Transposing EU Law on Legal Migration

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Introduction**

EU law on legal migration is far from complete, lacking the adoption of several key instruments. However, in 2003 the Directive on the right to family reuniﬁcation1 and the Directive concerning the status of third-country nationals who are long-term residents2 were adopted and must now be transposed by Member States. For the family reunion directive, the deadline for transposition is 3 October 2005. There is, however, a challenge by the European Parliament against some of its provisions.3 The deadline for the long-term residents directive is 23 January 2006.

In their ﬁnal form, these documents leave considerable leeway to Member States and could be interpreted restrictively if governments choose to take advantage of the derogations and ﬂexible wording. Non-governmental actors will ﬁnd an important task in identifying the challenges for transposition, monitoring legislative changes and advocating a timely and favourable implementation of the directives. This paper ﬁrst addresses the transposition of directives in general terms, before drawing attention to those articles which give the highest degree of ﬂexibility to Member States.

1. Transposition of Directives and Infringement Procedures

Article 249 of the EC-Treaty provides the following with regard to the legal nature of the Directive:

‘A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed but shall leave to the national authorities the choice of form and methods.’

In contrast with a Regulation, which implies the adoption of true Community law with direct effect, a Directive has to be transposed at the national level. Directives, making up about eighty percent of EU legislative output, are unique legislative
instruments in so far as they are not binding in their entirety, only ‘as to the result to be achieved’. Thus transposition is affected greatly by legal features, administrative procedures, and political processes within each of the Member States.

Nevertheless, the European Court of Justice has underlined the fact that the ‘correct application’ of directives is particularly important since the implementing measures are left to the discretion of the Member States. Full effect (‘effet utile’) must be given to directives following the aims pursued.\(^4\) Above all, there is a requirement that Member States ‘should implement the directives in question in a way which fully meets the requirements of clarity and certainty in legal situations’. For instance, regulation through administrative practices which can be changed depending on the will of the authorities and which are not publicised widely enough is not sufficient. Implementation has to take place through national provisions having the same legal status as those which regulated the particular subject beforehand.

Already during the negotiation process, governments typically seek to insert a degree of flexibility into the wording of a directive to help it fit with existing national mechanisms and reduce the costs of implementation. A UK government ‘transposition guide’\(^5\) recommends an implementation which achieves the objectives of the European measure while also being in accordance with other national policy goals. The latter element comes into play especially when a directive contains minimum standards. Here, it is recommended to avoid over-implementation of the directive unless the benefits of exceeding the standard are clearly greater than the associated costs. Over-implementation (also called ‘gold-plating’) means, for instance,

- Extending the scope, adding in some way to the substantive requirement, or substituting wider national legal terms for those used in the directive.
- Not taking full advantage of any derogations which keep requirements to a minimum.
- Providing sanctions and enforcement mechanisms that go beyond the minimum needed.
- Implementing early, before the date given in the directive.

The guide also specifies two approaches to implementing a provision where there is doubt about the precise legal obligation. The first approach, ‘copy-out’, entails that the implementing legislation simply adopts the same, or very similar, language as the directive itself. The second approach, ‘elaboration’, means choosing a particular meaning, in accordance with the traditional approach in national legislation, according to what the draftsman believes the provision to mean. In effect, it aims to work a provision into something clearer. Ultimately, the way in which such provisions are implemented is a policy decision, and departmental drafters are urged to communicate with their ministers about their policy goals regarding the transposition of the directive.

In many countries, an important aspect of transposition is the spread of the directive’s impact across different levels of national and sub-national governance. States

\(^4\) Court of Justice, Case C-190/90, Jur. 1992 p. I–3265.