

Chapter IV

Guidelines on preparing proposals, implementation, and transposition

Key requirements

- Implementation plans (in the format of a SWD) must accompany proposals for major Directives and should describe implementation challenges and relevant support actions to be taken by the Commission.
- Use available guidance to prepare a high quality legal text and explanatory memorandum.
- The Commission must justify in its proposals when it requires the Member States to provide explanatory documents to help it to carry out its task of overseeing the transposition of Directives.
- A compliance assessment of EU Directives must be carried out in two stages: (1) timely and systematic check whether Member States have transposed Union law; (2) a timely and systematic conformity check of national transposing measures against the relevant Union legislation (correct transposition).

1. INTRODUCTION

Who should read these Guidelines?

All officials involved in the preparation of an initiative and its subsequent implementation/application should read these guidelines.

Why is good implementation important?

Effective application of EU law is essential if the European Union is to meet its policy objectives. While Member States are responsible for the timely and accurate transposition of directives as well as the correct application of the entire *acquis*⁴⁴, the Commission has to monitor the Member States' efforts and ensure that their legislation complies with Union law. The Commission has three important roles:

First, during the preparation of a new initiative where issues and problems related to implementation and application should be anticipated and taken into account. Second, the Commission should prepare well-drafted, high quality legal texts that are easy to understand and implement. Third, the Commission needs to have thorough and consistent information on implementation/application in the Member States. It needs rigorously to examine national implementing measures to ensure that the laws of the Member States are fully compliant with the Union *acquis*.

The following guidance aims to assist services to take implementation aspects better into account when preparing new initiatives and to help them in identifying ways to check the implementation of EU law. This chapter complements the subsequent chapter which deals with how to monitor the application/effects of Union policies.

⁴⁴ Article 291 (1) TFEU.

2. ANTICIPATE IMPLEMENTATION PROBLEMS AND FACILITATE TRANSPOSITION: IMPLEMENTATION PLANS⁴⁵

Good implementation starts with a good impact assessment and stakeholder consultation. For each policy option, the analysis should explicitly address any clearly identifiable problems or issues which are likely to be encountered with its implementation and application by the Member States or other local or regional authorities or enforcement agencies. A key issue will be to assess the balance between the efforts of those who will be directly regulated or obliged to comply with a new initiative and the efforts of public authorities who will be responsible for enforcement in terms of costs and other resource implications. The analysis should also build on any relevant evaluation that may have identified implementation problems associated with existing legislation.

Box 1. Regulatory costs versus enforcement costs for public authorities

- Legal rules have to be monitored and enforced to be effective. Enforcement costs for public authorities may vary substantially between policy options.
- Abolishing business reporting obligations on health and safety measures does not remove the desirability of monitoring health and safety at the workplace. This will likely lead to more monitoring and inspection by public authorities;
- Speed limits enforced by police officers will be more costly than by using centralised speed cameras (entailing one-off capital costs and recurring maintenance costs and centralised administration issuance of fines);
- Enabling private actions for antitrust damages creates greater demand (and potential backlogs) and costs for the use of the judicial system which falls on public authorities.

The stakeholder consultation strategy should ensure that it targets the views of those public authorities who will ultimately be responsible for the effective application of the initiative and associated enforcement activities. This will ensure that relevant implementation experience and expertise is collected and built into the initiative.

The Commission should also support Member States in their transposition and implementation efforts by preparing implementation plans (IPs) for certain directives and regulations. The preparation of an IP aims at facilitating the timely and effective application of law, fully recognising the responsibility for the latter rests with the Member States⁴⁶.

Pursuant to the Interinstitutional Agreement on Better Law-Making⁴, the European Parliament, the Council and the European Commission have committed themselves to promote greater transparency about "gold-plating". This should be achieved by providing information in the national transposing measure itself or in complementary materials notified by the Member States to the Commission. The Commission cannot insist that such information be provided.

⁴⁵ This guidance replaces the guidance provided by the Annex II of the Note dated 7/01/2013 (Ares(2013) 12012).

⁴⁶ Article 288 TFEU

When is an implementation plan needed?

An implementation plan (IP) should be prepared when the implementation of the legal act concerned, because of its nature or complexity, could benefit or be facilitated by supportive measures.

IPs would normally be required for framework directives, directives with a large scope containing a large number of legal obligations, directives aimed at the full harmonisation of a policy area, and directives having a significant impact on or amending various branches of the national legal order. In contrast, IPs would normally not be required for directives with a limited or very technical scope or which do not require transposition measures⁴⁷, directives containing only one or a very limited number of legal obligations and directives amending only one or a very limited number of legal obligations of an existing directive.

Concerning regulations, an IP would be recommended in case the implementation requirements are similar to those of a directive and supporting measures to facilitate the application by Member States would be beneficial. The DGs are responsible for identifying where an IP for regulations concerning their particular sectors would be necessary.

Interservice consultation on the implementation plan

The preparation of an IP should be flagged in *Decide* before launching an interservice consultation. If no IP is planned, this should be justified in *Decide*. The Secretariat-General will verify and if necessary discuss justifications. The IP should be prepared as a staff working document and accompany the proposal in interservice consultation and as background to the discussions in the institutions. More guidance is provided in the *Toolbox*⁴⁸.

What should an implementation plan contain?

The preparation of the implementation plan should start with an assessment of the challenges which the Member States will face in applying the legislation. On the basis of the assessment, the IP should set out the various types of support which the Commission services will provide to the Member States to assist them in their implementation of the legislation. It should also set out the monitoring arrangements designed to ensure the availability of strong data and other evidence to track progress and report on the performance of the measure. A template for such an implementation is provided in the *Toolbox* along with additional information on how to prepare Commission guidance related to implementation of Union law by the Member States.

Where appropriate, the implementation plan should be updated after adoption of the act by the Legislator to reflect important changes that will affect how the legislation is to be transposed and implemented by the Member States.

⁴⁷ For example, Directives updating provisions related to (inter) institutional issues such as comitology.

⁴⁸ See Tool #36 on *The implementation plan*.

3. BETTER DRAFTING OF LEGAL ACTS

Union legislation should be well drafted in order to ensure it adequately reflects the intention of the legislator and can achieve its regulatory aim. Respect for the requirements of legislative drafting plays an important role in achieving the goal of legal certainty. If legislation is clear it can be implemented effectively, citizens and economic actors can know their rights and obligations and the courts can enforce them.

Where can legislative drafting rules be found?

The importance of good legislative drafting has been recognised for many years in the different institutions. The Interinstitutional Agreements on the quality of drafting of legislation⁴⁹ and on the use of codification⁵⁰ and recast⁵¹ techniques have established a common approach.

The Joint Practical Guide for people drafting European Union legislation⁵² builds upon the agreed principles. In addition, the Quality of Legislation team in the Legal Service has developed the Drafters' Assistance Package (DAP)⁵³ which offers guidance, step by step, on how to draft legal acts and is based on the Joint Practical Guide. It even provides useful links and suggested wording. In practice, if your draft is of high quality it is less likely to be altered later in the legislative procedure.

DAP only covers the legal act itself and does not deal with other related documents, such as the impact assessment or the explanatory memorandum. DAP is integrated into the Legiswrite models but can also be accessed as a stand-alone wiki.

Box 2. How to prepare a good quality legal act – some important steps

- Use the correct Legiswrite model whenever you draft a legal act;
- Follow the rules in the Joint Practical Guide and check in DAP whenever you have questions as to how a provision should be drafted;
- Bear in mind that your text may need to be translated into other languages;
- Check that references are accurate.

What is the recast technique?

Recast is a tool for the simplification of Union legislation. It is a technique which makes it possible to amend an earlier act (which itself may have already been amended) while

⁴⁹ Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ C 73, 17.3.1999, p.1).

⁵⁰ Interinstitutional Agreement of 20 December 1994 on an accelerated working method for official codification of legislative texts (OJ C102, 4.4.1996, p.2).

⁵¹ Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts (OJ C77, 28.3.2001, p.1).

⁵² Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation
<http://www.cc.cec/wikis/display/dap/Legislative+drafting+resources>

⁵³ <http://www.cc.cec/wikis/display/dap/Home>

immediately codifying the new amendments with the existing provisions of the earlier act. It results, therefore, in a new legal act which incorporates both the amendments and the unchanged provisions. The new legal act replaces the earlier one which is repealed.

The recast of legislative acts is governed by specific rules laid down in the Interinstitutional Agreement on a more structured use of the recasting technique for legal acts. The Agreement sets the "*rules of the game*" necessary for preserving both the right of initiative of the Commission and the right of the legislator to make amendments to the Commission's proposal in a recast exercise.

The Commission has given a commitment to the European Parliament and the Council to make greater use of the recast technique when preparing amendments to Union legislation⁵⁴.

Services should always consider using the recast technique when amending existing legislation. Advice should be sought at an early stage in the preparation of a new initiative from the Legal Service when determining whether recast is appropriate in a given case. In particular, the Legal Service's quality of legislation team can offer guidance and practical assistance⁵⁵. More information is also available in DAP. The translation of recast proposals is more demanding and more time is needed to translate into all language versions.⁸

What is codification?

Codification brings together all of the provisions of an existing legal act and all of its amendments in a new legal act replacing the earlier one, which is repealed. The distinctive feature of codification is that, in contrast to recast, no substantive changes may be made to the earlier act.

Codification – which passes through the full legislative process - should not be confused with the unofficial consolidation carried out by the Publications Office which results in texts which are not legally binding.

Codification is governed by the Interinstitutional Agreement on an accelerated working method for official codification of legislative texts. **In addition, where the recast technique is not appropriate, the Commission has agreed systematically to present a proposal for codification as soon as possible after the adoption of an amending act unless it presents reasons for not doing so.**⁵⁶

Codification is carried out on the basis of initiatives undertaken in cooperation between the Legal Service and the operational DGs, with the Legal Service acting as lead DG. The Legal Service is therefore responsible for the preparation of the proposal for a codification and for following up the procedure leading to the adoption of the new, codified act.

⁵⁴ Pursuant to the §46 Interinstitutional Agreement on Better Law-Making

⁵⁵ [SJ juristes-reviseurs@ec.europa.eu](mailto:SJ_juristes-reviseurs@ec.europa.eu)

⁵⁶ Pursuant to §46 Interinstitutional Agreement on Better Law-Making;

Other issues to consider when preparing proposals for legislation

The Commission is committed to the use of **common commencement dates** for EU regulations and decisions affecting businesses generally. Proposed Decisions, Regulations and delegated acts should, where possible, stipulate a commencement date of 1 January or 1 July in a given year to help simplify the actions of affected parties.

Sunset clauses may be used to prevent obsolete legal provisions from remaining in force. They terminate or repeal some or all provisions of a legal text after a specific date unless further legislative action is taken to extend them. As such, they can be used to direct an assessment of the continuing need for legislation and may be particularly relevant where emergency legislation is adopted, for example, in response to a particular crisis or unexpected issue etc.

Box 3. Example of a sunset clauses

The EU Agency on Network and Information security was initially established with a time limited mandate.

Legislative proposals should also envisage when and how ***legislation will be evaluated in the future***. The next chapter describes how monitoring arrangements should be conceived at the design stage of a new initiative in order to support such evaluations.

*The explanatory memorandum*⁵⁷

The purpose of the explanatory memorandum is to explain the Commission's proposal. It is required for all legislative proposals and non-legislative proposals for adoption by the Council or by the EP and the Council⁵⁸. It is transmitted to the other Institutions together with the accompanying proposal and is available to the public. The explanatory memorandum is, however, not published in the Official Journal and will not become part of the act to be adopted.

The explanatory memorandum should be used to communicate the following issues which are important for the Commission's better regulation policy:

- **Legal basis:** Explain the legal basis of the proposal. Where several feasible options exist, justify the choice on the basis of objective criteria.
- **Subsidiarity (for non-exclusive competence):** Explain the Union dimension of the problem. Describe why the objectives of the proposal cannot be adequately achieved by the Member States (necessity test). Explain why action at EU level, by reason of its scale or effects, would produce clear benefits as opposed to action at Member State level (effectiveness test).
- **Proportionality:** Explain the scope of the proposal and why it is considered proportionate (i.e. not going beyond what is necessary to achieve the objectives).

⁵⁷ See Tool #38 on *Drafting the explanatory memorandum*.

⁵⁸ A simpler explanatory memorandum also exists for delegated acts which are not directly covered by this guideline although elements of the Guidelines and tool may still be relevant. In addition, there are templates adapted to initiatives taken pursuant to Article 218 TFEU (see GoPro and MyIntracomm).

Explain the choice of instrument and why it is considered the most suitable act for achieving the objective.

- Summarise results of any **evaluations/fitness checks** and clarify the link to the identified problem(s) addressed by the proposal.
- Describe the results of the **stakeholder consultations** undertaken including the views of respondents and how these were taken into account in the proposal.
- A short summary on the **external expertise** on which the Commission has relied upon (approach, range, advice received and used, publicly available information).
- To explain why **no impact assessment** has been prepared where one would have usually been prepared according to these Guidelines⁵⁹.
- **Impact assessment:**
 - How the impact assessment has been revised to reflect the opinion(s) from the Regulatory Scrutiny Board.
 - Explain which policy alternatives were examined, how they compare and why the final proposal was considered to be the preferred policy choice.
 - Describe the main economic, social and environmental impacts of the preferred option, who would be affected and how;
 - Where the final policy proposal deviates from the options assessed in the IA, clarify the likely impacts of such a change.
- **Regulatory fitness and simplification:**
 - Mention, with quantified estimates wherever possible, the extent to which the proposal will reduce regulatory burden or simplify the existing legal framework.
 - Outline whether and how the proposal exempts micro-enterprises (and reasons if no exemption is proposed) or provides a lighter regulatory regime for SMEs generally including how it minimises compliance costs for SMEs.
 - The possible negative impacts on sectoral EU competitiveness or international trade should also be specified;
 - Explain how the initiative is "digital and internet ready" so that initiatives are appropriate for both the digital and physical worlds.⁶⁰
- **Implementation plans, monitoring, evaluation and reporting arrangements:** Refer to the implementation planning associated with the measure, including the monitoring, evaluation and reporting framework to be applied to assist with its

⁵⁹ See Tool #9 on *When an IA is necessary*.

⁶⁰ See Tool #27 on *The digital economy and society and ICT systems*.

implementation and application and to report on its performance. Alternatively, explain why no implementation plan is necessary.

- **Explanatory documents (for directives):** Explain if the proposal requires explanatory documents on the transposition and why (see later section).

4. DELEGATED ACTS AND IMPLEMENTING ACTS

The Interinstitutional Agreement on Better Law-Making contains a common understanding on the use of delegated acts (see Chapter I, section 2). This sets out the standard legal provisions which should be used to draft empowerments in basic acts as well as the steps to be followed when preparing new delegated acts and the control mechanisms for the European Parliament and the Council. The key commitment is that experts from the Member States are consulted on each draft delegated act and that the European Parliament and the Council are kept informed and can send experts to the relevant expert group meetings preparing the delegated act.

A legal framework is already in place for implementing acts and the respective procedures and control mechanisms⁶¹. Better regulation principles apply to the preparation of delegated and implementing acts as specified in these Guidelines and the Toolbox.

In addition, the Commission has decided that the draft legal texts of delegated and implementing acts (subject to certain exceptions) will be put onto the Commission's web site in order to allow stakeholders to provide feedback during a period of 4 weeks. Further details can be found in separate guidance in relation to delegated and implementing acts⁶² as well as in the toolbox.

5. THE LINK BETWEEN EU LAW AND MEMBER STATE TRANSPOSING MEASURES: EXPLANATORY DOCUMENTS⁶³

Why is it important to make the link between EU law and national transposition measures?

The Commission is the guardian of the Treaties. That means that it has to monitor the application of EU law and should be able to identify clearly how a Member State's legislation links with EU legislation⁶⁴.

The European institutions have agreed on a set of joint political declarations, which indicate how the Commission can be provided with this information on the transposition of directives. The Member States undertake to accompany the notification of transposition measures with one or more so-called explanatory documents, which can take the form of correlation tables or other documents serving the same purpose. The

⁶¹ Regulation (EU) 182/2011, OJ L 55, 28.2.2011, page 13.

⁶² <https://myintracomm.ec.europa.eu/sg/comitology/Pages/index.aspx>

⁶³ This guidance replaces the guidance provided in the Note dated 20/12/2011 (Ares(2011) 1386838).

⁶⁴ The policy is contained in: (1) joint political declaration between the Commission and the Member State (OJ 2011/C 369/02); and (2) a joint declaration between the EP, Council and Commission (OJ 2011/C 369/03 and (3) point 44 of the Interinstitutional Agreement on Better Law-Making).

Commission must first justify the need for, and the proportionality of, providing such documents on a case by case basis when presenting its proposals.

When is it justified to ask for explanatory documents?

The Commission lead service should justify the request for explanatory documents. The key question to be answered is whether the document is necessary for the Commission to carry out its task of overseeing the transposition of directives. The issues to consider are similar to those when considering whether to prepare an implementation plan.

The Commission should weigh up the following:

- The complexity of the directive concerned – the more complex, the more likely an explanatory document is needed;
- The complexity of the area concerned in view of its transposition into the legal order of the Member States;
- Possible additional administrative burden – is the request proportionate to the legislative initiative being prepared?

Explanatory documents would normally not be required if the notification of individual transposition measures itself is largely self-explanatory. This usually applies to:

- Directives containing only one or a very limited number of legal obligations;
- Directives amending only one or a very limited number of legal obligations of an existing Directive;
- Directives concerning well delimited and not heavily regulated domains at national level.

By contrast, explanatory documents are usually needed for:

- Directives with a large scope containing a large number of legal obligations;
- Directives aimed at full harmonisation of a policy area;
- Directives having a significant impact or amending various branches of the national legal order.

The Commission has also committed to justify, to the European Parliament, those cases for which it will not request explanatory documents. Although such justification may be shorter than those cases requiring explanatory documents, they should nonetheless be based on the considerations mentioned above.

Justification for explanatory documents in Commission initiatives

For all new proposals for Directives, and draft delegated acts, a justification should be prepared as part of the explanatory memorandum on why explanatory documents are requested (or not).

In cases where the services propose to request explanatory documents, a standard recital should directly be included in the proposed Directive to be adopted in a legislative procedure:

"In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the Legislator considers the transmission of such documents to be justified."

In cases where the services propose to request explanatory documents, a standard recital should directly be included in the directive adopted by the Commission as a delegated or implementing act:

"In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments."

For all Directives to be adopted as delegated or implementing acts, the justification for explanatory documents should be provided orally during discussions with the member States (i.e. in the expert groups for delegated acts and comitology committees for implementing acts). This can then be reflected in the summary record of the committee meeting).

If Member States fail to provide explanatory documents the responsible Commission service is encouraged to contact the competent national authorities and invite them to fulfill their obligation.

6. MONITORING IMPLEMENTATION

*Compliance assessment*⁶⁵

The Commission is committed to more systematic monitoring of the implementation of legislation.^{66,67} This is done, inter alia, by conducting compliance assessments of both transposition and conformity of Directives. Compliance assessment is two-staged:

First, the services carry out a **transposition check (completeness)**, assessing the status of the transposition of the directive concerned. If Directives are not completely transposed, services propose to launch an infringement procedure under Article 258 or, where a legislative Directive is concerned, in conjunction with Article 260(3) TFEU⁶⁸.

Once the transposition check is finalised and once possible ensuing infringement procedures for failure to communicate transposition measures have been closed, services

⁶⁵ This term covers transposition and conformity check

⁶⁶ [C\(2016\) 8600](#), OJ C18, 19.1.2017, p 10. EU Law: Better results through better application.

⁶⁷ [COM \(2012\) 746 final](#).

⁶⁸ See [Commission Communication, Implementation of Article 260\(3\) of the Treaty](#), OJ C12/02 of 15 Jan. 2011, para. 7.

should immediately start the second stage of the compliance assessment, the **conformity check** without excluding the possibility of launching conformity checks on parts of the Directive that have already been transposed completely. This check aims at getting a meaningful picture of the conformity of the legislation of the Member State with the Directive. Detailed guidance is provided in the Toolbox.

Monitoring application

Good implementation also involves the monitoring of the application of legislation on the ground. This is to ensure that the intervention performs as intended and to provide information so that corrective action can be taken if it is not performing or if there have been unintended consequences etc. The need for better performance monitoring is recognised in the Interinstitutional Agreement on Better Law-Making which sets out the need to consider systematically monitoring and evaluation clauses for new Union legislation⁶⁹. The Toolbox provides more information on how to prepare such provisions⁷⁰.

The Commission may decide that a "soft" policy instrument is preferable to a pure legislative approach (although these may be combined). This may include voluntary agreements or other forms of self-co-regulatory action which are described more fully in the Toolbox⁷¹. In such cases, there will also be a need to monitor the performance of such approaches against the policy/legislative principles underpinning them³⁰, the commitments made by the parties and the objectives of the initiative.

The next chapter deals in more detail with monitoring the effects over time associated with a given intervention.

Guidance documents containing legal interpretation of EU law

Commission documents often provide guidance to Member States and/or stakeholders in applying and implementing EU law. Such guidance may contain interpretation of EU law, which, according to the case law of the Court of Justice of the European Union, may legally bind the Commission. Therefore, guidance documents have to be endorsed by the College unless such documents are part of the Commission's normal administrative operations. Further guidance is provided in the Toolbox.

⁶⁹ Pursuant to §22 of the Interinstitutional Agreement on Better Law-Making.

⁷⁰ See Tool #42 on *Legal provisions on monitoring and evaluation*

⁷¹ See Tool #18 on *The choice of policy instruments*.