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The Europeanisation of Equality between Genders. Who Controls the Scope of Non-discrimination?

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Abstract:

The paper examines the extent to which member states control the impact of European Union (EU) policies. It does so through a historical study of what is considered to be the ‘least likely case’ - the Europeanisation of Danish gender equality. The analytical findings identify various and diverse effects of European integration over time on national policy, politics and law. Historically, the EU has had a major role in furthering and putting into effect equality rights – even in the ‘least likely’ case of Denmark. From a theoretical perspective, the paper argues that the study of Europeanisation could learn from the insights of implementation theory. Empirically, the analysis demonstrates that the process of implementation involves a complex series of ‘decision points’ that extend beyond the control of national governments. These ‘decision points’ may veto, extend, or enforce the impact of European policy. Furthermore, states do not act with a single purpose; but are comprised of a variety of, often competing, actors and interest groups.

Key words: Control, decision points, Europeanisation, gender equality, impact, implementation.

Introduction

This paper examines two important dimensions of ‘Europeanisation’: what is the impact of European Union (EU) policies in member countries, and do member states control¹ how EU policies are implemented? Taken together, these two dimensions address the extent to which member states *control* the *impact* of EU policies.

The study of the Europeanisation of public policy is concerned with the process and extent of change that domestic policies, politics and polities experience as a result of European integration (Hix & Goetz

2000; Radaelli 2003). The present study examines two dimensions of Europeanisation: the *effects* of the EU political system on national *policies* and *politics*, i.e. the way national *policies* are formulated, adopted, interpreted and amended; and the way domestic *politics*, i.e. interests, are perceived as a result of European integration.²

However, as will be demonstrated in the analysis below, the relationship between cause and effect is both complex and dynamic. A static analysis of impact and control is likely to conclude that European integration has only a modest effect on domestic affairs and that the member states, in the main, control the implementation of EU policies. The analysis presented below shows that, the effects of Europeanisation are rarely visible in the short term but rather manifest themselves over time. Thus, the study of these effects must also take a long perspective (Martinsen 2005).

In order to fulfil the diachronic analytical aim, the study investigates how EU policies on gender equality have been implemented and have impacted on the policies and political expression of competing interests around *equal pay* and *equal treatment* in one member state – Denmark, from Community membership in 1973 to the present. The study thus examines the part of the implementation process in which EU law and policy are turned into domestic policy outputs and may eventually affect politics.³

From a methodological perspective, the Danish case on gender equality provides a good test of theoretical propositions about the impact of European policies. Following Eckstein (1975)⁴ Denmark can be considered a ‘least likely’ case in which to find positive impacts of EU policies on gender equality. The dominant view is that *domestic* policies and agreements – and *not* supranational ones – have driven gender equality in Denmark. Furthermore, the general view is that Denmark has been far ahead of its continental and Southern European counterparts⁵ in guaranteeing rights to women. Thus, if evidence of the ‘Europeanisation’ of gender equality can be found in the ‘least likely’ case of Denmark, then ‘Europeanisation’ may have had a similar or even greater impact in other member states.

Furthermore, research expectations are linked to the specific status of gender equality policies and the institutionalised public-private relationship regulating the policy field in Denmark. Public policy initiatives on gender equality concern social and labour market regulation. In Danish national politics, both areas have long-established traditions, norms and practices which could be expected to act as a constraint on domestic change. In the Danish context, the policy field is further characterised by the historical influence of very strong interest groups, in particular the social partners and women’s

organisations. The social partners have traditionally enjoyed privileged access to national policy making and have been closely involved with government in formulating social and labour market policies; to the extent that a ‘Danish model’ has been identified for the regulation of the labour market in which the autonomy of the social partners is one of the main pillars (Falkner et al. 2005, pp. 229-260). These interest groups can therefore be expected to exert a strong influence on policy implementation in Denmark and represent potential ‘veto players’ in the decision making process.

In what follows, the study of ‘Europeanisation’ will firstly be discussed within the framework of implementation theory and national control of policy making. This will be followed by an analysis of the Europeanisation of gender equality policy. This analysis is presented in four parts: The first part describes the historical development of EU equality policies. The second part analyses the Europeanisation of equal pay in Denmark, while the third part focuses on the role played by competing interests. The fourth part examines the process of the Europeanisation of equal treatment in Denmark; and finally, the conclusion assesses the general assumptions about Europeanisation, including impact and control, in the light of the findings.

On Implementation and the Control of Impact

According to Bardach (1977) implementation is “the continuation of politics by other means”. In part, the study of implementation thus concerns who controls the allocation of resources after a policy has been decided. Although the redistributive competences of the EU are weak in a classic sense (Majone 1996), the implementation of EU policies nevertheless has redistributive consequences. Introducing EU policies is therefore not redistributively neutral; on the contrary, it brings about, either directly or indirectly, the reallocation of resources in member countries. In part, the reallocative effect of EU policies explains the extent to which implementation mobilises actors and interest groups. The redistributive consequences of introducing EU policies constitute one of the main reasons why it is important that the study of the EU polity expands to include the examination of implementation. Not only may it show that the redistributive impacts of EU policies are extensive, but it will also reveal the mechanisms through which EU policies reach citizens. The study of implementation is thus directly concerned with the question of political legitimacy and the extent to which EU policies are relevant to citizens.⁶

The implementation of Community law and policies has been interpreted as a potential second stronghold of national control, where national actors may attempt to ‘claw back’ what they may have lost during the European decision making process (From and Stava 1993; Mény et al. 1996, p. 7).

According to article 10 of the Treaty, member states are responsible for the correct implementation of EU policies. The post legislative phase of policy making may thus be where member states regain, or retain, control over the impact of policy. If that is the case, then ultimately, the concerns about lost or compromised sovereignty resulting from EU membership may mean less to member governments, since they control the interpretation, scope and reach of policies that have been adopted.

However, the proposition that member states control the implementation and impact of an adopted Community rule disregards at least three important aspects of policy making: *firstly*, member states are heterogeneous, and when considering the benefits, costs and risks of a policy do not act with a single purpose; *secondly*, it follows that implementation involves multiple actors with diverging and often competing interests; and *thirdly*, Europeanisation is a dynamic process that unfolds over time.

As pointed out by Dimitrakopoulos and Richardson (2001), amongst others, implementation theory, which originates from the study of federal states, may be useful for understanding the often ‘long and winding road’ by which EU policies are given effect. From classic implementation theory, we know that there are ‘*decision points*’ that are critical to the impact and control of policies in the implementation process. A ‘decision point’ arises when the consent of actors must be obtained in order to proceed with (further) implementation and may hinder efficient and/or successful implementation (Pressman and Wildavsky 1973, p. xxiv).

In Europeanisation theory, ‘decision points’ are conceived as ‘veto points’ or positions. Veto points arise at various stages in the policy-making process where agreement is required for policy change to take place (Haverland 2000, p. 85). The importance of veto points for the introduction of EU decisions has been extensively discussed in the Europeanisation literature (Haverland 2000; Mbaye 2001). Veto players may make use of domestic political opportunities to mobilise opposition to hinder the implementation of supranational decisions.

“Veto players in large number lead to both a lower quality and a lower speed of implementation (and therefore to higher non-compliance) (Mbaye 2001, p. 263).

The argument is that veto players constitute effective national opposition and thus may control and reduce the impact of EU policies. However, I argue that implementation theory developed subsequent to Pressman and Wildavsky’s seminal study (Winter 2003) has greater insights to offer to the study of Europeanisation. The subsequent development of implementation theory points out that, during the course of policy implementation, it is unlikely that all domestic stakeholders and veto players will adopt

and defend a single and homogenous interpretation of the 'national interest'. To interpret the national bureaucracy as a single united actor when implementing Community rules is in itself mistaken (Beck Jørgensen 2003). The mistake becomes even clearer when politicians and various other stakeholders are included in the equation. In the complex process of converting supranational intentions into substantive rights and obligations for citizens of EU member countries, interests are as likely to diverge as much as they do in the national policy making processes. Thus, in practice, the organisational context for implementation consists of multiple sources of power and influence, in which national actors may influence the substantive application of EU decisions at veto points. Implementation theory tells us that, at least in democracies, governments and bureaucracies do not impose national policies via a top-down hierarchical model of control (Meyers & Vorsanger 2003). It follows, therefore, that national governments and bureaucracies will similarly not have a monopoly of power and influence when implementing EU policies.

In practice, EU policy decisions may become effective channels for challenging national policies. In this scenario decision points may include interventions where stakeholders act to facilitate implementation and extend the impact of an EU policy, in opposition to the government standpoint. The social and material impact of EU policies means that national parliaments as well as other stakeholders take an interest in how EU rules are interpreted. As soon as the first 'decision point' in the implementation process has passed, any uniformity that may have existed is likely to break down as competing views about 'correct' implementation emerge.

Time is a crucial dimension in the study of Europeanisation. The Europeanisation of a policy area is not likely to be a 'one-off', fixed-term process - rather, it may unfold iteratively over several years or even decades (Bugdahn 2005) with national implementation feeding back into this long-term process. Indeed there may be several iterations and a considerable amount of time elapse between initial implementation, subsequent challenges and modification of a policy. During this process, the European Commission and European Court of Justice may play a key role in 'pushing' full implementation of policy through identifying and monitoring restrictive application or non-compliance by the national government (Börzel 2000). National stakeholders, including citizens and interest groups, may be their allies, pointing out an implementation deficit and thus 'pulling' the impact of EU regulation. While in the short term national governments and bureaucracies may exert a dominant influence over implementation, in the longer run, the combination of supranational mechanisms of enforcement and powerful national actors may be decisive. The Commission has the competence to take infringement proceedings against member states under article 226 of the Treaty, while the European Court of Justice may enter the Europeanisation

process through its interpretation of preliminary reference questions at the request of the national courts (article 234 of the Treaty). These ‘transnational constituencies’ (Pollack 1998, p. 221) of supranational and national actors are not only essential to the integration process, but equally to Europeanisation. The establishment of a ‘transnational constituency’ is likely to be a decisive turning point in the struggle for control of implementation, effectively loosening the control of national governments and bureaucracies over the impact of EU policies.

The following four sections present the empirical analysis of the Europeanisation of gender equality in Denmark, describing the process and identifying decision points, before examining the extent to which member states control the impact of EU policies in the long term.

Integrating Gender Equality

The Treaty provision providing for equal pay for men and women can be found in the original legal base of the Community and, over time, has become one of the most important aspects of ‘Social Europe’. However, article 119 was originally inserted into the Treaty of Rome for mainly economic reasons and not due to social considerations of the founding fathers. The original provision on *equal pay for equal work* between men and women was introduced as a result of the French concern about competitive disadvantage. The French government had wanted a provision in the Treaty on equal pay as France was the only one of the original six member countries to have introduced legislation for equal pay and perceived this to be a potential competitive disadvantage with the other member countries (Cichowski 2001, pp. 116-117).

The provision in the Treaty called for member states to implement equal pay before 31 December 1962, the date set for the completion of the first stage of the Common Market. However, despite the explicit deadline, none of the member states had introduced this provision by the required date (Warner 1984), and the article was to remain a declaration of intent until the beginning of the 1970s.

Progress in implementing this provision was hampered, amongst other causes, by disagreements over the definition of ‘equal work’, which narrowly defined, could mean that women only had a right to equal pay when performing precisely the same job as men and it required jurisprudence to give substance to the principle of equal pay within the Community.

The *Defrenne* cases⁷ can be considered to be key turning points in defining the meaning and effect of the Treaty’s declaration on equal pay. The *Defrenne II*⁸ demonstrates the crucial role of the European Court

of Justice, not only as a motor of integration, but also in matters concerning implementation and thus the effective scope, reach and impact of Community provisions. The Belgian Court questioned 1) if article 119 introduced the principle of equal pay directly into national law, and 2) whether article 119 had become applicable in the internal policies of the member states by virtue of the Treaty or had to be applied first by national authorities. The potential political impact of these questions was considerable. It could place all women in the Community in a position to claim equal pay retrospectively since the date of applicability – potentially the date the Treaty was adopted. In their observations to the Court, the UK and Ireland argued that while the Treaty article implied a commitment to a constitutional principle, it nevertheless required national implementing legislation to take effect. These member states thus aimed to retain control over implementation and determine the scope of equal pay. The Court's conclusion that article 119 had direct effect from the date of applicability, but that no claims on equal pay could be made retrospectively of the judgement, although a compromise, had radical implications. However, by restricting the material impact of its judgement, the Court reduced the potential political opposition to its establishment of a direct right - which could be defended in every national court - to equal pay for equal work.

The long awaited political initiatives came almost two decades after the adoption of the equal pay provision in the Treaty. The first EC Social Action Programme of 1974 included a section on women and shortly afterwards, the Council of Ministers introduced a first wave of secondary legislation. Between 1975 and 1986, five new directives were adopted. The first concerned *equal pay*, which detailed and extended, the scope and meaning of article 119 of the Treaty by stating that men and women are entitled to equal pay for equal work and *work of equal value*.⁹ The subsequent four directives went beyond the principle of equal pay to address the broader principle of *equal treatment*. The equal treatment directive¹⁰ extended the principle of non-discrimination to vocational training, access to employment and working conditions. Directive 79/7¹¹ extended equal treatment to social security, with the exception of occupational schemes, which were eventually included by the occupational social security directive of 1986.¹² In the same year, a directive extending equal treatment to the self-employed was introduced.¹³

Nevertheless, despite these political commitments, the implementation of gender equality remained restricted. The impact of the equal pay directive was soon perceived to be limited by inadequate implementation. In 1979, a report by the European Commission on the extent to which the equal pay directive had been implemented by the member states found that none had complied with the requirements. Thus, the stated policy objective had not been achieved, as demonstrated by only a modest

reduction of the wage gap between men and women, with the average differential between genders remaining at roughly 30 per cent (Warner 1984, p. 151-152).

Further rulings of the Court addressed the inadequacy of national implementation by considering the meaning and scope of the equal pay principle.¹⁴ These cases extended both the supranational regulation of equal pay, and the right of equal treatment to indirect and disguised forms of discrimination – where, although there is no *direct* gender-based discrimination, there is nevertheless a discriminatory effect (Craig and de Búrca 1998, pp. 809-815).

In the 1990s, supranational maternity and pregnancy rights evolved during a new drive for equality initiated by the Court and followed up by the Council. The Court first considered the rights of pregnant workers in the case C-177/88 *Dekker*.¹⁵ The case represented a further consideration of the scope of both Treaty article 119 and the equal treatment directive and took another step in extending the meaning of the right to equality under Community law. The case concerned *Dekker*, who had applied for a job when three months pregnant. Although *Dekker* was found to be the most qualified person for the job, she did not get it, as the prospective employer's insurer would not cover maternity pay. In its judgement the Court found, in support of the plaintiff, that such a refusal of employment on the grounds of pregnancy constituted direct sex discrimination (Craig and de Búrca 1998, p. 856). The Court's jurisprudence thus created new supranational rights by explicitly protecting pregnant women and thereby laying down a wider interpretation of sex discrimination, to include a situation where a woman is disadvantaged *per se* rather than only in comparison to a man (Cichowski 2001, p. 124).

From the 1990s onwards, the Council adopted a second wave of supranational equality policies. In 1992, the maternity leave directive was adopted,¹⁶ and from 1992 onwards, five additional directives were introduced concerning the organisation of working time,¹⁷ parental leave,¹⁸ burdens of proof in sex discrimination cases,¹⁹ and framework agreements on part-time work.²⁰ This growth of secondary legislation shows that member states had now come to accept EU gender discrimination policies as an important dimension of the Community objective and no longer to be regarded as a policy field to be left to domestic decisions alone. This long drawn-out process of integration was finally given constitutional form by the Treaty of Amsterdam, where the Treaty now confirms that legislation against sex discrimination has become a key Union commitment and furthermore allows positive discrimination to ensure full equality in practice between men and women.

The extent to which this evolution of equality rights has led to the Europeanisation of gender equality will be analysed below.

The Europeanisation of Equal Pay

When Denmark entered the European Community in 1973, the Community had not yet developed its equal treatment provisions beyond those originally declared in article 119 of the Treaty. However, the Community's provisions on gender equality would play a significant role in furthering gender equality in Denmark and provide a key lever to improve the labour market rights of Danish women.

From the outset the Danish government attempted to control the impact of Community law so that it did not conflict with national institutional traditions. By membership and the adoption by the Council of directive 75/117 on equal pay, the Danish government had committed itself to a regulatory field where no equivalent Danish legislation had previously existed. Initial discussions of the directive between the Danish legislator and the social partners considered whether Denmark actually required any legislation to govern equal pay or whether the principle was already adequately embedded, in particular by the Conciliation Officer's compromise in 1973, which had established the principle of equal pay in collective agreements (Interview, Danish civil servant, 2005; 'Official Report of Parliamentary Proceeding', 'Folketingstidende'; 1975-76, sp. 1675). The Danish government, however, decided that legislation was necessary, and parliament adopted a law on equal pay as a direct consequence of the Community directive (Dybkjær 2003, pp. 8-9),²¹ which was implemented a week prior to the deadline for compliance. Thus at first sight, Denmark had fulfilled its Community obligations with regard to equal pay for men and women.

However, the policy adopted by Denmark modified the impact of the directive and thus departed from its explicit intention. While the directive had extended the literal meaning of Treaty article 119 to regulate *work of same value*, the Danish law specified that the entitlement to equal pay covered *equal work*, stating in article 1:

“Every person who employs men and women at the same place of work must pay them the same salary for the same work” (Law no. 32, 4 February 1976. Own translation).

Furthermore, Denmark had issued a declaration during negotiations in the Council, proclaiming:

“Denmark is of the view that the expression ‘same work’ can continue to be used in the context of Danish labour law” (Case 143/83, para. 12).

This modification of the directive’s meaning was emphasised during negotiations in the Danish Parliament.²² MPs stressed that the formulation of domestic policy had taken place in close cooperation with the social partners and that the national legislative text deliberately spoke about ‘same work’ and not ‘work of same value’, since the expression ‘same work’ was used in the collective agreements.

“In the EC-Directive, it is mentioned that equal pay shall be paid for equal work or work of equal value. In relation to the adoption of the directive, Denmark made the reservation that Danish secondary legislation would only use the expression ‘same work’, because this is the expression we use in collective agreements” (Comments by Inge Fischer Møller, Social Democrats [governing party] in the parliamentary debate, 2. December 1975, Official Report of Parliamentary Proceeding 1975-76, sp. 2403. Own translation).

Denmark thus deliberately applied the directive restrictively, thereby reducing its scope in order to satisfy both institutional traditions and the social partners. In the early stage of implementation, the meaning of the Community directive was thus controlled domestically.

In 1979, the European Commission found Danish implementation of equal pay to be insufficient and in the following year began an infringement procedure, which resulted in Denmark appearing before the Court in 1983 over its implementation of the directive.²³

The Danish government defended the Danish traditions for labour market regulation before the Court, arguing that domestic law on equal pay was merely a subsidiary guarantee of the principle of equal pay, covering only those cases where equality was not ensured by a collective agreement. In addition, it emphasised that collective agreements also clearly upheld the principle of equal pay for work of equal value.

The Court’s conclusions, however, were contrary to the self-regulatory principle of the Danish labour market model. The Court did not find that the full scope of the equal pay principle could be sufficiently ensured by collective agreements alone. Instead, it found that the policy adopted by Denmark de facto restricted the scope of the principle and thus Denmark did not comply with its Community obligations. Furthermore, it pointed out that unilateral declarations, as made by the Danish government during negotiations in the Council, which stated that the expression ‘same work’ could continue to be used in a Danish context, could not be relied upon for the interpretation of Community measures (Case 143/83, paras. 12-13).

Thus Denmark's attempt to control the definition, and consequently the scope, of the equal pay principle could not be sustained in the long run. One year after the judgement, Danish law on equal pay was amended to include '*work of equal value*'.²⁴ The decision to finally comply with EC law not only demonstrates a substantive effect of European integration in terms of a change to domestic policy, but also a more fundamental modification of national regulatory traditions embedded in collective agreements. The institutional barrier to the full implementation of supranational rules had been high and explains why it took Denmark ten years to comply sufficiently. In the long run, however, Denmark was unable to retain full control over implementation.

Europeanisation through Interest Articulation

With the infringement procedure, the Europeanisation of Danish gender policy had entered into a second phase. This phase was marked by considerably increased Europeanisation due to changes in strategies and alliances amongst key stakeholders.

Until the infringement procedure in 1985, the Danish executive defended national positions based on the argument that the EC ought to avoid interfering in domestic social policies. The government position was strengthened by the fact that the social partners were strongly opposed to supranational labour market regulation (Strøby Jensen 1995, pp. 315-317).

However, Danish trade unions gradually began to change their opposition to EC regulation after the adoption of the Single European Act in 1986 and came to believe that there was a need for some supranational intervention in the field of equal treatment of men and women (Strøby Jensen 1995, pp. 320-324). This fundamental change of position was crucial to the extent of the Europeanisation of gender equality that followed. Trade unions now recognised the positive impact that Community law and the instrument of preliminary rulings could have on equality for Danish women. The interplay between trade unions, national courts and the European Court of Justice formed the framework for accelerating and deepening the Europeanisation of gender equality in Denmark.

In 1988, the first case, *Danfoss*, was referred to the European Court of Justice by a Danish court, but driven by the Union of Commercial and Clerical Employees in Denmark (HK). Not only did the judgement have a major impact on Danish policy, it also influenced the general course of integration. The Union had taken *Danfoss*, the employer, to Court over the question of equal pay.²⁵ Although *Danfoss* paid the same wage to its male and female employees, the structure of individual pay

supplements was argued to favour men and therefore average male wages were de facto higher than those of women.

In the *Danfoss* case, the European Court of Justice laid down the principle of the burden of proof. The Court concluded that once it has been established by an employee that a pay system systematically works to the disadvantage of female employees, the employer must prove that this is not due to indirect discrimination. The *Danfoss* judgement thus meant that the burden of proof in equal pay cases was to be shared between employee and employer, and not only carried by the employee in order to prove discrimination. In this aspect, the judgement overruled the existing practice concerning the burden of proof in discrimination cases

The case directly affected Danish equal pay policy.²⁶ The legislation on equal pay was amended in 1992 in order to insert the principle of the shared burden of proof into Danish law (Andersen et al. 2001, p. 144).²⁷ Additionally, it had a direct effect on the evolution of supranational gender policy. In 1988, the European Commission had proposed a directive on reversing the burden of proof in sex-discrimination cases (Craig and de Búrca 1998, p. 810). The proposal had, however, met strong opposition (Interview, Danish civil servant, 2005). In the *Danfoss* case, the Court of Justice implicitly overrode the member state objections. Nevertheless, it took subsequent legal rulings²⁸ and another ten years before the Council adopted directive 97/80 on the burden of proof.

The construction of the principle of shared proof demonstrates the dynamism of the Europeanisation process. Although the *Danfoss* case had already brought about an amendment to Danish law about equal pay, the Europeanisation of equal pay continued. The directive on the burden of proof was implemented by a major reform of Danish policies regarding gender equality, amending Danish laws on equal treatment, equal pay, childcare leave and equal treatment between genders for occupational social security schemes.²⁹ This major policy reform meant that the shared burden of proof would not be confined to equal pay alone but would operate in all areas of gender equality.

Europeanising Equal Treatment

As with equal pay, the Council's adoption of the directive on equal treatment in 1976 encountered a regulatory vacuum in Denmark. Equal treatment for Danish women and men was not regulated by law, but through the agreements of the social partners. In April 1978, however, the Danish Parliament adopted a law on equal treatment as a direct consequence of the EC secondary legislation.³⁰

Although the institutional tradition for regulating labour market policies through collective agreements was, in part, set aside by the adopted legislation, the Parliamentary negotiations show that the formulation of the national policy proposal took place in close cooperation with the social partners (Parliamentary debate, quoted in ‘Official Report of Parliamentary Proceeding’; 1977-78, sp. 4114; sp. 5288, ff; sp. 7874 ff). The implementation of the Community’s equal treatment principle was thus initially controlled by national employee and employer organisations in close cooperation with the executive and the legislator.

The substantive impact of the new Danish policy was far-reaching. It included several new equality rights for Danish women, for example, it prohibited advertising positions according to sex; making new appointments dependant on gender; and gender-related promotion and dismissal (‘Official Report of Parliamentary Proceeding’; 1977-78, *ibid.*). The prohibition of gender-related dismissal stood out as perhaps the most important advance in gender equality of that time, as well as the strongest manifestation of Europeanisation in the policy field. The prohibition included dismissal due to pregnancy, which had not yet been politically regulated in Denmark. The anti-discrimination clause was contrary to the Nordic, and certainly the Danish, tradition at this time. Traditionally, Nordic women’s organisations had been against specific protection for women, including during pregnancy, based on the argument that excessive protection would be to the disadvantage of women’s labour market participation.³¹ Public policies had thus not protected employed women specifically (Nielsen 1980, p. 41).

On this crucial point, the Nordic tradition clearly departed from the institutional tradition in Continental and Southern Europe, where women were legally protected against dismissals during pregnancy (Nielsen 1980; Andersen 2001, p. 260). The latter approach informed the approach of the Community, which in turn introduced – and later in part advanced – pregnancy-related protection to Danish women.

However far-reaching the Danish equal treatment law appeared to be, it was found insufficient by the European Commission. Implementation of the equal treatment directive was part of the infringement procedure that the Commission initiated against Denmark in 1980. The Commission argued that the directive was not fully implemented, as Danish legislation merely prohibited discrimination between men and women working in the same workplace and not as a general principle across different workplaces (Andersen et al. 2001, p. 161; Parliamentary debate quoted in ‘Official Report of Parliamentary Proceeding’; 1983-84, sp. 142 ff; sp. 739 ff). The Danish Parliament decided to comply

with the Commission's criticism and amended the Danish equal treatment law in 1984,³² to prohibit gender discrimination beyond the same work place (Official Report of Parliamentary Proceeding, Ibid).

In addition to these political responses to, and interpretations of, EU regulations, Danish courts and trade unions played a key role in clarifying the meaning and scope of the Community equal treatment provisions in relation to Danish labour market policies and practices. The Danish Union of Commercial and Clerical Employees (HK) in particular has taken an active role in converting supranational rules into substantive material rights for Danish female employees, making active use of the opportunity to have national policies and practices interpreted before the European Court of Justice. This accounts not only for the *Danfoss* case on equal pay, but also the protection of women's pregnancy and maternity-related rights. The potential veto player thus instead came to advance Europeanisation.

In the *Hertz*³³ and *Larsson*³⁴ cases, the Union questioned how far protection against dismissal on the grounds of pregnancy went in the event of illness. However, the European Court of Justice did not find these cases in favour of the plaintiff in either case. But despite these legal set backs, the trade union (HK) continued to feed the Danish courts with questions concerning the relationship between the European Community equality provisions and the eventual discriminatory content of national rules and practices. In the *Pedersen*³⁵ and the *Tele Denmark*³⁶ cases that followed, the Union succeeded in considerably advancing the protection of pregnant wage earners in Denmark.

In the *Pedersen* case, the European Court of Justice treated the question of whether it was in accordance with the pregnancy directive for an employer to send a female employee home during pregnancy without compensating her full salary. In this case, the Court extended the rights of pregnant Danish employees, concluding that a woman was entitled to full pay in such circumstances. As a direct consequence of the *Pedersen* case, Danish law on salaried employees (Funktionærloven) was amended so that salaried and clerical employees received the right to full pay if sent home during pregnancy, for example due to work place safety issues.³⁷ Furthermore, the conclusions in the *Pedersen* case were subsequently taken into account by national courts and extended to cover workers in general (Andersen 2001, p. 283).³⁸ Thus, not only did the *Pedersen* case cause a shift in national policy, it also changed the national legal reasoning to incorporate that of the European Court of Justice.

The *Tele Denmark* case further advanced the pregnancy-related rights of female workers in Denmark. The case addressed the situation of Ms Brandt-Nielsen, who was recruited for a six month contract but had not informed her employer that she was pregnant during the recruitment process. While pregnant,

she was unable to work for a substantial part of her contract. Ms Brandt-Nielsen was dismissed shortly after the employer was informed that she was pregnant on the grounds that the employer had not been informed of her pregnancy during recruitment. The Court concluded in favour of the plaintiff, clarifying that the rights entailed in the directives on equal treatment and maternity leave did not draw distinctions regarding the duration of the employment relationship. The European Court of Justice thus concluded that the right to protection from pregnancy-related dismissals also covers workers on fixed-term contracts, overruling the position of the Danish employer.

Over time, the Europeanisation of equal treatment has increased in scope and meaning. Initially, the Danish government implemented the equal treatment directive according to a literal understanding of its meaning, which the Commission found restrictive. After the first revision of Danish implementation, the meaning of equal treatment expanded and came to grant female employees in Denmark the right to protection from dismissal and indirect discrimination due to pregnancy. The material importance of this right cannot be overstated.

Concluding Remarks

The analysis of the Europeanisation of gender equality has demonstrated the various and extensive effects on national policy, politics and law brought about by European integration. Over time, the impact of European integration has progressed and intensified within a public policy field previously regarded as a national policy domain. The conclusion, is that historically, as well as in the present day, the EU has had a major role in furthering and putting equality rights into effect – even in such a ‘least likely’ case as Denmark.

Historically, Europeanisation acts on key dimensions of policy and lawmaking, for example, adopting and reforming national policies, changing public-private relations, domestic legal reasoning and reforming administrative practices. The study of the Europeanisation of gender equality provides support for the view that impact must be investigated over time, as it is unlikely to happen fully, or be detected, in the short to medium term. A study addressing Europeanisation over an inadequate time span is likely to find either non-compliance or the restrictive application of Community measures and therefore to conclude, wrongly, that implementation is “the second stronghold of national control”.

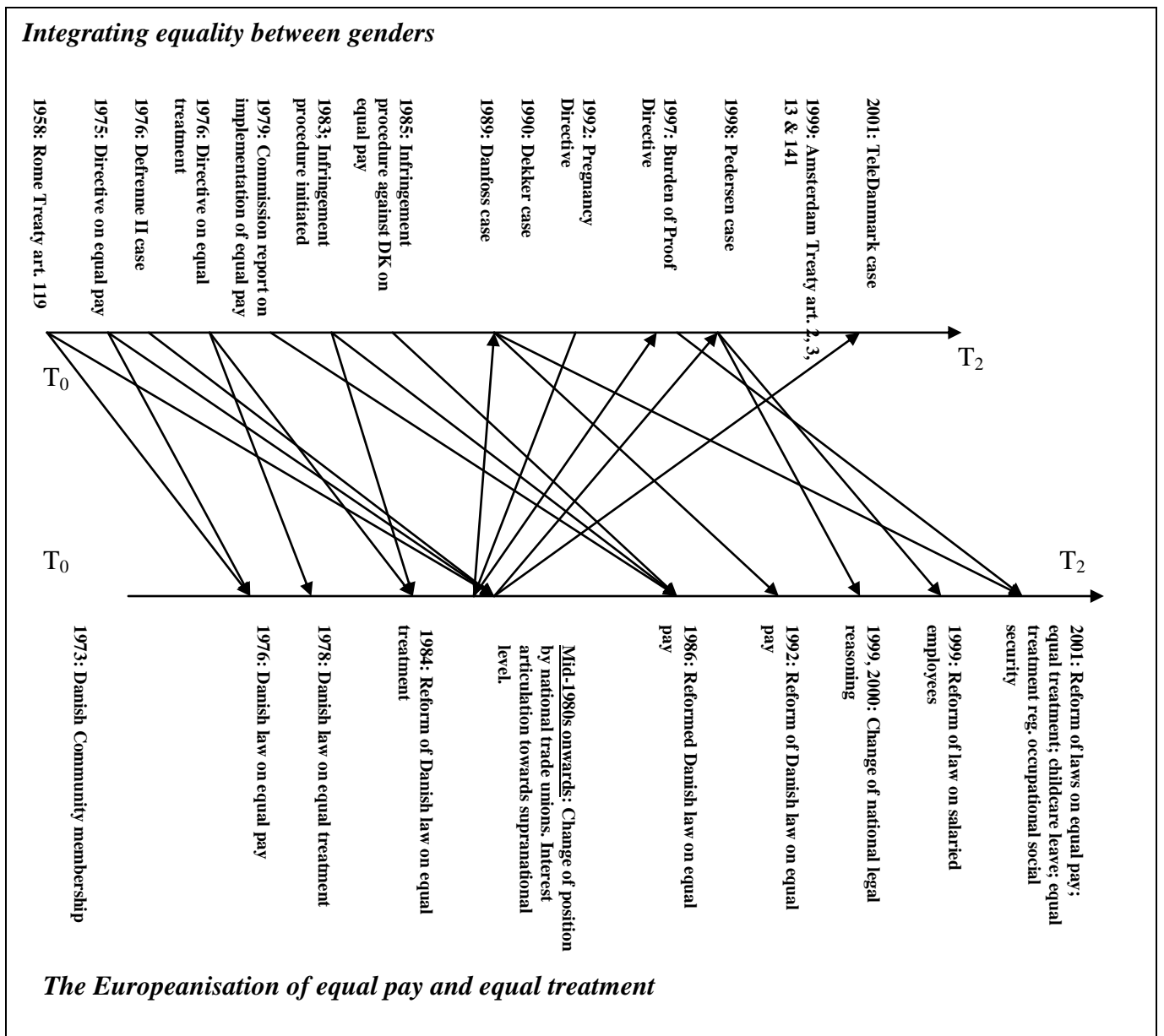
However, implementation involves a wide and complex set of decision points that represent competing positions on how implementation ought to proceed and which do not always leave member governments in control of the interpretation of Community obligations. Whereas decision points in the Pressman and

Wildavsky study of federal implementation hindered effective implementation, the present study of Europeanisation of equality rights shows that this is not necessarily the case, as decision points may also have the opposite function, propelling and consolidating the impact of Europe. Thus, it can be concluded that decision points may both hinder and facilitate the implementation of Community objectives – in accordance with, or in contrast to, what the member government considers to be the national interest. Decision points may – when utilized by stakeholders or when advanced by ‘transnational constituencies’ – enforce or extend the impact of Europe.

When returning to the research question - whether member states control the impact of EU policies - the conclusion of the analysis is that, from the outset of the Europeanisation process, the Danish executive possessed a considerable degree of control over implementation, which it used to contain the impact of EU policy and to protect institutionalized traditions and interests. In the longer run, however, the degree of control decreased. Given Denmark’s status as ‘least likely’ case, it may be reasonable to suggest that while restrictive application might be the national response to its Community obligations for several years, it is not a stable or permanent state. Over time, it becomes untenable due to infringement procedures, preliminary references and transnational constituencies between supranational organisations and national stakeholders. The interplay of these forces provides the momentum for taking forward the European policy agenda in the member countries.

Figure 1 summarises the empirical findings on the integration and Europeanisation of gender equality:

Figure 1: Integrating and Europeanising Equality between Genders



The figure presents two timelines. The upper line mirrors the integration process and the line below that of Europeanisation. The empirical and theoretical results contained in the figure can be summarised in five points;

- *First*, the figure demonstrates that Europeanisation occurs progressively and sometimes with a considerable time delay.
- *Secondly*, the figure shows that implementation deficits – and both supranational and national interpretations thereof – feed back into the integration process. In part, the integration of equality rights depends on the implementation of previous decisions.

- *Thirdly*, the figure emphasises that the European Court of Justice has a decisive say on the effective reach of Community rules and thus on the Europeanisation process. Together, trade unions, national courts and the European Court of Justice have formed pivotal points to take forward implementation.
- *Fourthly*, a key finding is that a veto point can be overridden when organisations or actors have an ideological or material interest in implementing the EU decision. Veto-points then turn into facilitating points. In the figure, there is a dividing line from the point in time in the mid-1980s where trade union policies shift away from national negotiations alone to include action through EU institutions. Before this point, the relationship between cause, i.e. European integration, and effect, i.e. national impact, was unidirectional, running from the supranational to national level. From the mid-1980s onwards, however, social actors also invoke and enforce European rules in domestic institutions, thus accelerating and deepening the Europeanisation process.
- *Finally*, Europeanisation feeds back dynamically into the integration process through competition between interests. The two processes, although not simultaneous, are nevertheless intertwined.

As with European integration, the Europeanisation of public policies is a dynamic process, which is formed in the interplay between politics and law and the content and scope of which are determined through a series of decisive interactions. Throughout this process, the degree of a member states' *control* of the *impact* of EU policies lessens. In the case of the Europeanisation of gender equality, this means that the effective reach of non discrimination is defined through the continuous interaction between member governments, supranational organisations and national stakeholders.

As Community objectives filter through national obstacles, the widespread impact of Community principles and policies reveals to have moved beyond the control of the member state. Moreover, as regards Europeanisation, member states are not homogenous and do not act with a single purpose, thus interests regarding implementation of policy are likely to diverge amongst the various national stakeholders, including representatives of the state. For this reason EU policies benefit some and disadvantage others.

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NOTES

¹ The present study defines control as a process of regulating policy outputs in which one party affects the behaviour of others in order to steer the specific output or outcome. The definition draws in part on Das and Teng (1998, p. 493) and on the work of Meyers and Vorsanger (2003).

² Derived from the distinction drawn by Börzel and Risse (Börzel and Risse 2003, p. 60), *policies* are comprised of national legislation, their organising principles and the administrative practices implemented to carry them out. *Politics* encapsulate the formation of national interests, together with their aggregation and articulation. Changes in national *polities* will not be examined here.

³ The study does not examine the part of implementation involving the behaviour of street-level bureaucrats, target group behaviour or, finally, outcomes (Winter 2003). Policy *outputs* are understood as results on national policies, whereas policy *outcome* would be their ultimate practical and societal effect. In a gender equality *outcome* study, the focus would be on how and the extent to which wage equality and discrimination had been effectuated in practice.

⁴ For the strategic-theoretical purposes of choosing a ‘least likely’ case, Eckstein (1975) pointed out that the ‘least likely’ case serves for theoretical testing and development, since it may confirm the theory against odds. The propositions of the theory will then also appear stronger and more likely to hold in other cases. The strategic-theoretical purpose of the present analysis is that if the Europeanisation of gender equality has taken place in the critical case of Denmark, then Europeanisation may have had a similar or even greater impact on other member states.

⁵ On this point, see for example comments made by MPs during the parliamentary debate on the law on equal pay in the Danish parliament, as quoted in the ‘Official Report of Parliamentary Proceeding’, ‘Folketingstidende’, 1977-78, sp. 7874 ff.

⁶ For the three legitimacy dimensions of which output legitimacy is part of the political system's ability to perform, see Beetham and Lord 1998.

⁷ The Defrenne cases concerned the discrimination practices of Sabena, the Belgian national airline. Male and female flight attendants had exactly the same job responsibilities, but the male attendants earned more. Furthermore, the female flight attendants were obliged to retire at age 40, whereas males could continue working another fifteen years, then becoming entitled to Sabena's special pension scheme.

⁸ Case 43/75, *Defrenne*, 8 April 1976.

⁹ Council Directive 75/117/EEC of 10 February 1975.

¹⁰ Council Directive 76/207/EEC of 9 February 1976.

¹¹ Council Directive 79/7/EEC of 19 December 1978.

¹² Council Directive 86/378/EEC of 24 July 1986.

¹³ Council Directive 86/613/EEC of 11 December 1986.

¹⁴ See for example case 129/79, *Smith*, 27 March 1980; case 96/80, *J.P. Jenkins*, 31 March 1981.; case 109/88, *Handels- og Kontorfunktionærernes Forbund i Danmark*, 17 October 1989, which will be discussed further below.

¹⁵ Case 177/88, *Dekker*, 8 November 1990.

¹⁶ Council Directive 92/85/EEC of 19 October 1992.

¹⁷ Council Directive 93/104/EC of 23 November 1993.

¹⁸ Council Directive 96/34/EC of 3 June 1996.

¹⁹ Council Directive 97/80/EC of 15 December 1997.

²⁰ Council Directive 97/81/EC of 15 December 1997.

²¹ Law no. 32, 4 February 1976, on equal pay for men and women.

²² For the negotiations in the Danish parliament on the legislation regarding equal pay, see 'Official Report of Parliamentary Proceeding'; 1975-76, sp. 1674 ff., sp. 2401 ff, sp. 5032 ff and sp. 5121ff.

²³ Case 143/83, *Commission of the European Communities v Kingdom of Denmark*, 30 January 1985.

²⁴ Law no. 65, 19 February 1986.

²⁵ Case 109/88, *Handels- og Kontorfunktionærernes Forbund i Danmark*, 17 October 1989.

²⁶ In the later Danish case regarding equal pay, Royal Copenhagen (case C-400, *Specialarbejderforbundet i Danmark*, 31 May 1995), the ECJ found that the observed difference in pay could be due to different individual outputs, and thus not based on direct or indirect sex discrimination.

²⁷ Law no. 374, 20 May 1992.

²⁸ See for example case C-127/92, *Enderby*, 27 October 1993.

²⁹ These amendments of national laws were adopted 29 May 2001 by proposal L 78.

³⁰ Law no. 161, 12 April 1978.

³¹ See comments made by the former President of the Danish Women's Society (Dansk Kvindesamfund), Grete Fenger Møller, in the parliamentary debate on the law on equal treatment; Official Report of Parliamentary Proceeding 1977-78, sp. 5330.

³² Law no. 117, 28 March 1984.

³³ Case 179/88, *Handels- og Kontorfunktionærernes Forbund i Danmark*, 8 November 1990.

³⁴ Case C-400/95, *Larsson*, 29 May 1997.

³⁵ Case C-66/96, *Pedersen*, 19 November 1998.

³⁶ Case C-109/00, *Tele Danmark*, 4 October 2001.

³⁷ Law no. 340, 2 June 1999.

³⁸ See Faglige Voldgiftskendelser: 23.4.1999 CO-industri for SID against DI for MoreGroup Danmark A/S; 10.2.2000 CO-industri for KAD against DI for Viking Life Saving Equipment A7S.

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