

A Defective Directive Implementation into National Legal Framework – Analysis of the CJEU Case Law 2017-2021

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Abstract. An adoption Better Regulation Programme had introduced many substantive institutional and procedural changes (European Commission, 2017, p. 1-2). In recent years, the European Commission monitors more rigorously with regard to a directive implementation process. The analysis of neoteric case-law of the Court of Justice of the European Union testifies increasing number of infringement proceedings against Member States due to a defective directive implementation into national legal framework. The main aim of article is identification and assessment of the cause defective directive implementation based on the Court of Justice of the European Union case law analysis. Furthermore, the theoretical aspects of implementation, which is an indirect model of legislation and the infringement proceedings according to art. 258 Treaty on Functioning of the European Union was presented in detail. An identification of a deviation has practical significance for better regulation in the European Union. The carried analysis does not have only theoretical significance, though it raises the issue of apparent implementation due to *goodness-of-fit* hypothesis.

Keywords: defective implementation, directive, the Court of Justice of the European Union, complaint of the European Commission.

JEL Classification: K10, K39

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1. AN ESSENCE OF IMPLEMENTATION

An effective directive implementation is an obligation imposed on Member States pursuant to art. 291 of the Treaty on Functioning of the European Union (The Treaty on Functioning of the European Union, 2012) and loyalty principle based on art. 4 pt. 3 of the Treaty on the European Union (art. 4 pt. 3 of the Treaty on European

Union, 2012, hereinafter: TUE). Furthermore, the lack of legal definition of implementation requires presentation of the Court of Justice of the European Union (hereinafter: CJEU) interpretation (Commission v Federal Republic of Germany., 1991, pt. 6; Commission v Grand Duchy of Luxembourg., 1995, pt. 22). The primary objective of the implementation is a deployment of the European provisions into national legal framework (Galewska, 2007, s. 71). In the one of the substantial case law, the CJEU has indicated that law-making, swap and abrogation constituted an implementation (Commission of v French Republic., 2002, pt. 38). Whereas, according to the federal law, any efforts undertaken by the national authorities to “provide effective functioning of European provision in national legal framework” is an implementation (Domańska, 2014, p. 44; Kubuj, 2001, p. 18).

Whereas an identification of degrees falls within the scope of effective implementation. According to Domańska, the bodies responsible for an effective implementation ought to differentiate and indicate to fulfil obligation under art. 288 pt. 3 TFEU. However, the means of implementation was not regulated uniformly. It is an exclusive competence of the Member States of the European Union (hereinafter: EU). *Ad exemplum*, in France, a governmental regulation concerning principles of directives implementation had been applied. Where, in Germany, there are provisions at ministerial grade. *A contrario*, in Poland and Spain, there are not binding provisions. However, it regulates some guidelines drawn up by experts (Barcz, 2003, p. 9–15; Czapliński, 2003, p. 179). According to the opinion of Advocate General in the case law, C-304/08 *Centrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH*, the Court held, that implementation does not require literal reconstruction of directive provision necessarily (*Opinion of Advocate General Trstenjak delivered, Centrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH.*, 2009, p. 76). The directive objective aims at approximation of legislation in the Member States (Kurcz, 2004, p. 46–47; Mikša i in., 2021, p. 2). An achievement of that objective is a basis of legal certainty (lat. *ius certum*). It is particularly relevant, that legal and natural person may take advantage from clear and precise legal situation, which enable them to ascertain extent of their rights and obligations in order to adduces on implemented provisions before national common courts (*Commission of the European Communities v Italian Republic*, 2001, pt. 21-22).

The wording used in directives like to provide or to achieve an effect constituted as an overall objective. While, a duty to transform primary objectives into operationalized objectives bear hard on national legislator (Maśnicki, 2015, p. 112). The consequence of an inappropriate identification of objectives is an ineffective transposition. Furthermore, it is assumed, that national legislators will strive to provide a legal certainty. Domańska presented accurate theory, according to which, the overall objective ought to be adjusted to institutional and procedural structure. Furthermore, an implementation should be completed before date, which is indicated in the directive, unless otherwise provided. As a general rule, the time limit shall be 3 years.

2. NOTIFICATION OF TRANSPOSITIONAL MEASURE

The final phase shall include notification of “transpositional measures” to the European Commission. It should be accomplished before running of period (Maśnicki, 2015, p. 113; hereinafter: EC). The art. 260 pt. 3 of the TFEU is a basis of the notification procedure. According to Bogdanowicz research, the art. 260 pt. 3 of the TFEU had been introduced into European legal order to motivate Member States to timely transposition (Bogdanowicz, 2016, p. 14). An absence of notification has two-fold consequences. First of all, the EC may bring an action against Member States due to failure to fulfil notification obligation of transposition measure and designate lump sum amount or periodic forfeit pursuant to art. 260 pt. 3 of the TFEU. Secondly, the directive provisions result in direct effect called as “indirect effect”, too (Samuiltytė-Mamontovė, 2014, p. 64–66). According to settled case-law with excluding of several judgements (see: *Unilever Italia SpA v Central Food SpA.*, 2000, pt. 35 ; *CIA Security International SA v Signalson SA and Securitel SPRL*, 1996) the directive provisions may be adduced between private parties (*Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, 1984, pt. 27). However, the criteria

of direct application ought to be met. The EU norm have to be accurate, unconditional and particular pursuant to *Van Gen en Loos* case law (see: *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, 1963).

The EC may also impose fine taking into consideration seriousness of infringement and amount of mandate in the European Parliament out in order to determine amount of the fine. The fine rate is determined the Communication of the Council and Parliament of the European Union (Communication from the Commission — Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice of the European Union in infringement proceedings, 2019). An obligation to make payment is successful on the date referred to TSUE judgement.

3. THE EC SUPERVISION BASED ON ART. 258 TFEU

The organization aspect is realized exercised supervision *ex officio* by the EC on the basis of art. 258 of the TFEU. The EC is a guardian of Treaties. With regard to the directive implementation, the EC investigates compliance transpositional measure with directive provisions. The introduced Electronic System of EU law Transposition supports monitor compliance through convergence table publishing by the national governments.

Originally, the EC appeals through letter of formal notice to the national government for explanation occurring reasons just after recognition of guilty Member States failure to fulfil obligation. It may be finalized by plea deal or bring a formal action. In the pre-trial proceedings, the EC calls for remove the effects as a rule within 2 months. However, if Member States fails to fulfil its obligation, the EC issues a justified opinion and allows for submit its comments. When, the Member States does not follow the opinion, the EC may bring an action to the CJEU. However, in the event of removal effect of failure obligation, the EC withholds the grievance. The EC, bring an action to the CJEU, when the Member States does not notice, too.

It enables the EC for inspection of compliance directive provisions with transpositional measure. The EC examines timelessness of transposition and designates areas, which needed to be changed.

4. A DEFECTIVE DIRECTIVE IMPLEMENTATION IN THE YEARS 2017-2021

The CJEU jurisprudential *acquis* states most frequent irregularity in regard to directive implementation into national legal framework. The amount of complaints is relatively high taking into account case law heard by the CJEU. However, not every failure to fulfil obligation is a further subject of TSUE review request. The literature on the subject draws attention on selective initiation of proceeding pursuant to art. 258 CJEU (Steunenberg, 2010, p. 12). B. Steunenberg is a prominent founder of that approach, in quantitative research had proved the EC is “the guardian of the treaties”, when the national legislators and the EC have divergent political preferences and it is one of cause of a defective implementation into national legal framework (Thomson i in., 2007, p. 688). In some cases, the EC is a “silent witness” and approves for some deviation in form of transpositional measures from agreed EU policy (Steunenberg, 2010, p. 11). This result from the fact, that some policies in frame of implementation are highly favored by the EC.

A delay in directive transposition is one of most frequent reasons of a defective directive implementation into national legal framework. According to the EC Report, a delay in directive transposition has been on the increase in 2017-2021. Compared with 2017s, delays implementation has increased by 37 %. As per, report submitted in 2017, the EC had announced introduction anti-inflation measure (Directorate General for Internal Policies, 2017, p. 28). Despite, an amount of directives has been reduced, the amount of infringement increases. According to the CJEU,

taken into consideration literal interpretation, transposition requires positive activities in the shape of an adoption of executive act published in Official Journal (*Commission v Kingdom of Spain*, 1997, pt. 31-33; *European Commission v Ireland*, 2020, pt. 13; *European Commission v Republic of Poland.*, 2015, pt. 49).

Table 1: Amount of the infringement proceedings



Table 2: Total transposition delays

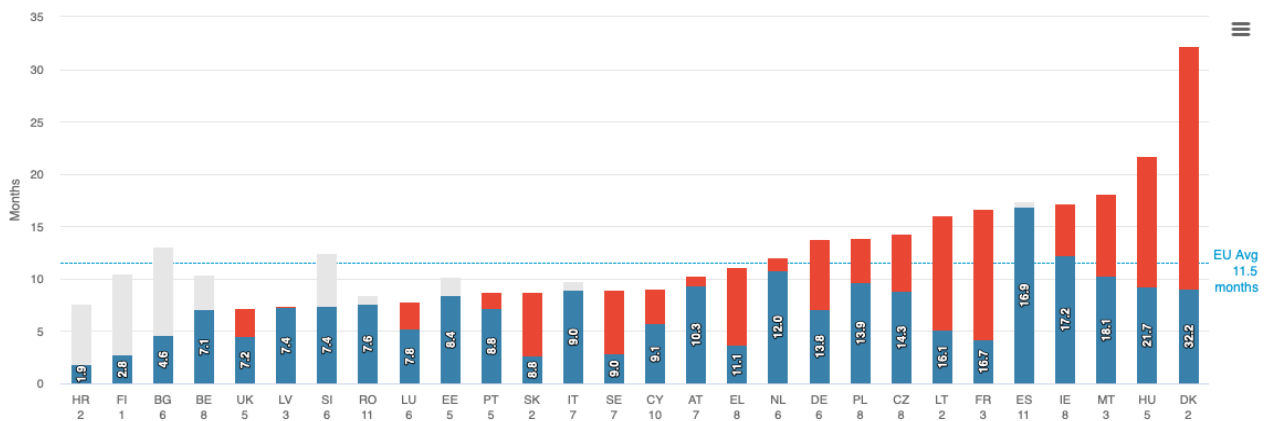
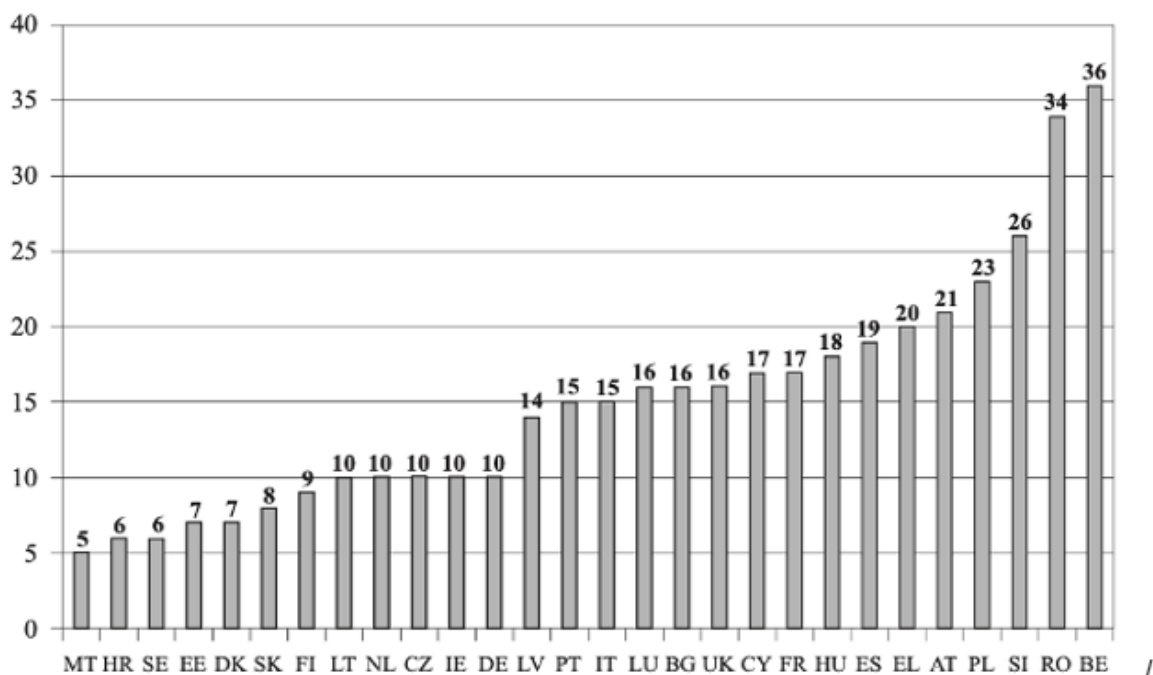


Table 3: Amount of infringements procedures due to a delays transposition in 2014



In the 2019, the average period of directive implementation amounts 11 ½ months according to the submitted data (Kaeding, 2006, p. 235). Furthermore, states, which implementing directives in a timely manner in 2014, five years later demonstrate a delay implementation.

According to the TSUE jurisprudential acquis, every tenth complaint due to failure to fulfil obligation concerns a delay in a directive transposition. Most of states, does not fulfil the obligation after the deadline prescribed by the EC (European Commission v United Kingdom of Great Britain and Northern Ireland, 2018, pt. 17; European Commission v Kingdom of Spain, 2021, pt. 66; European Commission v Federal Republic of Germany., 2018, pt. 108).

An absence of notification transposal measures is the basis for bring an action against Member State, which failure to fulfil its obligations (European Commission v Republic of Slovenia, 2018.; European Commission v Republic of Slovenia, 2018; Commission v Roma, .; European Commission v Kingdom of Spain, 2019; European Commission v Romania, 2018.; European Commission v Kingdom of Spain, 2018; European Commission v Kingdom of Spain, 2021; European Commission v Italian Republic, 2019, pt. 28-30; European Commission v Republic of Slovenia, 2021; European Commission v Republic of Slovenia, 2021, pt. 29). Attention is drawn to the *goodness-on-fit* hypothesis in the literature on the subject (König & Luetgert, 2009, p. 166–167). The hypothesis demonstrates that compliance cost is higher along with the increased adoption pressure (Stewart, 1981, p. 1361). Compliance costs in that sense are defined as a any expenditure that must be incurred by the state to implement directive effectively (see: Ciavarini Azzi, 1985). There are divergent preferences between national legislation and EU under conducted research hitherto (König & Luetgert, 2009, p. 166). Moreover, an administration culture governs on a delay in transposition (Ibidem, p. 182). A commitment and independence of administrative body has significance.

An implementation going beyond the minimum necessary in order to comply with directive's objective and an adoption in violation of directive provisions are frequent basis for bring an action against Member State, which failure to fulfil its obligations. The CJEU case law of 17 December 2020 is one of the prominent example of implementation going beyond the minimum necessary (European Commission v Hungary, 2020). Hungary lapsed from effective directive implementation through implementing of the provisions, which imposed requirements limiting accepts of application for international protection. The Hungarian statute permits filling an application in two transit areas - Rösztka i Tompa (European Commission v Hungary, 2020, pt. 71). Furthermore, implemented detention system of asylum seekers were incompatible with art. 8, 9 and 11 of Directive 2013/32/EU (Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, 2013). According to the common asylum policy, the primary objective is to introduction an area of freedom, security and justice for people who are in peril and are looking for international protection (art. 24 pt. 3 of Directive 2013/32/EU). The implementation of in-house assumptions constituted as a basis of the complaint brought by the EC. A defective implementation in tax law matter in the Republic of Austria has privileged legal position of tour entrepreneurs, too. The tour businesses were excluded from particular value add tax procedure (European Commission v Republic of Austria, 2021, pt. 1).

It is worth paying attention to the significance of operationalized objectives at implementation going beyond minimum necessary, again. A wrongful identification of *ratio legis* of the European legislator is consequence of aforementioned violations. Furthermore, it is needed to determine method of harmonisation. It states a phase aimed at realization of determined objective. An orderly determination of harmonisation method allows for designate unfettered boundary of directive implementation into national legal framework. In the doctrine, there is division of implementation into vertical, horizontal, partial, overall and optional one. According to the Osiejewicz, the horizontal harmonization applies to the regulation with lower degree, where, there is adoption of a common provisions for one particular subjective issue (Osiejewicz, 2016, s. 62–63). Where, the vertical harmonization is

more detailed in comparison to the vertical harmonization. It regulates any activities concerning the relations the EU standards and the national law. The minimal harmonization commits to Member State to implementing minimal standard determined by the directive. However, the partial harmonization regulates some civil and criminal norms. Whereas, the optional harmonization right of option left to Member State whether will apply European standards or apply national one. An abandonment implementation of minimum standards constitutes is an absolute basis for bring an action against Member State, which failure to fulfil its obligations pursuant to art. 258 TFEU.

It is worth to highlight that number of infringement proceedings decreased due to a defective interpretation of directives provisions, in years 2017-2021. The CJEU did not settle any complaint referring to a defective interpretation. Furthermore, the EU jurisprudence did not provided definition of a defective implementation. However, according to the polish jurisprudence, a defective interpretation is an inappropriate norm reconstruction (Wyrok Naczelnego Sądu Administracyjnego z dnia 5 kwietnia 2016 r., 2016). It is worth to highlight that CJEU determined various method of interpretation. Briefly, in that sense it a defective literal interpretation. In the preliminary ruling, the CJEU rules in the field of unclear legal definition. The judgement in the case *Eco-Emballages SA and Others v Sphère France SAS and Others and Melitta France SAS and Others v Ministre de l'Écologie, du Développement durable et de l'Énergie* of 10 November 2016 (*Eco-Emballages SA and Others v Sphère France SAS and Others and Melitta France SAS and Others v Ministre de l'Écologie, du Développement durable et de l'Énergie.*, 2016), the CJEU had explained meaning of the word packaging in light of Directive 94/62/EC (European Parliament and Council Directive 94/62/EC on packaging and packaging waste, 1994). The packaging shall mean “product, whatever the nature of the materials it is composed of, intended to be used for the containment, protection, handling, delivery and presentation of goods, from the producer to the user or the consumer” (*Eco-Emballages SA and Others v Sphère France SAS and Others and Melitta France SAS and Others v Ministre de l'Écologie, du Développement durable et de l'Énergie.*, 2016, pt. 4). Pursuant to art. 543 of French Environmental Code, the implemented regulations are taking into account an obligation to limit waste generation. Despite, the directive 94/62/EC was implemented into French legal framework, there were doubts still. The Tribunal de commerce de Paris and Conseil d'État requested for preliminary ruling, whether role cores in shape of “rolls, tubes and cylinders around which flexible material, such as paper or plastic film is packaging (*Eco-Emballages SA and Others v Sphère France SAS and Others and Melitta France SAS and Others v Ministre de l'Écologie, du Développement durable et de l'Énergie.*, 2016, pt. 20).

An incorrect technical classification is basis for bring an action against failure an obligation pursuant to art. 258 TFEU, too. Ad exemplum, on 25 January 2018, the Republic of Czech has been found guilty in infringement proceedings pursuant to case law *European Commission v Czech Republic* (*European Commission v Czech Republic*, 2018, pt. 55), The Czech Republic has implemented a wrongful technical classification to the Law No 361/2000 on road transit (org. cz. Zákon č. 361/2000 Sb. o provozu na pozemních komunikacích) pursuant to art. 4 pt. 1 and art. 4 pt. 4 d) and f) Directive 2006/126/EC (art. 4 of the Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences). In the opinion of the Advocate General the failure of differentiation between C/C1 and D/D1 category going to circumvent the application of Directive 2006/126/EC. Furthermore, through a defective implementation into law on road transit, the Republic of Czech has narrowed definition of the category D1 and breached art. 4 of the Directive 2006/126/EC.

Furthermore, a report submission, which is an obligation on directive is basis for bring an action under art. 258 TFEU. The Hellenic Republic failure an obligation to submit a report on cost-optimal levels (*European Commission v Hellenic Republic*, 2017) in a due time determined in Directive 2010/31/EU (Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings, 2010). Failure to notify a waste management plans defined by art. 30 pt. 1 and art. 33 pt. 1 Directive 2008/98/EC (art. 30 and 33 of the Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, 2008) is a defective implementation in light of CJEU case law (*European Commission v Kingdom of Spain*, 2019, pt. 21)

The last category of a defective implementation involves failure to implement and therefore maintaining the national material and procedural regulations, which are inconsistent with directive provisions. The CJEU declared the Republic of Germany guilty through maintaining national legislation on “fixed tariffs for architects and engineers” (art. 15 of the directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, 2006; *European Commission v Federal Republic of Germany*, 2019, pt. 19-22). The failure to perform environment policy are frequent basis for bring an action on art. 258 TFUE (*European Commission v Federal Republic of Germany*, 2017, pt. 136; *European Commission v Federal Republic of Germany*, 2017, pt. 20; *Evropska komisija proti Republiki Sloveniji*, 2017, pt. 19). In 2017, the Kingdom of Spain did not implement necessary measures for realization environmental policy under Directive 2008/98/EC (*European Commission v Kingdom of Spain*, 2017).

According to the literature on the subject, the maintenance of national legislation is a implementation beyond minimum necessary (Atthoff, & Wallgren, 2012, p. 24–25). Those are any acts to implement transpositional measure beyond minimum necessary determined by directive, as a general rule. However, it is also maintenance of the national legislation and implementing sanction and mechanism incompatible with Macrory principles (Miller, 2011, p. 2). The Macrory principles hammered out Anglo-Saxon doctrine, which are equivalent of better regulation principles. However, it is worth to highlight that maintaining national legislation with regard to the directive implementation is violation of EU law, too.

5. CONCLUSION

A defective implementation into national legal framework is multidimensional content. The conducted analysis proved, that there are numerous irregularities in given years. An absence of notification, a delay implementation, implementation going beyond minimum necessary, the wrongful interpretation and classification are among the most common types of the defective implementation. Despite most of cases concerns absence of notification of transpositional measure of the delay implementation, the CJEU still ruled on a wrongful interpretation or classification. It is worth to highlight, that paramount objective is a wrongful operationalization aims. Moreover, the diversity of political preferences between Member States and EU is a reason of delay in implementation and maintenance of national provisions.

However, the implementation process requires adjustment the method of harmonization due to casuistic character, constantly for several years. It is worth to highlight that appropriate determination of harmonization method enables establishing unfettered boundary of directive implementation into national legal framework and therefore implemented correctly. The case studies of implementation results from the fact, that there is no uniform regulation on implementation rules on legal drafting.

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