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The Selective Harmonization Impact of the Coordination Policy

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The strong interdependence of Member States' legal orders was the reason why Member States decided for coordination and for monitoring each other's legislative activity. Over the years, the Contracting States and the Union legislature have established more and more obligations referring to national legislatures in this respect. The most common of these are the well-known duties to transpose directives into national law. These EU legal acts contain substantive law, rights and/or obligations for individuals, and thus encompass material provisions that can be subject to a transposition process. However, this EU-wide harmonization is not the only way to influence national legal orders. This article deals with the kind of formal obligations which compel Member States to consult EU institutions on draft laws during their national legislative procedures. These obligations are of a procedural nature, with the outcome of the consultation procedure resulting in substantive law. This article shows that in respect to the Information Directive, the Court applies different criteria of inapplicability than it does for 'typical' or harmonizing directives. The Court examines the breach of the obligation to notify contained in the Information Directive, particularly if the criterion constituting a 'substantial procedural defect' renders such technical regulations inapplicable so that they may not be enforced against individuals. The Information Directive used to enjoy great attention from legal scholars and national courts as well as the Court of Justice of the European Union. The latter confirmed the Information Directive's direct applicability in several cases. Sometimes it did not heed opinions of the General Advocates and established settled case law in this regard. In other cases, however, it declined the enforcement of this directive in proceedings between private parties. The goal was to avoid disruptions of the internal market. It thus limited the impact of the unconditional procedural obligations resulting from the Information Directive to cases impacting the internal market only. This may have been necessary since obligations to consult constitute unconditional duties and all Member States' draft laws are supposed to be notified with no difference as to whether they refer to the internal market or not. The wording of the obligations to consult EU institutions rules that the Member State issuing a new law may act and – if it so desires – enforce the new national law. However, the state is not completely free in doing so: it cannot conduct the legislative process from beginning to end.

This article is Part 3 of a set of three interlinked articles. Parts 1 and 2 appeared in *European Review* 28(2) and 28(3) respectively.

1. Introduction

Most scholars that used to write about the Information Directive (the Information Directive or Directive)[1] focused on the jurisprudence of the Court of Justice of the European Union (the Court or CJEU) and the direct applicability of the Directive as ruled. However, a comparison with 'classic' directives is still missing. A careful study of the provisions of the Directive can help determine the exact duties following from obligations to consult cases (Skowron-Kadayer 2020a, 1–14) anchored in this legal act (Section 2.1). The differences between the regular implementation and the category of obligations to consult are part of the research. The Directive constitutes a special kind of directive, as it does not include any material provisions that would impact the laws of the Member States until a certain implementation period.

An analysis of the jurisprudence of the Court will constitute a further part of the research (Section 2.2). Consequently, the current article thus establishes new terms such as selective harmonization, and putting a directive into force, for which Article 108(3) TFEU is an indicator (Section 3). The current article supports a uniform terminology for the provisions that constitute obligations to consult (and is based on Skowron-Kadayer 2018). It argues that statements, recommendations and detailed opinions issued in a consultation procedure (and not the provision of the Directive) should be implemented into national law.

2. Differences between a 'Classic' Directive and the Information Directive

In several cases regarding the Information Directive cases (Skowron-Kadayer 2020a, 1–14), such as *CIA Security International* (*CIA*)[2] and *Unilever*,[3] the CJEU ruled that Articles 5 and 6 of this legal act are directly applicable in civil law proceedings in national courts. In the *Lemmens*[4] case, however, it declined the direct applicability. In these cases, the Court applied different criteria for direct applicability than that of settled case law regarding 'classic' directives. In order to discuss these differences and determine a system interruption, one should compare the Directive with 'normal' directives. Hereinafter, the comparison of the Court's jurisprudence regarding directives follows.

2.1. Characteristics of the Obligation to Consult from, and of, the Information Directive

The characteristics of Articles 5 and 6 of the Information Directive, constituting the obligation to consult EU institutions during the national legislative process, will be

1. Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Text with EEA relevance) OJ L 241, pp. 1–15.
2. (1996) ECR I-02201.
3. (2000) ECR I-07535.
4. (1998) ECR I-3711.

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discussed. These provisions of the Directive will be compared with a classic directive. At the outset, I would like to point out the similarities with classic directives, such as the name ('directive') and the manner of provisions it contains. Article 12 of the Directive states that it is addressed to Member States. All other directives also contain this wording. Even if Articles 5 and 6, as 'atypical directive provisions' (Abele 1998, 569–572), constitute unconditional procedural obligations, obligations of this kind are not uncommon in directives. For example, the obligation to transpose a directive into national law that is addressed to Member States is also considered an unconditional duty; it is thus similar to obligations to consult. In both cases (the Directive and a classic directive or, as termed by General Advocate Jacobs,[5] a 'normal' directive) a Member State can violate a formal duty – the duty to transpose (in case of a classic directive) or the obligation to consult EU institutions (in case of the Directive).

The main difference between the Directive and a 'classic' directive is that material provisions that form duties and rights of citizens are characteristic only for a 'classic' directive (Abele 1998, 569–572). A 'normal' directive thus contains guidelines for laws that are supposed to be transposed, that are prescribed by this directive and are known when it enters into force. This is different in the case of the Directive. According to an obligation to consult, the content of national law will be developed during the consultation procedure. The provisions of the Directive solely describe the procedural obligations of Member States (Abele 1998, 569–572). There are, however, more distinctions. They are discussed in the following sections.

2.1.1. The Scope of the Duties to Follow

The scope of the duty of a Member State to act with respect to national law differs. In order to follow the unconditional obligation to implement a 'classic' directive into national law, a Member State has to act with respect to its national legal order – it needs to transpose the provisions of the directive into national law. The obligation to transpose a directive into national law aims at an impact on the content of national provisions (Nettesheim 1999, 18). After the national law has been issued, the Member State notifies the Commission about its implementation. The valid Member State's law is the subject of this notification. The focus of the transposition thus lies in the new national law coming into force that is foreseen by a directive containing material rights and obligations.

It is different in the case of obligations to consult. The subject of notification is the national draft. The national law is not in force when this notification takes place. On the occasion of the notification, a consultation procedure between the Commission and other Member States follows. Here, two different legal actions need to be taken in order to fulfil this duty. The first is the preparation of a national draft. This occurs solely at Member State level. The other acts, the notification and the procedure being put into force by this notification, take place at EU level. It is only after this, if necessary, that the Commission and other Member States become active and can issue commentary or a detailed opinion that contain proposed amendments with regard to

5. Advocate General FG *Jacobs* in: CJEU, case C-443/98 [2000] ECR I-7565(80).

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the national law. The notifying Member State is then supposed to take into account these comments in formalizing its national law.

The wording of an unconditional procedural obligation from the Directive lets one assume that all elements of this formal duty constitute a fundamental requirement for the proper observance of this obligation. A clear focus on a Member State's duty cannot be determined. All elements of this obligation to consult are closely linked with one another.[6]

2.1.2 No Implementation Period

A 'classic' directive differs from the Directive in a further point. A typical directive contains an implementation period. Material provisions are supposed to be transposed into national law within a certain time.[7] In contrast, the Information Directive does not contain a provision that would obligate EU institutions to participate in the national legislative procedure within a determined timeframe. It also does not contain a provision that would obligate the national legislature to issue a technical standard within a certain period. The Directive contains unconditional procedural requirements (the obligation to notify and the standstill clause). It does not obligate Member States to follow them within a deadline. That is why if a Member State violates the provisions of the Directive, one cannot speak about belated transposition.

2.1.3. Goals of the Directive

The consultation procedure in the Information Directive aims at preventing the emergence of new obstacles to the internal market (European Commission 2005, 1–96). 'The smooth functioning of the internal market' should be ensured.[8] This Directive does not harmonize the laws of Member States.[9] Moreover, legal acts that are issued during the consultation procedure according to the Information Directive refer to areas that have not been harmonized.[10] In this respect, the EU coordinates the policies of Member States. The Information Directive does not apply to cases of harmonization.[11]

6. A Member State communicates with the Commission during legislative process. This communication constitutes a 'procedural requirement ... of a compulsory nature for the State concerned' (Advocate General M Lagrange, in: CJEU (1964) ECR 1251, 1297) or 'substantial procedural obligations' (CJEU, 1998 ECR I-3711, 3735(33) and (35); (2000) ECR I-7565, 7585(50); (1996) ECR I-2201, 2246(45) and (48); 2005 ECR I-7865, 7877(23); 2002 ECR I-5031, 5077(49).
7. The article regarding the transposition deadline is located in one of the last articles of a directive, after the provision that the directive is addressed to Member States.
8. 3rd Recital of the Information Directive.
9. CJEU, *Unilever*, case C-443/98, (2000) ECR I-7565(40); Advocate General FG *Jacobs* in: CJEU, case C-443/98 [2000] ECR I-7565(83).
10. See 8th and 11th Recital of the Information Directive in the version of Directive 98/48/EC; Advocate General FG *Jacobs* in: CJEU, case C-443/98 [2000] ECR I-7565(83); see also Article 6 (3 and 4) of the Information Directive.
11. See Article 7 Information Directive. In this regard, also sentence 2 of 15. Recital foresees a specific temporary standstill period and 16 recital states the Information Directive is applicable when technical standards are issued in not harmonised areas.

2.2. The Court's Jurisprudence regarding Directives versus the Directive Jurisprudence

In its jurisprudence regarding the Information Directive the CJEU established different conditions for direct effect than in the settled case law regarding directives.[12] Directive provisions must be unconditional and sufficiently precise. However, this would not be sufficient since the case in question needs to be relevant to the internal market. The goal of the Directive is to 'eliminate or restrict obstacles to trade'.[13]

The jurisprudence of the Court regarding the Information Directive has been discussed in the scholarly literature. Cases such as *CIA* und *Unilever* show that the question of conducting the consultation procedure can be relevant in conflicts between private parties. The jurisprudence of the Court has thus been discussed in connection with the horizontal direct effect of directives (Bradford 2014, 1723; Abele 1998, 569–572; Jarass and Beljin 2004, 1–11; Nettesheim 1999, 85; Dougan 2001, 1503–1517; Lackhoff and Nyssens 1998, 397–413; Prechal 2000, 1047–1069; Slot 1996, 1035–1050; Lenz *et al*. 2000, 509–522).[14] Until the ruling in the *Unilever* case, the literature understood this jurisprudence as an example of the horizontal direct effect of directives (Herrmann 2006, 69–70; Stuyck 1996, 1261–1272; Chojnacka 2005, 143 and 155).

Legal scholars assume that with *CIA* and *Unilever* the Court established an exemption from settled case law regarding the prohibition of horizontal direct effect as in *Marshall I* and *Faccini Dori* (Dougan 2001, 1503–1517; Abele 1998, 569–572). This jurisprudence is also called an 'open contradiction' to 'classic' jurisprudence, according to which a private entity cannot enforce the provisions of a directive in conflicts with another private entity (Abele 1998, 569–572). The Court confirmed the different legal nature of the Directive in comparison to other directives (Dougan 2001, 1503–1517).

If legal scholars understand the violation of the obligation to consult EU institutions as a case of horizontal direct effect, they treat violations of the obligation to consult (or an element of which) on a par with the obligation to transpose a directive into national law. The question concerning horizontal direct effect arises in the case of a Member State violating its duty to transpose a directive. The reason for this interpretation can be that the parties to legal proceedings were private individuals. Legal scholars judge a case according to this formality (Dougan 2001, 1503–1517, who criticises the Court for reviewing the wording of Directive provisions instead of looking at the result of the ruling). The horizontal direct effect of the Information Directive would mean that it is supposed to be transposed. However, as stated above, this Directive differs greatly from normal directives.

2.2.1. Formal versus Material Defects as the Reason for Direct Applicability

A procedural defect during the national law-making procedure constitutes the reason for the direct applicability of the Information Directive.

12. CJEU, *Becker v Finanzamt Münster-Innenstadt*, Case 8/81, [1982] ECR 53; CJEU, *Marshall*, case 152/84, (1986), ECR 737(46).
13. Case Unilever (para. 42).
14. Advocate General FG *Jacobs* in: CJEU, case C-443/98 [2000] ECR I-7565(80) and (81).

It is different in the case of transposing directives where the Member State did not do so and thus material provisions in the national legal order are missing. The reason for direct applicability is the lack of provisions transposing a substantive EU directive in national legal orders.A formal violation of EU law is possible only as a violation of the duties to transpose and to notify the Commission of the transposed law.

2.2.2. The Reference Point of Direct Applicability of Directive Provisions

The reference point of direct applicability of 'classic' transposition differs from that in the case of the Information Directive, according to the jurisprudence lines.[15] In case of classic implementation, it is neither the transposing law itself (the unconditional duty to transpose the directive into national law, which contains a deadline[16]) nor the notification of the Member State's law that transposes a directive (the formal and unconditional duty to inform the Commission about a national law). None of these formal provisions is directly applicable. The other sufficiently defined and unconditional substantive obligations of a directive are directly applicable. Defects refer to national law, since, due to the lack of, or defective, implementation, it does not contain material provisions as foreseen in the directive.

In the case of the Directive, a substantive violation of EU law – as in the case of a 'classic' directive – due to incorrect or lack of implementation cannot occur (Bernhard and Madner 1998, 87–110, according to whom 'defects regarding the notification procedure do not necessarily constitute violations of substantive Union law'). Formal obligations to consult do not provide Member States with any material guidelines. According to the Directive jurisprudence line, the formal obligations themselves constitute 'substantial procedural requirements' and are directly applicable.

2.2.3. Comparison of the Material Regulatory Areas of Three Different Types of Directives

A system interruption constitutes an argument against the direct applicability of procedural obligations from the Directive. Its effect with respect to the Directive is abstract-general and thus could be disproportionate[17] in cases of a violation of a solely procedural obligation. In order to prove this point, three categories of direct applicability of EU law will be discussed. They will be compared in regard to the competencies exercised by the EU.

The Court has developed three cases of direct applicability for the provisions of a directive. In the first, classic, category, there are two opposing provisions that contradict each other with respect to material content. By issuing the national law, the Member State in question violated the competency of the EU insofar as it ruled on

15. See under C regarding terminology.
16. As an example, the standard wording: 'The Directive to be implemented until …'
17. Similar, however, with a different justification, to Advocate General FG *Jacobs* in: CJEU, case C-443/98 [2000] ECR I-7565(107).

cross-border cases or the law that is supposed to be transposed into national legal order is missing. Either the Member State did not transpose the EU law or its law contradicts the EU law.

An example of the second category is the case of *Mangold*.[18] The German law was not in line with Directive 2000/78. National law did not collide with its provisions, but with the EU principle prohibiting age discrimination. The first, fourth, eighth and 25th recital indicated this principle. A precise material guideline of EU law for national law, as in the first category, is missing here. The directive does not govern the principle as detailed but governs material provisions. Moreover, one needed to interpret recitals of this directive in order to determine the principle. A material provision of law ruling on the rights and obligations of citizens is missing. The directive contains a generally worded material guideline for Member States.

The case of Articles 5 and 6 of the Information Directive constitutes a third known category in which the Court ruled on the direct applicability of a directive. Here, according to the Court and in contrast to the two categories just mentioned, a procedural provision is directly applicable that acts to protect the internal market. The material EU law – the consultation act – is issued only during the consultation procedure and the participation of EU institutions in the national law-making process.

A comparison of these categories regarding the division of competencies would be fruitful for further research. In the third category – in contrast to the first mentioned cases where a harmonizing measure was issued – the EU did not rule on the rights and obligations of citizens as precisely as it did in the first case. The Information Directive is not supposed to harmonize *uno tempore*, but rather to coordinate[19] the legal orders of the Member States. That is why the Member State is not missing the competency to issue national law that would contradict EU law. Moreover, the Member State is competent to issue national law.[20] At the time of the notification there still is no material law, and thus it has the right to initiate a new law. However, the Member State does not have the competence to conduct a legislative procedure all on its own. In this category, this competency is not missing completely, as in cases in which the EU exercised material competences by issuing a harmonizing legal act. The Member State is competent under some conditions (if it follows the rule of obligations to consult and consults EU institutions on the national draft law). The legislative procedure is the element that makes this category different from the two above-mentioned ones.

Here one can see a clear gradation. The first category contains clear guidelines for national practitioners. They can decide on the direct applicability of EU law and the inapplicability of the contradicting national law on their own. The content of the EU law is easy to determine. In addition, direct applicability helps in these cases to satisfy the goals of EU law, which spells out the rights and/or obligations for citizens. It thus

18. CJEU, *Mangold*, case C-144/04, 2005 ECR I-09981.
19. See Section 2.1.3 above.
20. The obligation to consult from Information Directive applies also to domestic technical rules.

contains reference to the duties that can be easily determined by national practitioners. In comparison, the second category contains fewer clear directions (guidelines). A generally formulated principle of age discrimination may collide with many provisions of national law and not one single rule of law (as is the case in the first category). Moreover, it is not clear if the national practitioner can determine the scope and the relevance of this principle. It is contained in the recital and not in the regulatory part of a directive. In addition, it is not precisely laid down.

There are even less precise material or content-related guidelines for national practitioners in the third category. Material EU law can, under some circumstances, be proposed as a reaction to the notification of national draft (the detailed opinion as a consultation act). The special feature here is that one cannot say from the beginning that national law actually contradicts EU law.[21] There is no material EU law at the time of notification. The content of EU law cannot be determined by national practitioners as it can be in the first category, for instance.

In the third category, the Member State's violation of EU law refers to a procedural duty and thus to law-making competencies (legislative powers). Here, one cannot say that the direct applicability of procedural duties actually supports the internal market[22] because it is suitable for substantive national rules colliding with EU law. The primacy of EU law cannot be applied as a sanction of defects that have their source in EU law – the procedure of consultation with EU institutions on national drafts.

Comparing the categories raises the need for further discussion. Applying the jurisprudence of the Court means here that the national provision can still be applied (exclusively to national cases) when the Member State violated harmonized EU law (first category) and that the national law provision cannot be applicable in any case when the Member State only violated duties resulting from the coordinating EU legal act (third category).[23] At the same time, provisions issued by the national legislature in the area of obligations to consult are supposed to be applied to national cases. Technical rules should be applied to exclusively national cases.

The system contradiction exists in as far that the national provision can be applicable (to solely national cases or cases in which there are no conflicts with EU law) when the EU harmonized a certain area.[24] In such cases, Member States are not allowed to issue national laws that would contradict EU law. They lack the competency to rule on cross-border cases. In the third category, where Member States

21. Cases in which the new unnotified law is substantively in line with EU law are possible.
22. Procedural provisions are indifferent in substantive matters. See also Advocate General F Jacobs in: CJEU [2000] ECR I-7335(84); Advocate General ME Elmer in: CJEU, C-194/94 [1996] ECR I-2201(65): 'The likelihood that a non-notified regulation is substantively in breach of Community law is thus no less than the likelihood that a notified regulation would be, rather the contrary') and Skowron-Kadayer (2020b).
23. See above Section 2.1.3.
24. If a Member State has a competence to issue rules of law after consulting EU institutions regarding national drafts, it actually has more competence, than in case of harmonization. The EU did not harmonize this area, but reserved its competence. The Member State is bound to follow the procedural duties of consulting EU institutions on national drafts.

comparatively have the most legislative competencies,[25] national law does not in fact (the factual impact of the primacy that creates regulatory gaps[26]) have any regulatory area left due to the unconditionally formulated wording of Articles 5 and 6.[27]

2.2.4. Legal gaps as a result of direct applicability of Information Directive

The confirmation of direct applicability of Articles 5 and 6 of the Information Directive by the Court is not in line with its dogma regarding directives (Abele 1998, 569–572). The direct applicability should sanction violations of the obligation to transpose a directive into national law and avoid legal gaps that are caused by omitted or defective transposition. It serves the goal of the efficiency of EU law (*effet utile*).[28]

In contrast, the direct applicability in case of the Information Directive creates legal gaps. The Court does not rule on direct applicability in every case where a Member State violates the obligation to transpose the Information Directive. Moreover, its applicability depends on the particular case, a first for provisions placed in a directive (Skowron-Kadayer 2020b). Once it examines the direct applicability of its provisions, the Court applies different criteria to the obligation to consult in the Information Directive than it usually applies to the provisions of directives. This raises the question of whether there has been a system change on the Kirchberg Plateau, the home of the Court.

3. Selective Harmonization

Bearing the above-mentioned differences between normal directives and the Information Directive in mind, one has to argue if 'implementation' is the right term for the Directive. Can its provisions be transposed? Some legal scholars state that the Directive should be transposed (Chojnacka 2003, 151, 154; Bernhard and Madner 1998, 87–110). However, it is doubtful if the Directive, which foresees the participation of EU institutions in national legislative proceedings, can be transposed. Some other scholars deny the necessity of implementation (see Nettesheim 1999, 65; while Ranacher and Frischhut 2009, 335 would like to differentiate between the duties to notify according the Information Directive and Article 108(3) TFEU and the duties to implement a directive). Provisions of the Directive that contain duties for Member States (and not individuals) should be fulfilled through their observance (Nettesheim 1999, 65). In those cases, 'dutiful compliance' (Nettesheim 1999, 65) corresponds with 'transposition'. The lack of compliance with the obligations to notify (the lack or incorrect notification of national draft to the EU institution) are defects of the Member State.[29]

25. See Section 2.1.3 above.
26. General Advocate G Cosmas in: CJEU (1999) ECR I-3135 (74).
27. The Member State that issues law without a previous notification will have to restart the legislative procedure and this time consult the Commission. The unnotified law cannot stay in national legal order permanently.
28. CJEU, *van Duyn/Home office*, case 41/74 (1974) 1337, 1384; case 148/78, (1979), p. 1629.
29. M Nettesheim in: E Grabitz, M Hilf, and M Nettesheim, 'Das Recht der EU' (2012) Art. 288(118).

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3.1. The New Category of Putting a Directive into Effect as an Aliud *to Implementation*

The above-mentioned differences show that obligations to consult do not constitute a case of classical implementation of a directive (also Jarass 1994, 108; Brenn 2005, 41–53). These provisions have a similar impact to laws contained in a regulation (Chojnacka 2005, 156).[30] The prohibition of Article 108(3) (third sentence) TFEU is an unconditional procedural obligation that is similar to Articles 5 and 6 (Skowron-Kadayer 2020a, 1–14). The provision of Article 108 TFEU is not transposed into national law. One needs implementation only if domestic validity is necessary. However, procedural obligations to consult are addressed to the Member States. There is no need for domestic validity.

The Information Directive constitutes a different kind of directive than a 'normal' one. The jurisprudence of the Court regarding 'classic' directives is thus not applicable to this case (Sommer 2005). Legal instruments developed for classic directives cannot be applied. The categories developed by the Court for incorrect or lack of implementation are not appropriate for this Directive. The direct applicability of the substantive provisions of a directive or the prohibition of the horizontal effect do not come into question. The Information Directive thus may take effect among private individuals like provisions of primary law (Craig and de Búrca 2015, 216; Abele 1998, 569–572; Freitag 2009, 799; Jarass and Beljin 2004, 1–11; Nettesheim 1999, 85; Oesch 2001, 1158–1168; Dougan 2001, 1503–1517; Prechal 2000, 1047–1069).[31] The horizontal direct effect of a directive and the effect of the Information Directive are not mutually exclusive. They exist in parallel (similar to Chojnacka 2005, 143; Lenz *et al*. 2000, 509–522).

The preventive control of national laws serves the coordination, not the harmonization, of Member States' legal orders. The term 'implementation' used with respect to the obligation to consult does not reflect the duties of Member State.[32] Following the obligations to consult involves putting the (Information) directive into force.[33]

In order to suggest a homogeneous terminology and take a first step towards systematization, a new term with respect to directives should be established: 'incidentally putting a directive into effect'. This term refers to putting measures into effect based on Article 108(3) TFEU and thus supports a general, uniform terminology applicable to several obligations to consult. Formal obligations to consult are put into effect according to this.

30. Advocate General FG Jacobs in: CJEU, case C-443/98 [2000] ECR I-7565(79).
31. General Advocate FG Jacobs, in: CJEU, Case C-443/98 *Unilever*, [2000] ECR I-7535(80) and (81).
32. Similar to Advocate General FG Jacobs in: CJEU, case C-443/98 [2000] ECR I-7565(78).
33. For uniform terminology for the sake of legal clarity and certainty, one can argue with settled case law where the Court describes the prohibition of Article 108(3) TFEU to put an unnotified state aid into force as a 'ban on implementation'.

3.2. The Substantive Essence of Legal Acts Issued at the End of a Consultation Procedure

The Directive does not harmonize Member States' legal orders *uno tempore*. Every Member State can decide on its own when it starts its national legislative procedure. The detailed opinion, as a consultation act (Skowron-Kadayer 2020b), issued during the consultation procedure should be implemented into national law. These acts are used in the harmonization of Member States' laws.

However, the harmonization here is selective because the EU did not issue a legal act harmonizing Member States' laws. Moreover, it waits until every Member State drafts a new law. In this case, the EU drafts substantive guidelines that should be followed in national law. Material guidelines that are supposed to be reflected in national law are well-known from harmonization.

The compliance with Articles 5 and 6 of the Information Directive constitutes an *aliud* to a harmonizing legal act in cases in which the EU still didn't propose a harmonizing legal act. And the consideration of the detailed opinion in national draft constitutes a *pendant* of an implementation. Substantive EU law is being implemented into a national draft that has been notified.

3.3. The Pre-pre-effect of the Information Directive

'Normal' or 'classic' directives can have an effect already before the end of the implementation period, the so-called pre-effect or advanced effect.[34] Member States should omit measures that could disrupt the goal of a harmonizing directive.[35] This anti-frustration law constitutes a further possibility for a directive effect that comes together with a harmonization process. The inapplicability of national law does not come into question before the end of the implementation period. It is possible only after this period ends.

The jurisprudence of the Court regarding the so-called pre-effect applied to the Information Directive shows a system interruption. The Information Directive foresees neither a material harmonization (Brenn 2005, 41–53) nor an implementation period. When the Court rules on inapplicability in cases where an implementation period does not exist,[36] the Directive develops its effect prematurely, meaning even before the time in which a pre-effect of a 'normal' directive would occur. However, the lack of harmonization or of the will to harmonize means that the uniform effect should not impact the Member State's legal orders.

The Information Directive would develop its effect prematurely, even before the time in which a pre-effect of a classic directive can occur. Direct applicability could also occur too early in that it would anticipate the uniform effect of EU law demand in the cases in question. The confirmation of the direct applicability of the

34. CJEU, case C-422/05, (2007) ECR I-4749; Nettesheim in: E Grabitz, M Hilf and M Nettesheim, 'Das Recht der EU' (2012) Art. 288 (118); W Schroeder in: M Streinz, EUV/AEUV (2012) Art. 288 (83).
35. CJEU, *Inter-Environment Wallonie*, case C-144/04 (1997) ECR I-7411 (41) (*Mangold*).
36. See Section 2.1.2 above.

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Information Directive is a system interruption in the jurisprudence of the Court. The legal institutes developed for 'normal' directives are not applicable to this case.

4. Conclusions

A thorough analysis shows that the provisions of this Directive are supposed to be put into force and not transposed. A Member State issuing a national law, such as technical rules, is supposed to put this Directive into force by following its wording. Conducting the notification and consultation procedure constitute putting its provisions into force.

However, the consultation act containing material specifications as to how national law is supposed to be harmonized with EU law can and should be transposed. A counterpart for the implementation of a 'classic' directive is the taking into account of a detailed opinion on the national draft according to the wording of Article 6 (2).

The Information Directive is supposed to coordinate Member States' policies. Harmonization does not occur at the same time, since the EU does not issue one legal act harmonizing all Member States' legal orders until the end of the implementation period *uno tempore*. Harmonization occurs once a consultation act is issued. Since Member States that notify of a new law decide on the time of the legislative procedure and not all Member States start these proceedings at the same time, the Directive serves 'selective harmonization'. This term should be introduced with respect to obligations to consult following from the Information Directive. Every Member State decides on the time of notification. Thus, harmonization occurs step-by-step and selectively. Selective harmonization occurs upon the request of a notifying Member State.

A detailed examination of the nature of the obligation to consult in the Information Directive shows that the EU exercised its competences with respect to the obligation to participate in national legislative procedures. That is why the jurisprudence of the Court regarding 'classic' directives can be applied partially and with respect to its very essence. It is not the provisions of the Directive that should be transposed, but the content of the consultation acts.

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