

CONSIDERATIONS ON THE PROCEDURE FOR THE NOTIFICATION OF NATIONAL MEASURES IMPLEMENTING THE EUROPEAN DIRECTIVES

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Abstract:

The EU membership obliges each state to be responsible for the implementation of the Union law, i.e. transposition within the deadlines, harmonization and proper application within the national legal system. The directive is a binding legal act for the member states which it addresses with regard to the result to be achieved, while the national authorities remain competent regarding the form and means to obtain it. The legal systems of the member states are based on different procedures for the transposition of directives, so national authorities are faced with a number of differences in their implementation. The effectiveness of monitoring the application of EU law depends to a large extent on the cooperation between the Commission and the member states. The notification process is the way in which the European Commission assesses the extent to which EU member states have fulfilled their obligation to transpose the European directives. The notification is made by introducing national enforcement measures (NEMs) into the Electronic Notification System, managed by the Secretariat-General of the European Commission.

Keywords: *European acquis, transposition of directives, national execution measures, transposition deadline, notification, monitoring*

Introduction

From the date of accession, the quality of member state has obliged Romania to fully apply the *acquis* of the European Union. The directive, as one of the forms embodied in the EU law, is a flexible legal instrument adopted by the European institutions [1] for the implementation of Union policies [2].

The legal regime of the directive is found in Article 288 paragraph (3) of the Treaty on the Functioning of the European Union (TFEU), according to which the directive is a binding legal act for the member states to which it is addressed concerning the result to be achieved, while the national authorities remain competent in the form and means for obtaining it. In the doctrine [3] it was considered that the directive is “a type of act more specific to the European Union system than regulations and decisions. Its practical

importance has grown over the years". Also, through the directive, "the authors of the treaties have provided the EU institutions with a legal equalization instrument, a formula based on task-sharing and collaboration between the national level, which is more sophisticated, and especially suited to the task of harmonizing national legislation" [4].

The directive is part of the EU compulsory acts, together with the regulation and the decision, and, like the decision but unlike the regulation, it only obliges the recipients it indicates. If it is addressed to all member states, the Directive is subject to simultaneous application, more precisely as an indirect legislative process, a situation which takes into account the "general applicability" [5] referred to by the Court of Justice of the European Union (CJEU) in its case-law. In the doctrine [6], it is considered that the directive can not be given a general binding character, just like the regulation, but it is obligatory only for the recipients.

An analysis of the directive by reference to the regulation and the decision, which are mandatory in all their elements, shows that it imposes on the member states solely an obligation regarding the result to be achieved, leaving them with the choice of form and means.

With regard to the evolution of the concept, initially, in the ECSC Treaty, the recommendation was considered to be the legal instrument equivalent to the directive, and in the Treaty establishing a Constitution for Europe, the European framework law was intended to be the act corresponding to the directive. Subsequent debates [7] triggered by the process of re-launching a Reform Treaty retained the original name. It can be noticed that the use of directives has increased in recent years. If, initially, their role was to indicate the objectives to be achieved whereas the states enjoyed absolute freedom in choosing the means of attainment, this freedom was gradually reduced, as the objectives to be achieved were clearly defined and detailed. As such, it can be said that the freedom of action of the states is subordinated to the goal pursued at EU level.

Enhanced transposition of directives

The process of transposing and enforcing EU law is a dynamic and permanent one, which is dealt with by the specialized national authorities with the right of legislative initiative and attributions in the areas covered by the Union legislation.

In accordance with Article 4 of the Treaty on European Union, “member states shall take any general or specific measure to ensure fulfillment of the obligations deriving from the Treaties or resulting from acts of the institutions of the Union”. Thus, each member state is responsible for the implementation of Union law, which means transposition within the deadlines, harmonization and correct application within the national legal system.

The legal systems of the member states are based on different procedures for the transposition of directives, so national authorities are faced with a number of differences in their implementation. The doctrine states that neither the Treaties of the European Union, nor the Union law establish a general scheme of the substantive or procedural right to govern the legal channels for the application of EU law [8]. Based on Article 17 of the Treaty on the Functioning of the European Union “The Commission shall promote the general interest of the Union, (...) ensure the application of the Treaties and the measures adopted by the institutions pursuant to them”; as such, the task of oversight is entrusted to the European Commission in its exclusive role as “Guardian of the Treaties” [9].

An effective monitoring of the application of EU law depends to a large extent on the cooperation between the Commission and the member states. However, over the years, a number of reasons [10] have been identified that have led to problems in the application of EU law: member states are not paying enough attention to correct interpretation and enforcement; delaying the implementation of activities and notifying transposition measures at national level; interpretation and choice of procedural options. After each action of the Union, the European Commission is the institution that analyzes the manner in which the actions have been effective or not and proposes new measures [11], which may be of simplification, such as codification [12].

Each directive provides for a transposition clause, i.e. the period expressed in months or years, as of the date of entry into force, or the date by which the member states are obliged to adopt and implement the European norm, after which the European Commission must be immediately informed about the respective acts [13].

The transposition [14] of the directive is the operation by which a recipient member state adopts measures of a legislative nature necessary for its implementation. The member state may decide both on the way and the means used to achieve the result. The

modalities concern the internal legislative or regulatory technique, and the means refer to the legal institutions involved in achieving the stated objective.

It may be appreciated that the transposition into national law of the EU legislation may be unsatisfactory as a result of late transposition, partial transposition, erroneous transposition or, more seriously, non-transposition.

Both the doctrine and the jurisprudence use various terms to indicate the transposition process: application, putting into practice, execution, implementation, terms that broaden or reduce the scope of this concept. The definition of the directive given by Article 288 paragraph (3) of the TFEU does not explicitly mention the issue of its application in the member states, as compared to the regulation, on which paragraph 2 of Article 288 states that “it is applied directly in each member state”. With regard to the transposition of directives, the TFEU refers to in Article 153 paragraph 3 and Article 260 paragraph 3. The terminology used in English “a directive or a decision must be transposed or implemented” or in French “une directive ou une décision doit être transposée ou mise en oeuvre”, distinguishing between “transposition” and “implementation” [15]. Thus, from a terminological point of view, the doctrine suggests the use of the terms “transposition” and “implementation”.

A Guide [16] drawn up by the European Commission specifies that the harmonization of the legislation can be achieved by combining several stages: transposition, implementation and enforcement. The directives are designed precisely to give member states flexibility. The practice of word by word transposition, known as “total reproduction”, is not preferred if the specifications of the directive are in conformity with national laws, since transposition, without the legal and administrative measures necessary to implement the directive effectively, is not sufficient. Naturally, in order to achieve the practical results of the directive, it is necessary to detail the transposition of the legislation more than the broad wording of the directives, in which the purpose of the directive’s obligations should not be restricted. Another important aspect is the literal and full transposition of the definitions of the EU Directives into the national legislation proposed for the implementation of the directive.

The importance of notification of the national execution measures of the directives

Failure to fulfill the obligations of a member state can be the result of a positive action consisting in the inappropriate application of European normative acts and of a negative action, such as the failure to notify the national regulatory acts transposing the directives.

In the process of transposing the Union directives, the member state which has to fulfill its obligations under the directive adopts a series of measures necessary to comply with that directive. In addition, transposition requires member states to eliminate those rules of the national law that are incompatible with the directive [17].

Each directive stipulates an article setting out the date of entry into force for the act, and also the deadline by which the member states are required to transmit the transposition documents to the European Commission.

The notification process is the way in which the European Commission assesses the extent to which the EU member states have fulfilled their obligation to transpose European directives. The notification is made by introducing national execution measures (NEMs) into the Electronic Notification System [18], managed by the Secretariat-General of the European Commission.

The Electronic Notification System, which determines the automatic triggering of the procedure for such cases, has been in operation since 3 May 2004 and allows the member state to enter the notification documentation directly into the Commission's database [19]. Therefore, Romania also ensures the notification (communication) to the European Commission, in electronic format, of all legislative measures that are adopted for the purpose of transposing the provisions of the current directives. The central authority responsible for coordinating the process of notifying the European Commission of the EU legislation is the Ministry of Foreign Affairs (MFA).

National Execution Measures (NEMs) shall be communicated electronically by electronic mail and shall contain the following documents: the electronic format (PDF file) of the Official Gazette of Romania in which the transposition normative act(s) was/were published; table of concordance between the directive and the transposition act(s) in Romanian (Word file).

The responsibility for ensuring the timely adoption of legislative measures for the transposition of directives and the transmission of the documents necessary for the

completion of the notification process to the MFA lies with the specialized authorities with legislative initiative and powers in the areas covered by the respective directives.

It can be stated that the notification is the final stage of the path drawn by a draft normative act that takes over a European directive in the internal law. From the point of avoiding action in failure to communicate the transposition measures, the notification is a formal requirement: any transposing national legislation in force must be in the Commission's database; otherwise a member state's failure to fulfill its obligations is taken into consideration.

Thus, at the level of the MFA, the National Program for the Transposition and Notification of Directives [20], is drafted, permanently updated and monitored. This is an electronic tool, i.e. a database containing, in tabular format, the directives for which the transposition documents need to be communicated. The program, for the current year, is submitted to the Government for adoption. In practice, this document includes all the directives published in the Official Journal of the European Union with a transposition deadline scheduled for that year, as well as the institutions and central public administration authorities competent to promote for approval/adoption those national normative acts necessary for the internal legal order of those directives [21].

In addition, in order to improve this process, the Network of contact points for the notification of directives [22] has been set up, comprising the contact persons designated at the level of the central public authorities responsible for transmitting updated information on the assumed transposition deadlines, the form of the transposition normative act and the stage of the process of drafting/adopting the normative acts in their area of competence.

The NEM notification process comprises two stages. The first step is to communicate the NEM to the Secretariat-General of the Commission, and the second refers to the validation of the Communication by the Secretariat-General.

In practice, the notification requires the fulfillment of certain conditions [23] to ensure the effective functioning of the monitoring system:

- it must be carried out within the deadline stipulated by the directives, since each directive contains provisions on the date of entry into force and the deadline for transposition, i.e. the deadline for notification to the European Commission;

- it must contain the electronic format of the Official Gazette of Romania in which the transposing act(s) has/have been published, the table of concordance between the directive and the transposition act(s), in Romanian;

- it is supposed to be met if the NEMs meet 2 cumulative conditions: they are officially communicated by the Romanian State and they are complete, i.e. they are applicable throughout the territory of the sovereign state and aim at fulfilling all the provisions of the transposed directive.

There are also situations where the notification is considered partial or even “non-communication” when the two above mentioned conditions are not fulfilled, which determines the initiation of the infringement procedure under Article 260 of the TFEU.

The non-communication of the measures transposing the directives is one of the main types of breaches of EU law [24], together with: non-compliance with the obligations (where the Commission considers that the legislation of a member state is not in conformity with the requirements of the EU directives); violation of treaties, regulations and decisions; improper/inappropriate application of the Union law by national authorities.

These cases of non-compliance of obligations can be detected by the Commission’s own investigations or can be brought to its attention by complaints or petitions of citizens, businesses, NGOs or other organizations. The Commission actively informs the complainants about the decisions taken at all stages of the procedure [25].

If we are in a situation where there is insufficient or inadequate transposition of a directive, the Commission has an obligation to determine the real effects of the national transposing legislation.

It should be noted that a significant aspect of the use of these mechanisms is precisely the prevention of excessive recourse to the judiciary system, involving very complex procedures, and the mechanisms for guaranteeing the protection of individuals often represent an obstacle to access to justice.

An important role is also that of the mechanisms created specifically at the level of the European Union and its member states, the EU Pilot project and the SOLVIT system. Their creation was aimed at ensuring the correct application of Union law, creating a partnership between the Commission and the member states in an attempt to resolve possible infringements before the infringement procedure is triggered.

The infringement procedure represents an original mechanism to ensure respect for the European Union law, to ensure its primacy over domestic law systems and, last but not least, to ensure the continuity and viability of the mechanisms necessary for the functioning of the European Union [26].

In other words, the main purpose of the infringement procedure is to oblige those member states which have breached a rule of European Union law to comply with that rule [27]. In this regard, the Court of Justice has stated that the purpose of the infringement procedure is “to enable the member state, on the one hand, to remedy, correct or level its position on the issue presented before the Court and, on the other hand, to present its own defense against the Commission’s complaints” [28].

Conclusions

The directives, regardless of the distinction made in practice - in framework directives or implementing directives -, set out targets for the EU member states to be considered as obligation to deliver. The directives involve transposition into the national legal order by specific regulatory acts, but within a deadline indicated by each directive for its application. In other words, a directive is considered to be applied in a member state only when it has been transposed into national law and when the national execution measure has been communicated to the Commission.

The way the directives are transposed into the national law of the states is constantly checked by the European Commission. The Commission’s annual reports [29] on the monitoring of the application of European Union law have noted that the most frequent cases of non-compliance with the transposition obligation consist in overcoming the transposition deadline.

One solution for facilitating the dialogue between the Commission and the member states is the EU Pilot mechanism, which is set up to quickly resolve possible breaches of EU law at an early stage, in appropriate cases, in order not to reach the contentious phase of the infringement procedure. At the end of 2016, most of the EU Pilot files leading to formal infringement procedures stating the unfulfillment of obligations concerned the following policy areas: the environment (53 cases), the internal market, industry,

entrepreneurship and small and medium-sized enterprises (SMEs) (38), energy (29) and taxation and customs union (25) [30].

That is why the correct and timely application of European Union legislation is absolutely necessary in order to achieve the goals pursued in the framework of European policies and to ensure the conditions of progress and development for the citizens of the Union.

References:

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- [2] Also, Article 116 TFEU (ex Article 96 TEC) provides that "Where the Commission finds that a disparity between the laws and regulations of the various member states distorts the conditions of competition in the internal market and thereby causes a distortion that should be removed, the Commission shall consult the member states concerned. If this consultation does not eliminate the distortion in question, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the relevant Directives. Any other useful measures provided for in the Treaties may be adopted".
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- [4] Guy Isaac, Marc Blanquet, *Droit communautaire général*, 8edition, Armand Colin Publishing House, Paris, 2001, p.144.
- [5] Decision CJEU of 29 June 1993, Cause C-298/89 Gibraltar/Council; Decision CJEU of 22 February 1984, Cause 70/83 Klppenburg/Finanzant Leer.
- [6] Augustin Fuerea, *Manualul Uniunii Europene*, 6th ed., Universul Juridic Publishing House, Bucharest, 2016, p.131.
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- [8] See Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, 4th ed., Hamangiu Publishing House, Bucharest, 2009, p. 381.
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- [26] See Monica Elena Oțel, loc. quoted, p.66.
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- [30] Idem, p. 24.