

NON-COMPLIANCE OF EU DIRECTIVES: PAST EXPERIENCE OR ONGOING CHALLENGE*

*Giorgi Gogokhia*¹

After the establishment of the European Union there were a colossal number of challenges for the newly launched organization. However, the EU developed step-by-step and nowadays totally different challenges exist than those that existed years ago, but some past difficulties still go on, such as the implementation of directives. As it is widely known, Member States are responsible for correctly applying the entire body of the EU legislation into their national law on time and accurately. This requirement derives from EU's fundamental Treaties. The annual report of 2016 announced that "...it is essential that Member States live up to their responsibility to respect and enforce the rules they themselves have jointly put in place" (Ballesteros 2017). As Hankins says in his book "How Nations behave", "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time" (Versluis 2005). Therefore, Member States are aware of their duties to record guaranteed rights and obligations into the national law, but some factors lead them to avoid such obligations.

1. Why do nations behave the way they do?

The issue of how the member states behave may have multiple aspects: institutional, political, lack of necessary resources, governmental inefficiency or corruption. Member States may fail to comply, because they are unwilling [political opposition], unable [legal & administrative obstacles], or unaware of their obligations (Nicolaidis – Oberg 2006). However, the first "step towards disintegration" could be greater flexibility and differentiation of member states (Martin 2016) which do not comply with the EU law, because it is not in their interests or they simply prefer not to comply (Mitchell 1996, 3-28).

In most cases, the coexistence of multiple reasons leads a member state to non-implementation. However, there are circumstances when even one difficulty is enough for non-compliance, namely, interpretation problems or political issues that are considered the most common reasons why nations act the way they do. In the following paragraphs, attention will be paid to these reasons.

a) It is presumed that the directives are unclear and the formulation is complicated, the terminology is confusing, regulations incomplete and at the same time on the other side there are different legislative cultures with their own traditions. (Beek 2007, 13) Therefore they cause misunderstanding, delays or non-compliance. Furthermore, having an opportunity to interpret the directives differently can be a factor leading to incorrect or delayed transposition into national law (Falkner - Hartlapp - Leiber - Treib 2004, 452-473).

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¹ *Giorgi Gogokhia*, LL.M European and international business law student at University of Debrecen, Faculty of Law

There is a satisfactory example of incorrect implementation. Ireland used to “improve on” the EU version of directives by adding different words and phrases or by changing logical order. It is undeniable, that even the implementation of directives in such a way would be recognized as a violation of EU law, but the Ireland scenario developed much more terribly than just a violation of community law. A €1 billion project was grounded because of a failure to transpose a single sentence in the EIA Directive properly! Those who suffer from bad transposition have a right to sue the State for their consequential losses (Scannell 2013).

b) Another factor of non-compliance is considered political, especially by the political actors, who play one of the vital parts in the transposition processes of directives. According to Francesco Duina, “Directives in line with the interests of leading political actors are well implemented, while Directives that challenge these interests are altered and transposed with delays. They are only partially and belatedly applied” (Duina 1997, 155-180). “Opposition through the backdoor” is also an interesting finding by Gerda Falkner, which could be connected to the political interests and the will of players. During the EU policy process some parties may be in the minority and outvoted. Their interests would not be considered in the produced EU law. Therefore, they are against that directive, trying to “*defend their existing rules*” and as a consequence, they do not implement it correctly. The political influence of this process is significantly high, because EU directives contain regulations that don’t align with the views of the political actors and new methods are in opposition to already existing rules in the state that are sufficient for the protection of individuals, democracy and community law. Moreover, government officials sometimes claim that the reason for a delay or non-compliance was caused by administrative inefficiency, lack of resources etc. as a politically convenient excuse for inaction, while their ostensible goal is to hide political interests. For example, the French government has started the implementation procedure of the Young Workers Directive years after the transposition period had expired. Their official argument for the delay was the lack of adequate legal support/administrative inefficiency. It is obvious that the given reason of postponement is understandable and relevant in many cases, but on the one hand, having a lack of legal expertise is not common for France and on the other hand, more than five years of delay for the above mentioned reason cannot be considered as an appropriate excuse of non-compliance. Finally, national experts reported that the real reason for the delay was that the government consciously decided not to transpose the Directive, because existing rules in France could provide at least as much protection for young workers as the standards in the EU Directive (Falkner - Hartlapp - Leiber - Treib 2004, 452-473). See more examples in reference: How member states defend their existing rules.²

² *The Swedish government openly refused to correctly implement the Pregnant Workers Directive (92/85/EEC). Most parts of the Directive were transposed in Sweden. Beside One aspect - the introduction of two weeks compulsory maternity leave. The Swedish government was convinced that their previous system was actually better than the regulation of the Directive. Their official position was that the pre-existing twelve (later fourteen) weeks of optional maternity leave de facto guaranteed exactly the same level of protection. They argued that women in Sweden generally made use of the maternity leave for much longer than two weeks so that there was no need to change the legal rules in order to prescribe the leave. Only after the interference of the European Commission did they finally give in and introduced the compulsory leave which in their eyes was completely superfluous.*” (Falkner - Hartlapp - Leiber - Treib 2004, 452-473).

2. What the numbers say

This part will concentrate on the early 1990s up to 1995, before Austria, Finland, and Sweden became members of the Community and then examine the EU enlargement period step-by-step. In the first half of 1990s, the most successful implementer was Denmark with 35 unimplemented directives per year, while Italy (then comes Greece, Portugal, Belgium) had the worst result at an average 156 unimplemented directives each year, see table 1 below (Lampine – Uusikylä 1998). This number shows that states were neglecting the demands of the EU extremely often. A 12.5% (Italy) refusal of directives was indeed totally destroying the efficiency of the internal market and the credibility of the Union. Due to this reason the European Commission sued Italy very often before the European Court of Justice. It is obvious that non-compliance of directives can cause damages for European citizens, because they would get all benefits that derive from a directive if it had been implemented by government. Because of the need for the protection of individuals and keeping the balance of parties, the ECJ stated that, "...Member State which has failed to fulfill its obligations to transpose a directive cannot defeat the rights which the directive creates for the benefit of individuals..."³ If bureaucracy and the length of an infringement procedure are taken into account, it could be said that member states are in a favorable condition, because they have an opportunity to avoid their EU obligations for several years at the cost of a meager fine. For instance, France, one of the worst compliers of all the time, suffered the largest penalty ever in July 2005: €20 million and a daily fine of €320,000, because the French government failed to apply a directive that needed to be implemented in 1991. Surprisingly, the annual cost of its infringement was less than € 1.5 million over that 14-year period. obligations (Nicolaidis – Oberg 2006). Indeed, in such cases, the above mentioned numbers could be justified in their eyes (of the worst compliers).

Table 1

Number of unimplemented directives during 1990-1995

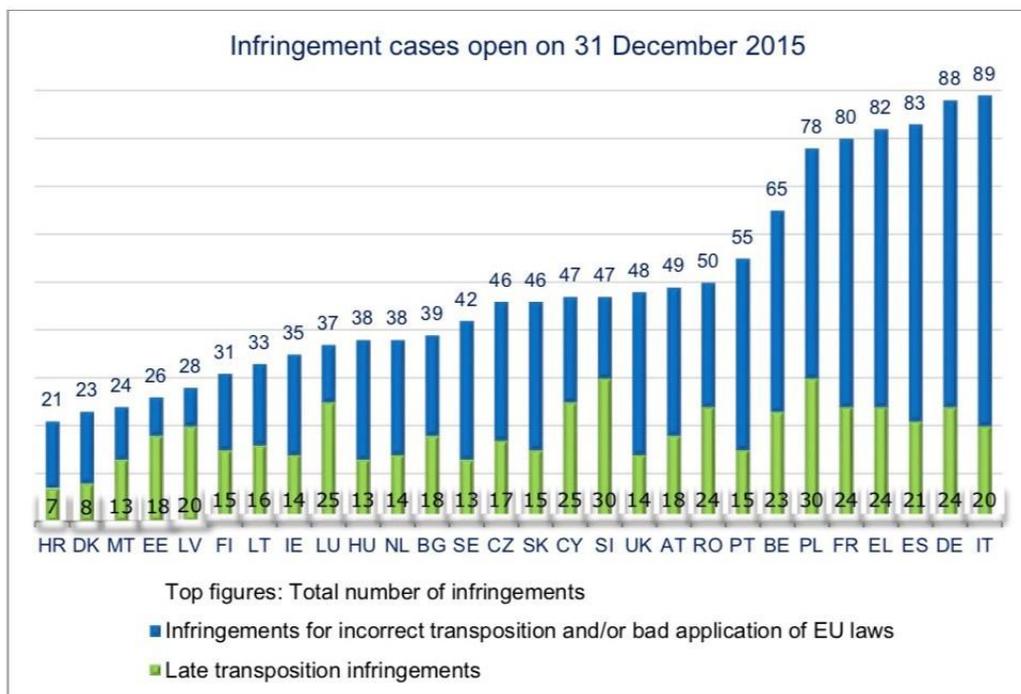
	1990	1991	1992	1993	1994	1995	Average
Belgium	114	113	103	104	127	133	115.7
Denmark	52	20	34	53	29	26	35.7
Germany	60	58	108	128	108	92	92.3
Greece	140	85	126	135	161	129	129.3
Spain	81	65	106	111	106	85	92.3
France	92	41	76	115	94	92	85.0
Ireland	114	91	97	129	98	91	103.3
Italy	229	182	118	123	141	143	156.0
Luxembourg	117	105	126	105	76	73	100.3
Netherlands	101	80	75	93	42	38	71.5
Portugal	161	117	117	123	128	126	128.7
UK	71	52	73	88	106	63	75.5

Source: Scandinavian Political Studies, Bind 21 (New Series) (1998) 3.

³ C-6/90 and C-9/90, Francovich and Bonifaci v Italy

The scenario dramatically changed during 1996-2005, because in 1996, almost 93% of directives have been implemented into domestic law by member states and consequently, 94% in 1997, but the performance of the individual Member States was variable (Annual Report 1996, 1997). Reasons for this include the enlargement of the Union, due to which new states (Austria, Finland, Sweden) actively started transposition of legislature and during the first year of membership, the implementation rate in Sweden was higher than the average among "old" members (Lampine – Uusikylä 1998). Additionally, at the beginning of 2005 the average deficit of the implementation of Internal Market Directives for the 15 member states was up to 2.9% from 2.2% at the time of enlargement, but at the middle of the year it has declined to 2.1% by including in the calculations the new states of the Union (25 members) (Nowak 2005). More recently, Croatia, the last new member state of the community, shows its best performance of compliance. For example, the number of open infringement cases against Croatia at the end of 2015 was 21 for incorrect and 7 for late transposition, respectively, see Table 2 below (Annual Report 2015). Croatia’s index is less than that of Denmark, the overall best performer at transposing directives. As a result, new Member States perform better than “old” ones.

Figure 1
The number of open infringement cases by Member State at the end of 2015



Source: Annual Report on Monitoring the Application of EU law (2015)

After Austria, Finland and Sweden became member states, their overall rate of implementation, compared to the 12 older members, was much higher. The same progress was noticeable after the biggest enlargement of Community and with regard to

Croatia's performance at the present time. It means that new members stick to the rules, but others don't. Therefore, such actions could cause damage for the Union, its institutions and the values and principles of the Community. Having an expectation to avoid derived obligations from the Treaties will be harmful for the Union and its members too. Furthermore, this prediction also gives an opportunity for possible future Member States to obey Community law in the first years of membership and later on, they would be able to act as Italy, France, Luxemburg and the other worst compliers to get benefits from delaying or non-compliance (see the above example of France, where they suffered a meager fine after 14 years). However, surprisingly, while the overall number of implementations significantly decreased from the past till now, non-compliance still exists, because the states that had a terrible implementation indicator in the past are falling behind again in recent years (Figure 1): for example, Italy's performance is truly unpredictable. Therefore, an effective EU weapon is still necessary to minimize violation of Community law.

3. EU weapon against non-implementation

The international enforcement of implementation rules is necessary, because without it all parties will violate (Versluis 2005). Therefore, in order to avoid violations of law, the EU always tries to establish new methods to overcome unfamiliar and ongoing obstacles. One of the key aspects is the exchange of the best practices of the best compliers. By this method, implementation guidelines, transposition plans, the attitude of citizens and expectations can be seen by the worst implementers and they will be able to transpose tried and tested methods in their legislation in order to raise the number of implemented directives and reach the minimum target of the Union. Also, the involvement of interest groups is crucial, because states where interest groups are actively involved in policy formulation and the process of transposition, comply better.

In contrast, in Greece and Italy, the weak involvement of interest groups in transposition mirrors their weakness in the formulation stage as well (Dimitrakopoulos 2001). At the opposite end from soft measures, stronger and starker actions are also subject of dialogue. For example, unambiguous and clear official responsibility forces Member States to fulfill their obligations. Raising the amount of infringement penalties is needed, because slight fines and the long infringement procedure are not effective mechanisms against non-implementation. Moreover, the EC has noted that once infringement procedures are opened, national measures are usually communicated swiftly. The fear of fines improves compliance. This trend is still valid in 2016 when out of the 868 transposition cases open in 2016, 498 could be closed due to the action by Member States.

Conclusions

To conclude, the answer to the main question is the following: the worst players in the past are again the worst implementers in the present. Therefore, non-compliance still exists and effective measures are still vitally important. Reasons of non-compliance vary state to state, but the results are common in all cases: damaging the EU. In order to strengthen the Community and overcome compliance difficulties, high-level bilateral

meetings, swift communications, and stricter rules are vital concepts that need to be followed by member states. Moreover, as practice shows, an infringement penalty utilizing large fines is a powerful instrument. In addition, older members' actions should be exemplary, because their activities are directly proportionate to new or possible future member states' reactions. However, the real scenario is that older member states are still much more divergent than they should be.

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