

Active Transposition of EU Legislation



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Better regulation cannot be achieved without giving serious attention to transposition. As a matter of fact EU Member States frequently breach EC law. The existing efforts by the European Commission to achieve effective transposition across Member States, such as the more frequent use of impact assessments, pre-legislative consultation processes and a dozen recommendations for an improved national coordination of transposition processes¹ seem to have missed out on tackling the EU-wide transposition deficit. Also the recently adopted European Commission Communication, *A Europe of Results – Applying Community Law*,² will not do the job and solve the pan-European problem.

Introduction

Although full implementation of EU legislation is enshrined in the treaties and is necessary for meeting the Lisbon goals by 2010, most Member States do not live up to this obligation. In 2006 more than 770 notifications were still pending and coincided with new European Court of Justice record fines.³ Non-transposition, however, creates uncertainty and undermines the legitimacy of EU legislation. It forestalls further European integration involving the free movement of goods, persons, services and capital. Furthermore, it jeopardises market competitiveness, national growth, and employment performances in Europe and beyond. The question is why some Member States fail to comply with EU law despite the image-marring effect on posterior EU negotiations and costly consequences both in pecuniary and legal terms?

This article analyses the timeliness of national transposition processes across nine Member States (France, Germany, Greece, Italy, Ireland, the Netherlands, Spain, Sweden and the UK). Based on extensive quantitative data,⁴ which covers the full population of all EU transport directives from 1995 to 2004 including the national implementing instruments, further insights can be gleaned from controlled case study research based on interviews with EU officials, diplomats and civil servants in Member States' ministries⁵ and supplementary studies in the burgeoning scholarly field of compliance, transposition and implementation.⁶ Based on this rich pool of studies, this study reports that almost 70% of all national transposition processes are problematic. Understanding both European-level and national-level factors is crucial to face this compliance challenge to ensure prompt transposition of Community law into national legislation within the prescribed deadlines. Distinguishing between three outcomes of the transposition process (on time, short and long delay) it is the specific

features of European directives that account, in particular, for short term transposition delays; whereas serious times lags of six months or more are a result of national domestic factors. To conclude, this article comments on its general and actor-specific implications.

Transposition deficit across Member States is common

There has long been a vague supposition that the EU has a transposition problem.⁷ At first blush though, the recently recorded 1.6% deficit⁸ appears to be getting smaller. At second sight, this study gives us a clearer picture and demonstrates that the EU does have a serious transposition problem across Member States and different modes of transport. The EU transposition deficit is more than just an illusion; it is sad reality. The EU transposition problem appears to be rather epidemic and not simply a "statistical artefact".⁹

- 47% of national implementing measures have been notified late to the European Commission of which 70% recorded delays of more than six months with a maximum delay of five years.

The nine Member States under investigation notified only 53% of the national instruments on time. 47% were transposed late, varying between just a few days tardy to 251 weeks (almost five years) overdue, as is the case for Greece's national transposing measure for the EU directive on *the harmonisation of boat masters' certificates*.¹⁰ This is in line with Conant and others¹¹ who even uncover delays upwards of ten years.

- The time length of missed deadlines varies significantly across Member States.

Why do some Member States fail to comply with EU law?

The nine Member States can be clustered into three groups with Sweden (SE) and the UK performing the best, having an average transposition delay of less than two months. In Germany (DE), France (FR), Spain (ES) and Ireland (IE) performance ranges below 30 weeks delay. The Netherlands (NL), Greece (EL) and Italy (IT) represent a group of their own, performing worst among the nine Member States with an average transposition delay exceeding 35 weeks.¹² Interestingly, this pattern shifts slightly if we consider the median value of delay across Member States.

Following the discussion of “gold plated” EU legislation in EU Member States, which is embedded in the broader EU better regulation discourse, the empirics show that it is not only the commonness of tardy transposition that raises major concerns about efficient and effective policy-making. The data uncovers that 20% of the national implementing measures had been in force more than six months before the official transposition deadline set in the directive.¹⁴ Early transposition, however, requires national businesses to adapt to new legislation before their European counter-

Table 1: National differences in transposition delays in weeks

Delay (in weeks)	SE	UK	DE	FR	ES	IE	EL	NL	IT
Mean	3	7	25	25	28	29	35	37	42
Median	0	0	8	20	0	10	10	22	13

- The time length of missed deadlines varies significantly across sub-sectors.

However, transposition also varies across the different transport sub-sectors, namely: maritime, road, rail, air and inland waterways. Whereas maritime and general transport directives perform best with an average delay of 20 weeks or less, Table 2 illustrates that air directives are delayed on average by one year. Road and rail directives range between eight and nine months of delay. Inland waterways directives take the most time. Here, the average transposition delay is 27 months (2.25 years).¹³ Again we find slight changes when looking at the median values. Rail and

parts; an action that may lead to a competitive disadvantage in the Single Market.¹⁵

- Problems in transposition processes occur in 66% of all national implementing measures.

In sum, almost 70% of all national legal measures transposing the EU transport *acquis* in nine Member States cause problems, either because they are transposed too late, risking the opening of an infringement proceeding, or because they are too early, risking warping effects on the regulatory environment for business and citizens in the EU alike.



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inland waterways seem to be the transport sub-sectors with considerable transposition delays (32-98 weeks) across all Member States.

- Not only late transposition but also early transposition is problematic (“gold-plating”), i.e. the temptation to go beyond the requirements of a Directive when transposing it into national law.

Driving and Constraining Forces for Timeliness

Generally speaking, two main sets of catalysts for policy change can be identified. Differentiating between policy design-related (European directive specific), and policy implementation-related (domestic context specific), each set has a different impact on the timeliness of national transposition processes. It seems that serious delays, those

Table 2: Different transposition delays of modes in weeks

Mode of transport	Transport general	Maritime	Road	Rail	Air	Inland waterways
Mean	-17	20	31	38	49	109
Median	0	6	12	32	23	98

longer than six months, are homemade in the capitals of Member States. On the other hand, the specific features of European directives, especially their technical aspects, account for short-term delays: those of six months or fewer. In this sense, this contribution agrees that "implementation should be part of design", suggesting that policy theory is formulated "with a view toward execution".¹⁶

European directive specific factors explaining short delays (< six months)

European directive specific factors account for short delays of national transposition processes.

- The longer a directive's deadline set for transposition, the less problematic a swift national transposition.

The more time a Member State has to transpose a directive, the lower the perceived costs of transposition, and therefore, the less likely that transposition delay will occur.¹⁷ Administrations must always act under time constraints, regardless of whether administrators like them. The fact that administrations are obliged to act within a legally fixed period compels them to improve their coordination and organisation to respect deadlines. From the equally important legal point of view, time constraints are even required by the principle of legal certainty. The transposition time set in the directive plays a significant role in determining the timeliness of national transposition processes. It is a necessary condition for apt transposition.

- Commission directives are easier to transpose than legislative directives.

Another distinction is between directives made by the European Commission based on the primary or secondary EC law (and, in that case, the result of a comitology procedure), and those resulting from the Council and Parliament (Art. 251 EC, co-decision procedure).¹⁸ The argument is that Commission directives are easier to transpose than directives from the Council and Parliament since they are often focused on politically less controversial and more technical issues.

- The higher the amount of a directive's discretion, the more difficult to settle the national transposition process on time.

The leeway of interpretation represents a core characteristic of a directive, which should specify, in the words of Article 249 of the Treaty, "the result to be achieved" but leave "to the national authorities the choice of form and methods". Over the last decade, however, directives have become more and more detailed, to the point where they could be viewed as regulations.¹⁹ The empirics show that the level of a Member State's discretion in transposing an EU directive is a significant positive indicator for short delays.²⁰

- The more recitals – considerations at the beginning of the text of the directive – the more difficult to transpose in a timely manner.

Recitals represent an important element of each adopted directive. They are meant to state the purpose of the directive and to describe each of its main provisions. Formally, recitals are not legally binding, but intend to help civil servants in Member States to interpret the purpose of the directive's provisions. The findings suggest that granting discretion may involve a trade-off between the quality and timing of compliance.²¹ Not seldom, these recitals seem to be used by the Member States to insert provisions which they have failed to get into the text in the Council negotiations and by the Commission to insert normative provisions which have not attracted agreement. In the meantime, they have become so specific that experts talk about a "third kind of lawmaking".²² The higher the number of recitals, the more complex the interpretation of the directive's content across national capitals, hence, national transposition processes are more likely to be delayed.²³

- The higher the level of agreement (reading stage) for legislative directives the more likely a delayed national transposition process.

Since highly political controversy topics are more likely to reach the third reading and might already reflect potential problems across national transposition actors later on in Member States' capitals, the stage of agreement serves as a proxy for the level of interinstitutional controversy of a policy issue. The higher the stage of agreement (first < second < third reading), the more likely a national transposition process will be delayed.²⁴

- Amending directives are often easier to transpose than new directives.

Some directives are the first to regulate a new area in which no other EC directive was previously issued. In the case of maritime directives, the Council Directive 98/18/EC of 17 March 1998 on *safety rules and standards for passenger ships* is a clear example. The reverse is a modifying directive, which changes existing legislation. Since there already exists national regulation, which is adapted to EC law, modifying directives can be regarded as a follow-up to already existing EC and therefore national legislation. The expectation is that modifying directives are easier to transpose than new directives (or, the likelihood of swift transposition is higher for modifying directives).²⁵ See table 3 for an overview.

Domestic context specific factors explaining long delays (> six months)

The outcome of national transposition processes depends on the institutional arena in which domestic decision

Table 3: Driving and constraining forces for timely transposition in the EU: European directive specific factors

	Factor	Effect
Policy design related (European directive specific)	Transposition time constraints	Short delays < 6 months
	Commission vs. legislative directive	
	Problem of discretion	
	Number of recitals	
	Level of interinstitutional agreement	
	Amending or new directive	

making takes place. The national context of transposition is predominantly policy-specific rather than country-specific.²⁶ Although the so-called *worlds of compliance* is an interesting way of looking at implementation,²⁷ it does not capture the full complexity. Transposition performance differs between sectors across countries; and between sectors within one single country since variation by policy area is more pronounced than variation by state.²⁸ It is these national level explanatory variables that explain long delays of over six months.²⁹

- The more political priority assigned to the process, the easier and less time consuming the transposition.

When a directive is attributed with high political priority, timely transposition is a natural outcome. Political priority represents a significant, usually necessary, condition for timeliness because it denotes a change in the usual order of things in the political realm.³⁰ That is, under special circumstances, the political priority for transposing a directive is unusually high, for any number of reasons. However, sometimes directives simply do not garner much priority – for electoral, economic and strategic matters.

- National elections falling at the beginning of the national transposition procedure decrease the probability of a problem-free agreement; a general election at the end of a transposition process accelerates the adoption of new national legislation.

General elections may accelerate or delay national transposition records, depending on when they occur. If a general election falls within the last six months of a set transposition period, it has an accelerating effect, whereas a general election scheduled within the first six months of the official transposition period invariably slows down the national transposition process. The argument is that a policy that is not adopted before the end of the legislative terms must be reintroduced, and by this reintroduction, raises the costs to the extent that transposition becomes more opportune.³¹

- A national transposition package increases the probability of a delayed transposition of the first directive

in the package, whereas, in turn, it accelerates a settlement of the last directive.

National transposition packages are the result of Member States deciding to transpose a number of single EU directives with one national implementing measure. In Germany for example, the *Seeschiffahrtsanpassungsgesetz*, on 18 September 1998, transposed eight maritime directives that had been adopted in the Council of Ministers between 1996 and 1998. So through a transposition package, a number of EU directives are grouped together for transposition purposes because they cover similar policy issues.³²

This number of directives however, often has varying deadlines. The so-called first directive in the package is the one with the earliest deadline, and the so-called last directive in the package is the one with the deadline furthest into the future. Due to the perceived transposition costs of directives yet to be transposed, the national package approach increases the probability of a delayed settlement of the first directive to be transposed, but accelerates a settlement for the last directive in the national transposition package to be transposed.³³

- The more transposition actors in the domestic arena that are involved in transposing a directive, the longer it takes to transpose a directive.

Assuming that actors have opposing views on some of the requirements of a directive, more actors create coordination problems. A deal between two actors is less complex than a deal with four because the number of possible policy combinations is much greater. Complexity can delay the process considerably. The more actors involved, the more time needed for policy change.³⁴

- The more ongoing transposition processes in a ministry, the longer the national transposition processes.

The number of simultaneously ongoing transposition processes in a ministry's unit provides a meaningful indicator of the timeliness of national transposition processes.³⁵ There are periods in which only one national implementing measure is formulated in a ministry's unit, whereas there

Not only late transposition but also early transposition is problematic.

are periods of time where several EU directives have to be transposed simultaneously, i.e. strategic withholding of specific national implementing measures might help to increase the share of the cooperative pie for the other EU directives discussed next to it.

- The more national implementing measures used for transposition, the more likely transposition delays.

The preparation of measures requires administrative capacity, which is limited in national ministries. More instruments absorb more administrative capacity, causing considerable transposition delays.³⁶ See table 4 for an overview.

vs. legislative directive ...) or administrative process run by civil servants in public administrations (occurrence of a national transposition package; number of national implementing measures ...). Next to legal and bureaucratic practices and procedures it is politics that matter (political priority; number of recitals, general elections ...).

- *Addressing the transposition problem requires a focus on the whole life cycle of a policy – a piecemeal approach risks being ineffective.* Therefore, policy implementation should be part of design. Policies need to be formulated with a view toward its execution. In order to understand, actors must not separate policy design from implementation. That is, actors have to

Table 4: Driving and constraining forces for timely transposition in the EU: Domestic context specific factors

	Factor	Effect
Policy implementation related (Domestic context specific)	National transposition package	Long delays > 6 months
	Number of transposition actors	
	Number of ongoing national transposition processes	
	Number of national implementing measures	
	Political priority	Accelerating and delaying effect
	Election timing	

Implications

Being at a crossroads of varying ways in which EU policies are implemented, it is the Member States' and EU institutions' task, accelerated by the development of the Lisbon strategy, to find a deliberate variety of methods to comply with their membership obligations. Scholarly findings show that the EU is far from having solved the transposition problem. The EU transposition deficit appears to be epidemic. The following general and actor-specific implications can be derived:

General implications

- *Not only late transposition but also early transposition is problematic.* All in all, the EU has a transposition problem, both in terms of delay and over-implementation ("gold-plating"). Not only late transposition but also early transposition is different. Early transposition requires national businesses to adapt to new legislation before their European counterparts, an action that may lead to a competitive disadvantage in the single market.
- *Delay is not delay* – Determinants for transposition delays differ between those explaining shorter delays (< six months) and those explaining longer delays (> six months). It is the *EU directive specific characteristics* that explain *short delays*, and *national level explanatory variables* that best account for *delays of more than six months*.
- *Driving and constraining factors for timeliness are legal, administrative and political.* Transposition is more than just a legal (amending vs. new directive; Commission

consider European directive specific characteristics as well as national transposition instrument features and their different impact on the timeliness of national transposition processes.

Specific implications for EU institutions

EU institutions do not have an independent effect on the timeliness of national transposition processes.

- *European Commission:* Although transposition deadlines set in the directive are often an integral part of the negotiation process, there are no clear rules on how they should be determined. As a matter of fact, the average transposition time agreed upon in the Council, despite an 84% increase in numbers of directives to be transposed over recent years, has decreased by 24%.³⁷ Since the mid 1980s to the late 1990s, the average guaranteed transposition time has steadily decreased from 18 to 13 months. Thus, in periods of high legislative output, all things being equal, transposition delays seem inevitable. Therefore, more time could undoubtedly be spent by the agenda setter in first researching existing legislation at a national level, so as to identify similarities of approach, any significant differences, underlying policy objectives, perceived shortcomings, market strengths and weaknesses and any consumer detriment. The Commission may first make an evaluation of the transposition's complexity by conducting a *tour d'Europe*. Then, based on this specific input, more "realistic" deadlines could be imposed.
- *European Commission and Member States:* They may strike a balance of power to determine suitable levels of

discretion. Directives are meant to leave a certain degree of leeway of interpretation to Member States. While there are good reasons not to believe that regulations per se would do the job (as suggested by the recent Commission's communication), the so-called Lamfalussy process could be an alternative and better example for future reform efforts. To recall, endorsed in March 2001 by the Stockholm European Council, the Lamfalussy process was designed to improve the quality and effectiveness of EU financial services legislation by differentiating between framework legislation (Level 1) and technical implementing legislation (Level 2). It also aims to ensure that practitioners and other interested parties are more fully consulted in the preparation of new EU legislation (at both levels). The Committee of European Securities Regulators (CESR) was then created to advise the Commission at levels 1 and 2. CESR aims to ensure greater consistency and equivalence in transposition and implementation of Directives and, more generally, convergence of regulatory approaches, through issuing guidelines and common, but non-binding, standards by comparing and reviewing national regulatory practices.

- *Council of the European Union*: The Council's Secretariat has an important role to advise the Council working group parties under the rotating presidency on how to avoid obvious pitfalls for the latter policy-implementation stage. Next to the adoption of a transposition deadline and a degree of flexibility, the use of recitals should not be abused as a "third kind of lawmaking". Adding issues that were not agreed upon during the negotiations interferes with a swift national transposition and, therefore, should be limited if not totally avoided. Ex-post supplements further increase the directive's detail and complexity which will create problems in the domestic arena. Clear rules about how to apply recitals are due, including a concluding discussion on their legal status, which, for the time being, has attracted only scant attention.
- *European Parliament*: Legislative directives tend to face more problems when transposed on the national level than on the Commission's directive. Considering the European Parliament's growing role under co-decision, one wonders whether the 2006 reform of the comitology process³⁸ will have a significant effect on the timeliness of national instruments transposing Commission directives (adopted under comitology). The comitology reform has put the two co-legislators, the EP and the Council, almost on equal footing (at least in a certain category of delegated legislation). The Treaty of Lisbon (if ratified) will even guarantee full blocking rights for the European Parliament. The first examples under the new procedure will have to show how the European Parliament and the interplay between its committees and the plenary will have adapted. Much here will depend on the European Parliament's activism and use of the new

regulatory procedure with scrutiny and the role of individual MEPs and interest groups in particular.

Specific implications for domestic actors in Member States

- *Political priority*: It is a significantly necessary, but not sufficient condition for timeliness by changing the usual order of things in the political realm.
- *Selection of national instrument(s)*: Early choices about the selection of a national instrument and the number of legal instruments have a considerable influence on the later transposition progress. Depending on the type of legal instrument chosen to transpose a directive, the numbers of ministries involved differ, as does the requirement for the parliament's approval. In some countries, parliament may even be hesitant to cooperate with a legislative act if not consulted at an early stage. Since there is considerable variation in the set of legal instruments,³⁹ including fast-track instruments, the timeliness of

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national transposition processes can be affected accordingly.

- *Use of national transposition package(s)*: Depending on the number of EU directives included in a national transposition package, and the parameters of their different deadlines, national transposition packages have either a significant delaying effect, or a significant accelerating affect. Consequently, national transposition packages appear counterproductive and distort the regulatory framework in which businesses operate if the number of directives included in a national transposition package is applied arbitrarily.

Concluding remarks

In order to face the challenges of an ever globalised world, it is time to proceed full steam ahead and actively respond to the challenges of EU law instead of getting lost in translation. After recent rounds of enlargement, adapting to EU law will remain an EU-wide ambition on the level of the statute books, but also in the new Member States where EU legislation transposition remains dead letters instead of becoming living rights.⁴⁰ Although new Member States perform very well – predominantly leading the latest European Commission's scoreboards – the question of correctness and enforcement has become a major concern.

If Brussels wants to address the Internal Market constraining effects of Member States' non-compliance records, its efforts to simplify and improve the regulatory environment hence have to go beyond recent efforts. Far-reaching decisions made in the European Commission's drafting and the EU policy-making phase under the leadership of the Council and the European Parliament have the greatest effect on the European regulatory framework in which businesses operate and where the free movement of goods, persons, services, and capital is at stake.

Therefore, implementation has to be part of the design, i.e. next to national related, European legislation related

features also have considerable influence on the outcome of the subsequent national implementation process – an element that has attracted only scant attention. Bearing in mind that not only delayed but also early transposition is current praxis in Member States, distinguishing between different transposition outcomes is helpful. It is the specific features of a European directive that account for short term delays, whereas serious time lags are the results of domestic factors.

NOTES

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- ¹⁸ Mastenbroek, "Surviving the deadline".
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