



Making Dead Letters Live: Strategies to Improve the Effectiveness of EU Legislation in Central and Eastern Europe

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Abstract

As many empirical studies have shown, non-compliance with EU legislation has already been a significant phenomenon within the EU15. With the accession of twelve new Member States since 2004, all of which had to align their legal and administrative systems to the *acquis communautaire* within a very short time frame, the compliance issue has become even more pressing. Against this background, it is the aim of this paper to take a closer look at how four new Member States from Central and Eastern Europe fare in implementing EU legislation and how possible compliance problems could be remedied in the future.

The paper presents findings from a comparative project on the transposition, enforcement and application of EU legislation from the fields of working time and equal treatment in the Czech Republic, Hungary, Slovakia and Slovenia. The results show that while transposition performance is relatively good, all four countries are marked by significant problems in application and enforcement. On the basis of intense focus group sessions involving practitioners from the four countries, the paper presents a set of strategies to improve the current state of affairs and concludes with some remarks on the chances for these options to be actually put into practice in the new Member States.

Introduction¹

The domestic implementation of policies enacted at the EU level is a particularly challenging task. The EU is marked by a highly decentralised implementation structure that leaves responsibility for policy execution to the Member States. Like in some federal polities, the lower level of governance is in charge of administrative enforcement. If we focus on the implementation of EU Directives, one of the major legal instruments of the EU, it also becomes apparent that even parts of the decision-making process are delegated to the domestic level. The standards laid down in Directives have to be incorporated into national law by Member States within a certain period of time. Only after this process of transposition is completed, may the rules be applied by societal target groups and enforced by administrations and the legal system at the domestic level. Given the heterogeneity of interests among the actors involved in EU decision-making and the high consensus requirements, EU policies often contain fuzzy concepts and leave certain issues to the discretion of Member States in order to facilitate agreement. What applies to implementation in general is thus particularly true for the domestic execution of EU policies: crucial decisions that may be decisive on the success or failure of a given policy are regularly taken at the implementation stage.

As many empirical studies have shown, non-compliance with EU legislation has already been a significant phenomenon among the old Western European Member States (see e.g. Siedentopf/Ziller 1988; Duina 1999; Jordan 1999; Knill/Lenschow 2000; Börzel 2003; Falkner/Treib/Hartlapp/Leiber 2005). With the unprecedented accession of twelve new Member States since 2004, however, the compliance issue has become ever more pressing. Especially the ten new Member States from Central and Eastern Europe (CEE) are transition states with a view to not only economics but also to their political and legal systems. Many of them had a long way to go to become fully-fledged democratic systems with stable institutions and societies whose entire membership respects the rule of law.

It is the aim of this paper to take a closer look at how Central and Eastern European Countries (CEECs) fare in implementing EU legislation and how possible compliance problems could be remedied in the future.

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To answer these questions, the paper presents findings from a comparative project on the transposition, enforcement and application of EU legislation in the Czech Republic, Hungary, Slovakia and Slovenia, carried out in 2005 and 2006. We specifically look at three Directives from the fields of working time and equal treatment in the workplace. Most of the EU provisions we study had to be implemented before accession. Some of them, however, were due to be fulfilled after the CEECs had joined the EU. In addition, we screened the relevant reform activities both before and after accession. Therefore, we are in a position to address not only implementation efforts in the pre-accession phase but also post-accession compliance, although more cases and a longer period of observation would certainly be needed to generate a definite assessment. Our qualitative case studies primarily rely on expert interviews with relevant Ministry officials and with representatives from trade unions, employer's organisations and NGOs; on focus group discussions involving those directly concerned with the relevant laws, or their representatives; as well as on an analysis of available legal documents, statistics and the scarce literature available in the field.

The paper is structured as follows: The next section will summarise our empirical findings on the implementation performance of the four selected countries, with a view to legal transposition as well as actual enforcement and application. Then we aim to set these findings into context by discussing in how far the observed patterns fit into the 'worlds of compliance' typology we have developed elsewhere (Falkner/Treib/Hartlapp/Leiber 2005; Falkner/Hartlapp/Treib 2007). We will proceed by presenting a set of useful strategies to improve the current state of affairs in Central and Eastern European countries. The Conclusions, finally, will assess the chances for these options to be actually put into practice in the new Member States.

I. Implementation performance: good transposition, but wide gulf between the law and action

The empirical analysis covered the transposition, enforcement and application of three EU Directives:

- The amended version of the Working Time Directive (2003/77/EC), which aims to improve the health and safety of workers by laying down maximum working time limits and minimum rest periods as well as annual leave entitlements;

- The amended Equal Treatment Directive (2002/73/EC), which prohibits direct or indirect gender discrimination as regards access to employment, vocational training and promotion, and working conditions;
- The Employment Equality Directive (2000/78/EC), which prohibits discrimination based on religion or belief, disability, age or sexual orientation as regards access to employment, vocational training and promotion, and working conditions.

a) Transposition performance

In overall terms, the four CEE countries fared comparatively well in transposing the three Directives into domestic legislation.

With regard to the *Working Time Directive*, all four countries managed to complete the transposition process in an essentially correct manner before they joined the EU. The only important issue that they have not yet fulfilled is the ECJ's case law in *Simap* and *Jaeger* with regard to on-call duties, but this is true for almost all other member states as well. It has been linked politically to the ongoing EU-level debates about a revision of the Directive, the understanding being that the member states would wait until the adoption of the revised Directive before they would take action in this respect. As some drafts discussed so far provided for an amended definition of working time to the effect that inactive periods spent on call would no longer have to be treated as working time, the revision of the Directive would mean that member states would no longer have to take action with regard to on-call working. After the governments repeatedly failed to agree on the updated version of the Directive, however, the Commission has announced that it will initiate infringement proceedings against all member states that do not comply with the ECJ's case law (23 out of the then 25 member states – only Italy and Luxembourg are exempt) (Council of the European Union 2006; EIRO 2006).

The transposition outcomes of the two *equality Directives* are somewhat more mixed. While Hungary completed transposition well before the deadline, Slovenia and Slovakia managed to adopt their respective anti-discrimination acts only a few days (Slovenia) or weeks (Slovakia) after their actual accession to the European Union. Given that the delays were very short (less than six months), we treat these cases as having been completed largely on time. The Czech Republic, however, has so far failed to transpose the two Directives in an essentially correct manner. Although reforms were enacted to incorporate the provisions of both Directives in a multitude of existing legislation

governing various aspects of the employment relationship, this diffusive approach to transposition failed to fulfil all essential parts of both Directives. In spring 2006, efforts to enact a general anti-discrimination act, which would have closed the remaining gaps, foundered on the lack of support for this broad reform among the members of the government coalition.

Despite the two cases of transposition failure in the Czech Republic, the overall record of our four countries in terms of legal compliance is good. 10 out of 12 cases (more than 80 per cent) were completed largely on time and in an essentially correct manner. This may come as a surprise, especially in comparison with the fifteen 'old' member states' performance in transposing six similar labour-law Directives, where "not even one third of all cases was transposed 'almost on time' and 'essentially correctly'" (Falkner/Treib/Hartlapp/Leiber 2005: 267).

The good transposition record is all the more remarkable since most reform processes were politically highly contested. With regard to working time, the bone of contention between political parties, trade unions and employers' associations was the extent of flexibility. The political leaning of the respective governments clearly left its stamp on the substantive outcomes. The right-wing Slovak government under Prime Minister Dzurinda, for example, made full use of the flexibility offered by the Directive, thus incorporating a minimalist version of the Directive into domestic law. In the Czech Republic, by contrast, the centre-left Zeman government rejected the employers' calls for more flexibility. In the end, therefore, transposition of the Working Time Directive in the Czech Republic turned out to be relatively supportive of employee protection.

Similar patterns of political contestation could be observed in the transposition of the two equality Directives. The partisan orientation of governments again played a crucial role in these processes. The transposition of the two Directives in Hungary and Slovenia could be completed relatively swiftly, primarily due to the determination of the two centre-left governments to push these reforms, backed by trade unions and civil society organisations. The resulting anti-discrimination acts even went far beyond the European minimum requirements. They both covered many more grounds of discrimination than laid down in European legislation, and they extended the scope of the non-discrimination principle beyond the area of employment. In the Czech Republic and Slovakia, by contrast, Christian-democratic government parties dragged their heels on the creation of encompassing anti-discrimination legislation.

Given the relatively high level of political controversy that characterised most of the transposition processes we looked at, how can we explain the good overall transposition

performance of our four countries? In our view, the answer is accession conditionality (Schimmelfennig/Engert/Heiko 2005; Schimmelfennig/Sedelmeier 2004). Although some of the provisions in our sample had to be complied with after accession only, most of them were subject to the Commission's pre-accession pressure. The prospect of being criticised for not fulfilling the *acquis communautaire*, and thus probably endangering smooth accession to the EU, served as a strong incentive for the political actors in our four countries to solve their disputes over how to transpose the Directives within the given time limits and in essential conformity with the legal requirements.

At the same time, this does not imply that implementation efforts significantly decreased once accession had been accomplished. There is thus no pattern of 'revenge' for the high pressure exerted by the Commission in the pre-accession phase (for hints in this direction, see e.g. Ágh 2003; Goetz 2005). In Slovakia, the Anti-Discrimination law was adopted three weeks after EU accession. After becoming a member of the EU, moreover, the Hungarian parliament passed a piece of legislation intended to tighten the prohibition of sexual harassment. In the Czech Republic, at least some minor adaptations were accomplished after joining the EU. All this indicates that there was certainly no systematic end to transposition activity immediately after the end of pre-accession supervision, although the fact that the Czech anti-discrimination bill was not adopted in spring 2006 and that the country thus continues to breach the legal requirements of the two equality Directives might give the impression that the importance of complying with EU rules has lost steam now that the country does no longer have to fear not being admitted to the 'club'.

In any case, it should be mentioned here that official data by the European Commission show that the transposition rates of our four new member states have steadily increased – rather than decreased – since accession. The Czech Republic, for example, improved its transposition rate from 89.88 per cent in August 2004 to 99.63 per cent in August 2006. For Slovakia, the figures are 92.21 and 99.67, respectively. The other two countries show similar developments, although starting from a somewhat higher level.² For sure, official transposition rates do not allow any insights on the completeness or correctness of the measures communicated to the Commission. Therefore, systematic empirical studies at a later point in time than ours are still needed to judge the post-accession transposition performance of the new member states in an authoritative manner.

² See the tables on "Progress in notification of national measures implementing directives" since mid-2004, available at http://ec.europa.eu/community_law/eulaw/index_en.htm (accessed at 13.4.2007).

b) Application and enforcement performance

The picture changes significantly if we look at the enforcement and application stage. As a result of the societal and institutional difficulties associated with the transition from Socialist rule, the Czech Republic, Hungary, Slovakia and Slovenia are all plagued by a multitude of problems that have so far largely prevented the legislation to be realised in practice.

In the field of *working time*, many employees voluntarily work longer hours than allowed by the law because they need the extra pay. This is a phenomenon that has already been observed in other (former) low-wage countries such as, e.g., Ireland (Falkner/Treib/Hartlapp/Leiber 2005: 114-115). Among the sectors where working excessive overtime is particularly widespread is health-care, where shift systems and on-call duties result in working hours that by far exceed the limits laid down in the European Directive. Major problems with overtime working were also reported from building, transport, agriculture, tourism and seasonal work, commerce, the food industry and catering.

With regard to *equality in the workplace*, discriminatory practices, especially to the detriment of women and homosexuals, are still a widespread phenomenon in the four countries. There is a tendency among employers not to hire younger women because of possible pregnancies. Additionally, women are often discriminated with regard to promotion, which is highlighted by the low share of women in leadership positions. In general, female employment is concentrated in low-paid sectors where part-time, fixed-term and other forms of precarious employment are widespread. Moreover, many women are confronted with sexual harassment by their male colleagues or superiors. Homosexuals often do not disclose their sexual orientation vis-à-vis their employers or colleagues for fear of being discriminated. The way in which high-ranking Christian democratic politicians in Slovakia openly agitated against the employment of homosexuals in schools, although certainly representing an extreme example, shows that these fears are not entirely ill-founded. Religious minorities seem to encounter less discrimination in our four countries, although we also found examples of discriminatory practices against religious groups. For example, Muslim women with headscarves were reported to be considered unsuitable for certain positions in Slovenia while wearing symbols of other religions was not stigmatised, and some religious groups in Hungary and Slovenia appeared to have difficulties getting time off for their religious rituals.

The bulk of these application problems may be explained by *societal and institutional shortcomings in the countries' enforcement systems*. It is important to highlight,

therefore, that the wide gulf between transposition and practical implementation is not due to deliberate efforts at cheating by CEE governments. Rather than amounting to purposeful “tick the boxes implementation” (Richardson 1996: 282), these shortcomings thus reflect genuine capacity problems in the CEECs. To shed more light on these capacity problems, it is useful to distinguish two parallel enforcement tracks that are important for the areas covered by our three Directives. The two equal treatment Directives are mainly based on individual enforcement, which requires effective and easily accessible courts and well-informed and courageous employees willing to pursue their rights. Enforcement of working time rules also encompasses this bottom-up mechanism. In addition, however, it involves monitoring compliance by public authorities. In order for this to be effective, labour inspectorates must be equipped with sufficient resources, must be organised effectively and must have effective sanctions at their disposal to punish non-compliers. We will first discuss problems related to individual litigation (1–4) and then turn to the limits of monitoring activities by labour inspectorates (5).

(1) A lack of individual litigation from below: The first major obstacle for employment legislation to become reality in the workplaces of the four countries is the lack of active litigation by employees. This has a number of reasons. As the introduction of the new laws was not accompanied by effective information campaigns either by the governments, by lower-level public authorities or by civil-society actors, *employees often do not know their rights*. This is particularly true for the field of equal treatment. In the area of working time, employees are traditionally better informed, mostly through their trade union organisations. Moreover, many employees do not dare to file complaints against their employer because they are *afraid of losing their jobs*. Although the equality Directives explicitly rules out such retaliatory action by employers, our information on everyday practice in the four CEE countries suggests that this provision has not been effective in overcoming litigation reluctance. The problem seems to be particularly severe in post-socialist countries such as our four CEECS, where many employees were used to life-long job security. It is aggravated in regions and branches with high unemployment rates and, therefore, low chances of finding a new job. As a result of the socialist heritage, finally, individual court actions have been introduced as an alien element of enforcement after 1989. Therefore, there is *no litigation culture among the citizens* of the four countries. In other words, the four CEECs cannot build on long-standing traditions of invoking one’s rights in court, as is the case in many ‘old’ member states.

(2) *A lack of support by civil society actors:* Trade unions and other civil society actors are too weak to effectively support employees in pursuing their rights. Trade unions, which are confronted with widespread distrust among the populations of our four countries, as they are associated with the former socialist regimes, struggle with steadily declining membership rates. In 2004, these had dropped to 17 per cent of all employees in Hungary, 22 per cent in the Czech Republic (2003 figure) and 31 per cent in Slovakia. Slovenia, in contrast, stands out with a relatively high unionisation rate of 44 per cent (CEC 2006: 25). Even there, however, less than half of all employees are organised in a trade union. Compared to countries like Denmark or Sweden, with unionisation rates of around 80 per cent (CEC 2006: 25), this still seems rather modest. Other civil society organisations, such as organisations of gays and lesbians, have only developed rather recently and struggle with a shortage of resources. Employees who may want to invoke their rights have thus *too little support from societal organisations*. Moreover, *procedures for involving societal organisations in judicial proceedings* have remained at a rather minimalist level in most countries. In general, interest associations may only support individual employees in legal proceedings relating to discrimination, as called for by the equality Directives. It is only in Hungary that societal groups may initiate, under certain conditions, discrimination-related proceedings themselves, without an individual being involved. In other areas and in the other three countries, however, the possibility of *actio-popularis* claims as a replacement for individual litigation does not exist.

(3) *Equal Treatment Bodies are promising babies with some teething problems:* Another way of supporting individuals in pursuing their rights is the creation of independent public bodies that offer advice and assistance to individuals who feel that their rights have been violated. It has to be highlighted that those countries that have so far created Equal Treatment Bodies surpassed the European minimum requirements and extended their sphere of competence beyond the area of race and gender. The Equal Treatment Bodies of Hungary, Slovakia and Slovenia are also responsible for assisting discrimination claims related to sexual orientation or religion. Moreover, these bodies do not only assist individuals in legal proceedings but they also act as easily accessible contact points that offer mediation and out-of-court settlements in discrimination-related disputes. In this sense, they are certainly a valuable instrument for giving effect to the principle of equality in practice. However, all of these bodies are plagued by a lack of visibility, institutional standing and resources so that their actual performance has so far lagged behind their formal competences. Due to the political problems

surrounding the transposition of the equality Directives, finally, the Czech Republic has not yet managed to create a proper Equal Treatment Body.

(4) *Shortcomings in the organisation of the judiciary*: Lacking resources in the court systems make for lengthy court proceedings in some of our countries. According to our information, the usual period until a first-instance ruling is achieved in the field of labour law ranges from about one year in Slovenia, fourteen months in Slovakia, between one and two years in Hungary, and up to three years in the Czech Republic. Unfortunately, we lack comparable data for the EU15. In any case, durations of two or three years definitely show a negative effect on people's willingness to go to court in the first place. The fact that it can take several years until a ruling is handed down thus acts as a serious impediment to individual litigation. Moreover, there seems to be a lack of attention for rulings by other courts, resulting in a situation where similar cases are often decided differently by different courts. This problem was reported to be particularly prevalent in the Czech Republic.

(5) *A lack of skilled inspectors and determination strains the work of labour inspectorates*: The problem in our four countries seems to be less the absolute number of inspectors in charge of monitoring compliance with labour law provisions or a lack of competences to act directly against cases of non-compliance. Although more personnel could certainly improve the situation, the rate of inspectors per 100,000 employees is not significantly below Western European standards. Moreover, they all have powers to act *ex officio* and are empowered to impose certain sanctions directly, without prior court proceedings. Instead, there are three other reasons to explain why many observers criticise the labour inspectorates for being ineffective in ensuring compliance with working time and equal treatment law.

First, the labour inspectorates in the four countries focus heavily on issues of occupational safety and health, such as preventing work-related accidents, and on combating undeclared work. As most resources are deployed on these topics, not much is left for monitoring working time or equality issues. Second and related to this, inspectors often have a technical background and therefore lack expertise in the fields of our Directives. This is especially true for the relatively new equality laws. Third, there were reports from employee representatives, especially in Slovakia and Slovenia, accusing the labour inspectorates of having too close relations to employers and deliberately sparing companies that are in an economically tense situation. It thus seems that many employees do not see the labour inspectorates as a neutral partner to turn to if there is a problem in the workplace. Despite these problems, it has to be noted that there have been recent efforts to improve the organisational structures and the capacities of

the labour inspectorates in Hungary and the Czech Republic. In these countries, there thus seems to be political willingness to improve the performance of the respective inspection services. In Slovakia, by contrast, recent reforms by the centre-right government rather yielded toward the opposite direction, involving a reduction of, rather than an increase in, the number of inspectors.

In sum, there are many problems in the enforcement systems of the four countries we studied. As a consequence, many of the legal provisions that entered the statute books in order to fulfil the EU's social policy *acquis* have so far largely remained 'dead letters'. This underlines the importance of studying not only transposition but also have a close look at the actual execution of the enacted transposition laws. Had we followed the example of many current studies on compliance with EU legislation and only looked at transposition, our conclusions would have been much more positive. In contrast, scrutinizing how transposition laws are being put into practice in the four CEECs has revealed a much more gloomy picture. Just like Puchala's (1972) blind men who try to discover the nature of an elephant by touching its ears or its trunk, our findings thus suggest that scholars who focus exclusively on the legal side of implementing EU legislation will fail to grasp the true nature of the whole implementation process.

II. Setting the empirical findings into context: a typology of four worlds of compliance

How do these findings fit in with the theoretical insights gained from the study of the EU15? One important argument, developed in an earlier study analysing the national transposition, enforcement, and application of six EU labour law Directives in the fifteen 'old' member states, was that there are different country clusters with different typical procedural patterns and, therefore, different styles of implementing EU legislation (Falkner/Treib/Hartlapp/Leiber 2005). These different "worlds of compliance" can be used as a filter that decides which explanatory factors are relevant for different countries and what the direction of their influence is. In this sense, crucial theoretical propositions in EU implementation research, including the misfit and the veto player approaches, are only 'sometimes-true theories' (Falkner/Hartlapp/Treib 2007).

Within the EU15, we identified three different worlds of compliance:

In the *world of law observance*, the compliance goal typically overrides domestic concerns. Even if there are conflicting national policy styles, interests or ideologies,

transposition of EU Directives is usually both in time and correct. This is supported by a ‘compliance culture’ in the sense of an issue-specific ‘shared interpretive scheme’ (Douglas 2001: 3149), a ‘set of cognitive rules and recipes’ (Berger and Luckmann 1967, quoted in Swidler 2001: 3064). Application and enforcement of the national implementation laws is also characteristically successful, as the transposition laws tend to be well considered and well adapted to the specific circumstances and enforcement agencies as well as court systems are generally well-organised and equipped with sufficient resources to fulfil their tasks. Non-compliance, by contrast, typically occurs only rarely and not without fundamental domestic traditions or basic regulatory philosophies being at stake. In addition, instances of non-compliance tend to be remedied rather quickly. The three Nordic member states (Denmark, Finland and Sweden) belong to this country cluster.

Obedying EU rules is at best one goal among many in the *world of domestic politics*. Domestic concerns frequently prevail if there is a conflict of interests, and each single act of transposing an EU Directive tends to happen on the basis of a fresh cost–benefit analysis. Transposition is likely to be timely and correct where no domestic concerns dominate over the fragile aspiration to comply. In cases of a manifest clash between EU requirements and domestic interest politics, non-compliance is the likely outcome. While in the countries belonging to the world of law observance breaking EU law would not be a socially acceptable state of affairs, it is much less of a problem in one of the countries in this second category. At times, their politicians or major interest groups even openly call for disobedience with European duties – an appeal that is not met with much serious condemnation in these countries. Since administrations and judiciaries generally work effectively, application and enforcement of transposition laws are not a major problem in this world – the main obstacle to compliance is political resistance at the transposition stage. Austria, Belgium, Germany, the Netherlands, Spain and the UK belong to this type.

In the countries forming the *world of transposition neglect*,³ compliance with EU law is not a goal in itself. Those domestic actors who call for more obedience thus have even less of a sound cultural basis for doing so than in the world of domestic politics. At least as long as there is no powerful action by supranational actors, transposition obligations are often not recognised at all in these ‘neglecting’ countries. A posture of ‘national arrogance’ (in the sense that indigenous standards are typically expected to be superior)

³ Building on the results of our new study on compliance in Central and Eastern Europe, we now suggest to slightly reformulate the label of this world (previously: ‘world of neglect’).

may support this, as may administrative inefficiency. In these cases, the typical reaction to an EU-related implementation duty is inactivity. After an intervention by the European Commission, the transposition process may finally be initiated and may even proceed rather swiftly. The result, however, is often correct only at the surface. Where literal translation of EU Directives takes place at the expense of careful adaptation to domestic conditions, for example, shortcomings in enforcement and application are a frequent phenomenon. Potential deficiencies of this type, however, do not belong to the defining characteristics of the world of transposition neglect. Instead, negligence at the transposition stage is the crucial factor in this cluster of countries, which includes France, Greece, Luxembourg and Portugal.

How do the new Member States fit into this scheme? As we have shown above, the implementation processes in the four CEE countries are marked by a combination of political contestation at the transposition stage and quite systematic problems at the enforcement and application stage. This is quite similar to two of the countries in the 'old' EU15, Ireland and Italy. Both feature procedures characterised by domestic politics considerations when it comes to transposition and have clearly inappropriate enforcement systems.⁴ To capture this combination of politicised transposition and systematic shortcomings in enforcement and application, we suggest a fourth category: the 'world of dead letters'. Countries belonging to this cluster of our typology may or may not transpose EU Directives in a compliant manner, depending on the prevalent political constellation among domestic actors and the degree of supranational pressure, but then there is non-compliance at the later stage of monitoring and enforcement. In this group of countries, what is written on the statute books simply does not become effective in practice. Shortcomings in the court systems, the labour inspections and finally also in civil society systems are among the detrimental factors accounting for this.

The typical process patterns of our extended typology of four worlds of compliance, and the countries belonging to each cluster, are summarised in Table 1 (see also Falkner/Treib 2007).

⁴ Therefore, we originally classified these two countries as belonging to what we then called the world of neglect if the focus is placed on the implementation process as a whole, and not only on transposition (Falkner/Treib/Hartlapp/Leiber 2005, chapter 15). With our new cases at hand, however, and with a view to ensuring a systematic and comprehensible typology, it seems preferable to conceptualise an additional world of compliance to grasp the new combination of typical patterns in the different phases. Consequently, we now subsume Ireland and Italy, along with the Czech Republic, Hungary, Slovakia and Slovenia, under a separate world of compliance.

Table 1: Four Worlds of Compliance

| | World of Law Observance | World of Domestic Politics | World of Dead Letters | World of Trans- position Neglect |
|--|---------------------------------|---|--|--|
| Process pattern at stage of trans- position | + | o | o | - |
| Process pattern at stage of practical implementation | + | + | - | +/- |
| Countries | Denmark, Finland, Sweden (3) | Austria, Belgium Germany, Nether- lands, Spain, UK (6) | Ireland, Italy, Czech Republic, Hungary, Slovakia, Slovenia (6) | France, Greece, Luxembourg, Portugal (4) |

+ = respect of rule of law; o = political pick-and-choose; - = neglect

This typology highlights which of the various theoretical factors are relevant in which country setting. The point is that implementation processes tend to depend on different factors within each of the various worlds. The compliance culture in the field can explain many cases in the world of law observance. In the world of domestic politics and the world of dead letters, transposition is decisively influenced by the extent to which the EU's rules match the political preferences of political parties and major interest groups. In the former, however, application and enforcement are generally effective, while the latter is marked by systematic shortcomings in the process of practical implementation. In the world of transposition neglect, finally, the decisive factor is administrative inertia at the transposition stage, caused by countervailing bureaucratic interests or malfunctioning routines. Given the huge problems in transposition, practical implementation is of secondary importance.

III. Improvement strategies for the World of Dead Letters

As we have demonstrated above, women, homosexuals and religious minorities are, inter alia, still subject to discrimination in the workplace in the four CEE countries. At the same time, violations of the legislation on working time are still rather common in the four countries we studied. Closer scrutiny reveals that most of these shortcomings are due to enforcement deficiencies, not to transposition failures. In most of the cases

we researched, there hence are “good letters” that, however, need more support in order to turn them into “living rights”. Crucial hurdles for making a practical success of EU social rights are typically a lack of resources generally, particularly for labour courts and equal treatment bodies; education and information shortcomings; and weakness of civil society representation.

In order to go beyond empirical compliance studies and instead try to give positive stimuli for reforms, we systematically collected ideas on how to improve the current status quo in the four countries. To this end, we organised a set of intensive *focus group sessions* involving representatives from a wide range of civil society representatives in each of the four countries. In order to foster conditions conducive to an atmosphere of trust and open discussion of potentially sensitive information, members were selected according to similarity of interests. In each country studied, three different focus groups engaged in a discussion, divided according mainly to the divide of interests between employers and employees but also other potential conflict lines, where useful. Each focus group brought together between four and twelve local participants plus members of our research team for three to four hours. Moreover, we convened a *transnational strategy workshop* in Vienna, which brought together experts and practitioners from all four countries plus Austria for a full day to discuss the status quo and possible improvements.

The resulting recommendations for improving the status quo on the domestic level are based on the analysis of numerous shortcomings, as summarised above. They fall into two groups: firstly, strategies that directly target the processes or institutions supervising rule enforcement (a below); and secondly, improvement strategies that seek to enhance social rights by strengthening actors that may support those fighting for their rights (b below). Such measures could hence indirectly work towards better implementation of EU social rights, at least in the longer term.

a) Direct ways to foster good practice in the Member States

Legislative or at least administrative action will typically be indispensable for strengthening the relevant institutions or their working modes. Member State governments and parliaments should therefore be convinced to improve the respective conditions by, for example (see below in detail), increasing resources, simplifying labour laws, establishing specialised departments for equal opportunity policy, strengthening Equal Treatment Bodies and Labour Inspectorates, and finally improving the court systems.

Adequate resources are a crucial issue: The problem of scarce means applies to all enforcement and litigation bodies more or less alike, particularly labour inspectorates, courts and equal treatment bodies. In most cases they require a significant increase of funding to provide more personnel and advanced training for staff to ensure higher effectiveness and turn around, a better quality of decisions and general awareness of anti-discrimination but also working time issues, thus also enabling the development of good practice.

Simplification of Labour Laws could also be a promising means to proffer social rights in practice: Labour law provisions tend to be phrased in a highly complex fashion, making it difficult to impossible for individuals to derive their rights directly from the text of the law. This adds to the burden of having to explain the rights and obligations of all involved, which is already comparably high given the manifold recent changes made in this area of law in the CEECs.

At the level of the administration, specialised Ministerial Departments for Equal Opportunity Policy would be useful: Governments may want to consider institutionalising a sufficiently equipped department with experts on such issues, also to ensure the mainstreaming of equal treatment in all policy areas. Our study revealed that to date, there are frequent changes to specialised departments within the governments of the CEECs, which is detrimental to a coherent equal opportunity policy. Often there are ‘Units’ within several ministries that are responsible for the enforcement of a gender equality policy within the respective ministry. However, these units are underdeveloped and since they are subordinated administrative units they typically cannot produce any effective impact.

Equal Treatment Bodies are central institutions in our field, too: Most countries have established equal treatment bodies, however, some have only granted the very minimum powers and resources to such institutions, thus making effective work and advancement of equality issues very difficult. There appear to be a number of possibilities to enhance compliance with anti-discrimination standards and principles:

- Equal Treatment Bodies should have a legally enshrined right to bring individual complaints to court.
- Best practice shows that *ex officio* powers and the possibility of imposing administrative sanctions are a very effective way to improve equality practices and policies.
- Given that Equal Treatment Bodies are generally designed – and also perceived – as watchdogs and advocates for individuals, it appears necessary to entrust the overarching issues of awareness raising and information sharing in a different

way. One way forward could be the creation of a separate communication department within the entity, which receives additional financial resources for these important tasks.

- Equal Treatment Bodies need visibility. If the people concerned do not know about the existence of these institutions, it is not possible for them to seek assistance. A separate web site, on which all the relevant information is available and European and national case law is published, would be an important step supporting the development in the right direction.
- Sharing best practice has proven time and again to be beneficial to all parties, thus the experts concur that an increase of trans-national cooperation among the bodies, also cooperation with NGOs, will strengthen the effectiveness of equal treatment practices.
- To increase accessibility of Equal Treatment Bodies it is necessary to decentralise them. Bringing them to the local level ensures that individual action is not obstructed because the body is perceived as being too far away. Additionally, administrative and financial independence seems important.

Strengthening the Labour Inspectorates will be an indispensable means of improved enforcement of EU social law in the CEECs: Labour Inspectorates are well established monitoring agencies, however, they struggle in all Member States to fulfil the manifold tasks put to them. Traditionally these bodies focus on issues of illegal work as well as safety and health at work. The expertise on discrimination issues but also the sensitivity toward issues of working time therefore needs to be strengthened in most countries. In addition it appears that one way of improving their authority could be increasing the severity of sanctions and an increase of leverage for the individual inspectors on the most suitable sanction(s). Often the superior ministry gives guidelines for the Labour Inspectorates indicating that sanctions and especially fines should be the ‘last resort’, to be used only if and where consensual modes fail. In practice this appears to favour employers. Additionally, in order to enhance the adherence to anti-discrimination provisions it appears necessary to empower the Labour Inspectorates to take *ex officio* action in such cases. Legislation should be amended accordingly. Also, it may be useful for Labour Inspectorates to increase the cooperation at the bi-national, multi-national and European levels to share best practice and to increase their efficiency. The most important task in the field of labour inspections, however, remains the expansion of their resources. As long as too few labour inspectors have to deal with too many tasks, effective and efficient supervision of the compliance of the employers with labour law provisions will remain difficult to achieve.

Finally, court system improvements are an essential remedy if citizens shall be empowered to make living rights out of their social rights granted in EU Directives: Under this heading, a number of relevant steps were discussed in the frame of our expert meetings:

- *Specialized Labour Courts*: In some Member States labour disputes are handled by civil courts, which may have specialized departments for industrial legal action. From the experience of countries with specialized labour courts it is safe to assume that separate labour courts benefit the quality of jurisprudence in this field. This also allows for judges to develop stronger expertise in labour law issues. Therefore, employers and employees can take advantage of decisions that are better tailored to their needs. Furthermore, lay judges with relevant expertise taking part in procedures handled by specialized labour courts may add further to the degree of satisfaction with the outcome of labour disputes.
- *Mediation*: Court cases are often the result of bad communication, thus court action is not always the most suitable means of resolving such disputes. Less adversarial means of dispute resolution can be more effective and efficient in finding the best possible way forward. Mediation is a low cost, least formal way of addressing disputes for sensitive issues such as equality and working time issues. Contrary to other civil proceedings, the aim of any labour dispute is to return to a feasible working relationship and ensure that the employee – with her/his expertise – continues to work in that very work place. However, issues of balancing the power between the employer and employee (trade union) may require special facilitation. Also, the closed-door fashion of such proceedings makes it difficult to share the outcome of mediation with the wider public and thereby raise awareness about labour disputes and add to the overall legal culture of society.
- *Actio popularis*: In societies where the settlement of disputes over cases of alleged discrimination is not yet common, it may be beneficial to give individuals the opportunity to join in a collective action to ensure that the violation of their rights is addressed. This possibility could in particular be strengthened by giving representative organizations such as NGOs and trade unions the right to initiate such cases, opening the possibility for individuals to join in. Experiences from other countries – also in other fields like environmental policy – show that the *actio popularis* has the potential to be an effective method to enforce collective interests.⁵ Also, because it solves the ‘David versus Goliath’ problem of one employee trying to fight against an employer who is perceived as far more powerful.
- *Right of Trade Unions to Represent Individuals in Court Cases*: Given the current constraints in the field of labour disputes individuals appear hesitant

⁵ On how public interests in environmental policy can be enforced through court litigation see de Sadeleer/Roller/Dross (2005); Deimann/Dyssli (1995); Ebbesson (2002); Schmidt/Zschiesche/Rosenbaum (2004).

to take action against alleged violations of their labour rights. Therefore, it may be feasible to take advantage of established representative organizations, such as trade unions, to take action on behalf of such persons. Thereby, expert bodies could also take on a part of the watchdog function in this field. This also serves as a way of empowering such organizations. Legislation should be amended accordingly, to explicitly grant the right of individual representation to specialized organisations.

- *Protection of Victims and Witnesses:* One of the minimum requirements to ensure that victims seek redress for violations while their concerns for privacy are safeguarded and their current employment is secured is the protection of victims and possible witnesses throughout the process.
- *Support for Court Proceedings:* Many victims do not seek redress for ill conduct because they fear the costs of such proceedings. A number of Member States provide support for persons who could otherwise not afford legal action. This can be done in a variety of ways: financial support or the institutionalisation of an agreement with the Bar Association, which provides a roster of attorneys who work *pro bono*.
- *Extending Training Possibilities:* Lawyers in all transition countries have had to adjust to a rapidly changing legal landscape: many laws have been amended multiple times within a relatively short period. Most of them have not had sufficient time to update their knowledge in specialized fields as well as in general EU law. Furthermore, working time as well as anti-discrimination affairs are very complex matters. Working time laws contain a great many of derogations and exemptions, which can hardly be reviewed even by experts with long standing experience. Anti-discrimination affairs are permanently enhanced by the jurisdiction of the ECJ, which means that practitioners have to be familiar with several recent judgements of the Court. Thus, substantial additional training should be provided for attorneys, judges and specialists such as labour inspectors. Additionally, it could be helpful to include independent experts in new highly specialized fields such as anti-discrimination to ensure that training and application are state of the art.
- *Developing Case Law:* In order to ensure effective awareness raising it would be beneficial to enhance the transparency of decisions. This can be done in a number of ways, e.g. institutionalising the anonymous publication of decisions, possibly also through a website. Such efforts assist the process of finding mutually agreed solutions to cases of discrimination and working time. Practitioners could easier catch up on the recent legal developments, which is of crucial importance for a better application of the laws. Only practitioners who know the current legal position and judgements of the competent bodies can guarantee a complete application. Therefore it would also be necessary to translate the ECJ's important judgements of the past into the respective languages.
A positive side effect of better-published court decisions is the increased public awareness, which adds to the knowledge about such issues and thus leads to better practices; it also encourages victims to seek redress for perceived violations of their rights.

b) Indirect improvement strategies

Further efforts to remedy the less than satisfying situation in the field of application and enforcement of EU social policy in the new member states could and should aim at strengthening civil society actors and at increasing media attention to social right implementation.

Strengthening cooperative governance seems one promising project: The new EU Member States established some consultation and coordination patterns between public and private actors as part of their pre-accession adaptation to EU-level standard procedures. However, the culture of such ‘Tripartism’ could be further strengthened in our four countries. While consultation among social partners takes place on a regular basis, the frequency and scope of these meetings could be increased in most countries. Higher frequency of meetings could assist efforts to rectify the impression that some bodies are merely formally established and are not yet working on a mutual and collaborative level.

A further point stressed by a number of practitioners from interest groups involved in our project is the need for better inclusion in drafting processes, particularly with regard to time provided for comments and statements on EU and national draft legislation. Given that the Member States by now already have transposed the pre-accession *acquis* and thus should now have more time in preparing legislation, a rapid improvement of the status quo can be expected.

It should also be noted that Tripartism could be slowed down because of ineffective cooperation between and among employers’ and employees’ representatives (‘bipartism’, intra-group relations). Therefore, the CEEC's newly established employer organisations as well as trade unions, which had to adjust their agenda in the wake of transition, should find institutionalised ways of increasing their level of coordination and cooperation.

With regard to specific interests, the important role of trade unions in putting employees’ rights and entitlements into effect could potentially be strengthened further. One possibility is that trade unions should have the right to bring a case to court on behalf of an individual or a group of employees. To increase the rights of trade unions is, however, just one side of the coin. Equally important is to ensure sufficient financial

resources.⁶ Close collaboration among NGOs, trade unions and other civil society actors could be useful for common fund raising and lobbying. Especially in the field of equal treatment and anti-discrimination the cooperation between trade unions and NGOs can be strengthened. Therefore, some of the classical role models – still represented in some conservative parts of the trade unions – should be adapted. The “male breadwinner model” – in the past sometimes an implicit aim of trade unions – cannot be combined with modern equal treatment policy. Since, in most CEECs, supportive civil society actors are weak and/or small, closer cooperation could (last but not least) raise their visibility. Corresponding networks should be established at the national, trans-national and European level, or strengthened were they exist already.

In short, civil society actors, such as women’s groups and trade unions, can contribute a lot to a better implementation of EU social law by raising awareness among individual citizens and by acting as watch-dogs vis-à-vis their governments. However, cooperative governance potentials have certainly not yet been fully exploited in the CEECs.

Improving communicative action on social rights is another promising improvement strategy: Labour law is highly complex, but only if the people concerned know their rights and entitlements, can they be motivated to go to court where they can enforce their claims through legal action. Broad dissemination of brochures on crucial laws, customised for a non-expert readership, could prove highly useful.

Otherwise, adequate coverage by the mass media is certainly crucial, particularly when it comes to efforts aimed at altering role models and overcoming stereotypes. Also, media are important for giving victims (e.g. of discrimination) a voice. On the other hand, the risk of going public is that media change the story (or misinterpret it). Journalism education should thus include sensitivity training on equal treatment issues. Furthermore, it is important to strike a balance between the publicity of cases and the protection of the victims’ privacy.

⁶ Currently, those unions which are only funded through membership fees particularly have to cope not only with a constantly diminishing membership but also with the ensuing economic constraints. For trade unions (but other interest groups as well), a ‘tax deduction system’ may be able to improve the financial situation and make them more independent. In Slovakia, for example, every employee can donate two percent of his/her income tax to one of the NGOs that are on an official list. However, such a system has shortcomings: Firms may create their own ‘NGOs’ and demand more or less openly that their employees donate to this entity. Given that donators make their own choices, NGOs with less “attractive” topics such as racism or domestic violence usually fare poorly in this system. Naturally, the degree of publicity also has an impact on the level of donations.

Media coverage on equal treatment policies should be enhanced not only in quality, but also in frequency. Relevant authorities and bodies should try to provide journalists with ‘tailored’ information, since the latter often do not have the time to investigate on their own, in depth. Interest groups (e.g. trade unions and employer federations) with own newspapers could reserve a specialised section to EU-related information and the follow-up on national level.

A further means to disseminate information on EU-related social rights could be Equal Treatment reports and articles on court proceedings, but only after being customised for public use. For example, reports by Equal Treatment Bodies could highlight best practices instead of only mentioning lengthy lists of “problems”. Efforts to alter the overall situation, particularly by overcoming stereotypes, can be supported by showing positive examples in conjunction with remaining problems.

Finally, scientific studies will sometimes be needed to shed light on complex questions (such as regarding reasons of the lack of efficiency of a court system, or of attitudes leading to discrimination). In Hungary, for example, a research project was successful in revealing stereotypes against Roma people within the police.⁷ The publication of such results can be expected to influence the decision-making in courts and ministries. Customised versions for broad dissemination throughout civil society will further enhance the effectiveness of this strategy.

Not in the least, teaching on equal treatment policies is an important issue, in the CEECs and elsewhere. Stereotypes within society, such as school books depicting the husband reading the newspaper while the wife cooks, are not easily changed – above all if they are reproduced in mass media and advertisements. What is called for are education/training efforts on various levels. Besides addressing adults (e.g. via information at the company level) it is equally important to attract the attention of children/adolescents to this topic. Therefore, equal treatment should become established in school and university curricula and, more generally, mainstreamed in official publications. Teachers together with experts (from Equal Treatment Bodies or Ombudsperson’s offices) could elaborate an approach on how to teach human rights best.

Lastly among the possibilities to (at least indirectly and in the long run) improve the situation of social rights in EU member states, it should be mentioned that language empowerment, in general, could help to improve effective implementation of EU law in

⁷ Expert information shared during our Strategy Workshop.

practice. It is difficult to represent interests, follow EU decision-making processes and participate in debates at the EU level with lacking language proficiency in English, and the latter is not yet sufficiently common in the CEECs (such as in some other EU Member States, for sure).

IV. Conclusions and outlook

This paper has presented results from empirical research on the implementation of EU social rights in the Czech Republic, Hungary, Slovakia and Slovenia. While transposition performance is relatively good, all four countries display significant problems in the field of application and enforcement.

We have argued in previous research on the EU15 that there are different country clusters with different typical procedural patterns and, therefore, different styles of implementing EU legislation (Falkner/Treib/Hartlapp/Leiber 2005). These different “worlds of compliance” can be used as a filter that decides which explanatory factors are relevant for different countries and what the direction of their influence is (Falkner/Hartlapp/Treib 2007). To capture the combination of a) politicised transposition and b) systematic shortcomings in enforcement and application, we suggested a fourth category covering (inter alia, not exclusively) the four countries studied here: the “world of dead letters” (see Table 1 above, and for more detail see Falkner/Treib 2007).

The main part of this paper presented a set of strategies to improve the current state of affairs. It goes without saying that improving the implementation of EU law in the new CEEC member states involves intricate issues at various levels including the economy, the administrations, the legal systems, the interest group set-ups and the interest intermediation systems.

Therefore, any effective reform will most probably need many parents, and the CEECs will without any doubt need both encouragement and support by the “old” EU. Neither benign neglect nor a snobbish attitude are in place: Firstly, the situation is truly alarming. Secondly, and as outlined above, the CEECs' poor performance in application and enforcement is not a deliberate strategy but caused by genuine capacity problems and structural issues.

Clearly, also the EU institutions have a role to play in “making the letters live” in new member states. In principle, implementation is a rather de-centralised affair in European

integration, but the Community treaties require the European Commission to ensure that they are properly implemented (e.g. Article 211 ECT), together with any EU decision taken on the basis of the treaties (the “secondary law”). The Commission fulfils its role as guardian of the treaties mainly through the “failure to act” procedure under Article 226 ECT. If it considers that a Member State has failed to fulfil an obligation under the treaty, it can initiate proceedings, potentially leading up to a ruling by the European Court of Justice and, if this is not complied with, finally even to financial sanctions to be imposed by the ECJ.

Although the Commission’s enforcement policy has recently been somewhat intensified (as a response to increasing public awareness of compliance failures), it could be helpful if the European Commission would further systematise and increase its efforts. Regular monitoring reports have already proven to be both a useful and very successful way to ensure better quality implementation during the accession process of new Member States. More systematic and regular Commission scrutiny, leading (for example) to annual publication of individual national reports on the implementation of the *acquis* – including new legislation – in all the Member States would most probably lead to a better respect of EU rules at the national level. The overall monitoring function of the Commission would probably be enhanced if the interaction with NGOs and trade unions was intensified. These sub-state actors often have valuable information concerning a Member State’s shortcomings in transposition, application and enforcement. Overall, the timing of the Commission’s response to breaches – particularly to overt ones – should be speeded up whenever possible and more resources should be devoted to the enforcement of EU derived regulations.

It is true that the governments do not always support this, for they have an immediate self-interest in preserving autonomy, including in the field of policy implementation. However, they need to realize that this is rather short sighted. Considering the extreme interdependence prevailing in the EU, systematically producing dead letters would in the end be detrimental to the goals set by the Community, which are thought serve the interests of all member states.

In that sense, it is high time that all relevant political actors join their forces to prevent the emergence of a potential vicious circle whereby the modes of deficient compliance with EU law described in this paper might actually spread across the entire European Union and endanger its very future.

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