



Robert Schuman

How Spain Implements European law

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How Spain Implements European law

Ramon Mullerat¹

I. Preface

The construction of Europe began with the building of a common market. Then, it expanded its objectives in order to address the new problems arising from its own success.

Fifty years later, a worrying imbalance can be observed. Economic integration has gone so far as to achieve the merging of national currencies and the holding of a simple passport, while the integration of Europe's peoples and citizens is still in its infancy.

A unified Europe needs a unified law. From the beginning of the EC/EU there has been an intense debate whether the EU should remain a large market or should become something much more intense. In the second case, the EU needs to have a single territory, a single currency and passport, an internal market without borders and also a single law. St. Mathew² said that "no kingdom can be at war with itself without being laid waste; no city or household that is at war with itself can stand him".

To have and apply a single law. As the European Commission's Strategic Objectives³ declared

Failure to apply European legislation on the ground damages the effectiveness of Union policy and undermines the trust on which the Union depends. The perception that "we stick to the rules but other don't", wherever it occurs, is deeply damaging to a sense of European solidarity ... Prompt and adequate transposition and vigorous pursuit of infringements are critical to the credibility of European legislation and the effectiveness of policies.

II. An overview on community law

Community law is the law enacted by the EU institutions, which is integrated in the legal systems of the Member States (MS) and is applied to the jurisdictional organs.

Community law benefits from the fragrances of the laws of all European peoples and constitutes an insuperable instrument for the harmonization of the law in the world through the convergence of the two main legal systems of *common law* and *civil law*.

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² Matthew, 12, 25.

³ European Commission's Strategic Objectives 2005-2009, COM(2005) 12 final, p. 5.

III. The *acquis communautaire*

The term *acquis communautaire* (Community acquired) refers to the total body of EU law created and accumulated in the EU thus far.

All European countries that wish to apply for membership of the EU must justify that they have integrated the *acquis communautaire* within their legal system. That is why candidates generally start introducing the necessary changes progressively as soon as they submit their membership application.

During the process of the **enlargement of the European Union**, the *acquis* was divided into 31 chapters for the purpose of negotiation between the EU and the candidate MS for the fifth enlargement.

IV. The EU sources of law

A. Primary or Origin legislation

a. Treaties

The Treaties are considered to be the "constitution" of the European Union. They imposed binding obligations on the signatory states particularly with regard to the supremacy of the Treaties and enacted European Community legislation over national laws. The Treaties form part of the national law of each member state.

i. Founding Treaties and Amending Treaties

- European Coal and Steel Community, Paris 1951
- European Economic Community, Rome 1957
- European Atomic Energy Community, Rome 1957
- Treaty establishing a Single Council and a Single Commission (Merger Treaty), Brussels 1965
- Single European Act, Luxembourg 1986
- Treaty on European Union, Maastricht 1992
- Treaty of Amsterdam, 1997
- Treaty of Lisbon, 2000, which entered into force a few days ago after its approval by the Czech Supreme Court.

ii. Treaties of accession

- Treaties of accession Denmark, Ireland y UK, which entered in vigor 1-1-1973.
- Second enlargement: Greece, 1-1-81
- Third enlargement: Spain and Portugal, 1-1-86
- Fourth enlargement: Czeck Republic, Estonia, Hungary, Latvia, Lithuania, Polland, Slovakia, Slovenia, Malta and Cyprus, 1-5-04.
- Fifth enlargement: Romania and Bulgaria, 1-1-07.

iii. Bilateral agreements

- Agreements between the EC and the African, Caribbean and Pacific Group countries (ACP countries) (Lomé Conventions).
- Other agreements between the EC and third countries, e.g. the *Agreement on the European Economic Area*.

b. Other documents

At the Agenda 2000, the Commission's detailed the strategy for strengthening growth, competitiveness and employment and widening the European Union in the early years of the 21st century.

B. Secondary or Derivative legislation

Major policy-making legislation issued by the Council itself or in conjunction with the European Parliament begins with a Commission proposal which is submitted to the Council. The European Parliament is consulted, as may the Economic and Social Committee, and both institutions can issue opinions on the proposals. The Commission also issues legislation in its own right to implement or regulate existing policies on the basis of authority given by the Treaties.

The following are the main types of legislation:

a. Regulations

The regulations become directly part of the national law of the MS. They are binding and directly applicable (meaning that they do not have to be implemented by any national legislation) to all member states. If there is a conflict between a regulation and an existing national law, the regulation prevails. Among the many examples, we can cite the Regulation 880/92 on Community eco-label award scheme and the Regulation 1346/2000 on insolvency proceedings, which were immediately applicable after their adoption.

b. Directives

The directives have to be implemented by national laws. They are requirements that MS change their national laws within a stated period of time in order to give effect to the directive aims. Directives are used to bring different national laws into line with each other and are particularly common in matters that affect the operation of single market⁴. A good example are the fourteen company law directives that intend to harmonize company law in the EU. There are also single-objective directives, such as the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, the Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, and many others.

c. Decisions

The decisions address a specific problem. They are not legislative instruments aimed at the general public, unlike the regulations, and are binding in their integrity, unlike the directives. The decisions are binding upon those they are addressed. One example is the Decision of the European Parliament and Council for the 6th Environment Action Programme, which obliges the EC to present strategies within a given time and including certain elements.

⁴ Vid among others, Enrique Puerta, La directiva comunitaria como norma aplicable en derecho, 1999.

d. Other

i. Decisions of the European Court of Justice (ECJ)

These are binding on the parties to whom they are addressed, whether MS or individuals. See, for example, *Commission v Spain* C-92/96, judgment of 1998-02-12 (environment and consumers), and *Interior v Commission*, T-124/96 judgment of 1998-02-06 (Law governing the institutions). See also the judgment of the ECJ in Case C-249/96 *Lisa Jacqueline Grant v South-West Trains Ltd* (discrimination based on sexual orientation is not covered by the equal pay rules of the Treaty), etc.

ii. Recommendation and opinions

These have no binding force, but merely state the view of the institution (such as the Commission) issuing them. For example, the opinion of the Advocate General Finlayson delivered on 5 February 1998 in C-170/96 *Commission of the European Communities v Council of the European Union* or Recommendation No. R (95) 13 of the Committee of Ministers to Member States concerning problems of criminal procedure law connected with information technology.

As the EU is becoming larger and more integrated, the number of secondary legislation is exponentially increasing. In 1970, we can count 46 regulations and 20 directives; from 1998 to 2004, 18.167 regulations and 750 directives were released. In Germany, the Ministry of Justice said that between 1998 and 2004, 84% of all next law originates in Brussels and only 16% in Berlin.

V. Implementation

The policy of European integration is in reality an exercise of war and peace in the 21st century.

Helmut Kohl

A. Transposition of sources of law

a. Implementation of regulations

As we saw, regulations need not to be transposed because they are immediately applicable to all citizens; directives need to be transposed. For example, Regulation 1346/2000 CE on insolvency proceedings need not to be transposed and, therefore, when Spain approved the new Bankruptcy Law (Ley Concursal) 2003, it did not transpose the Regulation, only the new law included a few provisions in Title I and IX on international bankruptcies so that the Regulation would not find any obstacle for its full application in Spain⁵.

b. Implementation of directives

The first step towards implementation of directives is transposition (incorporation of the directive's provision into national laws). Subsequent to transposition, national agencies need to become familiar with their monitoring and supervising tasks; the target groups of the policies, duly informed about their rights and obligations, their behavior needs to be monitored and, in cases of non compliance, sanctioned. The transposition of directives can only be implemented following their national transposition. The zeal for carrying out transposition varies with each MS. Traditionally, the best performer is probably the UK,

⁵ Eduardo Trizo and Ariadna Cambronero, "Aspectos procesales e internacionales de la Ley Concursal".

which at some times has complied in 60% of all cases and the worst is Greece with 25.5%. Spain is at 47.1%.

B. Steps for transposition⁶

a. Need to transpose

There is a need to transpose the directive, totally or partially, unless the MS has the directive's matter already developed in its internal system. Indeed, the European Court of Justice (ECJ) has declared that MS must not pass new legislation measures to develop directives in the case that national legislation already covers the objectives foreseen by the directive, but it requires guarantees that national legislation effectively covers the directive's contents.

b. National implementing measures

The authorities of a MS must issue the necessary national implementing measures, which vary from country to country, to incorporate the provisions in the directive into national law.

c. Form of transposition

The proper form to guarantee the useful effect of the directive depends on each MS legal system. The MS use different criteria in the process of transposition⁷. The ECJ says that transposition cannot be done through a verbal or a circular instruction that can be easily changed. A correct transposition requires provisions precise, clear and transparent so that everybody can understand their rights and obligations.

Transposition must be done totally and not through the referral to the directive itself; avoiding uncertainties or introducing alien legal categories which may complicate the execution; making express reference to the directive in the preamble; and containing a derogatory provision of all annulled provisions.

The Spanish State Council ("Consejo de Estado") resolved that the transposition norm must have the same rank as those which the matters of the transposable directive currently have. The problem arises when such matters are submitted to the principle of reserve of law. Due to the length of the legislative process, sometimes it is not possible to respect the transposition terms and the solution which has been found is the form of decree-law. If there is not such reserve of law, the form of regulation is normally used.

The Commission has issued useful recommendations in the form and good practices on transposition of directives⁸.

d. Procedures

In countries with a centralized political structure, the transposition is simple. In countries, such as Spain with decentralized structures (autonomous communities), institutional autonomy operates according to the Constitution prescriptions. In Spain, although at the beginning there was a tendency to expand the competence of the state, since 1989 the interpretation is more in favor of the autonomous communities and therefore, if the matter of the directive to be transposed is a matter of autonomic competence, the transposition will generally correspond to the autonomous regions.

⁶ Manuel Pacheco, "Derecho Comunitario", January 2008.

⁷ María Teresa Tascón, "¿Hay armonización en la transposición de directivas comunitarias? Análisis de los criterios de valoración aplicables a las fusiones y escisiones en Alemania, Italia, el Reino Unido y España".

⁸ Recommendation from the Commission of 12 July 2004 on the transposition into national law of directives affecting the internal market.

e. Time period

Directives must be incorporated to the MS systems in the periods established by each directive, regardless of their complexity. Currently, the time granted for transposition averages 37 months for new directives, and 30 for amending directives. The ECJ has held that, if the MS does not timely transpose a directive, it infringes the EU Treaties and the Commission can open an infringement procedure against the infractor. In Spain, in order to avoid delays, a Council of Ministers resolution of July 1990 passed an instruction to accelerate the transposition procedures, giving them priority character and recommending the relevant organs to speed up.

f. Facts that may speed/delay the transposition

The performance with the transposition periods varies for a number of factors, such as:

- from country to country;
- from different sectors with each country. It also depends on the interests of MS governments (the “voluntaristic approach”);
- from the complexity of the directive;
- from domestic reasons;
- federalism (Germany, Spain) v. unitarism;
- administrative efficiency;
- inter-ministerial coordination; and
- involvement of national parliament

g. Notification

Once the directive has been transposed, the MS must notify such transposition (the norms enacted) to the EU institutions and to the other MS.

h. Direct effects

Generally, the directive acquires direct effects when it is transposed into the national law. However, the directive may have direct effects, according to the ECJ (ECJ: *Ratti*), provided that the MS has not yet transposed the directive, that the directive defines subjective rights and that the rights are sufficiently determined and not subject to conditions. There is a vertical direct effect (limited to the relations between public powers) (ECJ: *Ratti*) and a horizontal direct effect (limited to the relations between individuals) (ECJ: *Marshall*)⁹.

C. Infringements

a. Infringement of the transposition obligations

There are four types of infringements for which the Commission can launch an infringement procedure: a) non-notification, b) non-transposition, c) late transposition, or d) wrong or incorrect transposition.

b. Stages of the infringement procedure

The following are the main steps of the infringement procedure.

- complaints launched by citizens, ECOs, corporations;
- the initiative of the Commission issues event;

⁹ Mar Jimeno, La aplicación del derecho comunitario. Los principios de efecto directo y primacía. La cuestión prejudicial del art. 177 TCE, 2006.

- non-communication of the transposition of directives by MS;
- formal letter of notice (art. 226) transposition delay beyond 35 weeks;
- reasoned opinion (art. 226) (if no satisfactory reply, and after giving the MS the opportunity to submit observations, the EC may refer it to the ECJ);
- referral to the ECJ (art. 236);
- ECJ judgment (art. 226);
- proceedings. Financial penalties (art. 228);

c. The transposition deficit

i. Time compliance

The majority but far from all national transposition instruments are completed on time¹⁰. Regarding time compliance, there are generally three main groups of outcome: the first group (50% of cases) represents their national instruments notified on time; a second group of instruments (15% of cases) has delay of less than 6 months; and finally, a third group of national measures (35% of cases) are transposed more than 6 months late.

The MS can be generally clustered into three groups with Sweden and the UK performing the best having a transposition delay of less than 2 months; Germany, France, Spain and Ireland performance range below 30 weeks delay; the Netherlands, Greece and Italy generally represent a group of their own performing worst with an average.

There are a good number of periodical controls and studies on the state of transposition of directives issued by different directorates, general secretariats, etc. with regard to the sectors affected (internal market, public procurement, tax, etc.).

There are also sectorial analysis. For instance, with regard to social directives, a study on Germany, Greece, the Netherlands, Spain and UK showed that only in 42.7% of cases MS transposed in time, and that 17.5% exceeded the deadline by more than two years¹¹.

The transposition deficit target (the percentage of internal market legislation not yet introduced into national legislation by MS) was set by the European Council in 2001 in 1.5%. The Internal Market Scoreboard July 2007 issued by the European Commission showed that the transposition deficit which was 1.2% at the beginning of 2007 had increased to 1.6%, which means that MS were relaxing their implementation efforts. According to the latest Internal Market Scoreboard of July 2008, for the third consecutive time, 1.0% of Internal Market Directives for which the implementation deadline has passed are not currently written into national law. This means that MS are again in line with the 1.0% target agreed by Heads of State, which was to be achieved by 2009 at the latest. In total, 18 Member States are either at or below the new target, while 13 MS achieved their best score so far. Overall Denmark and Malta are the best performers, and Greece and Poland are bottom of the league. Among other nine MS, Spain reached the 1% target last time round have managed to reduce their deficits even further.

According to the EC Secretariat General's report on progress in notification of national measures implementing all directives in force dated 5 September 2009, among the directives whose deadline for implementation had passed by the reference date gave Spain 1645 out of an average for EC of 1652; directives for which measures of implementation have been notified 1633 out of an EC average of 1634 and a percentage of notification of 98.97% out of the average of 98.91%.

¹⁰ In 2003, 60% of the directives were transposed late. See Etton Mastenbrock, *Surviving the Deadline*, 2003.

¹¹ Markus Hoverland, "Do MS make European policies work? Analyzing the EU transposition deficit", Chicago, 29 March-2 April 2006.

ii. Compliance by sectors

Environment, taxation and customs union, energy and transport and employment are the sectors that generally give rise to the maximum number of transposition infringements. Justice, health and consumer protection and information are the ones which give less.

Most MS are doing well when it comes to transposing EU internal market directives on time, but appear to pay less attention to transporting and then applying those directives correctly. The number of infringement proceedings for incorrect transposing of application of directives has increased constantly.

Every year, the Commission draws up an annual report on its monitoring of the application of community law in response to requests from the European Parliament and the MS.

Four factors have been distinguished affecting the implementation of European policies at the national level: political institutions, the degree of cooperation, citizen's support for the EU and political culture in the MS¹².

d. Causes of delays in transposition

The transposition of directives is a question of political will. However, as we have seen, delays of transposition are caused by combination of constitutional, legal, political and operational factors whose effect cannot be judged independently. Legal factors improving the speed of transposition are the transposition of directives with delegated instruments, avoiding national "extras" when transporting directives and avoiding complications at the transposition stage by anticipating transposition issues during the negotiation stage of the directive. Political factors are: giving priority to transposition and activating the national parliament at the negotiation stage. Operational factors include clear-cut lines of administrative responsibilities to transposition, lack of administrative departments with the explicit task to specialize in transposition, and accurate and frequent monitoring of progress.

As it has been said, whatever the degree of misfit with the new EU norms and standards, the implementation of directives confronts two political systems. This conforms to a view of the EU as a federal phenomenon with two different levels of government (national and European). This multi-layer perspective suggests that the preference formation processes of the lower-level polity and the higher-level polity are clearly distinct and implies that in cases where a national government is unsuccessful in "uploading" its own preferences at the EU level as the template for the joint measure or standard, it will try to resist during the "downloading" process. Only in those cases where there is no national protest against a specific measure during EU-level decision-making, implementation should be unproblematic according to such a mainly intergovernmental perspective. Non-transposition could hence be considered a means to protest against being outvoted or otherwise "minoritised" in the EU's policy process.

VI. How community law is transposed in Spain¹³

A. In general

A recent report of the Spanish Minister of Foreign Affairs on the evaluation of compliance by Spain of the transposition of EU directives¹⁴ stated that, in line with the traditional behaviour that is recorded in subsequent monitoring of transposition of directives, Spain continues to test a sustained effort to improve the transposition of directives. With only two exceptions, since 2004

¹² Risto Lampinen and Petri Uustila, "Implementing Deficit.- Why MS do not comply with EU Directives", *Scandinavian Political Studies*, 21, 1998.

¹³ Bernard Steunenberg and Wim J.M. Viermans, "The transposition of EU Directives: A comparative study of Instruments, Techniques and Processes in Six EU MS", Leiden, 2006.

¹⁴ La Moncloa. Informe sobre la transposición de directivas comunitarias.

Spain belongs to the group of EU countries that meet the transposition targets set by the European Council.

As previously stated, in the official scoreboard carried out by the European Commission in October 2007, Spain recorded a level of deficit of 1%, a figure that is below the then permitted maximum of 1.5%, and that it equals the future transposition deficit target set by the European Council for 2009.

Spain has managed to improve its rates of transposition of internal market directives. Indeed, in the control that closed in May 2008, it would have further improved such index, presents only a transposition deficit of 0.8 per 100, two tenths below the previous control result.

B. Complain and condemnation

In reality, Spain has had different periods between the first and the worst pupils in the class and recently with an acceptable current performance. Spain has transposed 98.5% of the EU directives in the internal market.

Notwithstanding this, Spain has received a good number of complaints/letters of notice from the Commission for infringements in transposition of several directives in a variety of subjects, such as money laundering, information and consultation, financing, investment services, race equality, and some others.

Spain has also been condemned by the ECJ for transposition or application infringements in several matters such as in environmental law such as Directives 85/337 and 97/11 (since a Valencia project did not affect the environmental impact), Directive 2001 on copyright, directives on security in work, etc.

The Commission sent also reasoned opinions in 2006 to Spain, among others, over non-communication of national measures on insurance mediation, market abuse directive, occupational pensions, public procurement law, etc.

Two of the sectors, on which Spain has shown particular delay or bad transposition of directives, are with regard to immigration and asylum¹⁵ and environment.

C. Examples of well transposed directives by Spain

The quality of the transposition of directives by Spain is unequal. In my professional experience, good examples of good implementation are:

- Regulations and directives harmonizing EU company law
- Directive 1985 on product liability
- Directive 94/45 on the constitution of a enterprise committee and a procedure of information and consultation of their employees, which was transposed through Law 10/1997 of 24 April (replaced by Directive 2009/38).

But others have had worse luck like, for instance, the transposition on the Timesharing Directive 94/47.

D. Spain and environmental directives

The *acquis* on environment law is broad and ambitious, applies to widely diverse situations in MS, is administered by many different government agencies acting at different levels and gives rise to a high level of public interest. Many problems are due to late and incorrect transposition of directives, the former accounting for 125 new infringement actions during 2007. To these are added the sectoral challenges described in detail in the Communication on 'Implementing European Community Environmental Law'.

¹⁵ In particular, Directive 2003/86 on family reagrouping, 2004/38 on rights of EU citizens, 2003/09 on third countries nationals, etc. "La transposición de directivas de la UE sobre inmigración" (Documentos CIDOB Migraciones, nº 8).

The overall EU environmental *acquis* comprises over 500 legislative items and about 75% of all national environmental acts go back to EU directive. It has been said that environmental policy is one of the “legislation factories of the EU”.

Environmental directives can be subdivided into two main categories: those aiming at establishing concrete environmental objectives and targets and those that introduce procedures which should help to achieve more environmentally sustainable action (which are the most numerous). Italy (61) and Spain (42) were the countries with more infringements of these directives in 2006-2007.

The transposition of directives is often an important driver for the development of a sector. This is the case for instance in the so expanded renewable energies in Spain where transposition of Directive 2001/77 on renewables, and Directive 2006 on biocarburant have definitely helped the development of this sector¹⁶.

E. Spain and the Service Directive

On 28 December 2006, EC Directive 1006/123 regarding services in the internal market came into force and MS have a transposition deadline of 3 years which ends on 28 December 2009.

The transposition of this Directive is extremely complex since it affects all service sectors (70% GNP) in which 66% of Spanish employees work. However, the transposition into the Spanish legal system is viewed both as a challenge and as an opportunity, as a unique occasion to lower unjustified or disproportioned barriers to the access and exercise of a service activity in certain sectors, which will encourage business activity and contribute towards improving regulation, gaining in productivity, efficiency and employment.

VI. The Lisbon Treaty

Everybody is happy that the Treaty has finally taken effect after the Czech Constitutional Court has approved it. The Treaty will certainly provide a tool to transform the EU into the world's most dynamic power.

We cannot overstate the benefits of the Treaty because it has taken 8 years to be approved, it has required 2 different texts and 3 failed referendums, and it has caused endless trouble in the Czech Republic, Ireland and the UK.

However, the implementation of community law will benefit from the Treaty of Lisbon and specially through the introduction of a full time President of the European Council and the Citizens' initiative (citizens may refer matters to the Commission).

Although the Treaty will not end all the EU's problems, such as the prospect of another Russian gas import crisis looming into the EU horizon, the serious foreign and economic policy problems and the lack of a common external energy policy, the reality is that it will clearly advance the construction of Europe. As Jean Monnet said: “the Common market is a process not a product”.

VII. Conclusion

There is a serious commitment of the Spanish government to ensure that EU legislation is transposed into Spanish law through a fast implementation, on time and correctly. Spain is an open MS in which the internal market rules operate and in which those obstacles which prevent businesses and citizens the full and effective exercise of rights under Community law will progressively disappear.

¹⁶ Suelo Solar. “La transposición de directivas europeas, clave para el desarrollo de los renovables”, 18 June 2009.