

*Rainbows and Crosses:  
Noncompliance with EU Law Prohibiting Sexual Orientation Discrimination*

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## *I. Introduction*

When Article 13 (now Article 19 TFEU) of the Amsterdam Treaty was approved in 1997, the EU was given the power to regulate morality policies at the national level. The second major piece of EU legislation to be approved with these new powers, the Framework Directive on Equality in Employment (EED) (2000/78/EC), required states adopt national measures prohibiting discrimination in the workplace based on a person's sexual orientation. This was a radical step in many ways. While some EU member states already had some protections for gay and lesbian employees in the private sector, others did not even consider sexual orientation a protected status. EU representatives could redefine what was appropriate behavior in the workplace with respect to a person's sexual orientation, even if that conflicted with existing religious norms and practices. Therefore, unsurprisingly, the EED was highly controversial not only at the bargaining table but also during the implementation process. National religious organizations, who are major employers in some countries, and countries with large shares of the population claiming to be highly religious led to greater problems of noncompliance than in more secular countries.

Much of the compliance literature as it currently stands ignores the role of public opinion and national preferences in creating implementation problems, primarily because there has been a lack of empirical support, with some exceptions (Lampinen and Uusikyla 1998; Zhelyazkova, Kaya, and Schrama 2016; Mbaye 2001). But, by considering only the main issue that shaped the negotiation process, this paper shows not only that what happens at the bargaining table impacts the probability of compliance, but also that domestic public opinion about the main point of dispute at the bargaining table can affect the quality of legal implementation.

The role of public opinion and national preferences in compliance studies is often missed because a new EU law's bargaining and implementation stages are often treated as analytically distinct from each other (Falkner et al. 2004). The politics of negotiating EU law are different from the implementation of the law. Instead, frequently the literature cites the "misfit" hypothesis, or the degree to which existing policy and institutional practices match a directive's requirements, for explaining why states have difficulty implementing agreements they agreed to at the Council level (Héritier 1996; Knill and Lenschow 1998; Falkner et al. 2005). Institutional or policy misfit has been found to affect levels of compliance with the EED's requirements in a variety of early studies (Petričević 2015; Givens and Case 2014; Zhelyazkova and Torenvlied 2011). One criticism of the misfit hypothesis is that it ignores how domestic political actors prevent compliance because they benefit from the status quo (Haverland 2000; Steunenberg 2006), but how religious organizations defending their interests cause noncompliance has not yet been explored.

In large-N studies, public opinion has not been detected as a factor affecting compliance because commonly used measures focus only on general support for the EU (see, for example, [Börzel et al. 2010](#)) and do not consider the main issues of dispute dividing the member states. When we do, we see that domestic public opinion about sexual orientation discrimination does affect how likely a provision or sub-provision of the EED will be implemented correctly. The evidence that conflict at the Council affects compliance later is also mixed (Thomson 2010; Thomson, Torenvlied, and Arregui 2007; Zhelyazkova and Torenvlied 2011; Zhelyazkova 2013). These previous studies, however, do not consider the main issue that divided the member states at the bargaining table and how that affected compliance with one aspect of the EED. If we consider the main subject matter at stake in the EED, prohibiting discrimination in the workplace

based on sexual orientation, and then track how well member states complied by implementing provisions addressing sexual orientation discrimination, we see that attitudes towards homosexuality and the role of churches as employers affect the probability a state transposed a provision correctly.

Therefore, this study of the EED's implementation moves our understanding of noncompliance in the EU forward by showing that the key subject matter of debate during negotiations must be taken seriously to identify the factors most likely to affect implementation. The following section briefly reviews the history of gay rights, out of which the EED's effort to combat sexual orientation discrimination in the workplace grew. The religious/secular divide, both in terms of church-state relations and levels of religiosity in society, affected negotiations over the EED requirements. The next section then shows how that divide affects the quality of transposition, controlling support for laws that protect gays and lesbians from discrimination. The concluding section discusses what the implications are for the study of compliance and the prospects for additional legislation guaranteeing equal treatment for gays and lesbians living and working in the EU.

## ***II. Religion, European Integration, and Gay Rights***

Since the EU's early days, conservative religious organizations have been strong supporters of European integration (Philpott and Shah 2006; Kaiser 2007; McCrea 2010). EU officials, government leaders, and religious groups perceived European integration as the best way to spur economic recovery and combat the growing popularity of communism in western Europe as well as to re-create a form of "ultramontanism" based on conservative, often Catholic, values (Byrnes 2006). Whether to expand protections for gays and lesbians in the EU, however, became a key tipping point when religious groups moved from being supporters of European integration to

becoming increasingly skeptical. For example, during the plenary vote endorsing the Squarcialupi Report in 1983,<sup>1</sup> which detailed the uneven treatment gays and lesbians faced across the then-EEC and called for EU legislation action, a large number of Christian Democratic Members of the European Parliament (MEPs) rejected it. MEPs from the Irish Fine Gael Party even boycotted the vote on the grounds that the Commission had no competence “to decide the moral attitudes of society or the pattern of the criminal laws of the Member States.”<sup>2</sup> Ten years later, the EP commissioned the Roth Report, which called for EU-level legal reforms that would end discrimination in all spheres of employment, including criminal, civil, and contract law as well as an “equivalent legal framework” of marriage and adoption rights for same-sex couples.<sup>3</sup> The Vatican’s reaction was that the EP was condoning “moral disorder” by pushing for such legislation (Bell 2002, 105).

Ten years later, when member state governments decided the EU needed to have a role in combatting the rise in hate crimes and other rightwing extremist violence, the protection of gays and lesbians from discrimination once again became the central issue of dispute that prevented quick consensus. Under Article 13 (now Article 19 TFEU), the EU would be granted the authority to draft legislation that addressed sexual orientation discrimination, which was opposed by the Christian-Democratic-led governments in the Netherlands, Italy, and Ireland. The Article was only adopted by the EU-15 after LGBT activists groups applied sufficient pressure on Dutch negotiators and the arrival of the left-leaning *Ulivo* coalition in Italy after national elections (Mos 2014; Bell 2002, 106).

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<sup>1</sup> European Parliament, “Report for the Committee on Social Affairs and Employment on sexual discrimination at the workplace,” [Squarcialupi] A1-1358/83.

<sup>2</sup> Ryan, Debates of the European Parliament No I-311/71, March 13, 1984.

<sup>3</sup> European Parliament, “Report for the Committee on Internal Affairs and Citizens Rights on Equal Rights for Homosexuals and Lesbians in the European Community,” [Roth] A3-28/94. Art. 14.

## Explaining Church Opposition to the EED

Member states come to the bargaining table whose preferences are often shaped by the dominant domestic interest groups in society (Moravcsik 1998). Interest groups are often more aware of the consequences of EU legislation than the general public given adjustment costs are concentrated among them and, therefore, they have a greater incentive to monitor the legislative process and lobby national governments than the general public (König and Luetgert 2009). Even if there is general consensus EU legislation is desired among EU member states, domestic interest groups most affected by policy change will shape national preferences at the bargaining table.

In the case of the EED, the core issue of disputes was whether religious employers would be exempt from the legal requirements of the EED was the main source of dispute among the member states and almost led to its failure at the bargaining table (Thomson et al. 2012).<sup>4</sup> France and Belgium, and somewhat less so the Netherlands, favored a very narrow exemption for religious employers, while Ireland, the UK, and Germany favored a broad one. Both Protestant and Catholic governments opposed the directive as written. The four national churches of Ireland, both Protestant and Catholic, recommended the governing Fianna Fáil party reject the entire directive if the exemption was not broad enough.<sup>5</sup> In the UK, Christian organizations widely feared that they would be sued by disgruntled employees if they refused to hire non-Christians.<sup>6</sup> As Lady Young, a Conservative Peer in the House of Lords, claimed, “A new European Union employment directive will make it illegal for a church to require Christian staff to fill posts. . . . Atheists and practicing homosexuals would be given just as much legal right to these posts as

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<sup>4</sup> The other issue of conflict in the Council was accommodation of disabled workers.

<sup>5</sup> Education Staff, “O’Toole Anger on Equality Line,” *Irish Times*, October 24, 2000, p. 51.

<sup>6</sup> Justine Hollins, “Christians oppose new EU directive over jobs,” *The Sentinel* (Stoke), September 14, 2000.

Christians.”<sup>7</sup> A supposed compromise was reached by including a second paragraph in the EED stating, “. . . 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].”<sup>8</sup> As Mark Bell (2002) summarizes, “. . .[t]he reluctance of certain organizations with a religious ethos to employ lesbians and gay men is one of the key reasons why [Article 4.2] is present in the Directive. . .” (Bell 2002, 117).

The narrow exemption for religious organizations in Article 4 is not the only EED provision that would challenge the autonomy of religious employers. Articles 1-2 require that governments adopt legislation that defines both direct and indirect discrimination-based sexual orientation, which several countries did not possess. Defining sexual orientation as a protected status undermines the teachings of some established churches, whether Protestant or Catholic. Religious groups could not retaliate against employees if their own members reported discrimination based on sexual orientation (Article 11). Governments were also required to pass legislation specifying that the burden of proof rested with the respondent, and not the plaintiff, when a claim of unlawful discrimination was made, affecting the standing of religious organizations in civil court (Article 10). Employment tribunals were created across the EU to handle disputes regarding employees who believed they were unfairly dismissed (Article 9.2). These tribunals became highly controversial, especially in countries where religious organizations were once given discretion over hiring and firing practices. For instance, the British House of Lords ruled in 2005 that the Church of Scotland could be brought before an

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<sup>7</sup> Stephen Bates, “Work of the Devil,” *The Guardian* (London), July 26, 2000.

<sup>8</sup> 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.

EED employment tribunal for the unfair firing of a former minister, Helen Percy (Steven 2010, 180-1). In Ireland, the Equality Tribunal voted in favor of a principal who had been denied a position when a nun asked her opinion about “homos.”<sup>9</sup>

The EED’s goal of prohibiting sexual orientation discrimination undermined the interests of religious organizations in two ways. First, religious organizations were the largest employers in some member states, especially in the provision of social services like health care and education, and benefitted from autonomy from civil employment law in turn for providing a large share of all social services. Religious employers from a large non-profit sector emerged whereby the family, charitable foundations and religious institutions would provide social care, limiting the role of the state or the free market in many Catholic countries or countries with sizable Catholic minorities (Van Kersbergen 1995; Daly 2006)

In the Netherlands at the turn of the twentieth century, for example, confessional parties representing Calvinists and Catholics established the foundations of the present-day Dutch welfare state, which created independent spheres for Catholic and Protestant care organizations to operate without state control or direction (Kersbergen 2009). In postwar Germany, the two main welfare associations, the Protestant *Diakonisches Werk* and the Catholic *Caritas*, became the main organizations through which large percentages of Germans received their healthcare (Katzenstein 1987, 73–5). These faith-based organizations operate as *Tendenzbetrieben*, occupy more than 50 percent of the total social services sector in terms of share of full-time workers and were exempted them from federal law in the area of employment discrimination (Kendall, Knapp, and Forder 2006). The role of religious organizations in delivery of care services is not limited to mixed confessional countries. In Catholic Ireland, the Irish constitution did not make

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<sup>9</sup> Joe Humphreys, “Schools Have Rights on Ethos, Says Priest,” *The Irish Times*, January 21, 2015.



Catholicism a state religion but gave the Catholic Church a “special position” in society, particularly in allowing the Catholic Church to manage over 90 percent of all primary and secondary schools, the authority to appoint its own administrators, and to hire its own teachers (Kissane 2003; O’Donoghue and Harford 2011). At the same time, as part of an initiative by the Blair government in the UK, religious organizations were also increasingly producing educational services and receiving state funding (Ahdar and Leigh 2015).

In turn for providing social services, many of these religious organizations enjoyed special forms of legal autonomy.<sup>10</sup> Under the principle of “subsidiarity” developed by former Dutch-Prime Minister and Calvinist theologian Abraham Kuypers, religious nonprofits are granted a significant autonomy over whom they may hire and fire and, thus, are permitted to hire and fire employees based on their moral doctrine. For example, in 1983, the German Federal Labor Court ruled that a Protestant charitable organization was permitted to dismiss a family counselor because he was gay.<sup>11</sup> The EED, from the perspective of religious employers, was a direct threat to their autonomy by prohibiting sexual orientation discrimination, even if same-sex sexual relations contradicted church teachings. They could no longer hire and fire anyone they wished. Instead, the employee could only be dismissed if his or her core activities were related to the “ethos” of the organization, such as working as a priest or religious official. State preferences over the EED, both this paragraph and the whether to adopt the EED in general, are partly a consequence of the role religious organizations played in delivering social

*Hypothesis: The countries that delegate important social services to religious organizations are less likely to comply with EED provisions related to same-sex orientation discrimination than those that do not.*

## **Explaining Public Opposition to and Support for the EED**

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<sup>10</sup> Morgan (2009) provides a comparative historical review of why the role of religious institutions and norms vary among West European welfare regimes (Morgan 2009).

<sup>11</sup> BAG decision of 30.06.83 case 2 AZR 52/81 NJW 1984, 1917.

Previous research shows that levels of religiosity in society are strong predictors of tolerance for homosexuality (Ayoub 2016, 137; Finke and Adamczyk 2008) and, thereby, whether laws protecting sexual minorities will advance (Inglehart and Welzel 2005; Fernández and Lutter 2013; Sommer and Asal 2014). New international norms carried by transnational activists (Kollman 2013) or presentations of gays and lesbians in the media (Garretson 2018), as well as the work of transnational activists using new framing strategies (Paternotte 2015; Paternotte and Kollman 2013), can set the stage for policy change, although many admit they are not causally sufficient. Changing attitudes about homosexuality among elites are also associated with the advancement of pro-LGBT legislation (Reynolds 2013).

Similar to support for pro-LGBT laws at the national level, a member state's support for the EED regarding non-discrimination measures against gay and lesbian employees is likely to be associated with the levels of secularism in a country and support for homosexuality. In contrast to the highly technical nature of other policies, morality policies, such as regulating how businesses treat their workers according to their sexual orientation, are highly salient issues in national politics. National interest groups, such as the Catholic Church and others, will work to make sure the national population is aware of how a draft EU law comports or not with established moral teachings. In addition, as the historical record shows, MEPs and national representatives from more religious countries opposed their expansion, even though gay and lesbian activists turned towards the EU, especially the European Parliament, because it held more political allies sympathetic to their causes than politicians at the national level (Ayoub and Paternotte 2014). These groups are also likely to mobilize sympathetic voters to influence the government to oppose the EU measure and implement the measure in ways that are least likely to affect existing belief systems, as shown in the case of Ireland and Germany, despite contrasting

levels of policy misfit (Siegel 2017). Thus, in contrast to some other more complex policy areas, national governments are likely to be quite sensitive to national public opinion when deciding to support the EED and the quality of its implementation.

In the EU-15, during negotiations over the EED, levels of religiosity were a strong predictor of discrimination against gays and lesbians in the workplace but not necessarily opposition to legal measures that would combat it. Figure 1 shows the relationship between those reporting religion as very or somewhat important in their lives, according to the 1999 European Values Survey, and opinion about the presence of sexual orientation discrimination in their country, according to the 2002 Eurobarometer (EVS 2000). Figure 1 shows that in countries with large numbers of religious individuals, such as Greece, Italy, and Portugal, more than 20 percent of respondents thought that people in their country considered it always or usually right to discriminate against a job applicant because they were gay; this is significantly lower in more secular countries. The second graph in Figure 1 shows a similar pattern in that higher levels of religiosity in a country are also associated with respondents' beliefs that gay and lesbian employees had fewer chances in the workplace in their country, although more religious countries show a greater deal of variation from the mean. Ireland, for example, is a major outlier in both cases.

*Hypothesis<sub>1</sub>*: Countries with higher shares of the population identifying as very religious are less likely to comply with EED provision related to sexual orientation discrimination.

*Hypothesis<sub>2</sub>*: Countries with a national public less (more) tolerant of homosexuality are more (less) likely to commit violations when transposing the EED.

Citizens in countries with higher levels of religiosity in society or intolerance did not necessarily claim that sexual orientation discrimination was less of a problem than in more secular countries. Employment discrimination against gays and lesbians was widely

acknowledged in countries with large shares of the population reporting religion as important. Figure 2 shows the percentage of respondents in each country that reported either observing employment discrimination based on sexual orientation or believing gays and lesbians “would have less chance . . . than everyone else of getting a job, training, or promotion” (Commission 2002).. There is not a clear relationship between people who believed such discrimination was legitimate and those reporting it was a problem. Sexual orientation discrimination was reported as a significant problem in both southern Catholic countries and northern Protestant ones, with Denmark as an exception.

Thus, higher levels of religiosity in a country are not always correlated with opposition to sexual orientation discrimination, as secular modernization theories predict. In countries where citizens reported homosexuality as still considered a taboo, there was stronger support for legal measures (of any kind) that would address sexual orientation discrimination (see Figure 3). For purposes of comparison, the third column lists the percentage that believed discrimination based on sexual orientation was either always or usually right. Clearly, citizens living in countries where large segments of the population said religion was important to them also acknowledged that discrimination against gays and lesbians existed, whether they believed it was legitimate or not, and support for such measures was high.

*Hypothesis<sub>2</sub>: Countries with higher (lower) levels of perceived discrimination are less (more) likely to transpose the EED correctly.*

Support was also high in countries without such laws in place, while support for legal measures was lowest in countries that already had some laws that protected gays and lesbians from discrimination in the workplace. One explanation is that respondents living in religious societies where homosexuality was still taboo supported such legislation because EU law might be the only mechanism that could change the status quo given religious opposition, a variation of

the “blame Brussels” argument for policy change (Green Cowles, Caporaso, and Risse 2001). In contrast, people living in more secular countries who had such laws either perceived sexual orientation as not a problem or believed EU legal measures would only weaken existing laws, which is consistent with the finding that countries with extensive social protection and generous social policy, such as Denmark, often oppose EU efforts in this area.

Existing laws banning such discrimination may not only be perceived as sufficient, but governments may also have less difficulty implementing EU legal measures that contrast with existing legal practices that have been successful in reducing sexual orientation discrimination. For instance, there were constitutional level protections as well as Irish case law protecting LGBT employees against discrimination in Ireland before the EED was adopted (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. 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. Thus, governments with these laws in place may find it easier to comply with the EED’s policy goals than those without, which supports the “misfit” hypothesis.

*Hypothesis: Countries with (without) existing legislation protecting gays and lesbians from discrimination in the workplace are more (less) likely to implement provisions of the EED related to sexual orientation discrimination correctly.*

### **III. Quantitative Analysis of Noncompliance**

This section shows how interests of organized religious groups and national public opinion about measures that would prohibit sexual orientation discrimination in the workplace affected the odds of compliance at the provision level. The EED contains 27 provisions, with 17 requiring national legislation that address sexual orientation discrimination. Moreover, some provisions

contain multiple sub-provisions that address sexual orientation discrimination. For example, Article 2(2)(a) addresses direct discrimination, while Article 2(2)(b) addresses indirect discrimination. This yields a record of compliance for 14 provisions or sub-provisions for the EU-15, producing 225 observations in most statistical models. Data on compliance with the EED with regard to sexual orientation discrimination provisions are drawn from Waaldijk and Bonini-Baraldi (2006), which tracks when and how well provisions addressing same-sex orientation discrimination in the workplace were implemented (Waaldijk and Bonini-Baraldi 2006).<sup>12</sup> The data is extended and cross-validated using Annual Reports of Compliance by the Annual Directorate-General for Employment, Social Affairs, and Equal Opportunities Annual Report on Developing Anti-Discrimination Law in Europe. This type of triangulation yields a more accurate assessment of levels of compliance by relying on multiple and different types of sources.

Figure 4 shows the number of provisions implemented incorrectly or not all with regard only to provisions requiring new national measures that tackle sexual orientation discrimination in the workplace. First, some member states transposed the necessary legislation far ahead of the deadline, while many other failed to meet the December 2005 deadline. Germany, Greece, and Luxembourg had infringement proceedings against them in 2005 for failing to transpose the EED entirely (Waaldijk and Bonini-Baraldi 2006, 90).<sup>13</sup> Of the EED's 29 provisions or sub-provisions, 15 require a member state to transpose legislation that addresses an issue related to sexual orientation discrimination, if it does not already exist. The second part of Figure 4 shows the

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<sup>12</sup> Zhelyazkova and Torenlid (2011) limit their analysis to the period between 2004 and 2007. One problem is that Germany and Luxembourg did not implement the EED until 2006. In addition, the Commission detected problems of noncompliance across the EU-15 until 2013.

<sup>13</sup> Finland and Austria also did not fully implement the Directive until it was transposed by the Åsland Islands and each Bundesland, respectively, in 2006.

number of times a state implemented a provision addressing sexual orientation discrimination incorrectly. The number of violations range from 0 (Germany and Luxembourg) to 11 by France, with an average of about 6 committed among all fifteen member states. Some countries, such as the UK, have not even fully complied with the Directive to this day, despite the Commission's decision to initiate infringement proceedings against it (Siegel 2017).

Are patterns of noncompliance with provisions related to sexual orientation discrimination different from more general patterns of noncompliance with the EED? Drawing from Commission reports and confirmed by labor law experts, Zhelyazkova and Torenvlied (2011) find 26 cases where an EED provision was not implemented correctly, but experts in the field of sexual and gender discrimination law identify a total of 24 cases of incorrect transposition not included in the authors' analysis specifically in reference to sexual orientation with regard to the same provisions (Zhelyazkova and Torenvlied 2011). Moreover, incorrect transposition of laws addressing sexual orientation discrimination is not strongly correlated with overall levels of noncompliance when not considering the type of anti-discrimination law ( $r^2 = 0.47$ ).<sup>14</sup> Thus, there is strong preliminary evidence that levels of noncompliance depend on the type of discrimination governments must combat, not just relative fit between the status quo and a Directive's provision.

### **Independent Variables: Religious Beliefs and Institutions**

The role of religious organizations as employers in society are indicated by two factors, whether the government funds religious or primary schools and whether the government funds

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<sup>14</sup> Zhelyazkova and Torenvlied (2011) limit their analysis to the period between 2004 and 2007. One problem is that Germany and Luxembourg did not implement the EED until 2006. In addition, the Commission detected problems of noncompliance across the EU-15 until 2013.

charitable organizations or not (Fox 2011).<sup>15</sup> Education and health care services are the predominant areas where religious actors are active. In exchange for generous funding, religious organizations enjoy autonomy from state employment laws. Charitable organizations include hospitals, elder care associations, and other groups sponsored or managed by religious actors. The strength of religious institutions in society and their interests extends beyond these two social sectors, however. States also extend constitutional privileges and financial subsidies for religious institutions and favor some religious groups over others (Grim and Finke 2006). As a result, the “faith-based” sector of the economy and society becomes larger and seeks greater autonomy from state control. Government favoritism exists on a scale ranging from 0—the state provides no funding of religious institutions and no religion is favored—to 12 in which governments not only provide funding for religious activities but also favor some religious groups over others. In the EU-15, government favoritism scores vary from 2.11 (Ireland) to 8.4 (Greece).

Public opinion for the EED’s anti-discrimination legal measures related to sexual orientation is indicated by religious beliefs and direct support for the law. To capture levels of religiosity, we draw on the percentage of the population responding that religion plays a very important role in their life (EVS 2000). Since views of homosexuality can be independent of religion, we also include the reported percentage of citizens who view homosexuality as “never be justified.”<sup>16</sup> Conversely, compliance with a legal provision should be more likely when the domestic population perceives sexual orientation discrimination as a widespread or fairly widespread problem (Papacostas 2010). Second, we consider whether strong public support for

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<sup>15</sup> The data were downloaded from the Association of Religion Data Archives, [www.TheARDA.com](http://www.TheARDA.com), and were collected by the author, March 6, 2018.

<sup>16</sup> Responses to the question vary from 1 (“never justifiable”) to 10 (“always justifiable”).



these specific legal measures for protecting people in the workplace increased the chances of compliance.

### **Alternative Explanations**

The null hypothesis is that characteristics of the provision most likely affect the probability of correct implementation, and factors that address the main subject of dispute are irrelevant. This includes problems of the “goodness of fit” between existing national laws and the directive’s requirements, without controlling for the type of discrimination. First, we consider whether existing national legislation improves the likelihood of compliance, which is measured according to Waaldijk and Bonini-Baraldi (2006). Second, measures of fit are also drawn from Zhelyazkova and Torenvlied (2011), who measure levels of technical fit from high to low and find the relative fit between the status quo and the provision’s requirements positively affects compliance, but the authors do not control for the type of discrimination governments were addressing when transposing the directive.

Other factors at the provision-level that affect that quality of transposition include the level of discretion given states to devise legislation that comports to the directive’s goals (Thomson 2010). Higher levels of discretion can reduce adjustment costs as governments craft legislation that fits existing policy practices. Finally, we also control for whether governments opposed a provision at the bargaining table. If a provision is debated at the Council level, as Article 4.2 was, compromise is more likely to be reached, and compliance with a provision is more likely. Measures of discretion are also drawn from Zhelyazkova and Torenvlied (2011).

A cross-classified design was used to account for the dependence between observations, which belong to two different groups: member state and provision (Raudenbush and Bryk 2002). This design helps capture the degree to which provision-level and country-level characteristics

themselves account for the quality of transposition. Because the dependent variable is binary as well as to account for fixed effects at both the country and provision level, a mixed-effects logistical regression model is used. By selecting provisions and sub-provisions only addressing sexual orientation discrimination, we are selecting “most-likely” cases for analysis. “Most-likely” case design is appropriate when testing whether an alternative theory has any additional explanatory weight compared to existing theories (Levy 2008; George and Bennett, 2005). Here we are comparing the explanatory weight of religious interest groups and domestic public opinion—national level characteristics—about sexual orientation discrimination and against the “misfit” hypothesis and other provision-level qualities that do no control for the substance of debate between the member states.

## **Results and Analysis**

Table 1 reports the conditional probability, presented as odds-ratios, that a member state will implement the directive correctly; a value greater than 1 represents an increasing probability the provision or sub-provision is implemented correctly, while a value less than 1 means the independent variable decreases the likelihood of correct implementation. The first model only considers proposed factors that shape national preferences over measures that address discrimination based on sexual orientation. Most factors behave as predicted; if a state supports religious schools or permits religious organizations to operate hospitals, the odds of correctly transposing a provision or sub-provision are statistically likely to decrease and substantially. State support of religious schools significantly decreases the odds of a provision being implementing correctly. When governments favor some religious institutions over others in issue areas beyond just education and hospitals, a provision addressing sexual orientation discrimination being correctly implemented decreases by 30 percent. The substantial effect these

factors have on compliance suggest that governments have great difficulty implementing laws that address sexual orientation discrimination when religious institutions play a role in delivering social services and the state gives them special treatment.

National public opinion about same-sex sexual orientation and importance of religious belief to an individual also reduce the odds of implementing a provision correctly. In member states with large populations who believe that homosexuality is always unjustified or believe religion is an important part of their lives, the odds of correct implementation decrease 30 percent and approximately 8 percent respectively. Perceptions that discrimination based on sexual orientation is widespread also reduce the possibility of correct implementation of a provision. Combined there is strong evidence that national attitudes can affect the transposition process. Perceptions that sexual orientation discrimination is widespread reduce the odds of implementation, even though national opinion favoring such measures improves its chances by almost 30 percent. If those countries with highest levels of reported sexual orientation discrimination in the workplace also strongly favored such legal measures, why do they have contrasting effects on the odds of correct implementation? One possible answer is that large segments of the population may support legal measures that address high levels of sexual orientation discrimination and are associated with better compliance in some cases, but those channels of influence are weakened when governments must transpose legislation. In these cases, religious institutions and existing beliefs pressure governments to implement the directive incorrectly. Socially conservative governments, even in countries that have large populations in support of these legal measures, can thwart their implementation, such as when the center-right government in Germany refused to even transpose the legislation until the Commission

threatened to sanction the government and center-left Red-Green replaced the previous coalition government (Skidmore 2001).

The characteristics of the provisions themselves do not affect the odds of implementing national legislation related to sexual orientation discrimination correctly. This supports the view that national or state preferences over the EED's core feature—anti-discrimination measures related to sexual orientation—had a direct effect on the likelihood of compliance. One shortcoming, however, is that data on relative fit is missing for some sub-provisions of the EED related to national measures that address sexual orientation discrimination. We only have an indicator for whether existing national legislation was in place before the EED was approved, not the extent to which policy and practice met the EED's standards. Yet, existing legislation neither improved nor decreased the chances of correct implementation. Levels of discretion or whether a provision was debated also did not affect the likelihood of compliance.

One check for robustness is to reconsider whether the institutional relationship between church and state, rather than the policy benefits religious institutions are provided, affect the quality of implementation. There are also problems with relying on dichotomous factors to characterize the relationship between church and state. Instead, the institutional relationship between church and state exists along a continuous spectrum that indicates the degree to which governments regulate their actions (Chaves and Cann 1992). State control of church activities are arranged on a 7-point scale according to the level of government involvement in church affairs, from appointment of church leaders to paying church personnel and managing its properties. Based on this scale, France and the Netherlands have the lowest level of state involvement in religion, while there is a complete control in Denmark and Sweden.<sup>17</sup> Countries like Austria,

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<sup>17</sup> I included Greece as a 8.4 following calculations in Kollman's (2013).

Germany, Italy, and the UK dwell somewhere in between those two extremes. Our expectation is that countries that have complete fusion of church-state are more likely to implement legislation correctly because they have full control of church activities. With the exception of France, Ireland, and the Netherlands, which Chaves and Cann (1992) score as having complete or almost complete separation of church and state, most western European countries lie somewhere in the scale's middle range. This produces the least desired position from the point of view of compliance with the EED. The state has neither full control over state affairs to impose secular law on religious institutions nor are religious institutions completely separate from state regulation and, therefore, less likely to also face compliance problems because they enjoy complete autonomy from state regulation under national law and, thus, are unlikely to be affected by the EED's legal requirements. Models 4 and 5 include this broader measure of church-state relations. We see that as governments increase their regulation of church activities, the odds of correct implementation improve by 30 percent or 40 percent, respectively.

#### **IV. Conclusion: The Europeanization of Gay Rights?**

This article presents evidence that states do use the "back door" to avoid complying with costly provisions of a directive. Directives are often written very broadly and address a wide variety of issues at the same time. The costs of compliance are a function of the domestic interest groups most likely to be harmed by compliance and the state of public opinion. The EED is an example because it required states implement measures that address employment discrimination based on sexual orientation. National preferences over granting equal treatment to gays and lesbians shaped both government positions at the bargaining table, and almost exclusively so, and the quality of the EED's later implementation. Evidence supporting the role of national preferences is derived from both tracing the history extending equal treatment laws in the

European Union, whereby protections for religious institutions allowed them to hire and fire based on their moral policy, as well as quantitative analysis infringements of EU law only with reference to how they put into effect protections for gay and lesbian employees in the private sector.

If the subject matter of directive's provision or sub-provision is important for how national preferences affect compliance, then we can expect that the causes of noncompliance to vary across the other areas of discrimination the EED is intended to combat. Future studies should consider those aspects of the EED. The goal here was relatively modest; if a directive addresses different types of discrimination, do public opinion and national preferences about combatting one type matter? The results here suggest that researchers must be careful when generalizing about the causes of noncompliance in the EU when directives like the EED are so broad in scope and affect multiple legal fields at the same time. This should not preclude the use of large-N studies, but it does reinforce the view that the multiple legal subjects and types of policies a directive affects need to be considered when considering what national factors cause noncompliance in the EU.

Finally, what are the implications for gay rights to become "Europeanized," that is, are we observing a convergence or harmonization of EU member state treatment of sexual minorities, at least with references to gays and lesbians and anti-discrimination laws? The EED's requirements that gays and lesbians be protected from discrimination in the workplace across the EU is a significant step forward given sexual orientation was a not even recognized a special status in the national laws of many member states when it was being negotiated, especially among the new member states joining after 2002. However, while some modifications have taken place, national models of anti-discrimination models remain largely in place (Bell 2008). There is evidence that

member states have avoided fully complying with the EED's requirements, despite the Commission's enforcement threats (Siegel 2017). Correct implementation of the EED does not mean that it is being applied correctly. Additional comparative research is needed to determine whether member states are actually applying the EED's anti-discrimination provisions, especially in the new member states.

In addition, contrary to developments at the national level, the EED has not served as powerful impetus for additional EU legislation. While the number of pro-LGBT laws, especially same-sex marriage legislation, has expanded rapidly across Europe, the EED is still the only piece of EU legislation that affords protection for same-sex-oriented individuals. The so-called EU Horizontal Directive, which would protect gay and lesbian citizens from discrimination by public authorities, is currently stalled in the Council of Ministers due to opposition by Poland, Latvia, and Lithuania, who cite its "cultural incompatibilities" with national traditions, and by the current German government, which perceives it as too costly for businesses (Thiel 2015, 76). This is in contrast to how the EU has been venue for European activists to organize transnationally to put additional pressure on their own national governments (Ayoub 2013) and rulings by the European Court of Human Rights and European Union Court of Justice (Helfer and Voeten 2014), which have done more to change national policies regarding the treatment of gays and lesbians, such as the ECJ's recent ruling requiring member states grant equal residency rights to spouses of same-sex partners under the principle of freedom of movement, even if the hosting country does not recognize same-sex partnerships in its own country.<sup>18</sup> But divides between the member states in terms of the power of religious organizations in society and

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<sup>18</sup> Judgment of 5 June 2018, *Coman*, C-672/16, ECLI:EU:C:2018:385.

existing moral beliefs will continue to hamper efforts to harmonize or Europeanize national laws that provide equal treatment for sexual minorities within the EU.



Figures and Tables.

Figure 1.

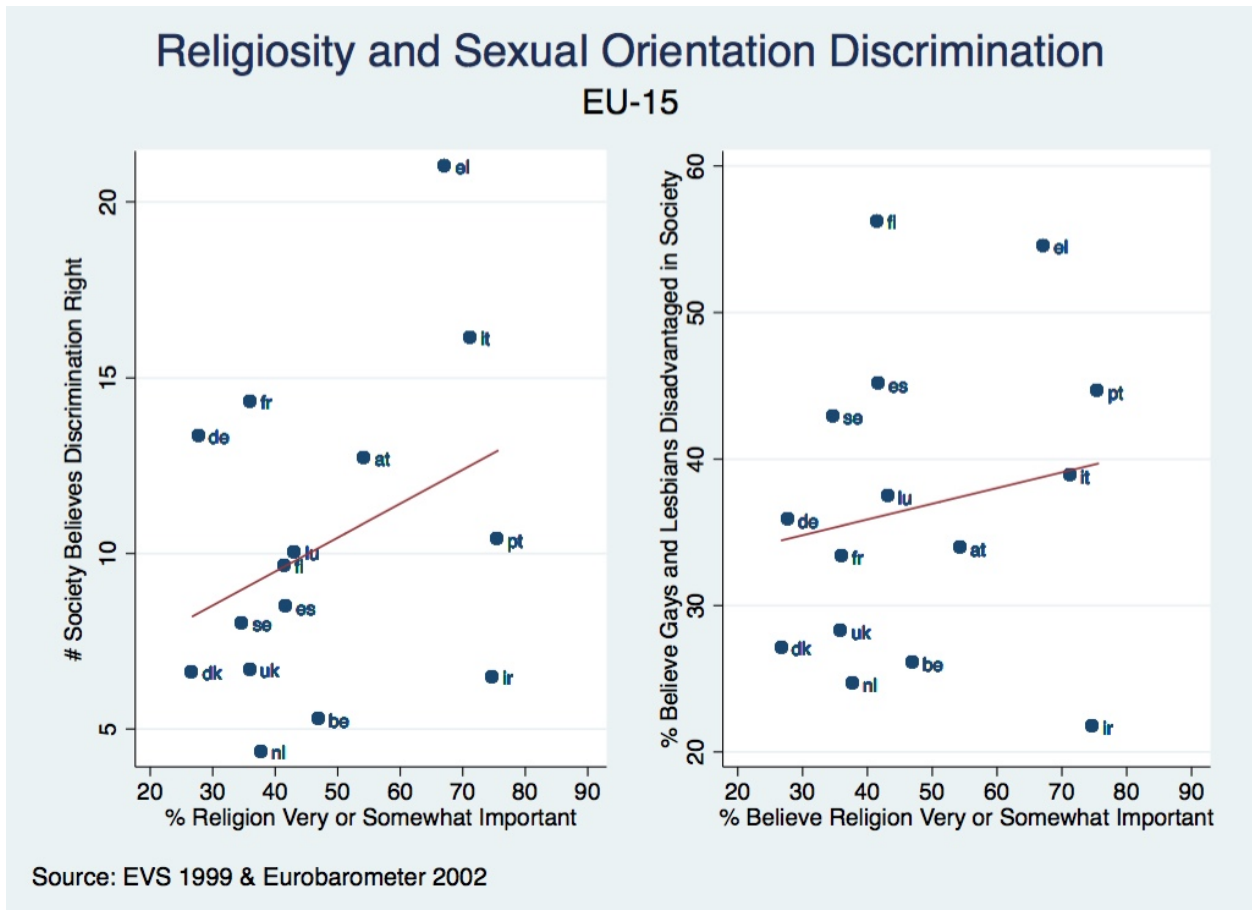


Figure 2.

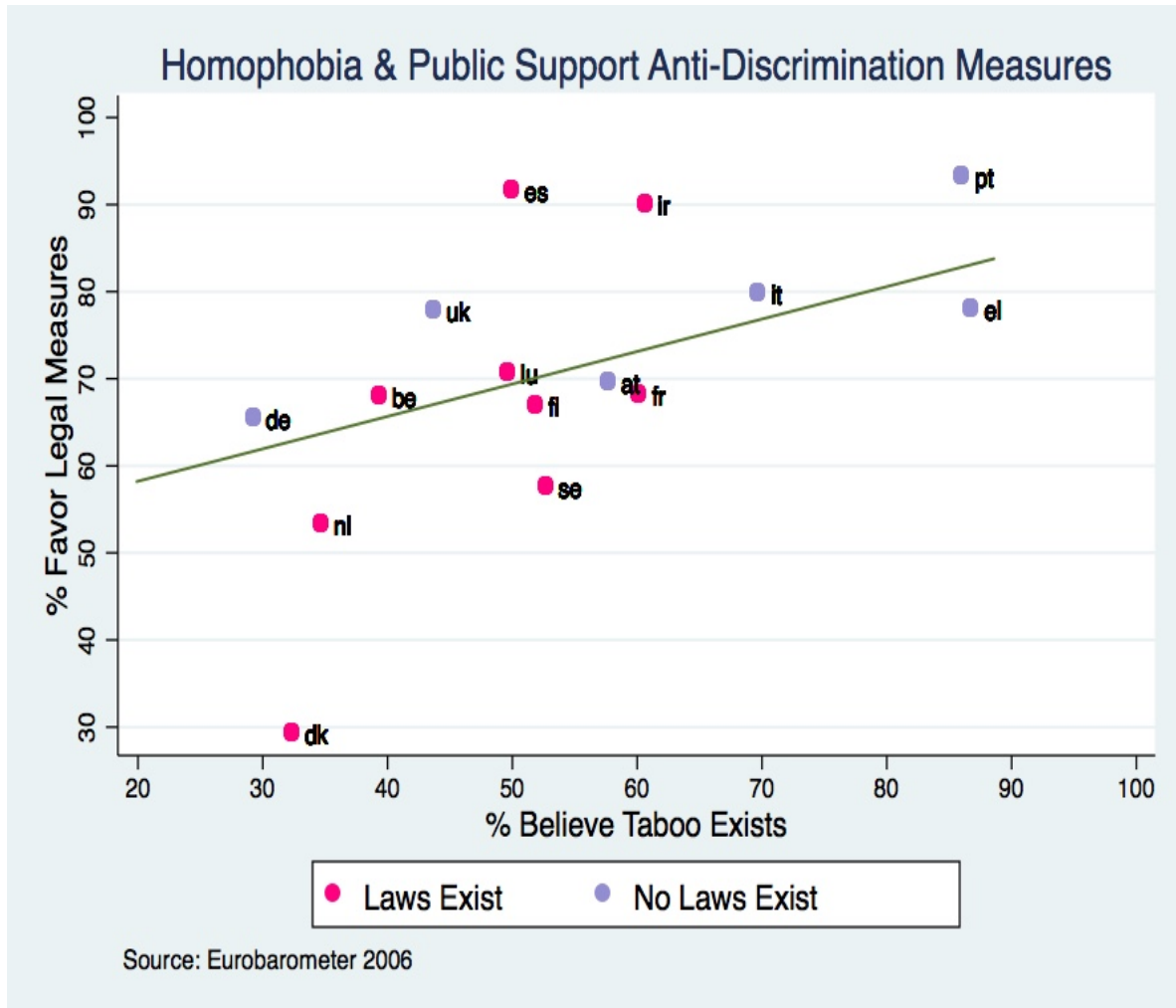


Figure 3.

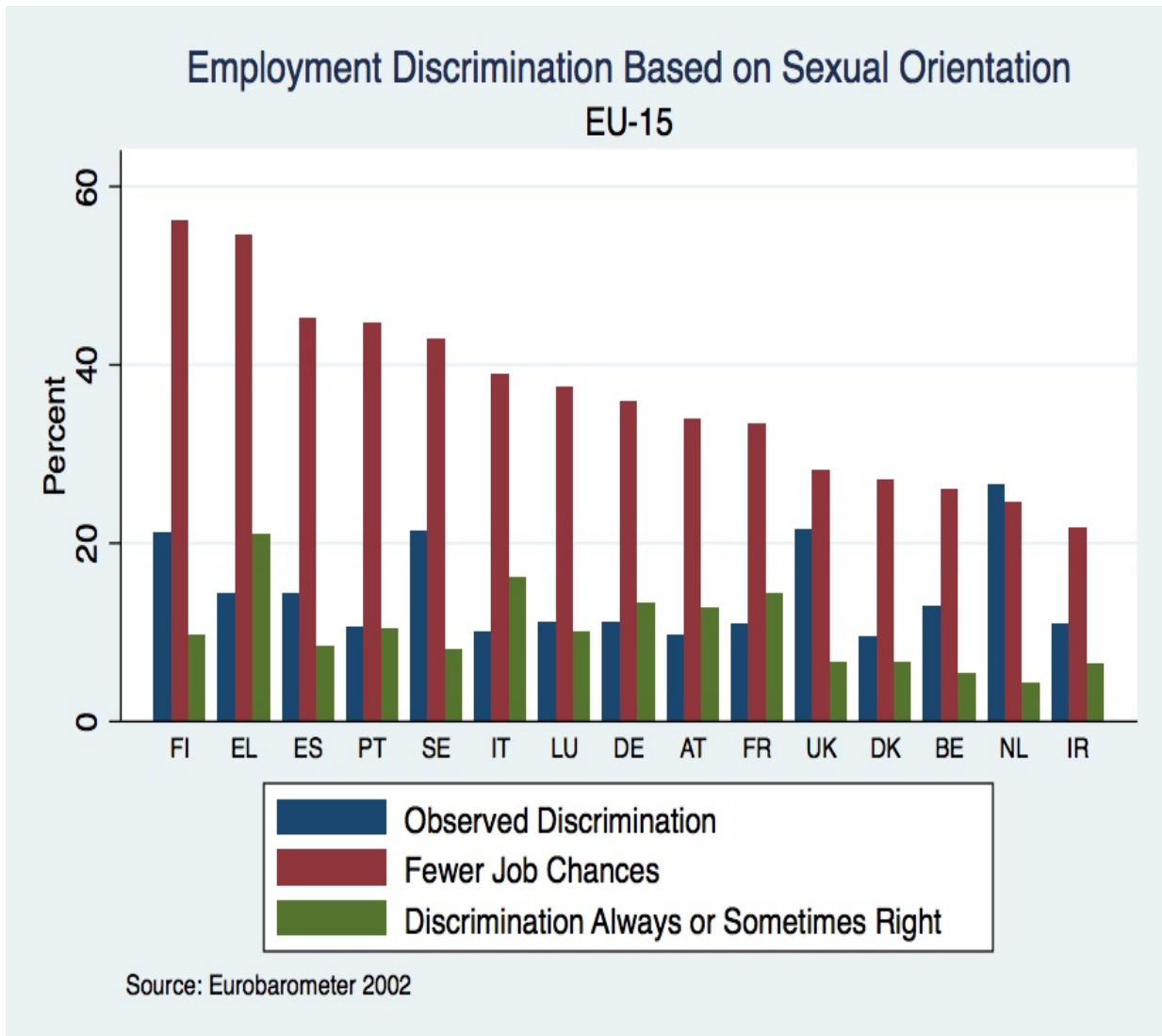
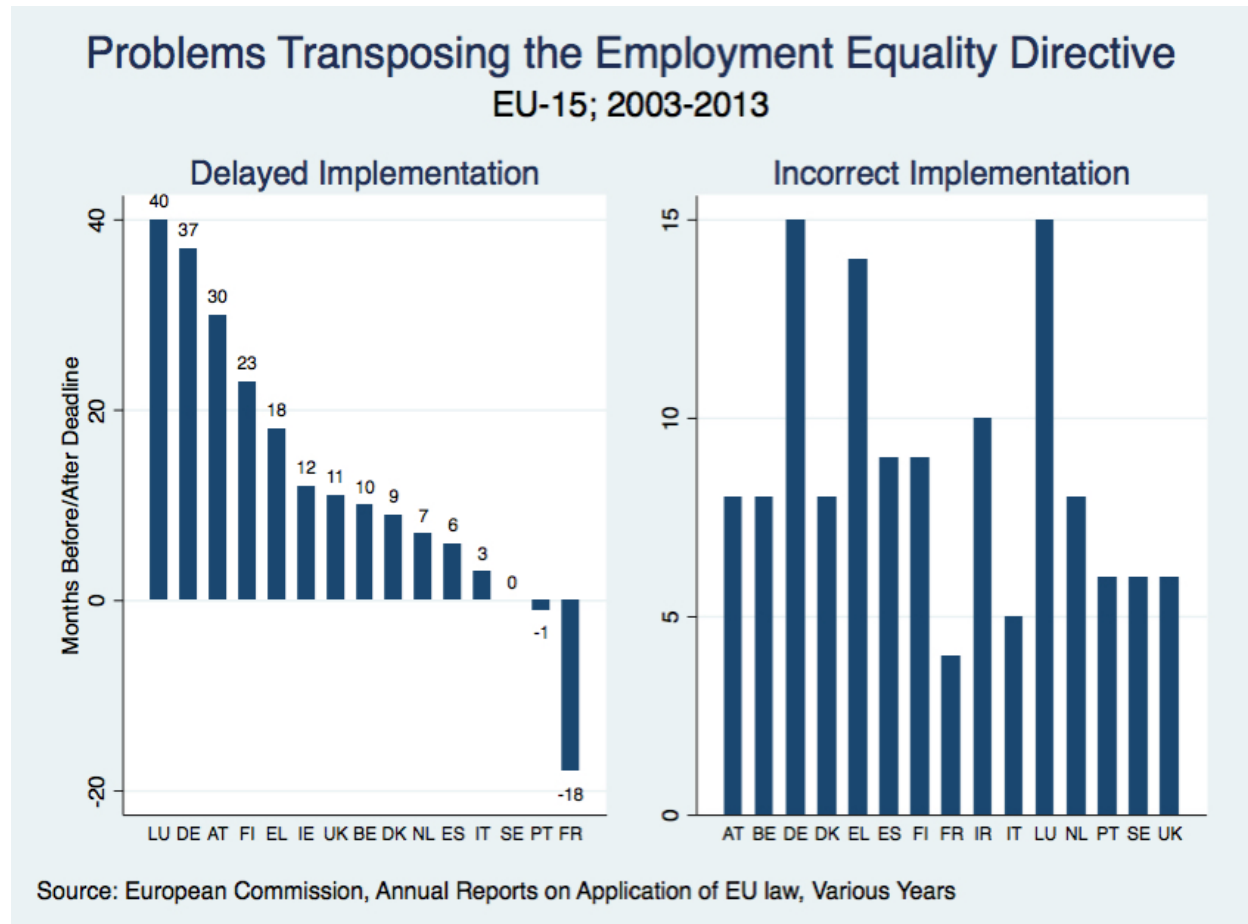


Figure 4.



<i>Independent Variables</i>	<i>Compliance (Odds Ratios)</i>				
	M1 National Preferences	M2 Policy Fit	M3 Combined	M4 Church-State Relations	M5 Church-State Combined
<i>Religious Interests</i>					
Education	0.000691*** (0.00129)		0.00140** (0.00290)		
Hospitals	0.0106*** (0.0125)		0.0102*** (0.0142)		
Government Favoritism	0.711* (0.115)		0.798 (0.155)		
Church-State Relations				1.356** (0.134)	1.441** (0.174)
<i>Public Opinion</i>					
% Homosexuality Unjustified	0.714*** (0.0514)		0.736*** (0.0601)	0.894*** (0.0275)	0.912** (0.0321)
% Believe Religion Important	0.926* (0.0286)		0.938 (0.0323)	1.041* (0.0179)	1.045* (0.0217)
% Discrimination Widespread	1.35e-15*** (8.99e-15)		2.67e-15*** (2.01e-14)	0.00000870*** (0.0000208)	0.00000219*** (0.00000634)
% Favor Legislation	1.281*** (0.0679)		1.263*** (0.0763)	1.070*** (0.0213)	1.070** (0.0254)
<i>Provision-Level Factors</i>					
Anti-Discrimination Law Exists	0.378 (0.195)		0.848 (0.496)	0.349* (0.148)	0.709 (0.349)
Medium Policy Fit		0.939 (0.592)	0.893 (0.573)		0.737 (0.464)
High Policy Fit		2.607 (1.986)	2.693 (1.974)		2.005 (1.402)

Discretion		2.309 (1.331)	2.411 (1.443)		2.396 (1.395)
Conflict in the Council		0.275 (0.267)	0.262 (0.268)		0.274 (0.267)
<i>Observations</i>	225	165	165	210	154
$X^2$	31.57	6.249	27.95	25.38	23.76
<i>Random Effects Parameters</i>					
Provision (se)	1.109 (0.321)	0.581 (0.325)	0.617 (0.328)	1.042 (0.305)	0.583 (0.324)
Member State (se)	3.41e-09 (0.210)	1.285 (0.404)	0.000000111 (0.301)	5.06e-08 (0.309)	3.82e-10 (0.345)

## Bibliography

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