Routledge
Taylor & Francis Group

Journal of European Integration

ISSN: 0703-6337 (Print) 1477-2280 (Online) Journal homepage: https://www.tandfonline.com/loi/geui20

You can always get what you want: why religious organizations opposed the employment equality directive

Scott N. Siegel

To cite this article: Scott N. Siegel (2018) You can always get what you want: why religious organizations opposed the employment equality directive, Journal of European Integration, 40:4, 479-494, DOI: 10.1080/07036337.2017.1415895

To link to this article: https://doi.org/10.1080/07036337.2017.1415895

JOURNAL OF EUROPEAN INTEGRATION, 2018
VOL. 40, NO. 4, 479–494
https://doi.org/10.1080/07036337.2017.1415895

Routledge
Taylor & Francis Group

You can always get what you want: why religious organizations opposed the employment equality directive

Scott N. Siegel

Department of International Relations, San Francisco State University, San Francisco, CA, USA

ABSTRACT

The Employment Equality Directive expands protections for, among others, gays and lesbians from discriminatory employment practices. This directive has been implemented poorly in Ireland, the UK, and Germany, because religious organizations believed their core ideological and material interests were threatened by extending these protections, even though degrees of policy fit vary among all three countries. Furthermore, the European Commission's enforcement measures have not been effective in securing compliance. The European Commission has permitted noncompliance to continue in Ireland and the UK. Only change in the partisan make-up of the government led to compliance. This article speaks to ongoing debates about the causes of noncompliance with European Union law and how religious groups, not often considered in the scholarly literature, are now trying to limit the effects of European integration.

KEYWORDS

LGBT rights; EU compliance; European Commission; religion; employment policy

1. Introduction

In 2000, the European Union (EU) took a significant step toward protecting the rights of gays and lesbians by adopting the Employment Equality Directive (EED).[1] It is the first and, so far, only piece of EU legislation protecting citizens from discrimination based on their sexual orientation. The EED was partially in response to growing demand for the EU to address the rising number of hate crimes in Europe and the growing popularity of extreme rightwing populist political parties that target minorities, including gays and lesbians. Member states and the European Commission (EC) also believed they needed to demonstrate the EU was neither irrelevant nor unable to respond to these concerns.

Although there was general consensus that EU legislation was necessary, the EED's initial implementation was flawed in several member states. In some countries, implementation was poor, even where the 'degree of fit' between the EED's requirements and the policy status quo was high. The EU's enforcement measures have also been ineffective when trying to change state behavior by raising the costs for noncompliance members. These results contradict existing theories of noncompliance. To explain these puzzling results, we must consider not just the magnitude of adjustment costs, but also how these costs are distributed

CONTACT Scott N. Siegel snsiegel@sfsu.edu

among domestic winners and losers. When a directive produces a public good, the adjustment costs are often concentrated among small groups, while the benefits are primarily diffused among large ones. The 'losers' then have a strong incentive to prevent policy change required by a directive, while the winners have little incentive to guarantee compliance. Domestic losers can also prevent the effectiveness of the EU's compliance mechanisms, as the certain short-term costs to the incumbent government outweigh the uncertain, long-term costs of continued noncompliance, regardless of whether the magnitude of adjustment costs is low or high.

The EED has directly affected the interests of religious organizations and established churches in Ireland, the UK, and Germany. As a small group, religious organizations in these countries have a strong incentive to protect their core ideological and material interests. Furthermore, the EU's enforcement measures have been ineffective in both Ireland and the UK, as the EC's threats of prosecution pale in comparison to the domestic pressure imposed by religious organizations to maintain the status quo, particularly because the costs of compliance were concentrated among religious organizations. Careful historical process tracing shows that governments complied only when their partisan makeup changed, and not because of added pressure from the EC. The political economy of noncompliance with the EED has implications for how we should approach the politics of compliance in the EU, while also recognizing a new group of actors at the national level actively trying to limit its effects.

2. The political economy of noncompliance

Rational approaches to the problem of noncompliance begin with the assumption that compliance is a function of its relative costs and benefits, often based on the 'goodness of fit' between a directive's policy requirements and the existing status quo (Héritier et al. 2001). When degrees of fit are low, or adjustment costs are high, the chances of noncompliance due to delayed or incorrect transposition increase. With regard to the EED, both legal and institutional fit appear to matter. For example, Zhelyazkova and Torenvlied (2011) find that compliance with the EED's provisions improves when states already have policies, practices, or both in place when implementing this directive (Zhelyazkova and Torenvlied 2011).[2] van der Vleuten (2005) finds that compliance with the EU's general equality directives is a function of both the economic (the wage disparity between men and women) and ideological (different national conceptions of equal rights for women) costs governments face when trying to comply (van der Vleuten 2005). Petričević (2015) finds that the policy-making process, such as through centralized decision-making and the nature of policy administration, as well as the availability of better information and preexisting knowledge, such as the attitudes of civil servants improved the directive's transposition (Petričević 2015).

The goodness of fit hypothesis focuses on the magnitude of adjustment costs, but assumes they are distributed evenly across society, which is often not the case. Just as existing policy status quo has both domestic winners and losers, the gains and losses from changing the status quo by implementing EU laws will be distributed to groups of different sizes. For example, van der Vleuten (2005) argues that a Christian Democratic philosophy means women and men should be treated different if and when they are in the labor market. However, not all Germans shared that view at the time – Social Democrats, Greens, and

women, even in the 1960s, supported changes to expanded equal treatment in the workplace, a large group of people that would have benefitted enormously from a reduction in wage disparities based on gender. Noncompliance continued because the costs were concentrated among the losers – primarily male-dominated businesses, which pressured the German government to delay implementation.

There are not only winners and losers, as the costs and benefits of compliance can also be concentrated or diffused based on group size. When the losses are concentrated among members of a small group, they have a greater incentive to mobilize and prevent changes to the status quo than members of a large group (Olson 1965). When EU directives produce a public good, such as equal treatment for a large group of people, the benefits are high, but a small group will bear most of the costs of adjustment. The losers can lose materially or ideologically. For instance, complying with the EC's demands that nontariff barriers limiting the free movement of goods harmed national industries that could not compete with EU imports, while European consumers would benefit from greater product choice and lower prices (Siegel 2011).

Small groups also have an informational advantage over large ones. König and Luetgert (2009) claim that 'due to the bureaucratic nature of transposition and public ignorance about this process [directive transposition], it is hardly convincing to view the general public as an additional political restraint, or informal veto player, in the transposition of Community law' (167). Interest groups can fill that knowledge gap, because they have a strong incentive to monitor negotiations closely, form lobbying groups at the supranational level, and then shape the implementation process so that the transposed legislation reflects their interests. Because members of parliament and government officials are also rationally ignorant about the impact of compliance, interest groups harmed by compliance can shape how governments perceive the costs of compliance, such as framing compliance as harmful to the entire country, and noncompliance as the most beneficial political course of action.

2.1. Predicting noncompliance

EU member states are constantly playing a 'two-level' game (Putnam 1988), trying to meet their obligations under international law, while also satisfying the demands of powerful domestic interest groups. The EU has supposedly powerful enforcement mechanisms to raise the overall costs of noncompliance, such that governments will choose to comply eventually (Börzel 2001; Börzel, Hofmann, and Panke 2012; Tallberg 2002). In addition to tools that improve state capacity, the EU has enforcement tools to ensure states comply, such as monitoring compliance, litigating such cases, and assessing financial penalties when noncompliance continues.[3] As a result, compliance is considered to be better in the EU than among either other international institutions or within member states (Zürn and Neyer 2005).

Some serious questions, however, have been raised about the effectiveness of these mechanisms (Falkner 2015). The likelihood they will be applied, and the long duration of the compliance process past the first European Court Justice (ECJ) stage, give states a strong incentive not to comply. States can often benefit from delaying compliance because infringement proceedings can take years to prosecute, and it is not always certain the ECJ will find in favor of the EC. Moreover, the fines imposed are minimal compared to gains

countries have by maintaining the status quo. In contrast, governments face more certain, short-term costs if they wish to comply with a law that affects a small group's interests. Interest groups can threaten incumbents' reelection efforts, defeat other policy interests a government may have, or rally the broader population against compliance, hurting the chances for future European integration. For example, Chancellor Kohl's decision not to comply with the EC's demands that Germany revise its Beer Purity Law was driven by then Minister President of Bavaria's, Franz Josef Strauß, ability to mobilize broad opposition in Germany against reforming a long-held traditional regulatory norm (Siegel 2011). The immediate short-term costs of compliance were high for the Kohl government, but the long-term costs in terms of penalties were small. Therefore, when the adjustment costs are concentrated among small groups, enforcement mechanisms are unlikely to be successful. However, collective action theory does not imply supporters of compliance are entirely passive. Small groups that benefit from a directive's implementation do try to shape the transposition process to their benefit. For example, the Teachers' Union of Ireland pushed strongly for compliance with the EED because it would add additional employment protections for Irish teachers of different faiths or those who were gay and lesbian. However, their efforts did not match the organizational and lobbying advantages of Ireland's four official churches.

Not all directives produce concentrated losses among small groups and benefits for large ones. Some EU policies and legal actions have the opposite distribution, whereby small groups benefit greatly, and the costs are dispersed among members of a large group. In this scenario, we expect compliance to be smooth, even if the overall adjustment costs are high or there is a high degree of misfit. If the benefits of compliance are concentrated and the costs dispersed among a large group, compliance is still the likely outcome. For instance, the EU supports farmers through the Common Agricultural Policy (CAP), especially in France and Germany, while all EU citizens must bear the financial burden of these protectionist measures. These constituencies in favor of the CAP lobby hard against reforms, while the rest of the EU remains rationally uninterested, despite its huge costs, inefficiencies, and negative effects on food prices.

Another scenario is when both the costs and benefits of compliance are concentrated among small groups. In this case, a directive is producing significant policy change that could alter the relative equal balance of power between domestic groups. Compliance with international law could lead to significant policy change. For example, Social Democratic and Green voters were strongly in favor of the EED because it would expand employment rights that have never existed. Prior to the passage of the EED, both Social Democrats and Greens had been advocating for changes to labor laws to promote equality for years. At the same time, both religious and business groups believe they would bear most of the adjustment costs and vigorously defended the policy status quo. If both groups have access to government decision makers, stalemate can ensue; thus, noncompliance will continue to happen until the EU applies its enforcement tools to break the stalemate. The ECJ's ruling meant Germany faced financial penalties if it did not implement the directives, giving political advantage to the supporters of the law in Germany.

One final scenario is when both the costs and benefits are dispersed across large groups. Noncompliance can be the result of the government simply not having the capacity to comply due to technical, financial, or bureaucratic limitations (Chayes, Chayes, and Mitchell

1998; Mbaye 2001). In this case, adjustment costs can be high or low, but they are distributed evenly across a state that is poor or does not have the ability to comply. With some added assistance from the EC or communication between it and bureaucratic officials, problems of noncompliance are solved quickly compared to instances in which the costs of compliance are concentrated among small groups. A summary of compliance outcomes as a function of the distribution of costs and benefits appears in Table 1.

3. Religions organizations and noncompliance

3.1. Historical background

For years, the European Parliament pressured the European Commission to develop EU anti-discrimination laws that addressed bias against the LGBT community among the member states. However, the EC feared backlash from the member states, and refused to draft any legislation until the member states changed their opposition and delegated the EC the necessary authorization to act in this policy area. At the same time, some member states also feared that the ECJ would strike down existing anti-discrimination laws where they existed because they would be deemed illegal impediments to the free movement of labor, resulting in a 'race-to-the-bottom' for workplace protections from discrimination within the EU (Bell 2002). When member states finally inserted Article 17 of the Amsterdam Treaty, the EU had the competency to act in sensitive national policy areas (Mos 2014), and the EC had the authorization to draft the EED.[4]

The EED protects religious minorities, the disabled, elderly, and gays and lesbians from discrimination, but only in the private sector. The EED required states to adopt national legislation that outlawed direct and indirect forms of discrimination and harassment in the workplace – changing the burden of proof from the accuser to the accused in such cases – and required governments to establish consulting bodies with civil society groups to develop additional laws that addressed past discrimination.

Despite consensus among the member states in favor of more EU involvement in national anti-discrimination policy, the key division between them was how broad the exemption for religious employers should be (Thomson et al. 2012).[5] During negotiations, Ireland, Germany, and the UK all called for a broad exemption that exempted all religious employers from the EED's anti-discrimination provisions. In contrast, France's tradition of *Laïcité* led to its opposition to extending special treatment to religious organizations (Bode 2006). French representatives argued that the EED as written already protected the activities of religious institutions, such as Sunday School instruction, under Article 4.1.[6] Additional exemptions would run counter to the spirit of the EED.[7] Other EU member states and the EC did not take strong positions on either side of the issue.

As a result, the member states decided to include a second paragraph under Article 4 as a compromise between the two camps. Article 4.2 states

Table 1. How the Distribution of Costs Affects Compliance

		Costs	
		Concentrated	Diffused
Benefits	Concentrated	Noncompliance (Germany's Equality Law)	Compliance (CAP and Structural Funds)
	Diffused	Noncompliance (EED)	Compliance (Technical Regulations)

> … this Directive shall thus not prejudice the right of churches and other public or private organisations, 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 organisation's ethos* [emphasis added].[8]

However, the second paragraph only addresses the employee's conduct, and not her professed religion or adherence to the organisation's faith or dogma (Ellis and Watson 2013). Although there were other possible justifications given at the time, this paragraph appears to specifically address the employment of gays and lesbians: 'The reluctance of certain organizations with a religious ethos to employ lesbians and gay men is one of the key reasons why this provision is present in the Directive, and therefore it would be naive to ignore the connections between these two issues' (Bell 2002, 117).

Banning discrimination based on an employee's sexual orientation challenged two core interests of religious groups. First, it would undermine their goal of providing a universal moral message that everyone should embrace, as well as religious creeds that will guide human behavior and give answers to difficult moral and philosophical questions (Warner 2000, 7). With most mainstream Protestant denominations and the Catholic Church opposed to homosexuality, religious groups perceived the EED as challenging their ability to evangelize according to their belief system (Carmody and Carmody 1993). The state would no longer have to tacitly endorse a church's decision to hire and fire based on the worker's degree of adherence to its moral doctrine.

Second, in many EU member states, religious institutions are also the largest providers of social welfare, especially in the field of education – both primary and secondary – but also elder care, emergency housing and shelter, and food assistance (Kersbergen and Manow 2009; Wilson 2014). In Ireland, the UK, and Germany, the Catholic Church, the Church of England, and Lutheran churches, operate a significant number of hospitals and primary schools.[9] The autonomy these established churches from civil employment law permits them to provide those services to whomever they wish, under certain limiting conditions, and employ only those who follow their moral doctrine. While the benefits of compliance would improve employment protections for all employees, including those who work for schools or organizations operated by religious organizations, compliance with the EED, if implemented correctly, would inhibit these religious organizations' ability, according to them, to propagate their belief system and challenge the special autonomy they enjoyed from civil labor law.

The objections Ireland, Germany, and the UK raised about the impact of the EED confirm Zhelyazkova's (2013) findings that objections raised at the Council level during negotiations over the EED could lead to poor implementation (Zhelyazkova 2013). For some countries, sexual orientation was defined as a protected status for the first time.[10] Left unanswered, however, are questions surrounding why these countries opposed the EED in the first place and this compromise outlined above was not sufficient to prevent noncompliance. Existing national laws that contradicted these levels of protection had to be repealed, while some needed strengthening. Some countries had levels of protection from sexual orientation discrimination that went beyond the workplace, such as prohibiting discrimination in the sale of goods or services and incitement of hatred.[11] Total adjustment costs have varied from low to high among Ireland, the UK, and Germany, respectively, but we observe noncompliance among all three countries, due in large part to the role religious organizations played in each country to prevent compliance.

3.2. Church opposition in Ireland

Existing Irish law fit well with the EED's requirements. According to Bell (2002), Ireland has a 'comprehensive equality regime,' where laws exist that already prohibit direct and indirect discrimination based on sexual orientation, including harassment and victimization, and has independent bodies to assist victims and provisions to take positive action to combat discrimination (Bell 2002, 149). Constiutional protections and Irish case law can protect LGBT employees from discrimination in Ireland (Waaldijk and Bonini-Baraldi 2006, 69). Ireland had also adopted the Unfair Dismissals Act in 1993 and the Employment Equality Act (EEA) in 1998, both of which prohibited sexual orientation discrimination in the workplace.[12] Section 6 of the EEA already contained many elements of the EED by forbidding direct and indirect discrimination on the basis of an employee's sexual orientation. It also protected employees from harassment in the private and public workplace. Later, the Equal Status Act was amended to include protection in the areas of goods and services, accommodation, and education (Bell 2002, 154). Altogether, this body of legislation and jurisprudence suggests a high level fit between existing Irish law and the EED's legal requirements.

Even though adjustment costs were low, they were concentrated among religious groups who felt their moral mission and special employment privileges under threat. The Catholic Church would have to bear almost all of these costs if the EED was implemented as prescribed, as it would undermine both its teachings and ability to hire and fire at will. To counter this, the Catholic Church recruited the leaders of Ireland's four other official churches to oppose the EED's implementation as required.[13] The Catholic Church opposed the EED just as Irish society was becoming increasingly secular and abandoning the Catholic Church's teachings. Eurobarometer surveys taken over time confirm that Irish society was no longer holding traditional Catholic values (Breen and Reynolds 2011). Weekly mass attendance declined in Ireland from 91% in 1972 to 35% in 2012 (Ganiel 2016, 34).

The Catholic Church has also held a monopoly on providing educational services in Ireland. For most of modern Irish history, the Catholic Church controlled 90% of all primary and secondary schools, and the state interfered very little in the daily affairs of the Catholic Church's education system, enjoying support from both political parties (Doe 2011; Whyte 1980). As late as 1992, the Catholic Church ran 2,988 out of 3,209 primary schools. The Catholic Church controlled who were admitted to these schools – mainly baptized Catholics – and trained all primary and secondary school teachers (Kissane 2003, 75). But by the late 1990s, Catholic doctrine was becoming diluted in Irish classrooms in reaction to the growing diversity of the student body. By 1998, there was no mention of God in the introduction to the new primary school curriculum. Instead, the curriculum's mission was to recognize 'a diversity of cultural, religious, social, environmental and ethnic backgrounds, and these engender their own beliefs, values and aspirations' (Kissane 2003, 89).

From the perspective of the Catholic Church, the EED interfered in the spreading of their universal message and further marginalized its teachings and role in the Irish educational system. Additionally, the EED would prohibit the Catholic Church, under most conditions, from employing individuals who did not abide by its religious code, and dismiss those employees whose private activities conflicted with the Catholic Church's teachings. Specifically, they could dismiss employees of a different faith, or those who engaged in sexual practices that contradicted their religious teachings, out of fear they would undermine its moral message that homosexuality practiced openly was sinful. The Church

effectively mobilized and lobbied the Irish Taoiseach (Prime Minister) for the broadest exemption for religious employers possible, especially for those who operated schools and hospitals.

The Irish government attempted to transpose the EED with the Employment Act of 1998 and with the second Equality Act of 2004. The transposing legislation allowed a religious organization to give favorable treatment to a prospective employee for religious reasons if it was deemed reasonable to maintain the religious ethos of the organization. The organization could also take action against an employee or prospective employee for undermining the religious ethos of the institution, where it is 'reasonable' or 'reasonably necessary.'[14] Irish law permitted discrimination in a far wider set of circumstances than envisioned in the EED. A 2007 EU report on the implementation of the EED identified over 13 flaws with the Irish legislation (Quinlivan 2007), ranging from the legal procedures for filing and settling a complaint to the removal of existing discriminatory measures.

As a result, the EC began infringement proceedings against Ireland when it failed to transpose the EED correctly.[15] In a letter of formal notice, the EC warned the Irish government in 2008 that the Irish Equality Act, Section 37(1), also failed to conform to the EED's purpose under Article 4.1. The exemption granted to schools and hospitals was too broad.[16] At the same time, the Catholic Bishops' Commission for Education began organizing opposition to changes in the Irish Equality Act by notifying fellow members within the Church of Ireland, as well as Catholic Bishops in Germany, whose government had also received a letter of formal notice. In response, the Iona Institute, a conservative Irish Catholic think tank, held a conference that year entitled 'In Defence of Denominational Schools,' calling the EC's actions as 'little known [about] but could impact very severely on the freedom of action of faith-based schools.'[17] Support for the EED's correct implementation was not absent in Ireland – the Teachers' Union of Ireland supported implementation, but lacked sufficient access and lobbying power compared to the four churches, and had no ally in government with Fianna Fáil in power.[18]

Despite the EC's efforts to ensure compliance, it did not choose to prosecute Ireland. While there is little evidence in the record to explain why, the EC was likely aware of the sensitivity of the subject and unwilling to challenge as powerful a domestic institution in Irish society as the Irish Catholic Church. This version of the Equality Act, with the nonconforming provisions, remained in place until 2013. In the elections of 2011, the center-left Fine Gael party came to power and formed a coalition government with the more leftwing Labour Party. A bill to amend the Equality Act was quickly introduced whereby no publicly-funded institution would be allowed to discriminate in employment in circumstances for which there was an objective justification in the furtherance of a legitimate aim and that was not proportionate to the aim being sought, bringing the Equality Act in line with the EED.[19] The proposed amendment of the Equality Act received strong support from the Teachers Union of Ireland, which now had a political ally in power.[20] In December 2015, the Equality (Miscellaneous Provisions) Bill removed this broad exemption, and replaced it with a narrower one that complied with the EED's goals.

3.3. British evangelicals lobby Labour

In contrast to Ireland, the UK has a 'mixed-level equality regime.' It has a robust set of laws that protect minorities from racial discrimination in and out of the workplace, but

there were no protections based on an employee's sexual orientation (Bell 2002, 158). British plaintiffs resorted to using the courts to obtain equal treatment and protection from discrimination based on sexual orientation, but failed (Bell 2002, 160, 161). Therefore, compared to Ireland, the overall magnitude of adjustment costs, or degrees of misfit, are somewhat higher than in Ireland. The UK long opposed the extension of social protections to sexual minorities during Conservative Party dominance of Parliament, until 1997 when the Labour Party took over. With the arrival of a Labour government in power, we would expect correct implementation of the EED by a political party in favor of expanding workers' rights and with more progressive attitudes towards homosexuality. Yet, religious organizations, small in size, still mobilized to prevent the newly-elected Labour government from complying with the EED correctly and, thereby, protecting their core interests.

In the UK, religious organizations occupied an important, but less dominant position in the area of primary education than in Ireland, at least until the late 1990s. Then Prime Minister Tony Blair's Labour government encouraged the development of religious schools, partly in response to the growing religious diversity of the British student body and where parents were uncomfortable being educated in public schools. Religious schools could hold religious services and have instruction in the schools that represented the wishes of the local community, even though they received state financial support (Ahdar and Leigh 2015). Many of these schools were operated by Christian evangelical groups strongly opposed to homosexuality.

British religious groups also opposed the EED because it would force them to hire teachers of a different faith and challenge their efforts to evangelize students. Hiring, remuneration, or promotion at a school, by reason of their religious opinions or for not attending daily worship, was already illegal (Doe 2011, 192). Instead, the main concern was whether the EED would change how and what was taught as part of spiritual development in British Christian public schools. In England and Wales, schools are legally required to foster a pupil's spiritual development under the Education Reform Act 1988. Local Standing Advisory Councils on Religious Education could exercise their own veto power over any changes to the syllabus.

The School Standards and Framework Act 1998 regulated voluntary religious schools and their employment practices, which permitted employment discrimination based on the employee's religion or whether the employee followed the faith organization's moral doctrine.[21] Section 60(5) permitted any voluntary aided school with a religious character to have sole discretion in the 'termination of the employment of any teacher at the school, to any conduct on his part which is incompatible with the precepts, or with the upholding of the tenets, of the [school's specified] religion or religious denomination…' Section 60(5) also gave voluntary aided schools preference in employment and promotion to persons who held the same religions opinions as the hiring religious organizations.

In contrast to Ireland, the British government implemented the EED using secondary legislation, or statutory instruments, rather than through an Act of Parliament.[22] As a regulatory instrument that bypassed Parliament, we would expect the law to be transposed correctly, since the process can easily exclude small groups' interference and the relatively high level of fit. Nevertheless, the EC began infringement proceedings against the UK for implementing Section 4 of the EED incorrectly by issuing a Reasoned Opinion in 2006.[23] In the opinion, the EC argued that the EED contained a strict test for what was determined a

legitimate reason for employment discrimination. 'There must be a genuine and determining occupation requirement, the objective must be legitimate and the requirement proportionate,' the EC argued.[24] The EED had to be implemented with sufficient clarity such that it was clear that any employment discrimination must be proportionate to the objective of maintaining the faith organization's religious ethos.

The EC's required language were not included in Section 9(2)(8) of the new 2003 Equality Act, which was intended to meet the EC's demands and although the British government was attempting to consolidate and rationalize the various statutory instruments that implemented the EU equality directives. The House of Commons' draft of the Equality Act had been amended by two Conservative members of the House of Lords, Lady O'Cathain and Baroness Butler-Sloss, who is a former judge on the High Court of Justice, who argued that inserting proportionality language would threaten the Catholic Church's requirement that priests remain celibate.[25] The Joint Committee on Human Rights, a committee of Members of Parliament and the House of Lords, believed the proposed language made the exception for religious organizations even more vague. According to legal experts, the amendments created a blanket exception not permitted by the EED (McColgan 2013).

Despite the amended Equality Act, evangelical Christian organizations in Britain still object to revising the law in order to become compliant with the Directive. The Christian Legal Centre, an organization committed to evangelizing in Great Britain, recently argued that 'the law as a whole strikes an incorrect balance between protecting those that wish to be free from discrimination and the need to allow Christians (and others) to act according to their religious beliefs, conscience and ethos.'[26] The Liberal Democrats, after entering into a coalition government with the Conservatives in 2009, vowed to narrow the exceptions for religious organizations, but their Conservative coalition partners refused to introduce any such bill. After the 2015 election, the incoming Conservative government, now governing alone, announced no intentions to revise the Equality Act to meet the EED's legal requirements. With negotiations over the UK's exit from the EU starting, it is highly unlikely that the British government would change existing anti-discrimination laws to comply with the EED.

Meanwhile, the EC has since closed its infringement case against the UK, as it did in the Irish case, without securing compliance. There is little in the empirical record to explain why. Perhaps the sensitivity of these issues and strong opposition to the EU in general within the British public led the EC to suggest this was a case not worth pursuing further. The EC has long been reluctant to enforce EU law in sensitive national policy areas, such as anti-discrimination policy. Before being delegated the authority to legislate in this area, the EC refused to draft EU-wide legislation combatting discrimination. National sensitivity toward EU involvement did not end when the EU was delegated competency to act in this area in 1997. Therefore, we can suspect the EC ended infringement proceedings by calculating the probability of blowback as greater than the benefits of securing compliance (Carrubba 2005).

3.4. Business and religion opposition in Germany

The German government faced the highest level of adjustment costs across the three countries considered here. Not only did Germany lack a robust, federal law which prohibited

discrimination in the workplace, but discrimination based on an employee's sexual orientation was explicitly permitted. In 1983, the German Federal Labor Court ruled that a Protestant charitable organization was permitted to dismiss a family counselor because he was gay.[27] The EED would threaten the ability of charitable organizations to advocate on behalf of their moral code and exclude secular values. As in Ireland and the UK, the EED threatened the special privileges and autonomy that German religious organizations enjoyed federal labor laws (Skidmore 2001). Religious groups have over 600,000 employees and deliver a significant portion of Germany's social services, including operating numerous hospitals, schools and universities, and institutions that care for the elderly. Thus, the low level of fit between the EED, existing German law, and German opposition to the law would predict noncompliance.

However, unlike in Ireland and the UK, both the costs and benefits of the EED's implementation were concentrated, producing a stalemate. In 2000, the ruling coalition of Social Democrats and Greens were strongly in favor of the EED, and gave implementation of EU anti-discrimination legislation high priority. Labor unions, members of minority activist groups, and rank-and-file members of the Green Party strongly favored implementation of the law in order to expand protections from discrimination for employees. In opposition were German religious organizations, which argued that the new Equality Law, implementing the EED, should not apply to faith-based organizations since they operated as special non-profits that should remain autonomous from civil law (*Tendenzbetrieben*) (Asensio 2008). German conservative parties and a wide swath of economic interest groups, including employers' associations, real estate owners, and insurance companies, also opposed to the EED, primarily out of fear that it would increase the chances of costly and frivolous litigation and establish large bureaucracies within corporations to ensure compliance with it. Furthermore, economic sanctions for noncompliance became a possibility. Despite support by the ruling coalition in the *Bundestag*, conservative politicians were able block it in the *Bundesrat*.

Because it missed the 2003 deadline for implementation, the EC referred Germany immediately to the ECJ for non-implementation of both the Racial Equality Directive and EED. The ECJ then ruled against the German government shortly thereafter.[28] The combination of EU pressure to comply and national elections in 2005, which produced a Grand Coalition of the German Social Democratic Party and Christian Democratic Union/Christian Social Union, led to the EED's quick implementation. With control of the labor ministry, the SPD drafted a new version of the bill that implemented both the Racial Equality Directive and the EED, which would be transposed through one law – the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*),[29] which the entire *Bundestag* approved in 2006 and generally conformed to the EED's policy goals.[30] The stalemate between the two sides was partially broken because the ECJ had ruled that Germany was not in compliance – thus increasing the costs of delayed implementation – while the domestic balance of power also shifted slightly such that a Grand Coalition, which actually reduced the number of veto players necessary to change the status quo.

Why did "pincers" work in Germany, but not in Ireland or the UK? One reason is that the EC did not have to exercise discretion when choosing to prosecute Germany. Non-notification and non-implementation of a directive leads to an almost automatic referral to the ECJ. This implies that financial penalties and EU pressure are both certain and short-term, which makes the EC's enforcement efforts effective. The EC's incentive to demure from fully prosecuting

a case because it is nationally sensitive and could generate backlash is also removed, allowing the EC to fulfill its duty to monitor the application of EU law.

4. Conclusion

When EU institutions begin legislating in the area of social affairs, large groups benefit, such as sexual minorities or women workers. However, each individual member of that large group has no incentive to ensure states implement EU law correctly. The marginal gains in protection from discrimination are less than the costs of organizing efforts to ensure compliance, encouraging free riding. At the same time, there are small groups whose interests, whether moral or material, are harmed by compliance with supranational law. They have a strong incentive to mobilize and lobby the government to maintain the status quo, even though large numbers of workers would benefit from compliance. If adjustment costs are concentrated among losers, noncompliance can occur, even if there is a high degree of fit between a directive and the existing status quo.

In the case of the EED, religious organizations bear most of the burden of adjustment. In the EU, given the low level of threat legal sanctions may play, member states can continue not to comply until the domestic balance of power and influence shifts in favor of small groups that benefit from compliance. These cases do show that government partisanship matters in all three cases (Treib 2003), but differently across the three countries. A leftist government changed Irish behavior, and a right-leaning Conservative government in the UK has refused to comply, but a coalition led by a Center-Right/Center-Left coalition government in Germany actually expanded employment protections.

The politics of compliance with the EED also reveal the growing role religious organizations play in EU politics. These organizations have long played a role in encouraging European integration by pushing it forward it some ways, such as uniting Christian Democratic governments in the 1950s and 1960s. (Byrnes 2006). Now, religious organizations are organizing at the national level to block the harmonization of EU law that favors secular values and equal treatment for sexual minorities. For example, the Horizontal Directive, which was designed to protect gays and lesbians in the EU from discrimination by public authorities, is stalled in the Council of Ministers due to opposition from Poland and Lithuania because of 'cultural incompatibilities,' as well as resistance from Germany, which argues it is too costly for businesses (Thiel 2015). In this case, 'normative misfit,' or national cultural identities supported by conservative political parties and religious institutions, prevent further steps toward equality in the EU (Dimitrova and Rhinard 2005). Finally, the EC's behavior with regard to Ireland and the UK shows we cannot assume states are in compliance when infringement proceedings terminate. Instead, they are dismissed out of fear of member state backlash, which is not reported in the data which quantitative studies of compliance with EU law rely on. Additional research is needed to explore which cases the EC chooses to end without obtaining compliance and why. Finally, any steps the EU makes towards harmonizing national laws with regard to LGBT equality may only engender more backlash from both conservative and rightwing populist forces that object to growing EU involvement in social policy and the treatment of sexual minorities.

Notes

1. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
2. However, when the provisions of the Employment Equality Directive are placed in a larger sample size that includes the provisions of other directives, levels of substantive fit do not predict noncompliance (Zhelyazkova 2013).
3. Serious questions have arisen about the effectiveness of the EU's enforcement mechanism, especially the use of financial penalties (Falkner 2015).
4. The first was the Racial Equality Directive, which prohibited discrimination in the delivery of public and private goods and services based on a person's ethnicity or race.
5. How to extend protections to disabled workers was the other major point of contention among Council Members.
6. Denis Staunton, 'O'Donoghue Happy with Equality Talks Despite EU Doubts,' *Irish Times*, October 18, 2000.
7. The other main area of dispute was protection for disabled employees in the workplace. An exception for Northern Ireland to Article 4.2 was also inserted to protect its unique policy of allocating positions according to confession to address past discrimination against Northern Irish Catholics in the public service.
8. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'), Article 4, §2.
9. The Catholic Church led early opposition to the expansion of gay rights as the European Parliament and Commission began to protect the interests of gay and lesbians EU employees and continues to do so (Bell 2008).
10. They included Austria, Belgium, Germany, Greece, Italy, Portugal, and the UK (Waaldijk and Bonini-Baraldi 2006, 67).
11. For an overview the legal status quo before implementation of the EED in 27 EU member states, see Waaldijk and Bonini-Baraldi (2006), Chapters 3 and 5.
12. In October 1998 Ireland approved the Employment Equality Act, which protected employees from discrimination based on sexual orientation, but contained a broad exemption for religious employers and institutions.
13. Sean Flynn and Alison O'Connor, 'Churches lobbied on EU directive,' *Irish Times*, October 19, 2000.
14. Equality Act 2004, Section 37, (1a-b).
15. In Zhelyazkova and Torenvlied's (2011) study, while the cases reaching the Formal Letter of Notice stage decreased from 2004 to 2006, after the Commission exercised Article 258 procedures, we do not know if governments actually complied with violations in 2006, only that the number of infringements declined over time.
16. *The Irish Independent*, 'Church Schools' Exemption from Equality Laws at Risk from EU.' April 5, 2008.
17. John Downes, 'Church Takes Advice on Equality Finding,' *The Irish Times*, April 5, 2008.
18. Education Staff, 'O'Toole Anger on Equality Line,' *Irish Times*, October 24, 2000, p. 51.
19. Dr Claire Hogan, 'Equality Must Apply in Employment as Well as in Marriage,' February 17, 2015.
20. Thejournal.ie, 'Gay Rights Groups Gives Cautions Welcome to Change in Discrimination Laws,' September 14, 2015, http://www.thejournal.ie/gay-rights-section-37-1669058-Sep2014/, accessed August 28, 2015.
21. The statutory instruments applied to hospitals as well (Coen 2008).
22. Employment Equality (Sexual Orientation) Regulations 2003, Employment Equality (Religion or Belief) Regulations 2003, and Employment Equality (Age) Regulations of 2006.
23. There is strong evidence that a similar Reasoned Opinion was issued against Ireland as well. However, the Irish Office of the Information Commission ruled that the Department of Justice was in its legal rights to refuse an applicant's request that the Commission's Reasoned Opinion be made public (Commission Decision, October 8, 2010).
24. European Commission, Reasoned Opinion No. 2006/2450.

25. 'Tories Defeat Government attempts to force religious bodies to employ gay people,' January 26, 2010, conservativehome.com, http://www.conservativehome.com/thetorydiary/2010/01/baroness-warsi.html, accessed August 28, 2015.
26. Christian Legal Centre, 'Guide to the Equality Act of 2010', http://www.christianconcern.com/sites/default/files/equality-employers%20of%20religion-proof.pdf, accessed August 28, 2015.
27. BAG decision of 30.06.83 case 2 AZR 52/81 NJW 1984, 1917.
28. Case C-43/05, *Commission v. Germany*, OJ C 82, p. 14.
29. The AAG also implemented the Gender Equality Directive (2004/113/EC) and the Sexual Harassment Directive (2002/73/EC).
30. The Commission identified far more errors in AGG as it related to the Racial Equality Directive (Petričević 2015, 66–68).

Acknowledgements

I would like to thank Matthias Staisch and two anonymous reviewers for their helpful comments and suggestions.

Disclosure statement

No potential conflict of interest was reported by the author.

References

Ahdar, Rex, and Ian Leigh. 2015. *Religious Freedom in the Liberal State*. 2nd ed. New York: Oxford University Press.

Asensio, Juan Casado. 2008. "When Progressive Law Hits Home: The Transposition of the Anti-Discrimination Directives in Austria, Germany and Spain." Paper Presented at the 4th Annual Pan-European Conference on EU Politics, ECPR, Riga, Latvia.

Bell, Mark. 2002. *Anti-Discrimination Law and the European Union*. Oxford University Press.

Bell, Mark. 2008. "The Implementation of European Anti-Discrimination Directives: Converging towards a Common Model?" *The Political Quarterly* 79 (1): 36–44.

Bode, Ingo. 2006. "Disorganized Welfare Mixes: Voluntary Agencies and New Governance Regimes in Western Europe." *Journal of European Social Policy* 16 (4): 346–359. doi:10.1177/0958928706068273.

Börzel, Tanja A. 2001. "Non-Compliance in the European Union: Pathology or Statistical Artifact." *Journal of European Public Policy* 8 (5): 803–824.

Börzel, Tanja A., Tobias Hofmann, and Diana Panke. 2012. "Caving in or Sitting It out? Longitudinal Patterns of Non-compliance in the European Union." *Journal of European Public Policy* 19 (4): 454–471. doi:10.1080/13501763.2011.607338.

Breen, Michael J., and Caillin Reynolds. 2011. "The Rise of Secularism and the Decline of Religiosity in Ireland: The Pattern of Religious Change in Europe." https://dspace.mic.ul.ie/xmlui/handle/10395/1800.

Byrnes, Timothy A. 2006. "Transnational Religion and Europeanization." In *Religion in an Expanding Europe*, edited by Timothy A. Byrnes and Peter J. Katzenstein, 283–305. Cambridge, UK: Cambridge University Press.

Carmody, D., and J. Carmody. 1993. "Homosexuality and Roman Catholicism." In *Homosexuality and World Religions*, 135–149. Valley Forge: Trinity Press International.

Carrubba, Clifford A. 2005. "Courts and Compliance in International Regulatory Regimes." *Journal of Politics* 67 (3): 669–689.

Chayes, Abram, Antonia Handler Chayes, and Ronald Mitchell. 1998. "Managing Compliance: A Comparative Perspective." In *Engaging Countries: Strengthening Compliance with International Environmental Accords*, edited by Edith Brown Weiss and Harold K. Jacobson, 39–62. Cambridge, MA: MIT Press.

Coen, Mark. 2008. "Religious Ethos and Employment Equality: A Comparative Irish Perspective." *Legal Studies* 28 (3): 452–474. doi:10.1111/j.1748-121X.2008.00092.x.

Dimitrova, Antoaneta L., and Marc Rhinard. 2005. "The Power of Norms in the Transposition of EU Directives." SSRN Scholarly Paper ID 856124. Rochester, NY: Social Science Research Network. http://papers.ssrn.com/abstract=856124.

Doe, Norman. 2011. *Law and Religion in Europe: A Comparative Introduction*. Oxford: Oxford University Press.

Ellis, Evelyn, and Philippa Watson. 2013. *EU Anti-discrimination Law*. 2nd ed. Oxford, UK: Oxford University Press.

Falkner, Gerda. 2015. "Fines against Member States: An Effective New Tool in EU Infringement Proceedings?" *Comparative European Politics* 14 (1): 36–52. doi:10.1057/cep.2015.8.

Ganiel, Gladys. 2016. *Transforming Post-Catholic Ireland: Religious Practice in Late Modernity*. Oxford: Oxford University Press.

Héritier, Adrienne, Dieter Kerwer, Christoph Knill, Dirk Lehmkuhl, Michael Teutsch, and Anne-Cécile Douillet. 2001. *Differential Europe: New Opportunities and Restrictions for Policymaking in the Member States*. Lanham, MD: Rowman and Littlefield.

Kersbergen, Kees van, and Philip Manow, eds. 2009. *Religion, Class Coalitions, and Welfare States*. 1st ed. Cambridge: Cambridge University Press.

Kissane, Bill. 2003. "The Illusion of State Neutrality in a Secularising Ireland." In *Church and State in Contemporary Europe*, edited by John T. S. Madeley and Zsolt Enyedi, annotated ed., 73–94. London: Routledge.

König, Thomas, and Brooke Luetgert. 2009. "Troubles with Transposition? Explaining Trends in Member-state Notification and the Delayed Transposition of EU Directives." *British Journal of Political Science* 39 (1): 163–194. doi:10.1017/S0007123408000380.

Mbaye, Heather A. D. 2001. "Explaining Implementation Infringements in the European Union 1972-1993." *European Union Politics* 2 (3): 259–281.

McColgan, Aileen. 2013. "Report on Measures to Combat Discrimination." Directives 2000/43/EC and 2000/78/EC. Country Report United Kingdom. http://www.ims.sdu.edu.cn/cms/attachment/080527103232.pdf.

Mos, Martijn. 2014. "Of Gay Rights and Christmas Ornaments: The Political History of Sexual Orientation Non-discrimination in the Treaty of Amsterdam." *JCMS. Journal of Common Market Studies* 52 (3): 632–649. doi:10.1111/jcms.12094.

Olson, Mancur. 1965. *The Logic of Collective Action*. 2nd ed. Cambridge, MA: Harvard University Press.

Petričević, Vanja. 2015. *Compliance Patterns with EU Anti-discrimination Legislation*. New York: Palgrave Macmillan.

Putnam, Robert D. 1988. "Diplomacy and Domestic Politics." *International Organization* 42 (3): 427–460.

Quinlivan, Shivaun. 2007. "Report on Measures to Combat Discrimination." Directives 2000/43/EC and 2000/78/EC. Country Report on Ireland. http://www.equalitylaw.eu/content/media/2006%20Ireland%20country%20report%20final.pdf.

Siegel, Scott. 2011. *The Political Economy of Noncompliance: Adjusting to the Single European Market*. London: Routledge.

Skidmore, Paul. 2001. "Improving the Position of Lesbians and Gay Men at Work in the Light of the Framework Directive for Equal Treatment in Employment: A German Case-study." In *The Cambridge Yearbook of European Legal Studies*, edited by Alan Dashwood, John Spencer, Angela Ward and Christophe Hillion. Vol. 3, 425–455. Oxford, UK: Hart Publishing.

Tallberg, Jonas. 2002. "Paths to Compliance: Enforcement, Management, and the European Union." *International Organization* 56 (3): 609–643.

Thiel, Markus. 2015. "Sexualities in World Politics." In *Sexualities in World Politics: How LGBTQ Claims Shape International Relations*, edited by Manuela Lavinas Picq and Markus Thiel, 75–91. New York: Routledge.

Thomson, Robert, Javier Arregui, Dirk Leuffen, Rory Costello, James Cross, Robin Hertz, and Thomas Jensen. 2012. "A New Dataset on Decision-Making in the European Union before and after the 2004 and 2007 Enlargements (DEUII)." *Journal of European Public Policy* 19 (4): 604–622.

Treib, Oliver. 2003. "EU Governance, Misfit, and the Partisan Logic of Domestic Adaptation." Paper Presented at the EUSA 8th International Biennial Conference, Nashville, TN.

van der Vleuten, Anna. 2005. "Pincers and Prestige: Explaining the Implementation of EU Gender Equality Legislation." *Comparative European Politics* 3 (4): 464–488.

Waaldijk, C. and Matteo Bonini-Baraldi. 2006. *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive*. Cambridge: Cambridge University Press.

Warner, Carolyn M.. 2000. *Confessions of an Interest Group: The Catholic Church and Political Parties in Europe*. Princeton, NJ: Princeton University Press.

Whyte, John Henry. 1980. *Church and State in Modern Ireland, 1923–1979*. 2nd ed. Dublin : Barnes & Noble Books.

Wilson, Angelia R. 2014. *Why Europe is Lesbian and Gay Friendly*. Albany: State University of New York Press.

Zhelyazkova, Asya. 2013. "Complying with EU Directives' Requirements: The Link between EU Decision-making and the Correct Transposition of EU Provisions." *Journal of European Public Policy* 20 (5): 702–721. doi:10.1080/13501763.2012.736728.

Zhelyazkova, Asya, and René Torenvlied. 2011. "The Successful Transposition of European Provisions by Member States: Application to the Framework Equality Directive." *Journal of European Public Policy* 18 (5): 690–708. doi:10.1080/13501763.2011.586799.

Zürn, Michael, and Jürgen Neyer. 2005. "Conclusions–The Conditions of Compliance." In *Law and Governance in Postnational Europe*, edited by Michael Zürn and Christian Joerges, 183–217. Cambridge, UK: Cambridge University Press.