another person ‘is, has been or would be’ in a comparable situation. Clearly, the comparator need not ‘exist’; establishment of the probability of ‘his’ or ‘her’ better treatment will be sufficient.²⁰ *Indirect discrimination* is when an apparently neutral provision, criterion, or practice would put persons with one property such as sex, race, ethnicity, etc., at a particular disadvantage compared with other persons, unless that provision, criterion, or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. The directive’s definition of *indirect discrimination* reflects ECJ case law on indirect discrimination on the basis of nationality. Whereas statistical evidence was previously necessary in order to prove a significantly disparate impact of an apparently neutral legal or policy measure when gender was involved, henceforth no proof is necessary ‘that a “considerably smaller percentage” of one sex is affected’ (Masselot 2004, 97). Such unfavourable treatment will not constitute discrimination if it can be justified objectively by a ‘legitimate aim’, if ‘the means of achieving that aim are appropriate and necessary’ (Article 2 (2)b Employment Equality Directive; Article 2 (2) Equal Treatment Directive). When it comes to direct discrimination, however, no objective justification is possible, though tendencies exist to justify even direct discrimination (Ellis 1998, 134–6). Either different treatment is justified, which means it is not discriminatory, or it constitutes direct discrimination, which is prohibited.

As a new legal development, the directives also outlaw *harassment*, an unwanted conduct related to the respective ground of discrimination (Article 2 (3) Employment Equality Directive; Article 2 (3) Equal Treatment Directive). Additionally, the Equal Treatment Directive contains a prohibition on *sexual harassment*, an unwanted conduct of a sexual nature. Sexual harassment is defined as any form of unwanted verbal, non-verbal, or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating, or offensive environment (Article 2 (2) Equal Treatment Directive). *Instructing* anyone to discriminate on

20 Everything will then depend on the construction of the comparator, the person who is, was, or would be treated more favourably. An infamous case in point is the construction of the comparator by the European Court of Justice in its judgement of 17 February 1998, Case C-249/96, *Lisa Grant v. South West Trains Ltd.*

the basis of the prohibited grounds is also considered discrimination (Article 2 (4) Employment Equality Directive).

Article 2 (5) Employment Equality Directive contains a provision that renders it justifiable to qualify what constitutes discrimination on the grounds of religion or belief, disability, age, or sexual orientation in that the ‘directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others’ (Article 2 (5) Employment Equality Directive).

This reservation primarily, though not uniformly, refers to conduct on the basis of religious convictions. An issue such as proscribing the wearing of an Islamic veil at school and in public office will have to be considered in the light of this reservation as well as many other questions concerning the position of religion and belief in a democratic society (for an analysis from a liberal egalitarian perspective, see Barry 2001; for a pronounced multiculturalist standpoint, see Parekh 2000).

Scope and exceptions The Equal Treatment Directive and the Employment Equality Directive are both confined to the sphere of work, generally speaking. This includes all dimensions of access to employment, working conditions, vocational training, and promotion in the private as well as public sectors and in public bodies (Article 1 Employment Equality Directive; Article 3 Equal Treatment Directive).

As an important limitation of its scope, the Employment Equality Directive is without prejudice to the national marriage and family laws of its member states (Recital 22, Preamble of the Employment Equality Directive), some of which make it possible for partners of the same sex to have their relationship legally recognized. The Employment Equality Directive contains one more limitation of scope concerning the armed forces. Member states may stipulate that the provisions concerning age and disability shall not apply to the military. This exception is remarkable for what it does not contain: namely an exception for sexual orientation. In contrast to the United States with its policy of ‘don’t ask, don’t tell, don’t pursue’,²¹ and in contrast to Great Britain’s longstanding reservations,²² homosexual orientation shall be no barrier to membership in the armed forces.

Both directives contain a reservation that justifies different treatment when occupational activities, their nature or the context in which they are carried out, demand a certain sex, sexual orientation, religion, or belief, if ‘such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate’ (Article 4 (1) Employment Equality Directive; Article 2 (6) Equal Treatment Directive).

21 See, e.g., US Department of Defense, Enclosure 2 of Department of Defense Directive 1304.26, available at <http://dont.stanford.edu> (accessed: 11 April 2007).

22 For a thorough examination of the policy and its consequences, see *Smith & Grady v. United Kingdom*, 29 European Court of Human Rights 493 (1999).

This general reservation will have to be interpreted narrowly, as the ECJ has stated repeatedly in cases where the sex of the applicant had been declared a requirement for occupation. However, the possibility of anti-subordination measures for members of disadvantaged groups has to be left open, such as hiring only women for battered-women's shelters.

Significantly, both Equal Treatment Directive and Employment Equality Directive contain a range of other justifications for different treatment. Turning to the Equal Treatment Directive first, it starts out with a general reservation for provisions that aim at the 'protection of women, particularly as regards pregnancy and maternity' (Article 2 (3)). 'Maternity' itself is a term that can be interpreted from very narrowly to rather broadly. The ECJ's case law has time and again opted for the broad version, thereby also strongly privileging maternity over paternity. It was also observed how a shift in language from maternity to motherhood can serve to rhetorically prepare a preference for maternal parenting in the case law of the EJC (Ellis 1998, 242), notably in the case *Hofmann v. Barmer Ersatzkasse*.²³ This has in some cases led to a deterioration of women's situation by giving member states the discretion to provide only for maternal but not for paternal leave. In the 1980s cases²⁴ the ideological framework was laid in a way that invoked a traditionalist 'ideology of motherhood' (McGlynn 2000, 29). Only since the middle of the 1990s have EU member states been required to provide for parental leave as an individual right of both men and women workers for at least three months.²⁵ However, it turned out that, where men can take paternal leave, their inclination to do so is regularly low (European Commission 2003d, 9). The member states' respective provisions usually grant women longer times of leave, an arrangement which ultimately serves the status quo of gendered societies.

The Employment Equality Directive contains an elaborate provision concerning 'occupational activities within churches and other public or private organizations the ethos of which is based on religion or belief' (Article 4 (2) Employment Equality Directive). Here people's religion or belief may constitute an occupational requirement. The exact formulation is of special interest: 'This difference of treatment *shall* be implemented taking account of member states' constitutional provisions and principles, as well as the general principles of Community law, and *should* not justify discrimination on another ground' (emphasis added). It seems that 'should' leaves more room for discrimination on another ground than 'shall' does. The next sentence makes obvious the complexity of the issue that this part of the provision deals with: 'Provided that its provisions are otherwise complied with, this directive shall thus not prejudice the right of churches and other public

23 Judgement of the Court of 12 July 1984, Case C-184/83, *Hofmann v. Barmer Ersatzkasse*.

24 Judgement of the Court of 26 October 1983, Case C-163/82, *Commission v. Italy* and Judgement of the Court of 12 July 1984, Case C-184/83, *Hofmann v. Barmer Ersatzkasse*.

25 Council directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, 1996 O.J. (L 145), *amended by* 1998 O.J. (L 10) 24, clause 2 (1).

or private organizations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organization's ethos' (ibid.).

In the process of negotiating the directive, the intersection of rights to religious freedom and equal treatment on the grounds of sex or sexual orientation formed one of the most contested areas. The compromise enshrined in the delicate formulations found in the directive is 'complex and cumbersome' (Bell 2002, 118). It contains three dimensions. First and foremost, even though sexual orientation may be taken into account, the directive obviously does not permit the overt and direct exclusion of lesbians and gay men from access to employment in religious organizations (ibid., 117). Second, religion and belief may, where national law or practice permit, only be taken into account if and insofar as the ethos of the organization needs to be maintained. Context, especially the vicinity to core doctrines of the respective faith, will play a decisive role here. Finally, and turning to existing employees, it will have to be established with diligence what it means that a religious institution may 'require individuals working for them to act in good faith and with loyalty to the organization's ethos' (Article 4 (2) Employment Equality Directive). For example, can somebody who *is* not only homosexual but also *acts* according to this 'status' behave in good faith and with loyalty to the Catholic Church? Or can he or she be required to keep his or her sexual orientation a secret (ibid., 118)?

While these issues are hardly new, the careful and cautious formulations of the directive add a new dimension to their consideration. Any privileging of religion or belief over other grounds was to be avoided while still giving religious communities their due. It remains to be seen whether and how the interests of churches and other organizations based on belief will be balanced with the interests of those who depart from their ethos in any way but nevertheless want to work in such organizations. Inter-group conflict seems rather logical here and was carried out vigorously during the negotiations for the Employment Equality Directive (ibid., 117).

A highly contested field is that of '*positive action*'. According to the Equal Treatment Directive, member states are allowed to 'maintain or adopt measures within the meaning of Article 141 (4) EC Treaty with a view to ensuring full equality in practice between men and women' (Article 1 (8)). Such measures may provide for 'specific advantages' for the under-represented sex, aimed at making it easier 'to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers' (Article 141 (4) EC Treaty).

The wording of the positive action provisions of the Employment Equality Directive is a bit more guarded and less inclusive. Member states are not required to refrain 'from maintaining or adopting *specific measures* to prevent or compensate for disadvantages' (Article 7 (emphasis added)) that are linked with any of the grounds referred to in the directive. The Employment Equality Directive does not specifically cite the pursuance of a vocational activity, and being guaranteed a 'specific advantage' may in some cases contain more than a package of 'specific measures'. We suspect that the demarcation line will be drawn when it comes to quota regulations. Quotas may, according to established case law

of the ECJ, be implemented in favour of the under-represented sex under certain conditions, among them the provision of a 'saving clause' for equally qualified and socially disadvantaged men.²⁶ It is doubtful that quota regulations would be regarded as legitimate when it comes to the 'other' grounds.²⁷

Procedures, bodies and remedies Turning to the question of implementation and its monitoring, we find one of the most important differences between the directives. Of course, the directives hold that the member states are obliged to make their judicial and/or administrative procedures accessible to 'all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended' (Article 9 (1) Employment Equality Directive; Article 6 (1) Equal Treatment Directive). The directives also commit the member states to ensuring the participation of NGOs in the process of application of anti-discrimination law (Article 9 (2) Employment Equality Directive; Article 6 (3) Equal Treatment Directive).

The directives depart at two points. First, only the Equal Treatment Directive foresees that the member states are obliged to secure 'such measures as are necessary to ensure real and effective compensation or reparation' in relation to the damage suffered (Article 6 (2)). Second, yet again only the Equal Treatment Directive commits the member states to establishing 'a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex' (Article 8a (1)). Their tasks shall be to assist victims of discrimination in their seeking for recognition and redress and to monitor the situation concerning discrimination by conducting surveys and publishing reports with respective recommendations. The Directive specifies that in relation to all these tasks the body has to act *independently*.

Outlook

The EU stresses that the two equality directives, but also the Working Time Directive and many further acts of EU social regulation, provide only minimum requirements. Accordingly, the member states can choose to implement the framework proposed by the EU or go far beyond this in their domestic reforms. In what follows, we are going to establish whether more, or rather less, profound changes to pre-existing policies have indeed taken place in the countries we have studied.

26 The paradigm-setting decision by the ECJ is: Judgement of the Court of 11 November 1997, Case C-409/95, *Hellmut Marschall v. Land Nordrhein-Westfalen*.

27 An indication in favour of this interpretation is the special provision concerning Northern Ireland in Article 15 of the Employment Equality Directive.

Structure of the Book

The following four chapters will report our findings from the Czech Republic, Hungary, Slovakia and Slovenia in the fields of equal treatment and working time. Each of our country chapters begins by presenting some crucial background information on the respective political, legal and socio-economic systems. All of these are of crucial importance as potential explanatory factors that shape the way EU directives are implemented. These passages are also designed to offer an easy-to-grasp overview of recent developments for readers of the book who may be interested more in the region than the details of the policy development. The chapters can thus be used to learn about the four countries on their path from communist systems to EU member states. The chapters then move on to the core subject of the book: the discussion of how our three directives were transposed, enforced and applied in each country. They conclude with a summary of the most promising improvement strategies encountered in each country.

The concluding chapter summarizes the main country findings, offers a theoretical discussion that relates these findings to the previous literature on implementing EU legislation, and suggests strategies for overall improvement of the state of affairs.