Transposition of EC Law for EU Approximation and Accession:

The Task of National Authorities

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A. Introduction

New and aspiring EU member states could be excused for being under the false impression that the decision of the EU to accept a new member state is still a purely political one.[1] After the last enlargement of the EU, where ten new member states managed to achieve the difficult goal of EU accession, it has become evident that the route to participation in the club of EU member states requires a national strategy at political, economic and legal levels. This does not contradict the realistic view that the road to accession is a long and painful one. However, in contrast to the almost fatalistic approach to accession encouraged by the purely political strategy of old member states, the current multi-level prerequisites to EU approximation and accession encourage the activist acquisition of skills necessary for compliance with the Copenhagen criteria. This article focuses on the legal prerequisites for accession and membership emphasising the issue of adequacy and efficiency in the national implementing measures. Apart from any academic value, the analysis of the legal prerequisites for EU accession and membership may also serve as a means of identification of the skills required for the achievement of EU accession and successful membership thus contributing to the continuing quest of governments for a national strategy for EU accession and membership.[2]

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[1] Nevertheless, transposition involves political choices. *See* D.G. Dimitrakopoulos, *The Transposition of EU Law: 'Post-Decisional Politics' and Institutional Autonomy*, 7 European Law Journal, 442-458, at 443 (2001).

[2] The lack of skilled staff is perceived to be one of the main factors adversely affecting transposition in Greece, France and Ireland. *See* N. Travers, *Rapport irlandais*, *in* FIDE, Les Directives Communautaires: Effets, Efficacité, Justiciabilité, XVIIIème Congrès, Stockholm, 3-6 June 1998, at 310 (1998); *see also* J. de Clausade, *L'adaptation de l'administration française à l'Europe*, Rapport au Ministre d'Etat, Ministre de la Fonction Publique et des Réformes Administratives et au Ministre des Affaires Européennes 68 (1991); A. Passas & A. Makridimitris, The Greek Government and the Co-ordination of European Policy 59-60 (1994).

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B. The Starting Point: Is Accession an Unfair Process?

The Copenhagen criteria utilised as a basis for the decision of the EU to accept ten new member states involve political, economic and legal requirements. From the point of view of the political criterion, the EU now demands that new member states can demonstrate the existence of stable institutions that guarantee democracy, the rule of law, human rights and respect for minorities. The economic criterion requires that new member states enjoy a functioning market economy. In order to comply with the legal criterion new member states must demonstrate that before accession they have succeeded to adopt fully the *acquis communautaire*. The *acquis* includes all primary and secondary legislation and other sources of EU law that are directly or indirectly binding upon member states and EU citizens. Adoption of the *acquis* is considered to be the only means of securing that the candidate country already shares the political, economic and monetary goals of the EU, as detailed in the constituting treaties and secondary laws. The 1995 Madrid European Council added a fourth administrative criterion that forms part or is directly linked to the Copenhagen legal criterion. New member states must put in place all administrative structures for the gentle integration of the candidate countries with the EU; the administrative criterion compliments the legal criterion and demands not only legislation for compliance with the acquis, but also adequate and efficient enforcement of implementing legislation.

Respecting the principle of autonomy of national governments the EU has refrained from providing a step-by-step guide for EU accession and membership. The strategy of existing and aspiring member states is based on decisions made independently from the EU. However, compliance with the principle of autonomy does not signify boundless liberty in the strategy of national governments. First, the goal to be achieved is strictly and restrictively determined by the acquis: for binding legal instruments passed before accession to the EU the state involved is expected to comply with decisions made by others; for binding legal instruments after accession the state is expected to comply with decisions increasingly made by the majority, albeit with its participation to negotiations and the decision-making process. Secondly, the adequacy and efficiency of the national means selected and implemented for the achievement of compliance with the *acquis* are monitored by the EU institutions: in the pre-accession stage the European Commission monitors and evaluates compliance with the *acquis* in minute detail thus ensuring – at least in theory – that at the moment of accession the new member state shares adequately and effectively the values of the EU as detailed in its primary and secondary legislation; in the post-accession stage the European Court of Justice controls compliance with the *acquis* and demands correction of any incompatibilities with the *acquis* that in the post-accession stage are re-named breaches of EU law.

The limited autonomy of aspiring and new member states may seem unfair as it seemingly imposes new conditions for accession that were not part of the route to accession before the last enlargement. However, there are considerable similarities in the tasks imposed on aspiring and existing member states. After all, is the autonomy of older member states not delimited by EU laws passed

by the majority, even when the member state has expressed serious concerns or even opposition to their passing? And, are the means for compliance with these laws not monitored and evaluated by the Commission in the first administrative stage of infringement proceedings and by the ECJ in the judicial stage of such proceedings? As a result, it would be inequitable to accuse the new criteria for EU accession as unfair: the new criteria simply extend the obligations of membership to the pre-membership period thus transferring the traditional period of grace for older member states to the new period of pre-accession negotiations.

Nevertheless, the two cases of pre and post accession are not identical. There are delicate qualitative and quantitative differences in the delimitation of autonomy pre and post accession. First, current member states participate in the decision making process and have the opportunity to present their national concerns or opposition to part of whole EU legal instruments before these are passed.[3] Consequently, their national position – when objectively plausible – is usually taken into account in the drafting of the EU legal text thus facilitating the difficult task of the opposing member state to implement and enforce the measure in its national legal order.[4] In contrast to this level of participation, new and aspiring member states lack the opportunity of direct or indirect participation to the decision making process. Second, current member states are offered the admittedly decreasing opportunity of a veto that may put legislation at the EU level to a complete hold. Similarly, member states may enjoy the benefits of the principle of flexibility and opt out of entire chapters. Notorious examples of this opportunity are the initial opt out of the UK from the social charter and the current opt out of Denmark from judicial cooperation in civil matters. Aspiring and new member states are excluded from this right as the content of the *acquis* is clearly set in the pre-accession package offered to them. The Schengen regime was non negotiable to new member states whereas the EMU was not open to any of the new member states in the last enlargement. Third, the danger of non-compliance in the case of aspiring member states lies with a delay or – in theory – cancellation of the accession process. In the case of current member states the danger lies with infringement proceedings before the ECJ that may lead to the imposition of hefty fines.[5]

Are these differences pronounced enough to be considered disproportionate? True, there is no participation in the EU decision-making process for pre-accession instruments; nevertheless, in approximation or accession negotiations aspiring member states can negotiate the nature and extent of national implementation and enforcement, albeit at a qualitative level. True, there is no flexibility in the constituting elements of the *acquis* for the purposes of accession; nevertheless, in approximation or accession negotiations aspiring member states may secure a period of exclusion from the application of certain chapters upon the initiative of

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[3] *See* Rapport Public 1991, Etudes et documents No. 43, at 15 (1991).

[4] Participation in the legislative process minimises that country's adjustment costs: *see* A. Héritier, *The Accommodation of Diversity in European Policy-Making and Its Outcomes: Regulatory Policy As A Patchwork*, 3 (3) Journal of European Public Policy 149 (1996).

[5] Fines are a deterrent for member states. *See* J. Tallberg, *Paths To Compliance: Enforcement, Management and The European Union*, 56 (3) International Organisations 609 (2002).

the national governments or the EU. True, the result of non compliance vary in the pre and post accession situations; nevertheless, the political consequences are comparable.

In fact, the accession process is a reflection of the process of membership without the risk of harsh fines imposed by the ECJ in cases of breaches of the acquis. It offers to aspiring member states the opportunity to participate to the decision making process for the implementation of the *acquis* in their national legal orders and to achieve transposition in a manner that may balance the obligation to comply fully and effectively with the task of achieving transposition without causing irreparable damage to the national legal system. Thus, the process of accession with specific reference to the legal Copenhagen criterion as supplemented by the Madrid administrative criterion entails a long and painful process of transposition, better described as legislating for EU accession and membership.

C. The Start of Negotiations

The first step towards the start of negotiations for accession is the evaluation of the candidate country's national legislation as a means of identifying areas of discrepancy. On the basis of this evaluation, that is undertaken by the Commission with the aid of the candidate country, a work programme is agreed and negotiating positions are defined. This first stage involves a comparative analysis of the main elements of the national legal system with the acquis.[6] The aim is to determine which area of national law is at worse odds with the *acquis* thus revealing the field where the most work will be needed.

At this stage the aim of national authorities is to ensure full and complete awareness of their national legal system and a good understanding of the *acquis* as a means of achieving an accurate evaluation of the two regimes. This will lead to a realistic determination of a work programme that may in practice be followed by the national authorities. There is little benefit in unfounded optimism at this early stage. Failure to identify areas of real difficulty will only disrupt negotiations and the accession at a later stage when time may not allow rectification of initial miscalculation within the deadline for accession. Similarly, undue pessimism does not serve the country either as it may place the initial timeframe for accession at an unreasonably late date that may not be put forward later.

The second step towards the start of negotiations is the inclusion of the work programme, negotiating positions and priorities for each sector of legislation in the accession partnerships of each candidate country. The aim of accession partnerships is to set clear goals for the reception of the acquis. For this purpose national authorities participating the negotiations process require an expert knowledge of the *acquis* in each one of the chapters of negotiations. The task is not as simple as it seems prima facie.

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[6] This is the main reason why lawyers must be involved in the process of negotiations. *See* Dimitrakopoulos, *supra* note 1, at 448.

The *acquis* is the body of common rights and obligations, which bind all the member states together within the EU. It is a dynamic body of stipulations which engulfs the content, principles and political objectives of the constituting treaties; secondary legislation adopted in application of the treaties and the case law of the European Courts (the ECJ and to a lesser degree the European Court of First Instance); the declarations and resolutions adopted by the EU; measures relating to the common foreign and security policy; measures relating to justice and home affairs; international agreements concluded by the Community and those concluded by the member states between themselves in the field of the EU's activities. In other words, the *acquis* covers not only law strictu sensu but also general principles of Community law and measures of the second and third pillars adopted by use of the special legislative procedures in these areas of EU law. When the European Constitution comes into force and the three pillars will be restructured to one body, the meaning of the *acquis* will be greatly simplified. This will assist candidate countries in their understanding of the task laid before them: applicant countries have to transpose all if the *acquis* before they can join the EU. This obligation is of course subject to specific and expressly agreed derogations or periods of grace clearly introduced in the accession treaty for the particular country. Implementation of the *acquis* by the new member states begins on the date of their formal accession to the EU.

The third step towards the start of negotiations is the conclusion of a detailed programme for the adoption of the acquis. The programme takes into account the Commission's evaluation of the legislation of the country and the identification of areas of discrepancy with the *acquis* as detailed in the accession partnership. The aim of the programme is to organise the implementation of the priorities identified in the accession partnership, the introduction of a realistic and adequate timetable for the transposition of the *acquis* into national law, and the identification of the human and financial resources needed to achieve compliance with the timetable and final compliance with the Copenhagen legal criterion and the Madrid administrative criterion as requirements for EU accession. Programmes and indeed accession partnerships are re-evaluated and adjusted regularly upon agreement of the Commission and the candidate country.

The main framework for accession remains the same and is based on Article 49 (former Article O) of the EU Treaty. Negotiations with candidate countries can only begin if all three central EU institutions are in agreement. What is required is support from the European Commission, agreement of the European Parliament and finally unanimous agreement of the Council. In other words, all existing member states and all EU institutions must be in agreement before even the lengthy period of negotiations for accession can begin. Apart from this *conditio sine qua non*, each candidate country must comply with the specific requirements for its own accession as negotiated and agreed in each particular case. Thus, specific conditions for admission, transitional periods and adjustments to the constituting treaties must be determined before negotiations for accession can begin and at a time when the candidate country has little, if any, negotiating powers. The legal nature of the agreement between the candidate country and the member states seems to be that of an international treaty. It is widely accepted, therefore that,

national ratification requirements for all signatory states involved in the process must be respected and fulfilled before the agreement can acquire legal force.

The main aim of accession negotiations is to achieve the highest possibly compliance of the national law of the applicant country with the Community *acquis*. Complete transposition must not be limited to the incorporation of the *acquis* to the national law of the applicant country. Implementation and enforceability of the *acquis* upon accession is an equally important part of transposition and indeed one that is often neglected by the applicant countries. It is the most technical and intricate part of their preparation for accession, as it requires the strengthening of the administrations and the legal system of applicant countries, as well as their drastic adaptation as a means of complying with EU standards. This is often a rather painstaking exercise especially in the very technical areas of agriculture, transport, energy and the environment. As a means of facilitating the intricate and often unbearable task of the radical prompt reform of the administration and the legal system to accommodate these requirements, the EU provides to applicant countries pre-accession aid.

Negotiations identify areas of difficulty, the measures required for transposition of the *acquis* and the timetable to be followed for complete compliance before the accession date. Moreover, negotiations look at the human and financial resources noted in the accession partnership in order to determine the nature and extent of pre-accession aid that the EU will award to the applicant country to support the gentle and effective incorporation of the *acquis* to the existing body of national laws. Lack of complete and timely transposition will signify failure of the applicant country to fulfil the legal Copenhagen criterion and, therefore, failure to accede to the EU. As a result, partial compliance is only acceptable if so agreed by the EU institutions. This can only occur in the minimal cases of derogation from the *acquis* or for transitional measures.

The role of the national authorities of the applicant country in accession negotiations is to clarify existing national law, to explore to which extent this complies with the *acquis* and to accept fully or partially the recommendation of the Commission on new measures to be introduced for the achievement of complete and timely transposition.[7] Within this framework of negotiations national authorities have the opportunity to argue for favourable terms for the adoption, implementation and enforcement of the *acquis* by their legislatures, executive and judiciary. They may also request limited transitional arrangements when more time is needed for the full reform of legislation in a particularly difficult area or where the nature and extent of discrepancy between the existing national law and the *acquis* in a particular area of very limited scope could allow a derogation from the *acquis* which would not disturb the full integration of the applicant country to the EU. Traditionally, arguments for derogations and periods of grace are received with much scepticism from the Commission. Nevertheless, in a small number of

[7] Timely transposition affects integration for existing member states too. *See* E. Mastenbroek, *Surviving the Deadline: The Transposition of EU Directives in the Netherlands*, 4 European Union Politics 371-395 (2003).

cases genuine difficulties of the applicant country are recognised. Each applicant country draws up its position on each of the 29 'negotiable' chapters of the EU *acquis*; these form the basis of negotiations.

The subjects of negotiations are the existing member states and the applicant country. The applicant country appoints a Chief Negotiator, with a supporting team of experts.[8] On the EU's side the subject of negotiations is neither the EU nor EU institutions: subjects are the existing member states. As a result, negotiating positions are presented by the President of the European Council as the representative of national governments and not the European Commission, which, however, is very much involved in the actual meetings. The Council also chairs meetings at the level of ministers or their deputies. The Presidency rotates every six months and applicant countries have the opportunity to push their positions forward under the Presidency of a number of existing member states. The role of the European Commission in negotiations is to propose the draft negotiating positions on the basis of pre-accession documents and outcomes of negotiations in the 29 chapters of the acquis. The Commission acts both as a facilitator of the applicant countries in the accession process but also as a guarantor of compliance with the *acquis* by the applicant country. The Commission is therefore in close cooperation with national authorities in order to advise them on solutions to problems and difficulties but also to apply pressure for the finalisation of all necessary measures for the timely and full transposition, implementation and enforcement of the acquis. In view of the role of the European Commission within the EU, this is not a task unknown to them. Although all Directorate Generals of the Commission take an active role in the accession process for applicant countries, it is the Directorate General for Enlargement that has overall responsibility for the coordination of the effort on the part of the Commission.

However, administrative/secretarial support for accession negotiations is provided for by the General Secretariat of the Council and by the applicant countries themselves. At the negotiating stage the role of the European Parliament is to watch the work undertaken by the Council and the Commission and to evaluate the progress of the applicant countries. The European Parliament, as indeed national Parliaments of the accession countries, acquire an active role in enlargement only at the final stage of assent to the resulting accession treaties in the case of the European Parliament and the stage of ratification of the resulting accession treaties in the case of national Parliaments. The citizens of the EU are represented by the Council and the Parliament in the accession process and are awarded a direct active role in enlargement only in countries where a referendum is a constitutional necessity for the final approval of the accession treaties.

Negotiations for EU accession are conducted on the basis of four main principles. The principle of specificity limits the scope of negotiations exclusively to the terms under which the applicant country can adopt, implement and enforce the acquis. The principle of leniency allows transitional arrangements but delimits

[8] It is unfortunate that negotiators are usually policy officials rather than lawyers. *See* E. Mastenbroek & R.B. Andeweg, *Europeanising Dutch Legislation*, paper presented at the conference Europeanising Legislation: The Subsidiarity Principle and The Practice of Law Making In The EU Member States, held at the Political Academy, Vienna, 25-27 March 2004, at 19 (2004).

them in scope and durations as a means of ensuring that they will not harm integration of the applicant country. The principle of differentiation prohibits the dependence of progress in negotiations on processes of negotiation undertaken in parallel with a group of candidate countries. Finally, the principle of catching up allows candidate countries to proceed quicker than previous applicants should their progress merit quicker advancement.

D. Transposition in Practice

The task of transposition is rather complex from a quantitative point of view: the sheer number of binding instruments that require transposition suffices to demonstrate the volume of the task ahead.[9] In addition to the quantitative difficulty of accession, from a quantitative perspective transposition is a multifaceted issue.

First, the dynamism of the acquis, especially when soft law is taken into account, signifies that the goalpost for transposition is inevitably being moved further away as time passes.[10] Every new EU legal instrument, every new judgement of the European Courts, every international agreement signed by the EU while negotiations for accession take place are added to the body of rights and obligations that form part of the *acquis* and which aspiring member states must receive in their national legal order. Thus, national negotiators, drafters and legislators require constant update in the definition and delimitation of their concept of the *acquis*.[11] Second, the nature of EC instruments differs from the form of national, and indeed international, legal measures. This renders the understanding of their legal value, their degree of binding-ness and the depth of their enforcement requirements a rather complicated task.[12] Third, the terminology used in EC instruments tends to have an idiosyncratic meaning[13] with connotations that differ from those awarded to the same term in the national laws of non EU member states.[14] The identification of the elements of the concept utilised in the *acquis* and the nuances of variation with the national concept adds a layer of

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[9] *See* J. O'Reilly, *Coping with Community Legislation – A Practitioner's Reaction*, 17 (1) Statute Law Review 15, at 16 (1996).

[10] *See* R. Wainwright, *Techniques of Drafting European Community Legislation: Problems of Interpretation*, 17 (1) Statute Law Review 7, at 9 (1996).

[11] The problem is becoming more pronounced as increasingly emphasis is placed on the use of alternative regulatory instruments, including self-regulation, co-regulation, open co-ordination, benchmarking, peer pressure, networks, standardization and soft law: *see* L.A.J. Senden, *Soft Law and Its Implications For Institutional Balance in the EC*, 1 (2) Utrecht Law Review 77, at 79 (2005).

[12] Even lists in annexes of EU Directives must be transposed either expressly or in preparatory work in national implementing measures; *see Case C-478/99, Commission of the European Communities v. Kingdom of Sweden*, [2002] ECR I-4147.

[13] *See* S. Chalton, *The Transposition Into UK Law of EU Directive 95/46/EC (The Data Protection Directive)*, 11 International Review of Law Computers and Technology 25, at 27 (1997).

[14] *See* Th.A. Finlay, *Community Legislation: How Big a Change for the National Judge?*, 17 (2) Statute Law Review 79, at 80 (1996).

extra difficulty to the task of adequate and full transposition. Fourth, the *acquis* enters into aspects of national law that are outside the chapters of negotiation for accession. In order to achieve the desired task of full reception and compliance without undue distortion to the national legal system, transposition must take into account the legal system as a whole thus requiring amendments to all of its fields.[15]

I. The Choice of Form

In view of these complexities, how can transposition be achieved in practice? In responding to the task, from a legal point of view[16] national authorities are faced with dilemmas concerning the choice of the type of national implementing legislative measure and dilemmas related to the means that can achieve quality of the national implementing legislation. The final decision concerning the means to be used for the achievement of transposition rests with the national authorities under the principle of autonomy. However, the principle of autonomy is balanced by the equally important principles of subsidiarity, proportionality, adequacy, synergy and adaptability. These are general principles of EC law, which form part of the *acquis* and touch upon all aspects of EU law and policy. In the legislative process at the post-accession stage the principles bind both EU institutions and the member states.[17] As a result, the principles dictate both the national implementing actions but also the monitoring and evaluation of national implementing measures by the Commission and the ECJ.

In the legislative process at the pre-accession stage the application of the principles by aspiring member states cannot be taken for granted. Applicability of the principles by the national authorities of third countries, which is what aspiring member states are in the pre-accession stage, cannot possibly be direct. However, indirect applicability can be demanded from the national authorities of aspiring member states. First, the task of transposition relates to the preparation of the country for accession. As national implementing measures enter into force at the moment of accession to the EU, general principles of EC law will apply to the new member states. Second, general principles of EC law form part of the *acquis* that aspiring member states endeavour to receive in their national laws. It would be inconceivable to demand receipt of the *acquis* in a manner that breaches some of

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[15] *See* Wulf-Henning Roth, *Transposing 'Pointillist' EC Guidelines Into Systematic National Codes – Problems And Consequences*, 10 (6) European Review of Private Law 761 (2002).

[16] At the domestic level, the *choice of national legislative instrument* is also a political one and individual ministerial styles affect this choice. *See* Dimitrakopoulos, *supra* note 1, at 450.

[17] *See* J.A. Usher, *The Reception of General Principles of Community Law in the United Kingdom*, 16 EBLR 489, at 495 (2005). The requirements flowing from the protection of general principles recognised in the Community legal order are also binding on Member States when they implement Community rules: *see Case C-107/97, Criminal Proceedings against Max Rombi and Arkopharma SA, the party liable at civil law, and Union federale des consommateurs "Que Choisir ?" and Organisation generale des consommateurs (Orgeco), Union departementale O6*, [2000] ECR I-3367, para. 65; *see also Case 145/88, Torfaen Borough Council v. B & Q plc.*, [1989] ECR 3851; 24 *Shrewsbury and Atcham BC v. B & Q,* [1990] 3 CMLR 535; *C-20/00 and C-64/00, Booker Aquaculture v. The Scottish Ministers*, [2003] ECR I-7411. *See* O'Reilly, *supra* note 9, at 18.

the principles that lay in the core of legislating at the EU and national legislative process. Third, the monitoring and evaluation of transposition is undertaken by the Commission and existing member states, all of which have the right and the duty to comply with general principles of EC law. These principles constitute the basis upon which compliance with the *acquis*, and consequently compliance with the Copenhagen criteria, can be judged.

The principle of subsidiarity dictates that the highest level of action is justifiable only when lower levels of legislative action are inefficient for the achievement of the goal.[18] When applied to transposition for EU accession and membership, subsidiarity is perceived at two levels: legal subsidiarity can be defined as an economy of approaches;[19] legislative subsidiarity can be defined as an economy of measures. In other words, when selecting the national implementing measure, national authorities may proceed with legislation only where other levels and forms of regulation are not efficient.[20] When selecting the form of the national implementing legal measure, national authorities go through the list of national legal forms in the hierarchy of normative measures from bottom upwards: only when a personal administrative act is inefficient, will national authorities select a law and only when a law is inefficient, will they proceed with constitutional reform.[21]

The principle of proportionality guarantees that the level of regulation selected by national authorities reflects the effect/aim to be achieved.[22] In other words, legal proportionality in the transposition process supplements subsidiarity in ensuring correspondence between the national authorities' choice to legislate and the aim that the proposed legal instrument aims to achieve.[23] Legislative proportionality

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[18] *See* European Commission, Report from the Commission "Better Lawmaking 2004" Pursuant To Article 9 Of The Protocol On The Application Of The Principles Of Subsidiarity And Proportionality (12th report), COM (2005) 98 final and SEC (2005) 364, Brussels, 21.03.2005, at 2; *see also* Senden, *supra* note 11, at 93; G. Davies, *Subsidiarity: The Wrong Idea, In The Wrong Place, At The Wrong Time*, 43 Common Market Law Review 63, at 67 (2006); B. Rodger & S. Wylie, *Taking The Community Interest Line: Decentralisation And Subsidiarity In Competition Law Enforcement*, 18 ECLR 485 (1997); K. Lenaerts, *The Principle Of Subsidiarity And The Environment In The European Union: Keeping The Balance Of Federalism*, 17 Fordham International Law Journal 846 (1994); N. Farnsworth, *Subsidiarity – A Conventional Industry Defence: Is The Directive On Environmental Liability With Regard To Prevention And Remedying Of Environmental Damage Justified Under The Subsidiarity Principle?*, 13 European Environmental Law Review 176 (2004).

[19] *See* Davies, *supra* note 18, at 76.

[20] Nevertheless, the UK tends to over-implement EC law. *See* J. O'Keeffe, *Making a Silk Purse Out of a Sow's Ear*, 103 (14) Law Society's Gazette 14 (2006).

[21] It is noteworthy that no measure adopted before the entry into force of the second paragraph of Article 3b of the EC Treaty may be reviewed by reference to that provision, since the latter would thereby be endowed with retroactive effect. *See Case T-29/92, Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and others v. Commission of the European Communities*, [1995] ECR II-289, paras. 12, 330-331.

[22] *See* J.A. Usher, *The Reception of General Principles of Community Law in the United Kingdom,* 16 EBLR 489, at 506 (2005); *see also Case 11/70, Internationale Handelsgesellschaft*, [1970] ECR 1125, at 1148; *see also* Report from the Commission "Better Lawmaking 2004", *supra* note 18, at 2; The Law Society, EU Better Law-Making Charter, Better Law-Making Programme 5 (2005).

[23] When there is a choice between several appropriate measures recourse must be had to the least

supplements legislative subsidiarity[24] and demands that the choice of form of the national implementing measure reflects its purpose.[25]

The principle of adequacy balances subsidiarity and accentuates proportionality, albeit expressed in the negative form. Legal adequacy demands that the chosen means of regulation is capable of achieving the effect pursued. Legislative adequacy secures that the chosen form of legislation is capable of achieving the effect pursued. Although adequacy is a value to aspire to in the legislative process, true adequacy in legislative drafting can only be secured post hoc through a prospective evaluation of the proposed law,[26] namely through a cost benefit analysis and a retrospective evaluation in the form of monitoring of passed laws.[27]

The principle of synergy promotes a holistic approach to the legal system.[28] Legal synergy promotes coherence and interrelated functioning of diverse fields of law within the national legal system of the aspiring member state. Legislative synergy promotes a holistic approach of the law on a concrete social phenomenon, thus ensuring that the new instruments falls smoothly into place upon its entry into force and that it combines its forces for the achievement of the aim of legislation on the social phenomenon in question.

The principle of adaptability completes the set of values pursued when legislating for EU accession and membership. Legislative practice often requires flexibility in the choice of the appropriate instrument: parliamentary time is valuable and the selection of form may be based on the lighter procedural requirements of a form.[29] When combined with subsidiarity and proportionality, adaptability can reach dangerous extremes of under-regulation or under-authorised regulation produced without resort to parliamentary legitimatisation. However, when delimited by adequacy and synergy, adaptability can serve national governments to achieve results legitimately but without a waste of resources. Adaptability allows for experimental legislation or legislation in stages.

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onerous, and the disadvantages caused must not be disproportionate to the aims pursued: *see Case T-54/99, max.mobil Telekommunikation Service GmbH v. Commission of the European Communities,* [2002] ECR II-313, para. 81; *see also Joined Cases C-133/93, C-300/93 and C-362/93, Crispoltoni and Others*, [1994] ECR I-4863, para. 41.

[24] *See* Davies, *supra* note 18, at 71; *see also* J. Snell, *True Proportionality*, 11 European Business Law Review 50 (2000); N. Emiliou, The Principle of Proportionality in European Law (1996).

[25] *See* G. De Burca, *The Principle of Proportionality and its Application in EC Law*, 13 YEL 105 (1993); J. Jans, *Proportionality Revisited*, 27 LIEI 239 (2000).

[26] Where the legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question. *See Case C-150/94, United Kingdom v. Council,* [1998] ECR I-7235, para. 49; *Case T-54/99, max.mobil Telekommunikation Service GmbH v. Commission of the European Communities*, [2002] ECR II-313, para.84.

[27] *See* Law Society, *supra* note 22, at 8.

[28] *See* Law Society, *supra* note 22, at 15.

[29] Factors include the lourdeur of parliamentary procedures and the lack of parliamentary time: see J. Usher, The Legal Framework for Implementation in the United Kingdom, in T. Daintith (Ed.), Implementing EC Law in the United Kingdom: Structures for Indirect Rule 101 (1995).

So, how can national authorities select the appropriate normative level? Three main considerations are taken into account for the application of the principles to the choice of form for the national implementing measures: the extent of legislative intervention required for full transposition; the type of the main EU instrument for reception; and the object of the national implementing measure.

The extent of legislative intervention required for the reception of EC instruments by the national law of the aspiring or current member state relates to the choice of a normative rather than an alternative means of regulation and to the choice of normative level.[30]

If, at the time of evaluation, national law does not regulate the purpose of the EC instrument under transposition, the need for regulation – and indeed regulation in compliance with the *acquis* – is undisputed.[31] In this case the five tests of legislative subsidiarity, proportionality, adequacy, synergy and adaptability have been passed at the EU level when the EU institutions produced the regulatory legal instrument in pursuance of a legislative process.[32] Thus, the need for legal regulation in the field must be taken for granted. Aspiring and existing member states would have extreme difficulty[33] in making a legitimate and objectively plausible case for a refusal to proceed with legal regulation on the basis of national intricacies.[34] As for the choice of national implementing legal instrument, here selection is also limited exclusively to secure and legally binding national forms. Administrative or delegated legislation could not commonly respond to the need for legal regulation in the cases of lack of former regulation at the national level, as – by definition – lack of prior regulation signifies lack of a primary instrument that would introduce the necessary authorising or enabling clause. As a result, a law would be required for proportionate and adequate regulation. It would be uncommon for the task of transposition to end with the passing of a law. For reasons of synergy, the main law may commonly be supplemented by secondary legal instruments that will deal with technical details arising from the application of the law. In this case delegated legislation would contribute to achieving legal

[30] For a sociological analysis of compatibility of national norms and transposition, *see* A. Dimitrova & M. Rhinard, The Power of Norms in the Transposition of EU Directives, 9 (2005), European Integration online Papers N° 16, http://eio, at or.at/eiop/texte/2005-016a.htm.

[31] However, transposition does not necessarily require EU provisions to be reproduced verbatim in a specific, express law or regulation; a general legal context may be sufficient, provided that it does effectively ensure the full application of the directive in a sufficiently clear and precise manner. *See C-49/00, Commission of the European Communities v. Italian Republic*, [2001] ECR I-8575. Nevertheless, faithful transposition is often required: *see Case C-38/99, Commission of the European Communities v. French Republic,* [2000] ECR I-10941.

[32] *See* Davies, *supra* note 18, at 77.

[33] In *Case C-327/98, Commission of the European Communities v. French Republic*, [2000] ECR I-1851, paras. 22-23, the ECJ held that national difficulties in transposition was not a plausible excuse for not passing implementing measures.

[34] National legislation is needed even when the activity regulated by the EU instrument does not take place in the member state: *see Case C-441/00, Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland,* [2002] ECR I-4699; *see also Case C-214/98, Commission v. Greece,* [2000] ECR I-9601, at para. 22. However, national legislation may not be needed when the EU instrument is pointless for reasons of geography; *see Case 420/85, Commission v. Italy,* [1987] ECR 2983, para.5.

proportionality and legal adaptability. Supplementing the main law with secondary legislation is absolutely necessary for reasons of adequacy with specific reference to compliance with the Madrid administrative criterion.

The same principles apply in the case of prior national regulation that is archaic or in radical and direct clash with EC law. In these cases the options available for national implementing measures are limited to the passing of a core law supplemented by delegated legislation dealing with technical and administrative details.[35]

In cases where there is prior national legislation in the field under transposition, national authorities tend to have a wider selection of options.[36] At the legislative level, the five tests are applicable to ensure that further regulation is indeed necessary. When prior national regulation is complete when compared with EC regulation, each of the tests must be repeated applying national circumstances. In view of prior national laws, is further regulation required? If so, would further regulation be proportionate to the aim that EC regulation sets out to achieve? Could it be that current national regulation is adequate for the achievement of EC aims? Would the proposed new regulatory measures be received smoothly? Is it necessary to regulate further or can a wider interpretation of current regulatory measures, perhaps with a simple addition of a reference to the EC instruments,[37] lead to the desired effect? The answer to these questions will depend on the results of the comparative analysis between national and EC regulation. If, and only if, the five tests are not passed at the legislative level, will national authorities proceed with the same five tests at the legal level. There the extent of incompatibility of national law with EC law under transposition will dictate the position of the selected national legal instrument in the hierarchy of sources of national law. In cases where existing national law is incomplete, supplementation of its core provisions via a legal instrument of the same hierarchical level would be necessary. A law will be supplemented by another law or, even better technically, by an amendment to the existing law. Delegated legislation would be appropriate if the legal intervention needed for the achievement of complete transposition aims to take the aim of primary legislation further, to introduce technical or detailed provisions necessary for the implementation of primary legislation, to introduce administrative arrangements necessary for primary legislation, to bring primary legislation in force, or to supplement or amend part of primary legislation.[38]

Notwithstanding the significance of the extent of legislative intervention required, the form of EC instruments under transposition influences the choice of national authorities to a great extent. From a legislative point of view, at least in theory, the five tests of subsidiarity, proportionality, adequacy, synergy and adaptability have been met when the decision to proceed with legal regulation

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[35] *See* Chalton, *supra* note 13, at 31.

[36] *See* Dimitrakopoulos, *supra* note 1, at 452.

[37] *See* O'Reilly, *supra* note 9, at 20.

[38] Nevertheless, national authorities cannot take adequacy to an extreme. This would be the case with transposition of Directives through administrative circulars previously used in France and the UK. *See* R. Kovar, P. Lagarde, D. Tallon, *L'éxécution des directives de la CEE en France*, 6 (3) Cahiers de Droit Européen 288 (1970).

was made at the EU level. Similarly, the level of legal instrument selected by the EU in the first place is attributed both to the legal basis of the instrument but also to the order of the selected form in the hierarchy of sources of EC law. The legal instrument selected passed, at least in theory, the five tests. Thus, the choice of EU institutions in the EU legislative process leads the way to evaluations and choices to be made by national authorities in the national legislative process for the introduction of implementing measures.[39]

In practice, the provisions of the constituting treaties are generally suitable for inclusion in national constitutions or constitutional principles. The logic behind this lies with the nature of treaty provisions as general, widely drafted fundamental rules of the sort that can be found in national constitutions or constitutional principles. However, few treaty provisions actually require reception from the national laws of aspiring and existing member states. Most treaty provisions tend to introduce general principles of EC law that influence the interpretation and application of EC law in its entirety[40] and can be considered part of the general principles of national law. Moreover, as is the case with all of EC law, most treaty provisions apply exclusively in relation to EU citizens. It is this latter point that supports the argument against express transposition of most treaty provisions in the national constitutions, as the latter apply to all persons from EU and third countries equally. So, when it comes to the provisions of the constituting treaties, the task of national authorities is dual: the negative task is to take out of the equation articles related exclusively to the functioning of the EU; the positive task is to identify articles that introduce rights and obligations which the treaties award to EU citizens but which subsequent EC law has extended to third country citizens also. These are mainly provisions related to fundamental freedoms rather than to freedoms related to the internal market. It is only the former that require express inclusion to the constitution or constitutional principles. All other treaty provisions require silent transposition through their application to the interpretation and reception of all sources of EC law.

Regulations are directly applicable, so they form part of the national laws of the member states without the need for express implementing measures. In pursuance of the principle of synergy, Regulations are drafted in a manner that allows their smooth reception by national laws as they stand. In general, therefore, Regulations do not require transposition. However, this does not relieve national authorities from the task of evaluating their provisions against existing national law.[41] If Regulations are in complete contrast with prior national legislation, the latter must be amended or repealed altogether. Implied amendment may be considered adequate for the purposes of transposition. However, it hinders clarity in the national law of the member state, which cannot be condoned. Moreover, it may leave ground to judicial interpretation and application contrary to EC

[39] *See* O'Reilly, *supra* note 9, at 17.
[40] The lack of any express provision to the same effect in the precise EC text does not mean that the general principle does not apply: *see Case T-18/97, Atlantic Container Line AB and Others v. Commission of the European Communities,* [2002] ECR II-1125, para. 39.
[41] *See* O'Reilly, *supra* note 9, at 20.

law,[42] which in turn may lead to judicial state liability claims.[43] If Regulations affect existing national law in part, the task of national authorities is to evaluate the extent and manner in which national law is changed by the reception of the Regulation. In this case amendments via alteration, substitution or incorporation will ensure synergy while respecting adaptability. In the rare case where the Regulation complies fully with prior national law, aspiring and existing member states may not act or may either add a reference to the Regulation in the purpose clause or explanatory materials of the national legal instrument, or may draw an express cross reference to prior national laws in the enabling clause of the national law to which the Regulation is annexed.[44]

Directives require attention by national authorities as they merely set aims to be achieved allowing national authorities to exercise their autonomy in the process of implementation.[45] Of course autonomy is not boundless. National authorities must ensure full application[46] not only in fact but also in law.[47] In application of this principle, for the transposition of Directives national authorities cannot find refuge to a mere circular that can be amended by the administration at will,[48] to a simple general provision in national legislation referring to EC law,[49] or to existing administrative practices,[50] the tolerance exercised by the administration under existing national rules and administrative rules that do not confer any right on individuals capable of being relied on before national courts.[51] The rationale behind these restrictions to the autonomy of national authorities lies with the fact that the five tests were met at the time of the passing of the Directive and as a result the need for legislative regulation and regulation at a legal (primary

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[42] *See* A.J. Gil Ibáñez, The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits (1999); on the political aspect of judicial interpretation *see* F. Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 56 (1) Modern Law Review 27-31 (1993).

[43] For an analysis of the duties of national judges when applying EC law, *see* Finlay, *supra* note 14, at 86.

[44] For the advantages of the annexing technique, *see* O'Reilly, *supra* note 9, at 19.

[45] For an analysis of autonomy in the national legislative process, *see* J.H. Jans, *National Legislative Autonomy? The Procedural Constraints Of European Law*, 25 (1) Legal Issues of European Integration 25-58 (1988).

[46] *Case C-365/93, Commission v. Greece*, [1995] ECR I-499, para. 9; *see also Case C-144/99, Commission v. Netherlands,* [2001] ECR I-3541, para.17: member states may not justify breach of EC law on the basis of failure of other member states to perform their obligations; *see also C-38/89, Ministere public v. Guy Blanguernon. Reference for a preliminary ruling: Tribunal de police d'Aix-les-Bains*, [1990] ECR I-83.

[47] *Case C-339/87 ,Commission v. Netherlands*, [1990] ECR I-851.

[48] *Case 239/85, Commission v. Belgium,* [1986] ECR 3645.

[49] *Case C-96/95, Commission vs. Germany,* [1997] ECR I-1653.

[50] *Case C-152/00, Commission of the European Communities v. French Republic*, [2002] ECR I-6973. Member states may not plead provisions, practices or circumstances existing in its internal legal system in order to justify its failure to comply with obligations and time-limits resulting from Community directives. *See Case C-310/89, Commission of the European Communities v. Kingdom of the Netherlands,* [1991] ECR I-138.

[51] *Case 102/79, Commission v. Belgium,* [1980] ECR 1473; *Case 145/82, Commission v. Italy,* [1983] ECR 711.

or secondary) rather than administrative level has been verified.[52] Nevertheless, national authorities may leave the implementation of the aims introduced by a Directive to social partners through collective agreements; however, national authorities are still responsible for ensuring that the Directive is fully implemented by adopting such legislative or administrative measures as may be appropriate.[53]

In the absence of prior national regulation or when prior national legislation is in clash with the provisions of the Directive, the latter requires full transposition via legislative measures.[54] In cases of prior partial regulation and in view of the nature of Directives, they are commonly transposed via delegated – and in rare occasions primary – legislation;[55] however, the power to use delegated legislation for the purposes of transposition must be included in the ratification of the Accession Act. In cases where the national legal system already secures the aims pursued by the Directive implementing measures are not necessary. This may be the case where the necessary legislation already exists in national law or where principles of constitutional or administrative law render specific national legislation superfluous.[56] The condition for this is that the legal position arising from such principles is sufficiently precise and clear and may be relied upon by individuals before the national courts.[57]

Decisions are transposed via administrative acts or delegated legislation addressed to whom they are addressed. Recommendations and Opinions require no transposition, as they are not legally binding.[58] However, they do serve as authentic interpretation of stronger, legally binding legislative texts[59] and they are subject to judicial review before the ECJ.[60] Last but not least, judgements of the ECJ and CFI and especially persistent case-law of the European Courts must be viewed as binding to member states and must be included in national implementing measures.

Apart from the extent of legislative intervention required for full transposition and the type of the main EU instrument for reception, national authorities base their choice of national implementing measure on the nature and object of the

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[52] Even where the settled case-law of a member state interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty. *See Case C-144/99, Commission of the European Communities v. Kingdom of the Netherlands,* [2001] ECR I-3541.

[53] *Case 143/83, Commission v. Denmark,* [1985] ECR 427.

[54] *See* Chalton, *supra* note 13, at 31.

[55] *See* Cabinet Office, Regulatory Impact Unit, Transposition Guide: How to Implement European Directives Effectively 14 (2005).

[56] However, even where the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty. *See Case C-144/99, Commission of the European Communities v. Kingdom of the Netherlands,* [2001] ECR I-3541, para. 21.

[57] *Case 29/84, Commission v. Germany*, [1985] ECR 1661.

[58] *See* Senden, *supra* note 11, at 94.

[59] Wainwright, *supra* note 10, at 9; *see also* M. Gardeòes Santiago, *Las 'comunicaciones interpretativas' de la Comisión: Concepto y valor normativo*, 3 Revista de Instituciones Europeas 933 (1992).

[60] *See Cases C-322/88, Grimaldi v. Fonds des Maladies Professionnelles,* [1989] ECR 4407; *see also Case C-325/91, France v. Commission,* [1993] ECR 3283.

field under treatment. In other words national authorities take into account the legal and legislative drafting criteria applicable for the selection of legal form in customary national legislative drafting. After all, transposition is ultimately a legislative drafting exercise. Legal criteria relate to the substantive field of law to which the implementing measure refers. Legislative drafting criteria refer to technical requirements for the classification of the national implementing measure as primary or executive legislation.

When it comes to legal criteria for the choice of form of the national implementing measure, national authorities identify the substantive field of law of the proposed measure. First, national legal custom may require that regulation in specific areas of activity is reserved for special legal forms: in this case for reasons of synergy national authorities will comply with custom.[61] This would be the case with the introduction of new crimes in the national legal order; this is traditionally reserved for criminal laws or special criminal laws.[62] Second, areas of minor importance are rarely considered worthy of legislative intervention via laws. In this case regulation takes the form of administrative acts, internal circulars or other lower forms of regulation. An example of such an area concerns the levels of compensation awarded to farmers whose crops have been destroyed by natural phenomena. Third, areas of increased significance are commonly reserved for higher forms of legislation. This refers to legislation affecting issues falling within the exclusive competence of the constitution and constitutional provisions, restrictions of citizens' rights, taxation, electoral issues or the establishment of a public body.

When it comes to legislative drafting criteria national authorities take into account technical drafting issues that affect the choice of form of the national implementing instrument.[63] The main factor in favour of a law in the formal sense refers to the need for parliamentary legitimatisation of the proposed measure in cases when there are special needs of democratic legitimacy such as a serious compromise of fundamental rights, when important authority or powers are introduction and attributed, when the measure is expected to have significant political, economic or social consequences, or when the proposed solutions are of controversial political character. Another factor in favour of a law in the formal sense refers to the characteristics of the proposed measure, namely to the wide circle of addressees, to its general application[64] and to its nature as a legally binding text high in the hierarchy of sources of national law. The main factor in favour of delegated legislation or administrative acts refers to the existence of authorisation

[61] *See* Dimitrakopoulos, *supra* note 1, at 453.
[62] *See* Cabinet Office, Regulatory Impact Unit, *supra* note 55, at 16.
[63] *See* Mastenbroek & Andeweg, *supra* note 8, at 9.
[64] The wide circle of addressees and the wide application of the measure is judged on the basis of its true characteristics and not on the basis of its title. *See Case T-17/00, Willy Rothley and Others v. European Parliament,* [2002] ECR II-579, para 61; the mere fact, however, that the number and even the identity of the persons to whom a measure applies can be determined in no way implies that those persons must be regarded as individually concerned by that measure, where that measure applies to them as a result of an objective situation of law or fact specified by the measure at issue: *see Case 6/68 Zuckerfabrik Watenstedt v. Council,* [1968] ECR 409, para. 415; *see also Case C-10/95, P Asocarne v. Council,* [1995] ECR I-4149, para. 30.

for regulation in this manner. Thus, the constitution or constitutional principles must not prohibit the delegation. The authorisation clause must be introduced in a law. The clause must delimit precisely the scope of the delegation. The clause must determine the aim and the means of the delegated regulation. Another factor in favour of delegated legislation or administrative acts refer to the characteristics of the proposed measure, namely the need for flexibility of regulation, the technical or detailed nature of the normative mater and the need for repetitive acts.

These considerations will influence the form of national implementing measure whose aim ultimately is the achievement of full and complete transposition of the *acquis* as a means of accomplishing EU accession and successful membership.

II. The Choice of Language, Syntax and Structure: Quality in National Legislation

The task of national authorities does not end with the choice of form. The EU has turned its attention to quality of EU and national implementing measures[65] and now requires that legislative texts adhere to its rules for quality of legislation.[66] Unfortunately, there is no magic formula for achieving quality in legislation.[67] Each country has its own rules which are affected by the type of its legal system (is it a civil or a common law system?), the type of its polity (federal state?) and the main aim of its legislators (to promote economic development, in which case legislation must serve corporations, or to protect its citizens, in which case legislation must be simple and approachable by all?).[68]

However, the EU has gone a long way in defining quality in legislation in a manner that is acceptable and receivable by all member states.[69] Jean-Claude Piris has stated that there are two aspects in the issue of quality: quality in the substance of the law and quality in the form of the law. Quality in the substance of the law refers mainly to issues of legislative policy and covers tests of subsidiarity and proportionality, choice of the appropriate instrument, duration and intensity of the intended instrument, consistency with previous measures, cost/benefit analysis and analysis of the impact of the proposed instrument on other important areas of policy, such as SMEs, environment, fraud prevention etc. Quality in the form of the law concerns accessibility, namely transparency in the decision-making

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[65] *See* Report from the Commission "Better Lawmaking 2004", *supra* note 18, at 2; *see* contra Wainwright, *supra* note 10, at 12.

[66] *See* W. Robinson, *How the European Commission Drafts Legislation in 20 Languages*, 53 Clarity 4-6 (2004).

[67] Nevertheless, national drafting guidelines introduce similar standards of quality: *see* H. Xanthaki, *The Problem of Quality in EU Legislation: What on Earth is Really Wrong?*, 38 Common Market Law Review 651-676 (2001).

[68] *See* Rt. Hon. Lord Renton, *The Preparation and Enforcement of Legislation in the Enlarged Community*, 17 (2) Statute Law Review 1-6, at 3 (1996).

[69] *See* Commission Communication "European Governance: Better Lawmaking", (COM (2002) 275 final); *see also* H. Xanthaki, *The SLIM Initiative*, 22 (2) Statute Law Review 108-118 (2001).

process, and dissemination of the law.[70] EU drafting rules can be classified in three categories: rules concerning the substance of the legislative text, rules related to the legislative process which leads to their passing, and rules relevant to technical drafting issues.

As for the substance of the legislative text, EU legislation must be an essential and effective means of achieving the aim of the law in question: thus, alternative means of regulation, such as inter-trade agreements, must be encouraged, and so is abstinence from regulation in areas which do not fall within priority policy issues.[71] EU legislation must be proportional to the aim to be achieved,[72] and consistent with existing legislation. Moreover, it must take into account the particular needs of the users of the final texts: thus, it must determine the new rights and obligations introduced by it in a manner which can be easily understood by lay persons. Furthermore, it must take into account the issue of transposition and the need for translation of the text in the many different EU official languages.

As for the legislative process, EU institutions must respect the principle of subsidiarity thus leaving it to Member States to regulate matters which are more effectively dealt with at the national level (another aspect of wise regulation).[73] The drafting process must be open,[74] transparent,[75] with full information of legislative dossiers available to all interested parties,[76] and consultation must be

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[70] *See* J-C. Piris, *The Quality of Community Legislation: the Viewpoint of the Council Legal Service, in* A. Kellermann *et al* (Eds.), Improving the Quality of Legislation in Europe 38-55, at 28 (1998).

[71] *See* General Guidelines for Legislative Policy: Communication of 9 January 1996 by the President of the Commission, SEC (95) 2255; European Commission, Communication "Towards A Reinforced Culture Of Consultation And Dialogue – General Principles And Minimum Standards For Consultation Of Interested Parties By The Commission", COM (2002) 704 final; European Commission, Communication "Updating And Simplifying The Community *Acquis*", COM (2003) 71 final; European Commission, Impact Assessment Guidelines of the European Commission, SEC (2005) 791; Interinstitutional Agreement On Better Law-Making, OJ 2003 C 321/1; European Commission, Communication On The Outcome Of The Screening Of Legislative Proposals Pending Before The Legislator, COM (2005) 462 final; European Commission, Communication "Implementing The Community Lisbon Programme: A Strategy For The Simplification Of The Regulatory Environment", COM (2005) 535 final.

[72] Proportionality is defined as appropriateness to meet the needs; *see Case C-84/94 UK* v. *Council*, ECR [1996] I-5755, at para. 47, 55, 57 and 58.

[73] *See* Communication from the Commission on Subsidiarity, SEC (92) 1990. *See also* Interinstiututional Agreement of 25 October 1993 On The Procedures For Implementing The Principle Of Subsidiarity, 12 Bull. EC (1993) at 129, which has no binding effect and places no obligation on the institutions to follow any particular rules when drafting legislative measures: *See Case C-149/96, Portuguese Republic v. Council of the European Union,* [1999] ECR I-8395. *See also* R. Wainwright, *Techniques of Drafting European Community Legislation: Problems of Interpretation*, 17 (1) Statute Law Review 7-14, at 8 (1996).

[74] *See* Communication of the Council, the Parliament and the Economic and Social Committee, "Openness in the Community", COM(93)258 fin., OJ 1993 C 166/4.

[75] *See* Interinstitutional Declaration On Democracy, Transparency And Subsidiarity, Bulletin EC, 10/93, at 119-123; *see also* Resolution of the European Parliament of 6 May 1994 on the transparency of Community legislation and the need for it to be consolidated, A3-0266/94, OJ 1994 C 205/514.

[76] *See* Code of Conduct 93/730/EC Concerning Public Access To Council and Commission

as wide as possible. The legislative process must also be carefully planned and co-ordinated. Furthermore, planned legislation must be subject to cost analysis, and already enacted laws must be monitored and evaluated.

As for the technical side of drafting, EU legislation must be clear,[77] unambiguous and simple; this is all the more important for texts which are going to be translated and transposed into fifteen different legal orders.[78] Clarity includes the use of plain language[79] and the avoidance of too many cross-references, and political statements without legislative character. Unambiguity covers the use of the same term throughout the text, lack of unnecessary abbreviations, and lack of pointless repetition of existing provisions. Simplicity incorporates lack of jargon, long sentences and imprecise references to other legal texts.[80] The now well established structure of title-preamble-enacting terms-annexes (where necessary) must be followed. Provisions must be formed in chapters-sections-articles and paragraphs. The title of EU legislative texts must be a full and clear indication of their subject matter. Preambles must only be used as means of justifying the enacting provisions in simple, non-repetitive terms. Citations (namely the short title within the title) must provide the legal basis of the text, whereas recitals within the preamble must be used as a means of presenting the concise reasons for passing this piece of legislation. Moreover, there must be a very clear reference of the date of entry into force, which must be clearly distinguished from the date of the actual text. Furthermore, the practices of consolidation, recasting and informal consolidation must be actively pursued for already existing legislation.

In their purity these drafting rules bind the EU and its institutions. However, as early as in 1998 the Commission in its *Better Lawmaking Report 1998: A Shared Responsibility*[81] the role of member states in the process of improving the quality of EU legislation was fully established. The Commission declared that Member States also have a role to play to complement the efforts of the institutions, as "they are, after all, the main producers of legislation and hence the most direct cause of the burden [on firms]." In fact, the correct transposition of EU Directives was one of the eight main guidelines for action introduced by the Report.[82] On this basis there is little doubt that the rules for drafting legislation of good quality

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Documents, OJ 1993 L 340/41; *see also* Commission Decision 94/90/ECSC, EC and Euroatom of February 1994 on public access to Commission documents, OJ 1994 L 46/58.

[77] When it comes to transposition, individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and duties and, where appropriate, to rely on them before the national courts: *see C-49/00 Commission of the European Communities v. Italian Republic,* [2001] ECR I-8575.

[78] For a detailed analysis of technical aspects in the quality of EC legislation, *see* Xanthaki, *supra* note 67.

[79] *See* Opinion of the Economic and Social Committee of 5 July 1995 on plain language, OJ 1995 C 256/8.

[80] *See* Resolution of the EP of 4 July 1996 on the report of independent experts on simplification of Community legislation and administrative provisions, COM(95)288 fin.; *see also* A-4 0201/96, OJ 1996 C 211/23.

[81] *See* COM (1998) 715 final.

[82] *See* Bulletin EU 5-1998, point 1.8.3.

introduced by the EU are applicable to drafting national implementing measures.[83] After all, the quality of the national implementing measure will be monitored and evaluated by the Commission and controlled by the ECJ, both of which are EU institutions whose perception of quality in legislation stems from the EU rules on legislative drafting.

E. Conclusions

This analysis focused on the intricacies of compliance with the legal Copenhagen criterion as supplemented by the Madrid administrative criterion for EU accession. The analysis of the constituting elements of compliance demonstrated clearly that, far from being unfair and unique, the process of legislating for EU approximation and accession bears significant similarities to the process of legislating for successful membership. Restrictions to the autonomy of the national authorities of aspiring member states when legislating for EU accession include the obligation to legislate in compliance with the *acquis* and the corrective evaluation of the national implanting measures by the European Commission. However, parallel restrictions to the choices made by national parliaments when legislating for the implementation of EC law as part EU membership demonstrate that the process of accession can be viewed not as an extra imposition on aspiring member states but as a unique learning opportunity in preparation for successful membership.

Despite the vagueness of the task involved in the transposition of the aquis and the EU's avoidance to guide aspiring member states in respect to the principle of autonomy, there are identifiable principles that can and should direct aspiring member states in their efforts to transpose EC law. Transposition of the *acquis* begins very early on for aspiring member states. Even before the partnership agreement is concluded, national authorities need a clear vision of the task of transposition ahead, the areas of difficulty, the time frame required and the mechanisms necessitated for transposition of the *acquis* in full, as it will stand at the time of accession. In a task that requires an element of speculation aspiring member states can be comforted by the principles of specificity, leniency, differentiation and catching up. Progress in negotiations relies exclusively on their own capacity and ability to transpose EC law adequately, efficiently and speedily. In order to achieve adequacy, efficiency and speed in transposition aspiring, but also existing, member states need to acquire the skills demanded for transposition in practice.

Transposition in practice is a complex task both from a quantitative and a qualitative point of view. Problems tend to arise from the sheer volume of EC instruments forming part of the acquis, the dynamic nature of the acquis, the unique nature and form of EC instruments, the intricacies of EU terminology and the indirect effect of the *acquis* on aspects of national law seemingly unaffected by EC legislation. Aspiring and existing member states seem to be left to their own devices against the chaotic task of the choice of form and content of national

[83] *See* Report from the Commission "Better Lawmaking 2004", *supra* note 18, at 4.

implementing measures. This could not be further from the truth. In the choice of form national authorities can utilise the five tests of legislative and legal subsidiarity, proportionality, adequacy, synergy and adaptability. These dictate the choice made on the basis of the extent of legislative intervention required for full transposition; the type of the main EU instrument for reception; and the object of the national implementing measure. In fact, the application of the five tests demolishes the simplistic correlation between particular forms of EC legislation with national forms: Regulations do not always require transposition via national law and Directives do not always require transposition via executive national measures. Each EC legal instrument must be considered ad hoc in the light of prior national legislation. This treatment requires accurate knowledge of the acquis, extensive experience in the workings of the national legal system and skills for the adaptation of the latter to the former.

However, complete transposition of the *acquis* from a substantive law point of view does not suffice for successful transposition. The quality of national implementing measures, pronounced since 1997, is equally important for the achievement of national implementing laws that are efficient, effective and enforceable, in other words that comply with both the Copenhagen and the Madrid criteria for accession. Drafting rules concern the substance of the legislative text, the legislative process leading to their adoption and technical drafting issues. As for the substance of the legislative text, legislation must be an essential and effective means of achieving the aim of the EC instrument under transposition, proportional to the aim to be achieved and consistent with other instruments of national law. As for the legislative process, national implementing measures must respect the principles of subsidiarity, openness, transparency and cost efficiency. As for the technical side of drafting, national implementing measures must be clear, unambiguous and simple.

This analysis aimed to identify the main elements of transposition as a means of achieving EU accession and successful membership. Transposition was dissected with reference to the stages of the drafting process (negotiations, drafting plan and actual drafting) and with reference to the dilemmas faced by national authorities at each of these stages (dilemmas in negotiations, in the choice of form of the national implementing measures and choices of drafting techniques). Dissection of the vague task of transposition facilitates compliance with the intricate requirements of completion of this task and identification of the strategy and skills required at the national level for EU accession and successful membership.