

Member states' opposition in the Council of the European Union and its impacts on the implementation of directives

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Abstract

In the Council of the European Union (EU), a qualified majority is mostly required to adopt legislative acts. Based on this majority rule, individual member states can be outvoted and are subsequently obliged to implement the law. This article analyses whether opposition in the Council of the EU affects the transposition of directives into national law by using the example of Austria from 2000 to 2008. The results demonstrate that domestic factors, rather than a negative political attitude, were responsible for delays and procedures when implementing previously contested directives. However, the effects of opposition in the Council on implementation were particularly apparent in cases where there was a high degree of misfit between EU provisions and the domestic legal structure.

Keywords

European Union, Council of the EU, oppositional voting behaviour, Austria, implementation of directives, legal misfit

Opposition der Mitgliedstaaten im Rat der Europäischen Union und ihre Auswirkungen auf die Richtlinienumsetzung

Zusammenfassung

Im Rat der Europäischen Union werden die meisten Rechtsakte mit qualifizierter Mehrheit verabschiedet. Diese Mehrheitsregel impliziert, dass einzelne Mitglieder überstimmt werden können und dennoch für die nationalstaatliche Umsetzung der Richtlinien verantwortlich sind. Dieser Forschungsartikel untersucht am Beispiel Österreich im Zeitraum von 2000 bis 2008, ob eine Opposition im Rat der EU die Transposition von Richtlinien in nationales Recht beeinflusst. Die Ergebnisse verdeutlichen: Nicht eine ablehnende politische Haltung, sondern vorrangig nationale Faktoren waren für Verspätungen und Verfahren während der Transposition von umstrittenen Richtlinien verantwortlich. Auswirkungen einer Opposition im Rat auf die Implementation von Richtlinien traten besonders in Fällen mit einer hohen Diskrepanz (*Misfit*) zwischen den EU-Bestimmungen und der nationalen Rechtsordnung auf.

Schlüsselwörter

Europäische Union, Rat der EU, oppositionelles Wahlverhalten, Österreich, Implementation von Richtlinien, rechtlicher *Misfit*

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1. Introduction

In the Council of the European Union (EU) (hereafter referred to as the Council), a qualified majority is mostly required to adopt legislative acts. Based on this majority rule, individual member states can be outvoted. Although qualified majority voting in the Council has been broadened, member states still strive for consensus to avoid overruling any particular member state. The literature on Council voting demonstrates that consensus decision-making in the Council is the norm, even in cases where a qualified majority is sufficient (Mattila/Lane 2001; Hayes-Renshaw/Wallace 2006, 56; Heisenberg 2005; Häge 2013; Naurin/Wallace 2010). This ‘consensus culture’ can be traced back to the evolution of the EU and its historical development. Contested votes by member states in the formal adoption of legislation are a rare occurrence (approximately 25% of decisions decided under qualified majority voting), and occur primarily in the fields of agriculture, internal market, and transport (Hayes-Renshaw et al. 2006; Mattila/Lane 2001). Serious differences of opinion between member states on matters of social preferences, policy principles, or EU provisions conflicting with nationals are specified sources for contestation (Hayes-Renshaw et al. 2006, 171).

In 2015, for example, the qualified majority ruling with regard to the asylum policy specified under Article 78 of the Treaty on the Functioning of the European Union (TFEU) gave rise to serious debate. While a qualified majority was required to adopt a quota system to relocate refugees across member states, the Council sought unanimity. Ultimately, Hungary and Slovakia, who were outvoted in the adoption, brought an action before the European Court of Justice (ECJ), demanding annulment of the Council’s decision. Moreover, Poland signalled that it would disregard the implementation of the quota system (Agence Europe 2015a; 2015b).

In a multi-level system, where decisions must be implemented and applied at the member-state level, consensus might foster a timely and compliant implementation of EU law, and outvoted member states may tend to oppose ‘through the backdoor’ by impeding implementation (Falkner et al. 2004).

Even though the Lisbon Treaty improved the efficiency of EU decision-making by extending the qualified majority ruling, the willingness to cooperate or make concessions in negotiations and the degree of generosity of member states decreased (Naurin 2015). Moreover, the simplified requirements for a blocking minority introduced in November 2014 and a crisis-induced development favouring intergovernmental agreements, where member states’ interests prevailed over common EU interests, may lead to more frequent contestation. As a result, it is important to investigate the implications that emerge at national level after an overruling at EU level. This paper therefore poses the following question:

- To what extent does being outvoted in the Council (independent variable) affect the implementation of directives (dependent variable)?

By investigating the case of Austria, the paper analyses all directives (12 in total) where Austria was outvoted in the Council in a specific period (2000–2008), and the reasons for Austria’s oppositional behaviour. The corresponding implementation processes are then qualitatively analysed to examine whether opposition (viewed as a vote against or abstention) in the Council affects implementation at national level. This study improves on the current scientific knowledge by providing a qualitative analysis of oppositional voting in the Council (other analyses have been predominantly quantitative to date) and by linking the voting behaviour in the Council to the implementation process. In contrast to other studies, the case selection is based on the opposition in the Council and not on particularly problematic cases of implementation. Moreover, the study provides crucial insights into the implementation process in Austria, a country that is under-represented in implementation studies.

The article reveals that it was predominantly factors other than opposing political standpoints that were responsible for delays and procedures when transposing directives that were previously opposed. However, oppositional voting in the Council did have a negative influence on implementation at national level in cases where a high level of legal misfit was apparent.

2. Europeanisation and Implementation Research: Misfit and member states’ opposition

Europeanisation studies involve several concepts and approaches (see Radaelli 2004 for an overview), and focus to a significant degree on how member states adapt to EU policies. The concept of adaptation pressure is essential when examining patterns of adjustment processes. According to Europeanisation scholars, the degree of compatibility (fit or misfit) between European and national rules and institutional and regulatory traditions, determines implementation outcomes. The underlying argument is that if the degree of misfit (i.e. the adaptation pressure) is high, the implementation of EU law is likely to be problematic or ineffective (Börzel 2000; Börzel/Risse 2000; Cowles et al. 2001; Knill 2001; Knill/Lenschow 1999). This misfit argument involves an institutional, legal, normative, and policy misfit – the latter having been investigated most frequently. Whereas some studies

find robust evidence for this argument, others demonstrate little or no support and reveal the limited explanatory power of the misfit thesis (Treib 2003, Mastenbroek 2005; Haverland 2000; Falkner et al. 2005; Mastenbroek/Kaeding 2006).

In line with this misfit argument, member states that were unable to advocate ('upload') their preferences at EU level might evade implementation or compliance in order to oppose the introduction ('downloading') of EU policies at the national level or in order to protect their national structures and administrations (Falkner et al. 2004, 453; Knill/Lenschow 2000, 261-262). Scholars have therefore investigated the impacts of a country's opposition to an EU directive on its implementation. However, the results have so far been ambiguous.

Thomson (2007) contends that no relationship exists between a state's disagreement and compliance with EU law. Despite Linos' (2007) observation that government preferences play an important role during the implementation process, she discovered that national capability was as important as political willingness in the analysed cases. Her quantitative analysis determined no correlation between the vote on a directive and transposition delays. Most studies found no relationship between the decision-making rule in the Council and compliance. One study concluded that a qualified majority vote constrained implementation, as the interests of member states could be overruled (König/Luetgert 2009), while another study described positive effects on the transposition resulting from qualified majority voting (Luetgert/Dannwolf 2009).

In contrast, other studies have identified negative effects resulting from a state's disagreement on implementation (Di Lucia/Kronsell 2010; Cliff 2009). Milio (2010, 8-11) provides evidence that greater challenges in administration and increased costs are more willingly accepted as necessary side-effects when there is the political will to comply with EU law than when the proposed innovations are perceived as 'imposed' by the EU. Falkner et al. (2004, 456-459) provide evidence that a member state's negative stance towards an EU directive is a potential reason for non-compliance. Nevertheless, these authors do concede that such incidents of 'opposition through the backdoor' are relatively infrequent.

In her study, Zhelyazkova (2013, 717) illustrates a positive correlation between an oppositional attitude towards a directive and non-compliance. She states the following, '[...] [N]ational legislators are less likely to comply with a provision if their representatives in the Council objected to its content'. In line with this argument, Thomson et al. (2007) observe negative influences on the number of infringement procedures resulting from a member state's opposition. They demonstrate that 'incentives to deviate', which is the distance between member states' preferred and actual outcome confirmed

in the directive, correlate positively with the likelihood of infringements (see also Thomson 2010).

König and Mäder (2013) reach a similar conclusion. In their comprehensive quantitative analysis, the authors demonstrate that the level of a country's disagreement correlates with the level of compliance. They conclude that the higher the level of disagreement, the higher the probability of a compliance deficit. Linos (2007), on the other hand, describes a slight, but non-significant effect, while Zhelyazkova (2013) finds that opposition has strong negative effects on the timeliness of transposition. As evidence exists in the literature of the negative effects of a country's disagreement on the implementation process, we expect to observe this phenomenon in our case study too:

H1: Austria's opposition in the Council while adopting directives negatively affects timely and correct transposition.

As the results of studies into whether opposition to a directive causes implementation problems are ambiguous, this paper aims to shed more light on this discussion.

3. Other factors influencing implementation

Even though scholars have identified several relevant variables affecting the implementation of EU law (see Toshkov 2010; Toshkov et al. 2010; Treib 2014), this section is limited to factors that are prominent in the literature and that may answer the current research question.

To begin with, *efficient administration* and a high degree of administrative capacity were identified as factors that positively influenced implementation and could effectively counteract transposition delays (Haverland/Rumeijn 2007; Linos 2007). In other words, administrative deficiency negatively impacts a timely and correct transposition of EU law (Coyle 1994; Lampinen/Uusikyla 1998; Mbaye 2001), and an inefficient administration fosters difficulties in its implementation and application (Börzel et al. 2010; Hartlapp 2009). Accordingly, administrative shortcomings lead to transposition delays (Falkner et al. 2005, 302).

A second possible variable is *federalism*. Whereas some studies suggest that federal structures lead to transposition flaws (Haverland/Romeijn 2007; Linos 2007; König/Luetgert 2009; Thomson 2010), others demonstrate that federalism has a negligible impact on implementation (Mbaye 2001; Steunenberg/Toshkov 2009). However, favourable effects of federalism on the implementation process have never been described (Toshkov 2010, 24-44).

As a third potential variable, *veto players* are a focal point of research. Compelling evidence in the literature

suggests that domestic veto players negatively influence implementation outcomes (Mbaye 2001; Kaeding 2006; 2008; Linos 2007).

The literature indicates several other factors that influence implementation outcomes. Therefore, it is also plausible that these other factors are decisive in the implementation of directives in our case study of Austria – independently of opposition to an EU directive.

H2: Factors other than opposition in the Council of the EU may determine implementation outcomes in Austria.

3. Research Design and Methods

With a view to examining voting behaviour in the Council from 2000 to 2008, the study draws upon the monthly summaries of Council acts, which form the basis of a homogeneous corpus (see Hosli et al. 2011; Mattila 2009), and which are officially available for the time period in question. The period between 2000 and 2008 was selected in order to ensure that all concerned directives had been implemented and applied at national level. This does, however, limit the study to the period before the adoption of the Lisbon Treaty. Fully cognizant of this limitation, the study includes data based on EUR-Lex and the monthly summaries of Council acts to show possible changes – at least for the level of contestation – in the Council after the Lisbon Treaty (2010–2016). As consensus decision-making dominates in the Council, an opposing vote at ministerial level is regarded as the strongest political dissent a government can express.

Based on the monthly summaries, all adopted directives, voting results, adopted texts, and explanatory notes were compiled and recorded for every month in every year. Having identified all the directives on which Austria was outvoted, this study investigates (i) the decision-making processes at EU level, (ii) the reasons for oppositional voting, (iii) the problems that occurred during implementation, and (iv) the relationship between oppositional voting and implementation. Implementation is defined as the phase of legal transposition and enforcement (Falkner et al. 2005, 6). A timely transposition means that all national implementation measures were in legal force by the transposition deadline. The sources used to evaluate the implementation process were the EUR-Lex database and information provided by the Secretariat-General of the Commission. As compliance research indicates that the Commission data are insufficient to evaluate implementation (see Hartlapp, Falkner 2009), the national database of federal and provincial law gazettes, made available by the Legal Information System of Austria and the Austrian Constitutional Service, were also consulted.

Further, 22 anonymous expert interviews were conducted between June 2014 and January 2015 in Vienna with the aid of a semi-structured interview guide to identify the specific reasons for oppositional voting in the Council and the problems that occurred during the implementation. To prevent any bias in the data, experts from various fields of interest were interviewed: various heads of section and heads of department and officials in the responsible ministry in charge of the Council negotiations and of the legislative transposition in Austria¹, representatives of relevant Austrian chambers (the Austrian Chamber of Labour and Chamber of Agriculture), and officials from various interest groups and non-governmental organizations that were to some extent involved in the process.² All interviews were evaluated with the aid of content analysis.

Several considerations led to Austria's being selected as a subject for investigation. First, Austrian national politics often take a higher priority during implementation than EU provisions do (Falkner et al. 2007, 405). Consequently, potential conflicts between European and national interests can be crucial for implementing directives. Second, the analysis of decision-making processes in the Council revealed that Austria, after Belgium, was the country with the most oppositional votes. As oppositional voting is a rare occurrence, examining further cases is important for the study. Third, the study delivers important insights into the process of implementing directives in Austria, a member state that has been the subject of fewer implementation studies than other member states.

4. Austria's opposition in the Council

Based on the monthly summaries of Council acts, the analysis demonstrates that the Council adopted 439 directives from 2000 to 2008. During the adoption of 75 directives (approximately 17.1%), at least one member state voted against or abstained from voting. In total, member states recorded 136 oppositional votes (votes against and abstentions). In order to provide data on contestation after the Lisbon Treaty, I additionally compiled data – based on the monthly summaries of Council acts – on oppositional voting from 2010 to 2016. During this period, member states contested 54 directives out

¹ The interviewees consisted of seven heads of section or department and five officials from the Federal Ministries of Labour, Social Affairs and Consumer Protection; Health; Agriculture, Forestry, Environment and Water Management; and the Interior.

² In Austria, there is only limited involvement of interest groups and NGOs in this policy process. However, the Austrian Chambers are involved and, depending on the specific topic, certain interest groups are consulted by the responsible ministries. Further, lobbying during the phase of Council negotiations and domestic transposition seems to be a crucial part of the policy process.

of a total of 208 adopted in the Council (approximately 26%), and a total of 121 oppositional votes were recorded. Even though the total number of directives decreased, this indicates that more directives were contested after Lisbon.

From 2000 to 2008, Austria opposed the adoption of 12 directives (with five votes against and seven abstentions), sharing second place with France, with the same number. Belgium was the member state that most often took a contested stance, with 19 opposing votes. With 11 cases of contestation each, Germany and Luxembourg occupied third place.

An analysis of member states' explanatory voting notes and the statements provided by the interviewed Austrian experts reveal various potential reasons for oppositional voting. Dissent or abstention from voting does not necessarily imply that a country rejects the provisions contained in the directives on a factual level. However, the assumption that an oppositional vote has implications for the implementation of directives only makes sense if two criteria are met: (i) the member state opposed provision(s) contained in the directive and (ii) the contested provision(s) had to be transposed into national law. Based on these criteria, the following four directives were filtered out. In the case of the Critical Infrastructure Directive 2008/114 and the Linking Directive 2004/101, Austria wanted the directive to have a broader scope, and to include provisions relating to nuclear power plants (MSoCA 2009, 22-23; Interview 16). Directive 2007/43, which laid down minimum rules for the protection of chickens kept for meat production, paid too little attention to animal protection and Austria therefore retained its stricter national standards (MSoCA 2008a, 32). Finally, Directive 2002/33, which dealt with health requirements for animal by-products, was omitted, as Austria's dissenting vote related to a provision of the jointly adopted Regulation 1774/2002 (Agence Europe 2001).

5. Effects of opposition on implementation

An analysis of directive implementation reveals differing levels of compliance. For example, the Timeshare Directive 2008/122 was implemented in a timely and correct manner, although Austria expressed concerns about the limitation of the right of consumers to cancel timeshare product contracts to a maximum period of one year and 14 days (MSoCA 2008b, 40; Written answer 1). Austria wanted to retain the more consumer-friendly national legislation that granted consumers the unlimited right to cancel such contracts, provided that valid reasons to do so existed. Furthermore, Austria feared extensive harmonization measures in this field (Written answer 1; Interview 12; Interview 4). In this case, Austria's opposition

did not influence the implementation of the directive. Three experts argued that the issues that were crucial for oppositional voting did not play a role during implementation (Written answer 1; Interview 20; Interview 21). One official emphasised that, ultimately, the directive offered substantial improvements, which also motivated a compliant implementation (Interview 20).

5.1. Administrative and legal misfit: Problems in Application

Austria and Finland abstained from voting in the Council during the adoption of the Firearms Directive 2008/51, as it tightened the gun control law and imposed the introduction of a national register of firearms (MSoCA 2008c, 17). Due to the high number of non-registered weapons in Austria, the government feared the financial and organisational burden involved in implementing the directive (Interview 1; Interview 2). Despite political resistance and a high degree of administrative and legal misfit – such a firearms register did not exist in law at that time – the transposing law came into effect 13 days before the deadline. Due to non-communication of national transposition measures, the Commission issued a letter of formal notice. Both interviewed experts stated that the opposition in the Council did not affect the directive's transposition (Interview 1; Interview 2). Although Austria had a positive transposition record, serious problems arose in the enforcement and application of this directive. Despite the obligation to register all weapons, only 250.000 weapons of an estimated two to three million were registered within the deadline (Interview 1).

In this case, Austria's opposition did not influence the timely and correct transposition of the directive, but it certainly influenced its enforcement and application due to the high degree of administrative and legal misfit between Austrian law and the provisions contained in the directive.

5.4. Administrative overload, issue linkage, and legal misinterpretation

An analysis of the cases indicates various difficulties in implementing the directives. For example, in three cases the delays and infringement procedures were triggered by administrative difficulties, issue linkage, limited transposition periods, and legal misinterpretation. Austria abstained from voting in the adoption of Directive 2005/47 relating to working conditions of mobile workers in the railway sector, thereby rejecting its inherent discrimination between national and cross-border areas. Furthermore, it was impossible to predict how the proposed law would affect the rail sector and small enterprises (MSoCA 2005, 16; Interview 3). Instead of

openly dissenting, Austria abstained, as the directive was based on an agreement between employee and employer representatives at EU level (Interview 3). The transposing Austrian law entered into force 16 days after the transposition deadline, and the Commission issued two letters of formal notice because of non-communication. The delay was due to an administrative overload in the field of social policy. The parliamentary session had to be adjourned to a later date. Prior opposition to the directive did not influence its transposition. However, only vague provisions in the directive were settled, with a view to facilitating a compromise between employees and employers; as a result, interpretation difficulties arose in the context of enforcement and application (Interview 3; Interview 4; Interview 17). This case confirms that vague provisions foster legal misinterpretation in the field of labour law (see also Falkner et al. 2005, 286–288).

A second example of delayed transposition occurred in the case of the Packaging Waste Directive 2004/12. Austria opposed its adoption due to the equalisation of waste recovery and waste incineration at waste incineration plants with energy recovery (Interview 9). Although the required adaptations in transposing the directive were classified as minimal (Interview 15), a delay of 409 days occurred. The Commission sent a letter of formal notice and a reasoned opinion due to non-communication (European Commission 2006, 252; 2007, 209). Nevertheless, in this case the infringement was not caused by any substantial political resistance. Experts stated that the period for transposition established by the Commission in the environmental issue sector was generally too short (Interview 9; Interview 16). Analysis of this case indicates that issue linkage between the directive and other comprehensive national reforms in the field of packaging waste and recycling should be regarded as a decisive factor in delayed implementation (see also Falkner et al. 2004, 461–463).

An example of incorrect implementation due to legal misinterpretation is Directive 2003/43 on the intra-Community trade in and imports of semen of domestic animals of the bovine species, which equalised the conditions for semen collection and semen storage centres, thus provoking Austria to abstain from voting. Austria foresaw serious problems with this equalisation in the animal health field (MSoCA 2003, 8; Interview 10). The Commission accepted the existing Austrian legislation and, according to EUR-Lex and the Secretariat-General, no transposition measures were needed and no transposition delay or infringement procedure occurred. However, when we analyse this case in depth, we gain a more nuanced perspective. In principle, Austria complied with the new provisions in the field of animal health. Nevertheless, after analysing the federal acts, national case law, and statements of the interviewed experts, we

concluded that in all the Austrian federal states (Bundesländer), adaptations in the field of animal breeding would have been necessary to transpose the new directive effectively. Breaches of EU legislation due to the unequal treatment of semen collection and storage centres only became evident during the course of several legal actions against existing federal state laws, which caused the Commission to react three years after the transposition deadline. Austria received a letter of formal notice and a reasoned opinion due to non-conformity with EU law (Press releases database 2007). The last federal act on animal breeding came into effect on 7 May 2009 (Landesrecht Steiermark 2009, §32), and the resulting delay in complete transposition of this directive therefore totalled 1,771 days, i.e. almost five years.

This case demonstrates that the Commission was unable to assess the requirements that Austria had to fulfil in accordance with the directive. Furthermore, it provides evidence that an investigation based only on the Commission's data would lead to distorted results, which once again highlights the importance of considering additional national information when investigating implementation processes. The case is complex and exhibits a high degree of discrepancy in competence between the federal and state level. Although one representative of the Chamber of Agriculture stated that Austria's earlier opposition did not negatively influence the transposition (Interview 18), we must assume that this opposition did affect the implementation, as it was exactly the same provision that resulted in Austria's dissenting vote that was not implemented at federal state level, and led to non-compliance and breaches with EU law.

5.5. Snap elections as an impediment to implementation

In three of the eight cases analysed, coalition conflicts and the early dissolution of the government were decisive for non-compliance. In addition to Germany and Ireland, Austria was one of the countries that voted against the Environmental Liability Directive 2004/35, because the act excluded liability for damages caused by nuclear technology (Interview 11). Austria favoured the inclusion of such liability. One representative of the Austrian Chamber of Labour questioned the veracity of the official reason, because granting liability exclusions to permit holders of authorised organisations was heatedly discussed during the decision-making process. Moreover, the Austrian Federal Ministry of Agriculture favoured a general liability exclusion for the agriculture sector (Interview 15).

The exceptions referred to above resulted in strong internal conflicts at the domestic level. Whereas the Federal Economic Chamber, the Federal Ministry of Agriculture, Forestry, Environment and Water Management,

and a large section of the Austrian People's Party were in favour of them, the Chamber of Labour and a significant section of the Social Democratic Party attempted to undermine these exceptions. Thus, a stalemate ensued between the two stakeholders (Interview 11; Interview 12; Interview 15). The coalition of the Social Democratic Party and the Austrian's People Party dissolved prematurely, resulting in elections in 2008 (Interview 12; Interview 15; ENDS Europe 2007). Furthermore, extensive national implementation measures – a total of 14 – were required at federal and state level in order to transpose the directive into national law (BMLFUW 2014). In addition to the federal structures, interpretation difficulties were perceived as a negative influence, resulting in delays and problems during transposition (Interview 11; Interview 12; Interview 13; Interview 15).

Consequently, of all the member states, Austria needed the most time for the transposition of this directive, and it did not conclude the process before 1 July 2010 (European Commission 2010, 9). Over and above a delay of 1.158 days, two formal notices, one reasoned opinion, and one legal action – including a sentence (C-422/08) by the ECJ (2009) – were needed to ensure compliance.

Three interviewees contended that Austria's earlier opposition to the directive had no impact on its implementation (Interview 11; Interview 12; Interview 13), whereas one official representative evaluated the opposition as highly influential. He argued that when a member state was unable to achieve its objective, it affected the implementation (Interview 15). Even though the official reason for Austria's dissenting vote did not play any role during the implementation, we observed its impact in the form of other factors that were heatedly debated and crucial for the voting behaviour and that finally led to implementation problems.

Austria abstained from voting on the Tobacco Products Directive 2001/37, because important national stakeholders, such as Austria Tabak, businesses, and employees, feared that the new regulations would result in reduced sales and increased job losses (Interview 5; Interview 6). The national transposition law came into effect after a delay of 324 days (Bundesgesetzblatt 2003), which led to one letter of formal notice and one reasoned opinion due to non-communication. Nonetheless, the delay was attributed to the early dissolution of the government coalition between the Austrian People's Party and the Freedom Party in the autumn of 2002 and not to Austria's opposition in the Council (Interview 5; Interview 6).

Germany and Austria both abstained from voting in the formal adoption of Directive 2001/89 on measures for the control of classical swine fever, as both countries opposed the ban on feeding catering waste to pigs (MSO-CA 2001, 7; Interview 8; Interview 7). The corresponding transposition was delayed for 292 days, and a letter of

formal notice and a reasoned opinion were sent out to Austria as the transposition measures were not timely reported. As in the case of the Tobacco Products Directive, the early dissolution of the government coalition in 2002 was responsible for the delay, not the earlier disagreement (Interview 8; Interview 7).

6. Conclusion

This article has examined whether opposition (viewed as votes against or abstention) in the Council of the EU affects the implementation of directives, by using the example of Austria in the years 2000 to 2008. After identifying all the directives on which Austria was outvoted, the study investigated (i) the decision-making processes at EU-level, (ii) the reasons for oppositional voting, (iii) the problems that arose during implementation, and (iv) the relationship between oppositional voting and implementation.

In five out of eight cases, the opposition did not affect the implementation process, as the issues that were decisive for oppositional voting in the Council did not play a role during the domestic implementation. The results illustrate that, in the case of Austria, it is not a common political practice to express an oppositional stance towards a directive by neglecting to implement it. The outcome confirms previous studies that identify only rare incidents of this phenomenon (Falkner et al. 2004; Linos 2007). Factors such as changes in government, issue linkage, administrative difficulties, and legal misinterpretation were responsible for improper implementation. Whereas issue linkage, administrative difficulties, and legal misinterpretation are discussed in other studies as factors with a strong influence on implementation, snap elections – which were a decisive factor in three cases of improper implementation – are rarely investigated as an obstacle to implementation. Further studies may therefore focus on this dimension of non-compliance. In all cases in which directives had to be implemented at federal state level, federalism delayed their transposition, which strongly supports previous findings (Haverland/Romeijn 2007; Linos 2007; König/Luetgert 2009; Thomson 2010). In the case of Austria, we can therefore draw the conclusion that domestic factors, in particular, determined the implementation outcomes, irrespective of the voting behaviour in the Council.

However, the study contradicts quantitative studies that demonstrate a strong correlation between opposition and problems with implementation (König/Mäder 2013; Zhelyazkova 2013). This study – and previous qualitative studies – nevertheless demonstrate that these implementation problems cannot be causally traced back to the opposition, as other factors influenc-

ing the implementation seem to be more responsible for flaws in the implementation.

In three studied cases (implementation of the Firearm Directive, the Directive on intra-Community trade in and imports of bovine semen, and the Environmental Liability Directive) opposition did influence implementation. Yet what all these cases have in common is that the new EU provisions greatly challenged the national legal architecture and changed the domestic legal structure in the area concerned. Steunenbergh and Toshkov (2009, 955) stress that the legal fit hypothesis ‘works independently from, or maybe in addition to’ discrepancies relating to preferences. It is evident from this study that only a combination of opposition in the Council and a high degree of legal misfit led to delayed and incorrect transposition in Austria. As the Europeanisation of national legal orders and traditions and its contestation at the domestic level as reasons for non-compliance are still an under-researched area, it requires greater attention in further research on implementation.

Another major outcome relates to the increased level of contestation in the Council after Lisbon. Utilising the monthly summaries of Council acts as a basis, the study demonstrates that member states’ contestation in the Council is increasing. The summaries further demonstrate that an increasing number of member states are not participating in the Council meetings. As consensus has dominated the decision-making process in the Council to date, these circumstances and their impacts on the EU political system should be considered in future research. Domestic opposition to the EU may therefore play a more decisive role in implementation outcomes in the future.

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