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Foreword

The Conference on the Implementation of EU law in the Member States, held in Prague from 11 to 13 March 2009 and organized by the Department for Compatibility with EU law within a series of events held during the Czech Presidency, was intended to provide a forum for discussion on current issues arising from implementation of EU law at national level.

The implementation of European Union legislation is a very complex process requiring pro-active cooperation between Member States and EU institutions. The legal acts adopted at the European level remain ineffective when not implemented properly and in a timely fashion at the national level. Since EU law does not include common rules for its implementation, national authorities act in accordance with procedural and substantive rules of national legislation when implementing EU law. As a result, various autonomous legal and administrative practices ensuring proper and timely implementation of EU law have emerged across the European Union each based on the constitutional and administrative traditions of individual Member States.

The Conference's clear objective was a broad debate on the issues arising from the implementation of EU law.

Following conclusions could be drawn from the Conference. First, it appears clear that an adequate coordination of EU law implementation is not an easy matter; smaller Member States are often faced with limited material and personnel resources, the bigger ones may face challenges arising from coordination within their federal or institutional structures.

Moreover, the coexistence of the rule of the national

administrative autonomy in the implementation process on one hand, and the doctrine of Community law supremacy on the other, gives rise to crucial problems regarding the use of specific methods of implementation at national level. Although methods and systems of implementation vary considerably across the European Union, depending on national administrative and constitutional specifics, Member States often solve similar issues and come up with similar solutions. Therefore it appears very useful to share good practices and exchange experiences with other Member States.

Secondly, the EU law implementation is a very complex process which is not limited only to national level. The effort to implement the EU legislation in a timely and proper manner requires active participation of Member States in the process of legislative drafting at European level. Continuous analysis of the legislative impact of proposals of EU acts helps in the preparation of implementing acts and thereby lowers the risk of not meeting legislative obligations arising out of the Treaties.

Thirdly, given the increasing number of legislative proposals and documents presented by EU institutions, it is necessary for Member States to create their own information systems for sorting and archiving the immense number of documents issued by European Institutions. The document management flow is gaining more and more importance not only in the process of legislative drafting and the coordination of implementation among various national institutions, but also in informing the public about the whole process.

Last but not least, the European Court of Justice plays an integral role in ensuring that EU legislation is interpreted and applied in the same manner in all EU countries. The decisions of the Court have substantial impact on national administrations as well as on the decision making of national courts. While discussing the role of the Court, it is important to

keep in mind that the Court only enforces obligations previously approved by Member States.

Since it doesn't appear possible to address all the outstanding issues related to the implementation at a single Conference and since the limited time frame didn't allow us to give the floor to representatives of all the Member States, this Volume includes the texts of many of the presentations given at the Conference as well as information about implementation systems and methods in those Member States which didn't have the opportunity to share their experience directly. We hope that this Volume will provide a reader with a clearer insight into implementation process in individual Member States.

The organization of the Conference took a great deal of work. We are extremely indebted to all Member States and the representatives of the European institutions, namely Claire-Françoise Durand and Eleanor Sharpston, for their cooperation with the preparation of the Conference, their willingness to share their valuable experience as well as their contribution to this Volume We would also like to thank all of our colleagues who helped with the organization, making the Conference a very pleasant experience.

We hope that this Volume will be useful to all those involved in the EU law implementation. As was to be expected, the Conference did not provide all the answers and didn't address all outstanding issues related to the implementation process. Nevertheless, we believe that the Conference does mark a step forward in our understanding of the EU law implementation process at a national level and represents a positive contribution by the Czech Republic to the ongoing debate on this issue.

Department for Compatibility with EC/EU Law - Brief History

In 1994, Decision of the Government of the Czech Republic No. 631 of 9 November 1994 stipulated the tasks of a specialised body for the European legislation, such body becoming an independent unit for compatibility with EC law under the Office for Legislation and Public Administration (OLPA). The Vice Prime Minister, who was assigned to manage OLPA, was responsible for the coordination and methodology of the work related to the approximation of the laws of the Czech Republic with EC law, so as to fulfil the Czech Republic's obligation arising from the Europe Agreement Establishing an Association concluded between the Czech Republic, of the one part, and the European Communities and their Member States, of the other part, through this unit.

Pursuant to Act No. 272/1996 Coll., amending the Act on Establishment of Ministries and Other Central Authorities (Act No. 2/1969 Coll.), the responsibilities of the Office for Legislation and Public Administration, which included the independent unit for compatibility with EC law, were assigned to the Ministry of Justice of the Czech Republic. In 1997, the independent unit for compatibility with EC law was made into a department.

The Department for Compatibility with EC Law became a part of the Office of the Government of the Czech Republic in March 1999. Due to this fact, the department can now better fulfil its role of coordinating and consulting point for the whole public administration.

Structure of the Department for Compatibility with EU Law

- Unit of Analysis and Consultations

- Unit for Information on Compatibility with EU law
- Unit for Legislative Procedure of the EU
- Coordination and Revision Centre

Until 1998, the Department for Compatibility consisted of two units: Unit of Analysis and Consultations and Unit for Information on Compatibility with EU law. Pursuant to Government Decision No. 645 of 30 September 1998 on providing translation of European Community law, a new unit named Coordination and Revision Centre was established. In March 2005, the fourth unit of the Department for Compatibility with EC Law was established: Unit for Legislative Procedure of the EU.

Unit of Analysis and Consultations

The Unit of Analysis and Consultations provides consultation services during the implementation of EU law into the Czech legal system. For this purpose, it provides statements on the level of compatibility of a draft legal act of the Czech Republic with EU law. The statements are delivered at the stage of the commentary procedure (it is a compatibility statement addressed mainly to the body responsible for drafting of the relevant act) and afterwards at the stage of negotiating the draft at the government level, as a rule in the Legislative Council of the Government (i.e. a revision statement). The presented draft act is re-assessed in the revision statement as regards the level of compatibility with EU law achieved after the commentary procedure. Besides it, the unit delivers statements to problems of a general conception encountered by ministries during their legislative activities and it prepares analyses and papers for this purpose.

Besides the tasks in the legislative process of the Czech Republic which are set in detail by the Government Legislative Rules (approved by the Government Decision of 19 March 1998 No. 188, as amended) and in

particular in the methodical instructions (approved by the Government Decision of 12 October 2005 No. 1304), the unit prepares ad hoc statements to relevant problems resulting from implementation of legal obligations ensuing from the EU law/membership of the Czech Republic in the European Union.

Unit for Information on Compatibility with EU Law

Unit for Information on Compatibility with EU Law provides informational support for all the agenda concerning the implementation of EC/EU law into the legal system of the Czech Republic. For this purpose the Information System for the Approximation of Law (ISAP) has been used for the past 10 ten years. Databases contained in the ISAP serve as a source of legislative information for the ministries and other bodies of the state administration; they are used for generating the statistical surveys for the government of the Czech Republic and for the data-export to the official databases of the Secretariat General of the European Commission.

The bodies of the state administration also use ISAP for gaining and addressing information relating to the EC/EU legislative acts from the moment of their creation on the EU level (the proposals of all the kinds of EC/EU legislation in the form of the documents of the European Commission and the Council of the EU and all kinds of state positions which are discussed in the Council of the EU) and for maintaining cooperation between the government and both chambers of the Parliament during the legislative process.

This Unit allocates the coordination roles to the bodies of the state administration, which are factually responsible for the agenda concerned in both - the proposed and the published EC/EU legislative acts. After the publication of a piece of legislation in the Official Journal of the EU the

Unit monitors the measures of its implementation and the compatibility of such measures with the EC/EU law.

Besides the aforementioned the Unit guarantees all the activities connected with the process of notification of the national transposition measures to the Secretariat General of the European Commission, including the inspection of data for carrying out the notification.

Unit for Legislative Procedure of the EU

Activities of the Unit for Legislative Procedure of the EU are focused in particular on monitoring the analysis of the impact that the draft and proposals of the European Union acts have on the legislation of the Czech Republic. The objective of this monitoring is to create an overall survey of the possible impacts of the proposals of EU legislative acts during the process of their adoption in the institutions of the EU. Continuous analysis of the legislative impact of the proposals of EU legislative acts serves the timely preparation of the implementing acts and lowers the risk of not meeting the legislative obligations ensuing from the membership of the Czech Republic in the European Union. The classification and updating of information about impacts of the proposals of EU draft legislative acts is pursued through a specialized database, which is part of the Information System for the Approximation of Law (ISAP).

The participation of the experts officers of the Unit for Legislative Procedure of the EU on meetings of Ministerial Coordination Groups and the interministerial Committee for the European Union (V-EU) ensures close cooperation with individual departments and other bodies of the state administration.

Coordination and Revision Centre

Until 2005, the Coordination and Revision Centre provided Czech versions of legal acts of the European Union in its complexity, i.e. it co-ordinated translations and made their revisions ensuring accuracy of these translations. The availability of revised translations of the primary and secondary law of the EU was a precondition for the official Czech version of those documents that were published in the Special Edition of the Official Journal of the European Union after the accession of the Czech Republic to the European Union.

At present, the main task of the Centre is to provide translation of the jurisprudence of the Court of Justice of the EC. As another task, it participates in meetings of the Lawyer-Linguists Group of the Council of the European Union so as to present linguistic and legal comments on draft acts of the European Union. Further, under the Government guideline for negotiation, internal discussion, implementation and termination of international agreements, it assesses the accuracy of translation of agreements and decisions that were not negotiated in the Czech language.

Implementation of EU Law in the Czech Republic

THE SYSTEM AND METHODS USED FOR THE IMPLEMENTATION OF EU LAW IN THE CZECH REPUBLIC

Markéta Whelanová

EU law constitutes a special legal order, characteristic of which, particularly in the first pillar, is the principle of priority over domestic law or the doctrine of direct and indirect effect. However, in spite of this specific character it is necessary to undertake extensive changes of a legislative and non-legislative nature to domestic legislation in order for due implementation of EU law to be secured.

Due implementation of EU law, which at present contains approximately thirty thousand legal acts of both a binding and soft-law nature, and a significant quantity of case law of European courts, which must also be taken into account, requires the creation of a system which will enable the smooth fulfilment of Member States' obligations.

In the Czech Republic the system for implementation of law (before accession the term “approximation” was used) was established in the 1990s by means of government decisions (the first government decision was No. 391 of 1991, still during the time of the Czech and Slovak Federal Republic). Although this system has developed over the years, at its roots it has remained the same up to the present day. The Czech system is thus based on the responsibility of the public administration, namely Ministries and other central administrative bodies with the responsibility within their jurisdiction for the full and timely implementation of all legislative obligations in Czech legislation, and also for the practical fulfilment of EU law in practice. Ministries and other

central administrative bodies are supposed to meet these obligations above all by using their "European" and legislative units. In view of the large volume of work, notable for its marked complexity, in addition it was decided early on that this responsibility of Ministries and other central administrative bodies would be augmented by certain coordination, methodical and control mechanisms, so that the individual steps taken by the public administration would be unified and, to the maximum degree possible, be error-free. In order to meet this obligation a special body was created - the Department for Compatibility with EU law, which initially operated within the Office for Legislation and Public Administration, and later within the Ministry of Justice, but which, in view of its cross-departmental agenda, was transferred in 1999 to the Office of the Czech Government. The Department for Compatibility has relatively broad powers, which ranks the Czech Republic among those states with a more centralised system for ensuring the implementation of EU law in its domestic legal order.

The role of the Department for Compatibility includes both technical powers of an organisational nature as well as legislative powers, and begins with the very creation of EU legal acts. The Department for Compatibility thus monitors the legislative impacts of proposed EU legislation (this is based on the so-called Framework Positions prepared by the Ministries responsible in respect of proposed legislation, which should adequately comment on whether and to what extent adoption of a particular EU legal act will affect the Czech legal order), allocates administrators (i.e. responsible Ministries and other central bodies) both for proposed EU legal acts and for EU legal acts published in the Official Journal of the EU, administers the Information System for the Approximation of Law (ISAP), which monitors the progress made (or not) by the Czech Republic in meeting all its legislative obligations, provides

notifications of Directives for the Commission database and, last but not least, in order to secure material correctness of implementation, prepares opinions on the compatibility of proposed Czech legislation with overall EU law through its Analytical and Consulting Unit. The Department for Compatibility prepares approximately 800 opinions a year. Opinions are prepared twice for each proposal submitted by the public administration, that is (compulsorily) during the so-called commentary procedure[1] and then again after the proposal in question is submitted to the government or other governmental-level body. For more on this see below.

As has already been mentioned the system for implementation in the Czech Republic, although its basis has been the same from the beginning, has undergone several changes over the years: in the mid-1990s the ISAP system was created, in 1999 the obligation was imposed on submitters of legislation to put forward, with certain exceptions, only draft Czech legislation which was fully compatible, and in the same year more detailed methods for the transposition of directives and adaptation of regulations were stipulated. However, the most noticeable changes were undertaken in connection with the Czech Republic's accession to the EU, through an amendment to the Government's Legislative Rules (Government decision No. 188/1998), and in particular through the preparation of a completely new set of Methodological Instructions for the Organisation of Work when Meeting the Legislative Obligations Ensuing from the Membership of the Czech Republic in the European Union (Government decision No. 1304/2005)[2]. The Methodological Instructions from 2005 thus deal with both the methods of implementation of various sources of EU law, as well as the organisational steps which have as their

[1] During this procedure other Ministries and administrative bodies submit their comments to the proposal, particularly in respect of its impact on their respective powers.
[2] In both these cases, these are internal by-laws which are binding on public administration.

aim faster and easily supervised implementation (correlation tables). Finally, the aim of the Methodological Instructions from 2005 was also to react to the Commission Recommendation of 12 July 2004 on the transposition into national law of Directives affecting the internal market.

The process leading to due implementation in the Czech Republic thus looks like this:

The responsible Ministry or other central administrative body to which the relevant EU legal act has been assigned conducts an initial analysis of the act to determine whether its implementation will require changes in Czech legislation. If the answer in the case of this initial analysis is affirmative, the responsible Ministry or other central administrative body (administrator, submitter) will prepare a draft of a Czech legal act.

This draft must fulfil certain formal requirements. First, the explanatory memorandum for it must contain a so-called compatibility clause, i.e. a commentary on its relation to EU law and the degree of compatibility which has been achieved (i.e. which EU legal acts it relates to, which case law of the European courts it relates to, whether it is wholly or partially compatible). In bills proposed by government harmonising provisions must be marked directly in the text, by underlining and with the celex number of the EU legal act (primary law, directive or regulation). In addition, a so-called differential table is attached to bills proposed by government, in which the provisions of the Czech draft are shown on the left, and the wording of the relevant EU legal act on the right. These formal matters are governed by the Government's Legislative Rules.

As far as the achievement of full compatibility is concerned, as early as 5 years before Czech accession, Government decision No. 453/1999 established the requirement, with some exceptions, to present to the government only Czech draft legislation which is fully

compatible with EU law. This requirement still applies, but sometimes its practical application reflects compromises between various political interests.

As far as the material correctness of implementation is concerned, for the last 10 years government drafts of Czech legislation have been subject to checks by the Analytical and Consulting Unit of the Department for Compatibility. A draft of a Czech legal act presented for the commentary procedure must, in accordance with the Government's Legislative Rules, be sent to this Unit, which prepares an opinion for it based on its compatibility with overall EU law. The submitter of the draft must then respond to the comments contained in the opinion (accept them, explain them, or justify why they have not been taken into account). In order that the obligation of Ministries and other central bodies is met and that government or governmental-level bodies are sufficiently acquainted with possible problems of a draft from the point of view of compatibility with EU law, the Department for Compatibility prepares for each draft from the executive a further opinion, in which it assesses the degree of compatibility, particularly with respect to whether comments raised during the commentary procedure have been taken into account or explained and whether the draft does not contain new provisions inserted after the commentary procedure, which are a problem from the point of view of compatibility. The second, so-called revision opinion is usually the subject of discussion within the Government's Legislative Council, which is the government's advisory body on points of law, or to be more precise, within the working commissions of this Legislative Council. It often happens that in connection with discussions in the Government's Legislative Council a draft is amended for reasons of achieving compatibility with EU law.

Although the Compatibility Department's opinions are not binding on the Government's Legislative Council, on its commissions or on the government, they enjoy relatively high authority and consequently there also exists at government level relatively broad scope for influencing the compatibility of draft Czech legislation with EU law.

As far as controls on the compatibility of Parliamentary and Senate drafts and drafts from the Regional Assemblies[1] are concerned, controls over these drafts are only general. This follows from the principle of the division of powers between the legislature and the executive. As part of its constitutional right the government regularly comments on these drafts (Art. 44 of the Czech Constitution) merely by recommending or not recommending them, for which it uses the opinions of the Department for Compatibility as prepared for these drafts, purely for the government's internal needs. The government thus cannot undertake specific changes in these drafts. Nor does the government express an opinion on individual amendment proposals from Deputies, from which it follows that the influence of the government over the compatibility of these proposals, Senate proposals and proposals from the Regional Assemblies is relatively small, even if it has responsibility for implementation. A particular correction in compatibility can be undertaken only by the Parliamentary Institute[2] on the basis of its ad hoc (i.e. not general) opinions or studies, however its outputs are often taken more broadly (its studies are not aimed only at the legal aspect) and serve rather as an

[1] According to Article 41 of the Czech Constitution legislative initiative is a prerogative both of individual deputies and a group of deputies, the Senate and regional assemblies, as well as of the government.

[2] Parliamentary institute fulfils the tasks of a scientific, information and training centre for the Chamber of deputies, its bodies, deputies and the Chancellory of the Chamber of deputies, for the Senate, its bodies, senators and the Chancellory of the Senate.

information source for the objective decision-making of members of Parliament.

Once a draft has been approved at government level the legislative process is either completed (as in the case of government regulations or decrees issued by Ministries or other central administrative bodies) or, in the case of bills, continues on for debate in Parliament (the Chamber of Deputies and the Senate), a process which culminates in the draft law being signed by the President. Here we should mention that the legislative process in the Czech Republic is, at this level in particular, relatively time-consuming (in the Chamber of Deputies a draft must go through 3 readings[1] , which takes several months) and that the Czech Republic does not have any special mechanism available to speed up the implementation of EU law. All debates therefore take place according to the principles of the "general" legislative process. In fact, an attempt was made in the Czech Republic to introduce simplified methods using a government regulation with the statutory effect, but the draft amendment to the Constitution was rejected in 1999 by the Chamber of Deputies at the first reading.

In view of the fact that there is no special system in the Czech Republic which serves to implement the law, the transposition, adaptation or other implementation of EU law takes place as part of "standard" Czech legislation. First are statutes, i.e. legal acts which are approved by Parliament. Foremost among then are constitutional laws[2] which have hitherto been changed only in connection with achieving the basic institutional and principal questions connected to Czech membership of the European Union (priority for EU law in the form of enshrining the

[1] Approval of a bill at the first reading, which is permitted by the Rules of Order of the Chamber of Deputies (Article 90 of Act No. 90/1995 Coll.), occurs only rarely in practice.

[2] Constitutional laws can be changed only if a majority of 3/5 of all Deputies and a majority of 3/5 of senators present are in favour.

option of transferring certain powers of Czech Republic bodies to international organisations or institutions, the obligation of the government to inform Parliament in good time and in advance), but not in connection with the actual implementation of a specific EU law. A further important source of law serving to govern both purely internal, as well as "European" legal relations, are government regulations, that is legal acts approved by the government which may not go beyond the scope and limits given by the statute. Finally, the implementation of law takes place through ministerial decrees, which are legal acts which implement statutes and which can be issued only when the statute contains empowering provisions to do so. Such an empowering provision must be clear, precise and set limits for issuing the decree.

The rules for the creation of legislation are relatively strict in the Czech Republic. The basic procedures are laid out in the Constitution itself or in the Charter of Fundamental Rights and Freedoms, which is one of the constitutional laws. Article 4 para. 1 of this Charter states, that *"Obligations may be imposed only by statute and within its limit and only if the fundamental rights and freedoms of the individual are respected"*. Article 79 para. 1 of the Constitution then states that *"Ministries and other administrative bodies and their jurisdiction may be established only by statute"*. In other words, the aforementioned important matters (creating obligations or new powers) must always take the form of a statute. For this reason it is usual for EU legal acts to be implemented partly at the level of one or more statutes, so that these constitutional requirements are not breached. The remaining, less important element of EU legal acts can then be implemented by Czech subordinate legislation. However, in the case of ministerial decrees, which are the most frequent means of implementing technical or detailed provisions of EU legal acts, it is necessary to have taken into account the precise empowering provision of

a particular statute without which the decree cannot be issued. Within Czech legislation the implementation of a given EU legal act is therefore often divided across more than one Czech legal act of varying legal force, which, however, causes problems, since it is often complicated to seek out full coverage of the scope of European directives in particular. Without a well thought out electronic monitoring system, in the end it would not be possible to search out many implementation provisions in the various legal acts.

Among other principles which are adhered to, as far as possible, in implementing EU law in Czech legislation is the fact that statutes should regulate only substantial legal relations and that the already burgeoning and badly arranged Czech legal order should not be excessively expanded simply for the reason of needing to implement EU law where similar legal institutions already exist. In other words rights and obligations arising from EU law which already appear in Czech legislation should not be regulated again, and any shifts or variances arising from EU law should be implemented only by supplementing existing legal relations, and not by establishing new ones. This is indeed a very logical principle, but in practice we often come across institutions arising from EU law which are only partially the same as the institutions in Czech legislation, or not at all, even if they sound the same (e.g. the terms worker, establishment, undertaking, the concept of social advantages, the principle of non-discrimination), and which do not allow for simple inclusion in Czech legislation, but require a complete change in the legal conception of certain institutions or certain legal relations. So we come to which problems we meet in implementing EU law in the Czech Republic.

EU law and Czech legislation are characterised by a significant quantity of relatively unclear legislation. In implementing law by merging two differing legal systems, this obscurity is a significant complication. It is

all the more important that the legal and law-making aspects with regard to future implementation are taken into account as early as the stage of negotiating EU legal acts, when it is still possible at least in part to influence the form of the future EU acts and thus prepare the ground for its problem-free inclusion into domestic legislation. But this does not always happen. Analyses of the impact of draft EU legal acts on Czech legislation are underestimated, particularly in those departments where there is a certain rivalry between the units dealing with the "European" issue (usually with the process of negotiation and with political matters relating to a particular issue within the EU) and legislative units, which should be the guarantors of correct implementation in domestic legislation. And these circumstances affect timely and correct implementation, which is fundamental for meeting the Czech Republic's legislative obligations to the EU. In addition to these problems it is also appropriate to look at other aspects which affect the proper inclusion of EU law in Czech legislation.

The Czech Republic has relatively large problems with sufficiently speedy implementation of EU law in Czech legislation. Firstly, we should mention the fact that the Czech Republic does not have a special system for the implementation of law. So even harmonisation proposals must go through the classic legislative process, as described earlier. To this we must add the fact that within the Czech Republic there are relatively strict constitutional and legislative rules (which often require deeper consideration of the method of implementation, which can also be time consuming) and that the legislative process in the case of statutes is rather protracted (one should allow for at least 10 months before draft legal acts subject to the legislative process in Parliament come into force). At the same time the preparation of implementing legal acts at a national level is often delayed when compared with the plan, and this happens in

spite of the fact that instructions exist that departments are to begin preparing draft implementing legal acts as early as the draft EU legal act itself and that the relevant data for future implementation of EU legal acts is routinely communicated to the departments through reports and information prepared for the government by the Department for Compatibility. In the present state of affairs one problem which will only be resolved with difficulty is how to secure the implementation of quickly adopted EU legal acts, which respond to a specific current problem and must be brought quickly into use, or the implementation of commitological implementing measures, which sometimes (even if they shouldn't) contain relatively substantial elements (amendments to basic terminology, establishing additional new obligations). In fact, such fundamental requirements often cannot be implemented in the form of subordinate legislation and because of them it is necessary to open statutes, which requires a longer timeframe.

As far as correct implementation is concerned, it should first be pointed out that arranging this has a personnel dimension as well as a material one. It has been shown that, in order to staff the public administration so that it has law-makers available with a knowledge of EU law is an enormous problem, especially since practical experience indicates that a law-maker should have at least 10 years' experience in the field in order to understand all the relations of Czech legislation and to be able to master the drafting of legal acts. Moreover, it is precisely in the implementation of EU law that it is necessary to conduct not only "positive" implementation, but also to remove discrepancies between national law and EU law (particularly in the case of EU regulations), and this places an emphasis on a very good knowledge of Czech law in addition to EU law, which will allow the person to spot possible pitfalls in

Czech legislation which would prevent execution of the relevant EU legal act or other EU legal source.

From a material standpoint the Czech Republic encounters the aforementioned obscurity of EU law and Czech legislation when implementing law. This obscurity consists of the significant number of legal acts which are not always consistent (e.g. in terminology or the concept of basic legal institutions) and also of the hazy relations between legal acts. In the case of EU law this already unfortunate situation is made worse by the fact that it contains institutions not known to Czech law, that explanatory case law, especially of the Court of Justice, sometimes substantially expands the meaning of legal institutions (the concept of social advantages, tax law), or the fact that EU law also contains many obscure references which complicate implementation, such as the amendment of directives by regulations or the aforementioned commitological implementing measures which amend quite substantial elements.

In the case of more complex amendments involving a more thorough reworking of Czech legislation, there is sometimes a certain reluctance to make more fundamental changes in Czech legislation, which would lead in the direction of a conceptual solution and full inclusion of EU law. We should also note that even where there is sufficient commitment, an attempt at implementation in existing Czech legislation with the aim of using Czech legal institutions which are similar to institutions in EU law sometimes causes inaccuracies, particularly where several statutes or subordinate legal acts are being amended to cover a whole scope. In this way, for example because of inadequate linking-up of legal acts, space is created for further disparate and inconsistent amendments to arise.

Conclusion

From what has been written it is clear that the Czech Republic at the executive level has a relatively well organised system for ensuring implementation of EU law in Czech legislation This system, divided between the Ministries (other central bodies of public administration) materially responsible and a coordination body - the Department for Compatibility, which inter alia prepares opinions on compatibility for each draft Czech legal act, is connected directly to the domestic legislative process and thus permits correction of draft legal acts prepared by the executive in those cases where there are doubts about the compatibility of these drafts with EU law.

Even so, the problem-free implementation of EU law into Czech legislation is not always achieved. In addition to the fact that no strict system of checks exists at Parliamentary level (and indeed cannot, in view of the independence of Deputies) as it does at the executive level, the Czech Republic has further problems, particularly with the sufficiently fast inclusion of EU requirements into domestic legislation (e.g. commitological implementation measures). The causes of this shortcoming can be found in both the long legislative process, the relatively strict legislative and constitutional rules, and the absence of any special acceleration procedures, but also in inadequate prior preparation and sometimes even in a reluctance to accommodate EU law. At the same time correct implementation is not always successful. In addition to organisational problems consisting of the fact that in the Czech Republic there are few specialists in drafting legislation - experts on Czech and EU law, it is sometimes a complicated business to implement wide-ranging, not always consistent and clear EU legislation in Czech law, which is characterised by the same problems. In addition Czech law sometimes does not recognise European legal institutions at all or does not recognise them to

the same extent - this concerns in particular the extensively interpreted requirements of the Court of Justice, and this has the effect that implementation requires conceptual changes to the Czech legal order.

The attempt to implement in existing Czech legislation, to make use of legal relations which already exist in the Czech legal order and which are similar to legal relations under EU law means that, particularly in the case of cross-sectional European provisions it is necessary to implement them in more statutes and subordinate legal acts, in order to cover their scope, from which arises space for further disparate and inconsistent amendments.

INFORMATION SUPPORT OF THE IMPLEMENTATION OF EU LAW IN THE CZECH REPUBLIC – INFORMATION SYSTEM FOR APPROXIMATION OF EU LAW (ISAP)

Jana Rybínová

The Czech Republic first started using information technologies to support and facilitate the implementation process in the mid 90's, just after signing the Accession Agreement. At that time a group of IT and law specialists who were also enthusiasts about new technologies set about to solve one concrete problem. What to do with all the documents that the Czech Republic was provided with by TAIEX? It was necessary to find a way to assort these documents and to monitor the way they were dealt with in the national legal system. As a result the first database was created. It became the foundation stone of a very sophisticated and complex system which is now called the Information System for Approximation of Law.

The system was built thanks to a generous subvention given by the EU – Phare program. It is based on Lotus Notes platform, a software product of IBM, and it is accessible via client-server access as well as via Internet. Lotus Notes enable cooperation and communication among several users simultaneously, and therefore provide for active communication between the ministries and other bodies of the central state administration as well as communication between them and the Department for Compatibility which plays the role of coordinator of the implementation of EU law into national legal system. Lotus Notes are also quite well known for being very secure software, which makes them perfect for the communication purposes in the state administration as some of the contained materials are working papers and their public availability is limited.

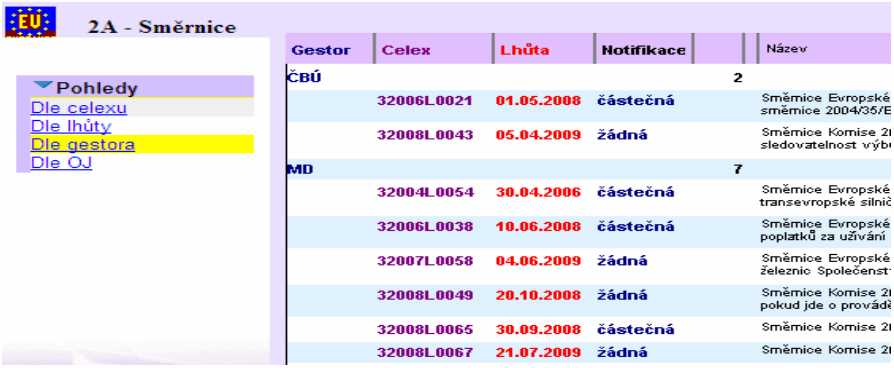
How ISAP serves its users very much depends on the level of accession rights the user possesses. The system is open to the general public to certain level and via Internet (http://isap.vlada.cz) but the

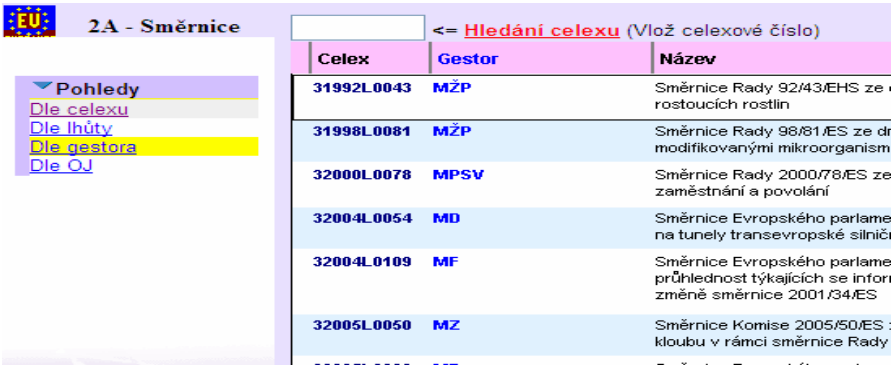
available information is not very profound (general information about EU and about accession process, the text of the Accession Treaty, revised translations of EU acts, terminology, dictionaries and so on).

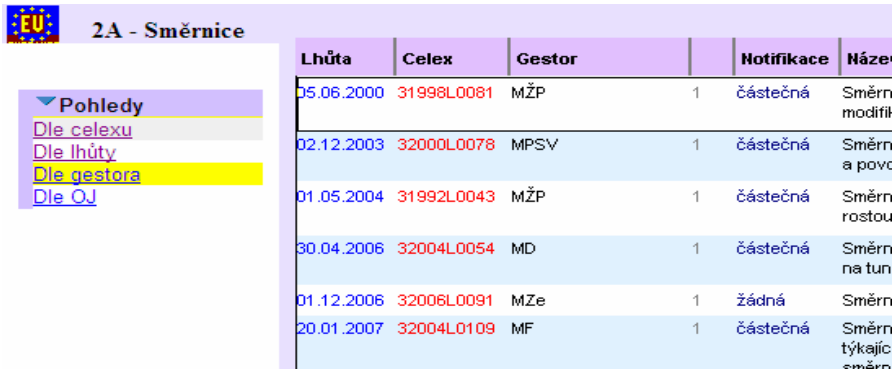
The more upgraded accession rights, the so called “Readers” rights, are primarily designed for the regular staff of the ministries and other bodies of central state administration. These users are not allowed to change any data; they are only entitled to read, to search and to check them. For a special group of users, who are authorized to change the data in databases of the system or to enter documents in it, “Editor” rights are created; these persons, employees of the ministries and other central bodies of state administration are usually responsible for accepting or refusing allocated coordination roles, for evaluating the extent of implementation and for entering correlation tables into the system.

“Administrator” rights are granted only to the staff of the Department for Compatibility, who creates new databases and evaluates functioning of the existing ones.

All databases of the system are created under the same principle. When building a new database it is first necessary to set out the purpose for its use and to point out the data that will be essential for identification of a document (draft legislation, legal act, formal notice issued by the Commission) and the data that will be relevant as to the object of monitoring (allocation of coordination role, monitoring of the implementation process, monitoring of the infringement procedures). These data are then scheduled into a form. By combining different data in the form various views are created and it really depends on the personal taste of the user what view will be the most convenient for him/her.







One database, three different views.

Every day the system provides its users with new information. National coordinators are allocated daily to newly arrived COM final documents, to the Council documents and to freshly promulgated EU legislation. The system is available to these coordinators as an electronic archive where they can deposit their national positions, instructions, mandates, minutes from the Council meetings etc. It is also used by the responsible bodies of the state administration for proving that they have properly fulfilled their obligations stemming from the EU membership by entering correlation tables to every single EU act that requires implementation. The national legislative process is being monitored in the system where each initial proposal created at the ministry, is followed through each step of the legislative process such as negotiation in the Government, until its approval in Parliament and promulgation in the Collection of Laws. In case of late or incorrect implementation the subsequent infringement procedure is followed from the first letter of formal notice until the possible ruling of the European Court of Justice. In general one can say that through ISAP the legislative process both on EU level and on national level (implementation process) is thoroughly covered.

Monthly and quarterly regular Information and Reports are generated out of ISAP databases in the form of statistical surveys for the Government of the Czech Republic.

Besides the aforementioned functions ISAP upholds all the activities connected with the process of notification of the national transposition measures to the Secretariat General of the European Commission.

The employment of three out of the many ISAP databases is obligatory for the ministries and other bodies of central state

administration under two methodical tools approved by the Government. These methodical tools are:

- Government Directive on the procedure for the dispatch of draft legislative acts of the EC/EU and materials of the European Commission to the Chamber of Deputies and the Senate of the Parliament of the Czech Republic (Government resolution no. 680 of June 7, 2006);
- Methodical Instructions for the Organization of Work when Meeting the Legislative Obligations ensuing from the Membership of the Czech Republic in the European Union (Government resolution no. 1304 of October 12, 2005).

Governmental "Dispatch Directive" sets out the rules how to handle a COM final document or a document of the Council when they arrive via EU Extranet and are forwarded into Database no. 1C of ISAP. The daily number of documents varies, nevertheless no matter how high the number the Department for Compatibility must allocate within 2 working days the coordinator (e.g. ministry or other body of central state administration responsible for drawing up national position documents – Framework Position - and for representing the Czech Republic in the formations of the Council of the EU). The allocated coordinator is informed by means of the database and also by means of an e-mail alert. The coordination role may be refused within 3 working days and the refusal must be justified and accompanied by nomination of another coordinator. In case the allocated coordinator does not act within the given period of time, it is assumed it agrees and accepts the coordination role.

Database no.1C – Council Documents

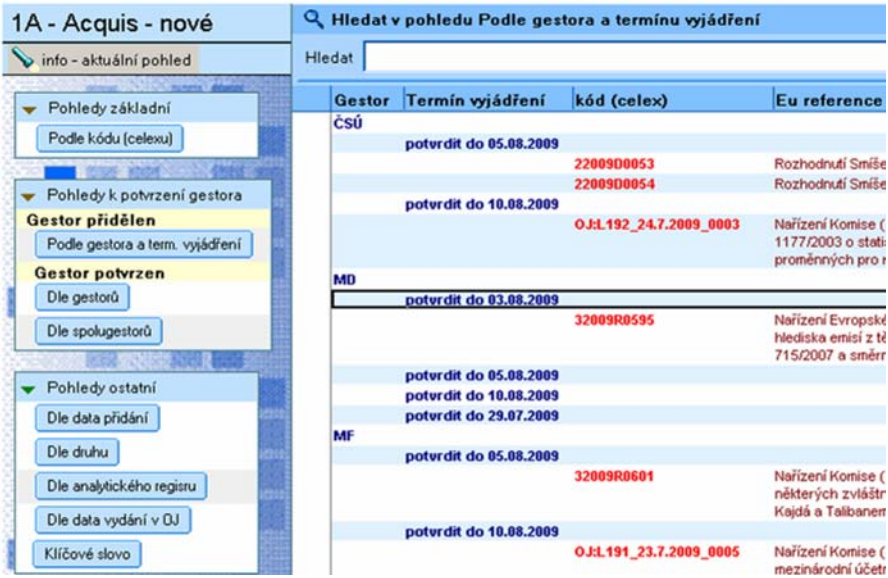
In case of a dispute over the coordination role the Department for Compatibility acts as a mediator in the first instance. In case the negation is unsuccessful the dispute is then submitted to the Committee on the European Union on the governmental level.

Coordination roles are allocated in two phases. Firstly as described above and then for a second time when a draft EU act becomes a valid piece of the European legal order by being published in the L series of the Official Journal of the EU. The reason for this is that sometimes the subject who best represented the national position in the Council is not as suitable for the implementation phase as well.

The second methodical tool (“Methodical Instructions”) covers the process of dealing with newly promulgated EU acts after they are copied from the electronic version of the Official Journal of the EU to the no. 1A Database of ISAP. The Department for Compatibility must within 3 working days assort these acts and allocate the coordinator again. The

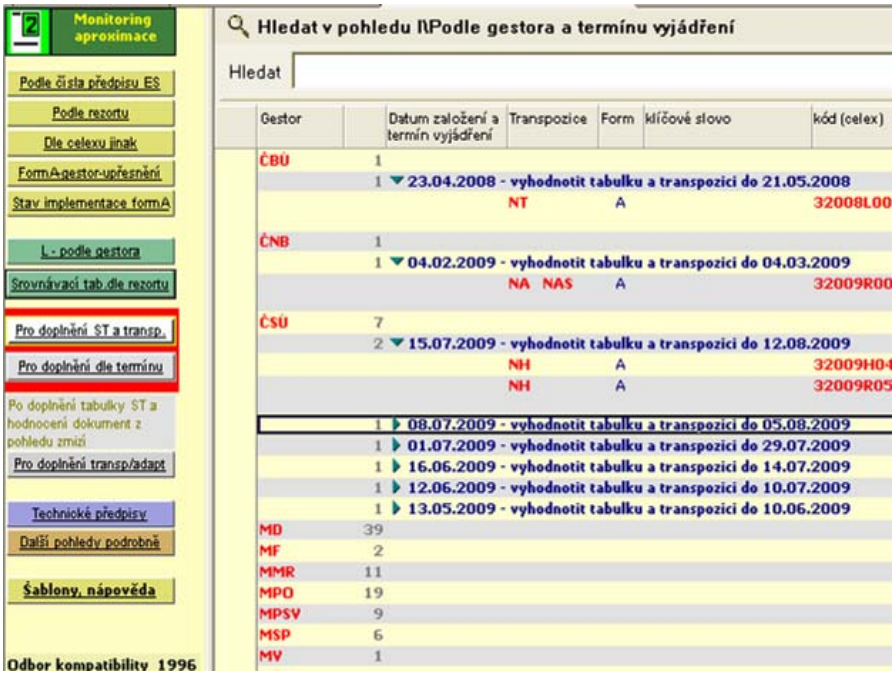
allocated coordinator is informed by means of the database and also by means of e-mail alert. Coordination role may be refused within 10 working days and the refusal must be justified and accompanied by nomination of another coordinator. In case the allocated coordinator does not act within the given period of time, it is assumed it agrees and accepts the coordination role.

Disputes over the coordination role are primarily solved by the Department for Compatibility. If agreement is not reached during the first phase of negotiation, the dispute is submitted to the Government in order to decide and to appoint the responsible coordinator.



Database no.1A – New Acquis

When the coordinator is allocated, it must within a period of 20 working days assess the extent and method of implementation of the EU act by means of no. 2 Database of ISAP – Monitoring of Implementation.

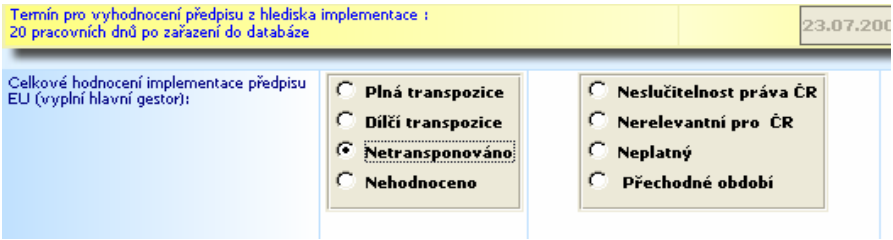


Database no. 2 – Monitoring of Implementation.

While doing this it must evaluate whether there are any duties laid on the Czech Republic, whether there will be any implementation necessary and which national legal acts will have to be modified in order to comply with the EU act.

In case the evaluation shows that implementation process will have to be launched the results of such evaluation must then be processed into a table of concordance. That being said all directives and framework decisions the tables are drawn obligatorily no matter whether their implementation is necessary or not. In the table of concordance provisions of the EU act are given on the left side and the title and the wording of the appropriate provisions of valid national legal acts or title of the draft implementing act are given on the right side. The table of

concordance must be then entered into the no. 2 Database of ISAP and the national implementation process should commence.

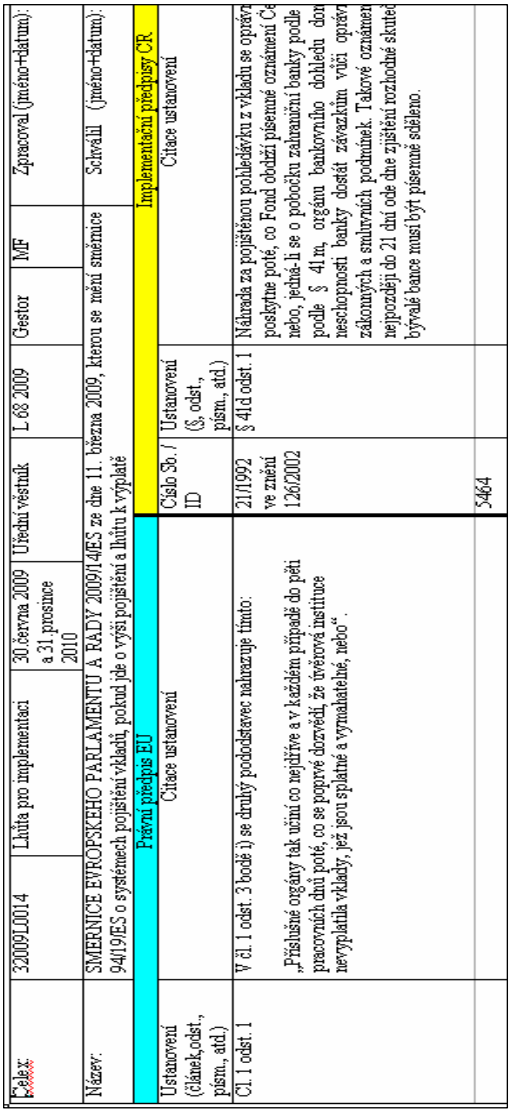


Database no 2 – Monitoring of Implementation (part of the form) - Indication of the extent of implementation.

After the implementation act becomes valid by being promulgated in the Collection of Laws the coordinator must within 15 working days update the initial table of concordance and to reenter it into the no. 2 Database of ISAP. It is then inspected by the Department for Compatibility and if no objections are raised from this side within 10 working days the implementation process is considered to be completed.
Of course there is one more step to be taken in the case of directives. The Department for Compatibility after having checked the updated table of concordance carries out the notification of the national transposition acts in the Commission's database.

So it is clear that at present in the Czech Republic the use of information technologies is a common part of every day implementation tasks. It is not always easy to persuade people to make use of the different databases in the system and thus simplify their work, yet nevertheless trying to do so is worth the effort. There is a rising number of people who see ISAP as a handy tool that enables them to find different types of information at one spot and we hope this trend will continue, because it is our belief that connection between technical means and the

law as a branch of humanities is not some kind of a fiction but a fully efficient and useful alliance that can make the implementation process much easier, faster, more profound and less paper congestive.



Celex:	32009L0014	Lhůta pro implementaci	30.června 2009 a 31 prosince 2010	Úřední věstník	L 68 2009	Gestor	MF	Zpracoval (jméno+datum):
Název:	SMĚRNICE EVROPSKÉHO PARLAMENTU A RADY 2009/14/ES ze dne 11. března 2009, kterou se mění směrnice 94/19/ES o systémech pojištění vkladů, pokud jde o výši pojištění a lhůtu k výplatě							Schválil (jméno+datum):
Právní předpis EU								Implementační předpisy ČR
Ustanovení (článek,odst., písm., atd.)	Citace ustanovení				Číslo Sb. / ID	Ustanovení (§, odst., písm., atd.)	Citace ustanovení	
Čl. 1 odst. 1	V čl. 1 odst. 3 bodě i) se druhý pododstavec nahrazuje tímto: „Příslušné orgány tak učiní co nejdříve a v každém případě do pěti pracovních dnů poté, co se poprvé dozvědí, že úvěrová instituce nevyplatila vklady, jež jsou splatné a vymahatelné, nebo“.				21/1992 ve znění 126/2002	§ 41d odst. 1	Náhrada za pojištěnou pohledávku z vkladu se oprávn poskytne poté, co Fondu obdrží písemné oznámení Če nebo, jedná-li se o pobočku zahraniční banky podle podle § 41m, orgánu bankovního dohledu dot neschopnosti banky dostát závazkům vůči oprávn zákonných a smluvních podmínek. Takové oznámen nejpozději do 21 dní ode dne zjištění rozhodné skuteč bývalé bance musí být písemně sděleno.	
					5464			

Extract from the table of concordance.

EVALUATION AND MONITORING OF IMPACTS OF THE PROPOSALS OF EU LEGISLATIVE ACTS ON NATIONAL LAW

Daniel Hoda

Introduction

Every member state of the EU has got sometimes problems with implementation of EU law in particular with timely transposition of the directives. There are various reasons – political situation, complicated national legislative procedure and constitutional rules, lack of experts on legislation and so on. To ensure correct and timely transposition of EC directives or implementation of other acts is not easy at all. That is why member states – Czech Republic as well – are trying to look for various methods and adapt their institutional and coordination structures to ensure correct and timely transposition of the EC directives or implementation of other EU legislative acts. One of the possibilities is to began preparation for transposition or implementation of EU legislative act as early as possible because if preparation for implementation of EU legislative acts takes place at an early stage - if possible during the stage of their negotiation in EU institutions - there is bigger probability that EU legislative acts will be transposed or implemented correctly and in particular on time!

In the Czech Republic there is a **system of evaluation and monitoring of the impacts of the proposals of EU legislative acts on national law** – it means that impacts on national law are systematically monitored already in the phase of their negotiation in the EU institutions - before their adoption. By the means of this system all ministries and other authorities have got comprehensive overview about impacts of all proposals of EU legislative acts on national law.

Evaluation and monitoring of impacts of the proposals of EU legislative acts on national law was inspired by *Commission Recommendation on the transposition into national law of Directives affecting the internal market (Official Journal L 98, 16 April 2005)*.

Member states were recommended to take the measures to ensure that preparations for transposition of directives take place at an early stage. This means:

- Preparation of planning schedule for transposition already during negotiations of the Directive by the Ministry or other authority responsible for negotiations,
- elaboration and regular updating of the analyses of impacts of the Directive on national law,
- Start of drafting of relevant national legislation if possible before Directive is published in the *Official Journal of the European Union.*

Commission recommendation was inspiration and basis for *Methodical Instructions for the Organisation of Work when Meeting the Legislative Obligations Ensuing from the Membership of the Czech Republic in the European Union*. This document, approved by the decision of the Government contains in Article 5 provision regulating monitoring of impacts of the proposals of EU legislative acts on national law and defines role of ministries and Department for compatibility.

Problems

Before the objectives of the monitoring of impacts on national law will be explained, it is suitable to mention certain problems concerning the stage before EU legislative acts are implemented:

- Not in all cases but in a lot of cases the impacts of the proposal negotiated in EU institutions on national law are underestimated

or more precisely impacts on national law are not priority for the experts responsible for formulating national position for negotiation in EU institutions. There are other priorities because some proposals have got very serious impacts on industry of a member state, budget, social situation and so on that is understandable because all member states are trying to negotiate terms as favourable as possible for the member state itself. In the stage of negotiations of the proposal its impacts on national law are not so important.

- The second problem is division of competences within ministries. Experts dealing with the substance of the proposal that are responsible for the phase of its negotiation in EU institution. Nevertheless in most cases there are specialized legislative departments responsible for preparation of national laws transposing or implementing EU legislative acts in force. Legislative departments are often in very difficult situation because experts from these departments were not engaged in the phase of negotiation of the legislative act in EU institutions. So if there is not good cooperation and communication between experts on substance and experts from legislative departments there can be problems with correct and timely transposition or implementation.
- And last but not least - the problems with correct and timely transposition may come if there is not sufficient analysis of the impacts on national law during the negotiation of the proposal of EU legislative act.

Objectives

The objectives of the monitoring of impacts on national law are focused on problems mentioned above:

- monitoring of impacts on national law should encourage concentration not only on the substance of the proposal during the negotiations but also on the impacts of the proposal on national law
- the objective is as well to put together all available information about impacts of the proposal of EU legislative acts on national law during the negotiation – it was mentioned that legislative departments of the ministries that are responsible for preparation of national law are not in most cases engaged in the negotiation of the proposal in EU institutions – so comprehensive and clearly organized information about the proposals of EU legislative acts being negotiated in EU institutions can help them to prepare for subsequent transposition.
- To conclude the objectives - the monitoring of impacts on national law should help to make conception of implementation of EU legislative act – if possible - just before its formal adoption in EU institutions.

Role of the ministries

In the Czech Republic, ministries are responsible both for negotiation of the proposals of EU legislative acts in EU institutions and for their subsequent transposition or implementation. They play key role as well in the definition of impacts of the proposals of EU legislative acts on national law.

In the beginning of negotiation of the proposal in EU institution, responsible ministry is obliged to draw up “Framework position”. It is very

important document defining national position to the proposal and containing other important information – positions of other member states – if known, impacts on budget, environment, social situation and last but not least impact on national law. Every national document – instructions for Council working groups, Coreper etc. must be in compliance with Framework position. For the department for compatibility it is important that in this document obligatory item is information about impact on national law. Quality of information about impact on national law in Framework position is diverse.

Role of the Department for Compatibility

In the matter of monitoring of impacts of the proposals of EU legislative acts on national law the Department for Compatibility plays - along with ministries - also important role:

- If necessary the department makes comments to the information about impacts on national law included in Framework position
- The department makes classification of all information concerning the impacts of the proposal on national law – this is very important because classification of information is necessary condition for searching of all available information and work with these information
- All information are registered in specialized database that was designed and now is fully administered by the department or more precisely Unit for Legislative procedure of the EU. Database is opened to all ministries and other authorities responsible for negotiation and transposition or implementation of EU legislative acts.
- Department for Compatibility also regularly submits to the Government the report on the fulfilment of legislative obligations

ensuing from the membership of the Czech Republic in the EU. The report includes in particular information regarding the status of the transposition of directives in light of deadlines for the implementation, and, if necessary, a proposal for remedial measures to be taken. The report also includes information about all proposals of EU legislative acts and their impact on national law.

Updating of information about impacts on national law

Information about impact of the proposal on national law are regularly updated when it is necessary. It was mentioned that regular report submitted to the Government also includes information about impacts of the proposal on national law. Before the report is approved by the government ministries and other authorities can make comments, it means that they usually precise information about impacts of the proposals on national law in connexion with latest development in negotiation of the proposals. This is possible method how to update all relevant information. Off course all responsible experts from the department communicate regularly in this matter with the experts from the ministries.

Classification of impacts of the proposals of EU legislative acts on national law

There are hundreds proposals being negotiated in EU institutions. Some of them are very important some are unimportant from the view of impacts on national law. There is difference between climate and energy packet, anti-discrimation directives and for example proposal for a *COUNCIL REGULATION as regards management measures adopted in*

the Indian Ocean Tuna Commission and in the South Pacific Regional Fisheries Management Organisation.

Criteria for classification on impact on national law

In order to have clearly organized overview about the impacts of the proposals on national law all proposals are divided into various categories and classified on the basis of relevant criteria the most important of them is general information about impact on national law. Every proposal falls to one of these groups:

- Impact on national law
- No impact on national law
- Impact analysis to be completed
- No information about impacts on national law

By the means of this basic classification we know the proposals the most important from the view of impacts on national law.

Category *"Impact analysis to be completed"* contains the proposals where impacts on national law are expected but impact analysis is not complete yet. In the beginning of the negotiation of the proposal it is sometimes very difficult or in some cases almost impossible to know the impacts of the proposal on national law. In this case it would not be proper to make pressure on ministries to define impact of the proposal immediately. In some cases there are more possibilities how to ensure transposition or implementation of EU legislative act – to amend current national law in force or to adopt completely new legislation. Final solution is question of policy of the ministry.

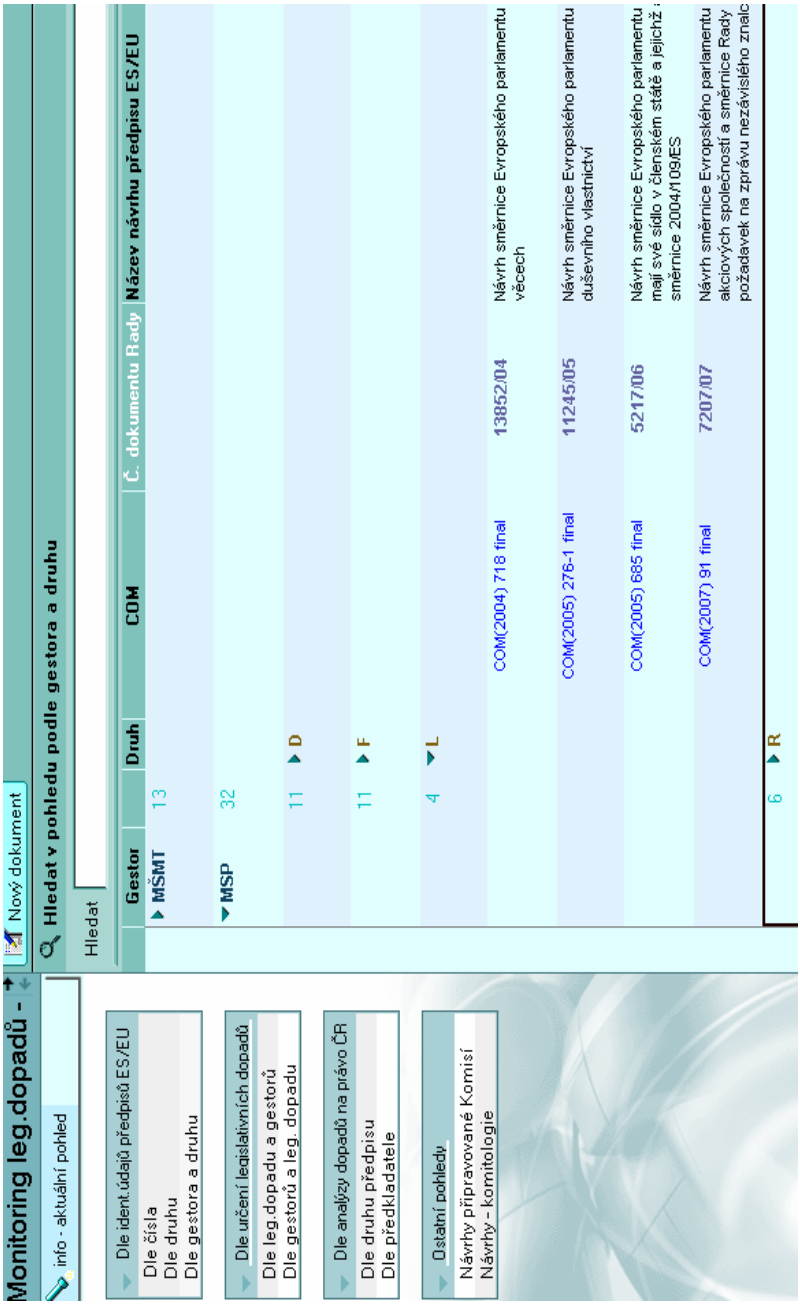
In a lot of cases result of the analysis of the impacts on national law is a list of national legislative acts that the Czech Republic will have to adopt or amend in order to transpose or implement EU legislative acts.

Important is also classification by the type of national act transposing or implementing EU legislative acts – in the Czech Republic there are three types of national law - statutes, government regulations or decrees of the ministries. In general implementation by statutes is the most complicated because the statutes must be approved by the Parliament.

Database ”Monitoring of impacts on national law“

All available information concerning the impacts of the proposals of EU legislative acts are registered in specialized database ***”Monitoring of impacts on national law“***. This database is part of the Information system for approximation of law (ISAP).

- The database is very efficient information tool developed, designed and administered by the department for Compatibility with EU law
- The advantage is that all relevant information about impacts of the proposals of EU legislative acts are „under one roof“
- Database is open to all ministries and other authorities responsible for proposals of EU legislative acts


Monitoring leg.dopadů -
info - aktuální pohled
Nový dokument
Hledat v pohledu podle gestora a druhu
Hledat
Dle ident.údajů předpisů ES/EU
Dle čísla
Dle druhu
Dle gestora a druhu
Dle určení legislativních dopadů
Dle leg.dopadu a gestorů
Dle gestorů a leg. dopadu
Dle analýzy dopadů na právo ČR
Dle druhu předpisu
Dle předkladatele
Ostatní pohledy
Návrhy připravované Komisí
Návrhy - komitologie
Gestor
Druh
COM
Č. dokumentu Rady
Název návrhu předpisu ES/EU
MŠMT 13
MSP 32
11 D
11 F
4 L
COM(2004) 718 final 13852/04 Návrh směrnice Evropského parlamentu věcech
COM(2005) 276-1 final 11245/05 Návrh směrnice Evropského parlamentu duševního vlastnictví
COM(2005) 685 final 5217/06 Návrh směrnice Evropského parlamentu mají své sídlo v členském státě a jejichž směrnice 2004/109/ES
COM(2007) 91 final 7207/07 Návrh směrnice Evropského parlamentu akciových společností a směrnice Rady požadavek na zprávu nezávislého znalc
6 R

In the database, there are so called “views“(see on the left side). All relevant information about the impacts of the proposals on national law are classified by the means of these views (for example – classification by the responsible ministry and type of the act – see on right side). After clicking on the title of the proposal you will get into the “form” of the proposal. On this form there are all relevant information concerning the proposal – identification (title, type, number, responsible ministry etc.), general information about impact (“Impact on national law”, “No impact on national law”, “Impact analysis to be completed” and category “No information about impacts on national law”. Finally there is a list of national law to be adopted or amended after the adoption of the proposal of EU legislative act in order to ensure transposition or implementation of the act.

Odbor kompatibility s právem ES Úřadu vlády ČR

Databáze č X.C : Monitoring of impacts on national law

I. Identification of the proposal

Type of the act:	○ A ○ D ○ F ◉ L ○ R ○ ost. ○ B ○ E ○ H ○ Q ○ X	○ Příprava návrhu v Komisi ○ Návrh - komitologie
Title:	Návrh směrnice Evropského parlamentu a Rady, kterou se stanoví postihy proti zaměstnavatelům státních příslušníků třetích zemí s nelegálním pobytem Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals	
COM / C:	COM(2007) 249 final	Text of the proposal: ST09871.CS07.DOC
Celex number (proposal):	52007PC0249	
Council document number:	9871/07	
Date:	23.05.2007	
Note:		

Coordinator:	MV
Joint coordinator:	

II. Impacts on national law

Impact on national law - general information:	◉ yes ○ without impact	○ no information on impact ○ impact analysis to be completed

Impact on national law :

Druh	Předkl.	ID/Sb.	Název	Datum zahájení prací na návrhu	Datum předložení vládě	Předpokl. účinnost	Stav přípravy
NNZ			Novela zákona č. 435/2004 Sb., o zaměstnanosti				
NNZ			Novela zákona č. 251/2005 Sb., o inspekci práce				
NNZ			Novela zákona č. 326/1999 Sb., o pobytu cizinců na území České republiky a o změně některých zákonů				

Additional information:	
Date for transposition / implementation:	

III. Decision-making process between EU institutions

Information about stage of the procedure:	Odkaz na vyhledávací formulář Pre-Lex
Related documents:	Odkaz do pohledu v databázi 1C (odkaz na dokument v databázi 1C)
Note:	
Official Journal: Date	**Celex (in force):**

IV. Doplňující informace

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The role of the European Court of Justice in ensuring the implementation of Community law

Eleanor Sharpston [1]

The Court of Justice is composed of three separate jurisdictions: the Court of Justice of the European Communities ('the ECJ'), the Court of First Instance ('the CFI') and the Civil Service Tribunal ('the CST').[2] It sits in Luxembourg, at the heart of the European Union. Many people automatically think of this judicial institution as 'the Community court' responsible for the implementation of Community law. However, that perception reflects a misapprehension as to the true role of the ECJ.

From the perspective of the ordinary citizen, the principal courts responsible for overseeing the correct application of Community law are the national courts of that citizen's Member State. In most cases, these will be the only courts involved, from beginning to end. Likewise, primary responsibility for implementing Community law rests with the legislature and the administrative authorities of each Member State.

It might therefore be said that, in reality, the ECJ does not itself 'implement' Community law at all. Its role is, rather, to hand down rulings that affect the implementation and application of Community law by the Member States' courts, legislatures and administrative organs.

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[1] The views expressed are personal to the author and do not bind the Court in which she currently serves as an Advocate General. I am grateful to my référendaire Cath Howdle and my assistant Michal Nadstoga for their comments and for their work in helping to turn a conference speech into a paper fit for publication.

[2] For reasons of economy, in what follows I shall concentrate exclusively on the ECJ. That should not be taken as either overlooking or belittling the very important role played by the CFI in, for example, exercising judicial control over the application and implementation of the Community rules on competition, dumping and state aids (a function subsequently exercised by the ECJ on appeal).

When examining 'the role of the ECJ in ensuring the implementation of Community law', I shall therefore divide my subject into two main areas.

First, I shall look at the role the ECJ plays in direct actions. In particular I shall focus on the infringement proceedings brought by the Commission against a Member State under Article 226 EC.[1] Other types of action (for example, disputes between Member States and the Community institutions, or between the Community institutions themselves as to the appropriate legal base for a particular measure) unquestionably have an important effect on the development of Community law; but they do not in general directly affect its implementation.

Second, I shall examine the role played by the ECJ in answering references for a preliminary ruling made under Article 234 EC,[2] thus providing guidance to national courts which enables those courts to ensure that Community law is applied correctly.[3]

1. Infringement proceedings under Article 226 EC

The origins of infringement proceedings

Direct actions tend to have their genesis in two different types of situation.

- <u>The first situation</u>

[1] Formerly Article 169 of the EEC Treaty.

[2] Formerly Article 177 of the EEC Treaty. Under specified conditions, references may now also be made under Article 68 EC and Article 35 TEU.

[3] It should be noted that to 'apply' Community law is not quite the same as to 'implement' it.

Suppose that a new Community directive has been agreed by the Member States after a period of discussion and negotiation. During that process, the Member States have formed their own (possibly divergent) ideas as to the precise scope of the obligations that they will be undertaking in signing up to the directive, and hence what changes (major or minor) they will need to make to existing national legislation in order to implement it. They have collectively agreed a deadline for its implementation. The directive is adopted and time for implementation starts to run.

In due course, the deadline for implementation expires. The Commission reviews its file and notes that it has no information from several Member States as to implementation.[1] It opens a dialogue with those Member States. If the Member State takes timely action that satisfy the Commission, that is the end of the story. If, however, a Member State takes no such action during the pre-contentious phase of the procedure, or if the Commission considers that the implementation by that Member State is inadequate, the Commission may[2] bring a case before the ECJ under Article 226 EC.

Some of these infringement proceedings are open-and-shut. In particular, a deadline is generally non-negotiable. When a Member State has failed to implement a directive within the appropriate time period, there is very little in the way of defence to fall back upon. The role of the ECJ in such cases is therefore a limited one: to mark, formally, that the Member State has failed to comply with its obligations.

[1] Directives routinely contain a provision requiring the Member States to inform the Commission of the measures that they have taken to implement the directive.

[2] The Commission 'may', not 'must', bring such proceedings: it enjoys a non-reviewable discretion as to whether in fact to take the Member State to court.

Other infringement proceedings involve a genuine disagreement between the Member State concerned and the Commission. These disagreements tend to revolve around the scope of the Member State's obligations, and frequently pose the question of the proper interpretation of the directive.

- The second situation

In the second situation, the Commission – acting either on its own initiative or (more often) following a complaint by an aggrieved party – begins to investigate a specific aspect of the implementation of Community law within a particular Member State.

Suppose that the Commission takes the preliminary view that that Member State's existing legislation or practice is not in conformity with its Treaty obligations.

In those circumstances, the Commission opens a dialogue with the Member State concerned, as part of a pre-contentious procedure that will (if necessary) serve as the prelude to an action under Article 226 EC. Sometimes, the pre-contentious procedure will lead to a total or partial modification of the domestic legislation. On other occasions, the Commission's position and the Member State's position are irreconcilable. If the Commission judges that it is appropriate (legally and politically) to do so, it will then bring proceedings before the ECJ.

The limits of the ECJ's role in infringement proceedings

In both these situations, the ECJ performs a double function. First, it provides an authoritative ruling as to the meaning of, and obligations that flow from, Community law. Second, it indicates whether a particular national arrangement is in conformity with those obligations.

At the end of the infringement proceedings, if the Commission has been successful in its application to the ECJ, the Court makes a declaration that, 'by doing X', or 'by failing to do Y' (sometimes, 'by a given date'), the Member State has failed to comply with its obligations. That declaration gives rise to a further legal obligation on the Member State to comply with the judgment of the ECJ.[1]

Besides the legal consequences, such a ruling may also generate or increase pressure from other Member States on the Member State concerned to implement the judgment.[2]

It is important to stress that, in such proceedings, the ECJ cannot and does not set out exactly what the Member State has to do in order to comply with its Community law obligations (although it may sometimes hint at the kind of action that is required). By way of exception, in certain very limited categories of cases the ECJ does spell out the specific result that must be achieved to comply with its judgment.[3] Normally, however, it is up to the Member State to choose what to do (and how far to go) in order to comply with the judgment (and hence to implement Community law).

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[1] Article 228(1) EC imposes the specific obligation: 'If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice'. Article 10 EC contains a general obligation to 'take all appropriate measures … to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community'.

[2] For example, the pressure on France to comply with the ruling of the ECJ regarding its ban on the importation of beef from the UK. See Case C-1/00 *Commission v France*, [2001] ECR I-9989.

[3] Notably where a Member State has been condemned by the Court for unlawful State aid; in which case that aid must be recovered. See Case 70/72 *Commission v Germany* [1973] ECR 813, paragraph 18.

A possible follow-up: An action under Article 228 EC

Normally, Member States do in fact comply with the judgments of the ECJ[1]. In these cases, it is clear that no further action is necessary in order to ensure compliance with Community law.

However, occasionally the Member State in question does not take the action necessary to enable it to meet its obligations under Community law. That may be so for a variety of reasons, ranging from disinclination to serious difficulties. If the Member State does not meet its obligations, the Commission then has the option of bringing a second action under Article 228 EC[2].

Such an action is, once again, preceded by a process of dialogue. In many instances, the issue may be resolved satisfactorily, without the need for further court proceedings. For example, the Member State may convince the Commission that the action it has already taken is in fact sufficient to comply with the original judgment.

If the pre-contentious procedure does not lead to a satisfactory result, the Commission may decide to bring further proceedings. In so doing, it recommends to the ECJ an amount by way of lump sum or (recurring) penalty payment which it considers appropriate that the Member State be ordered to pay.

On hearing the case, the ECJ first decides whether the Member State is indeed still in default of its obligations under Community law. If the ECJ finds that to be the case, it proceeds to assess the nature of the default (including any measures taken by the Member State to remedy the original breach of its Community obligations) and decides whether to

[1] In fact, since the introduction of the current Article 228 EC in 2002, the ECJ has, at the time this paper was written, rendered only 9 judgments confirming non-compliance with previous judgements.

[2] There is no time limit for compliance with a declaration under Article 226 EC. The Commission takes the decision if, and when, to commence the pre-contentious phase of proceedings under Article 228 EC.

impose the sum requested, some other sum, or no sum at all, on the defendant Member State.

In such cases, the ECJ may therefore impose a pecuniary sanction on a defaulting Member State in order to enforce the implementation of Community law.

2. References to the ECJ for a preliminary ruling under Article 234 EC

References for a preliminary ruling have played a crucial role in ascertaining the scope of rights and obligations under Community law. Any national court may refer a question concerning the interpretation of Community law, or the validity of Community secondary legislation to the ECJ.[1] Furthermore, in most circumstances, a 'court of final instance' – that is, a national court from which there is normally no appeal under national law[2] – is obliged to make such a reference.[3]

The need for such a reference arises where the action between the parties before the national court reveals a lack of clarity as to the correct interpretation of Community law, and hence as to how Community

[1] The limits of what constitutes a 'court' (or tribunal) have been tested in a series of cases, starting with Case 61/65 *Vaassen* [1966] ECR 261. In general, all courts and tribunals which are recognised as such by their Member States will also be recognised as such by the ECJ.

[2] There has been a good deal of lively debate on what constitutes a 'court of final instance'. See, for example, F. Jacobs, 'Which Courts and Tribunals are Bound to Refer to the European Court' (1977) 2 *ELRev.* 119; C. Barnard and E. Sharpston, 'The Changing Face of Article 177 References' (1997) 34 *CMLRev.* 113; T. Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 *CMLRev.* 9; and compare Case 6/64 *Costa v ENEL*[1964] ECR 585, third paragraph at 592.

[3] If such a court improperly declines to do so, as a matter of law that Member State should be considered to be in breach of its obligations under Article 234 EC. However, in practice, dissatisfied parties are left with rather little in the way of recourse. They can bring an action against the Member State under the principle set out in Case C-224/01 *Köbler* [2003 ECR I-10239 and further developed in Case C-173/03 *Traghetti dei Mediterraneo* [2006] ECR I-5177. Alternatively, they can lodge a complaint with the Commission, which is (understandably) reluctant, given the doctrine of the separation of powers between executive, legislature and judiciary, to pursue actions based on a single infringement of Article 234 EC.

law should have been implemented or should be applied. A national court – even one of final instance – does not need to refer a question if the ECJ has previously answered a materially identical question; if there is a clear line of case-law dealing with the same point of law that can simply be applied to the question before the national court; or if the correct interpretation of Community law is 'so obvious' as to leave no scope for reasonable doubt as to the manner in which the question is to be resolved (the doctrine of *acte clair*).[1]

In this procedure, the national court formulates a precise question (or series of questions) which it refers to the ECJ.[2] Such references are, of course, completely independent of any initiative on the part of the Commission. It should be noted, however, that the Commission will subsequently intervene before the ECJ to lodge written observations, and will attend the hearing, if one is held, in order to present its views as to how the questions referred should be answered.

In answering a question contained in a reference for a preliminary ruling, the ECJ gives a binding and authoritative ruling on the interpretation of provisions of Community law and, where so requested, on the validity of Community secondary legislation.

As with direct actions, the ECJ does not tell the Member State in terms what it has to do to implement Community law correctly. Even where the outcome of the judgment is a declaration that a particular set of national provisions are precluded by Community law, the Member State will still enjoy a considerable margin of manoeuvre.

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[1] See Case 283/81 *CILFIT* [1982] ECR 3415, paragraphs 14 to 20.

[2] There is a degree of variety in the form which such questions take – indeed certain referring courts may submit references which contain no clear question. The ECJ may, and quite often does, reformulate the question referred in order to give a clear answer to the referring court. See Case 6/64, *Costa v ENEL*, cited in n. 14 supra.

3. Some general observations

Unlike many national supreme courts – including (famously) the US Supreme Court – the ECJ does not have 'docket control'. There is no system of 'permission' or 'leave' that enables the ECJ to filter the cases which it hears. The ECJ can only refuse to hear a particular case on the technical grounds of inadmissibility.

The ECJ may find a reference to be inadmissible if (inter alia) the dispute before the referring court is spurious, fictitious or hypothetical; if the question referred has no relevance to the dispute before the referring court; if the order for reference does not provide the ECJ with sufficient information as to the facts and law, or ask any particular question; or if the subject matter for the reference falls outside the scope of Community law.[1]

The ECJ may find a direct action by the Commission under Article 226 EC to be inadmissible on the grounds that (inter alia) the pre-contentious phase of the proceedings was not conducted correctly; that the facts and/or law as set out in the Commission's application do not support the allegations it has brought; or that the Member State in question has taken the necessary measures to comply with the reasoned opinion within the time-limit set by the Commission. Furthermore, the ECJ is only bound to consider those aspects of the Commission's application which appeared in the reasoned opinion sent to the Member State in question.[2]

Once the ECJ is seized of an admissible case it normally has to give a ruling. The only exception occurs when a case pending before the

[1] See, for example, Joined Cases C-320-322/90 *Telemarsicabruzzo* [1993] ECR I393

[2] In practice, this has sometimes led to the Commission drawing its reasoned opinions very widely or using 'complementary' reasoned opinions.

ECJ is withdrawn.[1] The most common reasons for such withdrawal are that the parties in a case referred under Article 234 EC reach an out-of-court settlement whilst the reference is pending, or that the Member State takes the necessary measures to comply with its Community obligations and persuades the Commission to drop its action under Article 226 EC.

The ECJ is concerned to interpret the correct meaning of Community law. It is then for each Member State to determine how to comply with its obligations. In particular, where Community legislation is lacking in precise definitions of key concepts, or ambiguous, or otherwise difficult to understand, the ECJ performs an essential function in clarifying its meaning.

It is important to stress that the ECJ's role in such circumstances is one of clarification, not law-making. Even when the ECJ declares a Community measure invalid, the judgment will be confined to explaining the reasons that led to the declaration of invalidity. It will then be for the Community legislator to decide what further action should be taken.

Sometimes the ECJ determines that a particular provision of Community law is so framed that it may be relied upon directly by an individual before the national courts. Where a provision is sufficiently 'clear, precise and unconditional', it will thus be held to be 'directly effective'.[2] When the ECJ states that a particular provision is directly effective, that means, in effect, that that provision is immediately self-executing (or self-implementing) within the national legal order. Such

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[1] A case pending before the ECJ may be withdrawn at any time before judgment is delivered.

[2] See Case 8/81 *Becker* [1982] ECR 53, paragraph 25, Joined Cases C 397/01 to C 403/01 *Pfeiffer and Others* [2004] ECR I 8835, paragraphs 108 and 109 and the case-law cited therein. In general terms, Treaty articles may be directly effective 'vertically' against the State and are sometimes also directly effective 'horizontally' against another private party. A clear, precise and unconditional term in a directive whose deadline for transposition into national law has expired may be relied on against the State ('vertical direct effect') but not against a private party (absence of 'horizontal direct effect').

rulings therefore have a direct and immediate impact upon the implementation of Community law.

Certain provisions may not be not sufficiently clear, precise and unconditional to be capable of having direct effect. In other instances, the litigation before the referring court may concern the interpretation of a term in a directive but involve two private parties (rather than an individual and an 'emanation of the State'), thus ruling out the possibility of relying directly upon the directive itself.[1] In such situations, the ECJ will nevertheless stress that the national court is required to do all that lies within its power to interpret national law in a way that is consistent with the Community law obligation (the principle of 'interprétation conforme', or 'consistent interpretation'). Depending on the constraints within which the national court is operating, this may or may not be an effective way of ensuring the correct application of Community law in that particular case.

What the ECJ always does do, however, is to set out what the correct interpretation of Community law actually is. In so ruling, the ECJ is therefore – albeit at one remove – helping to promote the correct implementation of Community law. It is then for the Member State to draw the appropriate conclusions from the ECJ's judgment. If it fails to do so, it is in breach of its obligations under Community law.

Conclusion

The ECJ does not have front-line responsibility for ensuring the correct application or implementation of Community law. Those functions belong (respectively) to the national courts and to the national legislative and administrative authorities (with intervention, as appropriate, by the Commission as the guardian of the Treaties).[2]

[1] See previous footnote.
[2] See Article 211 EC.

Nevertheless, the ECJ plays an essential role by declaring authoritatively what the correct meaning of Community law is (thus determining what the rights and obligations arising from it actually are); and – through, in particular, the principles of direct effect and 'consistent interpretation' – by helping to ensure that Community law is indeed correctly applied and implemented.

Implementation of EU Law in Austria

Organisation structure

According to the federal structure of the Austrian constitution the main responsibility for the transposition of individual directives and other obligations deriving from EU law lies with the respective ministries responsible for the respective subject matter or with the regions ("Länder"), if their autonomous legislative powers are concerned.

However, since May 2003 the Federal Chancellor (prime minister's office) is competent to "facilitate the complete transposition of directives in due time". This competence basically comprises coordinative powers but no responsibility for the actual transposition of directives. For that purpose, the ministries and the regions have to inform the Federal Chancellor on a regular basis about community legislation within their field of competence, which has to be transposed and about the legal form and planned time tables to fulfil the transposition obligation.

Furthermore, and so called transpositioncommission ("Umsetzungskommission") meets on a regular basis to discuss problems, questions and possible solutions that arise in the context of the transposition of directives. The members of this commission are mainly representatives ("Umsetzungsbeauftragte") of the ministries and regions, who have to be informed about the transposition requirements of their respective authorities and serve as internal and external contact persons. It is chaired by a representative of the Federal Chancellery – Constitutional Advisory Service.

As far as general questions in the framework of the transposition of directives are concerned the Federal Chancellery – Constitutional Advisory Service can be contacted and give advice.

It is up to the Federal Chancellor to inform the Federal Government on transposition issues, if it is deemed necessary (e.g. if horizontal transposition problems are identified). Up to now, the Federal Government was usually informed about transposition issues in connection with the publication of the Internal Market Scoreboard.

In this context it should be noted that the Federal Chancellery – Constitutional Advisory Service is also responsible for the notification of implementation measures to the Commission as well as infringement proceedings.

Constitutional Framework and legal basis for implementation

Whether a directive has to be transposed on the federal or regional level is determined by their respective competence to regulate the subject matter. On the other hand, the legal form of the transposition (law or regulation/decree) depends upon already existing national legislation in the field addressed by each individual directive.

The Austrian legal system does not provide for a general possibility to take recourse to governmental decrees (regulations) to facilitate quicker transposition. The legal form a transposition measure has to comply with is determined by the subject matter and the national legislation already in force in the respective field.

The form of a law is required when there is no relevant national legislation or if relevant legislation in the form of a law needs to be amended. In these cases the parliamentary procedures (federal and/or regional) have to be followed. The form of a regulation can be chosen if a national law (or different national laws) provide a sufficient legal basis

according to the legality principle laid down in article 18 Federal Constitutional Law. In these cases, the federal and/or regional governments are responsible for the adoption of the respective transposition measures.

Past experiences have shown that the federal system can cause delays in transposition, if the federal and regional levels are both competent for the transposition of an individual directive. For practical reasons, in many cases the regions wait for the adoption of federal legislation in order to harmonize their measures or to adopt necessary complementary provisions.

The Federal Constitutional Law contains a basically exhaustive list of the federal competences (see articles 10ff Federal Constitutional Law) whereas the competences of the regions are conferred by a general clause (article 15 Federal Constitutional Law), which states that they have the competence in a matter unless the Federal Constitution expressly assigns it to the federal level. To clarify the competence for taking the necessary transposition measures can therefore cause difficulties in practice.

To give an example, in the field of employee protection both the federal level and the regions are competent to transpose the relevant directives for their respective organizational sphere (e.g. public service), which regularly causes delays in the transposition of the mentioned directives.

Transposition process

As there exist no general (legally binding) rules for starting the transposition process of directives (and it is the responsibility of the respective ministry or regional governments to start the transposition process in time), the formal transposition process (e.g. parliamentary

procedures) usually does not start before the publication of a directive in the EC official journal. It is, however, up to the competent authority to begin with the drafting and consultation of the relevant legal texts at an earlier stage in order to comply with the transposition time limit stated within a directive.

A special law binding the federal level contains a prohibition of "gold plating" community law, which means that national transposition measures must not exceed the necessary level required by the relevant EU legislation. The regions are bound by a similar decision. It is, however, up to the parliaments (federal and regional level) to amend government bills during the parliamentary procedures. The governments have no means to intervene in these cases.

Generally, businesses and civil society are given the opportunity to voice their interests and concern during a consultation process that precedes the passing of all government bills as well as the enactment of regulations. In the consultation process mainly the public administration (ministries, regions, etc.) and a large number of representative stake holder organizations (lobbies, pressure groups, NGOs) are invited to comment on the draft legislation that shall transpose the respective directives.

Throughout this process the ministries and regions have to provide information on directives (still) to be transposed including timetables on a regular basis to the Federal Chancellor. The Federal Chancellery who operates a database for that purpose collects this information. Currently, a new web database is under development in order to facilitate the implementation and monitoring process, including an early warning system.

For the time being, the Federal Chancellery forwards a monthly list with new directives published in the EC official journal and asks the

ministries and regions to fill in the competent department for the transposition along with a time schedule. A second list is forwarded on a regular basis, showing for each ministry and each of the regions how many directives still need to be transposed.

These lists are also used as a basis to identify ministries (or regions) with a conspicuous transposition deficit. In these cases the respective services are specifically contacted by the Federal Chancellery to discuss the reason for the delays, in order to help solving the problems.

Apart from the general guidelines for drafting legislation that contain also contain special rules for the transposition of directives (http://www.bundeskanzleramt.at/DocView.axd?CobId=1657) there as no guidebook for the implementation of EU law. In connection with the new database special guidance will be drafted, based upon the respective experiences with the new system.

THE GENERAL COMPETENCE REGARDING COMPLIANCE IN RELATION TRANSPOSITION OF EUROPEAN DIRECTIVES

The **Minister of Foreign Affairs** is competent for the general foreign policy and is responsible for the transposition of European directives. He is assisted by a State Secretary, who is charged with the preparations for Belgium's European Presidency, in the second half of 2010.

The Federal Public Service "Foreign Affairs, Foreign Trade and Development Cooperation" is, at an administrative level, responsible for ensuring general compliance. The President of the Board (equivalent for 'Secretary General') of the Ministry informs his or her counterparts in the other Federal Public Services on a regular basis of the state of play regarding the transposition of directives. The relevant services within the Directorate General for European Affairs and Coordination (DGE) discharge their role in the pro-active phase and regarding Solvit. Within the Directorate General for Legal Affairs (DGJ), the 'Transposition Service' is responsible for ensuring general compliance with the process of transposition of European directives, the management of the interactive Eurtransbel databank and general management of the pre-litigation proceeding taken against Belgium by the Commission. The 'EC Court of Justice' Service follows infringement proceedings before the EC Court of Justice. The Information and Communication Technology Directorate (ICT) looks after the running of the inter-active Eurtransbel databank and technical applications, including the development of the

databank. This is done in cooperation with the Federal Public Service "Information and Communication Technology".

The **Permanent Representation of Belgium to the EU**, of course, plays an active role both in the negotiation of European directives, forwarding information concerning the publication of these directives and the maintenance of contacts with the Commission during the transposition phase of the directives and in the pre-litigation, infringement phase.

The transposition of European directives – Belgian practice

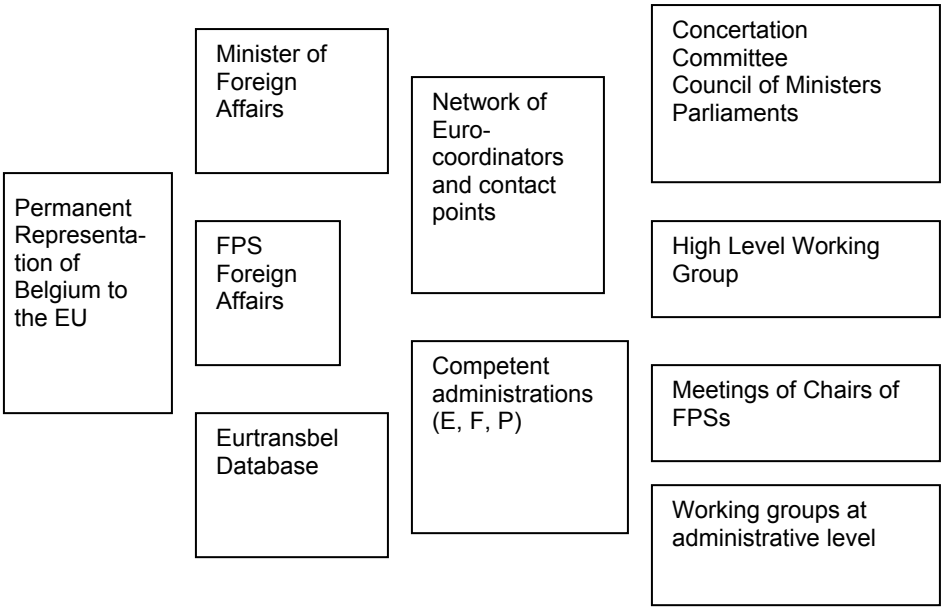
Introduction

Every federal and federated authority has **a Euro coordinator (E)**, who in the first instance keeps an eye on the transposition of European standards and who from that point of view also monitors draft directives. The Euro coordinator follows all transposition files that are being dealt with by his or her administration.

This distinguishes him or her from the **process manager (P)**. That person is responsible for the practical transposition of a specific or several directive(s). The process manager is an expert, who follows individual directives as regards the substance right up to their complete transposition and who intervenes in good time when difficulties appear. He or she is the actual (practical) "transposer".

The third function is that of the **pilot authority (F)**. It is important to designate a pilot authority in those cases, where various authorities are competent for the transposition of a directive. It is then up to this pilot authority to organise the external coordination between the various departments that are involved in the transposition. Every time a new directive is published, there is a consultation within the Euro-coordinator network about the designation of the pilot authority.

Transposition diagram



The pro-active phase

The Directorate General for European Affairs and Coordination fulfils its role with regards defining Belgium's position for the Council of Ministers, this in accordance with the cooperation agreement of 1994. The meetings of the Federal Council of Ministers of 11 February 2004, 30 April 2004 and 1 October 2004 and 9 November 2004 meeting of the Concertation Committee, which brings together the Federal Government and the Governments of the federated entities (i.e. the Regions and the Communities), have led to the decision to introduce a pro-active working procedure (an expansion of the work of the inter-federal working group to the examination of **draft directives**). The inclusion of a 'proactive

component' tot the databank **Eurtransbel** databank was achieved as well.

The **Euro-coordinator** has already an important role to play during this negotiation phase. His or her tasks concerning the pro-active action can be listed as follows:

- ascertaining or predicting difficulties which may arise within the scope of his or her administration during the transposition of directives;
- identification of process managers within his or her, each of whom is an expert with regard to the 'substance' of the directives and each of whom participate in the (follow-up of) the coordination process;
- the implementation of a legal impact assessment.

The practical transposition

The practical transposition starts with the **publication of the directive**. There is **no special legislative or implementation procedure** provided for the transposition of directives into Belgian law. The system applicable for the adoption of legislative and/or implementing instruments is applied. Transposition will, depending on the content of the directive, necessitate the intervention of:

- the legislative power (depending on the federal and/or federated level: laws, regional decrees or edicts) and the implementing power (drafting of bills in the majority of cases and - if necessary - the adoption of implementing orders) or
- only the implementing power (orders and official communications).

Compliance with the transposition requirement takes place under **political direction**. The Minister of Foreign Affairs has a general competence. The other Ministers at the federal and federated level have individual competences within the framework of the transposition of the directive proper. Compliance at a political level takes place on a regular basis through meetings of the Concertation Committee and the Council of Ministers at federal and federated level.

Administrative compliance is generally, as indicated, carried out by FPS Foreign Affairs. Compliance in relation to specific directives is the responsibility of the competent administrative bodies. Monitoring is organised via the network of Euro-coordinators and contact points in the relevant bodies of the executive branch and the legislative powers. There is regular consultation and coordination regarding both the state of affairs in general as well as over individual directives.

Central to the system is the **Euro-coordinator**, whose tasks during this transposition phase are the following: closely following up the timely transposition of the files within the competence of his or her administration, establishing a realistic transposition planning timetable in the Eurtransbel databank, identification of the competent process managers for the transposition, following up within the administration of the work of these process managers and forwarding of information about the transposition files. FPS Foreign Affairs is kept informed at regular intervals. Ultimately, the Euro-coordinator notifies the European Commission by depositing the instrument in the European databank, after which the Permanent Representation confirms the notification.

Given the complexity of the transposition process – a large number of files, spread over several years – it is of strategic importance to be able to provide all concerned with up-to-date information (per directive or an overview) via the **Eurtransbel databank**, so that these laws may be

enacted in order to complete the transposition within the set time limits. This databank is being further developed within the framework of the above-mentioned process as a central management tool with optimisation of the inter-operability and further automation of a number of functions.

The pre-litigation, infringement procedures taken by the Commission against Belgium

The notification of pre-litigation, infringement procedures taken by the Commission against Belgium is forwarded by the Permanent Representation directly to the competent body in Belgium and to FPS Foreign Affairs. The responses to the Commission's complaints are prepared and sent via the Permanent Representation to the European Commission. It goes without saying that, in the event of non-communication of national measures to transpose European legislation, every attempt is made to complete the transposition as fast as possible.
Of course, a copy is always forwarded to the 'Transposition' service so that it may fulfil its general and coordination function in an optimal manner. The work of the Euro-coordinators and pilot authority described above also play a role in the transmission of information and coordination.

Solvit

Solvit is an informal network that deals with complaints from citizens and business that arise following the application of Community law by national administrations. Solvit-be is a part of the Directorate General for European Affairs and Coordination (DGE). Solvit-be uses the existing network of Euro-coordinators for its contacts with the administrations concerned.

Ongoing efforts to reduce the transposition backlog

A number of important improvements recently introduced by Belgium at the federal level are described below.

Targeted action regarding planning and achievement of transposition

Here it is a question about practical transposition, which in theory can be prepared in advance, but effectively at the earliest starts with the publication of the directive. The 6 February 2009 decision made it a requirement for the concerned departments in general, within a week of the publication, to indicate their **competence** and, within a month of publication, to register with the inter-federal Eurtransbel databank the details of the **process manager** ("the transposer") and a realistic **transposition planning timeframe** and to follow up implementation. That way, possible potential delays could be identified in good time. An alert function will be integrated into the Eurtransbel databank, which will automatically signal any negative discrepancies between the planning and **progress** to the bodies concerned and to FPS Foreign Affairs. Until then, it is up to FPS Foreign Affairs to do so manually.

Structural applications

A new body also operates at the federal level between meetings of the Councils of Ministers, which spend about two months examining the transposition, and the meetings of the administrative network of Euro-coordinators (including the working groups which meet at the administrative level). This is the Transposition High Level Working Group, set up by decision of the Council of Ministers on 6 February 2009. Both the members of the policy cells of the Ministers concerned and the Euro-coordinators (contact point network at administrative level) participate in

the Transposition **High-Level Working Group**, which is chaired by a member of the policy cell of the Minister for Foreign Affairs. In this way, a maximum level of synergy between the political and the administrative levels is achieved. During the two-monthly meetings of this Working Group, the directives which remain to be transposed are monitored on the running scoreboard[1] and discussed. Furthermore, the agenda may be extended to include subjects, which usually affect the transposition of directives within the time limits.

The Presidents of the Boards of the Federal Public Services are the heads of the administrations. It was decided that the **meeting of the Presidents of the Boards of the Federal Public Services**, being the highest administrative organs, should be informed twice a year of the state of play of the transposition files for the running scoreboard. Furthermore, the **President of the Board of FPS Foreign Affairs** informs his or her colleagues on a monthly basis by means of circulation of a federal scoreboard, showing the progress made regarding transposition by every Federal Public Service and those bodies, which are responsible at an administrative level for the drafting of the transposition texts.

Conclusion

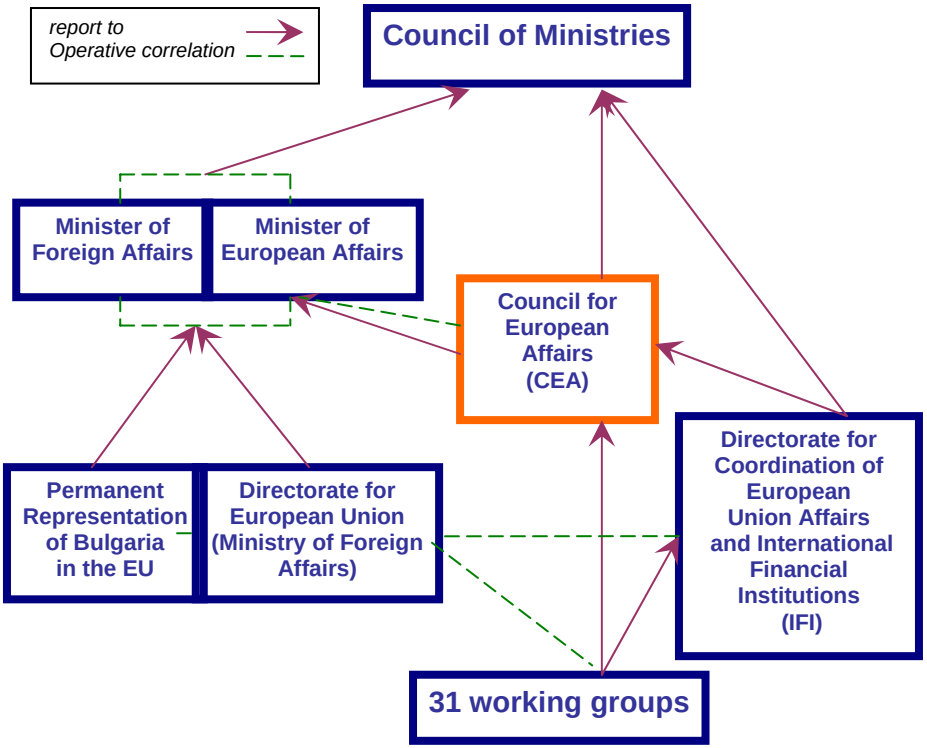
In the context of the implementation of Community Law, it is essential that the directives be transposed with the time limits. Over the years, we have seen a positive movement towards a substantial reduction in the number of files which were overdue. This process has still to continue so that, in the future, no infringement procedures are taken because of failure to communicate the transposition of directives into national legislation.

[1] The scoreboard for the internal market directives was set up at a European level from 1997.

IMPLEMENTATION OF COMMUNITY MEASURES IN BULGARIA

According to the **Ordinance of the Council of Ministers No 85 of 17 April 2007 concerning the organisation and coordination of matters relating to the European Union** (*Promulgated in the State Gazette No 35/2007*) the main participants in the coordination mechanism are the following: the Council of Ministers of the Republic of Bulgaria, the Minister of Foreign Affairs, the Minister of European Affairs, the Council for European Affairs, 31 working groups with the Council for European Affairs, the Directorate for Coordination of EU Affairs and International Financial Institutions with the administration of the Council of Ministers and the Directorate for the European Union of the Ministry of Foreign Affairs.

EU Affairs Coordination Mechanism



The Council of Ministers manages and implements the policy of the Republic of Bulgaria as a Member State of the European Union by means of:

- resolving policy issues concerning the membership of the Republic of Bulgaria in the European Union;

- adopting and updating the annual Programme for the participation by the Republic of Bulgaria in the process of decision-making of the European Union[1];
- approving the positions of the Republic of Bulgaria at regular or informal meetings of the European Council, the Council of the European Union or other European Union institutions, and approving the mandate for their presentation;
- approving framework positions[2] of the Republic of Bulgaria on the matters discussed by the European Council, by the Council of the European Union and its auxiliary bodies, and in the Comitology process;
- adopting the positions of the Republic of Bulgaria on ensuring the protection of the country's rights and interests before the judicial institutions of the European Union;
- adopting decisions on approaching the judicial institutions of the European Union by the Republic of Bulgaria;
- adopting strategic documents and operational plans relating to the implementation of the commitments arising from the Republic of Bulgaria's membership in the European Union;
- approving draft acts to adopt measures on the national level concerning the implementation and enforcement of European Union acts;

[1] "Annual Programme for the participation by the Republic of Bulgaria in the decision-making process of the European Union" means a document containing priorities and general guidelines on Bulgaria's positions on strategic European Union matters covering a period of one calendar year. The Programme is being developed in line with the priorities of the respective Presidency of the European Union and of the European Commission's programmes

[2] "Framework position" means a document prepared on all matters (dossiers) discussed by the European Council, the Council of the European Union, its auxiliary bodies, the Comitology process, and the White and Green Papers of the European Commission

- adopting the legislative programme of the Council of Ministers in line with the policies and acts of the European Union.

The Council of Ministers submits the National Assembly of the Republic of Bulgaria information concerning: matters related to the obligations of the Republic of Bulgaria in connection with this country's membership in the European Union and the actions included in the Programme for the participation by the Republic of Bulgaria in the process of decision-making of the European Union. When the Council of Ministers participates in the preparation or the adoption of acts of the European Union, it beforehand informs the National Assembly thereof, and reports to it about its activities. The Council of Ministers informs the National Assembly of its positions concerning the draft acts of the European Union included in the National Assembly's annual working programme on EU-related matters.

The Council for European Affairs, chaired by the Minister of European Affairs:

- approves draft framework positions of the Republic of Bulgaria on matters discussed by the European Council, the Council of the European Union and its auxiliary bodies, as well as in the Comitology process;
- approves the draft positions for the informal and formal meetings of the European Council and the Council of the European Union prior to their consideration by the Council of Ministers;
- approves the draft Programme for the participation by the Republic of Bulgaria in the process of decision-making of the European Union;
- approves the list of the contact persons concerning the framework positions of the Republic of Bulgaria on matters discussed by the

European Council, the Council of the European Union and its auxiliary bodies, and in the Comitology process;

- resolves coordination matters which are of the competency of more than one ministry, and on which no agreement has beenreached in the respective working group;
- analyses the information concerning the implementation of the commitments arising from the Republic of Bulgaria's membership in the European Union, and proposes to the working groups to adopt priority actions in this respect;
- consider matters related to the European Commission's mechanism for cooperation and assessment;
- set up ad hoc working groups for specific purposes, etc.

The (sectoral) working groups with the Council for European Affairs:

- analyse the policies and follow regularly the amendments to the legislation of the European Union in the respective area;
- prepare proposals for measures and action, which shall be included in the Programme for the participation by the Republic of Bulgaria in the process of decision-making of the European Union;
- prepare draft framework positions on the matters discussed by the European Council, the Council of the European Union and its auxiliary bodies, and in the Comitology process;
- organise the performance of an impact assessment in the preparation of framework positions;
- prepare draft positions for the meetings of the European Council and the Council of the European Union, including for their informal meetings, and submit them in the Council for European Affairs;

- prepare instructions for the implementation of the framework positions;
- discuss draft acts for the adoption of national measures necessary for the implementation and enforcement of European Union acts, and issue opinions on them and on the table of conformity;
- make an analysis of the obligations arising from the Republic of Bulgaria's membership in the European Union, and prepare materials, documents and opinions;
- prepare and submit the necessary information in the event of a procedure launched under Article 226 or Article 227 of the Treaty establishing the European Community;
- analyse and propose to the Council for European Affairs measures concerning the implementation of the priorities and commitments arising from the Republic of Bulgaria's membership in the European Union;
- perform the notification of acts of the Bulgarian domestic legislation which adopt national measures necessary for the implementation and enforcement of European Union acts.

The Directorate for Coordination of EU Affairs and International Financial Institutions with the administration of the Council of Ministers:

- extends expert assistance for the activities of the Council of Ministers concerning the implementation of the Republic of Bulgaria's coordinated policy vis-a-vis the European Union;
- formulates proposals for inclusion in the legislative programme of the Council of Ministers of draft acts, in line with the policies and acts of the European Union;

- prepares opinions on the draft decisions of the Council for European Affairs and on the draft acts of the Council of Ministers and of the ministers in order to ensure their compliance with the European Union's policies and the acquis communautaire;
- coordinates, jointly with the Ministry of Foreign Affairs, the activities relating to the preparations for the participation by the Prime Minister of the Republic of Bulgaria in meetings of the European Council;
- monitors and coordinates the process of preparation and approval of the draft framework positions on the matters discussed by the European Council, the Council of the European Union and its auxiliary bodies, in the Comitology process and the draft framework positions on the White and Green Papers of the European Commission, except for matters pertaining to the common foreign and security policy or the European security and defence policy;
- coordinates instructions concerning the meetings of the auxiliary bodies of the Council of the European Union and of the bodies in the Comitology process;
- analyses the policies of the European Union and monitor the implementation of the Republic of Bulgaria's commitments to the European Union;
- coordinates the notification of the Bulgarian legislative acts which introduce measures on the national level, such as are necessary for the implementation and enforcement of the directives of the European Communities;
- exercises monitoring of the adoption of acts introducing measures on the national level that are necessary for the implementation

and enforcement of European Union acts within the deadline indicated by the respective European Union institutions;

- coordinates the pre-trial phase of the procedures mentioned in Articles 226 and 227 of the Treaty establishing the European Community;
- administers the information system that include materials and documents received from the European Union, the respective framework positions and responsible working groups;
- provides organisational and technical assistance to the Council for European Affairs as Secretariat;
- act as National Contact Point with the Technical Assistance Information Exchange Office (TAIEX) of the European Commission in respect of the administration of the executive power in the Republic of Bulgaria'
- represent a national SOLVIT centre in the framework of the European on-line problem-solving network in which the Member States work together to solve problems caused by the misapplication of Internal Market law by public authorities.

The Directorate for the European Union of the Ministry of Foreign Affairs assists in the implementation of a unified coordinated policy by the Republic of Bulgaria on European affairs by performing the following functions:

- coordinate, jointly with the Directorate for Coordination of EU-related matters and International Financial Institutions with the administration of the Council of Ministers, the activities relating to the participation by the Republic of Bulgaria in the European Council meetings;
- submit to the Permanent Representation of the Republic of Bulgaria to the European Union the adopted framework positions

concerning this country's participation in the European Council, the General Affairs and External Relations Council in the General Affairs part, and in the other formats of the Council of the European Union;

- coordinate matters and provide expert assistance in connection with the participation by the Republic of Bulgaria in the work of the Council of the European Union;
- coordinate matters and send instructions to the Permanent Representation of the Republic of Bulgaria to the European Union concerning Bulgaria's participation in the work of the auxiliary bodies and the bodies in the Comitology process, except for the meetings on matters concerning the common foreign and security policy and the European security and defence policy; ensure the unity of the Republic of Bulgaria's positions in the different European Union institutions;
- prepare analyses and opinions with regard to participation in negotiations;
- coordinate bilateral relations with the member states of the European Union on European Union issues;
- participate in the foreign economic policy and coordinate the participation by the Republic of Bulgaria in international economic organisations, such as the Organisation for Economic Cooperation and Development, the World Trade Organisation, the European Economic Area, etc., jointly with the leading ministries and institutions;
- assist the minister of foreign affairs in the discharge of his functions, jointly with the competent directorates of the Ministry of Foreign Affairs.

The Directorate for Procedural Representation before the Judicial Institutions of the European Union with the administration of the Council of Ministers organises the procedural representation and legal protection of the Republic of Bulgaria before the judicial institutions of the European Union.

The drafting and approval of framework positions is being carried out in the following order: the framework positions are prepared in the predefined format in respect of each individual point discussed by the European Council, the Council of the European Union and its auxiliary bodies, and in the Comitology process. All new EU dossiers are distributed to the relevant working groups and the term for drafting a framework position is one month. The draft framework positions is introduced for discussion and approval in the Council for European Affairs. Where the framework position concerns matters on which agreement has been reached in the respective working group and/or which are only in the area of competency of the leading sectoral institution, the framework position is approved by the respective sectoral deputy minister or the deputy chair of the state agency or commission and sent to the Council for European Affairs for information only. Where an agreement on a draft framework position of the Council for European Affairs is impossible to reach, or where the draft framework position concerns priority issues of national importance, the draft shall be tabled by the sectoral minister or by the deputy prime minister in the Council of Ministers for consideration.

Transposition and implementation of EU Law in Bulgaria is done by legal acts, adopted by the National Parliament, the Council of Ministers or issued by the Ministers. The newly adopted EU legal acts are distributed for transposition and implementation to the responsible working groups on a monthly basis. The action plan relating to the

implementation of the commitments arising from the Republic of Bulgaria's membership in the European Union (adopted annually by the Council for European Affairs, respectively the Council of Ministers) presents a detailed plan for implementation of the necessary measures with terms and responsible working groups. This plan is reported to the Council for European Affairs on a monthly basis and to the Council of Ministers when necessary, but at least once a year. The draft acts for adoption of national measures necessary for the implementation and enforcement of EU acts, which are submitted to the Council of Ministers, shall be accompanied by the opinion of the respective working group and by a table of conformity. The unit responsible for monitoring the compatibility of the national to European law is the Directorate for Coordination of EU Affairs and International Financial Institutions with the administration of the Council of Ministers. The directorate issues its opinions twice: first, within the interministerial procedure of consultation of the draft act, and second, upon the submission of the draft act to the Council of Ministers for adoption.

The two processes: the participation of the Republic of Bulgaria in the EU decision-making process and the transposition and implementation of EU law, are supported by two information systems. Both systems are managed and administered by the Directorate for Coordination of EU Affairs and International Financial Institutions with the administration of the Council of Ministers.

State of plate as of April 2009: 0.4 % transposition deficit (Internal Market Scoreboard, edition 18) and no cases in the European Court of Justice. Bulgaria is the only country that has reached a 0.0 % transposition deficit (Internal Market Scoreboard, edition 18).

Implementation of EU Law in Denmark

THE COOPERATION BETWEEN GOVERNMENT AND PARLIAMENT IN THE PRE-ADOPTION PHASE

Jonas Bering Liisberg[1]

Introduction

- Reason for this presentation: Denmark has a fairly good track record with respect to implementation of EU legislation.
- Well illustrated on the Internal Market Scoreboard from December 2008.
- Denmark is once again back on the top together with Malta.
- Relatively few infringement cases against Denmark and only a small number of these cases have gone all the way to the European Court of Justice.
- One explanation to these good statistics is probably the strong cooperation between the Danish government and our Parliament (The Folketing) – not least in the pre-adoption phase but also in the implementation phase.
- What is "pre-adoption phase": the period after publication of a legislative proposal from the Commission and before it is adopted by the Council.

Outline of presentation

- Focus on pre-adoption phase – but also focus on implementation and infringement cases:

[1] Head of the EU Law Department, Ministry of Foreign Affairs of Denmark

- Internal Market Scoreboard
- The stakeholders in the Denmark
- The Danish decision making process
- Implementation and infringement cases
- Analysis of the Danish Model

Internal Market Scoreboard

- Since the introduction of the Internal Market Scoreboard the implementation deficit has continuously dropped throughout all the Member States – and gladly this ten-dency has continued after the accession of the new Member States.
- A few Member States are still struggling to reach the goal of a 1.5 % implementation deficit set by the European Council back in 2001. However a majority of Member States (17) have already reached the new goal (2009 and forward) which is max. 1 % implementation deficit.
- Denmark is once again back on top of the list together with Malta. The implementa-tion deficit is 0.3 % which is equivalent to five directives. In its report the Commis-sion points out that Malta and Denmark "prove that even with fairly small national administration it is possible to adjust to rapidly the national Internal Market legal framework."
- Infringement cases: Denmark is just No. 9.

The stakeholders in Denmark

Back ground

- Referendum in 1972 regarding Denmark's accession to the EC. Close vote - so even though Denmark joined the EC the

population was almost split on this issue. E.g. great fear of los-ing independence to the EC institutions. This was reflected in the Folketing. Fierce debate on how to control the government's negotiations in the EC.

- Long tradition for minority governments in Denmark -> strong parliamentary control with the government in both national and international affairs.
- Solution/result: provision in the Danish Law on the Accession to the EC, after which the government was obliged to inform the Parliament about legislative proposals from the EC which were to be directly applicable in Denmark or where the fulfilment the of the EC leg-islation called for the involvement of the Folketing - a constitutional obligation.
- This obligation has been elaborated and specified and today the basic rules for the coopera-tion between the government and the parliament read as follows:
    - The government must consult the Parliament's European Affairs Committee in questions relating to EU policy of a major importance with respect for the influence of the Parliament as well as the freedom for the Government to negotiate.
    - Prior to negotiations in the EU Council of Ministers on decisions of a wider scope, the government submits a mandate for negotiation to the European Affairs' Committee. If there is no majority against the mandate, the Government negotiates on this basis.
- Conclusion: Strong parliamentary control compared to many other Member States.

The Folketing's European Affairs Committee

- To handle the legislative proposals from the EU/EC it was decided to setup a committee to deal with European Affairs. (Earlier: The Internal Market Committee).
- The parliament has similar committees dealing with other issues – such as the environment, taxation and agriculture. The Europan Parliament has a similar setup with the LIBE com-mittee etc.
- The Danish Government's EU policy is supervised by the Parliament's European Affairs' Committee. The reason for such parliamentary control is the wish to ensure that a majority in Parliament supports the government positions for negotiations in the EU - especially in a political landscape with minority governments.

The Government's EU Committee

- In order to comply with its obligation to the Parliament, the Government has established its own inter-ministerial EU committee. The committee consists of representatives from all ministries that deal with EU affairs.
- Before the Government's position to a given proposal to an EU legislative act is presented before the Parliament's European Affairs' Committee, the position has been coordinated in the Government's EU Committee.
- This coordination between the relevant stakeholders within Government makes sure that the Government acts as one unity – both before the Parliament and when negotiating the proposal in Brussels.
- Every six months there is a strategic discussion of Danish positions and priorities under the upcoming presidency. The

discussion is based on the agenda presented by the forthcoming presidency. Very useful for the negotiators in Brussels.

The Government's Foreign Affairs Committee

- The Government's EU policy is decided by this Committee.
- Primarily deals with the Danish position on bigger issues or issues of a horizontal character. Also deals with specific cases prior to meetings in the Council.

The Government's EC Special Committees

- More than 30 committees. First step in the Danish decision-making process. Draft the gen-eral Danish position to a given proposal from the Commission. All technical issues are dealt with at this level.
- Composed of the relevant ministries and other authorities. The MFA, Prime Minister's Of-fice, Ministry of Finance and Ministry Justice always participate because of their horizontal interests. NGO's also participates in some of the Committees – e.g. the Red Cross is a member of the Special Committee for Asylum and Migration.

Special Committee for Legal Affairs

- One of these special committees is the so-called Special Committee for Legal Affairs. This committee deals with questions regarding EU law. In particular it plays a central role in the administrative phase of treaty infringement case. The Special Legal Committee was estab-lished in 1973 when Denmark acceded to the European Community. The Ministry of Jus-tice holds the chairmanship of the Special Legal Committee.
- In case the European Commission decides to open infringement proceedings against Den-mark by giving a letter of formal notice,

the matter will be subject to an inter-ministerial procedure in the Special Committee for Legal Affairs.

- The committee will devise an answer to the Commission and a memorandum for the Gov-ernment's EU committee and the Government's Foreign Policy Committee as well as a memorandum for the Parliament's European Affairs' Committee. The same procedure is used in case the Commission subsequently decides to issue a reasoned opinion or if it later decides to refer the case to the European Court of Justice.
- The Special Legal Committee also regularly examines references for preliminary rulings and direct actions to look for cases that might have an impact on the Danish understanding of EU law.

NGOs

- It is customary to consult the relevant Danish NGOs before a legislative proposal is adopted in the Folketing. This tradition also applies with regard to regard to legislative pro-posal from the European Commission.
- Some NGOs are even members of the Special Committees.
- The points of views of the NGOs are presented before the The Folketing's European Af-fairs Committee before they decide on their negotiation mandate to the Government.
- The involvement of NGOs provides transparency in the legislative process and contributes to the creation of a common Danish position in the negotiations in the EU.

Pre-adoption phase: The Danish decision-making process

- Consultation with The Folketing's European Affairs Committee before every meeting in the Council

- The Committee gives the Government a negative mandate to negotiate a legislative pro-posal from the Commission – i.e. if there no majority in the Committee against the position suggested by the Government, the mandate to negotiate is given. This resembles the system with minority governments that we have in Denmark.
- Transparency: Public access through regular consultations and meetings - now also via di-rect TV and internet transmissions.

Content of information given to the Folketing:

- Background and content
- Current Danish law
- Principle of subsidiarity and proportionality
- Statement from European Parliament
- Consultation with NGOs
- General description of the negotiation situation
- General position of the Government
- Consequences for legislation and general government finances

Parliament's European Affairs Committee must be informed of:

- Proposals/revised proposals for legislative acts
- Green and white papers
- Other proposals of major importance / policy decisions
- Communications from the Commission

Post-adoption phase: Implementation

Introduction

- Denmark has a decentralised structure for the implementation of EU law. Each min-istry is responsible for the implementation of EU law that correspond to the minis-tries' individual jurisdiction

and in some cases the responsibility may even be turned over to agencies within the ministries. For example the Danish Environmental Pro-tection Agency under the Ministry of the Environment has great experience with im-plementing EU law.

- No single department or like formation is therefore responsible for coordinating the implementation of EU law in Denmark.
- Each ministry must include in their governmental draft bills an assessment on the bill's connection to EU law. In this assessment it is stated if the bill intends to im-plement an EU directive or has given rise to other reflections on matters of EU law.

  The strong coordination in the pre-adoption phase is also very valuable when a given legislative act is to be implemented into Danish Law. The relevant stakeholders are already aware of the act and many of the conflicts of interests have already been dis-cussed – but not necessarily resolved. This often makes the period of implementation faster and smoother – this is reflected in the Internal Market Scoreboard.

Legal review

- All governmental draft bills are subject to a review by the Ministry of Justice by which the draft bill, among other things, is assessed in relation to constitutional law, EU law, human rights law and general legislative technique questions.
- This review of governmental draft bills does not focus on questions in relation to the implementation of the specific articles of the concerned EU legislative act. Keep in mind that each ministry is responsible for the correct implementation of EU law within their individual jurisdiction.
- Years ago the Ministry of Justice had an EU Legislative Technique Division that fo-cused on whether a draft bill

constituted a correct implementation of all articles of the concerned EU legislative act.

- Today if a bill raises more difficult questions regarding EU law or more specific ques-tions regarding the implementation the concerned ministry may on an ad hoc basis ask the EU Law Division in the Ministry of Justice for advice.
- All things considered – as stated earlier – each ministry is within their individual ju-risdiction responsible for the correct implementation of EU law within the pre-scribed period.

Infringement cases

- If the Commission decides to refer an infringement case to the Court, a delegation will be appointed for this phase of the case provided the government decides to plead the case.
- The Ministry of Foreign Affairs holds the chairmanship of this delegation, in which the Ministry of Justice as well as any affected ministries also take part, and the delega-tion is responsible for pleading the case before the Court. It is a representative from the Ministry of Foreign Affairs who is the Danish Government's agent before the European Court of Justice in Luxembourg.
- Generally judgments of the Court are not handled on an inter-ministerial level. The ministries assess the need for follow-ups on judgments that correspond to the minis-tries' individual jurisdiction. However, if necessary an inter-ministerial working group will be formed on an ad hoc basis to assess the need for changes due to a judgment of the Court – e.g. after the so-called Laval case from December 2007.

Analysis of the Danish Model

General

- When considering whether the Danish model - or parts of it - can serve as inspiration to other Member States it is important to keep the special Danish context in mind.
- First of all, Denmark is a relatively small country compared to the other Member States. This calls for a strong internal coordination in Denmark in order to achieve influence with the other Member States and in the EC Council. But larger Member States are also per-forming well on the Scoreboard – e.g. Germany, France and Spain. So the size cannot be the hole explanation.
- Secondly, Denmark has been a member of the EU for more than three decades. This means that both the Government and the Parliament has a long experience with working with EU affairs. Furthermore, continuous adjustments ensure a modern process adapted to new in-stitutional developments and new technologies.
- Thirdly, the Danish Parliament is a strong institution and the European Affairs' Committee is keen in its scrutiny of the Government's position in EU affairs.
- Finally, there is a strong tradition in Denmark for openness within the Government and the Parliament. Openness makes it easier to make sure that the Government complies with its parliamentary obligations.
- Reason to success: Early domestic administrative and political coordination. Organisation of the national decision-making process is probably the most important factor.

Advantages

- Early preparation of Danish positions: Early identification of priorities and problems. Three levels of administrative

committees. Follows dossier from inception to adoption. Ensuring coordination not only among ministries and sector interests within the administration, but also through consultation with stakeholder organisations in civil society.

- National agreement: Parliament's role. More than just ordinary scrutiny. The Parliament's European Affairs Committee. DK system has attracted a lot of attention and inspired sev-eral new MS. Parliament accorded actual role in the establishment of DK positions.
- Transparency: Getting ministries to work together may take hard work. Key role of one ministry, MFA.
- Bargaining power: Helps DK get bargaining power in Brussels in many ways. (1) Having a preliminary position early on, backed up by arguments and facts supplied from all relevant sides, covering all relevant angles, makes DK an attractive interlocutor, for Commission as well as MS. People listen to you. (2) High degree of domestic coordination and consultation helps ensure consistency and coherence throughout negotiations. Fact: DK almost never isolated, usually behind legislation when it is adopted.
- Faster implementation: In two ways: First, if a national law has to be passed by Parliament to full-fill obligations under EU law, the majority in Parliament has already been mobilised. Second, it makes Parliament confident to give Government fairly broad powers to imple-ment later/supplementary EU legislation through administrative measures instead of new legislation.
- Fewer infringement cases: A result of fast and well-coordinated implementation.

Disadvantages

- Lack of Government flexibility and autonomy: A limitation on the traditional Government prerogative of foreign policy.
- Costly and time-consuming: Requires a fairly large administration. Bureaucracy and cumber-some procedures. Sometimes too many meetings and papers.
- Interference of domestic issues: The closer link to domestic politics cuts both ways: May not only improve bargaining power in Brussels and ensure implementation. Government may also be held hostage on EU dossiers for domestic ransom. Sometimes expensive for Brussels goodwill.

Conclusion

- On balance, system has served DK extremely well. Must of course be continuously re-viewed, adjusted and reformed. Adaptability is the key. Continuously under reform. Cutting back on some of the bureaucracy. Reaping benefits of the Internet for example, but also of the increased familiarity with the EU in all parts of Danish society. Streamlining the admin-istrative coordination committees. Purpose: Identifying issues earlier, establishing coordi-nated positions earlier, all with a view to maximising influence in Brussels.

Implementation of EU law in Estonia

General coordination

The European Union Secretariat (EUS) of the State Chancellery works under the Prime Minister, supports and advises the Prime Minister and the Government on various EU issues. EU Secretariat is responsible for the overall co-ordination of transposition process but by law every ministry is obliged to transpose the acquis in their respective field of governance. The EUS co-ordinates preparation of Estonian positions for the Government meetings and COREPER I meetings, maintains the EU document management system, monitors the harmonisation of the acquis, the transposition and implementation process including the notification of transposition measures to the European Commission. The Secretariat also informs regularly the Government and the Parliament about the state of transposing process.

Coordination Council of EU issues ensures effective inter-ministerial cooperation. It is chaired by the director of EU affaires and is comprised of representatives of all the ministries, representatives of Parliament's EU Affaires Committee, Office of the President of the Republic of Estonia and the Bank of Estonia. The main tasks of the inter-ministerial group are following: discussing Estonian positions in EU decision-making and preparing Government meetings concerning the EU issues, monitoring implementation of the acquis, dealing with horizontal coordination issues and exchanging information on acute EU issues. Council convenes on a weekly basis.

Line ministries are responsible for performing EU related tasks within their respective competencies: they are responsible for the preparation of Estonia's positions and instructions at the working group

level, for the Committee of Permanent Representatives (COREPER), and for different councils and they transpose the acquis in their respective field of governance.

The Parliament (Riigikogu) is also an important player in the Estonian EU co-ordination system. It has a standing European Union Affairs Committee, which consists of members representing all parliamentary parties. The EU Affairs Committee monitors closely the Government's participation in the EU decision-making process. Moreover, all positions of the Government on strategic EU issues have to be approved by the EU Affairs Committee. According to the same statute, the Government will present to the Committee all EU draft legislation, which after adoption would require the amendment of national legislation or would have a significant economic or social impact.

Legal base

As regards the legal base for EU law implementation the main legal acts are Government of the Republic Act and Rules of the Government of the Republic approved by a regulation of the Government of the Republic.

Government of the Republic Act determines that a minister, as head of a corresponding ministry, shall be in charge of the implementation of the European Union law within the area of government of the ministry. The State Chancellery keeps account of the performance of functions assigned to the ministers by the Parliament (Riigikogu), the Government of the Republic and the Prime Minister and co-ordinate the forming of the positions of Estonia in European Union affairs.

According to the Estonian legal system every legislative measure adopted by the Government should be based on the provision delegating authority. This means in practice that even if the transposition is done by

Government regulation the Parliament has to adopt at first a law delegating authority to the Government.

Transposition of directives

EU Secretariat co-ordinates the transposition process in general, but every directive has a lead ministry, which is responsible for the negotiations on the directive and who also co-ordinates the transposition and implementation activities. After a directive is published in the Official Journal of the European Union it is inserted to the transposition database and ministries are informed by e-mail which is sent through database. If the ministries don't agree with the allocation, they inform State Chancellery and justify their reason for changing the coordinator. The ministries themselves must analyse the impact of the directives to domestic legal order and decide the implementing method and which acts need adopting. They inform the State Chancellery by database of the implementing acts and the deadlines when the act is ready for publishing in Official Journal (Regulation of the Minister) or sent to the Government (laws and Regulation of the Government). The information about transposing act that is provided by ministry through database is: the title of the act, the implementing measure (act or regulation), deadline for being sent to government, contacts of the responsible official in the ministry and the stage of transposition (eg preparing, composing, sending to the government, parliament or published in Official Journal).

As EUS monitors and coordinates the transposition process and it prepares a regular report on the bases of the data entered to database to the inter-ministerial coordination council on EU affairs, the Government and to the Parliament's EU Affairs Committee. These reports include information about delayed transposition measures and possible problems,

also information about likely infringement cases. It also includes 12 months forward-looking review in order to improve the planning of the preparation of transposition measures.

EUS informs the European Commission of the legal acts transposing the directives through Commission notification database. After transposing act is published in Estonian Official Journal EUS sends a notification to Commission and inserts the information also to internal database. The directive is being observed and in status 'non-transposed' in internal database until all the transposing acts have been notified.

Database

As regards information technologies or systems developed and used in order to collect information and data related to the implementation the State Chancellery holds a central database (electronic working plan for the Government, called SEIRA), which contains information about directives in force (deadlines etc.), transposing acts and indicative transposing acts. After a directive is published in Official Journal State Chancellery inserts the information about the directive to the database and sends the information to the relevant ministry. The information is sent as e-mail through the database. It's ministries' task to insert the information of transposing acts to the database and to prepare the internal acts before the deadline for notification.

Every ministry has an access to the database whereby it can see new directives and indicate necessary transposition acts with deadlines. All ministries have appointed one responsible official who regularly gathers the information inside the ministry and updates the central database. The responsible official monitors the transposition and implementation process inside the ministry and updates the database.

The database is primarily addressed to ministries and other central administration bodies, but it is also available to the public.

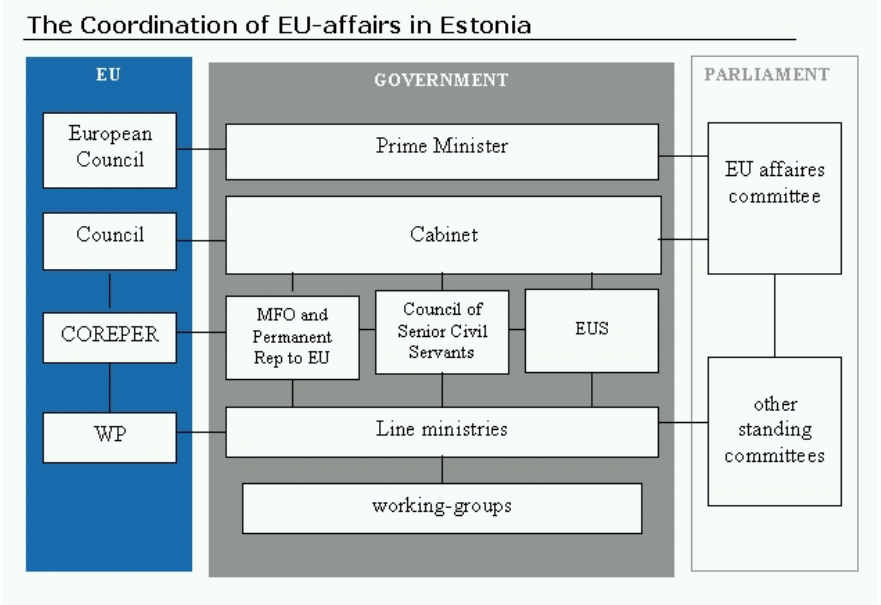
Evaluation of legal impacts of EU law proposals

The State Chancellery prepares weekly the table of EU law proposals that are discussed at the interministerial coordination council on EU affairs. Every proposal has responsible ministry who analyses the proposal and makes impact assessment, asks opinion form other ministries and from respective actors and prepares the Estonian position. Actors involved depend on the issue, meaning usually social partners and NGOs. The ministry analyses which internal legal acts will be necessary to amend, replace or compose and which are the economic, social and other relevant impacts. The position is discussed in inter-ministerial coordination council and is sent to the Government for approval. When the proposal has been approved at the Government session, the information is sent to the Parliament that means involving the Parliament at the earliest stage.

Infringements

The Ministry of Foreign Affairs in cooperation with EUS and the line-ministry co-ordinates the proceedings both with matters under article 226 and article 228 EC in Estonia. After Commission has sent the letter of formal notice, the Ministry of Foreign Affairs forwards the letter to the ministry responsible for the implementation of the EU legislation into Estonian law. After getting the opinion from ministry about the circumstances given in a letter of formal notice, the EU Litigation Division of the Ministry of Foreign Affairs writes the answer to Commission. The answer must get approved by the government and it is also sent to the

Parliament as additional information. The same scheme is used when answering the reasoned opinion.



http://www.riigikantselei.ee/?id=5024

Implementation of EU Law in Finland

Organization structure

The Constitution of Finland provides[1] that the government is responsible for the national preparation of the decisions to be made in the EU. The government decides on the Finnish measures, unless the decision requires the approval of the parliament. The parliament participates in the national preparation of the Finnish measures. Compared to many other states the Finnish parliament plays a strong role in the decision-making on EU affairs. The government must keep the parliament informed on the preparation of EU legislation and it must also hear the parliament's views on the proposals for EU legislation[2]. The position expressed by the parliament is politically binding on the government. If the government has not been able to act in accordance with the parliament's position, it must inform the parliament of the reasons for its actions.

Within the government the responsibility for the preparation of EU legislation and the determination of Finland's positions on EU issues rests with the competent ministries. Each ministry is responsible for matters that fall within its area of responsibility. There is a co-ordination system which ensures that Finland can present a co-ordinated position at each stage of the preparation and decision-making in EU. The co-ordination system involves the competent ministries, the Government of the Autonomous Province of Åland, the Cabinet Committee on European Union Affairs, the Committee for EU Affairs and its EU sub-committees. The Government Secretariat for EU Affairs serves as the secretariat for the Cabinet

[1] See the Constitution of Finland section 93.
[2] See the Constitution of Finland sections 96 and 97.

Committee on European Union Affairs and the Committee for EU Affairs. The Permanent Representation of Finland to the European Union in Brussels also participates in the preparation of EU affairs.

In the discussion and co-ordination of EU affairs particular attention is attached to the timely supply of information to and involvement of the Finnish parliament and the Provincial Government of Åland. The Provincial Government ´s participation in the co-ordination procedure and the decision-making of EU affairs within the State machinery is granted in the Act on the Autonomy of Åland (Autonomy Act, 1144/1991).

Implementation of EU legislation is carried out by the government and also by the parliament if the legislation needs to be amended. Within the government the responsibility for the implementation of EU legislation rests with the competent ministries. Each ministry carries out the implementation in the area of responsibility that they have in domestic matters. There is no co-ordination system or centralized monitoring of the implementation of EU law in Finland. However, when a government bill is drafted, the competent ministries co-operate to prepare the government bill.

According to the division of powers between the Finnish State and the Province of Åland as stated in the Autonomy Act, the Province is responsible for the implementation of EU legislation within its own fields of competence. This is applicable for example in matters which concern farming and forestry, environmental protection, fisheries, promotion of trade as well as public order and security with some exceptions.

In the infringement procedures and in the court proceedings concerning the implementation of EU legislation the Ministry for Foreign Affairs is responsible for the coordination of Finland's positions. (See below Organisation structure and process for infringement cases and cases before the Court of Justice of the European Communities).

Legal basis and instructions on implementation of EU legislation

Neither the Constitution of Finland nor special law includes specific provisions on the implementation of EU legislation. Acts adopted at national level for the implementation of EU legislation are regarded as national legislation and the same provisions in the Constitution that are applied to national acts apply to acts that are adopted for the implementation of EU legislation.

Instead of specific provisions or laws on the implementation of EU legislation there are instructions concerning questions relating to implementation of EU legislation. The Bill drafting instructions[1] contain instructions on drafting government bills, but there are also specific instructions on the implementation of EU legislation. The EU-guide on law drafting[2] focuses on questions relating to implementation of EU legislation. There are also guidelines on impact assessment in legislative drafting[3] which contain instructions on the national impact assessment in all legislative work and also on impact assessment in the drafting of EU provisions.

Process of Implementation of EU legislation

Implementation of EU legislation is carried out through national acts and degrees in the same order and at the same level as domestic acts and degrees. The Constitution provides in which cases an act adopted by the parliament is required. If the implementation of EU legislation requires an act, the government bill is given and handled in the Parliament in the same order as purely domestic matters. If the

[1] Bill Drafting Instructions, Ministry of Justice, Publication 2006:3.
[2] "Lainlaatijan EU-opas" Ministry of Justice, Publication 2004:6. The guide has not been translated in English.
[3] Impact Assessment in Legislative Drafting – Guidelines, Ministry of Justice, Publication 2008:4.

implementation does not require an act the implementation can be carried out by a government degree, a ministerial degree or other degree according to the level provided for purely domestic matters.

Openness is a central goal in Finnish legislative drafting. Consultation is an established part of the ministries' legislative drafting process and it is used also when implementing EU legislation. The goal is to promote the possibilities of the most important stakeholders to take part in the preparatory drafting or to hear their views at the beginning of the drafting through requests for comments, hearings or discussion meetings. Stakeholders mean in this context experts, organisations, businesses and also the citizens. The stakeholders are heard also in the Parliament in the Committee debate[1].

In consultation with the stakeholders both traditional hearing methods, such as written comments, and modern information and communication technology can be used. The choice of the method depends on the situation and the target group. It is recommended that several different methods for consultation are used during the drafting process to ensure as extensive consultation as possible.

For a legislative project, the government or the ministries may appoint a temporary preparatory body, which consists of stakeholders, experts in the field and political decision-makers. The preparatory bodies can be committees, commissions, advisory boards or working groups. The advantage of a broad-based preparatory body is that the different views and interests will be present throughout the whole drafting process.

The most common consultation method is a written request for comments, by which the ministry asks the stakeholders to comment the

[1] Provisions on consultation and participation are included in the Constitution, the Act on the Openness of Government Activities, the Administrative Procedure Act and the Language Act.

matter at hand, e.g. a working group report, a background report or a draft Bill. The request for comment should be sent as extensively as possible to all parties concerned and whose expertise is needed in the drafting.

The stakeholders can be heard in discussion meetings. In these meetings the drafters can present the content of the legislative proposal and the stakeholders have the opportunity to express their opinions and discuss the proposal.

When EU legislation is implemented, the government bill should explain the connection of the bill to the EU law and explain which parts of the bill are due to the obligations of EU law. The bill should also contain a general description of the contents of the EU legislation to be implemented. If the implementation concerns a directive, it should be clarified in the bill in detail article by article how the directive is being implemented. The government bill usually includes also an outlook into foreign legislation. On EU legislation there is usually an outlook into implementation of the EU legislation in other member states. If there is relevant case law of the European Court of Justice on the subject it should be explained in the bill. And also the relationship between the bill and the Charter of the Fundamental Rights and the relevant case law of the European Court of Justice concerning fundamental rights should be explained.

Impact assessment in the drafting of EU provisions[1]

The European Commission produces an impact assessment of all of the projects in its legislative working programme. The government and the ministries must be capable of monitoring and anticipating EU legislative projects with special relevance to Finland and to assess their

[1] Impact Assessment in Legislative Drafting – Guidelines, Ministry of Justice, Publication 2008:4 p. 13.

impact at national level. The identification of such projects can draw e.g. from the Commission's planning documents and its annual working programmes. Anticipation, in practice, can mean that a matter is taken up for consideration in the appropriate EU Affairs Section already before the Commission proposal becomes available.

Once the Commission has issued its proposal, the ministry in charge draws up a memorandum in accordance with the guidelines laid down by the Ministerial Committee for EU Affairs (Processing and Co-ordination of EU Affairs in the Government); the fundamental memorandum lays out the main substantive, legal, economic and political aspects of the EU legislative proposal. The fundamental memorandum must also cover the main regulatory, economic and other impact of the proposal as regards Finland. The impact assessment in the Commission proposal is utilised in the national impact assessment process in so far as appropriate.

"U" matters, as referred to in section 96 of the Constitution, are matters to be decided in the European Union, and which otherwise, were Finland not in the EU, would according to the Constitution fall within the competence of the Parliament. These matters must be brought before the Parliament by a communication of the Government. This communication should summarise the contents of the proposal and its regulatory, economic and other impact as regards Finland. The communication should also cover the possible impact assessments already carried out at EU level.

"E" matters, as referred to in section 97 of the Constitution, are EU legislative matters with broader significance in terms of principle, scope or political controversy. These matters must be brought before the Parliament by a report of the Government already before they have proceeded to a stage where a proposal is issued at EU level. The report

should cover the impact assessments carried out by the Commission and, in so far as possible, also the preliminary impact assessments carried out in Finland.

In the adoption and implementation of EU legislation and other international obligations, Impact Assessment Guidelines are to be observed in so far as appropriate. In such cases, and taking the substance of the proposal into account, the impact assessment may cover also the international impact of the proposal from the viewpoint of Finland.

Electronic document management system

Finland has used one single electronic document management system for documents and case management relating to EU affairs (preparatory phase of the legislative process) since September 2002. The system called EUTORI covers the whole lifecycle of a document from a draft to the archived version, and dossiers/cases from legislation proposals to implementation information (notifications). It combines national and the institutions' documents in the same database related to the corresponding case files.

The EUTORI system is used for drawing up, drafting and commenting national documents (meeting reports, instructions, EU-related correspondence etc.), distributing national and the institutions' unclassified documents (link or file sent by e-mail), registering and electronically archiving national and the EU institutions' documents and managing dossiers/cases (legislative process, ECJ cases etc; including individual meeting files).

The EUTORI-system also includes national implementation information concerning EU legislation. Metadata of the notifications (incl. submission information) of Finland and Provincial Government of Aland are updated in the EUTORI-system (dates of notifications, deadlines for

notifications, metadata of the national legislation etc.). In the same system we also have information concerning the submission of the Government's observations on formal notices and reasoned opinions delivered by the Commission. Maintenance of dossier/case management of the ECJ cases (direct actions, preliminary rulings, interventions) is also included.

Responsible Unit for the record keeping is the Unit for EU litigation of the Ministry for Foreign Affairs.

Organisation structure and process for infringement cases and cases before the Court of Justice of the European Communities

According to the Government's Rules of Procedure the Ministry for Foreign Affairs is responsible for the pre-litigation phase initiated by the Commission of the European Communities on the basis of Article 226 EC and Article 228 EC, i.e. infringement cases. The Ministry for Foreign affairs is also responsible for cases before the Court of Justice of the European Communities (ECJ) and the Court of First Instance (CFI). Along with these tasks the Ministry for Foreign Affairs deals with notification of national transposition measures to the Commission and State Aid cases. It also serves as a contact point for EU Pilot cases. The EU Litigation Unit situated within the Legal Service of the Ministry for Foreign Affairs actually handles these tasks.

The Unit enjoys a great deal of independence. The director of the Unit, Ms Alice Guimaraes-Purokoski, is the Finnish agent before the Court of Justice of the European Communities (ECJ) and the Court of First Instance (CFI). Her deputy Mr Joni Heliskoski is also authorised to plead before the Courts.

Commission's letters of formal notice and reasoned opinions (Article 226 EC and Article 228 EC) are addressed to the Minister for Foreign Affairs. The Ministry for Foreign Affairs is the competent Ministry

for coordinating the preparations of the replies as well as drafting these replies. The solution to allocate both these tasks and responsibilities related to EU litigation to the Ministry for Foreign Affairs was made already in 1995 when Finland joined the EU and it has proved to be functional. This enables the Unit to gain in-depth knowledge of the case prior to the litigation phase and ensures that argumentation is coherent and consistent through out the pre-litigation and litigation phase.

An informal working group is usually set up to prepare the Finnish answers to the Commission. The working group is chaired by the Director of the Unit or her deputy and one of the Unit's other lawyers participates in the work of the working group. Pre-litigation cases are not allocated to Unit's lawyers on the basis of the substance of the case. In principle all lawyers are responsible of all sectors of EU law. This enables the Unit's lawyers to keep up with as wide expertise of EU law as possible and minimises the vulnerability of the Unit on unexpected absence from work of personnel. Representatives of the different Ministries responsible for the substance of the case and also a representative from the Ministry of Justice participate in drafting the replies. The Ministry of substance supplies occasionally the Unit with a short note describing e.g. the pertinent national legislation and the substance of the case. Based on these preparations, the Unit drafts a short note on the case including a proposal for the main line of arguments i.e. the Finnish position to be put forward to the Commission. This note is then presented to the EU sub-committee on Legal Affairs in order to get backing to the proposed Finnish position. Cases are presented to the Cabinet Committee on European Union Affairs chaired by the Prime Minister in casu depending on the political, economic etc. importance of the case. All pre-litigation cases concerning Finland - except for those where the breach of the Community

law relates to the late transposition of a directive - are brought before the Cabinet Committee on European Union Affairs.

The final replies to Commission's letters of formal notice and reasoned opinions are drafted by the Unit. Draft replies are sent to inter-ministerial consultation (normally written) in which all the pertinent ministries participate. Final replies are signed by the Minister for Foreign Affairs on behalf of the Finnish Government. The Permanent Representation of Finland to the European Union in Brussels sends replies to the General Secretariat of the Commission. It would be of an additional value to establish on a permanent basis an electrical appliance for pre-litigation cases to be used in the communication between the Commission and Member States similar to the ones that already exist for notification of national transposition measures (MNE-WEB) and for EU Pilot cases to speed up procedures.

The Unit also submits notifications concerning the national implementation of EC Directives to the European Commission. The competent Ministry or the Provincial Government of Åland Islands informs the Unit of the national implementation of EC Directives via national EUTORI system (see above Electronic document management system). The contact person in the Unit forwards the information further to the Commission's MNE-WEB and is also responsible of giving information of the system to the national authorities. The Unit also updates national implementation information to the EUTORI system.

Furthermore, the Unit is the national contact point for the EU Pilot Project. The EU Pilot Project was launched by the Commission 15 April 2008 and its main aims are to reduce the number of pre-litigation cases and to provide faster answers to citizens' complaints. The role of the Unit differs from the Article 226 EC pre-litigation cases, since the responsibility to prepare the answers to EU Pilot cases is within the Ministry of

substance. The Unit's task is to forward the answers to the Commission via EU Pilot IT application within the given time limit. It also provides information on the system to the national authorities administers document distribution and manages communication with the Commission.

Implementation of EU Law in France

Organisation structure

Coordination of EU law implementation in France is based on inter-ministerial cooperation mechanisms which are useful to the good information of the public. The General Secretariat of the Government and the General Secretariat for European Affairs are responsible for the coordination of EU law implementation.

The General Secretariat of the Government and the General Secretariat for European Affairs have a steady cooperation, both under the French prime minister's whose control is essential for the timely transposition of EU texts. This cooperation is necessary to diffuse the information to the public, concerned or not by the transposition.

The General Secretariat of the Government has to supervise the government's work, to plan legislation proposals as well as to ensure that the government's action is legally secured. The General Secretariat of the Government intervenes at every stage of the elaboration of the French law by ensuring that all ministries speak with one voice and by guarantying the legality of the enacted law. At the last stage, the General Secretariat of the Government has to ensure the laws and decrees are countersigned and finally publish them into the French official gazette. All these responsibilities give the General Secretariat of the Government a main role in diffusing the law through *Légifrance.*

The General Secretariat for European Affairs coordinates with the Permanent Representation of France to the European Union situated in Brussels, to ensure France addresses the EU institutions with one voice, during negotiations, infringement procedures and before the ECJ.

Then the General Secretariat for European Affairs has to find out a single French position among the different French ministerial ones on European issues. If a position cannot be reached on technical issues, the General Secretariat for European Affairs is the last to decide what will be the French official position. In the event of a sensitive political case, the General Secretariat for European Affairs asks for the Prime Minister's decision. Finally, the General Secretariat for European Affairs coordinates the inter-ministerial handling of the transposition of EU directives and of the infringement procedures to community law. It is the Special legal Adviser of the Government as far as EU issues are concerned.

The legal basis for EU law implementation

Since the 1990's, several instructions have been enacted in order to give the guidelines upon inter-ministerial cooperation for the transposition of EU directives.

The last one enacted is the instruction of 27th September 2004 and deals with the French transposition process of EU directives and of EU framework directives negotiated within EU bodies. This instruction is the most exhaustive one and demonstrates a great willingness from the French government to ensure timely and legally secured EU directives transposition.

The main elements of this instruction are:

- The ministry in charge of the transposition on a particular case must - with the help of the other ministries involved by the transposition - make an analysis upon legal consequences of the EU law bills and notably directives. This analysis must start at the beginning of the transposition, i.e. after the directive has been

published and must be done on the basis of the preliminary summary of impact assessment

- At the beginning of the negotiations of a directive, the preliminary summary of impact assessment is transmitted to the Parliament and aims at informing it thoroughtly considering since the Parliament has to supervise the work led by the French government at Brussels. This preliminary summary of impact assessment is bound to be completed during the negotiation of the directive and results in being a real impact assessment. The impact assessment should include, among other things a correlating table.

Methods of implementation

Implementation is based on a steady cooperation between the General Secretariat for European Affairs and the General Secretariat of the Government:

The instruction of the 27th September 2004 plans for every bills of EU legislation (directives, regulations or decisions) a preliminary summary of impact assessment. The preliminary summary of impact assessment aims at establishing a list of the French texts which are likely to be adopted or amended in the event of the adoption of a directive or a framework directive. In the case of a draft directive, the preliminary summary of impact assessment also gives a view of difficulties which have been already identified regarding former transposition.

Even if those preliminary summaries of impact assessment are drafted by ministries, it is the General Secretariat for European Affairs which transmits them to the National Assembly and to the Senate via the General Secretariat of the Government. So, the General Secretariat for European Affairs and the General Secretariat of the Government are

aware at an early stage of changes likely to be made within the French laws.

The High level of inter-ministerial group for the transposition organized by the General Secretariat for European, Affairs is part of the transposition process. It is composed of the correspondents who belong to the transposition network (technical services and head of ministries) and chaired by the Secretary of the General Secretariat for European Affairs, the Prime Minister's adviser on Europe and the Secretary of the General Secretariat of the Government.

This group aims to examine the EU directives that are to be transposed before the publication of the next scoreboard as well as the directives which have to be transposed for all or part by legal provision (and which need to be identified to be put on the Agenda of the national assemblies). This will allow to identify transposition difficulties and to submit political difficulty to the PM Arbitration within the best delay.

This meeting finally enables the regular and precise information of the General Secretariat of the Government upon the required text and calendar for transposition. Then, it permits to adjust the plans of the government's work since the General Secretariat of the Government is in charge of summarizing them.

Information technologies or systems

- *Publication of the transposed texts at the French official gazette*

Officially during the High level of inter-ministerial group for the transposition or unofficially, the General Secretariat for European Affairs regularly informs the General Secretariat of the Government of the texts that have to be quickly signed and published in order to transpose timely a directive. The General Secretariat of the Government steadily and

precisely supervises those texts; this supervising is also useful to keep updating the heading “transposition of directives” in Légifrance.

- *Web sites of each ministry*

Information upon transposition of directives is available on the Web sites of each ministry. It especially deals with thematic information provided for the public (e.g. press release, headings) and can be found via a search engine.

- *Web sites of the National Assembly and the Senate*

Web sites of the National Assembly and the Senate offer information to the public on transposition through parliamentary reports on the law bills which are all or partly implement EU directives. However, this information only deals with the legislative part of the directives being transposed while other executive acts are required (decrees, orders/by laws). We can notice that until 2007, a French representative (Mr Christian Philip) used to publish a report on directives not totally transposed, without distinguishing from the nature of the texts required for transposition.

One major issue today is to make the legal system understandable for the public. The increasing number of laws, the mass of regulation either national or European, and the constant changes of the rule of law puzzle the citizens and creates a feeling of legal uncertainty for businesses.

Many people are aware today that a substantial part of new regulation stems from transposing European directives or implementing others EU laws. But, beyond this general statement, few of them are in position to tell exactly if a new provision passed by the Parliament comes from a national initiative or from a European obligation. And sometimes, the media themselves are not quite aware of the split, some of them criticising the so called European red tape where as the law is purely from

internal initiative or is "gold platting" for a large part. In some other cases, it would be of great interest for the EU that the public could better perceive the European influence through new pieces of national legislation,.

- *Légifrance website*

In order to make the citizen find a way in the mass of regulation, and to address the democratic issue, the French government has carried out for some years now a policy towards a better access to the law which is in one view quite complementary with the better regulation initiative at the national and European level, and perhaps ever a part of it if we remember the report. In others words, the principle that nobody is deemed to be ignorant of the law is some kind of fiction today if the public authorities do not provide the means to get the substance, but also the meaning of the law in plain language and, above all, the links between primarily and secondary legislation, and national and European acts as well.

Technologies for information and communication certainly give us the opportunity to make it possible. Most member states have developed public web sites or data basis which the public can use easily. And so have European institutions, for some years now.

The first data basis for legal information has been created in France at the end of the 60's. But it long remained rather confidential. The boom of internet in the 1990's led to a major change of scale. A new public service “Légifrance” devoted to diffusing the laws has been created at that time and it received a legal status with a decree of august 7th 2002.

The major features of Legifrance are the following:

- The website is available for the public, free of charge, and permits to consult any possible act: the constitution, statutes and by laws, all kinds of governmental secondary legislation, ministerial orders.

- The legal texts are available, not only as they are published by the official gazette, but also in their consolidated form, shortly after this publication.
- Since January 2008, the consolidated version is available at any possible date in a post, but also in the future for those provision which will get into force at a specific date.
- Legifrance also includes the case law of the constitutional court and of the higher courts, and also a selection of case law from other courts.
- The option has been taken to create as many hyperlinks as possible between the different acts or pieces of regulation. The user can navigate in the French law almost as easily as surfing on the internet and the French government intention is to make it work for the links between European laws and national laws.

Private Editors may ask for a licence to reuse a part of the whole of the information inside the data basis. And they do actually, with a quite reasonable cost. Nevertheless, Legifrance appears to be the leading website for the public and for legal professions as well. The number of users is increasing steadily (23 millions in 2003, more than 35 million last years).

Good practices

The General Secretariat for European Affairs steadily supervises the work on transposition with the General Secretariat of the Government. Three months after the publication of an EU directive, the ministry in charge of the transposition, with the help of the other ministries involved, has to transmit to the General Secretariat for European Affairs a correlating table and a schedule for the adoptions of the texts that are to

be transposed. It must be done thanks to the preliminary summary of impact assessment.

A useful network of transposition correspondents has been set up: one at the Cabinet of each ministry, one in the services of each ministry (often, it is the person in charge of the quality of the legislation; in practice there are other correspondents at a more technical level, who often belong to the legal department of ministries).

This inter-ministerial network is led by the legal department of the General Secretariat for European Affairs and especially by the person in charge of the transposition at the General Secretariat for European Affairs who also guarantees the updating of the internal General Secretariat for European Affairs database which enables to supervise the transposition process (this database is going to be upgraded, the new version will be available next spring and will be used only by the General Secretariat for European Affairs and will include a database concerning infringement, state aid, and cases before the ECJ).

Transposition meetings on all directives are organized by the General Secretariat for European Affairs for each ministry (meeting of transposition correspondents at a technical level). Then it is followed by the high level of inter-ministerial group for the transposition chaired by the General Secretary of the Government and the Prime Minister's Cabinet.
Furthermore, the instruction of 19th February 2007 set up guidelines for the handling of infringement procedures. The General Secretariat for European Affairs gives an opinion on all documents sent to the Commission and informs Prime Minister Cabinet.

Ensuring that EU law is well implemented in France is a great political commitment: the Minister in charge of European affairs intervenes every six months, immediately after the publication of the internal market scoreboard of the EU commission, by giving information to the Council of

Ministries and by publishing a press release (the last one has been published on the 25th February). It is the opportunity for Ministers and the French President to analyze the French performance transposition in comparison of the other Member States. The Minister also underlines the efforts or the lack of efforts of the ministries. This benchmark, made in presence of the PM and the French President, has a great impact in favor of the ministers' involvement in transpositions.

This system seems to be efficient even if some progress can still be made. The improvement of France's performance regarding transposition is obvious: in the last scoreboard published at the 18.2.2009 (accounting stopped at the 10.1.2008), France had 0,9% of transposition deficit i.e. 14 directives which have not been implemented. This rate was of (1,1 %) at 30.10.2007 and 1,7 % at 30.11.2005.

Nevertheless, other progress can be made since France is still in the average of the Member States regarding transposition performance. Anticipation of the transposition stage at the negotiation stage must be set up, and must include more systematically an impact assessment regarding French law. Furthermore, improvement of the transposition leading from the publication of the directives has to be made.

Finally the new database about transpositions will allow establishing easier monthly monitoring tables to supervise transposition. Those monthly tables will then be likely to be used either by the SGG or the transposition correspondents.

Implementation of EU Law in Greece

LEGAL AND ADMINISTRATIVE SYSTEM FOR THE IMPLEMENTATION OF EU LAW IN GREECE

The legal and administrative system for the implementation of EU law in Greece is mainly organized into three parts:

1. The Hellenic Republic's efforts in transposing directives into greek national legal order,
2. The Hellenic Republic via the Special Legal Service for EU affairs in the Ministry of Foreign Affairs in dealing with the infringement cases, and
3. The major task of coordination by decentralizing responsibilities into three administrative levels.

1. Transposition of directives

- After the proposal and publication of a new directive by the E.U. institutions, the competent authority (according to the subject-matter) appointed to the Permanent Representation in Brussels forwards the text of the directive to the competent ministries
- Subsequently, the mechanism for the transposition involves preparatory work within the competent ministry or ministries with the close collaboration of the Ministry of Economy and Finance. This collaboration ends with the setting of the signature from the minister in office. By virtue of greek law (1338/83) which is the legislative framework established for the transposition of EU law since the Hellenic Republic's accession, the minister of Finance is

obliged to participate alongside the other responsible ministers to enact legislation for the application of European law.

- The main national legal acts for implementing EU directives into national legal order are:
    - Ministerial decisions, in cases concerned mostly with technical matters. These acts are drafted by the competent ministry and submitted to the competent minister/s for signature before being issued. This procedure is easier and simpler without any other official intervention.
    - Presidential decrees as a general rule, which are drafted again by the competent ministry but in this case presidential decrees are submitted to the Administration Section of the Council of State for advise and final control. This procedure takes a little longer than decisions as the Council of State needs at least three months to give its opinion.
    - Then there are laws especially on major issues. After the draft of a law, usually by a preparatory committee set up for this case, the draft is submitted to the Parliament. It is only in case of laws that the Parliament gets involved in the judicial procedure.
    - Furthermore there are some other legal acts for transposing directives into greek legal order other than the above and these are the acts of the Governor of the Bank of Greece, acts of the Capital Market Commission or decisions of the General Chemical State Laboratory.

2. Infringement cases

- As far as infringements of EU law are concerned, all relevant correspondence by the Commission (information letter, official letter and reasoned opinion) are submitted through the Hellenic Permanent Representation in Brussels to the Special Legal Service in the Ministry of Foreign Affairs which was founded in 1986 by virtue of Law 1640.
- The members of the Legal Service in the Ministry of Foreign Affairs are representing the Hellenic Republic as agents if and when a case is brought before the European Court of Justice either under articles 226 or 228 and even 230 or under article 234 for preliminary rulings where the members of the legal service submit written observations and present arguments in oral proceedings.
- From then on, the legal service's task is to cooperate with other ministries competent for the case in question in order to form the suitable answer to Commission's requests. Since greek accession to the European Community each ministry has set up by virtue of Law 445/76 a department for European affairs in order to study and prepare replies related to the EU within their authority.
- The Special Legal Service is trying hard all the way through to bringing the matter in question to an end and, if possible, to avoid any further action taken by the Commission to bring the case before the ECJ.
- This can easily be achieved in cases of infringement for not transposing directives in time. The number of infringements for non transposition reduces significantly every year reaching this year only 3 pending cases. However it is not the same for

substantial cases that often need a political decision which goes beyond the legal service's efforts and will.

- The main task is to persuade the competent ministries to find solutions to the problem by keeping constant communication with them, and if and where needed, pursue negotiations with them and of course with the services of the Commission.
- Due to these systematic efforts that have been made throughout these years, Greece has achieved significant improvement in the implementation of Community law.

3. Coordination of administrative bodies

- Since 1980 and the Greek accession to the EU the Ministry of Foreign Affairs has been playing a dominant role in European affairs and external relations therein. Through its legal service for EU matters, the Ministry of Foreign Affairs has taken up the task of the application of community law in the administration and the settling of matters that are the subject of infringement proceedings.
    - The legal service has a coordinating authority vis-a-vis other ministries as regards the implementation of measures which have to comply with the provisions of Community law. The legal advisors work closely with other European affair services in the various ministries in order to manage things better and reach the desirable results by establishing tight bonds with them.
    - Furthermore, people in the legal service have direct access to the services of the Commission having constant contacts with the relevant persons in the various departments of both the Commission and the Council.

This becomes, in the long run, very helpful in lots of ways because quite often this can lead to a good result through compromises and mutual confidence.

- This close collaboration leads from time to time to fruitful meetings with the Commission, the so-called package-meetings where the representatives of the various ministries discuss in depth all infringement cases. The results of these meetings are always quite satisfactory as the country achieves significant reduction in infringement proceedings both in the sector of the transposition of community directives into national legal order as well as in the sector of other community matters.
- This reduction proves, inter alia, that the public administration gets a clearer view of European law and the competent authorities get closer to the Community itself, something which helps them solve the legal problems easily.

– On the other hand, there is the Ministry of Economy and Finance. This Ministry retains responsibility in the field of interministerial coordination regarding the government's economic policy in the framework of European Union. This coordination extents also in the transposition of EU directives as the above ministry is competent, at a national level, for observing the transposition of directives into the domestic legal system throughout the whole process.

- The above ministry is also responsible for the implementation of the Single Market Scoreboard, trying hard to reduce the Greek transposition deficit every time the Commission launches the Scoreboard figures.

- Both the above administrative bodies together with the Permanent Representation in Brussels, are competent for the electronic notification to the Commission's services of the transposition measures when these are published in the Official Journal of the Government.

– Besides the two aforementioned ministries, the process of transposing directives into national legal order is supervised by the Secretary General of the Council of Ministers, to the Prime Minister.

- Its role proved to be very important the last few years as it exercises some more pressure on the relevant ministries as far as the implementation of directives are concerned.
- The director of the legal service in the Ministry of Foreign Affairs, keeps regular contact with the above Secretariat and exchange information on every matter concerning Community law.
- The Secretary General of the Government has set up a legal data base called CIRCA used as a centralized tool to monitor the legislative process on national level in the Hellenic Republic.
- In conclusion, one can say that all these years since Greece's accession to the EU, the country has been facing difficulties in applying community law. However, due to systematic efforts that have been made throughout these 28 years the country has achieved significant improvements. Greece is today an equal partner which in order to meet the needs and obligations of its participation in the EU is continually searching for a functional and

efficient administrative model which in the long run may also prove to be the real benefit of its accession.

Implementation of EU Law in Hungary

INFLUENCE OF ECJ DECISIONS ON NATIONAL LEGISLATION – EXPERIENCE OF HUNGARY

Miklós Zoltán Fehér

The following paper aims to present Hungary's experience on the influence that the judgments of the European Court of Justice tend to have on national legislation. Before addressing the issue, it seems however necessary to introduce some aspects of the coordination mechanism that has been established in respect of the law approximation process after Hungary's accession to the European Union. Following that introduction, some examples will be given on how different procedures before the Court of Justice have made it necessary to amend Hungarian legislation or will most probably have such an effect in the near future.

In the Hungarian coordination mechanism, the Ministry of Justice and Law Enforcement (MJLE) has a predominant role, as it is mandated with overseeing the implementation of the acquis in the national legal system. The whole process begins with the monitoring of the Official Journal to identify the community legal acts that need implementation or transposition. Once these have been identified, the MJLE sets into motion a mechanism that is aimed at ensuring a correct and timely transposition of the relevant legal acts. This mechanism is based on the individual proposals from the line ministries, the so-called "law approximation proposals", which are prepared for every single community legal act that needs transposition or implementation. The responsibility for the preparation of the law approximation proposal lies normally with the body/ministry that took part in the EU's relevant decision making

procedure. This ministry then circulates the law approximation proposal setting out the details of the planned transposition process, i.e. the deadlines, the related legal instruments, the form of the legal instrument that is necessary for the transposition, the responsible bodies for the given law-making process, and all other information concerning the implementation of the community legal act in question. The MJLE – as a coordinator of the Hungarian law approximation process – channels these proposals and all relevant information into a database that ensures the monitoring of the overall process as well as the preparation of the quarterly reports for the Government on the achievements and on the eventual backlog.

It has to be pointed out that not only such proposals, but all draft measures are presented to the MJLE, which has traditionally been the ministry ensuring the legality of new legislative measures and their coherence within the legal system. This obligation includes, and has included since well before Hungary's accession to the EU, the appreciation of the proposed measures in the light of community law. Needless to say that community law is to be understood in this respect as also including the case-law of the Court of Justice.

The MJLE is responsible for the representation of the Government before the Court of Justice of the European Communities, and as such, the Ministry has to process all cases in order to articulate the Government's position in these proceedings. Thus, the fortnightly edition of the Official Journal dedicated to ECJ procedures is reviewed in order to notify the ministries of direct actions against other Member States which may call for intervention on behalf of the Hungarian Government and judgments that may be of interest in the ministries' respective fields of competence. If a judgment is likely to require the modification of a national legal act, the ministry in question is called upon to prepare the "law

approximation proposal" described above. While direct actions are normally made known only through their publication in the Official Journal, requests made by other Member States' courts for preliminary ruling procedures are transmitted to the governments directly by the Court of Justice. These requests are also closely monitored by the MJLE and are forwarded to the competent ministries in order to assess their possible impact on Hungarian legislation and to evaluate the opportunity of participating in these proceedings by submitting written observations or by appearing at the hearing.

The clearest and most pressing need to amend legislation arises quite naturally when the Commission decides to pursue infringement procedures by submitting an action for failure to comply with its reasoned opinion before the deadline specified. As all Member States, Hungary seeks to avoid such actions by making all the efforts necessary for the timely transposition of directives and by finding solutions to the objections raised by the Commission in the administrative phase of infringement procedures. However, should there be a fundamental interest in defending the national legislation scrutinised by the Commission, the Government might decide to confront the Commission before the Court of Justice. Since the accession, the Commission has filed only 5 actions against Hungary, 4 of which related to the timely transposition of certain directives. Only one of these proceedings is still pending, while in 4 of these cases the Commission withdrew its action after the relevant legal provisions had finally been adopted or brought in line with community law. It is safe to say that once the Commission decides to move forward by submitting an action to the Court of Justice, the pressure on the national administration to comply with the Commission's demands increases dramatically, especially in cases where the Commission's objections were held to be accurate from the outset and were not refused, but where the

national legislative process has been held back by internal discussions on how to resolve the legislative issues.

Since Hungary's accession to the European Union, the preliminary ruling procedures initiated by Hungarian courts have proved to be an effective way to trigger modifications of national legal provisions in respect of community law. The Hungarian courts have been very active in seeking guidance from the Court of Justice, as they have, since the 1st of May, 2004, submitted 19 requests for preliminary ruling , which is the highest number of preliminary ruling[1] requests from the new Member States. 9 of these procedures related to taxation in a broad sense, which indicates that there are several companies and lawyers who are very well aware of community law relating to taxation, including the case-law of the Court of Justice. It is quite common in these cases that the request for a preliminary ruling is based on the submission of the claimants insisting that the applicable national rules are contrary to community law as interpreted by a given judgment of the Court of Justice. Besides preliminary ruling procedures in tax cases, Hungarian courts have raised questions in other areas as well, in particular consumer protection law, company law, criminal law and public procurement law, to mention but a few.

The very first Hungarian preliminary ruling procedure is all the more interesting to our subject as it concerns a case where the Court of Justice did not actually declare in its judgment that the Hungarian legal provisions in question were contrary to community law, nevertheless, the provisions in question have been amended later on to take account of the case-law of the Court and of the findings of the Advocate General in this case. The case is C-302/04, Ynos, where the Court of Justice was asked to interpret Article 6(1) of Directive 93/13 on unfair terms in consumer

[1] As of March 2009.

contracts, which states that Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer. Under the Hungarian provisions applicable to the facts of the case, the consumer would have had to expressly contest an unfair term in a consumer contract in order for this term to cease to bind him or her. However, the facts of the case in which the national court requested a preliminary ruling have occurred prior to the accession of Hungary to the EU, therefore the Court of Justice declared that it lacked jurisdiction to answer the questions put forward by the Hungarian court. Although Advocate General Tizzano had, in his conclusions, come to a similar result as regards the lack of jurisdiction of the Court of Justice *ratione temporis*, the Advocate General also considered the substance of the case, just in case the Court should go forward with answering the questions of the national judge. The Advocate General concluded that, according to the case-law of the Court, the Directive precluded national legislation under which a national court may rule that an unfair term is without effect as regards the consumer only where the latter has expressly contested it. It seemed therefore clear that the Hungarian rules in question would have been found to be incompatible with community law, had the facts of the case occurred after the accession of Hungary to the EU. Thus this request for a preliminary ruling did, in spite of being inadmissible due to the circumstances of the main proceedings, throw light on an incompatibility with community law. Accordingly, the Hungarian Civil Code has since then been modified to take account of the interpretation given by the Court of Justice in previous judgments.

Another example of the rather immediate effects that a preliminary ruling procedure initiated by a national judge may have, is that of the cases concerning the Hungarian vehicle registration tax. The Hungarian

tax rules had provided for a similar amount of tax to be levied on a new car and a second-hand car with similar technical characteristics, which was found to be contrary to Article 90 EC in the joined cases C-290/05, Nádasdi and C-333/05, Németh. The Hungarian rules had been modified even before the Court of Justice delivered its judgment, as it was clear that if the provisions had been found to be in breach of community law, a recovery of the tax levied in excess would have followed from the well established case-law of the Court. As the judgment did in fact find the above provisions to be in breach of Article 90 EC, it was necessary to define a procedure for the recovery of the sums levied in breach of community law, since no such specific procedure existed at that time in the Hungarian legal order. In defining the precise rules of such a recovery, the legislator had to take due account of the Court's case-law in this area, which imposes several restraints on the national legislator's discretion. An Act on the partial recovery of vehicle registration tax was adopted within 3 months following the judgment of the Court of Justice, with the aim to fulfill the conditions set out by the Court's case-law. Furthermore, the Act on the rules of taxation was later amended to provide for a general procedure of recovery in eventual future cases. It has to be pointed out that in this particular case not only a single judgment of the Court had to be taken into account to resolve a conflict with community law, but rather a whole body of case-law had to be thoroughly examined to find a satisfying solution.

The last Hungarian preliminary ruling procedure to be mentioned here as an example is C-210/06, Cartesio, where, besides a rather exciting question relating to the transfer of the seat of companies within the EU, the national judge also put forward a question which concerned the possibility of an appeal against the decision of a national court to refer a case to the Court of Justice pursuant to Article 234 EC. Some Member

States' procedural law, including the Hungarian Code of Civil Procedure, had made an appeal possible, and the case-law of the Court of Justice seemed to suggest that the possibility of an appeal was in fact in accordance with Article 234 EC. In its judgment, however, the Court explained that Article 234 EC was to be interpreted as meaning that the jurisdiction conferred on any national court to make a reference to the Court of Justice for a preliminary ruling cannot be called into question by the application of national procedural rules which permit the appellate court to alter the order for reference, to set aside the reference and to order the referring court to resume the proceedings in which the reference for a preliminary ruling has arisen. Curiously, the Court of Justice declared once again that the possibility of an appeal was in itself not contrary to Article 234 EC, but seemed to have come to the conclusion that an eventual decision on appeal could not have any binding effect on the referring court. As far as the Hungarian civil procedural rules in general are concerned, a decision on appeal would always be binding on the lower court, therefore it became quite clear that the provisions in question had to be repealed altogether, as there seemed to be no other solution that would be in line with the judgment of the Court. It remains to be seen if Hungarian courts will actually refer more cases to the Court of Justice now that the order for reference can no longer be appealed.

The three Hungarian cases presented above demonstrate that the preliminary ruling procedure has in fact been the most effective and most frequently used judicial instrument of community law with a direct influence on Hungarian legislation, and that the judgments of the Court of Justice are being taken into account by the Hungarian legislator.

Finally, infringement procedures initiated against other Member States can also be mentioned as another example of how procedures before the Court of Justice may influence Hungarian legislation. The three

examples below may be of different significance, nevertheless, the outcome of all these proceedings seems capable of having notable implications on Hungarian legislation. The first group of cases mentioned here, in which the Hungarian government decided to intervene, are those brought against Austria, Sweden and Finland, where the Commission claimed that the provisions on the free transfer of investment-related payments in the bilateral investment agreements concluded by these Member States with third countries were incompatible with the EC Treaty, because these agreements did not allow the Member States in question to apply restrictions on capital or payments which the Council may adopt on the basis of the EC Treaty. The respective judgments of the Court in two of these cases have been handed down just recently, on the 3rd of March, and the Court has held that Austria and Sweden have failed to fulfill their obligations under the second paragraph of Article 307 EC, by not having taken appropriate steps to eliminate the incompatibilities between the Treaty and the bilateral investment agreements. The consequence of these judgments is that Member States, including Hungary, will have to consider renegotiating similar bilateral agreements predating the accession in order to comply with the findings of the Court and most probably in order to avoid being brought before the Court by the Commission in the near future. The second group of cases concerns infringement procedures against several Member States relating to the nationality requirement which these Member States impose on the access to the profession of notary. Since Hungary is also a Member State with a similar legal provision, and the Government intends to maintain such a nationality requirement as long as it is not found to be contrary to community law by the Court of Justice, the Government has decided to intervene in these cases, which will most probably set a precedent and will be decisive on the appreciation of the Hungarian provisions relating to

the profession of notary as well. Hungary has also decided to intervene in support of Belgium in a case that involves a tax advantage upon the purchase of immovable property, as Hungary has a provision that is somewhat similar to the Belgian rules in question. It is quite evident that the intervention in the above procedures is subject to the consideration that the outcome of these proceedings against other Member States is likely to have a considerable impact on Hungarian legislation, and therefore there is an evident interest in supporting the defendants in their dispute.

The above examples were intended to give some insight into how the decisions of the Court of Justice have influenced and continue to influence Hungarian legislation, and to point out the importance of considering the Court's case-law in all community law related legislative decisions. Although instances of legislative action triggered directly by ECJ decisions may not be as numerous as those necessary for the transposition of secondary community law, they usually relate to complex legal issues which merit particular attention.

SPECIAL METHODS OF IMPLEMENTATION OF EU LAW STEMMING FROM CONSTITUTIONAL PROVISIONS

MINISTERIAL REGULATIONS WITH STATUTORY EFFECT IMPLEMENTING EU LAW – EXPERIENCE OF IRELAND

David Kelly[1]

Ireland's membership of the EEC in 1973 resulted in the "historic transfer of legislative, executive and judicial sovereignty to the European Communities".[2] On a practical level, this meant Ireland had to implement large amounts of legislation originating from outside the State. Accordingly, the question arose as to what mechanisms would be employed to accommodate this influx of new law?

In order to answer that question it is necessary to examine certain aspects of the Irish Constitution and also how laws are promulgated by the State.

The Constitution of Ireland adopted by the People by Referendum in 1937, states that Ireland is a sovereign, independent, democratic State. The right of the Irish nation to self-determination is stated to be inalienable, indefeasible and sovereign. All powers of government, legislative, executive and judicial derive, under God, from the People, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good. These powers of Government are exercisable only by

[1] Advisory Counsel/Legal Counsellor to the Permanent Representation of Ireland to the EU

[2] Maher v. Minister for Agriculture [2001] 2 I.R. 139 at 175

or on the authority of the organs of State established by the Constitution.

These exclusive powers are entrusted to the National Parliament (the Oireachtas), the Government and the Courts.

Article 15.2. of the Irish Constitution states:

> "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas [the National Parliament]: no other legislative authority has power to make laws for the State.
>
> Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures."

Accordingly, statutes (our primary legislation) are the laws enacted by the Houses of Oireachtas (Parliament), pursuant to the first indent of Article 15.2 of the Constitution of Ireland. As you will have heard provision is made for a subordinate form of law (Statutory Instruments or Ministerial regulations) which are made pursuant to the second indent of Article 15.2. While statutes are passed by the legislature, Ministerial regulations (statutory instruments), as the name implies, may be brought into force by members of the executive.

Speaking purely domestically this provision of the Constitution was somewhat neglected and did not require or receive much judicial scrutiny. Since 1972 (the run up to Ireland's accession to the EEC Treaty) and later in the early 1980's this provision has come to assume increasing importance. Firstly as a means of curbing the excesses of executive power and secondly it ensures rigorous adherence to the ultra vires doctrine in the interpretation of statutes.

In these respects, judicial interpretation of Article 15.2 on the domestic plain has kept faith with the key democratic principle that only the Oireachtas can make law. The Irish Supreme court has put it thus "the power of the legislature must be protected. The power is for that body for the benefit of democratic government and may not be surrendered" [1]

The distinction between the nature and scope of statutes and Ministerial regulations was considered in detail by the Irish Supreme Court in the seminal case of *Cityview Press*[2] where the Supreme Court held that a statute contains "clear declarations of policies and aims and it establishes machinery for the carrying out of these policies and the achievement of these aims". The statutory instrument, however, ought simply to be a part of the machinery used to achieve policies and aims set out in the enabling statute. The Court further held that where a statutory instrument purports to achieve more than to give effect to statutes, it may risk constitutional challenge. Thus an examination of "principles and policies" is invariably at stake in formulating Ministerial regulations having regard to the intended exclusive legislative power of our Parliament.

However an obvious qualification of the exclusive legislative power of the Oireachtas results from Ireland's membership of the EC. Simply – our being part of the EC has meant that the stark language of Article 15 has required derogation involving a considerable degree of transfer of sovereignty to the Institutions of the Community.

Clearly the nature of Community Regulations, applying directly without requirement to be re-cast or transposed in Irish legislation, obviously derogates from the absolute words of Article 15 – "no other legislative authority has power to make laws for the State."

[1] Laurentiu -v- Minister for Justice [1999] 4 IR 26 at 63
[2] Cityview Press v. An Comhairle Oiliúna [1980] I.R. 381

A further example of such a derogation, and the subject matter of this presentation, lies in the status of domestic legislation which is "necessitated" by the obligations of Community membership. This "necessity" also pre-empts the discretion of the Oireachtas. Such necessitated legislation has now been enacted in a vast number of areas ranging from Agriculture and Fisheries law to detailed domestic regulations governing the single market of labour relations.

The Third Amendment of the Constitution Act 1972 provided the constitutional means for the State to accede to what were then the three original European Communities.

Subsequently the Tenth, Eleventh, Eighteenth and Twenty-sixth Amendment of the Constitution Acts 1987, 1992, 1998 and 2002 have supplemented that initial licence by authorising Ireland to ratify respectively, the Single European Act of 1985, the Treaty on European Union of 1991, and the treaty of Amsterdam 1997 as well as the Treaty of Nice of 2001. The approach followed by those later amendments has been fashioned upon that of the 1972 amendment, that is, to enumerate each new Community Treaty to which the State may accede.

In addition to acceding to the relevant Treaty, the Constitution itself has been amended in order to trump and override Article 15.2. This Article has been moved numerically as the EC itself has adapted and expanded and is currently located at Article 29.4.10

> "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties

establishing the Communities, from having the force of law in the State."

The need for so comprehensive an amendment lies in the nature of the Communities and its legislative capacities. As we are all aware a Regulation is "binding in its entirety and directly applicable in all member states" (Article 249 TEC). The fact of a regulation being promulgated in Brussels immediately becoming part of Irish domestic law would have been quite incompatible with Article 15 of our Constitution. Accordingly the second part of the sentence that is Article 29.4.10 facilitates the incorporation of directly applicable Community laws into Irish law.

In turn the first part of Article 29.4.10 is designed principally to ensure that legislation to transpose directives[1] into Irish law is withdrawn from domestic judicial control (on the grounds that it might violate the Constitution) once the requisite "necessity" for such legislation can be established.

Quite aside from the volume of, directly applicable, Regulations a considerable proportion of the legislative acts of the Communities are brought forward by Directives. Given the discretion vested in Ireland by the Community (in common with other Member States) as regards the method of implementation of Directives, the State opted to permit the use of Ministerial Regulations (our secondary legislation) to receive such Community legislation into the domestic legal order.

The specific vehicle for these Ministerial Regulations has been the European Communities Act 1972. The Act is relatively short and simply comprises the powers vested in Ministers of State to enable the

[1] "binding as to the result to be achieved, upon each member state to which it is addressed", whilst "leav[ing] to the national authorities the choice of form and methods".

transposition of EC legislation into our domestic law. The purpose and benefit of the Act are threefold.

Firstly it enshrines in domestic statutory law the treaties of the EC and the directly applicable EC Regulations. Secondly it enables Ministers to make domestic regulations (Statutory Instruments/Ministerial regulations) transposing EC Directives. Finally, and perhaps most importantly, it lifts an enormous legislative burden from the Oireachtas. Given the sheer volume of legislation, whether by Regulation or Directive, that the Communities promulgate our parliament would be hard pushed to keep up with transposing such measures into domestic law by means of primary legislation.

The Ministerial regulations made pursuant to the European Communities Act 1972 effectively rank lowest in the hierarchy of legal instruments yet represent the method by which the greatest bulk of Community secondary legislation is received into Irish law. At its simplest, if Irish law required the transposition of all Community directives by way of primary legislation Ireland would almost systematically find itself in breach of its obligations under Article 10 and 249 EC due to the somewhat limited annual legislative output of our national parliament.

Although the European Communities Act 1972 is short I do not propose to recite it in full. I will simply refer to section 2 and 3 of the Act.

Section 2 states:

> "From the 1st day of January, 1973, the treaties governing the European Communities and the existing and future acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties."

Section 3 of the European Communities Act 1972 states:

> "A Minister of State may make regulations for enabling section 2 of this Act to have full effect.
>
> Regulations under this section may contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations (including provisions repealing, amending or applying, with or without modification, other law, exclusive of this Act)."

Ministers are accordingly vested with broad powers in the implementation of EC Directives that would normally be the exclusive preserve of the Parliament. These powers can include the creation of offences attracting potentially significant penalties and also the power to amend, by Ministerial regulation, primary legislation.

It is clear from the 1972 Act that Ministers, as members of the executive, may implement directives using statutory instruments that have statutory effect. However, the Act does not specify the circumstances in which it is appropriate to use such statutory instruments. The question therefore arises as to whether Ministers have discretion in deciding how directives are to be implemented. Can they opt for the quickest or most convenient means of complying with Ireland's obligations under community law? This question ties into the "necessitated by the obligations of membership of the Communities" aspect of Article 29.4.10 and has been the subject of much judicial scrutiny.

The wide ambit of the powers conferred upon government ministers by the European Communities Act 1972 as amended provided

the backdrop to a constitutional challenge brought in the case of *Meagher v. Minister for Agriculture.*[1]

In *Meagher* the applicant challenged the constitutionality of section 3 of the 1972 Act, together with the validity of a statutory instrument brought into force under the 1972 Act, which prohibited the possession and use of certain substances having a hormonal action, sometimes administered by farmers to fatten their animals. The statutory instrument at issue had the effect of amending primary legislation, namely the Petty Sessions (Ireland) Act, 1851.

In its judgment, the Supreme Court explained that it was a fundamental obligation of the State to implement EC directives into domestic law and that:

> "The court is satisfied that, having regard to the number of community laws, acts done and measures adopted which either have to be facilitated in their direct application to the law of the State or have to be implemented by appropriate action into the law of the State, the obligation of membership would necessitate facilitating of these activities, in some instances, at least, and possibly in a great majority of instances, by the making of ministerial regulations rather than legislation of the Oireachtas."[2]

However it must be stressed that this did not amount to affording the executive *carte blanche* to implement directives by means of Ministerial regulations under the 1972 Act. The Supreme Court made it clear that in certain situations implementation of EC law would require the enactment of primary legislation by the Oireachtas. As the Supreme Court put it

[1] [1994] 1 I.R. 329 at 352
[2] Finlay C.J. at 352

"If the directive left to the national authority matters of principle or policy to be determined then the 'choice' of the minister would require legislation by the Oireachtas. But where….the situation is that the principles and policies were determined in the directive, then legislation by a delegated form, by regulation, is a valid choice."[1]

The Supreme Court went on to clarify that the "valid choice" of implementation by Ministerial regulation had its limits

> "If the [Ministerial] regulations contain material exceeding the policies and principles of the directives then they are not authorised by the directives and would not be valid under s. 3 unless the material was incidental, supplementary or consequential. In those circumstances if they were not incidental, supplementary or consequential the regulations would be an exercise of legislative power by an authority not so permitted under the Constitution."[2]

This complex issue was further clarified by the Supreme Court *in Maher v. Minister for Agriculture*[3] where a Council Regulation (EC) 1256/99 provided that Member States could take certain discretionary steps in the re-organisation of the milk quota regime. The Minister for Agriculture proceeded to implement Ministerial regulations to give effect to the Council Regulation. The applicants challenged the validity of the Ministerial regulations making the argument that implementation in this manner was not "necessitated" for the purposes of Article 29.4.10 of the Constitution and that once the Minister no longer enjoyed the immunity

[1] Denham J. at 366
[2] Denham J. at 366
[3] [2001] 2 I.R. 139

conferred by Article 29.4.10 he had accordingly violated Article 15.2 of the Constitution.

In its judgment the Supreme Court clarified that the issue as to what was the constitutionally appropriate method of transposition – whether Act of the Oireachtas (primary legislation) or Ministerial regulation (secondary legislation) – was entirely a question of domestic law. As a result, it can never be said that the transposition of Community legislation by means of Ministerial regulations is itself "necessitated" for the purposes of Article 29.4.10. Furthermore the Court also made it clear that the critical test in this area is whether the Community legislation which is sought to be transposed contains sufficient "principles and policies" so that transposition by way of Ministerial legislation is permitted in that transposition by primary legislation would be superfluous. This entails an examination of the Community legislation to see what – if any – discretion is conferred on the Member State.

The Supreme Court stated the view that:

> "In each case, while the Member State is obliged to implement the Directive or the specified part of the Regulation, the choice of form and method for implementation is clearly a matter for the member State."[1]

The Court went on to examine in minute detail the provisions of the "parent" EC Regulation:

> "The issue in this case is as to whether the choice of the appropriate measures can be regarded as involving no determination of policy or principle, as that expression has been used in previous decisions of this court.

[1] Keane C.J. at 182

> I have experienced some difficulty in arriving at a conclusion as to how this issue is to be resolved…. I am, however, persuaded by the analysis….that, in the case of the operation of the super levy scheme, the choices as to policy available to the member States have in truth been reduced almost to vanishing point."

The Supreme Court was satisfied, in this instance, that the Minister was not exercising policy choices but rather was merely doing no more than filling in the details of principles and policies contained in the EC and EU legislation.

The issues were subsequently summarised by the High Court in the case of *Browne v Attorney General*[1] where the Court suggested that the *Meagher and Maher* judgments demonstrate that one must inquire:

> "….if the Community law to be transposed sets out the principles and policies to such a degree as to obviate the requirement for domestic primary legislation. This involves a consideration of the content and substance of the measure to enable the Court to form a view as to the propriety of any attempt to carry it into effect in domestic law by regulation only. If significant policy choices or decisions are left to the Member State, then, as the decision of the Supreme Court in *Maher* makes clear, primary legislation is required."

From the decisions in the *Meagher and Maher* cases as outlined above it is evident that any directive requiring a national authority to formulate declarations of principle and policy ought to be incorporated into Irish law by way of statute. However, directives that do not give national authorities the scope or discretion to develop principles or policy, or which

[1] (Unreported, High Court 06/03/02, Kearns J.)

simply supply the necessary detail in order to give practical effect to existing principles and policy, may be implemented by way of statutory instrument.

While practice shows that the vast majority of directives are nevertheless incorporated into Irish law by statutory instrument a cautious civil servant will always seek legal advice where it appears plain that an option or discretion is being afforded to the State in implementation.

Implementation of EU Law in Italy

SYSTEM AND METHODS OF IMPLEMENTATION OF EU LAW IN ITALY

Main actors in the EU law implementation process

Competent Ministries

Department for European Policies is responsible for:

- Coordinating and monitoring the implementation process. It acts as the central point for coordinating the works concerning the transposition of the Directives into the national legislation.
- Monitoring the notification of the national measures of execution
- Maintaining dialogue between all actors concerned
- Coordinating and preparing Italian position in infringement proceedings
- Communicating with the European Commission
- Enters into the database "EUR-Infra" all documents concerning infringement proceedings against Italy

Ministry of Economy and Finance evaluates the financial consequences of the draft law implementing the provisions of EU law

Ministry of Justice takes part in drafting and improving the legislation and provides sanctions applicable to infringements of the national provisions adopted pursuant to the European directive

Ministry of Foreign Affairs attend to the meetings of transposition for juridical analysis of national legislation implementing European law; preparatory inquiries and activities prior to legal action in community disputes,

The transposition of EU directives in Italy

The transposition of community law into Italian legislation is based on the framework law titled "general norms on the participation of Italy to the legislative activity of the European Union and on the procedures relevant to the execution of community obligations" (law February, 4 th, 2005, n. 11).

The principal tool for this implementation, based on the above mentioned framework law, is the European Community Act ("Legge Comunitaria") that the Government submits annually to the Parliament within the term of January 31, after having verified that all the necessary measures have been carried out to conform our legislation to the laws - in particular to the directives - that the European Union has adopted in the previous year.

The European Community Act contains, besides specific provisions to recognize the direct effect of directives, the delegation to the Government for the adoption of legislative decrees providing for the necessary norms required to give application to other community directives listed within the above mentioned law.

Moreover, this law authorises the Government to adopt legislative decrees containing integrating or corrective provisions for the purpose of amending or integrating -where necessary and within a certain term- any law issued in execution of a community directive, should eventual difficulties or deficiencies emerge during the phase of its application.

Finally, the same law authorises the Government to adopt legislative decrees providing for penal or administrative sanctions aimed at punishing violations of community law.

The preparation and the approval of the above mentioned secondary legislation issued by decrees constitute the main activity of the "descending phase" of the overall legislative process of the European

Union, and are established according to the guidelines of a shared procedure.

In fact, any national law implementing the community legislation, even those measures which introduce modifications or impose sanctions, are elaborated within special Committees entitled to take coordinated decisions related to transposition matters, to which all the administrations involved in the transposition process participate. Then the proposed text of each legislative decree, drafted according to the terms established by the annual European Community Act, is submitted for a preliminary approval to the Council of Ministers by the competent Minister for the prevailing matter and by the Minister of the European Policies.

After this preliminary approval, the opinion of the competent parliamentary Committees is acquired and, where required, also that of a specialised public structure ("Conferenza permanente") appointed to organise the relations between the State, the Regions and the autonomous provinces of Trento and Bolzano.

Moreover, the law n. 11/2005 provides that, on the subjects of "concurrent legislation" not covered by absolute reserve of law, the Government may be delegated to implement the community directives through simple regulations. Therefore, when the annual European Community Act contains such provision, the transposition of the directives – listed in the enclosure C of the same law – is implemented by a regulation adopted according to art. 17, paragraphs 1 and 2 of the law n. 400/88.

A different tool used in Italy for the implementation of obligations deriving from community legislation consists in decrees issued for reasons of urgency. In fact, article 10 of the law February 4 th 2005, n. 11 empowers the President of the Council of the Ministers or the Minister for the European policies to propose any national law necessary to enforce

community laws or judgments pronounced by the Court of justice that involve government obligations to conform with these provisions, when such obligations must be fulfilled before the date of presumed entry into force of the European Community Act related to the year in progress.

Lately, decrees issued for reasons of urgency have been used as a useful alternative to the ordinary tool of the annual European Community Act as an effective means to fulfil community obligations.

In fact, while the European Community Act -as already clarified- intends primarily to confer delegated powers to the Government for the transposition of community directives published in the previous year, the adoption of such decrees is finalized to avoid the risk of possible infringement procedures and, eventually, of penalties carried out by a Court of justice judgment.

Finally, whenever the community legislation must be implemented by administrative means, its transposition into the national legal system is carried out through decrees issued by the Minister competent on the matter.

Problems concerning the implementation process

Specific mechanisms for the transposition of community law have been well established within the Italian legislative framework, which has been recently reorganised with the already mentioned law n. 11/05. Nevertheless, different problems persist in the Italian legal system which, in some cases, can jeopardise the timely implementation of the directives and cause the consequent opening of infringement procedures.

These problems are due to the complexity and the length of the parliamentary process for the approval of the annual European Community Act. The trouble is that the conclusion of this procedure – required to confer the delegation to the Government for the actual

transposition- has always taken place the year after the presentation of the relevant annual law (in fact only the law n. 306 of October 31 2003 has been approved in time).

For this reason, with the purpose of reaching the best results in terms of a timely transposition of the directives, new solutions are currently tested in order to build up a fast and effective system for a smooth implementation of community law. In the meantime, as a preliminary effort, some measures have already been put in place to ensure that the law on community matters is annually approved as quickly as possible.

In particular, the internal structure with the power to adopt and modify the rules governing the Italian Parliament (la Giunta per il Regolamento) is evaluating the possibility of abolishing the provision that requires a joined examination of the bill concerning the European Community Act together with the annual Report on the participation of the Italian Republic to the European Union, both of which the Government has the obligation to submit each year to the Parliament.

It is evident that these are two quite different provisions as far as content and objectives are concerned. Therefore it would be more profitable if they were dealt with separately. Disjoining their parliamentary debate would produce then the effect of accelerating the examination of the European Community Act and, accordingly, shortening the times of its final approval.

The Italian achievements within the internal-market Scoreboard

In the act of transposing the community directives, the Government pays particular attention to those pursuing the goals of the internal market. As a consequence, despite the above mentioned procedural problems, the Italian Republic has succeeded in achieving

flattering results in the context of the internal market scoreboard, which is the document drafted by the European Commission that underlines, for every member State, the deficit of transposition of the community directives (due to an incorrect or delayed transposition).

For the purpose of reducing the percentage of this deficit, the Italian authorities have, in the first place, increased the activity of impulse and coordination of the different administrations involved in the legislative process related to the fulfilment of the community obligations, establishing, in each one of these separate bodies, a contact point able to ensure a direct and constant collaboration.

Furthermore, other useful measures have been put forward to improve and to accelerate the procedures needed to carry out a complete implementation of the community obligations. In particular it has been decided to shorten the term of delegation granted to the Government by the annual European Community Act. This term was reduced in 2006 to twelve months, from the eighteen months provided for in the 2005 annual law. Subsequently, starting from the annual law 2007 the term of delegation has been aligned with that of transposition.

Moreover, the D.P.R. 14 May 2007 ns. 91 (i.e. the Regulation for the reorganisation of entities operating in the context of the Department, issued according to article 29 of the legislative decree dated July 4 th 2006, n. 223) has appointed 15 experts that can participate to the above mentioned coordination Committees and contribute, with their own technical expertises, to the layout of the national legislation required to conform to the Community obligations.

Finally, a method of work has been conceived that consists in preparing a preventive list of all directives – to be implemented either by administrative or legislative means – that are deemed to be included in the next scoreboard on the internal market.

Consequently, according to the data published last 8 July 2008, Italy has reduced its own deficit in the transposition field to a percentage equal to 1,2% of the corresponding community legislation. It is worthwhile to underline that this result is in line with the one (equal to 1%) achieved - on average- by the other European Countries. Which is the best result ever reached by our Country since 1997, when the first scoreboard on the internal market was published.

Even if in the last survey (Internal Market Scoreboard n. 18) Italy has recorded a deficit equal to 1,3%, it must be considered that this slight variation is entirely due to the advent of a new legislature, which has produced the consequent physiological deceleration of the legislative activity concerning the transposition process. At the moment, however, in view of the next survey, the Government is at work to regain or even to improve the good level reached in the past.

This is a very ambitious objective taking into consideration that this year the parliamentary procedures for the approval of the bill relevant to the annual law have begun at a later time than originally expected. It is convenient, however, to clarify that this delay is due to the fact that, although this bill was introduced at the beginning of the year as foreseen by the law, it expired because of the end of the legislature. Nevertheless, to guarantee continuity to the implementation process of the European law in Italy, the Government has immediately drafted a new bill of the same law for 2008, to be submitted as soon as possible to the Parliament. Therefore, an integrated version of this bill, containing further dispositions and mentioning new directives to be implemented, is currently being examined by the Senate.

The role of the Regions in the implementation of Community Law

The constitutional Law of October 18th 2001 n. 3, with the revision of Title V of the Constitution, has profoundly reformed the entire institutional structure of Italy. The allocation of responsibilities between the State and the Regions hold virtually equal state and regional legislative powers with regard to implementation of Community law.

The new Article 117 of the Constitution states that Regions can implement community law immediately in matters relating to their exclusive competence whereas the same article allows for the apposition of state principle norms only for concurrent legislative powers.

Therefore, article 117 represents an explicit confirmation of the direct relationship between the Regions and the implementation of community law, and, moreover, it provides for the direct participation of the Regions in the shaping of community law.

A relevant provision is provided by the introduction of a substitutive State power with regard to the Regions and other local authorities. This provides confirmation that the State has been assigned the unique and indivisible responsibility towards the community order.

The substitutive power (art. 117 and art. 120 of the Constitution) enables the central Government to adopt pre-emptive implementation measures which keep up force until the Region or Autonomous Province adopted the necessary act falling in the sphere of its competences. It stimulate timely implementation of community law in order to avoid infringement proceedings.

The law establish appropriate procedures in order to guarantee that substitution powers are exercised within the limits set by the principles of subsidiarity and fair cooperation.

Italian database of infringement proceedings (EUR-Infra)

Department for European Policies launched in 2008 a national data-base of infringement proceedings, called EUR-Infra, in order to simplify management and monitoring.

The system is available through the Department for European Policies website.

The Department for European Policies enters into the database all informations delivered by the European Commission and by the Administration concerned. It is allowed to change and update all data in the system.

EUR-Infra enables the user to retrieve information on each infringement proceeding concerning its stage (**Pre-litigation**: claim, letter of formal notice, observations of the State concerned, reasoned opinion and **Litigation (before the Court):** referral to the Court, judgement), correspondence between administrations and meetings between Administrations concerned and European Commission.

EUR-Infra includes extensive search facilities for dossiers.

Different levels of access to the system have been predisposed:

- a **Public access** for citizens who wish to access infringement proceedings basic information.
- a **restricted access**, through a secured log-in, for all Ministries involved.

Monthly regular information are generated out of the system in the form of statistical studies for the Government of Italy.

Implementation of EU Law in Latvia

Organisation structure

Each ministry is responsible of implementation of EU law according to their competence – starting with preparation of a national position and participation in different EU working parties in connection with EU law projects and finishing with implementation of adopted EU laws.

The main institution, which is responsible for control and coordination of implementation of EU law in Latvia, is Ministry of Justice. According to the regulation of the Cabinet of Ministers No 243 “Statute of Ministry of Justice“, adopted 29 April 2003, Ministry of Justice is responsible for coordination and control of implementation of EU law in Latvia.

According to the internal regulation of Ministry of Justice No 1-2/6 „Regulation of Ministry of Justice“, adopted 6 April 2009, the Division of Law Theory of Ministry of Justice is a formation which is responsible for coordination and control of implementation of EU law in Latvia. This entity is subordinated to the Deputy State Secretary on Legislation of the Ministry of Justice. The Division of Law Theory is responsible not only for coordination and control of implementation of EU law in Latvia but it also supervises the Database for Notification of National Execution Measures and elaborates methodology of implementation of EU law. The Division of Law Theory also has other responsibilities (e.g. it is responsible for systematisation and codification of laws and regulations in the Information System of Laws and Regulations).

There also are several other departments in Ministry of Justice (e.g. Civil Law Department, Criminal Law Department, State Law

Department), which are also responsible for implementation of EU law in Latvia. These departments prepare legal opinions on all draft legal acts implementing EU law which are elaborated by line ministries (according to the regulation of the Cabinet of Ministers No 300 “Rules of Order of Cabinet of Ministers“, adopted 7 April 2009, all draft legal acts (inter alia draft legal acts implementing EU law) shall be coordinated with ministry of Justice). These departments verify compliance of draft legal acts with EU law and practice of European Court of Justice. The legal opinions on draft legal act usually are signed by the Deputy State Secretary on Legislation of the Ministry of Justice.

There is also established the Meeting of Senior Officials in Latvia for providing cooperation between ministries about questions related to membership in EU.

Representatives from all ministries and the Bank of Latvia participate in the Meeting of Senior Officials. The Meeting of Senior Officials takes place once a week.

Currently the functions of the Meeting of Senior Officials are as follows:

- to consider proposals of Latvia’s priorities related to membership of EU;
- to consider proposals of harmonized state policy related to membership of EU;
- to agree about common solutions for practical work of Latvia’s representatives in EU institutions;
- to share responsibilities between ministries in questionable cases related to membership of EU;
- to coordinate the performance of assigned tasks between line ministries about questions related to membership of EU;

- to consider and prepare proposals for elaboration of draft legal acts if ministries have disaccords about implementation of EU law;
- to approve *Twinning Light* project tenders.

It is expected to update functions of the Meeting of Senior Officials. Currently a new version of regulations of the Cabinet of Ministers are being drafted providing the following functions for the Meeting of Senior Officials (expected to come in force on the third quarter of 2009) :

- to consider proposals of Latvia's priorities related to membership of EU;
- to consider proposals of harmonized state policy related to membership of EU;
- to consider national positions about EU policy documents, drafts of EU law or other questions if these questions fall within the competence of several ministries or substantially affect interests of Latvia;
- to designate ministries or other institutions responsible for EU working parties and committees as well as ministries or other institutions responsible for EU policy documents, drafts of EU law or other questions according to competence of these institutions and also consider disputes about competence of ministries and its responsibilities;
- to consider if it is necessary to submit national position or any other question in for consideration to the Meeting of the State Secretaries or the Cabinet of Ministers;
- to decide about necessity and terms to work out a national position of EU policy documents and EU law drafts;
- to consider other questions related to membership of EU.

Infringement procedures

Latvia has chosen a centralised model for coordination of infringement procedures, accordingly all positions in response to the European Commission's (hereinafter – the Commission) letter of formal notice or reasoned opinion must be approved by the government – the Cabinet of Ministers. In Latvia ministry responsible for the implementation of EU law is the Ministry of Justice, therefore it coordinates the handling of the infringement procedures at both stages (i.e., letter of formal notice and reasoned opinion). Within the Ministry of Justice the entity responsible for coordination of infringement procedures is the Department of Cooperation with the European Court of Justice (hereinafter – the ECJ department) which also is subordinated to the Deputy State Secretary on Legislation of the Ministry of Justice. The coordination process includes two main tasks – to distribute all the relevant information to the line ministries and to ensure that Latvia's opinion with regard to Commission's letter of formal notice or reasoned opinion is drafted, approved by the government and submitted to the Commission. Besides forwarding to the line ministries each individual infringement case, the Ministry of Justice and more specifically, the ECJ department, twice a year informs the government and the parliament (European Affairs Committee) on the state of affairs in respect to infringement procedures initiated against Latvia.

The drafting of Latvia's point of view in reply to Commission's letter of formal notice or reasoned opinion (hereinafter – the position) is the duty of line ministries. Each ministry is responsible for drafting the position in its field of competence (e.g., the Ministry of Agriculture in respect to agriculture, fisheries policy; the Ministry of Finance – in the area of tax law, etc.). Nevertheless, before the position is submitted to the government for approval, line ministries are obliged to obtain a legal opinion from the Ministry of Justice. Such a legal opinion is drafted by the

ECJ department, where necessary, drawing on expertise of the division in charge of the relevant area of substantive law (e.g., Civil Law Department or Public Law Department).

If a letter of formal notice is received, there is no obligation to organise a prior meeting with a line ministry in order to discuss the matter of infringement and Latvia's opinion thereof. The exchange of views among the line ministries and the ECJ department may, and often does, take place informally. In contrast, if a reasoned opinion is issued, one week before the deadline for drafting of the position the line ministry and the Ministry of Justice must get together and discuss Latvia's position and the eventual argumentation in case Latvia would disagree with the Commission. Having taken notice of the fact that reasoned opinions are issued not only for non-compliance, but also for failure to notify the implementation, it is currently proposed to change this order and to hold a meeting only if it is necessary. The meeting will be convened either by the line ministry or the Ministry of Justice – the idea is to remain flexible as to the convocation of such a meeting.

The ECJ department is primarily responsible for evaluation of the quality and argumentation of the position and has the power to suggest technical and substantial changes in the position and the argumentation as well. Where there is no consent with the line ministry about some suggestions or changes in the position or the argumentation, the issue is submitted to the government to decide.

After the position has been approved by the Cabinet of Ministers, the Ministry of Foreign Affairs sends it to the Permanent Representation in Brussels which forwards it to the Commission.

In conclusion it should be mentioned that Latvian system appears to function fairly well because so far Latvia is the only Member State among those who joined the EU in May 2004 which has not been brought

before the Court of Justice by the Commission for infringement of the Community law.

The legal basis for EU law implementation in your country

There is no national regulation for the implementation of EU law in Latvia.

The Ministry of Justice was drafted a handbook of implementation of EU law (hereinafter – handbook). The handbook is published in official WEB site of the Ministry of Justice (http://www.tm.gov.lv/lv/daliba_es/es_ta/tm_kompetence.html). The main aim of the handbook is to summarize basic principles of EU law and general legislative technic for implementation and adoption of EU law in legal system of Latvia. The handbook is divided into five chapters. The first chapter contains information about basic principles of EU law theory. Second chapter contains information about substantial legislative technic which has to be taken into account implementing EW law. Third chapter of the handbook is about terms of cooperation between institutions of Latvia and EU institutions. Forth chapter of the handbook displays a system of coordination and control of EU law in Latvia. But fifth chapter contains general information about infringement procedures. Target auditorium of the handbook is state administration institution and other institutions which are involved in implemetation of EU law.

Methods of implementation

EU law is implemented in Latvia by the means of law, regulation of the Cabinet of Ministers etc. As there are no special procedures for implementation of EU law in Latvia implementation of EU law in Latvia proceeds in common procedure of legislation.

In the process of drafting a law or a regulation of the Cabinet of Ministers ministry responsible for transposition of certain directive fills in an annotation to the draft law or the regulation of the Cabinet of Ministers including in the annotation information about conformity of the draft law or the regulation of the Cabinet of Ministers to the EU law and decisions of European Court of Justice. Evaluating the draft law or the regulation of the Cabinet of Ministers Ministry of Justice (division responsible for evaluation of certain draft law or regulation of the Cabinet of Ministers) checks the information presented in the annotation and writes legal opinion about conformity of the draft law or the draft regulation of the Cabinet of Ministers to the rule of law, legal system of Latvia and EU law. If Ministry of Justice establishes unconformity of the draft law or the draft regulation of the Cabinet of Ministers to EU law ministry responsible for transposition of certain directive makes amendment to the draft and sends it to the Ministry of Justice for evaluation again.

Information technologies or systems

Taking into consideration the increasing amount of exchanged documents between the institutions of the EU and the EU Member States an effective instrument for monitoring and controlling of the transposition is necessary to help the responsible state institutions react to changes in the EU legislation.

Currently an information system is being developed that will be composed of model parts such as:

(1) Section of controlling the transposition of the *acquis*.

The aim of this section is to control the observance of deadlines for transposition of the EU legislation (directives) as well as sending notification on transposition of directives, including individualized system of reminders for relevant state institutions before the deadline for

transposition. Thus the section of controlling would ensure timely transposition of the EU legislation into the national legislation and the planning process for the transposition of the *acquis*. The institutions responsible for the transposition of relevant EU legal acts will be able to enter the information on the foreseen arrangements it plans take to ensure transposition of the *acquis*, and on the present stage of execution in this functional section of the information system.

This section will also deal with implementation of other EU instruments (framework decisions) as well as directly applicable EU instruments (i.e., regulations, decisions), which may foreseen certain obligations of the state institutions to be implemented in the national law. The section would ensure timely and effective implementation and the planning process.

In addition, this section is to implement a mechanism of distribution of responsibility among state institutions on newly adopted EU legislative acts. By distributing responsibility and assigning joint responsibility the state institution involved in implementation will be determined on the basis of division of responibilities of national institutions to proposals of the particular acts.

(2) The section of infringement proceedings and (3) the section of European Court of Justice.

The aim of these sections is to ensure effective overview of the proceedings and coordination of the process of preparing official position of the country when infringement procedures are started against Latvia by the Commission. The section provides timely responses to the Commission as well as provides that necessary national measures are taken in order to stop infringement procedures. The section also stores information on infringement proceedings started against Latvia for late or incorrect transposition. This section will store and compile information and

documentation relating to proceedings initiated and decisions taken by the European Court of Justice.

(3) The Information Section.

The aim of this section is to store and compile information of the transposed *acquis*, the responsible and jointly responsible institutions, difficulties or problems in the process of transposition. This information must be kept in the information system in order to analyze, prepare reports and statistical reports on it, etc.

Implementation of this information system would ensure that all the information contained in it would be most up-to-date and easy to access for all parties involved – ministries and institutions subordinated to them, the State Chancellery, the Parliament. It would also ensure that all institutions have access to the same information sources; the information can be structured and found quickly by using detailed selection criteria.

The information system will be accessible to the state institutions of Latvia (ministries and institutions subordinated to the ministries responsible for transposition, the State Chancellery, the Parliament responsible for transposition) and will be managed by the Ministry of Justice as it is the main institution responsible for the transposition of *acquis* into national legislation.

The information flows will be secured as follows: the information of a newly adopted EU legislative act will be obtained from the database EUR-Lex (http://eur-lex.europa.eu/) by using the offered web service mechanism. The EUR-Lex database is maintained by the Office for Official Publications of the European Communities (Publications Office). The information on work completed by Latvia in the field of transposition is to be obtained from the Database for Notification of National Execution Measures (maintained by the European Commission) by using the XML data structures or web services. Accordingly, notifications to the national

execution measures will be transmitted in the same manner. It is not planned to store either EU legislation in force nor legislative drafts in the information system, but only a information about them (metadata). All the other information not obtained from the EU databases (the information on implementation progress into national law, responsible national institutions for implementation of particular EU legal act, etc) will be entered manually by the users of the information system (state institutions).

Good practices

In order to ensure timely and qualitative implementation of directives it is necessery to draft grafic of term for implementation of certain directive and duly share responsibilities between ministries. The Ministry of Justice since 26 July 2005 on a regular basis (usually three times a year) serves an information report to the Cabinet of Ministers including in the report information about directives which are not yet transposed into the legal system of Latvia. The report includes also information about further execution measures planned by ministries responsible for the transposition of certain directives. Such a system ensures harmonization of competence between ministries and duly implementation of directives. As it is shown by the information on a regular basis prepared by the Secretariat General of the Commission usually directives are implemented timely in Latvia. As by 29 April, 2009 Latvia was in the second place between EU member states in implementation of directives. Furthermore as it was mentioned before Latvian system appears to function fairly well because so far Latvia is the only Member State among those who joined the EU in May 2004 which has not been brought to the Court of Justice by the Commission for infringement of the Community law.

Implementation of EU Law in Lithuania

ORGANIZATION OF IMPLEMENTATION OF THE EUROPEAN UNION LAW IN THE CONDITIONS OF A SMALL MEMBER STATE.

Principle features of the European Union law transposition and implementation system in the Republic of Lithuania

The European Union (hereinafter – EU) can function effectively only if all member states unconditionally abide by common rules. The drafting, coordination and adjustment of these rules, *i.e*. EU legal acts, is quite a lengthy and complicated procedure. All the member states have an opportunity to express their opinion and defend their national interests seeking to achieve common goals at the end. Once a compromise has been reached and a legal act adopted, every member state has to ensure its domestic enforceability. The type of a legal act (regulation, directive or decision) determines the nature of its operation and further actions required from a member state.

Even if EU law becomes a part of national law since the EU membership comes into play, obviously, it can not be maintained that EU law unconsciously coincident with national law. These two legal systems are created at two different levels following different set of rules applied to legal procedure. So legal acts adopted by the European institutions can not be changed, replaced or complemented by legislative or other administrative institutions of member states. Though national judiciary institutions have a power to apply European Union's legal provisions, the solemn interpretation of the EU law is in the hands of the European Court of Justice.

Consequently, adequate coordination of the EU law transposition and implementation process is a vital precondition to ensure timely and effective operation of EU law in a member state. In the case of Lithuania, developed system of transposition and implementation of the EU law is based on the centralized coordination and is characterized by a detailed regulation of procedures, clear differentiation of institutional responsibilities and a flexible mechanism for problem solving.

Centralised coordination and organisation of the process of EU law implementation is a substantial tool in the case of a small member state to efficiently manage the process of transposition and implementation. The advantages of centralised coordination and organisation of the process reveal manifestly when the coordination is centralised at high administrative level.

So, in Lithuania horizontal coordination level is concentrated in the Office of the Government of the Republic of Lithuania. In vertical level – within ministries, state institutions and other bodies that within their competence are in charge of transposition of the EU law into the national legislation and its implementation, high level civil servants (i.e. state secretaries) and EU coordination units are responsible for the internal coordination. The low number of deficit on transposition of internal market tools (10/11/2008 – 0,6%, i.e. 10 non notified directives), high progress in notification of national measures implementing all adopted directives (first places among all member states during almost 5 years of membership) and low number of the EU law infringements proves and justifies well functioning of EU law transposition and implementation system in Lithuania.

The coordination is founded using following substantial system's principles which will be clarified and explained hereinafter:

- Clear division and arrangement of institutional responsibilities;

- Detailed regulation of procedures;
- Flexible mechanism for problem solving;
- Early involvement in shaping of the content of draft EU legal acts (through early coordination of national position);
- Transparency and accessibility of the EU related information to all related bodies (enabled through the Information system for Lithuania's membership of the EU – LINESIS);
- Systematic verification of compliance of draft national legal acts with the EU law (expert conclusions on the conformity of national draft legal acts with the EU law by the EU law department under the Ministry of Justice and revision of concordance tables by EU law division in the Office of the Government);
- Prioritisation of EU related draft laws and other draft legal acts.

Legal background of the European Union law transposition and implementation system in Lithuania

Relevant legal basis and operative legal instruments of implementation of the EU law are respectively important factors that lead a member state to fulfil its obligations. There are three main legal acts concerning implementation of the EU law in Lithuania: the **Constitution of the Republic of Lithuania** (more precisely – the Constitutional act on membership of the Republic of Lithuania in the European Union), the Law of the Government and the Rules on the Coordination of the EU affairs.

Incorporation of the EU law into the national law system is an object of constitutional regulation. The Constitution of the Republic of Lithuania (legal act of the supreme power) determines proceedings of legislation, establishes grounds of Lithuanian law system. Thus, foundation of the EU membership's obligations for the Republic of Lithuania is determined in the Constitution.

The Constitutional Act of 13 July 2004 "On the Membership of the Republic of Lithuania in the European Union", that is an integral part of the Constitution, provides that "The norms of *acquis* of the EU shall be an integral part of the legal order of the Republic of Lithuania. Where these arise from the founding Treaties of the EU, the norms of *acquis* shall apply directly, while in the event of a collision between legal norms, the norms of *acquis* shall prevail over the laws and other legal acts of the Republic of Lithuania. <…> The Government shall consider the proposals to adopt the acts of EU law following the procedure established by legal acts. As regards these proposals, the Government may adopt decisions or resolutions <…>."

The Article 51 of the **Law on the Government** provides that the Government "within its competence shall be in charge for the transposition of the EU law into the national legislation and the implementation thereof. The EU legal acts shall be transposed into the national legislation and implemented thereof in accordance with the procedure laid down by the Government." Thus, it is explicitly named that the Government within its competence is responsible institution for the transposition and implementation of the EU law.

According to mentioned provisions, in order to fulfil Government's obligation to lay down the procedure for transposition and implementation of the EU law into the national law, the **Rules on the Coordination of the EU affairs** were approved by the Government Resolution of 2004 January 9, No. 21.

The main purpose of the Rules on the Coordination is:

- To ensure that coordinated and coherent Lithuania's positions are prepared and presented in the EU institutions, and
- To enable smooth transposition of *acquis communautaire* and its implementation.

Institutional organisation and responsibility

The centralized model of the EU law implamantation coordination is based on top-down approach:

- The Office of the Government of the Republic of Lithuania appears as a main institution coordinating the whole process of European law implementation in Lithuania.
- On the other hand, ministries and other state institutions as well as the other bodies or agencies are the interactive and direct players of the system.
- Important role in this process is played by European law department as expert institution.

Areas of the European affairs coordination in the **Office of the Government** composes of several branches:

- Participation in the formation of Lithuania's EU policy;
- Coordination (in cooperation with Ministry of Foreign Affairs) of the preparation of Lithuania's position on the EU related issues;
- Management of administrative capacities related to better representation of Lithuania's interests in the EU institutions and preparation for EU presidency;
- Coordination of transposition of *acquis* communautaire and its implementation;
- Public information about Lithuania's membership in the EU;
- Coordination of Twining programme;
- Management of the flow of the EU documents (receiving, registration, storage, distribution);
- Initiation of the EU related impact assessments.

To cover all those areas and to have a clear division and separation of responsibilities there is inner institutional segmentation of

the Office of the Government designed to reflect implementation of attributed duties. There are two specialized departments of the Office of the Government:

- Department of the EU policy – it is responsible for coordination of matters relating to participation in the EU decision taking procedures, and
- Department of the EU law implementation – it is responsible for coordination of matters relating to the EU law transposition and implementation.

Department of the EU law implementation is composed of two divisions: Division of the EU law and Division of institutional capacities monitoring. Department of EU policy is composed of two divisions too: Division of EU policy analysis and Division of position coordination (*q.v.* Annex 1).

On behalf of the Office of the Government, Department of the EU law implementation coordinates the EU law transposition and implementation process, namely, oversees the entire EU law implementation system in Lithuania, including coordination of pre-trail stage of infringement procedure, ensures the planning of tasks and observance of deadlines, deals with arising problems, gives methodological assistance to other institutions, etc.

The main objectives of organization of the EU law transposition and implementation process are as follows:

- To ensure timely and appropriate elaboration and implementation of the EU law transposition and implementation plan (hereinafter – the Plan);
- To analyze and represent information about implementation of the Plan and other EU membership obligations;
- To assure timely and correct verification of correlation tables;

- To execute effective central notification of directives;
- To guarantee relevant operation of pre-trial infringement procedures.

Implementation of the EU law itself falls within the competence of respective **ministries and other state institutions** as well as other agencies. About 40 state institutions take part in this process. Competent institutions are responsible for proposition of national measures that implement the EU law (preparation of the Plan), implementation of the measures approved in the Plan, preparation of correlation tables, preparation and submission of the documents related to the pre-trial procedures of the EU law infringements. Specialists of these institutions draft laws, Government's decisions or Ministers' orders transposing and implementing directives and other EU acts and undertake other measures helping to ensure a proper functioning of the EU legislation in Lithuania.

Another important administrative formation considering the compatibility of national law with EU law in Lithuania is the European **law department under the Ministry of Justice**. European law department provides expert conclusions on the conformity of the national law to the EU law and represents Lithuania in the European Court of Justice. Besides other functions, European law department submits legal opinions on the compliance of draft laws, as well as draft resolutions of the Government and minister's orders if necessary with the requirements of the EU law and in accordance with the procedure established, rends assistance to ministries and other state institutions in drafting any national legal act in a way that it would not contradict to the requirements of the EU law. European law department also informs ministries and other state institutions about national legal acts in force, which do not comply with the practice of the European Court of Justice and interpretation of the EU law.

Procedure of transposition and implementation of the European Union law

Coordination **process of the transposition and implementation** of directives, regulations, decisions and other EU legal acts into the national legislation is complex and multi-stage mechanism (*q.v*. Annex 2). Detailed procedures are regulated by the Rules on the Coordination of the European Union affairs: it comprises Lithuanian state institutions' activities from publication of the EU legal acts to publication of adopted national legal acts (and their notification to the European Commission in case of directives).

The process starts when the EU legislation is being published in the Official Journal of EU. Office of the Government registers newly adopted and published EU legal acts in the LINESIS (Information system for Lithuania's membership of the EU) and performs immediate assignment of competent state institution for transposition and/or implementation. This assignment is based on main principle which assures effective work: one responsible institution for one EU legal act. Often, efforts of several institutions are required. Nevertheless, one institution is chosen as a *responsible* one and other (or more) is chosen as a *participating* one. The responsible institution is in charge of leading and administrating essential tasks required for transposition and/or implementation of an EU legal act.

Within 3 days institutions are able to express an objection for the assigned responsibility. Disagreements on the distribution of the EU legal acts are settled at the *coordination meetings* held by the Office of the Government and, if appropriate, at a meeting of State Secretaries of the ministries or at a meeting of the Government. Though in practise, most disagreements are settled by unofficial communication between the Office of the Government and state institutions involved in the matter.

Responsible institution for transposition and/or implementation of an EU legal act engages in the planning, preparation, adoption and implementation of necessary national measures. For that purpose the Plan of EU law transposition and implementation, which consists of two parts: the Plan of transposition and implementation of directives and the Plan of implementation of other EU legal acts, has been successfully used as an effective tool.

Within 3 weeks from the assignment, responsible institution has to submit concrete measures for the transposition and/or implementation of EU legal act to the Office of the Government. As a result, the Plan for the transposition and/or implementation of EU law is prepared and constantly updated. So, besides determined responsible and participating institutions, the Plan consists of concrete national measure (draft legal acts, administrative or other measures) and estimated dates for the preparation and adoption of those measures planned.

In case of the Plan of transposition and implementation of directives related institutions provide proposals concerning national draft legal acts following implementation deadlines of a specific directive – expected date of the adoption of a legal act has to be not later than a month prior to the implementation deadline set in the directive, and when a national measure transposing a directive is in the level of law – Government should approve it 6 month prior to the implementation deadline set in the directive – this is the commonly expected period of time for the Lithuanian Parliament to adopt a law (with an exception when the period between the implementation deadline of directive and its publication in Official Journal is shorter than 8 months).

In case of the Plan of implementation of other EU legal acts institutions indicate necessity of national measures and present concrete EU legislation provisions the implementation of which will require drafting

those measures, along with the dates set by the EU legislation for the implementation of the said provisions.

The Office of the Government is performing constant monitoring and supervision of how responsible institutions are following the requirements set in the Plan. The outcome of necessary actions taken by responsible institutions is presented and discussed on monthly basis in meetings of the Ministries' State Secretaries. Arising problems which responsible institutions might come across while implementing the national measures indicated in the Plan are addressed in coordination meetings organized in the Office of the Government, while the most difficult questions can be included into the agenda of meetings of the Ministries' State Secretaries or even Government's meetings. It should be emphasised, that the draft legal acts related to the EU law as well as purely national draft legal acts should follow the same law-making procedure.

An European Union member state, having transposed an EU directive into the national law, is obliged to notify the European Commission, by providing the texts of the respective national legal acts and, in some cases, correlation table. Supervision of the **process of directives notification to the European Commission** in Lithuania is also coordinated by the Office of the Government. In the process of notification the same assigned responsible institutions takes appropriate actions. It is required within 3 days after the publication of national legal act in the national Official Gazette to enter relevant information into the electronic notification database. Office of the Government examines if the information is correctly entered. To examine the content of national measures and its quality, the correlation tables are necessarily filled when notifying all the directives. Then within 3 days responsible official in the Office of the Government notifies the European Commission of the

transposition of directives. When amending or repealing provisions of the notified national legal acts that transpose and/or implement the provisions of the relevant directive, institutions enter information about that without delay.

If a member state does not transpose or implement the provisions of EU legal act in the national law by the date indicated in the act or does it only partially or inadequately, the European Commission may initiate the so-called **EU law infringement procedure** (Articles 226, 228 of the EC treaty). The coordination of EU law infringement procedure in Lithuania is divided into two stages taking into account its different nature and institutional responsibility: pre-trial stage of infringement procedures (including so called pre-226 cases) that is coordinated by Office of the Government (*q.v*. Annex 3) and stage of legal proceedings in European judicial institutions that is coordinated by European law department under the Ministry of Justice.

In pre-trial stage again, assigned institutions and bodies within their competence are responsible for the submission of replies and other documents to the European Commission. Requirement of coordination of draft reply with the Office of the Government, European law department and Ministry of Foreign Affairs endue the completeness and quality of an answer.

Further consideration of draft reply depends of the stage of pre-trail procedure: in the case of official notice a draft replay can be discussed in the meeting of State Secretaries only if necessary (though in practise it has never happened yet); in the case of reasoned opinion it is required to present a draft reply with the position of the Republic of Lithuania in the meeting of the Government, which adopts Resolution on it.

In the stage of legal proceedings in European judicial institutions European law department under the Ministry of Justice together with state institutions and other bodies concerned prepares Lithuanian position and compiles necessary procedural documents for a concrete case. The positions of the Republic of Lithuania on cases are drafted in order to ensure adequate representation of the Republic of Lithuania in judicial procedure held by the European Court of Justice, mostly in matters concerning interpretation and application of EU law. Drafted positions are generally coordinated in the working group on the EU courts. When a case being heard in a European judicial institution is related to the competence of the Parliament the European law department notifies the Committee on European Affairs and specialised committees of the Parliament. A position of the Republic of Lithuania on concrete case is approved at the meeting of the Government when adopting a resolution of the Government. Thereby, the European law department coordinates the drafting of positions, compile necessary procedural documents and represents them in the Court of Justice.

Instruments that ensure timely and qualitative transposition and implementation of the European Union law

Seeking to ensure timely and qualitative transposition and implementation of the EU law in Lithuania, there are several instruments that have to be emphasised. Those instruments are of essential importance to the whole regulated system. First of all, this is the **Plan for transposition and implementation of the EU law, which is the background for overall EU law transposition and implementation process in Lithuania.** It comprises all the activities of state institutions related with the EU law implementation, starting with the implementation of newly adopted EU legal acts and ending with the activities necessary to

implement decisions of European Court of Justice or to eliminate implied or formally declared EU law infringements. This single tool – the Plan for transposition and implementation of the EU law – is made in comprehensive though detailed manner, and is constantly updated. So it is like a live organism reflecting the real situation in EU law implementation. This instrument is a functional mean applied to simplify the whole complex transposition and implementation process. Possibility of simple update and close supervision of the Plan ensure decent functioning of the whole transposition and implementation process. Office of the Government as a main administrator of this tool provides methodological assistance and guidance to the state institutions and constantly monitors its implementation: monthly overviews are presented to the meetings of the State Secretaries, if necessary – to Government and Parliament.

Another effective tool is **correlation tables**. According to the Statute of the Parliament and Working regulation of the Government, as well as Rules on the coordination of EU affairs, it is required to complete and attach a correlation table to every single draft legal act which is transposing and/or implementing an EU legal act, disregarding the fact that this EU legal act itself is not requiring a Member State to provide a filled correlation table. Correlation tables for draft national legal act that transpose and/or implements the EU law serve as effective instrument seeking to ensure the best quality of the EU law transposition and implementation. Correlation tables are drafted, coordinated and submitted by the responsible Government institutions to the Office of the Government, which performs its checking. Another important requirement is that correlation tables are necessarily filled when notifying all the directives for European Commission. This reinsures another round of evaluation of the implementation level of the directives.

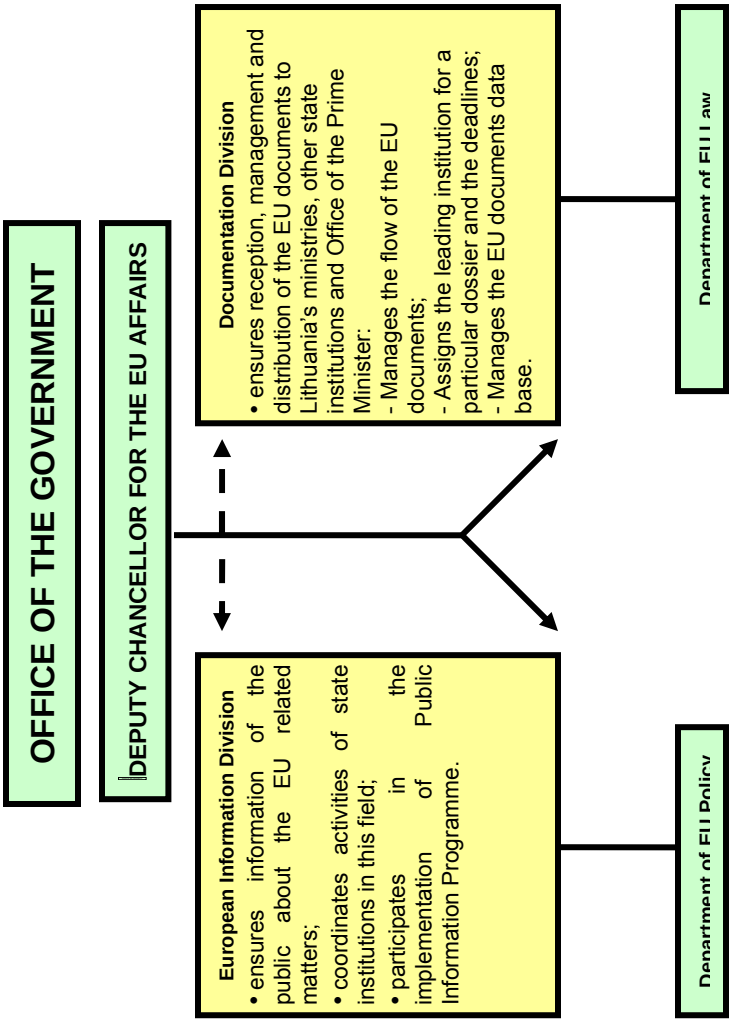
The third instrument, which ensures smooth coordination is a special **information system of the Lithuanian membership in the EU – LINESIS**. It is designed to manage the flow of documents in the EU affairs field and namely: to register and administer the EU documents, to work with Lithuanian positions and to coordinate transfer of the EU law into national legislation. With the help of LINESIS all the information related to the EU affairs (starting from new legislative initiatives to the EU to infringements procedures) is being kept in one electronic data base which works on a daily basis continuously on line where rising problems and questions are solved immediately and reciprocally.

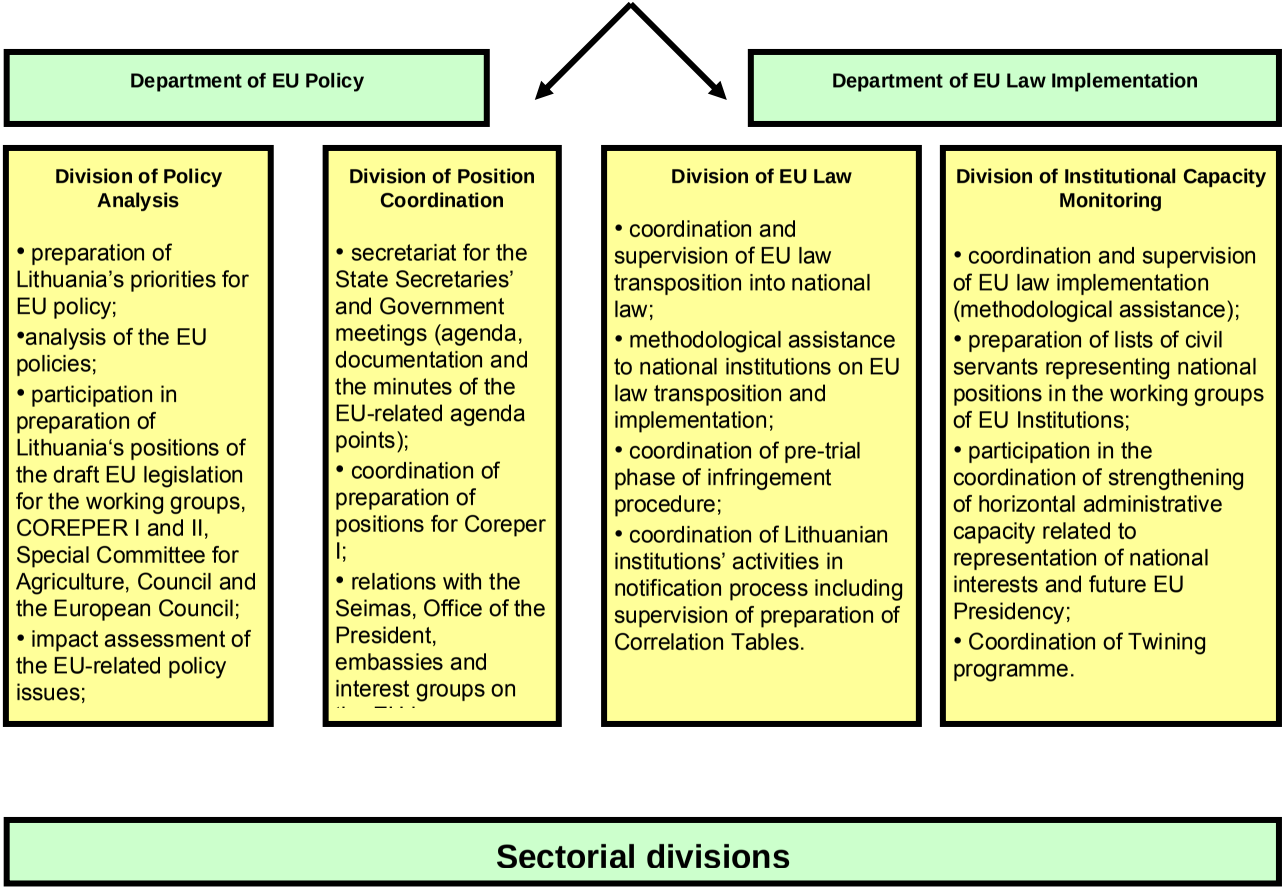
The users of LINESIS are ministries and other state institutions which take part in the EU affairs system. This information system is not open to the public. However efforts are being made so that the voice of all parties concerned is heard and the process of European policy formation and implementation is transparent, effective and democratic. Therefore, there exists a 'mirror' version of LINESIS designed for the social-economic partners. Public information related to the received EU documents, Lithuanian positions and other information is announced in this version of information system.

Finally, additional monitoring of draft parliamentary laws implementing EU law functions as complementary tool seeking to achieve timely EU law implementation. For this purpose a so-called **monitoring list of draft national laws** transposing and/or implementing the EU law is being prepared twice a year by the Office of the Government. This list has direct reflection in the Parliament's agenda of spring and autumn sessions. The monitoring list is being constantly updated and sent weekly to the Committee on European Affairs of the Parliament, which discusses the course of drafting EU related national laws periodically.

ANNEXE 1

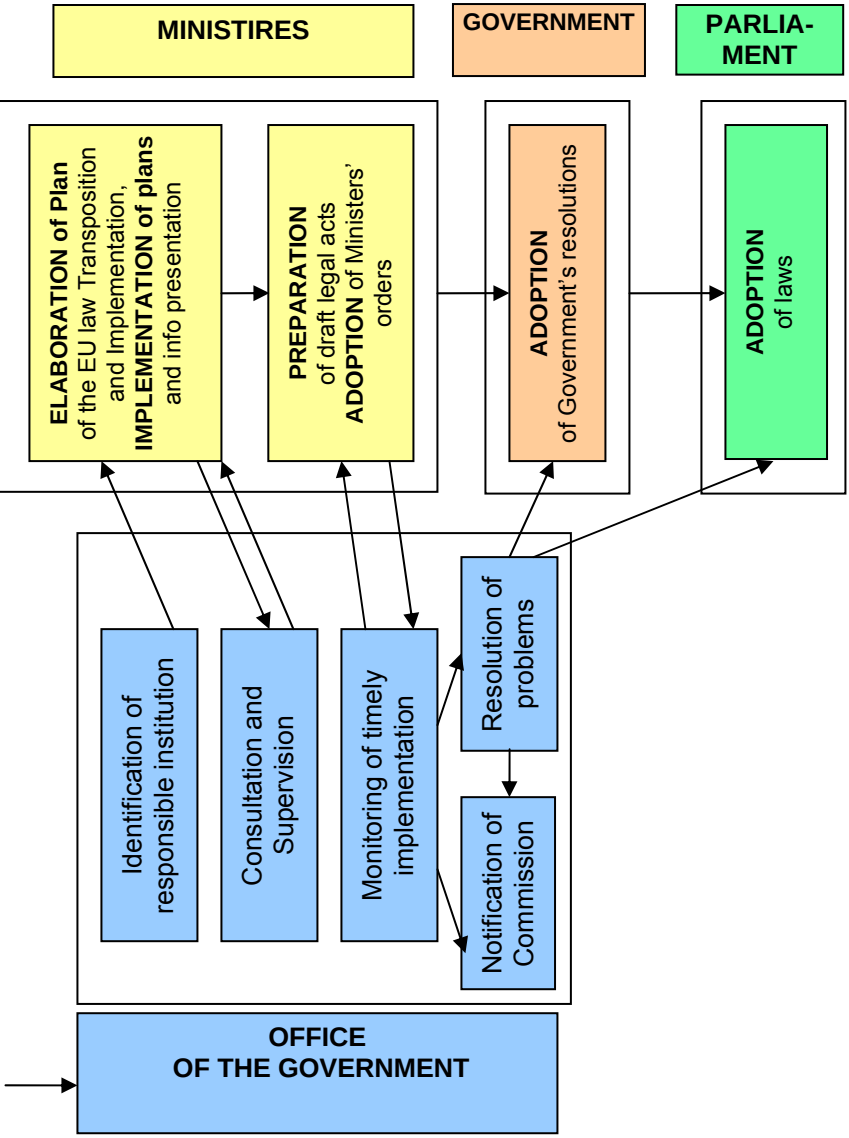
Administrative organisation of the European Union's affairs in the Office of the Government of the Republic of Lithuania




Department of EU Policy
Department of EU Law Implementation
Division of Policy Analysis
• preparation of Lithuania's priorities for EU policy;
•analysis of the EU policies;
• participation in preparation of Lithuania's positions of the draft EU legislation for the working groups, COREPER I and II, Special Committee for Agriculture, Council and the European Council;
• impact assessment of the EU-related policy issues;
Division of Position Coordination
• secretariat for the State Secretaries' and Government meetings (agenda, documentation and the minutes of the EU-related agenda points);
• coordination of preparation of positions for Coreper I;
• relations with the Seimas, Office of the President, embassies and interest groups on
Division of EU Law
• coordination and supervision of EU law transposition into national law;
• methodological assistance to national institutions on EU law transposition and implementation;
• coordination of pre-trial phase of infringement procedure;
• coordination of Lithuanian institutions' activities in notification process including supervision of preparation of Correlation Tables.
Division of Institutional Capacity Monitoring
• coordination and supervision of EU law implementation (methodological assistance);
• preparation of lists of civil servants representing national positions in the working groups of EU Institutions;
• participation in the coordination of strengthening of horizontal administrative capacity related to representation of national interests and future EU Presidency;
• Coordination of Twining programme.
Sectorial divisions

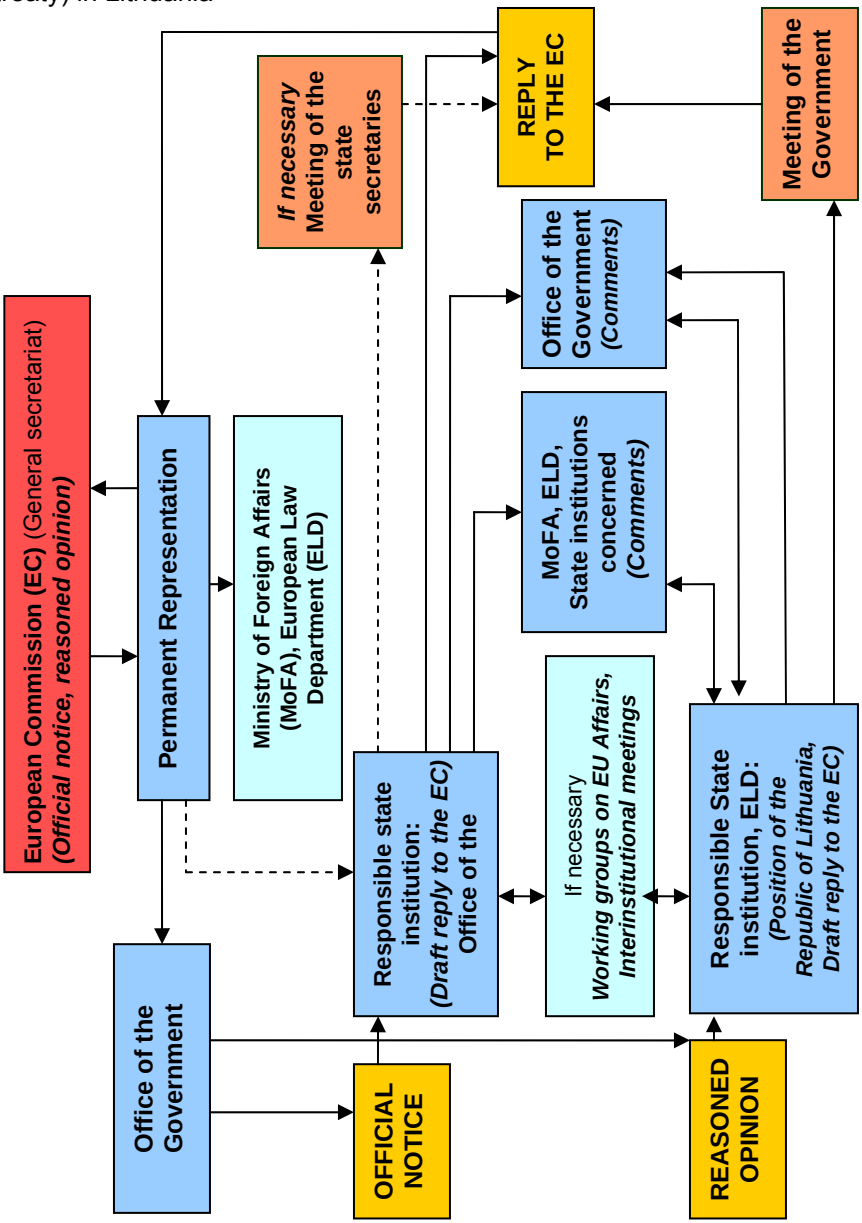
ANNEXE 2

Coordination of European Union law transposition and implementation procedure in Lithuania



ANNEXE 3

Coordination of EU law infringement procedure (Article 226 of the EC treaty) in Lithuania



Implementation of EU Law in Luxembourg

THE ROLE OF THE MINISTRY OF FOREIGN AFFAIRS AND IMMIGRATION IN THE TRANSPOSITION OF EUROPEAN DIRECTIVES AND IN FOLLOW UP OF INFRINGEMENT PROCEEDINGS

The Ministry of Foreign Affairs and Immigration (MFAI), and more particularly its Directorate for International Economic Relations, intervenes at two stages in the process of European law transposition, namely:

- the coordination of the transposition itself, and
- the coordination of the infringement proceedings, principally for non transposition, but also for late and incorrect transposition.

Concerning transposition of EU law, the role of the MFAI is limited to **coordination**. Once the competent ministry for a directive has been identified, the MFAI is **centralizing the information related to the transposition in a database.** This database contains the following information: name of the directive and its transposition deadline, name of the person(s) responsible in the respective ministry, type of national implementation measure envisaged, state of play in the national legislative or regulatory procedure, prospective transposition calendar, state of play in infringement proceedings and of Luxembourg's answers to the latter.

The MFAI draws on several sources of information to complement its database : (i) the ministries in charge of transposition, (ii) the European Commission, (iii) the Chambre des Députés (national parliament) and (iv) the Conseil d'Etat (State Council).

Moreover, the MFAI is responsible for the **official correspondence with the Commission**[1]: notification of transposition, notification of the answers to the letters of formal notice and reasoned opinion of the Commission in the infringement proceedings and the statements of defence in these same proceedings.

The MFAI informs the Minister of the **monthly infringement proceedings** as well as any other ministerial departments concerned by more advanced infringement proceedings. Our agent at the European Court of Justice represents Luxembourg in all infringement proceedings and coordinates the drafting of Luxembourg's statements of defence with the ministry in charge of transposition. The agent is the only person authorised to sign the statements of defence in the name of the government.

Due to its central role of coordination and its systematic follow-up of the transposition and of the infringement proceedings, the MAEI disposes of all necessary information allowing for a real-time analysis of **the state of play in EU law transposition**. The MFAI can thus inform the government at any time on the state of transposition of EU law and the infringement proceedings in Luxembourg.

The MFAI moreover drafts an **annual report** on transposition of EU law in Luxembourg which it transmits to **Parliament**.

The role of the ministries

The **different ministries are responsible** for the drafting of national legal or regulatory instruments in order to put the national legislation into conformity with the directives. In this regard, the ministries analyse the normative content of a directive. Next, they compare the current state of the national law in order to appreciate how far it has to be

[1] Parallel to the hard copy an electronic copy is sent.

modified. Finally, they draft the laws or grand-ducal regulations necessary for transposing the directive into national law. The ministries are also responsible for the **transposition within the deadline of the directive**.

Legal basis of the transposition

Concerning the legal instruments, the directives are (i) either implemented by **a law**, if necessary complemented by a grand-ducal regulation (which specifies the details of the implementing measures) or (ii) **by a grand-ducal regulation** (if the existing legal basis allows it).

The government submits the draft law for consultation to the State Council and introduces it in parallel to Parliament. The State Council's opinion checks the conformity of the draft law with international law, the Constitution and general principles of law in a report which contains general considerations, a review of the draft law, and if necessary an alternative draft law. The State Council's opinion is also required for grand-ducal regulations, except if an emergency procedure has been requested. In the case of draft laws, the opinion of the State Council can contain one or several formal oppositions. If there is/are any formal opposition(s), the competent parliamentary commission presents an amended text which it submits to the State Council.

The law of 9 August 1971 also enables the government to transpose certain directives by the means of a grand-ducal regulation and thus avoid transposition by law, which is a more complicated and time-consuming procedure. The use of this law is nevertheless limited to the following domains: economics, technical, agriculture and forest management, social affairs and transport, and is by consequence only very rarely used. However, the State Council rejects the use of the law of

1971 in those domains where the Constitution stipulates that a law is necessary, for instance the domain of restrictions to freedom of trade[1].

Tools the MFAI can draw on to promote timely transposition

The MFAI can draw on several tools enabling it to monitor the transposition of directives.

The MFAI organizes regular **bilateral meetings** with the ministries to discuss the transposition status of the directives which they are in charge of and to address measures to improve this status.

The MFAI also hosts an **inter-ministerial committee responsible for the coordination of EU policies** (CICPE). This committee brings together senior representatives of each ministry as well as of the permanent representation of Luxembourg to the EU. The state of transposition in Luxembourg is a permanent fixture on its agenda.

Since June 2008, the MFAI has adopted new accompanying measures to the ministerial guidelines set out in the Prime Minister's letter of 10 July 2006 concerning the transposition of European directives. The ministries are obliged to elaborate **explanatory "fiches" of directives**. These "fiches" aim to incite the ministries to familiarize themselves with the provisions of the draft directives from the stage of their adoption by the European Commission (as well as their legal impacts), to anticipate eventual difficulties that may arise at the time of the transposition and to clarify questions of competence at an early stage. The ministries submit the "fiche" within one month from the notification by the MFAI of the draft EU legislation. The "fiche" contains the following information: name of the draft directive, date of adoption by the European Commission and

[1] Art. 11 (6) of the Constitution: "Freedom of trade and industry, the exercise of liberal profession and of agricultural work are guaranteed, except for restrictions to be established by law".

Council, the transposition deadline, legal basis, decision process, person(s) in charge of the directive, objective and content, legal implications, effects on Luxembourg and potential difficulties of the transposition. The "fiches" are regularly presented in the CICPE. Furthermore, when a directive is published in the Official Journal, the MFAI continues to ask the competent ministry for a prospective calendar of transposition.

The new measures accompanying the circular letter of the Prime Minister of 10 July 2006 allow a regular follow-up of late transpositions as well as the transfer of the information to the Minister and the Council of Ministers.

Factors explaining late transposition by Luxembourg

The reasons for the transposition deficit of EU member states are either linked to substantial, institutional and organizational or political factors.

Concerning the **substantial factors**, they can be either (i) inherent characteristics of the directive, for example its technicality or level of detail, the complexity of the directive (introducing new legal concepts), its transposition deadline, (ii) or inherent characteristics of the pre-existing national law (topic already strongly regulated or not, important codification of the national law, etc.) or related to the transposition, as the type or the number of national legal instruments.

Institutional and organisational factors include specificities of the national legislative process, the number of ministries involved as well as the functioning of the administration.

Institutional and organisational factors are the principal factors at the origin for late implementation in Luxembourg: (i) the lack of staff

(depending on the ministry and on the number of directives to transpose) and (ii) the absence of a systematic follow-up of EU legislation, from the moment of its inception as a draft directive or regulation, through the various stages of negotiation until its publication in the Official Journal.

The governmental administration considers the quality of the drafting as well as legal codification as essential. This implies that the drafting of the national law or grand-ducal regulation takes much longer. A positive effect however is a relatively low number of infringement proceedings which are addressed to Luxembourg for incorrect implementation of EU law.

The adoption of several important legislative initiatives in the past years has also led to a restructuration of several sectors of the economy (water, energy, air and rail transport, etc). This is linked both to substantial factors and institutional factors (specific administrations needed to be created within the context of various important projects).

Finally, the last institutional factor is external, namely the mandatory consultation of the State Council on every draft law and nearly every grand-ducal regulation, as stated before, knowing that this procedure can be lengthy. The State Council also regularly rejects the use of the simplified procedure of the law of 9th August 1971. It is however important to underline that unfortunately many draft laws are submitted with a certain delay to the State Council.

It seems that **political factors** are rarely at the origin of late transpositions in Luxembourg.

Coordination of implementation of EU law in Malta

The EU Secretariat within the Office of the Prime Minister is responsible for the coordination of implementation of EU law in Malta. The Secretariat's tasks consists of two principal elements - at the internal level, responding to requests for policy decisions required by the EU's institutions through the Permanent Representation in Brussels in a manner which ensures timely and coordinated action; at the external level - finalising guidelines and instructions for approval by the Cabinet Committee on EU Affairs where these concern Council meetings as well as meetings of the Committee of Permanent Representatives (COREPER) and other Committees established by the Treaties. It is not involved in the preparation and instructions related to the Union's Common Foreign and Security Policy. It also has a trouble-shooting role especially in the area of arbitration on questions of inter-departmental overlap. It also ensures the flow of information between the Permanent Representation and the respective ministries with respect to different policy areas.

It coordinates the preparatory work for the Cabinet Committee on EU Affairs. It also coordinates the work of the Inter-Ministerial Committee for EU Affairs and acts as its secretariat. This Committee, chaired by Richard Cachia Caruana, Permanent Representative of Malta to the EU, serves as an advisory and mediatory body in the coordination of EU issues. This Committee meets once a week and includes the Permanent Secretaries of the Ministries who have items on the meeting's agenda and who form part of the Committee whilst that item is being discussed, the Directors of the EU Affairs Directorates established within each Ministry,

the Head of the Prime Minister's Secretariat, the Head of the Foreign Minister's Secretariat as well as the Director General, Economic and European Affairs of the Ministry of Foreign Affairs and the Head of Malta Forum in Europe which falls under the remit of the Ministry of Foreign Affairs. The Committee discusses and approves Malta's position in the relevant dossiers discussed in the Institutions including infringements.

The Secretariat is responsible for seeing that both the Cabinet Committee on EU Affairs as well as the Inter-Ministerial Committee for EU Affairs are in a position to take the required decisions about any EU related matter in a well-informed and timely manner while ensuring that appropriate instructions are received by the Permanent Representation in Brussels as well as those participating in Councils, committees, working parties and working groups of the EU.

Such procedure ensures that the required commitment to timely transposition is communicated across all Ministries at the required level.

Competence

The EU Secretariat within the Office of the Prime Minister coordinates the preparatory work for Cabinet with regard to EU-related issues. It also coordinates the preparatory work for the Inter-Ministerial Committee for EU Affairs.

The EU Secretariat is also responsible for monitoring the implementation of the adopted acquis in line with the agreed time-frames, both in terms of legal adoption and implementation. In so doing, it liaises on a regular basis with the Directors of EU Affairs in the different Ministries to ensure timely transposition.

Each Ministry (and government body through the Ministry) that is responsible for transposition designates the Director of EU Affairs as a

contact point with responsibility for monitoring transposition. A national network is, therefore, established amongst these officials.

Reminders are regularly sent well in advance to each Ministry prior to the deadline for transposition. When a deadline for transposition is due, a reminder is sent at both administrative and Ministerial level.

The EU Secretariat is designated as the national coordinator for dealing with the Commission concerning transposition through the eNotification database.

Legislative rules and methodical guidelines

The procedure for the enactment of law in Malta, including the transposition of EU law, can be found in the Constitution of Malta. Article 67 of the Constitution lays down that "subject to the provisions of this Constitution, the House of Representatives may regulate its own procedure." The powers and procedures of Parliament (Power to make laws) are contained in Article 65 (Part II) of the Constitution of Malta.
Moreover, the provisions of the European Union Act (Cap.460), notably Article 3(1) thereof states that “from the First day of May 2004, the Treaty and existing and future acts adopted by the European Union shall be binding on Malta and shall be part of the domestic law thereof under the conditions laid down in the Treaty.”

Article 4(2) of this Act also provides for the possibility of the Prime Minister or/and any designated Minister or Authority “to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument” for the purpose of implementing Malta’s obligations under the Treaty (which includes that of giving effect to existing and future acts adopted by the EU as stated in Article 3 of the same European Union Act).

On 6 June 2003, Cabinet approved a document entitled "Malta as a Member of the EU: Structures and Decision-Making Processes". This document puts forward the structures and processes that allow Malta to adopt coordinated positions in line with its overall EU policy on issues under consideration in the European Union at each level and stage of the decision-making process in EU fora.

Each Ministry is responsible for drawing up an Explanatory Memorandum on pipeline acquis. This Memorandum contains Malta's position on the relevant dossiers. Such Memoranda are then discussed during the Inter-Ministerial Committee for European Union Affairs. Once approved, these Memoranda are, in turn, discussed by Cabinet.

Following the approval of Cabinet, these Memoranda are then sent to Parliament's Standing Committee on Foreign and European Union Affairs for its scrutiny.

Considering the compatibility of national law with EU

The EU Secretariat is responsible for the coordination of the transposition of EU law in Malta. It is in constant liaison with the lead and secondary Ministries responsible for the transposition thereof. The list of Directives to be transposed including the Ministry responsible, as well as the deadline by which transposition is to be effected is compiled by the EU Secretariat and sent to the Ministries concerned. Such list is also regularly discussed at the Inter-Ministerial Committee for European Union Affairs chaired by the Permanent Representative of Malta to the EU. The Permanent Representative also discusses such list during the Permanent Secretaries Committee meeting, which convenes on a monthly basis, where all the Permanent Secretaries are present as well as during Cabinet which convenes every Monday. This strategy ensures that all the key persons involved in the process are kept in the loop.

Once the Ministry transposes the relevant legislation it informs the EU Secretariat, which in turn, particularly in the case of Directives, uploads the information on the E-Notification Database to formally notify the Commission of such transposition.

With regard to cases of infringements, all correspondence issued by the relevant Institution/s in this regard are sent to the Permanent Representation of Malta to the EU. The Permanent Representation, in turn, sends such correspondence to the lead Ministry and secondary Ministry of the issue concerned copying also the EU Secretariat. The EU Secretariat follows up the issue with the lead Ministry to ensure that a consolidated reply is drafted in a timely manner. Once drafted, the consolidated reply is sent to the Attorney General's Office within the Ministry for Justice and Home Affairs for legal vetting.

A final consolidated position is then sent to the EU Secretariat for clearance and onward transmission to the Permanent Representation for final approval. Once approved, the Permanent Representation sends the dossier to the Institution/s concerned accordingly.

Information systems

The 'Forum Malta in Europe' incorporates the previous functions of the Malta-EU Information Centre (MIC) and the Malta-EU Steering Committee (MEUSAC), which were considered a central element during Malta's accession process.

The Forum's main role is that of providing information to the general public on what the EU offers to its citizens, whilst at the same time keeping the public abreast with the ongoing debates and events held within the European Union.

The Forum's three main areas of competence are to:

- disseminate information on EU-related developments;

- facilitate consultation with stakeholders on EU-related issues; and
- provide support and awareness with regard to access to EU funding opportunities.

The EU Secretariat may also choose to channel certain information through the Forum in order to provide the necessary information to civil society for further consultation. The Forum will than administer the consultation process by providing an internet-based option which will channel this acquis to the civil society. Through this procedure, civil society will have access to all pipeline acquis found in this Forum Intranet, where it is free to comment on any areas of interest.

Currently, Malta does not foresee any insurmountable problems with respect to the implementation of EU law.

THE NETHERLANDS: LEGAL AND ORGANIZATIONAL STRUCTURES FOR THE IMPLEMENTATION OF EU LAW

Leo Vester[1]

Governmental structure of the Netherlands

Compared to some other member states, the Netherlands has a fairly simple governmental structure.

Basically speaking there is a hierarchical relation between central government and the other governmental bodies. Even though regional government (provinces, municipalities) and so-called independent governing bodies have a certain level of independence towards central government, they are far less autonomous than for example the German Länder are.

At the top of this hierarchy there is the Head of State (the Queen) and her cabinet. The cabinet currently consists of 16 ministers and is headed by the Prime Minister. Contrary to many other member states, in the Netherlands the Prime Minister has little or no formal powers over the other ministers, holding a position that is usually described as 'first among equals'.

Since there is no formal hierarchy within the cabinet, each minister is considered to be solely responsible for the timely and correct

[1] Senior legal advisor at the Dutch Ministry of Justice, Legislation department, section Legislative quality policy. The content of this article does not necessarily reflect the official views of the Dutch government or the minister of Justice.

implementation of EU legislation within the policy fields for which he or she is responsible[1].

Some ministers also have responsibilities of a more horizontal nature, spanning the 'columns' of the policy fields of other ministries. The minister of Foreign Affairs for example, has a general responsibility with respect to the coordination of relations with, and obligations towards the EU, while the minister of Justice has a general responsibility with respect to the quality of legislation and of the legal order (which includes conformity with EU law)

Preparation of implementation

Since there are little or no formal 'lines of command' between ministries when it comes to transposition of EU law, instead there is a strong emphasis on coordination of processes between ministries by means of multilateral deliberations.

Proposals for EC directives and regulations and EU framework decisions are sent to the Working Group for the Assessment of New Commission Proposals (Werkgroep Beoordeling nieuwe Commissievoorstellen or BNC), consisting of representatives of the ministries and of local government. This working group is responsible for drawing up an explanatory memorandum ("fiche") that analyses the significance of the proposed directive for the Netherlands.

An explanatory memorandum includes the following items:

- summary and the objective of the proposal
- the legislative procedure and legal basis of the proposal

[1] The influence the Prime Minister has as the political head of the coalition that forms government is disregarded here. It is evident that even though there is no legal provision prohibiting him to do so, a minister that chooses to continually ignore the views of his colleagues, especially those of the PM, usually does not have a long political career as a cabinet member.

- an assessment in terms of subsidiarity and proportionality
- a description of the consequences for national legislation.
- a suggested position to be taken by the Netherlands during the negotiations about the proposal and the anticipated method of implementing the proposal if it is adopted.

After the explanatory memorandum has been adopted by the BNC working group, it needs to be approved by the Council of Ministers. Explanatory memoranda are the basis for the Dutch position in the negotiations in Brussels. Shorter, 'political' version of the explanatory memoranda are sent to Dutch Parliament. Since these documents are open to the public, considerations about the estimated negotiation position of the relevant actors are omitted in these versions.

On the basis of these documents Parliament is able to make up its mind about a proposal in an early stage of the process. By means of deliberations with the minister who has the lead in the negotiations it can exercise its influence on the Dutch position in Brussels. This influence stems from political rather than legal powers of Parliament, since the Netherlands does not have a system of written mandates or parliamentary reserves.

Civil servants from the lead ministries then negotiate the proposals in the Working Groups of the Council, bearing in mind the position and directives set out in the agreed memoranda.

National coordination of transposition

As soon as possible, preferably even before the acceptance of the proposal, transposition measures are prepared by the departments concerned, usually the ministries that have conducted the negotiations.
The Interministerial Committee on European Law (ICER) is responsible for coordinating the legal advice regarding the preparation and

implementation of European law. The ICER is chaired jointly on behalf of the Minister of Justice and the Minister for Foreign Affairs. The ICER has a subcommittee on the subject of implementation, the ICER-I, chaired on behalf of the Minister of Justice. It convenes every four weeks.

Directives[1] are transposed according to implementation plans drawn up within two months after the adoption of a common position on a directive, or the adoption of the directive. The implementation plans are submitted to the ICER-I, where a final check is done if any consequences for the legislation of other ministries have been overlooked.

Instruments and techniques of implementation

EU law is usually incorporated into the existing Dutch legislative framework and the corpus of existing national law rather than being introduced alongside the existing legal order. In the context of the transposition of EC directives, implementing by means of amendments on existing instruments and law regulations is the general rule.

The standard legislative procedures are applicable while implementing EU law, although there are some minor variations in order to speed up the process[2]. The question how to implement a given directive is determined on a case-by-case basis. The choice of national legal instruments to be used depends on the contents of the directive and the requirements set by national law relevant to the subject of implementation.

In the Netherlands, approximately 87% of all directives are transposed using forms of delegated legislation (governmental or

[1] Unless indicated otherwise the term 'directive' also includes framework decisions within the context of this article.
[2] Legal obligations to consult parties in the field about proposed legislation for example, are not applicable when dealing with proposals that only contain obligatory implementing measures.

ministerial decrees, and in some cases decrees by other governmental bodies). About 13% of the directives have to be implemented by means of an act of parliament.

If directives are to be transposed by an act of parliament or a governmental decree, the Council of State must be consulted on the transposition proposal. This obligation does not apply to ministerial decrees.

From a perspective of timely transposition of EU law, implementation by means of delegated legislation is preferred because the procedures this requires are simpler and faster than those that need to be followed when implementing by means of acts of parliament.

However, this choice can only be made if the specific legal framework (most notably the acts of parliament that are relevant to the subject) allows for this, since there is no general enabling act for the implementation of EU law in the Netherlands.

Ministries with a long history of implementing EU law (for example the ministry of Agriculture) typically have developed a body of legislation which allows them to use delegated legislation more often than ministries that have only recently been confronted with frequent obligations to implement EU law (like for example the ministry of Justice).

It would be wrong however to attribute this situation solely to a lack of adaptation caused by a late start, because it also has to do with the legal nature of the topics concerned. Legislation regarding taxes or criminal, civil or administrative law can generally speaking only be realised by means of acts of parliament, according to the Dutch constitution. The effects of this are usually reflected in the percentage of directives implemented after the deadline by the ministries that are most often confronted with this requirement (the ministries of Finance and of Justice).

Information tools

In order to support the implementation process the Netherlands have introduced an electronic database in 2007 called the i-Timer, containing all the relevant information on directives that need to be implemented, as well as on the legal instruments that have to be created for this purpose.

The initial entry of information on directives to be implemented is done by the ministry of Foreign Affairs, but every ministry is responsible for entering and updating information about its own implementing measures.

When a directive and the necessary implementing measures are entered into the i-Timer, the required intermediate steps are automatically indicated, based upon the type of legal instrument which has been chosen. An act of parliament will thus show steps like the consultation of the Council of State and the approval by parliament, while a ministerial decree will only show the step of notification. For each of those intermediate steps a target date is set, based upon the average time needed to complete those steps and counting back from the transposition deadline.

Once such an intermediate step has been completed, the implementing ministry enters the date on which this has happened. If an intermediate step has not been completed on the given target date, the directive shows up in orange in the i-Timer, indicating there appears to be a delay that may endanger the timely transposition. The status of the directive remains this way until a next step in the process is completed on time again. If the implementation deadline has passed without the notification stage being completed, the directive shows up in red.

Using the i-Timer to monitor progress of their implementation processes, every ministry can not only see which directives are already

overdue but also which directives are at risk of not being implemented before the deadline. The I-Timer is also used by the ICER-I to identify any specific problematic directives that may possibly require additional coordinating measures.

Finally, the reports generated by the i-Timer are used to send a quarterly report to parliament about the number of directives that have been implemented before or after the given deadline.

The causes of late implementation

There are many reasons why legislative processes can take more time than originally envisaged. However well an (implementation) plan is thought out in advance, there can always be unforeseen problems of a legal or organizational nature. Planning is done by estimating the time it will take to complete the necessary steps, based upon averages that may not apply in the given case.

There is a direct relation between the type of legislative process and delays in implementation: acts of parliament are more often delayed than governmental decrees or ministerial decrees. Since it takes 1,5 years on average to create an act of parliament, in theory it should never be a problem with implementation periods of 2 or 3 years. In practice however, there is a wide variety of the time it actually takes from drafting the law to the moment it enters into force after being approved by parliament.

It is sometimes argued that directives that have to be implemented by means of acts of parliament usually also have a longer implementation deadline, so there should be no reason this causes delays in implementation. The heart of the problem however seems to be not in the average length of those procedures, but in the number of possible incidents that may happen along the way and interferes with the planning. Such incidents are for example the summer recess of parliament or the

changing of cabinets, not seldom holding up the parliamentary approval procedure for two to three months or more. The longer a legislative process takes, the bigger the change of such incidents happening along the way. Then of course there is also the possibility that parliament does not agree with the proposal, or demands alterations. While this is evidently the prerogative of parliament, it is also a cause of delays that cannot be taken into account beforehand.

Obviously such kind of delays can often be prevented by using delegated regulation. Dutch parliament however, especially the Senate, is reluctant to allow this. A recent debate about this subject has even led to stricter guidelines on the acceptability of provisions that mandate government to change legislation without involving parliament. This also applies in principle to legislation aiming to implement EU law.

In Dutch implementation practice it has been observed that with directives which have to be implemented by more than one ministry there is an above average probability that they will not be implemented on time. This is sometimes seen as an indication that coordinating problems between the involved ministries are a common cause of delay. In practice however, it is hard to find convincing examples of cases where delays in implementing can directly be attributed to a lack of cooperation between ministries. Furthermore there appear to be alternative explanations for this phenomenon that are equally plausible.

Firstly, it could be argued that because a directive spans across several policy fields it is inherently of a more complicated nature than the average directive.

Secondly, there may also be a purely statistical explanation for this phenomenon. If on average a ministry exceeds its implementing deadlines in 50% of the cases, the average score on timely transposition is of course 50%. However, if two ministries both have to implement a

directive, it will only be considered to be implemented on time if they both succeed in reaching the deadline. Even if they are just as good (or bad) in achieving this goal with directives like these as they are with the simpler ones, the statistical chance of both ministries being on time is a mere 25% (50% x 50%).

Conclusion

In the Netherlands we have not yet found the magic bullet against implementation delays. There do not seem to be one or two easy solutions to prevent delays in implementation. Rather it is a matter of keeping an eye open for lots of possible factors causing delays, so the relevant actors will recognize them early on and can take appropriate action on beforehand.

This stresses the importance of the early involvement during the negotiation phase of the EU proposal, of those who later on have to take the necessary implementing measures. This has a twofold effect: firstly, it enables the experts to give input about technical/legislative problems a certain element of the proposal will cause and if possible, provide an alternative to prevent this. Secondly it alerts them of the job that lies ahead.

The one essential element in all this is to heighten the awareness within the organization of possible problems. The use of information technology can never be in itself the solution to those problems but it can be a means to help identify them. After that it is still up to us humans to remedy them.

Implementation of EU Law in Poland

Institutional framework and law-making process

The key role in the process of implementation of UE law in Poland resides within the **Office of the Committee for European Integration (UKIE)**. It is a supreme government administration body competent for programming and coordinating the policy relating to Poland's membership in the European Union. In particular, UKIE coordinates the activities related to Poland's membership in the EU carried out by all ministries and institutions.

In concrete terms, one of the units of the UKIE, European Union Law Department (composed of approximately 30 lawyers) performs the following tasks:

- initiating, coordinating and monitoring the works concerning the adjustment of the Polish law to the EU law; preparing schedules of legislative proceedings of the government aimed at adjusting the Polish law to the EU law,
- providing legal opinions concerning draft statutes and regulations as to their compliance with the EU law at every stage of legislative proceedings on both government and parliamentary level, coordinating legislative proceedings connected with Poland's membership in the EU within the Government's tasks, including the evaluation of completeness of EU law implementation,
- participating in the proceedings of the *Sejm* and *Senat* (higher and lower chambers of the Polish Parliament) and in the intra-governmental consultations on the draft acts implementing EU directives,

- coordinating and preparing Polish positions in infringement proceedings under Art. 226 EC,
- representing the Polish government in proceedings before the Community Courts,
- provides legal expertise to the government on issues concerning interpretation and application of the EU law.

Moreover, UKIE provides assistance to the **European Committee of the Council of Ministers (KERM)**. KERM is a standing cabinet committee chaired formally by the Prime Minister (and *de facto* by the head of UKIE) and composed of representatives of all the ministries at the level of secretary or undersecretary of state, whose duties include matters of European policy. KERM is vested with decision-making powers in the field of EU policy in areas which do not fall under the exclusive competence of the Council of Ministers. An example of execution of its powers was the adoption of procedures aimed at coordination of works concerning EU matters within the government (including procedures for transposition of EU legal acts, the procedure coordinating Poland's participation in proceedings before Community courts).

KERM holds its meetings twice a week and matters are remitted for its consideration include information to the Council of Ministers on the Republic of Poland's participation in the European Union activities, the timetable of legislative works relating to the implementation of EU law into the Polish legal order and information on the state of implementation thereof.

The **law-making process** with regard to implementing EU law in Poland can be outlined in the following way:

Legislative proposals along with the appropriate correlation tables are drafted by **line ministries**. Next, they are submitted to **UKIE** for scrutiny regarding their compliance with EU law (occasionally, legislative

proposals are drafted by UKIE). **KERM** settles disputes or doubts that may arise within inter governmental consultations over provisions contained in the proposal and adopts the final version of the proposal. It is then submitted to the **Government Legislation Centre** which ensures the coherence of legislative proposals with the Polish legal system and their legislative accuracy. As a final stage, regulations are signed by the competent minister and published in the Journal of Laws of the Republic of Poland, whereas draft regulations of the **Council of Ministers** as well as bills are presented to the Council of Ministers for formal adoption or approval. The bills are then introduced to Parliament. The rules of submission of bills executing EU law obligations to Parliament are laid down in in the Act of 11 March 2004 on cooperation of the Council of Ministers with the **Sejm** and the **Senate** in matters concerning membership in European Union. Under Art. 11 of this Act, the government is required to submit, no later than three months before the deadline resulting from EU law expires, a bill implementing the EU legislation. If that deadline is longer than six months, it should be submitted five months before the expiry of the deadline. Once the statute is adopted by the Sejm and after reviewing the proposal of the **Senate** the Marshal of the Sejm submits the adopted statute to the President of the Republic of Poland for signature. The **President** is expected to sign the statute within 21 days and order its promulgation in the Journal of Laws. The promulgation ends the process of implementation and enables notification of a statute implementing EU legislation in the Database for the Notification of National Implementing Measures.

Methods of implementation and procedures

EU law implementation procedure

In order to streamline the process of EU law implementation in Poland and to respond to the call the European Commission formulated in its communication introducing a new approach in the area of cooperation with member states with a view to ensuring correct transposition of the Community law (*Commission Communication "A Europe of results: Applying Community law", COM (2007*) 502, 5.09.2007), Poland has adopted the **Procedure on transposition of the EU law**. Adopted by KERM, it is binding upon the whole of Polish administration. The major advances introduced by the Procedure include the obligation to prepare at the onset of works on legal acts of a correlation table showing how individual provisions of a EU legal act are transposed into national legal order, separation of legislative measures following from the necessity to implement an EU legal act from legislation of purely national nature, and the ensuing maintenance of a separate legislative track for acts of national law implementing EU law – so called "draft European acts and regulations".

Annual legislative schedules of the Council of Ministers

In addition to the Procedure on transposition of EU law, timely implementation of EU legislation is ensured by schedules for legislative works of the Council of Ministers. Apart from legislative proposals on purely domestic issues, they include proposals resulting from commitments under EU secondary law as well as from proceedings concerning infringements of the *acquis*, with an indication of deadlines for their adoption.

Parliamentary procedure

The Standing Orders of the Sejm provide for several requirements which are designed to ensure the correct and timely implementation of EU law.

In a justification of each bill without exception its authors must include a declaration about compliance with the law of the European Union, the degree of and reasons for non-conformity with that law, or a declaration that the subject of the bill is not encompassed by the law of the European Union.

One of the particularities of the law-making system in Poland is that a governmental body is empowered to exercise scrutiny over activities of the Legislature with regard to conformity with EU law. In the course of the legislative procedure involving the examination of bills by committees of the Sejm, it is obligatory to seek at every stage of the proceedings the opinion of UKIE on conformity of amendments and motions submitted in the first and second reading as well as amendments proposed by the Senate. This opinion is attached to a committee report.

The bills whose aim is to implement EU law can undergo a fast-track procedure. They can be referred to the European Committee of the Sejm and the Committee establishes a timetable of work on that bill. The Standing Orders also provide for certain rules aimed at restricting the possibility of introducing amendments to those bills, accelerating thus the proceedings. An amendment to such a bill may be introduced, in written form, at the sitting of the Committee by a group of at least 3 Deputies being members of the Committee (it also applies to the submission of the minority motion concerning the Committee's report). During the second reading an amendment to the approximating bill may be introduced by a group of at least 5 Deputies.

Global transposition

Since 2004, Poland has had three times recourse to a special instrument for implementing EU law: the so called “Horizontal Act”. It consists in introducing amendments to several acts within one single act.

The purpose is to ensure timely and accurate implementation of a number of EU acts or individual provisions. Due to its exceptional character, this instrument may cover exclusively measures implementing EU law or eliminating incompatibilities and address issues which are urgent, similar in its legal nature and non-controversial.

The legal basis for EU law implementation

In Poland, there is no specific legal basis devoted solely to the implementation of EU law. Therefore, the process of implementation has to abide by the relatively rigid system of sources of law established in the Constitution. The Constitution vests legislative power in the Parliament and only the Parliament can pass statutes to which the Constitution grants a special role in the system of sources of law as regards the determination of the legal position of the citizens. Neither the President nor the government have the authority to proclaim acts which would have the force of statute (excluding regulations which have the force of statute issued by the President during martial law). The powers of the Executive with regard to the possibility of issuing secondary legislation are laid down in Art. 92(2) of the Constitution, which provides that:

Regulations shall be issued on the basis of specific authorization contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorization shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act.

It follows from the above that in a number of cases implementing a directive into the Polish legal order is not possible without amending a respective statute. Exceptions include situations where a statute contains delegation to issue a regulation which covers precisely the subject matter of the directive. This translates into necessity to initiate a legislative process involving Parliament for most directives.

Information technologies or systems

In mid 2009 Poland put in place an electronic **System of Implementation of European Law (e-step)**. The purpose of e-step is to provide information about activities undertaken in relation to the implementation of EU law into the Polish legal order. The beneficiaries of this system are both the public administration and the general public. For the public administration the system operates as a data base. It enables a smooth exchange of information about the ways and deadlines of implementation and a precise monitoring of this process. It contains data on EU acts subject to implementation since their publication in the Official Journal of EU until the publication of the corresponding Polish act in the Journal of Laws of the Republic of Poland. For the citizen it takes the shape of a web page – **www.e-step.pl**, on which it is possible to trace the way from the EU act to its implementation in a Polish act. It provides full transparency as to the deadlines for implementation set out in the EU act and enables to assess the correctness and completeness of implementation thanks to correlation tables accompanying each implementing measure.

Good practices

In order to assist all institutions involved in implementation and application of EU law, UKIE published (first in 2003, updated in 2009) the

Guidelines on legislative policy and legislative technique – ensuring effectiveness of European Union law in domestic law. The Guidelines outline all relevant principles concerning application and implementation of EU legislation resulting from case law of the Community Courts. They also indicate good practices and drafting examples as guidance for the legislator confronted with concrete problems resulting from the implementation of provisions of EU law into the Polish law.

Implementation of EU Law in Portugal

Organisation structure

In Portugal, the Legal Service of Directorate General for European Affairs within the Ministry of Foreign Affairs is the department responsible for the coordination of implementation of EU law and electronic notification of directives. This department is chaired by a Director and two heads of unit. It comprises also five legal advisors.

The coordination of the activities of departments from different ministries, as regards the implementation of EU law, is done through the Inter-ministerial Commission for Community Affairs, chaired by the Secretary of State for European Affairs.

Furthermore, in the framework of the Better Law Making Programme (Programa Legislar Melhor), approved by the Resolution of the Council of Ministers nr. 63/2006, a centralized and automatic system of control of the transposition of EU legal acts is now under implementation. The new system, known as SCAN (Sistema de Controlo de Actos Normativos – System for the Control of Normative Acts), builds upon the existing networks and has a broader scope than merely the transposition of EU law (e.g. encompassing secondary regulations of the government). It has been approved by the Resolution of the Council of Ministers nr. 196/2008 and is coordinated by the Legal Centre of the Presidency of the Council of Ministers and is currently under implementation through the creation of a centralized database and the production of monthly reports to the Secretary of State for the Presidency of the Council of Ministers.

The legal basis for EU law implementation in your country

The legal basis for the transposition of EU law is Article 112 (8) of the Constitution. This article provides that "*The transposition of European Union legislation and other legal acts into the internal legal system shall take the form of a law, a decree-law, or, in accordance with (4) above, a regional legislative decree*."

Moreover the Resolution of the Portuguese Council of Ministers 198/2008, 30th December, which approved the Rules of Procedure of the Council of Ministers, establishes rules for the implementation of EU Law which include guidelines for the transposition of directives by the Government.

Methods of implementation

Pursuant to Article 112 (8) of the Constitution, EU directives are implemented by way of law or a decree-law.

Information technologies or systems

The databases set up by the Portuguese Government regarding the implementation of EU law are managed are the ones mentioned in the framework of the SCAN system and the Better Law Making Programme, which are coordinated by the Secretary of State for the Presidency of the Council of Ministers. Their main purpose is to provide a clear picture of the legislative proceedings related to the drafting and approval of national transposition measures. Their use is restricted to the relevant ministerial departments.

Good practices

A list of non-transposed directives is submitted monthly to the competent ministries in order to invite them to report on the state of play

of the implementation of EU law in their field of competence. The competent ministries are also notified of the publication of directives in the Official Journal of The European Union. Additionally, every two months meetings of coordination of directives are held.

GOVERNMENTAL REGULATIONS IMPLEMENTING EU LAW

Štefan Grman[1]

Governmental regulations implementing EU law was estabilished into slovak legal order before accession of the Slovak republic. Estabilishment of this kind of legal act entailed change in constitutional system of the Slovak Republic. Change was done at 2001 by constitutional act No. 90/2001 Coll. which amended the Constitution of the Slovak Republic.

By this amendment was touched article 7 paragraph 2 second and third sentence of the Constitution of the Slovak Republic, according to this article legally binding acts of the European Communities and European Union shall have primacy over the laws of the Slovak Republic and transposition of legally binding acts that require implementation shall be executed by law or government regulation pursuant to Article 120 paragraph 2 of The Constitution of the Slovak Republic.

Article 120 paragraph 2 of the Constitution of the Slovak Republic is legal empowerment to the Government of Slovak republic to issue regulations in order to execute the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, and to execute international treaties stipulated in article 7 paragraph 2 of the

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Constitution of the Slovak Republic (it is concerned international treaties which transfer the exercise of a part of Slovak republic powers to the European Communities and the European Union – accession treaty).

Governmental regulation implementing EU law is not convenient to specific characteristics relating to implementary legal acts, since it is not issued within the law and its intent is not to execute the law, so it doesn´t contain more detailed arrangements of social relations, which are regulated in its general level by the law. Approximation regulation of government serves for transposition of legally binding act of the European Communities and European Union.

By governmental regulation implementing EU law it is possible to impose the duties to the subjects of law as well as by the law. This possibility results from Article 13 paragraph 1 point c) of the Constitution of the Slovak Republic:

„*(1) Duties can be imposed*

a) .....,

b) .....,

c) by a regulation of the Government according to Article 120 paragraph 2.“

According to constitutional legal empowerment to the Government of Slovak republic was adopted act No. 19/2002 Coll. on conditions of issue governmental regulations implementing EU law. This act governs:

1. domains, in which the Government of Slovak republic could issue regulations implementing EU law (13 domains),

2. special conditions for issue governmental regulations implementing EU law.

Domains, in which the Government of Slovak republic could issue regulations implementing EU law was recipated from the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, as domains where was a obligation to conform slovak legal order to European law before accession. These domains are:

- *custom law*
- *law of banking*
- *managing of accounts and taxes of bussiness companies*
- *intellectual property*
- *protection of workers at workplace*
- *financial services*
- *consumer protection*
- *technical regulations and standards*
- *exploitation of atomic energy*
- *transport policy*
- *agriculture*
- *environment*
- *free movement of workers*

Act No. 19/2002 Coll. also governs affairs which governmental regulation implementing EU law cannot regularize. These are:

- limits of fundamental rights and freedoms,
- state budget and another matters, which according to The Constitution of the Slovak Republic are regularized or shall be reguralized by laws (e. g. using of another languages as official

state language in official communication, specialities about state symbols of the Slovak Republic and their application, conditions and restrictions of execution certain jobs or functions),

- creation of new state body,
- competence of state bodies, neither administrative sanctions.

Act on conditions of issue governmental regulations implementing EU law also contains additional special conditions of issue regulations implementing EU law. First condition is than in annex of regulation implementing EU law must be stated exact identification of implementing legal act of the European Communities or European Union or international treaty, and also source of publication. Second, not omissionable condition is than common part of reasoning to regulation implementing EU law must comprise of the compatibility clause with EU law and table of concordance.

From a view of legislative technique is most important a possibility to transpose texts of annexes of binding acts of the European Communities and of the European Union by reference on these acts (e. g. samples of printed matters, registers of institutions or technical specifications) by regulation implementing EU law.

By amendment of the Constitution of the Slovak Republic in connection with regulation implementing EU law the National Council of the Slovak Republic released and reduced a part of its sovereign law making competence, therefore the National Council of the Slovak Republic must be informend by the Government of Slovak republic on issue regulation implementing EU law. From power of Act No. 19/2002 Coll. is the Government of Slovak republic obliged to inform the National Council of Slovak republic half - yearly on published regulations implementing EU law and about further aim of their issue. As a highest law making authority the National Council of the Slovak Republic can after

discussion of this information make request the Government to submit legal form presented as regulation implementing EU law in form of governmental law draft.

From 2001 total number of isssued regulation implementing EU law, inclusive ammendments, is 539, number of regulation implementing EU law in force is 449 (amendments of them - 193) and from 2001 was 89 regulation implementing EU law derogated.

IMPLEMENTATION OF EUROPEAN LAW IN TERMS OF A NATIONAL PARLIAMENT

JUDr. Janetta Kubicová

Mgr. Milan Hodás

The history of the approximation of the law of the Slovak Republic (hereinafter "the SR") to European law (here is included so the EC law as the EU law) at the National Council of the Slovak Republic (hereinafter "NCSR") is linked to the euro-integration ambitions of the SR and the signing of the European Agreement on Association in 1993. Considering the position of the Parliament in the legislative process as well as the importance of fulfilling the obligations stemming from the agreement, the NCSR and Slovak government joined forces to address the task at hand. Consequently, the Commission for the Compatibility of Slovak Law with European Law was created in late 1993 as an initiative and oversight body subordinate to the Constitutional and Legal Affairs Committee. In 1994, an Office of Compatibility was created in the Chancellery of the NCSR and incorporated into the Legislation and Law Department.

The key conceptual document entitled "The Main Tasks of the NCSR in the Process of Approximating the Slovak Legal Order to EU Law, and Their Implementation in the Chancellery of the NCSR', was drafted and approved in 1996. This document defined the tasks and the

functions necessary to the process of approximation, identified the legal entities responsible for carrying out said tasks, and provided a methodology for the scrutiny of compatibility of laws.

As a result of this document, the Rules of Procedure of the NCSR (Act No. 350/1996 Coll. L.) and the Legislative Rules of Law-Drafting (No. 19/1997 Coll. L.) were adopted into laws, and the Unit of Approximation of Law was established as part of the Legislation and Law Department on 1 January 1998.

The Section on Legislation and the Approximation of Law

At the present time, review of the compatibility of a national law with European law is performed independently at the executive (government, ministries) and legislative (NCSR) levels. The Section on Legislation and the Approximation of Law (hereinafter "the ULAP"), which is a division of the Chancellery of the NCSR, evaluates compatibility at the level of the NCSR and works out the legal opinions. The ULAP is composed of two units – the legislative unit, which focuses on the domestic implications of legislation (compliance with the Constitution and existing national laws, etc.) and the approximation unit, which addresses the EU implications. The ULAP consists of seventeen legal specialists, of which the approximation unit employs four.

The primary task of the approximation unit is a scrutiny of conformity of all draft bills submitted to the NCSR with European law, which represents the last rank of reviewing the approximation of law. This review is performed in two steps.

The first step in assessing the compatibility of a draft bill with European law is an evaluation for the Speaker of the NCSR carried out in the form of a questionnaire (the so-called '24-hour information'). The questionnaire determines only whether the bill meets the formal technical

requirements for submission to the NCSR, with no evaluation of its content. If the bill fails to meet the technical requirements, the consequences are procedural only.

The legal basis for this evaluation is Art. 68 par. 3 of the Rules of Procedure of the NCSR as last amended, under which conformity of a bill with the Constitution of the SR, coherence with other existing laws and international treaties, and compatibility with European law, explicitly stated in the form of a Compatibility Clause, must be declared. A second legal basis for the formal oversight of the compatibility of a bill with European law is contained in Art. 2, in concurrence with Art. 3 of the Legislative Rules of Law-Drafting:

Article 2

The objective of the legislative work of law-drafting is to prepare and adopt an Act that shall become part of a balanced, transparent and stable legal order compatible with the law of the European Union.

Article 3

The compatibility of a bill with the law of the European Union is demonstrated by the inclusion of the Compatibility Clause, which states that the law is compatible with the law of the European Union. The requirements of this clause are stated in the Annex n. 1.

As a second step in its scrutiny of a substantive nature, if a bill is adopted in the first reading, the ULAP works out an expert opinion evaluating it for compatibility with European law. The first section of this opinion acquaints the Members of Parliament with the provisions of the primary and secondary EU law relating to the area addressed by the bill. A special attention is paid also to the principles of the internal market and

the general legal principles within this general-informative part. If a discrepancy with EU law is discovered, the opinion includes the original texts of the relevant provisions of the legal acts and a suggestion that the bill be modified. In this section of the opinion, the relevant provision(s) of EC and EU law are analyzed, with the focus on the substantive law and the objectives to be attained. The opinion also contains concrete proposals for amending the bill (so – called ´legislative-technical modifications´), but these proposals are of a technical nature only, most often concerned with standardizing terminology and legal references and citations. The opinion concludes with a statement of the degree to which the bill is compatible with European law: 'full', 'partial', 'not in compliance', or, if the area of law regulated by a bill falls into an area of autonomous legislation of the member states - 'not applicable'.

The opinion prepared in this way is then distributed to the members of the parliamentary committees to which the bill was assigned, and serves as a reference document to discussions preceding the second reading that takes place in the committees of the NCSR and then in the plenary session of the NCSR. Members of Parliament are not bound by the ULAP opinion, and the proposed concrete amendments are taken into consideration in the final version of a bill only if a Member of Parliament adopts them partially or in full and they are passed by a valid resolution.

ULAP staff also attends the committee sessions to provide on request a detailed explanation of the issues which, from the point of view of approximation, embody the shortcomings of the bill.

It is also possible to obtain an electronic version of an opinion from the intranet of the Chancellery of the NCSR, as well as a paper copy.

Selected problems in approximation

- The legislative practice at the ministries inclines to a verbatim translation of legal acts without regard to the implications of the native terminology; they often then adhere to the resulting Slovak mutation without reference to the original intent. There may also be a tendentious automatic effort to amend national laws without considering that a valid national law might already meet the European legal norms as to content, even if it is not identical in form.
- The goal of a European legal act or the aim of a directive may not be taken into account in the drafting of a bill.
- A problematic feature with far-reaching effect is the fragmentation of European legislation and the consequent secondary fragmentation of the national legal rules, which results in opacity of the legal order. Further, the necessity of transposing the legal norms from a directive to several national laws can impede the determination of the real status of the approximation of a law.
- The so-called Approximate Regulations of the Government are also problematic from the point of view of both legal theory and legislative practice. They are a legal instrument which originated in the pre-accession period with the purpose of accelerating the legislative process, especially in the area of transposing European legal acts of a technical character.
- The legal basis for adoption of these Approximate Regulations of the Government is Art. 120 par. 2 of the Constitution of the SR, under which it is possible to adopt a law allowing the government to issue regulations concerning implementation of the European Agreement on Association and the execution of an international treaty by which the SR transfers the exercise of part of its powers

to the European Communities and the EU. Art. 7 par. 2 of the Constitution of the SR establishes then expresis verbis that the transposition of legally binding acts requiring implementation shall be carried out through an Act or regulation of the Government according to Art. 120 par. 2 (by an Approximate Regulation of the Government). Particulars of adoption of these approximate regulations regulate the Act n. 19/2002 Coll. L. as last amended.

This Act contains in Art. 3 par. 2 a provision under which legally binding regulations on matters governed by an approximate regulation can be promulgated by a ministry, any other central body of state administration, or the National Bank of Slovakia. In legislative practice this provision is frequently utilized, and many so-called “technical” parts of directives are transposed into Slovak law by means of ministerial regulations or through regulations promulgated by the National Bank of Slovakia. It is entirely possible that this legislative practice constitutes a violation of the above-mentioned Art. 7 par. 2 of the Constitution of the SR.

The incorporation of these approximate regulations into the hierarchy of legal rules has also proved problematic. According to the explanatory memorandum to the above-mentioned Act n. 19/2002 Coll. L., an approximate regulation carries less legal force than an Act. But the European law has supremacy over the national law, and an EU directive is often transposed into national law by means of an approximate regulation. Therefore, from the EC point of view, it may seem to be a reasonable conclusion that a transposing measure such as an approximate regulation should also have supremacy over the national laws. In legislative practice, these approximate regulations should be used with temperance. But the opposite is admittedly the truth, and the

approximate regulations are often utilized as a tool to avoid legislative procedure in the Parliament.

The Committee on European Affairs

The Committee on European Affairs (hereinafter the "VEZ") was created during accession of the SR to the EU (April 2004) and to a certain extent was the successor of the Committee on European Integration that had been operating in the NCSR since 1996. Its area of competence is defined by Constitutional Act n. 397/2004 Coll. L. on the Cooperation of the National Council of the Slovak Republic and the Government of the Slovak Republic in European Union Affairs. The composition and status of the VEZ are regulated by Art. 58a of the Rules of Procedure of the NCSR (Act n. 253/2005 Coll. L.).

The main tasks of the VEZ include deliberations on proposed EC and EU legal acts and approval of the positions of the SR (so-called 'binding mandate') on these proposals prior to Council sessions.

The VEZ deliberations are informed by a background document which lays out the preliminary opinion of the Government, with comments by the competent Ministry. The document also contains a brief overview of the content and objectives of the proposed legal acts and the type and time schedule of the EU decision-making process and asses its compliance with the principle of subsidiarity. It further evaluates the potential impact of the proposed legal act on the SR from the political, legislative, economic, social and environmental perspectives.

This is the first step performed by the Parliament reviewing the Government in relation to European law-making. Because of the difficulty of an exhaustive examination of a proposal at this preparatory stage as well as the proportionate representation of the political parties in the VEZ, this evaluation is largely political – strategic in nature.

The relevant data and the results of the discussion are processed electronically in the VEZ's independent system.

Conclusion

The integration of the Slovak legal order with European law involves a number of new conceptual substantive and procedural legislative issues with important implications for both theoretical and applied law. There is a great need to amend the existing rules of legislative technique and to respond in a flexible and timely manner to problems arising in the legislative process. This article does not pretend to deal exhaustively with all the problems related to the approximation of law. Rather, its aim is to narrow in on some chosen issues with a focus on point of view of the parliamentary legislation.

Implementation of EU law in Spain

DEPARTMENT OR ANY OTHER SIMILAR AGENCY RESPONSIBLE FOR THE COORDINATION OF THE EU LAW IMPLEMENTATION AND ITS FIELD OF COMPETENCE.

In Spain, the Ministry of Foreign Affairs and Cooperation is responsible for coordinating the incorporation of Community law into the Spanish legal system. Specifically, the office implementing this task is the Under-Directorate General for Coordinating Community Legal Affairs; this agency is part of the Directorate General for Internal Market Coordination and other Community Policies, which, in turn, forms part of the State Secretariat for the European Union. As established under Article 11 of Royal Decree No. 1124/2008, dated 4 July, by which the basic organic structure of the Ministry of Foreign Affairs and Cooperation is developed, this Secretariat shall coordinate all actions taken within the framework of their competence by Spanish public administrations in the European Union. To this purpose, and through the legal channels established to this effect, the Secretariat communicates as necessary with the competent agencies and bodies of the Central State Administration, as well as with regional and local authorities. Likewise, it coordinates the actions taken as part of their duties, as regards the European Union, by the other senior and management bodies within the Ministry of Foreign Affairs and Cooperation.

As regards the Under-Directorate General for Coordinating Community Legal Affairs, the above-mentioned competences are recognized in the same Royal Decree, No. 1124/2008, dated 4 July, in which Article 14 states that the Directorate General for Internal Market

Coordination other Community Policies is responsible for, among other areas:

- Legal and Community counsel to Public Administrations; coordination with European Union institutions regarding state aid notifications; drafting replies to infringement procedures started against Spain, in their pre-contentious phase, as well as preparing replies during investigative procedures.
- The coordination, follow-up and notification of the transposition into national law of Community directives, as well as the preparation, follow-up and coordination of actions taken before the European Court of Justice.

Furthermore, and as part of this task of coordinating the work of the different Territorial Administrations in incorporating Community law into the national legal system, two fundamental agencies should be mentioned:

- On the one hand, the Permanent Representation of Spain to the European Union, created by Royal Decree No. 260/1986, dated 17 January, which defines it as a body with representation and management functions, accredited by the Spanish State before the European Communities, responsible for ensuring a Spanish presence in EU institutions and their dependent bodies.
- And on the other hand, the Conference for European Community Affairs, regulated by Act No. 2/1997, dated 13 March, is a body responsible for cooperation between the State and the Autonomous Communities to ensure the adequate participation of the latter in matters regarding European Community affairs, guaranteeing, in particular, the effective participation of these regional institutions in the preparation of the State position on EU affairs and in the implementation of Community law.

The legal base for EU law implementation in Spain.

Article 93 of the Spanish Constitution of 1978 sets out the possibility that an Organic Act, the approval, amendment or repeal of which requires a reinforced quorum at the Congress of Deputies (lower chamber of parliament), may authorize the conclusion of Treaties under which an international institution or organization may be attributed the exercise of competences derived from the Constitution. This Constitutional provision, thus, sets out the legal basis for the incorporation of EU law into the Spanish legal system allowing the transfer of legislative, executive and judicial competences to organizations of supra-national nature.

This Constitutional provision has been applied both in Spain's signing of the Accession Treaty to the European Communities, on 12 June 1985 (authorization provided under the Organic Act dated 2 August 1985), and in successive ratifications of the reform of the Treaties, that is, to the signing of the Single European Act, and the European Union Treaties of Maastricht, Amsterdam, Nice and Lisbon (authorized under the Organic Acts dated 26 November 1986, 28 December 1992, 16 December 1998, 6 November 2001 and 30 July 2008, respectively). This has allowed the integration into the Spanish system of European Union primary law, and has provided a basis for the incorporation of secondary law, in accordance with the provisions of the Community Treaties.

Methods of implementation

The transposition of Community Directives into the Spanish legal system is a matter of the highest priority for the Government of Spain. The situation of the transposition of Directives always is the first item on the agenda of the General Committee of Secretaries of State and Under-Secretaries, which is the body that prepares the decisions to be taken by

the Cabinet. This Committee, which meets weekly, is chaired by the First Deputy President of the Government and Minister of the Presidency. Also present are the Secretaries of State and Under-Secretaries of all the Ministries. Thus, the highest-level promotion and political supervision of the processes of transposition are guaranteed.

This Committee analyzes the report produced every week by the Ministry of Foreign Affairs and Cooperation which includes detailed information on the current state of each and every one of the Directives remaining to be transposed by the Kingdom of Spain. To do so, each of the Ministries makes a weekly report on the state of the situation of the transposition work that is its own responsibility.

At the technical level, there is a network of contact points at each of the Ministries, responsible for supervising the directive transposition procedures carried out within their Ministry: and also for channelling all the information with the other Ministries, especially with the Ministry of Foreign Affairs and Cooperation, as the national coordinator for the transposition of directives as a whole.

Compatibility check of the national legislation with EU law

In Spain no specific compatibility check with EU law is made during legislation drafting processes. However, this question is taken into account in the compulsory reports drawn up by the technical bodies of the relevant Ministries regarding preliminary legislative drafts, pursuant to Act 50/1997, dated 27 November, on the organization, competences and functioning of the Government. It is within this process that compatibility of the draft national legislation with Community Law is analyzed.

Secondly, with respect to this crucial task of eliminating the incompatibility between legislations, and, consequently, the situation of legal uncertainty, it is worth highlighting the role of the Council of State, as

the highest consultative body for the Government, which has to give its opinion, regarding the drafting of laws and the draft legislation which are to be passed in the execution, application and development of European Community Law, as set out in Organic Act 3/1980, dated 22 April, of the Council of State.

Evaluation of legal impacts of EU law proposals

Improving the quality of legislation is a goal that Spain shares with the European Commission. In line with the Commission's 2005 Communication, entitled "Better Regulation", the Spanish Government has approved a series of measures to promote better regulation and the reduction of administrative burdens. In this respect, mention must be made of:

- The creation of the State Agency for the Evaluation of Public Policies and Service Quality (AEVAL) in January 2007, with clear competences in this regard. Among the latter is that of analyzing and evaluating the legal impact envisaged in the corresponding regulation. Furthermore, it is competent to draw up, promote, adapt and disseminate guidelines and methodological guides in this respect.
- In June 2008, the Spanish Government approved the Action Plan for reducing administrative burdens, which includes the drawing up and application of an action protocol to assess legal impacts, with an emphasis on the systematization, regulatory improvement and economic appraisal of the new information obligations that may arise, so that it is systematically applied to all regulations approved as of 1 January 2009.
- Moreover, pending approval by the Cabinet, there is a Draft Royal Decree which regulates the Report on the Analysis of Legal

Impact, in the framework of all the measures implemented by the Spanish Government to promote better regulation and Administration activity. The aim of this project is to regulate what is known as the "Report on the Analysis of Legal Impact", in which the body proposing each legislative draft shall include an analysis of:

- The appropriateness of the proposal (with a special reference to whether it is the transposition of a Community Directive).
- Its content and legal analysis (specifying the criteria for distribution of competences when Community Law regulations are incorporated into national law).
- The economic impact and the impact of administrative burdens (including the detection and economic appraisal of such administrative burdens on citizens and businesses, when applicable).

The ultimate purpose of the draft described will be to ensure that, when drawing up and approving a draft that affects Community Law, the necessary information is available to assess the impact of the regulation on its recipients and on its agents; to this purpose, efforts will be made to examine the actual need to transpose, if applicable, a Community Directive, as well as all the legal aspects resulting from such a transposition, including the criteria for the distribution of competences between the State and the Autonomous Communities, which are necessary to define the competent body which will address the incorporation of such Community law into the national legal system.

Information technologies or systems developed and used in order to collect information and data related to the implementation of EU law or to the legislative process in the EU

As regards Community Directive transpositions, the Kingdom of Spain has a central computerized database containing all the relevant data revealing, at any time, the state of the transposition of each directive pending transposition, and also of the whole body of directives. This database enables the planning of future transpositions and the estimated schedule in which they can be carried out.

In addition, there is a specific database on the infringement procedures opened by the Commission regarding any alleged failure by Spain to comply with European Union legislation. As in the case of the above-mentioned database, this latter one includes the identification of European and national regulations that are the object of each procedure and all the information regarding their management and administration.

Finally, the State Secretariat for the European Union electronically notifies the Secretary-General of the European Commission, via the Internet, of each of the national measures for the transposition of Community directives.

Implementation of EU law in Sweden

SYSTEM OF EU LAW IMPLEMENTATION AND ITS COORDINATION IN SWEDEN

Ministry, authorities or agencies responsible for the coordination of the EU law implementation and its field of competence

Each Ministry within the Swedish Government is responsible for implementation of EU law falling within its field of competence. The actual responsibility of coordinating implementation therefore lies within each and every Ministry. In practice, the coordination is normally carried out by the respective Legal Secretariats. If several Ministries are involved, or if authorities or agencies are involved, one Ministry is designated to have overall responsibility for coordinating the process of implementing the legislative act.

Within the Prime Minister's Office, the EU Coordination Secretariat has an overall responsibility to notify transposed directives to the Commission. The EU Coordination Secretariat has a general overview of work carried out by all Ministries when it comes to implementing directives. The EU Coordination Secretariat consists of civil servants, lawyers, with the possibility to raise particular issues of concern to the State Secretary of the Minister for EU Affairs as well as to the Minister for EU Affairs.

Legal base for EU law implementation

The obligation to implement EU law stems primarily from the general law concerning Swedish membership of the EU "Lagen (1994:1500) med anledning av Sveriges anslutning till Europeiska

unionen“. The obligation is redefined in different ordinances for Ministries and authorities.

Methods of implementation

How EU law should be implemented nationally depends on the wording and the content of the legislative act in question. Certain matters can only be regulated by act of law, while others may be regulated in the form of secondary legislation (regulations or ordinances). If the directive, or as the case might be, the regulation, requires national rules imposing obligations on individuals, creating civil rights or regulating mutual matters between individuals, the provisions must be transposed in an act of law. Some aspects of a directive or a regulation might require amendments in the constitutional laws. The responsibility to adopt all new or amended laws lies with Parliament (Riksdagen). The Government has regulatory authority to adopt secondary legislation based either directly on the Constitution or on delegation from Parliament. If the Government´s regulatory authority follows directly from the Constitution or if it is prescribed in law the Government can also delegate its regulatory authority to adopt secondary legislation to a competent authority. The regulatory authority to adopt technical aspects of directives is often delegated to competent authorities which adopts these aspects in ordinances.

Different methods of implementation might also be used simultaneously to transpose a single legislative act, i.e. changes in law, regulations and/or ordinances.

Compatibility check of the national legislation with EU law

When the legal act is being finalised at EU level, a time-table for its implementation is drawn up by the relevant Ministry, or as the case

might be, by the competent authority. Before the Government can draw up a legislative proposal, the matter in question must be analysed and evaluated. The task may be assigned to officials within the Ministry concerned, but the Government often chooses to appoint a special expert or group – an inquiry – to take a closer look at the issues involved. Such Government inquiries examine and report on matters in accordance with terms of reference laid down by the Government. These instructions identify the issue to be investigated and define the problems to be addressed. Inquiry committees operate independently of the Government, but the Minister concerned appoints the members of the committee. The inquiry may consist of experts in different fields, public officials and politicians. Due to the composition of the inquiry, the parliamentary opposition and various interest groups are given an opportunity to follow the legislative work at an early stage. The committee of inquiry presents its proposals in an inquiry report. The terms of reference and the inquiry reports are published and made available to the public.

Before the Government handles the recommendations of the inquiry, the inquiry report is circulated for comment to relevant consultation bodies. These bodies may be courts, central government agencies, local government authorities and other bodies, including non-governmental organisations, whose activities may be affected by the proposals. The consultation process, which lasts for three months, is an important part of the democratic process. When the consultation bodies have submitted their comments, the Ministry responsible drafts the bill that will be submitted to Parliament. The inquiry report and the comments from the consultation bodies provide the basis of this process. The Government works as a collective, and thus the members of the Government must have reached consensus before a bill is decided on. Therefore before the revised proposal is finalised and sent to the Council on Legislation it is

sent for consultation within Ministries. The EU Coordination Secretariat should always be consulted. The Secretariat is responsible for reviewing and high-lighting issues of compatibility with EU law. In cases of conflict between interests, issues will be solved at political level. The Government is obliged – in principle – to refer major items of draft legislation to the Council on Legislation.

The Council on Legislation consists of distinguished judges from the Supreme Court and the Supreme Administrative Court. The consultation of the Council on Legislation is intended, above all, to ensure conformity with the legal system and compatibility of a statute with constitutional law. The Council is a consultative and not a decision-making body. When the Council on Legislation has submitted its opinion, a Government Bill is drafted, including the opinion of the Council on Legislation and the Government's considerations and response to questions raised. This proposal is also sent for consultation between Ministries before it is finalised and sent to Parliament for consideration and final adoption.

Evaluation of legal impacts of EU law proposals

The field of competence of the EU Coordination Secretariat is double in terms of coordinating the negotiation process as well as the overall implementation phase. During negotiations of EU law, the negotiating unit of the relevant Ministry is responsible for analysing the EU-proposal, including what likely consequences it might have on domestic law. During negotiations, all Ministries having an interest in the EU proposal should participate in analysing effects and formulating the Swedish position. The responsible Ministry shall also inform and consult Parliament and other interested parties. The EU Coordination Secretariat

should always be part of the consultations following negotiations in the EU.

The Ministry mainly responsible for negotiating an EU law proposal is primarily analysing all aspects of implementation, including the proposal´s likely impact on domestic rules. Considerations in this respect might be discussed with the EU Coordination Secretariat as part of the advisory role of the Secretariat.

The EU Coordination Secretariat also receives all proposals for national legislation (i.e. both implementing acts as well as purely national acts) and reviews questions of compatibility with EU law.

Information technologies or systems developed and used in order to collect information and data related to the implementation of EU law or to the legislative process in the EU

Ministries administer different registers for internal use concerning negotiations as well as implementation of EU law and the EU Coordination Secretariat has a full register concerning all directives requiring implementation. Information technologies will be further developed in order to support the efficient distribution of information regarding the negotiation and the implementation process.

The National Board of Trade, an independent authority, publishes information on how directives are implemented nationally in a database which is available to the public via Internet.

Implementation of EU Law in the United Kingdom

IMPLEMENTATION OF COMMUNITY MEASURES IN THE UNITED KINGDOM

Division of responsibilities in the United Kingdom government

In the United Kingdom, primary responsibility for implementing EU measures lies with the ministry which is in charge of the policy in question and which has negotiated the measure. There is no systematic central monitoring of implementation, because the relevant ministry is expected and trusted to manage its own affairs.

The following bodies in the United Kingdom government are responsible for coordinating the United Kingdom's broader position on the implementation of EU law:

- The European and Global Issues Secretariat (EGIS), part of the Cabinet Office
- Cabinet Office Legal Advisors (COLA), part of the European Division of the Treasury Solicitor's Department (TSol)
- The Better Regulation Executive (BRE), part of the Department for Business, Enterprise and Regulatory Reform (BERR).

EGIS is responsible for coordinating the government's European policies. It directly supports the Prime Minister's involvement in these policy areas, including preparation of European Councils.

BRE is responsible for improving new regulations and ensuring that they are properly communicated. Their function in respect of implementing EU law is to ensure that any new legislation minimises burdens on business and is proportionate and transparent.

COLA is responsible for coordinating the United Kingdom's position on questions of European law. COLA comprises a team of 5

lawyers and a team leader, who are responsible for advising EGIS on EU law, acting as a secondary specialist adviser to lawyers in other ministries, and ensuring that the United Kingdom takes a consistent position on questions of European law in Brussels and before the European Court of Justice. COLA also provides extensive guidance and training for government lawyers.

Transposing Community measures using delegated legislation

The United Kingdom Parliament has given ministers wide-ranging powers to transpose Community measures using delegated legislation, that is only subject to limited Parliamentary scrutiny. In practice, these powers are the main method that the United Kingdom uses to transpose Community legislation into national law.

The powers are contained in the European Communities Act 1972, the main piece of legislation by which the United Kingdom gave effect to its Community obligations when it acceded in 1973.

Section 2(1) of the Act provides:

> "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties… as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law…".

As a result of this provision, all directly applicable provisions of Community law take effect as part of the UK's domestic law.

Section 2(2) provides that, subject to the limitations in Schedule 2 to the Act, Her Majesty or any designated Minister or government department may by delegated instrument make provision:

> "(a) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be

> implemented, or of enabling rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or
>
> (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above."

The most important purpose of the power in section 2(2)(a) is to transpose directives into national law, or to remove provisions of national law that are inconsistent with Community law. The power can also be used to make provisions that go beyond what is specifically and directly required by the Community measure that is being implemented. In particular, the power can in some circumstances be used to make provisions that require policy decisions to be made about how an obligation should be implemented.

Section 2(2)(b) is much wider in scope than section 2(2)(a), and confers powers to make provisions that go beyond the obligations imposed by Community law. This is potentially a very significant power, so much depends on what exactly is meant by 'arising out of or related to'. The national courts of the United Kingdom have considered the meaning of these words on a number of occasions.

What makes this provision especially powerful is that it even allows ministers, by way of delegated legislation, to amend legislation that has been passed by both Houses of Parliament. This is a consequence of section 2(4), that says:

> "The provision that may be made under subsection (2) above includes… any such provision… as might be made by Act of Parliament…"

In the United Kingdom's constitutional system, Parliament is supreme, and there is no superior written constitution. So it is a significant step to give ministers the power to vary the laws passed by Parliament. But when the United Kingdom acceded to the European Economic Community, it was thought necessary to give ministers such a power, to ensure that the United Kingdom could give proper and rapid effect to European law even if there were inconsistent Acts of Parliament that might otherwise have impeded full transposition.

The power is subject to a limited degree of Parliamentary control. The Act allows ministers a choice about which Parliamentary procedure to use.

Under the lightest procedure, once the minister has made the delegated instrument, it can be revoked if either House of Parliament passes a resolution for the instrument to be annulled within 40 days of the date on which the minister made it. If Parliament does nothing, the instrument becomes law. In practice, it is rare for Parliament to use this power.

There is also a more onerous procedure, under which the legislation has to be presented to Parliament in draft. The minister cannot make the legislation unless the draft is approved by both Houses of Parliament. Since this procedure requires a positive act by Parliament, it is of course more time-consuming, and it is only used for the most significant implementing measures.

But both of these procedures are much quicker and easier than the normal method for making an Act of Parliament, where both the House of Commons and the House of Lords have to agree the legislation.

Transposing amendments to Community measures

The European Communities Act 1972 was amended in 2007 to make it easier to transpose Community instruments that are regularly amended. The new provision says:

> "Where–
>
> (a) subordinate legislation makes provision for a purpose mentioned in section 2(2) of this Act,
>
> (b) the legislation contains a reference to a Community instrument or any provision of a Community instrument, and
>
> (c) it appears to the person making the legislation that it is necessary or expedient for the reference to be construed as a reference to that instrument or that provision as amended from time to time,
>
> the subordinate legislation may make express provision to that effect."

This power is particularly useful when the United Kingdom transposes directives that are constantly amended to take account of technical progress. Before this new provision came into force, the United Kingdom had to make new implementing legislation each time such an amendment was made, which could be several times a year. This was cumbersome and time-consuming for ministries, given that amendments of this sort tend to be technical and uncontroversial.

To avoid this difficulty, the new power can be used to include a provision in the transposing legislation that refers to the directive "as amended from time to time". This means that whenever the directive is updated or amended, there is no need to amend the transposing legislation, as the change will automatically be given effect.

The United Kingdom's policy is that this power should only be used in cases where the amendments are likely to be purely technical. It will not normally be appropriate to use this power to give automatic effect to more radical amendments to directives, that could have far-reaching and unintended consequences.

Restrictions on the power to transpose using delegated legislation

Because the power in section 2(2) of the Act is potentially so wide, the limits to which it is subject are very important. Restrictions on the use of section 2(2) can be found in Schedule 2 of the Act, that deals with four especially sensitive matters. It provides that the powers in section 2(2) cannot be used in a way which:

- imposes or increases taxation
- makes retrospective provision
- sub-delegates legislative powers (other than powers to make rules of procedure for any court or tribunal) or
- creates criminal penalties of more than the specified amount

If a minister wants to make legislation that falls into any of these categories – or even if Community law requires it – Parliament has decided that it is necessary for the legislation to be subject to the full processes of Parliamentary scrutiny.

The United Kingdom's policy for transposition

The United Kingdom's policy for transposition is set out in the 'Transposition Guide' of September 2007, produced by BRE and available at http://www.berr.gov.uk/files/file44371.pdf. The guide gives effect to many of the recommendations in the review of the United Kingdom's

implementation practices conducted by Lord Davidson of Glen Cova QC in 2006, available at http://www.berr.gov.uk/files/file44583.pdf.

The United Kingdom's policy is to transpose directives into UK law so as to achieve the objectives of the European measure, on time and in accordance with other UK policy goals, including minimising the burdens on business.

Transposing legislation should avoid going beyond the minimum necessary to comply with a directive unless there are exceptional circumstances, justified by a strong cost-benefit analysis and extensive consultation with business.

Transposing ambiguous provisions

Particular difficulties arise when the Community measure that needs to be transposed is ambiguous or unclear. Of course, ideally the measure will be drafted in a way that avoids these difficulties, and the United Kingdom's policy is to seek to avoid ambiguities in Community legislation by considering how it will be transposed at the earliest possible stage in negotiations.

Where the Community measure is unclear, there are a number of ways of dealing with the problem in transposing legislation. One is to "copy out" the provisions of the directive word for word, and leave it to the courts to decide their meaning. The other is for the transposing legislation to spell out the United Kingdom's view about what the provisions in the directive mean

The advantage of the former approach is that it reduces the risk of challenge from the Commission under Article 226 EC, because reproducing the language of the directive in national legislation will normally be enough to ensure full transposition. But leaving the wording unclear could simply transfer to private parties the task of interpreting it,

and the risk that their interpretation is incorrect. It is therefore the United Kingdom's policy to ensure, as far as possible, that the meaning of the transposing legislation is clear, especially when it imposes criminal offences.

Where there is doubt about the precise legal obligation, the United Kingdom's policy is that ministers should be presented with options, together with a full explanation of the risks, costs and benefits attached to each. Instances where wider provisions have been drafted for safety's sake, or provisions have been narrowed down to what the draftsman takes the meaning to be, should be clearly identified and included in the impact assessment. The solution chosen must be the best policy solution consistent with the need to minimise the burdens on business and others. It may not always be the least legally risky one.

'Gold plating' and 'double-banking'

The United Kingdom's policy is that instances of over- or under-implementation should be avoided as far as possible. There may be pressures to preserve the existing domestic legislative framework; to provide legal certainty and avoid possibilities of challenge in the courts; and to implement different parts of a directive in different ways where it covers the responsibilities of more than one ministry. These pressures can lead ministries to over-implementation and in particular to what are referred to in the guide as 'gold-plating' and 'double-banking'.

'Gold-plating' is when implementation goes beyond the minimum necessary to comply with a directive, such as by:

- extending the scope, adding in some way to the substantive requirement, or substituting wider national legal terms for those used in the directive; or

- not taking full advantage of any derogations which keep requirements to a minimum (e.g. for certain scales of operation, or specific activities); or
- retaining pre-existing national standards where they are higher than those required by the directive; or
- providing excessive sanctions, enforcement mechanisms and matters such as burden of proof (e.g. as a result of reproducing existing criminal sanctions in that area); or
- implementing early, before the date given in the directive.

The United Kingdom's policy is that transposing legislation should not go beyond the minimum requirements of European directives except in exceptional circumstances, justified by a cost-benefit analysis and extensive consultation with stakeholders. Any proposal to 'gold-plate' must be agreed by a panel of ministers with particular responsibility for ensuring that the burden of regulation is kept to the minimum necessary.

'Double-banking' occurs when European legislation covers the same ground as existing national legislation, though possibly in different ways and to a varying extent. The United Kingdom's policy is that this should be avoided as far as possible. The test to be applied is whether maximum streamlining has been achieved between the new and existing regimes, and whether the opportunity has been taken to disapply domestic rules and guidance which serve less of a purpose under the new framework. Transposing legislation should aim to achieve as much consolidation as possible by merging all the relevant regulations into one.