

"Post-Accession Compliance in Central and Eastern Europe:
Transposition and Application
after the Age of Carrots and Sticks"

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Abstract

Now that ten CEECs have become EU members, it is high time to study if the "external incentives model" (Sedelmeier, et al.) in the field of compliance performance is indeed flawed after EU adhesion. A prolongation of the membership queue is no longer a threat to those who have become "member states" instead of pure "nation states" (Sbragia). In addition, to be expelled because of a serious and persistent breach of EU principles, such as e.g. the rule of law, is to date not a realistic sanction for implementation shortcomings. Does this mean that the CEECs will fall behind their achievements during the pre-accession phase, or that they will not progress any further on the path towards compliance with EU laws and standards?

With the examples of the Czech Republic and Hungary at hand, this paper studies two interesting examples of compliance (or non-compliance) in the field of broader social policy: working time and equal treatment in the workplace. In both cases, there are binding EU Directives that had to be implemented before accession. Interestingly enough, it turns out that refinements in transposition were accomplished even after EU membership had become a fact. Hence, it seems that transposition of EU law can work well even without the all-determining incentive of membership.

At the same time, however, it seems that the proper application of the relevant national laws is seriously hampered in day-to-day practice. Both the lack of information and the lack of relevant traditions could play a role here, in addition to court systems that make complaints anything but a realistic weapon in the hands of those who see their rights violated.

Introduction

In May 2004, ten new member states joined the European Union (EU): eight countries from Central and Eastern Europe (CEECs), Malta and Cyprus. In the enlarged union of 25 member states, the issue of compliance with EU law has become ever more pressing. There is no use in adopting intricate rules for a unified market, if EU laws remain dead letter. Therefore, the European Commission has made compliance with EU policies a priority in recent official statements such as, for example, the Governance White Book (2001).

At the same time, we still know much too little about the real impact of enlargement (Schimmelfennig and Sedelmeier 2005b). This is true for all layers of the European multi-level system, including the domestic realm. What makes things even worse is that where there are at all findings stemming from empirical studies, their comparability is seriously hampered by differences regarding research foci and regarding theoretical approaches (ibid.: 24). Therefore, a systematic comparison of two countries and two policy areas seemed fruitful to us. This paper will hence present findings on the Czech Republic and on Hungary, involving EU law in the fields of equal treatment in the workplace and of working time, i.e. Directives 76/207/EEC as amended by 2002/73/EC, 2000/78/EC and 2003/88/EC.¹

Leading authors in the field of CEEC enlargement studies have applied an “external incentives model” in the field of implementation performance. In their study on compliance with EU law in Central and Eastern Europe during the pre-accession phase, Schimmelfennig and Sedelmeier found that as far as rule adoption happened successfully, it had been driven mainly by external incentives. Therefore, they expected that “the absence of these incentives should significantly slow down or even halt the implementation process” (Schimmelfennig and Sedelmeier 2005a: 226; see also Schimmelfennig *et al.* 2005: 29; 2005b: 28; see also Linden 2002: 371). The finding that conditionality as an external incentive was the key mechanism that led to the adoption of EU rules by the candidates indeed makes the question of post-accession compliance even more salient (e.g. Schimmelfennig and Sedelmeier 2004: 677; 2005a: 226; Dimitrova and Streunenberg 2004: 180). After all, the “logic of

¹ This paper is part of a larger research project on the transposition and application of EU Directives in new member states funded by the Austrian Ministry of Science under the TRAFO programme for transdisciplinary research (for details see <http://www.ihs.ac.at/index.php3?id=1144>). Thanks to the Robert Schuman Centre for Advanced Studies at the European University Institute in Florence (and to its Director Helen Wallace) for hosting Gerda Falkner while she was writing her part of this paper.

control” which prevailed during the negotiation phase has now come to an end, and different dynamics are to be expected (Maniokas 2002).

This raises the following *questions for our country case studies*:

- First, have transposition activities stopped more or less by the time the accession negotiations were closed (December 2002)?
- Second, how good or bad is compliance with EU rules in the application stage (mainly look at application after the accession negotiations) after the above-mentioned date? This is of relevance because good transposition may be counteracted by flawed application in practice.

For sure, different theoretical perspectives (see e.g. Hall and Taylor 1996; Thelen and Steinmo 1992) suggest various possible answers to these questions. From a *rational choice* perspective that focuses on individual member states self interests in a narrow sense, it seems plausible to expect as much free riding as the EU’s political system allows. In the extreme, countries might hence prefer non-compliance as long as there are no fines enacted that might actually make breaking EU standards more costly (in terms of both money and prestige) than obeying the rules. For the pre-accession phase, authors did actually find that prospects of material benefits were decisive in the compliance performance to-be member states (Schimmelfennig *et al.* 2003: 514; Sedelmeier 2006 forthcoming).

From a more *sociological institutionalist* viewpoint, the new members might feel a desire to conform to the agreed standards and to belong to the community of advanced social and economic systems. Their concerns would then be appropriateness of implementation behaviour rather than own interests in determining policy outcomes (for the ‘logic of appropriateness’, see most importantly March and Olsen 1989; 1998). This argument is based on the assumption that respect for the rule of law and hence, compliance with EU law, is a norm that is more or less accepted in the “old” member states and that may disseminate throughout the EU25. It should be mentioned already here that this is certainly not the case without restrictions, for there are patterns of neglect to be found even among the EU15 and in some other cases, considerations of domestic politics often prevail over dutiful implementation (Falkner *et al.* 2005; Hartlapp and Leiber 2006). Nonetheless, a rule-following mode of adaptation may be relevant and should be taken into consideration (see also Olsen 2002: 927).

Historical institutionalism, in turn, would suggest that it is the domestic institutional setting and long-lasting heritages which decide if there is adaptation to EU law or not (see e.g. Olsen 2002: 938). The goodness of fit of European norms and national traditions would then be a major aspect determining implementation success.

Additionally, the quality of court systems and labour inspectorates could be a decisive factor among sources of non-compliance, for even in the absence of any will to break EU law, compliance could be hampered by such structural features that are almost impossible to be overcome on a short-term basis.

Compared to political practice, for sure, these political science lenses are all selective in their interpretation of politics and actor orientations. Any real life experience may hence combine these aspects and might therefore need a less than (or rather more than?) parsimonious uni-theoretical explanation. It is still a good disciplining exercise to take each of these perspectives into due consideration when looking at cases and countries. If the results of empirical enquiry should raise findings that are not comprehensible from any uni-theoretical viewpoint, it could still be the case that the weight of the various arguments or the patterns of combinations are differential.

Country study 1: Czech Republic

Working time

Contrary to the two equality Directives, the Working Time Directive was transposed at once ('European Amendment', No. 155/2000 Coll.). The required provisions were included in the Labour Code and can now be found in Sections 83 et seqq. (Chapter III – Working Time and Rest Periods). The Working Time Directive required substantial changes in the working time regime of the Czech Republic. The most important changes were in the formal structure and overall systematics. Breaks used to be included in the working time, therefore weekly working has appeared longer than in comparable countries (42,5 including breaks and effectively 40 hours per week). This particularity had to be abolished and the legal framework was harmonised with European requirements. Apart from two specific topics, Act No. 155/2000 transposed the Directive correctly. Therefore, there were not any significant changes in the working time regime after that date.

There are two topics that are still a matter of conflict and discussion. First, the government was not willing to consider the ECJ *Simap*² and *Jaeger*³ jurisprudence when transposing the Working Time Directive. The basic message of these judgements is that time spent on-call at the workplace must be regarded as working time. The current definition of working time in the Czech law reads: "*Working time*

² Judgement of the Court of 3 October 2000, Case C-303/98, *Simap v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana*.

³ Judgement of the Court of 9 September 2003, Case C-151/02, *Landeshauptstadt Kiel v. Norbert Jaeger*.

shall mean any period in which an employee is engaged in work for his employer.” (Section 83.1, Labour Code) The interpretation of this definition does not include on-call and stand-by times. However, it has to be mentioned that ECJ jurisprudence was not published before the ‘Harmonisation Amendment’ was drafted and later discussed in parliament. Therefore, the Czech government did not have the chance at that time to consider these judgements.

Currently, there are important developments on the European level concerning an amendment of the Working Time Directive, where the topic of on-call plays a major role (Röpke 2005). Therefore, Czech experts regard it as a ‘European problem’ and not as a Czech one. The government supports a European definition that does not determine on-call and stand-by times solely as working time. If another solution was chosen at the European level, the opt-out option (Article 22) possibly will be transposed into Czech legislation. Initially this provision – that runs counter to the whole idea of the Directive – was created on the demand of the UK government to retain a deregulatory working time regime. In the beginning, the UK was the only Member State to apply this provision (Kenner 2004). Apparently it is becoming more and more relevant for other Member States – like the Czech Republic – to sidestep the impact of the ECJ’s decisions.

The second ‘legal problem’ is the fact that under the current Czech law every single employment contract is regarded separately. Section 69 Labour Code stipulates: *“If an employee has agreed to more than one employment relationship, the rights and duties (obligations) ensuing from each shall be considered independently...”* The current interpretation of this provision is that an employee can have multiple employment contracts. Consequently, there is no legal hurdle for an employee to work longer than 40 (or the maximum of 48 of the Directive) hours a week. Some Member States allow such an addition of employment contracts, while it is prohibited in others. Again, Czech experts see it as a ‘European problem’ that does not affect them directly.

As in the field of equality in the workplace, there are serious shortcomings in application and enforcement. Overtime work seems to be a serious problem. In many sectors overtime is ‘normal’. It should be compensated with time off or extra salary. However, there are many cases of malpractice and employers do not award extra free time or extra payment for overtime. The average working time in the Czech Republic is traditionally high and is considerably longer than in the old Member States (Government of the Czech Republic 2005: 9).

In the field of working time, Czech employers are a little better informed about their rights and entitlements, since they have dealing with that topic for some time.

Working time affairs are more in the focus of the trade unions' work than equality in the workplace. Due to the declining membership, the trade union's influence is diminished and often they cannot provide real support for the enforcement of rights and entitlements (Hála and Kroupa 2005).

Another serious problem is the recording of working time. Basically, the Directive itself does not contain an obligation to record working time. Nevertheless, Czech law contains a general obligation for employers "*to keep records of individual employees' working time, overtime work, stand-by and night work*" (Section 94, Labour Code). This seems to be the most frequently breached provision of Czech labour law. Many employers keep these records incomplete; others do not keep any records. That makes it much more difficult for labour inspectorates to conduct their inspections and for the individuals to enforce their rights.

It is often the case that employees are, more or less overtly, forced to agree on discriminatory clauses when signing labour contracts. One of these clauses in the field of working time is that the salary, which was agreed upon in the labour contract, already compensates overtime. Therefore, the employee cannot demand any compensation payment for the overtime effectively worked. Many employees complain about this practice at labour offices and labour inspectorates. Since such clauses are not against the law, there are no legal means for the persons concerned.

In general, Czech employees hesitate to use courts as a way of conflict settlement and if an employee risks a court trial against his employer it is very unlikely that the matter in dispute will be working time. During an employment contract an employee will hardly sue his/her employer – risking negative consequences within his enterprise – only because of some 'minor breeches' of working time provisions. Approximately 90 percent of the cases pending at the courts have to do with unjustified firing. Concerning working time regulations – as general norms – the active enforcement of state installed bodies is of higher importance.

The labour inspectorates – primarily competent for monitoring compliance with labour law – cannot guarantee a continuous supervision. A law was enacted in 2005 (No. 251/2005 Coll.) that created a new legal base for labour inspections. Inspection competencies were extended and the fines inspectors can impose were raised keenly.⁴ Generally, the labour inspectorates' strategy is not to impose fines immediately. The guidelines of the Ministry of Labour and Social Affairs – to which the labour inspectorates are subordinated – also suggest that efforts to reach consensus with the employers have priority. The employers first should be requested to abolish overt shortcomings. Only if such requests are not implemented, a fine will be announced.

⁴ Fines are up to 2.000.000 CZK (around 68.000 Euro). But, in fact such high fines are never imposed; the average amount is about 15000 CZK (around 500 Euro).

Data on the Czech Republic shows that in 2004 the overall number of staff at the Labour Inspectorate Authority was 437. The number of inspectors was 232. They conducted 15256 visits during 2004. In 235 cases a cessation of work activities was ordered and the overall number of administrative fines imposed was 829.⁵ These figures hardly permit a conclusion on the efficiency of the current inspection system. However, employees' representatives and NGOs complain about the ineffectiveness of the system. Especially NGOs criticise the fact that the labour inspectorates are inactive and very sceptical concerning equal treatment affairs. The labour inspectorates themselves confess that this subject is new to them and they do not have any experience with it. Other issues (e.g. occupational health and safety as well as working time) appear to have more priority. Nevertheless, there are also shortcomings in these areas, e.g. repeatedly employees – on whose cooperation the labour inspectorates specifically rely during their inquiries – withhold relevant and important information because they want to avoid any conflict with their employer. This seriously diminishes the effectiveness of labour inspections in the Czech Republic.

Equal treatment

In the field of equality in the workplace, the Czech Republic implemented the Gender Equality and Employment Equality Directives only cautiously and hesitatingly. There are still shortcomings in the transposition, and application and enforcement remain fragmentary. The transposition of the two Directives has been ongoing for about seven years. In both cases it is certainly true that the transposition did not come to a halt after the EU's determining incentive of membership ceased to exist for the Czech Republic. Amendments to Czech labour law with regard to the transposition of these equality Directives were enacted after the end of the accession negotiations (December 2002), after the signing of the Treaty of Accession (April 2003) and subsequent accession (May 2004). It is noteworthy that further transposition steps can be expected.

The Czech Republic did not enact one uniform anti-discrimination act, which fulfils all the requirements of EU law. Despite broad discussions on adopting a single act, the approach of a 'diffusive legal arrangement' was chosen. Therefore, the right to equal treatment in the workplace is included among non-discriminatory provisions in all the laws that regulate any employers-employees relations (Pavlík 2004). The 'diffusive model' leads to inconsistencies in the field of equality in the workplace.

⁵ Data taken from: http://ec.europa.eu/employment_social/health_safety/slic_en.htm.

There are now different legal terms used in the relevant laws and several definitions differ (Boucková 2005). This legislative method promotes legal uncertainty and groups of employees ruled by specific laws (e.g. civil servants, member of armed forces) are not always guaranteed the same rights and entitlements.

The two most important laws that contain provisions transposing these equality Directives are the Labour Code (No. 65/1965 Coll.) and the new Employment Act (No. 435/2004 Coll.). Basically, the Labour Code governs a labour relation after the conclusion of a labour contract, while the Act on Employment covers relations before the conclusion of a contract, e.g. the access to employment. Equal treatment and antidiscrimination provisions are included in many other laws.⁶ Approximately 60 domestic Czech laws are affected by European anti-discrimination legislation, which either had to be changed already or will have to be changed in case there are modifications in European legislation.

Three important steps were taken thus far. Firstly, elementary anti-discrimination provisions were included in the Labour Code in 2000, by an amendment referred to as the big 'Harmonisation' or 'European Amendment' (No. 155/2000 Coll.). A further important amendment – described as 'Second European Amendment' – was approved in 2004 (No. 46/2004 Coll.). It brought more detailed and improved provisions concerning the definitions of direct and indirect discrimination, of harassment and sexual harassment and the scope of exemptions. Also in 2004 (No. 436/2004 Coll.), another step was taken to abolish provisions that were contrary to the principle of equal treatment. Section 150 Labour Code (and an ordinance based thereon) in principle forbade certain types of work for women. The provisions mentioned were changed and the new legal framework is by and large in accordance with European requirements.⁷ Nonetheless, Section 150 (1) still prohibits certain types of work for women in the mining industry, which is a breach of the Gender Equality Directive. It is likely that the Czech Republic will abolish this discriminatory provision, presumably in 2007.

The new 2004 Employment Act contains equal treatment provisions, which are particularly applicable in the field of access to employment. Section 4 bans any form

⁶ E.g.: Act on service by members of the security forces (No. 361/2003 Coll.); Act on service in the state administration (No. 218/2002 Coll.); Act on service by members of the armed forces (No. 221/1999 Coll.); School Law (No. 561/2004 Coll.); Law on Pay (No. 143/1992 Coll.); Law on Salary (No. 1/1992 Coll.).

⁷ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

of discrimination based on several grounds (sex, sexual orientation, religion, etc.) and includes definitions of direct and indirect discrimination as well as of sexual harassment.

In one specific area the Czech Republic is overtly in breach of the Gender Equality Directive. Art 8a provides for an 'Equal Treatment Body', which must have certain competencies (providing independent assistance to victims, conducting independent surveys, publishing independent reports). The 'body' installed through Government Resolution No. 1033 of 10th October 2001 ('The Government Council for Equal Opportunities for Women and Men') only has an advisory function and cannot fulfil any of the tasks as provided for in Art 8a. It is very short on resources and has not produced any significant output so far.

Contrary to most of the member states (e.g. Hungary), a unitary anti-discrimination act does not exist. Such a law would not only transpose the two Directives researched, but also other EC Directives from that policy area.⁸ Certainly, such an act would meet the requirements of the European legislation much better than the current legal patchwork (Havelkova 2005: 10; Boucková 2005). The lower Chamber of Parliament adopted a draft Anti-discrimination Act at the beginning of 2006. However, it will possibly not enter into force. The Senate and subsequently the President can veto the new law (Articles 46; 50 Constitution of the Czech Republic), which is expected to happen. These two constitutional institutions do not have absolute veto power but their objections could lead to a postponement of the coming into force of that act after the next elections scheduled for June 2006. A new centre-right government (ODS/KDU-CSL) would possibly overturn the plans of new anti-discrimination legislation.

However, the relatively successful ambitions of the current government to enact the new Antidiscrimination Act show that there are still efforts to improve the transposition of EC Directives also after the EU's external pressure has been reduced. The new Anti-discrimination Act would be the end of the long lasting transposition of the *acquis* in the field of equality in the workplace and only this act would definitely harmonise Czech law with European requirements.

⁸ E.g. Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

Besides the mentioned problems regarding the transposition of these Directives, shortcomings concerning their application and the enforcement are serious. On the one hand, employers frequently ignore the existing provisions. On the other hand, the two most important ‘enforcers’ – the civil courts and the labour inspectorates – are weakly developed and cannot guarantee steady compliance.

That the non-application of equal treatment provisions occurs habitually shows the following actualities: Job postings are frequently discriminatory and gender-neutral terms are hardly used (Pavlík 2004: 60). Young women are considered to be the most discriminated against group on the labour market. Illegal questions during job interviews are common (Kadavá 2005). In general women earn around 75 percent of men’s wages, women with university education or in leading positions earn significantly less than that. In the Finance and Insurance sector men’s salaries are roughly double those of women (Havelkova 2005: 35, 53). Furthermore, there is practically no area where women are adequately represented in decision-making positions (Pavlík 2004: 47).

Probably the biggest hurdle for a proper application of labour law provisions in general is the high unemployment. Since the chances to get a well-paid job shortly after the termination of an employment contract are considerably low, employees often accept breaches of labour law provisions. Employers are sooner willing to dismiss ‘trouble makers’ than employees that acquiesce worse labour conditions.

There are no legal barriers that would prevent people from going to the civil courts. By contrast, Czech provisions stemming from the Gender Equality and Employment Equality Directives abet victims to go to court (e.g. Section 7 (4-6) Labour Code, Section 4 (10) Employment Act). However, there are serious shortcomings in the court system. The Czech judicial system has similar problems to those of the other ‘transition countries’: Poor judicial infrastructure, the length of procedures, corruption or a low ability to enforce the decisions (Anderson and Gray 2006). The judges’ knowledge in the field of new subjects like equal treatment law is not developed substantially. Besides that, they are not familiar with European law and its systematics. Ordinary judges are not prepared to handle the *acquis communautaire* (Krepelka *et al.* 2005; Kühn 2005). The trust in courts is considerably low. Around two thirds of women do not believe that they could have any success when suing for discrimination in the workplace (Putnová 2003). Consequently, the willingness to start proceedings is low. Therefore, there are no leading cases, which could serve as role models and which could build up a deterrence-effect for potential ‘non-apppliers’.

Country study 2: Hungary

Hungary has consistently ranked among the most advanced candidate countries of the European Union and therefore constitutes one of the most likely cases of compliance with EU rules (Sissenich 2005a). In the field of working time and equal treatment in the workplace, national legislation was recently amended to comply with EU Directives. Changes were however limited since Hungarian social legislation was already relatively developed. While some elements of social justice derive from the socialist legacy, other provisions were adopted during the early stages of the transition period when ruling elites – keen to join the EU and prepared to make good gestures – deliberately sought to comply with the European requirements (Dupré 2003). Therefore, the Labour Code adopted in 1992 appeared rather liberal compared to socialist rules, but was also strongly inspired by EU regulations, the German model and recommendations from international agencies, such as the International Labour Organisation. The strong Hungarian desire for membership, combined with the European Commission active annual monitoring on the progress of candidate countries, generated intense national legislative activity in Hungary, including in the social field.

Working time

The main Labour Code amendment ensuring compliance with the Working Time Directive was made with the adoption of Act XVI of 2001. Interestingly, although it established provisions such as 48 hours maximum weekly working time and two days rest period, this amendment proposed by the then liberal-conservative government was criticized for introducing more flexibility, allowing employers to evade the normal work schedule in certain sectors and for certain kinds of jobs. After intense consultations, debates and bargains, no agreement was reached with the social partners (Neumann 2004). Therefore, one year later a second amendment passed by the newly elected socialist-liberal government mainly aimed, but partly failed, to correct the flexibility introduced previously. Another limited amendment was made in 2003⁹. Finally, the new Working Time Directive (Directive 2003/88/EC) did not necessitate any major modification of national legislation. All in all, also if main changes in the field of working time were made before the conclusion of accession negotiations and under the Commission's pressure, additional modifications were later introduced.

⁹ They were respectively XIX of 2002 and Act XX of 2003.

However, although the Labour Code and other specific acts mostly comply with the Directive, defects still subsist and an amendment of national working time legislation would be necessary in order to reach full compliance. First, Sections 117/B (1) and 119 (3) of the Labour Code, which stipulates that the working time of full-time employment shall be 40 hours and shall not exceed 48 hours are not based on employee working time calculation but on employment working time calculation. This means that in theory an employee is allowed to work more than forty-eight hours a week, if he/she has two different work contracts. Second, the Hungarian Labour Code differentiates between ordinary working time and overtime. This implies that an employee, who is normally entitled to two rest days a week (Section 124 (1) of the Labour Code), can be required to perform overtime during his/her rest period, which contradicts the logic of the Directive. Finally, Hungarian law does not comply with the *Simap* and *Jaeger* jurisprudence of the ECJ with regard to on-call working. The Labour Code stipulates that if the time used for actual work during on-call is not measurable, the whole on-call period qualifies as working time. Therefore, in the opposite case, on-call as a whole is not qualified as working time as it was decided by the ECJ. Only effectively worked hours are overtime. However, one should add that several national courts have showed their intention to adhere to EU jurisprudence.

Due to these legal deficiencies, national legislation is not totally in harmony with the Working Time Directive. However, Hungarian ruling elites have made some effort to comply with EU working time legislation, but have also provided stipulations allowing advantageous use of the Directive derogations or absence of regulations. This is particularly true of the practical application of working time laws.

In the health care sector, which is predominantly but not only a public sector, derogations and the opt-out provision are largely used to face the penury of doctors as well as the lack of resources. Therefore, it is not a surprise if civil servants in this sector may have to work up to eighty hours a week cumulating maximum working time, overtime, voluntary hours via opt-out and the absence of recognition of the totality of on-call time as working time (Fodor and Neumann 2004). The Hungarian government seems to be willing to preserve such practices in a sector where changes will generate high public costs and an urgent need for additional workers. Therefore, in the present debate at the European level about the forthcoming amendment of the Working Time Directive – without officially opposing the definition of on-call duty as a whole as working time – the Hungarian government has stated its intention to make use of the opt-out provision in order to avoid problems arising from ECJ rulings.¹⁰

¹⁰ See for example European Commission, Frequently asked questions about Working Time,

Memo/04/1, Brussels, 5 January 2004,

http://ec.europa.eu/employment_social/news/2004/jan/working_time_directive_en.html

The use of derogations is not only common and problematic in the health care sector. The extension of reference periods to four or six months or even one year in certain sectors via collective agreements also offers greater flexibility in the application of working time provisions (Section 118/A of the Labour Code). Such flexibility is also provided by the Directive and is as such not problematic. But in some extreme cases, reference periods are used for applying the law wrongfully. Employers use 'cumulative rest days' without stipulating it in the collective agreement. They disrespect the deadline of informing employees of their working schedule. They fail to introduce any schedule at all or use reference periods to deny an employee the right of a day off in compensation for working on a Sunday (Neumann 2004).

Next to the use or abuse of derogations, simple violations of working time legislation are also rather common in Hungary. Among the breaches reported, the majority of them occur in the private sector and in small enterprises with less than twenty employees. This does not necessarily mean that bigger companies are more law abiding, but that they might be better legally informed or may be subject to control more frequently. Sectors such as commerce, industry, construction, transport, agriculture, health care, tourism, catering and other seasonal sectors seem to be more vulnerable and more often subject to violation. In these sectors, employees are verbally asked to work more without being entitled to compensation. They are also not able to take their rest break or they are not granted the minimum daily rest period, weekly two days off or the minimum annual leave. The frequency of such violations suggests that there might be a real enforcement problem with respect to working time in Hungary.

Labour courts' action is limited by a lack of budgetary and workforce resources (Open Society Institute 2001), but also by employees' unwillingness to seek legal redress. Moreover, workers appear to be rather passive as shown by the limited number of Labour court cases in comparison with industrialised countries – even if their number has more than doubled since the eighties. This situation is partly due to cultural factors, partly to the weakness of interest groups, partly to a labour market more favourable to employers (Tóth *et al.* 2004). Hungarians seem to be rather sceptical about their court system, considering it to be too slow and too expensive. Trust and belief in judicial institution, relatively high at the beginning of the transition, progressively dropped (Körösényi 2002). Also, communist court practice has left a certain degree of suspicion. If trade unions offer legal assistance in court proceedings, their action is limited since unions' membership and their prestige among the population has constantly decreased during the transition period (Körösényi 1999; Balogh and Neumann 2005). Finally, job scarcity clearly influences employees' level of acceptance for unlawful treatment. Scared to lose their position, they are not only

ready to work more for a bit more money, but also to work more without any compensation.

Therefore, the action of the labour inspectorate in enforcing working time legislation should be essential. Labour inspectors can act *ex officio*. Recently, more inspectors have been trained and fines for violations have been increased to be more dissuasive (Act CLV of 2005)¹¹. However, working time is far from being the priority of the labour inspectorate's action, in a country where illegal work is still seriously high.

All in all, despite the existence of developed legislation mostly compliant with EC-law and introduced mainly before the conclusion of accession negotiation, the implementation of the Working Time Directive faced numerous application problems due to the weakness of national enforcement institutions – mainly labour courts and the labour inspectorate – and the weakness of employees and their representation' organisations.

Equal treatment

The situation is similar in the field of equality in the workplace. The relatively developed legislation had to be amended to comply with EC Directives. A first amendment to the Labour Code was made in 2001 to comply with the then remaining EC Directives on Equal Pay and on the Burden of Proof (Directives 75/117/EEC and 97/80/EC). The Racial Directive and Employment Equality Directive (Directives 2000/43/EC and 2000/78/EC) adoption necessitated amendments to include clearer definitions, the establishment of specific institutions and effective, proportionate and dissuasive sanctions. These indispensable changes generated a huge debate between those supporting branch level regulations – as was the custom – and those supporting the adoption of a general comprehensive act. In Autumn 2002, the newly elected socialist-liberal government admitted the need for a comprehensive anti-discrimination policy and consultations on the legal concept prepared by the Ministry of Justice was launched. Political elites, but also interest groups and citizens were invited to make comments. Based thereon, a draft text was prepared and finally passed in December 2003. Act CXXV on Equal Treatment and the Promotion of Equal Opportunities, after the conclusion of accession negotiations, was adopted within the transposition deadline provided by the Gender Equality and Employment Equality Directives.

¹¹ In 2005, the number of labour inspectors dealing with employment was increased from 175 to 285 and the minimum fine was raised from 80 to 115 Euro and the maximum from 8000 to 76800 Euro.

Meanwhile, these transposition deadlines have expired and the act is still not in total compliance with the Directives. First, it does prohibit harassment but not sexual harassment as required by the Gender Equality Directive. The draft bill recently submitted to the Parliament (December 2005) to amend Act CXXV might be a first attempt to bring the law into line with the Directive without referring to it, since it proposes to define harassment as “*offensive behaviour of a sexual or other nature*”. If it is adopted, this act will however not provide full harmonisation with the Directive (European Commission 2006). The second transposition problem concerns the exemption clause allowed by Act CXXV. According to Article 7 (2), exemptions are allowed for all types of discrimination, while in the two Directives exemptions are possible only in indirect discrimination cases. This provision gives way to more cases – as long as there is a reasonable explanation founded on an objective consideration – to being exempted from discrimination prohibitions and could be less favourable to victims. Finally, the shift of the burden of proof provided by Act CXXV is often considered to be too strict for the plaintiff, since it only applies when he/she has already proven that he/she has suffered a disadvantage and not only facts that might presume so – as stated in the Directives. Consequently, one cannot say that Hungarian legislation is in full compliance with EU rules and defects need to be addressed. Nevertheless, Hungarian equality legislation is quite developed and protective. The analysis of its practical application shows that problems remain.

There are a number of cases pending in labour courts and the newly instituted Equal Treatment Authority. There are lawsuits related to the discrimination of women in the workplace, promotion or job advertising. Only three cases relating to sexual harassment were reported (Krizsán and Pap 2005) and among the few cases relating to discrimination on grounds of sexual orientation, one gained significant public attention¹². However, our research allows us to conclude that a large majority of cases related to discrimination at work remain unknown. Women are discriminated against because they are considered to be less competent and less available or to generate too high non-wage costs because of their family responsibilities. Evidence of gender bias in recruitment practices has been reported (Unicef 1999). Women suffer vertical as well as horizontal segregation in relation to employment. They are concentrated and over represented in low prestige, low paid and conventional women’s jobs. Moreover, their employment structure is unfavourable and they are less represented than men in leading positions, although at a higher educational level (Hungarian Ministry of Employment and Labour 2004). Most homosexual people prefer to keep their sexual

¹² For more information about the case Hátter Support Society for LGBT People against Károli Gáspár Reformed University, see <http://www.hatter.hu/en/>.

orientation secret to avoid being discriminated against in their professional life. Finally, cases were reported where employees have been fired for refusing to work on Sunday on religious grounds.

Therefore, although a developed legislation ensuring equal treatment at work exists, there are cases of discrimination and only a limited amount of them reach enforcement institutions. The causes are rather obvious. First, as in the field of working time, labour courts lack resources and employees are unwilling to seek legal action and thereby take the risk of losing their job. There is a lack of awareness about the existence and the implications of protective legislation. Employers ignore that their actions might be discriminative, employees do not realise that they are discriminated against and do not know the possible remedies. Judges and labour inspectors are still not sufficiently aware of the legislation although training has been provided. Moreover, in that field labour inspectors cannot act *ex officio* but only based on complaints and are therefore dependent on workers' willingness to act (Kádár and Farkas 2005).

In order to remedy such problems, Act CXXV has instituted an Equal Treatment Authority whose powers extend beyond the requirements of the Gender Equality Directive. Established in February 2005, it can initiate lawsuits, conduct investigations *ex officio* and impose administrative sanctions¹³ (Act 362/2004 (XII. 26)). However, its limited budget and personnel – only seven lawyers – might soon become a problem, as its workload escalates. Act CXXV also allows social and interest representation organisations to act in support and on behalf of victims of discrimination (Article 18). Article 20 goes further and introduces the possibility of initiating *actio popularis* claim if the violation was based on a characteristic that is an essential feature of the individual and if the affected group cannot be determined accurately. Such procedures should help to ensure higher respect for the equal treatment principle and even if it is too early to draw conclusions, the well-known case Hátter against Károli Gáspár Reformed University, introduced by an *actio popularis* claim, serves as a precedent. However, one should also add that the number of NGOs offering legal support is limited and trade unions, which also offer legal support on that matter, have seen their position weakened in recent years – as mentioned above.

All in all, the conclusion is similar to that in the field of working time. The Hungarian government has made some efforts to comply with EU requirements within the given deadlines – with the exception of the Equal Treatment Authority, which was only created in 2005 – but after the conclusion of accession negotiation. The recently

¹³ The amount of the fine varies from 200 to 24 000 Euros.

proposed draft amendment of Act CXXV can also be considered as a first indirect attempt to bring Hungarian legislation into line with the Directives. However, there is evidence for compliance problems in the application stage, which is mostly due to citizens' 'passivity' and lack of information about their rights and duties, as well as inadequate enforcement institutions with too little resources and general weaknesses of the civil society.

Comparison and Outlook

We are now, for the first time, in a position to actually study post-accession compliance with EU law, which should give us a more realistic picture of what EU standards will actually mean in the daily life of citizens in the EU25.

Former studies have analysed stages in the Europeanization process of Central and Eastern Europe before EU accession in 2004. They still provided a useful baseline for our study of recent Europeanization of two of the new member states in two issue areas. Our results both underline and challenge some of the previous results.

Firstly, our study disconfirms some rather pessimistic scholarly expectations as to the transposition phase of EU Directives. Schimmelfennig and Sedelmeier expected that in the absence of external incentives in the form of the membership conditionality, the implementation process of EU law should "significantly slow down or even halt" (Schimmelfennig and Sedelmeier 2005a: 226). It seems, however, that adapting to EU law in fact remains an ambition in the new member states, at least on the level of the statute books. This was at least indicated by the examples from both countries researched in the field of equal treatment and to a certain extent by the case of Hungary in the field of working time. For sure, a much broader empirical analysis across a wider range of Directives would be needed to measure actual transposition performance on a larger scale. However, we can at least say that we discovered instances of visible effort to transpose in an ambitious manner in the two countries studied here, and we have no good reasons to suggest that this phenomenon should be restricted to our example cases only.

Secondly, however, we found ample confirmation of prior findings on compliance problems in the application phase. Schimmelfennig and Sedelmeier have rightly pointed out that "many EU rules have been only formally transposed into national legislation but are not fully or reliably implemented" (2005a: 226; see also Sissenich 2005b on Poland and Hungary; Leiber 2005: 25). We can highlight this problem for the two countries studied here, the Czech Republic and Hungary, in the fields of working time and equal treatment in the workplace.

These findings do not contradict the possibility that transposition behaviour (i.e., the first phase of the national implementation processes) may be characterised by a logic of appropriateness, at least sometimes (but we could not study empirically if this was the case). If so, however, it would not seem inappropriate to take into consideration the possibility that knowledge about later non-application does already influence the decision to transpose correctly, and that this accounts for the expectation that even expensive laws will not be costly due to their status as dead letters.¹⁴ More research is needed, in any case, to reveal the motivations behind the (lack of) translation of EU law into domestic rules.

In any case, it is clear that in terms of the differing theoretical lenses discussed in the introduction, the historical institutionalist viewpoint highlights the issues crucial in our case studies. Without any doubt, problems with longstanding domestic institutions such as, most importantly, court systems and labour inspectorates dominate the failures in the application phase of EU policy implementation in both countries studied here. These structural issues seem to be of primary importance in explaining the compliance failures we found. And what is even more important, they potentially counteract on the level of final outcomes both what may originally have resulted from considerations of rational self-interest or of a logic of appropriateness.

In practical terms, our second finding relating to seemingly broad-scale application failures may in the long run be as crucial for the overall success in implementing EU law than the first finding on transposition stage adaptations. It goes without saying that there is no use in producing “dead letters” only. Neglectful enforcement of a Directive’s standards, giving rise to application problems, may counterbalance dutiful performance during the transposition stage. Already in a prior study on the EU15, some of us concluded that in fact, “this may even be an explicit (though not publicly disclosed) strategy of countries that might want to appear as “good guys” while actually free riding” (Falkner *et al.* 2005: 326). Correct transposition cannot outweigh lacking application and enforcement of laws. The latter are forms of neglect, just like transposition failure would be.

How far-reaching these problems actually are for several CEEC countries and in different issue areas will be studied in depth in our ongoing larger research project¹⁵.

¹⁴ Note that Klaus Goetz sees “question marks ... not only over the capacity on the part of the new member states to ensure compliance”, but at least in some instances also over the willingness (Goetz 2005: 276).

¹⁵ “Dead letters or living rights?” A research project on the transposition and application of EU law Directives in new member states, carried out in the Political Science Department of the

A number of aspects, however, suggest that the application and enforcement phase might represent an even more severe problem for the new member states of Central and Eastern Europe than it already is for some countries in the old EU15.¹⁶ The most important of these features were highlighted in the two countries discussed above:

- Weakness of civil society, a well-known characteristic of CEEC countries (Schimmelfennig *et al.* 2003: 498; Sissenich 2002), suggests that less cases of non-compliance will be detected and pursued by collective actors (such as worker unions) that could, in principle, more easily and effectively fight for social rights than individuals (on the importance of civil society as a factor in differential Europeanization, see also the work by Vivien Schmidt (e.g. 2002));
- Ineffective state institutions (e.g. labour inspectorates) and public-private bodies (such as equal treatment agencies) can be another critical factor in terms of enforcement of EU law; without proper funding and training, one cannot expect that e.g. labour inspectorates can perform their functions well; there are, however, fields where individuals are for systematic reasons not in a situation to efficiently enforce their rights on their own, e.g. via the courts, and therefore enforcement and monitoring institutions are crucial¹⁷; it seems that in CEECs, the relevant institutions often lack either co-ordination and steering capacity, or pressure capacity (see Falkner *et al.* 2005: 35 for these necessary conditions on the level of national enforcement systems);
- Inadequate court systems are a further aspect that could lead to systematic compliance problems because there will be a lack of trust that fighting for one's rights will be worthwhile; a functioning judiciary would be even more important in the absence of strong civil society actors that could fight instead

Institute for Advanced Studies in Vienna (for details see <http://www.ihs.ac.at/index.php3?id=1144>).

¹⁶ In terms of Klaus Götz, this might then be another example for “clustered Europeanization” (Goetz 2006).

¹⁷ In the case of individual rights with essential advantages for clearly specified addressees in very specific situations (e.g. parental leave), passive enforcement by the state (only by individual law suits where needed) may suffice for effective application. General norms such as maximum working hours, however, typically need more active enforcement by formal institutions (at least, reactive controls where there are complaints). General norms referring to quite intricate and technical standards, in turn (e.g. health and safety protection at the workplace) even need proactive controls in order to have good prospects for effective practice (Falkner *et al.* 2005: 39; Hartlapp 2004).

of individuals; the latter will, in any case, rather not opt for a court case if it is well known that this lasts for many years and may not lead to a just result (e.g. for reasons of lacking expertise with EU law on the part of judges, or of corruption, or of ineffectiveness);

- Finally, also the general economic environment will play a role; in countries where the labour market situation is relatively tense that risking one's job in order to fight for one's rights seems a disproportionately dangerous strategy, one cannot expect that the route of individual complaints with the courts is an effective means to enforce EU (or any other) law.

These factors suggest a rather systematic pattern for the CEEC (or at least for a large part of them), with significantly worse application and enforcement of EU law than in the old EU member states (or at least in a large number of them). In spite of the evidence from two countries and four cases presented in this paper, only the final results of our larger study will allow us to judge the overall compliance record of the new member states, and if they actually belong to one of the "old" worlds of compliance with EU law (world of law abidance; world of domestic politics; world of neglect) or if they represent a proper own, additional, model of (non-) compliance within the EU25.

Looking at the long term future, in any case, it needs mentioning that the compliance issue will almost with certainty see a further increase in importance, due to the to-be member states and their political and judicial systems. In its monitoring reports on the candidates for entry in 2007, i.e. Bulgaria and Romania, the European Commission was highly critical about the lack of progress made exactly in the fields of rule of law and of court systems: "Bulgaria needs to demonstrate clear evidence of results in the fight against corruption, in terms of investigations and judicial proceedings. It also needs to further reform the judiciary, in particular to reinforce its transparency, efficiency and impartiality." (EU Commission, Key findings of the May 2006 monitoring reports on Bulgaria and Romania, MEMO/06/201, Brussels, 16 May 2006: 1). The Commission furthermore presses for more efficient and systematic implementation of laws for the fight against fraud and corruption. Organised crime is said to endanger the rule of law and to directly affect all citizens and their basic rights.¹⁸ Romania, also, was said to need to "demonstrate further results in the fight against corruption. It also needs to consolidate the implementation of the ongoing justice reform and further enhance the transparency, efficiency and impartiality of the judiciary." (ibid: 3)

¹⁸ Interestingly, this is only contained in the German version of the memo (page 3), the English version is slightly different, stressing more the economic effects of distrust due to corruption.

This makes it obvious that attributing more resources to issues of compliance with EU law, and to issues of the improved respect of the rule of law, in general, will be tantamount to a democratic, just and prosperous future of Europe.

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