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Citation

How implementation affects revision: EU decision-making on changing the posting of workers directive. (2021). How implementation affects revision: EU decision-making on changing the posting of workers directive. *Journal Of Common Market Studies*, 60(3), 562-579. doi:10.1111/jcms.13253

Version: Publisher's Version

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Note: To cite this publication please use the final published version (if applicable).

How Implementation Affects Revision: EU Decision-Making on Changing the Posting of Workers Directive*

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Abstract

In this paper, I focus on how national policy implementation affects policy revision at the EU level. The main argument is that when policy is implemented in a decentralized manner, it affects the current situation or status quo in member states. This affects the possibilities of any further legislative change at the EU level. The analyses suggests that heterogeneity in national preferences and homogeneity in national status quo points make it less easy to adopt a revised policy. This result is illustrated by the recent discussion on revising the Posting of Workers Directive. Having rather different views on this policy while faced with limited possibilities to shape this policy nationally, makes it difficult to change the Posting Directive. The rather long and difficult negotiations, especially among the member states, about its revision support this implication.

Keywords: policy revision; policy implementation; legislative decision-making; European Union; posting of workers directive

Introduction

Policymaking is a process in which policy as enacted by lawmakers is further developed as it moves from formulation to implementation. In implementation, the nature and scope, but also the effects of a policy become evident. The difference between the initial, *legislative* policy and the ultimately *implemented* policy is well documented in the classic work of Lipsky (1980), but also in more recent research on national implementation of EU policy (see, for instance, Zhelyazkova *et al.*, 2016, Dimitrova and Steunenberg, 2017). EU member states, but also authorities within these member states, often deviate from the EU legislative policy when they implement this policy in their national or subnational context. These differences have important consequences for the possibility of revising *existing* EU policy. The ‘gap’ between legislative and implemented policy affects the possibilities of making any further legislative changes.

In this paper we focus on how policy implementation affects policy revision at the EU level. The main argument is that when policy is implemented in a decentralized manner, implementation may change the current state of affairs or *status quo* in each of the member states. Consequently, and due to these changes, the starting point for any subsequent legislative process to change the existing policy may be different between member states and from the policy as adopted by the legislature years ago. Since member states, next to

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the Commission and the European Parliament, need to agree on a proposed change, their preferences as well as their national status quo affect the feasibility of making changes. In this paper, we will work with different national status quo points and explore the conditions in which EU policy change is possible.

The argument developed in this paper contributes to long standing research in EU policy implementation. Starting with research on compliance, this literature includes several generations of studies using different models and approaches (Mastenbroek, 2005; Toshkov, 2010; Treib, 2014). Due to the greater ease of data collection, transposition studies still dominate this literature. Nevertheless, implementation studies are growing, including studies on policy areas such as EU packaging and waste (Haverland, 2000), social policy (Falkner *et al.*, 2005), the handling of chemical substances (Versluis, 2007), food and mouth disease (Breeman and Zwaan, 2009), public procurement (Gelderman *et al.*, 2010), water policy (Lieferrink *et al.*, 2011; Leventon, 2015), residence rights (Henningsen *et al.*, 2013), cultural heritage (Dimitrova and Steunenberg, 2013, 2017), clean air (Bondarouk and Lieferrink, 2017; Gollata and Newig, 2017), and the internal market, the environment, home affairs and justice and social policy (Zhelyazkova *et al.*, 2016). These studies reveal that the implemented policy does not always reflect the EU legislative policy. Member states perform rather differently and tend to adapt EU policy to their own legal and political setting (Thomann, 2015; Thomann and Zhelyazkova, 2017). The idea of adapting and changing policy in the process of transposing and implementing EU policy is also supported by research showing that the European Commission acts rather politically in enforcing EU law. König and Mäder (2014, p. 59) show that when European interests clash with national ones, the Commission is willing to lessen EU enforcement allowing national governments to deviate more.

The approach in this paper differs by assuming that the status quo within member states is not necessarily the same as the legislative policy, while among member states these status quo points may also differ. In dropping the widely used assumption of one status quo point for all, this paper departs from most models in analytical politics (Shepsle, 2010, p. 124). A first study relaxing the idea of a common status quo is Schmidt (2000), who explores the idea of different framing of policy initiatives by the European Commission in different member states. Recently, Martinsen (2015, p. 36) points to the use of judicial interpretation as a tool to shift the status quo. Still, this new reference point remains the same for all players. In this paper, we depart from this assumption and focus on multiple status quo points, which are the result of the different ways of implementing EU policy nationally.

Developing a model with multiple status quo points, we show, in line with earlier research (Drüner *et al.*, 2018), that the revision of a legislative policy will be more difficult than in a situation with only one status quo point. National actors only prefer new proposals if these proposals are 'better' than their current national situation shaped by ongoing implementation. Given multiple status quo points, we show that policy change is only possible if there is *status quo heterogeneity* (e.g. national status quo points are sufficiently different). We also show that policy change under these conditions requires substantial *preference homogeneity*, that is, national actors need to have preferences that are closely related.

The implications of this model are illustrated with an analysis of the revision of the Posting Directive,¹ which regulates the temporary stay of workers from another EU member state. This case is interesting since it shows how changes in status quo points have affected the revision of the policy. Before the revision of the Directive in 2016 member states had different national status quo positions, which were pushed closer to each other through several decisions of the Court of Justice of the European Union (CJEU), leading to some degree of status quo homogeneity. In addition, preferences were different: most Western European EU member states wanted to implement the posting rules in a socially generous way providing broad protection to posted workers, while Eastern European member states implemented a much more liberal, free market approach, providing only a basic level of protection. This configuration leads to a *high* likelihood of blockage of policy change and long-lasting negotiations, which represents a nice illustration of the model.²

The paper is organized as follows. In the next section, a model with multiple status quo points is introduced identifying the conditions under which policy change is possible. To illustrate how status quo points affect change, we focus on the case of posting. In Section II, we discuss this policy, which offers temporary workers in other EU countries additional rights. Section III explores empirically the national status quo points and actor preferences in order to predict whether policy change will be possible. The empirical material for this case study was collected through policy documents, earlier studies and interviews with stakeholders.³ In Section IV we turn to the actual legislative decision-making process to confront the prediction based on the model with the actual process. The last section concludes and reflects on the implications of our findings for policymaking.

I. Decision-Making with Multiple Status Quo Points

To clarify how multiple status quo points affect decision-making, we will use an actor-driven approach in which member states implement policy nationally and may decide on a revision of this policy together with others at the EU level. The model developed in this paper is in line with earlier models of policy implementation (Dimitrova and Steunenberg, 2017) and EU legislative decision-making (Steunenberg, 2010).

We start with a basic model with two member states acting as players who decide on policy revision. Policy is represented in a one-dimensional outcome space $X=R$. The preferences of each of these member states are defined by a utility function $u_i(\cdot)$, which

¹ Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services (Posting of Workers Directive or, in brief, *Posting Directive*). To strengthen the implementation of this directive, Directive 2014/67/EU of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') has been adopted. In 2016 the Commission tabled a revision of the Posting Directive (COM(2016)128), which was adopted in 2018 as Directive 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (*Revised Posting Directive*).

² In its basic form, both theoretical factors central to the model developed in this paper have two values (homogeneity/heterogeneity). Combined, status quo homogeneity and preference heterogeneity produce a high likelihood for a blockade; the combination of status quo heterogeneity and preference homogeneity a low one. The other combinations are expected to provide possibilities of intermediate levels of change.

³ Interviews include representatives from national labour unions, national ministries, the Commission and the European Parliament.

Figure 1: Preference of Player i .

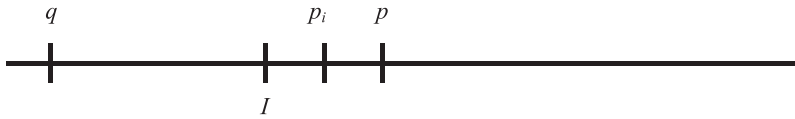
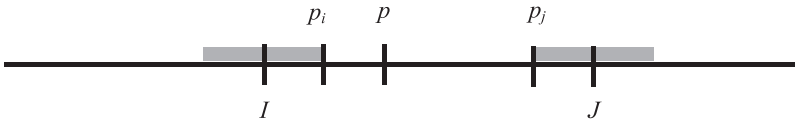


Figure 2: Preferences of Players i and j .



is single-peaked at I (which we call the ideal point of player i) and satisfies the single-crossing property.⁴ Furthermore, policy can be revised by consensus, which can be modeled by providing each member state with a veto. Agreement is, in that case, a situation in which both member states refrain from using their veto.

Let's first have a look at the decision-making situation for member state i , as presented in Figure 1. Based on the initial situation q , this country agreed with others to EU policy p , which is marginally preferred to the status quo by i . As research on EU implementation shows, transposition and implementation of this policy by various national and subnational authorities changes the current situation to p_i . This includes not only legal changes but also different ways in overcoming various problems in practical application of the EU policy. As a consequence, the new status quo in this country will be p_i , which will be the starting point if a revision of this EU policy is proposed.

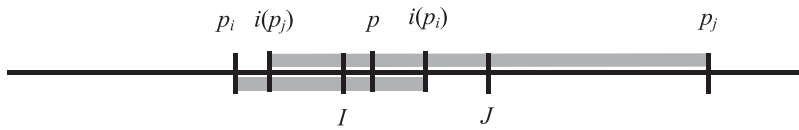
Other member states, of course, have similar experiences, which may play out differently. For example, implementation in country j in Figure 2 leads to a different current situation, p_j . As a consequence, these new status quo points define *different* individual preference sets (e.g., sets of alternatives that are better than policy p_i in utility terms) for each of these member states, as indicated by the grey zones in the figure. Furthermore, as these preference sets do not overlap, these two players will not agree on any policy revision. Their win set is the empty set.

This logic of multiple status quo points, which depend on national implementation, can be expanded to all kinds of different preference configurations, including those with more than two players (see the Appendix for the formal model). The essence is that policymakers are only able to agree on EU policy revision when a proposal is preferred (1) to their status quo points *and* (2) by all decision-makers.

These two conditions can be illustrated with the preference configuration in Figure 3. While the grey areas ($p_i, i(p_i)$) and ($i(p_j), p_j$) indicate the preference set of i and j , respectively, the win set comprises the interval ($i(p_j), i(p_i)$). Furthermore, the veto-proof set contains all points from the interval $[I, J]$. Selecting the best proposal from both sets, the agenda setter in the game will choose her best policy from the intersection, which equals, in this case, the interval $[I, i(p_i)]$. If player i is this agenda setter, his

⁴In other words, these functions satisfy for two players i and j the condition $du_i/dx < du_j/dx$ for $I < J$.

Figure 3: Example of Preferences Supporting a New Legislative Policy.



best choice will be policy $x = I$; if player j is the agenda setter, her best choice is policy $x = i(p_i)$.⁵

This equilibrium, in which the existing policy is a *bundle* of different national status quo points, occurs under two important conditions. The first condition is that players need to have policy preferences that are not very different. For instance, if the ideal position of player j changes and moves away from I and towards p_j in Figure 3, the opportunities for finding agreement decrease through a smaller win set for both players.⁶ This effect is generalized in the Appendix and leads to the well-known expectation that, also in the case of multiple status quo points, more *preference homogeneity* increases the possibility of adopting a new legislative policy.

Less obvious is the *second condition*: for the adoption of a new legislative policy, the status quo points need to be rather *different* from the preferences of the players and from each other.⁷ The reasoning leading to this result keeps preferences fixed and changes national status quo points. For instance, moving p_j towards J in Figure 3, reduces the win set and may, when p_j approaches J , even lead to an empty winset. A similar effect occurs when p_i moves towards I .⁸ Such a shift is obvious if national implementers follow national preferences in their work. Making these practices more alike – which is also what the EU policy aims to do – decreases the prospect of change. However, if we move the status quo points p_i or p_j outwards, the preference sets increase, which may also increase the win set. This increases the prospect of change.

To illustrate this, an example of a policy on which member states perform rather differently is the Residence Directive (2004/38) and specifically the information requirement in Article 34.⁹ While member states are obliged to provide information on rights and obligations of EU citizens when they wish to stay in another EU member state, practical implementation – how and what information is provided – varies a lot. According to Henningsen *et al.* (2013, p. 110), countries like Belgium, Germany and Italy provide limited information, while Luxemburg, the Czech Republic and Sweden perform very well.

⁵Based on the definition of a preference set – which is based on strict preference – the equilibrium policy will not be equal to p_i but just to the left of it. To keep our notation as simple as possible, we denote this point as p_i .

⁶Note that decision-making in one-dimensional space is a special case, since status quo point p_i only equals one indifference point, while in a two-dimensional space, indifference is represented with a continuous contour of which this status quo is only one point. Preference changes, then, mostly translate in a direct change in the win set (with extreme symmetry as the exception).

⁷A special case is when players have the same preferences: the outcome becomes ‘trivial’ in the sense that they will agree on any change of the status quo the moment it deviates from their identical preferences.

⁸For one-dimensional reasoning heterogeneity can be defined as: if $q_j < q_i$ for $I < J$, with $q_i = \max(p_i, i(p_i))$ and $q_j = \min(p_j, i(p_j))$, and $p_i \neq I$ and $p_j \neq J$. If this condition applies, the win set $W(p_i)$ is non-empty and equals the interval (q_j, q_i) .

⁹Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

This could lead to a configuration as shown in Figure 3, where the administrative practices cluster around p_i and p_j for Italy and the Czech Republic, respectively. Providing even less information (in the case of Italy) or just more (in the case of the Czech Republic), would move the national status quo points outwards. Such a change, which leads to more *heterogeneity in national status quo points* in view of the preferences of these countries, increases the possibility of EU policy revision.

II. The Posting of Workers Policy: Between Free Movement and Nondiscrimination

The free movement of workers is one of the fundamental rights embedded in the European treaties. As Article 45 TFEU indicates, EU member states need to secure the free movement of workers, ending any discrimination of workers from other EU member states with regard to employment, pay and other related conditions. The rules are further specified in various important regulations and directives,¹⁰ including those on the coordination of national social security rights.¹¹ The key principle of this *acquis* is that EU-workers can only be insured in *one EU country*. Furthermore, the framework determines that EU-workers are insured in the *country-of-work* from which they also enjoy their social benefits. In case of doubt, Article 75 of the Coordination Regulation provides an advisory committee of country representatives to examine problems related to the implementation of these rules.

The posting policy challenges these rules for mobile workers. It defines a hybrid system of benefits and payments in the country-of-origin (home country) and the country-of-work (host country). Based on the idea of free movement of services, the posting policy allows employees to carry out temporary work in the host country while they remain insured in their home country.¹² At the same time, the policy provides these workers, based on the idea of nondiscrimination, some protection that is the same as workers in the host country. In this way, the posting policy breaks with one of the basic rules in this field, that is, that workers are insured (and enjoy social benefits) in the country-of-work.

This possibility of working in one country while remaining insured in another has a significant impact on national labour markets. While the posting policy aims to facilitate temporary work in another EU country, in fact, the opportunities provided by the policy are increasingly used to compete on labour costs in several sectors of the economy. Especially after the accession of countries from Central and Eastern Europe, the differences in labour costs (e.g. salary as well as social security contributions) in the

¹⁰See Regulation 492/2011 of 5 April 2011 on freedom of movement of workers within the Union (*Free Movement of Workers Regulation*), which consolidated and updated the original Regulation 1612/68, and Directive 2014/54 of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.

¹¹On social security, see Regulation 883/2004 of 29 April 2004 on the coordination of social security systems (*Coordination Regulation*), which is amended by Regulation 988/2009, Regulation 1244/2010, Regulation 465/2012, and Commission Regulation 1224/2012. In addition, the *Coordination Regulation* is supplemented with Regulation 987/2009 of 16 September 2009 laying down the procedure for implementing Regulation 883/2004 on the coordination of social security systems (*Implementing Regulation*), which has been amended by Commission Regulation 1244/2010, Regulation 465/2012 and Commission Regulation 1224/2012.

¹²It is interesting to note that the European Court of Justice also focuses on services which require temporary labour mobility by workers. On traditional or non-temporary labour mobility, another part of the *acquis* applies, which is based on the *Free Movement of Workers Regulation*.

EU have widened, increasing the possibility to use cheaper labour. In the construction industry in Western Europe, a substantial number of persons is nowadays employed based on posting (Pacolet and De Wispelaere, 2015, p. 25) facilitated by employment agencies (Houwerzijl, 2014; Lodder, 2016).

The political discussion on the posting policy seems to be rooted in an inherent tension between *free movement* and *nondiscrimination* (or equal treatment), which are both important principles of EU law (Craig and de Burca, 2015, p. 745; see also Dølvik and Visser, 2009). From an *economic* perspective, labour mobility may help to find a more ‘optimal’ allocation of resources, reducing unemployment within the EU. This perspective is often used by employer organizations claiming that posting helps to reduce (temporary) labour shortages, especially for highly specialized personnel. The *social* perspective suggests that workers should enjoy the same rights as their co-workers in the same country based on the idea of nondiscrimination. This perspective is often used by trade unions, which claim that posting may lead to social dumping: an erosion of national labour conditions and security to employees (FNV, 2015; Furåker and Larsson, 2020, pp. 114–18). Workers in countries with high-cost social welfare systems will be outcompeted by temporary workers from countries with low-cost welfare systems in which social security benefits and pensions rights are lower (see also Kall and Lillie, 2017, pp. 14–16). This tension is reflected in the discussions among member states. Receiving countries such as France, Belgium and Luxembourg, but also the Netherlands, Germany and Denmark, favour equal pay and more inclusive social protection. In their view, the directive should extend social rights based on national collective labour agreements, or similar instruments, to posted workers. Sending countries, such as Portugal, Greece and the ‘new’ member states from Central and Eastern Europe favour free movement and more competition (Houwerzijl, 2005, p. 98). Although the member states seemed to agree on the core of the Posting Directive – the minimal employment conditions for which posted workers should have the same rights as national workers (Article 3.1) – they differ with regard to their perspective: whether the EU policy should define a level playing field by regulating posting to facilitate free movement or allow more favourable national rights leading to equal pay and equal social protection.

III. Analysing the Revision of the Posting Policy

Transposition and Implementation: Status Quo Points

To analyse the implications of our model, we first focus on the national status quo points by identifying how member states have implemented the basic rights of the Posting Directive. As posting is foremost a regulatory policy, which provides temporary workers from other EU member states with specific rights similar to national workers, the important question is whether member states have chosen a minimal interpretation or a broader one.

All EU members, including the more recently acceded members, have *transposed* the Posting Directive. Embedding the rights of posted workers can be done in different ways depending on the national legal system: rights can be based on national legislative law,

collective labour agreements, or both. The difference between these arrangements is that legislation is generic and applies to all workers but is more rigid as it can only be changed through legislative action. Collective labour agreements are more flexible and may grant specific groups of posted workers additional rights within the limits set by the CJEU. Interestingly, most member states rely on a combination of law and binding collective agreements in order to secure the rights of posted workers. Only in the UK, Poland and Latvia is posting fully regulated by law. Furthermore, by focusing on minimum pay, which is a core element of the policy, differences in legal process become clear: while most countries in Central and Eastern Europe opt for a generally applicable, legislative basis, countries in Western Europe often prefer the (more flexible) use of binding agreements.

For the *implementation* of this directive, several dimensions are important. First, member states can choose to provide different levels of protection to posted workers. The original Posting Directive allows member states, within boundaries, to formulate different national implementing policies. Member states can choose for minimum protection based on the core elements of the directive (Article 3.1) or opt for more generous protection. The latter can be based on the so-called ‘public policy’ clause (Article 3.10; see also recital 17). The choice for a minimal or more generous protection is, as discussed above, closely linked to whether member states prefer to emphasize free movement or social protection in their national policy. Second, a country’s general regulatory approach for social rights matters, since, as indicated, collective agreements provide more flexibility than law, which also translates in differences between countries. Third, countries may differ in sectoral coverage, partially since law or binding collective agreements may not be available in all economic sectors of a country. These conditions are related to the institutionalization of labour conditions in a member state.

Based on these three dimensions, Table 1 summarizes how member states implement posting in their national context.¹³

As shown in this table, most West-European member states (including Sweden, Finland, Germany and the UK) provide more generous rights to posted workers. Many Central and East-European countries, which have less generous social security systems, implement only the core of the directive. An exception is Slovenia, which also provides broad rights. Remarkably, a few West-European countries, including the Netherlands, support this minimal interpretation of the directive. Of course, and based on collective agreements, some differentiation in these interpretations may occur. Furthermore, countries that opt for more generous rights mostly use the more flexible binding collective or nation-wide agreements (Eurofound, 2010, pp. 14–20). Finally, countries differ with regard to the sectors that are covered. While most countries apply the rights to all sectors, Cyprus, Germany, Ireland and Luxembourg cover only a number of sectors. In the case of Germany and Luxembourg binding collective agreements are sector-specific and only exist in a limited number of sectors.

Although Table 1 indicates differences between especially minimum and broader protection, the possibility of granting posted workers additional rights has been limited by CJEU rulings. Although the Court initially supported the interpretation that member

¹³ See Voss *et al.* (2016, pp. 23–4), Eurofound (2010, p. 20), European Commission (2016b), see also Bilous (1999) for an earlier overview, and Sargeant (2007) for the situation in the CEECs.

Table 1: The Implemented Level of Protection and Sectoral Coverage for Posted Workers in EU Member States (National Status Quo Points)

Level of protection versus coverage		Minimum protection		Broad protection	
Sectoral coverage	Selected sectors	Legislation	Legislation and Collective Agreements	Legislation	Legislation and Collective Agreements
	All sectors	Latvia, Lithuania*, Malta*, Poland	Cyprus* Bulgaria, Croatia, Czech Republic, Estonia, Greece, Hungary*, the Netherlands, Portugal, Romania, Slovakia, Spain	UK	Germany, Ireland*, Luxembourg Austria, Belgium, Denmark*, Finland, France, Italy*, Slovenia, Sweden*

Note: There are further differences for countries with *; Malta and Lithuania did not conclude collective agreements; in Hungary collective agreements only apply to the construction sector; Ireland uses registered employment agreements; Italy, Denmark, Italy, Sweden have collective agreements signed by the most representative social partners.

Source: Compiled based on Eurofound (2010, p. 20), European Commission (2016b, p. 30) and Voss *et al.* (2016, pp. 23–4).

states may extend their national labour regulations to posted workers in the *Rush Portuguesa* ruling,¹⁴ in later rulings it developed a rather different interpretation emphasizing the importance of the free movement of services.¹⁵ In this new doctrine, the Court finds that member states are primarily held to the core elements of the directive (Article 3.1) and cannot expand these to more favourable ones (despite the fact that this is expressed in Article 3.7). Granting more rights could potentially be a barrier to free movement.¹⁶ In this way, the ‘minimum’ requirements of the directive were turned into ‘maximum’ ones in the sense that the EJC would not accept that service providers are confronted with additional barriers or costs (Maslauskaite, 2014, p. 9).

In view of the developing CJEU doctrine, it became clear that the directive foremost aims to establish a *level-playing field* for which the use of the same or similar rights is essential. This interpretation substantially limits implementation by the countries in the right-hand corner of Table 1, which were more and more restricted in developing their own, more generous national policies. It pushes their different initial status quo points towards ones in which more favourable terms or conditions to posted workers are reduced.¹⁷

Diversity of Views on the Posting Directive

Despite the judicial limits on national policy, most countries receiving a high number of posted workers prefer to reduce the negative impact of posting on their national labour

¹⁴CJEU Case C-1139/89, *Rush Portuguesa* [1990], ECR-I-3905.

¹⁵See CJEU Case C-369/96 and 366/96, *Arblade* [1999]; CJEU Case C-165/98, *Mazzoleni* [2001]; CJEU joined cases C-49/98, 50/98, 52/98, 54/98, 68/98, 71/98, *Finalarte* [2001]; CJEU Case C-164/99, *Portugaia Construcoes Lda* [2002].

¹⁶See CJEU Case C-438/05 *Viking* [2007], CJEU Case C-431/05, *Laval* [2007], CJEU Case C-346/06 *Rüffert* [2008] and CJEU Case C-319/06 *Commission vs Luxembourg* [2008].

¹⁷Furthermore, the Court also developed a rather strict interpretation on the use of collective labour agreements in these rulings. Only when these agreements were ‘universally binding’, applying to all companies in that sector, could they define rights to posted workers on the issues mentioned in the directive. Furthermore, the adoption of binding agreements should not hinder the free movement of services: CJEU Case C-396/13 *Sähköalojen ammattiliitto* [2013].

Table 2: Member State Preferences and their National Policy

		<i>National policy</i>	
		<i>Broader rights</i>	<i>Minimum rights</i>
Preference	Equal pay for equal work	Group 1 Austria, Belgium, Denmark, Finland, Germany, Ireland, Italy, Luxembourg, Sweden, France	Group 2 The Netherlands, Spain, UK
	Free movement	Group 2 Portugal, Slovenia	Group 4 Bulgaria, Czech Republic, Estonia, Greece, Hungary, Lithuania, Latvia, Poland, Romania, Slovakia

market. Their ambition is constrained by the legislative policy, which only regulates minimum wages and some additional elements of working conditions (Article 3.1) and lacks a clear understanding about how long a posting may last (which is only indirectly regulated by the Coordination Regulation).

The Commission introduced in 2016 a proposal to revise the Posting Directive. The proposal extends minimum pay to remuneration, which are ‘... all the elements of remuneration rendered mandatory by national law, regulation or administrative provision, collective agreements or arbitration awards which have been declared universally applicable’ (European Commission, 2016a, p. 12). Furthermore, the initial proposal limits the posting period to 2 years, considering the time other posted workers have taken to do the same work.¹⁸

The member states have rather different views on these issues, partially since they affect the competitive advantage of posting. Table 2 presents these views combined with member state ambitions as embedded national legislation.¹⁹

Emphasizing nondiscrimination, a group of member states supports the idea of ‘equal pay for equal work’. They prefer posted workers to be better integrated into the national labour market and receive pay and additional benefits similar to national workers. These are countries with more favourable social welfare arrangements, which suffer most from labour cost competition facilitated by posting. In this group Denmark is an interesting case: while the Danish support the idea of equal pay, they feel that the EU should not intervene in their national labour market and thus refrain from making further rules.

Other member states support the idea of free movement and consider equal pay as a barrier to competition. This applies also to other rights for posted workers, including proper housing, which may increase employers’ costs. Further revision of the Posting Directive would, in this view, be at the expense of the free movement of services.

¹⁸The proposal also extends the agreement in universal collective agreements to other sectors of the economy (and no longer formally limited to construction), imposing the working conditions of the contractor to subcontractors, and the introduction of equal treatment for temporary workers.

¹⁹Note that some of these ambitions are substantially constrained by CJEU rulings.

Combined with the status quo positions of the member states, the configuration is one in which a group of West-European countries (group 1 in Table 2) opposes a group of countries from Central and Eastern Europe (group 4). The first group wants to expand the rights of posted workers, moving away from the CJEU-imposed status quo, while the second group might at best only be willing to consider some limited ‘technical’ changes. Their differences reflect an often-noted East–West divide on this policy at the EU level (Van Nuffel and Afanasjeva, 2018, p. 1402; Furåker and Larsson, 2020, p. 132). Between these main groups, we have a number of countries with different positions. While group 2 prefers the same principles as group 1, it wants to change the current national status quo position towards more social equality. Group 3 supports the opposite – changes towards facilitating free movement.

The European Parliament, which under the ordinary legislative procedure participates in revising the Posting Directive, has preferences close to group 1. Parliament favours more workers protection including ‘equal pay for equal work’, which it also wants to express in the legal basis of the revised directive. The latter did not work out and the revised directive remained under the internal market basis. In addition, Parliament supports the move towards equal remuneration, including equalizing the various allowances for posted workers in comparison with the host as well as the home country. On the length of posting, Parliament favours a posting period of 24 months, like the European Commission, while most countries in group 1, led by France, propose a shorter period of 12 months.

What to Expect?

Based on the empirical analysis, we have different national status quo points about the level of protection to posted workers. Most sending countries, often located in Central and Eastern Europe, implement minimum levels of protection, while receiving countries in Western Europe are gradually forced to implement ‘imposed’ limited protection. As indicated, the latter group of countries is especially affected by the developing CJEU doctrine, which indicates that the core elements of the Posting Directive should be regarded as maximum requirements. This contributed to more status quo homogeneity, especially for this group, shifting national policy implementation more towards the core of the Posting Directive but still reflecting their national preferences. The latter is also evident by the almost continued bringing of cases to the Court. Concerning preferences, most ‘older’ member states prefer equal rights and further social protection, while the more recently joined member states from Central and Eastern Europe, including other sending countries like Portugal and Greece, prefer free movement and labour cost competition.

Combining both components results in a political spectrum in which national preferences differ with some degree of status quo homogeneity. In view of this configuration, the model developed in this paper predicts a limited prospect of revision.

IV. Revising the Policy: The Decision-Making Process

The Commission proposal, released in March 2016, was received with rather mixed feelings. Shortly after its release, the national parliaments in 11 member states sent a

reasoned opinion as part of the subsidiarity procedure (Protocol II of the Lisbon Treaty).²⁰ Not surprisingly, these were parliaments from countries in Central and Eastern Europe, supported also by the Danish Parliament. A major concern in these reasoned opinions was that the text of the revised directive might lead to more European involvement in the determination of remuneration, which is a national competence. The so-called ‘yellow card’ meant that the Commission needed to reconsider its proposal. In its subsequent Communication, the European Commission (2016c) rejected the main objection of the national parliaments and indicated that the concerns put forward have more to do with political considerations than subsidiarity. Maintaining its proposal, the Commission submitted the draft to Parliament and the Council initiating the ordinary legislative procedure.

After the Commission Communication in July 2016, Parliament and the Council started discussing the proposal. The Council had great difficulty in reaching a first agreement among the member states after the release of the Commission proposal. Important issues of contention were the clarification of remuneration, the additional allowances to posted workers and the length of posting (Van Nuffel and Afanasjeva, 2018, p. 1417–22). Other issues that needed further discussion were the extension of applicability of collective agreements to posted workers in all sectors of the economy (used to be only the construction sector), workers’ rights in cases of subcontracting and the position of temporary agency workers.

The negotiations among the member states required 14 meetings of the Social Questions Working Party under the Dutch, Slovak and Maltese Presidencies (Council of the European Union, 2016a, 2016b, 2017a, 2017b). Despite these efforts, they did not lead to a political accord. The member states remained too divided, especially when the newly elected French government felt that the proposed policy was still too generous and insisted on more protection to national workers.²¹ Following further discussions in the working party and a meeting of Coreper (11 October 2017), the Estonian Presidency managed to table a revised proposal for the Employment, Social Policy, Health and Consumer Affairs Council of 23 October 2017. After many hours of intensive negotiations, member states finally reached an agreement on their initial position (Council of the European Union, 2017c). Based on the Council proposal, posting workers will receive, based on the position of the member states, ‘equal pay’, while the period of posting will be limited to 12 months with the possibility of extending it by another six months after a request by the employer (Council of the European Union, 2017d). Hungary, Poland, Latvia and Lithuania voted against, while Ireland, the UK and Croatia abstained.

However, the interinstitutional negotiations between the Council, Parliament and the Commission, as part of a ‘trilogue’, had yet to start. Following the adoption of the initial position of the Council and Parliament’s amendments on the proposal of 19 October 2017 (European Parliament, 2017), the Estonian and Bulgarian Presidencies needed a total of eight ‘trilogue’ meetings to reach an agreement in March 2018 (Van Nuffel and

²⁰Next to the Danish Parliament, the national parliaments from the following countries submitted a reasoned opinion: Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, and Slovakia. See <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0070%28COD%29&l=en#tab-0>.

²¹See C. Stupp, ‘Macron’s proposals wreak havoc on posted worker negotiations’, at: <https://www.euractiv.com/section/economy-jobs/news/macrons-proposals-wreak-havoc-on-posted-worker-negotiations/>, 15 June 2017.

Afanasjeva, 2018, p. 1416). After Parliament formally adopted the amendments on 29 May, the Council finally approved the directive on 21 June 2018, voting with qualified majority. Hungary and Poland voted against, while Croatia, Latvia, Lithuania and UK abstained.

While the Council discussions to formulate an initial position ('general approach') lasted more than 19 months, the total duration of this process was more than 27 months. Compared to other dossiers, even controversial ones, the discussions on the Revised Posting Directive took a long time. The Activity Report of the EP on the 2014–19 term mentions that the average length of legislative processes decided in first reading is just below 18 months (McGuinness *et al.*, 2019, p. 4). Based on earlier data, Toshkov and Rasmussen (2012, p. 13) present more detailed information, which indicates that the average duration of the first reading for proposals that do lead to an early agreement is about 11 months. For the less controversial or 'trivial' proposals the duration in first reading is only seven months, while more controversial dossiers that move to the second or even third reading take about nine or 11 months of first reading negotiations. As this example illustrated, clustered multiple status quo points combined with different policy preferences made reaching agreement on the revision very difficult.

Conclusions

This paper links policy implementation with legislative policymaking in the context of the EU by focusing on how changes in the current situation in members states, due to implementation, affects the possibilities of policy revision. National policymakers often need to implement a common policy set at the EU level. This decentralized way of implementing EU policy has several consequences. First, national policymakers may transpose and implement national policy differently to better fit their context, which *shifts* the current situation in a country away from the initial legislative agreement. Second, since implementation takes place within in each member state's domestic arena, these implemented policies may also *differ* among member states. Both developments may restrict EU policymakers in revising their legislative policy.

As this paper shows, reaching agreement on policy revision is difficult when member states have developed common policy but hold rather different views. Still, it is facilitated by two conditions. The first is *preference homogeneity*, which indicates that making decisions is easier when national actors have rather similar preferences. The second condition is *status quo heterogeneity*, which refers to a situation in which the current situation at the domestic level is rather different from national preferences as well as the situation in other countries. These conditions can also extended to a situation in which new EU policy is introduced in a setting in which member states have well-established national policies. Strong externalities, which affect the outcomes of national policies, could be a reason why national status quo points more and more deviate from national policy preferences (leading to more status quo heterogeneity) and contribute to the adaptation of EU policy.

Interestingly, working with multiple status quo points nuances the idea that EU policy is only determined by the 'lowest common denominator' (Scharpf, 1988, p. 257). This classic logic indicates that the member state closest to the status quo will shape the final outcome as the alternatives preferred by the group are determined by this member state.

However, in a context with multiple status quo points, finding commonly preferred alternatives is much more difficult. Because of the different starting positions member states may prefer alternatives that do not overlap. This is a consequence of having different preferences *and* different status quo positions.

The main expectations from the model are illustrated by the revision of the EU Posting Directive. In 2016, the Commission proposed a revision of this policy in which the rights of posted workers are more aligned with those of national workers. The idea to provide posted workers with the same remuneration triggered fierce opposition from sending countries in mainly Central and Eastern Europe. Receiving countries, on the other hand, welcome the idea of equal treatment of all workers in their territory as it reduces labour cost competition. This would allow them to maintain national welfare and protect the rights of their national workers. In this context, the prospects of revising the posting policy are rather limited. As suggested by our model, legislative change requires some degree of preference homogeneity and status quo heterogeneity. However, in the posting case, the opposite seems to be true. Member states have rather different preferences based on supporting free movement or equal pay, while granting additional rights became less possible due to a change in the legal doctrine developed by the CJEU, which limits the implementation of more 'generous' national policies by some member states.

Under these circumstances, finding a compromise is predicted to be difficult. This was reflected in the exceptionally long period of Council deliberations to reach an initial position among the member states (only after 19 months) and the additional period of informal negotiations with Parliament and the Commission (for another period of eight months). Although, in the end, an 'early' agreement was reached, the negotiations lasted for more than 27 months. In comparison, other research (Toshkov and Rasmussen, 2012; McGuinness *et al.*, 2019, p. 4) shows that on average first reading negotiations are much shorter than the process leading to the Revised Posting Directive.

Policy implementation always has unexpected effects. At the same time, during implementation, governmental organizations interpret legislative policy in order to make sense or fit this policy to their context (see for example Dörrenbächer, 2017). This process shapes the way in which policy is perceived and determines the current situation in member states. If one would like to propose a change, this change must be supported in view of what has been implemented, in order to be successful. This link between implementation and policy formation is not limited to the well-known 'feedback loop' about sharing experiences to 'improve' policy, as presumed under the Better Regulation Agenda, or following the work of Breeman and Zwaan (2009) and Mastenbroek *et al.* (2015). It is also a 'hard' constraint to any attempt to reform or change existing legislative policy.

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Supporting Information

Additional supporting information may be found online in the Supporting Information section at the end of the article.

Data S1. Supporting information.