EU Social Policy:
The Governance Mix in Implementation Politics

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Introduction*

Since the beginning of European integration, and more pronounced since the mid 80s (Common Market Program, EMU) there is demand for a 'social dimension of Europe'. Not answering to this demand might endanger the integration project as the referenda *no* in 2005 have shown. Treaty reforms have resulted in a progressive extension of formal EU competences on social issues. And European Communities action capacity has been "incrementally increased in day-to-day politics" (Falkner/Treib/Hartlapp/Leiber 2005: 41). On these grounds we find that one dimension of social Europe, the regulatory output under the community method, has significantly increased and today could guarantee important social standards to EU constituents.[1] This raises the question about the impact of EU social policy. More concretely we ask whether EU social policy standards are timely and correctly implemented in the Member States? Or does Member States' reluctance undermine hierarchical steering set to deliver a 'social dimension of Europe'? A thorough analysis of these questions is an important contribution to an understanding of the use and capacity of different governance modes in the EU system.

In this article implementation is not understood as a restricted stage in the policy cycle (Easton 1965) where activity aims at bringing precisely defined policies into practice, but as "the continuation of politics by other means" (Bardach 1977: 88). In EU research this continuation of policy-making during the implementation phase has been addressed mostly with respect to the national level.[2] However, in the EU multilevel system there is also a supranational component to policy-making during implementation. I will analyse the way the European Commission (Commission) and the European Court of Justice

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[1] This is not to argue that regulation of social standards at EU level embraces a similar range of issues as at nation state level. Nor does this make a statement on the question whether social Europe is sufficient to balance liberalisation tendencies.

[2] Studies e.g. look at the interests of national actors or institutional constraints of Member States' political systems as explanatory factors for delaying or enhancing implementation (e.g. Héritier/Knill/Mingers 1996; Duina/Blithe 1999; Haverland 2000; Green Cowles/Caporaso/Risse 2001).

(ECJ) assure transposition and application as two phases of implementation of EU legislation in reluctant Member States. Thus departing from a perspective where implementation is simple hierarchical steering and considering this latter phase in the policy-cycle to be a continuation of policy-making it becomes a specific governance process, differing from comparable processes at the national level.

Why should we expect implementation of EU policy to be more prone to continued policy-making than implementation at national level? There are two reasons rooted in the EU system. First, the EU is highly dependent on Member States when it comes to implementation. Regulation is adopted at the central level while implementation is left to the decentralized actors (Scharpf 1985: 325). In the case of directives national political and administrative structures are entrusted with first transposition and then (support and control) application of commonly agreed standards. Hence, there is an additional level that complicates the implementation task. It also motivates the use of specific control instruments. Second, during decision-making competences of the Council, sided by Parliament, are restricted by a necessity to reach a majority or even unanimity amongst diverging interests and positions. Under these constraints side payments are frequent, legislation tends to be based on compromise and as a result the wording is often ambiguous. Vagueness and legal uncertainty (Schmidt 2004) are the grounds on which the Commission and the ECJ continue to make policy during the implementation stage.

This article will address the rational for development and use of instruments and procedures deployed by the Commission and the ECJ to assure transposition and application of EU legislation. It will pay particular attention to the mix of governance modes. Focusing on social policy I will show these instruments to be constrained and motivated by features of the EU system – specifically by the struggle about power and influence between Member States and the Commission. There are multiple reasons for Member States to oppose the implementation of a commonly adopted directive, e.g. because it runs counter to the ideological orientation of the government party or because it imposes high costs. At the same time they are aware that brought defection would endanger the integration project. And we should expect them to be interested in other Member States compliance with the commonly agreed rules, e.g. to remain competitive in the common market. Moreover, decentralised enforcement would carry the risk of

"forum shopping" or uneven implementation (Majone 2002: 382). On the supranational side the Commission as Guardian of the Treaties has an interest to veil about correct and timely implementation, since "(i)ts destiny and prestige are connected to the promotion of advances in European integration" (Ross 1995: 14). Yet, implementation control is resource demanding, politically costly and might at times contradict other interests of the Commission, e.g. concerning parallel decision taking processes or different policy arenas or levels.

The plan of this article is to first present a summary on the output of incremental social policy-making under the community method (chapter 2). These are the grounds on which to quantify Member States' reluctance to follow commonly agreed rules (chapter 3). I will then present supervision and enforcement policies enacted to counter this reluctance. It can be shown that Member States not only have at times agreed to transfer competences for hierarchical control to the European level, but that the Commission has skilfully extended these competences by recurring to other instruments and processes characterized by governance modes of competition and cooperation (chapter 4). It did so in interplay with the ECJ and substantially supported by sub-national, decentralized interests (chapter 5). Finally I will conclude on the continuation of policy-making during the implementation phase of EU social policy as a specific process of governance (chapter 6).

The output of incremental social policy-making[3]

Looking at the output of social policy over time allows us to trace the often cited incremental policy-making. By the end of 2005 the total number of social directives was 88 (63 individual social directives, 7 geographical extensions and 18 amendments to existing directives). Taking a closer look at the content of the regulative policy output we find that health and safety at work is the most active field with 31 directives. Minimum standards on working conditions outside this area follow with 25 new directives. Finally, nine directives belong to the field of non-discrimination and gender equality policy.

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[3]   For more details see the Chapter "EU social policy-making over time: the role of Directives" in Falkner et al. (2005: 41-55).

The EC's Directives*
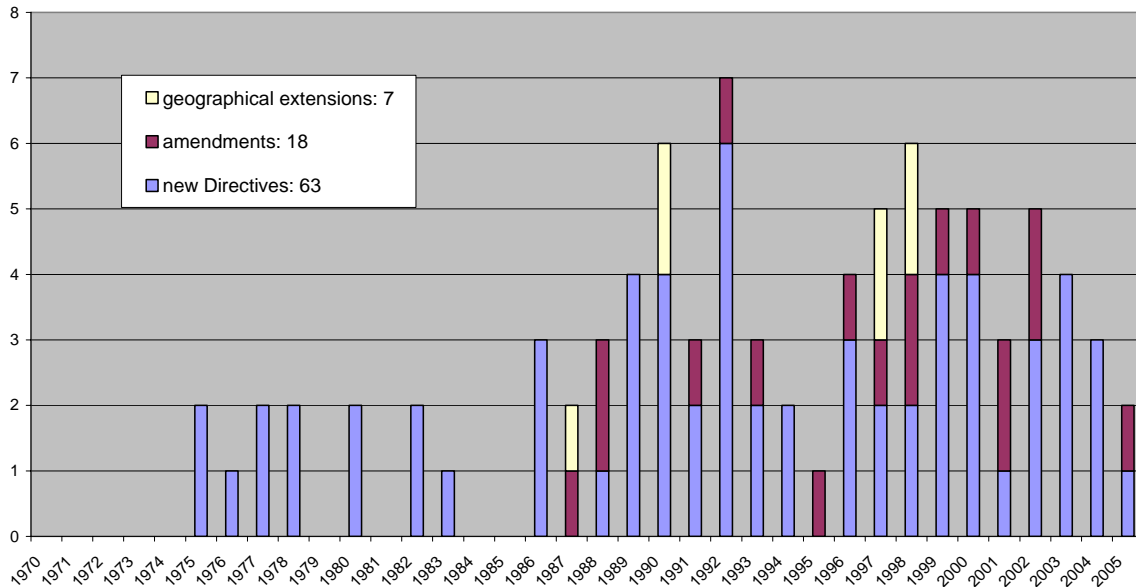
* Source: Falkner et al. (2005: 41-55), updated by own calculations. Adjusted Celex data on "social policy" Directives, excluding Euratom Directives, Directives adopted by the Commission, Directives on the free movement of workers and on social statistics. Incorrect classifications were corrected.

The rather slow take-off in the first two decades results from very limited policy-making competences. In the Rome Treaty, given an understanding that economic growth would by itself provide for improvements in welfare (Kohler-Koch 1997), regulatory competences on social policy had been transferred only for equal pay (Falkner 1998: 57) and social protection to assure the free movement of workers (Leibfried/Pierson 1995). During the late 1960s and early 1970s European social policy started to gain momentum – largely motivated by the wish to strengthen social issues vis-à-vis the consequences of economic integration (Barnard 1999). Most importantly a number of legislative measures proposed by the ensuing Social Action Programme (1974) were adopted by the Council up to the early 1980s. In this context the Commission played an important role as policy entrepreneur when undertaking studies, delivering opinions and arranging for consultation where no regulatory competences existed (Cram 1997).

Especially active periods are the late 80s and 90s. With the Single European Act (1987) qualified majority voting (QMV) was introduced for minimum harmonization of health and safety provisions (Art. 137 ECT). On other issues less closely connected to the single market Member States still proved reluctant to give the EU a broader role. Arguing that an improvement of general working conditions would ensure health and safety of

workers the Commission opened a path to adopt a wider range of social policy directives with QMV ("treat base game", Rhodes 1995: 100). A peak was reached in 1992 with six new directives, paralleling activities to accomplish the Common Market Program under Commission president Delors.

With the Maastricht Treaty the same year QMV was extended to many more issues including general working conditions, worker information and consultation as well as gender equality for the labour force. This move went along with important innovations in procedural terms. Under the 'social protocol' social partners can independently negotiate agreements that are then framed into a directive by the Council (Falkner 1998: 78-96). In the following years three such agreements were negotiated and without changes adopted by the Council: parental leave (96/34/EC), part-time work (97/81/EC) and fixed term work (99/70/EC). Amsterdam (1997) as well as Nice (2001) saw a progressive extension of social policy issues covered by regulatory competences.

In the last years newly adopted directives seem to show a declining trend. This might possibly be explained by a shift of activity to new areas of social policy, where legal or functional constraints suggest the use of the open method of coordination (e.g. social protection or employment). However, it is still unclear whether the observed mix of traditional and new modes of governance in social policy is complementary adding on the community method or follows a logic of replacement (see Falkner 2004; Trubek/Trubek 2005).

Overall we find that one dimension of social Europe, the regulatory output under the community method, has incrementally increased and today could guarantee important social standards to EU constituents. Yet, in the following these findings will be confronted with implementation success and failure of EU social policy regulation.

Member States' failure to implement EU social policy[4]

Member States are often reluctant to follow commonly agreed EU directives. This reluctance does not need to be based on explicit political opposition (Falkner/Hartlapp/

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[4]   Here I draw on the work of a collaborative research project. Many thanks to my colleagues Gerda Falkner, Simone Leiber and Oliver Treib; for more detailed results see Falkner et al. (2005).

Leiber/Treib 2004). We can discern three worlds with different typical modes of treating implementation duties and thus different factors explaining non-compliance: a world of law observance, a world of domestic politics, and a world of neglect. The specific results of particular examples of (non-)compliance tend to depend on different factors within each of the various worlds: the compliance culture in the field can explain most cases in the world of law observance, while in the world of domestic politics the specific fit with political preferences in each case plays a much larger role, and in the world of neglect this is true for administrative non-action. These patterns seem to be rather stable over time and to outlive governments of opposing ideological orientation (Falkner/Treib/Hartlapp/Leiber 2005: chapter 15).[5]

One possibility to qualify Member State reluctance to implement is to look at infringement procedures initiated by the Commission against non-compliant Member States. From 2002-2005 the Commission initiated an annual average of 136 social policy infringement procedures (CEC 2003, 2004a, 2005, 2006). Most of them address failure to transpose EU standards into national legislation. A smaller, but increasing number of infringement procedures concerns incorrect transposition. Cases in which the bad application of social policy is at stake are very rare. This does not necessarily mean that we face greater Member State reluctance to become active than to guarantee the correctness of the transposition. A substantial shortcoming of this method is that we simply depict the reaction of the Commission to non-compliance. They are only 'the tip of the iceberg' of non-compliance (Hartlapp 2005: 191-197).

To provide a better account of (non-)compliance we have looked in more detail at implementation processes and outcomes of six labour law directives in 15 Member States. The directives concern written information on employment conditions (91/533/EEC), parental leave (96/34/EC), working time (93/104/EC), and the protection of pregnant (92/85/EEC), young (94/33/EC) and part-time workers (97/81/EC). They cover all important EU social policy directives from the 1990s that supersede national regulation (thus excluding transnational issues such as European works councils) and that are not too closely related to some other EU laws to be studied individually.

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[5]   Note that these country clusters are not based on geographical criteria and that hence there is no 'southern bloc' (Hartlapp/Leiber, 2006).

We find that the discipline of the Member States in implementing labour law directives agreed in the Council is tremendously weak. In more than 2/3 the adaptation requirements experienced a delay of two years or more beyond the transposition deadline fixed in the directive before they were fully met. Only 11 per cent of the transposition cases were both on time and fully correct, while only 19 per cent were either on time or not more than six months delayed. How is this rather great resistance of Member States to implement regulative EU social policy answered by the Commission (even though not necessarily aware of the full degree of non-compliance)?

Implementation politics part one: Commission's powers in putting social policy into practice

In the EU, the implementation management of commonly agreed rules lies with the Commission as 'Guardian of the Treaties' (Art. 211 ECT). Given Member States' reluctance to implement commonly agreed standards the Commission has different instruments and strategies at her disposal to monitor and enforce transposition and application of EU social policy. Here I will focus on the development of these instruments in the interplay of Commission's interest to increase leverage when executing its powers and Member government's reservation to lose control over and enforcement processes that might drop back on national interests.

The Commission can start an infringement procedure when a Member State does not follow commonly agreed rules (Art. 226 and 228 ECT). It consists of four different steps including a judgment of the ECJ. In cases of remaining opposition to the ECJ judgment, the procedure can be started over again possibly leading to financial sanctions. Over time and for all policy areas the numbers of procedures initiated rose from an average of 670 in the years 1978 to 2653 in 2005 (CEC 2004a: Annex 1; 2006: Annex 1). For social policy similar developments can be traced (CEC 2003, 2004a, 2005, 2006). In social policy financial sanctions have been demanded by the Commission in three cases.[6] But so far no sanctions have been imposed in this area. Member States normally come into line as soon as sanctions are announced.

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[6]   A demand for sanctions was issued 1998 against Luxembourg concerning medical treatment on board of vessels, 1999 against France for discrimination of women in access to night work and against Italy concerning work equipment.

Member States had delegated enforcement rights already in the founding treaties. Their extension and practical use has developed over time driven by both Member States interest in mutual application of rules and Commission interest to increase its power when facing non-compliance. Until 1977 the use of the infringement procedure followed a diplomatic logic and reluctant Member States only seldom became subject of enforcement (Audretsch 1986: 279-283). In the 80s with increasing numbers of directives to be implemented and the Internal Market Project ahead the Commission became more active and infringement procedures more common. Tallberg (2003) shows how in 1991 it was Member States interest to extend enforcement competences in order to counter an implementation deficit presumed to endanger the Internal Market Project.[7] Following this proposal Maastricht saw the introduction of financial sanctions. Rules for calculations were published in 1997.[8] Recently the Commission extended its leverage to punish defection of common regulation when proposing financial sanctions. Article 228 ECT merely adheres to the Commission's right to "specify the amount of the lump sum *or* penalty payment to be paid by the Member State". However, in 2005 the ECJ – upon proposal of the Commission – ruled that penalty *and* lump sum could be imposed both in one case, thereby stretching an unclear treaty provision against the criticism of some Member States (C-304/02, interview ECJ, 22.2.2006).

In parallel and even when Member States no longer showed specific motivation to put the Common Market into place[9] the Commission expanded its enforcement capacity along informal paths and by recurring to competition as a governance mode. It further depoliticized and streamlined internal procedures (Sécretariat Général 1998), systematically used informal means to exert pressure by issuing press releases for all infringement cases unless explicitly decided differently (Sécretariat Général 1996: 7) and shamed implementation 'laggards': "I urge all those Member States who are lagging

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[7] Especially Great Britain as a stance advocate of the Internal Market Program pushed for financial sanctions (Tallberg 2003: 77) – possibly also because Britain itself showed a relatively good compliance record.

[8] A standard flat rate (currently 600€) is multiplied by the Member States' ability to pay and its weight in the Council (25,4-0,58), a coefficient for seriousness (1-20, based on the importance of the violated norm and the effect of the violation) and a coefficient for duration (1-3).

[9] An attempt of the Commission to further expand enforcement powers at the 1996/1997 IGC failed (Tallberg 2003: 82).

behind, particularly Luxembourg, Greece, Italy, Belgium, France and Portugal to take appropriate action immediately or face the legal consequences" (Commissioner Flynn cited in: CEC 1997). At Nice (2001) the Commission introduced the use of scoreboards to directly compare Member States' performance in notifying transposition of social policy directives and create a frame for more competition.[10]

Summarizing this overview of Commission enforcement politics we see relatively strong powers. At the same time I have argued that independent of the enforcement powers Commission infringement procedures only cover the 'tip of the iceberg' of Member States' non-compliance. To gain analytical leverage as to the logic of the Commission in doing so, we can differentiate between Commission's capacity to enforce infractions and its will to do so when potentially facing political costs.

With respect to capacity the Commission could be either unaware of infractions or it could lack the means to pursue them. In the EU-system monitoring of compliance is specifically difficult. The distance between supervisors in Brussels and addresses (in social policy: enterprises and individual workers) is greater than at national level. In addition transposition of directives allows for national diversity in the way the commonly agreed standards are assured. What allows for Member States' freedom to maintain regulatory traditions and to keep national specifics in legislation intact as an upshot increases the complexity of the control task. These systemic conditions are aggravated by limited resources. With a staff of 922 persons[11] and only a fraction of them dedicated to labour law regulation (interview ECJ, 22.2.2006) the Directorate General for Employment and Social Affaires (DG EMPL) is simply not in a position to systematically follow up on all cases of incorrect transposition. Thus, to pick cases of higher political relevance and to concentrate on directives with greater visibility and impact seems logical. Looking at our 90 in-depth case studies and comparing cases of non-compliance and Commission enforcement we see indeed a bias to prioritise some directives over others (here: pregnant workers and working time directives). Moreover in 2002 the

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[10]   Scoreboards had initially been introduced in 1997 for the Common Market and environmental issues.

[11]   See: http://europa.eu.int/comm/budget/budget_detail/policy_areas_en.htm#4, download 5.1.2006.

Commission has made such prioritisation an explicit goal of enforcement policy (CEC 2002).

Following a different logic the Commission might simply prefer not to enforce non-compliance. One rationale is that it is more interested in the production of new "rules (…) than in the thankless and politically costly task of implementing existing ones" (Majone 2002: 329). Member States are not only the addressees of rules. They are at the same time those who decide about (further) community activity. If the Commission wants to reach an agreement for a new initiative – for social policy or in a separate policy area – continuing an infringement procedure or proposing financial sanctions against a decisive Member State risks being counterproductive (c.f. Spencer 1994: 111).[12] By the same token, not starting an infringement could be used as a side-payment in negotiations.[13] Are these constraints on Commission's capacity to enforce infractions and its will to do so when potentially facing political costs simply accepted? In how far do the strategies and mechanism employed by the Commission to counter these constraints lead to a specific mix of governance modes in implementation politics?

Implementation politics part two: Interaction with sub-national interests to put social policy into practice

If we look at negotiation of EU regulation it is well known that one way the Commission has opened room for manoeuvre prior to or during negotiations is the involvement of sub-national interests (e.g. Kohler-Koch 1997). I argue that in social policy interaction with (sub-national) interests is similarly used to further implementation.

In many EU Member States there is a long tradition of both sides of industry to organise. Moreover during the 1980s, under Delors, the role of EU level social partners has been systematically strengthened and enshrined in the treaties (Falkner 1998). A comparative analysis of different policy areas shows that DG EMPL has more contacts to interest representatives from industry, trade unions and consumer groups than most other DGs

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[12]   In a recent infringement case a Finish island (Aaland) even threatens to leave the EU.

[13]   Yet, empirical analysis reveals that political costs of enforcement do not translate into a systematic favouritism of some countries over others, e.g. because they have more political weight or because their population is more euro-sceptic (Falkner/Treib/Hartlapp/Leiber 2005: 222-223; Hartlapp 2005: 203-205).

(Hooghe 2001: 65). Since the 1990s the Commission has extended "lobby sponsoring" (Bauer 2002: 388) to other, non-governmental social interest organisation under the 'social platform'. More concretely it made support in implementation and "monitoring transposition" an explicit requirement for Brussels-based NGOs to receive funding under the Community Action Programme 2001-2006 to Combat Discrimination (interviews DG EMPL, 20.2.2006 and social NGO, 21.2.2006). Here interests organized at the EU level function as transmission belts to raise awareness at sub-national levels and as channels to upload information. Overall DG EMPL is in a good position to stimulate and receive information concerning implementation from organized interests at the European or national level.

Drawing on the delegation literature the following paragraph will present two different mechanisms in implementation politics where the Commission builds on sub-national interest organizations or individuals: Whistle blowing and preliminary rulings. Both instruments answer to the constraints imposed by the limited capacity for systematic enforcement by following a cooperative governance mode. The latter also allows the Commission to avoid political costs of direct enforcement. Before analysing these mechanisms in more detail, I will point at national and community interests in creating and employing them.

For a long time the Commission itself wanted decentralized forms of implementation management to become the prime avenue of enforcement in the EU multilevel system (Ehlermann 1987). During the negotiations of the Maastricht Treaty it proposed to explicitly offer guarantees to individuals to redress consequences of non-implementation (CEC 1991: 131). But Member States refused to enshrine these powers in the treaties and opted for the more direct and hierarchical possibility to impose financial sanctions. In the same year, however, the ECJ established that the fundamental principles of direct effect (Van Gend & Loos, C-26/62) and supremacy (Costa v. ENEL, C-6/64) could be exercised against the state. Member States would – under certain conditions – be liable for non-implementation (Francovich, C-6/90). Thus, Commission implementation capacity along indirect paths were extended by the ECJ, its "primary ally in (the) implementation process" (Peters 1997: 193), thereby overruling Member States that criticised "judge-made law and judicial activism" (Tallberg 2003: 105).

Whistle blowing to prepare the ground for hierarchical enforcement

Decentralized actors blowing the whistle provide valuable information to the Commission at comparatively low costs (c.f. "fire-alarm", McCubbins/Schwartz 1984). Individuals or organized interests can directly address the Commission when they believe their government to be in breach of community legislation. While in principle information exchange between sub-national actors and the Commission existed before, the Commission started to make systematic use of this channel in 1989. To this aim a complaint form was published in the Official Journal (C-26, 1.2.1989, p.7-8) and can today be downloaded from the Secretariat General's homepage. The systematic use of whistle-blowers helps the Commission broadening its information base and countering the information deficit in order to efficiently target the use of hierarchical enforcement instruments. The extensive use of claimants was criticised by the European Ombudsman as treating them as information providers "to be deployed as and when the Commission chooses" (Rawlings 2000: 13). The Commission defended this action as essential to its role as 'Guardian of the Treaties' and as necessary to guarantee efficiency of enforcement (CEC 2001), but was forced to keep individual claimants informed throughout the whole procedure.

As for the quantitative use of the mechanism over all policy sectors individual complaints are more often at the roots of infringement procedures than recognition of implementation failure by the Commission. In social policy complaints from the sub-national level are even the chief source for detecting infringements. Here in 2004 almost half of the infringements were based on whistle blowing.[14]

A concrete example of whistle blowing from our case studies on the implementation of six directives concerns the transposition of the parental leave directive in Ireland. After having lost a battle during implementation at the national level the Irish Congress of Trade Unions blew the whistle. They fought for parents of children born before the cut-off date set by government to equally benefit from the new right of three month parental

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[14]   There were 100 infringement cases based on whistle blowing, 74 were initiated quasi automatically for non-communication of transposition legislation at the deadline while 33 cases were detected by the Commission's own offices (CEC 2005: Annexe 1). For 2002 the respective numbers are 98:11:28 (CEC 2003) and for 2003 the numbers are 88:8:46 (CEC 2004a).

leave. The Commission after consultation with the European trade unions quickly initiated an infringement procedure. Under such pressure the Irish government put the legislation into line (Treib 2004: 229-230). Whistle blowing is an important example showing how the limited capacity to know about all cases of Member States' reluctance to implement regulatory policies is partly substituted by the adroit interaction with sub-national actors.[15]

Preliminary rulings as enforcement at low costs and stepwise policy-making

Often individuals seek to enforce their (EU based) right against their own government by demanding a national court to address the ECJ how to interpret European regulation. Implementation failure can, but must not necessarily be the cause. The ECJ then lays out the meaning of a specific standard in a preliminary ruling (Art. 234 ECT).[16]
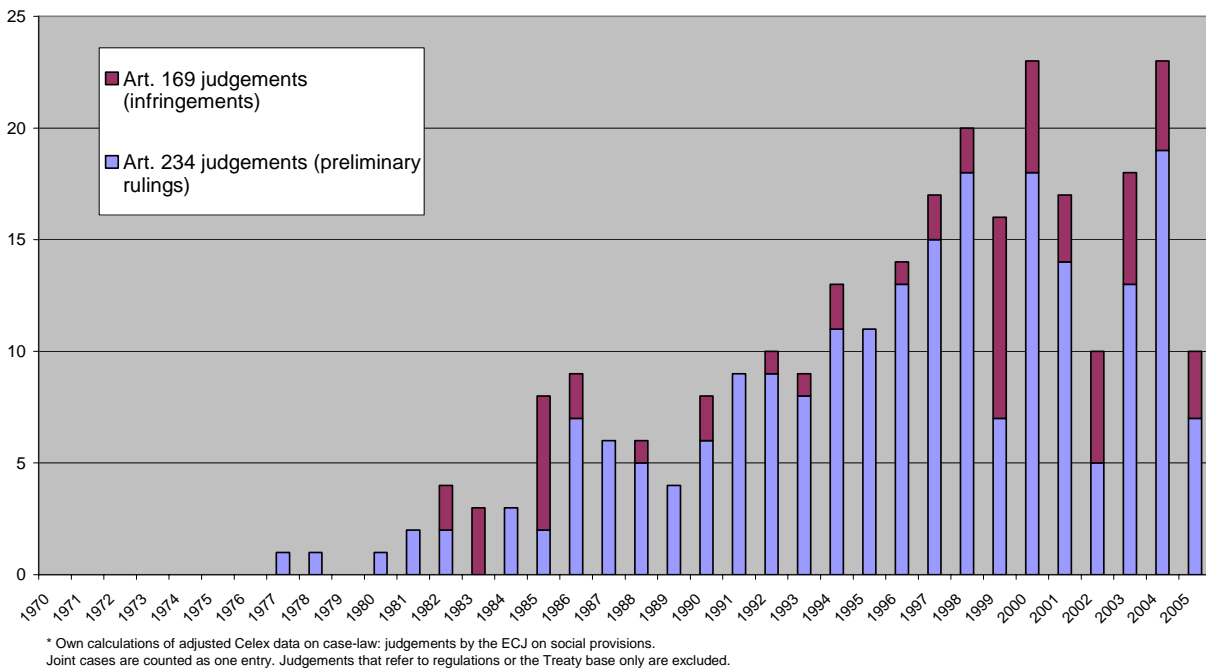
With respect to policy-making during implementation preliminary rulings are interesting from two perspectives. First, they are an indirect enforcement instrument against Member States' reluctance to implement EU legislation. Building on the legal principles of direct effect, supremacy and state liability they empower individuals and organised interests to actively support the Commission in its role as 'Guardian of the Treaties' (c.f. "deck staking", McCubbins/Noll/Weingast 1987). Second, they can earmark cases where the ECJ judgement substantially alters a specific standard of a directive and hence, policy continues to be made beyond the adoption of a directive under the classical community method.

If we want to find out more about the indirect enforcement capacity of preliminary rulings it is sensible to look at their numbers together with ECJ rulings as part of infringement procedures. Both present supranational means to exert pressure on defecting Member States. Their development is quantified by the following graph.

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[15] At first sight whistle blowing might seem like an attractive instrument for sub-national interests to systematically shift the national balance of power. Yet preliminary rulings allow for relatively greater influence on the process and are thus a more attractive avenue for systematic use.

[16] Article 234 ECT was installed as to ensure uniform interpretation of community law through Member States.

ECJ Judgements on Social Policy Directives*

* Own calculations of adjusted Celex data on case-law: judgements by the ECJ on social provisions.
Joint cases are counted as one entry. Judgements that refer to regulations or the Treaty base only are excluded.

We have seen in paragraph 2 that the EU witnessed a slow take-up in adopting social policy directives, thus it comes as no surprise that the first judgement referring to a directive stems from 1977. From then on we see an increasing trend of preliminary rulings until the late 1990s. In the last years numbers for ECJ judgements increased while numbers of preliminary rulings show an unstable and overall declining tendency. These developments have to be seen in the light of growing numbers of directives potentially invoked and growing numbers of potential claimants due to enlargements.

Whether preliminary rulings are raised also depends on national legal culture and the legal system (Alter/Vargas 2000). Here the Commission actively encourages the rise in preliminary rulings by financial support for the training of national judges in Community law in general, through exchange programmes of lawyers (SCHUMAN, GROTIUS or TAIEX with new Member States) and in the area of social policy by organisation and financing of seminars to explain legal implementation aspects of recently adopted directives to national legal actors (interview DG EMPL, 20.2.2006). Thus, from the perspective of the Commission preliminary rulings are means to indirectly enforce community regulations without carrying potential political costs. Yet, differing from

whistle blowing the Commission has little discretion in influencing the selection of cases or their substantive outcomes (but see Mattli/Slaughter Burley 1998 on the generally pro-integrationalist stance of the ECJ).

Preliminary rulings are also of interest for policy-making during implementation because of their potential to substantially alter the content of a directive. Specification through case law is a common feature of any legal system (Everling 2000: 218). But it is more important in the EU system because of greater legal uncertainty (Schmidt 2004). Ambiguous wording of a directive is often an inbuilt consequence of the negotiation dynamics prevailing at the European level. In other words, unclear wording sometimes serves as an instrument to make proposals agreeable to the Council of Ministers. Second, the overlap between national legal systems and supreme EU legislation often requires a fresh interpretation of a clause that had been clearly defined before.

To gain empirical insight into the use of preliminary rulings as an indirect means of enforcement and as an instance of policy alteration we have to look at a case to case basis again. For our 90 in-depth studies we find 14 preliminary rulings up to 2005 dealing headmost with one of the six directives.[17] Thereof four cases can be characterized as depicting the indirect enforcement mechanism. Most clearly visible (and successful) is the mechanism in a case where the dismissal protection of pregnant workers as prescribed in the EU directive was only transposed by the Spanish government after a preliminary ruling (C-438/99) had proven prior Spanish legislation to fall short of EU requirements (Hartlapp 2005: 95). The other cases concern the pregnant workers directive (C-356/03), the working-time directive (C-397/01-C403/01) and the directive on written employment information (C-253/96-C258/96). Moreover in one case, concerning the implementation of the pregnant workers directive in Portugal, the simple threat of initiating a number of related preliminary rulings as expressed by trade unions and broadly announced in the media sufficed to force the Portuguese government into a legislation that would retrospectively extend maternity leave to 14 weeks

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[17] This comprises six preliminary rulings for the working time directive (93/104/EC), five for the pregnant workers directive (92/85/EEC), two for written information on employment conditions (91/533/EEC) and one for the part-time directive (97/81/EC). Rulings where one of our six directives is mentioned, but does not form the central piece of EU regulation the judgement refers to are excluded.

(Falkner/Treib/Hartlapp/Leiber 2005: 87). Similarly the British Trade Union Congress withdrew a case from the ECJ after having successfully used a preliminary ruling to alert the Commission of incorrect implementation of a cut-off date for drawing on newly established rights during parental leave (Treib 2004: 200-201).

Cases from our sample where we can clearly link observed policy alteration to difficult negotiations concern the working time directive. The directive was one of the most contentious social policy proposals of the 1990s because it touched upon a politically and ideologically highly salient and in economic terms potentially very costly issue. Moreover the Commission played the treaty base game (Rhodes 1995) to adopt the directive by QMV thereby increasing opposition of certain Member States. During the negotiations the British government pressed for as many exemptions as possible and most importantly succeeded in pushing through the opportunity for individual workers to opt out of the 48-hour week. Other standards, especially the many derogation possibilities, saw tough negotiations among Member States, too.

Since the adoption the substance of the directive has been altered in many ways that governments had obviously not envisaged during negotiations (on unintended consequences, see e.g. Pierson 1996: 136-139). In the SIMAP case (C-303/98, similarly Jaeger C-151/02 and Dellas C-14/04) the ECJ decided on-call duties to be an integral part of working time and stepwise enlarged the scope of its judgements. Most countries hitherto had treated such duties (partly) as rest periods and would have to bear considerable direct economic costs resulting from the new definition – especially in (public) hospitals (CEC 2004b: 34-39). Taking into account that the original directive foresaw a revision of parts of the directive and following these ECJ rulings, the Commission opened renegotiations in 2003. It initially proposed to stick to the ECJ working time definition (interim directive 2003/88/EC). Facing fierce opposition from Member States and increasing use of the individual opt-out to escape the effect of the ECJ working time definition (Luxembourg, Spain, France, and Germany) the Commission changed its position in its latest proposal and added a new category of 'inactive part of on call-time'. If adopted this would safe Member States high direct economic costs. To sum up this is a case where compromise and vagueness in the text of the directive created much room for EU policy-making in implementation through

alteration. Yet it is also one of the rare cases where – given the specific conditions of prior envisaged renegotiation combined with ECJ rulings perceived as having a costly impact – Member States put a hold to supranational policy making during implementation.

Conclusion

Over time and through incremental policy-making a substantial 'social dimension of Europe' has developed in form of EU directives. But Member States show rather great reluctance when it comes to implement them timely and correctly. To counter this resistance different instruments and procedures are deployed by the Commission. In studying these instruments and procedures as well as interests of actors involved in their development and use this article analysed a specific governance process at the European level.

Even though looking at the classical community method I show that there is a substantial amount of instruments involved in implementation politics that follow non-hierarchical governance modes. The development and use of instruments other then the well known infringement procedures can be understood as resulting from the constraints of the EU system. Member States' reservation to transfer additional powers, as well as the political costs of enforcement and the limited capacity of the Commission to systematically follow up on all cases have been driving forces to enlarge room for manoeuvre by instruments that can be categorized as competitive in their governance mode (e.g. benchmarking). Interaction with sub-national actors in form of whistle blowing increases the information volume and sets hierarchical enforcement powers on a broader basis. Empowerment of individuals and organised interests to use preliminary rulings increased indirect pressure capacity. Thus, we observe a specific mix of governance modes where the important hierarchical enforcement is complemented by competition as well as cooperation as additional governance modes.

A second important aspect supporting a view on implementation as continued policy-making at the EU level is alteration of social policy standards in preliminary rulings. Case law is common at the national level, but its relevance is increased in the EU where ambiguous wording of a directive is often an inbuilt consequence of the negotiation

dynamics prevailing at the European level. Even though lacking clear channels to influence a specific outcome the Commission overall aims at stimulating preliminary rulings. Building on sub-national actors they serve as means to specify contested standards for which at times negotiation proofed difficult. In this process often initiated or supported by the Commission the strict separation of decision taking at the supranational level and later implementation at the national level is blurred. Overall we face a continuous process of policy-making during implementation which seems to better suit Commission interests than a limitation to instruments belonging to the hierarchical mode.

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