

LEGAL LANDSCAPE IN A “LEGISLATIVE HURRICANE:”
THE CZECH LEGISLATIVE PROCESS
FROM ASSOCIATION TO ACCESSION

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ABSTRACT

The latest enlargement of the European Union (“EU”) has been very successful, as ten new countries joined the EU in 2004. Amid the consensus about the overall success of the enlargement, the political science literature has recently begun to examine and debate the effects that preparations for EU membership have had on the applicant countries. This thesis studies the nature of the effects that these preparations have had on the legislative process in one of the new member countries by focusing on the procedural and institutional aspects of the process in the Czech Republic. The author argues that EU membership preparations always have effects on the legislative process in applicant countries, but that the nature of the effects depends on preexisting domestic conditions; in the case of the Czech Republic, the combination of the effects and domestic conditions was detrimental to the legislative process.

The research is based on the author’s professional experience in the Czech Cabinet and the European Commission and a number of interviews conducted with Czech politicians and experts actively involved in the Czech legislative process. The author performs an extensive analysis of legislative documents and Czech and other scholarly literature and uses statistics derived from an author-compiled database of Czech draft laws submitted between 1995 and 2004.

The thesis provides an analysis of the effects of the multi-year abnormal conditions under which the Czech legislative process operated during preparations for EU membership and makes findings that can be used in designing improvements in the legislative process and improving legislative output. The thesis should also serve to alert countries applying for EU membership and countries transitioning to democracy to a problem that is likely to remain a challenge in the future.

FOREWORD

In 1995, following the ratification of the *Europe Agreement Establishing an Association between the European Communities and their Member States, of the One Part, and the Czech Republic, of the Other Part*,¹ (the “Europe Agreement”), the Czech Republic officially began to prepare for its membership in the European Union (the “EU”).² It took nine years of preparations before the country and nine others acceded to the European Union on May 1, 2004. These years between association and accession represented one of the most exciting periods in Czech Republic history. The period posed a tremendous challenge to the legislative process, which had to fulfill the requirement to align domestic laws with EU legislation.

As a young lawyer, I had the privilege of taking part in this historic enterprise and contributing to preparations of the country for EU membership. My involvement between 1997 and 2004 included positions as Head of the Legislative Unit at the Czech Statistical Office, Head of the EU Law Unit at the Ministry of Justice of the Czech Republic, and a position in the Coordination and Revision Center of the Office of the Czech Republic Cabinet. In these positions I participated at various stages of the accession process, prepared analyses of Czech alignment with EU legislation, cooperated and negotiated with EU counterparts and took part in preparing Czech civil servants, judges and prosecutors for the country’s membership in the EU. In addition to this experience at the national level, I had an excellent opportunity to learn about the accession process from the EU institutions’ point of view during my six-month internship at the European Commission (Eurostat’s unit for legal affairs).³

Throughout this period it became clear to me that the uniqueness of the experience that my colleagues and I had shared deserved a more comprehensive reflection and

¹ Official Journal of the European Communities, L 360, December 31, 1994, pp. 2 – 210.

² In this thesis the term “European Union” is used even in references to the European Communities prior to the Maastricht Treaty.

³ Eurostat is the Statistical Office of the EU.

assessment. The possible form of such reflection naturally varied with time, as excitement and success alternated with fatigue and despair. As is the case in all great historical periods, there were certainly moments in the process of preparing for EU membership when those involved contemplated forms of reflection that oscillated between a comic fable and a Greek tragedy.⁴

It took a year after the Czech Republic became a member of the EU for me to realize that the time was right to look back and provide a constructive analysis. This realization was also prompted by various published works that aimed to provide an analysis of the EU enlargement process and evaluate its effects on the post-communist countries that had become members of the EU in May 2004.⁵ However, these studies appear to lack a legislative perspective and some even discount the legislative alignment aspect, suggesting that its purely technical nature makes it unworthy of study.

In this thesis I focus on the impact of the preparations for EU membership on the legislative process in the Czech Republic. I do not attempt to embrace the entire body of domestic law or to provide an in-depth substantive analysis of each relevant field of law, but instead concentrate on the procedural and institutional aspects of specific lawmaking that attempted to align national legislation with EU standards during the period of study (“examined period”). My objective is not to offer general answers about the impact of the EU enlargement on the new post-communist member states, but rather to contribute to the large mosaic of scholarly work that still needs to be completed in order to paint a comprehensive picture of the effects of recent developments in Central and Eastern Europe. At the same time, the issues raised in this thesis are relevant to today’s European Union as it continues to enlarge, adding even more new countries to its membership.

⁴ The first truly personal account of the accession process that I am aware of was presented by Pavel Telička, the Czech chief negotiator with the EU, and Karel Barták, a Czech journalist who has covered EU accession affairs as a ČTK (the Czech Press Agency) correspondent to Brussels since 1995. Telička, Pavel, Barták, Karel, *Kterak jsme vstupovali*, ČTK, Paseka, Praha – Litomyšl, 2003.

⁵ For instance, Cameron, Fraser (ed.), *The Future of Europe: Integration and Enlargement*, Routledge, 2004; Dimitrova, Antoaneta L. (ed.), *Driven to Change, The European Union’s Enlargement Viewed From the East*, Manchester University Press, 2004; Pridham, Geoffrey, *Designing Democracy: EU Enlargement and Regime Change in Post-Communist Europe*, Palgrave, 2005; Vachudova, Milada Anna, *Europe Undivided: Democracy, Leverage, and Integration After Communism*, Oxford University Press, 2005.

Even though parts of this thesis may appear to be critical of individuals who have been involved in the process, I would like to emphasize that this project was inspired by my deep respect for numerous remarkable civil servants who share a genuine enthusiasm for European integration and have devoted their careers to the idea of EU enlargement. Their names remain mostly unknown to the public at large, and their contributions are hidden in the shadows of more broadly publicized political actions. However, without these zealous individuals, many of the small pieces of the jigsaw puzzle of accession would remain missing.

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This thesis derives valuable input from interviews conducted in Prague in April and May 2005. I would like to thank all 24 experts and politicians who kindly provided answers to my questions. Some of them expressed a desire for their names not to appear in this thesis. Those who agreed to have their names listed are as follows:

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- Mgr. Zoran Nerandžič, Director of the Legislative Department of the Ministry of Healthcare of the Czech Republic,

- Mgr. Pavlína Obrová, Head of the Coordination and Revision Center of the Office of the Cabinet of the Czech Republic,
- Ing. Edvard Outrata, Vice-President of the Senate of the Czech Republic Parliament,
- Mgr. Miroslav Prokop, Director of the Human Resources Department of the Ministry of Agriculture,
- Ing. Marcela Provazníková, Director of the Human Resources Department of the Czech Statistical Office,
- Karel Schwarzenberg, Member of the Senate of the Czech Republic Parliament, Member of the Senate Committee for European Union Matters,
- Dr. Paul Springer, Pre-Accession Advisor to the Czech judiciary, currently Judge of the Oberlandesgericht in Hamm, Germany,
- Ing. Kamil Srnec, Director of the Department of Human Resource Management in the Administrative Offices, Office of the Cabinet of the Czech Republic.

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Finally, my thanks go also to my wonderful parents, Pavla Landová and Pavel Landa, who have shared all my concerns and successes and patiently studied my drafts. I owe a great deal of gratitude to my sister, Adéla Faladová, who offered a number of important insights and comments for which I am very thankful.

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INTRODUCTION

The preparations for the 2004 enlargement of the EU required countries aspiring to become EU members to fulfill a number of conditions posed by the EU. In addition to meeting important political and economic criteria, the applicant countries had to align their laws with EU standards. By the date of accession they were supposed to have EU directives and framework decisions transposed into their national legislation and to prepare their legal order for a smooth application of EU regulations, decisions and other instruments. The task of legislative alignment was enormous because the volume of EU legislation had grown to more than 80,000 pages by the end of the 20th century.

While the 2004 enlargement has been applauded as a successful enterprise with undeniably significant positive effects, some authors have begun to question whether these intended effects were not accompanied by certain unintended and less beneficial effects. For example, it has been suggested that the EU conditions that were necessary for ensuring the preparedness of the post-communist applicant countries for EU membership created pressure that was skillfully utilized by various domestic actors to support their own interests. Also, some contend that the fulfillment of the EU conditions might not have always satisfied the underlying goals that the EU set forth, but rather sometimes merely complied with the literal wording of the conditions.

Out of all of the unintended consequences, the possibility of a transfer of a “democratic deficit” is the most worrisome, particularly in the cases of the countries that were in the process of consolidating their democracies. The term “democratic deficit” is used by critics of the EU who use it to refer to the concept of the lack of democracy in EU decision making, where outcomes are based heavily on decisions by the Council of the EU (a representative body comprising executives from the member states) and the European Commission (an executive body many say lacks democratic legitimacy), and

where the European Parliament still lacks adequate power.⁶ The structure that exists at the EU level affects domestic institutions and processes in the member states by supporting a shift in power from the legislature towards the executive; in the applicant countries, this shift in power begins to occur once the country embarks on accession negotiations, leading to apprehensions about the EU democratic deficit being exported to the applicant countries.

Not all applicant countries are endangered by the unintended consequences of EU enlargement; prior to the 2004 enlargement, there were other applicant countries that had prepared for EU membership but that did not appear to be vulnerable to any adverse consequences from enlargement. The reason is that these countries did not carry the burden of preexisting conditions that the post-communist countries carried; certainly, the gap that the earlier applicants had to bridge was not as large as was the gap in the case of the post-communist applicants. For the post-communist applicants the situation was much different because their cultures, languages, historical experiences and legal past and present were so different from that of the existing EU member states. They also faced a much larger and more diverse body of EU law than any previous applicants because EU law evolved more rapidly in the 1990s than in the prior decades.

Among the post-communist countries exposed to EU conditions in the 2004 wave of enlargement was the Czech Republic. The desire of the country to become a member of the EU was expressed as early as the Velvet Revolution days of 1989, but the country first had to conquer the democracy-building stage, the first wave of significant institutional and legal reforms, and the stressful negotiations in the federative state organization that ultimately led to the division of Czechoslovakia in 1993. The Czech preparations for EU membership were framed by the dual dates of the *Europe Agreement*, which established an association with the EU and its member states that came into force in 1995, and the date of Czech Republic's accession to the EU in 2004. However, due to the Czech domestic political conditions and the EU timing of accession negotiations, the legislative alignment did not begin systematically until 1998; the demanding and

⁶ Europa Glossary, http://europa.eu.int/scadplus/glossary/democratic_deficit_en.htm.

extensive alignment process was thereafter squeezed into less than six years, earning its nickname as the “legislative hurricane.”

There are studies on the effects that the EU accession process had on the various aspects of policy in the Czech Republic, and the Czech literature has covered the changes that the preparations for EU membership required in specific fields of law; however, very few studies attempted to capture the impacts of the preparations on the entire Czech legal order. In 1999, Kořenský, Cvrček, and Novák⁷ published an interesting quantitative analysis of the development of the Czech legal order in which they proved the existence of the “legislative inflation”⁸ to which the Czech legal landscape was subjected; however, their study does not address the most important period of the preparations for EU membership – the period from 1999 until accession in 2004. A concise analysis of the impact of the EU accession process on the Czech legislative process in this time frame is still missing. The most comprehensive recent work on the Czech legislative process is the 2003 study by Šín,⁹ but unfortunately this expert with 40 years of experience in the legislative field did not analyze the impact of the preparations for EU membership on the Czech legislative process; in covering the EU influence he resorted to a brief five-page description of the methodology and normative framework of the alignment. Palivec, who has been involved as a Cabinet expert in the legislative alignment since its beginning, focused in his 2005 article¹⁰ solely on the quantitative aspects of alignment; although the statistics that he provides cover the entire body of Czech law that is affected they do not capture the full effects on the legislative process because they do not facilitate a qualitative view.

This thesis fills the gap in the mosaic of literature on the 2004 EU enlargement and the effects of the preparations for EU membership on the Czech legal order by examining whether the preparations had any effects on the Czech legislative process and its

⁷ Kořenský, Jan, Cvrček, František, Novák, František, *Juristická a lingvistická analýza právních textů (právně-informatický přístup)*, Academia, 1999

⁸ For more on the “legislative inflation,” see p. 55.

⁹ Šín, Zbyněk, *Tvorba práva, Pravidla, metodika, technika*, C.H. Beck, 2003.

¹⁰ Palivec, Jiří, *Kvantifikační analýza procesu aproximace práva České republiky s právem Evropských společenství*, Právník No. 1, 2005, pp. 29 – 65.

institutional setting, and if so, what the nature of such effects was. I argue that the preparations had detrimental effects on the Czech legislative process, though I point out that the effects of the preparations would not necessarily have been detrimental had the specific preexisting Czech domestic conditions not been present. These effects were detrimental to the quality of the Czech legislative output, which is today at the center of wide criticism by legal professionals and the general public alike.

To answer the questions that this research poses and support my argument, I chose several methods to critically decode my professional experience during my career in various bodies of the Czech Cabinet. My experience helped me to identify a number of experts and politicians who had been involved in matters pertinent to this research for significant periods of time; in April and May 2005 I surveyed the opinions of 24 experts and politicians in the Czech Republic, 18 through personal interviews and 6 by written questionnaire.¹¹ My research also required an extensive study of primary sources, legislative records and other documents of the Cabinet and the Parliament. To complete the picture I examined scholarly literature dealing with the EU enlargement, both from the legal and political science perspectives. Finally, I utilized statistics that I compiled from my database of draft laws that were submitted to the Czech Parliament between 1995 and 2004.¹²

In the first chapter I strive to show that there is a causal link between the legislative process in the applicant countries and EU “conditionality.” Conditionality is the term for and the method that is used by the EU to steer an applicant country in a certain direction or to make it achieve a desirable state by making the provision of support or aid contingent upon the fulfillment of certain conditions. The EU had used conditionality prior to the 2004 enlargement wave, but never before had its use of conditionality been as strong and extensive as in the case of the post-communist countries. Because of the ongoing debate among political scientists about the effectiveness of conditionality, I look

¹¹ For more information about the methodology, see Appendix B, Methodological Notes, section Interviews, pp. 106 ff.

¹² For more information about the methodology, see Appendix B, Methodological Notes, section Statistics, pp. 105 ff.

at the ways in which the EU conditions were defined and applied to determine the nature of the effects of EU conditionality on the legislative process in one applicant country. I suggest that in this case the effects in the Czech Republic were inevitable and describe the kinds of effects that we can identify.

Second, to understand the nature of the effects, it is necessary to examine the domestic conditions that existed in the Czech Republic at the time the conditionality was applied. Therefore, the second chapter focuses on the specific situation in the Czech Republic; it explains the legal framework of the legislative process there in 1995 and follows its development thereafter. I introduce the key players in the process and demonstrate how legislative alignment impacted the legislative initiatives of the Cabinet, which bore the primary responsibility for alignment with EU legislation. Because the alignment was conducted under severe time constraints, the Cabinet attempted to change the legal framework of the process to streamline it. I show that this attempt failed, forcing the Cabinet to put other measures in place to maintain the pace necessary for timely alignment. The scale of the assignment is documented by the statistics that I present; my statistics of draft laws from 1995 until 2004 conclusively demonstrate the rapid increase in the volume of legislative work after the 1998 European Commission *Regular Report*; additional data on published laws, regulations and decrees show the final results of the alignment in the increased quantity of legislation issued in the period prior to enlargement.

Because I believe that the “human aspect” played an important role in the alignment process, I turn my attention in the third chapter towards the “sociology” of alignment and present the Czech legislative experts, whose story is pertinent in contemplating the effects of the preparations for EU membership, and focus on the professional reputation of these experts and its evolution within the larger framework of the civil service and the legal profession in general. I also address the problem of the potentially important but nonexistent reform of the civil service, presenting an analysis of the reasons that contributed to the failure of the reform, and point out the specificity of the legislative experts within the civil service, offering some general thoughts about the situation of the

legal profession in the Czech Republic since the fall of communism in 1989; these thoughts shed additional light on the neglect of the proper professional status of legislative experts in the period of preparations for EU membership, even though the preparations urgently required the increased active involvement of these experts to satisfy alignment requirements.

Finally, I summarize my empirical findings that the effects of the preparations for EU membership were detrimental to the legislative process and identify the specific results caused by these effects. I look at the practical difficulties that developed within and outside of the legal framework of the legislative process and discuss the effects that EU support had on the process. In the final section I show the wave of demand for improvements in the Czech legal order that we observe in the Czech Republic today and the response to the demand by the political parties as they prepare for the upcoming June 2006 elections.

The research findings illuminate the problems that continue to accompany the legislative process in the Czech Republic; these problems have caused the current undesirable state of the legislative process that is blamed for the destabilization of the country's legal order. As legal professionals and the lay public call for an increase in the quality of the legal order, the effective improvement of the legislative process is a prerequisite to any successful revision of Czech laws; it is particularly important to remedy the deficiencies in the process now when the Czech Republic, as a new EU member, has to face not only its own policy needs, but also meet the legislative demands of the EU.

My conclusions suggest important lessons for countries in transition that respond to large-scale conditionality while struggling with their own shortcomings; these countries, as well as those who control the conditionality being applied, must be aware of the dangers of the unintended consequences that can arise due to applications of conditionality in circumstances where an inadequate foundation for reforms exists.

CHAPTER 1: ON EU CONDITIONS AND CONDITIONALITY

The preparations for the 2004 EU enlargement, undoubtedly one of the most profound events in European history, were accompanied by the extensive use of conditionality. The EU requirements, which had to be fulfilled by the countries aspiring to become EU members, encompassed many areas, and legislative changes were among the tools used to fulfill these requirements. The legislative process was thereby exposed to EU conditionality and had to face not only the time pressure that accompanied the conditionality but also any ambiguities in its definition.

Because the definition of conditionality (meaning the conditions for EU membership) was so important to the legislative process, this chapter first examines how the EU conditions were defined by the EU and discusses their usefulness as potentially clear guidelines for the applicants to follow. Second, the chapter presents the general debate among political scientists about the effectiveness of applying EU conditionality in post-communist countries and the possible impact of the application of conditionality to strengthening democracy in these countries. The final section of the chapter defines the effects of conditionality on the legislative process in an applicant country in general.

1.1 AIMING AT A “MOVING TARGET:” THE CLARITY OF EU CONDITIONS

When the European Council met in Copenhagen in June 1993, it agreed that “the associated countries in Central and Eastern Europe that so desire shall become members of the European Union.”¹³ At that time the EU had already concluded association agreements (so-called “*Europe Agreements*”) with a number of post-communist countries, namely Hungary, Poland, the Czech and Slovak Federative Republic,¹⁴ Romania and Bulgaria. The agreements were not yet in force; their ratification was about

¹³ *Conclusions of the Presidency*, European Council in Copenhagen, June 21 – 22, 1993, SN 180/93, point 7. A. iii), p. 12.

¹⁴ This *Europe Agreement* signed in 1991 was replaced by two new ones concluded with the Czech Republic and with Slovakia in October 1993.

to occur. The European Council was aware of the importance of supporting the democratic development in the post-communist countries, but at the same time it realized the possibility of opposition to future Eastern enlargement in the then-current EU member states. These concerns prompted the European Council to enlarge the basic framework for conditionality to cover issues of concern to the countries that were already members.¹⁵

The bases of the EU conditions were formulated in the *Conclusions of the Presidency* of the 1993 Copenhagen European Council. What became known as the *Copenhagen Criteria* (the “*Criteria*”)¹⁶ represented the concerns that the EU and its members shared about the enlargement towards the East. The *Criteria* first included the requirement of the “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.”¹⁷ Second, the *Criteria* emphasized the importance of the “existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.”¹⁸ Finally, the *Criteria* noted that “membership presupposes ... [the] ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.”¹⁹ This wording differed significantly from that used by the 1992 European Council in Edinburgh whose *Presidency Conclusions* required only the “acceptance in full of the Treaty on European Union and the ‘acquis [communautaire]’”²⁰ as conditions for the accession of Austria, Sweden and Finland.

The *Criteria* complemented the *Europe Agreements*, which provided the legal basis for the association regime. The Agreements included a standard chapter on the Approximation of Laws (e.g. Articles 69 – 71 of the Czech Republic’s *Europe*

¹⁵ Similarly, see Pridham, *supra* note 5, p. 37.

¹⁶ *Conclusions of the Presidency*, European Council in Copenhagen, June 21 – 22, 1993, SN 180/93, point 7. A. iii), pp. 12 - 13.

¹⁷ *Ibid.*, p. 12.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ The term “acquis communautaire,” literally “everything that was achieved,” usually refers to the entire body of EU legislation, but the European Commission tends to have an extensive notion of the definition, which includes even “achievements” of a non-legislative nature (declarations etc.). *Conclusions of the Presidency*, European Council in Edinburgh, December 11 – 12, 1992, SN 456/92, Part A, point 8., p. 6.

Agreement) that stated the obligation for the applicant country to gradually align its “existing and future legislation to that of the [EU]” as the “major precondition for [its] economic integration into the [EU].”²¹ Although the *Criteria*, unlike the provisions of the *Agreements*, were included in a legally non-binding instrument, the *Criteria* proved to be an important tool of EU conditionality, just as the conditions stipulated by the *Europe Agreements* were. The *Treaty of Amsterdam* “represented a qualitative jump in conditionality,” as Pridham notes,²² because it provided a legal basis for part of the *Criteria* language. However, it did not make the conditions more precise.

One feature that the various EU conditions had in common was their constant evolution. That is why domestic legislative experts in the applicant countries sometimes described their endeavors in the field of legislative alignment with EU requirements as aiming at a “moving target.” It is very difficult to work on legislative alignment when the standards that you wish to attain are a “moving target,” because it is indispensable for each legislative assignment to have a clear vision of a stable and defined goal that it seeks to meet; in the case of legislative alignment, this vision (or intent) should emerge from a thorough knowledge of the standards with which it should align.

There are various views about the extent to which the EU conditions presented clear guidelines for the applicants to follow. Some authors paint a rather idealistic picture of the conditions set by the EU. Pehe, for instance, has stated that “the EU’s massive and complicated membership requirements [...] also proved useful by giving easterners a set of standards by which they could measure the shortcomings of their own fledgling democratic polities and market economies.”²³ The question about the “improvement of democratic polities” will be discussed briefly later; the evaluation of the impact on “market economies” will be left to economists.²⁴ Our interest in this section is whether

²¹ *Europe Agreement*, Article 69.

²² Pridham, *supra* note 5, p. 36.

²³ Pehe, Jiří, *Consolidating Free Government in the New EU*, *Journal of Democracy*, Vol. 15, No. 1, January 2004, p. 37.

²⁴ One official of the Ministry of Agriculture, referring to the EU common agricultural policy, once mentioned that it took the fall of communism and application for EU membership for him to learn what “socialistic agriculture” was really about.

the requirements met the standard of being a useful, clear guide for the applicants to assist them in their preparations for membership, including legislative alignment.

The clarity of EU conditions, naturally, varied with each field of law subject to alignment, based on the extent to which the field had been regulated by EU legislation and the degree to which the field might have been affected by the language of the *Criteria*. In this thesis, which focuses on the entire Czech legislative process, we cannot look at each field separately and will make only general observations about EU conditionality in its entirety. As for the *Criteria*, the language was extremely vague, targeted primarily at fields beyond the scope of EU legislation, and provided generous leeway for the European Commission to define specific elements of the conditions stemming out of the *Criteria*. These elements were defined through expert missions, peer reviews and other instruments that the Commission applied to inspect the progress of the applicant countries with respect to their preparations for EU membership. It is important to realize that areas not subject to EU legislation are also not subject to harmonization in the EU member states; the approach to matters such as organization of the judiciary, civil service, or regional administration varies from one member state to another and the Commission has no competence to inspect member activity in these areas.

Because the Commission failed to set clear and unified norms in the areas covered by the *Criteria*, arbitrary standards were applied to the ten applicant countries,²⁵ without a single approach to the issues not harmonized by the EU in the EU member states, and without coordination by the Commission, the concrete elements of the *Criteria* reflected only the subjective views of the participants of the expert missions and peer reviews. Since these participants came from different member states and lacked guidance, the best they could do was to express their personal views and preferences.²⁶ While it would be inaccurate to suggest that the lack of coordination by the Commission was intentional, it is necessary

²⁵ On “the definitional handling of the [democratic conditionality],” see also Pridham, *supra* note 5, pp. 39 ff.

²⁶ Similarly, see Grabbe on twinning partners. Grabbe, Heather, *Europeanization Goes East: Power and Uncertainty in the EU Accession Process*, in: Featherstone, Kevin, Radaelli, Claudio M. (eds.), *The Politics of Europeanization*, Oxford University Press, 2003, p. 315.

to note that the “fogginess” of the *Criteria* allowed the Commission to use them as effective leverage.²⁷

EU conditionality was substantially clearer in the areas that had been previously regulated by EU legislation, but the task of the legislative experts in the applicant countries in these areas was immense, even after excluding the additional difficulties arising from the vagueness of the *Criteria*. The experts faced an unprecedented body of EU legislation; no country had ever assimilated anything close to 80,000 pages of EU norms simultaneously within only a very few years.²⁸ Perhaps more importantly, no country had ever had to simultaneously align its legislation in so many different areas of rapidly evolving law.

EU legislation did not suddenly stop or slow down during the accession process; between the dates of Czech association and accession (February 1995 and May 2004), important EU legislation was adopted contemporaneously with the accession process. The field of police and judicial cooperation in civil and criminal matters is an instructive example; this area of EU law evolved rapidly after the three-pillar architecture of the EU was created by the *Maastricht Treaty*, which came into force on November 1, 1993,²⁹ and September 11, 2001, served as an additional impetus.³⁰ In addition to considering the quantitative aspect, one must be aware that the instruments in this particular area of law

²⁷ Pridham talks about the “much enhanced role of the European Commission in determining the more regular aspects of enlargement and in controlling the [democratic conditionality] process and its monitoring.” Pridham, *supra* note 5, p. 42. On “relentless pressure” by the Commission and the possible effect of the failure to fulfill conditions on applicants’ “progress in accession,” see *ibid.*, p. 44.

²⁸ The Commission states in one of its 2003 Communications that the volume of the binding secondary legislation “in the sense of Article 249 of the [Treaty establishing the European Communities]” (major part of the measures adopted within the First Pillar) “amounted at the end of 2002 to 97,000 pages of the Official Journal.” *Communication from the Commission to the Council, the European Parliament and the Committee of the Regions: Updating and Simplifying the Community Acquis*, February 11, 2003, COM(2003) 71 final, p. 5. Palivec in his 2005 article states that as of April 30, 2004, there were more than 31,000 pieces of EU legislation. Palivec, Jiří, *Kvantifikační analýza procesu aproximace práva České republiky s právem Eropských společenství*, Právník No. 1, 2005, p. 31.

²⁹ The three Pillars of the EU were created by the Treaty on European Union (the “*Maastricht Treaty*”), which was signed on February 7, 1992, and came into force on November 1, 1993.

³⁰ According to the *Directory of Community Legislation* of February 1, 2006, in the area of judicial cooperation in criminal matters, 45 instruments were adopted or concluded in the period from 1995 to 2004. In the same period, in the area of judicial cooperation in civil matters, 29 instruments were adopted or concluded. *Directory of Community Legislation (01/02/2006)*, <http://europa.eu.int/eur-lex/lex/en/repert/index.htm>.

changed when the *Amsterdam Treaty* moved issues such as asylum and judicial cooperation in civil matters to the First Pillar. This reclassification enabled the EU to adopt binding and directly applicable instruments regulating these matters, thereby encouraging effective and possibly rapid legislative alignment in these areas. Regarding judicial cooperation in criminal matters, the *Amsterdam Treaty* also provided for the adoption of binding instruments of legislative alignment.

Another factor complicating the position of the legislative experts in the applicant countries was the lack of understanding of the legislative trajectory of the EU. Apart from insufficient legislative planning at the EU level, with which even the member states struggled, the applicant countries had limited insight because they were not allowed access to negotiations on new legislation in the working bodies of the European Commission and the Council prior to signing the *Accession Treaty* in April 2003.³¹ Even though this situation did not differ from previous EU enlargement practices, it severely impaired the ability of the new countries to better plan their legislative agendas and to schedule major amendments with a view towards future EU actions in a given field of law. Therefore, achieving the desired concert with EU legislative development was more difficult. The absence of closer contact with the legislative machinery of the EU also caused EU matters to remain abstract to the legislative experts for a prolonged period of time, also harming the aligning exercise.³²

Although EU conditionality was connected with a certain degree of uncertainty on the part of the applicants regarding its requirements, the degree of uncertainty varied with each area of law. In the areas regulated by EU law, the applicants had to learn to follow rapidly evolving instruments, despite the fact that they had limited access to information about EU legislative plans. Where specific EU legislation was missing but the *Criteria* supplied a basis for conditionality, the criteria were defined on an ad-hoc basis through expert evaluations and recommendations; in such areas the conditions could easily differ

³¹ *Treaty between the [...] (Member States of the European Union) and the Czech Republic, [...], concerning the accession of the Czech Republic, [...] to the European Union*, Official Journal of the European Union, L 236, 23 September 2003, pp. 17 ff.

³² This matter is further discussed in Chapter 3.

in each applicant country depending on the views of the expert who rendered the evaluation or recommendation. This ambiguity in the EU conditions complicated legislative alignment.

1.2 EFFECTIVENESS OF CONDITIONALITY AND ITS IMPACT ON DEMOCRATIC CONSOLIDATION

In addition to facing the ephemeral quality of “moving target” EU conditions, the legislative process in an applicant country also struggled with uncertainty about the validity of EU conditions stemming from the potential unwillingness of domestic politicians to accept the conditions and accord them full effect in domestic laws. This possible scenario brings us to the current debate among political scientists on the effectiveness of conditionality and its potential effect on democratic consolidation in the countries where it has been applied.³³

Effectiveness of EU Conditionality

Political scientists question whether EU conditionality has indeed been the driving force for change in the applicant countries and whether successful achievement of the desired results can be attributed solely to conditionality. This is an important subject for my research because if changes in legislation were driven by forces other than conditionality, we would legitimately doubt whether any effects of preparations for EU membership on the Czech legislative process could be detected.

When reflecting on how conditionality affected choices in policy making, one encounters difficulties in trying to separate purely domestic motivations for legislative changes from motivations emerging from external influences, such as EU conditionality. At the time when conditionality was applied, the post-communist countries of Central and Eastern Europe were already on a path toward democratic reforms, and to a large extent the

³³ See, for instance, Fukuyama, Francis, *State-building: governance and world order in the 21st century*, Cornell University Press, 2004, pp. 36, 37.

legislative changes represented a continuation of the democratic reforms that were launched because of domestic pressures immediately after the fall of communism. In retrospect, it has been difficult to detect whether and to what extent a change was driven by conditionality or whether it was triggered by a domestic motivation that happened to coincide with a conditionality requirement.³⁴

In this “melting pot” of motivations, Schimmelfenning and Sedelmeier have attempted to identify the true motivations behind the adoption of EU rules in the applicant countries.³⁵ In addition to motivations resulting purely from conditionality (the “external incentives model”), they offer two additional models for EU rule adoption as alternatives: the “social learning model” and the “lesson drawing model.”³⁶ Even though they attribute important weight to the additional two models when explaining EU rule adoption before EU conditionality was fully applied,³⁷ they conclude that the “external incentives model captures well the influence of the EU.”³⁸

However, Brusis criticizes the findings by Schimmelfenning and Sedelmeier and argues that “the presence of EU conditionality is neither a sufficient nor necessary condition for domestic change.”³⁹ He offers a clearer analytical framework by substituting in place of their “top-down” research method his own “bottom-up research design”⁴⁰ to see “how the EU altered the space of policy options.”⁴¹ Instead of starting from the results (meaning

³⁴ Brusis, Martin, *European Union Enlargement and the Europeanisation of Eastern Europe: Research Puzzles and Policy Issues*, in: Mansfeldová, Zdenka, Sparschuh, Vera, Wenninger, Agnieszka (eds.), *Patterns of Europeanisation in Central and Eastern Europe*, Reinhold Krämer Verlag, 2005, p. 23.

³⁵ Schimmelfenning, Frank, Sedelmeier, Ulrich, *Introduction: Conceptualizing the Europeanization of Central and Eastern Europe*, in: Schimmelfenning, Frank, Sedelmeier, Ulrich (eds.), *The Europeanization of Central and Eastern Europe*, Cornell University Press, 2005, pp. 1 – 28; Schimmelfenning, Frank, Sedelmeier, Ulrich, *Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe*, *Journal of European Public Policy*, Vol. 11, No. 4, August 2004, pp. 661 - 679.

³⁶ Schimmelfenning, Sedelmeier, *Introduction...*, supra note 35, pp. 10 – 25; Schimmelfenning, Sedelmeier, *Governance...*, supra note 35, pp. 663 ff.

³⁷ Schimmelfenning, Sedelmeier, *Conclusions: The Impact of the EU on the Accession Countries*, in: Schimmelfenning, Frank, Sedelmeier, Ulrich (eds.), *The Europeanization of Central and Eastern Europe*, Cornell University Press, 2005, p. 220.

³⁸ *Ibid.*

³⁹ Brusis, Martin, *The Instrumental Use of European Union Conditionality: Regionalization in the Czech Republic and Slovakia*, *East European Politics and Societies*, Vol. 19, No. 2, 2005, p. 297.

⁴⁰ *Ibid.*, p 300.

⁴¹ *Ibid.*

EU rule adoption), his analysis focuses on how decisive the EU has been “for shifts in domestic actor constellations and for the choice of policies.”⁴² He argues that in the area of his case study (regionalization) “the EU changed the opportunity structure domestic actors faced, but its role was more complementary than decisive.”⁴³

Brusis’ approach should appeal to the audience of the applicant countries because it avoids treating domestic actors as having limited independent political visions and aspirations that are influenced solely by EU conditionality, “social learning,” or “lesson drawing.” On the other hand, Schimmelfenning and Sedelmeier’s view may relate more closely to the experiences of those involved in preparations for EU membership in the applicant countries, specifically for those who dealt with areas regulated by EU legislation as opposed to areas in which EU legislation did not exist. References to “social learning” or “lesson drawing” may, in some instances, evoke painful memories for those who warned against ignoring the lessons from other countries and criticized an “innovative” approach that was sometimes adopted, but that ultimately led to a unique – but not necessarily better-working – “Czech solution.”⁴⁴

Brusis’ detailed approach unveiling the roots of domestic preferences and choices might provide an increased understanding of the motivations surrounding eventual EU rule adoption. And yet, in general, true motivations are usually difficult to identify; even in cases explicitly regulated by EU legislation, and even after EU conditionality has been fully applied, the presence of motivations other than “external incentives” cannot be excluded. The degree of complementariness or decisiveness of EU conditionality on EU rule adoption depends on a number of variables: the existence of EU legislation in the given area, the extent to which domestic motivations are aligned with EU conditions and the way in which “external incentives” are perceived. If the “incentives” translate into “external pressures,” the role of conditionality might be more decisive, but not necessarily more desirable, for strengthening democracy in the post-communist countries.

⁴² Brusis, *The Instrumental...*, supra note 39, p. 300.

⁴³ Brusis, *The Instrumental...*, supra note 39, p. 295.

⁴⁴ See, for instance, Zima, Petr, *Ovládací smlouvy „à la tchèque“*, *Právní rozhledy*, No. 10, 2004, pp. 386 – 388.

Impact on Democratic Consolidation

The effectiveness of EU conditionality in the applicant countries was tied to the nature of the “incentives” offered by the EU to fulfill its conditions, but it is crucial to realize that these “incentives” did not in any way represent a tempting option designed to “seduce” the post-communist applicant countries. Because of the geopolitical and economic situation of these applicants, the EU conditions were a dictate that they had no choice but to accept. This lack of choice does not imply any value judgment about the conditions, which, in fact, facilitated important safeguards for democracy, the rule of law, and support to economic prosperity, but it is important to recognize the true nature of EU conditionality. Without this realization, it would be impossible to make any conclusions about its effectiveness.

Following the fall of communism, the post-communist countries looked at the prospect of EU membership as a guarantee of a prosperous and democratic future alongside the Western European nations. As these newly democratic societies learned about the potentially negative aspects of democracy and a market economy and the possible (although sometimes misperceived due to misinformation) disadvantages of EU membership, the initial pro-European revolutionary enthusiasm was accompanied and eventually replaced by the realization that EU membership was not a matter of choice. There was “no other choice left”⁴⁵ other than to work for EU membership⁴⁶ because there was no viable alternative. Membership in the EU appeared as the only existing vehicle to

⁴⁵ The current Czech President, Václav Klaus, noted in one of his speeches in 2002: “We have always been an integral part of Europe and we want to be nothing more or nothing less than a self-governing nation in the European Union. I have to be explicit in saying that in spite of seeing it so sharply and with all our reservations, we want to participate in the European integration process. There is no other choice left. It is the only way how [*sic*] to get international recognition and legitimization.” Klaus, Václav, *Economic and Political Trends in the Czech Republic*, National Center for Policy Analysis conference, Balleroy, France, April 16, 2002, in Klaus, Václav, *On the Road to Democracy*, National Center for Policy Analysis, 2005, p. 40; on the rise in popularity of politicians, like Klaus, who are perceived as anti-EU politicians, see Grzymała-Busse, Anna, Innes, Abby, *Great Expectations: The EU and Domestic Political Competition in East Central Europe*, *East European Politics and Societies*, Vol. 17, No. 1, 2003, p. 64; Pinelli, Cesare, *Conditionality and Enlargement in Light of EU Constitutional Developments*, *European Law Journal*, Vol. 10, No. 3, May 2004, p. 357.

⁴⁶ On “virtual exclusion of alternative orientations” see Pridham, *supra* note 5, pp. 84 ff. and p. 221.

economic prosperity, security, international recognition and legitimization.⁴⁷ As Rupnik has commented, “The 15-year gap after the fall of communism eroded the perception of a link between the democratic changes of 1989 and the entry into Europe.”⁴⁸

Domestic motivations, feelings about the applicants’ own level of preparedness, which Vachudova sees as substantial,⁴⁹ or domestic factors favoring the importation of EU institutions and rules, as suggested by Sadurski⁵⁰ (the degree of “responsiveness of domestic actors,” in Pridham’s words)⁵¹ contributed to various delays in the process of preparations for EU membership but eventually proved to be irrelevant as domestic actors realized that leading the country to the EU was the one component without which no election could be won.⁵² Ultimately, the effectiveness of conditionality was linked to the necessity of the process from the perspective of constituencies in the post-communist applicant countries. On the other hand, the high probability of the impending entry into the EU⁵³ that was consistently supported by it played a significant role in maintaining support for EU enlargement among the constituencies.⁵⁴ Without the strong perception of both the constituencies of the EU and the applicant countries that EU enlargement was

⁴⁷ Klaus, *supra* note 46.

⁴⁸ Rupnik, Jacques, *Concluding Reflections*, *Journal of Democracy*, Vol. 15, No. 1, January 2004, p. 77.

⁴⁹ Vachudova, Milada Anna, *The Czech Republic: The Unexpected Force of Institutional Constraints*, in: Zielonka, Jan, Pravda, Alex (eds.), *Democratic Consolidation in Eastern Europe*, Oxford University Press, 2001, p. 325.

⁵⁰ Sadurski, Wojciech, *Accession’s Democracy Dividend: The Impact of the EU enlargement upon Democracy in the New Member States of Central and Eastern Europe*, *European Law Journal*, Vol. 10, No. 4, July 2004, p. 378.

⁵¹ Pridham, *supra* note 5, p. 9.

⁵² On variations of notions of inevitability of EU membership as portrayed by leading parties see, for instance, the interview with Pavel Rychetský; Moravec, Václav, *Interview s BBC*, Interview with Pavel Rychetský, at that time the Czech Vice-Prime Minister, November 16, 2001, republished at <http://wtd.vlada.cz/scripts/detail.php?id=1915>. Instructive in this respect is the comment by Jack Stack, an American who was the director of Česká spořitelna (a Czech bank that was bought by Erste Bank) and who noted that the bank sponsored the Czech Socialistic Democratic Party (ČSSD), the Civic Democratic Party (ODS), and the “Four-Coalition” (a coalition of four parties) because the goal was to support those who wanted to bring the country into the EU. “That was done; no more gifts this year,” he added. Nádoba, Jiří, *Stack opustí Spořitelnu a vrátí se do New Yorku*, iDNES, February 13, 2006, http://ekonomika.idnes.cz/ekonomika.asp?r=ekonomika&c=A060212_203648_ekonomika_ad. Stack’s statement may be very illustrative of Czech constituents’ view.

⁵³ See also Schimmelfenning, Sedelmeier, *Conclusions...*, *supra* note 38, pp. 210, 211; Rupnik, *supra* note 48, p. 78; Pridham, *supra* note 5, p. 58.

⁵⁴ On importance of enlargement promises, see also Raik, Kristi, *Democracy and Integration as Conflicting Logics*, UPI Working Papers No. 37, 2002, p. 17; Brusis, *The Instrumental...*, *supra* note 39, p. 293.

inevitable and without alternative, the EU conditionality effect would undoubtedly not have been as robust as it was.

Because EU conditionality was an imperative to the post-communist countries to which it was applied, several authors questioned the impact of conditionality on the consolidation of democracy in these countries. It is not realistic to suggest that the enlargement negotiations represented an instructive template for the democratic process,⁵⁵ the enlargement negotiations were conducted between actors of asymmetric powers,⁵⁶ as EU leverage was substantial given that there were no viable alternatives to EU membership. Schimmelfenning and Sedelmeier do not hesitate to label discussions in this context “negotiations only by name.”⁵⁷ Looking at conditionality from this critical viewpoint, Pridham’s definition of conditionality seems to be apt when he states that “of all the transnational concepts, *conditionality* is [...] the most suggestive of deliberate efforts to determine from outside the course and outcome of regime change, excepting of course ‘control’ through foreign occupation.”⁵⁸

The dearth of democratic experience in the applicant countries and their societies’ lack of experience with EU enlargement⁵⁹ are likely to produce negative consequences in these countries. Sadurski discounts this “accession democracy toll” paid in the applicant countries by highlighting the “accession democracy dividend” when he concludes that “although not all of the developments [...] are necessarily good for democracy [...], the real dividend coming from the accession process lies in the fact that, on a macro-level,

⁵⁵ Pehe – unwittingly – provides a perfect comment on this matter when he writes that “the machinery of European bureaucracy works quite reliably when ‘making history’ [...] but current Europe lacks political leaders who can persuade citizens of their countries that what happens in Europe does have sense.” Pehe, Jiří, *Má se Evropa dále rozšiřovat?*, *Hospodářské noviny*, November 8, 2005, <http://www.pehe.cz/zapisnik/2005/clanek.2005-11-08.4504520034?p=2>.

⁵⁶ See also Sadurski, supra note 50, p. 399; Brusis, *The Instrumental...*, supra note 39, p. 293; Moravcsik, Andrew, Vachudova, Milada Anna, *National Interests, State Power, and EU Enlargement*, *East European Politics and Societies*, Vol. 17, No. 1, 2003, p. 46; Pinelli, supra note 45, p. 357.

⁵⁷ Schimmelfenning, Sedelmeier, *Conclusions...*, supra note 38 p. 224.

⁵⁸ Pridham, supra note 5, p. 9.

⁵⁹ See, for instance, Klaus, *Economic...*, supra note 45, pp. 35–41; Grzymała-Busse, supra note 45, p. 68.

membership in the EU will make the democratic transition in Central and Eastern Europe practically irreversible.”⁶⁰ The future will show whether this optimism is warranted.

1.3 EU CONDITIONALITY AND THE LEGISLATIVE PROCESS IN THE APPLICANT COUNTRIES

After our examination of the impact that EU conditionality had in the post-communist applicant countries, we can now turn to the question of the effects of EU conditionality on the domestic legislative process of the applicant countries. I focus on two aspects: the partial elimination of policy defining⁶¹ and law drafting that occurs in the applicant countries during the preparations for EU membership, and the possible democratic deficit transfer⁶² from the EU to the applicant countries. This deficit transfer also affects the legislative process that normally reflects the potentially competing interests of the executive and the legislature.

Regarding the question of any direct effect of EU conditionality on the legislative process, it is necessary to explain that EU conditionality never targeted the domestic legislative process as such; there were no explicit conditions posed by the EU with specific regard to the legislative process. The process is an internal matter for each member state and is not subject to any uniform legislative framework within the EU. In the Czech Republic, the *Criteria* were also never used as a minimal standard against which the legislative process would be inspected. Although EU interest in monitoring the accession process did not include the legislative process specifically, the process faced conditionality in two ways. First, there were aspects of EU conditionality that were directly connected to the legislative process and its institutional setting; these aspects concerned civil service reform and institutional capacity building.⁶³ Second, the

⁶⁰ Sadurski, *supra* note 50, p. 371.

⁶¹ I view policy defining as the process which consists of policy analysis and determination of policy direction by the executive before it is submitted to the legislature for approval. I differentiate between policy defining and policy making: policy making comprises policy defining and final policy selection and approval by the legislature and occurs, naturally, also at the level of the executive; however, for purposes of this thesis I find making the terminological distinction helpful.

⁶² For the concept of democratic deficit, see also p. 1.

⁶³ These aspects are further debated in subsequent chapters.

legislative process was exposed to the pressure of the legislative alignment that was necessary to bring the Czech legislation in various areas in concert with EU standards.

Partial Elimination of Policy Defining and Law Drafting

For EU member states, the legislative endeavor is divided into two closely connected but distinct categories: domestic legislation and EU legislation. Although these categories are technically different, both involve the need for policy defining and law drafting in the member state. In the end, for the EU legislation category, the policy will be defined and the specific language of the instrument agreed upon at the EU level, but the member state will remain involved in the preparation and shaping of the legislation. This situation is much different in an applicant country.

In the applicant countries, policy defining and law drafting in the category of EU legislation does not exist; by signing the *Europe Agreements*, the applicants indicate their acceptance of current EU legislation *en bloc*. In addition, whatever legislation is adopted by the EU in the period between association and accession automatically becomes part of the EU legislation with which the applicant countries promise to align. During this period the applicants are excluded from EU-level decision making or formulation of legislation, which leads to “harmonization without representation.”⁶⁴ The process of preparations for EU membership eliminates an important portion of policy defining and law drafting for the applicant countries that an EU member state would normally conduct.

One might argue that elimination of policy defining and law drafting during a temporary period of preparations for EU membership would have no negative implications; after all, it may seem that it is actually helpful for the applicant to have some of its obligations temporarily lifted during a time when it needs to concentrate on the alignment of its own laws with existing EU legislation. However, the situation does present a problem when the time constraints imposed on the legislative alignment effectively eliminate the policy

⁶⁴ Vachudova, *supra* note 5, p. 86; on the one-sided character of the alignment, see also Pauknerová, Monika, *Asociační dohoda – některé teoretické a praktické otázky*, *Právník*, No. 9, 1995, p. 850.

defining process even for domestic legislation. In subsequent chapters, I show that such elimination did occur in the Czech Republic; combined with other circumstances, this harmed the legislative process and the future of the process in the Czech Republic.

EU Democratic Deficit Transfer

As I noted earlier, accepting EU conditions *per se* is usually unlikely to present any harm for the applicants. However, the application of EU conditionality can contribute to what Grabbe⁶⁵ and Hughes et al. call the “unintended policy transfer” from the EU to the applicant countries.⁶⁶ The transfer of the EU democratic deficit seems to be the most significant danger in this respect.

In the EU member state, an apparent shift in power from the legislature to the executive is noticeable;⁶⁷ the domestic parliaments play no role at the EU level, and the new *Constitution for Europe*, even if ratified, will not substantially improve their status at this level.⁶⁸ The executives, however, have direct access to and influence in shaping and making policy at the EU level. Despite the increasing role of the European Parliament, the Council, composed of ministers from the EU member states, remains the most powerful lawmaking body of the EU.

The shift of power can be observed as soon as the period of preparations for EU membership begins. Although the cabinets of the applicants are not involved in the decision making process at the EU level prior to accession, they begin to benefit during the accession negotiations from the substantial increase in the level of access that they enjoy to information about policy making at the EU level. This difference becomes even

⁶⁵ Grabbe, *supra* note 26, p. 311.

⁶⁶ Hughes, James, Sasse, Gwendolyn, Gordon, Claire, *Europeanization and Regionalization in the EU's Enlargement to Central and Eastern Europe, The Myth of Conditionality*, Palgrave Macmillan, 2004, p. 143; Pridham, *supra* note 5, pp. 3, 58.

⁶⁷ See, for instance, Jirásková, Věra, *Role Parlamentu ČR a legislative EU*, in: Tichý, Luboš (ed.), *Europeizace národních právních řádů*, Univerzita Karlova v Praze – Právnická fakulta, 2000, p. 56.

⁶⁸ Articles I-18, I-42, I-58, III-259, III-260, III-261, III-273, III-276, IV-443, IV-444 and the *Protocol on the role of national Parliaments in the European Union of the Treaty establishing a Constitution for Europe*, Official Journal, C 310, December 16, 2004, pp. 1 – 400.

more pronounced once the *Accession Treaty* is signed and the applicant's executive is awarded observer privileges in the Council. Although the European Parliament attempts to grant similar access to its own forum to the applicant's legislature, it cannot match the tremendous information advantage that the presence in the Council, the working bodies of the Council and the European Commission represents for the applicant's executive.

At the domestic level, the shift of power towards the executive is also apparent. The cabinet is responsible for aligning the laws of the member state with EU legislation and can "hide" the promotion of its own interests behind the "Brussels dictate." Even though the parliament maintains a certain amount of control⁶⁹ (e.g. it can pass a vote of no confidence in a cabinet that does not adequately inform it about developments at the EU level), it is clear that the executive (and the bureaucracies) gain substantial power because the maneuvering space left to the domestic legislature in the legislative process is largely restricted by EU legislation, which is shaped substantially by domestic executive participation in the legislative process at the EU level.

For the Czech Republic and all the other post-communist countries, the shift of power toward the executive is probably the greatest irony of their accession to the EU. Naturally, this shift has been experienced by all countries that have acceded to the EU, regardless of the date of accession. However, prior to the 2004 enlargement, all acceding countries had established civil services that did not carry the burden of a communist past. The post-communist countries spent significant time and effort to secure the necessary power of the electorate in their states in order to regain the equilibrium needed for a liberal democracy. Given the structure of the previous communist state, the equilibrium also required a shift of power from the executive towards the legislature. The dynamics of preparations for EU membership suddenly pushed in the opposite direction, strengthening executive bureaucracies that might not yet have been suitable to accept a more important role.

⁶⁹ On various mechanisms deployed in the "ex ante examination of [EU] legislation" see, for instance, Senden, Linda A.J., *General Report. The Quality of European Legislation and Its Implementation and Application in the National Legal Order*, in: Hirsch Ballin, Ernst M.H., Senden, Linda A.J., *Co-Actorship in the Development of European Law-Making*, T.M.C. Asser Press, The Hague, 2005, pp. 74 ff.

As is the case in the elimination of policy defining, the effect of the “democratic deficit transfer” depends largely on preexisting domestic conditions. In the Czech Republic the power struggle created tension between the executive and legislative branches; this tension was a natural consequence of the shift of power in a new democracy towards the executive branch. Unfortunately, as I show in Chapter 3, the lack of civil service reform in the Czech Republic cast serious doubt on the fitness of the executive bureaucracy for its more important role.

Based on the analysis in this chapter I suggest that despite the ambiguity that sometimes accompanied EU conditions, EU conditionality was very strong and effected compliance with the conditions in the applicant countries. Due to the lack of alternatives to EU membership for the post-communist countries, they fulfilled the conditions whether they matched any preexisting domestic motivations or not. While the domestic legislative process had to accommodate the legislative alignment mandated by EU conditionality, policy defining and law drafting in the applicant countries were limited because the countries were not yet permitted to participate in decision making and law drafting at the EU level. In the preparations for EU membership we can also observe state power shifting from the legislature towards the executive, a shift that was necessary for the timely fulfillment of EU conditions and legislative alignment.

This chapter shows that the preparations for EU membership had specific effects on the legislative process in the applicant countries; subsequent chapters will establish the nature of these effects.

CHAPTER 2: THE LEGISLATIVE PROCESS IN THE CZECH REPUBLIC

As I showed in Chapter 1, the EU conditionality applied during the preparations of the applicant countries for EU membership had significant effects on the legislative process in these countries. However, it is not possible to evaluate the effects in an applicant country without examining the preexisting domestic conditions in that country. To assess the nature of the effects that preparations for EU membership had on the Czech legislative process, this chapter examines the specific conditions within which the process functioned in the Czech Republic.

First, I provide a brief overview of the history of the Czech preparations for EU membership. Second, I explain details of the workings of the Czech legislative process; this explanation is technical but is indispensable for subsequent analysis. Third, I show how the Cabinet unsuccessfully attempted to change the legal basis of the process in response to EU preparation demands. Fourth, I explore the Cabinet's use of other mechanisms to regulate and streamline the Czech Republic's legislative alignment work. Finally, I demonstrate the magnitude of the alignment assignment by providing empirical data on draft laws and laws submitted and approved during the period of preparations for EU membership.

2.1 THE HISTORY OF CZECH PREPARATIONS FOR EU MEMBERSHIP AND THE “LEGISLATIVE HURRICANE”

It might be surprising that despite its clear desire to become an EU member state since the Velvet Revolution in 1989, the Czech Republic did not begin to systematically align its laws with EU legislation until 1998. This is not to suggest that there were no substantial legal changes introduced before 1998; after 1989 many significant reforms had to be instituted to safeguard democracy, the rule of law, the protection of human rights, and to create a functional market economy. In 1992 resources had to be allocated to the negotiations about and breakup of the federal structure of Czechoslovakia, which–

following Slovakia's declaration of sovereignty—resulted in the creation of two new states, the Czech Republic and Slovakia.

The obligation to align the country's laws with EU standards arises from the association agreement. Because discussions began on the split of Czechoslovakia, its 1991 *Europe Agreement* remained unratified, and after the “Velvet Divorce” the resulting two new countries each concluded new *Europe Agreements* in 1993. Following their ratifications, the *Agreements* came into force in 1995. However, the Czech Republic did not seriously approach its legislative alignment obligation until much later.

There were several reasons for the delay in commencing the legislative alignment work. First, there was uncertainty about the tangibility of the Czech Republic's prospects of becoming an EU member. It is true that the Czech Republic did not hurry with its application for EU membership; it applied in January 1996,⁷⁰ and only Slovenia submitted its application later.⁷¹ However, on the EU side, it still took until July 1997 for the Commission to prepare its *Opinion on the Czech Republic's Application*⁷² and until December 1997 for the EU to decide to “launch an accession process.”⁷³

Second, the comprehensive EU guidelines from and the systematic monitoring by the EU first began in 1998, at which time the Czech Republic faced an initial screening of its legislation based on EU requirements. For the first time, the Cabinet was forced to identify the most significant deficiencies in need of remedy and legislative alignment.⁷⁴

The European Commission's first Regular Report, which was issued in October 1998 and

⁷⁰ Václav Klaus, at the time the Prime Minister of the Czech Republic (today the President of the Czech Republic), submitted the application for the Czech Republic to become a member of the European Union on January 23, 1996, in Rome.

⁷¹ http://europa.eu.int/comm/enlargement/pas/europe_agr.htm.

⁷² *Agenda 2000 – Commission Opinion on the Czech Republic's Application for Membership of the European Union*, DOC/97/17, 15 July 1997.

⁷³ *Conclusions of the Presidency*, Luxembourg European Council, December 12 – 13, 1997, http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/032a0008.htm.

⁷⁴ Until then, the only reference to the identification of legislative gaps was made in relation to the 1995 White Paper, which included “only” 1,293 pieces of EU legislation, while the number of EU legislative acts that were ultimately included in the screening was 5,079; the body of EU legislation monitored for alignment increased to 9,343 in 2001 and to 22,016 in 2004. Palivec, *supra* note 28, pp. 37, 41, 44. The screening exercise took place until mid-1999, but concerned only instruments selected by the European Commission, not the entire body of EU legislation.

which exposed numerous inadequacies in the Czech alignment process, provided an important impetus for and legitimization of the alignment process, alerting the country to the fact that “alignment efforts need to be stepped up.”⁷⁵

A factor commonly presented as an impediment to legislative alignment was the domestic political situation; from June 1992 until November 1997 Václav Klaus, now President of the Czech Republic, served as the Prime Minister of the Czech Republic. This liberal economist never denied his skepticism about the EU, and his Cabinets were consistently blamed for the plodding pace of Czech activity in its alignment with EU requirements.

In 1998, however, following a political crisis in his party, Klaus’ Cabinet was forced to resign and was temporarily replaced by an interim Cabinet that served until a new Cabinet was created in the special elections of June 1998. The new political constellation soon brought about a “legislative hurricane;” starting in September 1998, the Cabinet decided to revisit its own plans for legislative work, to inspect them with respect to the dates of the proposed alignment listed in the screening documents, and to adjust the plans to the screening dates.⁷⁶ Clearly, the Cabinet had begun to realize the enormity of the task that it faced.⁷⁷ The regular legislative process suddenly appeared to be slower than ever, most definitely too slow to meet the need for rapid alignment with EU requirements.

An important figure in the legislative alignment endeavor of the new Cabinet was Pavel Rychetský, who became the Deputy Prime Minister and Chairman of the Legislative Council of the Cabinet. In the 1990s he used the term “legislative hurricane”⁷⁸ for the

⁷⁵ *1998 Regular Report from the Commission on Czech Republic’s Progress Towards Accession*, 1998, p. 29. On p. 42 it states that “the Czech Republic should be able to take on the obligations of membership provided that the momentum in the adoption of the *acquis* and the strengthening of related administrative structures is resumed rapidly so as to make up for the slow progress in the last year, particularly in the areas of internal market, agriculture and justice and home affairs.

⁷⁶ *Usnesení vlády České republiky ze dne 30. září 1998 č. 632 o Plánu legislativních prací vlády na zbývající část roku 1998 a na rok 1999...*

⁷⁷ For example, upon its accession in 2004 the Czech Republic had to notify the European Commission of its measures to transpose (align with) 1,600 EU directives. This number relates only to one category of EU legislative acts. Kolbabová, Martina, *Evropská unie a český právní svět, Část I.*, Právní fórum, No. 1, ASPI, 2004, p. 4.

⁷⁸ Pavel Rychetský remembered the origin of the term and its timing in his contribution at the conference “*Place and Role of the Law in the Continental Type of Legal Culture: Tradition, Presence, and Evolution*

first time to describe the scope of change and the speed at which the Cabinet intended to submit draft alignment laws to the Parliament.⁷⁹ The term that he coined quickly gained popularity, entering not only the regular terminology of legal professionals but also the daily journalistic and political vocabulary. The speed required by the “hurricane“ resulted from the initial delay in alignment, which necessitated a greatly accelerated approach to the legislative obligations that stemmed from the association agreement and other requirements in the *Criteria* as interpreted by the EU.

2.2 LEGAL BASIS OF THE LEGISLATIVE PROCESS IN THE CZECH REPUBLIC

Before we look at the ways in which the Cabinet modified, or attempted to modify, the legislative process for the pre-accession conditions, I will briefly introduce in this section the process itself and its key players. The introduction will be helpful for subsequent sections and chapters, which will use the terminology explained in this section.

The legislative power in the Czech Republic is vested by the 1993 *Constitution* in a two-chamber Parliament. The Chamber of Deputies (“Chamber”) became the successor to the Czech National Council, the republic’s legislature in the pre-1993 federative state. The upper chamber of the Parliament, the Senate, although envisaged by the *Constitution* since 1993,⁸⁰ was not actually established until December 1996. The President of the country, who is the head of state but not the head of the executive branch, participates in this power through his right to refuse to sign (though he has no right of veto) laws (other than constitutional laws) and return them to the Parliament, as we shall see subsequently.

Trends,“ organized by the Standing Committee of the Senate for the Constitution of the Czech Republic and Parliamentary Procedures and the Law School of the Charles University in Prague. The conference took place on May 28, 2004, in the Senate of the Czech Republic (the upper chamber of the Parliament of the Czech Republic).

⁷⁹ In Czech the term is “legislativní smršť.” Technically, the meteorological term “smršť” describes a tornado or a tromb. However, given the nature of the legislative phenomenon to which the word has been applied, it seems that a better translation and interpretation of the term would be “legislative hurricane.”

⁸⁰ Article 15 of the *Constitution*.

Only the Parliament can enact laws, and only laws can impose obligations on individuals.⁸¹ Subsequently, the laws themselves can authorize the Cabinet to adopt regulations (“nařízení”)⁸² for implementing the laws. The laws can also authorize the departments of the Cabinet (“ministries”), other administrative bodies and bodies of self-administration to adopt decrees (“vyhlášky”).

While the power of legislative enactment lies in the Parliament, legislative initiative is vested in several bodies. Draft laws can be proposed by the Cabinet, the Senate, an individual deputy (member of the Chamber) or group of deputies, or by an assembly of one of the 14 regions–Higher Territorial Self-Administrative Units (“vyšší územní samosprávné celky”; “Territorial Units”).⁸³ Again, the *Constitution* has provided for these as the possible initiators of legislation since 1993, but in fact, the Senate did not become operational until 1996, and the regional assemblies were not elected until 2000.⁸⁴

The statistics in Figure 1 reveal that as far as legislative initiative is concerned, in the period between February 1995 and May 2004 (the “examined period”) the Cabinet was the most active initiator among the possible initiators, followed by the Chamber. Any statistics regarding draft laws can be somewhat misleading because they do not take into consideration the differences in the importance of the drafts initiated, their length and the number of laws that they may affect. These numbers also do not necessarily reflect the true origins of the initiatives.⁸⁵ On the other hand, the statistical data still provide us with some understanding of the core of legislative work in the period crucial to the legislative

⁸¹ *Listina základních práv a svobod*, Article 4(1); *Usnesení předsednictva České národní rady ze dne 16. prosince 1992 o vyhlášení Listiny základních práv a svobod jako součásti ústavního pořádku České republiky*.

⁸² Article 78 of the *Constitution*.

⁸³ Article 41 of the *Constitution*; Higher Territorial Units are the 13 regions and the Capital City Prague (“kraje,” “hlavní město Praha”) into which the Czech Republic has been divided.

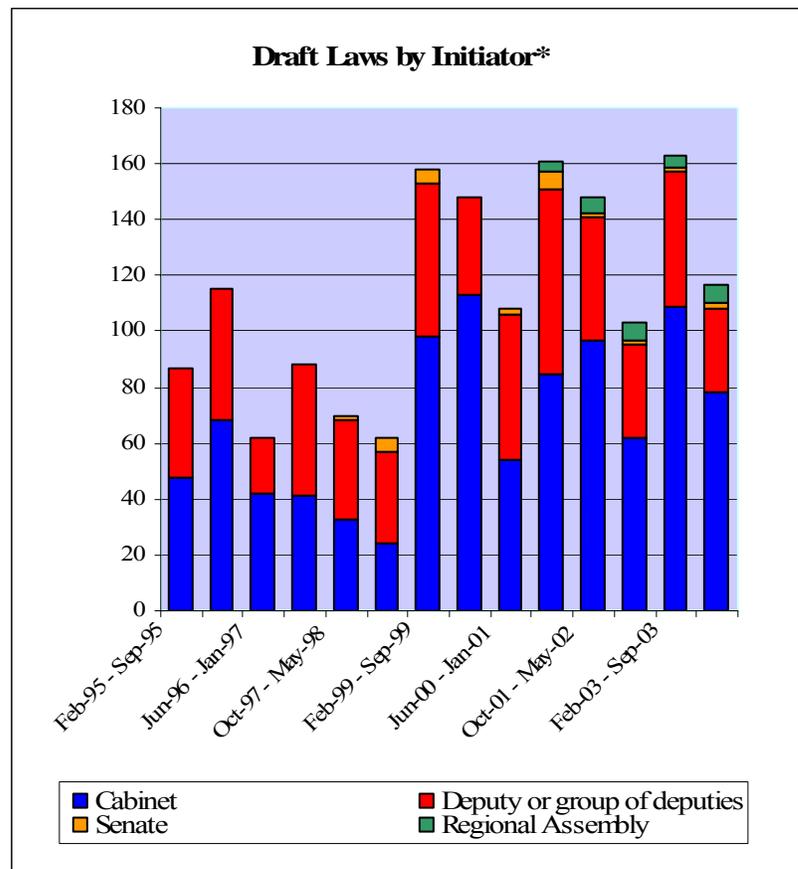
⁸⁴ Therefore, the first draft law ever proposed by the Senate appeared as late as November 1997; the Territorial Unit assemblies used their right of legislative initiative for the first time in March 2001, but the first law based on a successful initiative of theirs originated even later, and was issued in June 2002.

⁸⁵ We cannot expect that all legislative initiatives, in fact, originated in the bodies that submitted drafts. Lobbying mechanisms have certainly played a role in the creation and shaping of initiatives. Apart from various lobbies external to the legislative process, deputies, senators, or a representative of a Territorial Unit formally or even informally regularly suggest that a Cabinet official prepare a draft law that will eventually be submitted as a Cabinet initiative. In the same way, Cabinet departments sometimes use their connections to members of Parliament to pursue an initiative through them if such a solution is deemed to be potentially more successful due to the political circumstances in the Parliament.

alignment. It is important to add that it was the Cabinet that bore the primary responsibility for legislative alignment with EU standards.⁸⁶ Therefore, the vast majority of alignment proposals originated in the ministries.

With regard to the alignment, Figure 1 clearly shows that while the number of draft laws submitted by the Chamber of Deputies remained relatively stable, the number of drafts submitted by the Cabinet rapidly increased beginning in the first half of 1999, which is at the beginning of the “legislative hurricane” period mentioned above.

Figure 1⁸⁷



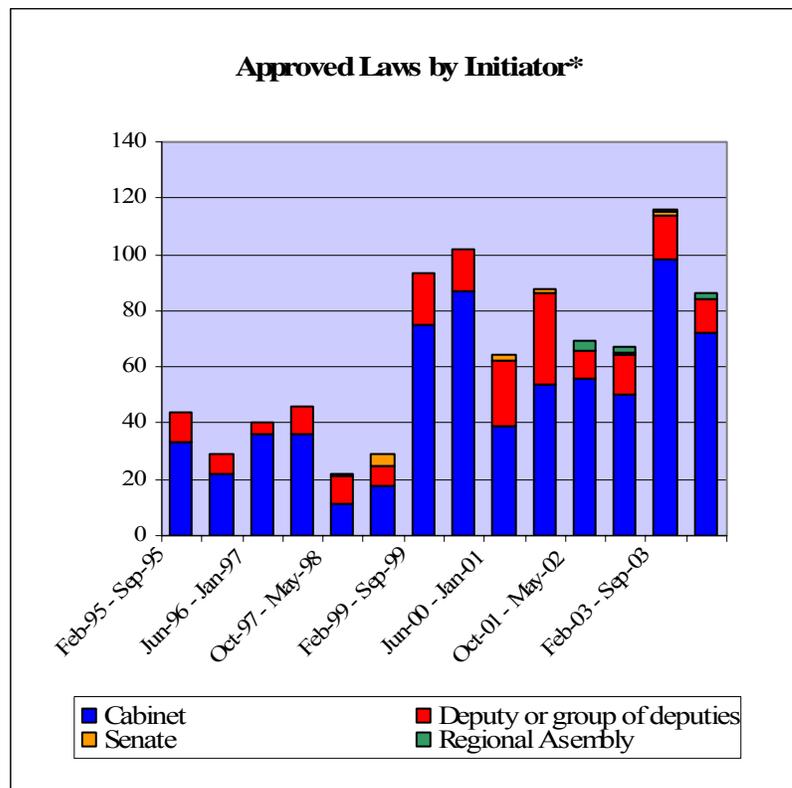
* Numbers of draft laws submitted by various initiators to the Chamber of Deputies from February 1, 1995, until April 30, 2004.

⁸⁶ *Zákon č. 2/1969 Sb., o zřízení ministerstev a jiných ústředních orgánů státní správy České republiky, ve znění pozdějších předpisů.*

⁸⁷ For a general note on the statistics of laws and draft laws, see p. 54.

The effect of the “legislative hurricane” is even more visible in Figure 2, which shows approved laws according to their original initiator and the time of submission to the Chamber. In this Figure we also notice the success of the Cabinet’s draft laws. These statistics are, of course, subject to the same limitations applicable to those in Figure 1. Additionally, we should note that even if a Cabinet draft law was “successful” (ultimately adopted), it does not necessarily mean that the draft law survived the legislative process unchanged. It was very likely amended in the process.

Figure 2⁸⁸

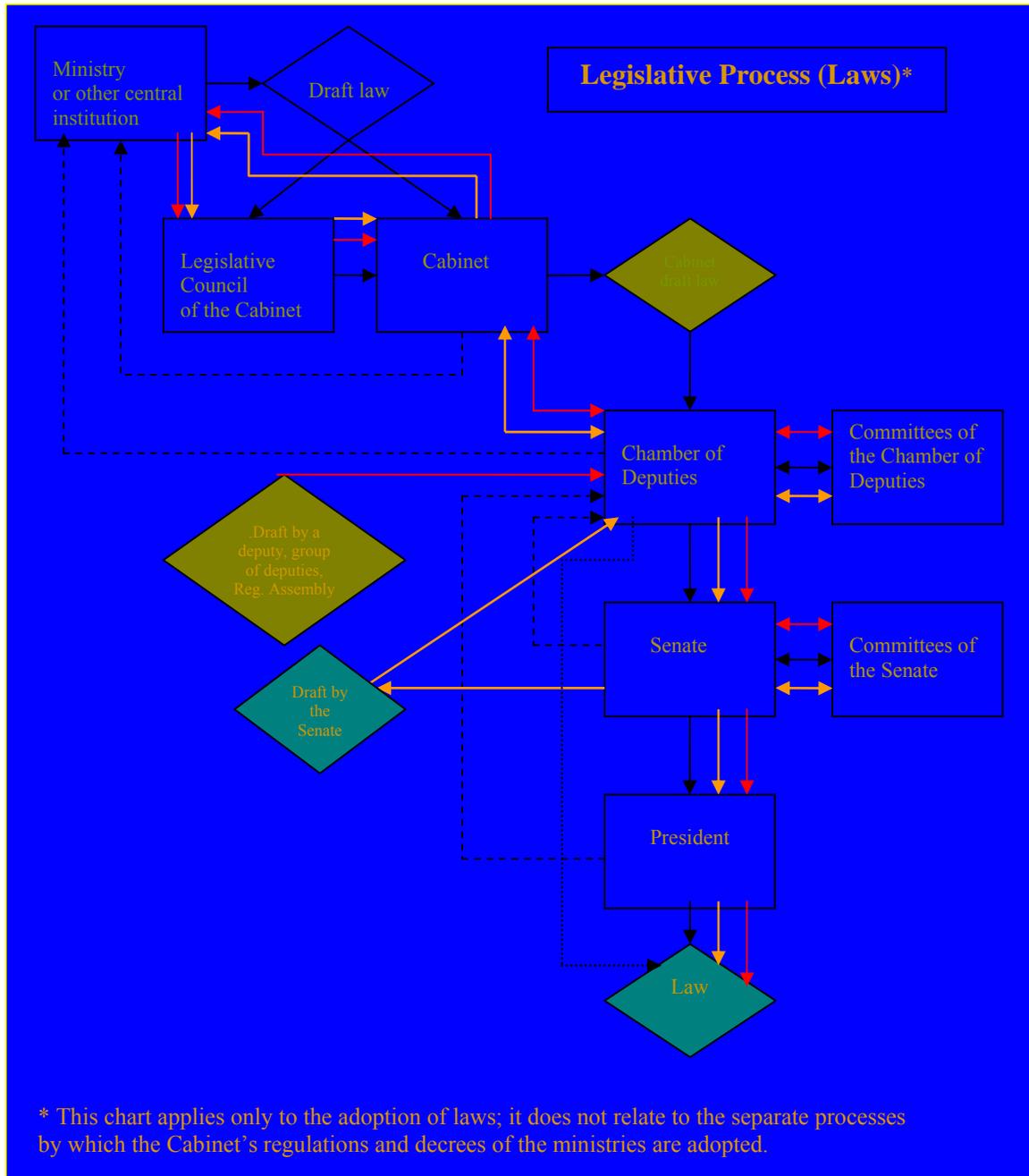


* Numbers of laws according to their initiators, as originally submitted to the Chamber of Deputies from February 1, 1995, until April 30, 2004.

Apart from its regulation under the *Constitution*, the legislative process is also regulated by several norms at different hierarchical levels. The *Constitution* identifies the players and establishes the basic structure of the process, which is depicted in Figure 3.

⁸⁸ For a general note on the statistics of laws and draft laws, see p. 54.

Figure 3



The process in the Chamber and the Senate is regulated by the *Rules of Procedure* of each chamber; these *Rules* are promulgated in the form of laws. In the Chamber, the *Rules of Procedure* provide for a three-readings procedure. A draft law can be returned to its initiator at the end of the first or third readings; it can be amended by deputies in the

second and third readings, and it can normally be approved only at the end of the third reading unless a special procedure applies.⁸⁹ Until December 1996, when a draft law was approved at the third reading by the Chamber, the draft was then forwarded to the President. However, once the Senate was elected and began activity, Chamber approval became merely a springboard for subsequent processing in the Senate, whose approval precedes the signature by the President.

The Senate can approve the draft law, but it can also express its intention not to debate the draft (or it can simply not act at all within the 30-day deadline, which has the same effect), in which case the draft is deemed to be approved.⁹⁰ If the draft is rejected by the Senate, it is returned to the Chamber, which may approve it again, but this time a qualified majority is required.⁹¹ The Senate can also return the draft with its own amendments; the Chamber may then either approve the draft with the Senate's amendments, or again by a qualified majority, approve its own original draft.

Once it is finally approved by the Senate, the draft law is submitted to the President for signature. The President may refuse to sign the law, in which case it is returned to the Chamber. At that time the Chamber has one last chance to approve the law if a qualified majority of deputies supports it. If the President signs the law, or if the Chamber approves it after he has returned the draft, the law is published in accordance with the law on Collection of Laws (“Sbírka zákonů”). Once published, the law becomes a part of the Czech legal order and comes into force on the date that is indicated in its final article.

While the *Rules of Procedure* of the chambers of Parliament deal with procedures for legislative initiatives by deputies, groups of deputies or the Senate, the most relevant for our purposes—considering the locus of the legislative alignment work—is the regulation of the Cabinet's initiatives and its technical provisions covering draft laws. The primary provisions at this level are set out in the *Legislative Rules of the Cabinet* (the “*Legislative Rules*”). The *Legislative Rules* are adopted by Cabinet resolution; therefore, they are

⁸⁹ For accelerated procedures, see *infra* p. 33.

⁹⁰ Article 97(2) of the *Rules of Procedure of the Chamber of Deputies*.

⁹¹ Article 97(3) of the *Rules of Procedure of the Chamber of Deputies*.

binding solely on those bodies subordinated to the Cabinet.⁹² This is important to keep in mind, because besides procedural provisions, the *Legislative Rules* also include technical details for draft laws and accompanying reasoning reports. Surprisingly, despite the fact that they are not bound by them, other initiators have tended to follow the *Legislative Rules* with regard to the technical provisions, in fact, acknowledging their practical usefulness.⁹³

The *Legislative Rules* provide for an “external consultative procedure” to be conducted by the ministry (or other central body) in which other ministries and central institutions are consulted. The *Legislative Rules* establish addressees in the procedure, deadlines for comments and manners in which comments should be handled by the ministry preparing the draft law. Each ministry usually has its own internal norms (guidelines, organizational rules, etc.) that regulate the preparatory work within its institution and the “internal consultative procedure.”

The legislative process was very lengthy; as a result, aware of the necessity of the timely adoption of alignment legislation, the Cabinet was concerned that significant delays would occur in the parts of the process over which it had no control, particularly the process in the Parliament. The existing accelerated procedures provided for by the parliamentary *Rules of Procedure* were not suitable for use by the Cabinet for the purpose of legislative alignment; in the Chamber, a state of legislative emergency (“legislativní nouze”)⁹⁴ was limited to situations in which there was a “danger to fundamental rights and freedoms of citizens or to state security, or a danger of substantial economic harm.”⁹⁵

Another possible way to expedite the process was for the Cabinet to connect the draft law with a vote of confidence by the Chamber; the Cabinet could then request that the Chamber finish the process within three months. Needless to say, the use of this

⁹² Article 21 of the Law No. 2/1969 Coll. *Zákon České národní rady č. 2/1969 Sb., o zřízení ministerstev a jiných ústředních orgánů státní správy České republiky, ve znění pozdějších předpisů.*

⁹³ Interviewee Q suggested that it would be desirable for the *Legislative Rules* to be adopted in some other form in order to bind other initiators of laws.

⁹⁴ Article 99 of the Law No. 90/1995. *Zákon č. 90/1995 Sb., o jednacím řádu Poslanecké sněmovny, ve znění pozdějších předpisů.*

⁹⁵ Article 99(1) of the Law No. 90/1995 Coll.

mechanism was even less frequent than the use of the legislative emergency because the Cabinet did not want to rush to endanger its own existence. Similarly, the accelerated exceptional procedures in the Senate were limited to extraordinary situations and were not suitable as a daily method of streamlining the legislative process for the purposes of adopting alignment legislation. Therefore, the Cabinet decided to enter the legislative scene with proposals to amend the legal basis of the legislative process.

2.3 ATTEMPTS TO CHANGE THE LEGAL BASIS OF THE CZECH LEGISLATIVE PROCESS FOR THE PURPOSES OF ALIGNMENT⁹⁶

The first Cabinet attempt to facilitate an expeditious and uncomplicated mechanism for adopting aligning legislation was ambitious – after all, it came from a very ambitious plan by Deputy Prime Minister Rychetský, who envisaged full alignment being achieved by June 30, 2001, which would have been by the end of the then-current Cabinet term.⁹⁷ He suggested creating an amendment to the *Constitution* that would enable the Cabinet to adopt aligning legislation in the special form of a regulation (“nařízení”). Whereas normally Cabinet regulations could be adopted solely on the basis of an authorization provided by the legislature, this special regulation would be adopted without such specific authorization. Although regulations are instruments that stand below the level of laws in the hierarchy of Czech legal norms, in this special instance, the regulations would have the force of law.

The proposed exception to the general legislative power normally exercised by the Parliament was supposed to be limited, not only by subject matter (to issues dealt with by

⁹⁶ This thesis does not discuss amendments to the Constitution or other laws connected to the legislative process that were proposed and adopted with regard to the Czech Republic’s expected accession to the EU unless these amendments or laws directly concerned the domestic legislative process. Therefore, note that this chapter omits any mention of amendments to the Rules of Procedure of the Chamber of Deputies and Senate on consultation mechanisms introduced due to the Czech Republic’s participation in EU decision-making bodies. It also does not present a number of draft amendments to the Constitution introduced in relation to EU requirements, such as the introduction of the European Arrest Warrant, or by EU-promoted reform of the judiciary, or the Constitutional Law on Referendum on Accession to the EU.

⁹⁷ Pavel Rychetský in Moravec, Václav, *Interview s BBC*, Interview with Pavel Rychetský, at that time the Czech Vice-Prime Minister, November 16, 2001, republished at <http://wtd.vlada.cz/scripts/detail.php?id=1915>.

the *Europe Agreement*), but also by time; that is, the delegation provision was supposed to expire upon the Czech Republic's accession to the EU. The Parliament was not completely excluded from the process; upon adoption by the Cabinet, draft regulations were to be submitted to the Parliament, which could then express its opposition to them within a 30-day period; if opposed, the draft regulations would become draft laws and enter the regular legislative process. If the Parliament did not express its opposition, the draft would come into force and be promulgated in the same form as a law. The regulation would be signed by the Prime Minister or a minister responsible for the sector that the regulation concerned.

The draft amendment to the *Constitution* that provided for this alignment by delegation was presented by the Cabinet to the Chamber in April 1999. It was an extensive draft designed, in general, to deal with three areas of paramount importance: the fulfillment of obligations originating in international treaties and agreements, obligations connected with membership in NATO and obligations stemming from the *Europe Agreement*. The amendment was supposed to modify 13 articles and add one new article to the *Constitution*;⁹⁸ it also proposed an amendment to one article of one other constitutional law. Special regulations, potentially to be adopted by the Cabinet, were envisaged by Point 11 of the draft amendment, which targeted Article 78 of the *Constitution*.

In its reasoning report, the Cabinet noted that the special regulations would be adopted only to align Czech legislation with the obligations included in the *Europe Agreement*. The Cabinet stressed that it considered it to be “dishonorable” for the legislature to be bothered by alignment legislation to which the legislature could make no substantive changes in any event.⁹⁹ In retrospect, this argument in the reasoning report (repeated by Rychetský, acting as the representative of the initiator, in the first reading before the Chamber)¹⁰⁰ appears to have been a guaranteed ticket for a direct trip to the legislative

⁹⁸ The *Constitution* had 113 articles in 1999.

⁹⁹ *Vládní návrh na vydání zákona, kterým se mění ústavní zákon České národní rady č. 1/1993 Sb., Ústava České republiky, a ústavní zákon č. 110/1998 Sb., o bezpečnosti České republiky*, Chamber of Deputies, Print No. 208/0, 1999.

¹⁰⁰ Stenographic record of the session of the Chamber of Deputies on June 8, 1999.

graveyard in a country where the legislature has been very proud of and keen on its important role in democratic discourse.¹⁰¹

The reporter of the draft in the Chamber recommended that the draft be allowed to advance to the second reading, but the draft was attacked by deputies of various political parties and eventually rejected before the second reading. Regarding the article on regulations, the arguments were rather predictable, alluding to the Cabinet's attempt to "take over the legislative power."¹⁰² To illustrate the agitation of the Chamber about the draft, I quote one deputy who called the draft "a legislative surrender"¹⁰³ by the Cabinet: "Through this draft the Cabinet clearly and simply reveals its incapability—and maybe even unwillingness—to prepare relevant drafts and prediscuss them in a manner that would enable them to be approved by the Parliament."¹⁰⁴ At the end of the three-hour first reading of the draft on June 8, 1999, 116 of the 186 deputies present voted against the draft. The issues related to NATO membership were eventually included in an amendment to the *Constitution* in 2000,¹⁰⁵ and the international law matters were dealt with by means of an additional amendment in 2001;¹⁰⁶ nevertheless, the special regulation idea never returned to the floor of the Chamber.

Following the summer of 1999, a second, significantly more modest attempt to solve the legislative squeeze was launched. In September 1999, a deputy of the Cabinet's majority party, Stanislav Gross,¹⁰⁷ proposed an amendment to the *Rules of Procedure* of the

¹⁰¹ A brief endorsement by Prime Minister Zeman did not help much either. It included, for instance, the sentence: "Dear Colleagues, if you want to work eight days a week, twenty-six hours a day, nobody prevents you from that." Stenographic record of the session of the Chamber of Deputies on June 8, 1999.

¹⁰² Deputy Marek Benda, first-reading debate, Stenographic record of the session of the Chamber of Deputies on June 8, 1999.

¹⁰³ Deputy Miloslav Výborný is intimately familiar with "military terminology:" In 1996 – 1997 he was the Czech Minister of Defense. He served as Chairman of the Legislative Council of the Cabinet in the first half of 1998.

¹⁰⁴ Deputy Miloslav Výborný, first-reading debate, Stenographic record of the session of the Chamber of Deputies on June 8, 1999.

¹⁰⁵ *Ústavní zákon č. 300/2000 Sb., kterým se mění ústavní zákon č. 1/1993 Sb., Ústava České republiky, ve znění ústavního zákona č. 347/1997 Sb., a ústavní zákon č. 110/1998 Sb., o bezpečnosti České republiky.*

¹⁰⁶ *Ústavní zákon č. 395/2001 Sb., kterým se mění ústavní zákon České národní rady č. 1/1993 Sb., Ústava České republiky, ve znění pozdějších předpisů.*

¹⁰⁷ The future youngest Prime Minister in Europe.

Chamber.¹⁰⁸ The amendment consisted of one article that was supposed to be added to the *Rules of Procedure* to facilitate a faster mechanism for the Chamber to deal with alignment legislation; the special procedure could be requested by the Cabinet when submitting draft alignment laws. Within the process, the draft could not be rejected after the first reading in the Chamber. It could be assigned to only one committee, which would have only 30 days to discuss the draft.

The original draft amendment was rather simplistic in nature,¹⁰⁹ and even though it was supported by the position of the Cabinet,¹¹⁰ it was subjected to substantial changes in the Constitutional-Legal Committee of the Chamber.¹¹¹ It was adopted as amended by the Committee with two other minor changes proposed by deputies in the second-reading debate. Finally, after passing in the Senate, it was signed by the President and issued as Act No. 47/2000 Coll.¹¹²

The Act provided for the possibility of a streamlined single-reading procedure in the Chamber, which became known as the “Article 90(2) procedure.” However, the procedure was not limited to drafts seeking alignment with EU legislation; it could be requested by any initiator of a draft law. In addition to losing the original exclusivity for aligning legislation, the law also did not secure the streamlined single-reading procedure for every draft for which the initiator asked: in the first reading the Chamber could adopt the draft as is (without substantive changes), reject it, or return it to the initiator. However, it could also reject the application of the requested procedure; then the draft was sent to one or more committees, and the draft reverted back into the regular legislative process.

The statistics in Figure 4 demonstrate that the new tool was not overused during the examined period. The initiators requested its application rather sporadically, and the

¹⁰⁸ *Návrh poslance Stanislava Grosse na vydání zákona, kterým se mění zákon č. 90/1995 Sb., o jednacím řádu Poslanecké sněmovny*, Chamber of Deputies, Print No. 361/0, 1999.

¹⁰⁹ Gross obtained his law degree in the same year at the Law School of Charles University in Prague.

¹¹⁰ *Stanovisko vlády k návrhu zákona, kterým se mění zákon č. 90/1995 Sb., o jednacím řádu Poslanecké sněmovny (sněmovní tisk č. 361)*, Annex to the Cabinet Resolution No. 1021 of 29 September 1999.

¹¹¹ *Usnesení Ústavně-právního výboru Poslanecké sněmovny ze 32. schůzky ze dne 19 listopadu 1999.*

¹¹² *Zákon č. 47/2000 Sb., kterým se mění zákon č. 90/1995 Sb., o jednacím řádu Poslanecké sněmovny.*

Chamber proved to be consistently reluctant to apply it to any drafts, whether they were intended to align with EU legislation or not. Ultimately, the effect of the Article 90(2) procedure on the adoption of draft alignment laws was minimal. Even though it was requested in 24% of the cases of draft alignment laws, the procedure was applied by the Chamber to less than 10% of all draft alignment laws in the examined period.¹¹³

Figure 4

Article 90(2) Procedure: Requests for and Application of the Procedure

	Draft laws submitted to the Chamber		Art. 90(2) procedure requested by the draft law initiator		Art. 90(2) procedure applied by the Chamber		% of EU alignment drafts** for which Art. 90(2) procedure was applied
	Total	EU alignment drafts**	Total	% of EU alignment drafts**	Total	% of EU alignment drafts**	
2000* – 2002	463	130	85	44%	40	45%	14%
2002 – 2004*	383	166	60	57%	19	53%	6%

* Period from February 24, 2000, when the Article 90(2) procedure became effective, until April 30, 2004; breakdown according to the election periods of the Chamber.

** See note on the statistics of alignment draft laws on p. 49.

As we see, none of the attempts to change the legal basis of the legislative process due to preparations for EU membership were successful. Certainly the framing of the first attempt, the draft amendment to the *Constitution*, was extremely unfortunate and contributed to the rapid failure of the draft. It is apparent that the Parliament considered the special regulations to be a method of “bypassing” it by allowing the Chamber a shorter period of time to inspect the Cabinet’s actions.

It would have been interesting to see whether legislation would have developed differently if the Cabinet had been forced to limit its special regulations solely to the requirements of alignment, rather than also burdening the regulations with additional

¹¹³ See note on the statistics of alignment draft laws on p. 49.

amendments unrelated to alignment (which regularly happened in the case of alignment laws).¹¹⁴ Rychetský regretted the failure and later noted that Slovakia, which just copied and adopted the amendment, was in a much better position to align with EU requirements because it had the special exception for the Cabinet to adopt aligning norms with the force of law.¹¹⁵

Other EU countries implement their versions of alignment by delegation: in the United Kingdom, “the European Communities Act 1972 authorises the government to use secondary legislation in order to amend primary legislation where it is necessary to do so in order to implement [an EU] obligation”¹¹⁶ that facilitates the timely adoption of alignment legislation. In Spain the Cabinet once received a one-time delegation to adopt legislative decrees to align with specific EU directives; in extraordinary situations, the Spanish Cabinet can also adopt decree-laws, but these are limited to cases of “extraordinary necessity and urgency.”¹¹⁷ Similarly, in France the Constitution allows the legislature to authorize the Cabinet to adopt governmental decrees rather than alignment laws. Similarly to the Czech Cabinet’s draft amendment, the authorization is limited by content and time.¹¹⁸ In connection with its accession to the EU, Greece also enacted legislation enabling its Cabinet to adopt alignment legislation.¹¹⁹

The failure of the first attempt of the Czech Cabinet probably also precluded any realistic future chance for the executive to push a more accommodating regime that would streamline the adoption of alignment legislation. The position of the stakeholders was predictable; the members of Parliament were convinced that their input was indispensable to appropriate alignment with EU requirements. They emphasized their function in inspecting the accuracy of alignment, its limits, and choices being made within the

¹¹⁴ Interviewee R specifically complained about this feature of draft alignment laws. In 2000 the Chamber adopted a resolution in which it asked the Cabinet to “visibly clean [in draft laws] purely [aligning] provisions from other [non-alignment] provisions.” *Usnesení Poslanecké sněmovny č. 766 ze dne 27. ledna 2000*, point 3.

¹¹⁵ Pavel Rychetský in an interview, *supra* note 52.

¹¹⁶ Senden, *supra* note 69, p. 56.

¹¹⁷ *Ibid.*, p. 58.

¹¹⁸ *Ibid.*, p. 62.

¹¹⁹ *Ibid.*, p. 59.

alignment.¹²⁰ Cabinet officials, on the other hand, believed that the majority of alignment difficulties stemmed from the legislative process in the Parliament. They criticized the “innovative” approach taken by some of the parliamentarians for causing the alignment legislation to become disaligning.¹²¹ According to the Cabinet officials, if alignment could have been done in the form of special regulations, it would not only have been faster, but also more efficient and substantively flawless.¹²²

In the attempts of the Cabinet to change the legal basis of the legislative process and facilitate an accelerated process for alignment laws, we can observe the materialization of the fear of the legislature of the democratic deficit transfer from the EU. The Chamber was aware of its limited ability to control the outcome of alignment, and yet it refused to be stripped of the possibility for discussing draft laws under the regular three-reading procedure. Even when an accelerated procedure was eventually adopted, the Chamber allowed it to be used for fewer than one out of ten alignment laws.

In the case of the introduction of the accelerated procedure, the effects of preparations for EU membership on the legislative process were diluted by the defensive position of the legislature. It is difficult to evaluate whether or not the result was advantageous for the legislative process and its output; if the original proposal of the Cabinet for special regulations had been passed, the proposed process would probably have accelerated the adoption of aligning legislation. In the absence of empirical evidence, it is irrelevant to speculate whether the quality of the resulting legislation would have been better than the actual legislative output.

¹²⁰ Interviewees B, J. Interviewee B expressed the opinion that the Cabinet is “less technically competent.” On the other hand, some experts within the Cabinet show a great deal of self-criticism – interviewee Q.

¹²¹ In these complaints, the Cabinet is often joined by other stakeholders interested in adequate alignment. See, for instance, Vaníček, Zdeněk, *Komise ES o stavu elektronických komunikací – výzva pro ČR*, Právní zpravodaj, No. 1, 2005, p. 13.

¹²² See, for instance, Pavel Rychetský and Jiří Payne in an interview with the BBC; Pavlíček, Tomáš, Interview with Pavel Rychetský and Jiří Payne for BBC programs *Dobré ráno s BBC* and *Svět o sedmé*, April 29, 1999, republished at <http://wtd.vlada.cz/scripts/detail.php?id=2011>.

2.4 ADJUSTMENTS TO THE LEGISLATIVE PROCESS RELATED TO THE EU REQUIREMENTS

Even though the Cabinet was unsuccessful in changing the legal basis of the legislative process and streamlining legal procedures for the adoption of alignment legislation, it deserves credit for being committed to legislative alignment. In this section I describe the effects that preparations for EU membership had on the legislative process through the Cabinet's own actions. First, I discuss the Cabinet's attempts to compensate for the absence of an accelerated parliamentary procedure for draft alignment laws. Subsequently, I show the stages of development in the Cabinet's approach to its own responsibility for alignment within its internal structure.

The Cabinet was concerned that parliamentarians would ignore the limits that EU conditionality imposed on Parliament's decision making and underestimate the importance of alignment provisions. To address these concerns, in November 1999 the Cabinet required all ministries to submit draft alignment laws to the Chamber's political party clubs¹²³ upon their distribution through the external consultative procedure (even prior to Cabinet approval). The Chairman of the Legislative Council was required to send the Cabinet's positions to the political clubs; the positions were prepared by the Department of Compatibility of the Office of the Cabinet and contained information on the degree of alignment of a particular draft.¹²⁴ The Cabinet hoped that the legislature's early access to the information through the political clubs would ensure that deputies would be more cautious in suggesting amendments to draft alignment laws.

An important part of ensuring the parliamentarians' awareness of the sensitivity of the legislative alignment process was the provision of a full list of EU legislation related to each draft law. The obligation of the ministries to make reference to the respective EU

¹²³ Political clubs, or "deputies clubs," are official bodies within the organizational structure of the Chamber. "Deputies may associate in deputies clubs according to their political parties and political movements of which they were candidates in elections." Article 77(1) of the *Rules of Procedure of the Chamber of Deputies*.

¹²⁴ *Usnesení vlády České republiky ze dne 15. listopadu 1999 č. 1210 k urychlení legislativního procesu v souvislosti s přípravou vstupu České republiky do Evropské unie.*

legislation was already in place in 1991, but as we will discuss below, it was not particularly respected until much later. Finally, in 2000 the Cabinet established a strict system for classifying the alignment of Cabinet draft laws; ministries were instructed to include specific references to EU legislation with regard to each separate provision of all draft laws. As part of the reasoning report, a comparative table had to be submitted, including all draft domestic provisions and the corresponding EU provisions.¹²⁵ Since 2000, a draft law accompanied by the alignment-related information was subjected to a preliminary consultation with the European Integration Committee of the Chamber¹²⁶ which—as in the case of submission to the clubs of the political parties—preceded approval by the Cabinet. Thus, the Committee became an intimate partner with the Cabinet in its alignment endeavor. A similar committee was also established in the Senate,¹²⁷ but no special draft alignment law preliminary consultation was established for this committee.

With regard to the Cabinet's approach to the ministries' obligation to align draft laws with EU standards, there were three distinctive stages. The characteristics of each stage are indicative of the importance that the Cabinet attached to the legislative alignment in the various periods. The first stage began in 1991, when a Cabinet resolution required the ministries to establish consistency between their draft laws and EU legislation.¹²⁸ However, at this time no active alignment obligation was formulated because it was not expected that the ministries would actively audit laws in their respective fields and propose aligning amendments. Nonetheless, the 1991 resolution imposed an obligation on the ministries to include information about the relevance (or irrelevance) of the draft laws to EU legislation and to the degree of alignment. Unfortunately, as noted above, this provision was not particularly effective; for instance, even at the beginning of the

¹²⁵ Originally, the system was established by Cabinet resolution No. 257 of 2000. In 2002, the corresponding provisions were inserted into the Legislative Rules of the Cabinet. *Usnesení vlády České republiky ze dne 15. března 2000 č. 257, kterým se stanoví Způsob prokazování slučitelnosti navrhovaných zákonů s právem Evropských společenství a postup při předběžných konzultacích o návrzích zákonů s výborem pro evropskou integraci Poslanecké sněmovny Parlamentu České republiky; Usnesení vlády České republiky ze dne 19. června 2002 č. 640 k návrhu změn Legislativních pravidel vlády.*

¹²⁶ The Committee was established in 1998. *Usnesení Poslanecké sněmovny č. 12 ze dne 17. července 1998.*

¹²⁷ *Usnesení Senátu č. 13 ze dne 16. prosince 1998.*

¹²⁸ *Usnesení vlády České republiky ze dne 9. října 1991 č. 396 k usnesení vlády ČSFR č. 533/1991 o zabezpečení slučitelnosti československého právního řádu s právem Evropských společenství, Příloha, point 2.*

examined period (between February 1, 1995, and April 1, 1996) less than 30% of the draft laws submitted by the Cabinet included a reference to the EU.¹²⁹

In the second stage, in 1993 and 1994, however, we see Cabinet resolutions stipulating the responsibility of the ministries to fulfill the obligations of the *Europe Agreement*¹³⁰ and to ensure legislative alignment in their respective fields.¹³¹ This active approach to the alignment obligation emerged with the first indications of the need for a timeline with an agenda for alignment with EU standards.¹³² In 1994, the institutional aspect of the alignment process was addressed by assigning the responsibility for the coordination role with respect to legislative alignment to the Office for Legislation and Public Administration¹³³ (except for the task of alignment with EU technical norms, which was assigned to the Office for Standardization). Within the Office, a specialized Department of Compatibility with EU Law was created¹³⁴ and, concomitantly, the prominence of EU affairs was elevated by the establishment of similar specialized departments in all ministries.¹³⁵ Special bodies to deal with the fulfillment of the *Europe Agreement* obligations and negotiations with the EU were also created in 1994.¹³⁶

The beginning of the third period was marked by the EU publication of the 1995 *White Paper*, which included the first guideline list of EU legislation for the applicant countries.

¹²⁹ Of the 116 draft laws submitted by the Cabinet during this period, 82 did not include information about the relevance or irrelevance to EU legislation or other references to the EU.

¹³⁰ *Usnesení vlády České republiky ze dne 22. září 1993 č. 522 o souhlasu se sjednáním Evropské dohody o přidružení mezi Českou republikou a Evropským společenstvím.*

¹³¹ *Usnesení vlády České republiky ze dne 3. března 1993 č. 97 o zásadách sblížení právních předpisů s technickým obsahem a technických norem s technickými předpisy Evropských společenství.*

¹³² *Usnesení vlády České republiky ze dne 15. března 1995 č. 151 k harmonogramu opatření k postupnému sblížení právních předpisů České republiky s právem Evropských společenství a o některých dalších opatřeních v této oblasti.*

¹³³ *Usnesení vlády České republiky ze dne 4 května 1994 č. 237 o sblížení právních předpisů České republiky s právem Evropských společenství.*

¹³⁴ *Institucionální zajištění procesu integrace České republiky do Evropské unie včetně harmonizace právního řádu České republiky s právním řádem Evropské unie, Příloha k Usnesení vlády České republiky ze dne 9. listopadu 1994 č. 631 o institucionálním zajištění procesu integrace České republiky do Evropské unie včetně harmonizace právního řádu České republiky s právním řádem Evropské unie.*

¹³⁵ We shall return to this matter in Chapter 3.

¹³⁶ *Usnesení vlády České republiky ze dne 9. listopadu 1994 č. 631 o institucionálním zajištění procesu integrace České republiky do Evropské unie včetně harmonizace právního řádu České republiky s právním řádem Evropské unie.* These bodies were the Cabinet's Committee for European Integration (Výbor vlády pro evropskou integraci), the Working Committee for the *Europe Agreement* Implementation (Pracovní výbor pro provádění Evropské dohody) and the Expert Working Groups (pracovní skupiny expertů).

In the Czech Republic, the Department of Compatibility with EU Law developed a monitoring database for legal approximation that was launched in the same year. To some extent, the ISAP database (“Information System for Legal Alignment”)¹³⁷ proved to be both a useful tool and, arguably, an additional burden, especially later as the specialized EU staff became overwhelmed with alignment tasks and lacked sufficient time to manually insert relevant data. Despite the fact that the system suffered from various problems,¹³⁸ most recognize that it represented, and still represents, an invaluable tool for legislative alignment and the translation of EU legislation.

In 1996, following the abolition of the Office for Legislation and Public Administration,¹³⁹ the Department of Compatibility was transferred to the Ministry of Justice; the Ministry thereafter assumed a special role as the coordinator of the legislative alignment process and was supposed to provide its position regarding the proper reflection of *Europe Agreement* obligations in alignment legislation.¹⁴⁰ It was also expected to inspect the degree of alignment within the external consultative procedure.¹⁴¹

However, the Ministry of Justice was not pleased with its role in the legislative alignment; it resisted the concept of one department “for the entire legislation” and did not want the overall responsibility for legislative alignment in all fields of law, especially in those fields beyond its control. It argued that it possessed no mechanism for controlling other parts of the Cabinet and, therefore, had no real power to act as a coordinator. As a result, the coordination assignment was eventually removed from the Ministry; in March 1999 the Department of Compatibility with all of its responsibilities

¹³⁷ <http://isap.vlada.cz/homepage.nsf/titul>.

¹³⁸ For instance, for a long period of time the computer system allowed the ministries to overwrite previously input information indicating the ministry responsible for alignment of a particular EU legislation. Thus, by the end of each quarter the ministries embarked on a “race” to be the last one to overwrite the information in the way they desired. Although stories like this are rather laughable today, in retrospect it is rather painful to realize the quantity of resources that was wasted because of purely technical flaws.

¹³⁹ Article 1(3) of the Law No. 272/1996. *Zákon č. 272/1996 Sb., kterým se provádějí některá opatření v soustavě ústředních orgánů státní správy České republiky a kterým se mění a doplňuje zákon České národní rady č. 2/1969 Sb., o zřízení ministerstev a jiných ústředních orgánů státní správy České republiky, ve znění pozdějších předpisů.*

¹⁴⁰ Article 2(3) of the *Legislative Rules of the Cabinet*.

¹⁴¹ Articles 5(2), 8(2) of the *Legislative Rules of the Cabinet*.

was transferred¹⁴² to the Office of the Cabinet.¹⁴³ Although the relocation of the Center to the core of the Cabinet might have been perceived as a sign of the Cabinet's elevation of the importance of EU matters,¹⁴⁴ the true reason was a combination of the reluctance of the Ministry of Justice to be burdened with the responsibility for the legislative alignment of the entire legal order and its objection that it lacked control over the alignment duties and decisions of other ministries.

In the summer of 1997, we can detect some progress in the Cabinet's approach to its alignment obligation; the Cabinet at that time adopted methodological guidelines for legislative alignment¹⁴⁵ that included the basic definitions and principles of alignment. After the screening exercise was completed and a new Cabinet came into power in 1998,¹⁴⁶ the active approach to alignment was strengthened by a push for special draft laws to be prepared and submitted with the intention of alignment with EU standards before the deadline, in order to comply with the promises given at the screening exercise. This approach was also reflected in the *Legislative Rules* when they were restated in 1998.¹⁴⁷ In November 1999, new methodological guidelines were issued which, with subsequent amendments, replaced the previous 1997 guidelines for the rest of the pre-accession period.

As we can see, in spite of the substantial delay the Cabinet ultimately reacted to the need for legislative alignment and introduced mechanisms to achieve a successful and timely alignment, even though these mechanisms had to be limited only to the legislative process at the Cabinet level, after the Cabinet's attempts to reach the legislature failed. This Cabinet initiative reassures us that there were indeed effects of preparations on the

¹⁴² *Usnesení vlády České republiky ze dne 28. června 1999 č. 660 [...] o změně usnesení vlády z 19. března 1998 č. 188, o Legislativních pravidlech vlády [...], Příloha č. 4.*

¹⁴³ *Usnesení vlády České republiky ze dne 24. února 1999 č. 163 o převodu některých činností vykonávaných Ministerstvem spravedlnosti na Úřad vlády.*

¹⁴⁴ Actually, the Department was never physically relocated; it remained in the same building.

¹⁴⁵ *Usnesení vlády České republiky ze dne 16. července 1997 č. 432 o metodických pokynech pro další zajišťování prací na slučitelnosti právních předpisů České republiky s právem Evropských společenství.*

¹⁴⁶ *Usnesení vlády České republiky ze dne 30. září 1998 č. 632 o Plánu legislativních prací vlády na zbývající část roku 1998 a na rok 1999 [...].*

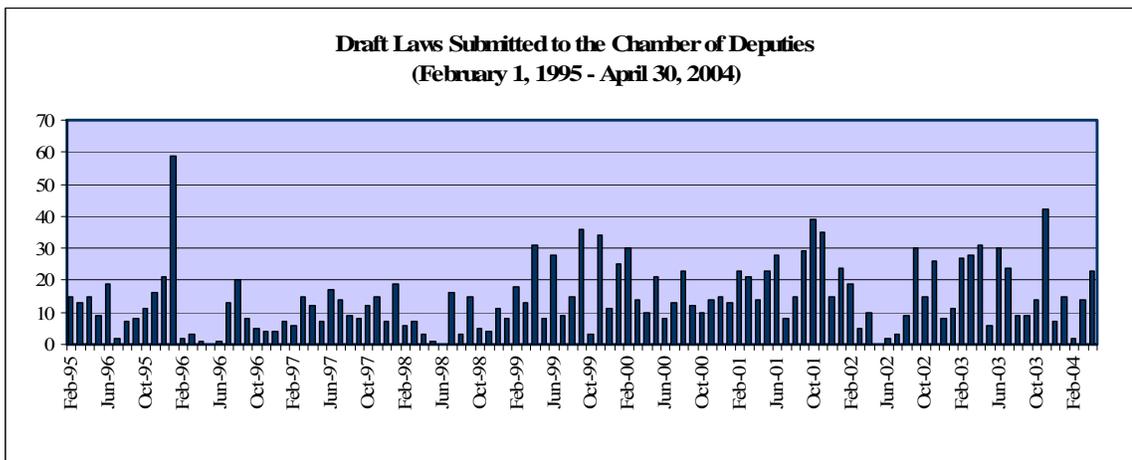
¹⁴⁷ The 1998 *Legislative Rules of the Cabinet* replaced the previous Rules dating back to 1987. *Usnesení vlády České republiky ze dne 18. března 1998 č. 188 o Legislativních pravidlech vlády.*

legislative process; in the next section I explore the quantitative evidence of these effects and provide a statistical overview of the legislative activity in the examined period.

2.5 THE STATISTICS OF THE “LEGISLATIVE HURRICANE”

If one asks a lawyer in the Czech Republic about the effects that the preparations for EU membership had on legislation, the lawyer might just simply point towards the shelves where he or she keeps his Collection of Laws. This “optical effect” of the “legislative hurricane” is truly impressive: the number of volumes in the Collection of Laws (in which is also published regulations, decrees and other documents) grew from 84 in 1995 to 160 in 2003.¹⁴⁸ In just the four months preceding accession in 2004, 88 volumes were added to the Collection.¹⁴⁹ Surprisingly, we might not get the same sense of growth by looking at Figure 5, which deals solely with draft laws. It captures the trend not only in the number of enacted laws, but also in the number of draft regulations or draft decrees, or adopted regulations or decrees.

Figure 5¹⁵⁰



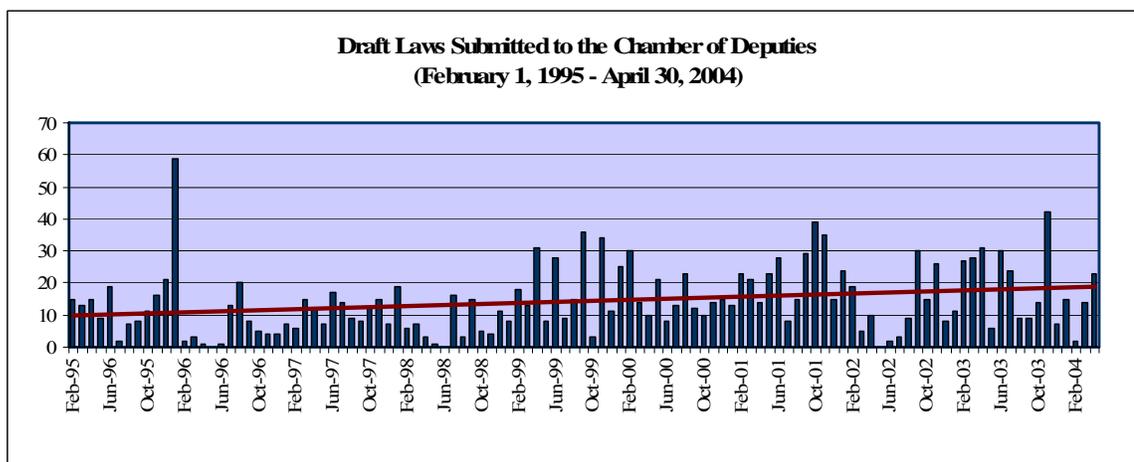
¹⁴⁸ Furthermore, in 1995 the Collection still included announcements on the conclusion of international treaties, which subsequently appear in a separate Collection of International Treaties. Thus, the difference is actually even greater because the announcements are missing from the 2003 Collection.

¹⁴⁹ In 2004, the Collection of Laws comprised 236 volumes. In 2005 it was “only” 188 volumes.

¹⁵⁰ For a general note on the statistics of laws and draft laws, see p. 54.

Figure 5 shows the number of draft laws submitted by various initiators to the Chamber during the examined period.¹⁵¹ Here we observe the repeated cycles of the legislative process; for instance, zero or very few drafts were submitted to the Chamber before the June 1996, 1998 and 2002 Chamber elections. We can also detect subdued legislative activity during the 1996 - 1998 political crises as well as in the first half of 1998 when the country was heading toward the June 1998 early elections.¹⁵² We notice the beginning of the “legislative hurricane” in the first half of 1999, which followed the critical *1998 Progress Report* by the European Commission. Apart from the exceptional load of drafts submitted in January 1996, we see that in April, 1999 the number of drafts submitted first exceeded 30 (31 drafts). However, Figure 5 does not provide us with a good sense of the trend in the number of draft laws since it only shows the raw numbers of draft laws submitted to the Chamber. When we add a trend line to the numbers (Figure 6), we suddenly see how the number of draft laws submitted to the Chamber grew during the examined period.

Figure 6¹⁵³



¹⁵¹ For an overview of the contribution of various initiators to the total number of draft laws, see Figure 1, p. 29.

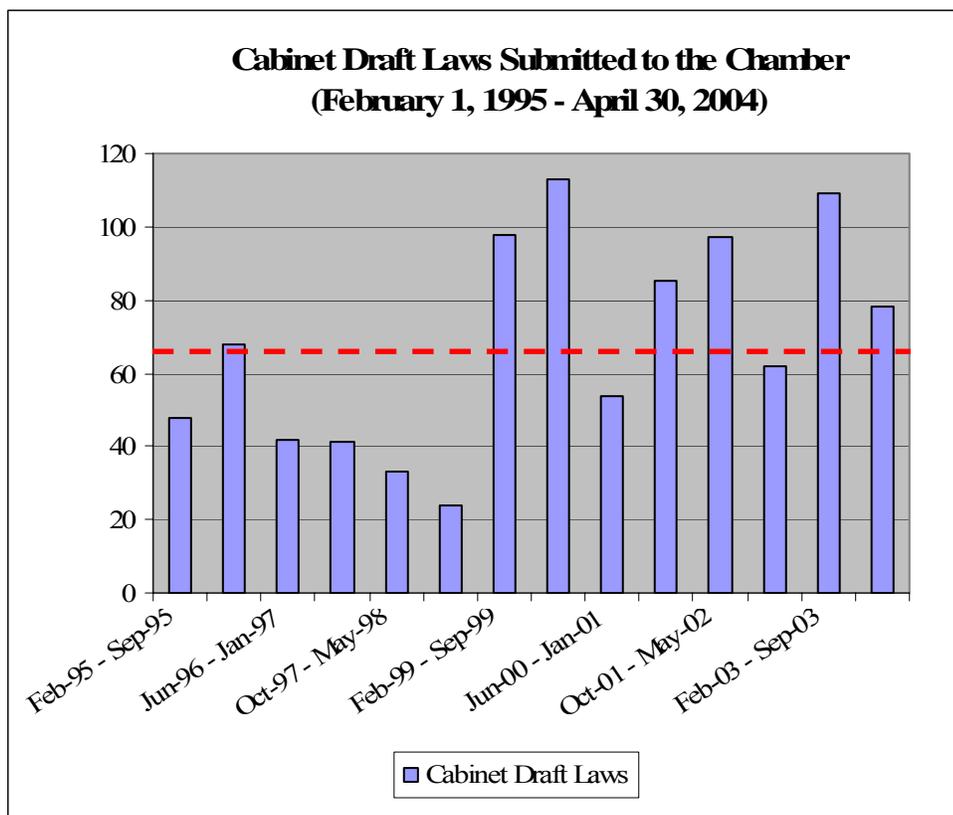
¹⁵² We are talking about the period between January 2, 1998, and July 17, 1998, the period of Tošovský’s interim Cabinet.

¹⁵³ For a general note on the statistics of laws and draft laws, see p. 54.

While Figures 5 and 6 are interesting for assessing the Chamber's activity in the examined period in general, they hardly provide a full picture of the effects of the preparations for EU membership on the legislative process; since the Cabinet carried the major load of the legislative alignment, we should direct our attention to the Cabinet's activity and the proportion of its work related to the alignment.

Figure 7 presents an overview of the numbers of draft laws approved by the Cabinet and subsequently submitted to the Chamber for further processing. We observe that after the period of February – September 1999, in only two eight-month periods since do the numbers of draft laws fall below the median of 65 (indicated by the red dashed line); the numbers of draft laws in the other six periods are above the median. Hence we can see the increase in legislative activity of the Cabinet, beginning with the first half of 1999, compared to the previous periods.

Figure 7¹⁵⁴



However, the question still remains as to what extent this increase in legislative activity of the Cabinet can be ascribed to legislative alignment. Here, it is necessary to assess what portion of the draft laws represented alignment drafts and how the ratio of alignment and non-alignment drafts developed. Before we present these statistics, a brief note on the data for alignment drafts is necessary.

Given the time constraints of this thesis, it was necessary, when looking at the legislative process as a whole (as opposed to one field of law or a specific law), to rely on the Cabinet’s own classification of a draft law as an “alignment draft law.” This approach should not pose a significant problem; it is unlikely that the Cabinet would deliberately omit the information that a draft represents an alignment effort, not only because the

¹⁵⁴ For a general note on the statistics of laws and draft laws, see p. 54.

ministries were instructed to insert such information into the reasoning reports by the Cabinet's *Legislative Rules*, but also because the alignment argument was expected to facilitate the draft's smooth passage through the Parliament.

The statistics exhibited in this paper rely solely on the information in the general section of the legislative report (“obecná část”), where the relationship of the draft to alignment was supposed to be indicated based on the requirements of the Cabinet's *Legislative Rules*. It is possible that, in some instances, the alignment drafts were identified in a misleading manner. Specifically, sometimes alignment drafts could have been labeled as being “compatible” (with EU legislation or requirements) instead of “aligning.” On the other hand, since the classification that was attached by the ministries was checked by the Cabinet's Department of Compatibility, it is impossible for a draft law to claim to be “aligning” if it was not. Thus, if an inaccuracy occurred when a draft was labeled, any inaccuracy would cause the statistics to under-represent, rather than over-represent, the number of alignment draft laws.¹⁵⁵

¹⁵⁵ Because of its approach focusing on draft alignment laws as opposed to all draft laws or laws “related to EU legislation,” the data presented by Palivec in his 2005 article could not be used in this study. Palivec operates with the category of Czech laws, regulations and decrees “related to EU legislation.” Palivec, *supra* note 28.

Figure 8¹⁵⁶

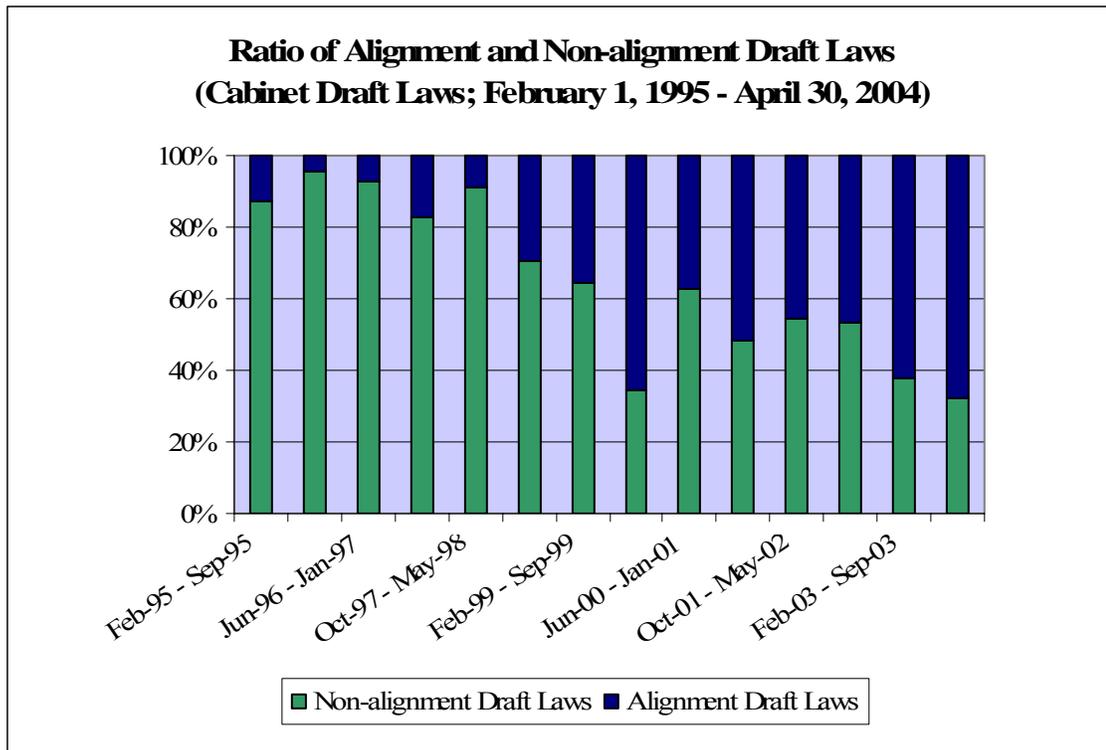
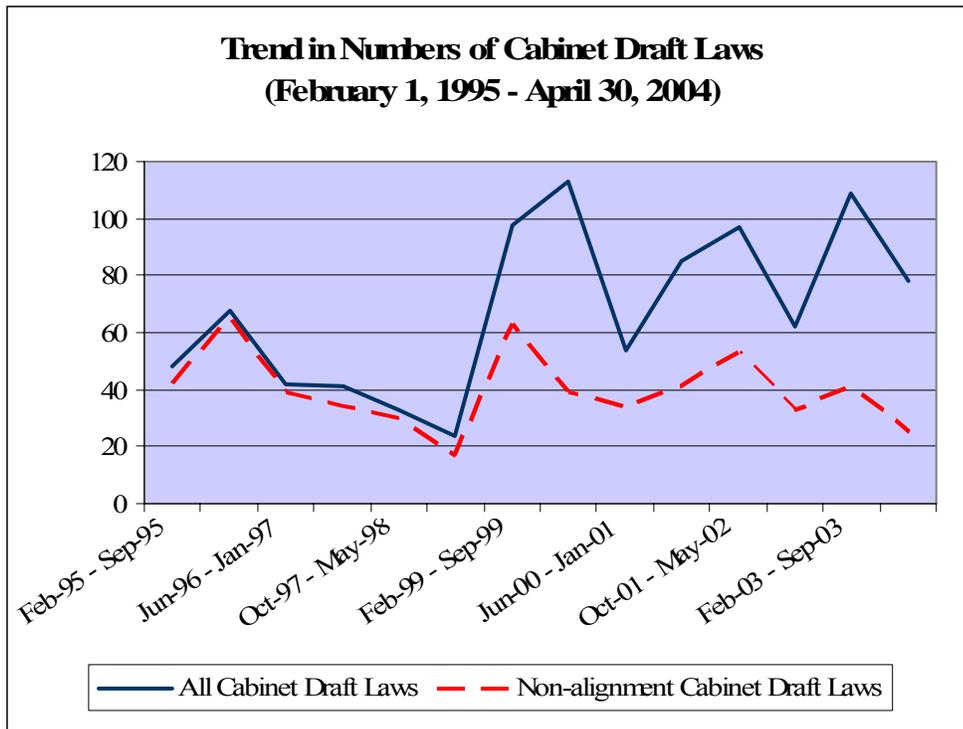


Figure 8 reveals the changing ratio of the alignment and non-alignment draft laws prepared by the Cabinet in the examined period. We see that the alignment draft laws represent more than 20% of the total draft law output of the Cabinet in each period since the eight-month period of June 1998 – January 1999, more than 40 % in each period since the period of February – September 2001, and more than 60 % in the last two periods (from February 2003 until April 30, 2004). Therefore, we can conclude that the legislative alignment represented a substantial proportion of the draft law preparation at the ministries. To capture the magnitude of the alignment task, we can compare the trend in the numbers of all draft laws approved by the Cabinet and the trend in the numbers of non-alignment draft laws. In other words, we can look at the Cabinet’s draft law output, and what it might have been without the alignment draft laws.

¹⁵⁶ For a general note on the statistics of laws and draft laws, see p. 54.

Figure 9¹⁵⁷



As we can see in Figure 9, non-alignment laws alone should not be blamed for the growth in the number of draft laws in the examined period; it was the alignment work that increased the number of drafts. Naturally, we need to keep in mind the fact that a portion of the draft alignment laws included non-alignment provisions; therefore, the results in Figure 9 should be considered to be only indicative. On the other hand, one could argue that without the alignment drafts the Cabinet might not have rushed to prepare the non-alignment provisions; the Cabinet often used the draft alignment laws as an opportunity to amend provisions in existing laws that were not necessarily related to alignment. The idea was that since the law was being amended anyway (due to the alignment requirements), the Cabinet might just as well introduce all the changes that it considered appropriate or necessary.

Despite the data limitations discussed above, we might agree that there was a significant increase in the Cabinet's law drafting activity due to the alignment task that stemmed

¹⁵⁷ For a general note on the statistics of laws and draft laws, see p. 54.

from the preparations for EU membership. However, draft laws do not represent the entire legislative output of the Cabinet; in addition to draft laws, the Cabinet prepares draft regulations and decrees. Regulations are eventually adopted by the Cabinet, whereas decrees are adopted by the respective minister. Nevertheless, the production of regulations and decrees was also affected by the preparations for EU membership because a portion of the overall alignment with EU requirements consisted of the alignment of regulations and decrees.

To obtain a complete picture of the legislative activity of the Cabinet, not limited solely to laws but also including decrees and regulations, we would have to obtain detailed information about the draft decrees and regulations prepared in the examined period. Given the numbers of drafts involved in the examined period and the time frame of this thesis, an analysis of such detailed information was not feasible. However, we can compile a simple overview of all adopted and issued draft laws, regulations and decrees. Figure 10 provides the results of such a compilation and indicates the numbers of the respective acts issued in each month of the examined period.¹⁵⁸ Although the chart does not indicate the ratio of alignment legislation to the total legislative output, it allows us to understand the massive growth in the amount of legislation issued in the examined period. Particularly, since mid-1999, we can observe the “legislative hurricane” phenomenon, which rarely allowed the number of acts issued per month to drop below 20.

¹⁵⁸ We can expect and safely assume that the acts had been issued (published in the Collection of Laws) without any substantial delay following their adoption.

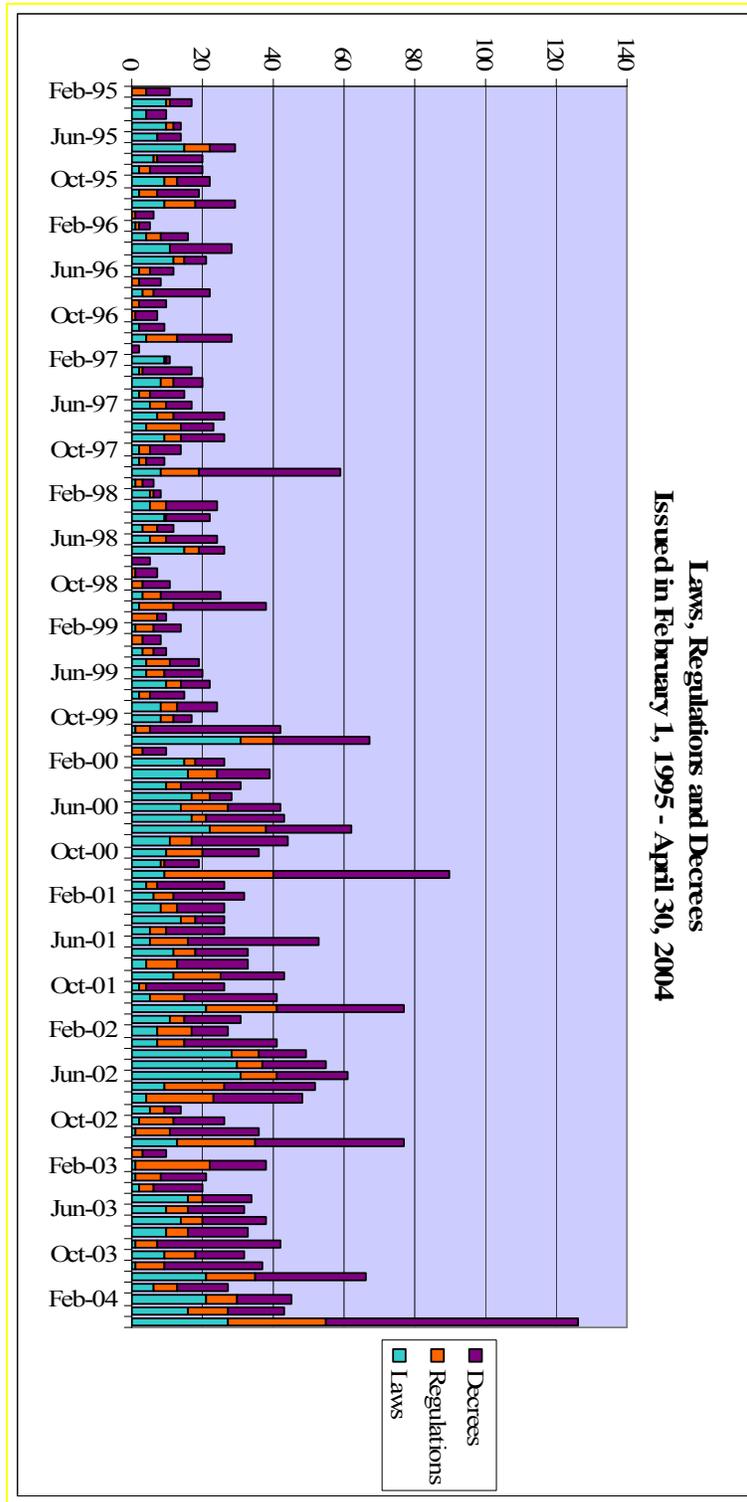


Figure 10

There is one important disclaimer to be added to the statistics presented here and the statistics of draft laws and laws in general: numbers appear to be very inadequate to

capture legislative output, and therefore to describe the legislative process. Clearly, one unit (one draft law or enacted law) can represent a minor one-article amendment of a purely technical nature or, for instance, a re-codification of the entire criminal law. On the other hand, even a one-article amendment can cause tremendous implementation difficulties, whereas a simple restatement of an often-amended code might not cause any revolutionary changes. One statistical unit could represent a novel law that is introduced to the legal system without any equivalent predecessor, or it could be an amendment to a previously existing law. In some instances, several laws in the examined period repeatedly amended the *same* provision. These are all factors that are very difficult to control in the statistics of draft laws and laws. This limitation has to be acknowledged and remembered each time we draw conclusions based on such statistics.

There are scholars who struggle to find an appropriate remedy to the above-described problem of statistical approach to legislation. Not surprisingly, these are the same scholars who have attempted to confirm the hypothesis of “legislative inflation.” The term itself apparently first appeared in Switzerland in the 1970s and prompted Linder, Schwager and Comandini¹⁵⁹ to perform a quantitative analysis of the legal order. They applied demographic methods to calculate whether the legislation adopted in 1948 – 1982 truly “inflated” the body of Swiss law. As the term “legislative inflation” began to be used in the 1990s in the context of Czech legislation, Kořenský, Cvrček, and Novák applied the earlier-developed Swiss approach in their 1999 study of the Czech legal order.¹⁶⁰ They confirmed the existence of “inflation” in Czech legislation within their definition of the term¹⁶¹ in the period of 1990 – 1997. Even though the demographic approach serves the purpose of measuring “legislative inflation” well, it is actually not relevant for the purposes of this thesis.

¹⁵⁹ Linder, Wolf, Schwager, Stefan, Comandini, Fabrizio, *Inflation Legislative? Une recherche sur l'évolution quantitative du droit Suisse 1948-82*, IDHEAP, 1985.

¹⁶⁰ Kořenský, Jan, Cvrček, František, Novák, František, *Juristická a lingvistická analýza právních textů (právně-informatický přístup)*, Academia, 1999.

¹⁶¹ They define “legislative inflation” as “a yearly increase to the valid legal order by more than its 5%.” Kořenský et al., *supra* note 160, p. 33.

Despite the skepticism that arises when we consider all the limitations inherent in statistical observations concerning legislation, descriptive statistics still have an important value for the purposes of this thesis. Although their weight differs, all units (whether of draft laws or enacted laws) are significant in the legislative process. They represent a point in the agenda to be dealt with in the process; as an item of output, it is a piece of legislation that the practitioners and the affected public, in general, should be aware of, despite the fact that it may subsequently be amended during the examined period. Therefore, while they are not apt for determining the “legislative inflation,” the statistics displayed in this section capture the “legislative hurricane” phenomenon and arguably provide a relevant quantitative picture of the impact of the preparations for EU membership on the legislative process.

CHAPTER 3: THE SOCIOLOGY OF ALIGNMENT

Given the dominant position of the Cabinet in legislative alignment, as discussed in the previous chapter, the Cabinet's legislative experts were an important part of the legislative process during the preparations for EU membership. These experts, all of whom were lawyers, were usually employed in the legislative departments of the ministries; they were the ones who carried, or should have carried, most of the weight of the alignment work. In assessing the effects of the preparations on the legislative process, it is thus instructive to look at how the preparations impacted the work, status and professional development of these experts, because their expertise was crucial for the demanding assignment of alignment. Therefore, in this chapter I turn to the "sociology" of alignment.

I begin first by exposing some of the general problems that the civil service in the Czech Republic has experienced since 1989 and contemplate the insufficient impact of EU conditionality on these problems. The problems are applicable to all civil servants at the Cabinet level of the executive branch, including the legislative experts of the ministries. Second, I discuss the effects of the preparations for EU membership on the legislative experts as a distinct group of professionals within the civil service. Finally, I offer general thoughts regarding the level of involvement of lawyers and legislative experts in the Czech decision making process since 1989 and debate the relevance of this phenomenon to legislative alignment.

3.1 THE "NON-REFORM" OF THE CZECH CIVIL SERVICE

Even though the legislative experts within the Cabinet are the focal point of this chapter, it is important to introduce the problems shared by the entire civil service at the central level, the level that comprises the Cabinet and the ministries. Following the fall of communism in 1989, the Czech civil service was weak because of the lack of well-trained staff; furthermore, it experienced difficulties in attracting new qualified

individuals. The civil service certainly did not offer an attractive career track; besides the low pay, civil service jobs inherited a bad reputation for being highly politicized positions, particularly at the central level of the state administration. It was difficult to persuade young professionals or even new graduates that there were advantages to working for the central level of the executive branch, where many employees were viewed as having collaborated with communists or even as being hardcore communists. Not insignificantly, the state had strong competition in the rapidly developing private sector, particularly in the capital city of Prague, where the wages offered greatly exceeded governmental pay. At that time accepting a job in the government was considered to be an admission of one's inability to find a better-paying job in the private sector.

While the opportunities in jobs at the central level increased with the prospect of EU membership, surprisingly, the general reputation of the positions among the public at large did not improve.¹⁶² Young people became interested in the civil service only after it began to offer the possibility of constant international contact, travel abroad, the use of and opportunity to learn foreign languages, and ultimately, perhaps even a position in one of the EU institutions once the country became a member. However, the outward perception of civil servants in the minds of the general public remained unfavorable. While we cannot discount the burden of the negative connotations of civil servants in the past, it must be said that the improvements—not only in the image but also in the actual state of affairs—were hindered by a constant lack of true advocates for the civil service within the Czech political elite.¹⁶³

Advocacy for the civil service was never a great strength of post-1989 Czech politicians; it seemed that it was much easier to win elections by denouncing the civil service than by

¹⁶² Unfortunately, Grabbe's comment well captures the biased perception of the general public when she states that "those stuck in underpaid civil service jobs are often poorly trained and motivated." Grabbe, Heather, *What the New Member States Bring Into the European Union*, in: Nugent, Neill (ed.), *European Union Enlargement*, Palgrave Macmillan, 2004, p. 76.

¹⁶³ Interviewee P. In the early 1990s, Edvard Outrata was an exception; unfortunately, he did not manage to accomplish his vision. Currently only the Green Party, which has recorded a significant increase in pre-election voter preferences, has the adoption of the Law on Civil Service in its party program. <http://www.zeleni.cz/rubrika/volebni-program/>.

supporting it or its reform. It is striking that a society that had embarked so quickly on the path to capitalism, and swiftly became aware of the need for high quality private-sector management in industry, did not extrapolate this idea to “country management”—the civil service.

Retaining qualified people, maintaining institutional continuity and limiting the effects of political influence on the professional levels of a civil service all require the promotion of a stable civil service through career tracks that offer both attractive compensation packages and a certain protective shield for civil servants against changes in a country’s political profile. A reform of the Czech civil service that would have engendered such measures and stabilized the human resource situation was proposed by various external players, but the domestic political interests at any given moment were not particularly attuned to the idea of “freezing” the state’s human resources.

After the fall of communism, a natural distrust among the new political leaders towards the civil servants that they had inherited from the communist period often led to dramatic personnel changes in state administration that were not necessarily merit driven. At this point, let us postpone any discussion of the necessity or futility of these changes and acknowledge that the culture that was introduced into the system of human resources management in the central government after the fall of communism was guided first and foremost by distrust. Once in power, politicians considered it appropriate and even necessary to replace individuals whom they did not trust. Since those who were considered untrustworthy were usually those who had been brought in by the previous politicians, a clear chain reaction was in play.¹⁶⁴ While personnel changes within ministries due to changes in the cabinet could hardly be said to represent anything unique in the world, it needs to be emphasized that in the Czech Republic these changes often affected even the lowest management levels within the institution; something that would

¹⁶⁴ It is interesting that Dimitrova attributes the overpoliticization of the civil service solely to the legacy of the communist past. This view appears to be very simplistic because it does not take into account the involvement of the post-1989 elites in a partisan approach to the civil service. Undoubtedly, however, the communist past can be blamed for the pitiful state of the current political culture in the Czech Republic. Dimitrova, Antoaneta L., *Europeanization and Civil Service Reform in Central and Eastern Europe*, in: Schimmelfenning, Frank, Sedelmeier, Ulrich (eds.), *The Europeanization of Central and Eastern Europe*, Cornell University Press, 2005, p. 82.

be impossible in many democratic countries due to the safeguards provided by civil service laws.¹⁶⁵

Under such a scenario it was difficult for any cabinet to carry out civil service reform, because each time the opposition would object to the governing party's faithful entrenching themselves in civil service positions for many years to come; any reforms providing for a "freezing" of the status quo would have shaped the political make-up of the civil service in a way that the opposition refused to allow.¹⁶⁶ This was the origin of the general unwillingness to engage in civil service reform at the level of the ministries in the Czech Republic.

The history of post-1989 attempts to reform the civil service is quite extensive. As early as 1991, a draft law on civil service was prepared,¹⁶⁷ but the reluctance of the political spectrum to institute reforms precluded the draft from being launched into the legislative process. This reluctance was not even overcome by the provision in the 1993 *Constitution* that required the adoption of a law to regulate state "legal relationships with employees in the ministries and other administrative bodies."¹⁶⁸ Following many years of patience, the European Commission applauded when a law on civil service¹⁶⁹ was finally adopted in 2002.¹⁷⁰ It turned out that the applause was slightly premature; even though some provisions of the law came into force on the day of the law's publication, the core of its provisions was supposed to come into force on January 1, 2004. However, later

¹⁶⁵ It should be noted that these changes went deep into the structure of the institutions but did not contribute to an increase in overall managerial skills. Interviewee B identified the lack of managerial skills as the "greatest deficit after the fall of communism."

¹⁶⁶ Interviewees B, U. Interviewee B believes that Czech politicians have also been worried about civil service reform empowering civil servants to the detriment of politicians.

¹⁶⁷ Interviewee S noted that the first draft was criticized as a copy of old pre-WWII legislation considered to be absolutely inadequate for the purposes of a modern state. Similarly, interviewee U.

¹⁶⁸ The Constitution, Article 79(2).

¹⁶⁹ Zákon č. 218/2002 Sb., o službě státních zaměstnanců ve správních úřadech a o odměňování těchto zaměstnanců a ostatních zaměstnanců ve správních úřadech (služební zákon). For information about preparation of the law, its adoption and content, see Czech Republic Public Service and the Administrative Framework Assessment 2002, SIGMA, June 2002.

¹⁷⁰ Pehe mentions that the law was "adopted [...] just weeks before the December 2002 Copenhagen summit," but the law had, in fact, already been adopted in April 2002. He talks about the law with respect to the need for implementation of resource capacity; at the time when he wrote the article he was obviously not yet aware of the fact that the law itself would become a paradigm for the non-implementation of a measure that was adopted partly due to EU pressure. Pehe, *supra* note 23, p. 40.

amendments¹⁷¹ subsequently postponed the effective date of these provisions until 2005, then 2007.

Currently, these provisions are expected to go into force on January 1, 2007, but there are some indications that the Cabinet might propose even further postponement, this time until 2008.¹⁷² The fate of the General Directorate, which was established in conjunction with the Act, does not seem to portend a positive future for the regime foreseen by the law; established in 2002 with 65 employees, later budgetary cuts targeted at human resources caused the Directorate to shrink to only 22 employees by spring 2005.¹⁷³

The repeated postponements of the effective date of the law were attributed to budgetary constraints that did not allow for the increases in wages and other social benefits provided by the law. While this argument certainly had an empirical basis, some emphasize that even if the budgetary provisions of the law were disregarded, the remainder of the law could have been implemented, providing desirable protection from political intrusion into the civil service.¹⁷⁴ Human resource experts consider this political intrusion to be the factor that has been the most detrimental to the quality of the civil service and state administration in general.¹⁷⁵

Some players see hope for the Czech civil service in its inevitable Europeanization.¹⁷⁶ They believe that exposing Czech civil servants to the practices in the EU will contribute to an increase in the professionalism in the civil service. One could argue that the effect that the EU has had on many Czech civil servants is already apparent; unfortunately,

¹⁷¹ Laws No. 281/2003, 626/2004 Coll. *Zákon č. 218/2003 Sb., o odpovědnosti mládeže za protiprávní činy a o soudnictví ve věcech mládeže a o změně některých zákonů (zákon o soudnictví ve věcech mládeže), zákon č. 626/2004 Sb., o změně některých zákonů v návaznosti na realizaci reformy veřejných financí v oblasti odměňování.*

¹⁷² Interviewee U.

¹⁷³ Interviewee U.

¹⁷⁴ Interviewees N, U, V. Interviewee V stated decisively that “public administration reform will be successful only if the civil service law is implemented.”

¹⁷⁵ Interviewee O suggested that the adoption of the law should have preceded any other actions targeted at improvements in the Czech civil service.

¹⁷⁶ Interviewee P.

however, the legislative experts of the ministries were among the last ones to be “Europeanized.”

3.2 THE CZECH LEGISLATIVE EXPERTS IN THE LEGISLATIVE ALIGNMENT

The legislative experts—lawyers professionally involved in legislation drafting in the Cabinet and its ministries—constitute a very specific category within the civil service. There are several reasons for their special importance: first, the legislative craft is not a skill that one can learn within a law school curriculum;¹⁷⁷ it is a skill that must be developed by working alongside veteran legislative experts, drawing from their experience accumulated through many years of legislative practice. Therefore, more than in other fields, institutional memory stands out as the framework on which is built the craft of legislative work.

Second, legislative expertise is linked to impaired job mobility; the number of workplaces where legislation is drafted is very limited, and the possibilities for changing jobs are diminished. External mobility is also disrupted because once a lawyer has spent sufficient time in legislative work to become a legislative expert, it is often too late to seek another professional career path.¹⁷⁸

On the other hand, in the Czech Republic, those who—for various reasons—left legislative departments after 1989 easily found their place in the burgeoning private sector because

¹⁷⁷ This has particularly been the case in the Czech Republic; the departments of the theory of law that would normally provide the basis for the necessary training in Czech law schools had a hard time recovering after the long period of communist indoctrination. Since there was no new school of legal thought created, a solid theoretical basis for legislative work was missing. Havlíček, Karel, *Rozhovory o právu*, Interview with JUDr. Pavel Rychetský, President of the Constitutional Court of the Czech Republic, *Soudce*, No. 2, 2004, p. 5. Regarding the same problem of the neglect of lawyers-draftsmen in Poland, see Gwiżdż, Andrzej, *Organization of the Post-Graduate Course in Legislation at the University of Warsaw*, in: Karpen, Ulrich, Delnoy, Paul (eds.), *Contributions to the Methodology of the Creation of Written Law*, Nomos Verlagsgesellschaft, Baden-Baden, 1996, p. 108. In as early as 1920 Ehrlich lamented the lack of adequate training for legislative experts: “One can say that today Europe is in a state of total dilettantisms. The art of legislation is one of the most difficult and most important assignments that a person can have; and, still, undoubtedly, every dentist is much better scientifically prepared for his job than an average legislator, at least in Europe.” Ehrlich, Eugen, *Gesetz und lebendes Recht*, *Hōgaku Kyokai Zasshi* 38, No. 12, Tokyo, 1920, pp. 1 – 22, reprinted in Eugen Ehrlich, *Gesetz und lebendes Recht*, Duncker & Humblot, Berlin, 1986, pp. 228 – 240; p. 238.

¹⁷⁸ One Czech expert suggests that it takes 10 years to bring up a legislative expert. Interviewee H.

the legal job market had not yet been saturated. After this initial wave of departures, the legislative field became weakened a second time when the federative Czechoslovak Cabinet was dissolved. Before 1993 the greatest legislative resources resided in the ministries of the federation; after the split of Czechoslovakia, some of these resources were wasted when the Czech ministries did not attract many of the former federal legislative experts to their offices.¹⁷⁹ The institutional memory was interrupted and eventually lost.¹⁸⁰

After 1993, the human resource situation in the legislative departments stabilized and eventually was greater in the legislative departments of the ministries than in other departments,¹⁸¹ while the number of civil servants in other departments fluctuated and many left for better-paying private sector jobs after acquiring sufficient expertise in the government, senior legislative experts tended to stay.¹⁸² For a long period of time the legislative departments were staffed with lawyers who had studied law prior to 1989; these lawyers were very domestically oriented, since international law was out of the scope of their study, responsibility and interests, and their knowledge of foreign languages was very limited.¹⁸³

Traditionally (meaning before 1989), the legislative departments in the ministries did not deal with international matters; it was understood in the communist times that only

¹⁷⁹ Interviewee S recalled that many federal experts left because of the job insecurity that they experienced on the eve of the federation's dissolution. See also the interview with Pavel Rychetský, at the time Czech Vice-Prime Minister; Kubík, Jiří, *V polovině případů předkládají ministři špatné návrhy, říká Rychetský*, Interview with Pavel Rychetský, at the time Czech Vice-Prime Minister, *Mladá fronta Dnes*, January 20, 1999, p. 4, republished at <http://wtd.vlada.cz/scripts/detail.php?id=2021>.

¹⁸⁰ Interviewee O.

¹⁸¹ Interviewee P.

¹⁸² In one ministry, for instance, as of spring, 2005, 28% of the legislative department employees had worked in the department for more than eight years and 56% for more than two years. In the EU department, which was established in 1996, only 8% of the employees had worked there since 1998 (seven or more years) and 80% had worked there for two or fewer years. The legislative department was the most stable as far as the human resources were concerned in this ministry. Interviewee O.

¹⁸³ Foreign language limitations were not limited to law graduates; even the Ministry of Foreign Affairs apparently did not have staff with perfect foreign language skills. Interviewee B recalled that when the application for EU membership was submitted to the Cabinet, it had to be redrafted at the last minute during the Cabinet session by Pavel Tigrid, the Minister of Culture, and Edvard Oustrata, the President of the Czech Statistical Office—the two participants of the session who had spent significant parts of their lives in the West.

international departments dealt with international matters. Even in cases in which these matters had implications for legislative work, it would be the job of the international departments to prepare clear guidelines for the legislative departments to follow in fulfilling international obligations. EU matters, once they arose, were perceived by legislative departments in the same manner, as something “external” and “foreign” to the legislative departments, something outside their competence, and, therefore, to be handled by someone else.

It is difficult to assess to what extent the approach of the legislative departments stemmed from the lack of foreign language skills in their personnel.¹⁸⁴ Previously, Czech law schools did not emphasize foreign language training for lawyers, whose job in a communist country did not require foreign language skills due to limited contacts abroad. In addition, it would have been unrealistic to expect a communist government to promote the study of Western foreign languages for lawyers—active contacts with such languages were minimal, and their knowledge could potentially lead to lawyers learning “dangerous” Western ideas. Therefore, before EU legislation was available in Czech, it remained difficult to involve the experts in legislative departments in any alignment work.¹⁸⁵

In fact, the Cabinet’s approach to an institutional framework in preparation for EU membership encouraged the distance that the legislative departments wished to keep from EU matters. Based on a 1994 Cabinet resolution, new departments designed to deal exclusively with EU affairs were created in all ministries.¹⁸⁶ While this development was welcomed by the European Commission as a systemic approach to preparations for EU membership, it in fact strengthened the resistance of legislative departments to EU-

¹⁸⁴ Later, the Cabinet selected categories of employees who were supposed to pass a language test as a condition of their positions. By October 2005, one and a half years after accession, only 62.5% of the selected employees passed the test. *Třetina státních úředníků dosud nemá zkoušku z cizího jazyka*, IHned.cz, October 5, 2005. The outlook is positive now, as a number of employees prepare for the Czech Republic’s presidency of the EU in the first half of 2009. Intensive language training is part of the preparations.

¹⁸⁵ On availability of EU legislation in the Czech language, see Appendix A.

¹⁸⁶ Some ministries already had preexisting units or departments dealing with EU matters. One of the first ministries to have such a department was the Ministry of Trade and Industry (starting in 1993).

related issues because of the animosity that developed between the two departments and ultimately hindered their effective cooperation.

Furthermore, the Cabinet was under pressure not to increase the number of civil servants in general;¹⁸⁷ the ministries were, naturally, under particular public scrutiny in this respect. The public was opposed to any increase in the number of civil servants because it expected that the post-communist liberalization would lead to a natural decrease in regulation, state control and supervision, and, of course, a decrease in the number of civil servants. Even today, it is unimaginable that any politician would suggest that any sector of the state administration needs more civil servants.¹⁸⁸ Anti-bureaucracy feelings in the general public exist in many countries but are much stronger in post-communist countries.

While it was very difficult to increase the staff in any department of a ministry, it was likely to be more palatable to the public to see the creation of new departments to fulfill an important desire for the country to become an EU member. The newly-created EU departments required staff members with foreign language skills and hired primarily young graduates, who were better trained in Western foreign languages because they had studied after the fall of communism. As explained above, it was not as difficult to attract them for the positions in the specialized EU departments as it was for jobs in the legislative departments.

Struggling with an increasing workload without any increased support in human resources, legislative departments began to feel that the EU departments were, to a large extent, growing at their expense.¹⁸⁹ EU matters became more and more prevalent in

¹⁸⁷ The image of inflated numbers of civil servants was widespread even at times when no audit of the administrative bodies was conducted that could empirically confirm that there were, indeed, too many civil servants. Systematic audits were conducted in most ministries in 2004 or 2005.

¹⁸⁸ Czech political parties are promising a decrease in the number of civil servants in their 2006 election campaign documents. *Politické strany slibují redukci státní správy a poté vyšší platy*, České noviny, April 7, 2006, http://www.ceskenoviny.cz/volby/temata/index_view.php?id=181948.

¹⁸⁹ On the inadequate number of legislative experts for the task expected of them and „the critical shortage of trained lawyers“ in the Czech Republic in general see Stein, Eric, *Czecho/Slovakia, Ethnic Conflict, Constitutional Fissure, Negotiated Breakup*, The University of Michigan Press, 2000, p. 99.

internal discussions and received wide publicity, creating support within and outside the ministries for the pressure that the EU departments necessarily exercised vis-à-vis the legislative departments when the EU departments requested legislative participation in drafting reports, evaluation sheets, peer reviews imposed by the European Commission and, most importantly, as they pushed for legislative alignment. The generation gap between the departments exacerbated the rift; the employees of the EU departments were strikingly younger, on average, than the rest of the employees in their ministry, in which the entire middle-age generation was missing.¹⁹⁰ Of all the departments of the ministries, the legislative departments had the oldest employees for the longest period of time compared to the EU departments; eventually, the average age finally dropped in the legislative departments and this drop likely contributed to a subsequent normalization of contacts between the EU and legislative departments.¹⁹¹

Originally, the contacts between the EU departments and the legislative departments were rather sporadic. The ineffective relations between the departments were obvious, for instance, in the attendance at and the negotiations of the Working Group for Legal Approximation. The participants in the Working Group came from the EU departments and generally had a very limited knowledge of legislative work and its role in their respective ministries. This situation was highly undesirable because these participants and their departments were supposed to report on the state of alignment and input data on the alignment progress into the ISAP database that was supposed to provide the European Commission with a detailed overview of the Czech alignment work.

The separation of the legislative and EU departments was eventually overcome as EU matters became a daily routine; the generation gap was remedied once the EU departments were saturated, and thereafter, younger people began to enter other departments, including the legislative departments of the ministries. They brought foreign language skills to the legislative departments while, concurrently, more EU legislation

¹⁹⁰ Interviewees N, P, T.

¹⁹¹ However, the generational change in the civil service cannot be seen as the ultimate solution to all problems. Interviewee G believes that the generational change in the legislative departments of the ministries worsened rather than improved the state of legislative work. This is easy to understand, particularly in those ministries where institutional memory was lost.

became available in the Czech language, enabling even the senior staff to become more intimately familiar with the EU legal framework.

The original separation of EU issues and the responsibility for drafting legislation within the ministries impeded attempts for a swift alignment process. Unfortunately, the long-term grooming necessarily involved in the training of legislative experts was incompatible with the rapid pace required by the preparations for EU membership, making the creation of specialized EU departments within the ministries an understandable decision. Perhaps, however, it should have been a more temporary measure; maintaining the separation meant that there were no (or limited) mechanisms for the legislative experts to become familiar with EU affairs and combine their legislative skills with EU expertise.¹⁹² The prolonged separation resulted in the legislative departments, responsible for legislative alignment, remaining distanced from EU issues for an excessive period of time. Interestingly, this period was often longer in the legislative departments than even in the other non-EU departments that, as accession approached, became involved in Czech-EU negotiations on substantive issues within their spheres of competence.

3.3 ON THE IMPACT OF THE “LAWYERLESS” REVOLUTION

The lower level of importance that seemed to be accorded to legislative experts’ awareness of and involvement in the issues surrounding the preparations for EU membership corresponds to a general observation about the role of lawyers in Czech decision-making since 1989. Even without endorsing Dicey’s concept of conservative

¹⁹² The issue of the preparation of new lawyers for the country’s membership in the EU deserves its own chapter. As a brief example we can note that in the Law School of Charles University in Prague, a specialized EU department was established in 1993; since the summer semester of 1993 there has been a mandatory one-semester EU law course as part of the curriculum. Later, several elective courses were added, and EU law gradually entered the regular subject-matter courses. Today, the mandatory EU course is a one-year course. Interviewee M; *Právnická fakulta Univerzity Karlovy 1348 – 1998, Jubilejní sborník*, Právnická fakulta Univerzity Karlovy, 1998, p. 201. At the Law School of the West-Bohemian University in Pilsen, an EU law course has been mandatory since 1997 and currently exists as a two-semester course. Other elective EU courses are also offered. Interviewee K.

legislators and judges,¹⁹³ we may note that Czech legal professionals—whether advisors to legislators, legislative experts within the executive branch, judges, or attorneys—do not appear to be particularly inclined towards revolutionary thought. Throughout the 20th century they proved to be experts in maintaining the *status quo* and legal continuity with the previously existing legal order.

The major concern of Czech lawyers throughout the 20th century was the maintenance of order and securing sufficient time for the preparation of new legislation that would reflect social changes spurred by historic events; they were never ones who rushed to change a law. This should not imply, however, that we should speak about a “cultural lag,” in Ogburn’s sense, on the part of lawyers, or—as Friedman and Ladinsky point out—that lawyers are resistant to social change.¹⁹⁴ One may attribute this characteristic of Czech lawyers rather to the nature of the law-drafting enterprise, which requires its own deliberate pace, and to the lawyers’ consciousness of the necessary “present-minded pragmatism”¹⁹⁵ in lawmaking. Both of these aspects may be tenable in times of gradual social change, but are incompatible with a euphoric revolutionary upheaval.

In November 1989, as communism faced its defeat, there were two distinguished speakers in the freezing late autumn 1989 Velvet Revolution demonstrations: one was a theatre playwright, the other a liberal economist; both were on different paths to becoming the future leaders of the country. There were certainly others who were applauded and welcomed by the crowds, but there was not one lawyer among the memorable speakers. The “Velvet Revolution” was a “lawyerless” revolution.

Why did lawyers not participate in the revolutionary events of 1989? They did not seem to fit in with an “anti-state” action; the legal profession is inherently intertwined with the state. It lives on state action (regulation) and deals with state institutions. That is not to say, however, that all lawyers before 1989 were servile agents of the state, the

¹⁹³ Macaulay, Stewart, Friedman Lawrence M., Stookey, John, *Law & Society, Readings on the Social Study of Law*, 1995, p. 209.

¹⁹⁴ Friedman, Lawrence M., Ladinsky, Jack, *Social Change and the Law of Industrial Accidents*, Columbia Law Review, Vol. 67, No. 1, January 1967, p. 73.

¹⁹⁵ Friedman, Ladinsky, *supra* note 194, p. 77.

government, and, therefore, the Communist Party; there were many who performed their jobs with the highest ethical standards possible at the time. Differences in the degree of their engagement with the communist regime were naturally related to the fields in which the lawyers practiced; the exposure of a family law attorney or a company (in-house) lawyer was significantly less than that of a prosecutor, for instance. There were also a few cases of lawyers who did not hesitate to stand up to the regime (two of them today hold the highly respected offices of President of the Constitutional Court and of Ombudsman). But in general lawyers were perceived—at least in the eyes of the public—as a group that contributed to the creation of the communist legal order or—at a minimum—helped to maintain it.

Lawyers were unprepared for the regime change in 1989 and the opening of the country; their education was traditionally domestically oriented, and their jobs did not usually require them to learn foreign languages. Economists, on the other hand, were often trained in foreign languages (especially if they had studied foreign trade) and were interested in the development of their field abroad. While lawyers concentrated on making the best of the existing legal system, economists were able to look ahead with an eye towards remedying the effects of the collapsing communist economy.¹⁹⁶

After 1989 lawyers faced difficult ethical issues in the judiciary and prosecution, which had to be stripped of those who had discredited themselves beyond bearable moral limits.¹⁹⁷ Lawyers realized the tremendous task before them: adjusting the legal system to the expectations of democracy, the rule of law, and a free market economy. It was necessary to remedy expropriations by the communist regime, exonerate those who had suffered injustice, and create a basis for a new economy by settling the status of property and providing an adequate modern commercial law. Lawyers knew that this would not be

¹⁹⁶ Symbolically, the first Minister of Finance of the new federal Cabinet in December, 1989 (later Prime Minister of the Czech Republic and the current President of the country) came from the [Economic] Prognostic Institute of the Czechoslovak Academy of Sciences.

¹⁹⁷ For various reasons, almost one-half of Czech judges left the Czech judiciary in the early 1990s. Sváček, Jan, *Potřebuje naše soudnictví reformu?*, *Soudce*, No. 3, 2004, p. 2.

achieved quickly and realized that the extent and nature of the necessary changes in the legal system did not provide much space for “false starts.”¹⁹⁸

Nevertheless, the economists felt that speed was crucial to the success of economic reforms. With the support of foreign experts and in compliance with prevailing economic thought they pushed for changes to be instituted rapidly. Lawyers seemed to be an obstacle in the process because they lagged behind due to their constant attention to the rule of law, an apparent impediment to economic development.¹⁹⁹ There was no “revolutionary group” particularly interested in them; former dissidents did not seem to hold them in either high esteem or disdain, and economists did not show much respect for them either. As a result, pragmatic economists, for better or worse, prevailed in Czech decision making.

This prevalence of economists was very pronounced in the central government; this prevalence adversely affected legislative experts, whose services became less valued than before and their voices less audible. It is difficult to determine exactly when their work will become more deservedly appreciated or their voices regain the weight that should be accorded those who are versed in legal considerations. It is clear that the lack of well-trained, highly-skilled legislative experts will be an obstacle for legislative departments as they strive to reclaim their lost reputation.

As we have seen in this chapter, the effects of the preparations for EU membership on the legislative experts were rather indirect; as members of the civil service, they experienced the failure of EU conditionality to bring substantive improvements to the status of civil servants. Although the EU pressured the Czech Republic to engage in civil service reform, the reform remained only theoretical. The effect of the law that was enacted to facilitate the reform has been repeatedly postponed, continuing the undesirable

¹⁹⁸ Friedman, Ladinsky, *supra* note 194, p. 76.

¹⁹⁹ Pridham notes that “The view that constitutional democracy was not possible without a functioning market economy, that indeed the latter formed the essential basis of the former, carried weight then in EC thinking.” Pridham, *supra* note 5, p. 38. On a similar theme, see Milton Friedman’s comments in Friedman, Milton, *Preface: Economic Freedom behind the Scenes*, in: Gwartney, James, Lawson, Robert (eds.), *Economic Freedom of the World: 2002 Annual Report*, The Fraser Institute, 2002, pp. xvii – xviii. For a popular understanding of Klaus’ approach to lawyers, see Pehe, *supra* note 23, p. 40.

politicization of the civil service. After specialized EU departments were created in the ministries, EU expertise was built up within these departments, while legislative experts remained removed from EU matters; for a long period of time EU matters seemed completely abstract to them. The position of the legislative experts was also weakened by the general distrust of civil servants and lawyers inherited from the communist past and shared by politicians and the general public alike.

The findings of this chapter are not so important in terms of what the effects of EU conditionality were but rather what they were not, or what the EU conditionality failed to achieve. Given the shift of power from the legislature to the executive that we observe in the applicant countries that I explained in Chapter 1, more attention should have been paid to the building of a professional and highly competent bureaucracy. The EU emphasized institutional capacity building as one of the important accession conditions, but in the case of the Czech Republic, I argue that EU conditionality failed to bring about the desired result in the most important segment of institutional capacity building—the capacity of the Cabinet. The unique situation of legislative experts and their absence, or limited participation, in the alignment reflected negatively on the quality of the legislative output, as I discuss in Chapter 4.

CHAPTER 4: THE IMPACT OF PREPARATIONS FOR EU MEMBERSHIP ON THE CZECH LEGAL LANDSCAPE

The lost respect for the legislative experts and the never-to-be-found pride of legal professionals seem unlikely to be remedied now in the period following the “legislative hurricane.” The legislative process that had to cope with the alignment with EU requirements has been blamed for producing a vast number of laws in a short period of time – voluminous legislation that critics still point to for its destabilizing effects.²⁰⁰ The term “legislative inflation” has been used not only to refer to the rapid increase in the amount of adopted legislation, but also as an indication of the decreasing quality of the legislation that was produced so hastily.²⁰¹

In this chapter I summarize my empirical findings about the effects of the preparations for EU membership on the legislative process as an integral part of the legal landscape in the Czech Republic. I also present findings about the effects of the preparations for EU membership on the Czech legislative process. Finally, I contemplate the impact that the legislative process had (as transformed during the examined period) on the rest of the Czech legal landscape and reveal the reaction of leaders in the current political spectrum to the popular demand for improvement of the legal order.

4.1 THE QUALITATIVE ASPECTS OF THE IMPACT ON THE LEGISLATIVE PROCESS

The increased intensity of legislative work, and alignment in particular, affected the legislative process primarily at the Cabinet level, since it was the institution responsible for the legislative alignment with EU requirements. In Chapter 2, I show how the legal basis for the legislative process changed and which instruments and mechanisms the Cabinet adopted in trying to streamline the process. However, this thesis would not be

²⁰⁰ Sokol, Tomáš, *Deset let práva ČR*, Právní rádce, No. 1, 2003, pp. 4 - 9.

²⁰¹ Kanda, Antonín, *K naší soudobé legislativě*, Právní rádce, No. 6, 2001, p. 3; Kanda, Antonín, *Důvěra v právní stát*, Právní rádce, No. 12, 2003, p. 1; Šimek, Lubomír, *Lesk a bída legislativy*, Právní rádce, No. 5, 2001, pp. 35 - 36.

complete without summarizing my qualitative empirical findings about the legislative process in the examined period. This section presents these findings, building on the information and analysis provided in the previous chapters.

Impact on Policy Defining and Law Drafting

In Chapter 1, I explain that one of the effects of preparations for EU membership in all applicant countries was the partial elimination of policy defining and law drafting.²⁰² In the category of EU legislation the applicant had to accept whatever was adopted at the EU level without any possibility of contributing with its own notion of the proper policy or adequate wording of the instrument. I point out that such partial elimination does not necessarily have negative effects unless it is accompanied by a similar elimination of policy defining in the category of domestic legislation. In the Czech Republic this undesirable combination occurred and led to a significant reduction in policy considerations.

As the number of issues that arose as a result of the alignment requirements grew rapidly in the examined period, it precluded any ability to responsibly deal with essential policy analysis. Thus, the legislative departments found themselves in an uneasy position in which they were often presented only with the policy decision to align with EU requirements.²⁰³ However, these alignment requirements regularly offered a certain flexibility and anticipated that domestic policy choices could be made. Such flexibility was intentionally embedded in the EU instruments by the “old” member states, who wanted to retain a certain maneuvering space for their own domestic policymaking. This space was not effectively used in the Czech Republic prior to accession because “in the area of legislation, meeting the plan prevailed over programming, extensity over

²⁰² See supra pp. 20 ff.

²⁰³ Interviewees D, T. It is important to note that this situation was not exactly the same in every ministry. The two extremes were the Ministry of Justice and the Ministry of Finance. The Ministry of Justice has no subject-matter departments; therefore, the entire preparation of new legislation, including policy choices, is missing from the political leadership, reposes upon the legislative department. In the Ministry of Finance, the subject-matter departments have traditionally been strong, and when the Ministry prepared a draft law, it regularly bypassed the legislative department. Interviewee H.

intensity.”²⁰⁴ Thus, the preoccupation with quantity was detrimental to the quality of the legislative output.²⁰⁵

The lack of policy analysis as a basis for policy choices and legislative changes is also associated with the ultimate implementation problems. Despite the fact that, formally, the draft laws were supposed to include an assessment of their impact (on the state budget, on small and medium enterprises), due to time constraints, the approach to the assessment became mechanical. Therefore, new laws sometimes lacked the budgetary backing necessary for their effective implementation, which was subsequently hindered or even postponed.²⁰⁶ Under EU pressure, in some instances, the lack of assessment led to the unwise and rapid introduction of a new framework. A good example is the introduction of an independent appeal in the asylum procedure, which was requested by the EU based on an interpretation of the *Criteria*²⁰⁷ and a legally non-binding EU resolution. The solution included in the amendment to the asylum law²⁰⁸ resulted in a sudden sharp increase in the number of filings at the High Court in Prague, which subsequently had to be rescued from the resulting backlog by the passage of a subsequent law.²⁰⁹

Some see overt evidence of the lack of policy analysis in the discontinuance of the practice of preparing a text detailing the “substantive intent,” which was supposed to lay out the consequences of the intended legislation. Originally, this document was to be

²⁰⁴ Kabele, Jiří, Linek, Lukáš, *Decision-making of the Czech Cabinet, EU accession and legislative planning between 1998 and 2004*, paper prepared for the ECPR Joint Sessions of Workshops, Workshop No. 10: The Process of Decision-Making in Cabinets in Central-Eastern and Southern Europe, Uppsala, Sweden, April 13 – 18, 2004, p. 17.

²⁰⁵ Kanda, *K naší soudobé...*, supra note 201, p. 3. See also Rychetský’s comment in 2001: “The people [in the Cabinet’s legislative bodies] really worked for the past three years at an unbelievable speed, on Saturdays, Sundays, at nights; therefore as soon as the Chamber, so to say, stops working and begins to prepare for elections, we will [have time to] relax and will be able to do more conceptual stuff.” Moravec, Václav, *Interview s BBC*, Interview with Pavel Rychetský, at that time the Czech Vice-Prime Minister, November 16, 2001, republished at <http://wtd.vlada.cz/scripts/detail.php?id=1915>.

²⁰⁶ Such was the case of the Law on Juvenile Justice (*zákon č. 218/2003 Sb., o soudnictví ve věcech mládeže*), where the promise of an increase in the number of judges and court administrative personnel was apparently not even implemented by the end of 2004. Sváček, Jan, *Emancipace soudní moci*, Soudce, No. 1, 2005, p. 5. Also, interviewee E.

²⁰⁷ See criticism by the European Commission in its *2000 Regular Report*.

²⁰⁸ *Zákon č. 2/2002 Sb., kterým se mění zákon č. 325/1999 Sb., o azylu a o změně zákona č. 283/1991 Sb., o Policii České republiky, ve znění pozdějších předpisů, (zákon o azylu), a některé další zákony.*

²⁰⁹ Pipková, Hana, *Aktuální problémy soudního řízení v azylových věcech*, Právní rádce, No. 11, 2004, pp. 48 – 55.

prepared and passed by the Chamber before a law was drafted; at the beginning of the examined period, the practice was already being gradually phased out. The new *Rules of Procedure* of the Chamber adopted in 1995 did not foresee that the “substantive intents” would be processed in the Chamber any longer; they remained a working instrument of the Cabinet, but the practice of preparing them became more infrequent as the time pressure associated with the legislative alignment escalated.

Regarding law drafting, the inadequate staffing of the legislative departments often caused draft laws to remain in the hands of a limited number of experts. With the legislative departments understaffed, often without sufficient expertise and with no time to obtain it, in cases of substantial changes or recodifications the draft legislation was entrusted to a working group of external experts—judges,²¹⁰ attorneys, members of academia, etc. Since there were not even enough resources within the ministries to effectively supervise the work of such groups, the legislation often ended up being drafted by a small number of individuals, and in a few extreme cases, by only one person. These individuals were often the same people who eventually wrote commentaries on the new legislation, taught it in the law schools, applied it in their law practices, and sometimes even rendered judicial decisions based on it,²¹¹ leading some critics to point out that the affected fields of law began to represent “occult sciences:”²¹² understandable to the limited intimate circle of the drafters, but “black magic” to all outsiders.²¹³

It would probably be a bit farfetched to suggest that the drafting experts in such cases knowingly contributed to or purposely designed almost incomprehensible draft laws to sell more commentaries, become indispensable law professors or profit in their own law practices; as is the case in any law drafting, however, if a pool of qualified opponents is

²¹⁰ See, for instance, the comment by Pavel Kučera, Vice-President of the Supreme Court: “[The] Ministry [of Justice] does not have the necessary experts, and therefore the drafters of most draft laws submitted by the Ministry are judges.” Havlíček, Karel, *Rozhovory o právu*, Interview with JUDr. Pavel Rychetský, President of the Constitutional Court of the Czech Republic, *Soudce*, No. 2, 2004, p. 9. Also, Žák, Václav, *Bude to trvat generace*, an interview with Dr. Paul Springer, *Ekonom*, May 13, 2004, p. 27, republished by Transparency International, <http://www.transparency.cz>.

²¹¹ Some of the experts were judges of the highest courts in the Czech Republic.

²¹² I thank a civil servant from one of the Ministries for this term.

²¹³ Interviewee C.

missing, the draft laws may reflect any professional narrow-mindedness within the drafting experts, who lose their ability to be understood either by the general public or their peers.²¹⁴ Although specialization is a necessary feature of modern law, elitism in law drafting can be detrimental to the general understanding of laws and therefore to legal certainty. Moreover, we cannot discount the value of legislative expertise; judges or attorneys may be experts in a specific field, but are not necessarily likely to possess the skills needed for high-quality legislative work.²¹⁵

If constructive and informed feedback to draft laws was not available to the ministerial staff, one could hope that it might arise in consultative procedures. With the increase in time pressure, however, it was often the case that the departments of the ministries were pushed to reduce the length of the legislative process whenever possible, and the consultative procedures were the most susceptible to time savings.²¹⁶ To decrease both work and time, the ministries were likely to limit the number of addressees in the consultative procedures. As an illustration of such an approach, we might quote one ministerial official who in a debate about the potential addressees of a draft exhorted, “Let’s not mail it to [X]. After all, they could have some comments!” Even those who remained addressees were often constrained by the relatively short periods of time allotted for returning their comments on draft laws. In this way, even inter-ministerial cooperation suffered,²¹⁷ and judges and the Supreme Prosecutor’s Office also felt

²¹⁴ Dr. Springer noted that “[m]ost laws are written by the same people, and therefore, there is little hope for improvement.” Žák, Václav, *Bude to trvat generace*, an interview with Dr. Paul Springer; Žák, Václav, *Bude to trvat generace*, an interview with Dr. Paul Springer, *Ekonom*, May 13, 2004, p. 27, republished by Transparency International, <http://www.transparency.cz/index.php?id=2349>. In the case of the Bankruptcy Law, the impact of this outsourcing method was particularly lethal; due to the lack of oversight over the author of the draft, the alignment was delayed by many months.

²¹⁵ Pavel Kučera, Vice-President of the Supreme Court, noted in an interview: “I wish that judges would take a significant role in the legislative process, but when collecting material and in the consultative procedure. But the law should be drafted by a legislative expert.” Havlíček, Karel, *Rozhovory o právu*, an interview with JUDr. Pavel Kučera, Vice-President of the Supreme Court of the Czech Republic, *Soudce*, No. 4, 2004, p. 12.

²¹⁶ Pridham comments on „the insufficient time or effort to consult where necessary“ as “[the applicant] countries [had] to accommodate the whole *acquis communautaire* at high speed.“ Pridham, *supra* note 5, p. 226.

²¹⁷ Interviewee L.

neglected; sometimes they were surprised to learn that they had not been consulted about drafts that would potentially directly affect judiciary or prosecutorial work.²¹⁸

Impact of EU Support for the Legislative Process

The EU was aware of the difficulties that alignment presented to the post-communist countries and attempted to provide support for the legislative alignment endeavor through generous projects within the *Phare* program.²¹⁹ In addition to participating in various seminars, obtaining written analyses and short-term visits by experts,²²⁰ the applicant countries were encouraged to take on a twinning partner. Such a partner would be an expert from one of the “old” member states who would come to the applicant country and stay for a significant period of time, even for years, to assist the applicant with his expertise and experience. Though well-intentioned, the effect of the twinning exercise was not always as effective as intended.

The twinning partners for the Czech Republic arrived during the period of the uneasy relationship between the domestic legislative experts and EU alignment, the situation discussed in Chapter 3; as a result, the twinning partners struggled to find appropriate and qualified domestic counterparts for their activities. Their official charge was not well-prepared; the programming stage of the projects was the responsibility of very young and inexperienced officials, on both the sides of the Czechs and the EU, who probably lacked the experience necessary to prepare projects of such significant magnitude.²²¹

The language barrier also was a great impediment; most twinning partners could not communicate in the Czech language²²² and found it difficult to approach relevant

²¹⁸ Interviewees E, F, Q.

²¹⁹ “The Phare program is one of the three pre-accession instruments financed by the European Union to assist the applicant countries of Central and Eastern Europe in their preparations for joining the European Union.” <http://europa.eu.int/comm/enlargement/pas/phare/>.

²²⁰ In addition to the *Phare* programs, a number of activities were also organized by TAIEX, Technical Assistance and Information Exchange Office of the European Commission, established in 1995.

²²¹ Interviewee C. The problems of twinning projects being focused solely on “technical issues” and lacking “central controlling,” which have been flagged by Grabbe, appeared to be of less importance, at least in the Czech conditions. Grabbe, *supra* note 26, p. 315.

²²² Interviewees N, O, V, W.

domestic experts directly. Knowledge of the language could have made an incredible difference, even if the project had not been ideally designed to begin with.²²³ The example is Dr. Paul Springer, a judge and twinning partner from Germany, whose fluent Czech was an invaluable qualification for his position as an advisor to the Czech judiciary. His immediate success was moderate but his legacy might prove to be more important in the long run. His achievements had much to do with his ability to communicate with all the domestic experts and parties involved in the Czech reform of the judiciary process.

Due to the lack of contact between the twinning partners and the relevant domestic experts,²²⁴ the twinning partners' presence did not help solve the problem of the distance with which the domestic experts perceived EU matters. With the language limitations inherent in the legislative and other ministerial departments, it was the officials from the EU departments of the ministries who served as “postmen” or “transmitters” from the EU and its twinning representatives to the rest of the institution. The lack of personal involvement of the domestic legislative experts – or of their presence, at a minimum – in the negotiations with the EU and later in the working bodies of the Council and the

²²³ Bettina Fellmer from the Twinning Office of the German Federal Ministry of Finance points out that “[t]he most challenging task in the preparation phase is to [identify and select] a technically and personally suitable [pre-accession advisor—twinning partner] candidate. She mentions the need for the candidate to have “good English language skills” but also a “willingness to learn and to accept cultural differences.” Surprisingly, she does not go so far as to acknowledge the importance of knowledge of a local language. Fellmer, Bettina, *The Adoption of Acquis Communautaire in Environmental Legislation in the Accession Countries—Examples Under German Co-Operation*, in: Schmidt, Michael, Knopp, Lothar (eds.), *Reform in CEE-Countries with Regard to European Enlargement: Institution Building and Public Administration Reform in the Environmental Sector*, Springer, Berlin, Heidelberg, 2004, p. 122.

²²⁴ In its extreme forms, the detachment meant that the twinning partners ended up commenting on a law that had already been adopted without the twinning partners ever having had the chance to comment on the draft law before it was adopted. Interviewee U. Sometimes, the detachment was also caused by time constraints; twinning partners were relieved from their everyday duties in their home institutions and had the entire time available to concentrate on advising. However, the domestic experts were often overwhelmed with their alignment tasks and had limited time to cooperate with the twinning partners. Fellmer, supra note 223, p. 123. Similarly, Badura, Marianne, *Twinning as an Instrument for Implementing the Principles of Ecological Planning in the Countries of Central and Eastern Europe*, in: Schmidt, Michael, Knopp, Lothar (eds.), *Reform in CEE-Countries with Regard to European Enlargement: Institution Building and Public Administration Reform in the Environmental Sector*, Springer, Berlin, Heidelberg, 2004, p. 131.

Commission hindered promotion of the experts' full understanding of the content of the demands and the urgency of the expectations expressed by the EU.²²⁵

The instability of the unreformed civil service in the Czech Republic caused an increased fluctuation in the number of civil servants that harmed the institutional memory; this was particularly unfortunate, because otherwise the institutional memory would have helped to bridge the temporary period of the elimination of policy defining and the partial elimination and decrease in law drafting. Without such a bridge, newer personnel were left without access to veteran legislative experts who had the proper experience and expertise that would normally be acquired through active participation in the regularly functioning legislative process. I submit that some of the reasons for the current dissatisfaction with the Czech legal order can be traced to the effects that the preparations for EU membership had on this part of the legislative process.

4.2 THE LEGAL LANDSCAPE AFTER THE “LEGISLATIVE HURRICANE”

The “legislative hurricane” left the Czech legal landscape in an undesirable condition; as I document in the first section of this chapter, the quantitative aspect of the “hurricane” was massive. Some experts argue that the “hurricane” contributed to (if not caused) the decline of the legal consciousness of the public by introducing a vast number of laws within a relatively short period of time. In order to comply with the alignment schedule, the laws often came into effect very shortly after their publication, sometimes on the day of their publication. Amendments to laws were introduced very quickly, often with an intent to remedy a provision that had become disaligning through changes that were proposed during the legislative process.

²²⁵ Similarly, Senden comments on the Belgian perception of the need to involve more “the legislative and administrative authorities responsible for the transposition of the directives [...] in their elaboration and drafting.” Senden, *supra* note 69, p. 75. The absence of relevant experts can also be detrimental to subsequent interpretations of the ultimately adopted EU instrument. See, for instance, the comment by Finland, *ibid.*, p. 37. For instance, I had the opportunity to observe a change in the attitude of a Czech criminal law expert (the author of the criminal law re-codification) once he participated in a Council working group, observed the content and dynamics of the law-making at the EU level and compared his views with those of his EU peers.

Repeatedly, the Cabinet had to come up with an immediate amendment of a newly adopted alignment law, in which the alignment aspect disappeared or was altered due to the disaligning changes introduced in the Parliament.²²⁶ Some analysts suggest that the creativity of particular individual deputies, who tended to come up with last minute “improvements” to draft laws, should have been limited.²²⁷ The immediate amendment procedure could, for instance, enable the Chamber to either adopt the draft “as is” or return it to the initiator. Some suggest that changes to laws, whether as changes to draft laws within the legislative process or draft amendment laws, should not have been initiated by individual deputies but that a minimum number of deputies should have been required.²²⁸ However, as discussed in Chapter 2, in light of the visible—and in an applicant country unavoidable—shift of power towards the executive, the Chamber was not receptive to any solution that appeared to limit its role in democratic discourse.

On the other hand, the Parliament points to the Cabinet’s shortcomings in the legislative process; in addition to its claims of inaccurate alignment, the Parliament was also not satisfied with what it perceived to be inadequate consultations on Cabinet drafts. Various individuals and groups complained about not being included in the consultative procedures of the ministries and then turned to the Parliament with their objections. Consequently, the parliamentarians proposed amendments without sufficient knowledge of the underlying EU legislation,²²⁹ resulting in the disalignment of the final legislative product.²³⁰ Later repeated amendments to the same law, whether inevitable due to

²²⁶ *Zpráva o činnosti Legislativní rady vlády za období od srpna 1998 do března 2002*, pp. 5, 7. The legislative branch, as noted in Chapter 2, resisted attempts of the Cabinet to limit the Parliament’s role in democratic discourse. Similarly, interviewee H.

²²⁷ See, for instance, Pavel Rychetský, at the time Czech Vice-Prime Minister, in an interview; Bílek, Ondřej, *Vice-Prime Minister Rychetský: Laws Are Endangered by Deputies’ Creativity*, Interview with Pavel Rychetský, at the time Czech Vice-Prime Minister, *Lidové noviny*, December 29, 2001, republished at <http://wtd.vlada.cz/scripts/detail.php?id=1909>.

²²⁸ Aleš Gerloch and Pavel Rychetský in their contributions to a conference in 2004. „*Place and Role of the Law in the Continental Type of Legal Culture: Tradition, Presence, and Evolution Trends*,” transcript of the conference organized by the Standing Committee of the Senate for the Constitution of the Czech Republic and Parliamentary Procedures and the Law School of the Charles University in Prague, May 28, 2004.

²²⁹ Interviewee J.

²³⁰ An example here is the amendment to the copyright law, which was altered in the Chamber under the influence of the lobby of hotel owners. This alteration caused a disalignment of copyright law that is the subject of one of the first infringement proceedings initiated by the European Commission against the Czech Republic. Macháček, David, *Za úlevy hoteliérům hrozí Česku trest*, *Aktuálně.cz*, November 24,

incompatible parliamentary changes or to actual mistakes by the executive branch,²³¹ contributed to the destabilization of the Czech legal order.²³²

Based on the discussion above, I argue that the preparations for EU membership had a detrimental effect on the Czech legislative process; however, it might be problematic to claim direct causality of the preparations, considering the ultimate state of the Czech legal landscape as an entire complex in which the legislative process was only a part. The troubled condition of the legal landscape was a matter of concern even before EU conditionality arrived on the scene; the first complaints about the unsatisfactory situation of the Czech legal order appeared as early as the beginning of the examined period in 1995,²³³ still, it seems likely that since the legislative process was detrimentally affected by the preparations for EU membership, the preexisting unhealthy condition of the Czech legal landscape was aggravated.

Repeatedly, experts have contended that the unprecedented volume of legislative output required by the EU corresponded to the rapid increase in the speed with which legislation had to be prepared and adopted. It is logical that due to limited human resources, an increased output requires actors–producers to work at a faster rate, and while a higher speed does not necessarily equate to lower output quality, at a certain stage it necessarily reaches a point at which the rapid pace translates into compromises in quality.

In fact, Kořenský, Cvrček and Novák, in their study of “legislative inflation,” link the volume of the output to the general “devaluation” of the Czech legal order. They observe that “there is a reason to suppose that these changes [–which have no comparison in

2005, <http://aktualne.centrum.cz/domaci/kauzy/clanek.phtml?id=3103>; Holecová, Simona, Junek, Adam, *EK poprvé žaluje Česko. Hned čtyřikrát*, Aktuálně.cz, January 10, 2006, <http://aktualne.centrum.cz/domaci/clanek.phtml?id=47973>.

²³¹ See, for instance Pelikánová, Irena, Dědič, Jan, Čech, Petr, *Vládní návrhy zákonů o kapitálovém trhu – ostuda české legislativy i vážná hrozba*, Právní zpravodaj, No. 1, 2004, pp. 11 – 14.

²³² Kořenský et al. recorded an interesting finding that “after 1993 the Parliament concentrated on amendments to the laws that were adopted by the same Parliament. We call this feature a self-destruction. [...] It is possible to show that the amendments [...] concern primarily the same laws. If we believe that about three years are necessary for the new law to be accepted for application, we can imagine what the effects of such amendments have to be.” Kořenský et al., *supra* note 160, p. 39.

²³³ Novák, František, *Péče o právní řád*, Právník, No. 10 – 11, 1995, p. 1028.

Czech history prior to 1993—] had to cause a considerably chaotic situation in the [Czech] legal order.”²³⁴ Indeed, the perception of the chaos in the legal order has generally been shared by legal professionals, politicians and the lay public. It is usually documented citing the unprecedented numbers of laws that amended major Czech codes; for instance, in the ten years from 1995 until 2004, the Code of Civil Procedure was amended 53 times, the Code of Criminal Procedure 24 times, the Civil Code 26 times, the Commercial Code 34 times and the Criminal Code 38 times. The top of the list is occupied by the Trades Licensing Law with 66 amendments.²³⁵ We should clarify the fact that these amendments rarely concerned only one article of a code or law; usually, they affected numerous provisions.

Despite the fact that, in general, it does not appear to be particularly wise to amend a law on an average of every two months for a period of ten years, we might assume that this wave of amendments could be attributed to an undesirable, but potentially common, feature of modern legal orders exhibiting a high degree of regulation to keep up with the dramatic evolution of society. However, as I argue in this thesis, the Czech legislative process was substantially weakened by the process of preparations for EU membership; it was forced to introduce changes in legislation rapidly, lacking sufficient information, human resources, and the expertise necessary to deal with the challenge. These factors, exacerbated by EU pressure, were the “subjective reasons” that generated the cycle recently described by Grospič.²³⁶ The cycle consisted of interconnected problems in the legislative process that caused legislative-technical flaws in its output and led to a need to immediately remedy these flaws. This cycle inevitably added to the volume of legislative work and further deepened the problems from which the legislative process suffered.²³⁷

While the overall chaos in the legal system is clearly detrimental to its quality, the qualitative changes of various areas of law or individual laws might be more difficult to

²³⁴ Kořenský et al., *supra* note 160, p. 39.

²³⁵ The numbers also include findings of the Constitutional Court with the effect of amendments to the respective laws.

²³⁶ Grospič, Jiří, *Regulatorní a legislativní problémy ve světle hodnocení OECD a Evropské asociace pro legislativu*, *Právník* No. 9, 2005, p. 947.

²³⁷ Grospič, *supra* note 236, p. 947.

assess. After all, as Senden suggested, “giving substance to the concept of ‘quality’ in relation to legislation is a highly subjective exercise.”²³⁸ However, at this point, it is necessary to clarify that when we talk about the quality of legislation from the perspective of legislative craft, we are not assessing the policy choices that are inherent to the legislation in question. The quality of policy needs to be evaluated by policy analysts. For legislative experts, the issues of quality are detached from the particular policy choices but not entirely from the substance of the legislation; they concentrate on matters such as the “legitimacy, consistency, clarity and completeness of laws”²³⁹ that cannot be studied without the substance of legislation being taken into account. Nevertheless, judgments are not rendered about the goals that are set by policy-makers, but rather about the quality of the vehicle that is supposed to take us to the goal.

The experts who specialize in the quality of legislation are often accused of being extremely formalistic, lacking interest in the true substance of legislation; their work has been discounted as “legislative engineering.”²⁴⁰ Interestingly, however, the critics of this approach to legislation are the same ones who emphasize their own concern about the content of legislation and its proper implementation. Nevertheless, without high-quality legislative technique, the content of legislation easily becomes irrelevant. Once laws are mutually inconsistent, lack clarity and are incomplete (e.g. lack sanctions), their content, even if well intended, becomes lost, and the laws are in danger of being ineffective in practice.

It is clearly beyond the scope of this thesis to attempt to assess the changes in quality of Czech legislation. Here we have to draw on the work of Czech legal experts who agree that following the “legislative hurricane,” the legal order was left destabilized.²⁴¹ They

²³⁸ Senden, *supra* note 69, p. 29.

²³⁹ Hirsch Ballin, Ernst M.H., *Reflections on Co-Authorship in the Development of European Law-Making*, in: Hirsch Ballin, Ernst M.H., Senden, Linda A.J., *Co-Actorship in the Development of European Law-Making*, T.M.C. Asser Press, The Hague, 2005, p. 11.

²⁴⁰ Hughes et al., *supra* note 66, p. 165; Grabbe, *supra* note 162, p. 76.

²⁴¹ Kalenský, Pavel, Pauknerová, Monika, *Problémy compatibility práva České republiky s právem Evropské unie z hlediska tvorby práva*, in: Knapp, Viktor, et al., *Tvorba práva a její současné problémy*, Linde Praha a.s., Praha 1998, pp. 285 – 286; Rychetský, Pavel, *Další pokračování reformy soudnictví*, *Justiční praxe*, No. 1, 2003, p. 2; interviewee E.

point to laws becoming both incomprehensible and mutually inconsistent.²⁴² As a result, Czech society faces a complicated legal order that is seen by some as the major barrier to the growth of private business in the Czech Republic;²⁴³ others do not hesitate to label it as the major cause for most of the problems in public administration.²⁴⁴ In two 2005 polls conducted by the Public Opinion Research Centre of the Institute of Sociology of the Academy of Sciences of the Czech Republic, 46% of the respondents expressed their dissatisfaction with the legal environment in the Czech Republic (31% were neither satisfied nor unsatisfied)²⁴⁵ and 85% considered establishment of a functioning legal system to be currently an acute problem for the country.²⁴⁶ The general popular sentiment was aptly captured by a Czech weekly, *Týden*, which entitled its 2004 article on the subject, symptomatically, “Through a Jungle and Forest.”²⁴⁷

The current Czech Cabinet has reacted to the discontent of the professional and general public and, consistent with the general trend in Europe, has declared its interest in regulatory reform. Unfortunately, although the intention to make the legal order more transparent was declared in the current Cabinet Program,²⁴⁸ the Cabinet’s reform attempts lack actual results. Recently, the Cabinet came forward with a remarkable March 2006

²⁴² David, judge of the Supreme Court of the Czech Republic, talks about high “atomization“ of domestic legislation; Ludvík, *Fungují záruky právního státu?*, Virtually.cz, January 12, 2006, <http://www.virtually.cz/index.php?art=10033>. Also, see Kanda, Antonín, *K naší soudobé legislativě*, Právní rádce, No. 6, 2001, p. 3; Kanda, Antonín, *Důvěra v právní stát*, Právní rádce, No. 12, 2003, p. 1; Šimek, Lubomír, *Lesk a bída legislativy*, Právní rádce, No. 5, 2001, pp. 35 - 36; Václav Klaus in a speech to members of the Senate, *Klaus: Zákonů máme daleko více, než je žádoucí, je třeba redukce*, Český rozhlas, March 18, 2004, <http://www.radio.cz/cz/zpravy/51851#1>.

²⁴³ Evžen Tošenovský in an interview; Houžvička, Přemysl, *Vážne spojení s Prahou*, Profit, October 24, 2005, <http://www.profit.cz/archiv.php?iEd=200543&iArt=14755&iSearch=>. In his 2006 New Year’s speech President Klaus complained that in the less than three years of his presidency he received almost 350 laws for his signature. “This diminishes space for private business and people’s enterprise and decreases respect for laws and their abidance.” Klaus, Václav, *Novoroční projev prezidenta republiky*, January 1, 2006, http://www.hrad.cz/cms/cz/prezident_cr/klaus_projevy/3129.shtml.

²⁴⁴ Interviewees O, S, V.

²⁴⁵ *Hodnocení stavu některých společenských oblastí a očekávání budoucího vývoje*, Centrum pro výzkum veřejného mínění, Sociologický ústav Akademie věd České republiky, 2005, http://www.cvvm.cas.cz/upl/zpravy/100464s_ps50404.pdf, p. 2.

²⁴⁶ *Naléhavost některých problémů očima veřejnosti*, Centrum pro výzkum veřejného mínění, Sociologický ústav Akademie věd České republiky, 2005, http://www.cvvm.cas.cz/upl/zpravy/100448s_po50221.pdf, p. 1.

²⁴⁷ Korecký, Miroslav, Ludvíková, Veronika, *Džunglí a pralesem*, Týden, No. 14, 2004, pp. 20 - 23.

²⁴⁸ *Programové prohlášení vlády Jiřího Paroubka, point 7.3.*, http://wtd.vlada.cz/vlada/vlada_progprohl.htm.

initiative called “Devote Ten Minutes to the Improvement of the Legal Environment in the Czech Republic.”²⁴⁹ The initiative consists of the Cabinet’s call to the public to provide feedback on the problems that people face with the application of laws. Although we may be sympathetic to the Cabinet’s effort to reach out to the dissatisfied public (coincidentally, less than three months before the next elections), it is difficult to applaud an initiative that appears to be more of a desperate call for help than a viable step towards an actual solution. Collecting ideas from the public is certainly important, but hardly represents a systemic approach to solving the problems of the Czech legal order.

The public now appears to expect the solution to the legal order misery from the next Cabinet. With general public dismay about the state of legislation in the Czech Republic, the issue of an improvement in the legal order has been established as an important political agenda and has been revived in anticipation of the June 2006 elections. The party traditionally criticizing the state of affairs in Czech legislation the most is the opposition Civic Democratic Party (ODS). Among the goals of its “shadow Cabinet” have been “slowing down the pace of legislative process,” “taking care of the quality of draft laws” and “taking an inventory of effective laws,”²⁵⁰ with a goal of revising the legal order.

Even parties that actively participated in the “legislative hurricane” do not lag far behind in proclaiming their interest in the state of the legal order. The Christian Democratic Party (KDU-ČSL) promises to aim for “global improvement of the legal culture” in the Czech Republic, and in its 2006 election program asserts that it “does not share the legislative optimism of the left-wing parties that believe that every problem may be solved by a law.”²⁵¹ However, even the left is becoming aware of the value of the “legislative card” for the upcoming elections; the Social Democratic Party (ČSSD), the leading party running the Cabinet since 1998, in its election platform comments on the “non-transparent legal order” and mentions the need for its “stabilization” and for the

²⁴⁹ <http://reforma.vlada.cz/10minut/>; announced on March 15, 2006.

²⁵⁰ *Kvalitní právo, pružné soudy*, ODS, Dokumenty stínové vlády, edice Modrá šance, No. 5, 2003, p. 5; *Modrá kniha*, ODS, Dokumenty stínové vlády, Resortní koncepce ODS, edice Modrá šance, 2004, http://www.ods.cz/docs/publikace/modra_kniha.pdf.

²⁵¹ *Volební program KDU-ČSL*, http://www.kdu.cz/videa/Media_15075_2006_2_27_13_35_22.pdf, p. 66.

“creation of conditions for maximizing legal consciousness in society.”²⁵² The Communist Party of Bohemia and Moravia (KSČM) promises the “strengthening of the legal consciousness of the public” whose “trust in law and in possibility of its abidance” needs to be rebuilt; simplifying and stabilizing the legal order are also listed in its program.²⁵³

Even though used frequently by politicians, the “legislative card” presented in their platforms seems to be quite abstract. For instance, it would be very interesting to see what kind of concrete actions the Social Democratic Party envisages to “maximize the legal consciousness” of the public; these actions are not detailed in its platform. Similarly, the revision of the legal order appears to face obvious and severe practical obstacles. Although the intention to revise and improve legislation is understandable given the general dissatisfaction with its current state, it is difficult to imagine when there would be adequate time to make such a revision feasible; it is unlikely that new legislative assignments could ever be postponed for the period of time necessary to allow legislative experts to conduct the preparatory analysis necessary for a substantial revision of the existing legal order. The fact that the Czech Republic now has not only to accommodate its own immediate needs, but also to comply with the legislative aspirations of the EU, makes the possibility of such an ideal reflection period nonexistent.

The fact that ideal “clinical” conditions for the improvement of the Czech legal order are not present at this stage should not lead us to the conclusion that there is nothing that can be done to improve the quality of Czech legislation. Nevertheless, the right therapy might require treating not only specific existing legislation, but also the entire Czech legal landscape; the starting point needs to be the legislative process and its crucial players. Undeniably, legislative experts are part of the landscape; without securing their professional growth and adequate training, any inventory and revision of legislation will be in vain.

²⁵² *Volební program ČSSD pro volby do Poslanecké sněmovny Parlamentu ČR, 2006*, <http://www.cssd.cz/soubory/422010/Voolebni%20program%20CSSD%5F2006.pdf>, p. 58.

²⁵³ *Volební program Komunistické strany Čech a Moravy na období 2006 – 2010 (volby do Poslanecké sněmovny 2006)*, <http://www.kscm.cz/article.asp?thema=2665&item=29090&managepreview=ok>.

As part of the legal landscape therapy, a careful assessment of possible adjustments to the Czech legislative process should be conducted. The ministries' internal legislative rules and practices should be revisited and adjusted, and special working groups for law revisions should be created. At the Parliament level, adjustments should also be implemented to guarantee that respect will be given to the quality of legislative drafting; given the current interest of the Czech political spectrum in improvements to the legal order, support for limitations on the Chamber's ability to amend drafts (deputy "creativity") might be gathered among politicians and might be successful if carefully and diplomatically negotiated in the Chamber. To launch a revision of legislation without improvements to the legislative process would be irresponsible and—continuing the "legislative inflation" metaphor—analogous to simply issuing more currency in the middle of a period of hyperinflation.

CONCLUSIONS

The body of literature on EU enlargement and the effects of EU conditionality has evolved significantly in the past few years; research in the area is beginning to offer not only an overview of the dynamics of the relationships between the EU and the applicant countries, but also a detailed look into the evolution of the domestic politics of the applicant countries and the ways in which domestic actors reacted to and utilized EU conditionality.

This thesis fills the gap in this literature that has existed because of the lack of any comprehensive studies of the effects of preparations for EU membership on the legislative process in the applicant countries. The legislative process was exposed to conditionality that caused two major effects common to countries joining the EU: first, the creation of a two-level legislative process (with one level of domestic issues and another level of EU issues); and second, a shift of power from the legislature to the executive. These effects are not necessarily detrimental, but may be when combined with certain preexisting conditions in applicant countries; in such cases the effects, combined with the preexisting conditions, can be problematic.

The existing conditions in the Czech Republic caused the effects of the preparations for EU membership to be detrimental to the Czech legislative process and its output. Because of the delay in the alignment process, the alignment had to be conducted under severe time constraints that created a significant increase in the legislative workload, with a concomitant need for a substantial increase in the output capacity of the Cabinet's legislative departments – the departments that carried most of the burden of the alignment work. Unfortunately, the legislative departments were not able to meet their obligation using their existing staff; since the Cabinet was under severe pressure not to increase the number of civil servants, no increase in staffing was possible. In addition, the need to reform the civil service was not met, causing further instability and a resultant loss of

institutional memory through staff attrition. Although the EU has pressured the country to conduct civil service reform, there remains no political will to do so.

The situation of legislative experts in the Cabinet was complicated by the general distrust of lawyers inherited from the communist period that was shared by politicians and the public alike. In 1989, lawyers were conspicuously absent from the revolutionary forces; the economists who organized the major reforms after the fall of communism were not interested in lawyers, who consistently slowed down the reform process with their interest in details, safeguards and effects on rights. The position of the legislative departments in the Cabinet was affected by this phenomenon, and the responsibility for EU expertise was largely left to the EU departments.

The legislative experts were often left out of the alignment, not only because they lacked applicable expertise, which was concentrated almost exclusively in the EU departments, but also because of the language barrier. EU legislation was not available in the Czech language in time for these experts to use the translations in their alignment work; further, the problem of translation was underestimated by the EU, perhaps because previous enlargements had never posed such an issue. However, the experts' lack of knowledge of western languages in the post-communist countries was a significant problem for the alignment exercise.

Because of the tremendous time pressure, it was not possible to define domestic policy; often, the only policy goal of the Cabinet was the alignment itself, causing the country to miss opportunities to make policy choices even in instances where EU instruments were designed to allow for certain choices to be made. Since policy defining at the EU level was inaccessible to the applicants (because they were not yet EU members), and since policy defining was highly limited at the domestic level (because of time constraints), the Czech legislative process experienced several years of very limited policy defining.

The Cabinet's legislative experts had very limited opportunities to learn law drafting and to mature in a productive legislative environment; when the time pressure became severe,

the Cabinet outsourced law drafting, and the drafting in such cases was prepared by small groups of individuals (or even one person). After the Cabinet failed to streamline the legislative process for alignment draft laws in the Parliament, it had to save time in the process at its own level by limiting consultative procedures and reducing the quality of the legislative output. The legislation adopted was further compromised by multiple amendments correcting disaligning provisions and other discrepancies.

Although the EU attempted to assist the Czech Republic in the alignment process by providing long-term experts under the twinning programs, the contributions of these programs were insignificant. The EU experts struggled with a language barrier that precluded them from effectively communicating with most of the local legislative experts – who, in any event, were distanced from EU matters and who regarded EU matters as “foreign” and outside the scope of their interest and competence for a long time.

To address the research question of this thesis, the data presented indicate that the preparations for EU membership had detrimental effects on the Czech legislative process. However, the reasons for the effects lie not in the characteristics of the preparations themselves, but in the conditions that existed in the Czech Republic. Therefore, I do not contend that my findings may be reliably extrapolated to the situations in other post-communist countries. To do so, a comparative study would have to be conducted to answer questions regarding the local conditions in these countries and determine whether they were affected similarly by EU conditionality.

Regardless of the validity of possible extrapolations, this research provides important warnings for current and future applicant countries and the EU, who should be cautious about the effects that preparations for EU membership might have on their legislative processes. Given the inevitable shift of power to the executive, the EU should pay close attention to what kind of executive (or bureaucracy) exists in applicant countries and whether they are actually prepared for such a shift to take place. The EU should also acknowledge that as much as actual implementation of EU rules is indispensable for fulfillment of the EU conditions, the importance of “legislative engineering” cannot be

underestimated. The damage to the legal landscape that can be inflicted by an improper and inadequate approach to legislative alignment can have long-term consequences for applicants and frustrate the proper implementation of the alignment legislation.

In the Czech Republic, the demand among legal professionals and the general public for improvements in the legal order is the best evidence of the hardship that the “legislative hurricane” imposed on the population and the economy. Little has yet been done to change the state of the legal order, but most political parties mechanically declare their interest in reform as part of their election platforms. However, no attempts to improve the legal order will succeed without reform of the civil service and careful scrutiny of the legislative process. Without the completion of both of these prerequisites, any attempts at improvement will only exacerbate the residual effects of the “legislative hurricane” and worsen the country’s “legislative inflation.”

APPENDIX A

ACCESS TO EU LEGISLATION IN THE CZECH REPUBLIC

It is a prerequisite to the alignment of domestic laws with EU legislation that the legislative experts who are preparing the alignment have access to the instruments that are the target of the alignment; without the ready availability of basic documents to the experts, we cannot expect the legislative process to function smoothly and produce adequate results. One aspect of the negative effects in the preparations for EU membership on the Czech legislative process stemmed simply from the unavailability of source legislation for alignment to the relevant domestic experts. The problem is divided into two sections dealing first with issues of translation and second with publication.

TRANSLATION OF EU LEGISLATION INTO THE CZECH LANGUAGE

The translations of EU legislation into the Czech language were necessary for legislative alignment because most of the experienced Czech legislative experts were not vested in the preexisting official EU languages. In the absence of official translations they had to rely on preliminary translations of dubious quality or on the expertise of their junior colleagues that was not always adequate for the complexity of the assignment.

Normally, EU legislation is expected to be available in all of the official languages of the EU through simultaneous publication in the *Official Journal of the EU*.²⁵⁴ On the day of accession of a new member state, all effective EU legislation as of that day also becomes effective in the territory of the new member.²⁵⁵ If the new member brings with it a new

²⁵⁴ EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community, as amended by the *Act Concerning the Conditions of Accession of the Czech Republic [...] and the Adjustments to the Treaties on which the European Union Is Founded*.

²⁵⁵ *Act Concerning the Conditions of Accession of the Czech Republic [...] and the Adjustments to the Treaties on which the European Union Is Founded*, Official Journal of the European Union, L 236, September 23, 2003, pp. 33 – 49, Article 2.

EU official language (not all of the new members do; an example is the case of Austria), all EU legislation issued prior to the accession date must be translated into the new language and published in a special edition of the *Official Journal*. All EU legislation issued subsequent to the day of accession is then published in the new language in the same manner as in the other official language versions—simultaneously in the regular issues of the *Official Journal*. Obviously, this system cannot function without a transitional period—it would be unrealistic to expect EU legislation issued within a few weeks prior the accession to appear in the special edition published on the day of accession.

It is important to emphasize that language had not been a significant problem in previous EU enlargements. First, earlier enlargements had not struggled with such a large amount of EU legislation whose body had, in recent years, hypertrophied to an unmanageable size. Second, previous enlargements involved countries whose population (including their legislative experts and other legal professionals) was largely familiar with previous official EU languages. In this respect, we do not have to think of extremes—such as Austria or Ireland²⁵⁶—in which no translations were necessary because the new members used languages that were already official EU languages, but we can mention countries like Sweden or Finland, where using EU legislation in English did not represent a significant problem for their inhabitants.²⁵⁷ However, the post-communist applicant countries were greatly at a disadvantage in this respect, since the majority of their productive population was not sufficiently vested in preexisting official EU languages.²⁵⁸

²⁵⁶ Although it should be noted that Irish was a “treaty language,” and hence all primary EU legislation was translated into Irish. Recently, the Irish government decided to promote Irish and managed to make it the 21st official EU language as of January 1, 2007.

http://europa.eu.int/comm/dgs/translation/spotlight/irish_en.htm.

²⁵⁷ According to a 2005 poll by Eurobarometer, 85% of Swedes and 60% of Finns knew English.

Europeans and Languages, Eurobarometer, 2005,

http://europa.eu.int/comm/public_opinion/archives/ebs/ebs_237.en.pdf, p. 4. Yet it is instructive to learn about complaints that the representatives of these states share with regards to a lack of versions in their own languages. See for instance, Senden, *supra* note 69, p. 56.

²⁵⁸ According to a 2005 poll by Eurobarometer, among post-communist countries the highest knowledge of a preexisting EU official language was in Slovenia, where 56% knew English and 45% German. In the Czech Republic the three most widely known foreign languages were German (31%), English (24%) and Russian (19%). *Europeans and Languages*, Eurobarometer, 2005,

http://europa.eu.int/comm/public_opinion/archives/ebs/ebs_237.en.pdf, p. 4.

It is difficult to ascertain when the first EU laws were translated into the Czech language; clearly, various departments of the Czech Cabinet began to commission translations as soon as they had substantial contact with EU-related issues. Therefore, some of the texts were translated—usually for purposes of legislative work—as early as 1994, but without any standardization guidelines or organization; furthermore, the quality of the translations was apparently not very high,²⁵⁹ and the approach to translation, in general, appeared to be rather chaotic.²⁶⁰

The *Europe Agreement* provided a framework for “aid for the translation of [EU] legislation in the relevant sectors.”²⁶¹ Based on this impetus, translation into Czech began to be more structured in 1998 after the Cabinet approved a translation project for EU legislation²⁶² and established a specialized unit within the Ministry of Justice to be in charge of the translations.²⁶³ The unit, the Coordination and Revision Center (the “Center”), was part of the Department of Compatibility and as such was eventually transferred to the Office of the Cabinet on March 1, 1999,²⁶⁴ for the reasons explained in Chapter 2.²⁶⁵

The Center did not face an easy task, not only because of the general intricacy of legal translation and of EU legislation, in particular,²⁶⁶ but also due to the volume of texts. This

²⁵⁹ Kalenský and Pauknerová point out, for instance, the incorrect translations in the Europe Agreement: in Article 45(1) b) “subsidiary” was translated as “podřízená jednotka” rather than “dceřinná společnost,” and in Article 70 “company law” was translated as “firemní právo” rather than “právo obchodních společností.” Kalenský, Pavel, Pauknerová, Monika, *Problémy compatibility práva České republiky s právem Evropské unie z hlediska tvorby práva*, in: Knapp, Viktor, et al., *Tvorba práva a její současné problémy*, Linde Praha a.s., Praha 1998, pp. 291, 292.

²⁶⁰ Interviewee A.

²⁶¹ Article 71 of the Europe Agreement.

²⁶² *Usnesení vlády České republiky ze dne 30. září 1998 č. 645 o zajištění oficiálních překladů právních předpisů Evropských společenství.*

²⁶³ *Usnesení vlády České republiky ze dne 21. srpna 1998 č. 537 k přehledu dosud identifikovaných dopadů přípravy České republiky na členství v Evropské unii na státní rozpočet a institucionální zabezpečení*, point II.

²⁶⁴ *Usnesení vlády České republiky ze dne 24. února 1999 č. 163 o převodu některých činností vykonávaných Ministerstvem spravedlnosti na Úřad vlády.*

²⁶⁵ See p. 44.

²⁶⁶ On the issues of difficulties with EU legislation terminology translation and consequent alignment problems, see for instance, Senden, supra note 69, pp. 37, 52, 53. The translation difficulties are closely related to the problems of interpretation when transposing EU directives and framework decisions or implementing other EU legislation. *Ibid.*, pp. 37, 39, 42.

amount of text was overwhelming to the initial 20-member staff of the Center²⁶⁷ even though the translation itself was outsourced and financed by the generous funding that the country received from the EU *Phare* program.²⁶⁸ Nevertheless, as we will see later, the Center had an important role in the process, and although it received EU financial support, with respect to methodology, the EU institutions were unable to provide the Center with any clear methodological guidelines for translations that would have enabled the Center to launch a successful translation mechanism more quickly. The Center realized that without such guidelines there could be no unified translation and decided to create its own guidelines (the *Manual*) based on the Swedish model, with input from some internal materials of certain EU institutions.²⁶⁹ Thanks to the ISAP database,²⁷⁰ the Center was able to maintain compliance with its guidelines by facilitating the access of translators and coordinators to all translations and a dictionary of established terminology.

The European Commission also provided minimal support in setting translation priorities. Since the beginning of the organized translation process, the Center suffered from the absence of a complete list of texts to be translated²⁷¹ because the Commission never identified an exact total number of legislative acts to be translated; its information as to the volume of legislation always oscillated around an approximate number of pages.²⁷² The Commission's initiative in the field of governance²⁷³ indicates that it has had problems with its own housekeeping.

²⁶⁷ *Usnesení vlády České republiky ze dne 30. září 1998 č. 645 o zajištění oficiálních překladů právních předpisů Evropských společenství*, Annex 2. There were three additional employees within the Office for Standardization, Metrology and Testing who formed a translation and revision Center for Technical Norms.

²⁶⁸ For *Phare* program, see supra note 219.

²⁶⁹ Interviewee A. Apparently, the *Manual* was subsequently provided to Romanian colleagues who faced similar challenges.

²⁷⁰ On ISAP, see supra p. 44.

²⁷¹ Interviewee A. Kolbabová in her 2004 article states that “The complete list of secondary law documents to be translated was submitted by the EU institutions first in 2003. *The list is not a definitive one and is being updated.*” (emphasis added). Kolbabová, supra note 77, p. 7.

²⁷² In a 2003 Communication the Commission stated that the volume of the binding secondary legislation “in the sense of Article 249 of the [Treaty establishing the European Communities]” (major part of the measures adopted within the First Pillar) “at the end of 2002 was 97,000 pages of the Official Journal.” *Communication...*, supra note 28, p. 5. The *2000 Regular Report from the Commission on the Czech Republic's Progress towards Accession* mentions 60,000 – 70,000 pages of the primary and secondary binding legislation. *2000 Regular Report...*, p. 100.

²⁷³ *Communication...*, supra note 28.

Obviously, it would have been impossible in 1998 or 1999 to create a definitive list of all EU legislation to be translated by any specific date of accession, since there followed another five to six years of future legislative development in which the EU would adopt and abolish many legislative acts. On the other hand, it might have been feasible for the European Commission to provide a strategic evaluation and recommend legislation that it considered to be crucial and unlikely to be completely abolished within the next few years and, at the same time, to identify legislation that would probably be abolished or significantly modified within the same time frame. The screening exercise, to the surprise and dismay of the domestic legislative experts and the displeasure of the Center, provided only an overview of EU legislation, rather than a full list of legal norms.²⁷⁴

Because of the ignorance of the Center regarding the life expectancy of any single piece of legislation, some resources of the Center were inevitably wasted in the translation of legislation that no longer existed as of the date of accession in the form that the Center had earlier translated. In some instances, one has to hope that these translations might have played some role in a preliminary alignment of Czech laws with EU legislation. In other instances, the waste might have been prevented if the Directorates-General of the Commission had been better coordinated and willing to share their legislative intentions with their colleagues in the applicant countries.

The process of translating EU legislation into the Czech language was lengthy and required the participation of numerous players. It was divided into three consecutive stages. In the first stage, the EU text was provided to a translation agency for initial translation. The quality of the agency's translations varied significantly; the majority of translators working for the agency had no legal background, and much of the terminology that they applied did not reflect correct Czech legal usage. Therefore, the next stage—the so-called revision stage—was designed to clean up and polish the legal and subject-matter terminology of the translation.

²⁷⁴ See also, for instance, Kohout, Alexej, *Některé poznatky z uplatňování legislativních metod a technik k harmonizaci práva ČR s právem EU*, *Právník*, No. 11, 2002, p. 1168.

In the revision stage the translations were edited by the experts at the Center, primarily lawyers, economists and linguists, all of whom were working in a minimum of three languages (Czech and two official EU languages)²⁷⁵ and focusing on the usage of legal terminology in the texts. Throughout this stage the texts were shared with coordinators in the departments of the Cabinet, who were assigned to contact the relevant experts of their respective departments and collect possible objections to the usage of terms related to the subject-matter of the text. This process was a very time-consuming activity for the departments without any increase in dedicated human resources for the task; as a result, the intensity and dedication devoted to this activity varied by department. At the end of the revision the coordinators were responsible for approving the revised text.

The third stage, the finalization of the documents, took place in the EU institutions, where the texts were once again checked by multilingual experts. The major problem in the third stage was that the coordinator from the Czech Cabinet department was not formally (and was rarely even informally) a participant in the finalization stage; therefore, the final text sometimes diverged from the version agreed upon within the department. The fact that the text emerging from this lengthy process sometimes did not satisfy the experts who had worked on the subject-matter terminology within the Cabinet department led—quite understandably—to pessimism among these experts regarding the process of translation and a reluctance to cooperate with their coordinator and the Center in the future.

The process of finalizing the pre-accession EU legislation was, in fact, not finished on accession day,²⁷⁶ it took until the beginning of 2005 before the finalization was completed.²⁷⁷ Throughout the process of preparations for EU membership, the translation progress usually lagged behind the legislative alignment process, meaning that experts at the Center and in the Cabinet departments often had to use existing Czech aligning

²⁷⁵ When translating, and thus largely interpreting EU legislation, it is often indispensable to work with several language versions. See, for instance, Senden, *supra* note 69, pp. 90 ff.

²⁷⁶ *Česko nestíhá přeložit zákony EU*, March 17, 2004, http://zpravy.idnes.cz/domaci.asp?r=domaci&c=A040316_220055_domaci_fri.

²⁷⁷ Interviewee A.

legislation to revise the translations of EU laws and to adjust their terminology to the current Czech usage. Only the February 2003 finalization of primary EU law occurred before the May 2004 date of accession.²⁷⁸

While working on the alignment with EU laws, the translators' access to the jurisprudence of the Court of Justice of the EU was just as important as access to the texts of the laws;²⁷⁹ however, the translation work on the jurisprudence had been delayed even more than the work on EU laws. At the time of accession, only about one-third of the 870 key decisions selected by the Court for translation had already been translated into the Czech language; these translations were of varying quality and still had to undergo a lengthy revision and finalization process. As for the other two-thirds of the decisions, in April 2005 the Center selected an agency to translate the remainder of the documents; it was estimated that the remaining translations, revisions and finalizations of the Court's decisions would be finished sometime in 2007.²⁸⁰ Considering the importance of the Court's jurisprudence, the fact that its selected key decisions were still unavailable, not only to the Czech-speaking general public, but even to legislative experts, judges, and other legal professionals on the day of accession, is rather distressing.

As this section documents, the procedure involved in the translation of EU legislation was very lengthy and complicated and required the active participation of various actors. It was unfortunate that the translations were not available to the legislative experts at the time they had to offer solutions for alignment. The fact that the legislative departments often lacked the resources to deal with texts in foreign languages clearly contributed to the departments distancing themselves from the alignment issue, as I discussed in Chapter 3.

²⁷⁸ Kolbabová, *supra* note 77, p. 7.

²⁷⁹ See, for instance, the comment in Tröster, Petr, *Sbližování českého pracovního práva s právem Evropské unie*, *Právník*, No. 10 – 11, 1997, p. 841.

²⁸⁰ Interviewee A. The selected decisions represent about 15,000 – 20,000 pages. Kolbabová, *supra* note 77, p. 7.

PUBLICATION OF EU LEGISLATION IN THE CZECH LANGUAGE

The matter of publication of EU legislation is very important to an analysis of the domestic legislative process, which requires these texts, preferably in the language in which the legislative experts operate. The importance of accessibility is further elevated because some of the instruments are expected to be directly applicable independently of domestic legislation. In this section I discuss the level of availability of published EU legislation, contemplate the consequences that could result from the delayed publication of EU legislation and reveal the actual situation of publication in the Czech language.

The lack of access to any legislation that is supposed to be effective in the territory of the Czech Republic in the official language (Czech) would be detrimental not only to legislative alignment but also to legal certainty in general, for which “accessibility of legislation and clarity of legal norms and also clarity of the legal order as a whole”²⁸¹ are preconditions. In 1979 the Court of Justice of the European Communities emphasized that “a fundamental principle in the [EU] legal order requires that a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it.”²⁸²

In the case of EU legislation there were two distinct levels of accessibility in the applicant countries prior to their EU membership. At one level there is EU legislation that will be directly applicable; thus its availability to the public at large prior to its coming into force is unquestionably essential. At the second level there is a body of EU legislation that is not directly applicable and requires transposition into the domestic laws of each country. One could argue that at the second level it is more important to secure timely accessibility of transposing domestic legislation than it is the wording of its EU “trigger.” However, given the direct effect that some of these indirectly applicable EU instruments have been awarded by the jurisprudence of the Court of Justice of the

²⁸¹ Knapp, Viktor, *Teorie práva*, C.H.Beck, Praha 1995, pp. 206 – 207.

²⁸² Judgment of the Court of Justice of the European Communities of January 25, 1979, in *A. Racke v. Hauptzollamt Mainz*, C-98/78, point 15.

European Communities, their accessibility within a reasonable period prior to EU enlargement cannot be underestimated.

The consequences associated with a delay in the publication of EU legislation could be significant. It is possible that the lack of published Czech versions of EU legislation could provide a defense to anyone who would be expected to act based on such legislation. Furthermore, the fulfillment of obligations stemming from unavailable EU legislation could be refused because any directly applicable EU legislation would be ineffective if it were not available to its addressees. Another problem would exist if a domestic alignment were scheduled to become effective on the day of accession and adapt the domestic legal order to the direct application of EU legislation. Such an arrangement would not be viable if the directly applicable instrument were missing.

The question is whether lawsuits could be brought against the state for not timely securing EU legislation in a timely manner. Damages might be claimed for a third party's refusal to follow unavailable EU legislation or for the impossibility of relying on other EU instruments with direct effect if those EU instruments were not available in time to provide possible arguments in litigation.

Initially, the translations of EU legislation were available solely to the experts in the Cabinet departments who used the ISAP database²⁸³ to access the texts. In 1999 the database website was also made accessible to the public on the Cabinet's website,²⁸⁴ but only the translations that had been approved after the revision stage were published on the website. Later, the translations began to appear on the official EU Eur-Lex database website, but their publication was conditional not only on the finalization of the Czech version in the EU institutions, but also on the finalization of all other new language versions. Therefore, even when the Czech translation was ready its publication was delayed while waiting for all eight of the other new language versions to be finalized so

²⁸³ On ISAP see supra p. 44.

²⁸⁴ *Usnesení vlády České republiky ze dne 15. září 1999 č. 946 k zajištění průběžného zveřejňování revidovaného českého znění právních předpisů Evropského společenství.*

that all nine new versions could be published simultaneously on the publicly accessible website.

With regard to the Czech public, the crucial problem of the publication of pre-accession EU legislation on the internet was the fact that Czech legislation was (and still is) officially published only in paper form – internet versions are not official.²⁸⁵ With EU involvement prior to accession, two standards of publication seemed to be applicable, which was definitely detrimental to the raising of the legal consciousness of the public.²⁸⁶ It may also be disputed whether in a country where the population has limited access to the internet²⁸⁷ (and where the majority of the older generation has no computer skills at all),²⁸⁸ publication on the internet offers sufficient access to legislation. In addition, it should be noted that for a long time the Eur-Lex website did not offer a Czech language navigation page, again limiting the access of Czech users to translations.

The Cabinet dealt with the criticism of low accessibility by instructing the country's district offices ("okresní úřady," or local state administration offices) to provide paper copies of translations—printouts from the internet—to interested parties.²⁸⁹ However, it is difficult to collect satisfactory evidence about how extensively this service was used; due to public administration reform, district offices were abolished as of December 31, 2002, and their responsibilities were divided among local and regional administrations. The fact is that the awareness of this information channel was rather limited even among civil servants; the best illustration of the undesirable situation may be the fact that several months after the accession of the Czech Republic to the EU, a prominent member of the

²⁸⁵ *Zákon č. 309/1999 Sb., o Sbírce zákonů a Sbírce mezinárodních smluv.*

²⁸⁶ On complaints by Czech businessman about the lack of a paper version of EU legislation see *Evropské normy česky na internetu*, May 5, 2004, <http://euractiv.cz/cl/38/158/Evropske-normy-cesky-na-internetu>.

²⁸⁷ According to the Czech Statistical Office, in 2001 only 9.3% of households in the Czech Republic had access to the internet. Czech Statistical Office, [http://www.czso.cz/csu/edicniplan.nsf/t/09004626D3/\\$File/30060104.pdf](http://www.czso.cz/csu/edicniplan.nsf/t/09004626D3/$File/30060104.pdf).

²⁸⁸ According to the Czech Statistical Office, in 2001 only 1% of the households of retired persons had access to the internet and only 3.6% owned a computer.

[http://www.czso.cz/csu/edicniplan.nsf/t/09004626D3/\\$File/30060104.pdf](http://www.czso.cz/csu/edicniplan.nsf/t/09004626D3/$File/30060104.pdf).

²⁸⁹ *Národní program přípravy České republiky na členství v Evropské Unii 2000*, p. 37; *Usnesení vlády České republiky ze dne 15. září 1999 č. 946 k zajištění průběžného zveřejňování revidovaného českého znění právních předpisů Evropského společenství*, point III.3.

Cabinet's Legislative Council asked her colleagues where EU legislation could be located.²⁹⁰

Whatever disadvantages publication on the internet might present, it was the fastest way to facilitate some level of access to Czech translations of EU legislation. One might argue that this access was sufficient prior to the date of accession to the EU, but after the date of accession anyone could legitimately contest the legal effect of an EU instrument that was not published after accession in a hardcopy version of the *Official Journal*.²⁹¹ The hardcopy version of the pre-accession EU legislation was provided with great delay after the date of accession,²⁹² apparently, only 6,000 copies were published in the Czech language.²⁹³ According to the EU Publications Office, the so-called *Special Edition* of 85,000 pages in 217 volumes takes up about ten feet of shelf space,²⁹⁴ posing a potential problem to anyone keen on acquiring a paper version of the pre-accession legislation. More than the space problem, however, most in the post-communist countries would be discouraged by the price of the *Special Edition*, which was set at € 2,000.

Since the day of accession, May 1, 2004, the Czech language versions of EU legislation have been published regularly and simultaneously with the versions in the other 19 languages of the EU in the *Official Journal* of the EU, both on the internet (on the Eur-Lex website)²⁹⁵ and in hardcopy version. The Center does not appear to be fully satisfied with the quality of the new translations that the EU institutions are now in charge of and

²⁹⁰ Interviewees F and I suggested that the quality of work of the Legislative Council decreased after the Council was reorganized in September, 2004. However, this issue does not fall within the scope of this thesis.

²⁹¹ Mlsna, Petr, *K nepublikování předpisů práva ES/EU v českém jazyce v Úředním věstníku EU*, Právní zpravodaj, No. 9, 2004, pp. 6, 9.

²⁹² "The Special Edition of the Official Journal in the languages of the new Member States will be published gradually between May 1, 2004 and mid 2005." <http://europa.eu.int/eur-lex/en/accession.html>.

²⁹³ Interviewee A.

²⁹⁴ *Newsletter*, the Office for Official Publications of the European Communities, No. 2/2004, <http://publications.eu.int/shared/docs/opoce/2-2004-en.pdf>; *Zvláštní vydání 2004*, <http://europa.eu.int/eur-lex/lex/JOEdSpecRep.do?year=2004&ihmlang=cs>.

²⁹⁵ <http://europa.eu.int/eur-lex/lex/JOIndex.do?ihmlang=cs>.

that are often relegated solely to translation agencies or to individuals without prior experience or knowledge of the preexisting methodology developed by the Center.²⁹⁶

Therefore, although translation and publication issues may seem to be technical in nature with no real legal consequence, it should be apparent that the nonexistence of a Czech version of EU legislation prior to the accession date severely impeded its accessibility to the Czech public, including legal professionals. Some Czech officials repeatedly emphasized the importance of the timely production of the Czech version of the legislative texts and appealed to the EU to prioritize this matter.²⁹⁷ The Ministry of Justice was especially concerned about judges being offered an adequate opportunity to study EU legislation and being able to use EU Court of Justice jurisprudence upon accession.

In retrospect, it seems that the importance of the translation and publication issues were largely underestimated by the EU because of its previous enlargement experiences where language was not a problem. The current head of the Center, who has served in this position since the creation of the Center, believes that the translations could have been successfully finished even if work had begun later than 1998 if the EU had had a clear system and a reliable list of priorities. On the Czech side, it would have helped if the Center had been staffed with more experts, including in-house translators, which would have streamlined and improved the translation process. However, the apparent inability of the Commission to set a clear list of priorities has been viewed as the major obstacle to translation progress.²⁹⁸

Therefore, even if we do not see any litigation arising from the lack of access to hardcopy versions of pre-accession EU legislation before 2005,²⁹⁹ we should be aware of the handicap under which the Czech public entered the EU. And, more importantly, we

²⁹⁶ Interviewee A. See also, for instance, Varadinková, Milena, *Rozumí tady někdo bruselštině?*, *Laissez Faire*, No. 12, Praha, 2005, <http://petrmach.cz/docs/LF12-2005.pdf>.

²⁹⁷ See, for instance, *Česko nestíhá přeložit zákony EU*, March 17, 2004, http://zpravy.idnes.cz/domaci.asp?r=domaci&c=A040316_220055_domaci_fri.

²⁹⁸ Interviewee A.

²⁹⁹ Mlsna, *supra* note 291, p. 9.

should realize that this handicap was shared by individuals involved in the legislative process who were expected to have the most up-to-date knowledge of EU law and to prepare the Czech legal order to function smoothly once the country became a member of the EU.³⁰⁰

³⁰⁰ “The understanding of EU matters and its projection into legislative processes was determined by then-current language illiteracy.” Interviewee L.

APPENDIX B

METHODOLOGICAL NOTES

STATISTICS

The statistics that I present in this thesis are based on the data that I collected from the following sources:

- Collection of Laws, 1995 – 2005, available at the webpage of the Ministry of the Interior of the Czech Republic, <http://www.mvcr.cz/sbirka/>,
- documents of the Chamber of Deputies, available at the webpage of the Chamber, <http://www.psp.cz/docs/>.

I inserted the data from these sources manually into a database with several variables related to draft laws. With respect to regulations and decrees, and due to time constraints and the restricted availability of documentation, the data used in the thesis are limited to the regulations and decrees issued in 1995 – 2004 and do not concern draft regulations or draft decrees.

The statistics cover the period from the Czech Republic's association (February 1, 1995) until accession (May 1, 2004). Only Figure 2 presents data that extend beyond the accession date: Figure 2 (supra page 30) shows the numbers of laws approved according to their initiator. The laws are listed according to the date when the drafts were submitted to the Chamber; in some instances, however, these laws were ultimately approved after the accession date.

The statistics on draft laws and enacted laws have limitations. For disclaimers regarding the statistics on draft laws and enacted laws, see supra pages 54 ff.

Interesting data on the numbers of EU laws that the Czech legislative process faced in the examined period originate from Palivec's 2005 article.³⁰¹ Ing. Jiří Palivec, a senior official of the Department of Compatibility with EU Law (in the Office of the Cabinet), based his article on the data that he obtained from the ISAP database,³⁰² which is the major Czech data source on legislative alignment with EU requirements.

INTERVIEWS

Even though this project draws on my personal professional experience, my professional expertise is certainly not sufficient to cover all the myriad aspects of the issue that the project addresses. In fact, the project could not exist without the contributions of several former colleagues who contributed their thoughts and experiences – in some cases, experience acquired over several decades.

Much valuable information and many leads came from the eighteen interviews that I conducted in Prague in April and May 2005. In addition to those who provided personal interviews, six experts gave written answers to my questions. The interviews were of a qualitative nature, open-ended and focused on the experiences of those interviewed with the legislative process as well as their perception of the European Union's influence on the process in the period studied. For the purposes of the thesis, the interviewees and other respondents are referred to by capital letters ("interviewee A," "interviewee B" etc.).

When selecting the respondents I drew on my experience from several Czech institutions, but in doing so I did not limit my choice to my circle of former colleagues. In particular, I searched for state officials, civil servants and politicians who had been involved in the legislative process for many years and had an opportunity to observe its development both before and after the partition of Czechoslovakia, before and after the Europe Agreement came into force to begin the preparations for European Union membership,

³⁰¹ Palivec, Jiří, *Kvantifikační analýza procesu aproximace práva České republiky s právem Evropských společenství*, *Právník* No. 1, 2005, pp. 29 – 65.

³⁰² On ISAP database, see *supra* p. 44.

and before and after the Czech Republic's entry into the European Union. At the same time I strove to achieve a diversity of perspectives by interviewing individuals experienced in different stages of the legislative process. My previous governmental work and familiarity with the environment and its problems assisted me in locating and contacting relevant experts.

Since I wished to remain as apolitical as possible in my project, I purposely ignored political affiliation as a criterion for selecting respondents. A paramount criterion for a respondent's selection was his or her active involvement in the legislative process, experience with the preparations for European Union membership and knowledge of the development of the human resource policies in the Czech administrative institutions.

The interviews were conducted at the time of a crisis in the Cabinet that resulted in the resignation of the Prime Minister of the Czech Republic.³⁰³ In my interviews I deliberately avoided asking questions related to the current political situation, and as far as I could judge, my respondents did not seem to be influenced by the political scene at that time. I believe that their answers would likely have been the same even if the political climate had been less stormy at the moment. It seemed, rather, that many were relieved that my questions were of a "technical" nonpolitical nature, which permitted them to talk about their fields of expertise.

Based on my knowledge of the Czech social and political environment I abstained from using an audiotape or video recorder during the interviews. In a country like the Czech Republic, infamous for the nefarious practices of the secret police in the past, a recording device can create undesired hostility detrimental to an interview and therefore to the research. I have no doubt that many experts would have consented to a recorded interview, but I am also certain that it would have also imposed significant self-censorship on their comments.

³⁰³ On May 13, 2005, the Chamber of Deputies of the Parliament of the Czech Republic voted by a close majority of 101 votes to express confidence in the new cabinet of Prime Minister Jiří Paroubek.

In contrast to non-Czech researchers, I had the advantage of being able to approach any expert, regardless of whether they spoke any foreign (non-Czech) languages. Foreign language limitations, as elementary as it may sound, can be crucial in research that makes extensive use of interviews. A foreign researcher's selection of experts for interviews is usually limited to a narrow population who are fluent in foreign languages. In the former communist Czechoslovakia the only officially promoted foreign language was Russian, and even though schools offered lessons in other foreign languages and the State Language School offered language courses to the public as well, the knowledge of Western foreign languages was extremely limited due to the unavailability of opportunities to practice these languages.

It is irrelevant to speculate whom foreign researchers end up approaching when they must take language limitations into account.³⁰⁴ What is important is that Western language knowledge is a variable that identifies a pool of Czech state officials whose ideas and expertise might not be representative of the general domestic expert population. Even 16 years after the fall of Communism, the language barrier still circumscribes a certain category of people, usually oriented towards the international arena and knowledgeable about international life, foreign customs and the expectations of foreigners towards the Czech Republic.³⁰⁵

³⁰⁴ In the case of the older generation, in some instances, foreign researchers may end up approaching people who were vested in Western languages due to their affiliation with the communist regime. The extent to which that depreciates the information provided probably depends largely upon the subject of a researcher's interest.

³⁰⁵ When I held the position of Head of the European Union Law Unit at the Ministry of Justice of the Czech Republic, I was contacted several times by foreign students and experts preparing different projects on the Czech Republic. It was clear to me that the information I was able to provide was much different from the information my colleagues with 30 years of state service experience could have provided. The language issue might have been even more detrimental in the case of legislative experts in a post-communist country; until recently, it was not common for experts in the Czech legislative departments to have a command of any Western foreign language, as that was a skill considered unnecessary in such departments until the late 1990s.

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