

The power of norms in the transposition of EU directives
Antoaneta Dimitrova and Mark Rhinard
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Abstract
Transposition research provides an excellent opportunity to bring new data to bear on two of the most dominant theoretical approaches to European Union studies: rational choice institutionalism and sociological institutionalism. Yet the goal of comparable testing is hampered by the underspecified nature of the sociological perspective. This paper takes some steps towards identifying and operationalising a sociological explanation of the transposition of EU directives. Examining an array of alternatives, we single out an approach that focuses on the transmission of norms as a way to explain transposition delay and content changes, and on persuasion to help explain norm change over time. To probe the validity of our explanation, we apply it to a case study of the transposition of two anti-discrimination directives from 2000 in Slovakia. In short, our paper aims to move forward the search for a testable sociological framework in EU studies, while offering an operational approach to studying the process of transposing EU directives.
Kurzfassung
Die Forschung über die Umsetzung von EU-Richtlinien bietet eine hervorragende Gelegenheit, zwei der bekanntesten theoretischen Ansätze in der Europaforschung mithilfe neuer Daten zu überprüfen: den Rational-Choice-Institutionalismus und den soziologischen Institutionalismus. Der empirische Theorietest wird jedoch dadurch erschwert, dass die soziologische Perspektive nicht ausreichend spezifiziert ist. Dieser Beitrag zeigt, wie sich ein soziologisches Erklärungsmodell für die Umsetzung von EU-Richtlinien definieren und operationalisieren lässt. Dazu diskutieren wir mehrere alternative Möglichkeiten, um schließlich einen Ansatz zu entwickeln, der einerseits auf Normübertragung als Erklärungsfaktor für Umsetzungsverzögerungen oder inhaltliche Abweichungen abstellt und andererseits Überzeugungsprozesse als Ursache von Normenwandel im Laufe der Zeit versteht. Anhand einer Fallstudie zur Umsetzung zweier Anti-Diskriminierungs-Richtlinien aus dem Jahr 2000 in der Slowakei überprüfen wir die Erklärungskraft dieses Ansatzes. Insgesamt zielt unser Beitrag darauf ab, einen empirisch überzeugenden Ansatz zu erarbeiten, der in der Lage ist, die Umsetzung von EU-Richtlinien zu erklären, um dadurch die Entwicklung eines überprüfbaren soziologischen Theorieansatzes in der Europaforschung insgesamt voranzubringen.
The authors
Dr. Antoaneta Dimitrova is Assistant Professor at Leiden University; email: dimitrova@fsw.leidenuniv.nl ; Dr. Mark Rhinard is Postdoctoral Fellow at Leiden University; email: rhinard@fsw.leidenuniv.nl

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1. Introduction

Why do national governments apply European Union (EU) legislation even when it appears to harm their chances for re-election? Do ministers and civil servants ever 'go European' and make policy changes despite political interests defending the status quo? Does invoking a country's good name in Europe, or conversely, being shamed for not complying with EU legislation, matter to governments beyond material sanctions? As the EU extends its influence into an increasing number of national policy domains, such questions emerge and draw our attention to sociological or constructivist explanations of political reality.

The changing focus of the debate between proponents of different institutionalisms offers promising new opportunities for research into such questions. A key suggestion in the new strategy of bringing divergent approaches together is to 'go empirical' to reveal the explanatory power of the two main institutionalisms (Checkel and Moravcsik 2001). This research orientation holds the promise of not only revealing intriguing new insights about the EU polity, but also contributing to theoretical developments valuable to the broader discipline.

Studies on the transposition of EU directives are well-positioned to follow this trend. Rich, new data is emerging on a crucial aspect of European governance: the way EU member states transpose the policies specified in EU acts into national policy.

Transposition is a key stage in the process of European directives becoming ‘law in action’, with important consequences for the effective functioning of the internal market, the even application of Union law, and the overall depth of policy integration in the EU. Yet a number of EU members still have considerable transposition deficits, especially when measured in terms of how long it takes states to transpose certain directives (see Mastebroek 2003) or how far a state’s interpretation strays from that of the Commission. A database developed by a transposition research team in the Netherlands includes data across countries and policy sectors. The analysis of this data suggests considerable delays in the transposition of certain directives.⁽¹⁾ Is this transposition deficit the product of the interaction of the interests of veto players in various coordination structures? Or are the norms and shared understandings of key organizational and political actors responsible for the delayed domestic response to the adoption of policy measures in the Council of Ministers?

This paper explores the potential of a norm-based explanatory framework for studying the transposition of European directives in EU member states. Transposition is a complex process involving several stages of interaction between supranational officials and national administrators, including ministerial actors and agency representatives. Many EU directives contain new norms that must be absorbed into the domestic setting of member states, yet as the empirical evidence shows, that process is far from straightforward. We take tentative steps here towards building an analytical framework for understanding the normative dimensions behind transposition. Our approach builds upon work within international relations (Cortell and Davis 2005, Pevehouse 2002, Johnston 2001, Finnemore and Sikkink 1998, Legro 1997), public policy and comparative politics (Campbell 1998, Brehm and Gates 1997, Hall 1993), along with a growing number of studies dealing with norms within EU studies specifically (Schwellnus 2005, Wiener 2002, Checkel 2001a, 2001b). These approaches, while focused on different empirical dynamics, nevertheless share an affinity with the claim that ‘norms matter in a constitutive, interest shaping way, not captured by rationalistic arguments’ (Checkel 2001a: 554).

We draw from prevailing normative approaches to international relations and public policy, but do so in a way that accounts for the specifics and complexities of transposition. The goal here is to develop testable explanations of transposition from a normative perspective in response to recent calls for more rigorous research in EU studies. In the next section (Section 2), we examine the difficulties of taking a normative approach to transposition and review the discussion within the broader literature. Within that discussion we outline our definition of norms and make explicit our underlying assumptions and scope conditions.

In Section 3, we build our explanation of transposition in three parts. The *first* part lays the foundation for the approach by detailing how norm transmission works and sketching out a conception of the domestic norm context. Following some classic conventions, we suggest that norms in the domestic setting exist in a multi-layered ‘norm set’ that can be disrupted by European norms as the result of transposition requirements. The second and third parts of the section present arguments as to how such disruption will affect transposition and why:

The *first* set of claims we advance is that the compatibility of European norms and domestic norms matters. We eschew ‘norm fit’ arguments, which assume a binary relationship about fit (yes or no), in favour of a more sophisticated approach that looks beyond the question of whether norms fit to see *how* European norms relate and interact with different domestic norms. We argue that norm compatibility between domestic norms and the EU directive will produce varying results depending on compatibility with norms at first, second, or third-order in the domestic hierarchy of norms.

Our *second* set of claims complements our first set by accounting for the possibility of norm change, and thus successful transposition. Serious transposition delay, or content change, might be resolved by processes of persuasion and domestic adjustment over time. Here a different set of mechanisms would be expected to affect causal processes, including the role of domestic advocacy groups in promoting new norms and socialisation processes that might drive domestic norm change.

In Section 4, we take a first cut at probing the empirical applicability of this framework with a case study that illustrates the potential value of our approach as well as its limitations. After describing two EU directives concerning non-discrimination, we analyse the transposition of these directives in Slovakia. We believe that understanding the normative dimension behind EU transposition is not only a crucial step towards identifying how behavioural compliance might be achieved, but also an important contribution to the vibrant literature on norm change.

2. Norms and EU Transposition

Transposition research falls under the broad category of studies focused on the international sources of domestic change. Gourevitch drew the attention of the international relations community in 1978 to the ‘second order reversed’, or the rising prominence of international organizations and their effect on domestic politics. Since then, the web of international laws, rules, and institutions has only thickened, and scholarly attention to the topic has exploded. In the field of EU studies, this trend is exemplified by the growing literature on ‘Europeanization’, compliance, and transposition. Each set of studies focuses on the multiple and complex sources of change between the EU and domestic levels.

Theoretical approaches used to study such phenomena derive from several fields, but generally fall into two familiar camps. The first comprises institutional rational choice accounts which explore EU decision making as an outcome of the interaction of strategically-acting member states and institutions under specific legislative rules (see *inter alia* Thomson *et al.* 2005; Steunenberg and Selck 2005; Crombez 2000, 1997; Steunenberg *et al.* 1999; Steunenberg 1997; Garrett and Tsebelis 1996; Tsebelis and Garrett 1996; Tsebelis 1994). Rational choice and rationalist analyses are also increasingly turning to domestic change as a result of Europeanisation (see *inter alia* Schimmelfennig and Sedelmeier 2004, Mattli and Plümpfer 2004, Mastenbroek 2003, Mbaye 2001, Dimitrova and Steunenberg 2000). The second camp is more loosely connected, but includes sociologically-oriented studies that examine how domestic change might emerge as the result of collective beliefs and understandings of what constitutes proper behaviour in a given institutional setting. Selecting only a few examples, such studies focus on identity and pro-European attitudes (Trondal 2004, Beyers 2004, Egeberg 1999), learning and persuasion (Checkel 2001a, 1999b), persuasion and social influence (Johnston 2001), culture (Legro 1996), and norms (Keck and Sikkink 1998, Finnemore and Sikkink 1998, Legro 1997).

Scholars from both camps are heeding the call to ‘go empirical’; that is, to end the abstract theoretical debates by deriving specific hypotheses and testing them empirically (Checkel and Moravcsik 2001). In this regard we perceive more progress being made on the rational choice side of the debate than on the sociological side (cf. Steunenberg 2005, Dowding 2000). The former enjoys a relatively clear set of unifying assumptions, yet the latter is hampered by the sheer diversity of approaches. Sociological explanations of the domestic impact of international organizations generally, and Europeanization, specifically, employ a wide array of assumptions and methods. Moreover, much of this work inherits the epistemological challenges of sociological institutionalism, with the requisite problems associated with demonstrating causal relationships (Johnston 2001: 492).

To build a sociological explanation of transposition that can be employed alongside rationalist accounts, we single out the literature on the transmission of norms into domestic settings as the best way forward. Studies of norms and norm change are found across academic disciplines, including public administration, comparative politics, and international relations (see *inter alia* Schimmelfennig and Sedelmeier 2005; Cortell and Davis 2005, 1996; Finnemore and Sikkink 1998; Legro 1997, 1996). Several reasons recommend this approach. First, such approaches seem highly relevant for transposition, since EU directives are comparable to the norms studied in association with international treaties and organizations. Second, employing this approach avoids further fragmentation that currently characterizes the field. Finally, the norm transmission literature has evolved as a way to specify and operationalise some of the main precepts of sociological institutionalism. Indeed, a motivation behind our framework is the enduring criticism (particularly within EU studies) that sociological studies lack rigor and testable hypotheses (Moravcsik 1999; Checkel 2001a, 1999b).

Finnemore and Sikkink (1998) have made great strides in this regard. They have moved beyond studies of norm influence *per se* toward analysis of norm change. Why are some norms adopted, some rejected, and others synthesized into local norm hierarchies? In an influential article on norm change, Finnemore and Sikkink identify one of the key weaknesses of existing normative approaches; namely, that ‘claims that actors conform to “logics of appropriateness” say little about how standards of appropriateness might change’ (1998: 888). The authors argue that norms evolve in a patterned cycle and that different behavioural logics may dominate different parts of the cycle. While we do not adopt the exact arguments of Finnemore and Sikkink, we build on them and take inspiration from their disciplined and rigorous approach to explaining the effect of international norms in domestic settings.

Before proceeding to our framework, some justification for a norm transmission approach is in order. To a certain extent, singling out norms as a theoretical building block remains arbitrary. When we expect to see norms play a role in transposition, they may do so in conjunction with rules, on the one hand, and with identity, beliefs, value perceptions, etc. on the other. Is it not more meaningful to talk about the role of domestic institutions in transposition? The two concepts are indeed closely related since within a sociological framework we expect the institutional ‘logic of appropriateness’ to presuppose certain norms. We take into consideration Finnemore and Sikkink’s warning against subsuming norms and institutions, however. Norms are ‘single standards of behaviour’ whereas institutions consist of multiple norms, practices, and rules that can be rearranged at certain points into new patterns of politics (1998: 891).

To formulate clear propositions regarding the effects of sociological institutions on transposition, we emphasize here that norms should be considered as one aspect of institutions as defined in the sociological tradition.

A second issue is why we do not place more attention on another central concept within sociological research: identities. Studies of identity change in the EU have become quite sophisticated, although they lead to inconclusive results. Egeberg (1999) uses a social constructivist angle to examine the role and identity perceptions of national civil servants, and the potential for loyalty shifts due to their participation in expert committees under the European Commission or working groups of the Council of Ministers. He tests whether the institutional experiences of national officials lead them to develop additional, pro-European identities alongside their primary functional or national identities. Some of Egeberg's findings, while based on a small group of civil servants, offer interesting clues for the influence of identity change on behaviour of civil servants. He finds that the more participation on a committee, the more loyalty seems to be created towards that committee while more generic participation in the EU does not generate a similar effect (Egeberg, 1999: 465). Yet it is difficult to confirm whether this group loyalty would lead to a weakened national identity when domestic and international norms clash. Other identity studies seem to suggest the two would co-exist, with socialisation in the domestic setting playing a crucial role for attitudes toward the EU (e.g. Trondal 2004, Hooghe 1999). This coexistence of multiple identities or roles makes it more difficult to formulate identity-based hypotheses related to transposition. In general, however, a coherent sociological framework for transposition must assume some degree of linkage between identity and norms. We would expect that groups united by certain identities are likely to share similar norms regarding appropriate behaviour.

A third potential explanation with sociological undertones is the effect of different 'administrative cultures' (Sverdrup 2003) or 'worlds of compliance' (Falkner 2004) on transposition. Falkner's findings of the existence of different worlds of compliance suggest that some countries enjoy innate advantages over others when it comes to timely and accurate compliance with EU legislation. While our explanatory framework is not incompatible with such studies, we find that they do not explain from where such 'cultures of compliance' originate. Moreover, and more importantly for the questions we ask in this paper, this approach presumes little micro-variation in compliance. Explanations are constant across all directives in the domestic setting. We are interested in the processes which unfold when individual directives enter domestic arenas; in a sense, administrative culture might provide us with a coefficient indicating higher or lower overall number of transpositions in a given country, but does not shed light on what affects transposition in individual cases.

Further questions about our approach concern how much explanatory weight a norms perspective can carry. The definition of norms as single standards of behaviour with an element of shared moral assessment implies that norms may matter in some policy areas more than others. Checkel, for instance, examines normatively charged issues such as human rights law, where norms are exposed and the single standards of behaviour have a clear moral dimension. He suggests such effects may not be relevant to explaining legislation related to market integration processes in the EU (1999b: 554). Indeed, a high number of EU directives are highly technical in nature, implicate few domestic norms during transposition, and thus limit the explanatory value of a normative approach. We address this scope condition in the next section. For the most part, however, we believe that EU directives cover such a wide array of issue areas that norms are bound to influence the process of transposition. Over the years, legislation related to gender and racial equality, biotechnology, working time, and health and safety in the workplace have exemplified directives with strong normative content in both international and domestic arenas. Moreover, seemingly banal regulatory directives actually can have momentous consequences to existing models of state regulation, for instance, by introducing completely different logics of appropriateness in regulatory matters.

Finally, our approach to understanding the normative underpinnings of transposition seeks to satisfy the ever-present concern with operationalisation: how can we identify a norm when we see it, and how can we assess its influence? We address these questions head-on in the sections that follow, being careful to make clear our assumptions and outline our methods. Further developments along this path are needed to help scholars identify norms *a priori* before testing their effects empirically.

3. Building a Framework

We construct our explanatory framework in three steps. The first step sets the foundation for our approach by explaining how we define norms, where and how we expect to find norms, which norms matter, and in what configuration. The second and third steps present our interpretation of how norms matter. Our first analytical claim is that norm compatibility and norm relationships shape how new norms will be received, and thus how transposition will proceed. Our second analytical claim suggests hypotheses based on possible normative change after a process of domestic adjustment.

3.1. Part 1: European Directives and Domestic Norm Sets

This section outlines the basis for our approach. Two main questions immediately arise: what exactly is a norm? Which norms are relevant in the process of transposition? The first question takes us back to the classic work on sociological institutionalism by March and Olsen (1989). These authors do not define norms specifically but treat them interchangeably with rules (1989: 22). Since rules feature prominently in other institutionalist approaches, especially rational choice institutionalism (as in ‘rules of the game’), we find that distinguishing rules from norms is helpful here even though rules, social norms, and routines are often used interchangeably in sociological accounts.⁽²⁾ Wendt defines norms as ‘shared beliefs which may or may not manifest in behaviour, depending on their strength’ (1999: 185). This definition, however, seems to conflate norms and beliefs. Legro defines norms as ‘collective understandings of the proper behaviour of actors’ (1997: 33). We prefer the definition of Finnemore and Sikkink, who specify a norm as ‘a standard of appropriate behaviour for actors with a given identity’ (1998: 891). Finnemore and Sikkink stress the fact that norms have a component of shared moral assessment – which we can contrast with rules, which are, at least in the rational choice tradition, perceived by actors as neutral constraints.

This leads us to the second important question when creating an explanatory framework for transposition: what is a *relevant* norm in the context of transposition? Which norms are relevant, and what makes them so? Even taking into account the intersubjectivity of norms, one must specify the relevant characteristic of the norm if we are to make a sociological approach feasible. Identifying the relevant norms is also crucial from a methodological point of view. The fact that norms do not exist in isolation, but are intersubjective and intertwined with other norms, beliefs and rules, makes this task more difficult.

The literature dealing with the influence of domestic norms in a national setting offers few hints in terms of identifying norms because researchers often start with very specific norms. Scholars who study human rights and how such norms influence national settings have little difficulty identifying the relevant norms—such norms are clear and easily documented (Schwellnus 2005, 2001; Checkel 2001b). Yet this ignores the whole range of norms that cover ‘very specific social expectations’ as well, a critique launched by Zürn (2003). Zürn argues that the constructivist focus on only broad and fundamental norms is not very persuasive in explaining specific socialisation processes. Sharing his criticism, we were faced with the question of how to cut through the complexity of norms existing at EU and domestic levels in a way that allows us to specify the norms that matter to transposition outcomes.

We find that a promising way to approach this problem is to draw upon the established argument that norms exist in sets, with different norms making claims on different actors at different levels. Scott, for instance, refers to ‘normative systems’ suggesting that ‘some norms are applicable to all members of the collectivity; others apply only to selected types of actors’ (2001: 55). Finnemore and Sikkink paraphrase a similar argument by Legro, that ‘different norms [command] different levels of agreement’ (1998: 892). How might we conceptualize these different types of norms? Goldstein and Keohane categorize different ideational factors that can influence international outcomes. At a broad and abstract level, normative standards exist that underpin the very fabric of a society. At a more practical level, standards exist about how goals should be attained (1993: 9-10). Perhaps Hall sets out the most explicit scheme. He outlines three types of ideational change that can take place in the policy arena. *First-order* change adjusts policy instruments incrementally, without challenging underlying assumptions. *Second-order* change changes policy instruments in the pursuit of different policy goals. *Third-order* change is more momentous—and rare—sweeping away old paradigms, policy discourses, and, to extend the argument, to fundamental norms (1993: 279).

If we use these insights to build a scheme for our use here, we can identify three levels of domestic norms relevant to transposition (see [Table 1](#)). In keeping with standard convention, we use the term ‘first-order’ to describe norms that make claims on a specific group of actors, becoming apparent in the behaviour and discourse of small, policy-relevant communities. Such norms guide the management of policy programs, relate to the cause-effect of narrow public problems, and often concern the ‘proper’ setting levels of policy instruments. Examples include occupational health and safety guidelines, water purification standards, risk management principles for GMOs, and financial information disclosure rules. In practical terms, we identify such norms in the policy-specific discourse and documentation of certain communities, but rarely outside that community.

‘Second-order’ norms are broader, making claims on a wider section of the political community than first-order norms. Such norms span policy sector boundaries, and are held in common by actors from various ministries, interests groups, and elected officials. We see second-order norms manifest not only in the policy-level discourse of multiple communities, but also in the utterances and claims of actors at ministerial level. Norms guide general approaches to policymaking in certain areas, stipulate the goals and methods of regulatory approaches, and suggest appropriate policy instruments to achieve goals.

Examples include norms related to different approaches to managing markets (liberal vs. interventionist), to varying approaches to environmental protection (economic vs. environmental sustainability), and the primary criteria for regulating risks (science vs. politics). When confronting the theoretical construction of norm sets with research into regulatory aspects of the EU, it becomes clear that most EU directives can be expected to contain second-order norms related to regulatory 'styles' and objectives (Richardson 2001; Majone 1996). To identify second-order norms, we might study the language and arguments emerging from multiple communities within a policy dispute. In periods of norm conflict, second-order norms are likely to be expressed in sectoral and cross-sectoral debates within government.

'Third-order' norms are more broadly and deeply rooted in a society, perhaps even codified in the constitutional order. EU directives rarely implicate domestic third-order norms, but as the EU's impact on the domestic arena grows, this may increasingly occur and we therefore include them in our heuristic model. Third-order changes span the political system and society, often related to their basic foundations and societal cleavages. Member state governments would be reluctant to pass measures of such magnitude using directives although it does happen. In recent years, EU legislation has implicated third-order norms in some member states, i.e. the Dutch approach to religious education, the Irish stance on abortion, and the UK's constitutional methods of protecting human rights. Such norms become apparent in society-wide debates, and conflict over those norms will likely feature in the popular press and news reports. While such fundamental conflicts are rare, our case study on gender and racial equality directives in Slovakia offers insights into what happens when third-order norms are implicated by European directives.

Table 1

By employing the concept of the 'norm set', we gain a heuristic device for understanding the domestic, normative setting within which transposition takes place. Several scholars emphasize that the domestic norm setting is crucial to understanding how international norms will be received. Campbell explicitly demonstrates that norms must fit into the 'nested hierarchy' of norms already existing within a society (1998: 399). Acharya points out that in considering the impact of international norms, local beliefs and normative order should be taken into account. He urges scholars to examine 'how the cognitive priors of norm takers [influence] the reshaping and reception of foreign norms' (2004: 269). More recently, Cortell and Davis have encouraged study of how 'internationally promulgated norms clash with pre-existing national understandings' (2005: 3). In our view, focusing on the relationship between international and domestic norms is highly appropriate when looking at how norms influence the transposition of EU directives. After all, EU directives must be transposed: there is a strong possibility of sanctions associated with non-transposition, even though the Commission is constrained by monitoring and enforcement costs. However, directives can be transposed in different ways and with different speed, thus affecting actual policy outcomes.

We appreciate that this is a stylised account of norms within a domestic setting. For one, norms are not always readily distinguishable; nor do they exist entirely independently at different levels. We should also point out that these domestic norm structures are not immune to ongoing influence from international sources, of which European directives are only one. In general, though, we believe that clear conceptions of normative frameworks are crucial for pinpointing and identifying norms in order to operationalise a sociological explanation.

Using this perspective of the domestic norm set enables us to treat European norms as largely external, and potentially disruptive, to this pre-existing normative setting. See Figure 1 below.

Figure 1

This perspective provides the foundation for our subsequent arguments. Although domestic norms can be difficult to disentangle, we scrutinize the domestic normative environment through empirical analysis of constitutional, institutional, and policy characteristics. We then study how the norm associated with European legislation interacts with that existing normative order. Which norms conflict, and how that conflict is reconciled, should determine how transposition will proceed.

Before moving to the specific arguments, we present here a few thoughts about how to identify norms in practical contexts. At the European level, we take a cue from Legro that the robustness of the arriving norm will matter. He has suggested that in order to avoid circular reasoning when looking for the effects of norms, their robustness should be evaluated separately from their effects (1997: 33). For this purpose, he suggests looking at some crucial characteristics, namely their specificity, durability and concordance (1997:34). Legro's suggestion that a norm's specificity and concordance would matter are particularly interesting to apply to the case of transposition of directives as it allows us to specify scope conditions for when we can expect norms to matter. Following the specificity criterion, we would exclude EU directives that are too vague from a normative point of view.

This, linked to the highly technical nature of some directives, suggests eliminating those from the pool of cases where we expect norms to make a difference to transposition. Thus before we develop the framework further, we specify an essential scope condition:

Scope condition: A norm based framework for the transposition of directives is likely to have explanatory power only if directives are not completely technical and instead carry some normative content. Purely technical directives should be excluded from the field of cases in which we expect norms to have an effect.

Finally, what relevant actors might come under the influence of European norms during the course of transposition? Again, the norm set conceptualization helps to clarify this question. Actors associated with the day-to-day process of transposition, typically ministry officials or agency representatives, will be exposed to any type or level of new norm. The circle will broaden slightly if a European directive implicates a second-order norm. Such a situation means that officials in ministries outside of the immediate policy area, or higher level political actors such as ministers and cabinet officers, will likely become involved in transposition. Finally, if a European directive touches upon third-order, broadly held norms, societal actors across the political and policy spectrum are likely to become involved. This high level of participation is likely to go hand-in-hand with significant norm conflict.

3.2. Part 2: Norm Compatibility

With the foundation for our approach established, we now move to two sets of arguments regarding the effect of norms on transposition. The first concerns norm compatibility: What happens when a new norm, associated with a European directive, enters a domestic terrain already structured by its own set of norms? How does this influence transposition?

Our first expectation is a straightforward one: it holds that if a European directive carries a norm that is in concordance with first-, second-, and third-order norms in the domestic setting, few transposition problems should occur. National actors will envision few, if any, incompatibilities between the normative prescripts of new legislation and existing practices.

[H1] Transposition will proceed smoothly if an EU directive's norms are in concordance with first-, second-, and third-order norms in the domestic setting.

Perfect norm concordance is possible, but unlikely. On the one hand, European norms may match domestic ones as the result of policy 'uploading' at the beginning of the decision process (Padgett 2001) or because of socialisation processes occurring over time (see below). On the other hand, complete norm concordance is rare, because of the process of negotiation in the Council of Ministers which tends to mitigate uploaded domestic norms. As Héritier has shown in her work on European clean air policy, EU legislation is likely to resemble a 'patchwork' of different regulatory styles and approaches (1996: 1350-51). When a directive contains a norm related to a different regulatory tradition or a mixture of traditions, local actors will likely perceive it as not fitting the domestic arena.

The probability of norm conflict gives rise to more uncertainty, and more interesting propositions concerning transposition. Those propositions are the crux of the explanatory framework we set out below. Our starting point is that norm conflict will clearly be troublesome for the process of transposition, *but to varying degrees depending on which norms conflict*. The way domestic and European norms interact is crucial to how directives would be transposed and to wider institutional changes that might occur. To us, it is not a binary question of 'fit', or 'level of misfit'. The general claim that 'fit' can have explanatory power on its own has come under criticism of late (Falkner *et al.* 2005; Mastenbroek and Kaeding 2004), criticism which we largely share. However, in the case of our approach, we focus on compatibility across different levels of norms and between domestic and international spheres, dimensions that have attracted widespread scholarly attention as potential sources of change.

To explain outcomes in the case of norm conflict, we first turn to a recent revision of the 'logic of appropriateness' argument by March and Olsen (2004). The authors confront the question of what happens when different social logics collide. European integration, they suggest, is a prime source of such conflict, when 'collisions between previously separated and segmented traditions' result from 'the integration of sovereign nation states into the European Union' (2004: 16). Taking the perspective of the individual actor, new situations and 'foreign' influences mean actors 'may find the rules and situations they encounter to be obscure. What is true and right and therefore what should be done may be ambiguous. Sometimes they may know what to do but not be able to do it because prescriptive rules and capabilities are incompatible' (2004:9).

In such situations, actors are likely to ‘apply criteria of similarity in order to use the most appropriate rule or account’ (March and Olsen 2004: 9). In effect, the actor engages in a search around her for potentially relevant rules or accounts to make sense of a situation. One place to look is the broader norms that govern an organization or polity. As Brehm and Gates (2000: 50-51) point out, public officials are keen to maintain consistent behaviour even in the face of conflict; they take ‘shortcuts’ and ‘peripheral cues’ to reconfigure new challenges. Administrative scientists and legal scholars alike suggest that when an agent is confronted with a choice about whether to adopt a new norm, one primary consideration is whether a new norm is consistent with higher norms (see Hage 2000). March and Olsen make the point directly: ‘higher order rules are used to differentiate between lower order rules’ during times of ambiguity (2004: 9).

When a European norm conflicts with first-order norms, i.e. norms at the sectoral, operational level, we will see a similar normative ‘search’ to resolve the conflict. Actors are likely to defer to broader norms operating at the polity and societal level. If the EU norm does not conflict with those second-order norms, transposition is likely to proceed timely but with some degree of content change.

[H2] Content change will occur if an EU directive’s norm conflicts with a domestic community’s first-order norm but is *consistent* with the broader second-order norm. ↑

Why might this be the case? Ambiguity and confusion in such situations is easier to reconcile, largely because actors can use second-order norms to make sense of new circumstances. New norms challenge the existing ‘oughtness’ of how policies should be made, programs administered, and laws structured, but *not* the wider, cross-sectoral norms in a polity. This situation thus represents the least severe form of norm-conflict. Administrators may couch new directives in the norms and languages of broader normative frameworks, requiring some degree of content change but no major delays. Persuasion in small groups may also occur, by means of actors invoking higher level norms (more about this in the last part of our framework). This argument echoes the findings of Knill and Lehmkuhl, who argue that a ‘framing mechanism’ is used to reconcile the demands of new directives and thus can lead to better transposition (1999: 12).

When an EU norm conflicts with both a first- and second-order norm in the domestic setting, the problem becomes more severe. Incompatibility between an EU directive and both first- and second-order norms will give rise to considerable difficulties. Not only will policy-specific norms be challenged, but wider feelings of ‘oughtness’ in the polity will prove inconsistent with new norms. The relevant policy community will be hamstrung by ambiguity, deprived of an easy reconciliation mechanism. March and Olsen suggest that major conflicts such as these are resolved only through ‘time-consuming processes’ and the slow conversion of a majority of actors (2004:13)

[H3] Delay will occur if the EU norm appears to the domestic community as incompatible not only with the existing first-order norm but *also* with the second-order norm that prevails in the domestic context. ↑

Transposition under these conditions is thus likely to lead to delay. Conflict between first- and second-order norms generates a type of ambiguity that does not lead to easy answers. Moreover, the organizational field is likely to swell as new policy communities and higher political actors join the debate. This results from the cross-cutting nature of second-order norms, which make claims on the broader political community. No longer is the policy relevant community the only ‘player’ in transposition; political conflict can be expected to arise. The transposition process will likely slow to a crawl as broader reconciliation processes play out, processes that can be identified in public debate. This proposition is consistent with transposition studies that show how exogenous pressure on the ‘core’ of a country’s administrative style is likely to lead to serious delay (Knill and Lenschow 2000, Krasner 1988).

Last, but not least, in a few but important cases, an EU norm may touch upon the very normative foundation of a society, for instance on the norms enshrined in written or unwritten constitutions. In that case, we expect transposition to be near impossible and serious delays to occur.

[H4] Serious delay and possible failure to transpose by the indicated deadline will occur when a directive is incompatible with norms of the highest order in society. ↑

The hypotheses derived above are summarized in Figure 2.

Figure 2

A major challenge for this approach is identifying the norms that might conflict with the external norm contained in a directive. The first step we suggest to take in order to resolve this is to identify the relevant community or arena where the norms should play a role.

As discussed at the end of the previous section, actors at various levels will be affected by the relevant domestic norms. These levels would depend on the content of the directive and on the relevant transposition authorities—parliaments, ministries, or implementing agencies. Thus norms which influence the transposition of a directive could exist at the level of organization—e.g. a ministry or a ministerial department, at the level of policy sector, or even at a constitutional level. The potential arenas with relevant norms might be hierarchical in organization but might also be horizontal, e.g. based on some professional community. In the case of transposition, legal communities closely linked to the drafting of laws provide a good example. The types of arguments that might emerge to support a norm-based explanation would consist of ‘this is not the way we do things’, or similar appropriateness arguments.

3.3. Part 3: Towards inclusion of norm change

Thus far, our theoretical framework has focused on how the norms associated with European directives challenge domestic settings in the first instance. We have highlighted the difficulties that arise from norm conflict and the various ways in which conflicts play out, with direct consequences for the timeliness and accuracy of transposition. Yet our story does not end there. Several of our hypotheses predict severe transposition problems (H3, H4) as a result of second- and third-order norm conflict. This situation begs the question of what might take place to improve conflicts and lead to better transposition.

For answers, we turn to a major strength of sociological institutionalism and constructivist explanations of political change: the potential for preference change and learning within social settings. This implies that over time, and even in the face of severe norm conflict, actors may be persuaded to adopt and adjust to EU norms. In this section we examine the conditions under which ‘socialisation’ might occur, mindful of the need to specify a null hypothesis, i.e. when actors would clearly not be persuaded to take on a new norm. We also hypothesize some preliminary mechanisms which might trigger socialisation into new European norms.

Under what conditions might socialisation occur? The concept of the ‘norm set’ once again offers some suggestions here. We believe that socialisation into new norms is most likely when a European norm can be reconciled with higher order norms, even if the European norm conflicts with first-order, policy specific norms. This increases the likelihood that deliberation regarding the new norm will invoke familiar discourses and schema, and will make actors less resistant to preference shifts.

The upshot of this argument is that socialisation is most likely within small, sector-specific communities. This follows the required conditions of socialisation set out by both Johnston (2001) and Checkel (2001a). In line with these authors, we would expect that insulated arenas with an issue-specific focus would be fertile grounds for socialisation. The main thrust of this paper suggests that such conditions are satisfied during times of first- and second-order norm conflict, when broader norms might influence community-level deliberations.

[H5] When a norm is incompatible with low-level norms, but consistent with high-level norms, norm change can occur in insulated, sector-specific communities.

This raises an obvious question: can we expect socialisation to take place when an EU norm is incompatible with third level domestic norms? Under what conditions might this occur? We believe that socialisation is less likely when society-wide, and high profile debates are taking place regarding major norm incompatibility. However, it is possible that, over time, other third-order norms can be invoked laterally to encourage socialisation and provoke norm change. Here we take note of some ‘universal’ norms in the European context, including ‘European-ness’ (being a good member of the European Union, being pro-integration, etc.) or the ‘rule of law’ norm (strong adherence to compliance as a matter of principle). Such broad-ranging norms related specifically to integration may play a role in socializing actors into new norms in severe cases of third-order norm conflict. If civil servants responsible for transposition encounter political opposition they can invoke a European perspective to justify the necessary changes to policy. The last hypothesis we might formulate here is:

[H6] When a norm is incompatible with higher order norms, norm change can still occur when other compatible, high-level norms are invoked by societal actors. ↑

An observable implication of the situation described in this hypothesis would be widespread societal debate, characterized by arguments invoking the ‘good European’ or ‘rule of law’ norms to counter high-level domestic norm conflict. In order to test this hypothesis, researchers would analyse specific discourses that become manifest in the popular press and high level government proclamations. Since the study of norm change would require following the entry and acceptance of a norm in at least two points of time (t_0 – norm entry, incompatibility and t_1 – potential change or resistance) we will not test this part of the framework here, but will focus on the first part of our propositions dealing with the initial effects of norm compatibility.

What mechanisms might be operating to induce socialisation? The specification of these mechanisms remains a challenge even if the social constructivist literature is becoming increasingly sophisticated in its operationalisation of key concepts and the creation of fine-grained hypotheses. Serious discussion of socialisation mechanisms takes place amongst authors in a recent issue of *International Organization*, where socialisation ‘triggers’ are proposed, mechanisms specified, and scope conditions established (2005: vol. 59, no. 4). As the discussion above demonstrates, we single out two potential mechanisms related to socialisation.

First, socialisation can be spurred by key actors involved in the process of encouraging norm change. The notion of the ‘norm entrepreneur’ captures the commonality between these approaches. Finnemore and Sikkink refer to studies that suggest when domestic actors advocating minority positions link with entrepreneurs advocating an international norm, this norm has a greater chance of being accepted and diffused domestically (1998: 893). Starting from the familiar perspective whereby an international norm is advocated by domestic entrepreneurs and may be adopted, changing domestic institutions, successful transposition might be expected when domestic actors take charge of ‘explaining’ the European norm to society or certain groups or communities (Schimmelfennig 2001; Finnemore and Sikkink 1998; Goldstein 1989, 1988).

What kind of domestic actors might play the role of norm entrepreneurs with regard to transposition? The most obvious candidates are not politicians, but civil servants who, in the course of their participation in Council working groups, become persuaded by other civil servants or Commission experts of the legitimacy of a set of norms contained in a directive. This would entail the presence of one of the most important mechanisms for social constructivist scholars, namely, persuasion.

The norm entrepreneur approach has its critics, as well. Zürn critiques the approach in a recent article (Zürn 2003). He questions the focus on intentional action by an outside actor, i.e. a teacher or entrepreneur, as inconsistent with common sense sociological notions. He notes that norm change is often ‘the unintended result of an interplay of “activities” by many different actors, i.e. the result of a process of developing a personality in permanent intercourse of one’s own natural devices with the social and physical environment’ (2003: 9). The focus, he maintains, should be on those undergoing norm change, rather than the strategic actors encouraging change. The latter should be conceived of as part of the institutional environment rather than as agent.

Second, some approaches suggest that the relevant mechanism is the process of persuasion in small group settings. Checkel’s study of human rights norms in the Ukraine stands out here, where he documents the persuasion of actors into new international norms (2001a). Checkel stipulates key scope conditions under which persuasion takes place, including the insulated nature of the arena, the inexperience of the actors, the specificity of the issue at hand, and the intensity of interaction. Johnston encourages further study into this type of socialisation as well. He calls for a special focus on the effect of international institutions and the extent to which domestic settings influence ‘the creation, diffusion of, and compliance with international norms’ (1998: 489). Highly relevant for our purposes is Johnston’s warning to avoid macro studies of socialisation (in which the impact of international norms is measured simply by the correlation between some global norm and its presence in local practice) in favour of analysing how socialisation may differ across units (Johnston 2001: 492).

An interesting addendum here is the importance of linking the necessary condition of persuasion to the sufficient condition of institutional change. As Checkel’s study shows, even when actors in an insulated setting become persuaded or learn new international norms, broader institutional structures may undermine these norms’ acceptance domestically (2001a). Combining the insights of these studies together, we would look for evidence that not only persuasion, but also institutional change, has occurred. Under such conditions, we might assume that transposition processes would improve. (3) These insights will inform further hypothesis development in our future research.

4. The Anti-Discrimination Directives [↑]

To assess the plausibility of this framework for understanding transposition, we now turn to the empirical case of two European anti-discrimination directives and their transposition in Slovakia. The goal here is to use the case study as a 'plausibility probe' (Eckstein 1992: 124), a method used to check preliminary claims as part of the process of theory building. From this perspective the case is meant to be exploratory and to assist us in refining our approach. This initial case was selected under a 'most likely' research design, representing an instance in which the normative aspects of transposition loomed large and in which our claims are likely to be strongly confirmed or refuted.

The data on which we base our case study comes from several sources, among which a Commission study of the state of transposition in the candidate states from 2002, several Commission Green papers, and our own documentary and interview research. The interviews held have been exploratory. A second important source of information is the records of national policy debate, especially when process tracing reveals that arguments of appropriateness have been brought into play. The manner of operationalisation and identification of norms at this stage is to look for norms which are embedded in legal texts or basic laws and constitutions. Finally, we have used survey data as a way to triangulate findings based on legislative analysis and participant interviews to specify how important or widespread certain norms may be. Being aware of the shortcomings of identifying norms in this way, we plan to conduct further research by means of additional interviews and possibly using reflexive methods to identify *a priori* important norms in the relevant arena.

The European Union has legislated on issues of non-discrimination for several decades. Early legislation, however, focused narrowly on gender discrimination (Mazey 1998). Only in the mid-1990s did a movement take shape, largely pushed by NGOs and the European Parliament, to expand the Union's competences into other areas of non-discrimination. The eventual result was the inclusion of a new article (Article 13) in the EC Treaty with the entry into force of the 1997 Amsterdam Treaty. Article 13 represented a 'quantum leap forward' in that it provided a legal basis for anti-discrimination legislation in a whole range of areas, including racial or ethnic origin, religion or belief, age, disability and sexual orientation (Commission 2004: 9). The Nice Treaty further modified Article 13 to allow qualified majority voting for 'incentive measures' related to discrimination. Member states reserved unanimity voting for legislation, however, suggesting the sensitivity with which governments view anti-discrimination policy issues.

The Commission wasted little time in initiating new legislation based on Article 13, submitting a package of proposals at the end of 1999. This led to the adoption by the Council in 2000 of two 'ground breaking directives, which aim to ensure that everyone living in the EU can benefit from effective legal protection against discrimination' (Commission 2004: 10).

The first one, Council Directive 2000/43/EC, adopted in the context of the EU's effort to fight racism and xenophobia, prohibits discrimination on the basis of ethnic and racial origin. The second one, Council Directive 2000/78/EC, follows in a long line of directives dealing with equal rights at work and is a framework directive for equal treatment in employment and occupation⁽⁴⁾. The two directives are closely linked and the Commission has expressed a preference for their transposition with a single piece of anti-discrimination legislation.

By the Commission's own admission, the two directives 'have required significant changes to national law in all Member States, even those that already had comprehensive anti-discrimination legislation' (Commission 2004: 11). The directives encompass much of the accumulated case law of the ECJ in the field of gender equality and comprise 'an entirely new, rights-based approach to anti-discrimination legislation and policy' (*Ibid.*). According to the Commission, 'the directives have introduced protection against discrimination on certain grounds for the first time in many Member States. They have required the introduction of new definitions and legal concepts' (*Ibid.*). While these commentaries are general in nature, they clearly presage the challenges to domestic normative settings that the directives present.

The cases of transposition analysed here take place within a member state that was a then-candidate for EU accession. The new member states are, in a sense, a least likely case for a norm driven explanation of transposition as conditionality in the pre-accession period has produced different patterns of Europeanization there (Schimmelfennig and Sedelmeier 2005; Dimitrova 2002). Research presented in a recent volume edited by Schimmelfennig and Sedelmeier show that conditionality in the pre-accession period, along with the general features of 'enlargement governance', create conditions for a logic of consequentiality to dominate and encourage a cost-benefit approach to transposition. There is a strong possibility that a different logic than consequentiality might also have driven transposition, after the first formal adoption of the relevant legislation was completed.

The process tracing study below, however, suggests that formal compliance driven by accession requirements was not accompanied by behavioural compliance. Furthermore, problems with transposition persisted even after Slovakia joined the EU and could be assumed to be spread among new and old member states. The Commission itself has been careful not to judge new and old member states differently, noting that 'new member states have faced many of the same challenges as old member states transposing EC anti-discrimination legislation' (Commission 2004: 20).

The selected directives contain clearly identifiable norms prohibiting discrimination on various grounds. These norms have the potential to affect the highest order norms in a domestic setting as they relate to issues such as equality before the law and basic rights. Also, the two directives contain identical definitions of what constitutes direct and indirect discrimination.

More specifically, Council Directive 2000/43/EC prohibits any direct and indirect discrimination based on racial or ethnic origin. Importantly, the directive goes beyond previous directives prohibiting gender discrimination in employment and also covers education, social protection, social security and health care, access to supply of good and services (Arts. 1 and 2).

The framework Council Directive 2000/78/EC refers to the above directive and complements it by prohibiting discrimination in employment based on religion or belief, disability, age or sexual orientation (Art. 1).

Importantly, the grounds for possible discrimination are specified in such a way that they can be treated, for our purposes, as separate norms. In other words, there could be a norm prohibiting discrimination on racial grounds and another on the grounds of ethnicity. In the framework directive, we can identify norms prohibiting discrimination on the basis of (a) religion or belief, (b) disability, (c) age, and (d) sexual orientation.

The identification of these as separate norms is critical because it is possible that one norm might conflict with domestic norms at some level, while the others would not. Since the directive prohibits discrimination on all of these grounds, omitting one should be equivalent to non-transposition (except in the cases of age and disability where the deadline for transposition could be extended to 2006).

When identifying the norms associated with these directives, we note that alongside the 'main' normative component related to anti-discrimination, there are also nuances in the categories of discrimination put forth, which, along with the Commission's preference for the type of transposition law, are important to examine. The preferred legal instrument might be regarded as a norm in itself: in many cases of candidate country transposition, the Commission has expressed a preference for the adoption of a new, separate law rather than scattered anti-discrimination clauses placed into existing instruments.

The next step is to identify potential norm conflict. A number of member states have pre-existing provisions, constitutional or otherwise, that deal with the issue of anti-discrimination. There is, according to our framework, potential for tension between the directive and third-order norms, which would translate in major delay and possible content change. The character of the second- and third-order norms would be important here and can be established by looking at existing legal provisions, explanatory notes accompanying legislation, and press statements.

When assessing the 'success' of transposition, the deadlines specified in the directives are a critical cut-off point. For the directive on equal treatment irrespective of race and ethnic origin, the deadline was 19 July 2003; for the new member states the deadline was their date of accession: 1 May 2004. For the framework directive the relevant dates are 2 December 2003 for transposition of the overall provisions and a potential extension for the provisions on age and disability till 2006. The deadline for transposition by the new member states is, once again, their date of accession: 1 May 2004.

The Commission study 'Equality, Diversity and Enlargement', completed 2 years before the 2004 deadline, lists problems on particular grounds in a number of candidate (now new) member states. It lists specifically Estonia, Latvia and Slovakia as states that in 2002 had explicitly omitted sexual discrimination from legislation adopted to partially address transposition requirements. We have taken this as evidence of norm conflict and selected one of the three states, Slovakia, for a more detailed case study tracing the role of norms in transposition.⁽⁵⁾

4.1. Anti-discrimination directives in Slovakia

What evidence do we have of the anti-discrimination norms that existed in Slovakia prior to the period in which the directives mentioned above required transposition? Already in 2000, the Slovak government had adopted an 'Action Plan to Prevent All Forms of Discrimination, Racism, Xenophobia, Anti-Semitism and other forms of Intolerance' for the period 2000-2001 (Action Plan 2000-2001). In 2001, the Section for Human Rights and Minorities of the Office of the Government of the Slovak Republic prepared an audit of existing anti-discrimination legislation and protection against discrimination in the areas of civil, constitutional, labour, penalty and international law (Slovak Memorandum, 2003). The conclusions suggested that existing legislation was inadequate to provide complex protection from discrimination. While up to eighteen Slovakian laws reportedly contained non-discrimination clauses, the fragmented approach did not cover the issue of sexual orientation or promote positive discrimination.⁽⁶⁾ More importantly, government reports argued that a gap existed between constitutional provisions, by their nature very general and limited to the rights guaranteed by the constitution, and specific laws regulating 'a certain narrow area and lack[ing] proper definitions of discrimination' (Slovak memorandum, 2003).

In terms of popular attitudes, the legacy of communism in many of the candidate states meant that awareness of anti-discrimination issues, and gay rights in particular, simply did not exist.⁽⁷⁾ There was little public discussion of anti-discrimination issues after the fall of communism as well. A survey conducted by the polling agency MVK in the first part of 2005 indicated that popular attitudes had not changed dramatically. Although 28 percent of respondents declared that the sexual orientation of the people they met was not important, for others, and in many professions, homosexuality was seen as a problem. 50 percent of parents, for instance, declared they did not want a homosexual teaching their children (from *The Slovak Spectator*, 16 May 2005).

During early discussions of the issue of non-discrimination, which took place in the context of the 2002 amendment of the Slovakian Labour Code, norm conflict seems to have resulted in a deliberate omission of non-discrimination on the grounds of sexual orientation from the resulting amendment to the Labour Code. That event implies that the transposition of the EU directives in Slovakia, involving the passing of a separate, horizontal law as recommended by the Commission, would entail similar conflict. For that reason we now examine further the debate and normative tensions in Slovakia in the period 2002-2005 to assess whether transposition outcomes confirm our theoretical expectations.

A draft anti-discrimination law was prepared in 2001 by the Section for Human Rights and Minorities of Office of the Government and the Centre for Legal Analyses of the Kalligram Foundation, in consultation with UK experts and following analysis of the gaps in existing legislation. In fact, there were two pieces of draft legislation meant to transpose the two EU directives as well as the Council of Europe Protocol to the European Convention on Human Rights and Basic Liberties No. 12. The two laws proposed were (a) the Act on Equal Treatment and (b) the Act on Establishment of the Centre for Equal Treatment (Slovak memorandum, 2003). The second draft was discarded early, owing to the fact that the advisory legislative committee argued that a pre-existing centre for human rights was sufficient.

The initial draft of the anti-discrimination law was discussed by representatives of different parties in the government coalition in February 2002, followed by discussions in interministerial committees in March-April 2002. In June 2002, following a proposal by the Christian Democratic Movement (KDH), one of the main political parties, the legislative program of the Slovak parliament was changed to exclude the proposed legislation. In effect, the first attempt at a legislative act on anti-discrimination was withdrawn.

The normative underpinnings supporting the KDH's opposition to the law are fairly clear. The motivation of a Declaration adopted by the Slovak Parliament in early 2002, sponsored by the KDH, refers to findings that 'homosexuality is in many cases treatable and/or curable' ('liecitelna').⁽⁸⁾ Statements by KDH leaders over the past years have confirmed this position. Jan Ěarnogursky, the previous chairman of the KDH, has stated that homosexuals should be treated (for their illness), while KDH MP Anna Záborská is reported to have said in 2003 that she thought it was questionable whether homosexuals should fill all occupations and work with children (*The Slovak Spectator*, 16 May 2005).

Meanwhile, deficiencies in the first amended version of the Labour Code led to further amendments passed in May 2003. The reformed Labour Code of May 2003 still excluded sexual orientation, but contained a clause forbidding employers to inquire about their employees' sexual orientation. The Secretary of the KDH's parliamentary group, Mia Lukaěová, stated that 'with the passing of this [labour code amendment], we consider the issue of non-discrimination against homosexuals solved and closed'. Lukaěová also suggested that the gay minority was pushing for extraordinary rights that

no other group enjoyed (Pisarová, *The Slovak Spectator*, 2 June 2003).

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Following this rather ambiguous reform of the Labour Code, and despite the efforts of the KDH to forestall additional legislation, efforts to adopt an anti-discrimination law geared up once again. Deputy Prime Minister for EU Integration and Human Rights and Minorities Pál Csáky initiated a campaign in support of a new draft of the anti-discrimination law, even launching a public information campaign. This drive met an unexpected obstacle when in September 2003 the general director of the public service Slovak television (STV), Richard Rybniček, stopped the broadcast of public interest advertisements against discrimination. He was quoted to say that, as a person of Christian faith, 'he objected to the expressions of homosexual behaviour in the spots' (*The Slovak Spectator*, 30 September 2003).

Further opposition mounted. In another statement, Justice Minister Daniel Lipšic (KDH) argued that the draft law equalled an attempt at social engineering and that it would give more rights to homosexuals than required by the EU. Moreover, efforts by an opposition party, the SMER, to revive the anti-discrimination legislation by crafting a new proposal failed due to a lack of support in Parliament (Juhász, *The Slovak Spectator*, 26 January 2004). The government's own attempts to restart proceedings suffered a setback when a new draft law was approved by the Slovak cabinet only after KDH Ministers Lipšic and Fronc abstained and fellow party member Palko, Minister of the Interior, voted against (*The Slovak Spectator*, 16 February 2004).

At issue was not only the high-level norm related to the category of persons covered by anti-discrimination and the law's overall goals, but also some secondary norms. The Commission's requirement of one comprehensive law, along with a related European edict changing the burden of proof for sexual discrimination cases,⁽⁹⁾ also represented contentious issues that engendered debate amongst specialist communities (Interview, August 2005).

The debate continued even in the face of deep, underlying norm conflicts. Vigorous discussions in parliamentary committees followed, in which the sponsor of the law, Deputy Prime Minister Pál Csáky, argued that the adoption of the law was not a matter of politics but of being 'civilised': 'I think our legislative system and even Slovak life will become more civilized if such a law is passed' (Balogová, *The Slovak Spectator*, 17 May 2004).

The anti-discrimination law was finally passed by the Slovak Parliament on 20 May 2004 (in force from 1 July 2004), by a coalition including both government parties and opposition parties, overcoming the opposition of one of the ruling parties, the Christian Democrats. The law was supported by 116 legislators out of 150 (Jurinová, *The Slovak Spectator*, 18 October 2004). The law explicitly transposed the two EU directives covering non-discrimination on race and ethnic grounds and on equal treatment in the workplace.

At the urging of Edit Bauer, a member of parliament from the Hungarian minority, the law also included 'temporary balancing measures', provisions for positive discrimination that were intended, according to Bauer's party colleague, Deputy Prime Minister Pál Csáky, to create conditions in which some groups and minorities could exercise the rights given to them by law. Csáky argued that the EU encourages national legislation enabling temporary measures to help disadvantaged groups (Jurinová, *The Slovak Spectator*, 18 October 2004).⁽¹⁰⁾

The approval of the legislation launched a new chapter in the transposition struggle. As soon as the law was adopted, Justice Minister Lipšic announced his intention to initiate a motion in the Constitutional Court against the law's positive discrimination provisions. He argued that positive discrimination was against the Slovak constitution and that it 'degrades the human dignity and strengthens stereotypes' of certain groups of people (Pisarová, *The Slovak Spectator*, 31 May 2004). The public debate on the law thus shifted its focus from sexual orientation to positive discrimination with regard to certain minorities such as the Roma.

In October 2004 the Slovak anti-discrimination law was submitted to the Slovak Constitutional Court. The challenged provisions were temporary measures for positive discrimination to help certain disadvantaged groups. The Court was due to issue a judgement in May 2005, but the ruling was delayed. The delay has been taken by commentators to be a sign of how sensitive the issue has become (Balogová, *The Slovak Spectator*, 5 September 2005). Finally, on 18 October 2005, the Constitutional Court ruled that the positive discrimination provisions in Article 7 of the law were unconstitutional and were therefore repealed.

4.2. Analysis

The analysis of this case suggests that norm conflict occurred between the EU norm and a highest order norm, a third-order norm, which resulted in considerable delay in transposition. Even before the referral to the Constitutional Court, the law took ‘two and a half years of work plus three hours of negotiation’ according to Jana Kviečinská, general director of the government’s department for human rights and minorities (Juhász, *The Slovak Spectator*, 26 January 2004). With this delay the Slovaks would have failed to transpose on time had the country already been a member of the EU. As it stood, the law was passed with barely enough time to clear the date of Slovakia’s accession to the EU, May 2004. This confirms our expectation that conflict between an EU norm and a third-order domestic norm would lead to considerable delay and failure to transpose on time. Furthermore, after the Constitutional Court’s decision on the unconstitutionality of Article 7, we can say that the transposed law has seen content change in a pattern consistent with our expectations.

The third-order norm in question was not embedded in the constitution but was prominent in the statements and actions of groups that identified themselves as ‘Christian’. The latter were comprised not only of members of the Christian Democrat party (KDH), which could have been described in rationalist terms as a veto player, but also of prominent members of society, such as the Director of the State TV channel, who shared similar norms.⁽¹¹⁾ Furthermore, other parties in the Slovak Parliament supported the previously mentioned ‘Declaration of the National Council of the Slovak Republic on the Sovereignty of the Member States of the European Union in Cultural-Ethical Questions’, suggesting their unwillingness to openly oppose a norm that may be shared by other Christian groups in Slovak society.⁽¹²⁾ There were also those who rejected the need for comprehensive anti-discrimination legislation from a legal perspective, and other groups for which anti-discrimination in Slovakia was simply not an issue (Interview, August 2005). Thus, both second- and third-order norms appeared in conflict, causing the type of contention, friction, and delay that we would expect. Identity emerged as a normative concern as well. The main norm conflict, however, was identity driven in the sense that for the opponents of the law, their self identification as Christian was crucial and they were led by norms which were seen to derive from Christian norms and principles.⁽¹³⁾

At the same time, the motivation presented by the Slovak Minister of Justice for challenging the law in front of the Constitutional Court was based on his formal objections to positive discrimination which, according to him, did not fit with the Slovak tradition. Taken on its own, this can be interpreted as evidence of EU norms conflicting with a second-order norm concerning the way to achieve certain policy objectives. Even though positive discrimination was only an option in the EU directive 2000/43/EC, evidence that the EU has tried to encourage member states to take steps to ensure equal opportunities and promote social inclusion (Goldirova, *EU Observer*, 19 October 2005) suggests that the positive discrimination norm has also been associated with the EU legislation.⁽¹⁴⁾

Since a more fundamental third-order norm was invoked at least by some groups, this secondary conflict became wrapped up and debated in the context of the broader discussion. Also, arguments related to the conflict between a second-order norm having to do with positive discrimination as a tool to achieve the basic norm of non-discrimination appeared quite late in the debate. This leaves us to interpret the conflict of the directive with the religious norms of the Christian Democrats as the more significant factor causing problems with transposition.

Importantly, since the process of adopting the anti-discrimination bill lasted some time, we expect that there were possibilities for changes in domestic norms as a result of the public and expert debates. Indeed, considerable societal and political debate occurred around the anti-discrimination drafts and there were many opportunities for persuasion and socialisation to take place. The debate over the law lasted over three years and included not only political parties and officials but also the media, think-tanks and academic institutions. There is indeed some evidence of norm change. One official noted that while initial arguments in favour of the law were linked to Slovakia’s accession obligations and the need to transpose the anti-discrimination directives, a ‘breakthrough came when the argumentation turned to the role of this legislation in strengthening further human rights and providing equal opportunities for all Slovak citizens’ (Interview, Slovak official, August 2005).

More evidence of norm change can be drawn from available sociological polling data that suggests society-wide support for the anti-discrimination law was high towards the end of the debate. A poll of 1016 adults, taken by the IVO Institute in September 2004, showed 85 per cent of support for the anti-discrimination law as then approved. It was noted by the IVO report that support was very broad and crossed party lines (*The Slovak Spectator*, 8 October 2004).

Since September 2004, when the law’s constitutionality was challenged because of the positive discrimination provisions, public debate on this particular issue has remained intense. The continuation of this debate, as well as reactions to the Constitutional Court ruling from October 2005 and the first few anti-discrimination cases, are likely to

open the possibility for further norm change.

16

5. Conclusion [↑]

This paper sets out a preliminary framework to explain transposition from a ‘norm transmission’ perspective. After positioning our approach in the existing literature and addressing some initial concerns, we built our framework in three steps. As a first step we outlined the heuristic of a ‘norm set’ as a way to understand norms in domestic polities. Ranging from quite specific first-level norms to broad and encompassing third-level norms, this heuristic represents the normative environment that influences the reception of an EU norm in the domestic setting. As a second step we argued that the level of domestic norm implicated by an EU norm affects the outcome of transposition – whether it will occur speedily and accurately, or slowly and incorrectly. As a last step we suggested that norm change may occur over time as the result of persuasion and socialisation processes. We then applied the first part of our theoretical framework to the critical case of the Slovakian transposition of two gender and racial equality directives. A brief process tracing exercise tested the plausibility of the framework and revealed its promise.

The paper goes some way towards making sociological approaches to compliance and transposition more theoretically clear and operationalizable. Yet more work needs to be done. Regarding the theoretical framework, more refinement is required and clearer guidelines for the operationalisation of key concepts. Regarding the empirical study, it is clear that a reliance on interpretation as the method of identifying the relevant norms can lead to weak results. Future drafts will consider using methods that allow us to identify the domestic norms independently of the EU norms in question. The testing of a least-likely case or a number of cases could say more about the validity of the framework, but given the epistemological foundations of sociological and constructivist approaches, process tracing and interpretation would remain part of the design.

Finally, returning to the question of alternative explanations, the question of conditionality looms large over this study (see Schimmelfennig and Sedelmeier 2005). Conditionality is undoubtedly a strong explanatory variable for pre-accession rule adoption, but the findings of existing conditionality research do not exclude the possibility of socialization and learning dynamics (see Schweltnus 2005, for instance, in the same volume above). Furthermore, our case study shows that despite formal adoption of the anti-discrimination law, which could be attributed to conditionality, norm conflict leads to actual delay even after accession. Thus, we expect norm conflict to matter more when conditionality has reached its expiration date and member states are treated as equals. Ultimately, more research and a systematic comparison of a number of cases would provide better evidence whether a norm based framework can be used successfully to explain transposition delay.

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Endnotes

(*) (1) The ‘Analysing EU Policies: The Transposition of EU Directives’ research program is a multiyear project underway at four universities in the Netherlands. For more information, visit the website: <http://www.transposition.leidenuniv.nl>. We would like to thank the members of the research program, including Bernard Steunenbergh, Kees van Kersbergen, Frans van Waarden, Markus Haverland, Ellen Mastenbroek, Sara Berglund, Ieva Gange, Michael Kaeding, and Marleen Romeijn. Funding for this research was generously provided by the Netherlands Organisation for Scientific Research. We would also like to thank Karen Henderson, John O’ Brennan, the participants of the 2005 ECPR workshop in Granada and two anonymous referees for their helpful comments and suggestions. Antoaneta Dimitrova would like to thank the Slovak officials who have provided comments and advice regarding the debate around the anti discrimination law. She also thanks Rob Doeleman and Marta Darulová for research assistance.

(2) For March and Olsen, rules are internalized prescriptions of appropriate action that are related, but not identical, to identities. Modern social organizations provide the venue in which actors match rules to their respective identities, and behave accordingly: ‘the matching of identities, situations, and behavioural rules may be based on experience, expert knowledge, or intuition’ (2004: 3). Finnemore and Sikkink’s definition of norms has certain affinities with this approach: ‘a standard of appropriate behaviour for actors with a given identity’ (1998).

(3) We recognise that the constructivist framework proposed here is based on a ‘thin’ version of constructivist explanation, including actors and strategic use of norms, similar to the ‘soft’ or ‘modernist’ version featuring in the work by Checkel (1999b, 2001a). We appreciate that for ‘thick’ constructivists ideas of causal mechanisms and testing make no sense at all, but we find a more moderate approach which recognises norms as causal as they regulate behaviour (Wendt, 1999:82) is much more fruitful for our purposes. Guzzini (2000:148) has criticized ‘constructivism’s alleged middle ground position’ as implying neglect for the basic tenets of constructivism and eclectic usage of the term itself. We take on board some of his criticism and his appeal to return to the basic tenets by paying attention to the intersubjectivity of norms as the unit of analysis. The need to remain grounded in empirical research, however, takes precedence to the purity of constructivism approach.

(4) In the framework of the EU’s social policy, there are more directives which have addressed the issue of equal opportunities, for example several directives from the 1970s such as Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. There is also the recent Directive 2002/73/EC of the European Parliament and the Council, amending Council Directive 76/207/EEC and a Directive from 1997, changing the burden of proof in cases of discrimination. We have taken only the above two directives as they seemed the broadest in scope and are related in time.

(5) The choice of Slovakia for the case study should not be taken as evidence that we believe Slovakia should be singled out as a laggard in this area. Our educated guess is that many of the norms and debates we identify below would be similar in other countries with a communist legacy or strong religious influences.

(6) A similar situation of fragmented anti discrimination protection could also be found in a number of other CEE states, e.g. Hungary and Bulgaria.

(7) Or, as in other post communist states such as Romania, was defined as a crime.

(8) Declaration of the National Council of the Slovak Republic on the Sovereignty of the Members States of the European Union in Cultural-Ethical Questions, passed by the Slovak Parliament in early 2002 (<http://www.kdh.sk/dokumentyDeklaraciaNrsr.aspx>). The motivation behind the declaration, in which the findings are referred to, can be found at <http://www.kdh.sk/dokumentyDeklaraciaDovodovaSprava.aspx>). We thank Karen Henderson for bringing this to our attention.

(9) The burden of proof issue was linked to another EU measure, Council Directive 97/80/EC on the burden of proof in cases of discriminations based on sex (*Official Journal* L014, 20/01/1998). The compatibility of these norms with Slovak normative and legal traditions was the centre of the debate and some of the issues were resolved only in the last draft which came out in January 2004.

(10) There has been some contention regarding the issue of whether the positive discrimination clause in the law was required by the EU. Article 5 of Directive 2000/43/EC allows for the option of affirmative action. During the accession period, the EU encouraged Slovakia to help the Roma catch up with the rest of society.

(11) Evidence of the importance of Christian-based norms and values can be found in most analyses of Slovak society. Another interesting illustration of potential conflicts between these and some of the EU norms is the fate of the treaty between Slovakia and the Vatican on conscientious objectors and the reaction of 54 MEPs who wrote to the Slovak Prime Minister in May 2005 asking him to explain whether the treaty is in conflict with EU law (Balogová, *The Slovak Spectator*, 19 October 2005).

(12) This does not mean, however, that the share of the Slovak public willing to discriminate against homosexuals is necessarily large. See references to opinion poll surveys in the paper.

(13) An important aside to this story is to remind the reader that even though norms are considered to carry a moral element, defining 'good' standards of behaviour, this judgment is relative and based on the logic of appropriateness of a certain group. As March and Olsen stressed (2004:4), 'The term, 'logic of appropriateness' has overtones of morality, but rules of appropriateness underlie atrocities of action such as ethnical cleansing and blood feuds as well as moral heroism'.

(14) *EU Observer* quotes a Commission spokesperson for social matters who commented on the Slovak ruling by saying that it is definitely important to include minorities into society and prevent certain areas from becoming ghettos' (Goldirova, *EU Observer*, 19 October 2005).

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Table I

The Norm Set

Norm Level	Where Operate?	Claims On?	Examples
First-Order Norms	Sectoral level; technical questions	Sectoral experts and organization actors; single ministry	Workplace safety norms; recycling target levels
Second-Order Norms	Across sectors and even domestic polity; political questions	Cross-sectoral actors and roles; multiple ministries and political actors	New regulatory styles; environmental protection norms
Third-Order Norms	Across society; deeply held 'value' questions	Most of society, at least political elite	Civil liberties or human rights norms, equality on the basis of gender and race

Figure 1

EU Norms and the Domestic Setting

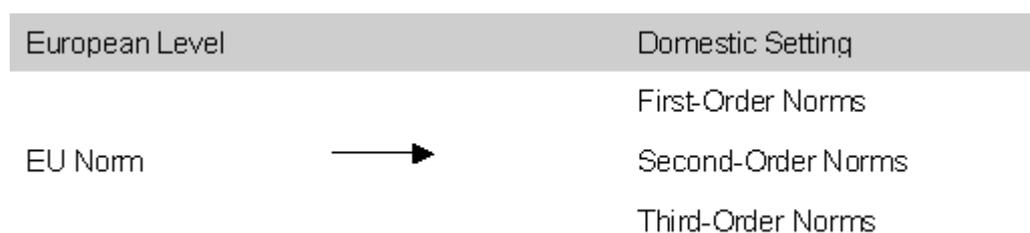
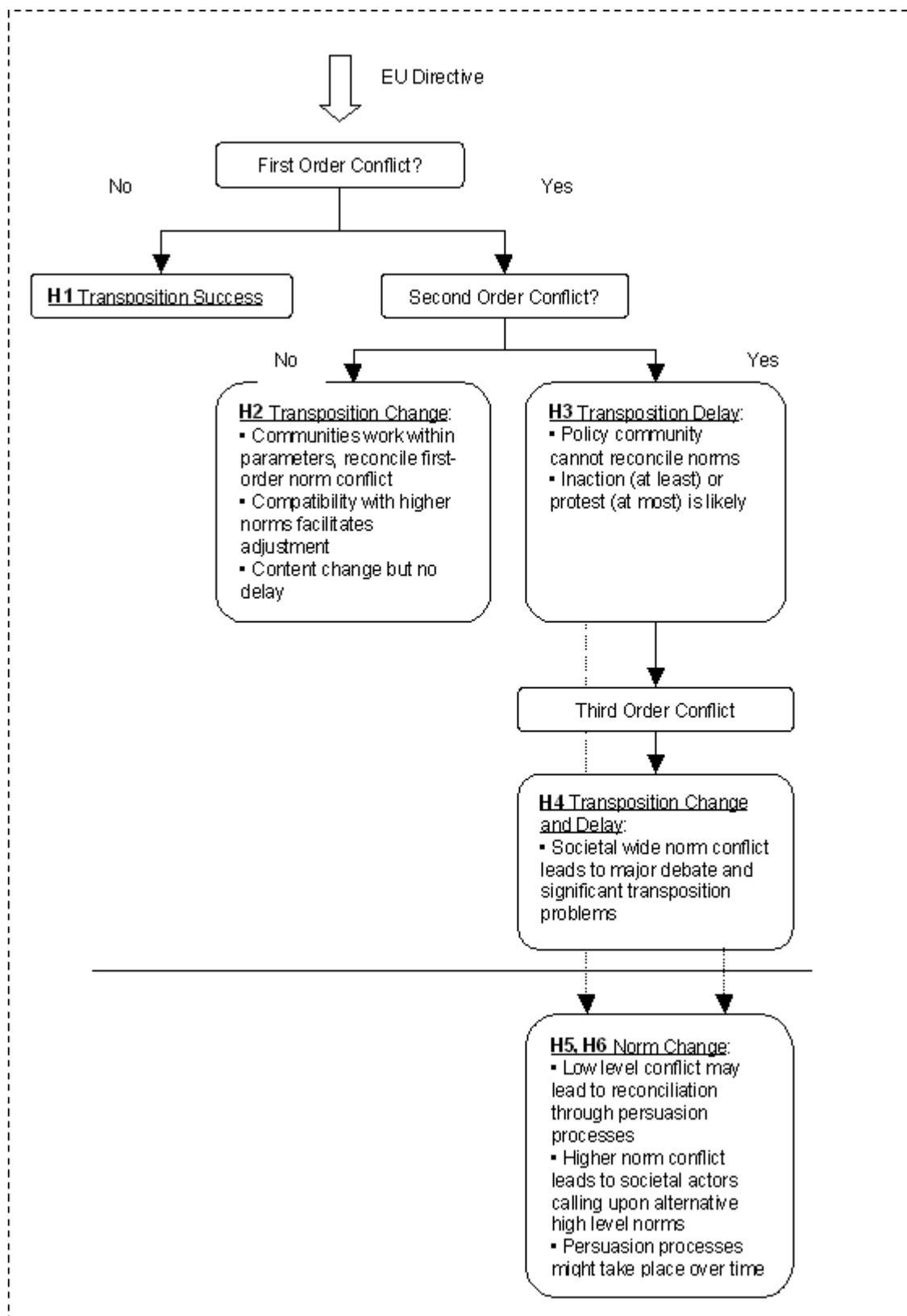


Figure 2

Transposition patterns resulting from norm incompatibility



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