

ON THE GROUNDS JUSTIFYING NON-TRANSPOSITION OF EU DIRECTIVES

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Abstract: *This article shows that although EU Member States are quite unsuccessful when they plead many different grounds before the ECJ to justify the non-transposition of EU directives, there are still strikingly many grounds that can possibly justify non-transposition. This article also argues that although there are many good reasons for the ECJ to be very strict in accepting possible grounds justifying the non-transposition of EU directives, there was no good reason for the ECJ to reject as justifying basis one special case of the pointlessness of the transposition. Namely the pointlessness because an activity referred to in a directive does not yet exist in a Member State due to an EU law compatible national legal obstacle for such activity in that State.*

Keywords: *EU directives, transposition, justifiable/unjustifiable grounds for non-transposition, ECJ case 343/08, transposition clause, legal obstacle*

1. INTRODUCTION

EU Member States when sued by the Commission for non-transposition of EU directives have tried to plead many different grounds to justify their inaction. However the ECJ has so far shown extreme reluctance in accepting these grounds because when some Member States take the necessary transposition measures and some do not, it endangers the uniform application of EU law¹, causes fragmentation of the internal market² and may result in discrimination³. Still there are several grounds that can possibly justify the non-transposition of EU directives.

This article will map both justifiable and unjustifiable grounds for non-transposition of EU directives.⁴ It will also specifically challenge the rejection by the ECJ of one particular basis for non-transposition of EU directives, namely that transposition is pointless because an activity referred to in a directive does not yet exist in a Member State because there is an EU law compatible national legal obstacle for such activity.

By non-transposition of an EU directive it is understood in this article the situation when a Member State does not transpose an EU directive or its part into national law within the prescribed time limit.

2. UNJUSTIFIABLE GROUNDS

The ECJ has so far explicitly rejected the following types of grounds pleaded by the Member States to justify their non-transposition of EU directives.

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¹ Case 10/76 *Commission v Italy* [1976] E.C.R. 1359 at [12].

² See recital 7 of Recommendation 2005/309 on the transposition into national law of Directives affecting the internal market [2005] OJ L98/47.

³ Case 52/75 *Commission v Italy* [1976] E.C.R. 277 at [10].

⁴ In this respect the article partly builds upon the survey of such grounds provided by PRECHAL, S. *Directives in EC law*. Oxford Press. 2005, pp. 23–28.

Firstly, the ECJ has rejected the grounds of the internal difficulties of legislative⁵ (e.g. dissolution of parliament⁶), institutional (e.g. distribution of powers under the Federal Constitution between the Federal State and the Lands⁷), legal⁸, practical⁹, political¹⁰ (e.g. opposition on the part of certain individuals¹¹), financial¹², administrative¹³ or technical¹⁴ nature. The ECJ's typical reaction to these grounds is that *“a Member State may not plead provisions, practices or circumstances in its own legal order to justify failure to implement a directive within the prescribed period”*¹⁵.

Secondly, the ECJ has rejected the grounds that transposition is not necessary because a given directive is fully effective in the Member State through its direct effect.¹⁶

Thirdly, the ECJ has rejected the grounds that validity of the directive has been challenged either within the annulment procedure or the preliminary ruling procedure before the ECJ.¹⁷

Fourthly, the ECJ has rejected the grounds that the directive is so incomprehensible or ambiguous that it poses a serious problem of interpretation.¹⁸ The ECJ when refusing this justification drew the attention to *“the fact that the governments of the Member States participate in the preparatory work for directives and must therefore be in a position to prepare within the period prescribed the legislative provisions necessary for their implementation”*.¹⁹

Fifthly the ECJ has rejected the grounds, that other Member States have not transposed the directive either. The ECJ made it clear that *“any delays there may have been on the part of other member states in performing obligations imposed by a directive may not be invoked by a member state in order to justify its own, even temporary, failure to perform its obligations”*.²⁰

Sixthly, the ECJ has rejected the grounds that the result prescribed by the directive has been achieved in fact²¹ including by administrative practice²². In this respect it can be recalled that according to the ECJ *“both the principle of legal certainty and the need to secure the full implementation of directives in law and not only in fact require that all Member*

⁵ Case 301/81 *Commission v Belgium* [1983] E.C.R. 467 at [5]–[7]; Case 102/79 *Commission v Belgium* [1980] E.C.R. 1473 at [14] and [15].

⁶ Case 42/80 *Commission v Italy* [1980] E.C.R. 3635 at [3].

⁷ Case C-110/00 *Commission v Austria* [2001] E.C.R. I-7545 at [10].

⁸ Case C-326/97 *Commission v Belgium* [1998] E.C.R. I-6107; Case C-253/95 *Commission v Germany* [1996] E.C.R. I-2423 at [12].

⁹ Case C-42/89 *Commission v Belgium* [1990] E.C.R. I-2821 at [5]–[24].

¹⁰ Case C-45/91 *Commission v Greece* [1992] E.C.R. I-2509 at [12] and [20].

¹¹ Case C-165/08 *Commission v Poland* [2009] E.C.R. I-6843 at [56].

¹² Case 63/87 *Commission v Greece* [1988] E.C.R. 2875 at [8].

¹³ Case C-42/89 *Commission v Belgium* [1990] E.C.R. I-2821 at [24].

¹⁴ Case C-22/02 *Commission v Italy* [2003] E.C.R. I-9011 at [6].

¹⁵ Case C-22/02 *Commission v Italy* [2003] E.C.R. I-9011 at [9].

¹⁶ Case C-207/96 *Commission v Italy* [1997] E.C.R. I-6869 at [26].

¹⁷ Case C-74/91 *Commission v Germany* [1992] E.C.R. I-5437.

¹⁸ Case 301/81 *Commission v Belgium* [1983] E.C.R. 467 at [12]; Case C-40/07 *Commission v Italy* [2007] E.C.R. I-155 at [12].

¹⁹ Case 301/81 *Commission v Belgium* [1983] E.C.R. 467 at [11].

²⁰ Case 52/75 *Commission v Italy* [1976] E.C.R. 277 at [11].

²¹ Case C-361/88 *Commission v Germany* [1991] E.C.R. I-2567 at [24].

²² Case C-159/99 *Commission v Italy* [2001] E.C.R. I-4007 at [32].

States reproduce the rules of the directive concerned within a clear, precise and transparent framework providing for mandatory legal provisions”²³

Finally, the ECJ has rejected the grounds that the transposition is pointless because an activity referred to in a directive does not yet exist in a Member State.²⁴ As to these grounds the ECJ specified that it can be exceptionally accepted as justifiable, only if there are reasons of geography for the inexistence of an activity referred to in a directive in a Member State.²⁵ The ECJ²⁶ even refused to accept these grounds as justifiable, when the reason for inexistence of an activity referred to in a directive in a Member State is an EU law compatible national legal obstacle for such activity. This will be critically analyzed later.

3. JUSTIFIABLE GROUNDS

There are several grounds justifying non-transposition of EU directives or their parts. These grounds can be derived from EU directives themselves, from the EU Treaties as well as from the relevant case law of the ECJ. The grounds justify the non-transposition of EU directives or their parts either permanently or temporarily.

It is submitted that the justifiable grounds include the following ones.

The first justifiable grounds are based on art. 351 of TFEU. According to this article “*the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties ...*”. The first justifiable grounds therefore are that transposition of a directive entails a violation of an international law obligation resulting from a bilateral or multilateral agreement concluded by the Member State concerned with third countries prior to its EU membership.²⁷ Transposition of the Directive 76/207²⁸, which considers prohibition of night work by women as discriminatory, possibly entails such a violation. The point is that transposition of this Directive conflicts with ILO²⁹ Convention No. 89³⁰, which prohibits night work by women. This means that Member States that became party to ILO Convention No. 89 before their EU membership had been absolved of the duty to fully transpose the Directive in question.³¹ However, the grounds that transposition of a directive entails a violation of an international law obligation resulting from a bilateral or multilateral agreement with third countries concluded by the Member State prior to its EU membership, do not absolve the Member State of its transposition obligation indefinitely.³² The Member State is under a duty to denounce or renegotiate the international

²³ Case C-343/08 *Commission v Czech Republic* [2010] E.C.R. I-275 at [40].

²⁴ Case C-343/08 *Commission v Czech Republic* [2010] E.C.R. I-275 at [39].

²⁵ Case C-343/08 *Commission v Czech Republic* [2010] E.C.R. I-275 at [42].

²⁶ Case C-343/08 *Commission v Czech Republic* [2010] E.C.R. I-275 at [52].

²⁷ Analogical situation would be where the obligations for a Member State would result from a previous agreement concluded within the third international organization or from an act of such organization.

²⁸ Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40.

²⁹ International Labour Organisation.

³⁰ Convention concerning Night Work of Women Employed in Industry (Revised) 1948 (ILO 89).

³¹ Case C-158/91 *Criminal proceedings against Jean-Claude Levy* [1993] E.C.R. I-4287 at [22].

³² See art.351 TFEU.

agreement in question on the first possible occasion after the incompatibility between the directive and the agreement has been sufficiently established.³³

The second justifiable grounds are that a directive exceptionally allows for the prolongation of the transposition deadline and the Member State concerned meets all the necessary preconditions for the prolongation.³⁴ These grounds therefore justify non-transposition of the directive or its parts until the expiration of the prolonged time limit.

The third justifiable grounds are that the Member State having difficulty with timely transposition of the directive requests the EU institutions that enacted the directive (not containing the explicit prolongation clause) to prolong the transposition time limit and the request is granted.³⁵

The fourth justifiable grounds are that the transitional arrangement negotiated during EU accession negotiations entitles the Member State concerned to delay the transposition of the given directive until the expiration of the transitional arrangement. For example, the Czech Republic was allowed to delay the transposition of Directive 1999/74³⁶ until December 31, 2009, i.e. more than six years after the Czech accession into the EU.³⁷

The fifth justifiable grounds are that the Member State concerned managed to negotiate for itself during the accession negotiations or on other occasions a permanent and full derogation from the obligation to transpose certain directives or some of their parts. For example Sweden negotiated a permanent derogation from the obligation to transpose the prohibition of the sale in the Member States of certain types of tobacco for oral use.³⁸ Sweden is therefore not obliged to transpose art.8 of Directive 2001/37³⁹, which contains such prohibition.

The sixth justifiable grounds are that in a directive addressed to all Member States, there is a derogation for some Member States from the duty to transpose certain provisions or parts of the directive. For example the first subparagraph of art. 41(1) of Directive 2013/30⁴⁰ lays down that “*Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive by 19 July 2015*”. However, in art. 41(4) of the Directive it is stated that “*By way of derogation from the first subparagraph of paragraph 1 and subject to paragraph 5, landlocked Member States shall be obliged to bring into force, by 19 July 2015, only those measures which are necessary to ensure compliance with Article 20*”.

³³ Case C- 203/03 *Commission v Austria* [2005] E.C.R. I-935 at [62].

³⁴ See art.20 of Directive 80/778 relating to the quality of water intended for human consumption [1980] OJ L229/11; art.26(2) of Directive 2003/54 concerning common rules for the internal market in electricity and repealing Directive 96/92 [2003] OJ L176/37. See also C-42/89 *Commission v Belgium* [1990] E.C.R. I-2821 at [23].

³⁵ Case 52/75 *Commission v Italy* [1976] E.C.R. 277 at [12/13]; Case C-71/97 *Commission v Spain* [1998] E.C.R. I-5991 at [16].

³⁶ Directive 1999/74 laying down minimum standards for the protection of laying hens [1999] OJ L203/53.

³⁷ See Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded [2003] OJ L236/33, Annex V.

³⁸ See art.151 of Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded [1994] OJ C241/21.

³⁹ Directive 2001/37 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products [2001] OJ L194/26.

⁴⁰ Directive 2013/30 on safety of offshore oil and gas operations and amending Directive 2004/35 [2013] OJ L178/66.

The seventh justifiable grounds are that it is absolutely impossible for the Member State concerned to achieve the transposition within the prescribed limit due to force majeure or comparable circumstances. In case 101/84⁴¹ the ECJ indicated that a bomb attack may constitute force majeure based grounds for non transposition of a directive, however only for a reasonable and limited time.⁴² The ECJ therefore refused to accept the Italian plea on these grounds because the situation of non-transposition of the directive persisted in Italy for more than four years after the bomb attack on the Italian Ministry of Transport's data processing centre had occurred.

The eighth justifiable grounds are when it is absolutely impossible for the Member State concerned to transpose a directive in time due to the lack of implementing or delegated acts on the EU level, that are indispensable for the full transposition of the (legislative) directive in question.⁴³

The ninth justifiable grounds are that the transposition of a directive, or more precisely some of its relevant provisions, is not necessary due to the special nature of these provisions. In case 296/01⁴⁴ the ECJ stated that *"It is apparent from the Court's case-law that a provision which concerns only the relations between the Member States and the Commission does not, in principle, have to be transposed"*.⁴⁵ Provisions of such nature have to be transposed only if it can be demonstrated that *"compliance with a provision of a directive governing those relations requires the adoption of specific transposing measures in national law"*.⁴⁶ In case 72/02⁴⁷ the ECJ found art.12(1) of Directive 79/409⁴⁸ to be a clear example of a provision that concerns only the relations between the Member States and the Commission. This is no surprise because art.12(1) of Directive 79/409 requires that every three years the Member States draw up a report on the implementation of national provisions taken under the Directive and forward it to the Commission so that it can check that the Directive has been complied with by the Member States. It is therefore also no surprise that in case C-72/02 the ECJ confirmed that this provision of Directive 79/409 does not have to be transposed into national law since the Commission has not demonstrated that compliance with this provision requires transposition.⁴⁹

Apart from the provisions that concern only the relations between the Member States and the Commission there can still be other types of provisions of a directive which, due to their special nature, also do not have to be transposed. Namely from ECJ case 363/85⁵⁰ it follows, that definitions in a directive do not have to be transposed providing an absence of their transposition into national law is neither practically nor theoretically liable to jeopardize the due implementation of the directive.⁵¹ Specifically in case 363/85 the ECJ made

⁴¹ Case 101/84 *Commission v Italy* [1985] E.C.R. 2629.

⁴² Case 101/84 *Commission v Italy* [1985] E.C.R. 2629 at [16].

⁴³ See Recital 2 of Directive 2006/31 amending Directive 2004/39 on markets in financial instruments, as regards certain deadlines [2006] OJ L114/60.

⁴⁴ Case C-296/01 *Commission v France* [2003] E.C.R. I-13909.

⁴⁵ Case C-296/01 *Commission v France* [2003] E.C.R. I-13909 at [92].

⁴⁶ Case C-296/01 *Commission v France* [2003] E.C.R. I-13909 at [92].

⁴⁷ Case C-72/02 *Commission v Portugal* [2003] E.C.R. I-6597.

⁴⁸ Directive 79/409 on the conservation of wild birds [1979] OJ L103/1.

⁴⁹ Case C-72/02 *Commission v Portugal* [2003] E.C.R. I-6597 at [19] and [20].

⁵⁰ Case 363/85 *Commission v Italy* [1987] E.C.R. 1733.

⁵¹ Case 363/85 *Commission v Italy* [1987] E.C.R. 1733 at [10]–[12].

it clear, that the definition of *pet animals*⁵² contained in the Directive 80/502⁵³ did not have to be transposed. It is submitted that typically definitions offering no additional defining value, such as definitions that define terms and notions totally in accordance with the ordinarily known meaning of their words or circular definitions, do not have to be transposed because the absence of their transposition into national law is not liable to impede the due implementation of the directive. For example, definitions of “*weak acid dissociable cyanide*” as “*cyanide and cyanide compounds that are dissociated with a weak acid at a defined pH*”⁵⁴, “*lake*” as “*a body of standing inland surface water*”, or “*river*” as “*a body of inland water flowing for the most part on the surface of the land but which may flow underground for part of its course*”⁵⁵ clearly offer no additional defining value.

The tenth justifiable grounds are when “*transposition of a directive is pointless for reasons of geography*”⁵⁶. For example, transposition of Directive 95/21⁵⁷ is obviously pointless in landlocked Member States for reasons of geography. Also transposition of Directive 2013/18⁵⁸ is totally pointless for reasons of geography in all Member States other than Croatia. This Directive although it is formally addressed to all Member States is geographically relevant only for Croatia, because in its sole material provision to be transposed the Directive only provides that “*In part A of Annex I to Directive 2009/28/EC, the following is inserted in the table after the entry for France: Croatia, 12,6 %, 20 %.*”

Finally in case 165/08⁵⁹ the ECJ did not explicitly rule out that religious or ethical grounds could possibly justify incomplete transposition of EU directives or some of their provisions.⁶⁰

Some of the above mentioned grounds, namely the third and from the seventh onward can be described as rule of reason grounds justifying non-transposition of an EU directive or some of its parts. It is submitted that there should be at least one additional justifying basis of this nature. Namely the grounds that the transposition is pointless because an activity referred to in a directive does not yet exist in a Member State for the reason that there is an EU law compatible national legal obstacle for such activity. Unfortunately, as already mentioned, these grounds have been rejected by the ECJ in the 343/08 case. As will be addressed below, this rejection lacks convincing and reasonable arguments.

⁵² Case 363/85 *Commission v Italy* [1987] E.C.R. 1733 at [14].

⁵³ Directive 80/502 amending Directive 74/63 on the fixing of maximum permitted levels for undesirable substances and products in feeding stuffs [1980] OJ L124/17.

⁵⁴ Art.3(13) of Directive 2006/21 on the management of waste from extractive industries and amending Directive 2004/35 [2006] OJ L102/15.

⁵⁵ Art.2 of Directive 2000/60 establishing a framework for Community action in the field of water policy [2000] OJ L327/1.

⁵⁶ Case C-441/00 *Commission v United Kingdom* [2002] E.C.R. I-4699 at [17].

⁵⁷ Directive 95/21 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control) [1995] OJ L157/1.

⁵⁸ Directive 2013/18 adapting Directive 2009/28 on the promotion of the use of energy from renewable sources, by reason of the accession of the Republic of Croatia [2013] OJ L158/230.

⁵⁹ Case C-165/08 *Commission v Poland* [2009] E.C.R. I-6843 at [57].

⁶⁰ It is quite striking that the ECJ did not explicitly rule out these grounds or that the ECJ at least did not link their possible invocation with art. 4 (2) TEU.

4. UNCONVINCING REJECTION OF JUSTIFYING GROUNDS

As already indicated, the last-mentioned justifying grounds were unsuccessfully pleaded by the Czech Republic in the 343/08 case. This case concerned partial non-transposition of Directive 2003/41⁶¹. As there were no institutions for occupational retirement provision falling within the scope of Directive 2003/41 located within its territory, the Czech Republic merely transposed the provisions of the Directive intended to enable institutions for occupational retirement provision located in other Member States to carry out cross-border activities by means of the provision of services destined for the Czech territory and, in that way, to enable undertakings located in the Czech territory to contribute to the schemes offered by those institutions. The Czech Republic left untransposed those provisions of the Directive that concerned activities and supervision of occupational retirement institutions in Member States of their location or to be more precise of their establishment. The Czech Republic sought to justify the non-transposition of these provisions of Directive 2003/41, especially because no occupational retirement institution is located in its territory as a result of the prohibition which national law imposes on their establishment.⁶² The ECJ rejected this justification by pointing out that “*according to the settled case-law of the Court, the fact that an activity referred to in a directive does not yet exist in a Member State cannot release that State from its obligation to adopt laws or regulations in order to ensure that all the provisions of the directive are properly transposed*”.⁶³

It is, however, submitted that the ECJ in applying its settled case-law⁶⁴ in the Czech case failed to take into account one essential fact, namely that in the Czech case, as distinguished from the settled case-law, there is an EU law compatible national legal obstacle⁶⁵ for the existence of an activity referred to in a directive.

In the settled case-law of the ECJ there was no legal obstacle for the existence of a not yet existing activity referred to in a directive in a Member State concerned. For example, in the Greek partial non-transposition case C-214/98, there was no Greek law obstacle for slaughter of solipeds/equidae referred to in Directive 93/118⁶⁶. In the Dutch partial non-transposition case C-339/87, there was no Dutch law obstacle for hunting of birds from aircraft referred to in Directive 79/409⁶⁷. In the Irish non-transposition case C-372/00, there was no Irish law obstacle for operation of high-speed trains referred to in Directive 96/48⁶⁸. In the Luxembourgish non-transposition case C-71/05, there was no national law

⁶¹ Directive 2003/41 on the activities and supervision of institutions for occupational retirement provision [2003] OJ L235/10.

⁶² Case C-343/08 *Commission v Czech Republic* [2010] E.C.R. I-275 at [37].

⁶³ Case C-343/08 *Commission v Czech Republic* [2010] E.C.R. I-275 at [39].

⁶⁴ Case C-214/98 *Commission v Greece* [2000] E.C.R. I-9601; Case C-339/87 *Commission v Netherlands* [1990] E.C.R. I-851; Case C-372/00 *Commission v Ireland* [2001] E.C.R. I-10303; Case C-71/05 *Commission v Luxembourg* [2006] E.C.R. I-75.

⁶⁵ EU law compatibility of the Czech prohibition of the establishment of occupational retirement institutions on the Czech territory has been acknowledged by the ECJ. See Case C-343/08 *Commission v Czech Republic* [2010] E.C.R. I-275 at [57] and [62].

⁶⁶ Directive 93/118 amending Directive 85/73 on the financing of health inspections and controls of fresh meat and poultry meat [1993] OJ L340/15.

⁶⁷ Directive 79/409 on the conservation of wild birds [1979] OJ L103/1.

⁶⁸ Directive 96/48 on the interoperability of the trans-European high-speed rail system [1996] OJ L235/6.

obstacle for operation of national airports with more than 50,000 movements of civil subsonic jet aeroplanes per calendar year referred to in Directive 2002/30.⁶⁹

Obviously, where there is no national law obstacle for the existence of a not yet existing activity referred to in a directive (be it prohibited or permitted activity), it is impossible to foresee if and when such activity could emerge in the Member State concerned. It is also impossible to rule out the emergence of such activity in a Member State concerned for a certain determinable period of time. It is therefore impossible to foresee if and when the directive in question would become relevant for the Member State, where an activity referred to in the directive does not yet exist. Under such circumstances it is fully rational for the ECJ to maintain, that the transposition obligation is not pointless, because it “*applies to Member States in order to anticipate any change in the situation existing in them at a given point in time and in order to ensure that all legal persons in the Community, including those in Member States in which a particular activity referred to in a directive does not exist, may know with clarity and precision, what are, in all circumstances, their rights and obligations*”.⁷⁰

However, it can be argued that such considerations are hardly applicable where there is (an EU law compatible) national legal obstacle for the existence of a not yet existing activity referred to in a directive. In such a case the activity in question can only emerge after the elimination of the national legal obstacle by appropriate legislative action of the Member State concerned. So until the Czech Republic eliminates its prohibition of the establishment of occupational retirement institutions in the Czech territory, the emergence of the activity referred to in the Directive, i.e. the establishment of occupational retirement institutions in the Czech territory, can be objectively ruled out. Therefore in the Czech case in contrast to the above mentioned Greek, Dutch, Luxembourgish and Irish cases, the Czech Republic has got 100% control over the possible emergence of a not yet existing activity referred to in a directive.

Now if the Member States do not have such 100% control, i.e. the control over a possible change in the existing situation, it makes sense to insist on the transposition of provisions of a directive referring to a not yet existing activity in those Member States, in order to anticipate any (uncontrollable) change in the situation existing in them, i.e. in order to anticipate the possible uncontrollable emergence of not yet existing activity referred to in a directive. This insistence on anticipatory transposition, however, makes no sense if the Member States have got 100% control over the possible (non)emergence of a not yet existing activity referred to in a directive.

Also it is submitted, contrary to the view of the ECJ⁷¹, that it does not make sense to ensure (by anticipatory transposition) in the Member States in which a particular activity referred to in a directive does not yet exist, that all persons know their rights and obligations with clarity and precision, in the event of elimination of a national legal obstacle to a particular activity referred to in a directive in question. If the national legal obstacle is compatible with EU law, then to ensure the above mentioned makes as little sense as to ensure

⁶⁹ Directive 2002/30 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports [2002] OJ L85/40.

⁷⁰ Case C-343/08 *Commission v Czech Republic* [2010] E.C.R. I-275 at [41].

⁷¹ Case C-343/08 *Commission v Czech Republic* [2010] E.C.R. I-275 at [41] and [50].

(by anticipatory transposition) in Member States that took advantage of the derogation option in the directive or that have temporary derogation from the duty to transpose, that all persons in advance know their rights and obligations with clarity and precision, in the event it is decided by those Member States not to take advantage of the derogation option anymore or in the event temporary derogation expires in the possibly very distant future. It can possibly make sense to insist on anticipatory transposition (as it makes sense to insist on distinguishing between entry into force and applicability of a national transposition measure) shortly or reasonably early before the elimination of the given national legal obstacle, expiration of temporary derogation or giving up the derogation option, but surely not an unreasonable amount of time before these events.

In summary, there are no convincing arguments or considerations for the ECJ to insist on anticipatory transposition of provisions of a directive referring to a not yet existing activity in Member States, providing there is an EU law compatible national legal obstacle for such activity in these States. In such a case the anticipatory transposition cannot be compared to anticipatory transposition of provisions of a directive referring to a not yet existing activity, for which there is no EU law compatible national legal obstacle in the Member States concerned. In such a case the anticipatory transposition should be compared to possible anticipatory transposition of EU directives that provide the derogation option or EU directives with respect to which the Member States concerned have temporary derogation from the duty to transpose. In such a case the anticipatory transposition is therefore as premature, as pointless, and as redundant as in the case when Member States take advantage of the derogation option in a directive or when Member States have temporary derogation from the duty to transpose.

It is therefore argued that the fact that an activity referred to in a directive does not yet exist in a Member State should be considered as justifiable grounds for non-transposition, not only when there is a geographical reason for the inexistence of the activity in question in the Member States concerned but also when there is an EU law compatible national legal obstacle for such inexistence.

Although on the one hand, as argued above, the anticipatory transposition of provisions of a directive referring to a not yet existing activity in some Member States does not make sense and is pointless in those Member States in which there is for such activity an EU law compatible national legal obstacle, the elimination of which is not imminent. On the other hand it does make sense and it is not pointless to oblige those Member States to notify the Commission (for the purpose of ensuring effective control of the Commission over the transposition in the Member states concerned) of the existence of such national legal obstacle, and as the case may be, the (imminent) elimination of such obstacle. In this respect the rational special transposition clause in art. 41(3) of Directive 2013/30⁷² deserves reference. This clause lays down by way of derogation from the general transposition clause that *“Member States with offshore waters that do not have offshore oil and gas operations under their jurisdiction, and which do not plan to license such operations, shall inform the Commission thereof and shall be obliged to bring into force, by 19 July 2015, only those measures which are necessary to ensure compliance with Articles 20, 32 and 34. Such*

⁷² Directive 2013/30 on safety of offshore oil and gas operations and amending Directive 2004/35 [2013] OJ L178/66.

Member States may not license such operations until they have transposed and implemented the remaining provisions of this Directive and have informed the Commission thereof”.

Clearly this transposition clause perfectly reflects the pointlessness of the above mentioned anticipatory transposition as well as the above mentioned need for notification. It is therefore suggested that such a type of special transposition clause should serve as a model for all directives with provisions referring to a not yet existing activity in some Member States, provided there is an EU law compatible national legal obstacle for such activity in those Member States.

5. CONCLUSIONS

Undisputedly, there are many good reasons for the ECJ to be very strict in accepting possible grounds justifying the non-transposition of EU directives. However, there was no good reason for the ECJ to reject as justifying grounds the pointlessness of the transposition because an activity referred to in a directive does not yet exist in a Member State due to an EU law compatible national legal obstacle for such activity in that State.

The special transposition clause modelled on the clause in art. 41(3) of Directive 2013/30 should be used in all directives with provisions referring to a not yet existing activity in some Member States, provided there is an EU law compatible national legal obstacle for such activity in those Member States.