

*Bartłomiej Nowak**

Implementation of Directives into Domestic Legal System. The Case of Poland

The process of legal approximation in the context of enlargement of the European Union is a unique process and interesting object of scientific research. The commitment to harmonize Polish law with the Community law entails transposition of a large number of Community legal acts to the Polish legal system. Obviously, this also applies to Directives, which play fundamental role in the process of harmonization of laws. The obligation to harmonize/approximate Polish legal system within the law of the European Union arises from the Europe Agreement. Article 68 of the Europe Agreement states “*The Contracting Parties recognize that the major precondition for Poland’s economic integration into the Community is the approximation of the country’s existing and future legislation to that of the Community. Poland shall use its best endeavors to ensure that future legislation is compatible with the Community legislation*”. A literal interpretation of article 68 of the Europe Agreement leads to the conclusion that the highly important issues of the timetable and methods of approximation activities remain to the restricted competence of the Polish authorities. Whereas the scope of approximation is defined by the regulatory extent of the EU law.

Poland thus, as a matter of enlargement had to undergo a substantial process of reforms and adaptation to the *acquis communautaire* before joining the European Union. Implementation¹ of Directives² therefore is an ongoing

* **Bartłomiej Nowak** – European University Institute, Florence, Italy.

¹ Implementation in this dissertation covers transposition as well as application of Directives.

² Directives as a legal instrument have to be transposed into domestic legislation in order to have a binding force in the country(s) they are directed to. Therefore directly applicable are the provisions of Directives already incorporated/transposed into domestic law. Directives itself are

process, which has started prior to enlargement. Consequently in a short time Poland had to adopt large body of legislation ranging from 80,000 to 100,000 pages. The challenge of implementation becomes even tougher; if one takes into account not only length of the Community legislation, but also its technical complexity, and its overreaching nature supplemented by two main principles: direct effect and supremacy of the Community law over domestic law. Since 1st of May 2004 Poland as the member of the European Union have to fully accept and follow this rules. In case of conflict between the tenor of the domestic legal norm and the tenor of the Community law, administrative body, or Polish court have to apply Community law.³

This article, thus will seek to answer the question, how well Poland is doing in fulfilling task of EU membership regarding implementation of Directives. What are the difficulties or obstacles arising in the process of Directives transposition? Who are the main actors (parliament or government) involved in this process? What are the means of approximation used in the process of Directive incorporation and what bodies are responsible for the supervision over the process of Directives implementation? It will also try to investigate whether Polish officials play an active role in the process of policy making as well as Directive creation at the Community level.

The main aim of this article therefore, is to identify the basic elements and procedural components which facilitate or impede the implementation of Directives with regard to Poland. Although because of the complexity of the implementation process, example of "Single Market Directives" transposition in the old Member States as well as in the new Member States, based on the Single Market Scoreboard will be used for comparison.

Additionally since the subject of Directive implementation in Poland is rather of a rare and new nature and there is not much investigation on it, this research might have a positive impact in the field.

1. Process of Directive creation and its incorporation into domestic legislation

1.1. Definition of a Directive

Directives as a secondary legislation lead to the harmonization of the legal systems across the Community. They are particularly useful device when the aim is to harmonize the laws within a certain area. Directives can be

not directly applicable. This will be elaborated more deeply in section "definition of Directives".

³ M.Szpunar, *Korzyści i koszty członkostwa Polski w Unii Europejskiej (Benefits and Costs of Poland's Membership in the European Union)*, Centrum Europejskie Natolin, Warszawa 2003, p.98.

addressed to all Member States or to any one and they are binding with respect to the aim to be achieved, the time within they are to be realised, while leaving some choices as to form and method open to the Member States.⁴ Article 249 EC states “*A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods*”. Unlike in the case of regulations or decisions, national transposition of Directives is considered necessary by the Treaty. The provision of a Directive generally represents a compromise as a result of long-lasting negotiations between representatives of the Member States and Community institutions on a complex matter – often a matter of harmonizing divergent bodies of law in different Member States.⁵

All Directives must be notified to whom they are addressed.⁶ Directives which apply to all Member States have to be published in the Official Journal.⁷ The date of entry into force of Directive is either the date specified in the Directive itself or, in case of the absence of such date, the twentieth day following that of publication.⁸

Directives contrary to regulations are directly applicable only in the sense that they impose on a state an obligation to implement them.

As a rule, Directives, addressed as they are to the Member States, are not immediately effective. However the ECJ has held in its decisions,⁹ that Directives have direct effect, enabling individuals to rely on them, at least in actions against the State.¹⁰ Czapliński also maintain, that individuals may claim the rights conferred by a Directive if a Member State fails to enact the necessary domestic provision for the implementation of the Directive within specified time, or if it does so improperly. Claims concerning the rights deriving from a Directive can be made against a Member State which has not

⁴ P.Craig, G.de Burca, *EU Law. Text, Cases and Materials*, Second edition, Oxford University Press 1998, p.108.

⁵ B.Kurcz, *Dyrektywy Wspólnoty Europejskiej i ich implementacja do prawa krajowego (European Directives and their implementation into the domestic law)*, Zakamycze 2004, p.40.

⁶ Art. 254 (3) EC, (O.J. C 325/24.12.2002)
http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.003301.html

⁷ Art. 254 EC, (O.J. C 325/24.12.2002)
http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.003301.html

⁸ Art. 254 (1) and (2) EC, (O.J. C 325/24.12.2002)
http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.003301.html

⁹ CIA Security, C-194/94, [1996] ECR I-2201; Unilever Italia, C-443/98, [2000] ECR I-7535; Linster, C-287/98, [2000] ECR I-6917.

¹⁰ P.Craig, G.de Burca, *EU Law. Text, Cases and Materials*, Second edition, Oxford University Press 1998, p.109.

fulfilled the obligations resulting from Directive – “vertical direct effect”.¹¹ It is not possible to pursue claim to rights deriving from a Directive against other legal subjects acting in the same dimension. If the state does not implement a Directive in the prescribed time, it may be liable for any injury caused to the aggrieved person concludes further Czapliński.

1.2. Directive creation – Community and National level

The Treaties contain around 30 provisions authorizing the Council and the Commission to issue Directives. Contrary to the regulation, Directive requires a legislative procedure in two steps. On one side there is a power of the European Commission¹² and the Council to issue Directive, and on the other side obligation of the Member States to incorporate Directive into national law.¹³ Commission statistics show that implementation performance is much better when the national interests are included in the elaboration/negotiation of Directives.

The EU is an enormous network of committees and working groups filled with representatives of Member State government administrations. Those representatives apart of being responsible for applying the Community law directly in case of regulations, and indirectly in case of Directives, participate to an important degree in the creation of Community policies and laws, and largely affect the functioning of the EU. National officials often have to explain and defend national policies at the Community level. This participation (co-operation) allows representatives of national government administrations to develop networks of influence across the Community system, enabling domestic civil servants to be present at every stage and in all areas of EU institutional activities¹⁴. These nationally organized unofficial networks operate within the Commission and within the Council.

Member States most obvious institutional presence at the European level is in the form of the permanent representation, which creates Committee of Permanent Representatives (COREPER).¹⁵ The permanent representatives,

¹¹ W.Czapliński, *Harmonisation of Laws in the European Community and Approximation of Polish Legislation to Community Law* in: *Poland's Way to the European Union, Legal aspects*, ed. W.Czapliński, Scholar Publishing House, Warsaw 2002, p.56-68.

¹² European Commission will be also called Commission in the latter stage of the paper.

¹³ *Making European Policies Work: The implementation of Community Legislation in the Member States*, eds. H.Siedentopf, J.Ziller, European Institute of Public Administration, Maastricht 1988, vol. I, p.8.

¹⁴ H.Kassim, A.Menon, *European Integration since the 1990's: Member States and the European Commission*, ARENA Working Papers, no. 6/04.

¹⁵ COREPER connects the European Union directly to the administrations of the member states. Its members occupy a unique position, providing a gateway between the European

provide a formal point of contact with EU institutions and governments. They are a base for national negotiators, and relay the information they collect in Brussels to interested parties at home.¹⁶

The multiplication of committees by both Commissions and Council guarantee the involvement of national administrations at all stages of the policy cycle. For instance, national officials are important actors in the consultative committees whose opinions are taken under consideration by the Commission in the pre-proposal phase. These committees – some of which are standing some ad hoc; some composed entirely of civil service – enable national governments to monitor and influence policy formulation at this crucial phase.¹⁷

National administrations also act as lobbyists of the Commission. Working through their permanent representations, Member States systematically try to develop relations and keep in touch with officials in the service. Through these contacts, national officials are hoping to discover when the policy initiatives are to be launched, so the national position can be defined and communicated as quickly as possible to the relevant unit in the Commission or Council of Ministers.¹⁸

In practice, the range of influence of the Member State on the functioning of EU institutions, as well as on the Directives creation depends on the quality and efficiency of the State administration, or in other words on choosing right officials to represent the country at the Community level. State administration that is weak, poorly staffed and lacking in coordination is rather observer than active participant of a Directive creation and further initiator of its application. Polish authorities therefore are obliged to improve their diplomatic and domestic services with a view to participate in political and bureaucratic processes on the European forum. In order to do that, Poland has to acquire the ability to gather competent officials, able to identify national interests, and effectively influence EU Directives creation. Moreover stronger administration

Union and their respective national administrations, and acting as senior policy makers at both European and national levels. For more see: H.Kassim, B.G.Peters, *Conclusion: Coordinating National Action in Brussels – a Comparative Perspective* in: *The National Coordination of European Policy. The European Level*, eds. H.Kassim, A.Menon, B.G.Peters, V.Wright, Oxford University Press 2001, p.297-342.

¹⁶ D.Spence, B.Hocking, *Foreign ministries in the European Union: Integrating Diplomats*, Palgrave Macmillan, Basingstoke, New York 2002.

¹⁷ H.Kassim, B.G.Peters, *Conclusion: Coordinating National Action in Brussels – a Comparative Perspective* in: *The National Coordination of European Policy. The European Level*, eds. H.Kassim, A.Menon, B.G.Peters, V.Wright, Oxford University Press 2001, p.297-342.

¹⁸ H.Kassim, A.Menon, *European Integration since the 1990's: Member States and the European Commission*, ARENA Working Papers, 6/04.

is needed not only because Poland must adopt EU procedures and laws, but it is also required to ensure proper utilization of the EU membership (e.g. EU funds¹⁹). After all it is public administration officials and judiciaries who put the law into practice.

National administrations can be therefore seen as true Community bodies being the subject to certain obligations to apply EC law. They are also together with judiciaries' responsible entities for supervising and enforcing the application of EC law.²⁰ In such case Commission relies to a large extent, on national officials to provide technical expertise and support on the process of application of Directives. Its officials may also make use of their personal contacts in the national administrations in developing policy initiatives.

In Poland the Office of the Committee for European Integration (UKIE) is responsible for the co-ordination of the participation of Polish representatives in the decision-making process of the EU, including participation in the Council working groups and committees. Enhancing the capacity of Polish public administration to fulfill tasks resulting from membership in the EU is one of the major tasks of UKIE, stated in the Act of the Committee for European Integration and regulation on UKIE,²¹ as well as a result of respective decisions of Polish government. According to Minister Nowakowski,²² as of its accession Poland has been able to directly participate as a Member State in the process of drafting the Community legislation, both regulations and Directives. The main participants from Polish side are among particular ministries and central offices.²³ In other words representatives of those

¹⁹ While preparing for absorption of structural funds, Polish government hired around 600 employees only in 2002/2003. According to experts evaluations, there are many more civil servants servicing European funds in Western countries than currently in Poland (although some progress made in last two years is visible). In "old" EU Member States, one civil servant handles on average between Euro 2.5 million and Euro 5 million. For more see: T.G.Grosse, *Poland in the European Union: A Challenge for Polish Administration*, "Analyses & Opinions", no. 14, The Institute of Public Affairs, Warsaw 2003.

²⁰ A.Gil Ibanez, *The administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits*, Hart Publishing, Oxford – Portland 1999, p.3.

²¹ Law of 8 August 1996 on the Committee for European Integration, "Journal of Laws", no. 106, item 494; Regulation issued by the Chairman of the Council of Ministers on 2 October 1996 on the assignment of status to the Office of the Committee for European Integration, "Journal of Laws", no. 116, item 555.

²² Mr. Tomasz Nowakowski, the Undersecretary of State in the Office of the Committee for European Integration (UKIE), Interview conducted with Minister Nowakowski on April 4th, 2005.

²³ In some Member States apart from national administrations there are other interested parties such as worker's, producers or even consumer's unions who are involved in the process of Directive creation. In Poland since the whole process of Directive creation and involvement

ministries, which have specific interest in the creation of a Directive are involved. Later on representatives of particular ministries involved in the Directive creation at the European level in many cases are involved in the process of Directive transposition in Poland.

Although Min. Nowakowski stated that Poland has been able to directly participate in the process of drafting the Community legislation, it seems that in the near future it will be necessary to strengthen the lobbying activities of Polish representatives within the Union in order to assure correct representation of Polish citizens in the EU institutions. At this time Poland has around 750²⁴ permanent representatives within Council and Commission, which is by far not enough especially as compared to the size of the country (around 39 million of people). Furthermore very small percentage of these 750 representatives holds managerial positions, so important in decision – making process. It can be assumed that, the main fault lies on the Polish side, since the interest among Polish officials (probably due to lack of the language skills, or lack of the knowledge and interest on European policies and decision making process) has not been satisfactory over the last years. Although it can be expected that participation of Polish representatives in EU policy creation will increase in the next years. This process can be compared with the Poland's accession negotiations, which at the beginning didn't look too optimistic. Though when the time passed by, and more officials got better acquainted with it, the negotiations went faster. Therefore bigger involvement in the process of Directive creation at the Community level is a matter of short time, also because the home-parliamentary elections will demand from the politicians to answer the questions what it has been done in EU matters, or how much Poland is represented at the Community level. Min. Nowakowski what's important pointed out, that in the near future Poland will attempt to "Europeanize" its ministries *i.e.* to involve the highest number of their employees in the joint making of the Community law especially Directives, descending to the low level of decision making and making the arrangements within the ministries.

1.3. Incorporation of Directives into national legal system – guidelines

The incorporation of Directives is necessary since Directives, which aim to harmonize legislation in the Member States, are not directly applicable.

of interested parties in it, is fairly new and unknown to other parties then government administration ones, therefore participation of the non-governmental parties is rather rare.

²⁴ *Polska w Unii Europejskiej. Doświadczenia pierwszego roku członkostwa (Poland in the European Union. First year experience)*, The Office of the Committee for European Integration (UKIE), Warszawa 2005, p.66.

Based on the experience of EU-15 and on the case law of the European Court of Justice (arising from both judgments for non-implementation of obligations and opinions under the preliminary ruling procedure) some general rules can be formed regarding the correct implementation of Directives:²⁵

1. Each state decides what kind of legal act should be enacted on the basis of its constitutional order for the purpose of Directive transposition. The status of domestic enactment however should correspond to the status of the act which previously regulated a given matter under the domestic law.
2. The body which is responsible for passing an implementing act is defined by the domestic law. It might be also the regional or local government if the matter questioned falls within their competence. In any case central governmental agencies are responsible for the correct implementation of a Directive. States are not allowed to invoke their domestic law (including constitutional provisions) to justify non-fulfillment of the obligations stemming from Community law.²⁶
3. The Directive nomenclature and terminology doesn't have to be translated word for word into domestic legislation,²⁷ since such translation creates danger of introducing institutions unknown to the domestic legislation. Domestic legislation should reflect spirit or idea rather than wording of a Directive.²⁸
4. However in case of some Directives, especially those which use a very technical language, which are very detailed, the only solution might be a literal transposition of the text of a Directive into domestic legislation. However it is not permissible to treat Directive as an annex to an act of domestic legislation.
5. If it is necessary the domestic legislation in extreme – specific situations should expressly quote Directive which it implements (in general the specific provisions of the Directive) to avoid misinterpretations.

²⁵ M.Szwarc, *Implementacja dyrektyw wspólnotowych przez państwa członkowskie (Implementation of Communities' directives by the member countries)*, 2000; see also: W.Czapliński, *Harmonisation of Laws in the European Community and Approximation of Polish Legislation to Community Law in: Poland's Way to the European Union, Legal aspects*, ed. W.Czapliński, Scholar Publishing House, Warsaw 2002, p.56-68.

²⁶ Case 163/78 Commission v. Italy, (1979) ECR 771.

²⁷ Case 131/88 Commission v. Germany, (1991) ECR I825.

²⁸ Directive's nomenclature is rather used in order to specify or indicate to domestic legislator which institutions of domestic law should be covered by the relevant domestic legislation.

6. The domestic laws transposing Directive have to be enacted within the time limit stated in a Directive. Delays due to domestic factors are not base for justification.²⁹
7. If the existing domestic legislation guarantees proper implementation of a Directive or provisions of a Directive, there is no need to issue new act, however the European Commission should be informed about this.³⁰
8. The act of domestic legislation should possess both the substantive provisions of a Directive and the procedures necessary for its implementation, including competent bodies and the penalties for non-fulfillment.
9. Measures of implementation of a Directive into domestic legislation must be notified to the Commission.³¹

Those guidelines (not a full list, rather general principles) are of practical matter. They reflect experience of the EU countries and the European Court of Justice in implementation of Community Directives. Therefore it would be of great benefit to follow them when passing legal act for Directive transposition, especially in the case of new members such as Poland, whose practice in this field is rather rare.

1.4. Transposition of Single Market Directives in EU-15 and EU-25

Before discussing Directives transposition in Poland some time should be spent on transposition of Directives in the “old” and “new” Member States. However due to limits of this paper it is impossible to focus on all Directives, therefore the comparison will be made, based on the Single (Internal) Market Directives.

At first, phrase “transposition deficit” should be clarified since it will be used later on. The transposition deficit shows the percentage of Internal Market Directives not yet communicated as having been transposed, in relation to the total number of Internal Market Directives which should have been transposed by the deadline.³² The average deficit per Member State (EU-15) at the beginning of 2005 was up to 2.9% from 2.2 at the time of enlargement.³³ However, when all 25 Members are included in the

²⁹ Case 43/80 Commission v. Italy, (1980) ECR 3543.

³⁰ Case 69/90 Commission v. Italy, (1991) ECR I-6011.

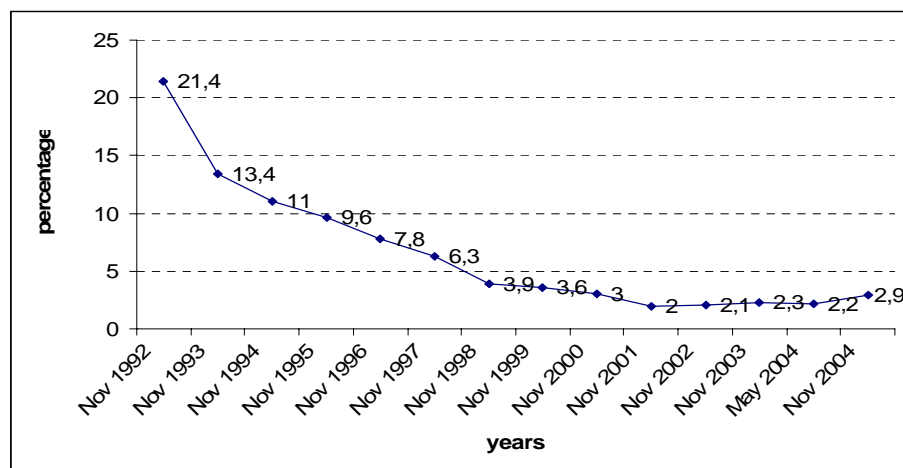
³¹ Such notification has only informative character and has no bearing on the validity of the domestic measures. However, it should be pointed out, that the ECJ stated several times in the past, that the state which did not notify implementation provisions could not invoke them in relation to individuals; see Case 194/94 CIA Security International, (1996) ECR I-2201.

³² *Single Market News* at: http://europa.eu.int/comm/internal_market/smn/smn36/p30_en.htm

³³ http://europa.eu.int/comm/internal_market/smn/smn36/p30_en.htm

calculation, the deficit by July 2005 declined to 2.1%.³⁴ This indicates that new Member States in general perform better than EU-15 Member States, despite having to absorb the whole *acquis* in a short time frame. This is also significantly lower than the 7.1% deficit for EU-25, which was evident at the time of enlargement³⁵ and as compared with 21.4% in 1992,³⁶ the decrease is significant. The table below represents the change in the transposition deficit of Single Market Directives between years 1992 – 2004 among EU-15.

Figure 1. Transposition deficit in years 1992 – 2004 among the EU-15



Note: The transposition deficit shows the percentage of Internal Market Directives not yet communicated as having been transposed, in relation to the total number of Internal Market Directives which should have been transposed by the deadline.

Source: *Internal Market Scoreboard*, November 2002, May 2003, June 2004, European Commission Staff Working Paper.

³⁴ *Internal Market Scoreboard 2005*

<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/961&format=HTML&aged=0&language=EN&guiLanguage=fr>

³⁵ This is probably credit to the sustained notification efforts of the new Member States. However in concrete terms, this means that Commission is still awaiting 1,428 notifications of national implementing measures. Of all *Single Market Directives*, over 15% or 245 Directives have not been fully transposed in at least one Member State

http://europa.eu.int/comm/internal_market/smn/smn36/p30_en.htm

³⁶ *Internal Market Scoreboard*, November 2002, May 2003, June 2004, European Commission Staff Working Paper http://europa.eu.int/comm/internal_market/score/index_en.htm

As it can be seen on the figure 1 transposition deficit was gradually going down. In year 2002 only five Member States (Sweden, Finland, Denmark Netherlands, UK) met the European Council target, by having a transposition deficit of 1.5% or less. The transposition deficit of 3 other Member States (France, Greece, Portugal) was more than double the European Council's target.³⁷ In year 2003 only Sweden, Finland, Denmark, UK and Spain met the European Council's target for Member States to keep their deficits to 1,5%.³⁸ In May 2004 the transposition deficit for Internal Market Directives was 2.2%. This means that as many as 134, or 9% of, Internal Market Directives have not been transposed into national law in all EU-15 Member States, despite deadline for transposition having passed.³⁹ In 2004 however Denmark, Spain, UK, Ireland and Finland were the countries who met the 1.5% interim target, and in 2005 after one year absence Sweden have rejoined the group (see figure 3).

Italy was once again at the bottom of the transposition, failing to have transposed as many as 66 Directives on time by the middle of 2005. Its large transposition deficit has gone bigger since the Scoreboard in June 2004 was published. The other members of the Community namely, France, Luxembourg, Portugal, Belgium as well as Greece had the next worst record.

Furthermore the total number of Internal Market infringements proceedings (one of the tools to measure the effectiveness of transposition) remained high at around 1500 open cases in 2003 and 2 years later down to 1071 open cases. This drop is probably due to Internal Market Strategy 2003 – 2006, which called for a 50% reduction in infringements by 2006 through a combination of better compliance, prevention and use of alternative methods of problem solving such as SOLVIT.⁴⁰

At the middle of 2005 France and Italy continued to have the highest number of infringements, together having nearly 25% of all cases. Italy on its own had almost as many cases against it as Denmark, Sweden, Finland, Luxembourg combined. Figure 2 represents these findings.

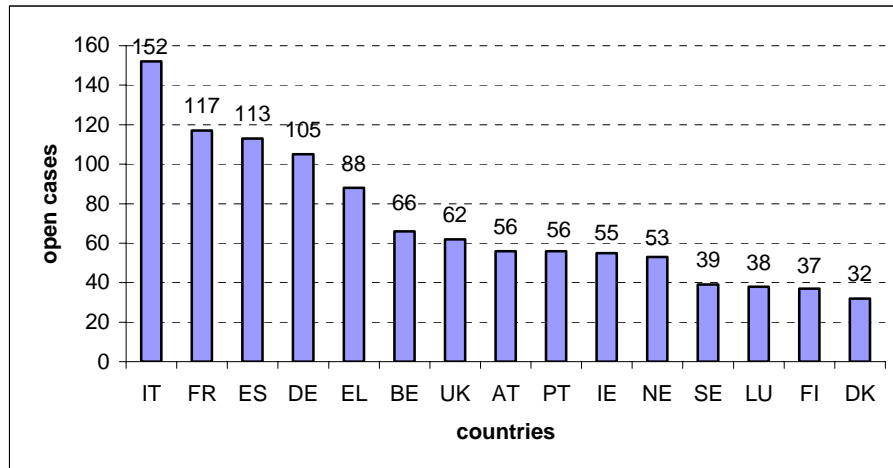
³⁷ *Internal Market Scoreboard*, no. 11, Nov 2002, European Commission Staff Working Paper.

³⁸ *Internal Market Scoreboard*, no. 12, May 2003, European Commission Staff Working Paper.

³⁹ *Internal Market Scoreboard*, no. 13, June 2004, European Commission Staff Working Paper.

⁴⁰ However in order to see if this strategy rely works we have to wait for the statistics from the new Member States.

Figure 2. Open infringement cases as at 1 May 2005



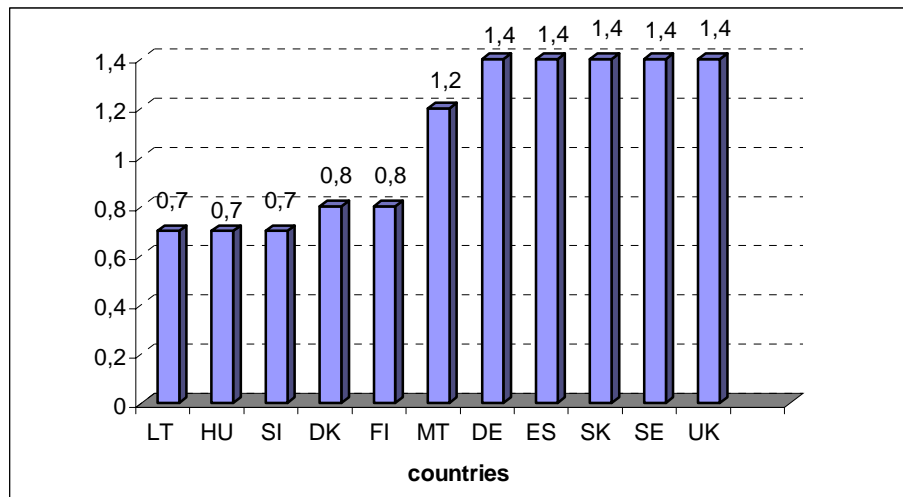
Source: *Second Implementation Report of the Internal Market Strategy 2003 – 2006*, COM (2005) p.21, http://europa.eu.int/comm/internal_market/en/update/strategy/2nd-impl-report_en.pdf

see also: IP/05/961 at: <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/961&format=HTML&aged=0&language=EN&guiLanguage=fr>

What striking in all of these findings is the fact that the performance in Directives transposition of many EU-15 Member States has declined significantly since enlargement. On the other hand the EU-10 Member States have significantly reduced their deficits since accession, although some countries such as Latvia or Czech Republic are still at the far back end. However some of the new countries have now even better records than EU-15. This was also confirmed by Charlie McCreevy European Commissioner for Internal Market and Services⁴¹ who stated that the transposition deficit of EU Directives in three new Member States, Lithuania, Hungary and Poland at the beginning of 2005 has been reduced since the accession, whereas other new Member States such as Czech Rep. still have had high deficits. The figures 3 and 4 below present this trend.

⁴¹ *Press Conference on the Internal Market Strategy Implementation – Scoreboard*, Brussels 27 January 2005, <http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/47&format=HTML&aged=0&language=EN&guiLanguage=en>

Figure 3. Transposition deficit, per Member State (EU-25) as of June 2005 in percent. First Division



Source: *Internal Market Scoreboard 2005*

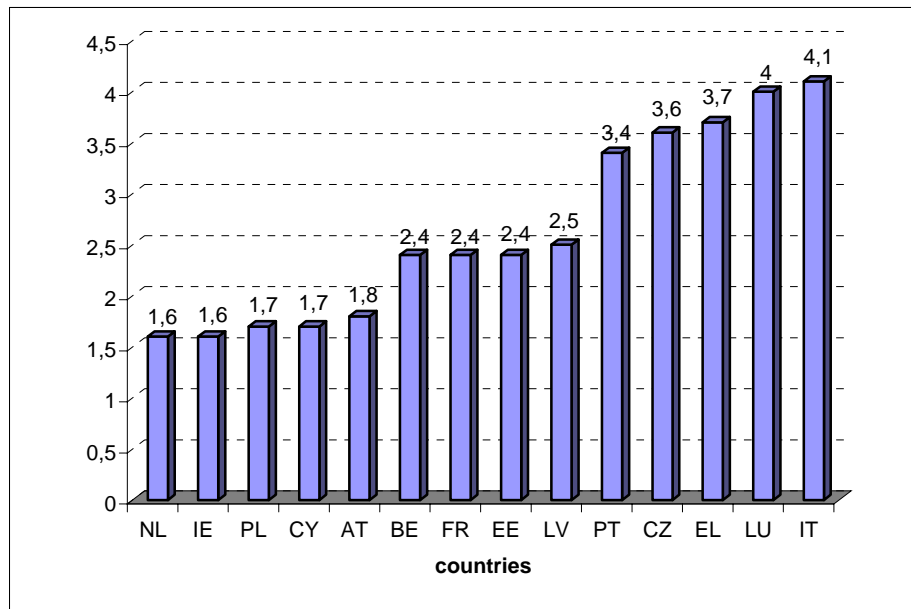
http://europa.eu.int/comm/internal_market/score/index_en.htm

Lithuania, Hungary and Slovenia are top of the league. Denmark and Finland are best among EU-15. Malta, Spain, the Slovak Republic, Sweden and the UK also show very good results; they all achieve the 1.5 transposition deficit target set by the European Council.

The Netherlands, Ireland, Poland, Cyprus and Austria are on the wrong side of the target, but still close. 1.7% for Poland is a satisfactory number, although there is still lot to do, to improve the whole process. This number corresponds most probably to the 60 Directives, in case of which Poland was lacking to notify the Commission about their transposition at the middle of 2005.

Moreover Portugal, the Czech Republic (worst among EU-10), Greece, Luxembourg and Italy, all have very bad records, with transposition deficits of more than double the 1.5% target. On the other hand France which had the second worst transposition deficit together with Italy in previous years has declined its deficit in 2005.

Figure 4. Transposition deficit, per Member State (EU-25) as of June 2005 in percent. Second Division



Source: *Internal Market Scoreboard 2005*

http://europa.eu.int/comm/internal_market/score/index_en.htm

Based on the above figures and analysis, it can be concluded that the process of Directives transposition, its speed and effectiveness is diverse. All EU members have different institutional and administrative settings to apply EU legislation – sometimes better, sometimes worse developed and coordinated. Member States have also different cultural backgrounds, and their own political and economical problems, what makes the transposition unstable and divergent. We have to remember that directives are result of prolonged negotiations between Member States and EU institutions, who in general have different views on particular subject regulated by a Directive. Furthermore although above analysis corresponds to Single Market Directives, conclusion might be drawn that it corresponds to Directives in general. Since those countries that are good in transposing Single Market Directives are good in transposing overall number of Directives. For instance Hungary, Spain, Finland, Denmark and UK are leaders in transposing not only Single Market Directives but Directives in general. Whereas Italy which is at the far back end in transposing overall number of Directives is also at the end in transposing Single Market Directives.

1.5. Process of Directives transposition in Poland

Legislative approximation⁴² in Poland is achieved by the amendment or repeal of the legislation currently in force or, when required, by the adoption of completely new acts of legislation. The national procedures for incorporating EC Directives into national law by setting up or amending national law follow the respective constitutional and state laws for this. In Poland statutes and regulations are the main instruments of the legislative activism of the relevant state organs and the main approximation tool.

Statutes are reserved for the Parliament, although other bodies, which have the legislative initiative, are able to issue draft of the statute which later on goes to Parliament for voting. Regulations according to the hierarchy of legal acts in Poland (Polish Constitution art. 87 and 92),⁴³ are subordinate to statutes. Regulations are legal acts of an executive character introduced by the President of the Republic of Poland, Council of Ministers, Prime Minister, Government Ministers. Lower in hierarchy level of administration together with the courts are responsible for the enforcement (enforcing the application) of regulations and statutes. The essence of the regulations is that they may be adopted only on the basis of explicit statutory delegation and for the purpose of the enforcement of statute.⁴⁴

The proposal of the new law (draft of a statute) which is transposing Directive is usually prepared by the ministries or central offices within ministries – due to legislative initiative they possess. Legislative Council at the Prime Minister in order to eliminate the deficiencies verifies the drafts submitted to it for coherence with the system of Polish law,⁴⁵ whereas the

⁴² In many cases legislative approximation causes the evolution of undeveloped fields of law and sometimes may even lead to creation of new, previously unknown fields of law. For more on this see also: A.Łazowski, *Adaptacja polskiego prawa do wymogów prawa Unii Europejskiej. Wybrane aspekty (Adaptation of the Polish legal system to European Union law: Selected aspects)*, SEI (Sussex European Institute) Working Paper No. 45/2001.

⁴³ *Konstytucja Rzeczypospolitej Polski z dn. 2 kwietnia 1997 (Constitution of Republic of Poland 2 April, 1997)*, "Dziennik Ustaw", no. 78/1997, item 483.

⁴⁴ It is logical that ministries who in theory are free to choose between statute and regulation when transposing Directive, in practice, will choose statute as an approximation tool. If ministries choose regulation (although regulation doesn't have to be accepted by the parliament, since it is act of an executive character) there still has to be statute passed by the parliament to comply with the regulation. Therefore it is quicker in legislative matter and more convenient and practical to use statute as approximation tool to incorporate Directive.

⁴⁵ C.Kosikowski, *Prawne problemy zbliżania prawa polskiego do prawa Unii Europejskiej i jego harmonizacja oceniona przez Radę Legislacyjną (The legislative problems of approximation of Polish law to the European Union law and harmonization therewith evaluated by the Legislative Council)*, "Przegląd Legislacyjny", no. 6(46)/2004, p.30-46.

Office of the Committee for European Integration gives its final opinion on the conformity of a draft act to the EU law.⁴⁶ Such draft goes later on to the Parliament for voting.

Constitution which gives legislative initiative is not the only reason why ministries or central offices are in general responsible for the proposal of the new act transposing Directive in Poland. The other is more of practical cause. Members of the government take an active role in the process of Directive creation, as already mention they create informal networks where they share common ideas, beliefs and create mutual understanding and agreements. Therefore they are better informed about the aim of the Directive itself, than the Parliament members who do not play such active role in Directive creation process both on European and domestic level.

In theory, under the pre-accession arrangements, the new Member States have the obligation to fully and correctly implement the *acquis communautaire* by the date of accession.⁴⁷ This means that the relevant *acquis* in Poland should already have been incorporated into national law by 1st May, 2004, and accession should have institutional rather than substantive law consequences. According to Minister Nowakowski in case of around 64 Directives, the transposition works were not finished before the 1st of May 2004, though deadline for their transposition have passed. However 1,5 year after the accession Poland is in reasonable good shape in transposing Directives into national legislation. This was also confirmed by professor Kosikowski⁴⁸ who stated that results of approximation of Polish law to the EU law, as well as Directive transposition are satisfactory. Now if we look at the case of Single Market Directives as the leading case (figure 3,4), this proves to be right.

Year after the accession there was no Directive which has not been transposed or which was not in the process of being transposed. There are some Directives which are not fully transposed (some articles of the Directive are missing), or are incorrectly transposed⁴⁹ due to economical or political

⁴⁶ T.Nowakowski, *Zbliżanie prawa polskiego do prawa Unii Europejskiej, ocenione przez Urząd Komitetu Integracji Europejskiej (Approximation of Polish law to the European Union law evaluated by the Office of the Committee for European Integration)*, "Przegląd Legislacyjny", no. 6(46)/2004, p.17-25.

⁴⁷ 21st Annual Report on monitoring the application of Community law, COM(2004) 839 final, <http://www.wales.gov.uk/keypubassemeuropeancomm2/content/euleg050124/5640-05.pdf>

⁴⁸ C.Kosikowski, *Prawne problemy zbliżania prawa polskiego do prawa Unii Europejskiej i jego harmonizacja oceniona przez Radę Legislacyjną (The legislative problems of approximation of Polish law to the European Union law and harmonization therewith evaluated by the Legislative Council)*, "Przegląd legislacyjny", no. 6(46)/2004, p.30-46.

⁴⁹ This corresponds to the 60 Directives in case of which the Commission asked Poland (between May 2004 and April 2005), why Poland failed to notify the Commission about their transposition.

reasons, but in general all Directives, which were not already transposed are currently in the process of being so.⁵⁰ However in the first period after submission of the membership application, there was significant and prolonged delay in the process of approximation. Mostly due to political reasons, what was strongly criticized by the European Commission. Large number of initiatives aimed at improving approximation process, undertaken independently by both Sejm (Lower House of the Polish Parliament) and the Council of Ministers, failed, being too particular and autonomous in character to bring the expected results. This led to the creation of special parliamentary procedure by way of amending the Standing Orders of the Sejm, which gave a beginning to a special European Law Committee, which was established on 13 July 2000 with the task to screen approximation bills.⁵¹

Therefore in the year 2001 there was an acceleration of work in aligning national legislation to Community law. Changes were introduced to the system of coordination and monitoring of works relating to law harmonization. Proper rank was assigned to Parliament for the transposition of Directives into national law system and law harmonization bills were referred to the fast legislative track⁵². Efficient cooperation between the government and the extraordinary Parliamentary Committee on European Law set up on the strength of Sejm resolution of 13 July 2000 also served to intensify alignment of Polish law to EC legislation. As a result in years

⁵⁰ One of such political reason of not transposing all provisions of a Directive is emergency number 112, due to lack of agreement between TP S.A., (Polish telecommunication monopolist) and the ministries responsible for the Directive transposition. The other example, this time transposing some of the Directive provisions incorrectly are VAT on diapers for kids and VAT on Internet. Polish authorities new that 7% VAT on Internet is to low in comparison with other EU countries and Directive provision. However due to already high Internet prices (the highest in EU – due to monopolistic practices of TPSA) and probably because of decrease in votes for the government, Ministry of Finance didn't want to make public opinion more angry and maintained the 7 % VAT which was later on changed due to Commission reaction. Similar situation was with VAT on diapers for kids. Poland adopted and used decreased amount of VAT, lower than the one proposed and required by the Commission.

⁵¹ M.Laskowska, *Komitet Legislacyjny Parlamentu Europejskiego w roli zbliżania procedur prawnych w: Droga Polski do Unii Europejskiej. Aspekty prawne (The Parliamentary European Legislation Committee in the Approximation of Laws Procedure in: Poland's Way to the European Union. Legal Aspects)*, ed. W.Czapliński, Scholar Publishing House, Warsaw 2002, p.69-81.

⁵² Press release from 8 February 2002 meeting of the Preparatory Committee of the Committee for European Integration. However it is still up to the government's decision, whether a bill is directed to the European fast track and so due to the more stringent procedure for introducing amendments, also whether the content of the approximation bills proposed by the Council of Ministers is stiffened,
<http://www2.ukie.gov.pl/WWW/en.nsf/0/5D62B0C835351D7EC1256E82005242B6?Open>

2000 – 2001, 179 drafts of statutes transposing EU Directives were passed to the Parliament. 141 of those drafts were successfully voted for. To compare in year 1998 there were only 20 drafts. In years 2002 – 2003 the number of drafts transposing UE Directives was similar than two years before, reaching 170 drafts, from which 150 were approved. In 2004 the process was similar to years before, and in year 2005 the plan is to transpose further 89 Directives.⁵³ Unfortunately there were also several mistakes made during harmonization. In 2003 there was a horizontal act (statute) passed, which incorporated around 100 Directives at once. Regrettably this hasn't been done correctly. Such quick transposition created more problems in applying provisions of Directives than benefits.

As to the effectiveness of the transposition process in Poland, the other tool to measure it, apart of transposition deficit based on the notification database – publication of national records for transposition of Directives, might be the amount of infringement proceedings before the European Court of Justice directed by the Commission for incorrect transposition or for not transposing Directives within prescribed time at all. The difficulty with this measurement at this stage for New Members is lack of full statistics being published.

2. Community and domestic supervision over implementation of Directives

2.1. Community supervision

Each state is responsible before the Community and before individuals for non-implementation, delayed or incomplete implementation of Directives.

The Community institution that has responsibility, as guardian of the treaties to oversee the implementation of its rules is the Commission. The Commission is responsible for ensuring that the EU legislation such as Directives are incorporated into national laws and enforced pursuant to the Article 211 EC Treaty. However the Commission has no direct power, so it has to rely on receiving notification about the process of implementation from national governments. The Commission under the procedure specified in Article 226 EC may carry out its task in the following manners:⁵⁴

- Supervise the notification on the state activities aimed at implementation of EU directives.

⁵³ UKIE materials and own resources, based on interviews.

⁵⁴ S.Biernat, *Kilka uwag o harmonizacji polskiego prawa z prawem Wspólnoty Europejskiej* (Some remarks on harmonisation of polish law with the European Union's law), "Przegląd Legislacyjny", no. 1-2/1998, p.20-31.

- Verify whether the state activities for transposition of Directives are in accordance with the original provisions.
- Analyze actual application of the provisions included in Directives.

The procedure provided for in the Article 226 of the EC Treaty enables the Commission to ensure good application of EC law by the Member State. Before Commission brings infringement proceedings before ECJ, it has to remind the Member State concerned in a procedure consisting of two steps, *i.e.* by Formal Notices and Reasoned Opinions, according to Article 226 EC,⁵⁵ which provides: *“If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations”*.

If the state will not react to reminder made by the Commission, Commission may based on the second paragraph of the article 226 EC start the infringement proceedings. *“If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice”*.

Therefore, anyone who is confronted with the case of non-compliance with EU law by any public authority in Poland may file a complaint to the Commission. Commission may open its own investigation and, if necessary may start an infringement proceeding against Poland before the European Court of Justice.

The Commission has a full discretion as to whether or not take action against the Member State. A plaintiff is not able to force the Commission to take action against the Member State, and there is no legal redress if the Commission refuses to do so. Therefore obligation for the national courts in the Member States to guarantee effective legal redress seems to be primary and essential.

2.2. Polish courts – their supervision activities

The preliminary ruling procedure under article 234 EC, gives additional guarantee of effective protection over application of Directives. The preliminary ruling procedure creates possibility and, in certain instances, the obligation of domestic courts to ask the European Court of Justice to give a ruling on the validity of the acts issued by the Community institutions, or on the interpretation of Community law. As a result preliminary ruling procedure

⁵⁵ Consolidated version of the Treaty establishing European Community, O.J. C 325, 24 December 2002, http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.003301.html

allows individuals and business entities to directly invoke rights provided by a Directive before national courts. Consequently from the 1st of May, 2004 domestic courts in Poland were obliged to disregard any domestic law conflicting with EU law and to award damages if the failure to implement a Directive has resulted in prejudice to the applicant. This certainly implies necessity of furnishing Polish courts with a knowledge and power to define a breach of European law. Though there is one problem which arises here, associated on one side with the application of Directives and harmonization process done by the court and on the other with the supervision conducted by the courts. Namely since Directives have to be transposed into domestic legislation, in order to be legally binding, it might be assumed that the domestic courts in Poland do not have to have knowledge of the original versions of Directives in order to define a breach of EU law, as well to control the process of application. In other words the assumption is that knowledge of the EU law might be circled only to Polish version of the EU legislation. Such reasoning is misleading and dangerous. The knowledge of the original versions of Directives or EU legislation in general is essential at least because of two reasons.

Firstly Polish courts by judicial interpretation of Polish legal acts are obligated to interpret it in accordance with the relevant provisions of EC law as well as jurisprudence of the European Court of Justice. Such pro-European interpretation of laws is considered by the European Court of Justice as one of the main obligation of the EU members.

Secondly the Polish courts in case of non-compliance of the Polish law with the EU law are obliged (based on the supremacy rule) to use the EU legislation as a base for the judgment, refusing to act on the base of the contradictory Polish legislation.

Practice shows that there are number of courts, including the Supreme Court and the Constitutional Tribunal, which are willing to apply these rules. Although there are cases proving that many judges are still reluctant to apply European standards and laws in their legal practice. In general such reluctance is derived from the negative attitude in Poland towards the application of external legal systems and especially public international law. Before entry into force of the 1997 Constitution of the Republic of Poland there was no general rule defining the relations between Polish legal system and the public international law. Therefore judicial activism in this regard was unclear and selective. Furthermore if one looks prior to year 1989 one will notice, that Poland was administered by the Communistic Party in the so called central planning way. The Communist system subjugated the law and courts to the implementation of the Party policy and not the international standards or laws.

Polish courts have also some other dilemmas when facing the European law which do not make the application of Directives and supervision of the process easier. Significant complications arise from impeded access to the sources of the Community law. Lack of official and publicly available texts of the legal acts are felt in particular. The preparation of the Polish version of the Official Journal of the European Union is a slow process, and it is not known if it will cover all legislation in force. Enforcement and control over the application process of the Directives by Polish courts require access not only to the sources of law, but also to a rich jurisprudence of the European courts. At this point and in the future it is doubtful that a Polish version of the "European Court Reports", which would cover the case law prior to the accession of Poland, will be published. It is worth to mention that, publishing of the full Swedish and Finnish versions were abandoned. Even though, unofficial translations of the European case law appear, they contain only some of the more important judgments.

Furthermore tendency to refer to the literal tenor of the rules present in Polish judicature ("textcentrism" as called by E.Łętowska⁵⁶) may be dangerous and risky to Polish courts in applying EC laws. It happens that the enforcement bodies have to make an individual evaluation of how the domestic acts comply with the Community law (based on the supremacy of the Community law principle). Quite often the discrepancy between both legal systems may not ensue directly from the tenor of the provisions, but it may become necessary to refer to the functioning interpretation of the Community law, what might turn to be too problematic for the Polish judicature.

The above problems cause the efficiency of the Polish judicial system to go down. However the fact that within a time more and more legal entities (e.g. entrepreneurs, employees or consumers) will invoke the Community law before the national courts, will force judges to become better acquainted with the Community law and how it should be applied.

3. Conclusion

The extent of transposition and application of Directives is a result of the capacity and institutional structures at the domestic level. Certain institutional structures are believed to be more receptive for adaptation to European integration than others. Some scholars⁵⁷ argue that certain state traditions and

⁵⁶ See: E.Łętowska, *Sędziowie wobec prawa europejskiego* in: *Konstytucja dla rozszerzającej się Europy* (*Judges facing European Law in: Constitution for enlarging Europe*), ed. E.Popławska, Warszawa 2000, p.235.

⁵⁷ T.A.Borzel, *Non-compliance in the European Union: pathology or statistical artifact?*, EUI Working Paper, no. 2001/28, European University Institute, Florence.

political – administrative cultures can explain variation, assuming that some states have a stronger tradition than others for following and implementing rules in general. The ability to allocate energy and resources (both in terms of human and financial resources) to make sure that the obligations of EU membership such as implementation of Directives are met within the appropriate deadlines, varies between states. State administration that is poorly staffed and lacking in coordination is rather observer than active participant and initiator of law application.

It was assumed at the beginning of the research that the new states will be worse in transposing Directives than the old ones, since they have had fewer possibilities to influence Directives creation at the Community level. However based on the Single Market Scoreboard it is not true for all. Mainly for Lithuania, Hungary and Slovenia who are leaders in transposition, not only among EU-10 but also among EU-15. It is also not true for Poland which is better than some of the EU-15 countries such as Italy or France. Furthermore based on the transposition deficit it can be summarized that Polish works in transposing Directives are satisfactory. Poland having transposition deficit at 1.7% is on the right track, although process of transposition still suffers from certain inadequacies.

There is a great need for education and training in the areas concerning application and enforcement of Directives at all stages. But also the practical aspects of working methods within European institutions, especially with regard to participation in the EU decision-making process and Poland's participatory role in working groups and committees has to be improved. Countries with more power in the EU, not only economically better developed but also legally and institutionally more efficient have a stronger possibility to influence Community legislation and generate Directives that fit with their own preferences, thereby reducing the difficulties of implementation. Therefore it is logical that Poland which has aspiration to be a strong member within European Community is strained to strengthen not only its economy but also legal and institutional setting for better fulfillment of its membership obligations.

Furthermore bodies responsible for the relevant legislation which transpose Directives seem sometimes to understand the transposition process only as a process of translating Directive into Polish language, such as in the case of "horizontal act". The problem which raises here is that, Directive nomenclature is translated word for word (without differentiation whether Directive is very technical or not), thereby introducing concepts, or vocabulary which are unknown to the Polish legal system. Sometimes even a Directive's text is annexed to the statute, which is not permissible. In result such action

causes serious problems in application or execution of Directive, therefore leading to the deterioration of the quality of law in Poland.

As to control or supervision over the implementation and enforcement of Directives, it can be assumed that the states that are under a stricter supervision regime will have a higher implementation rate, than the states under more relaxed supervision regime. Moreover from this it can be assumed that more cases of non-implementation of Directives will be detected quicker in new Member States (such as Poland), which are under a stricter monitoring regime, than in regimes that are less strict.

All of this brings us to the final conclusion, Member States which have higher implementation rate, will have fewer cases of conflict or disputes related to implementation and will seek solutions to these problems at an early stage, therefore they will be willing to integrate quicker. Moreover states with more positive attitude towards EU and stronger role in influencing Community legislation will have fewer problems with non-compliance. On the contrary, countries that are reluctant to integrate will have higher number of disputes with the EU related to implementation, and they will be slower to resolve those cases, therefore their European integration will take more time.

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