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Non-Compliance with EU Directives in the Member States: Opposition through the Backdoor?

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To what extent are European rules complied with, and what are the reasons for non-compliance with EU law? According to an intergovernmentalist perspective, implementation problems should occur when member states failed to assert their interests in the European decision-making process. Focusing on 26 infringement procedures from the area of labour law, we show that such "opposition through the backdoor" does occur occasionally. However, we demonstrate that opposition at the end of the EU policy process may also arise without prior opposition at the beginning. Additionally, our findings indicate that non-compliance is often unrelated to opposition, and due to administrative shortcomings, interpretation problems, and issue linkage. This study is based on unique in-depth data stemming from a ground-level analysis of the implementation of six EU Directives in all 15 member states.

KEYWORDS: compliance with EU law, transposition of EU Directives, social policy, implementation.

NON COMPLIANCE AS OPPOSITION: QUESTIONS AND RESEARCH DESIGN

In recent times, scholars of European integration have increasingly focused on the effects of Europeanization on domestic systems of governance. This perspective has produced a number of

studies dealing with the impact of membership in the European Union (EU) on such phenomena as national parliaments (Maurer and Wessels 2001; Dimitrakopoulos 2001a; Raunio and Hix 2001), party systems (Ladrech 2001; Mair 2001), administrations (Olsen 2002b), state-society relationships (Schmidt 1999; Falkner 2000) or territorial state structures (Börzel 2001a). In this context, scholars have also turned their attention to the patterns of adjustment to European policies, and in particular to the national implementation of EU law.[1] With regard to implementation, Directives are of particular interest. They are not directly applicable at the national level (as Regulations are), but have to be incorporated into national law first. Therefore, the focus of this paper lies on the transposition of European Directives, more specifically, and on the meaning of transposition failures.

According to the mainstream of the more recent literature on Europeanisation, adjustment processes are expected to be more problematic if the degree of *misfit*[2] between European rules and existing institutional and regulatory traditions is high (Börzel 2000a; 2000b; Duina 1999; Knill 2001; Knill and Lenschow 1999; 2001). From this perspective, national governments, parliaments and administrations are expected to act as 'guardians of the status quo, as the shield protecting national legal-administrative traditions' against intrusion from the European level (Duina 1997: 157; for similar statements see Börzel 2000a: 224-225; 2000b: 147; Knill and Lenschow 2000: 261). Following this line of reasoning, deliberate opposition of national actors during the transposition phase should thus be expected if European Directives demand significant changes to the pre-existing national arrangements.

On a more general level, one could argue that whatever the degree of misfit with the new EU norms and standards, the implementation of European Directives confronts two political systems. This conforms to a view of the EU as a federal phenomenon with two[3] different levels of government (national and European). This multi-layer perspective[4] suggests that the preference formation processes of the lower-level polity and the higher-level polity are clearly distinct. This implies that in cases where a national government is unsuccessful in "uploading" its own preferences at the EU level as the template for the joint measure or standard, it will try to resist during the "downloading" process, i.e. later at the implementation stage (for the uploading versus downloading terminology see Börzel 2002a). Only in those cases where there is no national protest against a specific measure

during EU-level decision-making, implementation should be unproblematic according to such a mainly intergovernmentalist perspective (for this perspective on European integration, see most importantly Moravcsik 1993). Non-transposition could hence be considered a means to protest against being outvoted or otherwise "minoritised" in the EU's policy process, as "*opposition through the backdoor*".

Older contributions to the debate about implementation processes in the European context, which have received less scholarly attention in recent years, had a different focus. They expected implementation problems to be rather due to *administrative shortcomings* (Ciavarini Azzi 1985; Siedentopf and Ziller 1988a; 1988b; Schwarze *et al.* 1993). In addition, scholars have highlighted concerns about the legal quality of EU Directives (e.g. Weiler 1988; Dimitrakopoulos 2001b). Since Directives are typically the result of long discussions and elaborate compromises between the fifteen member states, they argue that such texts may be less than clear and may leave room for diverse understandings. This suggests that *misinterpretation* can be a factor leading to incorrect or delayed transposition into national law (and to application problems, if the transposition does not provide a clear-cut interpretation itself).

Our analysis is based on a unique in-depth study in one policy area of particular political importance, i.e. social policy. This especially interesting case is seen by many as an important complement to the EU's Internal Market but is sternly opposed by others. These conflicts make non-implementation all the more interesting from a political science perspective. Our paper will shed light on problematic national adjustment processes and will discuss the factors that explain why member states do not transpose correctly and/or in a timely or efficient manner. Is that kind of national non-compliance caused by the deliberate opposition of national actors who want to protect their "national systems", as suggested in much of the recent misfit-oriented literature and by the multi-layer perspective on European integration?

Most research on compliance with EU law analyses data on the infringement processes initiated by the EU Commission (Ehlermann 1987; Mendrinou 1996; Neyer and Zürn 2001; Sverdrup 2003; Börzel 2002a; 2001b; 2002b). Typically, however, the Commission's enforcement policy (being a reaction to non-compliant behaviour) cannot be set as the equivalent to the implementation

performance at the national level and, most importantly, the reasons for failures to comply are unknown due to a lack of knowledge beyond the statistical data offered by Commission sources. Improving on this state of the art, our in-depth empirical study identifies the reasons for "misbehaviour" and finally looks at "the other side of the coin". The analysis offered in this article links the Commission data to institutional aspects of legislative and administrative structures in the member states, and to the interaction of actors involved in the implementation processes. By improving our knowledge on the reasons for non-compliance[5] and by relating concrete empirical findings to the extant theories in the field (see immediately below), this text furthers the rather broad ongoing debate on "Europeanisation" (see e.g. Olsen 2002a).

The empirical material for this paper stems from collaborative research which analyses the national transposition, enforcement, and application of six EU[6] labour law Directives in all fifteen member states. The sample covers the most important labour law Directives from the 1990s.[7] The *Employment Contract Information* Directive[8] wants to create more transparency on the labour market. To this aim the Directive assigns the employee the right to receive essential information on his or her working conditions in written form. Expatriate workers are entitled to specific infomation on their work abroad. The Directive on *Pregnant Workers*[9] prohibits the exposure of pregnant and breast feeding employees to work or substances that might cause harm for mother and child, especially at night. To avoid this, transfer to another job or paid suspension are envisaged. Every worker who has given birth is entitled to fourteen weeks maternity leave (of which at least two weeks are compulsory) and dismissal is only allowed for reasons not related to pregnancy. The *Working Time* Directive[10] fixes daily and weekly maximum working hours and rest periods. The weekly maximum of 48 hours can be calculated over a reference period of four months. Exemptions from working and rest periods can be granted for specific groups of workers and on the basis of collective or company level agreements. The Directive also grants special protection to night workers and four weeks annual leave to all workers. Doctors in training and sectors such as air, road, rail and sea transport are not covered by the Directive.

The Directive on *Young Workers*[11] contains a general prohibition of child labour that only allows exemptions in exceptional cases of light work. Daily and weekly maximum working time limits and rest periods are fixed and night work is limited. Time worked for different employers has to be

counted in an additive way. For some groups of young workers exemptions from these limits can be introduced. Children and young workers have to be protected against activities that would harm their health and safety. This can be determined by a medical assessment, while some especially dangerous activities are absolutely prohibited. Under the *Parental Leave* Directive[12], father and mother are given an individual right of at least three months parental leave to take care of their (natural or adopted) child, with the right to return to the same or an equivalent work place. Moreover workers have the right to leave for urgent family reasons. Finally, the *Part-time Work* Directive[13] fixes a general non-discrimination principle for part-time workers compared to full time workers in similar positions – unless such unequal treatment is justified by "objective reasons". Access to particular conditions of employment can be made dependent on the time worked, the period worked or on earnings.

Our research design, covering in total 90 cases, allows us to analyse, in a comparative perspective, specifics of both Directives and individual member states. Almost 200 interviews have been conducted with experts from the administrations, interest groups and labour inspections in all member states. We collected material on the pre-existing national standards (in order to assess the potential impact of the new European Directives), on the adaptation process (to learn which actors prevailed and why non-compliance took place), and on the national experts' views as to the usefulness of the changes induced by the EU.

In this paper, we can for reasons of time and space only present from one (quite particular) of these angles that cut through our material.[14] In cases of member state non-compliance, the Commission can start an infringement procedure with a letter of formal notice that can be followed by a reasoned opinion, a transferral to the European Court of Justice (ECJ), and finally a ruling by the ECJ (article 226 ECT). If the member state does not follow the ruling, a second infringement procedure can be initiated and financial sanctions can be imposed (article 228 ECT). We look at those cases where the Commission pursued infringement procedures at least until the stage of a "reasoned opinion". These are the crucial cases of national "misbehaviour" – either non-notification, non-transposition, late transposition, or substively incorrect transposition[15] – as recognised by the responsible EU-level "watchdog", the European Commission.[16]

INSERT HERE Table 1: Six Directives and related infringement proceedings

Since our analysis highlights a set of four factors that account (singularly or in combination) for all of the cases, we designed the paper to proceed along these lines. The sections on non-compliance as opposition; non-compliance as administrative shortcoming; non-compliance due to issue linkage; and non-compliance due to interpretation problems each present the most interesting cases of their category. The conclusions will put the findings into perspective.

NON-COMPLIANCE AS OPPOSITION

Deliberate opposition by national governments is one possible reason why some member states fail to comply with European standards. In our sample we found *two variants* of this pattern. On the one hand, it can be outright "*opposition through the backdoor*". In other words, these are cases where governments which had not wanted a Directive (or specific aspects thereof) later do not implement it correctly (below a). On the other hand, opposition can be due to the wish to still protect the older national patterns but without any dispute at the prior decision-making stage (below b).

a) Related to our six Directives to be implemented in the fifteen member states (90 cases), only two cases are clear-cut examples of *opposition through the backdoor* in which the respective national government fought hard against the Directive in Brussels and, after having lost the battle at the European level, tried to win it back at the implementation stage. This confrontation strategy was used by the *UK's* conservative government in regard to the *Working Time* and the *Young Workers Directives*. In both cases, John Major's team was fundamentally opposed to the draft Directives during the European negotiations (see e.g. Cassell 1992; EIRR 1993a; 1993b) because the Commission proposals ran counter to its deregulatory *laissez-faire* approach to economic and

labour-market policy. As a result of the Commission's 'treaty-base game' (Rhodes 1995: 99), the Directives had been tabled as a health and safety measure and could therefore be passed by a qualified majority. Unlike with many other initiatives at the time, the UK government thus could not block the proposals.

After the Directives had been adopted in Brussels, the Tory government was not willing to accept the defeat that they had suffered at the European level. In March 1994, the UK challenged the *Working Time Directive* in the European Court of Justice, seeking to annul the Directive on the grounds that it had been issued on a wrong legal basis. A few days before the end of the implementation deadline in November 1996, however, the European judges rejected all major points of the UK challenge.[17] The Tory government openly refused to accept the Court ruling (House of Commons 1996: Cols 152-155) and did not take any decisive steps to comply with the Directive until the end of its term of office in May 1997 (Interview GB4: 285-300). The incoming Labour government, who had made transposition of the Directive a pre-election manifesto commitment (Interview GB3: 532-534), then implemented the Directive within less than one and a half years.[18] As a consequence of the delaying tactics of their Conservative predecessors, however, the Blair government could not help exceeding the implementation deadline by almost two years, which triggered the initiation of an infringement proceeding against the UK.[19]

Through the UK's reaction to the *Young Workers Directive* it can be clearly seen that the deliberate opposition by the Tory government was in fact caused by the liberal economic-policy approach of the Conservative Party and not (or at least not primarily) by the desire to fend off economically expensive reforms imposed by Europe. In contrast to the Working Time Directive, which had made considerable reforms of the deregulated British labour market necessary,[20] the Young Workers Directive required only minor changes in the UK at this point in time since the government had secured a four-year opt-out from some of the core standards of the Directive. Nevertheless, the Major government only transposed those provisions of the Directive that they accepted politically (i.e. the health and safety aspects of the Directive narrowly defined).[21] Due to the Conservative government's opposition, and in striking similarity to the Working Time case, the remaining parts of the Directive were transposed with considerable delay only after the Labour government had assumed power.[22]

b) A number of our cases of purposeful resistance were, by contrast, due to governments trying to *defend their existing rules* and regulations against European adaptation pressure without significant protest having occurred at the EU-level decision-making stage. Finland, Sweden, and Austria were not members of the EU before 1995 and automatically fall into this category for four cases in the sample of infringement procedures, since they were absent from the decision making processes. Other countries chose not to protest either because of inadvertence or political reasons.

This pattern could be observed, for example, in the context of the implementation of the *Pregnant Workers* Directive in *France*. Here, the government refused to introduce a specific leave for health and safety reasons connected to pregnancy for several years, until the Commission initiated an infringement proceeding.[23] France argued that according to the *Code du Travail* (L 122-26) maternity leave could be extended for up to six additional weeks in cases of pathological pregnancies and on grounds of a medical certificate, and that therefore the national regulation and practice did not need to be changed. Besides the strict misfit to the standard on *preventive* leave for health and safety reasons connected to pregnancy, this national regulation was not in line with the overall policy model of the EU Directive, since the preamble of the Directive states that regulation 'should in no circumstances be interpreted as suggesting an analogy between pregnancy and illness'. Even though the trade unions had pointed to this incompatibility between the French regulation and the EU Directive (Interview F6: 467-491), the French government stated that the national model provided sufficient or even better protection. It was not until February 2001 that France gave in to European pressure and amended its legislation accordingly.[24]

A similar constellation characterised the transposition of the *Young Workers* Directive in *France*. Here, the implementation process started years after the transposition period had expired. The official argument put forward to explain the delay in the transposition was a 'lack of adequate legal support'.[25] Implicitly such an argument transmits an image of inadvertence or administrative inefficiency. However this seems a weak excuse – a lack of legal expertise in the French Labour Ministry is not likely[26] – and cannot explain why inertia prevailed for more than five years. A national expert reported that the real reason for the delay was that the government consciously decided not to transpose the Directive (Interview F2: 1003-1031). Even left-wing trade unions supported this strategy of deliberate opposition to the EU Directive (Interview F3: 681-690). Thus the actors in the

national arena consented that the existing French model could provide at least as much protection for young workers as the standards in the EU Directive, even if they clearly differed in some aspects – such as the definition of 'additive working time' or the introduction of stricter rules for fourteen and fifteen year olds. The transposition only took place after the ECJ had convicted France for non-transposition of this Directive on 18 May 2000 (C-45/99)[27] and the Commission had initiated a second infringement procedure (according to article 228 ECT) in the same year. The threat of financial sanctions increased the external pressure to a degree at which opposition and 'sticking to the national model' was no longer a viable solution.[28]

The *Swedish government* openly refused to correctly implement the *Pregnant Workers Directive*. Most parts of the Pregnant Workers Directive were transposed in Sweden without further problems and approximately in time.[29] One aspect though – the introduction of two weeks compulsory maternity leave – was not implemented until August 2000, i.e. roughly six years after the end of the transposition period, and after the European Commission had started an infringement procedure.[30] This is quite surprising as Sweden generally belongs to the group of member states with rather good implementation records (see e.g. Commission Européenne 2001: 126 and 144) and the protection of pregnant workers is well developed. In this case though, Sweden clearly opposed the transposition of the two weeks of *compulsory* leave. Similar to the French cases, the Swedish government was convinced that their previous system was actually better than the regulation of the Directive. The Swedish government's official position was that the pre-existing twelve (later fourteen) weeks of *optional* maternity leave *de facto* guaranteed exactly the same level of protection. They argued that women in Sweden generally made use of the maternity leave for much longer than two weeks so that there was no need to change the legal rules in order to prescribe the leave (Interview S8: 411-456). Only after the interference of the European Commission did they finally give in and introduced the compulsory leave which in their eyes was completely superfluous. The following section, however, will highlight the fact that such instances of politically motivated non-compliance tell only a part of the whole story.

NON-COMPLIANCE FOR ADMINISTRATIVE REASONS

In addition to deliberate opposition, *administrative problems* are an at least equally important reason for non-compliance with EU law in our sample. Several cases show that even if the necessary adaptations are not of major magnitude and importance (small- or medium-scale misfit at most) and even if the government as such is not un-willing to transpose, there may still be a delay or (less frequently) an incorrect transposition. In quite many cases this can be attributed to administrative shortcomings.[31]

The country where this pattern most clearly occurs is *Luxembourg*. Of the 29 infringement cases related to our six Directives and fifteen member states, Luxembourg alone covers six (see Table 1). Among those, three were caused by administrative problems. The main reason for the frequent occurrence of this factor is administrative overload due to a lack of resources in the small country. Equipped with a comparatively low number of staff, the administration is constantly at its limits, having to deal with the national as well as the increasing number of European matters. Under these circumstances, especially when the Directives do require rather small details to be changed, the priorities of the respective administrative units are focussed on the major national or European reform projects rather than on issues where pre-existing national rules already assure (more or less) appropriate protection (Interview LUX1: 1000-1034). This pattern explains why four of the six Directives in our sample were transposed with a tremendous delay of up to five years (Young Workers Directive) in Luxembourg, despite (or maybe more appropriately: *because of*) the fact that they only required small- or at most medium-scale adaptations. Interestingly, the only Directive creating high misfit in Luxembourg, the *Parental Leave Directive*, was transposed almost in time.

In other countries administrative problems also do occur. For example, regarding the *Employment Contract Directive*, *Italy* received a reasoned opinion because of non-notification.[32] A high degree of misfit or controversial issues in the Directive, which could have attracted the interest of veto players, can be excluded as reasons for this three-year delay. Even before the Directive had to be implemented, written information or contract to inform employees of the conditions of the working relationship had already been quite common in Italian practice. On the social partners' part, therefore, not very much attention was paid to this Directive (Interview I8: 29-102). The Italian

government even seemed to have welcomed the European provisions as a means to bring together the different pre-existing rules under the heading of one piece of legislation (Interview I4: 196-255). Nevertheless, Italy's administrative inefficiency[33] hampered timely implementation measures.

In sum, these cases demonstrate that besides more "political" factors like deliberate governmental opposition, administrative shortcomings can also play an important role for non-compliance. Sufficient financial or personnel resources are crucial for efficient implementation (see already e.g. Bichler 1995; Siedentopf 1997).

NON-COMPLIANCE DUE TO ISSUE LINKAGE

In addition to government opposition and administrative problems, a further variable is of considerable importance in our case studies: *issue linkage*. It is a broad category which refers to all those cases where member states transposed – or tried to transpose – a Directive in connection with other issues. They can either be thematically related to the subject of the Directive or extraneous. Note that the direction of influence can be either positive or negative, leading to improvement or decline of implementation performance. Issue linkage *alone* can have crucial explanatory power even in the absence of the other factors.

In EU social policy, linkage of implementation to closely related national reforms is often almost inevitable since in almost all member states specific labour regulation existed prior to the European Directives and reforms or at least debates have been the rule in recent years. Above all, working time issues are typically high on the agenda. Therefore, it comes as no surprise that the linkage to national debates can explain the delayed transposition of the EU *Working Time Directive* in four out of six delayed cases in our sample (*France*, *Greece*, *Italy* and *Portugal*).

Portugal is an example for linkage with broader and multi-actor reform processes that had already proven to be difficult per se. Government and social partners had classified the transposition of the EU *Working Time, Young Workers* and *Parental Leave Directive* as specific legal operations to be tackled within a social pact signed on 20 December 1996 (Commission Permanente de Concertation Sociale du Conseil Économique et Social 1996: 99). Ongoing national discussions

revolved around issues that lay in the realm of the EU provisions. For *Working Time*[34], the government tried in vain to keep particularly controversial issues out of the transposition discussion (such as the question of what to count as effective working time and what time to consider as breaks).[35] Since the employers and unions tried to interpret the Directive in a way that would support their position on this point (Interviews P3: 441-457, P4: 309-317, P2: 612-641 and 472-500), the government could not prevent controversies, as an interview partner in the ministry reported: 'The Directives are important, but on the national level it is more the social partners, the internal politics, that are important' (Interview P1: 485-488, translation MH). The working time law 73/98 was finally adopted on 10 November 1998 with a delay of two years.

For the implementation of the *Young Workers* Directive[36] in *Portugal* the situation was similar. Here external and internal pressure to tackle child labour had led to a broad national reform process (Interview P3: 1010-1046). It took place parallel to the negotiations in Brussels and even continued thereafter.[37] To the dynamic of the reform process came, as an additional factor, the specific requirements to comply with the EU Directive. Even though willingness existed, in principle, to legislate on the issue and to implement the Directive, special aspects – such as the concept of light work – had already been debated very controversially. Existing conflicts on the issue seemed relevant enough to now hinder timely transposition.[38] Transposition by law 58/99 finally took place too late.[39] The transposition process of the *Parental Leave* Directive followed similar patterns. This time transposition was delayed due to controversies around the linkage with national reform interests (e.g. teenage pregnancies or incentive measure for fathers to take the leave) (Interviews P1: 1723-1730, P8: 772-775 and P4: 89-93). It was not until 31 August 1999 that transposition law 142/99 was adopted.

The case of delayed transposition of the *Working Time* Directive[40] in *France* is different. Here, EU-related adjustments to national laws concerning daily rest and breaks, as well as health and safety checks, were saddled onto the 35-hour week flagship reform of the Jospin government. In this context, the EU standards – even if described as 'the first evidence of social Europe' (Interview F4: 1432, translation MH) – did not cause trouble because of their controversially discussed specific policy standards or regulation mode (e.g. the concept of light work in the Young Workers Directive or the notion of effective working time in Portugal). While the controversial national debate

centred on non-EU issues of working time regulation, transposition of the Working Time Directive took an excessive amount of time because of the functional linkage to the national reform laws *Loi Aubry I* (98/461) and *Loi Aubry II* (37/2000).

Sometimes issue linkage is pursued for some time until it becomes clear that transposition on the basis of this linkage is impossible, the transposition is unlinked, and the discussion of critical points is transferred to a later reform. Often times, this is related to rising external pressure from Brussels or to the government's realisation that the transposition is running the risk of being late. Then the country may choose a particularly fast transposition of the EU-related aspects via a rather easily manageable instrument, such as a presidential decree. The big trunks of the national discussion or potential exceeding implementation aspects to the European law are sometimes left for a national law later to follow. This was the case when it came to transposition of the *Working Time* Directive in *Greece*. These and further examples (*Working Time, Young Workers Protection* and *Parental Leave* in *Italy* as well as non-notification of the *parental leave* Directive in Luxembourg) show that issue linkage is often a reason for delayed transposition, but that the details of the linkage, its timing, and its persistence are crucial for determining the practical effects on the implementation of EU Directives. These aspects will be discussed in the conclusions.

NON-COMPLIANCE DUE TO INTERPRETATION PROBLEMS

Besides political opposition, administrative problems, or issue linkage with contested or protracted national reform processes, infringement proceedings against allegedly non-compliant member states may also be caused by contested interpretations of what European law actually requires member states to do.[41] Due to the multitude of actors and arenas involved in the EU decision-making process, and to the ensuing variety of different views which have to be taken on board in the course of that process, European Directives are often loosely worded in order to accommodate differences in the decision-making process. In addition, policy-making in the European Union is faced with general limits of defining adequate legal provisions that provide clear-cut solutions for fifteen diverse national settings. As a consequence, the resulting European policies are often open for different

(maybe even equally plausible) interpretations. In such cases, infringement proceedings or a ruling by the European Court of Justice may be the only way to clarify that one particular interpretation is more adequate.[42]

Problems of interpretation are all the more likely if those who have to transpose a Directive are not directly involved in its negotiation. This constellation is particularly frequent in European social policy, where some Directives are based on agreements concluded by the European peak-level organisations of business and labour. Normally these Directives still have to be implemented by national governments (for a thorough analysis of the functioning of this corporatist procedure, see Hartenberger 2001; Falkner 1998).

The infringement proceedings initiated against the *UK*, *Ireland* and *Luxemburg* with regard to the transposition of the *Parental Leave* Directive resulted exactly from such interpretation difficulties. The governments of the *UK* and *Ireland* were generally favourable to the Directive's aim of providing working parents with a right to parental leave in order to take care of their children for a period of up to three months. Pressurized by employers' organisations, however, they decided to introduce a "cut-off date" limiting the parental leave entitlement to parents whose children were born after the coming into force of the Directive (in the case of Ireland) or the implementation legislation (in the British case) respectively. The trade unions in both countries claimed this was contradictory to the Directive, but this was denied by employers' organisations (Interviews GB2: 184-195, 531-552 and IRL1: 250-263).

The dispute between the two sides of industry played a decisive role in these cases since the Parental Leave Directive had been based on an agreement between the leading organisations of business and labour at the European-level. Hence, the same actors that had negotiated the parental leave deal in the first place now had conflicting views about the interpretation of their own agreement. Since the Irish and British governments had decided to follow the employers' interpretation, the trade unions turned to the European level in order to clarify the matter. The Irish Congress of Trade Unions filed a complaint with the European Commission which in turn initiated an infringement proceeding against Ireland (Interview IRL1: 880-921).[43] In the UK, the Trades Union Congress brought a case against the government to the High Court in London, which was

subsequently referred to the European Court of Justice for a preliminary ruling (Interview GB6: 270-277, see also Taylor 2000b; 2000a). At the same time, the Commission also initiated an infringement proceeding against the UK.[44]

Since the European-level social partners had explicitly requested in their agreement that 'any matter relating to the interpretation of this agreement at European level should, in the first instance, be referred by the Commission to the signatory parties' (Clause 4.6 of the Agreement), the Commission consulted representatives of UNICE (Union of Industrial and Employers' Confederations of Europe), CEEP (European Centre of Enterprises with Public Participation) and ETUC (European Trade Union Confederation) in order to clarify the matter. The European peak organisations of business and labour finally supported the Commissions interpretation that the cut-off dates introduced in Ireland and the UK were contrary to the Parental Leave Agreement.[45] On the basis of this clarification, the Irish and British governments subsequently agreed to amend their legislation in such a way that the cut-off date would be repealed.[46] Also in *Luxembourg* such a cut-off date was introduced. Interestingly enough this issue was not taken up at all by the trade unions during the transposition phase, although the process was based on tripartite negotiations.[47] So far the country has still not correctly incorporated this standard in its legislation.[48]

In sum, these cases demonstrate that the inherent legal ambiguity of some European Directives may give rise to interpretation problems which subsequently have to be clarified by infringement proceedings.

CONCLUSION

Do the member states regularly practice "opposition through the backdoor" by not transposing EU Directives into national law? We presented evidence from our survey of six Directives and their implementation in all fifteen EU member states. In this paper, we looked at those 29 cases that were enforced with advanced infringement proceedings sustained by the European Commission.

Indeed, deliberate *opposition* by national governments is one reason why member states fail to comply with European standards. Among the 29 infringement proceedings in our sample which have at least reached the stage of "reasoned opinion" (see Table 1), there were eight cases where intentional opposition against adaptation by the respective national governments was the main reason for non-compliance. There are two variants of the opposition pattern: outright "opposition through the backdoor" where governments which had not wanted a Directive (or specific aspects thereof) later do not implement it correctly (two cases); and the wish to protect the national system without significant dispute at the prior EU decision-making stage. Countries which could not show opposition (one case) and others that chose not to do so (five cases) fall into the latter category.

In addition to outright opposition, another important factor in our cases of non-compliance was *issue linkage*. With nine cases out of 29, this factor, which has so far been almost completely neglected by compliance scholars, is quantitatively even more important. As outlined above, issue linkage can occur with issues more or less closely related to the standards of the EU Directive to be implemented and, partly related to this, it can be more or less voluntary. In cases where in the very same issue area a national reform process has already been going on (as is often the case with working time regulation), it is plausible that governments cannot easily set the implementation of EU law apart from the other reforms under consideration.

In further cases, however, issue linkage may be used to practice a hidden form of opposition to the required changes, or, by contrast, to speed up national transposition. Issue linkage as such does not say much about good or bad implementation records. The effect on the implementation performance depends on additional factors, for example situational or structural political factors; the point in time when the transposition of the Directive is linked to an issue; or whether the added-on issue is discussed controversially or not. As a consequence, timely transposition can be assured by saddling the transposition of a Directive on an almost finished reform process where the legislative machinery is at a point which produces rapid outcomes.[49] By contrast, timeliness is difficult to assure where the transposition of a Directive is attached to an ongoing but extremely controversial decision process with many stakeholders and veto-players. An example of this is if transposition of a European Directive is linked to a national social pact where many issues are linked and multiple concessions have to be made. In any case, the frequent linkage of European and national policy issues suggests

that these two levels of political contestation in contemporary Europe are less distinct than frequently expected (see also our general conclusions below).

A third factor in our sample, almost as important in quantitative terms as opposition and issue linkage, is *administrative shortcomings* as the prime source of transposition failure (seven cases in total). For this reason, four of the six Directives in our sample were transposed with a tremendous delay of up to five years (Young Workers Directive) in Luxembourg, despite (or better: *because of*) the fact that they only demanded small- or at most medium-scale adaptation. In contrast, the only Directive creating high degrees of misfit in Luxembourg, the *Parental Leave Directive*, was almost transposed in time. This contradicts scholarly expectations that effective implementation arises from low adaptation pressure where 'EU requirements basically confirm existing national arrangements, requiring no or only negligible adaptations' (Knill and Lenschow 1998: 610), and that '(o)nly if the implementation of an EU policy requires considerable legal and administrative changes imposing economic and political costs on the public administration, implementation failure should be expected' (Börzel 2000a: 225; for similar expectations, see e.g. Duina and Blithe 1999: 499). Our cases indicate that even very minor misfit may lead to non-compliance, e.g. where the national administration is overburdened or inefficient, and where national actors have a strong (often ideologically founded) hostility against even minor changes to their way of doing things.

Finally, we also found that *interpretation problems* cause implementation problems, albeit only in rather few cases (five out of 29). With a view to the *theoretical considerations* presented in the introduction, it therefore seems that all the factors mentioned in the literature can play a role, including opposition; administrative shortcomings; and interpretation problems. This indicates that, in any case, transposition shortcomings are *more than just opposition through the backdoor*.

These findings add to other limitations of what has been coined in our introduction the 'multi-layer perspective' on transposition, suggesting that nation states use their domestic arena to protest against the decisions of the supranational level. Among the practical limitations of such a narrow view of the EUs implementation problems is, most importantly, the fact that visible non-implementation is no longer a viable final solution. The threat of financial sanctions as introduced with the Maastricht Treaty, in addition to prior "naming and shaming" in the infringement proceeding,

have so far made every non-compliant Member State implement the relevant standards in the end. Changes in government, such as in the UK from Tory to Labour, also promote compliance with EU law in the long run.

Our cases indicate, on top of that general aspect, that there are also cases of opposition at the end of the EU policy process at national level that are not connected to opposition during the adoption of the relevant Directives. This is one further indicator for two aspects described by non-intergovernmental approaches to integration theory and by earlier empirical studies that the member states cannot fully control their agents in the EU Council, and that there are many unintended consequences of European integration – not in the least place, unforeseen *misfit* in the member states.

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[1] The term implementation refers to the transposition of European legislation into national law as well as to the enforcement of these legal provisions, both influencing proper application in the member states.

[2] The degree of *misfit* refers to the match or mismatch between EU measures and domestic institutions, policy instruments, standards and problem-solving approaches. It can thus be either of qualitative or of quantitative nature.

[3] At least, since some member states have even lower levels of internal government.

[4] It is crucial to highlight that this "multi-layer" perspective is quite different from the "multi-level" governance approach (see Marks *et al*. 1996; Hooghe and Marks 2001).

[5] Note that we do not focus here on the overall *level* of compliance in the member states (for this is another topic to be discussed in forthcoming publications).

[6] In this paper we only look into issues connected to the "first pillar" of the European Union. Therefore, in a strict sense "European Community (EC)" would be more accurate. Nevertheless, we will use "European Union" throughout the paper because it has become a common term in everyday usage.

[7] Which touch on issues that were previously covered by national law. By contrast, Directives on *trans*national issues such as the European Works Council Directive (94/45/EC) are not of interest here.

[8] Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ L 288, 18 Oct. 1991, 32–35.

[9] 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 (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 348, 28 Nov. 1992, 1–8.

[10] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, OJ L 307, 13 Dec. 1993, 18–24.

[11] Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work, OJ L 216, 20 Aug. 1994, 12–20.

[12] Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145, 19 June 1996, 4–9.

[13] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work, OJ L 014, 20 Jan. 1998, 9–14.

[14] In later papers, we will look at our material "the other way round". Where did the EU standards demand significant adaptations, and how smooth was national change then? Also, looking at those cases with high degrees of misfit and national *non*-compliance, did the Commission actually initiate and pursue infringement proceedings? For further details on the project see http://www.mpi-fg-koeln.mpg.de/socialeurope/.

[15] The European Commission differentiates between infringement procedures for non-notification of the national transposition measures, cases with incorrect transposition and cases with incorrect application. However, for the purpose of this paper it is not necessary to follow the distinction between non-notification and incorrect transposition since here we only study cases of *advanced* infringement procedures, where failure of notification as the real reason (as opposed to the revealed reason for a failure to implement) is not a likely scenario. Furthermore for the Directives under scrutiny here, no cases of infringement procedures for incorrect application exist.

[16] The data on infringement procedures initiated by the European Commission are based on information obtained from the homepage of the European Commission, on the annual *Reports on Monitoring the Application of Community Law*, which are published by the European Commission and on press releases and information collected in our interviews. Note that this data does not necessarily reveal all cases of non-compliance in the member states. This can be due either to insufficient information or to a political decision taken by the Commission. This problem cannot be tackled adequately within the scope of this paper, where we chose official infringement procedures to determine our sample of non-compliance cases.

[17] Judgment of the Court of 12 November 1996, United Kingdom of Great Britain and Northern Ireland v Council of the European Union, Case C-84/94, European Court Reports 1996, p. I-05755.

[18] The Working Time Regulations 1998, Statutory Instrument 1998 No. 1833.

[19] Letter of formal notice for non-transposition (1997) and reasoned opinion for non-transposition (Dec. 1997 or early 1998).

[20] Even considering that the UK had pushed through a number of far-reaching exemptions and derogations.

[21] The Health and Safety (Young Persons) Regulations 1997, Statutory Instrument 1997 No. 135.

[22] Letter of formal notice for non-transposition (1997) and reasoned opinion for non-transposition (Dec. 1997 or early 1998), decision to stop procedure (2 Dec. 1998).

[23] Letter of formal notice for incorrect transposition (11 Dec. 1998), reasoned opinion for incorrect transposition (6 Aug. 1999), decision for transferral to the ECJ (2000), but no seizure by ECJ, instead additional reasoned opinion (11 Oct. 2001). We are aware that non-compliance also existed for the regulation of female night work, in general, but since the whole debate about the lifting of the night work ban for women in France is more related to the equal treatment Directive (76/207/EEC) we limit the analysis to the reasons for the infringement procedure brought forward by the Commission, thus to the leave for health and safety reasons connected with pregnancy.

[24] O*rdonnance relative aux femmes enceintes au travail et au congé maternité* of 21 Feb. 2001 (*Journal Officiel* of 24 Feb. 2001).

[25] 'Ces dispositions devaient faire l'objet d'une transposition au plus tard le 22 juin 1996. Faute de support juridique adéquat, la France n'a pas opéré ces ajustements' (*Bulletin Officiel du Travail, de l'Emploie et de Formation Professionnelle* 20 March 2001).

[26] Moreover, France is known for quite professional work of the coordination unit for EU policy, the SGCI (Lequesne 1996: 263-269).

[27] Letter of formal notice for non-notification (1997), reasoned opinion for non-notification (20 Jan. 1998), transferral to the ECJ (2 Dec. 1998).

[28] Some standards had already been transposed with the second *Loi Aubry* (37/2000) on 19 Jan. 2000. The remaining misfit was tackled a year later by an *ordonnance* on 3 Jan. 2001. The infringement procedure was subsequently stopped on 23 May 2001.

[29] Meaning no later than six months after the end of the transposition period.

[30] Letter of formal notice for incorrect transposition (30 Dec. 1998), reasoned opinion for incorrect transposition (6 Aug. 1999).

[31] Of course these administrative problems can also occur in combination with other factors. If e.g. a transposition process is delayed due to issue linkage (more details see below), it is also plausible that an inefficient administration can extend the delay additionally.

[32] Letter of formal notice for non-notification (1993), reasoned opinion for non-notification (1996).

[33] In the literature, the Italian administration is often described as highly fragmented with overlapping competencies between old and new regulations, which may cause serious co-ordination problems. For further details (see e.g. Cananea 2000; or Gallo and Hanny 2003). It has to be mentioned that the transposition of this Directive (adopted at the beginning of the 1990s) fell into a period with difficult changes in government, in particular from the Andreotti (*Democrazia Cristiana*) to the Amato (left-liberal) government in 1992. The period until the Directive was finally transposed saw the so called 'technocrat governments' (Ciampi 1993-94 and Dini 1995-96), divided by a short interplay of Berlusconi (1994) and followed by the Prodi government (1996-98). It is clear though that this Directive was not sufficiently important to become a "politically significant issue", which might have led to conflicts among the parties in government or parliament and a therefore delayed transposition. Thus, we consider administrative problems to be the main reason for the delay in implementation.

[34] Letter of formal notice for non-notification (1997), reasoned opinion for non-notification (1998).

[35] The discussion on working time reduction had been very controversial during the years prior to the transposition (Interview P2: 551-573).

[36] Letter of formal notice for non-notification (1997), reasoned opinion for non-notification (1997).

[37] In this national reform process the ILO convention N°138 was also implemented, but earlier than the Directive. The Short Term Social Pact signed in Jan. 1996 under the initiative of the Socialist government introduced stricter regulation for child labour (Petmesidou 2001: 85).

[38] As a reaction the *Confederação Geral dos Trabalhadores Portugueses* (CGTP-IN, communist trade union) critically declared that a clearer concept of what to consider light work would be needed. The *Confederação do Comércio e Servicios de Portugal* (CCP, service sector employers' organisation) welcomed the draft, stating that it did not require major changes to the existing regulation. *Uniao Geral de Trabalhadores* (UGT, trade unions) had already highlighted the problem in their 1 May celebrations. Their demands were not related to the EU Directive, but centered around a decent minimum wage to help families survive without recourse to child work, heavier fines, and more intervention from the labour inspectorate (Cristovam 1998).

[39] Law 58/99 was approved by the *Assembleia da República* on 13 May 1999 and published in the Official Journal on 30 June. Later on, light work was defined by decree law 170/2001 on 25 May 2001. Law 61/99 of 30 June regulated working time for young workers, and law 118/99, adopted on 11 Aug., dealt with sanctions and punishment in cases of non-compliance with the bundle of legislation for young workers (Interviews P2: 731-1007 and P8: 672-725).

[40] Letter of formal notice for non-notification (1997), reasoned opinion for non-notification (12 Feb. 1998), decision for transferral to the ECJ (2 Dec. 1998) and ruling in case 46/99 by the ECJ (8 June 2000) (European Court of Justice 2000).

[41] For sure, a particular national interpretation can potentially just be another means to hide opposition. This is not what we discuss in this sub-section.

[42] Popular examples concerning the Directives studied here are the SIMAP case (C-303/98), dealing with the question of whether time on call in hospitals has to be considered working time, or the BECTU case (C-173/99), which specified the right of short term workers for annual leave.

[43] Letter of formal notice for incorrect transposition (11 March 1999) and reasoned opinion for incorrect transposition (3 April 2000).

[44] Reasoned opinion for incorrect transposition (2 April 2001).

[45] The text of the reasoned opinion issued by the European Commission against Ireland is reprinted in Clauwaert (2000: 117-118). This document also describes the process of consultation with the European-level social partners.

[46] For Ireland, see The European Communities (Parental Leave) Regulations, 2000, Statutory Instrument 2000. In the UK, the cut-off date was repealed by *The Maternity and Parental Leave (Amendment) Regulations* 2001, Statutory Instrument 2001 No. 4010.

[47] This may be due to the fact that the transposition of the Directive was linked to a whole package of employment policy measures. Compared to that the cut-off date was only a minor issue that attracted thus no major interest.

[48] Therefore the case was referred to the ECJ on 9 July 2003.

[49] Correctness, by contrast, might be more difficult to attain in these cases since there can be less room for detailed change when the added-on reform is almost finished.

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Table 1: Six Directives and related infringement proceedings

Directive	End of trans-position period	Letters of formal notice	Reasoned opinions	Cases referred to ECJ	EJC decisions
Employment Contract (91/533/EEC)	30.6.1993	- B, D, F, GR, I, IRL, LUX, NL, P, UK - **F**	- I		
Pregnant Workers (92/85/EEC)	19.10.1994	- B, D, F, GR, I, LUX, P - **A, D, E, F, FIN, I, IRL, LUX, S**	- GR, LUX - **E, F, I, IRL, LUX, S**	- LUX	
Working Time (93/104/EC)	23.11.1996	- A, F, GR, I, IRL, LUX, P, UK - **B, D, DK, F, GR, P, LUX, S, UK**	- F, GR, I, LUX, P, UK - **DK**	- F, I, LUX	- F, I
Young Workers (94/33/EC)	22.6.1996	- A, F, GR, I, LUX, P, S, UK	- A, F, GR, I, LUX, P, UK	- F, I, LUX	- F, LUX
Parental Leave (96/34/EC)	3.6.1998 UK: 15.12.1999	- D, GR, I, IRL, LUX, P, UK - **IRL, LUX**	- I, LUX, P - **IRL, LUX, UK**	- I - **LUX**	
Part-time Work (97/81/EC)	20.1.2000 UK: 7.4.2000	-	-	-	-
		total: 61	total: 29	total: 9	total: 4

Note: Standard size letters refer to infringement procedures for non-notification while bold letters indicate procedures due to incorrect transposition. Data: September 2003.[49]