Judicial Pincers, Political Boomerang:
Supranational Enforcement of European Legislation Concerning Gender Equality

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Abstract
In this paper I will argue that in the EU, the impact of the European Commission and of the European Court on implementation depends on the domestic structure (internal polarity) of the Member State and the pressure exerted by subnational societal and judicial actors. Only when internal polarity is low or when there is simultaneous pressure at the supranational and the subnational levels (pincers), a state will implement an agreement against its own intentions to do so. Supranational institutions cannot influence the internal polarity of the state; therefore their strategies are aimed at mobilizing judicial and societal actors at the subnational level. The European Commission has created networks of national experts and supported actions by subnational societal groups. The European Court has been successful in strengthening the links with national courts, while Member States did not have the power to prevent this. Compliance by Member States will be predominantly rhetorical when only its prestige is at stake. It will result in behavioural change when ideological, political and economic costs of non-compliance exceed costs of compliance. However, this may result in reluctance towards new agreements in the field (boomerang). I will test these expectations by means of an analysis of the implementation of gender equality policies in France, the Netherlands and Germany between 1958 and 2001.
JUDICIAL PINCERS, POLITICAL BOOMERANG:
SUPRANATIONAL ENFORCEMENT OF EUROPEAN LEGISLATION
CONCERNING GENDER EQUALITY

1. Supranational enforcement of EU agreements: credibility and pincers

“I don’t think that we would have agreed to this measure if we had known about the implications that it would have to the government now over the Equal Pay Act”, exclaimed the British permanent representative in Brussels, when in 1982 his country was declared guilty of non-compliance with European legislation. Reluctantly, after years of resistance, the British government bowed its head to European rules. This raises the question under which conditions compliance with European agreements can be successfully enforced. I will argue that the impact of the actions by the European Commission (Commission) and of the European Court of Justice (Court) depends on the domestic structure (internal polarity) of the Member State and the pressure exercised by subnational societal and judicial actors.

A Commission action against a Member State starts after the Commission has detected a suspected infringement of Community law or has received a complaint from an individual or the European Parliament. A dialogue is opened up between the Commission and the permanent representative of the member state. If the matter is not resolved, the Commission sends a letter of formal notice to the Member State. If the government’s response is judged inadequate, the Commission sends a reasoned opinion. If this still does not produce a satisfactory result, the Commission refers the case to the Court. The Court’s judgment is binding on the member state, but prior to the Maastricht Treaty amendments (1992) the Court had no powers to enforce its judgments. At Maastricht the member states approved the British proposal that if the Commission under Article 228 (ex 171) starts a second infringement procedure and if the Court finds that the member state has not complied with its previous judgment, the Court may impose a lump sum or penalty payment on the state. Still, member states may continue to defy the Court by not complying with the financial sanctions. None the less, statistics show that most cases are settled at one of the first two formal stages1 and that states avoid an open prestige conflict with the Court.

In fact, opportunistic behaviour is restrained by the interest which member states have in a strong court and the interest they have in their credibility. A Member State avoids directly undermining the credibility of the Court because the state generally benefits from a strong and impartial legal system. The Court should be strong enough to monitor the actions of the Commission. It should be strong enough to reduce the transaction costs of negotiations in an authoritative fashion and solve problems of “imperfect contracting” by applying general treaty regulations to unforeseen situations. States attach importance to their credibility because it is a source of information in an uncertain environment. The credibility of a state concerns the expectations of other states that it will be capable of keeping its promises and carrying out its threats (cf. Lieshout 1992, 417). A state with a good reputation will be able to make agreements more easily because its partners believe that it is prepared to keep its promises (cf.

\[1\] In 1998, 34,63% of the cases were closed before sending the letter of formal notice, 43,04% before sending the reasoned opinion, and 10,56% before deciding to bring the case to the Court (Sixteenth Annual Report, OJ C 354/92).
Keohane 1984, 105). The credibility of a state plays an important role in negotiations on new agreements, but it is primarily established by the implementation of previous agreements. A state that greatly values its credibility has the following options when it does not want to implement a joint agreement. The state can initially ignore the agreement in the hope that the non-compliance will remain unnoticed. If this strategy fails, it can attempt to “immunize” its credibility (cf. Lieshout 1995, 41) by explaining that the information about its behaviour is incorrect because it has in fact complied with the agreement according to its own standards. If this strategy also fails and the cost of losing credibility exceeds the costs of compliance, a state may then begin to implement the agreement.

An international organization increases the costs of non-compliance. It offers an arena where non-compliance by a Member State in one area can provoke non-compliance by other Member States in another area; as a result, the interests of the first violator can be harmed (cf. Keohane 1984). Moreover, it reduces the probability that non-compliance remains unnoticed and makes it harder for a state to immunize its credibility. The EU has a particularly strong monitoring system. The reports which the Commission draws up on the state of affairs inform member states about each other’s omissions. If the Commission ascertains non-compliance and invites the relevant state to provide an explanation, the Member State is required to admit, justify, or refute the non-compliance. It can no longer immunize its credibility by arguing that the non-compliance was the result of a difference in interpretation. If only other states had the competency to bring a member state before the Court, it would be unlikely that any state would be forced to acknowledge its non-compliance. Member states are reluctant to bring each other before the Court out of fear that this could focus attention on their own non-compliance or damage their relations with each other. How eager is the Commission to bring states before the Court? The mandate of the Commission requires it to be severe in order to keep up its credibility as guardian of the treaties; on the other hand, due to the intricate legislative process where the Commission proposes and the Council disposes (jointly with the European Parliament if the codecision procedure applies), the Commission depends on the cooperation of (at least the majority of) the Member States to get its proposals approved. Therefore it has no interest in finding the Member States opposing it as a bloc. It is to be expected that the Commission seeks support for its actions against a defaulting member state among forerunner states and among subnational actors in the defaulting state.

If a judgement is contrary to the interests of a Member State, the state’s decision to either implement or disregard the judgement depends on the ‘supranational’ costs of non-compliance versus the ‘domestic’ costs of compliance (see below). If the government encounters heavy resistance from social groups who are opposed to implementation of a judgement, it is then faced with a dilemma: either to implement the judgement despite the political costs in the short term or to disregard it despite the costs in the long term of the reduced credibility of the tribunal and of the state itself. Governments have a time horizon that does not stretch beyond the next elections (cf. Hix 1999, 51). It is therefore expected that a state will prefer not to implement the judgement. Nonetheless, there is a crucial difference between an intergovernmental

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2 Between 1953 and 1999, there were only four cases of a Member State taking another Member State to the Court based on Article 227 (ex 170). In contrast, between 1953 and 1999 the Commission brought a total of 1,442 cases against the Member States before the Court based on Article 226 (ex 169) (http://curia.eu.int/en/stat/index.htm, 1999).

4 Article 234 (ex 177) gives national courts the authority to refer questions to the Court concerning the interpretation of Community law and the validity and the interpretation of the actions of the institutions.
tribunal and a supranational tribunal; this concerns the link between the supranational and the subnational levels.

The possibility for the Court to establish a link with the national level was inserted in the treaties due to a provision that was necessary for achieving an effective supranational legal system, the procedure for preliminary rulings. However, the Court utilized its authority to strengthen its mandate and the position of supranational law with respect to national law. It has created three ‘pincers’, mechanisms which link the supranational and the subnational levels. The first is the construction of a transnational legal community, the second is the direct effect of European law, and the third is the supremacy of European law.

The first mechanism was developed by the Court in order to utilize the instrument of preliminary ruling. The Court formally depended on the input by national courts, but the Court did not wait passively for the national courts to come up with questions; it actively searched for their cooperation by inviting legal experts to Luxemburg. It was especially lower national courts that accepted the invitations of the Court, because in this way they were able to strengthen their position with respect to the higher domestic courts (cf. Weiler 1993, 425). A transnational legal community developed that was willing to bring questions before the Court and to accept the far-reaching legal interpretations of the Court against the more restricted political interpretations of the member states. As a result, a state can be faced with an agreement that has more far-reaching content than it initially intended, and it cannot ignore the broad interpretation by the Court because the national courts apply this interpretation.

The second mechanism, the direct effect, became established in the 1960s and 1970s as a result of several preliminary rulings. In the mandate provided by Article 234 (ex 177), which was intended to ensure the uniform application of European law, the Court found the judicial basis to rule that provisions of Community law are directly effective in that they create ‘individual rights which national courts must protect’. Individual citizens and companies can file a complaint with the national courts if their interests have been harmed because the government has not implemented Community law. When the national court rules that the state has failed, it can be expected that the state will finally implement the provisions because states “find it harder to disobey their own courts than international tribunals” (Weiler 1993, 422). Moreover, national courts can award citizens and companies financial compensation if the state violates their “supranational rights” (cf. Craufurd Smith 1999, 302). Due to the direct effect, the state is faced with the dilemma of either not implementing the provisions (at the cost of further court cases and damage claims), or going ahead and implementing against its initial intentions to do so. The fact that international law can have a direct effect is not new in itself. The innovative aspect was that it was not the Member States who decide which provisions of European law have a direct effect, as was customary in international treaty provisions, but that the Court makes this decision (cf. De Witte 1999, 178). The Court has therefore made the enforcement of supranational decisions more effective by forging this link with the national courts.

The third mechanism between the supranational and national levels is also the result of a request for a prejudicial decision: in case of conflict between supranational and national norms, community law would always have supremacy over national law. For all three mechanisms, the cooperation of national courts is essential to make them effective. The national court can decide whether it accepts the rulings by the Court, but

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5 See Case 26/62, Van Gend and Loos; Case 57/65, Lütticke; Case 41/74, Van Duyn; Case 43/75, Defrenne-II.
6 See Case 6/64, Costa/ENEL; Case 106/77, Simmenthal II.
a government does not have any means to approve this or reject it. It is a typical result of the delegation of authority that this can have unintended consequences without the delegating actor being able to easily undo this delegation. Member States only have the option of limiting the authority of an intractable Court by changing the Treaty.

We can conclude that the Commission and the Court have the capacity to increase the costs of non-compliance and thereby increase the probability that states will comply with agreements. This is because the actions of the Commission increase the probability that non-compliance is noticed, and because the Court can place the state in “pinners” (between the national and supranational levels) in various ways. However, whether or not supranational enforcement can be effective ultimately depends on the cooperation of subnational actors. The explanation of variance in implementation requires us to take the domestic level into account: the extent to which societal actors are able and willing to exercise effective political and legal pressure in favour of or against implementation, as well as the capabilities of the state to withstand pressure.

![Fig. 1 Pincers](image.png)

2. Polarity and pressure at the domestic level

Variance across time, issues, and states in implementation depends on the differences in internal polarity between states and across time, and on the pressure exercised at the domestic level.

The polarity concerns the structural distribution of power between the government and society. The following four institutional characteristics enable us to differentiate between states and across time: the degree of centralization of state authority, the power relations between government and parliament (executive dominance, balance between executive and legislative, legislative dominance), the institutionalization of relations between government and interest groups (pluralist or coordinated interest group system), and the position of the judicial branch vis-à-vis the government.

![Figure 2. Internal polarity of France, the Netherlands and Germany](image.png)

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7 In the case of *Van Gend en Loos* (Case 26/62), Belgium and the Netherlands lodged a protest with the Court and argued that the issue of direct effect was a case for the Dutch court. The Court responded that this was indeed a case for the national *court* but not for the national *government* (see Jur. 1963, 24-25).
As polarity increases, the steering capacity of the government increases, as does the probability that it will be capable of establishing its preference against the will of society. States with a high polarity are more successful in resisting pressure for implementation if they are not willing to implement. As polarity increases, societal actors must apply more power to influence the preference of the government. As polarity declines or as the internal power relations become more unstable, the government becomes more sensitive to pressure. If the polarity of the state is low, the steering capacity of the government is limited. A government with a weak power position is confronted by a society with strongly institutionalized interest groups or a strong judicial system. The state will be less capable of keeping its European obligations when compliance encounters domestic resistance. On the other hand, societal and judicial pressure in favour of implementation may coerce a government into compliance.

A state will not wish to implement joint policy if implementation is accompanied by high political, economic, and ideological costs, in other words if implementation encounters more resistance than support (political costs), or has negative economic consequences, or does not correspond to its political programme and structural policy paradigm (ideological costs). The political costs and benefits are related to the level of discord and harmony between the government and societal actors concerning implementation. Social-economic interest groups, political parties, social movements, action groups, advisory bodies, and experts all may develop standpoints concerning implementation and exert pressure on the government. If the costs or benefits of policy change are thought to be high, the actor will exert pressure in favour of implementation, especially if it expects that these costs or benefits will affect it specifically. The strength of domestic pressure is also related to the amount of resources of the domestic actor. Pressure is more effective if it is exerted by a homogeneous group with a high degree of mobilization (farmers) than if it is exerted by a heterogeneous group or one that is difficult to mobilize and without regular access to the government bureaucracy (single mothers, the unemployed, illegal immigrants).

A government is sensitive to pressure in favour of or against implementation of supranational decisions for several reasons. If the government wants to implement a supranational decision, it needs the cooperation of domestic public and private actors. Because other actors (aggrieved citizens and companies, national and supranational courts) hold the state ultimately responsible in cases of negligence (cf. Prechal 1995, 338), the state has an interest in making sure it has sufficient domestic support beforehand. A government is also sensitive to pressure for electoral reasons. Therefore the effectiveness of pressure increases when it comes from the grassroots support (or
potential support) of the political party or parties from which the government is comprised, especially if elections are planned in the short term. The effectiveness of domestic pressure further increases if actors at the supranational level simultaneously exert pressure on the state. The strategies of supranational institutions are aimed at mobilizing legal and societal actors at the subnational level.

The economic costs of implementation can be measured according to the expected consequences of the policy changes on relevant aspects of the national economy such as the GNP, the export/import ratio, price development, or labour costs.

The expected ideological costs depend on the extent to which the policy corresponds to, first, the structural division of labour (level of state intervention) and second, the political programme of a government. First, the costs of implementation are generally lower in a state that strongly intervenes in market and society and has at its disposal a large set of policy instruments. The level of state intervention concerns the way in which a state defines its sphere of activities with respect to the market and society: liberal, corporatist, or statist (cf. Katzenstein 1978, 322). These categories are not connected to the ideology of the governing party: they reflect a long-standing structural characteristic of a state, a division of labour which influences the options and the relative costs of each option a government has at its disposal, no matter what its ideological program is. The level of state intervention has consequences for the costs attached to the implementation of international agreements. A statist state intervenes strongly in the market and society and it has access to a large number of policy instruments (cf. Katzenstein 1978, 323). For such a state, there is a greater probability that the implementation of agreements will entail relatively few costs because it only has to implement a limited policy modification – a “first-order change” (cf. Hall 1993, 278). Corporatist states also have access to a broad range of policy instruments, but they must negotiate with interest groups about the application and modification of such instruments. This increases the cost of policy change. Non-interventionist, liberal states have access to fewer possibilities for directly influencing policy than both of the other types. If international agreements require the state to intervene, there is a higher probability that a liberal state will have to introduce a new instrument, or even take measures that do not fit within its policy paradigm – “second order” and “third order change,” respectively (cf. Hall 1993, 279).

Second, the ideological costs are related to the extent to which a proposal corresponds with the views and aims of a government and the importance the government gives to the topic depending on its political colour, its programme, and its policy in that area.

To the extent that implementation is linked with higher political, economic, and ideological costs, there is an increased probability that a state will not implement joint policy.

3. The pincers at work

If the government wants to implement the agreement, but encounters resistance from interest groups, implementation becomes more costly than expected. If the government does not want to implement the agreement due to the high economic or ideological costs (costly policy), this can encounter resistance from groups who would benefit from implementation but it entails also costs at the supranational level such as damage to its credibility and damage to supranational cooperation (the risk of setting a precedent). However, the costs at the supranational level are not incurred immediately, but over the longer term, due to the length of procedures and the diffuse character of the costs. For electoral reasons, short-term costs and benefits usually carry more weight for a
government than long-term costs and benefits. The ultimate trade-off depends on the internal polarity of the nation state and the actions of supranational actors (see Figure 2):

In a state with a high polarity, the government will successfully maintain its own preference despite the political costs of resistance to its decision, except when it is simultaneously confronted to supranational pressure.

In a state with a low polarity, the government will be constrained to follow the preference of interest groups despite the economic or ideological costs attached to it.

In a state with an intermediate polarity, if the government and societal actors disagree regarding implementation or non-implementation, the government will implement only when there is simultaneous supranational pressure.

Compliance by a Member State will be predominantly rhetorical when only its prestige is at stake. It will result in behavioural change when ideological, political and economic costs of non-compliance exceed costs of compliance. However, this may result in reluctance towards new agreements in the field: a boomerang effect. The experience of a state having to implement Community law despite high costs at the national level will play a role in the negotiations about new supranational policy. After all, the successes and miscalculations of a state are an important source of information. Moreover, it can be expected that the affected interest groups will be more aware in the future of the costs and benefits of supranational policy. The state will make a higher estimate of the costs of new supranational agreements in the relevant policy area and the probability of agreement concerning new joint policy is therefore smaller than during the previous round of negotiations. Due to the previous experiences, a “boomerang effect” takes place in the sense that the success of the cooperation involved in the establishment and implementation of joint policy hampers further cooperation. This affects the actors (Member States, interest groups, Commission, European Parliament) that have an interest in the development of new joint policy that goes further than a minimum common denominator norm. From the above it can be deduced that as the implementation of joint policy turns out to be more costly than expected, Member States will take a more reluctant position with respect to new agreements in this area.

I will test these expectations by means of the reconstruction of parts of the implementation process of gender equality policies in three EU Member States. These states differ as far as their internal polarity is concerned: France (high), Germany\(^8\) (low), and the Netherlands (intermediate) (see Figure 3). My aim is to explain changes in outcome (compliance and non-compliance with European norms) across time and between states by differences in internal polarity and changes in pressure ‘from above’ (Commission and Court) and ‘from below’ (societal actors).\(^9\)

\(^8\) Germany means ‘West Germany’, the former FRG as far as the period until 1990 is concerned; it means the whole Federal Republic for the period after 1990.

\(^9\) Large part of the empirical work has been done in the framework of the PhD project “Costly Women, Contrary States”, cf. Van der Vleuten (2001).
4. The 1960s – weak pressure from above and from below
In March 1957 six countries signed the Treaty of Rome for the establishment of a customs union (EEC). It contained an article which required member states to apply the principle that men and women should receive equal pay for equal work (Article 141, ex 119). Correct implementation of Article 141 meant that Member States would offer a statutory guarantee of the right to equal pay and that collective agreements would be declared void if they stipulated different wages for men and women. Job classification schemes should not discriminate and the right to equal pay should be judicially enforceable. Between 1958 and 1967, no Member State implemented Article 141 correctly, although other articles in the Treaty of Rome, such as the ones on tariff reduction, were implemented on time or even sooner than required.

A cautious Commission
The Commission was cautious. The responsible Commissioner, Giuseppe Petrilli, even commissioned a study into the Commission’s authority concerning Article 141 (ex 119) (Memorandum Petrilli, 23.4.59, III/a/3954; Letter Dörr to Leleux, 28.4.59; BAC 008/1966). The legal service of the Commission told him that until the end of the first stage of the customs union (1961), the Commission could only formulate non-binding recommendations to remind Member States of their obligations. After 1961, the Commission had the right to bring the matter before the Court, but the legal service did not recommend this procedure because an open conflict between the Commission and Member States should be avoided (Note service juridique, 11.5.59; BAC 008/1966). The Directorate General of Social Affairs (DG V) disagreed with the legal service and believed there were possibilities for intervention based on other treaty articles (Memorandum Toffanin, 14.5.59; BAC 008/1966). However, Petrilli decided that the Commission should limit itself to collecting information.

Even this modest activity encountered resistance. The Netherlands referred repeatedly to its interest – due to its declaration – in reliable statistical data, but at the same time it delayed the statistical research of the Commission and questioned the necessity of the requested information (S/4853, 1959; BAC 008/1966). The data collection was further delayed due to disagreements among the national experts about the scope of the “equal work” concept. Days of discussion were necessary to determine whether women who produced small automobile tires and men who produced large automobile tires did the same work or not, and whether men could be paid more because they were allowed to turn on the machinery in the morning (Commission 1959, V/4847/59). It took three years before German and French experts agreed that Article 119 also applied if a man and a woman did the same job in the same company, but not at the same moment (Commission 1961, V/5529/61).

Every year, the Commission published a report on the state of affairs. It ascertained that a certain amount of progress was achieved, but that the application of the equal pay principle was still inadequate. Every time the tone became more critical, the Member States promptly censured the report. For instance, in the 1964 draft report the Commission criticized Germany because female employees had no protection against the arbitrary classification of jobs. The principle of equal pay was “very inadequately applied” and due to the freedom of the parties in collective agreements, the conditions for correctly implementing the principle were unfavourable (Commission 1964, V/13206/64). In the final version of the report, in West Germany, “the conditions
for correct application of the principle” had suddenly become “remarkably beneficial” (Commission 1964, V/COM(64)11).

Based on the conclusions in the reports, the Commission appeared to be justified in taking action against the Member States. However, the Commission believed it could only initiate an infringement procedure when the government itself had not taken the necessary measures and not where it where employers and trade unions who had failed to adopt implementing measures. The Commission recoiled from initiating a procedure against France, which was in breach of the treaty because it did not offer adequate judicial protection for equal pay, because the situation was less serious than in Germany, where the gaps in implementation were the result of the lack of action of the employers and trade unions. Moreover, due to the difficult position of the Commission in the summer of 1965, “it appears there is no practical possibility political and psicological opportunity for a procedure at the Court of Justice” ([strikeout and spelling errors in the original, AvdV]; Reminder from Toffanin for the 324th meeting of the Commission, 5.7.65; BAC 006/1977).

In 1967, the Commission again compiled a report on the implementation of equal pay. After it had heavily amended the report, Coreper submitted it to the Council (Bulletin 9/10-1967, 68). Even the amended report showed that the Member States were still in breach of the equal pay principle. The Member States felt they were unjustly condemned. They complained that they were unable to evaluate to what extent the various countries had applied the principle because the Commission provided no figures concerning wage differences. Commissioner Levi-Sandri indignantly reminded the Member States that their own experts, after meeting for three years, had decided that such a study was “technically problematic” and had returned the assignment (Council 1966, 416/66 SOC(69); 568/66 SOC(91)). The European Parliament made an appeal to the Commission to “finally draw the obvious conclusion from this report” and initiate proceedings against one or more Member States (Resolution, OJ C 55, 5.6.68). However, rapporteur Cornelis Berkhouwer failed to acquire the support of a majority of the EP who were willing to place the Commission under real pressure and bring an action before the Court for failure to act (Article 232, ex 175).

Subnational pressure: weak but growing
The pressure for implementation increased during the 1960s, but remained too weak to force governments to implement Article 119 correctly.

In France, the principle of equal pay was included in the new constitution of 1958. Moreover, the difference between men’s and women’s wages was smaller than in the other Member States.10 However, Commission reports showed that systematic wage discrimination was also prevalent in France (Commission 1963, V/3479/63). In the paper and footwear industries women and men in the same job category were paid differently. In the gas and electricity sector jobs performed exclusively by women were classified as “work for the handicapped.” In regions where the employment opportunities for women were limited to a single sector (such as the canning industry in coastal regions), the wages for “non-mixed jobs” were very low (Commission 1963, Draft Report DG V; BAC 006/1977). Married male workers received a family and child supplement, but married female workers did not because they had “other needs” (Commission 1964, V/13206/64, 21).

It was very important to France to be the only Member State that had completely implemented Article 141. According to the government, the 10% difference in women’s

10 In 1954, the average difference between men’s and women’s pay was in France 14%, in Germany 37%, and in the Netherlands 42% (MAE 102f/55, 21.7.1955).
and men’s wages was related to objective differences in performance, the number of years of employment and the skill level; therefore, there was no discrimination against female workers in France. The best proof of this, according to the government, was that not a single female employee had submitted a complaint about unequal pay in recent years. The government ignored the fact that women were unable to complain about the most prevalent forms of wage discrimination because it was primarily women in “non-mixed jobs” who were victimized. The classification of jobs was not strictly specified, and this allowed arbitrary choices to be made (Commission 1965, V/COM(65)270). An interesting example of “rhetorical implementation” to immunize French credibility is the following. The government prepared a law that the parliament was supposed to approve in December of 1964. According to the law, every wage agreement that did not respect the principle of equal pay should be declared void (Commission 1964, 10760/V/64). However, the French parliament did not deal with the equal pay law until 1972. At least, the government could refer the Commission and other Member States to its intention to implement Article 119 correctly.

Nevertheless, a shift was taking place. The French trade union movement initially denied that there was any kind of systematic discrimination (Letter from Louet, CGT-FO to Van Tilburg, NVV, 13.3.61, BAC 008/1966). After 1962, the trade unions became more critical. Due to the increasing educational level and the increasing labour market participation of women, the inferior position of working women in France was no longer seen as self-evident (cf. Mazur 1991, 124). The government established a Comité d’études et de liaison pour les problèmes du travail féminin (Committee for Women’s Work) in 1965 at the Ministry of Social Affairs. The Committee was made up of employers associations and trade unions, representatives of women’s organizations, and independent experts. However, the influence of the Committee remained limited until it acquired political support at the beginning of the 1970s.

In Germany, employers believed that equal pay had been achieved and that the 25%-30% difference in men’s and women’s wages was the result of age differences, marital status, and seniority (Commission 1961, V/6120/61). The government also claimed that “the principle of equal pay for men and women for equal work has been implemented and is applied in West Germany” (Bundestag, Drucksache 2793, 7.6.61; Drucksache 2899, 21.6.61). Article 3 of the German Constitution laid down that men and women have equal rights. The Federal Labour Court declared various collective labour agreements void based on a violation of Article 3 (Memorandum from Dörr, 10.6.63; BAC 006/1977). However, there was a major discrepancy between the formal right to equal pay and the actual wages paid to women. This was because employers and trade unions did not apply a fixed system of job classification; therefore job valuations varied according to regional traditions and characteristics of the local labour market. They systematically assigned a lower value to work that was done primarily by women (Commission 1960, V/7154/60). Female employees had no judicial recourse because the courts had ruled that women could be paid less if their work was not identical to the work done by men in the same company. The employers association BDA and the government maintained that the issue of job equivalency was not subject to the provisions in Article 3 (Constitution) or Article 141 (EEC Treaty).

The German trade unions complained that equal pay was only being applied in a formal sense (DGB press release, 7.7.61; BAC 008/1966). At the initiative of Maria Weber, the only woman in the Central Administration of the DGB (German trade union organization), the DGB asked the Commission to be sceptical about the German government’s assertion that equal pay had been completely implemented (Commission 1961, V/6286/61). Nevertheless, trade unions approved collective agreements with
different pay scales for women and men because they continued to give precedence to the interests of the male majority in their membership (Commission 1962, V/6286/62).

In 1966, West Germany experienced a recession. The increasing unemployment led to a decline in the number of female workers. The return of women to “hearth and home” confirmed the findings of a study that the government had carried out (at the repeated insistence of the SPD) concerning the position of women. The report defined women as “mothers and housewives,” despite figures that showed that half of all women engaged in paid work (cf. Wiggershaus 1979, 36). In the eyes of the DGB and the SPD, the report provided proof of the “failure to achieve statutory equality for women” and the “failure to acknowledge working women” in West Germany (Krasnogolovy 1968, 370).

In the Netherlands, the implementation of equal pay was at the lowest level of all Member States. It discriminated openly by continuing to stipulate different wages for men and women in collective agreements. There was no statutory equal pay provision for women who were not employed under a collective agreement. For women who were employed under a collective agreement, the situation was hardly any better because the Board of Government Mediators delivered uncontested binding declarations, even though women’s wages in collective agreements were 25%-30% lower than men’s wages for the same work (Commission 1959, V/3804/59). Women did not have any judicial options for fighting against wage discrimination. According to a study the Commission had conducted, there was a “historical difference” in the Netherlands between men’s and women’s wages, and this difference was “quite generally accepted” based on the “need” element (Commission 1962, V/10993/62). The companies involved in the Commission study had prevented their employees from participating because they were concerned that “asking questions about the topic of equal pay for men and women would cause unrest. For such simple people, this could lead to unjustified or premature expectations” (OJ 1956/64, 28.7.64). Pressured by the European Commission, the Dutch trade unions promised they would formally protest every collective agreement that did not respect the equal pay obligation. However, the concern of the trade unions for equal pay was primarily rhetorical because they continued to approve discriminatory collective agreements (cf. Van Eijl 1997, 100 and 295).

During the signing of the EEC Treaty in March 1957, the Netherlands had made a declaration concerning Article 141 (ex 119) in which it stated that “the Netherlands shall not be required to go further in this matter than that which has in fact been realized in France” (Handelingen 1956-7, 4725, 31; MAE 945 f/57, 6.5.57). The government counteracted the criticism of France and the Commission concerning the large differences between men’s and women’s wages with the argument that the differences in other Member States were larger than the figures suggested (Commission 1959, V/4847/59). The government admitted that a simple government guideline for the Board of Government Mediators would have eliminated wage differences. However, it did not want to go further than other countries and before taking any steps wanted to have statistical material which showed that the other Member States had satisfied their obligations (Letters from Minister Veldkamp to the Labour Foundation, 18.1.62, 21.2.62, and 1.12.64; BAC 006/1977). The Board approved collective agreements in the

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11 Until 1968, the Netherlands had a controlled wage policy; after receiving advice from the bipartite Labour Foundation, the Board of Government Mediators specified binding wage regulations and also approved collective wage agreements.

12 The need element refers to the idea that a woman does not have to maintain a family with her wage and therefore has different needs than the man who is the breadwinner.
sugar, chocolate, footwear, cigar, and leather industries, all of which were in violation of Article 141. In 1966, the Board of Government Mediators issued a Minimum Income Order that only applied to men. Critical questions were asked in parliament. At the same time, Henk Vredeling, member of the EP, asked the European Commission to evaluate this breach of Article 141 (OJ 21.4.66, 1071/66). As a result, Veldkamp asked the Board to expand the order so that it applied to women in mixed jobs (Letter 53.276, Veldkamp to Levi-Sandri; BAC 006/1977). The Board agreed, but stipulated that industries could ask an exemption. The laundry, footwear, and leather industries asked for and received exemptions. Exceptions were also made for other sectors (Raad 1966, 416/66(SOC 69)). The Dutch government maintained that “the situation was not yet ripe” for equalizing the wages of men and women (Handelingen 1966-67, 8606, 2).

To summarize, the Member States did not implement equal pay. They did not admit non-compliance, but they legitimized their negligence with the argument that the Commission did not provide figures that enabled them to make a comparison. They argued that the requested intervention was outside their authority (France and West Germany) or that they preferred to postpone complete implementation because there were no reliable data (the Netherlands). They did not outright reject the ‘principle’ of equal pay but gave it only rhetorical support. The ‘pincers’ did not work: domestic pressure was too weak to raise costs of non-implementation (see Appendix), and the Commission recoiled from linking consequences to its criticism. It did not bring a single Member State before the Court.

5. 1970s: change in France and the Netherlands, no change in Germany

France introduced equal pay legislation in 1972; the Netherlands did so in 1975. Only the German government did not introduce new legislation. At first sight, this seems hard to explain. In all Member States at the beginning of the 1970s, the women’s movement put the position of women on the political agenda. A shift in the voting behaviour of women helped to bring governments into power that were motivated to implement reforms to retain this part of the electorate. The Commission abandoned its passive role. Did the pincers only work in some countries?

Subnational pressure

At the beginning of the 1970s, there were strikes all over France during which women demanded equal pay and better terms of employment (cf. Callet and Du Granrut 1973, 13). The weekly Elle organized the General Assembly of Women from 20 to 22 November 1970 in Versailles, where Prime Minister Jacques Chaban-Delmas made a speech. Strict application of the “equal pay for equal work” principle was one of the demands made (cf. Albistur and Ar mogathe 1977, 662). Opinion polls showed that equal pay was the most popular measure to improve the status of women (cf. Mazur 1991, 125). In 1971, the Committee for Women’s Work published a report about wage discrimination. It contained a draft version of an equal pay law inspired by the British Equal Pay Act and reported the criticism of the European Commission concerning the state of affairs in France. The reform programme of Chaban-Delmas, called “The New Society”, offered Minister of Labour Joseph Fontanet a framework for new social legislation. He submitted the draft equal pay law of the Committee for Women’s Work to the French government. Fontanet was unable to steer the law through the French Council of Ministers before the change of government in the summer of 1972, when President Pompidou replaced Chaban-Delmas with the Gaullist “hardliner” Pierre Messmer. Edgar Faure became the new Minister of Labour. Pressure from employers
led him to weaken the proposed law by eliminating the reversal of the burden of proof.\textsuperscript{13} The proposal to establish an independent commission to supervise the law according to the model of the British Equal Opportunities Commission foundered due to the resistance of the Industrial Relations Board. On 21 November 1972, the parliament approved the weakened Equal Pay Act (cf. Mazur 1991, 127). Act 72-1143 established the principle of “equal pay for equal work and work of equal value” in the private sector, required employers to classify all jobs, specified in greater detail the criteria for job classification, and provided sanctions for employers who discriminated (cf. Callet and Du Granrut 1973, 184). Once more, France would benefit from the prestige it gained from its role as a “model of social progress”.

In the Netherlands, in 1968 the controlled wage policy was terminated. The relations between the government and both employers and trade unions worsened, and there were long lasting conflicts and wildcat strikes. In the same year, the \textit{Man Vrouw Maatschappij} (MVM: Man-Woman Society) was founded and signalled the beginning of the second feminist wave in the Netherlands. Due to the support of the women’s movement, the continuing quest of women in trade unions for equality gained more attention. However, the trade unions continued to defend the interests of the breadwinner every time when equal rights meant that male trade union members had to make concessions and the government still validated collective agreements that contained different wages for men and women \textit{(Nadere Memorie van Antwoord 8606, 26.4.71)}. The centre-right government ignored the demands of the women’s movement. This led to increased mobilization, which was favoured by the fact that the opposition parties supported the women’s movement.

During the 1972 parliamentary elections there was a spectacular shift: women reduced their traditional support for Christian Democratic parties, and for the first time more women than men voted for the PvdA.\textsuperscript{14} Partly due to this shift, in May 1973 a coalition of progressive parties and Christian Democrats came into power under the leadership of Joop den Uyl (PvdA). The government was accessible for the women’s movement due to the personal contacts between women in the governing parties, the MVM, \textit{Dolle Mina}, and women in the trade unions. Den Uyl’s motto, “share knowledge, power, and income,” offered a link to the demands of the women’s movement. In October 1973, the MVM conducted a postcard campaign “Den Uyl, now is the time for emancipation policy” and formulated three demands: a national steering group for emancipation policy, a support institute for statistics and research, and equal pay and equal treatment legislation following the British-American example. Den Uyl announced by return mail that the Minister of Culture would consider the demands (cf. Van Praag 1985, 6). Also in October 1973, the tripartite SER issued an advice on equal pay. It noted, that separate scales for men’s and women’s wages remained in only a few sector collective agreements, but it was precisely these sectors (such as the clothing, textile and shoe industries, and laundries) that employed large numbers of women. In view of the number of female workers who were not covered by collective labour agreements, the SER believed it was essential to have a generally applicable equal pay regulation. It was desirable to establish a tripartite commission of experts that could advise disadvantaged women and the courts (cf. SER 1973, No. 13, 4-5). The ‘Optilon experience’ confirmed the advice of the SER. In March 1973, at the Optilon zipper

\textsuperscript{13} The principle of “reversing the burden of proof” means that the individual who submits a complaint about discrimination is not required to show that he or she suffered discrimination, but that the accused employer must prove that there has been no discrimination.

\textsuperscript{14} In 1971, of the female voters 42.2\% voted for the CDA and 21.6 for the PvdA; one year later, 32.9\% voted for the CDA and 27.3 for the PvdA (Leyenaar 1989, 22).
factory, women conducted an unsuccessful strike for equal pay. The strike was given a
great deal of publicity and support by *Dolle Mina* and women in the trade unions, but
the industrial union decided to stop the strike for tactical reasons and accepted a
collective agreement without a provision for equal pay. Despite protests from the trade
union’s Women’s Association, the collective agreement was declared to be binding.

The decision of the Dutch government to finally implement Article 141 can be
explained by the double pressure in October/November 1973. At domestic level, the
women’s movement exerted pressure to take emancipation policy seriously and the
government was sensitive to this demand; the SER advice in favour of a statutory equal
wage regulation contradicted the government standpoint that after the end of controlled
wage policy, the employers and trade unions were primarily responsible for equal pay
policy. Moreover, the Optilon case made it even clearer how difficult it was to ensure
equal pay by means of a collective agreement. At the supranational level, in November
1973, the Commission sent the government the official warning by which it announced
infringement proceedings against the Netherlands. The Commission demanded that the
Netherlands finally implement the statutory right to equal pay. The Den Uyl
government viewed itself as progressive. A possible condemnation by the Court because
in the Netherlands women were more poorly paid than men, was considered to damage
this progressive reputation. The Commission agreed to halt the infringement procedure
after the government promised to take measures (*Europa van Morgen* 1974, 628). In
August 1974, Minister Boersma presented the equal pay bill to parliament to “end a
certain period of women being at a disadvantage with respect to men” (*Handelingen*

In Germany, the women’s movement arose from student resistance. Their battle
against capitalism and patriarchy took concrete shape in their campaigns for childcare
and liberalization of abortion. In April 1974, the Parliament approved a modest reform
of the abortion law, but due to a ruling by the Federal Constitutional Court, the reform
was largely reversed. This defeat strengthened the women’s movement in its distrust of
established institutions. It moved away from regular politics and concentrated on actions
at the grassroots level (cf. Doormann 1983, 243). Shifts in the female electorate resulted
in the Christian Democrats going into the opposition and the SPD becoming the
governing party. The ASF (women’s working groups in the SPD) put pressure on the
SPD to do something for women. However, although women still earned 30% less than
men, there was no strong pressure in favour of an equal pay act. On 31 January 1973, 18
years after a German court had ruled that separate wages for women were
unconstitutional, the last two collective agreements that contained *Frauenlohngruppen*
(women’s wage groups) became null and void. However, 104 of the 346 collective
agreements that were in force in 1974 still contained *Leichtlohngruppen* for “light
physical work” (cf. Wiggershaus 1979, 81). As unskilled or semiskilled work was
classified only on the basis of the physical strength required, the *Leichtlohngruppen*
contained almost exclusively female workers. The trade unions declared 1972 as “The
Year of the Woman Worker,” but they opposed equal rights legislation because they
feared losing their freedom to negotiate. They rather concentrated on improving
professional training for women. The women’s movement and the ASF primarily
exerted pressure for the reform of marriage and family law, which had not changed
since the 1950s. Married women still did not have the same right to perform paid work
as men due to the statutorily mandated allocation of tasks in marriage. Part of the
women’s movement was reluctant to support the demands for equal rights on the labour
market, and preferred instead to emphasize the *difference* between men and women (cf.
Ostner 1993, 94). Their campaigns for a “housewife wage” and “glorification of the
Female body and motherhood” were not compatible with equal rights policy. The ASF were unable to persuade their own party let alone the government that Article 3 of the Constitution offered insufficient protection for women’s rights. The government argued that it had to respect the autonomy of employers and trade unions.

When unemployment increased rapidly in 1974, the government preferred to emphasize the Wahlfreiheit, the “free choice” of women between paid and unpaid work, rather than strengthening the rights of female workers. The European Commission recoiled from starting an infringement procedure against Germany, in which it would have to convince the Court that the German Constitution failed to provide sufficient guarantee of individual rights.

Supranational pressure
As the Commission ascertained in its report published in June 1970, the implementation of Article 141 (ex 119) had reached an impasse (Commission 1970, SEC(70)2338 fin). The Commission initially did not link any consequences to its criticism of the Member States, and Commissioner Coppé did not establish a new deadline for the implementation of equal pay. His only proposal was that the Member States continue to report periodically (Europe 20.4.71). The European Parliament therefore called for women to take individual action to put their right to equal pay into effect. Rapporteur Astrid Lulling of the Social Affairs Committee of the EP asked the Commission to establish a European agreement between employers and employees to improve the compliance with the equal pay principle in collective agreements. However, the employers and employee organizations were not motivated to make such an agreement (Europe 13.4.71). The Commission was compelled to postpone the publication of the next report on the implementation of Article 141 (ex 119) because the Member States refused to provide recent figures (O J C 52/15, 5.7.73). In the report, that was finally published in July 1973, the Commission changed its tune (Commission 1973, SEC(73)3000). It announced that it would start infringement procedures and that it would introduce a new instrument (a Directive concerning Equal Pay). How can we explain this sudden change?

First, in 1971, the Court issued the first prejudicial ruling concerning Article 141 (ex 119). In February 1968, Sabena, the Belgian national airline fired the stewardess Gabrielle Defrenne, because she had reached the age of 40, even though male cabin personnel remained in service until they were 55. The lawyers Eliane Vogel-Polsky and Marie-Thérèse Cuvelliez began a case against the Belgian state that came before the Court in 1970 (Case 80/70, Defrenne I) and a case against Sabena that came before the Court in 1976 (Case 43/75, Defrenne II). In Defrenne I, the complaint was that stewardesses were excluded from the pension regulation for airline personnel. The Court decided in accordance with the conclusion of the Advocate General Dutheillet de Lamothe that statutory pension regulations did not fall under Article 141 (Jur. 1971, 455). However, Dutheillet de Lamotte reminded the Member States that Article 141 (ex 119) imposed an obligation on them that was sufficiently precise to have a direct effect. This would mean that women in the Netherlands could appeal to the national court on the basis of Article 141. The Court would rule on this aspect only in 1975 in Defrenne II, but the signal to the legal service of the Commission was clear: if it started an infringement procedure against the Netherlands, the Court would support it.

Second, in January of 1973, a new Commission began work under the presidency of the Frenchman François-Xavier Ortoli. “Social Affairs” was assigned a separate portfolio, presided by the Irishman Patrick Hillery. Newcomers who wanted to
optimally utilize “the social mandate” of the Commission (cf. Hoskyns 1985, 79) replaced several conservative top officials in the DG V.

Third, the newcomers strengthened the transnational network of national experts and supranational officials that had developed around the issue of equal rights. Officials in DG V had been involved with the topic of equal pay since the early 1960s. They had achieved few results due to the lack of will of the Member States and the cautious attitude of the Commission, but had collected information and had established a network of contacts with national experts and women in the trade unions.

Fourth, pressure from domestic actors on the Commission had increased. Women’s organizations and women in political parties and the trade unions had placed equal pay on the national agenda. There was pressure from national groups “so the Commission would resume the battle for equal pay and, more generally, equal employment rights” at the supranational level (Nonon and Clamen 1991, 61). The Commission supported the initiatives of women who wanted to take action at the European level (cf. Deshormes La Valle 1979, 51). The emergence of the women’s movement offered a good opportunity for the Commission to strengthen its own position with respect to the Member States by acquiring the political support of a large group that was still getting an inadequate response at the national level.

To summarize, ideological and political costs of implementation decreased in France and the Netherlands, but not so much in Germany (see Appendix). The Commission raised costs of non-compliance for the Netherlands by starting an infringement procedure. As expected on the basis of the expected cost/benefit ratio, Germany resisted the amendment of national legislation, and France and the Netherlands accepted it.

6. The 1980s: judicial pincers, political backlash

At the end of the 1970s, the Member States were faced with deadlines for the implementation of the directives they had approved on equal pay and equal treatment. The governments discovered that they could no longer avoid implementation as easily as their predecessors in the 1960s had done. This was due to the pressure for implementation exerted from both the supranational and national levels.

Supranational → national pressure

In the 1970s, the Commission increasingly played an active monitoring role. A reprimand by the Court had made it conscious of its own negligence in this respect. In April 1976, in Defrenne II, the Court ruled that Article 141 had a direct effect and that this effect had been in force since 1 January 1962. However, the Court limited the retroactive effect to the date of its ruling because the Member States had been able to apply practices which were in violation of Article 141 without the Commission initiating an infringement procedure. As a result, there could have been a lack of clarity about the obligation to implement equal pay (Jur. 1976, 481). The Court accused the Commission of failing to act against non-compliance with Article 141 “in an appropriate fashion.” The fact that the Commission could not act against all forms of non-compliance did not justify its lack of action against any form of non-compliance. As a result, the Commission initiated an infringement procedure against every Member

15 Directive 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.
State that had formally not or not correctly implemented a directive, even if the practices in other Member States left much more to be desired. The “supranational equal rights commission,” the Bureau for Employment and Equal Opportunities for Women (Women’s Bureau) at DG V (established by Hillery in 1976), played an active role in preparing infringement procedures (Europe 17.6.76). The Women’s Bureau also organized a network of contacts between national equal rights commissions, resulting in the establishment of an Advisory Committee on Equal Opportunities for Men and Women in 1981. The Bureau hoped that the Advisory Committee could function as a transmission belt between the supranational and the national levels, but this did not come about. In particular, the Advisory Committee lacked a strategy to mobilize women to support its demands (cf. Hoskyns 1996, 126).

Accordingly, the Commission actively focused on judicial instead of political pressure. Immediately after publishing its reports on (non-)implementation of the first and second directives, the Commission, with Defrenne II in mind, began infringement proceedings against the Member States. The Member States had given themselves until December 1984 to implement the third directive on social security. Already in June 1979, DG V took the initiative to remind the governments that they had agreed to “gradually” implement the equality principle and in 1983 it published an interim report (Commission 1983, COM(83)793).

National ➔ supranational pressure
At the national level, women’s organizations and women in the trade unions, political parties, and the parliament insisted that their governments implement the directives. In the Netherlands, an equal rights commission had been established that supported male and female workers who felt they were being discriminated against. More and more frequently, victims of discrimination submitted complaints; as a result, national courts were given the opportunity to cite European provisions and to ask the Court for its interpretation. Between 1979 and 1986, national courts submitted 23 cases to the Court that concerned equal pay and equal treatment, among which five German cases and seven Dutch cases. In contrast, French courts did not ask for a single preliminary decision in the area of equal rights. Compared to the other Member States, few cases were submitted to French national courts. The high threshold in the French court system and, due to the resistance of the trade unions, the lack of an independent equal rights commission that could advise discrimination victims, appeared to be responsible for this situation (cf. Pettiti 1995, 141).

France: implementation due to national change
After a minor modification (abolishing the head of family provision for housing allowances in mining companies) France satisfied the formal provisions of the Equal Pay Directive according to the Commission. However, in 1976, the Committee on Women’s Work had issued a report indicating that the enforcement of the 1972 equal pay act was inadequate. When in May 1981 François Mitterrand was elected and “imagination came into power”, socialist Minister of Women’s Rights Yvette Roudy seized the occasion and submitted a bill to improve enforcement and to eliminate indirect discrimination (cf. Mazur 1991, 131-2). The Roudy Act forbade discrimination based on sex or family situation. New collective labour agreements could no longer include protective measures. Personnel advertisements could no longer specify the sex of potential applicants. Employers were required to publish an annual report about the position of men and women in their company. Despite the protests of the employers, a clause appeared in the Act that reversed the burden of proof, fourteen years before a
European Directive required it.\textsuperscript{16} It was no longer the employee who had to prove that unequal pay was the result of discrimination; the employer now had to prove that unequal pay was not the result of discrimination (cf. Sabourin-Ragnaud 1993, 211). The leftist majority in parliament approved the Roudy Act in July 1983 (Loi no. 83-635). It was the most far-reaching legislation in this area in the EC. France therefore believed it had more than satisfied the requirements of the directives. It was mistaken in this belief.

The Commission started an infringement procedure because women were excluded from certain jobs in the public sector. The government thought it had solved the problem by approving a law that forbade employers from making a distinction according to sex (Act no. 82/380, Decree 82/886). In an appendix, however, the law contained a list of job groups for which separate admission procedures for men and women still applied: five job groups in the police, three job groups in the prison system, two job groups in the customs service, teachers, and instructors and assistant instructors in physical education and sports (Jur. 1988, 3562). The Commission sent the government a new warning on 7 August 1984. When France did not respond, the Commission took the case to the European Court. During the written Court procedure, France shortened the list of exceptions in steps: on 7 March 1986, the government eliminated the job groups of the customs service, on 2 February 1987 it eliminated the teachers, and after the oral presentations before the Court in March 1988, it eliminated the instructors and assistant instructors. The Court ultimately had to evaluate only the jobs with the police and the prison directors. France insisted on a quota for these job groups because an excessively high percentage of women would “seriously erode the credibility” of the police (Jur. 1988, 3566). The Commission argued that it was not sex, but physical suitability, that should be decisive for certain police jobs and that it had not been proven that women were unable to act against violent behaviour. In June 1988, the Court ruled that the Commission was correct concerning the job groups with the police, but not with respect to the directors of small prisons (Case 318/86). In accordance with the court decree, France abolished separate male and female recruiting except for the latter category. “One can therefore say that France at last follows the directive” (Sabourin-Ragnaud 1993, 209).

In 1986, the Commission initiated a second infringement procedure against France because France had failed to eliminate protective measures (Case 312/86). The Roudy Act stipulated that protective measures in existing collective agreements could continue to be applied. It did require that the employers and trade unions gradually bring these measures into accordance with the principle of equal treatment, but there was no time limit. France defended itself with the argument that the trade unions had asked for these provisions in the interest of women to allow them to combine work and family life, and that the provisions contributed to an increasing birth rate (EC Reports 1988, 06315ff.). The Court rejected both of these arguments because the “special measures for women” covered an excessively broad area, and it was unacceptable that, years after the deadline stipulated in the directive, there was still no time limit to eliminate protective measures. Between 1984 and 1987, the provisions in 16 collective agreements were amended, which was a “extremely modest” number compared to the 3450 collective agreements that were concluded in 1983 alone (EC Reports 1988, 06315ff.). Due to the Court ruling, France passed a law requiring the trade unions and employers to adapt collective agreements within 2 years (Journal Officiel, 14.07.1989, p. 8872). However, as the law contained no sanction, implementation was purely rhetorical, and employers and trade unions could continue to resist implementation. The “pincers” of simultaneous national

\textsuperscript{16} Burden of Proof Directive 97/80.
and supranational pressure were not effective in this case, and implementation continued to be postponed. Only when the national courts were presented with complaints and started asking preliminary rulings, French behaviour changed (see next section).

**Germany: the Court and the Constitution**

The German government had always maintained that it had satisfied the requirements of Article 141 and the directives due to the provisions in Article 3 of the Constitution. However, in 1979, the Commission sent the German government two warnings, arguing that the government was unable to declare discriminatory provisions in collective agreements to be invalid and did not have “effective means” to assure compliance with the equal pay and equal treatment directives. When there was no response, the Commission sent Germany a “reazoned opinion” ([Europe](Europe 23.2.80)) – and the government promised the Commission it would modify its legislation. The decision to modify its legislation was due to the double pressure. The criticism of the Commission made it plausible that the Court had sufficient cause to condemn Germany if it did not take action. Moreover, in [Defrenne II](Defrenne II), Advocate General Trabucchi had asserted that the “prohibition of discrimination based on sex” must be considered as a fundamental Community right ([Jur.](Jur. 1976, 491)). A condemnation for lack of respect for the fundamental rights of its citizens would be especially painful for Germany, since it had always claimed that fundamental rights were better protected in Germany than at the European level (cf. [Weiler](Weiler 1999, 108-10 concerning Case 44/79, [Hauer](Hauer)).

The Commission’s warnings coincided with a great deal of pressure at the national level. Equal pay was the central focus of a series of court cases on behalf of the “Heinze women,” 29 women employed at the Heinze photographic laboratory who had become the national symbol of the difficult struggle of women for equal pay (cf. [Doormann](Doormann 1983, 264)). Moreover, in October 1980, parliamentary elections would be held. The government (SPD-FDP) submitted a bill to parliament to take the wind out of the sails of women in the SPD, the DGB, and the women’s movement, and to avoid condemnation by the Court. Under pressure from employers, and with parliamentary support from the CDU/CSU, the coalition partner FDP weakened the bill by placing limits on the reversal of the burden of proof, the sanctions in case of violation, and damage awards. The resulting act, titled “EC Labour Law Adaptation Act – Act Concerning the Equal Treatment of Men and Women in the Workplace” of 13 August 1980 was, as its name indicates, intended only to satisfy the obligations of the European directives and did not aim to develop new policy for women. However, it did strengthen the rights of women as it forbade lower pay for equal work or work of equal value (§612, BGB) and direct and indirect discrimination regarding access to the labour process, training, promotion, firing, and the terms and conditions of employment (§611a, BGB). Moreover, if an employee could make a plausible case that there was discrimination regarding sex, the employer had to prove that this was not the case.

On 15 January 1982, the Commission sent the German government a new warning, because the act did not apply to the public sector and the self-employed, and the exceptions to equal treatment were formulated in general terms. Following a “futile correspondence” with the German government, the Commission brought Germany before the Court. Advocate General Mancini concluded in a “closely argued opinion” ([Prechal and Burrows](Prechal and Burrows 1990, 97)) that Article 3 of the German Constitution was insufficiently clear to guarantee equal treatment for civil servants and the self-employed ([Jur.](Jur. 1985, 1468)). However, in its ruling of 21 May 1985, the Court rejected Mancini’s argument. The German system appeared to work in practice because the Commission
could not show that it led to discrimination (Case 248/83). The Commission had underestimated the strength of the German system of constitutional review, and the Court did not dare to compete directly with the German Constitutional Court. The Court did condemn Germany for negligence regarding the point that the civil code did not specify which professions were excluded from equal treatment (Jur. 1985, 1487). In November 1987, Germany complied and sent the Commission the requested list of professions for which sex was the determining factor (cf. Bertelsmann and Rust 1995, 134).

Further progress resulted from preliminary rulings. The problem of Leichtlohnarbeit (the underpayment of physically “light” work) could finally be settled due to the case of Gisela Rummler (Case 237/85, Rummler v. Dato-Druck GmbH). The Court ruled that work could not be defined as heavy or light in criteria that were based on the physical efforts that a specific sex can exert. As a result, the German Federal Labour Court ruled that classifying jobs based on physical strength was no longer permissible and that all forms of effort must be included. Due to another preliminary decision, the “practical importance” of the EC Labour Law Adaptation Act increased significantly. German legislation required an employer who had been convicted of discriminating a job applicant to only reimburse the expenses of the applicant, which usually amounted to 2.31 DM for the postage stamp and photocopying the letter of application. In Von Colson and Kamann (Case 14/83) and a similar case (Case 79/83, Harz v. Deutsche Tradax), the Court ruled that a damage reimbursement should have an “avertive” effect. As a result, German Labour Courts could award damages amounting to six months of wages. Von Colson and Kamann were each awarded 21,000 DM instead of 2.31 DM.

The Netherlands: incremental implementation

The Dutch government was very reluctant to improve the legal position of women due to increasing unemployment and the increasing number of applications for social benefits combined with its attempts to reduce government spending (cf. Warner 1984, 155). Reluctantly, in steps, the Dutch government modified existing legislation. It was pressured by warnings and reasoned opinions of the Commission, pressure by the women’s movement and the trade unions, and a decision from the Civil Service Tribunal of Rotterdam on 18 February 1980, in which the Tribunal, due to a lack of Dutch equal treatment legislation, accepted the direct effect of the second directive for civil servants. The Equal Opportunities Commission noted that “the intermittent adaptation of Dutch legislation to the EC directives for equal pay and equal treatment has led to a patchwork of provisions in which holes can clearly be seen” (Emancipatiekommissie 1981). The Commission began a new infringement procedure. It was only in August 1988 that the government offered the parliament its definitive Act of Amendment. Minister of Social Affairs Jan de Koning expressed his hope that this Act would finally allow the Netherlands to satisfy the requirements of the first two directives (Handelingen 1987-88, 19908, 5436). The parliament approved the Act of Amendment in 1989.

A preliminary decision that had major consequences for the Dutch government was Liefting (Case 23/83). The Court ascertained that pension contributions were indeed considered to be wages and that Dutch regulation was not in accordance with Article 141. The Dutch court accepted the decision of the European Court. This caused a great

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17 Regarding the competitive battle between the German Federal Constitutional Court and the European Court, see the court cases Internationale Handelsgesellschaft 11/70, Solange-I (1974), Solange-II (1976), Simmenthal II (106/77).
deal of commotion in the government, which feared thousands of claims from female civil servants and estimated that it would have to pay out 100 million guilders (cf. Van Bergen 1984, 37). The government mailed a circular to the relevant government services stating that they were not required to agree to such requests since the judgement of the Court was only binding for the nine women who had submitted a complaint (cf. Prechal and Burrows 1990, 238). However, the court ruling was given a great deal of publicity and led to new legal proceedings and questions in parliament. The civil servants union insisted on a general solution. Because the third EC directive also required changes in the retirement and unemployment premiums, the government decided at this point to abolish the discriminatory provision. It was this third directive which would bring the Dutch government into problems. The Commission anticipated that there would be problems with social security systems that were based on the concept of the husband as head of the family and the wife as a dependent partner, such as the system in the Netherlands (Europe 5.1.80). In the Netherlands, disabled men had a right to disability benefits regardless of whether or not they previously had a source of income, while disabled married women could only qualify for benefits if they had previously earned their own income. A married woman did not have a right to unemployment benefits unless she could show that she was the breadwinner, while married men were automatically treated as the breadwinner. A married couple received pension benefits only when the husband turned 65, even if his wife was older than he was.

The Dutch government (CDA/VVD) combined the obligation to implement the third directive with its struggle to reduce collective expenditures. It amended the regulations by assuming for every type of benefit that there was a family income, which could be supplemented with extra payments to the dependent spouse. It did not appear to realize that a provision formulated in a sex-neutral fashion could lead to indirect discrimination if in practice it primarily affected employees of a specific sex (cf. Commission 1983, COM(83)793, 7).

Preliminary decisions would play a crucial role in the conversion of the third directive into Dutch legislation. In Teuling (Case 30/85), the Supplementary Benefits Act from 1982 and the amended General Disability Act came under fire. As a result of the Court ruling, the Central Appeals Tribunal found in favour of the complainant. In a memorandum to parliament, “the tone of which is mild panic,” State Secretary De Graaf of Social Affairs calculated the ruling could cost the state 7 billion guilders (De Volkskrant 23.2.88 and 24.2.88). Several women’s organizations joined together to form the Equal Rights Now Committee. The Committee placed advertisements in local papers and women’s magazines, which called for married women who had once been denied benefits to apply again for benefits (De Volkskrant 19.4.88).

The case of the Netherlands v. FNV (Case 71/85) concerned the Earnings-related Unemployment Assistance Act (WWV). Married women only had a right to unemployment benefits if they were the breadwinner. The government announced that it wanted to submit a new bill, and instructed the agencies to continue to apply the WWV, including the discriminatory breadwinner provision, “pending the Act of Amendment” (Prechal and Burrows 1990, 247). As a result, the FNV (trade union) brought a case against the state. On 17 January 1985, the court ruled that the government had not fulfilled its obligation because it had not yet revoked the WWV, even though it violated the equal treatment principle. The state appealed the decision. The Court of Appeals ruled that the WWV, due to a lack of relevant Dutch legislation, could only be tested against the principle of equal treatment if the third directive had a direct effect. The Dutch government argued that the directive did not have a direct effect because it did
not prescribe an exact method for the way in which social security must be adapted. Advocate General Mancini delicately reminded the government that it confused the “discretion” that a Member State has when converting a directive into national legislation with the issue of direct effect. The Court followed Mancini and confirmed that the directive had a direct effect beginning on 23 December 1984. The rights of women who had become unemployed before this date were addressed in Dik et al. (Case 80/87). The Court ruled that married women who became unemployed before 23 December 1984 had the same benefit rights as men who had become unemployed before this date. In response to this ruling, State Secretary De Graaf sent a letter to the relevant agencies in which he limited the retroactive effect of equal treatment for married women (cf. Prechal and Burrows 1990, 251). However, the court in Arnhem ruled on 20 July 1988, in accordance with the ruling of the Court, that the female complainant had a right to WWV benefits under the same conditions as unemployed male workers, and added that “the viewpoint of the State Secretary must be considered as incorrect” (cf. Prechal and Burrows 1990, 252). The government appealed the decision, but the appeal was rejected. Moreover, on 3 November 1988, the Commission sent a warning to the Dutch government concerning implementation of the third directive and the Dik ruling. The Dutch government reluctantly complied.

To summarize, the pressure that resulted from infringement procedures was amplified by the pressure at the national level in the parliament, the pressure applied by the women’s movement and the trade unions, and the court cases brought by female employees. Preliminary decisions sometimes improved the actual scope of the directives, but they sometimes also made it more attractive for governments to finally amend their legislation to avoid being confronted with large numbers of court cases. Double pressure resulted in the Member States implementing the three equality directives against their initial intentions to do so. There was a single case where a Member State only rhetorically implemented a ruling of the Court; this concerned France on the elimination of protective measures. Both the French government, employers and trade unions did not want the directive to be implemented, and no cases were presented to the French courts on this point. The “pincers” of simultaneous national and supranational pressure could therefore not operate in this case.

The Court affirmed the direct effect of provisions in the directives (cf. Defrenne II, FNV). As a result, disadvantaged parties could take their cases to the national courts on the basis of the directive, even if a government had not yet converted this directive into national legislation. Secondly, the Court rulings increased the costs of equal rights policy for the state (cf. Teuling, FNV, Dik) or the employer (cf. Von Colson, Harz). The rulings of the Court were a breakthrough in the political struggles concerning “Leichtlohnarbeit” (cf. Rummler), and indirect discrimination (cf. Liefting, Teuling, FNV, Dik). Due to these experiences, the Member States were more conscious of the costs and the scope of equal rights policy than they were in the mid-1970s. As a result, no strong, binding directives on gender equality were approved in the 1980s.

7. The 1990s – the Court rules?
During the last decade, gender equality policies have met with contradictory developments. On the one hand, the Treaty of Maastricht (1992) and the Treaty of Amsterdam (1997) introduced new procedures, making it harder for a single Member
State to block progress in the field of gender equality.\textsuperscript{18} Moreover, the Commission introduced mainstreaming and benchmarking as new instruments. On the other hand, Member States have become reluctant to approve new binding instruments that include norms above the national level, as they discovered that the Commission and the Court not only hold them to their obligations but also extend the scope of these obligations. In this section I focus on three singularly problematic cases for the three Member States studied, resulting from Court rulings between 1990 and 2001.

**France: nightwork as a political nightmare**

As I argued before, in 1989 France only rhetorically implemented the Court ruling on the elimination of protective measures. The French Labour Code continued to violate the directive on equal treatment between men and women, especially as it continued to prohibit nightwork for women. When a French employer, Alfred Stoeckel, was charged with violating the Labour Code because he employed women on night shifts, he defended himself with the argument that article L-213-1 of the Labour Code contravened the Directive. In the first preliminary ruling ever on a French gender equality case, the Court confirmed the direct effect of the directive and ruled that the Labour Code was in violation of the equal treatment directive (C-345/89). Hence, in 1992, the socialist Minister of Labour, Martine Aubry, proposed a law to establish similar conditions for women and men, but the proposal was rejected. The trade unions were opposed to permitting night work for women, the employers were opposed to offer financial compensation in the case of night work for both sexes (cf. Reuter and Mazur 2003, 64).

In March 1994, the Commission started a new infringement procedure against France. France argued that the article was no longer effective due to the direct effect of the 1976 Directive so there was no need to repeal it. The Court did not accept the argument, because ‘the incompatibility of national legislation with Community provisions (…) can be finally remedied only by means of national provisions of a binding nature’. It ruled that France had failed to fulfil its obligations (Case 197/96; ECR, 1997, I-01489). The Commission used the prerogatives she obtained in ‘Maastricht’ and on 21 April 1999, she started a second infringement procedure (Case 224/99), asking the Court to impose a fine of 142,425 Euros per day for non-implementation of the earlier judgement. This time the French government did not wait for the Court’s ruling. In Spring 2000 Minister Aubry (again) proposed a law to implement the directive. Trade unions and women’s organizations were split on the issue (was lifting the ban progressive or regressive?), employers emphasized economic arguments in favour of lifting the ban (Reuter and Mazur 2003, 69-75). After a “lively” parliamentary debate, in May 2001 the ban on night work for women was repealed (Loi 2001-397, J.O. 10.05.2001), and Case 224/99 was discreetly removed from the Court’s register. Unlike the 1980s, double judicial pressure made the pincers work. After the Stoeckel ruling, the government had to admit that the French ban on night work had become useless. To make France change national law because of supranational pressure, the Commission and the Court had to prove their determination.

\textsuperscript{18} European organizations of trade unions and employers may conclude agreements, which are then approved by the Council of Ministers (Art. 139, ex 118b). The role of the European Parliament in decisionmaking in this field has increased (codecision) and in the Council of Ministers unanimity voting has been replaced qualified majority voting.
Germany: women in uniform
In December 1975, Germany approved the equal treatment directive in the conviction that it had succeeded in removing the costly aspects such as social security and the mandatory establishment of an equal opportunities commission, and that it did not have to adapt its own legislation. In 1980, Germany adapted its legislation under pressure by the Commission. In 2000, Germany even had to adapt the constitution. The Administrative Court in Hanover asked the Court for a preliminary ruling on the interpretation of the equal treatment directive. Tanja Kreil, who had been trained in electronics, applied for work in the maintenance (weapon electronics) of the Bundeswehr. Her application was rejected because the German Basic Law excludes women from armed service. Women may enlist only in the medical and the military-music services. The German government argued that the directive did not concern matters of defence, ‘which remain within the Member States’ sphere of sovereignty’. In January 2000, the Court, for this important occasion composed of nine judges, ruled that the complaint of Tanja Kreil was valid (Kreil v. Bundesrepublik Deutschland, Case 285/98). The directive precluded national provisions which impose such a general exclusion of women from all jobs in the military involving the use of arms was not permissible based on the directive. On 1 December 2000, the Bundestag passed an amendment to the German Constitution (Article 12a§4) with the necessary two-thirds majority in order to implement the Kreil ruling. Rechtsstaat Germany could not ignore a Court ruling.

The Netherlands: a cheap treaty reform
In the margins of the negotiations about the ‘Maastricht Treaty reform’, the Netherlands, as Chair of the EC, took the initiative to limit the effect of Article 141. The reason for this was the preliminary ruling of the Court in a British case, Barber v. Guardian Royal Exchange (Case 262/88). Douglas Barber had complained that he was the victim of discrimination because the early retirement scheme gave women the right to pension benefits beginning when they were 50, but men only when they were 55. At the time he was fired, Barber was 52 years old. The British Court asked whether pensions must be considered as wages as defined in Article 119; the Court answered on 17 May 1990 that this was indeed the case. Barber himself could no longer enjoy his victory, since he died during the procedure, but based on the decision, some male employees, and especially innumerable female employees, could qualify for pension benefits retroactively. British industry calculated that this court ruling would cost 40 billion pounds, West Germany figured the cost at 35 billion DM, and the Dutch retirement funds estimated the costs resulting from the ruling at 70 to 120 billion guilders (NRC-Handelsblad, 18.4.91). The pension funds exerted national and supranational pressure to change the situation.

The Netherlands was extremely motivated to intervene. In October 1988, State Secretary De Graaf had submitted a bill to implement equal treatment in pension regulations beginning on 1 January 1993, so that the Netherlands would satisfy the provisions of the EC directive from 1986 concerning occupational social security schemes. During the debate in the standing parliamentary commission, members of parliament had already warned that pension funds would be confronted with “unexpected demands for pension benefits” if women were able to appeal to the direct effect of Article 141 (Handelingen 1988-89, 20890, no. 4, 10). When the European Court announced its decision in the Barber case, the Dutch parliament suspended the debate on the bill (Handelingen 1991-92, 22300, XV, no. 2). The bill was in conflict with Barber, because, on the basis of the ruling, women appeared to be able to claim
equal treatment in pension schemes with retroactive effect until 8 April 1976 (the *Defrenne II* ruling), while the Dutch government wanted to implement equal treatment as of 1 January 1993, 16 years later. In view of the magnitude of the discrimination against women in pension schemes in the Netherlands, the right to equal treatment from 1976 would have important financial consequences. The pension funds for the ceramics industry and the fisheries excluded women by definition. Three-fourths of the investigated schemes contained indirect discriminatory provisions, such as a high-income threshold and the exclusion of part-timers (Equal Opportunities Council 1991, 9-10).

As a result of the commotion in the Member States, in April 1991 the Commission established a workgroup of judicial experts to study the consequences of the Barber ruling. The Netherlands believed it was too risky to wait for the results of the study. Neither did it want to wait for more preliminary decisions to obtain clarity about the retroactive effect of the judgement. It decided to use its position as Chair to put the issue on the agenda of the IGC, and, in the margin of the treaty reform, to alter Article 141. In its Draft Treaty towards European Union, the Netherlands stated: “The question arises whether this judgement will lead the Conference to make amendments to the wording of Article 119. The Presidency reserves to itself the possibility of drawing up proposals on this matter” (Europe Documents No. 1733/1734, 3.10.91, 5). On 13 October, the Ministers of Social Affairs held a “very informal” discussion about “Barber” (*Europe* 15.10.91). As a result, Dutch Minister of Social Affairs Bert de Vries submitted the proposal to change Article 141 by excluding “schemes with an accretive character” such as pension schemes, from equal treatment. In this way he hoped to keep the effect of Article 141 “within reasonable financial limits.” Women’s organizations and women members of the Dutch parliament protested against De Vries’ proposal because it meant that women would continue to be given unequal pension benefits for a long time. They called it “simply scandalous” that the minister wanted to implement this far-reaching treaty change “secretly” without having consulted parliament (*NRC-Handelsblad*, 4.12.91).

In its decision, the Court had already taken account of the “serious financial consequences” that the ruling could cause. Therefore, as in *Defrenne II*, it had limited the retroactive effect of “entitlement to a pension” to the date of the ruling: 17 May 1990 (Jur. 1990, 1889f.f., §45). However, this formulation left various interpretations open. Did it concern all pension payments after 17 May 1990, only the pensions that were paid beginning on 17 May 1990, only the pensions of employees whose contract ended after this date, or only pension entitlements that were accrued after 17 May 1990? De Vries chose the latter, most restrictive, interpretation. In Maastricht, the Member States agreed to add the following protocol to the Treaty: “For the purposes of Article 119 of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990”. This construction showed a great deal of inventiveness, but it was not particularly elegant. The provision that pension rights were not considered as wages until 17 May 1990, but were considered to be wages afterwards, goes against every form of logic. The Netherlands maintained the “honourable” tradition that it had established in Rome in 1957, when it made its declaration concerning the implementation of Article 141: if the costs of equal rights for women threatened to become too high, every judicial trick in the book to avoid implementation was permissible. For the Court, it was the first boomerang experience, where a ruling extending the scope of a treaty article resulted in the opposite: the restriction of the scope.
8. Conclusion
From the present study, it results that supranational institutions can have a strong impact on the implementation of agreements.

In the first place, Member States indeed attach much value to their credibility. They attempt to “immunize” their credibility: they deny non-compliance and avoid condemnation by the Commission and the Court by throwing doubt upon the data in reports and postponing a final assessment. Nevertheless, in the end this tactic was not always successful. A threatened or actual condemnation by the Court was so damaging to their reputation that it caused them to modify their behaviour, especially when their prestige was at stake as ‘progressive government’ (the Netherlands, 1973) or ‘guardian of fundamental rights’ (Germany, 1980), or ‘role model for social policy’ (France).

In the second place, there is an increased probability that a state will implement joint policy to the extent that non-implementation entails higher political, economic, and ideological costs. In the 1960s, costs of non-compliance were low as opposed to high costs of implementation. During the 1970s, the economic and ideological costs of implementation of equal pay declined. However, the costs of non-compliance had risen because domestic protests against non-compliance had increased and the Commission began an infringement procedure against the most negligent Member State, the Netherlands. Only in Germany the cost-benefit balance for implementation remained negative. During the 1980s, the costs of non-compliance increased so strongly due to the combination of preliminary decisions and infringement procedures that the Member States adapted their legislation despite the high costs of compliance.

Third, I stated that
- In a state with a high polarity, the government will successfully maintain its own preference despite the political costs of resistance to its decision, except when it is simultaneously confronted to supranational pressure;
- In a state with a low polarity, the government will be constrained to follow the preference of interest groups despite the economic or ideological costs attached to it;
- In a state with an intermediate polarity, if the government and societal actors disagree regarding implementation or non-implementation, the government will implement only when there is simultaneous supranational pressure.

![Fig. 5 Implementation of joint policy](image)

<table>
<thead>
<tr>
<th>Internal polarity ↓</th>
<th>Government opposed, societal actors opposed</th>
<th>Government opposed, societal actors in favour</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No supranational pressure</td>
<td>Supranational pressure</td>
</tr>
<tr>
<td>Low</td>
<td>Germany-1960s</td>
<td>Germany-1970s</td>
</tr>
</tbody>
</table>

Shaded fields: state could be theoretically expected to implement the directives

There are four cases where the government opposed implementation and the majority of social actors favoured implementation: the Netherlands after 1965, the Netherlands in the 1970s, and Germany and the Netherlands in the 1980s. When did national pressure lead to implementation? Only when the supranational institutions also exerted “active” pressure, in the sense that this resulted in an infringement procedure. Placed in the pincers of national social pressure and supranational pressure, the governments of the states implemented the policies as expected. The assumption that governments only
implement costly joint policy if they are placed in the pincers therefore turns out to be correct. This explains the difference in the 1980s between France and the other two Member States, and the shift of France in 1991. In France, until 1991 the courts did not request preliminary decisions in the field of gender equality. The pincers are formed by two instruments that amplify each other’s effect: the infringement procedure and the preliminary decision. A threatened or actual condemnation by the Court in the context of an infringement procedure leads to implementation only if there are cases before the national courts and, at the same time, they request the Court for a preliminary decision. When the Court confirms that a Community legal instrument has a direct effect, this enables citizens and companies to exercise their ‘European rights’. This increases the costs to the government of postponing implementation due to an infringement ruling.

In addition, there were cases where both the government and social groups resisted implementation. In these cases, implementation did not take place regardless of the polarity and the actions of supranational institutions.

Finally, strong enforcement measures seem to produce a boomerang effect. At the beginning of the 1980s, when the rulings of national and supranational courts resulted in the Member States being compelled to adapt their legislation, the Member States became much more reluctant about new policy. They did approve non-binding decisions such as recommendations and resolutions, but no longer approved decisions from which citizens or companies could derive rights by means of the direct effect of European law or with which the Court could demand compliance by means of an infringement procedure. The lessons they had learned with respect to the effectiveness of the pincers are shown in their quick response to the Barber ruling.

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### Appendix

#### 1960s: Expected costs of the implementation of Article 141

<table>
<thead>
<tr>
<th>Costs</th>
<th>France</th>
<th>West Germany</th>
<th>The Netherlands</th>
</tr>
</thead>
<tbody>
<tr>
<td>1a. Political costs: resistance to implementation equal pay provision</td>
<td>low → weak resistance: employers</td>
<td>high → strong, effective resistance: employers (BDA), liberal party and Christian Democrats</td>
<td>high → strong, effective resistance: employers, liberal party and Christian Democrats</td>
</tr>
<tr>
<td>1b. Political benefits: pressure in favour of implementation equal pay provision</td>
<td>low → weak (increasing) pressure: trade unions, women</td>
<td>low → weak (increasing) pressure: trade unions, SPD (opposition)</td>
<td>low → weak (increasing) pressure: women in trade unions and the PvdA</td>
</tr>
<tr>
<td>1c. Judicial pressure: number of court cases, preliminary rulings, infringement procedures</td>
<td>no pressure (0, 0, 0)</td>
<td>limited pressure (some cases, 0, 0)</td>
<td>no pressure (0, 0, 0)</td>
</tr>
<tr>
<td>2. Economic costs: men’s and women’s pay</td>
<td>low: difference of 14%</td>
<td>high: difference of 37%</td>
<td>high difference of 42%</td>
</tr>
<tr>
<td>3. Ideological costs: little state intervention, incompatible with policy; Ideological benefits: compatible with government programme</td>
<td>benefits &gt; costs: - statism - compatible with statutory equal rights</td>
<td>costs &gt; benefits: - corporatism - incompatible with tariff autonomy, objective differences philosophy</td>
<td>costs ≥ benefits: - statism - incompatible with family wage, need philosophy</td>
</tr>
</tbody>
</table>

### 1970s: Expected costs and benefits of implementation equal pay

<table>
<thead>
<tr>
<th>Costs</th>
<th>France</th>
<th>West Germany</th>
<th>The Netherlands</th>
</tr>
</thead>
<tbody>
<tr>
<td>1a. Political costs: resistance to implementation equal pay provision</td>
<td>low → weak resistance: Gaullist party</td>
<td>high → strong resistance: employers, governing parties, CDU/CSU</td>
<td>low → rather weak resistance: employers, small Christian parties</td>
</tr>
<tr>
<td>1b. Political benefits: pressure in favour of implementation equal pay provision</td>
<td>high → strong pressure: PS, PCF, Chaban, trade unions, MLF</td>
<td>medium → pressure by ASF (women SPD), division Policies for Women</td>
<td>high → strong pressure: MVM, Dolle Mina, women in parliament and in trade unions</td>
</tr>
<tr>
<td>1c. Judicial pressure: number of court cases, preliminary rulings, infringement procedures</td>
<td>(0, 0, 0)</td>
<td>(some cases, 0, 0)</td>
<td>(0, 0, 1)</td>
</tr>
<tr>
<td>2. Economic costs: hourly wages w/m (1972)*</td>
<td>difference 21.3 %</td>
<td>difference 30.3 %</td>
<td>difference 35.4 %</td>
</tr>
<tr>
<td>3. Ideological costs = little state intervention, incompatible with policy; Ideological benefits = compatible with government programme</td>
<td>benefits &gt; costs: - direct state intervention - compatible with ‘new society’ (Chaban), vanguard role</td>
<td>costs &gt; benefits: - corporatism - incompatible with wage autonomy, free choice</td>
<td>benefits &gt; costs: - corporatism - compatible with redistribution of opportunities and income</td>
</tr>
</tbody>
</table>

### Cost/benefit ratio of implementation of equal pay provision

- benefits > costs
- costs > benefits
- costs > benefits

* Hourly wages in industry (source: Saunders and Marsden 1981, 221)