

# Transposition of the European Anti-Discrimination Directives in Lithuania

*The Explanatory Power of Rationalist and Sociological Institutionalism*

**Thaisia Elisabeth de Waal**

*Supervisor: prof. dr. J. van der Harst*

Rijksuniversiteit Groningen

**Contact: thaisiadewaal@gmail.com**

## ABSTRACT

This paper examines the European anti-discrimination directives and their transposition in the context of a relatively new member state; Lithuania. The post-enlargement context provides a new testing ground for an assessment of the ability of the EU to instigate domestic change. Taking this post-communist society as a case study, it is suggested that while formal legislative compliance has been broadly accomplished as a consequence of EU conditionality, structural behavioral change has not been achieved. The combination of EU pressure on the one hand, and norm incompatibility on the other, may result in a normative backlash which prevents true behavioral change.

## Keywords

Employment Equality Directive, Europeanization, Institutionalism, Lithuania, norm socialization, Racial Equality Directive.

## INTRODUCTION

It has been approximately ten years since the so-called Big Bang enlargement took place in the European Union (EU). By including three former Soviet Republics (Lithuania, Latvia and Estonia), four former members of the Warsaw Pact (Poland, Czech Republic, Hungary and Slovakia), a previous member of the Yugoslav Federation (Slovenia) and two island states (Cyprus and Malta), the EU was no longer a community of exclusively Western European states. To be accepted into the EU, these candidate countries had to adopt all accumulated legislation, legal acts and court decisions of the EU (*acquis communautaire*). The question arises how the prospect of EU membership influenced the candidate states' decisions to transpose EU law into their domestic legal order, and whether norms and cultural values had an impact on the transposition and subsequent implementation of EU rules. The post-enlargement context provides a promising new testing ground for the study of the capability of EU conditionality in securing political, economic and legal reforms in Central and Eastern Europe.<sup>1</sup> This paper will examine to what extent the transposition of European directives can be explained by the two dominant institutionalist approaches within the theory of top-down Europeanization; namely rationalist

and sociological institutionalism. Whereas the rationalist institutionalist approach to the theory of top-down Europeanization emphasizes the power of EU conditionality in inducing domestic changes in EU member states, the sociological institutionalist approach emphasizes the importance of norm compatibility and the role of societal attitudes. The main research question of the paper is the following: *“to what extent can the theory of top-down Europeanization contribute to our understanding of the implementation of the Council 2000/43/EC (Racial Equality Directive) and Council 2000/78/EC (Employment Equality Directive) anti-discrimination directives in Lithuania?”*

Lithuania has been selected as a case study. There is little literature on the specific case of Lithuania in the context of the European anti-discrimination directives and Europeanization theory. Although the EU has generated various reports on the general transposition of the two directives across the EU, specific case studies on Lithuania are scarce. One exception is a paper by Charles Woolfson (2012), who has studied the transposition of the Racial Equality Directive in Lithuania. He concluded that five years after transposition, the socio-political context continues to be problematic and that “differential” Europeanization may be observed in the new member states.<sup>2</sup> Woolfson, however, does not make an explicit link with rational or sociological institutionalism, although his work seems to be informed by the sociological approach. This paper, in contrast, aims to make this link between Lithuania's transposition of the anti-discrimination directives and the theory of top-down Europeanization explicit. The top-down perspective to Europeanization has been selected rather than the bottom-up perspective. Lithuania was not yet a member of the EU at the time when the Council unanimously agreed upon the European anti-discrimination directives in 2000. Nevertheless, in order to become a member Lithuania had to transpose these anti-discrimination directives into its national law as part of the EU *acquis communautaire* conditionality. Given that Lithuania was not involved in the negotiations regarding the antidiscrimination directives but had to accept them after they had already been adopted, a bottom up approach to Europeanization is not considered in this paper.

Both approaches within the theory of top-down Europeanization, the rationalist institutionalist approach and the sociological institutionalist approach, will be used in the explanation for the transposition and

Permission to make digital or hard copies of all or part of this work for personal or classroom use is granted under the conditions of the Creative Commons Attribution-Share Alike (CC BY-SA) license and that copies bear this notice and the full citation on the first page.

implementation patterns of the anti-discrimination directives in Lithuania. Arguably, Lithuania provides a least likely case for a norm driven explanation of transposition. It is likely that conditionality in the pre-accession period generates conditions for a logic of consequentialism to dominate, encouraging a cost-benefit approach to transposition.<sup>3</sup> It is however still possible that a different logic also had an effect on the transposition of the anti-discrimination directives, especially after the first formal adoption of the relevant legislation was completed. It is expected that a so-called “norm misfit” exists in Lithuania between national and European anti-discrimination norms, especially with regard to discrimination on the ground of sexual orientation. In examining both approaches, this case study can shed light on the two different strands of top-down Europeanization and their compatibility.

The anti-discrimination directives have been selected for several reasons. First of all, non-discrimination is a well-established and important norm of Community law. Second, these directives were adopted just before Lithuania began its accession negotiations with the EU, which makes it possible to assess the explanatory power of both institutionalist approaches in two different phases; the pre-accession and post-accession phase. This distinction makes it possible to assess whether the two approaches can take place at the same time or describe different phases in a process of adaptational change.

#### THEORY & METHODOLOGY

Tanja Börzel and Thomas Risse developed the notion of “top-down” Europeanization as a response to early European studies, which were mostly concerned with explaining European integration and Europeanization processes themselves. Börzel and Risse called this a ‘bottom-up’ perspective on Europeanization.<sup>4</sup> To fully capture the concept of Europeanization, Börzel and Risse developed a ‘top-down’ perspective on Europeanization in their influential article “*When Europe Hits Home: Europeanization and Domestic Change.*” This top-down perspective analyzes “*the impact of European integration and Europeanization on domestic member states and social processes of the member States and beyond.*”<sup>5</sup> According to Börzel and Risse, domestic change in response to Europeanization is expected under two conditions. The first prerequisite is some degree of “misfit” between European-level and domestic processes, policies and institutions. The degree of misfit encourages adaptational pressures: the lower the compatibility between European-level and domestic institutions, processes and policies; the higher the adaptational pressure. The second precondition for domestic change in response to Europeanization is that there are some “facilitating factors” which respond to the adaptational pressures initiated by the misfit. Börzel and Risse go on to identify two ways of conceptualizing the adaptational pressures in response to Europeanization: a rationalist institutionalist approach and a sociological institutionalist approach. The two institutionalist approaches to top-down Europeanization are not necessarily mutually exclusive but may occur simultaneously or characterize different stages in a process of adaptational change. In

order assess the contribution of these two approaches in explaining the transposition of the European anti-discrimination directives in Lithuania, two models have been identified which form the basis for this case study.

The starting point for the rationalist institutionalist approach is the “external incentives model” as developed by Frank Schimmelfennig and Ulrich Sedelmeier. Guido Schweltnus, Lilla Balázs and Liudmila Mikalayeva (2009) have drawn on Schimmelfennig’s framework to derive three hypotheses to account for change in formal rule adoption: 1] *the domestic path hypothesis*: positive change should occur independently of any external incentives if domestic conditions are favorable; 2] *the external incentives path hypothesis*: strong and determinate external incentives should induce positive change also in cases where domestic conditions are less favorable, for instance if large minorities, indifferent or even moderately nationalist governments and/or veto players exist, as long as they are not ultra-nationalist and would incur prohibitively high political adoption costs; 3] *the revocation hypothesis*: negative change should occur when external incentives are weak, indeterminate or absent and a combination of nationalist government and no pro-minority veto player exists.<sup>6</sup>

With regard to sociological institutionalism, the starting point for analysis is Schimmelfennig’s “social learning model.”<sup>7</sup> Three hypotheses can be derived from this model to account for rule adoption: 1] the likelihood of rule adoption increases as the *legitimacy* of the rules increases. 2] the likelihood of rule adoption increases with *the identification* of the target government and society with the community that has established the rules. 3] the likelihood of rule adoption increases with domestic *resonance*. Furthermore, the framework developed by Antoaneta Dimitrova and Mark Rhinard (2005), about the importance of norms in the transposition of EU directives, will be taken into account when dealing with the sociological institutionalist approach. According to them, norm compatibility shapes how norms will be received, and thus how transposition will proceed.<sup>8</sup>

#### LITHUANIA: TRANSPOSITION IN THE PRE-ACCESSION PERIOD (2000-2004)

With regard to the pre-accession period, rationalist institutionalism can be considered the most dominant model for explaining the transposition of the European nondiscrimination directives. The conditional rewards were certain and high; the rules determinate and precise; while domestic political actors had an incentive to demonstrate to their electorate that they were complying with the EU requirements. Indeed, the promise of EU membership can be considered the most effective conditionality tool of the European Union. Membership of the EU means full access to, inter alia, the internal market, EU funding (such as the European Regional Development Fund) and the decision-making institutions of the EU. Although the EU speaks of accession “negotiations,” this suggests an openness that does not exist in the accession process, especially in the case of the Central and Eastern European States (CEEC’s).<sup>9</sup> The outcome of accession negotiations is largely

predetermined, namely the adoption of the entire body of EU legislation and policies as codified in the *acquis communautaire* (consisting of approximately 80.000 pages of EU legislation). Unlike existing Member States, applicants are unable to negotiate opt-outs. Moreover, in the accession negotiations with the CEECs the conditions for accession were the most detailed and comprehensive ever formulated.<sup>10</sup> This strict conditionality allowed the EU an unprecedented influence in restructuring domestic institutions and public policies in the CEECs.

Nevertheless, the social learning model can also explain some aspects. It was not until the accession “endgame” that transposition occurred in Lithuania.<sup>11</sup> This can partly be explained by the low resonance of some of the European norms, especially the sexual orientation norm. The EU directives were only transposed when the accession date drew closer. The fact that Lithuanians strongly identified themselves with “Europeans” in the pre-accession period and the wish to “return to Europe” helped the Lithuanian government to pass the necessary legislation. Moreover, the details of the legal changes were not widely discussed, since Lithuanian identification with the European Union was based on emotional and ideological assessments, rather than on the basis of clear policies whose impact was understood by the Lithuanian public.<sup>12</sup>

#### **LITHUANIA: COMPLIANCE IN THE POST-ACCESSION PERIOD (2005-2014)**

Although Lithuania transposed the European anti-discrimination directives through a unified and comprehensive national law, Lithuania did not meet all European requirements with regard to the anti-discrimination directives. The European Commission acknowledged these failures and opened an infringement case against Lithuania, after which the Lithuanian government amended the “Law on Equal Treatment” to the satisfaction of the European Commission. Explained from a rationalist institutionalist perspective, the EU continues to have sufficient leverage over its Member States after accession and is able to compel the Member States to comply with European obligations, even when there are nationalist tendencies in the government.

Nevertheless, formal compliance of Lithuania did not extend to *de facto* compliance. Problems such as a lack of effective application of the existing legal instruments and passive social attitudes, continued to persist.<sup>13</sup> The sociological approach is able to explain the lack of behavioral change. Although the EU aimed to achieve behavioral compliance with the directives, norm socialization has not occurred in Lithuania. To the contrary, attitudes both amongst the society at large and the Lithuanian elite with regard to sexual minorities have hardened. After Lithuania obtained EU membership, public discourse changed: the labels “Lithuanian” and “European” are no longer presumed to be complementary and the economic crisis has further diminished support for the European project. The provisions of nondiscrimination and equal opportunities for sexual minorities are perceived to be “imposed” by the European Union.<sup>14</sup> This feeling is further exacerbated by the fact

that local LGBT (Lesbian, Gay, Bisexual and Transgender people) advocacy NGO’s in Lithuania receive vital European support. Moreover, the EU provides these local organizations with new opportunities to challenge domestic authorities. For instance, on October 25th 2014, the Lithuanian Gay League, in collaboration with ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), appealed to the European Commission using the EU infringement procedure, claiming that the Lithuanian government has breached European rules and disproportionately limited the right of LGBT-people to freedom of speech and expression. This challenge to Lithuanian authorities by a local NGO through the institutions and processes of the European Union may feed the perception in Lithuania that the European Union “imposes” policies on Lithuania. This perception of EU interference has resulted in a normative backlash. For instance, in 2009, the “Law on the Protection of Minors against the Detrimental Effects of Public Information,” which effectively prohibits information on same-sex relationships, was adopted by the Lithuanian Parliament with two-thirds of the Members of Parliament voting in favor of the bill. More anti-gay bills have been proposed since then which are still under consideration at the time of writing.

#### **CONCLUSION**

This paper aimed to explore to what extent the two strands of top-down Europeanization theory can contribute to our understanding of the implementation of the Council 2000/43/EC and Council 2000/78/EC anti-discrimination directives in Lithuania. The rationalist institutionalist model can be considered the most dominant model for explaining the *initial* transposition of the European nondiscrimination directives in Lithuania. In the pre-accession period the prospect of European Union membership acted as a decisive conditionality mechanism: the rules of conditionality were determinate and precise and the benefits associated with EU membership were considered to be particularly high. The revocation hypothesis of the rational institutionalists, which states that negative change should occur when external incentives are weak, indeterminate or absent and a combination of nationalist government and no pro-minority veto player exists, is also able to explain certain developments in the post-accession period. After the incentive of EU membership was no longer relevant, the EU proved to continue to have considerable leverage over Lithuania: the EU was able to force the Member State, despite nationalistic tendencies and domestic opposition, to comply with European obligations through the initiation of an infringement procedure.

The social learning model however, also explains certain aspects of Lithuania’s transposition and implementation patters. The norm of sexual orientation did not resonate with domestic attitudes. The “endgame” transposition of the European directives can partly be explained by this lack of norm resonance. However, the high level of identification with the European Union helped the Lithuanian government to pass the necessary legislation, as did the fact that the legal changes were not widely

discussed with society. EU membership was presented to Lithuanians as a broad question of national orientation, referring to emotional assessments such as the “going back to Europe” argument. In the post-accession period, the importance of norm compatibility and domestic support became particularly apparent. Indeed, the importance of socialization in supporting the process of legal change should not be underestimated. Although external incentives may initially drive legal changes in candidate countries, this does not necessarily mean that the legal changes are supported by successful socialization into European norms. This was evident in the case of the antidiscrimination directives in Lithuania, especially with regard to the ground of sexual orientation and, to a lesser extent, the ground of race or ethnicity. Formal compliance of Lithuania did not extend to de facto compliance in some areas. It has been argued that both European directives are still not covered in their entirety in Lithuanian law. Problems such as a lack of effective application of the existing legal instruments, insufficient competence of judicial institutions and passive social attitudes, continues to persist. Rather than achieving norm socialization and securing better protection for minorities, the European directives seem to have generated a normative backlash. After gaining EU membership, Lithuanian public discourse with regard to the European Union changed. Politicians increasingly started to claim that the “liberal European agenda” was threatening “traditional Lithuanian values,” and this conflict between values became particularly visible in the attitudes against sexual minorities, which deteriorated since the transposition of the European directives. This normative backlash can be explained by the EU conditionality mechanism: because Lithuania was confronted with massive pressure by the EU to adopt liberal gay legislation long before society appeared to be ready for it, the provisions of nondiscrimination on the ground of sexual orientation are perceived to be “imposed” by the European Union. This feeling is further exacerbated by the fact that local LGBT NGO’s in Lithuania receive significant European support. The incompatibility of norms and lack of domestic support caused a normative backlash against sexual minorities, rather than norm socialization which the EU aimed to achieve.

Thus, although in the pre-accession period the EU is able to pressure potential member states to adopt European rules and continues to have significant leverage in the post-accession phase even when domestic conditions are less favorable, in the long term, norm compatibility between national and EU norms is crucial for proper implementation and compliance. EU pressure to adopt certain legislation despite a lack of popular domestic support is likely to result in a normative backlash. The EU’s impact on (prospective) Member States depends not only on external incentives and supportive governments, but also on popular domestic support.

#### **ROLE OF THE STUDENT**

T. de Waal was an undergraduate student in International Relations who wrote this thesis under the supervision of professor dr. J. van der Harst. The topic was proposed by de Waal and further fine-tuned together with the

supervisor. The research and the writing were done by the student.

#### **REFERENCES**

1. Sasse, Gwendolyn. “The Politics of EU Conditionality: the Norm of Minority Protection During and Beyond Accession.” *Journal of European Public Policy* 15, no. 6 (2008): 842-860
2. Woolfson, Charles. “The Race Equality Directive: “Differentiated” or “Differential” Europeanisation in the New EU Member States?.” *European Societies* 12, no. 4 (2012): 1-24.
3. Dimitrova, Antoaneta, and Mark Rhinard. “The Power of Norms in the Transposition of EU Directives.” *European Integration Online Papers* 9, no.16 (2005): 1-22. <http://eiop.or.at/eiop/pdf/2005-016.pdf>.
4. Bulmer, Simon. “Theorizing Europeanization.” In *Europeanization: New Research Agendas*, edited by Paolo Graziano and Maarten P. Vink, 46-58. Basingstoke: Palgrave Macmillan, 2007.
5. Börzel, Tanja A., and Thomas Risse. “When Europe Hits Home: Europeanization and Domestic Change.” *European Integration Online Papers* 4, no.15 (2000). <http://eiop.or.at/eiop/pdf/2000-015.pdf>.
6. Schwellnus, Guido, Lilla Balázs and Liudmila Mikalayeva. “It Ain’t Over When it’s Over: the Adoption and Sustainability of Minority Protection Rules in New EU Member States.” *European Integration Online Papers* 13, special issue no. 2 (2009). <http://eiop.or.at/eiop/pdf/2009-024.pdf>
7. Schimmelfennig, Frank and Ulrich Sedelmeier. “Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe.” *Journal of European Public Policy* 11, no.4 (2004), 669-687.
8. Dimitrova, Antoaneta, and Mark Rhinard. “The Power of Norms in the Transposition of EU Directives.” *European Integration Online Papers* 9, no.16 (2005): 1-22. <http://eiop.or.at/eiop/pdf/2005-016.pdf>.
9. Schimmelfennig, Frank, and Ulrich Sedelmeier. *The Europeanization of Central and Eastern Europe*. Ithaca: Cornell University Press, 2005.
10. Grabbe, Heather. “European Union Conditionality and the Acquis Communautaire.” *International Political Science Review* 23, no. 3 (2002): 249-268.
11. Schwellnus, Guido. “Anti-Discrimination Legislation.” In *Minority Rights in Central and Eastern Europe*, edited by Rechel Bernd, 32-46. Oxon: Routledge, 2009.
12. European Commission. “Equality, Diversity and Enlargement.” *Report on Measures to Combat Discrimination in Acceding and Candidate Countries* (2003).
13. European Network Against Racism (ENAR). “Responding to Racism in Lithuania.” National Leaflet. [http://cms.horus.be/files/99935/MediaArchive/pdf/lithuania\\_en.pdf](http://cms.horus.be/files/99935/MediaArchive/pdf/lithuania_en.pdf).
14. Budryte, Dovile, and Vilana Pilinkaite-Sotirovic. “Lithuania: Progressive legislation without Popular Support.” In *Minority Rights in Central and Eastern Europe*, edited by Rechel Bernd, 151-161. Oxon: Routledge, 2009.