

The transposition of EC directives:

**A Comparative Study of Instruments, Techniques and Processes in Six
Member States**

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Prof.dr. Bernard Steunenberg and Prof.dr. Wim Voermans

Summary and Conclusions

The central question of this research project is: What kind of transposition instruments and techniques are used in Germany, Denmark, France, Italy, the United Kingdom, and Spain to transpose EC directives into the national legal order in a timely, precise and legally correct way?

The premise of this research is that the Netherlands can learn from the experiences of other Member States. In answering the central question – and the various sub questions resulting from it – this project has made an inventory of the available transposition instruments and techniques, which has been analyzed in relation to the context of national policy processes. The different dimensions of national policy processes play an important role concerning the timely and correct transposition of EC directives.

We have performed a comprehensive comparative analysis of relevant secondary sources combined with a series of in-depth expert interviews to gain as rich and accurate as possible insight into the different national transposition instruments and techniques as well as the way in which the techniques and instruments used are embedded in the national policy processes. Interviews have been conducted in Denmark, France, the United Kingdom and Spain, based on the comparability of these countries with the Netherlands and the variety of legal instruments and techniques involved. The analyses of Italy and Germany are based on relevant written documentation only.

Based on our comparison of the six countries, we have reached the following conclusions:

- the introduction of special legal instruments and techniques for the transposition of EC Directives is not in and of itself an explanation for the improvement of timeliness in the transposition of directives;
 - the regular national legal system (including the common legislative procedures and legal instruments) is the point of departure for transposition. As a consequence, the national legal system is commonly used in the countries involved in this research;
 - there does not seem to be a preferred or best technique for the transposition of directives that is not already being used in the Netherlands;
 - delays in transposition are caused by combinations of several constitutional, legal, political and operational factors whose effect cannot be judged independently. Rather, these effects can only be considered interrelated elements of the national system;
 - important sets of legal factors improving the speed of transposition are the transposition of directives with delegated instruments (subordinated legislation), avoiding national “extras” when transposing directives and avoiding complications at the transposition stage by anticipating transposition issues during the negotiation stage of a directive;
 - important political factors are: giving priority to transposition and activating the national Parliament at the negotiation stage; and
 - important operational factors include clear-cut lines of administrative responsibilities for transposition, working with multidisciplinary project teams, and accurate and frequent monitoring of progress.
- Of these conclusions we have highlighted those which are particularly relevant for the Dutch situation. On the basis of these findings, we recommend the following:
- involve the Dutch Parliament by introducing a parliamentary scrutiny reserve,
 - pursue an active strategic policy with respect to the transposition of EC directives by organizing more efficiently responsibilities for the monitoring of progress for the transposition,

- transpose the directive by the lowest possible legal instrument and use the existing legislative system and instruments to the full extent, instead of introducing new, special transposition instruments or procedures, that are alien to our constitutional system;
- try to generate broadly-based and joint Dutch influence on European dossiers.

1 Rationale and Structure of the Research Project

1.1 Background

For a long time, the transposition of EC directives did not function smoothly in the Netherlands. On 31 December 2003, 59 directives whose transposition deadlines had already passed had not yet been transposed. The Lower House of the Dutch Parliament – the House of Representatives – expressed its concern¹ because for years attempts had been made to reduce this transposition deficit.² In the next few months, the deficit increased from 59 to 65 directives, as reflected in Table 1.1. As a result of this deficit increase, the Netherlands dropped from third place in 2003 to tenth place in the European Commission’s transposition rankings in 2004.³

Table 1.1: Deficits in the Netherlands regarding the transposition of EC directives: by Ministry and for the period 2004-2005

Reference date: Ministry:	31 December 2003	31 March 2004	30 June 2004	30 September 2004	31 December 2004	31 March 2005
BZK	0	1	0	0	0	0
EZ	7	8	1	1	0	0
Finance	5	4	9	6	11	13
Justice	9	10	7	4	5	3
LNV	2	3	3	2	0	0
OCW	0	0	0	0	0	0
SZW	1	2	1	1	2	1
V&W	13	14	14	12	3	2
VROM	5	15	6	8	6	7
VWS	3	8	7	7	3	3
Other	14	0	1	0	0	0
Total	59	65	49	41	30	29

Source: Quarterly surveys on the Transposition of EC Directives, *Parliamentary Papers II*, 21 109.

Starting in the second quarter of 2004, things began to change in terms of the total number of directives still to be transposed for which the transposition deadline had already passed. Whereas there were still 65 overdue directives on 31 March 2004, this number had dropped to 29 a year later, on 31 March 2005. This amounts to a reduction of no less than 55%. In the second Report on the Implementation of the Internal

¹ See the motion by Van Dijk *et al.*, *Parliamentary Papers II* 2003/04, 21 109, no. 118. Note that the Dutch Parliament (*Staten-Generaal*) consists of two chambers: the *Tweede Kamer* (House of Representatives) is the main chamber directly elected, and the *Eerste Kamer* (Senate) indirectly elected by members of the provincial councils. In a legislative process the *Tweede Kamer* discusses, amends and votes first on a bill. If a bill is approved, discussions continue in the *Eerste Kamer*. The latter cannot amend a bill and formally only has the possibility of veto.

² See the initiative taken by State Secretary Nicolăi, *Parliamentary Papers II* 2003/04, 21 109, nos. 117 and 119. The Dutch catch-all action (see Newsletter ICER of May 2003, no. 14, p. 1), which was initiated in the spring of 2003 in anticipation of the upcoming EU-Presidency, has not turned out to be effective.

³ See Progress in notification of national measures implementing directives reference date 30/04/2004, http://europa.eu.int/comm/secretariat_general/sgb/droit/com/index.and.htm#transpositions.

Market Strategy 2003-2006,⁴ the Commission compliments the Netherlands for its efforts to reduce the transposition deficit over the past period. The Netherlands managed to reduce the transposition deficit to less than 1.9% in the light of the European Union's 1.5% target and to reduce to zero the dossiers with a backlog of more than two years.

The extra efforts undertaken by the Netherlands before the Dutch EU-Presidency during the second half of 2004 certainly gave a boost to this catching-up maneuver. Nevertheless, there is still a substantial transposition deficit in absolute terms – i.e. directives for which the implementation deadline has passed and that have not yet been transposed. In addition, there is a chance that after the end of the Dutch Presidency in December 2004, attention to transposition will wane in the years ahead. Late transposition is a structural problem in the Netherlands, as Mastenbroek (2003) demonstrates, even if there are occasional bouts of feverish activity involving the transposition of a large number of directives, in particular in anticipation of an upcoming Presidency.

Furthermore, Table 1.1 shows that the catching-up maneuver in 2004 is attributable mainly to the handling of the deficit problem within the ministries of Transport, Public Works and Water Management (V&W), Housing, Spatial Planning and the Environment (VROM), Economic Affairs (EZ), the Ministry of Justice, and the Ministry of Health, Welfare and Sport (VWS).⁵ It is also remarkable that the Ministry of Finance is responsible for a deficit increase of no fewer than 9 directives. This stymies the substantial efforts undertaken by the other ministries. The differing performance levels make it clear that not all obstacles to the speedy transposition of EC directives have been removed in the Netherlands. It is quite conceivable that the deficit in the Netherlands will increase again in the coming years because the causes of the deficit may still not be completely clear. In any case, we can conclude that the Netherlands is not performing badly in terms of the completeness and correctness of the transposition (from a quality perspective, in other words). Compared to other countries, the Netherlands has not faced many infringement proceedings on account of incorrect transposition, for example. The same picture emerges when we consider the letters of formal notice and the reasoned opinions for incorrect transposition of directives (see Section 3.1, Tables 3.3 and 3.4). These also reveal that, compared to other countries, the Netherlands is censured relatively infrequently by the Commission for incorrect transposition.

This does not detract from the conclusion, however, that the Netherlands is facing a relatively persistent transposition deficit. For years now, there has been much speculation and discussion about the causes of this growing deficit in the Netherlands, as in other countries. Some believe that the lengthy legislative procedures and the method of implementation are responsible for the deficit (see, *inter alia*, Mastenbroek, 2003; König et al., 2005; Kaeding, 2005; Berglund et al., 2005).⁶ Others point to the problem of inadequate coordination and the insufficient political priority given to transposition as the main causes (Voermans, 2004; Steunenbergh 2004; 2005). In addition, the search for causes is difficult due to the great differences in the content of

⁴ Commission Notice to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Second Report on the Implementation of the Internal Market Strategy 2003-2006, COM (2005).

⁵ In this context, compare the deficit figures on 31 March 2004 to the figures on 31 March 2005 in Table 1.1: the absolute reduction is 12 directives for V&W, 8 directives for VROM and EZ, 7 directives for the Ministry of Justice and 5 directives for VWS.

⁶ See, for example, the analysis in the Explanatory Memorandum to the Bill concerning the passage and implementation of EC decisions in the area of energy, post and telecommunication, *Parliamentary Papers II* 2003/04, 29 474, nos. 1-3 (submitted to the House of Representatives on 26 March 2004).

directives. The complexity of some directives and the degree to which directives allow the Member States freedom of choice also seem to be relevant (see, for example, Thomson et al., 2005). It is certainly too early to draw any definitive conclusions about the factors that affect the deficit increase. The empirical research data available at this juncture have not enabled us to draw any strong conclusions (for an overview, see Steunenberg and Rhinard, 2005).⁷

Even though the causes of the transposition deficit are sometimes difficult to pinpoint, the Dutch government has not used this as an excuse to be passive. The present plan for tackling the deficit includes, *inter alia*, involving the Dutch Parliament in the preparation at an earlier stage and to provide it with greater insight into the implementation process. In addition, the Dutch negotiators will, wherever this is necessary or possible, stipulate a longer transposition period and the Dutch government will try to find ways to expedite the transposition or implementation process.⁸ Many attempts to expedite implementation through legal structures have had little impact so far. Admittedly, various legal obligations to seek advice on the implementation of EU decisions were abolished 10 years ago⁹, but expediting implementation through special delegation structures is still controversial.¹⁰ The final step in this direction is the bill concerning the passage and implementation of EC decisions in the area of energy, post and telecommunication, which was submitted to the House of Representatives on 26 March 2003, and which authorizes the implementation of EU decisions through subordinate legislation that may depart from higher national legislation in a limited number of areas.

At this juncture, the Dutch debate on faster implementation is facing an uncertain future, because it is not entirely clear which factors cause the implementation deficit and to what extent. It is also unclear whether the use of legal 'acceleration techniques' (using different procedures or input during the preparatory phase of transposition, implementation through delegation and authorization structures, further reduction of advisory obligations, other ways of cooperation with Parliament, etc.) will permanently contribute to the reduction of the implementation deficit.

Thus there are sufficient reasons to look abroad to see how other Member States are trying to deal with the growing flow of EU legislation that requires implementation. Knowledge gained by analyzing the experiences of other Member States may be used not only for shaping ideas for a Dutch plan of action but can also provide insight into the causes of the deficit and the way in which this can be tackled effectively.

1.2 Definition of the Problem

The central question of the research project is the following:

⁷ At the moment of writing the report, various European research groups are investigating the causes of this deficit (*inter alia*, Berlin, Speyer, and a group of Dutch researchers coordinated by Leiden University). It is expected that the results will be available in the next few years. In addition to the sources mentioned above, the empirical research includes references to Lampinen and Uusikylä (1998), Mbaye (2001, 2003) and Giuliani (2003a, 2003b).

⁸ *Parliamentary Papers II* 2003/04, 21 109, no. 120 (quite a lengthy overview of 54 pages).

⁹ See Sections 1:7 and 1:8 of the General Administrative Law Act.

¹⁰ See the discussion that prompted the government position paper on the accelerated implementation of EC and other international decisions (*Parliamentary Papers II* 1998/99, 26 200 VI, no. 65) and a follow-up memorandum related to this (*Parliamentary Papers II* 1999-2000, 26 800 VI, no. 79).

What kind of implementation instruments and techniques are used in Germany, Denmark, France, Italy, the United Kingdom, and Spain to transpose EC directives into the national legal order in a timely, precise and legally correct way?

This central question of this research report includes six sub questions:

1. What are the most important internal obstacles that hinder the Member States analyzed in this report in implementing and transposing EC legislation in a timely and precise way?
2. What preventive measures are taken in the countries analyzed here, *inter alia*, during the preparation of the implementation, in order to limit or prevent implementation problems? Is there any implementation chain management, i.e. a system that anticipates the implementation of European legislation during the preparatory stages (transposition, implementation and enforcement)?
3. What transposition and implementation techniques do the various EU Member States analyzed here use in implementing EU legislation?
 - a. Are there any special statutory regulations that include procedures and standards for expedited or simplified implementation and transposition of EC legislation?
 - b. Are advisory bodies consulted about implementation measures or during the preparation of European legislation? If this is the case, is this consultation compulsory?
 - c. When and how must the national Parliament be involved in the implementation of EC legislation?
 - d. If EC legislation has to be implemented through statutory regulations, when does it have to be implemented by an Act of Parliament and when by delegation?
 - e. Are there any special legislative procedures for treating EC legislation more quickly or in a simpler manner than comparable national legislative proposals (through authorization or delegation structures)?
 - f. What is the approximate quantitative and qualitative relationship between implementation through an Act of Parliament and implementation by subordinate regulations?
 - g. What are the effects of the implementation techniques studied in this report in terms of timing and transparency, the involvement of those working with these techniques (e.g. are the courts informed in a timely fashion), flexibility, and what are the effects on the legislative system?
 - h. What are the advantages and disadvantages of the various techniques?
4. Do regional or local governments (if applicable), independent administrative bodies and local government bodies play a role in the transposition and implementation process?
5. Is there any political or societal discussion about this subject in the countries researched?
6. Which of the findings in this report are potentially useful for the Netherlands?

1.3 Implementation: Definitions

In analyzing the implementation techniques and systems in this study, we use a broad concept of implementation. By *implementation* of EC law, we mean ‘the taking of all general and special measures needed to ensure the operation of EC law in a country.’ This concept encompasses in the case of implementation of EU legislation¹¹ a chain of activities ranging from:

¹¹ In EU law, there is no distinction between *materiële wet* (generally binding regulation) and *formele wet* (Act of Parliament) as in the Netherlands. We use ‘European legislation’ as a shortcut for primary and secondary Community law (regulations, generally binding directives and generally binding decisions).

- the preparation of a piece of EU legislation;
- the adoption of the EU legislation;
- the incorporation of European legislation into the national legal order, which, in the case of a directive, means transposing the directive into the national regulatory framework, to
- the execution and enforcement of the EU legislation (including the supervision of it).

The term *transposition* is used for the selection of the appropriate forms and means to achieve the result required by an EC directive.

Under the present Article 249 of the EC Treaty, Member States are free to choose the most appropriate forms and means to achieve a result required by an EC directive. The Member States use a variety of instruments and techniques for transposing directives.

In this context, *instruments* refer to the legal instruments that allow the provisions of a directive to be transposed. In the Netherlands, the primary examples are regulatory instruments such as Acts of Parliament, general administrative orders, ministerial regulations, the bylaws of a local authority (such as regulatory industrial organizations, independent administrative bodies, provinces, municipalities, etc). We use a broad definition of the concept of instrument. Legal instruments also include regulations that do not contain any generally binding rules, such as policy rules and even alternative transposition instruments such as covenants and collective employment agreements.

In this context, *techniques* refer to the manner in which directive provisions are transposed by means of a legal instrument. Examples of techniques include the following:

- the ‘ 1-to-1’ transposition (i.e. the literal copying of parts of the text of a directive in a new national regulation);
- ‘ 1-to-1’ transposition with minor or major terminology changes, or other adjustments (for the Netherlands, see Instruction 56 of the Instructions for Drafting Legislation¹²);
- transposition of an EC directive through an existing legal regime (if the transposition of a directive does not require the adoption of a new regulation, the mere issuance of a notice may be sufficient; see Instruction 347);
- transposition through incorporating a directive into the system (corpus) of existing legislation (also known as elaboration);

Within these techniques, the following approaches can be distinguished:

- transposition by referencing (i.e. statistical and dynamic references to the provisions of an EC directive);
- the annex method, which means that the directive is included as an annex to a national transposition measure;
- *straightforward* transposition (Instruction 337);
- using the transposition as a vehicle for additional national policy;

‘Legal instruments’ include the manner in which a country uses delegated legislation. Not all countries covered in this study have a concept of delegation that is comparable to the one in the Netherlands concerning the transfer of powers to adopt generally binding rules. Admittedly, on the surface it seems that countries such as Spain, Italy and the United Kingdom have a concept of delegation that corresponds with

¹² Below, ‘instruction’ means an instruction in the context of the Instructions for Drafting Legislation, as used in the Netherlands. See Instructions for Drafting Legislation (2004), for an overview.

the Dutch one, but if we consider the relationship between primary legislation and delegated legislation adopted by ‘lower’ regulators, it turns out that these countries assume quite a different attitude towards the hierarchical relationship between enabling legislation and delegated legislation. In this study, we therefore avoid comparing delegation techniques as such.

1.4 Structure of the Country Studies

For the country studies, we used a structure that emphasizes the *national constitutional and legal context* and the *national policy process* with respect to European directives.

In the description of the *national constitutional and legal context* in which the transposition process takes place, the various transposition instruments and techniques are discussed, including special or simplified possibilities, such as special delegation provisions aimed at achieving faster implementation.

In addition, attention will be focused on the *national policy process* relating to European directives. In this context, it will be assumed that transposition and actual application are parts of a longer sequence of steps that are connected with European legislation, in particular directives. Generally, this sequence consists of the following steps:

1. the preparation of a European directive;
2. the national and European decision-making on the proposed directive;
3. the national transposition of the directive;
4. the implementation, including the supervision and enforcement of the national policy measures aimed at implementing the directive;
5. the evaluation of the effects of the national policy measures, and
6. the feedback relating to the national (the contents and effects of the national measures implementing the directive) and the European policy (the contents of the directive).

By analyzing both the available instruments and techniques and the manner in which the national policy process is shaped, we attempt to form a picture of the degree to which Germany, Denmark, France, Italy, the United Kingdom and Spain are able to incorporate European directives into their legal system in a timely, precise and legally correct way.

On the basis of both lines of analysis— constitutional and legal context and policy process – the country studies are structured as follows:

- general overview of the legal and political system, including the constitutional and political characteristics of the organization of the public administration/ministries;
- political/societal discussion relating to European directives and their transposition;
- description of legal instruments and techniques;
- description of the national policy cycle relating to directives, with a focus on administrative consultative and coordinating bodies involved in the process, the role of compulsory institutionalized advisory bodies, the role of the national Parliament, the role of other, sub national or functional administrations, and the role of interest groups;
- an analysis of instruments and techniques in terms of timing, feasibility, completeness, flexibility, and in conjunction with other national legislation;
- an analysis of the national procedure, focusing on the timeliness of transposition, the effectiveness in drafting the position, the relationship between preparation and execution, and the involvement of the national Parliament (democratic legitimacy).

1.5 Method: Literature Review and Expert Interviews

Insights into the experiences of the transposition instruments and techniques used and the national policy processes are based on an extensive literature review and expert interviews. For budgetary considerations, interviews were held only in:

- Denmark,
- France,
- the United Kingdom, and
- Spain.

The following considerations are relevant to the selection of these countries. First, the constitutional system of these countries is more similar to that of the Netherlands, than, for example, a country like Germany. Germany's federal structure entails its own transposition complications. Second, it was considered relevant to have a mix of countries with a good performance record (Denmark and Spain) and those with a poorer performance record (France). Finally, the United Kingdom is relevant because of the existence of specific instruments for transposing European directives.

We have opted for a more limited structure concerning Italy and Germany: as far as these countries are concerned, the study is based only on a review of existing literature.

We conducted interviews with persons from the following two categories. First, we interviewed civil servants responsible for coordinating the transposition of European legislation and/or for legislation quality assurance (comparable to the representatives of the Ministries of Foreign Affairs and Justice, and participants in the ICER in the Netherlands). Second, we tried to arrange interviews with members of the national Parliaments. This concerned mainly members of the European Affairs Committees or committees that are closely involved in the debate on the decision-making about and the transposition and implementation of European directives.

The interviews are semi-structured, with the interviewers drawing up a report after the interview, which was sent to the respondents for verification purposes. The round of interviews in Denmark was also used for testing the list of questions. This has resulted in using a more limited number of open questions and in gearing the questions to the interviewee's position. The adjusted questionnaire was used for the other country studies.

1.6 Structure of the Report

The report consists of two parts. Part I is the main report in which the situation in the Netherlands is described and the findings based on the country reports are compared and analyzed. This part ends with conclusions and recommendations relating to the situation in the Netherlands.

Part II of the report contains the country studies relating to Denmark, France, Spain, the United Kingdom, Germany and Italy. As indicated above, the studies relating to Denmark, France, Spain and the United Kingdom are more extensive than those relating to Germany and Italy. As far as the latter two countries are concerned, we confined ourselves to a literature review and we did not conduct any interviews in these countries. In Section 1.5, this procedure is explained in more detail.

Part I: Main Report

2 Transposition of Directives in the Netherlands

2.1 General: Dutch Debate on Faster Transposition of Directives

As discussed in Section 1.1, the Dutch debate on both the implementation of EC directives and related policy developments has been very dependent on the Dutch transposition record over the years. This record was reasonably good in general until the end of the 1980s, even if this analysis is not beyond criticism (Mastenbroek 2003). With the acceleration of the implementation of the internal market and the accompanying increase in the number of directives, the transposition deficit began to grow in the Netherlands. During the Dutch Presidencies in the 1990s, there were several attempts to speed up the implementation of EC directives. During the first phase (from 1994), the Netherlands tried to speed up the implementation process by abolishing the legally required advisory procedures relating to proposals for EC directives¹³ and measures in the area of legislative policy. The year 1999 saw the beginnings of a new phase, which involved the search for new instruments and techniques (especially delegation structures) that might help to speed up the process of implementation. This has sparked an ongoing debate on ‘faster implementation’ in the Netherlands that continues to this day. Recently, this debate has been given an impetus in the run-up to the Dutch Presidency in 2004 and the bill concerning the passage and implementation of EC decisions in the field of energy, post and telecommunication.¹⁴

The driving force behind the second phase in the debate was the attempt to speed up the implementation of directives in the field of telecommunication through clause 18.2 in the proposal to amend the Telecommunication Act.¹⁵ This provision creates the possibility to deviate from the law in lower-level regulations if EC legislation so requires. The Senate opposed this and asked the Government for a broader framework of assessment. This framework was provided by the 1999 Government Position Paper on the permissibility of powers to decide on faster implementation. That Government Position Paper focused on the question of whether it is permissible to create structures offering a general provision that allows the adoption of delegated legislation for the purpose of implementing future directives, or, if that appears to be necessary, that allows the temporary deviation from an Act of Parliament if the relevant provision is inconsistent with a directive provision (power to render statutory provisions inoperative).¹⁶ In the position paper on faster implementation, the Government concludes that granting lower-level regulators the power to render statutory provisions inoperative is not unconstitutional. If European or other international legislation has a large impact in a specific policy area and the implementation periods are so short that implementation according to the customary procedures is unrealistic, it is permissible, according to the Government, to provide for a power to render provisions in an Act of Parliament or general administrative order temporarily inoperative by means of a lower-level instrument, provided that the necessary implementation rules are adopted simultaneously in this regulation (substitution). From the perspective of the legal quality of legislation,

¹³ Advisory procedures with respect to regulations used for the transposition of directives have been reduced as well. The advisory role of the Council of State has been preserved.

¹⁴ *Parliamentary Papers II*, 2003/04, 29 474, nos. 1-3.

¹⁵ *Parliamentary Papers I*, 1998/99, 25 533, no. 11b.

¹⁶ Government Position Paper on faster implementation of EC and other international decisions (*Parliamentary Papers II* 1998/99, 26 200 VI, no. 65) and the follow-up memorandum (*Parliamentary Papers II* 1999-2000, 26 800 VI, no. 79).

however, this power should be exercised in a very restrained manner and should be subject to some strict conditions, according to the Government.¹⁷

The Government's position was not supported by everybody. In passing the Jurgens motion, the Senate took the position that EU legislation (or EC legislation, as the case may be) should be implemented in accordance with a regular constitutional process.¹⁸ More recently it was also established that far-reaching delegation for the sake of speedy implementation, such as delegated power to render statutory provisions inoperative and the power of substitution (i.e. the power to substitute statutory provisions implementing EC directives by way of a decree or ministerial regulation if the EC directive is amended), is at odds with the principle of legality, the legislator's supremacy and the corresponding prohibition against 'free' delegation (Besselink, 2003).

After the debate on that Government Position Paper,¹⁹ two bills (amendment of the Media Act and a bill on the preparation and introduction of animal feeds)²⁰ incorporated a mitigated power to render Dutch statutory provisions - implementing EU legislation - inoperative (by governmental decree) in case new EU legislation was enacted that contravenes the original statutory implementation. Recently, the discussion on faster implementation gathered momentum when on 16 March 2004 the bill concerning the passage and implementation of EC decisions in the area of energy, post and telecommunication was submitted to the House of Representatives.²¹ The legislative proposal is based on a system allowing directives and regulations to be implemented by subordinate legislation. The bill is based on the premise that a directive can be implemented by subordinate legislation only if there is no need for any amendments at the level of primary legislation (i.e. Acts of Parliaments, or – treated here as the synonym – statutes). As there are over 15 directives and regulations in the policy areas of electricity, gas and post alone, these amendments to primary legislation are often necessary if one of the EU regulations and directives – already implemented in Dutch primary legislation - is amended (and that happens frequently in these areas). Even when the amendment to EU legislation is, of itself, of little consequence, the long and winding road of amending primary legislation has to be taken if the original (provisions of the) EU act was implemented in a Parliamentary Act. At present it is simply not possible to amend an Act of Parliament by - lower ranking - decrees or ministerial regulations. To prevent the stagnation of implementation because of the cumbersome and repetitive need of amendments to primary legislation due to frequent amendments to EU Acts, the bill introduces a system that does allow statutory provisions to be rendered inoperative and even substituted by decrees or ministerial

¹⁷ The Government mentions seven conditions: strict necessity; a special act should authorize it (no general authorization law); only for implementation purposes; the power to render statutory provisions inoperative can be exercised only through an instrument at the level immediately below; a resolution procedure in the case of implementation of non-self-executing international regulations; power can be exercised only temporarily, and any exercise of power to render statutory provisions inoperative and of the power of substitution should always be published in the Bulletin of Acts and Decrees. See *Parliamentary Papers II* 1998/99, 26 200 VI, no. 65, pp. 5-6.

¹⁸ The motion tabled by Jurgens, Kohnstamm and The Wolff, *Parliamentary Papers I* 2000-2001, 26 200 VI no. 65 and no. 37b.

¹⁹ Proceedings I 2000-2001:2-54.

²⁰ The bill amending the Media Act with a view to effecting necessary improvements in the act and its execution (*Parliamentary Papers I* 2002/03, 28 476, no. 189) and the bill introducing provisions concerning the preparation and introduction of animal feeds (*Parliamentary Papers I* 2002/03, 28 173, no. 212).

²¹ *Parliamentary Papers II* 2003/04, 29 474, nos. 1-3.

regulations. The bill tries to soften the constitutional blow of subordinated statutory instruments amending Acts of Parliament by introducing the system of the concordance tables. These concordance tables – annexed to Acts implementing EU legislation - indicate which section from the Act implements – or is intended to implement - which article from a directive or a regulation. The concordance table-system makes it possible, if any amendment of European legislation so requires, to repeal predefined provisions mentioned in this annex of the Act by using a lower-level instrument. The system is accompanied by the intention of the Minister for Economic Affairs to inform the Dutch Parliament at an earlier stage about the passage of directives and regulations in the area of energy, post or telecommunication.²² In addition, the Council of State will be consulted at an early stage on important drafts for basic directives to be adopted in the previously mentioned policy areas in an attempt to invite Parliament to engage in a more active debate on proposed EC legislation.

During the discussion with the Senate on the amendment of the Media Act, which also includes a provision allowing statutory provisions to be rendered inoperative on the basis of the Government Position Paper from 1999, the Government was challenged in the Spring of 2004 once again to reconsider its position with respect to the desirability of special statutory provisions aimed at safeguarding timely implementation. In response, the Government sent a letter to the Senate which contained the Government's amended position.²³ The Senate wanted to know whether it was necessary to introduce a constitutional basis for faster transposition, or special statutory authorization structures. The policy line defined by the Government in its letter dated 27 October 2004 opts for adequate regular delegation rather than special provisions. According to the Government, the existing legislative system is appropriate for implementation purposes, which means that there is no need for developing or applying special delegation provisions with or without the possibility of deviating from the law. Further, the Government is trying to achieve an effective level of implementation and the earlier involvement of the Houses in the preparation and transposition of directives. Finally, the Government proposes a tailor-made approach for emergency situations. The Senate was critical of this letter in February of this year, when Senator Jurgens reiterated his view that where delegation constructions permit deviations from an Act of Parliament through subordinate legislation, for example, by means of substitution, this is inconsistent, as a matter of principle, with Article 81 of the Dutch Constitution.²⁴

By now, a third phase seems to have begun in recent months because of the urgency of reducing the implementation deficit.²⁵ This has involved the adoption of procedural measures to speed up the process in anticipation of the outcome of the debate with Parliament on faster implementation. The first initiative has been taken by the House of Representatives itself. On 15 September 2004, the Presidium of the House of

²² To this end, the Minister will inform the Houses about (a) the Government's position on the main points concerning a proposal of the Commission of the European Communities for this kind of directive or regulation, as well as (b) an outline of his view to be expressed in the meeting of the Council of Ministers in which it is decided whether or not to adopt a common position, or – if applicable – in meetings of the Council of Ministers in which other crucial decisions (political agreement, general orientation) are taken (where he will add, where appropriate, the results of the advice of the Council of State to the outline position).

²³ *Parliamentary Papers I* 2003/04, 29 200 VI-F and – in connection with the discussion on the Media Act, the amended Government Position on the desirability of special statutory provisions aimed at safeguarding timely implementation, *Parliamentary Papers I* 2003/04, 29 200 VI, F, second reprint.

²⁴ *Proceedings I* 2004/05, 14 645-649.

²⁵ In April 2005, 51 directives were published, which will have to be transposed by 2006.

Representatives proposed to the House a better and more transparent specification of the implementation deadline of a bill aimed at transposing a directive, giving priority to the treatment of implementation proposals and the potential introduction of an optional, faster discussion procedure relating to implementation legislation in the House.²⁶ In his letter of 9 November 2004, the State Secretary for Foreign Affairs – also on behalf of the Minister of Justice – announced six measures aimed at achieving faster transposition of directives in the short term.²⁷ They include, *inter alia*, the following: planning and working arrangements for dealing with a new wave of directives; a progress monitoring system capable of quickly observing backlogs; the adoption of a priority rule, which means that as a general rule, implementation legislation – within the various ministries – takes priority over national legislation, unless the responsible Minister or State Secretary decides otherwise in a concrete case; the measure that transposition legislation no longer needs to be passed through ‘portals’ or sub councils but can be put directly on the agenda of the Council of Ministers; and the arrangement that in future advice is sought at the earliest possible opportunity (during the negotiation stage). For this purpose, the Minister of Justice announced several technical measures on 23 December 2004 aimed at preventing misconceptions arising in Parliament over the question whether a proposed regulation, or any part of it, is intended to transpose a directive or another Community obligation.²⁸

2.2 Preparation of the National Position

In the Netherlands, proposals for EC directives are sent to the Minister for Foreign Affairs through the Permanent Representation. The proposals are also sent to the Working Group for the Assessment of New Commission Proposals (BNC), consisting of representatives of the ministries, and since 2001, local government representatives.²⁹ This working group is responsible for drawing up an explanatory memorandum that analyses the significance of the proposed directive for the Netherlands.³⁰ In addition, the explanatory memorandum includes a proposal for the position to be taken by the Netherlands during the negotiations about the proposal and the anticipated method of implementing the proposal if it is adopted. After the explanatory memorandum has been approved by the BNC working group, it goes to the ‘CoCo’ (Coordination Committee for European Integration and Association Problems). The CoCo is the administrative gateway to the Council of Ministers and is chaired by the State Secretary for European Affairs. The CoCo passes the explanatory memoranda on to the Council of Ministers. The explanatory memoranda that have been approved constitute the basis for the Dutch contribution to negotiations on Commission proposals in the Council and its working groups in Brussels. A shorter, ‘political’ version of the explanatory memoranda is also drawn up for the purpose of informing the Dutch Parliament about the directive proposal in question. The State Secretary for Foreign Affairs acts as an intermediary in this context. On the basis of the official explanatory memoranda, he sends periodic surveys of the Commission’s directive

²⁶ *Parliamentary Papers II* 2003/04 21 109, no. 142.

²⁷ *Parliamentary Papers II* 2004/05, 21 109, no. 144.

²⁸ *Parliamentary Papers II* 2004/05, 21 109, no. 145.

²⁹ Represented by the Association of Netherlands Municipalities and Interprovincial Consultations.

³⁰ An explanatory memorandum includes the following items: the approval procedure of the proposal in Brussels; the consequences of the proposal for the EC Budget; a brief summary and the objective of the proposal; the legal basis; an assessment in terms of subsidiarity, proportionality and deregulation; the Dutch interests in the proposal and the consequences for national legislation.

proposals, accompanied by ‘political’ files, to the House of Representatives.³¹ The underlying idea is that on the basis of these explanatory memoranda, together with the annotated agenda of the relevant meeting of the Council of Ministers, there will be a discussion between Government and Parliament about the Dutch position in the Council meetings, so that the negotiations in Brussels are conducted on the basis of instructions agreed with Parliament. In this way, the Dutch Parliament may exercise influence on the passage and contents of EC legislation. The Netherlands does not have a system based on a written mandate, nor does it have a parliamentary reserve: without the discussion of an explanatory memorandum in the House of Representatives, a Dutch minister may also take a position in the Council.

Civil servants from the lead ministries negotiate EC directives in the Working Groups of the Council. Usually these are policy-making officials from the ministries and staff of the Permanent Representation. Sometimes, only the staff of the Permanent Representation in the relevant policy area is involved, sometimes only civil servants from the responsible ministry in The Hague. The Dutch Government’s intention of always sending law-making civil servants to ensure the quality of EC legislation has not been achieved to date. The Dutch Permanent Representation, as an intermediary, channels communication between Brussels and The Hague and informs the Dutch Government of current developments.

Adopted directives are usually transposed in the Netherlands by the same ministries that conducted the negotiations, but not always by the same civil servants. Whereas the negotiations are usually conducted by policy-making civil servants, the transposition of the directives is often carried out by civil servants specialized in the drafting of legislation.

2.3 Transposition: Instruments and Techniques

The Netherlands does not have general delegation structures for speeding up the transposition process. The standard legislative procedures are used for the transposition of EC directives. This means that the transposition of an EC directive is determined on a case-by-case basis. As a result of the legislator’s primacy, which requires that the basic elements of a statutory system be regulated through Acts of Parliament, and the constitutional system, which sometimes prescribes a regulation through an Act of Parliament, EC directives are implemented relatively frequently by the slow procedure applicable to the Act of Parliament. Parliament does not give high priority to the transposition of EC directives and does not give much weight to the debate on the negotiations, and this constitutes an important source for transposition delays (Voermans, 2004). The House of Representatives does not assert itself and does not draw the conclusion that there are problems or questions until the debate on the transposition measures has started. This is too late. As stated above, the Government initially tried to change this by submitting proposals for more sophisticated delegation structures (power to render statutory provisions inoperative and the like) and earlier parliamentary involvement, but in the recent period, the Government has opted for the standard delegation options and legislative process.³² Transposition delays are caused not only by the lengthy procedure, the manner in which Parliament contributes towards the process, but also by the manner in which the ministries prepare the transposition. There are also obstacles in that area. Even though Instruction 335 of the Instructions for Drafting Legislation, amended with effect from 1 January 2005, requires that proposals for transposition

³¹ This can be found in *Parliamentary Papers II*, under number 22 112, titled: ‘Draft Directives of the European Commission’.

³² See the above Government Position Paper, *Parliamentary Papers I*, 2003/04, 29 200 VI, F second reprint.

measures be submitted to the Council of Ministers no later than 18 months before the expiry of the implementation period (with only a minor possibility for an extension), this deadline is not always met. This is why the Government has decided to tighten the policy relating to internal preparation as well. In future, a priority rule will be applicable, which means that before national bills are dealt with, directives must be transposed first. Ministerial action plans must be drawn up in order to remove the deficit. The relevant actors will now explicitly plan for dealing with a wave of EC directives and there will be a better progress monitoring system. In future, it will be possible to submit transposition measures directly to the Council of Ministers without any involvement from the gateway structures or sub councils. Compulsory review and advice about transposition measures will also be moved to an earlier stage in the process.³³

Whereas there is still a debate on structures permitting a temporary or permanent deviation from a statutory provision if this provision is inconsistent with a directive provision (the power to render a statutory provision inoperative), the transposition of EC directives through delegated legislation as such is not very controversial.³⁴ Instruction 339 even recommends delegation structures for purposes of the implementation of Community legislation, to the extent that the constitutional system and the legislator's primacy permit so. Certainly where the transposition no longer allows any scope for substantive choices, transposition through a ministerial regulation, which can be adopted rapidly, is preferable, and the latter is used quite extensively for this reason.

The Dutch legislative system, expressed through the legislator's primacy, is inconsistent; however, with transposition rules without a direct or indirect statutory basis and that have extensive delegation possibilities. The underlying idea is that Parliament must always be able to contribute to legislation. There is a hierarchy between the various Dutch legislation instruments, which means that as a general rule, any lower-level regulation that is inconsistent with a higher one does not have binding effect.

Directives are usually incorporated into the system of the existing Dutch legislative framework. Even though the Instructions for Drafting Legislation insist that no extra national policy should be added in the process of transposing EC directives³⁵, this does not prevent the incorporation of EC legislation into the corpus of existing national law. In the context of the transposition of EC directives, utilizing existing instruments and regulations is even preferred (Instruction 338). The Instructions also include the advice to use the terminology of Community legislation as much as possible (Instruction 56), unless this terminology is insufficiently precise, results in incorrect Dutch, or where another term reflects existing Dutch legislation more accurately.

2.4 National Coordination of Transposition

Once a directive has been adopted at the European level, it usually has to be transposed in the Netherlands, often through legislation. The type of legislation depends on the contents of the directive and the requirements set by the national law.³⁶ The transposition is prepared at the departments, usually the

³³ *Parliamentary Papers II* 2004/05, 21 109, no. 144.

³⁴ For an overview of the numerous possibilities of implementing international and Community decisions through lower-level regulators, see Besselink *et al.* (2002: 112-113).

³⁵ See Instruction 337.

³⁶ In a number of situations, the Dutch constitutional system dictates that important subjects may be regulated only through an Act of Parliament, in other words with the cooperation of Parliament. This is the

ministries that were also involved in preparing the Dutch position. The Interdepartmental Committee on European Law (ICER), which was established after the Securitel affair in 1997³⁷, is responsible for coordinating the legal advice regarding the preparation and implementation of European law. As a general rule, the ICER is chaired jointly on behalf of the Minister of Justice and the Minister for Foreign Affairs.³⁸ Following an evaluation in 2002, the ICER has three regular working groups: the ICER-I (Implementation); the ICER-N (Notification); and ICER-H (Court of Justice Cases). In addition, ad hoc working groups are set up. The first two regular working groups are chaired on behalf of the Minister of Justice and the latter regular working group on behalf of the Minister for Foreign Affairs. Directives are transposed according to the implementation plan³⁹ that has already been drawn up on the basis of the directive proposal and amended during the Community procedure.

In the Netherlands, approximately 87% of directives are transposed using forms of delegated legislation (general administrative orders, ministerial regulations, etc.) (Bovens and Yesilkagit, 2005: 525). In a number of cases, however, directives must be implemented by Act of Parliament. This usually takes a somewhat longer period (on average 15 months) and this is why this procedure is mentioned as one of the most important explanations for late transposition.⁴⁰

If directives are to be transposed by an Act of Parliament or a general administrative order, the ordinary procedures are applicable as a general rule, under which the Council of State must give advice on the transposition proposal.

2.5 Compulsory Advisory Bodies

As regards the preparation of EC legislation, there have not been any statutory advisory obligations for bills implementing EC directives since the early 1990s, apart from the advice of the Council of State. For its part, the Council of State does not advise on proposals for EC directives. In the period 2000-2002, however, the Government experimented with requests for advice from the Council of State about EC directive proposals. The results seem to have been positive.⁴¹ It has been found that an advisory procedure in two rounds may save time concerning compulsory consultation about the proposals for transposing directives. In that case,

case, for example, if the Constitution prescribes a regulation by an Act of Parliament for a subject, or where the legislator's primacy, as enshrined in Instruction 22 in conjunction with 24, so requires.

³⁷ After the decision of the Court of Justice in the Securitel case of 30 April 1996 (C-194/94, ECR 1996 p. I-2201), it became clear that the Netherlands was insufficiently alert to legal problems relating to the implementation of EC law. For example, the Netherlands had failed to notify the European Commission of a relatively large number of Dutch regulations. The cause of this failure was also thought to be related to the ministries' lack of awareness and effective commitment and expertise. The ICER was designed to fill this gap.

³⁸ In addition to the ICER, there are another two interdepartmental coordination bodies specialized in economic government activities: the ISO (Interdepartementaal Support Consultations) and the IOEA (Interdepartmental Consultative Body for European Tender Rules).

³⁹ Instruction 334 *et seq.*

⁴⁰ See, for example, the explanatory memorandum to the bill on the passage and implementation of EC decisions in the field of energy, post and telecommunication, *Parliamentary Papers II* 2003/04, 29 474, no. 3.

⁴¹ Again, see, the explanatory memorandum to the bill on the passage and implementation of EC decisions in the field of energy, post and telecommunication, *Parliamentary Papers II* 2003/04, 29 474, no. 3.

the Council of State already knows the relevant directive and can provide its advice more quickly. As stated in Section 2.3, the Government intends to reconsider and, where necessary, speed up the consultation procedure for transposition legislation.

2.6 The role of Parliament

Parliament is informed about directive proposals, their significance for the Netherlands and Dutch legislation, and about the proposed Dutch position by means of the explanatory memorandum procedure and the submission of the annotated council agendas. Nevertheless, the explanatory memorandum procedure does not function adequately. The consultation and negotiation circuits in the Netherlands and Brussels are separate and are not geared to each other. In Brussels Commission proposals are negotiated first in the Council Working Groups by Dutch civil servants and after that in *the Comité des Représentants Permanents* (Coreper). Feedback from these circuits to the Dutch Parliament in order to discuss the Dutch position and the Dutch instructions again is very difficult, because the cycle of priorities is different in Brussels and the Netherlands. The interaction between the Dutch Parliament and the responsible Minister about developments in the negotiations is very time-consuming and difficult as well.⁴² Del Grosso notes that the Dutch Parliament addresses European questions too little, in too fragmented a manner, and often at too late a stage. And where parliamentarians are in a position to exercise influence on the Dutch contribution to the European process of integration, they often fail to do so (Del Grosso, 2000). In its annual report for 2004, the Council of State draws a similar conclusion (Council of State, 2005).

In recent years, the Dutch Parliament's attitude has also been mentioned as a possible source of transposition delay. The bill transposing a directive sometimes comes as an unpleasant surprise to Parliament. Especially where Parliament does not agree with the proposal, the passage of transposition legislation may well assume the characteristics of a rearguard action. (Public Administration Council, 2004: 26). In the meantime, the Council of State has drawn attention to the role of the Dutch actors in the Community legislative chain on a number of occasions. This role begins with the preparation of Dutch rules and ends with the adoption of the national implementation rules. As the Community is a co-legislator, the role played by Parliament in the context of transposition legislation is moving in the direction of mandator and inspector. This also means that an effective contribution in this legislative chain should be made as early as possible (Council of State, 2005: 141-2).

By now, the House of Representatives of Parliament is aware of this responsibility. The European legislation committee, consisting of members of the House of Representatives and members of the Senate, which was established in 2003, was in fact designed to prepare the Houses for the new role to be played by the national Parliaments under the European Constitution, but it is currently in the process of encouraging the two Houses of Parliament to give priority to the treatment of European legislation.

2.7 Conclusions

The Netherlands is not among the countries researched in depth for the purposes of this study, but we discussed it briefly because it will probably serve as the reference point for many readers of this report. On

⁴² The Danes, however, have opted for a system under which its Parliament gives a strict and limited negotiation mandate to the government. This system requires the government to provide feedback about the negotiation results. Strict as it may be, it does not require a written negotiation mandate.

the basis of this brief analysis, it is possible to conclude that the Netherlands has been struggling with the problem of the prevention and reduction of the transposition deficit for quite some time now. During the first phase (until 1999), attempts were made to deal with the deficit by means of minor procedural measures, but after that, during the second phase, possibilities for speeding up the process of transposing directives through flexible implementation techniques were explored as well. By now, this discussion appears to be stagnating. Time and time again, the Senate in particular has been very critical of proposals for new implementation instruments and techniques. This has also triggered a debate on the deeper causes of the transposition deficit. Is it due to the procedures (in particular the procedure of an Act of Parliament), to coordination⁴³, or, by contrast, to a lack of understanding and, as a result, adequate management of the respective contributions to be made by the various Dutch actors in the Community's legislative chain?

It now seems that a third phase has begun, which involves the exploration of a number of procedural solutions within the existing legislative system for the purpose of tackling the most urgent problems, which is reminiscent of the situation before 1999. The most important of these include the preparation of a planning and progress monitoring system, giving priority to transposition legislation in the Council of Ministers, and avoiding gateways and sub councils in the case of transposition proposals.

⁴³ This coordination is quite 'event-based' in the Netherlands, according to the Public Administration Council (2004: 99-100), and therefore reactive rather than pro-active. For further comments on this report, see De Goede (2005).

3 Transposition and the Performance Records of the Various Member States

3.1 Delay in Transposition

Despite their obligation of timeliness and completeness, most EU Member States sometimes experience problems with the transposition of EC directives.

**Table 3.1: Transposition of directives by Member State:
internal market directives vs. total number of directives**

Member State:	Second Report on Internal Market Strategy (internal market directives)		Overview Secretariat General of the European Commission		
	reference date: 30 November 2004		reference date: 10 January 2005		
	number of overdue directives*	% non-transposed directives	number of directives	number of overdue directives delayed	% non-transposed directives
Lithuania	15	1.0%	2568	14	0.5%
Spain	21	1.3%	2538	23	0.9%
Austria	33	2.1%	2525	30	1.2%
Denmark	36	2.3%	2517	30	1.2%
Hungary	32	2.0%	2546	34	1.3%
Finland	37	2.3%	2516	39	1.6%
Slovenia	51	3.2%	2550	40	1.6%
Poland	46	2.9%	2544	41	1.6%
Belgium	54	3.4%	2575	42	1.6%
UK	40	2.5%	2515	45	1.8%
The Netherlands	31	2.0%	2517	47	1.9%
France	50	3.2%	2520	48	1.9%
Ireland	38	2.4%	2533	50	2.0%
Sweden	32	2.0%	2502	50	2.0%
Germany	40	2.5%	2520	52	2.1%
Portugal	51	3.2%	2560	65	2.5%
Luxembourg	67	4.2%	2525	72	2.9%
Estonia	79	5.0%	2528	77	3.0%
Cyprus	69	4.4%	2550	82	3.2%
Latvia	110	7.0%	2566	90	3.5%
Italy	71	4.5%	2529	90	3.6%
Greece	80	5.1%	2524	92	3.6%
Malta	95	6.0%	2549	93	3.6%
Slovakia	99	6.3%	2561	96	3.7%
Czech Republic	151	9.6%	2552	121	4.7%
EU average	57	3.6%	2537	59	2.3%

* The total number of internal market directives is 1579.

Source: columns 2-4 are based on the European Commission (2005a); columns 5-7 on the European Commission (2005b).

A recent overview relating to internal market directives can be found in the second implementation report of the European Commission concerning the internal market strategy 2003-2006 (European Commission, 2005a: 16-21). This shows that on 30 November 2004, the average number of delayed and non-transposed directives amounts to 3.6%. Furthermore, most Member States still do not achieve the target agreed during

the Stockholm European Council (2001). The target was to reduce the deficit to 1.5% of the total number of directives in force. An overview of the deficit by Member State is included in Table 3.1.⁴⁴

A second overview of the transposition of EC directives originates from the Secretariat General of the European Commission (2005b).⁴⁵ This overview is based on all directives and is not confined only to the internal market directives. This means that directives relating to flora, fauna, the habitat of animals, animal protection, swimming water, statistics, and export credit facilities and insurance have also been taken into account. Furthermore, there are two important differences between the figures from the report on the internal market and those from the Secretariat General:

- the transposed directives in the internal market overview include directives that have been fully transposed according to the Commission; the overview of the Secretariat General is based only on the Member States' notifications; and
- the internal market overview includes only the directives in force; the Secretariat General's overview includes all directives, including directives that are no longer in force.

These data are included in columns 4 to 6 of Table 3.1. Based on these figures, which reflect the situation on 10 January 2005, the average deficit in the Union amounts to 2.3%: for the EU-15 (the countries that were already Member States of the Union before 1 May 2004), the transposition deficit is 2.0% on average; for the EU-10 (the countries that became Member States with effect from 1 May 2004), this is 2.7%. Furthermore, it turns out that 12 of the 15 'older' Member States do not achieve the 1.5% standard. Among the 'new' Member States, 8 of the 10 countries do not meet the 1.5% target.⁴⁶

In addition to the deficit concerning directives still to be transposed for which the transposition deadline has passed, a second indicator is used within the EU. This concerns the number of directives to be transposed for which the deadline passed more than two years ago. During the Barcelona European Council (2002), a 'zero tolerance' target was agreed for this group of directives: this number must be reduced to 0% within the Union. Table 3.2 shows the number of directives that have not been transposed more than two years after the implementation period has passed.

Table 3.2 shows that at this juncture the Netherlands is doing relatively well in terms of directives delayed for more than two years. In this respect, the recent catching-up maneuver, which also involved the transposition of three long overdue directives, seems to have been successful. At the time of the reference date, the United Kingdom, Denmark and Spain each have one long overdue directive. As far as Denmark and Spain are concerned, this deficit arose in the period May 2004 – November 2004. France, with five directives delayed for a long time, is not performing as well. Even so, France's reduction from nine to five overdue directives is impressive.

In a more general sense, the performance records of the countries studied here vary. Based on the most recent - and the most complete - overview of the European Commission, the following picture emerges:

⁴⁴ As a result of the use of different reference dates and delays in the processing of data, the number of directives the Netherlands still has to transpose but for which the implementation deadline has passed sometimes deviates from the number mentioned in Table 1.1.

⁴⁵ This overview is found at

http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm#transpositions.

⁴⁶ The performance records of Lithuania and Hungary are spectacular in this respect. At the same time, the European Commission notes in its second report concerning the internal market that the figures for the 'new' Member States are provisional only because the national implementation instruments still have to be verified by the Commission (European Commission, 2005: 16).

- Spain and Denmark have a transposition deficit of 0.9% and 1.2%, respectively; which means that both countries satisfy the 1.5% standard (based on the earlier, internal market overview, only Spain satisfies this standard, with a deficit of 1.3%; in that report, Denmark has a deficit of no less than 2.3%);
- The Netherlands (1.9%) and the United Kingdom (1.8%) are in the middle bracket. Compared to other Member States, both countries have a deficit that is well below the average for the EU-15 (which average is 2.0%), but do not meet the 1.5% standard;
- in the last overview, the position of France (1.9%) has improved. In the internal market overview, France is invariably at the bottom of the list (with a deficit of 3.2%). Further, France has a relatively large number of directives more than two years overdue;
- Germany (2.1%) and Italy (3.6%) perform notoriously badly in the overview as far as the EU-15 is concerned.

**Table 3.2: The number of directives more than two years overdue:
by Member States of the EU-15**

Member State:	Second Report on Internal Market Strategy (internal market directives) Reference date: 30 November 2004	
	number of directives	change compared to May 2004
Portugal	0	0
Sweden	0	0
The Netherlands	0	-3
Finland	1	0
UK	1	0
Ireland	1	-2
Denmark	1	+1
Spain	1	+1
Belgium	3	-1
Greece	3	+2
Italy	3	+2
Austria	3	+1
Luxembourg	4	+1
Germany	5	0
France	5	-4

Source: European Commission (2005a: 20).

3.2 Quality of Transposition: Infringement Proceedings

Apart from the delay in transposition, it is also important to gain a picture of the quality of transposition. This quality is revealed in part by the number of infringement proceedings initiated against a country. As the quality of the transposition improves, a smaller number of infringement proceedings is to be expected.

The analysis of the number of infringement actions takes two factors into consideration. First, the number of Court of Justice cases instituted against a Member State. The choice of the number of Court of Justice cases is related to the idea that not all stages of an infringement proceeding are equally as relevant as a quality indicator. The letters of notice sent by the Commission and its reasoned opinions constitute steps that

are usually due to delays in the Member States. As is shown by the research project, the number of cases falls sharply after letters of notice are sent and opinions issued (see Börzel, 2001; Tallberg, 2002). In that event, a Member State does transpose a directive, which prevents further steps by the Commission and a case before the European Court of Justice. In such cases, factors other than problems relating to the quality of national transposition measures usually play a role – for example the temporary postponement of the date of entry into force of transposition measures that have a negative effect on domestic business. This is why we focus on the number of Court of Justice cases as the first indicator.

Second, we take account of the number of cases involving directives that have been incorrectly transposed, according to the European Commission. Besides the incorrect transposition of a directive, the Commission distinguishes two other grounds that may result in a letter of notice and a Court of Justice case. These are the failure to notify a national measure and the incorrect implementation of a directive for which the implementation period has passed. These grounds reveal much less about the quality of transposition. This is why we do not take these cases into consideration as a quality indicator. The second indicator we use is the number of cases against a country – in terms of letters of notice, reasoned opinions and Court of Justice cases – based on the incorrect transposition of a directive.

By using both of these indicators, we hope to gain a sufficiently reliable picture of the quality of transposition in the various EU Member States and in particular in the countries analyzed here.

Table 3.3: the number of ECJ cases involving Member States of the EU-15 as of 31 December of the relevant year

Member State:	2000	2001	2002	2003	Average
Denmark	0	2	2	3	2
Finland	4	2	1	6	3
Sweden	3	3	2	7	4
The Netherlands	12	5	7	9	8
Portugal	10	7	10	10	9
UK	4	14	16	11	11
Belgium	5	13	8	19	11
Austria	8	7	15	22	13
Luxembourg	16	10	12	16	14
Germany	11	12	16	18	14
Ireland	17	13	9	18	14
Spain	8	14	11	23	14
Greece	23	16	17	14	18
Italy	24	22	23	18	22
France	27	22	31	21	25
EU	172	162	180	411	231

Source: European Commission (2004b).

Table 3.3 shows the number of Court of Justice cases that have been initiated, broken down by country and by year. The table shows that the Scandinavian countries perform relatively well. These countries face an average of about 3 Court of Justice cases per year. The Netherlands follows these countries with an average of 8 new Court of Justice cases per year. Countries such as France, Italy and Greece perform badly. Spain, too, has a relatively high average of 14 cases initiated by the Commission before the Court of Justice. This could mean that in these countries the transposition quality is relatively poor.

The second quality indicator is included in Table 3.4. This table includes the number of cases involving incorrect transposition of EC directives according to the Commission for each Member State. This relates to the period 1999-2002. This table shows that Italy, France, Austria and Belgium have a relatively large number of cases where the Commission intervenes on the ground of the incorrect transposition of directives. Even though there is some variation in terms of the number of letters of notice, reasoned opinions and Court of Justice cases, these Member States are responsible for most cases, on average, for each of the distinct stages of the infringement proceeding. After these four countries, Germany and Spain are ranked next. This means that the quality of the transposition measures in these countries appears to be relatively lower than in countries such as Denmark, Finland and, in third position, the Netherlands.

Table 3.4: The number of cases involving the incorrect transposition of EC directives, by Member States of the EU-15 as of 31 December of the relevant year

	1999			2000			2001			2002			Average		
	<i>N</i>	<i>O</i>	<i>C</i>												
Denmark	4	0	1	2	3	0	2	2	0	1	1	0	2	2	0
Finland	2	3	0	2	3	0	10	3	0	1	8	0	4	4	0
The Netherlands	2	0	1	3	2	1	2	2	2	2	0	1	2	1	1
Ireland	3	4	1	0	2	1	2	2	1	0	0	2	1	2	1
Portugal	4	4	3	3	4	0	2	1	0	3	0	2	3	2	1
UK	2	4	1	5	1	0	3	4	1	3	2	3	3	3	1
Greece	4	6	1	4	2	1	3	1	1	4	1	0	4	J	1
Sweden	6	4	1	3	4	0	5	1	2	2	5	0	4	4	1
Luxembourg	10	5	2	1	7	0	4	2	2	2	1	2	4	4	2
Spain	5	4	4	4	1	1	2	4	0	6	6	1	4	4	2
Germany	7	5	1	7	4	2	0	4	4	4	4	0	5	4	2
Belgium	10	6	5	6	6	1	1	7	4	1	0	0	5	5	3
Austria	12	4	2	13	6	1	13	11	3	3	6	6	10	7	3
France	3	11	2	8	6	5	7	4	3	8	9	2	7	8	3
Italy	4	8	4	15	4	5	6	8	5	7	3	6	8	6	5
EU	78	68	29	76	55	18	62	56	28	47	46	25	66	56	25

Declaration: N=letter of notice; O=reasoned opinion; C=ECJ case instituted.

Source: European Commission (2003a).

The general picture emerging from both of these indicators is that France and Italy show relatively poor performance in terms of quality. In recent years, these countries have had a relatively large number of Court of Justice cases initiated against them as well as a relatively large number of infringement actions based on the incorrect transposition of directives. Germany and Spain follow these countries with a slightly better performance record, but these countries also have a rather poor quality level. These poor performance records are at odds with the earlier picture of Spain as one of the countries that transposes directives relatively quickly and satisfies the 1.5% and 0% targets defined by the European Council. Apparently, speed does not always mean that directives are transposed correctly.

Countries with a very limited number of Court of Justice cases and with a good performance record in terms of the number of cases based on incorrect transposition include Denmark, Finland and the Netherlands. In these countries, the transposition quality appears to be high. Sometimes this involves a limited delay: for example, the Netherlands does not satisfy the Union's 1.5% standard. At the same time, Denmark is able to transpose directives both rapidly and accurately. Denmark satisfies the 1.5% standard and has the smallest number of Court of Justice cases in the period 2000-03. It remains an open question whether carefulness in the transposition process takes more time and may therefore result in delay.

4 Instruments and Techniques

A great variety of instruments and techniques is used to implement EC directives in the countries researched. The variations in the different legal instruments often depend greatly on a country's constitutional system, making it difficult to compare these instruments.

4.1 Special Implementation Procedures

None of the countries researched for this report utilize special, faster implementation procedures for transposing EC directives. The constitutions of these countries do not include any special provisions for speeding up the treatment of EC directives, nor are there any other special procedures permitting a simplified or another kind of treatment of EC directives for transposition purposes. Articles 1:7 and 1:8 of the General Administrative Law Act, which permit consultation to be bypassed for the purposes of implementing EC legislation, come closest to a separate procedural provision aimed at implementation. Countries such as France and the United Kingdom do have various special statutory regulations permitting the use of special instruments (for example, the extensive use of delegated legislation) for transposing EC directives. The result of these special instruments is that the transposition procedure is less time-consuming: as a general rule, delegated legislation is adopted faster than Acts of Parliament in all countries studied.⁴⁷ This means that the legal instrument also defines the duration of the procedure.

Even though there are no separate transposition procedures in the literal sense of the word, the resolution procedures used in the United Kingdom pursuant to the European Communities Act 1972 are still often regarded as such. Under the European Communities Act, the British Government has wide powers to transpose directives through 'statutory instruments' provided that the draft instrument is presented to Parliament. The two resolution possibilities, the 'negative resolution procedure', under which Parliament may approve the draft statutory instrument by implication, and the 'affirmative resolution procedure', under which the draft instrument requires Parliament's express approval, are actual 'procedures'. These resolution procedures, however, are not exclusively reserved for the transposition of EC directives. They are also used in the case of regular delegation to a Minister under ordinary British statutes.

4.2 Instruments

4.2.1 Instruments I: no or a trivial instrument (direct effect or transposition through reference)

Member States are required to transpose EC directives precisely and completely.⁴⁸ Admittedly, under Article 249 of the ECT, Member States are free to choose the appropriate form and methods in order to achieve the result required by a directive, but this freedom of choice is not without limitations. The form chosen must be suitable for achieving the aim of the directive. Nevertheless, precise and complete transposition means that Member States have to make an assessment of how the various directive provisions are to be transposed into the national legal order. Member States are not permitted to strive for the direct effect of directives by doing

⁴⁷ As a result of non-procedural factors, the introduction of subordinate legislation may take longer than the approval of primary legislation. An example that came up during the interviews concerns France, where the ministerial process is sometimes considerably delayed as a result of transposition receiving low priority.

⁴⁸ For a recent decision, see, *inter alia*, ECJ, C 194-01 Commission v. Austria.

nothing. And methods that do not involve any assessment regarding transposition but that declare a directive applicable in a country's national legal order unconditionally – without any substantive considerations – are not always acceptable either.

These criteria make it immediately clear that the non-transposition of a directive as a method or instrument (the directive itself is the instrument in that case) is not permitted under Community law.⁴⁹ Transposition through reference in a national act is not prohibited as such. It depends on the contents of the directive (or the parts of the directive to which reference is made) whether this is permitted. In a number of the countries studied, transposition of directives through reference takes place, especially in Italy, Denmark and Germany. In Italy, this 'trivial' instrument (actually not a 'real' form or method of transposition, because there is no substantive review of any kind), is occasionally part of the *Pergola* system. This study does not permit us to draw any exact conclusions about how frequently this instrument is used, because we have not conducted any interviews in Italy for this research project. The literature search creates the impression that it is hardly ever used.

4.2.2 Instruments II: Package Laws and Omnibus Laws

Package law

A transposition instrument that we found in several countries studied is the *package law*. A package law is an act whereby a number of directives for which the implementation deadline has passed are transposed into the national legal order simultaneously. These laws are like an emergency measure. This instrument was occasionally used mainly in Italy in the late 1970s for the purpose of reducing the transposition deficit.⁵⁰ In Spain it was used once at the time of its accession to the European Union. The package law in Italy took the form of an ordinary Act of Parliament. The once-only package law in Spain was based on a Delegation of Powers Act that granted the government the power to transpose a large number of directives through a Decree-Law (*real decreto-legislativo*).⁵¹

Omnibus law

An omnibus law, too, transposes several directives into the national legal system simultaneously, but is not necessarily designed to reduce the deficit by way of an emergency measure. In Italy and France, omnibus laws are more or less part of the regular transposition system. In Italy, the system of the *Pergola* Act (*legge Pergola*)⁵² allows omnibus laws to be adopted. The *Pergola* system instructs the government to prepare a bill every year that is designed to implement EC directives that are in direct or indirect need of transposition and to introduce it, together with a report on the significance of European policy for Italy and the Italian position, to the Italian Parliament. Usually, this kind of EC law transposes several EC directives simultaneously. The

⁴⁹ This situation should be distinguished from the situation where a directive is transposed through the 'existing national regime', i.e. the situation where an EC directive can be transposed into existing regulations without the passage of a new regulation or amendment legislation. In the Netherlands this situation is regulated by Instruction 347. In the Netherlands, this form of transposition must be published in the Government Gazette.

⁵⁰ Act 42/87 implemented 97 directives and Act 183/87 100 directives.

⁵¹ Ley the Bases 47/1985 the 27 diciembre, para la delegación al Gobierno para la aplicación del Derecho Comunitario.

⁵² Legge 9 marzo 1989, n. 86, Gazz. Uff., 10 marzo, n. 58.

French DDAC laws (*Disposition d'adaption au droit Community*) are also omnibus laws, but these do not have the periodic nature of the Italian EC law and they are often (preferably) confined to one policy area.

4.2.3 Instruments III: Delegation Structures

Apart from the package and omnibus laws, we have not found any special legal instruments in the countries analyzed in this report that are specifically designed to transpose or implement EC directives. All of the instruments used in the countries for the purpose of transposing EC directives are taken from the regular repertoire of regulations and other instruments. This also applies to the package and omnibus laws, which are regular Acts of Parliament in terms of form.

Even so, countries frequently attempt to transpose EC directives through delegated legislation within their regular legislative system in order to avoid the often time-consuming road to an Act of Parliament. It is striking that none of the countries studied here makes any constitutional concessions in the context of their attempts to transpose directives at the lowest possible regulatory level. The existing instruments are used to the fullest extent within the limits of the countries' own constitutional system and the requirements placed by the Court of Justice on precise and complete transposition. In Spain, approximately 84% of the directives are transposed through subordinate legislation. In the United Kingdom, the figure is about 80-90%; in Denmark 85%. In France it is estimated that approximately 60% of directives are transposed through subordinate legislation. In this comparison, the Dutch figure is among the highest: approximately 87% of the EC directives are transposed by instruments other than an Act of Parliament (Bovens and Yesilkagit, 2005: 525). There are no figures for Germany and Italy because these countries were not part of the fieldwork for this study.⁵³

All of the Member States we studied use delegation structures in order to transpose directives at the lowest possible level. Below, we will first discuss the types of delegation (general or special authorization), followed by the delegation standards (delegation prohibitions and restrictions) and finally, the delegation structure (statutory or constitutional basis, direct or cascade delegation, hierarchy of standards).

a. Types of delegation: general authorization ('umbrella' delegation) or specified delegation

Some of the countries we studied use 'general authorization laws'. General authorization laws allow a group of EC directives defined in general terms to be transposed through subordinate legislation (government decree or ministerial regulation).

The European Communities Act 1972 in the United Kingdom is an authorization law with an extraordinarily broad scope. The law permits nearly all EC directives to be transposed through a ministerial order, rule or regulation (known as a 'statutory instrument'). The only exceptions concern cases where the transposition of EC directives would involve new taxes, grant new regulatory powers to British authorities or define important new summary or indictable offences.⁵⁴ This far-reaching form of delegation is subject to a restriction, however. Proposals for statutory instruments designed to transpose EC directives have to be presented to Parliament.

⁵³ Jenny and Müller (2005) show with respect to the federal government of Austria that approximately 41% of the EC directives were transposed through Acts of Parliament in the period 1995-2003. About 59% of directives were transposed by subordinate legislation.

⁵⁴ Schedule 2 to the European Communities Act 1972.

The resolution procedure as used in the United Kingdom has two versions that were already discussed in Section 4.1. Parliament may say ‘yes’ or ‘no’ to the proposal presented to Parliament, either through approval by implication (‘negative procedure’), or through express approval (‘affirmative procedure’). The advantage of this general authorization is that a great deal of time can be saved compared to the ordinary Act of Parliament procedure. According to the interviewees, the disadvantage is the loss of parliamentary control and, consequently, legitimacy and support. The UK Parliament does not exercise its power to critically discuss proposals for ‘transposing’ ministerial orders or regulations very frequently. Parliament hardly ever blocks a proposal. This loss is somewhat compensated by extensive consultations at the time of the preparation of ‘transposing’ regulations and parliamentary control in retrospect (Joint Scrutiny Committee on Statutory Instruments & Merits Committee), but this is not quite sufficient.

France uses general authorization laws known as *lois d’habilitation*. This kind of law grants the government the power, possibly on the basis of Article 38 of the French Constitution, to implement a number of directives through Decree-Laws. A special characteristic of these French authorization laws is that the authorization is only valid for a specified period and that the *ordonnances* have to be approved by Parliament (without the possibility of amendment). If the authorization law has already entered into force and Parliament does not grant its approval, all the consequences will have to be undone. The French Parliament uses this option only a few times a year. Since the proposals must always be accompanied by a list of non-transposed directives, they include an element of self-criticism on the part of the Government.

This form of authorization law is also possible in Spain under Article 82 of the Spanish Constitution (*ley de bases*). As in France, this form of delegation in Spain is based on a list of directives, is valid for a limited period, and lapses after the entry into force of government decrees (*real decreto-legislativo*). As stated above, this form of authorization has been used only once: at the time of the Spanish accession to the Union. The general authorization delegation is also an established part of the Italian EC laws on the basis of the *Pergola* system. Under Article 76 of the Italian Constitution, the legislator is empowered to authorize the government in this way. Through a general authorization law, the government is granted the power to adopt Decree-Laws relating to a specific subject – for example, the transposition of EC directives.

In this context, the Constitution requires that the law includes principles and criteria for the exercise of this power. As in France, the authorization can be granted only for a specified period and in Italy as well. Parliamentary approval (without the right to amendments) is necessary.⁵⁵ This procedure is widely used in Italy.

In Denmark and Germany, the special delegation system prevails, as in the Netherlands. Incidentally, in the countries with general authorization laws, there are also opportunities for special delegation. Special delegation means that powers to adopt further legislation are transferred by Act of Parliament to the government or to a Minister on a case-by-case basis (for example, according to subject, specific powers, or specific directives). In many countries, the extent to which there are opportunities for delegation very much depends on the policy area concerned. In Denmark, for example, it is mainly the Danish laws governing the Union’s traditional, first-pillar policy areas that provide many opportunities for special delegation. This does not apply to the same extent to Danish laws governing third-pillar issues.

Opportunities for special delegation come in many forms. Sometimes, delegation possibilities in a special act (special delegation possibilities, in other words) are very open in that they grant the government or a

⁵⁵ Article 77 of the Italian Constitution.

Minister exceedingly broad powers to transpose each and every directive within the scope of the relevant Act. We have found examples of this in Spain, but this is not an unknown phenomenon in the Netherlands either, notwithstanding the prohibition included in Instruction 25.

b. Delegation standards: delegation prohibitions and restrictions

In searching for the lowest possible form of transposition, many of the countries we studied face restrictions in terms of delegation possibilities. For example, the Spanish and German constitutions have restrictions relating to the legislative power of the central and federal government. When the federal government does not have powers in a specific area under the Constitution, it goes without saying that an EC directive concerning this area cannot be transposed at a federal level through delegated legislation. In the United Kingdom, too, Wales, Northern Ireland and Scotland have been granted significant autonomous powers quite recently. In the context of the transposition of directives, these autonomous powers of Länder or regions sometimes give rise to complications, because the central (federal) government is and remains responsible for complete and precise transposition. Spain and – to a somewhat less extent – Germany seem to have found a means to deal with this problem, but the United Kingdom is still experiencing difficulties.

A second form of delegation restriction also has a constitutional origin. In most of the countries we studied, the constitution contains delegation prohibitions or restrictions in one form or another with respect to specific subjects. Explicit examples can be found in Article 34 of the French Constitution and Articles 81-92 of the Spanish Constitution and the organic law based on it.⁵⁶

Even if there are no prohibitions on delegation, some of the countries we studied still choose to transpose directives by Act of Parliament. In the countries without general authorization laws but with only special delegation possibilities, the rule is that if an EC directive concerns a subject for which there is no national legislation yet, this directive must first be transposed by an Act of Parliament. In addition, the societal, administrative or political significance of a subject covered by a directive is sometimes mentioned as a reason for transposing a directive by Act of Parliament in Denmark and the United Kingdom. In the United Kingdom, as in France, consistency with national law or policy tradition can be a reason for using an Act of Parliament. In the United Kingdom, company law, for example, is traditionally governed by Act of Parliament.

c. Delegation structures

As far as delegation structures are concerned, this study shows that in some cases, the granting of legislative power to the government is based directly on the constitution. In France, Italy and in Spain, the government is empowered directly under the constitution or organic laws based on the constitution to adopt Decree-Laws for the purpose of implementing legislation under specified conditions. It is important to note that in Italy and Spain the government's constitutional power to issue decrees without parliamentary interference is hardly ever used for transposing directives. In these countries, the power to adopt decrees is designed to take decisions quickly in emergency situations. These statutory orders are reserved for exceptional situations and require retrospective parliamentary approval in one form or another.

The situation is different in France, where the government has a regular, separate constitutional power to draft Decree-Laws in those areas that are not governed by Acts or that do not fall within the legislative

⁵⁶ An organic law is an Act of Parliament that implements one or more constitutional provisions.

domain (Article 37 of the French Constitution). This is due to the complicated (from a Dutch perspective) demarcation of powers under the Constitution of the Fifth Republic.

In several countries there is no hierarchy of legislation as in the Netherlands. In Spain, Italy and France, certain Decree-Laws adopted by the government (for example, *decreti leggi*, *real decretos-legislativos*, or *décrets*) have the same order and rank as Acts of Parliament. Considering the general priority rule that new regulations prevail over older ones (*lex posterior derogat lege priori*), this may mean that a decree takes precedence over an Act of Parliament.

In the United Kingdom, it is possible not only that ministerial regulations take precedence over Acts of Parliament, but even that they expressly deviate from or amend Acts of Parliament. The provisions granting such powers are fittingly called *Henry VIII powers*.

This study has not investigated the rules that apply in the countries we studied concerning direct delegation and indirect or cascade delegation. This would require additional research.

4.3 Techniques

The implementation techniques used by the countries we studied present a varied picture. The differences are the result of a Member State's answer to the question of which system governs transposition: the national system or the European system? In France, Denmark⁵⁷ and Germany, the national legislative system is used as the point of departure for the transposition of EC directives. The substance of the directive is incorporated into national legislation, which usually means that the terminology used in the directive is changed. In the United Kingdom, Spain, Italy and the Netherlands, there is a preference for staying as close as possible to the text of the EC directive and generally using it as a basis for legislation in order to promote the speed, accuracy and completeness of the transposition.

Concurrent to the policy in the United Kingdom, the Dutch legislative policy prefers the copy-out technique wherever this is possible.⁵⁸ In most countries that share this preference, it is considered to be almost a matter of course that where it is not possible to use the copy-out technique, this is not required either. It could be, for example, that the text of the directive is confusing, in terms of language or contents, or that the text of the directive and national regulations are not consistent with each other. In this situation, re-wording is recommended.

The copy-out technique can be used in a variety of ways. First, transposition through reference automatically means that contents will be copied out. This may be done dynamically, as in the Netherlands (meaning that national legislation includes references to the provisions of a directive, including any future amendments to it) or static (references to the provisions of a directive as specified at a given moment in

⁵⁷ See Instruction 56 of the Instructions for Drafting Legislation (2004). This study has shown that in recent years the copying method has gained popularity in Denmark.

⁵⁸ In the United Kingdom, this is known as the 'copy-out technique'. In recent years, the UK has seen a debate on the question whether copy-out or the best possible incorporation of the directive into the existing British legislative system (the technique of 'elaboration') is preferable. The supporters of incorporation in the UK have pointed out that it not only has systematic advantages, but that it is also a service to the courts, which are not used to working with European legislation. In the UK the debate has been won by the copy-out technique, which is faster, often more precise, and which is also more popular with judges. They are the ones who have to apply EC law and this is simpler if only the original text is used or if the relevant regulation stays quite close to the latter.

time).⁵⁹ Section 4.2.1 discussed the technique of transposition through reference. The advantage of this technique is speed of transposition. The limited recognizability and the deficient way in which justice is done to the nature of the directive instrument may be considered disadvantages. Directives are also transposed through the ‘annex method’: an article in a national regulation declares an annex to the regulation applicable. In this way, the often-technical annexes to European directives are declared applicable by direct referencing.

There is a difference between the Member States concerning the question of whether or not there should be a minimalist approach towards transposition. The Netherlands and the United Kingdom prefer to transpose directives in as straightforward a manner as possible – which is understandable in view of the volume of directives to be transposed – which means that only the directives are transposed, and extra national measures or policies are not adopted.⁶⁰ Moreover, imposing extra requirements (*gold-plating*) often increases the burdens attached to the regulation for businesses and citizens. In the United Kingdom, this is an added reason to refrain from adopting additional requirements, based on the concept of Better Regulation.

A related question is whether directives should be transposed through a new separate regulation or whether existing instruments and regulations should be used. This study shows that countries adopt a case-by-case attitude on this issue and do not pursue any deliberate policy. Of course, in the case of package and omnibus laws, existing national instruments are not used, and in the case of delegated legislation, a directive is often transposed without involving any existing national regulations, but there does not appear to be any real consistent and deliberate policy. In the context of the British legislative policy, the co-existence of *double regimes* governing the same subject – national and European – (this is known as *double-banking*) is discouraged, however.

4.4 Conclusion

In the countries studied in this report, the normal legislative system is used for transposing EC directives. There are no separate procedures for transposing EC directives, and no special instruments. The various countries, however, frequently use the possibilities of transposing directives at the lowest possible regulatory level. It is remarkable that in transposing directives through instruments ranked lower than an Act of Parliament, all countries do so within the limits of the regular constitutional system, within the framework of the ordinary delegation techniques and the existing national repertoire of regulatory forms, in short within the normal national legislative system. Some countries do have forms of parliamentary legislation (package and omnibus laws) and forms of delegation (general authorization) that allow groups of directives to be transposed simultaneously, or that allow directives to be transposed by definition through delegated legislation. Other countries opt for forms of specific delegation rather than forms of generic delegation. The advantage of the former technique is that the best balance between transposition by Act of Parliament and transposition through delegation can be defined for each individual Act.

Transposing directives through instruments ranked lower than an Act of Parliament may save a great deal of time, but has the general disadvantage that there can be little parliamentary control over the relevant instrument in advance. The result of this is that legitimacy is sometimes low. Yet, despite these objections, delegated instruments are widely used. In most of the countries surveyed, more than 80% of directives are transposed through delegated instruments.

⁵⁹ See Instructions 342 and 341.

⁶⁰ See, for example, Instruction 337 of the Instructions for Drafting Legislation.

As far as the techniques used are concerned, this study reveals a varied picture. Some countries attempt to stay as close as possible to the text of the directive and to transpose in as minimalist a manner as possible. Other countries prefer to incorporate the directives as carefully as possible into the national legislative system, which often entails deviations from the terminology used in the directive text. Naturally, the latter technique has the disadvantage of being more time-consuming and more vulnerable to infringement proceedings. Its advantage is that it may do a better job at safeguarding the coherence of the national system. There is also a varied picture with respect to the use of already existing national instruments or the adoption of a new regulation for every transposition of a directive. This depends greatly on the instruments used for implementation purposes.

5 The National Policy Cycle

5.1 General

The national policy cycle relating to European legislation begins with the preparation of an initiative by the European Commission. In none of the countries studied is there any systematic preparation and discussion of proposals circulating within the Commission that the Commission has not yet presented to the Council. Occasionally, a specific proposal attracts some attention, especially if the European Commission publishes a policy document on it. It is true that some observers argue that it is important to take note of ideas within the Commission at an early stage, but this has not yet resulted in a specific procedure or working method. Some national Parliaments also try to gather more information about forthcoming Commission proposals by maintaining close ties with the national Permanent Representation and perhaps by posting their own representative in Brussels. Another reason to do this is the subsidiarity and proportionality tests to be introduced by the European Constitution. But these parliaments do not systematically discuss potential pre-proposals either. The publication of new Commission proposal signals the beginning of the drafting of the national position.

5.2 Drafting of the National Position

Start. In the countries studied here, the drafting of the national position concerning a Commission proposal begins after the publication of a proposal. The lead ministry begins the drafting process by analyzing the proposal and surveying potential problems. Only in France is the Council of State systematically involved at this stage because the Council must assess under the French Constitution whether a new proposal contains only 'legislative' or 'executive' elements, or both. This assessment is relevant to further proceedings, since the French national Parliament gives its opinion only for proposals or parts of proposals with 'legislative' relevance.

Ministerial preparation. The manner in which the ministry organizes the discussion about the proposal varies. At this point, it is possible to distinguish two models:

- A broad consultation model for all proposals, with active involvement of various interest groups and local authorities. This model is used in Denmark and the United Kingdom. In Denmark, the discussion is held in a large number of institutionalized EU committees in various policy fields. This extensive discussion fits with the national Parliament's active involvement during the follow-up stages of ministerial preparation. In the United Kingdom, broad consultation, also with other ministries, is recommended as well, but the lead Minister manages the process. The informal consultations are intended especially for interested citizens, businesses and institutions. Interested parties are also invited to express their views in Brussels.
- A limited consultation model, sometimes only involving civil servants, depending on the policy field: in this model, it is mainly the various ministries that provide their input in the process of drafting legislation. Depending on the policy field, interest groups are sometimes involved in the consultations as well. This model is found mainly in Spain and France, where ad hoc committees primarily consisting of civil

servants are set up (through the Ministry of Foreign Affairs – Spain – or a secretariat under the Prime Minister that is specifically focused on Europe – France) for drafting the country's position. As soon as a position has been reached, this is usually presented to the Cabinet through a sub council.

Internal information provision and explanatory memorandum. In all of the countries we studied, a document is drawn up that is used as a basis for both the administrative and political decision-making process at the preliminary stage.

In France, an explanatory memorandum is drawn up that focuses special attention on the manner in which the proposal affects the national legislative framework (*fiche d'impact*). This is related to the French constitutional difference between 'legislative' and 'executive' measures, which defines the further decision-making process (whether or not the national Parliament is involved in the process) and the fact that the French generally want to gain insight at an early stage into the question of which French legislation must be amended if the proposal is approved. Thus one reason for changing parts of the proposal during the negotiations in Brussels is to avoid transposition problems later.

In Spain, an explanatory memorandum is also drawn up and sent to Parliament. The Spanish explanatory memorandum is more detailed than the French one, but it deals with rather formal items. The most detailed explanatory memoranda can be found in the United Kingdom and Denmark. In some respects, these memoranda are comparable to those used in the Netherlands, where, in addition to a number of formal points (such as the responsible ministry, the legal basis and the background of the directive), attention is also paid to the financial, personnel and administrative consequences of the proposal, the consequences for national and local regulations and policies, the consequences for developing countries and the feasibility of the time limits suggested in the draft proposal. A short version of the explanatory memorandum is presented to the national Parliament in the Netherlands.

In the United Kingdom, the government draws up the explanatory memorandum for the Parliament's benefit when an EC proposal is received. This memorandum deals with the various aspects of the proposal and a report is added, which includes a 'regulatory impact assessment' of the economic, legal, social and environmental effects of the proposal. In this context, special attention is paid to the administrative consequences for British businesses and civilians. The drawing up of a memorandum is subject to a strict protocol. A special unit within the Cabinet Office (Regulatory Impact Unit) provides assistance to ministries in the preparation of impact assessments. In addition, there is an independent Scrutiny Team, which tries to convince departments and interested parties of the importance of Better (read: especially more business-friendly) Regulation.

In Denmark, a memorandum is drawn up in the drafting process, which is presented to Parliament (*grundnotat*). The Danish procedure is the most extensive compared to other countries we studied. The Danish memorandum includes a total of 13 sections, the most important of which are the assessment in terms of financial, socio-economic and environmental aspects, the results of interest-group consultations, the position of the Danish government compared to the position of other governments in the EU and the Danish position in comparable cases.

Coordination. The coordination of the drafting process is organized differently in the countries studied.

Denmark has the most decentralized form of coordination. Danish line ministries are, for the most part, responsible for the drafting process. The Danish position is prepared by the institutionalized committees that

have been set up for each policy field and in which interested groups are represented as well. This position is then raised in the Council of Ministers through an interdepartmental coordination group and a sub council. The Ministry of Foreign Affairs acts as the secretary in this process.

The Spanish model is somewhat similar. One difference is that the preparations take place in an ad hoc working group that is set up on the initiative of the Ministry of Foreign Affairs. At this stage, depending on the subject, the line ministry sometimes consults interested groups and autonomous regions. Through an interdepartmental, administrative coordination group and a sub council, the proposal is placed on the agenda of the Council of Ministers.

In the United Kingdom, the Cabinet Office is entrusted with the central coordination of the drafting and transposition of EC directives. The Cabinet Office manages this process. In many cases, the division of responsibilities between the ministries, laid down in the Designating Order, determines the lead ministry.

The French model differs from the models in Denmark and Spain. The drafting of France's position is a co-production of two coordination bodies under the Prime Minister: the Secretariat for European affairs – the *Secrétariat Général de la Comité Interministériel*, the SGCI – which is charged with the management of European policies, and the coordinating Secretariat for Legislative Affairs – the *Secrétariat Général du Gouvernement Général*, the SGG. The SGCI establishes an ad hoc committee for each dossier, in which the line ministers concerned are represented. Although the SGCI prefers one line ministry to assume the leadership in the drafting of the French position, it frequently happens that several ministries claim leadership. This is due to the French line ministries' relative autonomy and the fact that a Commission proposal sometimes has consequences for several ministries. As soon as the ministries have developed a draft position, the SGCI and subsequently the SGG present it to the Council of Ministers. The French coordination model is formalistic and complex. Furthermore, there are two bodies engaged in the internal coordination and each has a different perspective.

Drafting the position. As soon as the Council of Ministers has defined its provisional position, the various countries differ in terms of follow-up.

In France, the follow-up depends on whether the directive contains 'legislative' elements. If this is the case, Parliament is informed through an explanatory memorandum (*fiche d'impact*). Parliament and in particular the *Assemblée Nationale* may ask the government to take a number of points into account by tabling a motion. This does not happen very frequently. The government is not forced to implement the motion, which explains the limited popularity of this instrument, but the government is required to make a reservation during the European negotiations until Parliament's view is known. Parliament is not informed any further about directives that contain merely 'executive' elements. The government is autonomous concerning these directives, or parts thereof.

In Spain, all Commission proposals are presented to the national Parliament with an explanatory memorandum. Parliament can take a position on this proposal, but it little incentive to do so. This is partly due to the fact that Parliament's position is not a mandate within which the government must conduct negotiations in Brussels.

In the United Kingdom, the existence of the 'scrutiny reserve' means that the Government cannot enter into negotiation on EC proposals that have not yet been discussed by the British Parliament. In practice, this requirement is flexibly applied. On the basis of the explanatory memorandum, including a proposal for the British position, the European Scrutiny Committee, a separate House of Commons committee, selects the EC

proposals that must be discussed by Parliament. The committee usually refers only some proposals to Parliament. A small minority of the proposals referred to the House are actually discussed substantively in the House of Commons.

In Denmark, all Commission proposals are submitted to the national Parliament through an explanatory memorandum (*grundnotat*) and discussed with the government in detail. After other, relevant standing committees have presented their views on the proposal, there is a discussion in the European Affairs Committee of the Danish Parliament. Based on the discussion, the European Affairs Committee adopts the Government's negotiation mandate. The Danish government is obliged to obtain the national Parliament's consent before it assumes a position for negotiations in Brussels.

5.3 Transposition

Start. The transposition of a European directive is usually prepared after the decision on the directive has been published in the Official Journal. Although various representatives have expressed their willingness to begin the transposition process at an earlier stage, in practice the process begins only after the publication of the directive.

Preparation. In the various countries, the line ministries are responsible for preparing the transposition process. In this context, the following points are relevant:

- In some countries it is not the same team that is responsible for both the negotiations on the directive and for the transposition (especially in France this is still a problem);
- concerning the division of responsibilities, France in particular faces the problem that several ministries assume a leading role, which means that the responsibility for the progress of the transposition is often unclear;
- the legal support for transposition varies from country to country: in Denmark, 'multidisciplinary' teams are set up to supervise the negotiations regarding transposition. The United Kingdom also relies on multidisciplinary project teams, but transposition through statutory instruments is usually carried out by civil servants specialized in drafting legislation. The quality of their work is considered much lower than that of the Parliamentary Counsel's Office, which writes proposals for Parliamentary Acts. In Spain, legal expertise is obtained from the central staff departments within the ministry (*Secretario General Tecnicos*). In France, legal support is not systematic and varies greatly from ministry to ministry.
- in some countries, interested parties (*inter alia*, interest groups and lower authorities) are consulted at this stage. This is mainly the case in Spain and France. This consultation process has a statutory basis and is, in the short term, unavoidable. In Spain, this sometimes delays the process somewhat. In France these delays are sometimes very substantial because of the strongly autonomous nature of these consultation forums;
- the procedure concerning the transposition of European directives does not differ greatly from the procedure concerning national measures. There is no classification system according to types of directives that are decisive for the approach to be adopted (with the exception of the classification according to 'legislative' and 'executive' elements in France);
- several of the countries studied do not provide instructions concerning transposition, or more generally, relating to legislation. National guidelines are used in Denmark and the United Kingdom; various Prime Ministerial circulars are used in France; Spain has hardly any well-defined and uniform instructions. Each

ministry formulates its own ‘instructions’, which may vary substantially between the various ministries. Even so, uniform instructions do not seem to have a very positive effect on the speed and quality of the transposition process.

Coordination. Administrative coordination at the transposition stage has various shapes and forms in the countries we studied, with Denmark and France appearing to take the most extreme positions. Spain and the United Kingdom take intermediate positions.

We identified the following models:

- *decentralized coordination:* Denmark has a decentralized form of coordination between the various line ministries. In the Danish model, the ministries are responsible for the transposition of directives, and other ministries are involved as well. Only if an infringement proceeding is initiated does a special Ministry of Justice committee convene to discuss the situation. The Ministry of Foreign Affairs, responsible for coordinating the process during the negotiation stage, bears no responsibility for coordination at the transposition stage.
- *centralized interdepartmental coordination:* Spain has opted for a model in which the ministries are primarily responsible for the transposition and in which the Ministry of Foreign Affairs identifies possible and expected backlogs. In Spain, problems are on the weekly agenda of the Committee of State-secretaries and Sub-secretaries, which is the administrative gateway to the Council of Ministers. The progress of the transposition and any complications and problems are discussed in this committee.

In the United Kingdom, the Cabinet Office functions as a “spider in the web,” in consultation with the Ministry of Foreign Affairs. The Cabinet Office is the central coordinator. The Cabinet Office acts as an intermediary between London and the Permanent Representation in Brussels, intervenes where there are problems between ministries during the implementation process, takes the lead in the explanatory memoranda that concern vital British interests, and monitors the progress of implementation. The Cabinet Office is close to the Prime Minister and therefore has authority over other line ministries and other departments.

- *coordination of the coordinators:* in France, the coordination regarding the transposition of European directives is traditionally entrusted to the SGCI and, in the second instance, to the SGG (see the drafting stage concerning Commission proposals). Together with the Junior Minister for European Affairs, the SGCI is responsible for identifying any problems and backlog. With the recent reforms of the French coordination system, a new interdepartmental coordination committee has been set up, chaired by the SGCI and SGG jointly. This new committee is to discuss problems concerning the transposition of directives (*réseau interministériel des correspondants de la transposition*) and attempt to improve the structure of the administrative coordination in France. The Junior Minister for European Affairs is supposed to take a tougher stance *vis-à-vis* the ministries regarding transposition deficits.

So far, the Danish and Spanish models – but to a certain extent, the United Kingdom model as well – have turned out to be the most effective. In Denmark, most of the work – and the coordination relating to it – is carried out when a directive is being negotiated in Brussels.

In Spain, it is remarkable how frequently (a weekly discussion) those responsible for transposition backlogs are called to account. Furthermore, the ‘naming and shaming’ in the Committee of State-secretaries and Sub-secretaries has turned out to be very effective, since none of the administrative heads of the ministries (and sometimes of the policy departments within the ministries) want to be reminded of the poor

performance of the ministry time after time. In most cases, persistent disagreements between the ministries are discussed and dealt with at this level. The Council of Ministers hardly ever needs to deal with the transposition of directives. This also applies to the United Kingdom, where for the most part, transposition is carried out by delegated legislation. In the United Kingdom, the Cabinet occasionally launches a targeted action to quickly clear transposition deficits.⁶¹ Some years ago, an undersecretary was assigned the job of implementing an action plan for cutting the deficit at a faster pace in collaboration with the departments.

France faces the complication that there are two different administrative bodies with transposition responsibilities: the SGCI is responsible for coordinating the transposition of European directives and the SGG for coordinating the preparation of legislation. The recent introduction of a coordination structure involving both coordinating bodies and the main administrative and political officials within a ministry may improve this situation. In each ministry, the members of the newly established committee – the transposition ‘correspondents’ – include a high-ranking civil servant responsible for transposition and a member of the Minister’s ‘political’ Cabinet (in other words: per ministry, two representatives participate in the consultation). It is hoped that any controversy within and between the ministries, to the extent that this has not been resolved at an earlier stage, will be addressed within this committee. If a solution cannot be reached, the Junior Minister for European Affairs, who participates in the meetings, will place the problem on the agenda of the Council of Ministers, together with a survey of the general progress relating to transposition within the various ministries. It is remarkable that France has seen the rise of a structure of coordination of coordinators, which is the result of a very formalized and sometimes laborious relationship between the ministries and bodies such as the SGCI and SGG. This means that France has a rather extensive and heavy coordination structure, certainly in comparison with a country like Denmark.

Concerning the coordination of transposition, it is worth mentioning that there are differences between the countries we studied in terms of the priority given to transposition. In Denmark each ministry is keenly aware of the fact that EC directives must be transposed in a timely fashion. None of the ministries is eager to attend the special Ministry of Justice committee that convenes when an infringement proceeding against Denmark has been initiated. Especially because Denmark has few overdue directives and hardly ever faces any infringement proceedings, the civil service and the government will quickly learn about a poorly performing ministry. Up to now, this has been an incentive to perform well and has been the main reason for the high priority given to transposing directives in Denmark.

In Spain, the transposition of directives is given extra political weight. As indicated above, there is a weekly progress meeting within the sub council of the Council of Ministers, the Committee of State-secretaries and Sub-secretaries. In the United Kingdom, political pressure plays a role as well. In the British system, this is reflected in the watchdog role of the Cabinet Office, which is closely associated with the Prime Minister. Backed by the Prime Minister’s political weight, the Cabinet Office may force line ministries to work out compromises in the case of deadlock.

The present situation in France is complex: if one has the Prime Minister’s support, the Junior Minister for European Affairs appears to be able to speed up the transposition process. Through the recently *established réseau interministériel des correspondants de la transposition*, progress is discussed with the

⁶¹ This is comparable to the situation in Ireland, where the Taoiseach, Bertie Ahern, started a targeted action for the purpose of improving the poor Irish transposition record more than six months before the Irish Presidency. By drawing attention to transposition progress during the weekly Cabinet meetings – on the basis of ‘naming and shaming’ – the number of overdue directives was reduced from 13 to 3 in a short time.

various line ministries and the traditional coordination bodies for transposition (SGCI) and legislation (SGG) once every two or three months. A striking feature is the low frequency of the meetings of this coordination body and the limited political weight of the responsible Junior Minister. As soon as other issues dominate the Prime Minister's agenda, transposition is given a lower priority.

5.4 Compulsory Advisory Bodies

The countries we studied show differences as far as compulsory advisory bodies are concerned. The situation in the United Kingdom is remarkable in that consultation of other ministries and interest groups is rather informal. Denmark has a 'light' compulsory advisory procedure at the stage of transposition concerning the legal quality and administrative burdens. Spain and France also provide for compulsory legal advice that takes the form of the review of proposals by the Council of State. In addition, interest groups are consulted at the transposition stage in these countries (for more details, see Section 5.7). The following overview summarizes the situation:

- *informal consultation*: the United Kingdom provides for a system of extensive informal (which means not legally required) consultation of interested parties (governmental and non-governmental) both in relation to the EC proposal itself and proposed transposition measures;
- *limited compulsory consultation*: in Denmark, the lead ministry may, if required, use the expertise of a specific department within the Ministry of Justice regarding European legislation and transposition. Legislative proposals are, however, assessed in terms of their legal merits (by the Ministry of Justice) and administrative burdens (on the basis of a panel discussion with the business sector organized by the Ministry of Economic and Business Affairs);
- *extensive, compulsory consultation*: Spain and France. In Spain, compulsory consultation during transposition consists (besides the compulsory consultation of interest groups), of a test of the legal quality of the proposal by the General Technical Secretariat of the Ministry, the compulsory advice on the proposal by the Council of State, and consultations with the autonomous areas in Spain, if the proposal concerns one of the competences shared by the central government and these areas.

During the preparation of a transposition instrument, France provides for the compulsory consultation of interest groups, as enshrined in the French legislative framework, and the compulsory advice by the Council of State. Considering the diversity characterizing the French ministries, it is impossible to give an indication of the advisory regulations applicable within the ministries. In any case, there is no uniformity.

In France the Council of State is involved in the preparation and transposition process several times. At the beginning of the process of drafting the country's position on a new Commission proposal, the Council must indicate how the proposal is to be characterized: is it a 'legislative' or 'executive' proposal or does it contain both 'legislative' and 'executive' elements. This characterization is relevant to the follow-up process in France and the type of instruments that must be prepared. If the Commission proposal is substantially amended as a result of the negotiations, the Council may have to render a new opinion in the preparation process of the directive. At the transposition stage, the Council assesses whether the government has transposed the directive in accordance with the advice provided at an earlier stage and the legal quality is reviewed. As for the latter, the Council frequently indicates that the quality leaves much to be desired. This may result in a substantial revision of the original text.

The legal advice provided by the Council of State (Spain, France) or by the Ministry of Justice (Denmark) and the assessment in terms of administrative burdens (Denmark) are not considered obstacles to the

transposition process. This advice appears to improve the quality of the proposals. In France, some observers point out, however, that the compulsory consultation of interest groups is one of the main factors responsible for delay. This point is discussed in more detail in Section 5.7.

5.5 The Role of the National Parliament

The national Parliament is involved in the process in several ways. In this context, three aspects can be distinguished:

- a. the degree to which the national Parliament is involved in drafting the national position on new directives,
- b. the moment at which the national Parliament is asked for its input, and
- c. the manner in which the national Parliament is informed about the contents of the proposals.

Is the national Parliament involved in the process?

In the countries we studied, the national Parliaments are not always informed by the government about the new proposals for European directives on the basis of explanatory memoranda. In the French constitutional system, Parliament is informed about new Commission proposals only if these proposals contain ‘legislative’ elements. If the Council of State characterizes the proposal as ‘executive’, the proposal is not sent to Parliament, which in that case cannot take any position on it, and the government decides the implementation measure without further parliamentary interference once the directive has been adopted. The French system is unique in this respect. In the Netherlands, explanatory memoranda relating to Commission proposals are not always prepared. In Denmark, Spain and the United Kingdom, however, the national Parliament is informed about all new Commission proposals.

When is the national Parliament asked for its input?

As for the role played by the national Parliaments in the next stage of the process, a distinction should be drawn between countries that actively involve the national Parliament in the debate on new Commission proposals (Denmark), countries where some subjects expressly selected by Parliament are discussed (the United Kingdom) and countries where discussion on the merits of a proposed directive is held only at a later stage (Spain and France).

The differences between the United Kingdom, Spain and France are not that great. Like Spain and France, the national Parliament in the UK does not thoroughly address each Commission proposal. The European Scrutiny Committee, which determines within the framework of the ‘scrutiny reserve’ which Commission proposals are suitable for a discussion on the merits, acts as a strong filter. The Committee refers only a small minority of the Commission proposals to the House, as a result of which the British Parliament is often confronted with a directive only at the stage of the transposition measure. And even in that case, there is often no discussion on the proposal’s merits, because most directives are transposed through ministerial regulations that are subject to the parliamentary resolution procedure.

In Spain and France, there are occasional debates in the national Parliaments on Commission proposals and the position the government intends to take. These debates do not replace the substantive debates relating to national bills implementing these directives. In other words, the national Parliament in these countries has input at the transposition stage to the extent that statutory measures are required.

How is the national Parliament informed?

The national Parliaments receive an explanatory memorandum that includes the main information about new Commission proposals. In Denmark, these explanatory memoranda (*grundnotat*) are, with 13 compulsory sections, the most extensive; in France the explanatory memorandum (*fiche d'impact*) has only 5 compulsory sections and is less detailed. The Spanish explanatory memorandum is more extensive than the French one, but to a significant extent, it deals with similar items. The annex to the British explanatory memorandum deals with the legal, financial, social and business impact of a directive. With 14 compulsory sections and a focus on the legal, policy, financial and administrative effects of the draft directive, the Dutch explanatory memorandum is similar to the Danish and British documents.

The information contained in the explanatory memorandum constitutes the basis for the discussion between government and Parliament. In this respect the countries we studied differ. In Denmark, the explanatory memorandum is the basis for the discussion, which results in the adoption of the government's negotiation mandate. In Spain and the United Kingdom, as in the Netherlands, explanatory memoranda are occasionally discussed in the national Parliament and these may result in recommendations. In France, too, a parliamentary discussion about new proposals is sometimes held, which may result in a recommendation. If the French Parliament indicates that it wants to make a recommendation, the government is forced to wait for this position before it starts negotiations in Brussels. The government determines whether and to what extent it considers Parliament's recommendations.

In the United Kingdom and France attempts are made to amend and refine the explanatory memorandum during the negotiations and discussions. In France this is mainly inspired by the need to make a distinction between 'legislative' and 'executive' elements of the proposal, which are highly relevant to the transposition. As soon as a draft directive has been approved, the explanatory memorandum, accompanied by an implementation table prepared by the SGCI, constitutes the basis for the implementation plan. In the United Kingdom, transposition notes are now added to the proposals for transposition measures, as a result of which it is immediately clear whether the United Kingdom has not done more than strictly necessary.

At the transposition stage, information is given to the Parliament through the regular procedure for legislative proposals.

5.6 The role of Lower-level Government Authorities

Local government authorities play a role in the field of European directives only in Denmark, the United Kingdom and Spain. In France, these hardly play any role.

In Denmark, local authorities sometimes participate in the special committees that have been established within the various ministries relating to the rendition of advice on new Commission proposals. The lower authorities' input may play a role, in addition to the input of interest groups, in defining the Danish negotiation position.

In the United Kingdom, the devolved governments of Wales, Scotland and Northern Ireland participate in the transposition process. With the new division of powers, they are autonomously empowered to transpose directives in specific areas. It is always the central Government, however, that takes the lead in the negotiation process and that bears final responsibility for transposition. The effects of the new division of powers are not yet completely clear and the current complaint is that some of the new autonomous areas do not work hard enough to reduce the transposition deficit.

In Spain the autonomous regions have a role to play when a directive concerns a competence shared between the central government and the regions. In Spain, there are 17 regions. The autonomous regions are

consulted by the ministries during the preliminary stages concerning Commission proposals that are also subject to the competence of the autonomous regions. In the transposition process, attempts are made to coordinate the activities between the line ministry and the autonomous regions through special conferences.

In the transposition process, the autonomous regions must amend legislation to make sure it is in line with the legislation of the central government. The central government usually takes the initiative and introduces a “skeleton” Act that provides a framework within which the autonomous regions can decide their own statutory measures. If the central government is delayed and a region has introduced a legislative proposal in order to prevent delayed transposition (in that region), this may mean that the region must amend its legislation later because of the delayed central legislation. Occasionally some regions are late in completing their part of the transposition process, in which case the entire transposition process takes place at the central level. In that case, the central government tries to encourage the regions concerned to transpose directives faster by offering them financial incentives.

5.7 The role of Interest Groups

In the countries we researched, the intensity of interest group involvement varies. The way in which a country has shaped the preparation and implementation of the directives affects the timing of transposition.

In Denmark interest groups are part of the broad-based EU committees that play an important role in the advisory process relating to the Danish position on a new proposal. In addition to civil servants from the various ministries, representatives of interest groups, municipalities and other organizations active in specific policy areas increasingly participate in this consultation process. There are now 34 committees and their field of activity overlaps with the policy areas of the DGs of the European Commission. In addition, the interest groups sometimes approach the European Affairs Committee of the national Parliament. This committee has a key role in determining the Danish position. Because of the interest groups’ active involvement during the preliminary stages, there is consultation at the transposition stage only if the directive adopted by the Council contains new elements or offers specific options to choose from. Additionally, interest groups – and the business sector in particular – contribute to the transposition process in the context of the administrative burden test.

The United Kingdom attaches great value to broad consultation. This takes place at the negotiation stage and in the preparation of transposition. The Code of Practice on Consultation encourages broad consultation in order to mobilizing support as well. In principle, written consultations must be held in connection with transposition measures, and these take 12 weeks. Recently, consultations have focused on the prevention of red tape, restricting administrative burdens and attention to impact on business. There is no legally required consultation.

In Spain, interest groups play a role in particular at the transposition stage. Depending on obligations arising from national legislation, interest groups are involved in the manner in which directives are transposed, depending on the policy area. This consultation takes place at the stage of preparation of the draft implementing regulations. This consultation is not considered an obstacle to a speedy transposition process as it can usually be completed within a reasonably short time span. Occasionally, this consultation may result in delays, however. It is important that the ministry take the initiative for consultation, so that the advisory procedure fits in well with the planning of the transposition process.

In France too, interest-group consultation is held at the transposition stage. As in Spain, this compulsory consultation is enshrined in national legislation. The problem of the French model is that these consultation

structures are independent of the government, as a result of which the ministry is no longer in control of this advisory process. It is estimated that this advisory procedure delays the process by an average of three to six months (Philip, 2004). Delays may be much longer if the committee concerned meets only once a year and believes that it has insufficient time to complete the advisory process in one meeting. At the same time, various observers point out that this consultation is completely redundant because the proposal cannot be amended on many points since it follows the text of the directive. Consequently, this advisory procedure is rather frustrating both for the ministries and the parties involved. Many feel that it would be better to move the consultation process to the preparatory stages. Even so, there are no signs that these countries have taken any steps toward this.

5.8 Priority Rules

In Section 2.1, the measure⁶² adopted in 2004 to give priority to legislative proposals aimed at transposing EC directives was discussed in the context of the Dutch efforts to speed up the transposition of EC directives. The country studies show that the Netherlands is not the only country to give priority to transposition regulations. Spain sometimes does so by using the possibility offered by the Constitution to designate legislative proposals as urgent, which means that these proposals go through the legislative process at an accelerated pace. An accelerated procedure applies to such cases, somewhat comparable to the procedure proposed by the Presidium of the Dutch House of Representatives 2004.⁶³

⁶² *Parliamentary Papers II* 2004/05, 21 109, no. 144.

⁶³ Letter by the Presidium to the President of the House of Representatives of Parliament, dated 15 September 2004, *Parliamentary Papers II*, 2003/04, 21109, no. 142.

6 Discussions in the Countries Studied

Not all of the countries we studied regard the timely transposition of directives as an urgent problem, which means that there is hardly any political or public debate on this issue. In Denmark and Spain, this is undoubtedly due to the favorable long-term transposition record, but in other countries it is more difficult to identify why the transposition deficit attracts hardly any attention.

In Denmark the timely transposition of directives is not so much the focus of attention; rather, as European cooperation as such attracts the most attention. The Danes are very focused on European influence on Denmark, demonstrated by the rejection of the Maastricht Treaty (1992) and the discussion about and rejection of the euro (2000). This is why it is actually surprising that the Danes transpose directives so loyally and in a timely fashion. Some observers argue that the Danes' intensive involvement in the passage of Community legislation saves time during the transposition process.

Spain's reputation in terms of timely transposition is good. Perhaps because Spain wants to maintain this reputation, various internal discussions are now conducted that should contribute to an acceleration and a simplification of the transposition of EC directives. For example, the Secretariat of the Spanish Ministry of Foreign Affairs is working on a proposal for a uniform transposition procedure in the various ministries. It is unclear whether this proposal will gain sufficient support. In addition, forms of authorization that allow more use of delegated legislation in the transposition of technical directives are also considered. One suggestion is to increase the *potestad reglamentaria*⁶⁴, through which the government may independently transpose directives that no longer allow any further substantive choices.

In France, as in the Netherlands, there are worries about the increasing transposition deficit. As mentioned in Section 3.1, the deficit is 3.2% for the internal market directives. This is remarkable, as framework acts (DDAC) have been adopted regularly, which allow the government to implement many directives through implementing legislation at an accelerated pace.⁶⁵ Philip (2004), a member of the French *Assemblée Nationale*, has doubts about the effectiveness of these framework acts. He thinks that the deficit is not caused by the implementation instrument that is chosen, but by delays due to late government initiatives (submitting legislative proposals too late, or adopting ordinances too late), by too little in-depth analyses of the consequences of a directive proposal during the negotiation stage and legal perfectionism in the transposition process. The report, which contains an extensive comparative law study into the implementation practices in other Member States, recommends another approach, also based on the recommended best practices defined by the European Commission (2004a). The French government will have to give priority to transposition of EC directives through various channels. This caused the French government to decide to speed up implementation. The French government launched an action plan, partly

⁶⁴ This power is vested in the government under Section 23 of the organic law Ley 50/1997 de 27 noviembre, del Gobierno.

⁶⁵ Loi n° 2001-1 du 3 janvier 2001 portant habilitation du Gouvernement à transposer, par ordonnances, des directives communautaires et à mettre en œuvre certaines dispositions du droit communautaire, JORF 4 January 2001. In this framework act, Parliament delegates the power to transpose 46 directives to the government. More recently, the following act was enacted: Loi n° 2004-237 du 18 mars 2004 portant habilitation du Gouvernement à transposer, par ordonnance, des directives communautaires et à mettre en œuvre certaines dispositions du droit communautaire, JORF 19 March 2004. This act delegates the power to transpose 20 directives.

included in a circular of 27 September 2004, which requires that in future, all government members will be responsible for their own transposition deficit. Furthermore, a new interdepartmental committee has been established to monitor the progress of implementation, applying improved test methods concerning the draft implementation legislation and assessing proposals for EC legislation in terms of their legal and socio-economic consequences for France.⁶⁶ The committee is also responsible for the interdepartmental coordination relating to the French negotiation position. There are also efforts to improve the supply of information to Parliament, whilst the possibilities of simplifying the parliamentary debate procedure for implementation legislation are considered. Finally, the government accepts the idea of using framework legislation as a regular instrument for the implementation of technical directives. Within Parliament, there is some opposition to the frequent use of this instrument.

Over the past few years, Germany has had a poor transposition record as well, but the political debate has hardly addressed the consequences of this. The mixed *Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung*, which had to provide advice on possibilities for renewing the federal structure of Europe, was also asked – because of the poor performance record – to consider structures (procedures or instruments) that could help to speed up the transposition of EC directives. As it happens, transposition is impeded as a result of the *Länder* and the Federation each having their own distinct responsibilities (due to the constitutional division of powers). Still, the German Federal Government is the contact point for Brussels. The discussions within the mixed Committee are, however, deadlocked, and the Committee was dissolved in December 2004. A new Committee is now being considered.

In the United Kingdom, which has had a reasonable to good transposition record over the years, public debate is not focused on transposition itself but on legislative policy. The heart of the modern British Better Regulation policy comprises measures aimed at protecting citizens and businesses from unnecessary administrative and bureaucratic burdens and legislative effects. This influences the discussion concerning timely and complete transposition. For this reason, the United Kingdom considers the transposition record with a critical eye and asks whether it does not transpose directives all too loyally and in too timely a fashion, causing relative harm to the British business community in the process. A second point of discussion concerns the question of how directives are to be transposed. Should a directive be properly incorporated into the British system, or can and should directives be transposed in a minimalist and straightforward manner? The current debate favors the latter, as this also prevents the transposition measure from being unnecessarily burdened with additional national policies, which may also result in extra burdens for citizens and businesses.

The latest developments in the Italian debate are unclear, since Italy has not been included in the in-depth country studies. For the debate on the prevention and reduction of the transposition deficit in the Netherlands, we refer, for the sake of brevity, to Section 2.1 of Chapter 2.

⁶⁶ Circulaire du 27 septembre à la procédure de transposition en droit interne des directives et décisions-cadres négociées dans le cadre des institutions européennes, J.O. no. 230 (2 octobre 2004): 16920. See also Communication au Conseil des ministres du 20 décembre sur l'application des lois et la transposition des directives et des décisions-cadres communautaires. For a further discussion, reference is made to the chapter on France.

7 Decisive Factors in the Transposition Process

7.1 Introduction

The analysis in the preceding chapters shows differences and similarities in the manner in which the countries studied organize the preparatory work for new Commission proposals and the transposition of European directives. Attention was also focused on the available legal transposition instruments and the techniques used. At the same time, there are major differences concerning the extent to which these countries transpose directives:

- Spain and Denmark have been at the top of the European Commission's scoreboards for quite some time;
- the United Kingdom and the Netherlands are ranked in the middle;
- France is often at the bottom of the list.

What does this mean for the factors that allow or prevent timely transposition? To what extent are special techniques important for speedy transposition? To what extent does the organization of the policy process play a role? Before evaluating the factors that could be decisive in this respect, we will first compare the various countries in terms of their performance record, available instruments and the organization of the transposition process. Germany and Italy will not be addressed because we have not carried out an extensive study of these countries – these country studies are more concise and based only on a literature review.

The structure of this chapter is as follows. In Section 7.2, we first present an overview of important factors for each country on the basis of our country studies in Part II of the study. In Section 7.3, the perspective is shifted from a country-based analysis to a comparative analysis of the countries studied. This analysis reveals decisive factors affecting the transposition process.

7.2 Differences in Performance Record, Instruments and Organization between the Countries

Denmark

Denmark does not have any special legal techniques. Transposition usually does not pose any problems because most coordination and consultation procedures have been moved to the preparation phase. Even though attempts are made to transpose directives as much as possible on the basis of ministerial regulations, the existing legislation must include a delegation provision. If there is no such provision, a bill is submitted to Parliament. As far as the introduction of a ministerial regulation is concerned, the following situation is typical of the Danish political system with minority governments: if the Minister is under the impression that the ministerial regulation is potentially controversial or may include elements some Members of Parliament may disagree with, the regulation is discussed with Parliament in advance. This happens even if the regulation does not have to be formally approved by Parliament.

The fact that the Danish political debate on directives has been moved to the stage at which the position on the Commission proposal is drafted is more important than which instruments are used. At this stage, there is extensive consultation involving the relevant ministries, interest groups and, in a number of cases, municipalities. This time shift in the political debate means that there is no longer any need for extensive discussions concerning transposition between politicians and civil servants. This is an important factor contributing to the success of the Danish model. In addition, there are other factors contributing to

Denmark's success, including the clear division of responsibilities concerning directives, the deployment of broadly based project teams, the continued use of these teams from the negotiation stage to the implementation stage, the businesslike and flexible working procedures within the various ministries and a certain 'pride' in the proper and speedy transposition of directives, combined with 'naming and shaming' of the ministries responsible for the late or incorrect transposition of directives.

Spain

Unlike Denmark, Spain has a number of special legal instruments that can be used for transposition. First, there is the *decreto-ley*, an instrument that may be used only in very urgent or emergency situations. Sometimes, when Spain faces an infringement proceeding, this instrument is used as an escape. Experts believe that this use is questionable, if not unconstitutional, however. In short, the *decreto-ley* does not play a very significant role in the transposition of European directives. Besides, this is not an instrument specially developed for the purpose of transposing EC directives.

A second instrument is the *real decreto legislativo*, which is based on a separate authorization law that must first be approved by Parliament. This Act defines which directives the government may transpose by means of the *decreto legislativo* within a predefined period. As soon as the measures have been accepted, the authorization expires. Since this instrument requires a separate Act, the decision-making procedure is not much faster than that of ordinary Acts. These authorization laws are not instruments used only for the purpose of transposing directives either: they are regular constitutional instruments which are also used for transposing directives.

In Spain the majority of European directives are transposed through subordinate legislation (government decrees and ministerial orders). This means that Spain's speedy transposition of directives is not related to the use of special instruments. The success of the Spanish model could be the result of political will; as a relatively new Member State, Spain takes membership obligations seriously, including implementation. Moreover, it should not be forgotten that, as a net recipient, Spain has a clear and direct financial interest in the European Union. In addition, the Spanish model is characterized by quite accurate monitoring and weekly discussions about the progress of the transposition of directives at the highest civil service level, combined with political support for fast and, above all, smooth procedures. In this way there is a clear incentive to transpose directives in a timely fashion. Finally, Spain approaches the transposition issue in a fairly pragmatic way.

The United Kingdom

The United Kingdom's transposition performance record is reasonable and stable. One of the most important reasons for the current performance record is undoubtedly the operation of the European Communities Act of 1972, which allows the UK Government to transpose directives through a system of general authorization by ministerial regulations. This system has a number of safeguards designed to ensure equilibrium and control. The Act itself is designed to guarantee that Parliament is informed about ministerial transposition measures and any related drafts through the negative and affirmative resolution procedure. In addition, there are attempts to compensate for the loss of parliamentary control and input relating to the transposition by allowing Parliament to make a formal contribution to the negotiations ('scrutiny reserve') and broad consultation both relating to the Commission proposal for a directive and relating to the intended British transposition measure.

Another speed-enhancing factor is the role of the Cabinet Office as a watchdog in the negotiation and transposition process. The Cabinet Office (CO) is responsible for the progress of the negotiations and the transposition. Operating close to the British Prime Minister, it is an authoritative “spider in the web”. The Cabinet Office closely monitors the progress of the negotiations and maintains close contacts with the Permanent Representation. The Cabinet Office deals with important dossiers itself. In addition, it coordinates and acts as an intermediary between the Government and Parliament and between the various ministries. Every week, the head of the European Desk of the Cabinet Office meets the Permanent Representation (Grant Darroch meeting) in order to discuss subjects that require attention. Depending on the subjects to be raised, civil servants from the line ministries are invited for these talks. Where progress is at issue, the Cabinet Office may take active measures at the lead ministry. If necessary, the Cabinet Office and the Permanent Representation may take away responsibilities for an issue. This threat means that ministries are sufficiently encouraged to coordinate their efforts properly with the other ministries.

An issue that dominates the transposition debate in the United Kingdom at this juncture is that of the Better Regulation policy. At present, the British are quite focused on business and citizen-friendly legislation aimed at minimizing regulatory burdens on the British business sector. This results in a jumble of measures, such as sophisticated impact studies of directive proposals and intended transposition measures, written consultations of interested parties, both in the context of the Commission proposal and the transposition measure, and common commencement dates designed to avoid burdening business with new statutory rules.

A remarkable feature of the present transposition strategy is the *Realpolitik* approach. In the United Kingdom, there is a debate within specific departments at this juncture on the question of whether the British transposition record might actually be too good, and whether the United Kingdom’s transposition performance might be too Euro friendly. Some believe that from an economic cost and benefit perspective, it is not always a good idea to implement in a timely fashion.

France

France has various special legal instruments for speeding up the transposition of directives, such as the introduction of an authorization law (*loi d’habilitation*) and the possibility of a package law (DDAC). The advantage of an authorization law is that the government may take measures (*ordonnances*) in fields where it is usually necessary to adopt several Acts. The instrument of a package law prevents the government from having to submit several bills to Parliament. The discussion of this group of bills would be more time-consuming than the introduction of a single Act due to the busy parliamentary agenda and the fact that there has to be a separate parliamentary debate for each bill in each Chamber (and, if there are differences of opinion, an attempt to reach a compromise).

In addition, the French constitutional system distinguishes between ‘legislative’ and ‘executive’ subjects, which means that some directives may be transposed by the government autonomously and without any parliamentary involvement as soon as these are classified as ‘executive’. This constitutional delegation of specific subjects to the government is unique. This could make a contribution to the speed of transposition, because a number of directives can be transposed immediately after having been approved at the European level.

It is remarkable that despite these technical opportunities, France’s transposition record is poor. Some observers report that even the introduction of ministerial regulations is sometimes more time-consuming,

contrary to expectations, than the introduction of amendments to an Act. Statistical data supporting this claim are not available, which means that it is not clear whether this is really true. In any case, France is a country where the available legal instruments do not result in faster transposition.

This means that the factors affecting the French performance record are related mainly to the national policy process, including the organization of the transposition process. Factors preventing speedy transposition include the relative autonomy of the French line ministries, a lack of clarity about which of the ministries is responsible for the transposition of directives, the transfer of dossiers when the negotiations in Brussels have been finished, extensive compulsory consultation involving interest groups, the different political priorities within the ministries, the fact that the government does not always give priority to transposition, the involvement of various coordination bodies in the transposition process (even though this may improve with the introduction of a structure in the autumn of 2004) and the extent to which politicians are interested in the transposition issue, which changes over time.

7.3 Analysis

Delays in the transposition of directives are caused by a range of different, inter-related factors. In Section 1.1, we pointed out that the literature mentions many potential causes underlying the transposition deficit.

This study demonstrates that delays in transposition are never caused by a single factor but always by several factors combined. The country studies show different results in this respect. For example, the monitoring and coordination of the transposition process by the ministries themselves is regarded as a success factor in Denmark, whereas in another country (Spain), the central coordination between the various ministries is pinpointed as a relevant factor. Coordination is important, but there can be different arrangements for coordination. Furthermore, like France, Spain has rather autonomous ministries able to determine their own working methods. In Spain this does not result in long delays, but in France it does, which may also be caused by unclear political priorities and overlapping procedures in the coordination structure. Accordingly, the same factors, in combination with other factors, may produce different results. The same applies to the procedures, instruments and techniques used by countries to prevent a deficit, for where the latter procedures are concerned, too, it is a combination of factors that is decisive for the question of whether or not these procedures can speed up the transposition process.

Even if it is difficult to answer the question which obstacles hamper or delay the transposition of EC directives, a comparative analysis reveals a number of factors that could be relevant in this context:

1. *special instruments*: the availability of special legal instruments, such as package laws and the delegation of the transposition to the government, may be helpful in specific cases, but this is not decisive for a country's general performance in terms of timely transposition. France, which has a variety of special instruments at its disposal, performs significantly worse than Denmark, which does not use any special instruments. Spain provides a second example. Spain has special instruments, but it hardly ever uses these instruments for transposing directives. Italy is particularly instructive because it has a very rich repertoire of general authorization and delegation mechanisms under the *Pergola* system, but its performance record has been poor for many years. As far as a country's general transposition record is concerned, the availability of special legal instruments is not a sufficient and perhaps not a necessary condition for achieving timeliness. The European Communities Act 1972 may be an exception in this context, because the reasonable British transposition record is probably attributable to a great extent to the ample

possibilities for transposing directives through statutory instruments. In this context, the question arises, however, why in view of the broad scope of the authorization system of the European Communities Act 1972, the United Kingdom does not achieve a better transposition record than countries that do not have this instrument. Moreover, even within the United Kingdom, it is impossible to determine to what extent the system of the European Communities Act 1972 contributes to a better or worse UK transposition record, because the Act has been in force since the date of the United Kingdom's accession to the Union.

2. *subordinate legislation*: European directives are usually transposed at the lowest possible level. In the countries studied, there is a clear tendency to do so for the sake of speed. Both the countries using package and omnibus laws and/or general – i.e. without there being the need for Acts of Parliament – authorizations and the countries using specific delegation provisions in statutory regulations have been capable of transposing between 60 and 80 percent of the directives through delegated legislation. In nearly all countries studied, saving time is mentioned as an advantage of transposition through subordinate legislation, whilst the lack of parliamentary involvement and, consequently, weaker democratic legitimacy are mentioned as disadvantages.
3. *no extras*: in several of the countries we studied, including the Netherlands and the UK, it is assumed that extra national measures and the precise incorporation of directives into national legislation, accompanied by adjustments of the directive terminology, delay the transposition process. For this reason, various countries prefer straightforward transposition.
4. *an early start*: anticipation of the transposition phase during the negotiations saves time in the transposition process.
5. *administrative responsibility*: unequivocal and transparent administrative responsibility for the preparation and transposition of directives is an important factor affecting timeliness. This unequivocal and transparent responsibility is expressed, for example, in:
 - working with one ministry that is responsible for the directive procedure;
 - a transparent structure within the ministry geared to the persons in effective control of the preparation and transposition (bottom-up);
 - frequent monitoring of the progress of the activities at departmental and/or inter- departmental level.These elements emerge after experiences in Denmark and Spain. Experiences in France are indicative of the relevancy of these elements, even though French practice is often inconsistent with the points mentioned. In this context, reference can also be made to a recent recommendation by the European Commission (2004a). In addition, it is important that there should be decentralized, businesslike collaboration between the ministries. This collaboration is important in order to prevent differences and conflicts.
6. *project teams*: the deployment of the same national project teams during the drafting of the national position and the transposition seems to have a positive effect on the speed of transposition. In several countries multidisciplinary project teams are used to safeguard consistency of treatment in this way (including policy-specific and legal expertise). This factor is demonstrated by the positive experiences of

the use of multidisciplinary teams in Denmark, in contrast to the negative experiences of the absence of a good and especially legal support structure in France. However, the deployment of these teams does not mean that all team members participate in the negotiations. This task may be entrusted to one of the team members or someone from the Permanent Representation. The team-based approach also has the advantage that draft measures can be assessed in terms of their possibilities for transposition into the national legal system at an early stage.

7. *frequent progress monitoring*: timeliness is affected positively by the accurate and frequent monitoring of the progress of the transposition of directives at a high departmental and interdepartmental level. This factor is based on positive experiences in Spain, where an interdepartmental committee discusses progress on a weekly basis. In the United Kingdom, the Cabinet Office keeps a close watch on the progress of the transposition by the various line ministries. By contrast, France has two coordination bodies (SGCI and SGG), which recently concentrated their coordination efforts in a new committee – the *réseau interministériel des correspondants de la transposition*. In Denmark there is little interdepartmental coordination, but the relevant ministry is called for the Special Legal Committee of the Ministry of Justice in the case of an imminent infringement proceeding. This threat is sufficient to force the line ministries to cooperate in Denmark.

8. *political priority*: if the government gives priority to transposition, this accelerates the process. Transposition has priority both in Denmark and in Spain. It is a task that is taken seriously by high-level civil servants and politicians alike. In France, transposition is often overshadowed by other, national priorities:

- within ministries, no special attention is paid to transposition;
- ministers often prefer their ‘own’ priorities and the corresponding legislative procedures that delay the transposition of directives;
- within SGCI and SGG, which are responsible for monitoring the transposition process, there are also different priorities; and
- within the French government and in particular the Prime Minister’s Office – the transposition issue is currently receiving attention, but this may change over time, as it has in the past.

The importance of political priority is also shown by the package operations that have taken place in various countries, often in anticipation of the EU Presidency (for example, Ireland and, recently, in the Netherlands). This point is closely related to the preceding point related to the effectiveness of progress monitoring: no matter which system is used, there can be no effective progress monitoring without political support. The latter can be arranged in various ways: from appointing a politician as a chairperson of a coordination committee dealing with transposition, to creating close and regular contacts with the Prime Minister who unconditionally supports speedy transposition.

9. *parliamentary involvement*: involving the national Parliament at the negotiation stage may speed up the transposition process. In most of the countries we studied, the negotiation stage and the transposition stage of a directive are communicative processes. The interested parties are of the opinion that solid preparation speeds up the transposition process, certainly if there is intense parliamentary involvement. The success of the Danish model is the clearest example of this. Extensive consultation of the national

Parliament means that Parliament's view is taken into account in the negotiations in Brussels, so there is less need for the extensive treatment of 'implementing' legislation. This accelerates the transposition process.

10. *broad consultation*: the broad and early consultation of interest groups, including the business sector and possibly local government authorities, improves the process of drafting the national position and may mobilize support for a directive and the transposition measure. This may subsequently have a positive effect on the execution of new policies. The examples of Denmark and the United Kingdom show that broad consultation does not necessarily cause any delay and has advantages in the context of the drafting of the national position on a directive. In addition, it improves the quality of the transposition measure in terms of feasibility and may prevent excessive burdens on citizens, institutions and businesses. It is, however, important to move this consultation procedure, if possible, to the drafting of the national position phase. Furthermore, in some countries consultation is regarded as an important supplement in order to compensate for the lack of parliamentary control and the loss of democratic legitimacy as a result of the transposition of directives through subordinate legislation that does not have the rank of an Act of Parliament.

8 Conclusions and Recommendations

The central question of this research project is: what kinds of implementation techniques and systems are used in Germany, Denmark, France, Italy, the United Kingdom and Spain to transpose EC directives into the national legal order in a timely, precise and legally correct way. In order to answer this question, this study surveyed the available legal instruments and techniques and analyzed the national policy process relating to directives. Specific aspects of the policy process may also influence the timely and precise transposition of directives.

8.1 Conclusions

Based on the experiences in the countries we studied, we reach the following conclusions.

1. *The introduction of special legal instruments and techniques does not by itself explain sustained improvements in the punctuality of transposition.* First, we should note that there is no connection between the introduction of new transposition instruments ranked lower than Acts of Parliament and the long-term improvement of the transposition performance record. In most of the countries we studied, with the exception of the United Kingdom, the introduction of authorization instruments and delegation techniques has a limited and temporarily positive effect. A special set of instruments may be helpful in a number of specific cases, but is not decisive for a country's general performance in terms of timely transposition. In other words, it is not a sufficient condition for the timely transposition of European directives on a long-term basis.
2. *The national legislative system is usually the basis for transposition.* For the most part, the countries analyzed here use instruments within the regular constitutional system as much as possible. The regular national legislative process sets the limits for the transposition of EC directives. None of the countries – not even the United Kingdom – have amended the Constitution or the constitutional system in order to speed up the transposition of EC directives. Since transposition instruments depend on constitutional provisions, it is difficult to compare the transposition strategies and the performance records of the countries analyzed in this report because of their diversity. Even so, we have not found transposition instruments in any of the countries we studied that are used solely for transposing directives.
3. *There is no single preferred technique for transposing directives.* On the issue of the techniques used for transposition, our findings suggest a varied picture. In some countries, the national system of pre-existing laws defines how directives are transposed, whereas in other countries this is not the case. In the former case, there is a preference for the best possible incorporation of the directive into the national legislative system. Delays are accepted as the price to be paid for the consistency and integrity of the national system. Other countries choose to stay as close as possible to the text and content of the directive, even if it is inconsistent with the national system. In this context, these countries, including the Netherlands and the United Kingdom, often prefer 'straightforward implementation', i.e. avoiding including extra national policies when transposing directives.

4. *Delays are the result of various factors.* Timely and precise transposition is the result of various constitutional/legal, political and operational factors.⁶⁷ Any of these factors may have a decisive impact on transposition outcomes and as such each one is a prerequisite for timely and precise transposition. At the same time, the study shows that none of these factors on its own is sufficient to ensure timely and precise transposition.
5. *Legal factors.* Even though the availability of a special set of legal instruments as such does not appear to have a long-term effect on the timeliness of transposition, other legal factors are relevant in this respect. Our findings suggest that the following elements are important:
- transposing the directives at the lowest possible level;
 - preventing the inclusion of national extras; and
 - anticipating complications in the transposition process by starting to prepare for transposition during the final stages of the negotiations.
- In addition, some countries use common start dates aimed at limiting the administrative burdens on businesses and institutions.
6. *Operational factors.* The importance of these factors was recently noted by the European Commission (2004a). In this study, three elements are found to be particularly relevant.
- division of responsibilities: unequivocal and clear-cut lines of administrative responsibilities relating to the preparation and transposition of directives;
 - project teams: it is important to work with the same multidisciplinary project teams (including, in any case, policy-specific and legal disciplines) during the preparation and transposition stages. We do not argue that these teams should conduct the actual negotiations in Brussels. This can be done by a representative, seconded to the Permanent Representation or otherwise. We believe that the main point is that the drafting of the Dutch position and the transposition of directives be prepared from different angles within the line ministries. This prevents problems and delays during the later stages of the policy process;
 - *monitoring of progress*: accurate and frequent monitoring of the progress of the transposition of directives at a high administrative level. This requires, first, an effective administrative system that can monitor the progress of the transposition process. Without information about progress, it is impossible to pursue a policy concerning this progress. In this context, information is a necessary condition for monitoring timeliness. Second, it is necessary to pursue a policy concerning transposition so that it is clear what can be expected in terms of the treatment of the various EC directives.
7. *Political factors.* Political factors are important in terms of prioritizing transposition and ensuring effective monitoring of progress. In most of the countries we studied, the transposition of directives is primarily a task of the government. This is related to the choice of transposing directives at the lowest possible level, i.e. through government decrees or ministerial regulations. A limited proportion of the directives are transposed by Acts of Parliament, which is a procedure that involves the national Parliaments. The following political factors influence the speed of transposition:

⁶⁷ For this distinction, see Kiser and Ostrom (1982).

- *transposition should have political priority*: The importance of this factor is clear when there are package operations based on political priorities, often in anticipation of the EU Presidency. This applies, for example, to the efforts made by the Netherlands before the Presidency in the autumn of 2004, and which has had considerable success. Similar actions have taken place in Ireland, and at this juncture there is a catch-up maneuver occurring in France. Without political support, the monitoring of any kind of progress is less effective.
- *active involvement of the national Parliament*: by activating the national Parliament in the negotiation stage, less time needs to be spent on discussions during the transposition stage. At this juncture, there is active involvement in defining the national position during the negotiation stage only in Denmark. The role of the other national Parliaments in the negotiations on Commission proposals is of only minor practical significance, which sometimes results in lengthy debates and, consequently, delays in the transposition phase.

8.2 Recommendations for the Netherlands

On the basis of the findings of this research project, we make the following recommendations for the situation in the Netherlands, taking into account the recent amendments to transposition policies which are designed to improve Dutch performance:

1. Involve the Dutch Parliament more by introducing a scrutiny reserve

More systematic parliamentary involvement during the drafting of the Dutch position is extremely important for the timely transposition of directives. This will speed up the process of transposition particularly concerning subjects that require an Act of Parliament during the transposition phase (and to a lesser extent for subjects requiring a general administrative order subject to a resolution procedure).⁶⁸ In a more general sense, the active involvement of the national Parliament has advantages in terms of the better utilization of the national legislative system in transposing directives (the different use of existing possibilities within the existing constitutional framework) and democratic legitimacy.

We propose the introduction of a scrutiny reserve – like the one in the United Kingdom – to ensure a more active role for the Parliament.⁶⁹ To achieve a scrutiny reserve (which basically means that the Government cannot negotiate the terms of a European legislative proposal before Parliament has discussed it) the two Houses of Parliament could establish a selection committee responsible for reviewing, like the scrutiny committee of the British Parliament, which proposals should and should not be submitted to the Houses for discussion. This ensures that important dossiers that Parliament does not take a keen interest in for whatever reason, are still discussed. Selection will also substantially reduce the permanent committee's workload relating to proposals, which should result in more time for a discussion based on the merits of a proposal. If the selection committee refers a proposal to a permanent committee for a discussion on the merits of a proposal, the latter may ask the Government after this discussion to focus on specific points to be included in the negotiations. The reserve means that the Government is required to wait until after the

⁶⁸ In accordance with Article 1:7 of the General Administrative Law Act, resolution procedures in the context of implementing administrative orders are applicable only if conditional delegation has been provided for, and this is only the case in a minority of the resolution cases.

⁶⁹ Denmark also uses a reserve of this kind since all proposals must be discussed by the national Parliament. In France, a reserve is made when Parliament has indicated that it wants to draw up a motion.

parliamentary discussion before presenting its own position on behalf of the Netherlands in the Council negotiations. As for the question of which committee should act as ‘gatekeeper’, the most obvious candidates would be the existing European Affairs committees of both Houses. An alternative is to entrust this task in one form or another to the recently established Joint Committee on the Application of Subsidiarity, which is currently – by way of an experiment currently under way – responsible for administering the subsidiarity and proportionality tests under the terms of the protocols to the – yet-to-be-ratified– European Constitution.

If the Dutch Parliament is to seize the opportunity of being more closely involved in the negotiations about the transposition of directives, it is also extremely important that the MPs enhance their knowledge about the European agenda and the Dutch contribution to the European legislative chain.

2. Pursue an active, strategic policy relating to the transposition of EC directives

In the Netherlands, the ICER (*Interdepartementale Commissie Europees Recht*) is responsible for monitoring the progress of the transposition of directives. This is an interdepartmental commission chaired by representatives of the Ministries of Justice and the Interior, and it is charged with monitoring the quality of the transposition measures (*inter alia*). Despite the work performed by the committee, the ICER (-I)⁷⁰ is insufficiently equipped at this juncture for monitoring the progress of transposition in the various ministries. The committee is unable to call the line ministries to account concerning progress issues and to make arrangements about the manner in which the transposition deficit is to be resolved.

For this reason, it seems natural to move progress monitoring to a high administrative level, perhaps the level of one of the sub councils of the Council of Ministers, which could then be specifically entrusted with the central responsibility for monitoring progress. At this level, it is possible to consult with representatives from the relevant ministries about progress issues and to make arrangements about the date at which specified directives are to be transposed. The present Coordination Committee (CoCo) is not yet equipped for this task.

In addition to this structure, we recommend developing a strategic policy relating to the transposition of directives. This policy could define the desired rate of transposition, with due regard for the interests of the relevant sector, within the limits set by the European Commission.

3. Transpose directives at the lowest possible level and use the existing legislative system and instruments to the fullest extent possible

We recommend utilizing the possibilities offered by the existing legislative system – including the regular instruments and delegation options – in a more effective manner and to encourage the transposition of EC directives at the lowest possible regulatory level. It has not been established that new generic transposition instruments or procedures provide a significant and long-term advantage in terms of the speed of transposition, certainly not if we consider the latent potential of the present instruments and delegation possibilities. In addition, far-reaching authorization constructions in transposition instruments occasionally have certain constitutional disadvantages. Furthermore, if the existing legislative system is used in a more effective manner, it is easier to do justice to the individual character of the directives to be transposed in a specific policy area.

⁷⁰ ICER (-I) is the working group of the ICER entrusted with implementation.

4. *Work on a broadly supported, joint Dutch influence on European dossiers*

With the enlargement of the European Union, the influence exerted by the Netherlands, as one of the founding members of the Union, will decline both in absolute and in relative terms. To date, the Netherlands seems to have assumed the attitude that whatever is good for Europe is also good for the Netherlands. This position will probably not be tenable in the future. This means that the Netherlands has to change the manner in which it operates in Brussels. This could include strengthening the role of the national Parliament during the negotiation phase, developing closer ties with members of the European Parliament and engaging in broad consultation involving interest groups at the negotiation stage.

Part II: Country studies

9 Denmark

9.1 General overview of the constitutional and political system

9.1.1 Constitutional characteristics

Denmark is a constitutional monarchy with its first constitution dating from 1849 and several subsequent revisions, most recently from 1953. Legislative powers are formally divided between the Parliament and the Queen (article 3 of the Danish constitution).

The parliament, the Folketing, consists of one chamber. It has 179 members, directly elected for a mandate of 4 years. Seats are distributed using a mixed district based and proportional system (Thomsen and Pennings, 2002).

9.1.2 Political characteristics

The Danish government is formed in coalition between parties in the Folketing. The future Prime Minister is responsible for forming a coalition. Minority cabinets are frequently formed. Remarkably, no single party has had a parliamentary majority since 1909 (Danish Ministry of Foreign Affairs at www.denmark.dk, consulted at 19 January 2005). Ministers are chosen from the ranks of parliament and remain members during their executive term of office. They can also be occasionally recruited outside the parliament.

9.1.3 Political administrative characteristics

The Danish executive has 18 ministries. There are also a number of government agencies, which play a central role in EU policy making. They operate under the responsibility of the Minister, but enjoy a great degree of discretion (Steenbeek and Gilhuis, 2003: 86). Importantly, the bulk of administrative staff is in the agencies and ministries are small, compared to the Netherlands (Mandrup Thomsen and Pennings, 2002: 17).

Another important characteristic of the Danish political-administrative system is the high level of autonomy of local and regional authorities, seen by the Danes themselves as some of the most extensive in the world. The local authorities' right to manage their own affairs is enshrined in the constitution of 1849. There are 14 counties and 275 municipalities. A reform of the municipal system is due to take place after the parliamentary elections due on 8 February 2005 (Danish Ministry of Foreign Affairs).

A third important feature is the important role played by interest groups. A high degree of (neo-) corporatism is present in most policy fields (Jørgensen, 2002: 2). Denmark has a high density of societal organization in a wide range of areas. Policy-making is generally highly corporatist, with interest groups playing a crucial role.

Finally, the Danish politico-administrative system is generally considered open and informal, mainly oiled by unwritten rules. Policy making is very much decentralized, individual ministers being responsible for their policy areas. (Von Dosenrode, 1998: 52)

9.2 Political or public discussion concerning EU directives and their transposition

There is little wide public discussion on the transposition of directives in Denmark. Timely transposition for a long time was not considered an issue, because of Denmark's good record. Yet, sometimes relevant public or professional debate occurs. Public debate focuses on general topics of Denmark's involvement with the

EU, while recent professional debate has involved some limited discussion of transposition linked to the latest scoreboard results.

Public debate is mostly focused on the general issues of Denmark's EU membership and controversial decisions such as the adoption of the Euro. These discussions need to be understood in the general context of Denmark's attitude to the EU ever since the country's accession in 1973.

Denmark's accession to the EU and the ratification of subsequent EU treaties were based on referendums held in accordance with Article 20 of the 1953 Danish constitution. Article 20 is a provision allowing Denmark to commit itself to international treaties if a five-sixths majority in the Folketing, or alternatively a simple majority in a referendum, can be established. According to *the Economist*, Article 20 represented a significant shift in the Danish constitution by providing for the transfer of some sovereignty to international institutions.

The Danish system of incorporating international treaties is dualistic, with the principle of incorporating international treaties enshrined in the abovementioned article 20 of the Constitution. Yet is it arguable whether this dualism has much impact on the transposition of directives since the development of the doctrines of direct effect and supremacy of EC law by the ECJ in the 1960s⁷¹ has eroded national autonomy with secondary legislation from the EU. The direct effect of EC law has led to some debate in Denmark (Steenbeek en Gilhuis, 2003:70-71) and the erosion of sovereignty has not been accepted easily. As *the Economist* noted, the rejection of the Treaty on European Union (Maastricht treaty) in a referendum in 1992, as well as polls that consistently show that the population has some concerns about the EU encroaching upon national sovereignty, seem to indicate that a large part of the population disagrees with any transfers of sovereignty.⁷²

On the whole, Danish attitudes to European integration can be described as cautious or even Eurosceptic. In September 2000, the Danes rejected participation in the common European currency, the Euro, in a referendum which was the culmination of an intense societal discussion. Their foreign policy is described as 'torn between its activist stance and a very cautious approach to integration into the EU' (The Economist Country report).

In the light of this it is even more remarkable that Denmark has a very good record of transposing EU directives. Some experts suggest an indirect link, in the sense that the Danes' skepticism at the political level has led to procedures of extensive consultation which in their turn ensure smooth transposition once a measure is passed. And, interestingly, good transposition is seen in specialist circles as a way to ensure Denmark's room for maneuver at the negotiation stage and a positive stance from the Commission towards Danish positions. Interview evidence suggests that the Danes see their good transposition record as a key to their standing in the EU.

Also, occasionally there is public debate on the transposition of a particular directive, especially in the rare case that transposition is problematic for political reasons (interview ISA). An example is the directive on personal data protection.

⁷¹ HvJEG 5 February 1963, 26/62, *Jur.* 1963, p. 1-59, *Van Gend en Loos* and HvJEG 15 July 1964, 6/64, *Jur.* 1964, 1209-1259, *Costa/ENEL*).

⁷² The Economist Country Reports at http://www.economist.com/countries/Denmark/PrinterFriendly.cfm?Story_ID=2920616, consulted at 18 January 2005.

Professional debate has recently focused on the deterioration of the Danish position in the latest edition of the internal market scoreboard. Danish civil servants have taken pride in their excellent transposition record and thus recent results have been some cause for concern, but it is clearly limited to a narrow circle of specialists. The Ministry of Economic Affairs has taken the lead in this respect, because the scoreboard concerns the area of the internal market. In terms of press comments, the Danish business newspaper has devoted a couple of articles to the worsening of the Danish position.

9.2.1 Discussion of recent reports and their recommendations

As a measure taken to improve the standing of Denmark in the last scoreboard, the Minister for economic and business affairs has recently written a letter to his colleagues responsible for directives on the scoreboard for Denmark. In the letter the minister urges his colleagues to pay attention to the obligations of securing correct and timely transposition. The ministry has also sent around a list of non transposed directives, the idea is to make the list shorter.

There has been also some reaction to a Commission idea of appointing a transposition coordinator. Most of our respondents found this would not be a good idea for Denmark as it would create a center of coordination that would potentially take away responsibilities from the line ministries. The Danes prefer that line ministries continue to take responsibility for transposition. Furthermore, no Ministry seems particularly keen to have such a position, although the Ministries of Justice and Economic affairs have been mentioned as potential centers where the coordinator could be placed.

Following a recent report, there has also been some professional discussion regarding the role of Parliament in the EU decision making process. One of the issues discussed was how to integrate the sub-committees and the entire parliament into the EU decision making cycle. The need was seen to balance the need for coordination with the need for substantive treatment. The Secretariat of The European Affairs committee (EAC) recognizes that in recent years they have been overwhelmed by information – nowadays members of parliament want not so much more information as they want better and specific information from us. The next step is simply to integrate EU policies in the entire Parliament.

9.2.2 Expectations regarding the process and results of these discussions

The expectation of most interviewed civil servants is that the Danish record will soon be improved again, mostly because they see the slip up in the scoreboard ranking as a result of failure to notify by ministries and difficulties with the electronic system of notification, rather than real cases of non-transposition.

9.3 Description of judicial instruments and techniques

9.3.1 Instruments

We can distinguish the following instruments (see Table 9.1 for an overview):

- Laws or amendments of existing laws
- Ministerial orders or amendments thereof: addressing the wider public, published in the State gazette. A particular form this instrument may take is the Technical Regulation, which addresses the professional world, and is published in the Notices of the implementing agency. Otherwise, the status and procedure of these two instruments is the same (Asser Instituut, 2004a: 24).

Laws and ministerial orders are by far the most important instruments, technical regulations are used only in a limited number of sectors, namely transport (air, motor vehicles, maritime) and electrical safety rules. According to experts from the Ministry of Justice, technical regulations are essentially the same as Ministerial orders. Only rarely is a totally new law required for transposition, as most policy areas are already densely regulated. Furthermore, there is no difference in speed between adopting a new law and amending an existing one. The same is claimed to hold for ministerial orders.

The bulk of transposition, about 85% of all directives, takes place by means of Ministerial orders (*bekendtgørelse*). Over time, the trend has been to use more and more delegation to a Minister to pass certain provisions. The use of delegation varies in time but also from policy area to policy area. While in agriculture and fisheries, all measures are transposed by delegated measures, in an area such as Justice and Home Affairs delegation is not used so much, due to the policy’s sensitivity and the fact that these areas are only now beginning to be regulated by the European Union. Other highly sensitive areas are taxation, financial regulation, and financial services. Most internal market directives are transposed through ministerial orders.

Delegation is specific and contained in a law relevant to a certain sector, a parent law. The delegating provision contained in a specific law stipulates that ‘The Minister of so-and-so can enact the necessary orders in order to fulfill Denmark’s obligations under EU law.’ This can only be done if it is clear what to do, that is if the necessary changes are quite specific. However, when the issues concerned is highly political, even if delegation is possible, a law may be used after all. Also, it is sometimes not clear to a civil servant which of the two is to be used.

Alternative instruments are never used. It is generally known that these cannot be used for transposition, as they are not binding. Denmark sometimes uses collective labor agreements, but then a backup law is used, covering those not included in the collective agreement and providing minimum guarantees.

Table 9.1: Danish legal instruments used for transposition

	<i>love</i>	<i>bekendtgørelse</i>
		<i>anordning/ kongelig anordning</i> ⁷³
	act	ministerial order
Main features	adopted by Parliament, often taking the form of framework laws	Based on delegation
Advice State Council	Not required (Denmark has no State Council)	Not required (Denmark has no State Council)
Parliamentary approval	Required	Not required formally, but sometimes informally needed
Remarks	All bills submitted in one parliamentary year must be concluded in the same year. If not, submitted again.	Sometimes these are called technical regulations.

9.3.2. Techniques

The two most important techniques or methods used in Denmark according to the interviewed officials and experts are copying and re-wording. Whereas for a long time rewording was the most popular technique, nowadays copying is increasingly used.

⁷³ According to our Danish sources, all these are identical.

A. *Copying*, one to one, the contents of a directive in a Danish translation into one law. This law is then an exact copy of the directive. Sometimes, but not always, such a law is then appended to the ‘original’ version of a law. However, the annex is in most cases for information and is not meant to be the legal text in force. Thus copying is sometimes combined with annexing, which is mostly used in technical areas.

- *Annexing*: the directive is annexed to a new Danish regulation. Annexing the directive is not very popular, mainly used in technical areas. E.g. transposing measures in industrial regulation can consist of 1 article: ‘The annex to this law is now in force’
- *Referencing*: As above, the passing of a law with only one article, which states that ‘this law is in force in Denmark’, with the directive as an appendage. We have not found many cases of using of this method alone. According to most interviewed experts, dynamic referencing is not used at all!

B. *Re-wording*: putting the directive into an own version. It seems to be the preferred strategy in Denmark, although respondents differ in their opinion as to how often it is used in relation to copying. It is a sort of unpacking of directives to be put into the Danish legal order. Sometimes the annex method and re—wording are combined, whereby certain sections are re-worded and in others the annex method is used.(Asser Instituut, 2004a: 18)

In addition to these, the following types of amendments should be differentiated: A common procedure is the adoption of subordinating legislation under an umbrella act (also called ‘parent act’ by experts) as in the case of transport directives described in the Asser report. In the case described by the Asser report, the umbrella law delegates to the Danish maritime agency the adoption of subordinate legislative acts, such as regulations. If the umbrella Act does not provide a legal basis for the transposing measure, the Act itself is amended.

Agencies or ministries responsible for negotiation of a directive check already at the negotiation stage whether subjects in a directive are in conflict with existing Danish law.

Finally, in densely regulated areas, one directive will often require changes in various existing laws/orders. In this case, one transposing measure is adopted, listing all the changes. As a next step, the various laws/orders thus changed are then consolidated into one piece. Ministries make sure we consolidate the act immediately so that the most advanced version is available to make it clear to the user. Also, sometimes several directives are combined into one transposing measure, which is called the ‘*package law*’ method.

9.3.3 Character and level of implementing measure

Directives are transposed at the levels of:

- Primary legislation: laws and amendments of Laws/acts
- subordinate/secondary legislation such as ministerial orders and technical Regulations.

9.3.4 Specific instruments

As said above, there are no possibilities for other instruments.

9.4 The national policy cycle concerning directives

9.4.1 General overview of the process

9.4.1.1 National preparation of Commission initiatives

There is no formal procedure for signaling and preparing Commission initiatives in an early stage. Even though the formal preparation procedure (see below) may be set in motion with an initiative that has not yet the status of a formal proposal, government and Parliament to a large extent have to rely on the Commission and informal contacts for information. Yet, individual ministries try to anticipate on forthcoming Commission proposals, and start working earlier (interview). At the same time, since 1991 the Folketing has had a representative in Brussels, which is to inform Parliament as early as possible on EU initiatives (Folketing et al., 2002: 18).

9.4.1.2 National treatment of Commission proposals

The process of EU policy making in Denmark has been described as having two sides: a government side and a parliament side, related to the activities of the Danish Parliament's European committee (Danish Ministry of Foreign Affairs). It mirrors the decision-making process at the European level, and it is characterized by high time pressure (Pedersen, 2000: 221). There are four levels: the EU special committees, the EU committee, the government's foreign policy committee and the Folketing's European Affairs Committee (see Table 9.2).

Table 9.2: Key meetings on EU decision-making on a weekly basis

	Government		Parliament
Ad hoc	Tuesday (if needed)	Thursday (if needed)	Friday
EU special committees	EU committee	Foreign Affairs Committee	European Affairs Committee

National decision making on EU matters starts in the *EU special committees (EF-special udvalgene)* based in the line ministries (Nedergaard, 1995:118). These committees have the task of coordinating the viewpoints of the different ministries involved and recommend a Danish position (Von Dosenrode, 1998: 55). Also, the special committees are the place for internal consultation involving interest groups at a very early stage. Already in 1972, it was formally stated that the special committees are responsible for hearing relevant interest groups (Von Dosenrode, 1998: 55). They are hence seen as real negotiating bodies in which public and private interests are merged (Asser Instituut, 2004a: 9). The special committees also hold the technical expertise necessary for deciding on many of the legislative proposals to be put forward by the Commission (Nedergaard, 1995:118-119).

There are currently 34 standing special committees, which largely reflect the division of policy areas in the European Commission's directorate-generals (Pedersen, 2000: 223). In addition, there may be ad hoc committees, concentrating on temporary matters. The committees are usually quite large; that of environmental affairs has 75 members (Pedersen, 2000; 223). They are normally chaired by a civil servant from the responsible ministry, typically the head of division and composed of civil servants from other

relevant ministries (interview). EU cases are generally handled by the sections that are responsible for the corresponding 'Danish' cases (Von Dosenrode, 1998: 57). Increasingly, committees have interest groups as their members (i.e. committees for environmental affairs, transport, and labor), though in some cases they are simply heard (i.e. finance). According to one of our respondents, the reason for the increased participation of interest groups is to prevent them 'taking revenge' when the proposal goes to Parliament. Because of its coordinating role vis-à-vis EU questions, the Ministry of Foreign Affairs is represented on all special committees.

The basis for deliberations in the special committees is formed by draft position papers. These are drawn up by the responsible ministry, and discussed by the other members of the committee. (Pedersen, 2000: 225). Also, the committee draws up memoranda for Parliament, which serve as the basis for discussions there (see section 9.4.4).

The process enters the second stage when the special committee presents its draft proposal to the leading ministry. Then the minister makes a proposal based on the advice of the special committee. This proposal is coordinated at the interdepartmental level⁷⁴ in the *EU Committee (EF-Udvalget)*, which meets when needed on Tuesdays⁷⁵. The ministries which are most involved in EU matters are permanent members of the Committee. Other Ministries participate on an ad-hoc basis. The head of the so-called North group of the Ministry of Foreign Affairs holds the chairmanship and secretariat of the EU Committee. Originally, the committee consisted of high-level civil servants, typically heads of division, but according to Pedersen (2000: 223-224) it is now usually attended by juniors.

Nowadays, the role of the EU Committee is to a great extent symbolic, in that agreement in the majority of the cases is reached in the special committees.⁷⁶ Politically sensitive issues are passed on to the higher level. For this reason, the EU committee deals in particular with EU questions that have horizontal, fundamental or sensitive aspects. It should be noted, though, that the committee over time seems to have lost power to the Government's Foreign Policy committee, which has taken to deciding all politically sensitive acts (Pedersen, 2000: 223). The task of the Committee hence seems to have been reduced to 'helping the government separate technical and administrative cases from political cases' (Nedergaard, 1995: 121).

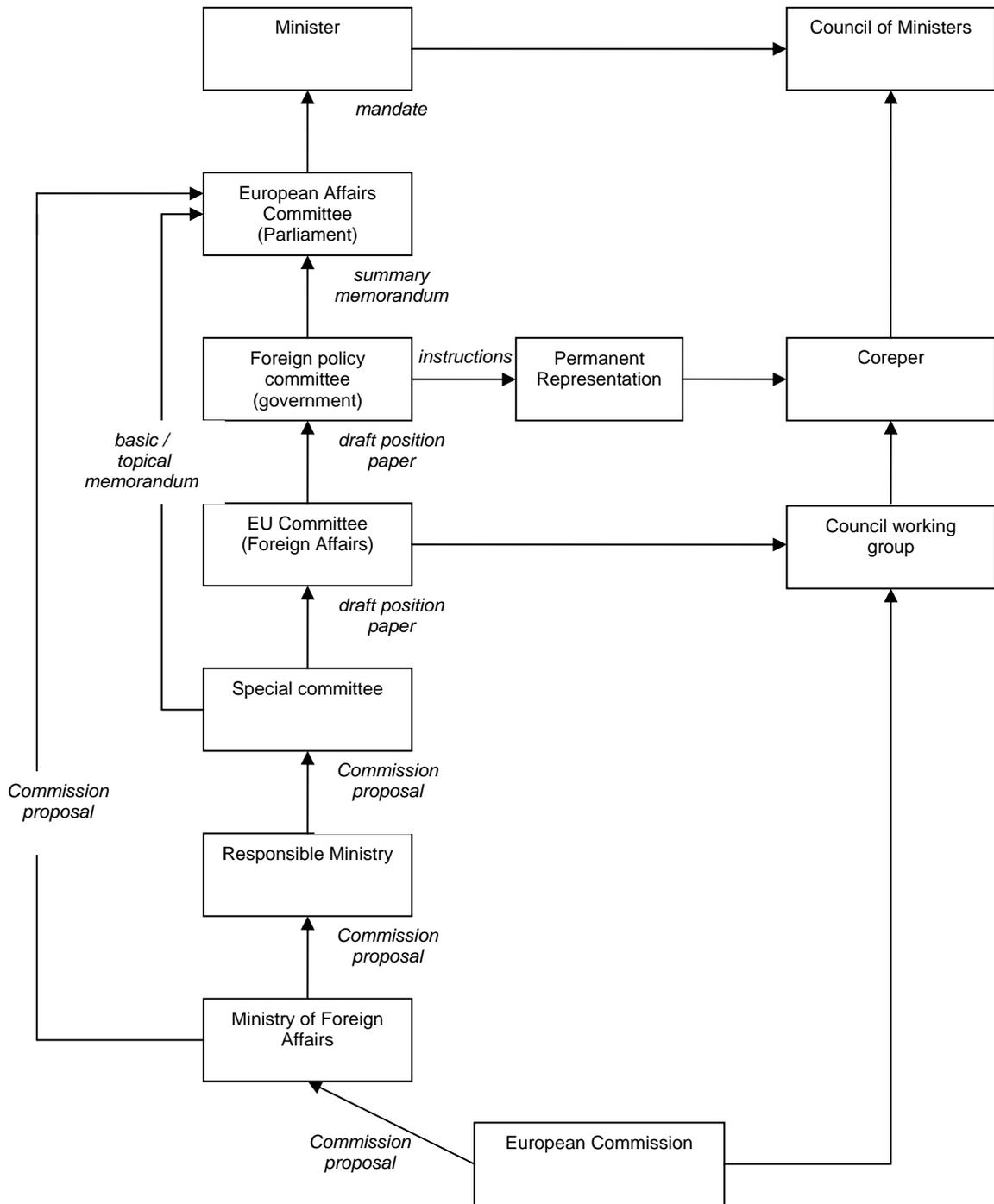
The third tier in the system is the *Government's Foreign Policy Committee (Regeringens Udenrigspolitiske Udvalg)*. This committee has as its members the Prime Minister, the Minister of Foreign Affairs, and eight sectoral ministers. Chaired by Foreign Affairs, it is the highest coordinating body. The committee is chaired by the Minister of Foreign Affairs and includes the prime Minister and other Ministers from Ministries most involved with European affairs. It meets on Tuesdays, if needed- which is not very often (Pedersen, 2000: 224). According to one of our interviewees, it often communicates through e-mail, as 'they don't want to meet on issues where everyone agrees.' The central task of the government's foreign policy committee is to formulate the political guidelines for the Danish position

⁷⁴ As a convention we use the term 'interdepartmental' for discussions between officials from different ministries, while the term 'interministerial' is reserved for discussions between different ministers.

⁷⁵ This is not to be confused with the Government's Foreign Policy Committee which lays down the Government's position in EU matters on a higher, 'political level'. The Chairman is the Minister for Foreign Affairs. In addition to the permanent members all other ministers are normally invited to the meetings. The Committee meets when needed on Thursdays.

⁷⁶ In the field of environment, this is estimated to be the case for some 95 per cent of the Commission proposals (Pedersen, 2000: 222).

Figure 9.1: The Danish EU decision making process



As a final step, the government's position has to be coordinated with the Folketing. Here, sectoral committees may play a role in evaluating proposals but the main role is reserved for the *European Affairs Committee (Europa Udvalget)* and its secretariat (see also Section 9.4).

All in all, the different steps in the decision-making process can be depicted as follows (see Figure 9.1).

9.4.1.3 National transposition

There is a stark contrast between the phases of decision-making and transposition with respect to centralization and formality. Whereas the first stage is well-regulated and coordinated by Foreign Affairs the second stage is the responsibility of the ministries (Mandrup Thomsen and Pennings, 2002: 15). Coordination here is completely absent, except for the Special Legal Committee at the Ministry of Justice, which supervises all infringement cases (Biering, 2000: 959). There is no central body that keeps information on the progress made with transposition; The Ministry of Foreign Affairs is no longer involved. The general feeling is that to install coordinating bodies would lead to unnecessary bureaucracy, and at the same time take away the responsibility from the ministries, which take their job very seriously. For these reasons, it is hard to sketch a general picture of transposition; practices and procedures may differ from ministry to ministry, and agency to agency. Yet some commonalities exist.

Concerning the preparatory stage, one important characteristic is the absence of so-called Chinese Walls: the civil servants and ministers responsible for negotiating are also responsible for transposition (Biering, 2000: 959, Mandrup Thomsen and Pennings, 2002: 15). Moreover, Denmark has no clear dividing line between legislative and policy civil servants. Bills are drafted by lawyers who also have policy responsibilities (Mandrup Thomsen and Pennings, 2002: 9). This practice is sustained by the interviews we held at the Ministry of Economic and Business Affairs, the Danish Financial Supervisory Committee, and the Ministry of the Environment, which together are responsible for a great part of the directives. Most ministries have an EU law section, which is involved in transposition (Mandrup Thomsen and Pennings, 2002: 15). Yet often the several policy divisions are responsible for transposition in their own area.

A second crucial characteristic of Danish transposition is that, in principle, all substantive discussions are held during the decision-making stage. Generally, the tight coordination procedure in the first stage prevents further debates during transposition. In the words of one of our interviewees: 'We have a very participatory approach that creates a lot of awareness, so when we transpose we don't start from scratch.' There generally is no duplication (interview). What is more, the general attitude is 'to go by the rules, even if we are outvoted' (interview).

There is no special procedure for transposition; the regular procedures for adopting statutes or ministerial orders apply. In drafting statutes, the ministries are guided by the Guidelines on Quality of the Legislation (*Lovkvalitetsvejledning*). However, these only contain minimal provisions that specifically concern the process of transposition. Notably, these are that a transposing bill must clearly refer to the directive in question, as well as state the type, contents, and deadline of the directive in the explanatory notes. What is more, it must be clearly stated which parts of a transposing bill are EU relevant, and which are not. Gold-plating should also be explicitly stated. (*Lovkvalitetsvejledning*, art. 2.3.3. g).

When the draft of the bill is complete, it is sent to the Ministry of Justice for the usual advisory procedures (see 9.4.3.). Changes are not made very often. Then, the bill is discussed in Cabinet (*Ministersmøde*) (Steenbeek and Gilhuis, 2003: 90). If everything goes well, the bill can then be submitted to the Folketing. There are no 'Raad van State', nor advisory bodies that need to be heard. In Parliament, the

European Affairs Committee is no longer involved (Folketing et al, 2002, 9). Parliament treats every bill three times, at increasing levels of specificity. The sectoral committees play an important role here. After the third reading, the minister signs it, as well as the King, after which it is published in the Law Gazette (*Lovtidende*) (Steenbeek and Gilhuis, 2003: 91). The legislative process is hence much shorter than in the Netherlands. In reality it is even shorter, though, because generally transposing bills are not discussed in committees, but rubberstamped in the plenary. According to our interview partner at the Folketing: ‘The Danish parliament is not a legislator when it comes to already adopted EU issues.’

For ministerial orders, the procedure is even shorter. Drafts are not seen the Ministry of Justice, but by internal evaluators (Mandrup Thomsen and Pennings, 2002: 17).

9.4.2 Bureaucratic consultative and coordinating bodies

As said, the Danish politico-administrative system is generally informal and decentralized in nature. A puzzling exception to this general qualification is Denmark’s EU coordination system, which is remarkably formal and centralized (Von Dosenrode, 1998: 57; Nedergaard, 1995: 114). Yet this seeming contradiction in reality is more of a paradox, since the formal and centralized procedures are underpinned by flexibility and strong informal networks. What is more, over time centralization has been countered by a process of sectorization (Pedersen, 2000: 220), so that in reality individual ministries play the key role in the process (Nedergaard, 1995: 115). The role of the ministry of Foreign Affairs has developed from ‘police-patrol’ to that of a backstop (Pedersen, 2000: 226-228). Furthermore, ‘the wheels of the rigid procedure are oiled’ by a culture of pragmatism and informality, and a strong wish to reach consensus (Nedergaard, 1996: 115, Pedersen, 2000: 221). Finally, the formal and centralized coordination procedure only applies to the EU decision-making stage. Transposition is characterized by the common pattern of decentralization and informal rules. Coordination in this stage is virtually non-existing, ministries are on their own (Nedergaard, 1996: 115; interviews).

All, in all, the following institutions play some coordinating role:

- At the lowest level, the EU special committees coordinate positions with other ministries and interest groups.
- At the second tier, coordination takes place in the EU Committee composed of civil servants and chaired by the Foreign Affairs Ministry
- The highest coordinating actor is the Foreign Policy Committee of the cabinet
- Coordination in parliament is undertaken by the Parliamentary European Affairs committee and its secretariat which coordinate the positions of specialized standing committees
- The Ministry of Foreign Affairs plays the central coordinating role in the decision-making process. The North group of the Ministry participates in all meetings of the special committees, chairs the EU committees, functions as secretary for the government’s foreign policy committee, and attends all meetings of the Folketing’s European Affairs Committee. In addition, it acts as a clearing house for communications to and from the EU, and to the Folketing. Finally, it presents the final negotiating instruction to the Danish EU representation. All in all, it is a central node in the coordination system.
- In the transposition stage, an important role is played by the Special Legal Committee, chaired by the Ministry of Justice. This Committee meets biweekly to discuss all infringement cases, also the

relevant ones against other member states. Here, each line Ministry has to explain what went wrong. Being called for the Committee is considered harmful to a Ministry's professional pride and reputation (interview).

9.4.3 The role of compulsory advisory bodies

Denmark does not have any advisory bodies, nor an advisory institution similar to the Dutch *Raad van State* (Mandrup Thomsen and Pennings, 2002: 11). However, each department is required to consult with relevant interest groups and the public. Furthermore, all draft law proposals coming from the government, including those for implementation, are subject to a quality of legislation check by the Legislative Department of the Ministry of Justice (Mandrup Thomsen and Pennings, 2002: 15). The Ministry of Justice also has a division EC law which controls compatibility of proposals with EC law (Mandrup Thomsen and Pennings, 2002:9). This section may also be consulted about particular issues concerning transposition (Mandrup Thomsen and Pennings, 2002: 15). Finally, a compulsory assessment of the administrative burdens resulting from new legislation is made by the Ministry of Economics and Business Affairs in a panel with business representatives. The line ministries have to include the results of these assessments in their advice on the proposed legislation (Asser Instituut, 2004b: 9).

9.4.4 The role of parliament

Denmark has an unparalleled system for democratic control over EU policies: the Folketing has an extremely powerful role in the preparation of Danish European policy. For each negotiation process, government is required to obtain a mandate from Parliament. The rationale for this construction, is twofold. First, because Denmark has a strong tradition of minority government, it is deemed important to prevent cabinets from being voted down by Parliament (Nedergaard, 1995, 129). Second, due to Denmark's EU-skeptical stance, most political parties want to keep a firm check on EU policy. This system is not known in any other member state, even though the UK and Sweden come close.

The key player in Parliament is the European Affairs Committee, previously called the Market Relations Committee. It has seventeen members, proportionally representing the political parties represented in Parliament. It is mostly comprised of senior MPs, among whom many former ministers (Von Dosenrode, 1998: 60). It is supported by a secretariat consisting of 22 staff members and some 8 interns, which is the largest staff of all Parliamentary committees (Folketing et al, 2002: 23, Von Dosenrode, 1998; 61), The meetings of the European Affairs Committee normally take place on Fridays and deal with all the Council meetings taking place in the following week. The meetings typically take 2 to 5 hours (Eliason, 2001: 200).

Parliament's powers in EU policy-making are laid down in the 1972 Law on Denmark's accession to the EC, and have been further specified in reports by the Committee, agreed by the government (Folketing et al, 2002: 5). Originally, the Government was obliged to consult with the Parliament's European Committee in EU matters of essential importance. The mandate obligation follows from the first report from the Committee in 1973, which holds that 'Prior to negotiations in the EC Council of Ministers on decisions of a wider scope, the Government submits an oral mandate for Negotiation to the Market Committee. If there is no majority against the mandate, the Government negotiates on this basis'. Thus, the Danish government cannot conduct negotiations without receiving a mandate from the Parliament (Nordic Parliaments Report, (2002:7). The political development has been such, that the mandate procedure now applies to every

proposal for a new directive. The mandate is never set in writing and is not legally binding, yet in the context of Danish politics it has decisive weight in determining the positions of Danish Ministers in the Council of Ministers (Rehof, 1996:68-69).

Deliberations in the EAC's meeting are structured on basis of a so-called summary memorandum, which is an annotated agenda of an upcoming Council meeting (Folketing et al, 2002: 13). This is distributed Friday morning at the latest, so 8 days before the Council meeting, and a few hours before the EAC meeting (Nedergaard, 1995: 124). For each pending proposal, the responsible minister has two options (Von Dosenrode, 1998: 60). First, he or she may simply brief the committee, if no decision by the Council of Ministers is to be expected. The second option is to propose a negotiating mandate (*forhandlingsopslæg*). If the latter is the case, the parties proceed by giving their positions, after which discussions may ensue. Finally, the Chairman of the Committee presents the conclusion, after counting the number of votes. The mandate is not written, but oral, even though a stenographic record is kept (Eliason, 2001: 200). It contains agreement on the subject matter, the allies to be sought, and the degree of discretion for the negotiator (Von Dosenrode, 1998: 60).

Table 9.3: Contents of Danish basic memorandum

1	Title and nickname of initiative
2	Parallel distribution to sectoral committees
3	Identification, relevant dates and legal basis
4	Previous presentation to the EAC
5	Resume of contents
6	Most important elements
7	Consequences for Danish law
8	Principles of subsidiarity and proportionality (<i>new</i>)
9	Financial, socio-economic, and environmental consequences
10	Hearings of interest groups
11	Danish attitude (<i>new</i>)
12	Public attitudes of other member states (<i>new</i>)
13	Relevant Danish decisions on European policies

Source: European Affairs Committee, 2004: 23-24.

In forming its opinion about a proposed mandate, Parliament to a great extent relies on the so-called basic memorandum (*grundnotat*). This is a standardized document, composed by the special committee, which must be sent to the EAC within four weeks after a Commission proposal is made. Over the course of the negotiation process, the memo may be modified, after which it is called a topical memorandum (Folketing et al, 2002: 13). Its main elements are: a description of the Commission proposal, its legislative and financial consequences, previous considerations by the EAC, possible compromise proposals by the Presidency, amendments proposed by the European Parliament, its itinerary through the EU institutions, and the opinion of interest groups (Folketing, 2002: 7; Pedersen, 2000: 230; Von Dosenrode, 1998: 61; see Table 9.3 for a full overview). For a long time, it did not contain the government's opinion, but this has changed in January 2005, when a new EAC report entered into force. Parliament is generally satisfied with the documents it gets. They are usually rather elaborate, comprising 5 to 20 pages (interview). Finally, Parliament receives all Commission proposals directly from the Ministry of Foreign Affairs, as well as lists of all the proposals received (Folketing, 2002: 5-6).

9.4.5 *The role of other, subnational or functional governments*

Local government is represented in the special committees, as they represent employers throughout the country. According to one of our interviewees (ENV), this is really important, as local government often needs extra resources to comply with European directives.

9.4.6 *The role of interest groups*

Interest groups are involved throughout the process of EU policy-making and implementation. First, they are member of or heard by the special committees that make the initial policy proposals. They are consulted at the early stage of preparation of legislation. Second, they play a role in preparing transposition, and the actual application of directives, just like normal Danish law (Von Dosenrode, 1998: 55). Third, they have a rather close relationship with the European Affairs Committee in Parliament. They have rather good access, as all interest groups can present a delegation to the EAC. Usually they present their point of view right before a minister appears for the EAC. In this way, the committee benefits from their expertise. Groups that often make their appearance are the Unions, anti-federalist movements, the anti-constitution movement, fishermen organizations, and industry representatives. Generally, no attempts are made to lobby Parliament during the transposition stage (interview).

9.5 Analysis of instruments

9.5.1 *Advantages and disadvantages of instruments*

As one expert pointed out, the pro-s and con-s of instruments are different depending on whom you ask: the opposition prefers using laws so that they get debated in parliament, the government prefers administrative orders.

Undoubtedly, ministerial orders are faster. They are used much more frequently and considered much faster as they do not have to pass through Parliament. It takes much longer to get a bill through parliament and ministers can never be quite sure of success as linkages with other issues might occur. Still, in general the parliament does not make problems at the transposition stage since they have been consulted extensively at the negotiations stage. A rare example of a difficult act to pass was the law transposing the personal data protection directive where the parliament felt it had not received all the relevant information during the first stage of the policy process.

However, in terms of speed laws present another problem. Ministries and agencies are bound by the regularity of Parliamentary meetings and the preparation of the legislative program for the whole year. The way the parliamentary year is organized, all bills must be dealt with within one and the same parliamentary year. On the 2nd Tuesday in October, the new year starts. All outstanding bills must be withdrawn and submitted again in the new year (Mandrup, Thomsen and Pennings, 2002: 6). To deal with this civil servants often combine and make a lot of changes in 1 act.

As for Ministerial orders, even though in legal terms the government is not obliged to go to the Parliament, in practice, since Denmark operates with minority governments sometimes there is a political agreement or pressure/imposition from parliament for a draft of the administrative order to be seen by parliament before being adopted.

As mentioned before, delegation differs from area to area and there are areas where one cannot avoid using legislation as they are so politically sensitive. Examples of such areas are: Justice and Home affairs, taxation, financial regulation, and financial services.

There is no difference between amendments and new laws in terms of speed as the debates look at the substance. The reason for that is that any piece of legislation, whether it is original or an amendment, has a written explanation with comments and reasoning by the government, also anticipated impact on the administration and on finance. This enables the politicians to focus on the substance.

However, another expert points out that sometimes amendments of existing laws are problematic because national concerns are re-examined and other issues may be added to the list. Ministries and agencies busy with transposition try not to have this and limit the discussion to transposition, because it can be a problem when the agency is pressed for time.

9.5.2 Advantages and disadvantages of techniques

For a long time, re-wording was the preferred strategy, because this is considered more user-friendly. Problems of interpretation are solved in an early stage, rather than pushed to the end user. The **re-worded** directives, are therefore evaluated as clearer for the citizens. In the words of one official, ‘we try to make it fit the Danish legislation and use legal language used here’. Another expert points out that ‘Directives are not ‘microwave ready’ text. They need to be unpacked and put into our legal order.’ Thus re-worded directives are also considered more compatible with national legal frameworks rewriting then has the clear preference of the Ministry of Justice. However, rewording is considered more difficult, which makes it slower than rewriting. Also, according to some, if you re-word there is a risk you may be using the wrong words. That’s because there is not so much leeway in transposition as there should be.

Copying is seen as faster and according to at least one interviewed expert is used increasingly as a way to cope with the growing number of directives. However, it is also seen as unfriendly to the end user. Another expert pointed out that copying is done ‘if we can’t make up our minds’, when a directive is considered difficult. Again, it is seen as undesirable as it transfers responsibility for understanding and interpreting the provisions to the next user – local government, businesses and courts.

9.6 Analysis of national policy process

The Danish transposition record has been consistently good, one of the best in the EU. According to Nedergaard, this is due to the fact that the Danish position in the EU is based on domestic consensus which is achieved by a time-consuming process of consultation of a multiplicity of interests before a policy proposal is negotiated in Brussels (Nedergaard, 1995:114). Similarly, the Asser report attributes the success of implementation in Denmark to the attention for internal consultation during the drafting of national position phase. In this internal negotiation phase, all stakeholders are consulted, including Parliament (Asser Instituut, 2004b: 3; Nedergaard, 1995: 114; interviews). This implies there is no political force attempting to stop transposition and implementation later.

Parliamentary involvement is generally evaluated rather positively. Even though Parliament is said to reject a mandate only rarely⁷⁷ (Folketing et al, 2002: 10), government usually anticipates on the EAC's stance (Pedersen, 2000: 30). Furthermore, its power is boosted by seniority of its members. All in all, the strong role of parliament is considered one of the factors ultimately facilitating transposition as it 'ensures that sudden surprises do not occur when new legislation is necessary' (Biering, 2000: 959). According to one of our interviewees, the procedure ensures that 'the train is set in motion, and it will arrive at the next station.'

Yet, some weaknesses are also reported. It is positioned rather late in the EU decision/making process, when the Danish position has already been formulated in Coreper (Nedergaard, 1995, 126). What is more, it depends almost fully on the government for information, and must trust the latter that it followed its mandate, due to the secrecy of Council meetings. The biggest concern, though is that it suffers from work overload (Pedersen, 2000: 231). The staff is considered wholly inadequate (Eliason, 2001: 201). For this reason, debate has ensued about the role of the sectoral committees. For a long time, EU affairs were the sole responsibility of the EAC. EAC could forward memoranda to the sectoral committees, or informally hear their opinion, but this was completely optional. If it happened, the committees were usually not very interested (Nedergaard, 1995: 128; Pedersen, 2000: 231). Therefore, in May 2001, the Parliamentary European Affairs committee recommended that memoranda are sent by the government simultaneously to the specialized committees and the European Affairs committee (Danish Parliament information fact sheet, at <http://www.ft.dk/?/samling/20041/menu/00000005.htm>). This has been effected in the most recent Folketing report (2004), which has made EU issues a formal responsibility of the sectoral committees. Their instruments for exerting influence are that they can call the minister, make recommendations to the EAC, and arrange public hearings, something which is often done for Green and White papers (interview, Folketing).

On the whole, even though the Danish process of EU policy making at first sight seems rather formal and centralized, in reality it is highly informal (interview). It is a bottom up approach, starting with the sectoral committees and the individual teams of civil servants in Ministries/agencies and then ending up there again for transposition. One and the same team is responsible for the whole process of negotiation and implementation, which creates a sense of ownership and prevents 'Chinese walls' between those who negotiate and those who implement. Furthermore, the coordination style is informal, except for the part where Parliament is involved, but also there the stress is on obtaining an oral mandate and not on increasing the paper trail. A final important factor seems to be the rule of law, which is one of the fundamental building blocks of Danish politics and administration. The basic attitude is that EU laws must be implemented properly, even if they go against Denmark's wishes.

Despite the good Danish record, sometimes transposition is delayed. The major reason for delay, according to our respondents, is formed by notification problems (also see Von Dosenrode, 1998, 58). Sometimes the European Commission has not registered notification, or sometimes it is forgotten by the ministries. Real delays are generally said to be very rare. One of our respondents reports that on average

⁷⁷ According to Nedergaard (1995) this happens only in some 95 % of the cases. According to one of our interviewees, the frequency has increased over the last three to four years, due to the generally Euro-skeptical stance of the Dansk Folkeparti. It allegedly has been especially difficult in the fields of GMOs and food directives. According to our interviewee at the Folketing, however, there are no particular sectors in which mandates are hard to obtain.

once a year transposition is problematic for substantive reasons. Other reasons for delays reported are a lack of manpower, and the ambiguity and difficulty of some directives.

9.7 Conclusions

- The swift transposition of EU directives in Denmark is not a direct result of the use of special legal instruments or techniques. In fact, Denmark knows only two legal instruments used for transposition. The very simplicity of the legal options seems to contribute to swift transposition. Most transposition happens through ministerial orders, but this does not diminish the role of Parliament.
- The extensive involvement of the Danish Parliament at the pre-negotiation stage is seen by many experts and civil servants as key to Denmark's success in transposition. Interviewees have all stressed that the process of obtaining a mandate from Parliament before negotiations on a proposal have taken place in the Council of Ministers is crucial. Parliament takes its task of scrutinizing EU proposals highly seriously, which prevents surprises during transposition.
- Consultation and domestic consensus building at the pre-negotiations stage contribute to swift transposition. The extensive consultation not only with Parliament but also with interest groups at a very early stage creates awareness which also helps successful transposition later.
- Ministerial powers of delegation are important, but delegation is specific and based on sectoral laws. As proposals have been already discussed in parliament, at the transposition stage powers can be delegated to a Minister to pass the necessary legislation by a Ministerial order.
- Another reason for Denmark's good transposition record is that lines of responsibility are clear and final responsibility is not in a centralizing authority but in the line ministries. On this bottom up basis, administrative coordination is maintained throughout the policy cycle. More specifically, the same civil servants/teams which negotiate a directive are involved in transposing it, so that there are no 'Chinese walls between negotiation and transposition.' Teams consist of both lawyers and practitioners, drafting of transposing acts is done by the same people. This means that those who negotiate are familiar with the domestic situation and are aware of the EU policy context in which a decision is made.
- Flexible consultation mechanisms and an informal manner of coordination save time and make the Danish approach highly effective.
- A culture of obeying the law is credited with ensuring that directives are transposed even when they were seen to be to Denmark's disadvantage. The values and beliefs of administrators play a crucial role in this process. Danish civil servants take a pride in transposing directives well and on time, and conversely, it is considered shameful for ministries to have been late with transposition.
- The naming and shaming of laggards among ministries in the Special Legal Committee based in the Ministry of Justice is a helpful mechanism that reinforces the rule of law culture that exists in Ministries.

Appendix: List of interviewees

- Peter Biering, Legal adviser to the Danish government, Law firm Poul Schmith
- Susanne Isaksen, Department of EU Coordination, Ministry of Foreign Affairs
- Peter Riis, European Affairs Committee of the Folketing
- Klaus Werner, International Unit, Ministry of Economic and Business Affairs
- Leif Thomassen, Senior EU Coordinator, Danish Financial Supervisory Authority
- Christina Toftegaard Nielsen, EU Affairs Unit, Department of Law
- Nikolaj Aaro-Hansen, EU Affairs Unit, Department of Law
- Jørgen Molde, EU Law Department, Legal Service, Ministry of Foreign Affairs
- Merete Voetmann, EU Law Department, Legal Service, Ministry of Foreign Affairs
- Lise Wesenberg Jensen, Specialkonsulent Legal Affairs, Danish Environmental Protection Agency

10 France

10.1 General overview of the constitutional and political system

10.1.1 Constitutional characteristics

France is a decentralised unitary state in which the central government takes the lead with regard to the preparation of the French position on new Commission initiatives and the transposition of EU directives. Subnational governments do not have their own competences for the transposition of legislation even though their cooperation may be required for effective implementation at a later stage.

In contrast to the United Kingdom, whose constitution does not consist of a single solemn document but a multitude of texts, laws, traditions and conventions, France is ‘attached to the idea of a written, solemn and rigid constitution’ (Mény, 2000: 120). So rigid is this attachment, that, if the existing constitution is unable to deal with a problem, there is a change in the regime and a new constitution is adopted to deal with the questions not resolved by the preceding version.

The French constitution makes a clear distinction between legislative and executive power and attributes to each of these branches of government autonomous rulemaking power. Article 34 of the constitution specifies the issues for which Parliament needs to be involved by the executive for the passing of law. These areas, which are labeled as *législatives*, include public liberties, the determination of serious crimes and other major offences, taxation, the budget and the fundamental principles of national defence, the self-government of territorial units, education, ownership issues, labor law and social security. In 1996 these areas were expanded to include also the financing of social security. All other issue areas are regarded as *executive* and can be autonomously arranged by government using regulations (that is, government decrees and ministerial orders). The State Council and the Constitutional Council ensure that the government and parliament observe the distinction between ‘legislative’ and ‘executive’ issues. In applying this distinction the State Council (*Council d’Etat*) has to assess a proposal and decide whether the proposal belongs to the ‘legislative’ or ‘executive’ domain.

10.1.2 Political characteristics

France is sometimes characterized as a ‘rationalized’ parliamentary system. In principle, France is a parliamentary system in which law has to be approved by parliament. At the same time, as indicated above, the French constitution makes a distinction between issues that require the adoption of law and those that can be directly regulated by the ‘executive’. In this way, the role of parliament in France is more limited than in some other European countries.

In France, the President has in many respects the advantages and privileges of the Head of State in a presidential system. In other respects he enjoys the prerogative powers of a head of state in a parliamentary system. This ambiguous combination of roles secures for the President an independent and powerful position in the French political system, simultaneously giving them ‘complete political irresponsibility and the strength to make decisions and pressure other constitutional bodies’ (Mény, 2002: 117-118). The head of state appoints the prime minister and, conjointly with the prime minister, appoints Ministers. The head of state can address messages to both Houses but, in conformity with ‘republican tradition’, cannot speak direct to parliamentarians. To these powers belonging specifically to the President are added those shared with the

prime minister and government, in particular the signing of regulations and decrees, appointments to various civilian and military posts and all measures decided in the Council of Ministers (Articles 20-23 and 34-51 of the Constitution). While the Constitution does not guarantee that the President will be directly involved in the day-to-day running of the country, he is undoubtedly an integral part of the political process. As Elgie (2003: 98) indicates, the President is only an ‘independent and autonomous actor of either the first instance or the last resort’.

The French party system is characterized by competition between two opposing forces: the ‘left’ and the ‘right’. However, the ‘left’ and ‘right’ are not strong and stable ‘blocs’ but consist of a substantial number of different political parties. The rivalry and competition between these different parties makes the French party system rather ‘fragile, instable and weak and reduces the effectiveness of Parliament with regard to government’ (Mény, 2002: 104).

Parliament has two chambers:

- the upper chamber or Senate (331 members, elected for 6 years by indirect suffrage (electoral college));
- the lower chamber or National Assembly (*Assemblée Nationale*) with 577 members elected by direct universal suffrage for five years using majority voting in a two-categorical ballot.

The members of the National Assembly (deputies) and the government are entitled to initiate legislation.

Government bills are called *projets de loi*; bills introduced by deputies are called *propositions de loi*.

Effective parliamentary influence lies almost exclusively with the National Assembly.

In addition to national lawmaking the National Assembly and the Senate also have a role in foreign policy by examining government bills authorizing ratification of a treaty or approval of an international agreement negotiated by the President of the Republic or on his behalf. Major international treaties—such as peace treaties, commercial treaties, treaties or agreements concerning international organizations, state finances, status of persons, and agreements that modify statutory provisions—do not commit France until passed by a ratification statute.

Amendments of the constitution are also matter for Parliament. The amending bill has to be passed by both chambers, but does not have effect until it has been approved by referendum or, in the case of a government bill, by the Congress (a joint session of the National Assembly and the Senate in the Palace of Versailles) if the President of the Republic prefers this procedure. Approval by Congress requires a majority of three fifths of the votes.

10.1.3 Political administrative characteristics

The French government consists of the prime minister and his ministers, who meet weekly as part of the Council of Ministers. The prime minister directs the operation of the government and has a superior position to the ministers. He is responsible for national defense and ensures the implementation of legislation (including the transposition of EU directives). Within the government, he has the right to initiate legislation (Article 39 Constitution). Moreover, the prime minister has the power to make regulations. The regulations proposed by the prime minister are countersigned, where required, by the ministers responsible for their implementation. In addition, he/she may sometimes delegate some powers to ministers. During the annual budgetary process, the Prime Minister is responsible ‘for arbitrating between the conflicting demands of the spending ministers’ (Carcassonne, 1997: 400).

Moreover, the prime minister has a special constitutional position towards parliament (Articles 34-50 Constitution) and plays, in contrast to the President, a full role in the parliamentary process. The Prime

Minister is closely involved in setting the parliamentary timetable, which is important for the prioritization of discussions on legislative proposals (Article 48). He also acts as the government's main spokesperson in parliament, most notably during the weekly session of questions to the government in the National Assembly.

Within the government, and next to the Prime Minister, there are three different kinds of positions: minister:

- 'full' minister (*ministre*), who is positioned directly under the prime minister and have a separate portfolio for which they are within the government responsible. Ministers participate in the Council of Ministers;
- junior minister (*ministre délégué*), like the Junior Minister for European Affairs, who are positioned under a 'full' minister; and
- state secretary (*secrétaire d'Etat*), are either 'autonomous' heading a ministerial department or attached to the Prime Minister or a Minister; inferior to the position of a minister; they only participate in the Council of Ministers if their portfolio is concerned. From a protocol point of view, state secretaries are referred to as 'minister'.

According to the composition of government from 25 February 2005 there are 17 full ministers, 13 junior ministers and 10 state secretaries. Junior Ministers and state secretaries are allowed to sign all acts falling under the supervision, but government decrees (*décrets*) which require the countersignature by the full minister.

An important characteristic of French civil service is a strong linkage between the government and the administration (and sometimes the courts). This is reflected in political cabinets supporting the Prime Minister and the individual ministers, and the membership of various consultative bodies and committees of key actors from the highest administrative level. These multiple positions and close personal connections are part of extensive political-administrative networks in France. These networks, which include members occupying various positions in the administration as well as consultative bodies and the courts, affect daily politics and policy. Moreover, these networks are partly maintained through training at France's prestigious public administration school (*École Nationale d'Administration* or *ENA*), which 'has been attended by most of the currently high-level civil servants and some of the political actors' (Elgie, 2003: 144).

The senior officials can be characterized as dynamic, innovative, confident and highly trained. In part this reflects the fact that civil servants are often appointed to ministerial posts.⁷⁸ It is still the case that many political leaders, including President Chirac, began their careers as civil servants and then moved into politics. Such a move can be easily made due to the rather liberal employment provisions, which allow civil servants to leave the public service and return to it without losing any seniority.

French senior civil servants mostly identify themselves as a member of one of the 'great corps'. There are several of these services such as the State Council, the diplomatic corps and, for instance, depending on their technical vocation, the Corps of Roads and Bridges. The members of these services tend to monopolize the senior positions in the administration. Each corps is independent from the others and provides a separate identity to its members. Senior officials identify themselves as being a member of one of these services and

⁷⁸ This was made easier by the fact that the 1958 Constitution did not require ministers to be members of the National Assembly, but actually forbade it.

will be loyal to his or her corps rather than to the civil service as a whole. This feature of French administrative culture may cause rivalries between units within a ministry and between ministries.

Elgie (2003: 135-139) characterizes the French administration by the following three features: First, the administration is still 'top-down' and *centralistic* in its nature. Second, the administration is characterized by a strong division of labor and a lack of cooperation and collaboration. Consequently, it is marked by a profound set of rivalries within and between the ministries which can be very difficult to manage and affects the coherence of a ministry's policy. Ministries are split on a functional basis into divisions headed by a director, each having responsibility for a particular area of the ministry's work (Rouban, 1995: 42-47).⁷⁹ Divisions are then split on a functional basis into subdivisions, each having responsibility for a separate aspect of the division's work. A subdivision is headed by a sub-director.⁸⁰ These subdivisions are further split on a functional basis into bureaus. Third, the administration is characterized by deconcentration instead of decentralization. At the local level French departments have a well-developed range of deconcentrated services, which work closely with civil servants at the local level. These features make the central administration rather powerful in specific policy areas, but at the same time fragmented and difficult to manage, especially if government-wide priorities have to be fulfilled such as the transposition of EU directives.

10.2 Political or public discussion concerning EU directives and their transposition

10.2.1 Discussion of recent reports and their recommendations

At first sight, there seems to be an increasing awareness in France about its rather poor performance with regard to transposition, as indicated by the Commission scoreboards. Currently, France has a transposition deficit of 3.2% for the internal market directives (European Commission, 2005a: 18) and 1.9% for all directives in force (European Commission, 2005b). In addition, a substantial number of infringement cases against France have been brought before the European Court of Justice. Until now, none of these cases have led to a fine imposed on the French state. There is the possibility that, as part of the *Merlus case*, the French state might be faced with a substantial fine, which has increased awareness among parliamentarians as well as the government aware of the need to seek for improving France's performance. This need has become apparent through a number of reports and communications which have been issued over the last three of years.

The Parliament, for example, has started a debate of the transposition problematic. In July 2003 and July 2004 respectively, Christian Philip (2003; 2004), member of the Delegation for European Affairs in the National Assembly, issued annual reports on transposition to the National Assembly. Whereas the first report focuses on the overall evaluation of the French transposition process, the second report also compares the national transposition mechanisms in all fifteen member states. Philip summarized the major problems in the French transposition process as follows:

- lack of coordination between ministries;

⁷⁹ For example, in 2002 the Ministry for Civil Engineering, Transport, Housing, Tourism, and the Sea comprised thirteen separate divisions, such as the Roads Division and the Air Transport Division, as well as the ministerial information service which had the equivalent status to a division.

⁸⁰ For example, in the Roads Division of the Ministry for Civil Engineering there were four subdivisions, including the Subdivision for Motorways and Toll Roads and the Subdivision for Road-Building Investment.

- numerous interventions of compulsory advisory bodies;
- irregular and poor drafting of impact data sheet.

Based on his analysis, Philip recommended three main points:

1. systematic making of the impact assessment studies;
2. resisting legal perfectionism; and
3. reinforcement of collaboration with the European Commission.

Furthermore, he suggested to give transposition a heavier political weight in the overall policy-cycle by involving the prime minister because transposition is not only a Community obligation, but also a constitutional demand. Second, he suggested setting up a new interdepartmental committee. This committee could meet regularly to strengthen the political accountability of individual ministries and could be led by the Junior Minister for European Affairs ‘empowered’ and explicitly supported by the prime minister. Moreover, he recommended for ministries to improve their administrative structure towards transposition, by setting up a legal service helping to draft the legal texts. He suggested consultation with advisory bodies to be transferred to the earlier, negotiation phase. Finally, he argued for a reinforcement of parliament’s role in the transposition process by more frequent consultations.

The Philip report caught the attention of politicians. It was immediately followed by a communication on transposition by Prime Minister, Jean-Pierre Raffarin.⁸¹ This communication followed an earlier communication from 3 July 2002 in which the Prime Minister declared transposition to be high on the political agenda in order to catch up with France’s backlog. In view of this declaration, the Junior Minister for European Affairs presented a communication to the Council of Minister on 6 November 2002. In this communication Claudie Haigneré announced the setting up of an action plan to clarify the administrative responsibilities and to further involve parliament in transposition.

In the new communication of September 2004, the Prime Minister again underlined the importance of transposition. In addition, he urged ministers to take the necessary steps to make up for the delay which could be very costly and disadvantageous for French competitiveness and credibility in the European Union.⁸² He suggested the following: (1) an improved effort in drafting impact assessment studies; (2) a better coordinated transposition planning and process-tracing with a regularly updated transposition scoreboard for all the ministries; and the (3) the setting up of an interdepartmental committee coordinating transposition (in line with Philip report).

Based on this communication, high-level officials were given responsibility for transposition in each of the various line ministries, including a member of the (political) cabinet of each minister. These officials meet regularly to discuss the progress on transposition in the newly established interdepartmental committee on transposition (*réseau interministériel des correspondants de la transposition*). In this committee the Junior Minister for EU Affairs presents the results on progress, ‘naming and shaming’ the laggards. Additionally, the information on progress is also presented to the Council of Ministers.

⁸¹ Communication of the Prime Minister (2004) *Circulaire du 27 septembre 2004 relative à la procédure de transposition en droit interne des directives et décisions-cadres négociées dans le cadre des institutions européennes*, J.O. no. 230 (2 octobre 2004): 16920.

⁸² The Prime Minister underlines the importance of swift and proper transposition in the last meeting of the Council of Ministers before Christmas in 2004; see Communication of the Prime Minister (2004) *Communication au Conseil des ministres du 20 décembre 2004 sur l’application des lois et la transposition des directives et décisions-cadres communautaires*.

On 2 February 2005, the Junior Minister for European Affairs, Mme Haigneré, issued a first scoreboard on transposition. She outlined the earlier improvements in transposition, but stressed that more needed to be done to consolidate these improvements and to improve France's performance on transposition. She concluded with some comments on future strategy and developments and the need to prepare for transposition already during the negotiation phase.

10.2.2 Expectations regarding the process and results of these discussions

The new measures underscore the political awareness of the rather poor performance of France in the various Commission scoreboards. After the communication of the Prime Minister in July 2002 the number of delayed directives for which the deadline already expired was reduced. The latest scoreboards indicate that France seems to succeed in improving its performance. For instance, the absolute number of not yet transposed directives is smaller than before (48 compared to 92 in February 2002) while the number of directives delayed for more than two years is reduced by half. Despite the government communications and proposed changes and reforms, France is still not performing that well in relative terms, partly because other EU member states are improving their performance as well. Furthermore, France is still far from reaching the objective of the 2001 Stockholm European Council to reduce the transposition backlog below 1.5% of all directives in force or the zero-tolerance objective of the 2002 Barcelona European Council.

Some observers indicate that the current political interest in transposition could be temporary because previous prime ministers already issued communications on transposition. Michel Rocard, for example, issued communications in 1986, 1988 and 1990. Then, in 1998, Lionel Jospin presented a communication to the Council of Ministers on the poor French performance on transposition underlining the importance of the negotiation process in Brussels for later transposition in France.⁸³ The communication stresses that during the bargaining process in the working groups, COREPER and the meetings of the Council of Ministers, the French delegation should prevent directives from including definitions in the introduction which could make it very difficult and time-consuming to ensure coherence with the national framework of law at a later stage. Negotiation teams for a directive should be involved in the later transposition phase and in a timeframe of *one* month after the adoption of the directive, the line ministry should work out an impact assessment study. But in 1988 and 1990 respectively, Prime Minister Rocard had already drawn the ministers' attention to problematic transposition of EU law.⁸⁴ He outlined and specified the different tasks of the SGCI and the SGG in the transposition process in order to improve coordination. In addition, he asked every ministry to take responsibility for the transposition of directives falling under their supervision. He stressed the need to keep transposition requirements in mind from the moment on a Commission proposal is being discussed in the Council's working groups.

Hence, the current attempt made by Prime Minister Raffarin to increase the ministries awareness for transposition and to improve France's performance seems to be a recurrent issue on the French political agenda. If these more attempts, like in the past, do not lead to structural changes within the administration and the way in which transposition is handled, the 'new policy' will appear to be a symbolic one. However,

⁸³ *Circulaire du 9 novembre 1998 relative à la procédure de suivi de la transposition des directives communautaires en droit interne.*

⁸⁴ *Circulaire du 25 janvier 1990 relative à la procédure de suivi de la transposition des directives communautaires en droit interne.*

if these communications are embedded in a well-established belief that France's performance should become better, as part of the notion that France should play an important but also exemplary role in Europe, which includes the transposition and implementation of the *acquis communautaire*, current developments may be more long lasting.

10.3 Description of judicial instruments and techniques

10.3.1 Instruments

In France, the choice of an instrument to transpose an EU directive is affected by the question whether its contents requires 'legislative' or 'executive' actions, that is, the introduction of law or government regulations. The State Council determines whether the contents of a directive fits to the 'legislative' or 'executive' domain in its advice to the government (see also Section 3.4.3). Based on this advice, the preparation of draft measures to transpose a directive can be started. Clearly, France does not have an integrated vision on the transposition of directives. It does not use, for example, a typology of directives. The legal instruments used in France in order to transpose directives are:

- law (*loi ordinaire*), based on Article 34 of the constitution, which need to pass Parliament based on a bill (*projet de loi*); this instrument includes the possibility of an omnibus bill (*disposition d'adaptation au droit communautaire* or DDAC), which is equivalent to law, but transposes a number of directives preferably in the same policy area;
- authorization law (*loi d'habilitation*) based on Article 38 of the constitution, which allows the government to transpose of directives by ordinances (*ordonnances*); and
- government regulations (*réglement*), which includes government decrees (*décrets*), ministerial orders (*arrêtés*), and communications (*circulaires*).

These instruments and their main characteristics are summarized in Table 10.1. We will discuss each of these instruments separately.

Law (Loi)

Based on Article 34 of the constitution, Parliament needs to be involved in issues of 'legislative' nature. For those issues, a law has to be passed. As indicated, before the start of any transposition process, the State Council has to determine whether an issue is part of the 'legislative' or the 'executive' domain. If the State Council decides that a directive, or some of its elements, requires the introduction of a new law or the amendment of existing ones, a bill has to be prepared.

The initiative for the making of a new law (*projet de loi*) lies with the line ministries. Depending on the contents of the directive, several line ministries may be involved, each starting preparations for the introduction of new legal measures. Although the government aims for some coordination by having only one 'lead' ministry, it is rather common that two and sometimes three ministries jointly have the lead in the preparatory process. After consulting the State Council, the proposal is discussed by the Council of Ministers. With the Council's approval, the proposal is submitted to parliament for debate. Government bills are debated by both chambers. In each chamber these discussions normally start within the standing committees and are then followed by a discussion at the floor. The discussion results in amendments of the text submitted by the government, which are subsequently sent back and forth between both chambers. The aim of this procedure is to arrive at a common text, which can be approved by both chambers. However, if

this is not immediately possible, there is special procedure of conciliation to resolve the differences. If this procedure fails and both chambers are incapable of adopting the same text, the National Assembly has the last word (Article 45 of the Constitution).

Table 10.1: French legal instruments

	<i>Loi ordinaire</i>	<i>DDAC</i>	<i>Ordonnance</i>	<i>Régulations</i>		
				<i>Décret</i>	<i>Arrêté</i>	<i>Circulaire</i>
	Law	Law with the format of omnibus bill	Ordinance	Government decree	Ministerial order	Communication
Main features	Issues for which the Constitution calls for settlement through law	Transposes a number of directives preferably in one policy area	Government measure with the status of law based on parliamentary authorization (<i>loi d'habilitation</i>)	Provisions issued by government without explicit authorization through law for 'executive' issues, or with authorization for other issues	Provisions issued by the minister without explicit authorization through law for 'executive' issues, or with authorization for other issues	Provisions issued by a minister without explicit authorization through law
Advice State Council	Required	Required	Required	Required	Not required	Not required
Parliamentary approval	Required	Required	'Required', Parliament must approve the ordinances after its adoption	n.a.	n.a.	n.a.
Procedure	Simple majority in Parliament	Simple majority in Parliament	Emergency procedure	Decision by the Council of Ministers on a proposal of a minister		
Remarks			Temporary decree, sometimes used in case of an infraction procedure			As such not sufficient to transpose directives

Omnibus bill (diverses disposition d'adaptation au droit communautaire or DDAC)

This instrument is equivalent to law, and follows the same procedure as a bill. This only difference with a 'normal' bill is that this proposal contains a text that transposes a number of directives. Normally, these directives refer to related policy areas.

The introduction of an omnibus is usually discussed with the presidents of the National Assembly and the Senate in order to see whether the list contains issues that might be politically sensitive. If that is the case, parliament as well as the government prefer to introduce a separate bill for those issues to avoid that the omnibus bill is delayed in the parliamentary process. As indicated, if a bill triggers amendments, it has to go through a lengthy and time consuming negotiations process in which both chambers first try to find some common text, before the National Assembly can make a final decision. Without substantial amendments, the bill can be passed at rather short notice.

Ordinances based on an authorization law (loi d'habilitation)

Based on Article 38 of the Constitution, the government may propose to Parliament the authorization to transpose a number of directives by government ordinances (*ordonnances*) for issues that normally would

require the adoption of law. Hence, they contain detailed provisions that fall within the scope of the legislative purview of the Parliament. The authorization, however, is limited in time. Moreover, the ordinances need to be ratified by Parliament in a ‘yes-no’ vote. Since these ordinances have the status of law, they can only be changed by law (or a new authorization law that again provides government this authority).

In general, parliament only prefers the use of ordinances in rather exceptional circumstances. The main disadvantage of this instrument is that parliament no longer has the possibility of amendment. Once the government has adopted an ordinance, parliament only has the possibility to approve or reject the measure.

The use of authorization law is a derogative and exceptional procedure which allows for an expeditious way of dealing with a subset of legal matters that are not overly politically sensitive but represents a part of the transposition backlog. So far, the use of authorization laws as a way to transpose directives is limited to one or two proposals per year. This rather small frequency is not surprising since each authorization law includes a list of directives, especially those which are delayed. Most recently, the government proposed an authorization law in March 2004, which includes 20 different directives.⁸⁵

Government decree (Décret).

Based on Article 37 of the constitution, the government can independently adopt decrees using its executive power. Decrees can also be based on the delegation of authority to government by law. Decrees are not considered by parliament (the possibility of call-back is not used for decrees in France). Proposals for decrees have to be submitted to the State Council, which considers the legal quality of the draft, its consistency with the constitution and other national laws, and its compatibility with EU law.

Ministerial order (Arrêté)

Based on Article 37 and 21 of the constitution, ministers may also issue ministerial orders in order to further develop ‘executive’ issues within their ministerial portfolio. These orders are approved by a minister without the approval of parliament or the Council of Ministers. However, they need an authorization to do so based on a government decree or a law.

10.3.2 Techniques

Mostly, EU directives are transposed into the French legal order using *incorporation* in the system (corpus) of already existing laws (rewording). Copying and transposition through referencing does not occur. Transposition through incorporation is very time-consuming. The existing system and concepts of the French legal order are maintained as much as possible. This sometimes leads to rather peculiar situations. For instance, as one official commented, it is not customary in France to include definitions in a legal text.⁸⁶ For more recent directives, which start by defining the most important concepts, these definitions are not included in the French text. In addition, if a directive is transposed through law, the introduction of a new bill is often used to add elements of national policy, which are not necessary. These new elements may trigger additional discussion, which could cause delay.

⁸⁵ *Loi n° 2004-237 du 18 mars 2004 portant habilitation du Gouvernement à transposer, par ordonnance, des directives communautaires et à mettre en œuvre certaines dispositions du droit communautaire, JORF 19 Mardi 2004.* This law delegates the government to transpose 20 directives, which contain ‘legislative’ issues, by ordinance.

⁸⁶ A problem already identified in the 1990 communication of Prime Minister Rocard.

France also uses two other techniques:

1. the introduction of an omnibus bill (*DDAC*), which transposes a number of directives, and
2. transposition through the passing of a law (*loi d'habilitation*) delegating the government to pass measures (ordinances) to transpose a number of directives.

10.3.3 Character and level of implementing measure

In France, there is little information available concerning the use of these instruments in transposing directives. The SGCI and the various line ministries keep track of the directives that still need to be transposed. The moment this has been achieved, the information about the transposed directives is no longer preserved. The general perception is that about 40% of the instruments used to transpose directives are laws (including *DDAC* and ordinances). About 60% are government decrees and ministerial orders. Here it is important to point out that some directives may require both the introduction of a law and decrees since they cover both 'legislative' and 'executive' issues. Furthermore, based on the existing French legal system, the transposition of a directive may require the change of several instruments due to the hierarchical specification of legal norms. A directive may require a change in law, government decrees and ministerial orders since it introduces general legislative principles next to executive principles, which both have to be further specified by additional decrees or ministerial orders.

The latter is often referred to as the cascade-model, which is typical for French law. The legal system is regarded as a hierarchical system of norms in which similar but new norms need to be specified in the same way as already existing ones. This way of categorizing legal norms may contribute to coherence, but is, at the same time, rather time consuming.

10.3.4 Specific instruments

In addition to the 'regular' legal instruments mentioned in Section 10.3.1 no other specific instruments are used in France.

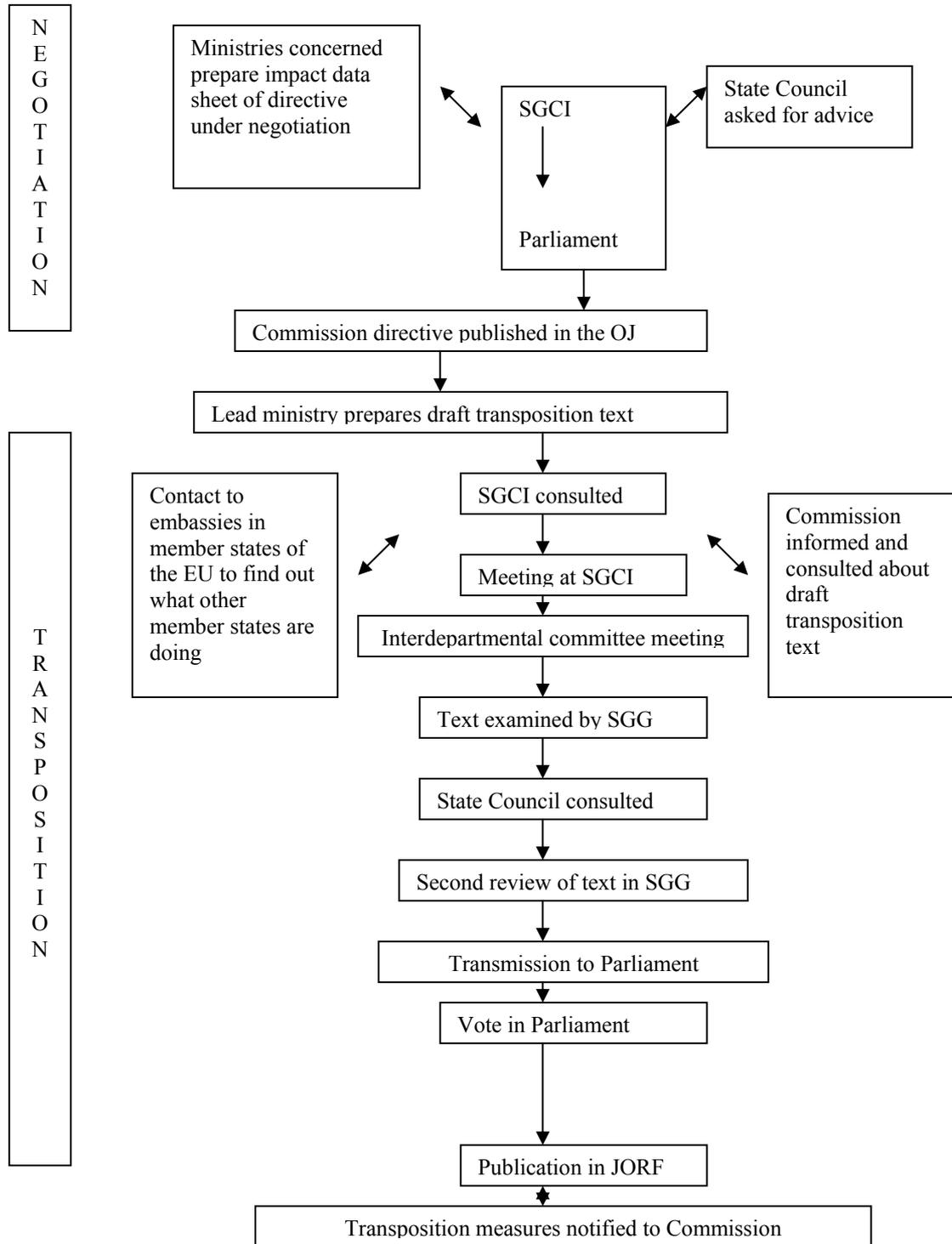
10.4 The national policy cycle concerning directives

10.4.1 General overview of the process

In the French EU policy cycle, the central government takes the lead. The general coordination on EU policy is in the hands of the *Secrétariat Général du Comité Interministériel pour les questions de coopération économique européenne* (SGCI), which one of the interdepartmental coordination units under the supervision of the Prime Minister.⁸⁷ The SGCI is responsible for European Affairs, while other units focus on different issues. The SGCI has a staff of about 180 persons. The desire of successive presidents to influence European issues has meant that the President has paid close attention to the organization and work of the SGCI. On occasions the head of the SGCI '...has been a personal friend and collaborator of the President' (Elgie, 2003: 111-2). At the same time, since 1958 the Secretary General of the SGCI has always been the personal adviser for European affairs of the Prime Minister.

⁸⁷ Such as the *comité interministériel pour la société de l'information* or the *comité interministériel sur la sécurité routière*.

Figure 10.1: Transposition of EU Texts into National Law under Circular 27 September 2004



Source: Based on Sauron (2000: 135).

With regard to transposition, another coordination unit is also important, the *Secrétariat Général du Gouvernement* (SGG). The SGG is in charge of the coordination of the making of law and government decrees in the administration. It is an administrative partner of the Prime Minister's cabinet. With regard to both the preparation of the French position on new Commission initiatives and the transposition of adopted directives, SGCI and SGG have to work together as their responsibilities overlap. While SGCI is functionally involved with European issues, SGG manages, among others, the national measures to transpose EU directives into the French legal order.

This 'dual' responsibility for EU directives translates into an additional coordination structure that has been recently installed as part of the Prime Minister's communication on transposition: the interdepartmental committee. It is a network of about 20 people—*les hauts fonctionnaires de transposition*, i.e. civil servants including the legal directors and the secretary generals of the ministries, representatives from the SGG and the SGCI.

Finally, within the Ministry of Foreign Affairs there is a special post of the Junior Minister for European Affairs (*Ministre Délégué aux Affaires Européennes*). This minister and her supporting unit are responsible for the horizontal coordination of French policy-making in the EU has, however, little power in the transposition process whatsoever.

The French coordination of the policy process concerning EU directives can be briefly characterized as a rather formalized process, which is coordinated by several bodies: although the SGCI takes the lead in coordinating the French position on new Commission initiatives, SGG is involved since new Commission proposals may have consequences for the French legal order. At the stage of transposition, the responsibilities of SGCI and SGG become even more interconnected. Furthermore, the Junior Minister for European Affairs within the Ministry of Foreign Affairs seems to have taken responsibility in presenting overviews of the progress in transposition to the line ministries. Finally, the recently installed interdepartmental committee, which meets once per two to three months, brings together these different actors as well as the line ministries. Figure 10.1 presents an overview of the French policy process concerning directives.

10.4.1.1 National preparation of Commission initiatives

There is hardly any systematic and early discussion of Commission initiatives in the French political and administrative system. The SGCI, with the help of the Permanent Representation, keeps itself informed about major Commission initiatives. This may lead to the presentation of important Commission papers to the administration and sometimes Parliament. However, there is no systematic way in which information on (all) forthcoming Commission proposals is collected and channeled through the French administration.

10.4.1.2 National treatment of Commission proposals

In the negotiation phase in Brussels, the SGCI is the supreme coordinating authority. Under Article 88-4 of the French Constitution, the SGCI receives draft texts of Commission measures from the Permanent Representation in Brussels. When agreement on the French position is reached, the SGCI communicates the position to the Permanent Representation. Line ministries or bodies such as the SGG do not formally communicate with the Permanent Representation. All correspondence is sent by the SGCI. The cooperation between the Permanent Representation and the SGCI includes the 'drafting of alternative proposals for the

negotiations as part of the Council working parties, additional expert advice from the line ministries on technical matters, and legal advice on some of the proposals' (Sauron, 2000: 88-89). In this way, the SGCI functions as the linking pin between the national administration and the negotiations in Brussels, maintaining consistency in the French position throughout the EU legislative process.

After receiving the draft texts of Commission measures from the Permanent Representation, the SGCI sends these proposals immediately to the State Council and the SGG. The State Council has to determine the legislative or executive nature of these drafts. It has seven working days from receipt to inform the SGCI and the SGG of its findings. The determination of the boundary between legislative and executive contents often causes agitated discussions in the State Council, since the reasons to classify an issue as 'legislative' or 'executive' are not fixed and may differ per policy area. The distribution of fire arms is, for instance, covered by a law from 1936 which indicates that it falls under 'executive'.

The SGCI's role in the negotiation phase is to achieve the coordination of the French position on the proposal among the various ministries involved. The SGCI selects the line ministries and starts discussions in ad hoc committees typically at middle-management/expert levels which are formed for each Commission proposal. In these discussions, the SGCI plays an important role in shaping the French position by raising questions above and beyond what Ministries will suggest as possible positions and by balancing a range of conflicting arguments in order to achieve a consensus is the SGCI primary goal at this stage. If needed, key issues may be brought to the attention of the Ministers' advisers and Prime Minister's advisers for 'political' arbitration. The most affected line ministry will act as the 'leading' ministry in the process, but often this includes two or sometimes three different ministries. The leading ministry (or ministries) sends its opinion on the principles of subsidiarity and proportionality (if they apply) to the SGCI. Within one month after dispatch of the draft measure to the lead ministry, the latter prepares an assessment of the implications of the proposal and how it will affect French law. The results of this assessment together with other key data on the proposal are organized as an impact data sheet (*fiche d'impact*).⁸⁸ This data sheet identifies the difficulties with the proposal including those related to the transposition of the current proposal into national law. If the assessment suggests that the proposal may raise important transposition problems, the SGCI seeks advice from the State Council.

Hence, in the early stages of the negotiation, the French representatives to the working groups of the Council are often not fully equipped with the detailed legal impact assessment of the Commission's proposal or of possible amendments.

Within 24 hours of receiving the advice of the State Council, the SGG sends to the presidents of each chamber of parliament the draft text of the Commission proposal which has provisions of a legislative nature, together with the opinion of the State Council. Parliament lists these proposals in the parliamentary information bulletin (Sauron, 2000: 110). After being informed by the SGG, the SGCI also distributes to the EU select committees of the two chambers of Parliament the opinions of the State Council on those drafts which do not contain provisions of a legislative nature.

A reduced version of the impact data sheet or *fiche* is sent to Parliament for those proposals that were labeled as *légitimative*. During the negotiations in Brussels start, the SGCI checks whether Parliament has indicated an intention to adopt a position on a proposal based on the *fiche*. The National Assembly and the

⁸⁸ The impact data sheet as used within the administration is sometimes more detailed than the one sent to Parliament.

Senate, however, have to adopt an opinion if the Commission's proposal falls under Article 88-4 of the French Constitution. Otherwise, it does not have a compulsory mandate. In general, Parliament 'rarely' discusses new Commission proposals based on the fiches. If Parliament, however, has indicated its intention to adopt a position on the proposal but fails to react while agreement of a proposal by the Council of Ministers is expected (6 weeks according to the Treaty of Amsterdam), the minister responsible for the negotiations or the Junior Minister for European Affairs can ask Parliament to accelerate their examination.

During the negotiations in Brussels, the impact data sheet may need to be updated, especially if the Commission proposal is substantially amended by the member states during the negotiations in the Council working parties. This update, however, is not systematically pursued. The updates in quality and never include any financial assessment at the negotiation stage.

10.4.1.3 National transposition

Until 1986 there had not been a central mechanism for coordinating the transposition of EU directives in France. In his 1986 communication Prime Minister Rocard transferred this additional task to the SGCI and the SGG which made the coordination between these two institutions crucial for swift transposition.⁸⁹ This coordination of the transposition process was fine tuned in the subsequent communications of the Prime Ministers Rocard (1990), Jospin (1998) and Raffarin (2004) and is summarized in Table 10.2.⁹⁰

The preparations for transposition normally start after the agreement on a new measure by the EU and its publication in the Official Journal. The SGCI allocates the task of transposing the directive to the ministries which have already participated in shaping the French position. Again preferably one, but often several ministries have the lead in this process of preparing legal measures reducing the autonomy of the lead ministry. The leading ministry, other relevant line ministries and the SGG are informed about the proposal. The leading ministry, and possibly some of the other line ministries affected by the directive, start preparing the measures to transpose the directive. The way in which the various ministries handle transposition varies, however, and is not based on similar rules of procedure. As Sauron (2000: 138) indicates 'no ministry has a central structure with the task of ensuring the sound integration of EU law into the positions adopted by the ministry, and attempting to prevent legal disputes arising'. In practice, ministries have not reviewed their structures with the demands of EU work in mind, but rather they have been concerned not to disturb the internal administrative balance between the old central directorates. This runs counter to the earlier communications of the prime minister of 9 November 1998 and 27 September 2004, which state that 'the central administration should include a clearly identifiable structure, specifically responsible for overseeing transposition in all the areas for which the ministry is responsible.' As the communications indicate, 'this role may, for example, be given to the directorate responsible for legal affairs or for international affairs.' However, most ministries do not have a legal affairs unit at the level of a directorate or as a staff unit of the minister. The only exceptions seem to be the ministries of Foreign Affairs, Defense, and Economy and

⁸⁹ *Circulaire du 23 janvier 1986 relative a la procédure de suivi de la transposition des directives communautaires en droit interne .*

⁹⁰ *Circulaire du 25 janvier 1990 relative a la procédure de suivi de la transposition des directives communautaires en droit interne ; Cirulaire du 9 novembre 1998 relative a la procédure de suivi de la transposition des directives communautaires en droit interne ; Circulaire du 27 septembre 2004 relative a la procédure de transposition en droit interne des directives et décisions-cadres négociées dans le cadre des institutions européennes.*

Finances (see also Sauron, 2000: 140-1) and Agriculture, National Education and the Interior, traditionally having *direction des libertés publiques et des affaires juridiques* which comes close to legal affairs units.

The SGCI also informs the Junior Minister for European Affairs or the responsible minister about how the possible resolutions of the parliament were taken into account during the negotiations, if the proposal, or parts of it, were labeled as ‘legislative’.

Table 10.2: Main stages and average time frame for transposing EU directives in France: laws, government decrees and ministerial orders

Stage	Actor	average duration	law	decree	order
1 Allocation of administrative responsibility	SGCI		•	•	•
2 Preparation of draft text	Lead ministry	<i>3 months</i>	•	•	•
3 Comments on draft text	Other ministries interested	<i>2 weeks</i>	•	•	•
4 Discussion of draft text	Interdepartmental meeting		•	•	•
5 Distribution of text	SGG		•	•	•
6 Advice on delicate legal issues	State Council		•	•	•
7 Examination of text in SGG	SGG	<i>2-4 months</i>	•	•	•
8 Parliamentary review and approval	Committees in National Assembly and Senat	<i>6 weeks</i>	•		
9 Consultation with interest groups	Interest groups and compulsory advisory bodies	<i>3-6 months</i>	•	•	
10 Check by interested ministries	Ministries	<i>2- 4 months</i>			•
11 Compulsory rule to inform the cabinet about a ministerial decree	Cabinet	<i>Several hours to a couple of weeks</i>			•
12 Reinforcement	President of the Republic	<i>15 days</i>	•	•	•
13 Forwarding of legislative text for publication			•	•	•

Then, regular meetings at the SGCI allow for interdepartmental discussion, coordination and approval of the proposals prepared by the ministries. The ministries must draw up a time-table for the transposition process within *3 months*. In choosing the ‘type of legal instrument that will be appropriate for the transposition of the directive’, the lead ministry must take into account the opinion of the State Council—which was presented at the beginning of the negotiation process—if the directive is one of those on which it has been consulted under the procedure laid down in the communication of 21 April 1993 on the application of article 88-4 of the Constitution. If there is persistent disagreement on such measures, the prime minister can be asked to resolve the dispute.

Two activities come together at this point: (1) the impact data sheet, prepared at the start of negotiation and containing detailed information on how the new directive affects French law and which legal instruments need to be adapted or added in order to comply with the obligations based on the new measure; (2) the implementation table to be prepared during the transposition process by the SGCI and the Junior Minister for European Affairs, i.e. the impact data sheet is reworked into an implementation plan for the stage of transposition in which the text becomes more elaborated and precise (Sauron, 2000: 136). The circular of 9 November 1998 introduced the procedure according to which the SGCI sends a list of all pending directives directly to the SGG every six months. The SGG should ‘...draw it to the attention of the relevant members of the Prime Minister’s cabinet, and to the director of the cabinet of each minister and junior minister concerned.’ The SGCI attends the regular meetings with the directors of the cabinets of all ministers to agree on their work programs (including the transposition of directives) organized by the SGG. During these meetings SGCI brings transposition deadlines to the attention of the cabinets and may resolve some of the

difficulties. If there are disagreements between ministries, the Prime Minister's cabinet can be asked to intervene, and the SGG will arrange a meeting.

It is the responsibility of the SGG to send the drafts of the most important national legislative texts to the appropriate administrative sections of the State Council. In practice the State Council considers all laws and regulations before they reach the agenda of the French Cabinet, and also about half of all regulatory decrees before they are published (Sauron, 2000: 139). Because of the missing experience and lack of legal services, Sauron argues that the quality of work of ministries differs considerably. Whereas the drafting quality of the big, old, traditional ministries like justice, economics and finances and foreign affairs is high, the drafting quality of the rather new, inexperienced and smaller ministries is low (environment). Advice is given in the form of a new draft text based on the draft prepared by the government and a note explaining briefly the reasons for any disagreement with the text originally proposed. The government, then, has to choose between its initial text and that of the State Council. The SGG has to be particularly careful to take account of the advice when it has concluded that a proposed legal provision is unconstitutional or that a provision within a decree is contrary to a law. Normally, the advice is followed, fearing otherwise that the text will subsequently be rejected or annulled either by the State Council judicial sections or by the Constitutional Court.

The circular of 27 September 2004 results in a new simplified structure for the set-up of the impact data sheet. In order to speed up the delivery of the study, they are directly sent to parliament. The SGCI, then circulates it to the other ministries involved which have 2 weeks to react. Then, there is a meeting of representatives of ministry of lower-level (international and European affairs civil servants in each ministry) conducting a provisional and conservative assessment. In the past the SGCI was very conservative in these meetings, addressing only those questions asked by the ministries themselves. Then, on the Cabinet-level the instruments are discussed in several rounds and more political issues are addressed.

Then, normally, the SGG sends the draft text to the Parliament which has to vote in both chambers in favor, first, in the permanent committee under which supervision the text fall and then in the full plenary. Here, the consultation with interest groups and compulsory advisory bodies is important and time-consuming. Although hearings and consultations of advisory bodies and interest groups cannot change any text of the national legislation, they are compulsory and cause considerable delay: *3 to 6 months* (Philip, 2004).

Moreover, the compulsory rules to inform the cabinet of the Prime Minister about a ministerial decree before it can be published in the Official Journal causes additional delays between *several hours and up to 2 to 4 months*.

Once it has been finally adopted, the Act of Parliament is transmitted to the Government. The President of the Republic promulgates the Act within fifteen days of its transmittal. Before this period has expired the President may still ask Parliament to reconsider the Act or some of its provisions. Lastly, an Act of Parliament may be referred to the Constitutional Council, before promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty deputies or sixty senators. Any statute or statutory provision, found unconstitutional cannot be promulgated or implemented.

The transposition process in France may also involve the consultation of French representations in the other member states to find out how they transpose the directive, and if there have been any difficulties they have encountered (Sauron, 2000: 136). Such enquiries yield information on the legal position in the other

member states, and thus enable the transposition in France. It takes this information into account and avoids putting national operators at a disadvantage by comparison with their competitors. This procedure may be preceded by consultation with the Commission, either on a voluntary basis, or as a requirement of the EU text. In these cases the relevant DG of the Commission is asked for advice on the text of the draft national law.

10.4.2 Bureaucratic consultative and coordinating bodies

The main administrative consultative and coordinating bodies in the French administration on EU law are:

- the *Secrétariat Général du Comité Interministériel* (SGCI), which coordinates the preparation of the French position during the negotiations in Brussels and the transposition of directives in the French administration;
- the *Secrétariat Général du Gouvernement* (SGG), which is the general coordinating body with regard to the making of law and government decrees;
- the interdepartmental committee on transposition (*réseau interministériel des correspondants de la transposition*), which has been recently installed based on the 2004 communication of Prime Minister Raffarin; and
- the Junior Minister for European Affairs, who plays a role in the monitoring of the progress in transposition and supervises whether the line ministries keep to the time-tables made at the beginning of the transposition process. He also cooperates with the SGCI on the preparation of the overviews on a quarterly basis which are used in the interdepartmental committee on transposition and eventually the Council of Ministers for ‘naming and shaming’ the laggards.

The most important body with regard to the preparation and the implementation of EU policy is SGCI in collaboration with the SGG. SGCI is an administrative unit under the prime minister without much political authority, whereas the SGG is the administrative arm of the Prime Minister. Coordination of these two institutions is important for successful transposition of EU law. The SGCI arranges meetings with each ministry two or three times a year to review the progress in transposition of each directive. At these meetings line ministries are asked to commit themselves to a precise time table for transposition. The SGG scrutinize and delivers draft text back and forth to the State Council and the Parliament.

Since 1993 the SGCI maintains an overview of all directives requiring transposition (implementation table). Regularly updated, this overview allows SGCI to check whether line ministries are respecting the time-table for transposition envisaged in each directive. This data-base also provides information on how the workload associated with transposition is divided between areas in which parliamentary law is required and those in which governmental regulations will suffice.

Based on the recent communication of Prime Minister Raffarin, a new interdepartmental coordination body is installed in 27 November 2004 in order to improve the coordination and France performance on transposition.⁹¹ It consists of an informal group of about 20 people, the *hauts fonctionnaires de transposition*, i.e. senior managers (either the legal director of the Secretary General of the Ministry, the Secretary General of the SGG and the Secretary General of the SGCI joined by some personal advisers to key Ministers. Stressing that every member of government to be responsible for their deficit as from that

⁹¹ *Circulaire du 27 septembre 2004 relative à la procédure de transposition en droit interne des directives et décisions-cadres négociées dans le cadre des institutions européennes, JORF 2004 2 octobre 2004.*

date⁹² the interdepartmental committee on transposition is in charge of the preparation of transposition. Its members are of the line ministries and of the political cabinets of each minister. The committee is jointly chaired by the SGCI and the SGG. The committee supervises the implementation of EU legislation by regularly discussing detailed overviews on the progress of transposition. It aims to ‘coordinate’ the coordinators as well as motivate the line ministries in making progress. The relative autonomy of the line ministries, the existence of several coordinating bodies, the infrequent meetings of the overarching interdepartmental coordination committee, and perhaps the still insufficient political backing for introducing more substantial changes within the administration, makes the French coordination structure on transposition rather weak.

Based on one of these reports presented in the transposition interdepartmental committee by the Junior Minister for European Affairs, there are rather substantial differences in the performance of individual ministries. Whereas the ministry for Agriculture handles transposition quite efficiently, traditionally autonomous ministries, such as the ministries of Finances and Economic Affairs lag behind. Based on a recent overview 83 directives⁹³ were not transposed on time. They were distributed over the various line ministries as follows:

- Economy, Finance and Industry: 28 directives
- Environment: 13 directives
- Agriculture: 9 directives,
- Health and Family: 9 directives,
- Transport and Tourism: 9 directives
- Justice: 7 directives,
- Education and research: 3 directives,
- Interior and Security: 2 directives,
- Employment and Social Cohesion: 2 directives,
- Culture and Communication: 1 directive

So far the committee has met three times, suggesting that it meets once per two to three months. The last three meetings could identify 14 directives whose transposition problematic was resolved immediately.

10.4.3 The role of compulsory advisory bodies

Three compulsory advisory bodies can be identified in the French transposition process: the State Council, interest groups and the Economic and Social Affairs Council. One of the standard and traditional procedures within the French administration is the consultation of the ‘chronically work-overloaded’ State Council by the SGG on legislative proposals while they are in preparation. There are two options of action: First, the State Council concentrates on determining whether the text will require legislative action or can be dealt with by government regulation. And second, the State Council gives its opinion in a very short space of time, eight days on average (Sauron, 2000: 120). Moreover, an emergency procedure has been established to respond very rapidly to the SGG and the SGCI when the latter indicates that a decision by the EU Council of Ministers is imminent. It is the responsibility of the SGG to send the drafts of the all national legislative texts

⁹² Already mentioned in the circular by Michel Rocard from 1990.

⁹³ *Communication de Mme Claudie Haigneré, Ministre déléguée aux Affaires européennes sur la transposition des directives.*

to the appropriate administrative sections of the State Council. In practice the State Council considers all laws and regulations, before they reach the agenda of the French Cabinet, and also about half of all regulatory decrees before they are published.

Although hearings and consultations of interest groups cannot change any text of the national legislation, they are compulsory and cause considerable delays (especially relevant in the field of health and environment). According to Philip (2004) these delays are on average between *3 to 6 months*. Philip argues that it would be preferable to have consultations with interest groups during the negotiation phase and not afterwards. First these interventions come too late and could be held earlier during the preparation of the national negotiation position. Second, the institutionalized meetings often cause delay due to their low frequency. The *Commission spéciale des installations nucléaires de base secrètes* and the *Agence française de sécurité sanitaire des aliments*, for example, meet only once a year. The committee of public health meets every three months.

The Economic and Social Council is a consultative assembly. It does not play a role in the adoption of statutes and regulations, but advises the lawmaking bodies on questions of social and economic policies. The executive may refer any question or proposal of social or economic importance to the Economic and Social Council. Before adopting statutes, Parliament may consult the Economic and Social Council; this body, comprising the whole range of the country's economic and social forces, is regularly entrusted with studies on the major economic and social issues affecting the life of the nation. According to Articles 69-71, the Economic and Social Council, on a reference from the Government, gives its opinion on such government bills, draft ordinances or decrees, and Members' bills as have been submitted to it. A member of the Economic and Social Council may be designated by the Council to present, to the parliamentary assemblies, the opinion of the Council on such bills or drafts as have been submitted to it. The Economic and Social Council may likewise be consulted by the Government on any economic or social issue. Any plan or program bill of an economic or social character shall be submitted to it for its opinion.

10.4.4 The role of parliament

The French Parliament has hardly any influence in the bargaining phase whereas during the transposition process it can delay the process considerably. Still during the bargaining process in Brussels, the French Parliament is immediately informed via a *fiche* of new Commission proposals. The items on the French fiches are presented in Table 10.3. Next to information about the background and legal base of the Commission proposal, the *fiche* includes an assessment of the impact of the proposal on the French legal order, the relevance of the proposal to France and the initial position of the government, based on the discussions between the line ministries and the SGCI, on the proposal.

The *fiche* sent to parliament is based on the impact data sheet, which is made to assess how the proposal affects the French legal order. Parliament only receives fiches for proposals with 'legislative' content. The impact data sheet is primarily an administrative instrument, which is the basis of the less detailed and more concentrated *fiche*. The quality of the fiches, and the underlying impact assessments, however, varies considerably and is sometimes not reliable. Moreover, they do not include any assessment of financial and administrative issues related to the proposal. Apparently, members of Parliament hardly use the fiches to prepare their opinion on the new Commission initiatives. Instead, they meet with representatives from the SGCI and the ministries concerned in order to make their recommendation and stay in regular contact with the attachés of the National Assembly and Senate at the Permanent Representation of France in Brussels.

Since 2003 the government aims to intensify the debate in the preparation phase with the help of monthly consultations with the parliament. Parliament can discuss with the government the French position during the negotiations, but parliament cannot impose its will on the government, or presents the government with a mandate for the negotiations.

Table 10.3: Contents of French fiches

1	resumé of content, background and objectives
2	judicial base
3	assessment of proposed legislation
4	special France’s interest in the proposal
5	position of the government

The government has to comply with a period of one month in which parliament has the chance to present its position, before taking its final bargaining position in the European Council. The Delegation on European Affairs has 6 weeks to draft recommendations on the report sent to parliament by the SGG. The latter sends the comments as soon as possible to the SGCI, which on its turn has to ask Parliament to present a report. During this period, the French delegation negotiation a proposal has to ask for a scrutiny reservation until the recommendation of Parliament is available. If the Parliament’s deadline to adopt an opinion passes the parliamentary reserve is lifted because its lack of action.

During the transposition phase, in most cases bills are transmitted by the SGG for consideration to the Parliament. A rapporteur is appointed and after studying the bill presents a draft report or opinion. Bills are included on the Assembly's agenda by the Chairmen's Conference, which meets each week under the chairmanship of the President of the Assembly. Its other members are the Vice-Presidents, the chairmen of standing committees, the general rapporteur of the Finance Committee, the chairman of the Delegation for the European Union, the chairmen of political groups and a representative of the Government. The Chairmen's Conference determines the agenda for the following three weeks. Precedence is given to discussing bills in the order determined by the Government. The Constitutional Act of 4 August 1995 specifies, however, that precedence is given at one sitting per month to business determined by the Assembly; by a resolution carried in March 1998 the Chairmen's Conference may determine how the items remaining on this agenda are to be debated.

After debating the committee adopts the report recommending either adoption of the bill or rejection. Government bills are debated on the basis of the text proposed by government. After closure of the general debate, the bill is considered clause by clause. On each clause, any amendments are first debated and voted upon, and then the clause itself, when all clauses have been considered in turn, the chairman puts the entire bill to vote. Consideration of a bill on the floor of the Assembly may also be dealt with more rapidly. Changes made in the Assembly’s rules of procedure in March 1998 introduced the simplified examination procedure. Before it is finally adopted by Parliament, a bill must be passed in identical terms by both assemblies. If the Senate amends a bill brought from the Assembly, the Assembly has to reconsider the clause amended (*navette*). This shuttle procedure can take up to 3-4 months.

10.4.5 The role of other, subnational or functional governments

Subnational governments do not play a role in the process of transposition. Transposition in France is an activity in the line ministries of the central government. Since France does not have functional governments, they do not play a role either.

10.4.6 The role of interest groups

The interest groups are normally consulted by the lead ministry, i.e. relevant lobby groups, unions, employees- and employers organizations (*partenaires sociales*) and the plenary sessions. However, their opinions are not binding on the government. New text proposals cannot be considered. This is extremely frustrating for all affected and, moreover, cause considerable delays (3 to 6 months according to Philip, 2004).

10.5 Analysis of instruments

10.5.1 Advantages and disadvantages of instruments

Timeliness. The rather slow and often late transposition of EU directives in France is not a direct result of the lacking of special legal instruments, which may increase the speed of the transposition process. Although a substantial number of directives are transposed through lower-level instruments, that is, government decrees and ministerial orders, two possibilities exist to adopt legislative measure at rather short notice. These possibilities are:

- an authorization law (*loi d'habilitation*), which provides the government with the authority to adopt ordinances. This instrument helps since it bypasses a lengthy political debate in both chambers of Parliament and the shuttling of a proposal back and forth between the National Assembly and the Senate. An ordinance only needs to be approved by Parliament in a yes-no vote, without the possibility of amendment. In 2000 50 directives were transposed using this instrument, in 2004 an authorization law was approved for the transposition of 23 directives. For important political issues like telecommunication and transport the government prefers to use ordinances;
- a package law (*DDAC*), which includes the legislative measures transposing of a number of directives. The use of a package law helps to coordinate the order of the day in the parliament. Whereas the National Assembly could be monthly convened to vote on legislative measures to transpose EU law, the *DDAC* procedure accommodates the parliament's organization of the hearing plan. Twice a month for half a day the parliament has reserved time to examine package laws, which helps to speed up the parliamentary procedure to adopt a new law. In contrast to ordinances, the package law follows the normal parliamentary procedure, which also means that members of parliament may propose amendments. The package laws are mostly reserved for politically non-controversial and often technical directives. In the last couple of years about three package laws have been introduced per year.

Interestingly, ministerial orders are often adopted at a very late moment despite the fact that the preparatory procedure is rather straightforward. Often the delay is caused by the obligatory consultations with stakeholders, which is based on the specific, national law regulating a policy area. Based on these provisions, the independent consultative bodies have to review proposed measures. The ministry or the government cannot impose any pressure on them resulting into a rather uncontrollable delay in transposition.

Completeness. In France the completeness of transposition (that is, are all elements from the directive included in the national legal instrument) is not associated with specific instruments. At the same time, ministers decide how many different ministerial orders they want to adopt in order to fully transpose. Since these decisions are no further assessed, there may exist some omissions.

Clarity for those involved and practicability. As such the adoption of specific instruments does not have so much an impact on the clarity of the rules to executive agencies and courts. The use of several government decrees and ministerial orders to transpose a directive is intended to place those elements of a directive there where similar national rules are located. It therefore intends to improve the clarity of the French legal system. It is difficult to assess whether these intentions have the desired effect.

Flexibility. When introducing a new directive amending a previous directive in the same field, the use of government decrees and ministerial orders provide for more flexibility in the sense of being able to change existing rules at, in principle, rather short notice (except when extensive consultations with institutionalized stakeholders are required). As indicated, the procedure of introducing new law requires more time, which reduces flexibility.

Ordinances do not lead to more flexibility the moment these rules need to be: the initial delegation of lawmaking power to the government applies only for a number of specific directives. The moment one of these directives is amended, the amendments need to be introduced by law if they involve 'legislative' issues. In other words, the flexibility of ordinances is, with regard to 'legislative' issues, the same as law.

Systemic purity of the legal system. Maintaining systemic purity is not so much related to the use of the different legal instruments. It is more related to the French method of extensively re-writing the text of a directive (See Section 10.5.2).

10.5.2 Advantages and disadvantages of techniques

The techniques and methods of transposition in France are best characterized as extensively re-writing the text of a directive in order to introduce it as closely as possible to existing French law. Sometimes re-writing leads to a complete overhaul of the text with the risk that its meaning is affected. Furthermore, the new rules included in the directive are located there where similar French national rules are found. This mostly requires the adoption of several legal instruments, including government decrees and ministerial orders. In addition and due to the existence of linkages between different laws or regulations, additional decrees and/or ministerial orders need to be adapted. This 'snowball' effect in changing French law is often referred to as cascade. A large number of new measures may originate from the introduction of only one new directive.

By re-writing the text of the directive and introducing it there where it best fits to existing French law has the advantage of preserving the consistency of the French legal order. The disadvantage of this method is, is that the contents or the intentions of a directive may change in the process of transposition. Moreover, it also comes at the expense of extensive and foremost time consuming work, including the adoption of multiple legal measures per directives, which contributes to the slow speed of transposition.

As some observers have indicated, the French tradition does not include definitions of key concepts in a legal text, which causes problems when directives include rather precise and detailed definitions of the main concepts used in the directive. This has led to a greater awareness to comment on the text of a proposal for a directive at the stage of the negotiations in Brussels. The impact data sheet, which is made the moment a new Commission proposal is released, needs to pay attention to these complications. Moreover, the advice of the

State Council at this stage could also be used in order to renegotiate the text of the proposed directive. This may speed up the subsequent process of transposition.

Since other techniques are rarely used in France, they are not included in our assessment.

10.6 Analysis of national policy process

The coordination of the preparation of the French position in Brussels as well as the transposition of EU directives is in the hands of the SGCI in cooperation with the SGG.

At the start of the preparations for the negotiations, the State Council prepares an advice on whether the proposal contains ‘legislative’ and/or ‘executive’ issues. This distinction is important to the procedure that will be followed, that is, whether or not parliament needs to be involved in the discussion on the directive. If directives refer to ‘executive’ issues, parliament does not play a role in the shaping of the French position. If a proposal contains ‘legislative’ issues, Parliament may issue a recommendation to the government, which may affect the French position.

The line ministries have to assess the Commission proposal, which results into an impact data sheet (*fiche d’impact*). However, the quality of these assessments varies. Moreover, these assessments are not always made, or not on time. As Philip (2004: 52) shows, from the 47 proposals sent to the National Assembly between 1 September 2003 and 18 June 2004 only 26 proposals included an impact assessment. From January 2002 on the line ministries are obliged to make these assessments within three weeks after the release of the new Commission proposal. Here several problems within the French administration become appeared:

- ministries are rather autonomous in France and often there are several ministries that are ‘leading’ in the process of preparing (and later transposing) Commission proposals;
- the organization of legal expertise varies substantially within the ministries. Moreover, there is sometimes a lack of a central juridical service which could support or monitor the legal work.

These problems are also present at the stage of transposition. Moreover, the civil servants in charge of the negotiations are hardly involved in the preparation of the legal measures. When finished, the transposition is moved to another unit within the ministry. Moreover, there exists the impression that the French administration hardly consults the European Commission in relation to transposition, while consultations could help to identify and solve problems.

More in general, the transposition process in France is complicated and therefore often delayed due to a number of reasons, which all seem to be mutually dependent:

- the substantial autonomy of the line ministries and the fact that sometimes several line ministries take the ‘lead’ in the preparatory and transposition process⁹⁴;
- the rather unsystematic way in which legal expertise is organized within the line ministries;
- the excessive consultations with stakeholders based on French national law at the stage of transposition;
- the existence of different priorities within the administration, which do not always provide high priority to transposition, or lead to the inclusion of additional unrelated issues in a legislative proposal that could delay the process due to extensive parliamentary discussion;

⁹⁴ In the cases of directives 2000/53 and 2003/17 two ministries were about taking the lead in the transposition process. Being asked Philip, ‘who is in charge of the transposition process?’, none of these ministries seemed to take the leading part which does not facilitate swift transposition (Philip, 2004: 52).

- the involvement of different coordinating bodies, like SGCI and SGG, which may have different priorities in the process of passing legal measures through the Council of Ministers and, in the case of law, through Parliament. Furthermore, both SGCI as well as SGG organizes *ad hoc* meetings with the line ministries to monitor the progress of work. These meetings are often ‘*doublées pour être suivies d’effets*’ (Philip, 2004: 62), which reduces the effectiveness of coordination;
- the limited political power of the junior minister for EU Affairs, who is involved in monitoring the progress on transposition and reports to the Council of Ministers. This minister is not in the position to stand up against the line ministries (or their ministers);
- limited involvement of Parliament at the negotiation stage leading to sometimes extensive discussions in parliament on legislative proposals transposing directives that are labeled as *législative*.

Based on these factors France performance remains rather poor despite the fact that the SGCI has substantial capacity, the State Council is involved at a very early moment to assess how the proposed measures affect the French legal order, and the government obliges the ministries to use impact data sheets and implementation plans to guide their work on new Commission directives.

Recently, the French government has introduced some changes in the coordination of transposition. These include

- the assignment of high-level officials responsible for transposition in the various line ministries, including a member of the (political) cabinet of each minister, and
- regular discussions between these officials on the progress on transposition in the newly installed interdepartmental committee on transposition (*réseau interministériel des correspondants de la transposition*).

The new committee meets one per two to three months to discuss and resolve bottlenecks in the transposition process by ‘naming and shaming’. The Junior Minister for EU Affairs leads these discussions and presents the results on transposition, which also be discussed in the Council of Ministers. At the moment, the work of the junior minister seems to be supported by the prime minister. It remains an open question whether this system will improve the French performance, especially since the political will to improve the performance of the line ministries seems to be crucial. Both the European Commission and Philip suggest that France needs to make transposition a national political priority, like Spain, Portugal and Ireland (Philip, 2004: 60).

As mentioned before, the national parliament is hardly involved in the preparation of the French position on new Commission initiatives. First, the distinction between ‘legislative’ and ‘executive’ in French law means that Parliament’s role is limited to ‘legislative’ Commission proposals. Second, although Parliament may adopt recommendations on Commission initiatives, which could shape the French position in Brussels, the government is clearly in the lead with regard to these negotiations. Discussions on new EU measures are concentrated at the stage in which the government introduces legislative proposals to Parliament. At that point, and in view of the delay in transposition that has accumulated during the preparatory administrative phase, the introduction of an authorization law might be necessary to avoid any further delay in the process and possible Commission infringements. However, Parliament perceives this as a way to avoid discussion on issues that are regarded as important to Parliament.

10.7 Conclusions

- In France different legal instruments are available, which would allow the government to transpose EU directives in a swift and timely manner. First, the distinction between ‘legislative’ and ‘executive’ spheres

in French law provides the government with autonomous power to adopt measures to transpose directives or parts of directives that refer to ‘executive’ issues. Second, for ‘legislative’ issues, the instrument of authorization law (*loi d’habilitation*) allows the government, after parliament’s approval, to transpose directives through ordinances in areas where law is required. Despite these possibilities, the French performance is far from impressive.

- In case of emergency, the government proposes an authorization law in order to transpose a list of directives in a short period of time. Based on this law, the government is able to adopt ordinances on legislative issues which later have to be approved by Parliament (in a ‘yes-no’ vote). A major drawback of the use of this instrument is that Parliament feels that it is bypassed by the executive on legislative issues.
- Another often used technique is the package law or *DDAC*, which transposes a number of non-controversial directives preferably in a similar or related policy area. This package law is often more swiftly passed through Parliament than separate laws transposing each directive individually since it only requires the scheduling of one *projet de loi* instead of several. The technique is mostly used for rather technical issues which, in the French legal order, need to be introduced by law.
- The French legal system makes a distinction between ‘legislative’ and ‘executive’ issues, that is, issues that need to be regulated by law or by government regulation. If directives refer to ‘executive’ issues, they can be directly transposed by government independently from parliamentary approval. If a directive contains ‘legislative’ issues, it requires change in law through a parliamentary procedure and, most likely, the adoption of government decrees and/or ministerial orders.
- The process of drafting the French position in Brussels as well as the transposition of directives at a later stage is a detailed, formalized procedure in which the SGCI plays a key coordinating role, while with regard to the development of national implementing instruments supplemented with the SGG, which monitors the making of national law and decrees. Despite:
 - the substantial capacity of the SGCI;
 - an early involvement of the State Council to present advice on the way in which a proposed measure can be transposed in the French legal order;
 - the use of an impact data sheet (*fiche d’impact*) in the stage of the negotiations in Brussels containing information of the expected effects of the proposed measures to France and the French legal order and the development of an implementation plan at the beginning of the stage of transposition, which presents an overview of the work that needs to be done, including a time table;
 the performance of France remains rather poor.
- Recent changes in France focus on:
 - the assignment of high-level officials responsible for transposition in the various line ministries, including a member of the (political) cabinet of each minister;
 - regular discussions between these officials on the progress on transposition in the newly installed interdepartmental committee on transposition (*réseau interministériel des correspondants de la transposition*);
 - which meets one per two to three months;
 - to discuss and resolve bottlenecks in the transposition process by ‘naming and shaming’; and
 - where the junior minister for EU Affairs presents the results to the Council of Ministers;
 - supported, at the moment, by the Prime Minister.

It remains an open question whether this system will improve the French performance, especially since the political will to improve the performance of the line ministries seems to be crucial.

- Complications in the French system, which may delay transposition include:
 - The substantial autonomy of the line ministries, which translates into the fact that often more than one ministry takes the lead in the transposition process as various legal instruments need to be prepared to transpose the contents of one directive;
 - The rather unsystematic way in which legal expertise is organized within the line ministries;
 - Excessive consultations with stakeholders based on French national law;
 - The existence of different political priorities within the administration, which do not always provide high priority to transposition, or lead to the inclusion of additional unrelated issues in a legislative proposal that could delay the process due to extensive parliamentary discussion;
 - The involvement of different coordinating bodies, like SGCI and SGG (in particular the cabinet of the Prime minister), which may have different priorities in the process of passing legal measures through the Council of Ministers and, in the case of law, through Parliament; and
 - The limited political power of the junior minister for EU Affairs, who is involved in monitoring the progress on transposition and reports to the Council of Ministers.
- The techniques and methods of transposition in France are best characterized as extensive incorporation (that is, re-wording of the directive). There is a strong preference of maintaining the current structure of French national law and putting the contents of a directive there where similar elements are found based on national priorities. Moreover, the French legal tradition sometimes goes up against the drafting of some directives leading to a complete overhaul of the text with the risk that its meaning is affected.

Appendix: List of interviewees

- Christian Philip, Member of Parliament, National Assembly.
- Thierry Anjubault, Administrator, Delegation of the European Union, National Assembly.
- Jean-Michel Linois, Cabinet Deputy Director of the Junior Minister for European Affairs, Ministry of Foreign Affairs.
- Jean Maïa, Legal Counselor and *maître des requêtes* of the State Council, SGCI.
- Serge Lasvignes, Director of the General Secretariat of the Government, SGG.
- Xavier Lapeyre-de-Cabanes, *Chargé de mission* for defense and foreign affairs, SGG.
- Jean-Luc Sauron, Professor at IEP Strasbourg and *maître des requêtes* at State Council.
- Isabelle Pingel, Professor of European law, Panthéon-Sorbonne Université Paris 1.
- Philippe Manin, Professor of European law, Panthéon-Sorbonne Université Paris 1.

11 Spain

11.1 General overview of the constitutional and political system

11.1.1 Constitutional characteristics

Spain joined the European Union in 1986. From this moment, Community law ranks above Spanish national law. This is partly an effect of Community law itself, but also a result of Articles 93 and 96 of the Spanish Constitution which defines it as a comprehensive monistic system. In view of Spain's accession to the EU the relationship between the Constitution and Community law has been extensively discussed. Based on this the principles of precedence and direct applicability of EU law are well established in the Spanish constitutional order.⁹⁵

11.1.2 Political characteristics

Spain is a parliamentary monarchy. The King is head of state, but has in constitutional terms little political power. In accordance to the principle of separation of power, the power of the state is divided among parliament, government, and the courts.

The national parliament or *Cortes* has two chambers:

- the upper chamber or *Senate* (259 members, of which 208 members are elected by provinces, and 51 members appointed by the Legislative Assembly of each Autonomous Communities);
- the lower chamber or the *Congress of Deputies* (with 300-400 members).⁹⁶

Effective parliamentary influence lies almost exclusively with the lower chamber or Congress. In particular, Congress alone designates the prime minister, and hence indirectly the entire cabinet.⁹⁷ Although both chambers may be used to initiate legislation, Congress ultimately approves legislation and in doing so may override concerns from the Senate. According to observers, the Spanish parliament has failed to act as an effective scrutinizer of government for much of its recent history.⁹⁸ It rather serves as a compliant channel (Heywood, 1995: 100). The relative dominance of the government over parliament, and to some extent also

⁹⁵ As Villiers (1999: 145-6) indicates, the autonomy and precedence of EU law vis-à-vis Spanish law are pragmatically founded on (at least) five arguments: (1) the conscious acceptance of the *acquis communautaire* (including the precedence rule) as one of the conditions to Spain's accession to the Union, (2) Articles 93 and 96 of the Constitution, (3) the jurisprudence of the European Court of Justice, (4) the signing and ratification of the EC and EU Treaty by Spain (and the subsequent limits to national sovereignty), and (5) the fact that the Community is established for an indefinite period of time.

⁹⁶ The law (ley Orgánica del Régimen Electoral General de 19 de Junio de 1985) establishes the number of 350 deputies. The Congress is based on the d'Hondt system of proportional representation, favoring larger parties over smaller ones (Heywood 1995: 165-7; Newton and Donaghy 1997: 46). The Senate is based on a first-past-the post or majority system (Newton and Donaghy 1997: 47). Regardless of the population size of the province 208 senators are elected directly by voters (each mainland province elects four senators, the island provinces elect three, and the cities of Ceuta and Melilla elect two senators each). Additionally each region appoints through its Legislative Assembly one senator, plus one more for every million inhabitants living in the respective region, resulting in 51 regional representatives in the Senate (<http://www.senado.es>).

⁹⁷ The President of the Government composes the cabinet.

⁹⁸ Depending on the prime minister the Congress has one day per week to have a session to control the government. See the 'control instruments' on their website: <http://www.congreso.es>.

over the judiciary, is shaped by a number of factors. First, executive dominance is a result of the Constitution, which provides the government with regulatory authority to adopt executive measures in accordance with the Constitution and existing laws (Article 97). In addition, the proportional electoral system developed in the Constitution did not lead to the envisaged coalition or minority governments but a succession of single party governments.⁹⁹ Moreover, the discipline within the party in government proved to be much stronger than expected, increasing the power of the government.

As a consequence, actual political power in the Spanish system is concentrated in the hands of the prime minister or, in terms of the Spanish Constitution, the *President of the Government* and the *President of the Council of Ministers*. Elected by Congress, the prime minister enjoys considerable powers and can only be dismissed from office by a constructive censure motion or resign if Congress withholds its confidence from the government. Nonetheless, political reality leaves some room for varying outcomes: Adolfo Suarez, for example, did not succeed in imposing his will on the government, while Felipe Gonzalez, who won the 1982 elections, became one of Spain's most dominant figures (Heywood, 1995: 91).

The Constitution recognizes and guarantees the principle of autonomy of nationalities and regions. As a result three different levels of government exist for which the Constitution specifies their domain. These levels are the state, Autonomous Communities, and municipalities.¹⁰⁰ At the same time, the Constitution stresses the un-separable and indivisible unity of the Spanish state. This makes Spain formally a unitary state, while the way in which autonomy has been granted to the 17 Autonomous Communities and the cities of Ceuta and Melilla suggests materially that Spain is a federal system (Schagen and Koelman, 2003: 1).

The Autonomous Communities as well as cities have considerable competences in areas such as spatial planning, environmental protection management, social assistance, public safety, public health, culture, tourism, sports, language teaching, and some issues in the area of agriculture.¹⁰¹ The actual authorities of the Autonomous Communities and cities are selected as part of their Statute of Autonomy (*Estatutos de Autonomía*), which are adopted by national parliament as organic law. As these statutes are developed and adopted on an individual basis, the selected competences of Autonomous Communities vary. Navarra and the Basque Country are authorized to levy taxes, while Catalonia and the Basque Country have their own police force. Moreover, non-endorsed competences remain with the state, and, more specifically, central government. Given the type of competences that have been granted to them, the Autonomous Communities implement approximately 20 per cent of the rules enacted by the European Union (Schagen and Koelman, 2003: 10), which seems a considerable amount. Yet, the proportion shows as well that it is the central government that plays a major role in the transposition process¹⁰².

⁹⁹ Spain has had a number of minority governments and coalition governments. Spain's current prime minister Rodríguez Zapatero, for example, was elected with the votes of PSOE and a few minor parties.

¹⁰⁰ Four on islands (Canary Islands and Balears) where the '*cabildos*' represent the island and are elected for a period of four years.

¹⁰¹ See Article 148 of the Constitution for these competences. Article 149 lists the exclusive competences of the state.

¹⁰² Even in cases in which the Autonomous Communities have the exclusive competence to transpose directives.

11.1.3 Political administrative characteristics

Central government consists of the prime minister, his deputies (currently two: Maria Teresa Fernandez de la Vega who is first deputy prime minister and minister of the presidency, and Pedro Solbes, who is the second deputy prime minister and minister of economy), ministers, and any other members appointed by *real decreto* signed by the prime minister and the King. Even though the Constitution allows government to include members other than ministers, this provision has never been used.

The prime minister is the central and most important post in government. Ministers are *subordinate* to the prime minister since their positions depend on the prime minister who can propose the appointment and dismissal of his ministers. At the same time, they are relatively immune from parliamentary pressures since parliament cannot force their resignation by censure motion. Furthermore, ministers are not necessarily members of the governing political party. They cannot combine their ministerial post with a membership of parliament; when a member of parliament becomes minister his/her post goes to a substitute on the list.

In contrast to the prime minister and, at times, his deputy, who both may have a general political responsibility, each minister is responsible for a specific portfolio or policy area. In addition, the Constitution provides for the appointment of ministers without portfolio.

While the ministries prepare draft legislation and government decrees, ministers need to submit these proposals to the *Council of Ministers*, which is the weekly meeting of all ministers chaired by the prime minister. The decision making in the Council is prepared in various Council committees of which the prime minister and his deputy are automatically members. In addition to laws and decrees, which are issued by government as a whole, ministers are authorized to issue by themselves ministerial orders.

EU membership has affected the Spanish political-administrative system, although, according to some, these changes have been rather modest (Closa and Heywood, 2004: 59). Interestingly, Molina (2001) argues that EU membership has led to a reinforcement of the executive's role in the Spanish political system. First, through EU membership, the executive could position itself above parliament, political parties and the civil society in Spain. Second, membership has encouraged a further presidentialization of the country's policy style, strengthening the hierarchically superior position of the prime minister vis-à-vis ministers.

11.2 Political or public discussion concerning EU directives and their transposition

11.2.1 Discussion of recent reports and their recommendations

In view of the rather impressive performance of Spain on transposition, as revealed by the Internal Scoreboards of DG Internal Market and the overall scoreboards of the General Secretariat of the European Commission, no recent reports have emerged on these issues. At the same time, there are some informal and not yet politically visible discussions about the way in which Spain is transposing directives.

The General Secretary of European Affairs of the Ministry of Foreign Affairs is currently preparing a proposal to introduce a general and unified procedure for the transposition of directives, which includes when to start transposition, what advices need to be included on legislative instruments to be used, and which agencies have to be consulted. The General Secretary is also trying to establish discussions with political parties with regard to laws implementing EU directives. These discussions aim to provide parliamentarians more information on their margins with regard to the original proposal. Alternatively, an option is to use more often the instrument of authorization law (*ley de bases*) for rather technical directives or directives that

do not allow for further ‘national’ interpretation. However, parliament has some reservations with regard to the government’s use of this instrument.

Another discussion is on whether the government should have a broader authority. Presently the Spanish *Potestad Reglamentaria* (Article 23 of *ley 50/1997 de 27 noviembre, del Gobierno*), which indicates in which instances a law is required, is under discussion in the State Council. Since the use of government decrees and ministerial orders is limited to develop existing law, it cannot be used for incorporating new elements which are not covered by existing law. Revision of the *Potestad Reglamentaria* allowing for a broader introduction of autonomous government regulations (*autonomos reglementos*), that is, extending the possibility to use government decrees or ministerial orders in transposing EU directives, could increase the power of the government to transpose EU directives without further involvement of parliament. This discussion in Spain is related to the current discussion in the Netherlands of providing broad and rather open delegation clauses to the government in order to transpose directives in the areas of telecom, gas and electricity. The reasons for considering this possibility is that some directives are very technical and do not offer any possibilities for national interpretation. As more and more directives resemble European regulations, it becomes questionable whether parliament needs to be involved in the putting into national law of these directives. The main advantage of the introduction of such an instrument is that transposition can be done in a speedily way. The major disadvantage of the proposal concerns the reduction in national democratic legitimacy.

Alternatively, the *decreto-legislativo* offers the government similar advantages, although they still require the decision of parliament to delegate its legislative power. In the case of a *decreto-legislativo* delegation has to be arranged in each specific instance, which allows parliament to check whether the directive indeed does not lead to any national discretion in the national adoption process.

11.2.2 Expectations regarding the process and results of these discussions

Current discussions have a rather limited scope and are mainly located in specific institutions. It is not expected that under the current circumstances—a rather impressive performance of Spain in the Commission scoreboards—much will be changed.

An additional issue here is that the ministries in Spain are rather autonomous in the transposition process. The existing coordination structure, which will be described in Section 11.4.2, draws on a high-level, frequently arranged assessment of the ministries’ progress in transposing directives. Each line ministry is therefore strongly motivated to organize its internal working processes in such a way that the job is done on time. The Maritime Marine DG, for example, reformed its organization and working processes in 1999, which had a positive impact on the timely transposition of directives (Asser Institute, 2004c: 14). More in general, as Molina (1997), Dastis (1995: 349) and Closa and Heywood (2004: 65) suggest, EU membership has encouraged a further departmentalization of the Spanish administration. Each line ministry has strengthened its functional specialization and developed vertical networks in its policy sector. Not surprisingly, the rather different individual efforts and the relative autonomy of the various ministries have not yet resulted in the development of a ‘best practice’ manual or strict guidelines on transposition in Spain.

11.3 Description of judicial instruments and techniques

11.3.1 Instruments

The Spanish legal system is a hierarchical one, meaning that laws of lower jurisdiction cannot conflict those of a higher jurisdiction. Apart from the 1978 Constitution, international agreements¹⁰³ and rules of the Autonomous Communities, the available legal instruments are the following (from higher to lower level ones):

- law (*leyes organicas* and *leyes ordinarias*),
- governmental dispositions ranked as laws (*reales decretos-leyes* and *reales decretos-legislativos*), and
- government regulations (*reglamentos*), which include government decrees (*reales decretos*), ministerial orders (*ordenes*), resolutions (*resoluciones*), instructions (*instrucciones*) and communications (*circulares*).

The main characteristics of the Spanish legal instruments are summarized in Table 11.1.

The extent to which the various Spanish legal instruments are used to transpose EU directives that are currently in force is presented in Table 11.2. It appears that government decrees are the most popular transposing instrument. With regard to all transposing instruments that are used, 42% is of this type. The government decrees are followed by ministerial orders, which rank second with 40%. The usage of law is limited. Ordinary law ranks third and is used in only 11% of the total number of instruments employed for transposition. The table also indicates that organic law (0.6%), *decreto-ley* (0.6%) and *decreto-legislativo* (2.6%) are rarely used as transposition instruments. Similarly, resolutions, instructions and communications are hardly ever used in Spain.

Organic and ordinary law (Articles 81-92 Constitution)

The constitution requires that specific issues including the statutes founding Autonomous Communities and electoral issues, as well as fundamental rights and the others established in the Constitution, are regulated by organic law. The adoption or change of organic law requires an *absolute* majority in parliament. For ordinary laws, that is, all other issues regulated by law, a *simple* majority suffices. The initiative to issue a bill for ordinary law can be taken by government, each chamber of parliament, Autonomous Communities, or based on an initiative of 500.000 voters. Governmental bills are referred to as *proyectos de ley* as opposed to *proposiciones de ley*¹⁰⁴, which refers to all other initiatives. More precisely, depending on their status within the administration (depending on issues), governmental bills are—before they passed the Council of Ministers—labeled as *ante-proyecto de ley*, while after approval of the Council of Ministers the bill has the status of *proyecto de ley*, and becomes *ley*, after the approval of parliament.

Considering government bills, the Senate which as a rule has two months to veto or amend a bill, can be called to deal with it within a fixed period of time. Article 90.3 of the Constitution authorizes government to label a bill as ‘urgent’, which imposes stricter deadlines on its treatment. Congress knows a similar

¹⁰³ International agreements become part of Spanish law immediately after they have been officially announced in Spain.

¹⁰⁴ The Assembly of the Autonomous Communities can ask to the Government to adopt a ‘*proyecto de ley*’, or it can send to Congress (*Mesa del Congreso*) a ‘*proposición de ley*’, which needs to be supported by at least three members of the Assembly in order to become a proposal.

emergency procedure as part of its standing order (*procedimiento de urgencia*), which allows for a reduction of the review term by half (Prakke and Schutte, 2004: 814).

Table 11.1: Spanish legal instruments

	<i>Ley organica</i>	<i>Ley ordinaria</i>	<i>Real decreto-ley</i>	<i>Real decreto-legislativo</i>	<i>Reglamentos</i>		
					<i>Real decreto</i>	<i>Orden</i>	<i>Resolucion, Instruccion, Circular</i>
	Organic law	Ordinary law	Law-by-decree	Delegated law by decree (based on <i>ley de bases</i>)	Government decree	Ministerial order	Resolutions, instructions, communications
Main features	Issues for which the Constitution calls for settlement through organic law (including Statutes of Autonomy and electoral law)	All other cases	Emergency measure ranked as law	Delegated government decree ranked as law on issues of which Parliament has given its approval	Provisions issued by government without explicit authorization through law	Provisions issued by the minister without explicit authorization through law	Provisions issued by the minister without explicit authorization through law
Advice State Council	Required	Required	Required	Required	Required	Required	Required
Parliamentary approval	Required	Required	Required, Parliament must approve within 30 days after release	n.a.	n.a.	n.a.	n.a.
Procedure	Absolute majority in Parliament	Simple majority in Parliament	Emergency procedure*	Decision by the Council of Ministers on a proposal of a minister, which is based on basic or ordinary law**	Decision by the Council of Ministers on a proposal of a minister		
Remarks			Temporary decree, sometimes used in case of an infraction procedure against Spain	Decree based on delegation law specifying concrete goal and time period (<i>ley de bases</i>)			

* Enactment of urgency laws leaves room to summon the Senate to shorten its review term from 2 months to 20 days. Similarly, parliament may delegate its review competence to the standing parliamentary legislative committee herewith replacing plenary meeting of both Houses.

** Article 82 of the Constitution provides parliament power to delegate substantial legislative competence to the government by law (*ley de bases*).

Real decreto-ley

Based on Article 86 of the Constitution, the government may issue a special type of decree with the status of law in case of *extraordinary* and *urgent need*. The provisions of this so-called *real decretos-ley* are directly applicable, but they may not affect the legal system of the basic state institutions, civil rights and freedoms of citizens, the Autonomous Communities and the general electoral law. Furthermore, the law-by-decree is temporary since it must be immediately submitted to parliament, particularly Congress. Concerning the treatment in Congress the following rules apply:

- Congress must be convened, if not already in session, and take a decision on the decree within 30 days;
- Congress must ratify the decree or repeal it using a special summary procedure (as provided in the standing orders of Congress);

- Congress may process the decree as a government bill by means of the urgency procedure, which implies that the treatment of the bill is delegated to a parliamentary committee which decides on the proposal in only one reading.

The law-by-decree procedure is sometimes used in cases of the start of an infraction procedure against Spain. It is however a rather weighty and as such regarded as an unlawful instrument for ironing out transposition delays (Nanclares and Castillo, 2003: 30-1).

Table 11.2: The use of various legal instruments for the transposition of EU directives in Spain

Legal instrument		%
<i>a/ instruments at the level of law</i>		
Organic law	Ley organica	0.60%
Ordinary Law	Ley ordinaria	11.41%
Temporary law-by-decree	Real decreto-ley	0.64%
Delegated law-by-decree	Real decreto-legislativo	2.59%
<i>b/ lower-level instruments</i>		
Government decree	Real decreto	42.06%
Ministerial order	Orden	40.31%
Resolution	Resolucion	0.88%
Instruction	Instruccion	0.02%
Communication	Circular	0.80%
Decree (before 1976)	Decre	0.70%
Total		100%

Source: Subdirectorate General de Asuntos Juridicos, D.G.C. de Mercado Interior y Otras Politicas Comunitarias, Secretaria de Estado de Asuntos Europeos (situation on 23 February 2005).

Real decreto-legislativo

A second type of law-by-decree is based on a clear and preceding authorization by parliament. As Article 82 of the Constitution indicates, parliament may delegate the government the power to adopt a decree with the status of law. This legislative delegation must be granted by the legislator by a

- authorization law (*ley de bases*) if the objective is to draw up texts comprising various articles, or
- ordinary law (*ley ordinaria*) if the objective is consolidating several existing legal texts into one (Article 82.2 Constitution); in this case existing laws are put into one derogating the old laws.

The delegation law has to express the concrete matter and range of delegation and a fixed time period within which the government is authorized to adopt a measure (Article 82.3 Constitution). In addition, delegation expires as soon as the decrees are adopted.

With regard to transposition, this instrument has been used in order to transpose a large number of directives during the Spanish accession to the EU. Law 47/1985 (*Ley de Bases 47/1985 de 27 diciembre, para la delegación al Gobierno para la aplicación del Derecho Comunitario*) made it possible that the government could transpose 68 EU directives and 3 EU decisions by changing 36 national laws. This work was done through the adoption of 15 decretos legislativos in a period of merely 6 months (Nanclares and Castillo, 2002: 31, note 110).

This large-scale adoption of directives by using the instrument of a law-by-decree has had no successors. The general opinion is that this instrument should only be used for rather exceptional circumstances. Parliament is rather reluctant to provide government with the power to draft laws since it is no longer involved and it could lead to unwanted measures.

Moreover, the *decreto-legislativo* is as an instrument not very suitable for the speeding up of transposition in case of a single directive. The passing of a *ley de bases* requires time and effort and will further delay the preparatory process leading to the adoption of the *acquis communautaire*. Furthermore a *decreto-legislativo* is said to be inflexible. Amendments to a directive that has been transposed through a *decreto-legislativo* have to be transposed through law or *decretos-legislativos*, if the relevant issues are regulated by law. In this respect, the passing of law is regarded as a preferred instrument since it could be adopted within a similar timeframe. With regard to rather detailed directives which resemble EU regulations and do not provide for further national choices and other adaptations, the *decreto-legislativo* is considered as the way to go.

Reglamentos

In Spain, the government is entitled to issue provisions of a regulatory nature, which as Prakke and Schutte (2004: 796) indicate, provide the government “a general right to regulate for the execution of laws”. This is the so-called *potestad reglamentaria*, which is the general competence of the government to issue regulations for the execution of a law, also if this law does not ascribe this competence (Article 23 of *Ley 50/1997, de 27 noviembre, del Gobierno*).

Based on this competence, the government may adopt decrees and ministerial orders that further develop issues covered by a law. These measures do not require specific delegation within the law in question (or ‘parent’ law). Furthermore, the lower-level regulations must be in accordance with the Constitution and existing law (Article 97 Constitution). An ordinary judge, instead of the Constitutional Court, may assess the (constitutional) legality of these measures.

Due to the existence of a multitude of laws in Spain, the government often has the possibility of transposing directives through government decrees (*reales decretos*) and ministerial orders (*ordenes*). If, however, a directive includes elements that are not regulated by Spanish law, or elements that are not consistent with Spanish law, it is not possible to transpose the directive through governmental regulations. The government has to introduce a new law through a parliamentary procedure. The introduction of law is also required if transposition requires the introduction or amendment of crimes, offenses, sanctions or fines or other public charges which are not already enforced through existing legislation.

Depending the importance of the issue, the government may choose to transpose a directive either through a *real decreto* or authorize a minister to regulate certain issues by ministerial order, which are hierarchically lower than decrees and typically regulate, for example, the dispatch of ships, while the settlement of boundary recognition for guaranteeing the ship’s crew’s security, calls for a *real decreto*. Unlike decrees which have to be adopted by the government in a meeting of the Council of Ministers, an order may be based on a decision by a single minister. Similar to laws, decrees as well as orders that transpose directives require an obligatory advice of the State Council.

Incidentally, directives are transposed through lower-level measures while it is not clear whether the elements introduced in this way fit to the scope of existing national law. This may raise questions about the legality of some of these measures.

11.3.2 Techniques

Mostly, EU directives are transposed into the Spanish legal order using the following techniques:

- *One-to-one transposition* or copying; and

- *One-to-one with some (terminological) adjustments*; these adjustments refer mainly to the introduction of legal terms that are commonly used in Spanish law and which have not been incorporated in the text of the directives as published in the Official Journal. These adjustments are regarded as necessary in order to relate the requirements of the directive to Spanish law, but the general impression is that too often the European Commission is not willing to accept these changes in terms. As a consequence, the more literal copying of directives which is imposed on the ministries creates potential frictions in Spanish law. Especially, in the case of commercial and civil law problems occur since the Spanish legal tradition differs strongly from the one embedded in EU directives.

To a lesser extent the Spanish use:

- *Incorporation* in the system (corpus) of already existing laws (rewording), and
- transposition through the passing of a law (*ley de bases*) delegating the government to pass a number of measures.

The Spanish rarely use a package law to transpose several directives (the only example is *Ley de Bases 47/1985 de 27 diciembre, para la delegación al Gobierno para la aplicación del Derecho Comunitario*).

Transposition through reference is rather uncommon in Spain.

With an average of 1.7 legal measures per directive, the number of transposing instruments is limited. Often only one instrument is used. Sometimes more instruments are needed, especially if a new law or a change in law is required. The introduction of law is often combined with the introduction of a government decree or a ministerial order. With regard to the implementing measures mentioned in Table 11.2, 19% of the government decrees transposing a directive the decree is combined with the introduction of law. In a similar way, 14% of the ministerial orders, the order is combined with the introduction of law in order to fully transpose a directive. If a directive has to be transposed by the Autonomous Communities as well, the number of implementing measures often will be at least 18 (a specific law adopted by each of the 17 Autonomous Communities and at least one instrument adopted by the central government or state).¹⁰⁵

Spain does not have provisions that prescribe the method of transposing a directive ‘sec’. At the same time, many officials seem to have a rather pragmatic attitude towards transposition. If additional, national regulations do not affect the speed of transposition, they do not see the point why these regulations have to be left out. If, however, these are controversial, they will not be added. In this respect, the actual working practice seems to be more nuanced.

According to previous studies, the national additions regularly occur in the field of public health and consumer rights (Senden, 2004: 39-40). In those cases it is common to explain in the preamble of the legislative measure which parts serve to transpose the directive and which parts introduce new national legislation.

11.3.3 Character and level of implementing measure

Most transposing instruments used in Spain are of a lower level than law (about 84%). Most frequently, a directive is transposed through a government decree (42%), followed by ministerial orders (40%). The use of

¹⁰⁵ In our report on transposition we mainly focus on instruments and working practices of the central government in Spain. In the section on other, subnational, governments we further discuss the role of the Autonomous Communities in Spain. In general, the legislative action of the Autonomous Communities is confined to further development of national transposing legislation.

law to transpose directives is limited in Spain: only in 12% of the cases of transposition, a law has been introduced (both organic and ordinary law). Law-by-decree is even rarer: *reales decretos-ley* are used in 0.6% of the cases and *reales decretos-legislativos* in only 3%. A complete overview is presented in Table 11.2. Ministerial orders are mainly used for the transposition of directives that introduce or amend technical norms and standards and as such relate to rather specific and detailed elements of national legislation. An example is the introduction of new standards and technical requirements of equipment on board of vessels, as mentioned in the report of the Asser Institute (2004c: 11).

11.3.4 Specific instruments

Spain does not use special instruments for the transposition of directives. Instruments such as instructions and communications are only used in very exceptional cases: based on all transposed directives currently in force only instructions are used in 0.02% and communications in 0.08% of the cases. Most likely, these instruments are used in combination with some of the other legal instruments.

11.4 The national policy cycle concerning directives

11.4.1 General overview of the process

In the national policy cycle concerning transposition of EU law, the central government takes the lead in Spain. The coordination of this process is in the hands of the ministry of Foreign Affairs (*Ministerio de Asuntos Exteriores y de Cooperación*). This ministry is responsible for EU affairs since the removal of the ministry of EU Relations in the early 1980s (Closa and Heywood, 2004: 62). At the same time, the process is supported by high-level administrative and political coordinating bodies:

- for the preparation of the Spanish position these bodies are the *Inter ministerial committee for EU Affairs* (*Comisión Interministerial para Asuntos de la Unión Europea*) meeting every 2 to 3 weeks and the *Delegated committee for Economic Affairs* of the Council of Ministers meeting on a weekly basis;
- for transposition and implementation the main body is the *Committee of State-secretaries and Sub-secretaries*.

The Spanish coordination of the policy process concerning EU directives can be briefly characterized as a frequently meeting monitoring structure at high administrative level with strong political backing.

11.4.1.1 National preparation of Commission initiatives

There hardly exists a systematic and early discussion of Commission initiatives in the Spanish political and administrative system. With the exception of the Permanent Representation, which keeps itself informed about major Commission initiatives, and which keeps contact with the civil servants of the ministries, each having members in the Permanent Representation, there is no systematic way in which information on forthcoming Commission proposals is channeled through the Spanish administration.

11.4.1.2 National treatment of Commission proposals

With regard to formulation of the Spanish position, the *Secretariat of State for the European Union* in Madrid, and the *Permanent Representation* in Brussels are the two principal bodies responsible for EU policymaking within the ministry of Foreign Affairs (Closa and Heywood, 2004: 62-3). Members of the

Permanent Representation, sometimes supported by civil servants from Madrid, are engaged in the negotiations in Brussels, in accordance with instructions coming from Madrid. Often these instructions are drafted by the line ministries which are responsible for implementation.

The ministry of Foreign Affairs allocates Commission proposals to a first-responsible line ministry. Only one ministry is responsible. If at this stage problems occur since a ministry does (or does not) want to be involved, the issue is discussed in a first coordination meeting among the ministries. If this meeting does not lead to a solution, advice is asked to the Secretary of State for the EU. If the participants still do not agree, the *Inter ministerial committee for the EU Affairs* is involved.

The involvement of other ministries in the shaping of the Spanish position is discussed in the *Inter ministerial committee for EU Affairs*, which is chaired by the Secretary of State for the EU of the ministry of Foreign Affairs, consists of high-level administrative officials from the different ministries, sometimes even political, and meets once per 2 to 3 weeks. At its meetings, the committee discusses which ministries need to be involved in the making of the Spanish position in the event that EU legislation involves interests of several ministries. In addition, this committee also sometimes discusses the progress in transposition and the judgments of the European Court of Justice.

The first-responsible line ministry prepares the Spanish position, partly in *ad hoc* meetings with representatives from other ministries. In this phase, and depending on the proposal, the line ministry may involve other stakeholders to put forward their views on the proposal. Especially when these groups are consulted under Spanish national law, the line ministry has to discuss the proposal with them. The State Council, which provides legal advice on draft legislation and government decrees, does not play a role at this stage. The Autonomous Communities are being consulted by the Spanish executive in this particular phase, but only if Commission proposals affect their autonomous competencies. Parliament is, at this stage, informed about the European legislation by means of a *fiche*-procedure.

The proposed position of Spain as well as unresolved issues are first submitted to the *Inter ministerial committee for EU Affairs*, which is chaired by the Secretary of the State for the EU. It confirms the proposed position or tries to find common ground for a position on the Commission proposal. If the committee fails, the issue is discussed at the weekly meeting of the *Delegated committee for Economic Affairs*. This committee is one of the subcommittees of the Council of Ministers. It includes all ministers involved in economic affairs and is chaired by the second deputy prime minister and minister of Economic Affairs (currently Pedro Solbes). The Secretary of the State of the EU assists the deputy minister. Issues related to the Justice and home affairs pillar are not discussed in this committee (and the same holds for issues related to defense and foreign affairs), but are directly referred to the Council of Ministers.

11.4.1.3 National transposition

After the adoption of the directive and its publication in the Official Journal of the European Union, the line ministry that also had the lead in preparing the Spanish position, is in most cases also the one responsible for the transposition of the directive. Usually, the same policy unit involved in the preparatory process starts the preparations for the drafting of a legal measure to transpose the directive. The preparatory work of the unit includes:

- inter ministerial consultations, which are handled through ad hoc committees composed on the basis of the earlier decision of the Inter ministerial committee for EU Affairs on which line ministries needs to be consulted;

- consultations with the relevant social and economic stakeholders towards whom the directive is directed. The unit also consults, if necessary, academics and particular advisory boards;
- in case of competences that are shared between the central government and the Autonomous Communities, also consultations are initiated (see also Section 11.4.5).

Before the proposal is submitted to the minister, it is sent for legal advice to the *General Technical Secretariat (Secretario General Tecnicos)* of the line ministry. Although variations exist, in most ministries the General Technical Secretariat plays the role of the central legislative unit which has to be consulted as part of the preparations within the ministry of legal measures. The General Technical Secretariat has to approve the proposed measure before it is submitted to the minister and possible the Council of Ministers. In the case of proposals for transposing Community legislation, whether it is through law, government decree, or ministerial order, the *State Council* has to be consulted and provides ministers with legal advice particularly regarding the issue whether a proposal is compatible with the Constitution and other national legislation (Ross, 2002; Schagen and Koelman, 2003: 3).

If the proposed transposing instrument concerns a law or a government decree, the proposal also has to pass through the *General Technical Secretariat* of the *ministry of General Affairs (Ministerio de la Presidencia)*. This Secretariat plays a more general and coordinating role in the government’s decision making process. Its main task is to coordinate and monitor the submission of proposals for discussion in the Council of Ministers. It forwards proposals to the other ministries for comments. A proposal is scheduled for the meeting of the Council of Ministers if no objections are received. If, however, substantial differences in view exist between the ministries involved, the proposal might be scheduled only if it concerns a politically important issue. Under other circumstances, the proposal will be referred back to the responsible line ministry with the instruction to settle the differences with the other ministries. An overview of this process is presented in Table 11.3.

Table 11.3: Key government meetings on transposition on a weekly basis

Monday	Tuesday	Wednesday	Thursday	Friday
		Ministry send proposal 1 to General Affairs Ministry	Time for questions and answers among ministries	Time for questions and answers among ministries
Monday	Tuesday	Wednesday	Thursday	Friday
Time for questions and answers among ministries	Proposal 1 has to be completed before 20:00 hrs. to go to the Committee.	Committee of State-secretaries and Sub-secretaries		Council of Ministers

By Wednesday the *General Technical Secretariat* of the *ministry of General Affairs* sends the available documents to all ministries, which have until next Tuesday (20:00 hrs) to make comments, while the ministry submitting the proposal may provide additional clarification. Depending on the contents of the comments, the leading ministry may have to discuss certain issues with the other ministries before it is submitted to the *Committee of State-secretaries and Sub-secretaries*. This committee discusses all proposals, which need to pass the Council of Ministers. When the committee accepts a proposal in its Wednesday meeting, it will be scheduled for the next meeting of the Council of Ministers on Friday.

The procedure for transposing EU directives does not differ from the ones used for preparing national regulations and law. Each legal initiative, whether it is inspired by national interests or EU law, follows the same procedure. The Law of 27 November 1997 (*Ley 50/1997, de 27 noviembre, del Gobierno*) provides the general framework. Regardless of the kind of directive, its nature (for instance, harmonization, basic legislation, amendment or technical standards), or the issues at stake, the Spanish do not make an *ex ante* distinction in procedure.

Table 11.4: Main stages and average time frame for transposing EU directives in Spain: laws, government decrees and ministerial orders

Stage		Actor	average duration	Law	decree	order
1	Allocation of administrative responsibility	Ministry of Foreign Affairs	1 month	•	•	•
2	Preparation of draft text	Lead line ministry	2 months	•	•	•
3	Public consultation and inter ministerial discussion	with other ministries and relevant social and economic stakeholders	2 months and sometimes more	•	•	•
4	Comment and approval	General Technical Secretariat of the line ministry	1 month	•	•	•
5	Ministerial approval	Sectoral Minister	few days	•	•	•
6	Legal assessment and comments	State Council	up to 3 months	•	•	•
7	Executive approval	Council of Ministers	?	•	•	
8	First parliamentary review and approval	Congress (Committee)	?	•		
9	Second parliamentary review and approval	Senate	20 days to ** months	•		
10	Reinforcement	King	Up to 15 days	•		
11	Forwarding of legislative text for publication		up to 2 weeks	•		

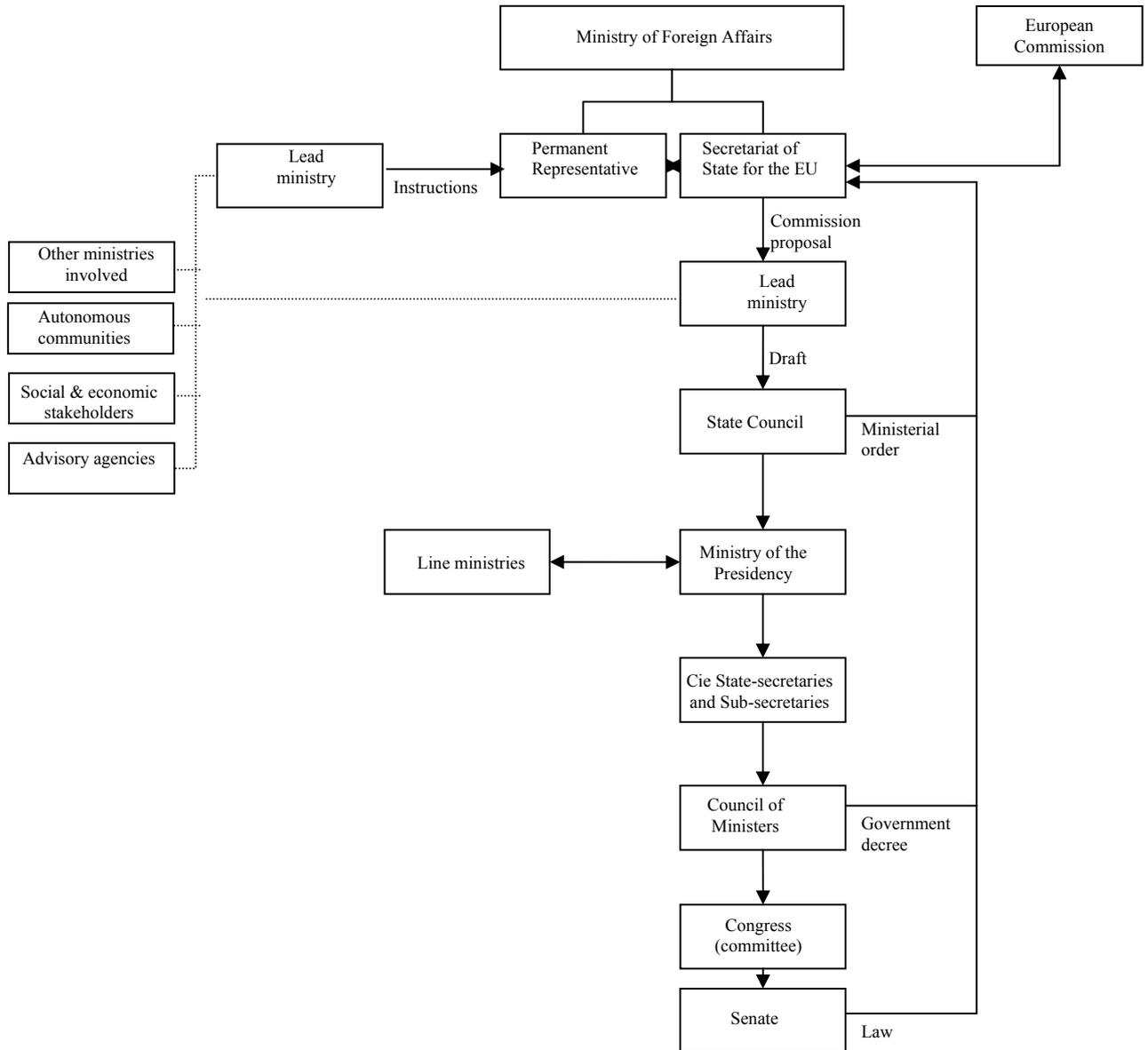
Source: the information in this table is partly based on Prakke and Kortmann (2004: 810-7) and Asser Institute (2004c: 16-7)

The main stages of the different procedures leading to law, government decree and ministerial order are illustrated in Table 11.4. This table also contains a conservative estimate about the time needed in order to conclude the various stages in the process. If a directive has to be transposed through law, the average transposition time will take about 18 months (Asser Institute, 2004c: 19). It is not so much the parliamentary procedure that slows down the process, but rather the political debate. Transposition through a government decree or ministerial order takes less time. On average a directive using one of these instruments will be transposed within about 12 months (Asser Institute, 2004c: 16-7). For the transposition of directives that introduce technical norms, for example, approximately 3 months extra time is needed. This delay is a consequence of the type of directive and the actors involved in the decision making process, that is, depending on the policy area, different consultation practices and timetables apply. It is in particular the longer consultation period with sectoral stakeholders and with other ministries that causes delay (Asser Institute, 2004c: 16).

Table 11.4 briefly indicates the procedure which parliament uses for legislative proposals. Once a bill is submitted (see also Prakke and Kortmann, 2004: 812-4):

- Congress forwards it to either its Permanent Committee (*Comision Legislativa Permanente*) or a special committee. A sub-committee, especially appointed for this task, prepares the review of the bill for the Committee;

Figure 11.1 Transposition process



- After Congress' approval, the bill will be submitted to the Senate, which has to decide within two months, or, in case of urgency procedure, within 20 days;
- If the Senate rejects the bill, Congress can overrule the Senate's rejection immediately by absolute majority, or after two months by simple majority of votes. Congress can overrule the amendments made by the Senate by simple majority;
- Acceptance of the proposal by Parliament means that the government is required to submit the bill within 15 days to the King for its reinforcement.

Two possibilities exist to accelerate the decision making process. The first option is based on Article 90.3 of the Constitution, which provides the government the opportunity to label a legislative proposal as urgent. This offers a shortened procedure for parliamentary consideration of the bill. Depending on the urgency of the transposition, completion of the parliamentary stages might run faster, yet none of these stages can be skipped (Asser Institute, 2004c: 14). The second option is the introduction of a *real decreto-ley*. However, the use of this instrument is not regarded as a legitimate one for reducing transposition delays. Finally, parliament may decide to delegate its review competence to the standing parliamentary legislative committee, which procedure replaces the plenary meeting of both Houses. The standing committee may nonetheless demand the plenary to debate and vote upon the bill.

The progress in transposition, independently whether the directives is implemented through law, government decree or ministerial order, is weekly monitored by the *Committee of State-secretaries and Sub-secretaries*, which consists of the highest civil servants from the different ministries, who are politically appointed by ministers. This committee is extensively informed about the state of affairs regarding all directives not yet transposed, including actual and projected delays and their causes. As the schedule presented in Table 11.4 indicates, the meetings of this committee are well embedded in the administration and precede the meeting of the Council of Ministers.¹⁰⁶ The ‘naming and shaming’ as part of this high-level discussion on the progress of transposition leads to a setting in which none of the state-secretaries or sub-secretaries prefer their ministry to have a problem.

Figure 11.1 presents a flow-chart featuring a directive’s course from negotiation to transposition among the main parties involved in the Spanish process.

11.4.2 Bureaucratic consultative and coordinating bodies

The transposition progress is an item which weekly returns on the agenda of the interdepartmental meeting at the highest administrative level: the *Committee of State-secretaries and Sub-secretaries*. This committee, chaired by the deputy prime minister—currently Mrs. Fernandez de la Vega—prepares the Council of Ministers. State-secretaries are the highest ranked central civil servants at a ministry. Furthermore, general-secretaries and sub-secretaries, who are responsible for a specific policy area, are rather similar with regard to their rank within the ministry (comparable with DG’s in the Netherlands). In some cases, i.e. if on the same ministry several State-secretaries are in charge of a specific domain, the sub-secretary may not be involved in the transposition process

It is the State-secretary for the EU who introduces the first substantive item on the agenda of the Committee of State-secretaries and Sub-secretaries, which is the progress in the transposition of EU directives. In the board of the *SubDG of Coordination of European Juridical Affairs* at the *Secretariat-General to the European Union* of the ministry of Foreign Affairs, a fulltime position is assigned for the preparation of this item. This official receives weekly information from the other ministries on the progress in transposition. A committee member, who is challenged about delay, will mostly see to it that his ministry

¹⁰⁶ In case of conflict between ministries about the transposition of a directive, the issue is either referred to a standing inter ministerial committee, if it concerns agriculture or health policy or to *ad hoc* committee’s initiated by the ministry of Foreign Affairs. In principle, politically important issues could be discussed at the Council of Ministers, but this hardly ever occurs.

takes the required measures. If nevertheless progress fails to occur, the ministry of Foreign Affairs reports directly to the Council of Ministers.

11.4.3 The role of compulsory advisory bodies

To assess the quality of draft legislation two different advisory bodies are important, which are the General Technical Secretariat (*Secretario General Tecnicos*) and the State Council (*Consejo de Estado*).

The *General Technical Secretariats* are staff units within each line ministry, which have technical or legal expertise. The staff of the General Technical Secretariat assesses the quality of a proposal. The policy units within the line ministries, which have the lead in the process ending in the transposition of directives, need to call for the advice of the General Technical Secretariats before their proposal can be submitted to the minister.

If the proposed transposing instrument concerns a law or a government decree, which requires the approval of the Council of Ministers, the proposal also has to pass through the *General Technical Secretariat* of the *ministry of General Affairs*.

This Secretariat plays a more general and coordinating role in the government's decision making process. Its main task as discussed in Section 11.4.1.3 is to coordinate and monitor the submission of proposals for discussion in the Council of Ministers.

The State Council evaluates the Spanish legislative initiatives in terms of legality, opportunity, quality and legitimacy. The organic law of 22 April 1980 (*Ley Orgánica 3/1980, de 22 de Abril, Del Consejo de Estado, modify by Ley Orgánica 3/2004, de 28 de diciembre*) specifies which initiatives require the consultation of the State Council. Apart from proposals involving constitutional reforms, which are initiated by other bodies than the State Council, government is obliged to obtain the opinion of the Council on:

- proposals for delegated legislation and for *decretos legislativos*;
- proposals for law (*ley*) dictating the execution, completion or development of treaties, conventions or international agreements and European Community law;
- the interpretation or fulfillment of international treaties, agreements or agreements in which Spain is part;
- the interpretation or fulfillment of acts and resolutions emanated from international or supranational organizations;
- issues of special importance recognized by the government;
- every other issue where, by law, the State Council has to be consulted.

For the transposition of Community directives the advice of the State is obligatory, regardless of the type of instrument used. Hence, apart from laws, and government decrees, also rules of a lower order (for example, ministerial orders) are reviewed by the State Council.

Although government is not required to comply with State Council's opinion, most proposals are in conformity with the Council's advice.

In its advice the Council may make two types of observations: *essentials* and *remarks*. While essentials have to be taken into account, remarks do not need to be addressed. Essentials normally refer to problems related to the Constitution or important legal principles, which, if they were not taken into account, could lead to the annulment of the law when adopted. In preparing legislation, the ministry has to report to parliament on the advice of the State Council. If the State Council has no observations, it gives an indication, which is attached to the legislative proposal.

The organic law of the State Council does not require government to consult the Council when preparing its opinion on Commission proposals. A change is not expected since the involvement of the State Council at this earlier stage of the policy process is expected to have an unwanted, delaying effect (Tribunal Supremo de España 2004: 14).

11.4.4 The role of Parliament

Parliament receives information on new Commission proposals and documents immediately after their release. Since 1994 this information is passed to Parliament through a *fiche*. The main elements of a *fiche* are presented in Table 11.5.

Table 11.5: Contents of Spanish fiches

1	area of competence and ministries involved
2	judicial base, procedure
3	background, contents and objectives
4	Assessment of proposed legislation
5	special Spanish interests in relation to the proposal
6	position of other EU members
7	proposals to change or improve the legislative proposal
8	situation and expected date of approval
9	contact person within the Spanish administration

Although parliament occasionally discusses these *fiches* and presents its views on new Commission initiatives, it is not actively involved in the preparation of the Spanish position. This observation is supported by Nanclares and Castillo (2002: 32) who indicate that parliament is less concerned with the contents of the government’s mandate, while its actions are focused on monitoring and commenting afterwards. Schagen and Koelman (2003: 10) emphasize that the Spanish parliament does not have a direct role or competencies in the European legislative process. Furthermore, Parliament’s limited involvement may be partly due to the occurrence of single party governments in Spain in combination with strong party discipline. In addition, it may be an effect of the “predominant perception of EU policy as being part of Spain’s foreign policy”, an area in which government takes the lead (Closa and Heywood, 2003: 74).

Parliament does not have special committees which deal with the preparation of the Spanish position on new Commission proposals. There is however a joint committee of Congress and Senate—*la Comisión mixta para las Comunidades Europeas*— There is however a joint committee of Congress and Senate—*la Comisión mixta para la Unión Europea*— which maintains relations between the Spanish Parliament and the European legislative bodies. During each parliamentary session the joint committee reports on its activities to both Houses. These reports include governmental guidelines and activities as regards EU policy, information on EU legislation, information on the implementation of EU law, and the creation of sub-committees (*potencias*) which are assigned to study and follow-up specific issues (Closa and Heywood, 2004: 77).

11.4.5 *The role of other, subnational or functional governments*

In the case of competencies shared by central government and Autonomous Communities, both central government and the communities play a role in the transposition process.¹⁰⁷ Shared competences may exist in two different situations (Villiers, 1999: 95):

1. the central government has a legislative competence, while the Autonomous Community has an executive competence in the field of one and the same topic, or
2. on the basis of Article 149.1 of the Constitution, the central government may be authorized to issue basic law (framework legislation), while the Autonomous Community is qualified to issue or add detailed legislation on the basis of such framework legislation.

This situation of shared competences mostly occurs for directives on issues related to the environment protection management. Disputes over the shared competences may lead to the involvement of the Constitutional Court (*Tribunal Constitucional*). For example, in case CTR 102/1995, the Constitutional Court had to give its judgment on a Spanish law (4/1989), which was meant to implement parts of the Habitat directive (92/43 EEC), an area which actually belonged to the competences of the Autonomous Communities. The jurisprudence on the division of competencies is still developing, which is a complicating factor to the transposition and implementation of some directives (see also Ross and Crespo, 2003: 227).

Mostly the central government and the Autonomous Communities start working at the same moment on the transposition of a directive for which they have shared competences. This has a positive impact on the period needed to transpose the directive, but may lead to substantial revisions at the side of the Autonomous Communities depending on the contents of the legal instrument that will be eventually adopted by central government. This practice might not be very efficient, but, at least, prevents that substantial delays occur in the transposition and implementation.

The line ministries may discuss new Commission initiatives, new directives and relevant rulings of the European Court of Justice with the Autonomous Communities as part of *sectorial conferences*. These conferences are organized by the line ministry involved (*Ley 30/92*). At these conferences, the government and the Autonomous Communities exchange views and, if possible, aim to reach agreement on how they want to proceed in transposing a specific directive. The actual transposition is in the hands of the Autonomous Communities, which, and depending on their competences, may require the introduction of 17 additional laws (one by each Community) if all communities have to transpose a specific directive.

The central government has a difficult task in directing the implementation of directives that are at the core of the competencies of the Communities. Sometimes a Community fails to implement legislation, leaving the central government relatively powerless to change the situation, although the central government will pass the more general, framework legislation. Spain was, for example, held responsible for the incomplete implementation of directive 96/62 EC (HvJEG case 417/99, Commission t. Spain, *Jur.* 2001, I-

¹⁰⁷ See Articles 148 and 149 of the Constitution, which describes the Spanish system of competences between the central government and the Autonomous Communities. Furthermore, as indicated before, the competences of these communities vary slightly, as laid down in their Statutes of Autonomy. From the 17 Communities, 2 have different economic competences and 2 have their own police force. In addition, there are some minor differences in competences between the Communities, including competences with regard to nature preservation (Basque Country and Navarra).

6015). The only way that is left under these circumstances is to impose accountability measures (including financial incentives) on the Communities that failed to correctly implement some directive.

Sometimes the reversed situation occurs in which the central government is late in transposing a directive. In those circumstances, the Autonomous Communities can transpose a directive (Article 149 Constitution) if the directive is concerned with the Communities' exclusive competences (see, for instance, Article 27 *Estatuto de Autonomía* of the Autonomous Community of Madrid). This is what one's calls 'a directive with direct effect if the central government is late'. For example, with regard to a directive on waste management, the Communities started to develop some plans before the adoption of a law at the central level. If the Autonomous Communities establish a law while the central government is, and the central law contradicts the laws adopted by the Communities, the Communities have to change their initial law. Normally, this does not happen since the Communities tend to copy the text of the directive in their legislation.

The Autonomous Communities are not yet in a position to attend the negotiations in Brussels, even though they have tried, without success, to get more involved in the making of EU law. These efforts failed partly because the Communities were unable to formulate a common view (Schagen and Koelman, 2003: 10). Yet, the Communities are consulted by the central government in this phase, but only if Commission proposals affect their autonomous competencies. Furthermore, they keep contact with the developments in the EU through their offices in Brussels.

11.4.6 The role of interest groups

Each line ministry determines with whom it will discuss draft measures, which include proposals for law, decrees and ministerial orders. Public consultations may become a bottleneck in the process especially if directives call for the involvement of socio-economic stakeholders and other ministries. In those cases, consultations tend to become time-consuming, depending on the stakeholders involved (see also Asser Institute, 2004c: 20). In general, the government aims for rather swift consultations, which may take about 10 to 15 days. At most, ministries may wait for a period of 2 to 3 months to obtain advice before they are requested by the ministry of Foreign Affairs (for instance, in the meeting of the *Committee of State-secretaries and Sub-secretaries*) to move on and speed up the transposition process.

11.5 Analysis of legal instruments and techniques

11.5.1 Advantages and disadvantages of instruments

Timeliness. The swift transposition of EU directives in Spain is not a direct result of the use of special legal instruments. In Spain directives are mostly transposed through lower-level instruments, that is, government decrees and ministerial orders.

As discussed in Section 11.4.1.3 the speed of the legal instruments used in Spain depends on whether they need to be approved by parliament or not. The adoption of law requires more time than the adoption of a government decree, while a decree requires in principle more time than a ministerial order. Additional stages in the procedure leading to the adoption of an instrument increase the risk of delay.

The Spanish legal system has a special legal instrument—the *real decreto-ley*—which is only used in situations of urgency or emergency. This instrument is sometimes used when Spain is faced with an

infringement procedure. In general, this instrument is regarded as unsuitable or even unlawful for transposition, since it is intended to deal with rather different situations.

Another special legal instrument—the *real decreto legislativo*—is based on a delegation law passed by Parliament (*ley de bases*), which specifies for which purpose the government is allowed to adopt a decree with the status of law. Since this instrument requires a separate law, its procedure is not much faster than the adoption of other laws. In addition, a change of the rules adopted by a *real decreto-legislativo* requires again the adoption of law. The advantage of this instrument is that rather detailed and mostly technical legislation can be passed without extensive parliamentary discussion.

Completeness. In Spain the completeness of transposition (that is, are all elements from the directive included in the national legal instrument) is not associated with specific instruments.

Clarity for those involved and practicability. As such the adoption of specific instruments does not have so much an impact on the clarity of the rules to executive agencies, legal advisors and the courts. The substantial number of government decrees and ministerial orders which have been used to transpose the *acquis communautaire* also do not improve the clarity of the legal system. It has led to a situation in which executive agencies, citizens, and the courts are faced with a large number of rules from various sources which potentially may challenge each other.

Flexibility. When introducing a new directive amending a previous directive in the same field, the use of government decrees and ministerial orders provide for more flexibility in the sense of being able to change existing rules at rather short notice. As indicated, the procedure of introducing new law requires more time, which reduces flexibility. The introduction previously of law-by-decree (*real decreto-legislativo*) will not lead to more flexibility the moment these laws-by-decree need to be changed: the initial delegation of lawmaking power to the government was only valued for the adoption of a decree. Furthermore, if the enacted decree has to be changed, it can only be done by law (which could be an new authorization law providing the government the authority to introduce yet another *decreto-legislativo*). In other words, the flexibility of this instrument is the same as law.

Systemic purity of the legal system. The rather pragmatic attitude towards transposition and the strong emphasis to transpose directives on time have led, according to some, to a large number of ‘special’ laws next to the more traditional ‘codes’. This developed is also fed by the European Commission’s insistence that national provisions should only include the requirements of a directive and no other provisions, including provisions that already exist on the subject matter. This makes, according to some observers, the Spanish legal system less clearly organized than one would wish. A number of related laws are sometimes consolidated in order to improve the clarity of the legal system. As one interview partner commented: “I prefer changes in present law and not the addition of yet another new law. The adoption of yet another law for the transposition of directives leads to too many laws. Put every article of a directive in its place. This avoids obsolete legal requirements which may otherwise remain to exist and require, at a later stage, codification.”

11.5.2 Advantages and disadvantages of techniques

The techniques and methods of transposition in Spain are best characterized as pragmatic. There is a preference for copying. If the main concepts used in a directive differ from the common concepts of Spanish law, one aims to reformulate some of the wording of the text of the directives. This has a positive impact on timeliness and completeness of transposition.

A problem frequently mentioned by civil servants in Spain is that the European Commission often insists on copying directives even when some of the terms used in the directive have no legal meaning in Spain. The position of the Commission has already led to the inclusion of terms in Spanish law, which are ‘foreign’ and have a rather dubious status.

Since other techniques are not or hardly used in Spain, they are not included in our assessment.

11.6 Analysis of national policy process

The coordination of the preparation of the Spanish position in Brussels as well as the transposition of EU directives is in the hands of the ministry of Foreign Affairs. The Inter ministerial committee for EU Affairs (allocation of responsibility for new Commission initiatives) and the Committee of State-secretaries and Sub-secretaries (discussion of the progress of transposition) play an important role. Still, for the discussion of concrete issues, ministries make use of ad hoc committees, which makes the overall coordinating structure in Spain rather light and informal. Line ministries have the lead in the actual work, both in shaping the Spanish position and the transposition of directives. The overarching coordination structures, which are part of the regular structure of Spanish government, provide a sufficient incentive to the line ministries to deliver on their commitments.

The administration aims to maintain a relationship between the preparatory work as part of the negotiations in Brussels and the transposition of the directive. The policy unit which is involved in the drafting of the Spanish position in the EU legislative process is mostly also the unit in charge of transposition. The Spanish line ministries regard the fact that they use the same legislative instruments and procedures for both national initiatives and EU directives as a positive feature of the Spanish system. Also the fact that all proposals of the ministry are assessed by the *General Technical Secretariat* of the ministry leads to a high level of technical uniformity and consistency.

The Spanish administration has a highly accurate and detailed monitoring system on the progress of transposition, which supports the coordination of the transposition of EU directives by the ministry of Foreign Affairs. Connected with

- a. a weekly monitoring of the progress of transposition at the level of each directive,
- b. at the highest administrative level,
- c. which includes the ‘naming and shaming’ of the ministries that are delayed in transposition (in both the prognosis and the actual passing of the deadline of transposition),
- d. which is backed by strong political will at the highest political level in Spain to transpose directives on time,

this system provides a substantial incentive to transpose directives in a pragmatic way and on time.

Another factor that may enhance the speed of transposition in Spain is the existence of an inexhaustible number of national laws and rules which facilitate a smooth integration of EU directives by means of government decrees and ministerial orders. These instruments are used in about 82% of the cases of transposition. In addition, the administration rarely decides to ameliorate or complicate the text of the directive, which means that one-to-one transposition is more or less common practice.

The national parliament is hardly involved in the preparation of the Spanish position on new Commission initiatives. With regard to transposition, Parliament plays a role if a new law has to be adopted or an existing law needs to be changed. Since this occurs only for a small number of directives, also at this stage of the policy process parliament’s involvement can be regarded as limited.

A possible complication in Spain is that in some policy areas, and specifically environmental protection, part of the *acquis communautaire* has to be transposed and implemented by the Autonomous Communities. In those cases, the central government has to rely on the Communities, which and depending on their individual enacting statutes have to take care of part of the work.

In recent years Spain's transposition rates are very high and impressive. But in spite of this achievement, the number of Spanish cases for presumed noncompliance in terms of insufficient or non implementation of the *acquis communautaire* is relatively high. This requires some further nuance about the effectiveness of Spain's performance with regard to the implementation of EU policy.

11.7 Conclusions

- The swift transposition of EU directives in Spain is not a direct result of the use of special legal instruments or techniques. In Spain directives are mostly transposed through lower-level instruments, that is, government decrees and ministerial orders.
- The Spanish legal system has a special legal instrument—the *real decreto-ley*—which is only used in situations of urgency or emergency. This instrument is sometimes used when Spain is faced with an infringement procedure. In general, this instrument is regarded as unsuitable or even unlawful for transposition.
- The other special instrument—the *real decreto legislativo*—is based on a delegation law passed by parliament (*ley de bases*), which specifies for which purpose the government is allowed to adopt a decree with the status of law. The delegation expires the moment the instrument has been adopted. Since this instrument requires a separate law, its procedure is not much faster than the adoption of other laws. In addition, a change of the rules adopted by a *real decreto-legislativo* require the adoption of a law. The advantage of this instrument is that rather detailed and mostly technical legislation can be passed without extensive parliamentary discussion.
- The Spanish administration has a highly accurate and detailed monitoring system on the progress of transposition, which supports the coordination of the transposition of EU directives by the ministry of Foreign Affairs. Connected with
 - a weekly monitoring of the progress of transposition at the level of each directive,
 - at the highest administrative level,
 - which includes the ‘naming and shaming’ of the ministries that are delayed in transposition (in both the prognosis and the actual passing of deadline of transposition),
 - which is backed by strong political will at the highest political level in Spain to transpose directives on time,this system provides a substantial incentive to transpose directives in a pragmatic way and on time.
- The techniques and methods of transposition in Spain are best characterized as pragmatic. There is a strong preference for copying. If the main concepts used in a directive differ from concepts common in Spanish law, one aims to reformulate some of the text of the directive.
- The pragmatic attitude towards transposition and the strong emphasis to transpose directives on time have as a drawback that Spain has many laws next to its more traditional ‘codes’. It makes, according to some observers, the Spanish legal system less clearly organized than one would wish. This may cause lack of

clarity and potentially inconsistency in the daily practice of applying Spanish law, which could be a problem to both courts and those who are subject to these laws.

- An additional complication in Spain is that in some policy areas, and specifically environmental protection, part of the *acquis communautaire* has to be transposed and implemented by the Autonomous Communities. In those cases, the central government has to rely on the Communities, which and depending on their individual enacting statutes have to take care of part of the work.

Appendix: List of interviewees

- Miguel Angel Navarro Portera, General Secretary for the European Union, Ministry of Foreign Affairs, State Secretariat for the European Union
- José Maria Roche, General subdirector of Juridical affairs, Ministry of Foreign Affairs, State Secretariat for the European Union, General directorat for coordination and additional Community policies
- Eleuterio Alcocer García, Ministry of Foreign Affairs, State Secretariat for the European Union, General directorat for coordination and additional Community policies
- Diego Chacón Ortiz, General technical secretary, Ministry of the Presidency
- Juan Luis Morell Evangelista, General subdirector for cooperation and international studies, Ministry of the Presidency
- Julio Carlos Fuentes Gómez, General subdirector Legal affairs, Ministry of Justice
- Miguel Herrero y Rodríguez de Miñón, ex Legal advisor, State Council
- Jesús Avezuela, Legal advisor, State Council
- Alfonso Moreno Gómez, General technical secretary, Autonomous Community Madrid
- Pedro Baena Pinedo, director of juridical and normative affairs, Autonomous Community Madrid
- Maribel Jimeno, Autonomous Community Madrid
- Carmen Lopez de Zuaso, regional lawyer, Autonomous Community Madrid

12 United Kingdom

12.1 General overview of the legal and political system

12.1.1 Constitutional characteristics

The UK has a parliamentary, bicameral system. Parliament consists of two Houses, the House of Commons - the more representative body – and the House of Lords. Both Houses are involved in the process of debating, amending, rejecting or enacting Acts of Parliament, but ever since the Parliament Acts of 1911 and 1949, the influence of the House of Lords in the legislative process in the last resort amounts to that of a suspensory veto.

The British legal system is quite different from the legal systems of some of the other Member States of the European Union. Most remarkably, the UK does not have a written constitution. This means that there is no established procedure for making changes of a constitutional character, but that constitutional conventions and constitutional law evolve over time and well from different sources (Craig and De Búrca, 2003). As regards the issue of transposition of European directives in the UK, two basic principles of the British legal system are important. Firstly, the UK has a *dualist* approach to international law. This means that international treaties, which are signed by the UK, do not automatically become part of the British legal system, but they need to be transformed into the national legal system by an Act of Parliament in order to become applicable. Secondly, there is the principle of the sovereignty of Parliament. Once this principle held – as some feel it still does - that no Parliament can bind a future Parliament. Another aspect of Parliament's sovereignty is that its will ranks above the will of government, the administration or – for that matter - the judiciary if parliamentary will has been enshrined into legislation. These connotations of Parliamentary sovereignty of course sometimes run contrary to the idea of the supremacy of EC Law.

The European Communities Act 1972 and its subsequent Amendment Acts reconcile the potentially conflicting interests of the UK dualistic tradition, the principle of sovereignty of Parliament and the supremacy of EC Law. The Act transfers sovereign powers to the EC, establishes the supremacy of Community law, and makes Community law directly applicable in the UK (Craig and De Búrca, 2003). The Act also makes it possible to implement European directives by means of delegated legislation (so called 'Statutory Instruments') on a wide scale. This might seem inconsistent with the principle of the sovereignty of Parliament. However, this is less contradictory than it appears, since Parliament can exert influence through an extensive process of parliamentary scrutiny during the negotiation of e.g proposed EC directives.

12.1.2 Political characteristics

The political institutions in the UK are characterized by a parliamentary government with the power centralized in the Cabinet supported by a majority in the House of Commons. Due to the mechanics of the parliamentary majority system, and the absence of a written constitution¹⁰⁸ substantially limiting the scope of the UK government, UK governments, supported by the majority in Parliament, are very powerful. The party mandate and party discipline system give government a strong position vis-à-vis Parliament. The relation

¹⁰⁸ The UK does have a number of statutes on discrete constitutional issues, it does however not have a written constitution in the sense of an overarching, consolidated and written Constitution.

between government and Parliament is monistic to a high extent. In addition it is extremely rare that government legislation is challenged in the courts. However, there are practical limits to the power of the government. Most importantly, the government does not have deconcentrated, local administration branches of its own, but must largely rely on other, not subordinated, bodies for the implementation of its policies. Furthermore non-governmental organisations, like trade unions, interest groups etc. are able to influence policies. Nonetheless, the UK government is one of the most powerful in Europe. The relative autonomy of the government is justified by the party mandate doctrine, according to which the government has received a mandate from the electorate that entitles it, or even requires it, to implement its party program. This severely limits the importance of the Parliament, and it also secures strict party discipline (Budge 1996).

As a result Parliament is not a strong constraint on government power. However intense the debates in Parliament maybe, they do not often have an unforeseen outcome, nor do they frequently succeed in tackling or changing government policies. The debates in the Houses do not only aim to change the minds of Members of Parliament (MPs) but also try to influence public opinion. The official opposition, the main party not in possession of government power, has a recognized role independent of the government. However, its aim in the parliamentary debates is often not to provide constructive criticism of government policy, but to win the next elections. This explains the adversarial quality of the debates.

Faced with an authoritative and powerful government it is difficult for MP's to really scrutinize government policies. So called 'official secrecy', which substantively restricts government and the bureaucracy to communicate information on government business and policies (see sections 22 through 44 of the Freedom of Information Act 2000), adds to these restraints. For example members of the civil service are not allowed to give certain information to parliamentary committees investigating government policies. These problems have, to a certain extent, been overcome by investigative journalism and select committees of the House of Commons that, for example, specialise in investigating the work of a specific ministry in a specific area. However, their work is held back internally by party loyalty and externally by official secrecy. Select committees in the House of Lords often work better, since they are less troubled by adversarial politics, and they are able to rally cross-party support. However, their influence is diffuse. Their non-elective base works to their disadvantage, and they have no final veto power over primary legislation, but can merely delay it (Budge 1996).

12.1.3 Political administrative characteristics

Both the operation of the cabinet government and the work of the UK civil service are formed by two fundamental constitutional principles, namely the principle of collective responsibility and the principle of ministerial responsibility. These two principles necessitate extensive coordination between the government and ministries (Kassim, 2000). The principle of collective responsibility involves that decisions taken by the Cabinet are agreed to by all members, and as a consequence, a dissenting minister should resign from the government. The principle of ministerial responsibility means that ministers are responsible for the actions of their officials. Loyalty and consistency are therefore important. Officials function as servants to ministers, and once an issue is settled, the professional task of the official is to implement it as efficiently as possible. In this context, neutrality is very important, and a good civil servant should be able to adapt to changes in policy easily (Wallace 1996; Kassim, 2000).

The central bureaucracy is grouped into fairly autonomous ministries and departments. There are about 15 centrally important ministries, which are represented by their political heads in the Cabinet, and about 70

fairly important ministries and offices. There are usually two or three junior Ministers in each ministry who are appointed by the government, and the government is exceptionally dependent on independently appointed bureaucrats for policy implementation and advice. A minister spends on average two years at a particular department, and he or she is dependent on the civil servants for information and guidance. This opens up possibilities for the department to influence the minister into supporting the departmental view in cases when the government has no clear line on the policy in question (Budge 1996).

Over the years, an extensive network of cabinet committees and subcommittees has developed in order to handle the increased scale and complexity of government responsibilities. The administrative procedures in Whitehall are organized to support the far-reaching requirements of coordination, and the administration is obliged to ensure that all interested departments are consulted. The Cabinet Office has a central role in monitoring progress and stepping in as a coordinator when necessary. This system of coordination has amounted to an administrative culture with norms and values that support information-sharing, instinctive consultation, cross-departmental contact, a spirit of mutual trust, group loyalty and corporate endeavour (Wallace 1996; Kassim, 2000).

At the top of the civil service hierarchy, the policy-making level, about 6000-10000 people are employed. Although there have been some changes in recent years, this group is still dominated by 'Oxbridge' graduates. One consequence of this is that the top of the civil service have a shared ethos. They are resistant to change stemming from the government, have a preference for shutting off discussions from ill-informed intervention and they have a generalist approach to policy-making. The civil servants perceive their roles as advocates of the interest of their department, which is partly formed in the interaction with interest groups (Budge 1996).

The UK administration has traditionally been characterized by homogeneity of the higher civil service, loyalty to the government (rather than to the administrative corps or individual departments), high morale and a strong sense of professionalism. The interviews confirmed this impression.

These characteristics have been somewhat weakened in the past 25 years, since changes have been made to make the conduct of the government more businesslike and to privatise some public functions. Because of these changes, managerial skills have become more valued in the definition and implementation of policy (Wallace 1996; Kassim, 2000). One important part of this process of change is the 'Next steps initiative', which was initiated by the government of Mrs Thatcher in 1984. This process of restructuring the civil service was based on criticism of British civil servants for being inefficient, particularly regarding the delivery of services, and Thatcherite ideas about modelling the delivery of services on the free market. The reform was aimed at reducing the scope of government and to render it more efficient while limiting the costs, and basically it has involved reducing the government departments in size. The idea is that they focus on policy-making and handling legislation in Parliament, while the implementation of policy is transferred to autonomous agencies (Budge 1996). It is also important to note that this initiative has had as one of its consequences that about half of the British civil servants currently work at semi-independent agencies, and this is of course a challenge to the traditional administrative culture and procedures of Whitehall (Christoph 1993).

It is possible that membership in the EU has also led to changes in the British civil service. Bulmer and Burch (1998) have argued that adapting to membership in the EU has been possible within Whitehall's established approach of handling policy, and that the formal, informal and cultural characteristics of the British civil service have remained intact. They also argue that the machinery put in place before and in the

process of acceding to the EC for handling European business has remained largely unchanged. On the other hand, Christoph (1993) argues that changes in attitudes of British civil servants who participate in European Union policy making has added to the domestic pressure for change, which is present for example in the 'Next steps initiative'. For example, some of the civil servants belonging to the European 'cadre' are more open to limiting the secrecy in policy-making and the hierarchical structure of the civil service.

According to the respondents in the interviews civil servants are encouraged to work for some time in Brussels in one form or other. Although off late it has proved to become more difficult to recruit stagiaires or 'temporaires' for posts in Brussels there is an ongoing exchange of – interested - staff between Brussels and London. There is, on the face of things, no official policy to encourage and accommodate staff exchange. E.g. a temporary Brussels' position is not a fixed career requirement. The London-Brussels staff exchange however does blend in quite well with the system of job-rotation in the British civil service. Changes in position every three or four years are customary the civil service. Life long positions are very rare. A stay in Brussels is certainly not a career-disadvantage.

12.2 Political or public discussion concerning EU directives and their transposition

12.2.1 Discussion of recent reports and their recommendations

The UK takes implementation of EC legislation very seriously, and it is the stated goal of the government that directives should be transposed according to the Community goals of effectiveness and timeliness. It is also important that the measures used for implementation should be in accordance with UK policy goals, including minimising the burdens on business (Cabinet Office, 2005). This policy, combined with the high level of professionalism and loyalty in the civil service and the skills of government lawyers, has resulted in a good implementation score in the past and present. The actual debate on the implementation of EC directives however is not focussed on the implementation score, but rather on better regulation policies. The policies aim to avoid administrative burdens for economic operators and excessive bureaucracy, so-called red tape. Current topical questions are whether or not the British government is over-zealous when implementing EC directives both in respect to the speed of transposition as well as to the substance of it. There are two distinct strands in the discussion. The first one has to do with speed of transposition. At this moment – some of the respondents tell us - the UK is looking to its implementation score from a new angle: are we not doing too much? In a cost-benefit equation timely implementation is not always per se beneficial to British businesses. A second strand relates to the way in which the UK transposes EC directives. At this moment there are concerns regarding over-implementation (Cabinet Office, 2005). Present government policies favour transposition by way of copying-out (i.e. sticking as close to the wording of a directive as possible, as opposed to the technique of elaboration i.e. reshuffling or translating a directive text in order to get a better fit with British legislation). These new policies also frown on 'gold-plating' i.e. implementation that goes beyond the minimum necessary to comply with a directive.

12.2.2 Expectations regarding the process and results of these discussions

The ambitions of the UK government policy seem to be successfully followed in practice, since the UK has one of the best transposition records in the EU. In May 2003, for example, the UK was one of only five member states that reached the goal of a transposition deficit of 1.5% or smaller (European Commission,

2003b). On the other hand, there are signs that the transposition record of the UK is getting worse (van den Brink, 2004). Respondents in the interviews confirm this, but note that the UK until recently was not really preoccupied with the transposition record since it had a respectable performance. In the run up to the Barcelona summit in 2002 the transposition record slacked to a 3.3% deficit (12th position) and was made more or less on strategic grounds an issue. A high level project was set up to ‘sweep up’ the backlog and did so with considerable success. Some of the respondents think that a similar project is needed in the advent of the upcoming British EU presidency.

Table 12.1: British legal instruments used for transposition

	<i>Act of Parliament</i>	<i>Order in Council</i>	<i>Ministerial orders, regulations or rules (Statutory Instruments)</i>
	Law		Ministerial order
Main features	Used for transposition when the European Communities Act cannot be used as delegating legislation, and when there is no other suitable delegating legislation, or when there is an already existing tradition in the specific area concerned of using primary legislation for transposition	A ‘Designation Order’ is used to decide which minister or state secretary is competent to adopt Statutory Instruments in order to transpose directives in a certain area	Statutory Instruments used for transposition are usually based on delegation by the European Communities Act, but can also be based on more specific Acts of Parliament
Advice State Council	Not required (The UK has no State Council)	Not required (The UK has no State Council)	Not required (The UK has no State Council)
Parliamentary approval	Required	Required	In principle required (the parent act determines)
Procedure	Proposed by government and passing through both Houses of Parliament	Proposed by government enacted by the Privy Council	Negative resolution procedure (most common): the Parliament can pass a motion to annul (a ‘prayer’) within 40 days Affirmative resolution procedure: Parliamentary approval is needed

12.3 Description of judicial instruments and techniques

12.3.1 Instruments

In the UK EC directives can be transposed either into primary or secondary legislation. Primary legislation in the UK is called ‘Acts of Parliament’. A common term for delegated or secondary legislation, i.e. legislation that is based on an Act of Parliament, is ‘Statutory instruments’. Examples of this type of legislation are ministerial rules, orders or regulations. No clear hierarchy among these instruments exists (House of Commons Information Office, 2003). There is also a tradition in the UK of using ‘quasi-legislative’ devices, for example administrative circulars and codes of practice. These instruments, however, are unsuitable for the transposition of EC directives containing rights and obligations (EC Court of Justice, C-102/79 *Commission v. Belgium* and C-29/84, *Commission v. Germany*) (see section 12.3.3 for further reference). In the UK the bulk of all EC directives (80-90%) is—most of the time by virtue of section 2(2) of the European Communities Act 1972—implemented in statutory instruments, but on occasion directives are transposed using an Act of Parliament. There may be various reasons to take the long route. For instance if directives – e.g. for reasons of consistency - have traditionally been transposed in Acts of Parliament new

directives in the field will be implemented in primary legislation as well. This is for instance – the respondents tell us - the case in the field of British company law. Another reason to implement by way of primary legislation can be the situation in which the use of a statutory instrument is impossible. Schedule 2 of the European Communities Act of 1972, for instance, resists transposition into subordinated legislation when EC directive provisions for instance impose or increase taxation, attribute legislative power, or create substantive new criminal offences.

In Table 12.1, the main characteristics of the legal instruments that are used in the UK for the transposition of directives and the procedure by which they are adopted are briefly presented. In order to get an accurate insight in how the system works both the processes for adopting Acts of Parliament and statutory instruments are described in more detail below.

Procedure for adopting Acts of Parliament

Before an Act of Parliament is adopted, the proposed legislation is called a bill. In order to become an Act of Parliament, a bill has to go through different stages in both Houses of Parliament, and it can start in either House. Typically, it takes weeks or months for a bill to pass through all the stages, but if the Government finds it necessary and the Parliament agrees, the process can be accelerated. As the respondents in the interviews made clear, the actual passage of a bill through Parliament does not take all that much time. It is the bidding for a timeslot for parliamentary debate on a bill that can truly be time consuming. Bills are not debated in order of their arrival. The Government determines the order of business in the Commons, with some consultation of the opposition parties. In the different circumstances of the House of Lords, the Government's management of business needs to be more accommodating. Other priorities can and do prevail over transposition issues, which can tie up the transposition for months.

There is a distinction between public bills and private bills. A public bill seeks to alter the general law, and a private bill relates to a matter of individual, corporate or local interest. The term public bill includes both Government bills, which are initiated by the government and Private Members' bills, which are initiated by individual Members of Parliament. Below, the stages of a Government bill that starts in the House of Commons are described.

The preparatory stages of a bill involve drafting by lawyers in the Parliamentary Counsel Office (PCO), which is part of the Cabinet Office. The drafting is performed on instructions of the Government department concerned. During the drafting, there is consultation with other departments and interested parties, and sometimes use is made of green (consultative) or white (policy statement) papers.

The first formal step takes place at the beginning of each session of Parliament, when the sponsoring minister presents the bill to the Commons. The bill then receives a formal first reading and is then printed and published.

The next step is the second reading, when the House debates the general proposals contained in the bill. The House considers the principle of the bill, and there is usually widespread debate. Some non-controversial bills are dealt with in a special second reading committee instead of the whole House. Usually the second reading takes place in the second week following the printing of a bill.

After the second reading, the bill enters the committee stage. Usually the bill is referred for consideration to a standing committee, but sometimes it is considered by a committee of the whole House. Examples of bills that were considered by a committee of the whole House are the European Communities Act 1972, and the European Communities (Amendment) Act 1993, which approved the Treaty of the European Union

(TEU). The name standing committee is a little misleading in this context, since a new standing committee is appointed for each bill. The committee must consider each clause and Schedule of the bill, and agree or disagree. It may also make amendments. Short bills may pass through this stage in a single sitting, but long and controversial bills may take many weeks.

Next, the bill enters the consideration or report stage, and is reported as amended to the whole House. The House may make further amendments and reverse or amend changes made by the Standing Committee, but otherwise it does not consider clauses and schedules not amended in the committee stage.

The final stage in the House of Commons is the third reading. This stage usually commences directly after the conclusion of the report stage. No amendments may be made, and if there are debates, they are usually very short. For controversial bills, the opposition may wish once more to vote against it.

After the third reading, usually on the next sitting day, the bill is sent to the House of Lords where a broadly similar process is followed. The House of Lords may amend the bill, and the bill as amended is then considered by the House of Commons. The Commons may agree to these amendments, agree to them with amendments or disagree. If the Commons agree to the Lords amendments with amendments, the Lords will be asked to agree to the amendments. The bill may travel back and forth between the two Houses several times, and the Lords and Commons must agree on a text. However, in a case of deadlock, an identical bill may be passed the following year without the consent of the House of Lords. This means that the House of Lords may delay a piece of legislation that has started in the House of Commons, but it cannot block it indefinitely.

Finally, the bill will need the royal assent, by which the bill becomes an Act. An Act can enter into force immediately, at a date specified in the Act, by Commencement Orders or by a combination of the three (House of Commons Information Office, 2001).

Procedure for adopting Statutory Instruments

The legal department in a ministerial department concerned usually drafts statutory instruments itself. The departmental drafters do not have the same level of skill or experience as the senior drafters of the PCO. To monitor and review some aspects of the technical quality of the statutory instruments (SIs) the parliamentary Joint Committee on Statutory Instruments (sometimes called the Scrutiny Committee) scrutinises SIs. The Scrutiny Committee does not consider the merits of SIs, but only tests whether a Minister's powers are being carried out in accordance with the provision of the enabling (parent) Act (House of Commons Information Office, 2003a). Because the Scrutiny Committee has a limited scope of review, and some scrutiny on the merits of SIs was felt necessary, on 17 December 2003 the House of Lords appointed the Select Committee on the Merits of Statutory Instruments. The Committee functions quite satisfactorily. A Special Report of the House of Lords of 2004, reviewing the work of the Merits Committee, recommends that the Merits Committee should be made a regular 'sessional' committee (House of Lords, 2004).

Which minister or state secretary is competent to draft and enact SIs, such as ministerial orders, rules or regulations, whatever the case may be, is decided by an Order in Council made by the Privy Council, the so called 'Designating Order'. The Privy Council however does not have the lead in attributing the designation, nor does it decide on issues of conflicting competence. The Council mechanically takes the requests for new designations – submitted by the different ministers or state secretaries - on board. Since the Privy Council only meets every three months it requires some strategic planning on behalf of the departments when they

need to draft a ministerial order or regulation for which no designation exist as of yet. The Cabinet Offices organises regular trawlers within the departments to see whether new designating orders are needed.

As a rule of good practice interested bodies and parties are often consulted during the process of drafting statutory instruments. When the drafting is finalised, the instrument is either made in the name of the responsible minister or secretary of state, or it is issued in draft requiring the approval of both Houses of Parliament. Statutory instruments apply to the whole UK or to some of the individual countries. Frequently used terms in the context of statutory instruments are 'laid' and 'made'. When an instrument is laid before the House of Commons, a copy of the instrument is placed with the Votes and Proceedings desk in the Journal Office. A statutory instrument is made when it has been signed by the minister with authority under the Act. When an instrument has been made, it is no longer in draft.

The parent Act determines whether or not an instrument is subject to parliamentary procedure. If it is subject to parliamentary control, either the negative resolution procedure or the affirmative resolution procedure is followed. The instrument can either be laid in draft or laid after making. Instruments based on the European Communities Act 1972 are subject to parliamentary procedure, and the government decides upon whether the negative or affirmative resolution procedure is followed. The negative resolution procedure is the most commonly used one.

The most common procedure is the negative resolution procedure. Instruments subject to the negative procedure are usually laid after making. They come into force on the date stated on them, but are subject to annulment if a motion to annul, known as a 'prayer', is passed within 40 days. Any Member of Parliament can put such a motion, but the chance that it will be dealt with is greater if it is tabled by the Official Opposition or if there are a large number of signatories. Prayers are exceptionally rare when it comes down to (draft) statutory instruments implementing EC directives. It is the experience of the respondents that it virtually never happens that a statutory instrument is actually rejected as a result of a prayer with a negative outcome.

A very small number of instruments are laid in draft under the negative procedure. These instruments cannot be made if the draft is disapproved within 40 days.

The affirmative resolution procedure provides more efficient parliamentary control, since the instrument must receive the approval of Parliament. Most commonly, instruments subject to the affirmative procedure are laid in the form of a draft Order, and cannot be made unless both Houses approve the draft. If an instrument is laid after making there are two procedures. Either, it cannot come into force unless and until it is approved, or it will come into effect immediately, but cannot remain in force unless approved within a certain period (usually 28 or 40 days).

Statutory instruments cannot, except in rare cases when the parent Act provides for it, be amended or adapted by either House. Thus, Parliament can only accept or reject the instrument in its entirety.

12.3.2 Techniques

In principle, there are two methods that are used for transposition, namely 'copy-out' and 'elaboration'. If the copy-out method is used, domestic legislation merely reproduces provisions contained in directives.

Elaboration means 'coming down on one side or the other of choosing a particular meaning, in accordance with the traditional approach in UK legislation, according to what the draftsman believes the provision to mean' (Cabinet Office, 2005). Depending on the contents of a directive one of them or combinations of two are used. The importance of not over- or under-implementing directives is emphasised

by the Transposition Guide. Recent better regulation policies are especially critical of gold plating, i.e. transposition that goes beyond the minimum necessary to comply with the directive. Gold plating is to be avoided since it could lead to extra administrative burdens for businesses. In much the same way so called double-banking, i.e. the situation in which EC legislation covers the same ground as domestic legislation, is burdensome. It is preferable to prevent double regimes and aim for some form of consolidation e.g. by merging EC and domestic legislation into one piece of legislation (Cabinet Office, 2005).

The technique of ‘copy out’ is becoming increasingly popular in the UK, since it means that judges and lawyers can focus on one instrument instead of two (Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, 2004). The Bellis report makes a connection between the use of copy out and the fact that directives are becoming more and more detailed (Bellis, 2003). In the past, the British need for detailed legislation that leaves the judge with little room for interpretation, has proved to be a problem in the process of implementation. When the directive contained many vague expressions, ‘elaboration’, i.e. a more precise expression of the content of the directive, was often used as technique for implementation. This – in some cases - inevitably led to more detailed regulations that sometimes went beyond the goal of the directives, or led to over-regulation (‘gold-plating’). However, that does not mean that copy-out is exempt of any risk of over-regulation. Copy-out also runs the risk of over-regulation, if stake-holders interpret the regulation in a burdensome way due to the lack of clarity of the source (directive) text.

The growing popularity and government endorsement of the copy-out technique does however not mean that it has become the most commonly technique. According to the experience of some of the respondents, elaboration and rewriting are still the prevalent approaches to transposition, at least in relation to directives that do not merely contain a few amendments of legislation already in place. In this respect Cabinet Office Guidance encouraging copying-out is one thing, drafting practice is another.

12.3.3 Character and level of implementing instruments

The bulk of EC directives is transposed into statutory instruments. These statutory instruments are either based on the European Communities Act 1972, which then functions as a general basis for delegation, or any other act, which provides appropriate powers. This delegated legislation, which is adopted by a rather swift procedure, can amend and in some cases even diverge from existing primary legislation (R v. Secretary of State for Employment *ex parte* Unison (1997) 1 CMLR). The European Communities Act 1972 contains an explicit so-called Henry VIII power, i.e. a provision that enables primary legislation to be amended or repealed by subordinate legislation (House of Lords, 2002). This is a strange feature of British law in continental eyes. Powers like this, enabling subordinated legislation to override primary legislation, are called Henry VIII powers. In a special report on these Henry VIII powers the House of Lords in 2002 takes the view that there are occasions that the use of these powers is justified for instance when amendments to primary legislation would disproportionate increase of the length of a Bill or when it is very difficult to anticipate the full extent of necessary (future) amendments. When Henry VIII powers are used according to the House of Lords parliamentary scrutiny is called for, preferably the affirmative procedure (House of Lords, 2002).

Both Houses of Parliament, indeed, must be informed of all statutory instruments based on the European Communities Act 1972, but it is left to Ministers drafting the statutory instruments to decide whether the

affirmative or negative resolution procedure applies. In most cases the negative resolution procedure is used (see paragraph 12.3.1).

The powers that the European Communities Act 1972 creates for lower level legislators does not affect the power of the formal legislator to adopt (parallel) legislation (Usher 1995).

Concerning statutory instruments used for the transposition of directives that are based on the European Communities Act 1972, Section 2(2) and Schedule 2(2) of the Act are the relevant parts. Section 2(2) provides for the implementation of Community obligations, and makes it possible to implement Community obligations by delegated legislation. No new Act of Parliament is needed, but the delegated legislation used to transpose directives can be based directly on the European Communities Act. Section 2(2) also states that the responsible minister or department is to be designated by an Order in Council. Paragraph 1 of Schedule 2 provides exceptions when it is necessary to use an Act of Parliament to transpose a directive. For example, this is the case when taxation is being imposed and for provisions with retrospective effect. Apart from these exceptions, there could also be other reasons for using primary rather than delegated legislation for the transposition of directives. One example of this is if the UK government wishes to do more than the minimum requirements of a directive (Drewry 1995; House of Commons Information Office, 2003). In addition, primary legislation is used when the issue is of great importance or if important policy change is necessary (Van den Brink, 2004), or when directives in a certain policy field traditionally have been transposed into primary legislation (e.g. Company Law, see Section 12.3.1)

Section 2(2) is frequently used as basis for delegation, either alone or in combination with sector specific legislation. It is widely acknowledged (Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, 2004) that the construction for delegation of the European Communities Act is a useful and even essential method in order to implement European law on time. Judges have seldom or never accepted arguments based on constitutional considerations against the use of section 2(2) in legal procedures. Detailed guidance is available to government lawyers on the use of section 2(2).

Initially, 'quasi-legislative' instruments were used for the transposition of some directives. However, in the early 1980s rulings by the European Court of Justice (ECJ) signalled that this was inadequate. The ECJ stated that the ambiguous status of quasi-legislation 'may create uncertainty about the nature of legal obligations, and its use may also deprive those adversely affected of effective legal redress in the courts'. Although administrative means are currently only used for transposition of directives in certain limited circumstances, they are still often used as a complement to the legal instruments (Drewry 1995; House of Commons Information Office, 2003).

12.3.4 Specific instruments

Aside from the instruments discussed above we have not come across any other special instruments. Most of the instruments based on the European Communities Act 1972 are not unique to transposition. Ministerial regulations, orders, etc. are also used as a result of normal domestic delegation.

12.4 The national policy cycle concerning directives

12.4.1 General overview of the process

The UK system of co-ordination of EU policy is considered very efficient, and it has been widely admired. UK representatives are reputed to be well briefed and able to present the common position of the government. The European Secretariat (placed in the Cabinet Office), the Foreign and Commonwealth Office (FCO) and the UK Permanent Representation are together responsible for EU policy co-ordination. They communicate on a very regular basis and keep each other well informed. There is no real secret or elaborate co-ordination procedure between London and Brussels, apart from the fact that both London and the Brussels-UK-representation are plugged in very well in European processes, and that they react very quickly to European initiatives ('when the glimmer is in the eyes of the Commissioner').

The UK system for co-ordinating EU policy has many things in common with the domestic administrative system, among them mechanisms for ensuring horizontal and vertical co-ordination. The norms and values of the domestic system are also reflected in the way the UK handles EU matters (Kassim, 2000; Kassim, 2003).

The main actors involved in EC business are ministers and civil servants in the ministries. Other actors are Members of Parliament, especially those involved in scrutiny of EC proposals in one of the European Committees, UK members of the European Parliament, and personnel of other public sector bodies (local authorities, public corporations etc). The last category are involved in EC business in a variety of ways, for example as agents of implementation and as lobbyists (Drewry, 1995).

The UK goals for co-ordination are ambitious, and involve ensuring for any EU proposal that agreement is reached on a UK policy well in advance, and that account is taken of affected interests and overall government policy. It also involves that the policy agreed upon is pursued consistently in the negotiations, and that, once the decision is taken in Brussels, it is put into effect in the UK. The UK has a broad co-ordination ambition, which is not only focused on particular policy areas as in many other member states, and the co-ordination system is centralised (Kassim, 2001; Kassim, 2003). The effective transposition of EC directives is an important part of the UK co-ordination ambition (Bulmer and Burch, 1998).

In the UK, there are various internal guidelines concerning the implementation of European legislation. The two most important documents are the Cabinet Office Transposition Guide, and the Regulatory Impact Assessment Guide (Cabinet Office, 2005; Cabinet Office, 2003). The Transposition Guide expresses the policy and goals of the government concerning transposition and contains recommendations on how to handle Commission proposals, the use of options contained in directives, and how domestic legislation should be drafted. The Transposition Guide is a tool for policy-makers and lawyers across the government, although some requirements only apply to those laying legislation before the UK Parliament. It is not legally binding, like legislation, but rather consists of a collection of best practices.

Parliament is actively involved in the adoption of European legislation, in a threefold manner: a. through scrutiny of proposed EC legislation, b. scrutiny of Statutory Instruments transposing EC directives, or, c. as the co-author of primary legislation if EC or EU legislation is implemented by way of Act of Parliament. We will elaborate on the negotiation, preparation and transposition as well as on Parliament's role in it, in the upcoming sections.

12.4.1.1 National preparation of Commission initiatives

The transposition process in the UK starts very early on. From the moment ‘the glimmer is in the eyes of the Commissioner’ – the respondents say - the UK tries to influence EU policies and legislative proposals in the making. This ‘glimmer’ may be read from expert meetings that the EU Commission organises to consult experts and interested parties prior to initiatives. The UK has a tradition of monitoring EU policies very closely and ‘upstreaming’ its influence. During this embryonic phase the UK tries to assess the possible impacts of the EU plans and tries to organise informal consultations. UK based stakeholders are, by their government, encouraged to engage directly with the EU institutions too in this stage in order to transmit their views early on (Cabinet Office, 2005; Cabinet Office, 2003).

The UK transposition process officially commences when the Commission issues its draft proposal for a directive and the process by and large proceeds parallel to the process of negotiation of the EC directive. When a draft proposal is published two subsequent processes start. The first process aims to arrive at a common British negotiation strategy on the basis of an impact analysis and consultations on the proposal, and the second aims to put together a project plan for the transposition of the directive once it has been enacted. The processes of negotiation and the preparation of the transposition are closely interlinked and – according to some of the respondents in the interviews - ideally the team of policy-makers, lawyers and other civil servants that worked on the preparation and negotiation-strategy on the draft EC directive should also work on the actual transposition. Continuity is considered good practice. Due to job-rotation – a change of position every three to four years is quite common in the civil service – this ideal is very difficult to achieve given the length of European legislative processes.

Once the draft Commission proposal is published a lead department is charged with the treatment of the dossier. Sometimes more than one department is involved. The assignment of the dossier to the lead department is a relatively informal process supervised by the cabinet. Judging from the interviews the assignment hardly ever causes major problems. In our view two factors account for that. First of all the British system is based upon the system of collegial responsibility or prime ministerial responsibility (Prakke Kortmann, 2004; 879-880) which to a certain extent prevents adversarial departmental entrenchment. Secondly there is a tradition of strong co-ordination from the Cabinet Office.

Table 12.2: Information regarding EU proposals presented to the British parliament

Document	Contents
Explanatory memorandum	Legal and procedural issues
	Policy and financial implications of the proposal
	Timetable for transposition
Regulatory Impact Assessment (RIA)	Examination of the economic, social, environmental and legal effects of the proposal
	Negotiation strategy

12.4.1.2 National treatment of Commission proposals

This stage in the process starts, as we noted in section 12.4.1.1, with the presentation of a proposal for a directive by the Commission. The lead department provides the Cabinet Office with an ‘explanatory

memorandum' (a formal communication to Parliament) and a partial 'Regulatory Impact Assessment' (RIA) as soon as possible. The Cabinet Office in its turn passes it on to Parliament. The explanatory memorandum includes information on legal and procedural issues and policy and financial implications of the proposal and a timetable for transposition. In principle separate memoranda – each dealing with a separate aspect - are prepared for each document. This is also the case when the original proposal is substantially amended. The partial RIA, in which the (economic, social, environmental and legal) effects of the proposed directive for the UK are examined, is developed on the base of the initial RIA prepared before the proposal was presented. The RIA, which is updated as the negotiations proceed, serves to inform the relevant minister of the negotiating line, to seek agreement with other departments, and to inform the parliament of the negotiation strategy. Table 12.2 gives an overview of the information that is presented to the parliament.

Before the Common Position by the Council is adopted, a project plan for the transposition should be put together by the responsible department in agreement with Ministers, other departments, Cabinet Office and, where appropriate, with the Devolved Administrations (Cabinet Office, 2005). Informal consultation is also initiated.

At this stage, in most cases, a project team consisting of policy officials as well as lawyers and sometimes technical specialists from Whitehall, agencies, devolved administrations or local government is created. A project team (or 'bill team') does not necessarily have an interdepartmental composition: its composition varies according to the specifics of the directive at hand.

The tasks of a project team is twofold: a) to forge a negotiation strategy and b) to make a transposition plan, including the identification of provisions in the directive that will require transposition, division of tasks, timetable, and risks connected with the coming transposition. In interviews conducted with officials in the Cabinet Office and the Department of Transport in the course of a study by the Asser Institute, it was confirmed that those teams have been created since 2001 and that they form an efficient tool securing timely transposition of directives. The use of project teams is encouraged, though, as some of the respondents pointed out, not always feasible or practical. Some departments like the Department of Trade and Industry pool staff members in order to be able to allot sufficient personnel power to different project teams over time.

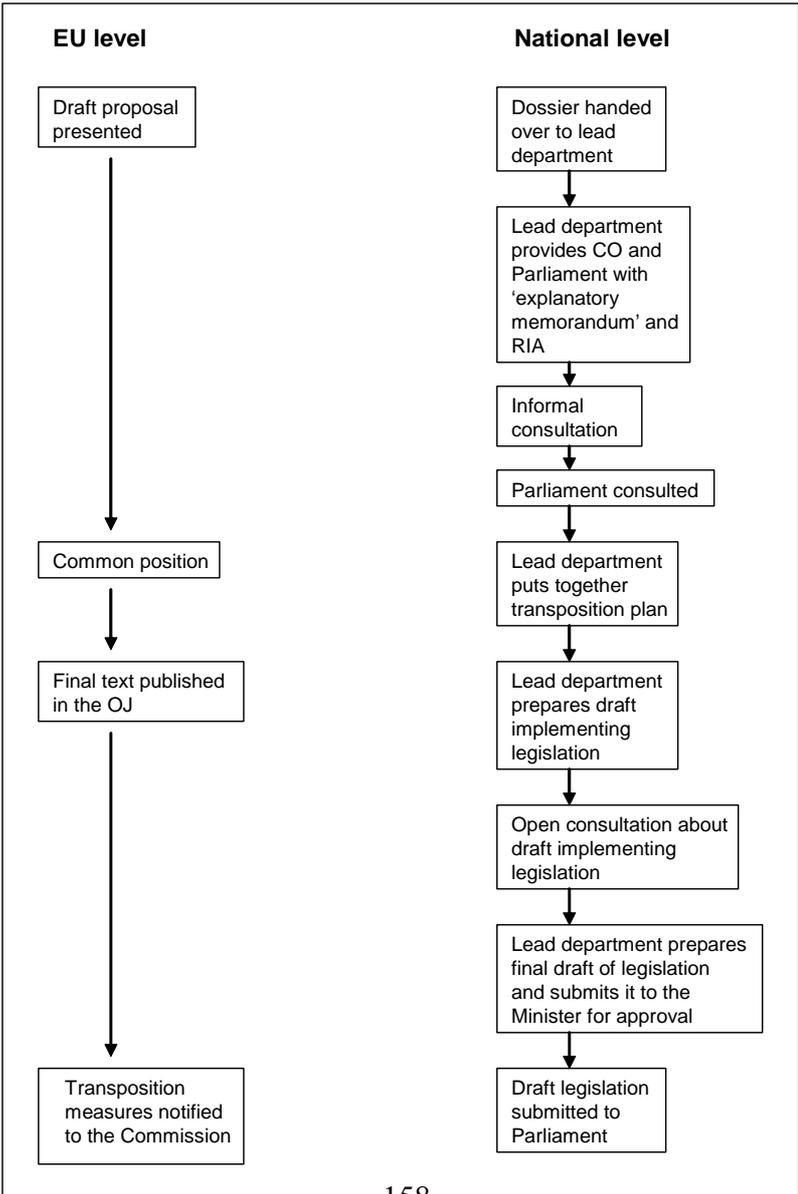
The project team - or civil servants within the lead department - take the lead in the formulation of the negotiation line. Depending on the nature and contents of the proposal this may require the involvement of various authorities. In cases of inter-departmental conflicts the European Policy Committee at the Cabinet Office acts as co-ordinator. This may also involve resolution of conflicts with the devolved authorities, although this sometimes may prove difficult because they are not hierarchically subordinated to the Whitehall authorities.

Before a negotiation line is decided the lead department will have – as a result of the so-called scrutiny reserve (see section 12.4.4) – to consult Parliament, the fellow ministers (via the European Policy Committee of the Cabinet) and relevant interested parties, governmental and non-governmental alike. Consultation is considered very important in the UK. After initial informal consultations in most cases formal consultations on more important directive proposals are initiated. In January 2004 the Regulatory Impact Unit of the Cabinet Office issued a Code of Practice on Consultation laying down some important do's and don'ts as regards consultation (Cabinet Office, 2004). The Code of Practice advocates wide consultations, and requires a minimum of twelve weeks for a written consultation. Respondents in the interviews reported the threat of

consultation fatigue. At this moment (spring 2005) the Cabinet Office is considering more dynamic and less time consuming forms of consultation.

In spite of its efficient co-ordination of EU policy, the UK has for the most part not been very successful in securing favourable outcomes in the negotiations. The UK has been the most successful in the area of economic policy, and particularly in the development and implementation of the single market programme. However, for other policy types, for example constitutional and institutional reform, and social policy, the UK has not been able to shape policy outcomes according to its preferences. One explanation for this lack of success could be that the preferences simply have not converged with the preferences of other member states. Inability to form coalitions could also stem from the fact that the administrative culture among British civil servants is different to the administrative culture in most other member states. While the EU policy environment is characterised by accommodation and consensus building, the British civil servants are schooled in the tradition of neutrality and are used to single party government in an adversarial party system. Also, the co-ordination system itself could have adverse effects, since the focus on a centralised strategy severely limits the flexibility of the UK in the negotiations (Kassim, 2000).

Figure 12.1: Main features of the UK transposition process



12.4.1.3 National transposition

The second task of a project team, or – if no project team was set up – the lead department is to examine the directive proposal with respect to its transposition implications. In order to secure timely transposition the Transposition Guide of the Cabinet Office recommends that – after the European legislative procedure on the directive proposal has reached the stage of the Common position - a Transposition Project Plan is formulated. Important elements of this plan are the relationship of the proposed directive to the existing legal UK framework, the choice of enforcement regime, transposition deadlines, and the clarity of the proposal and its impact on future domestic legislation. The main features of the process of transposition in the UK in relation to the timing of the decision making process at the European level is outlined in Figure 12.1.

Best practices concerning the options for transposition are elaborated on in the Chapter 3 of the Transposition Guide. The Guide calls for particular attention to the margins of discretion that are left to the Member States in implementation. Other key issues to be discussed and resolved at this stage are enforcement regimes, including sanctions, (if appropriate) the monitoring and administrative regime and the legal remedies along with the possibility of producing practical guidance for the economic operators. The RIA covering the economical, social, environmental, and legal costs and benefits of the directive is, at this particular stage, refocused to include options for implementation. Once the draft domestic implementation legislation is considered this upgraded RIA and the draft of the implementing regulations is used for open consultation on the different implementation options. Again, in principle, at least 12 weeks need to be provided for a written consultation on the implementation options.

While this may slow down the process of transposition, it can – according to the Code of Practice on Consultation - lead to better solutions, especially when the directive in question leaves some discretion to the Member States. On the face of things implementation consultation does not seem to seriously hamper timely transposition in the UK. The aforementioned ‘consultation fatigue’ seems, judging from the interviews, to be more of a concern.

When the consultation is concluded, the final draft of the legislation is prepared. At this stage, the final RIA is presented and attached to the draft legislation. In the next step the proposal is submitted to the Minister for approval and subsequently for approval by the Parliament (Asser Institute, 2004d).

When the transposition of a directive in the UK is completed, a letter of notice is sent to the Commission by the responsible department, and the transposing measures are laid before Parliament. Since November 2001, UK legislation laid before Parliament that transposes a European directive, must be accompanied by a so-called Transposition Note. In the Transposition Note, it is explained how the main elements of the relevant directive has been or will be transposed into UK law. Exceptions can be made for situations in which the costs of producing such a note outweigh the benefits (Cabinet Office, 2003). The Transposition Notes allow MP’s to check instantly whether or not a directive was gold-plated (see Section 12.3.2).

Reducing bureaucracy, avoiding administrative burden and cutting red tape are the pinnacles of the Better Regulation policies. In order to reduce the burdens of – quickly changing – EC directives and national legislation implementing it for – chiefly - economic operators, the UK has of recent resorted to the concept of ‘common commencement dates’. The idea of common commencement dates is that only twice a year new legislation pertaining to businesses or other economic operators in a certain sector enters into force. Common

commencement dates also offer opportunities to improve and focus the guidance on sets of forthcoming legislative measures. Guidance is, some of the respondents tell us, becoming an increasingly critical factor to policy success.

12 4.2 Bureaucratic consultation and coordinating bodies

Individual departments play—as was pointed out in Section 12.1—the leading role in the co-ordination system, and each department deals with Community matters that fall within their area of responsibility. Experts within the technical divisions of the department concerned take the lead in formulating the UK's position, and consult other departments. How this is organised differs between the departments, but many departments have set up special units to co-ordinate European activities internally. The two departments that are most extensively involved in EU affairs are the Department for the Environment, Food and Rural Affairs (DEFRA) and the Department of Trade and Industry (DTI). They have created respectively an EU Division and a European Directorate, which oversee EU related work and implementation of EC law. DEFRA and the DTI also encourage their officials to build a 'European' career (Drewry, 1995; Kassim, 2000).

Although the initiative lies with the individual departments, all directives in negotiation must be commented upon by the European Secretariat and the Foreign and Commonwealth Office (FCO). However, the domestic departments feel that they have the necessary expertise, and therefore the co-ordinating function of the Secretariat is seen more as a formality (Siedentopf and Hauschild, 1988). Still, the machinery that is set up is rather efficient, and it plays an important role in helping the government form a common position.

In the UK, in contrast to most other member states where the main co-ordinating role is played by the Foreign Ministry, the key role in co-ordination of EU policy is played by the European Secretariat of the Cabinet Office. One advantage of this is that the Cabinet Office is a more neutral body than the FCO, which has interests over a wide range of issues. A second advantage is that the Cabinet Office has an important role in coordinating domestic policy as well, and it presides over a large network of Committees. The role of the European Secretariat is therefore a natural extension of this role (Drewry, 1995). One of the main tasks of the European Secretariat is to oversee that European directives are transposed properly into domestic law (Bulmer and Burch, 1998). It also makes sure that other departments with an interest in a particular issue are consulted in the process of negotiation. The officers keep in close touch with the experts in the responsible departments and with the UK Permanent Representation (Kassim, 2000). The head of the European Desk of the Cabinet Office meets with the Permanent Representation on a weekly basis in the so called Grant Darroch meeting. If problems occur within or between departments handling European dossiers the Cabinet Office will intervene. If the European Secretariat is not able to resolve the differences informally, formal procedures follow in one of the committees. The subcommittee on European questions is divided into three levels. Routine policy matters are handled on official level by EQO, which meet at least 100 times per year. All departments are entitled to send representatives to meetings. The committee at senior level is called EQO*, and at the ministerial level (E)DOP. Legal aspects of EC business are dealt with in the EQO(L), an offshoot of the EQO. This committee also coordinates legal advice across departments (Drewry, 1995; Kassim, 2000). In some respects the Cabinet Office is the nerve centre of British European policies. It acts as an intermediary between the Permanent Representation in Brussels, the Foreign and Commonwealth Office and other departments during the very early stages of a directive proposal, it takes the lead on proposals for directives that are considered very important to UK interests or policies, it monitors whether good practice (e.g. the implementation of the Better Regulation targets, legislative quality) is observed by the lead

departments, (implementing) agencies or regulators. To this last end a Regulatory Impact Unit was set up within the Cabinet Office offering advice and guidance to government departments e.g. to help them conduct impacts assessments and more generally make them aware of notions of better regulation (i.e. aiming for fair and effective regulation and reducing bureaucracy and red tape to the bare minimum) (Cabinet Office, 2002). In order to give better regulation a more permanent foothold, all departments have set up a Departmental Regulatory Impact Unit (DRIU), which acts as the first point of contact within Departments on regulatory issues. Although there are no formal, procedurally engrained, relations with the Better Regulation Taskforce during the negotiation (or transposition for that matter) of EC directives, the spirit of Better Regulation is – at this moment - very much present at all levels of government. The Blair administration is trying to convince the relevant stakeholders of the benefits of Better Regulation rather than to impose it. This is illustrated by the example of the Scrutiny Team. This Team acts as an independent promoter of Better Regulation policies and – in order to convey the message – it works together with the Cabinet Office Units, other departments, regulators and the regulated, focusing on those regulations which impact on business, charities, and the voluntary sector.

The strong position of the Cabinet Office is both beneficial to effective negotiation and timely transposition, respondents in the interviews feel. The Cabinet Office keeps close track of the transposition processes and results and can therefore spot bottlenecks and act upon it. This however does not prevent transposition backlogs from occurring every now and then. Raising the game of the transposition results and reducing backlog – often felt necessary in the advent of a UK presidency or an important EU summit – needs - as in most member states – strong political backing.

Although the European Secretariat of the Cabinet office plays the key role in coordination of EU matters, the FCO also still plays a central role. The FCO has set up three European Union Divisions, one external (EUDE), one internal (EUDI) and one for bilateral relations (EUB). The divisions report to the Director for Europe who has the general responsibility for EU policy. The main roles of the EUDI are adding a FCO perspective to dossiers going through the EU legislative process, keeping the Foreign Secretary up to date with EU developments, taking the lead on broad issues and organizing coordination on these issues together with the European Secretariat. It also operates the communications infrastructure connecting London with Brussels and other capitals, distributes EC documents to other departments, provides briefings for European Council meetings and is the main link with the UK Permanent Representation. The role of the EUDE is more like the roles of divisions in other departments, and it takes the lead in issues dealing with the foreign policy of the EU (Drewry, 1995; Kassim, 2000).

12.4.3 The role of compulsory advisory bodies

The UK does not have a overall system of mandatory consultation on draft legislation. Scrutiny is exercised by both Houses of Parliament, the House of Lords acting as a *Chambre of reflexion*. Parliamentary scrutiny of statutory instruments implementing EC directives is intensifying over the last years.

Consultations during negotiations are conducted at the government's discretion, but are considered ever more important and best practice. During the negotiation and transposition of EC substantive EC directives even double consultation is encouraged (Cabinet Office, 2004) (see for further reference section 4.1). Sometimes legislation makes consultation mandatory. E.g. Section 5 (1) of the Regulatory Reform Act 2001 does oblige ministers to consult interested parties before they make an order on the basis of the 2001 Act.

The Cabinet office serves as a go between for the co-ordination and an observer of good form as regards these consultations. There is no distinct compulsory advisory body nor is there a form of formal review during the negotiation or implementation phase in the UK.

12.4.4 The role of the parliament

As mentioned above, the parliamentary scrutiny of EC legislation is underpinned by the understanding that ministers should not normally agree to EC legislation without giving Parliament an opportunity to scrutinise the legislation (House of Commons Information Office, 2003). This principle is called the 'scrutiny reserve' and it is enshrined in the Scrutiny reserve resolution passed by the House of Commons in 1998 (House of Commons, 1998).

Upon the adoption of a Commission proposal, the British government presents the proposal, including an 'explanatory memorandum' to the Lower and Upper Chamber, which can then debate the proposal and can in principle disagree and push for certain amendments. The negotiator in Brussels should then respect the mandate of the parliament. However, due to overload, differing timetables and difficulties for the Parliament to access information about the governments position in the negotiations, it is far from always the case that Parliament has a say in negotiations on European legislation (Miers and Page, 1990). The lack of the technical knowledge necessary to sufficiently understand certain issues further limits the influence of the Parliament. The problems of parliamentary scrutiny could also be explained by underlying weaknesses in the position of the Parliament, the most important of which is that the Parliament is, for the most part, politically dependent on the government. However, the UK Parliament has a more prominent role in EU business than parliaments in most other member states, with the Danish Folketing as an outstanding exception (Drewry, 1995; Kassim, 2000).

The parliamentary scrutiny of EU proposals is supervised by the European Secretariat. Among other things, the Secretariat makes sure that the departments supply the scrutiny committees in the Parliament with information about Commission proposals accompanied by explanatory memoranda (Kassim, 2000). However, it is also of great importance that the UK Parliament, as opposed to the national parliaments of many other member states, asks for EC documents on its own accord and does not sit and wait for EC material to be forwarded by the government. In addition to traditional methods for scrutiny, for example the tabling of parliamentary questions and the holding of debates, special procedures and mechanisms have been developed. In the House of Commons a select committee, the European Scrutiny Committee, has been established. The European Scrutiny Committee is informed on EU issues, including legislative proposals. It focuses on matters of political importance, and decides on which proposals (about 1100 per year) should be considered by the Parliament. The Committee receives an explanatory memorandum on each document from the relevant Minister. All documents deemed politically or legally important are discussed in the Committee's weekly Reports. Debates recommended by the Committee take place either in a European Standing Committee or (more rarely) on the Floor of the House. There are only three EU standing committees: A. which includes Agriculture, B. which includes Home Affairs and C. which includes Trade. Some of the respondents feel that these committees have too broad a scope which results in lukewarm interest for the debates.

Documents that are not selected for debate can be negotiated by the government. The scrutiny reserve involves that the scrutiny procedure should be finished before the minister agrees in the Council. However, if

it is urgent, the reserve might be breached. This happens about 20 times a year, and the reason can be that otherwise the UK would not be able to vote because of the time schedule.

In the House of Lords, there is a Select Committee on the European Union, which mainly evaluates Community policies and proposals. The Committee publishes reports on any area of EU business, and the reports are extremely well respected. However, the Committee has not escaped criticism, and it has been argued that the reports have little effect on government policy (Miers and Page, 1990; Kassim, 2000).

Paragraph 2 of Schedule 2 of the European Communities Act contains provisions for scrutiny of delegated legislation used for the transposition of EC law. There are two possibilities. Either, a draft of the implementing measure has to be approved by Parliament ('affirmative resolution procedure'), or otherwise, the implementing measure can be annulled by either House of Parliament ('negative resolution procedure'). In the 'affirmative resolution procedure' approval by both chambers is required. In the negative resolution procedure, which is the most commonly used, the implementation measure is presented to both chambers of parliament. They then have 40 days to adopt a resolution against the regulation, which, partly because of the tight time schedule, very seldom occurs. Statutory instruments used for the implementation of EC law can thus be annulled by either House of Parliament. However, this is more or less a formality, since statutory instruments used for the implementation of EC law are seldom effectively scrutinized and almost never obstructed by Parliament (Drewry, 1995).

12.4.5 The role of other, subnational of functional administrations

European integration has been important for emerging challenges of the unitary British state. Scotland, Northern Ireland, Wales and the English regions have all seen new opportunities that European integration has brought with it, for example inter-regional alliances (Bulmer and Burch, 1998). Perhaps partly because of European influences, important constitutional changes were made in 1997, which lead to the devolvement of certain areas of government to different parts of the UK. Based on referendums in Scotland and Wales, a Scottish Parliament and a Welsh Assembly were created. In Northern Ireland, there already was an Assembly, but it was not in operation. The Northern Ireland Assembly is currently suspended through the Northern Ireland Act 2000 (Suspension of Devolved Government Order, 2002).

Although the power over important policy areas such as agriculture, fisheries, environment and structural funds has been transferred to the devolved administrations, this has, at least not yet, brought about a transformation of the system for coordinating UK policy. A Scottish Executive EU Office and a National Assembly for Wales EU Office have been set up in Brussels. However, the UK Permanent Representation has maintained its central position in the coordination of EU policy at the European level. On the domestic level, there are three territorial ministries, the Scotland Office, the Wales Office and the Northern Ireland Office, which participate in the coordination of EU policy. However, they do not take the lead in any policy area, but remain dependent on the sectoral departments (Kassim, 2000; Kassim, 2001).

Traditionally the process of transposition is highly centralized, and the county councils are not consulted. However, for Scotland and Northern Ireland, separate transposition measures have often been used (Butt Philip and Baron, 1988). The Government of Wales Act 2000 makes it possible to transfer rights of implementation of EC law to the National Assembly of Wales. The Scotland Act indicates that some implementation rights should be transferred to Scotland. It seems that whether transposition is done on a central or regional basis depends on the policy area. For example, food, agricultural and environmental measures seem to be transposed on a devolved basis, i.e. England, Scotland, Wales and Northern Ireland.

Transport measures are transposed on a UK basis. Several measures are transposed on a parallel basis in Great Britain and in Northern Ireland. Since devolution is a quite new phenomenon the way devolved government partake in the implementation of EC directives is only now settling in. It proves quite difficult to manage the different responsibilities. The UK government handles most of the negotiation, but for some areas – like fisheries – transposition of EC Directives is a joint responsibility. Some devolved governments have some trouble with timely transposition, which in its turn is a problem for the UK government that is at the end of the day responsible for transposition deficits.

12.4.6 *The role of interest groups*

Each department has its own ‘policy network’, on which they rely for information and for gaining compliance for policies. The policy preferences of the departments are influenced by these networks. There are advantages for both sides. The interest groups have opportunities of influencing policy and legislation before it is adopted, and the departments, partly due to their generalist nature, are dependent on advice from the interest groups. The process of interaction is not open, but in order to influence policy, interest groups need to obtain insider status with the department. As mentioned above, the department responsible for the transposition of a directive usually consults affected interests during the process of drafting and adopting the necessary transposition measures (Drewry, 1995).

12.5 Analysis of instruments and techniques

12.5.1 *Advantages and disadvantages of instruments*

The obvious benefits of the use of statutory instruments are speed and flexibility. The system of the European Communities Act 1972 allows the UK government to transpose EC directive very quickly, since transposition by way of SIs is less time-consuming than transposition by way of Acts of Parliament. An additional benefit is that the EU origin of the legislation is clear, since there is a mandatory reference to the directive in the Explanatory Memorandum attached to each statutory instrument. The downsides are as obvious too. The disadvantages are that the degree of parliamentary scrutiny is at best modest, that the level of public transparency is low and that the quality of the instruments is generally of a different standard than is the case with Acts of Parliament.

Parliamentary scrutiny on statutory instruments is in most cases only really possible after the SIs have been made. The volume of the instruments, almost all of them subject to the negative resolution procedure, is such that it is very hard for Parliament to keep track. Consequently it almost never happens that a proposal for a statutory instrument is blocked by Parliament. Prayers are seldom successful. When we combine that with the aloof scrutiny exercised by the Joint Committee on Statutory Instruments – even with the Merits committee in place - the transposition and the resulting instruments are very much government centred and controlled.

At least there is a systematic review of statutory instruments to check whether or not they are ‘ultra vires’, since the Joint Committee on Statutory Instruments scrutinises all statutory instruments.

12.5.2 Advantages and disadvantages of techniques

The debate on copying-out (merely reproducing provisions contained in directives in British law) or elaboration (trying to integrate EC provisions in British law by bending and twisting the text somewhat) has definitely turned out in favour of copying-out as the default option, although there are circumstances where elaboration is still necessary. Still in the recent past a lot of British lawyers felt that copying out would confuse English judges, since the style and system of EC legislation differ from that in British law. This argument is countered by the judges themselves who – as the ones having to apply and interpret EC legislation – increasingly prefer to consult the ‘raw’ text of EC directives in order to see what was actually meant.

In the wake of the Better Regulation policies the present-day focus in the UK is on preventing gold plating, i.e. transposition that goes beyond the minimum necessary to comply with the directive, and double banking.

12.6 Analysis of the national process

There are at least two characteristics of the UK transposition process that account for speedy transposition. The first is the fact that the European Communities Act makes it possible to implement EC obligations with statutory instruments without the adoption of a new Act.

The second characteristic is that the departmental lawyers, who also draft the legal texts for statutory instruments, ought to be involved in the transposition process from the very start and should therefore be able to indicate at an early stage in the negotiations if there will be problems with introducing certain provisions into national law. Since these lawyers tend to circulate among the departments and have a culture of their own, it is unlikely that the drafting styles differ between the departments. However, a technicality, which could make transposition more difficult, is that the drafting style of British lawyers differs from the style used by draftsmen in the EU.

Administrative culture also seems to play a role, and Kassim (2000) suggests that the efficient transposition and implementation in the UK, which seems to be unaffected by the substance of the directive, reflects deeply entrenched values in the UK administration.

As mentioned above, the coordination effort of the UK is very ambitious. This can partly be explained by the principles of the domestic system of government in the UK. Another explanation could be derived from the facts that the UK entered the EC/EU late, and that the attitude in the UK towards membership has been rather sceptical in nature. This could explain the adoption of a system that ensured that the UK interests are carefully safeguarded (Kassim, 2000). Yet another explanation could be found in the legalistic attitude of the UK towards the implementation and enforcement of directives. Since directives are implemented and enforced in the same way as domestic law, it is important that the directives are acceptable and possible to implement (Butt Philip and Baron, 1988).

12.7 Conclusions

- In the UK, most directives are transposed by Statutory Instrument (delegated legislation). While specific legislation is sometimes used as the basis for delegation, an important feature in the UK is that it is possible to base delegated legislation that aim to transpose European directives on the European

Communities Act 1972. While this certainly is important for speedy transposition, it cannot in itself account for the good transposition record of the UK.

- Another factor that facilitates prompt transposition is the efficient system for coordination of EU affairs in the UK. The central position of the Cabinet Office in this system is also of importance for transposition, since its central position can be used to put political weight behind efforts to reduce the transposition backlog.
- A third factor that is important for timely transposition is the link between the stages of negotiation and transposition. In the UK, project teams responsible for the negotiation strategy and the transposition plan are set up when appropriate. According to good practice, the same officials should be involved in both stages. While job-rotation makes this difficult in practice, the teams provide a certain degree of continuity throughout the process. It is regarded as important to ‘think transposition’ already at the negotiation stage.
- An important feature of the UK system is the so called ‘scrutiny reserve’, which gives the Parliament a possibility to be involved already at the negotiation stage. The ‘scrutiny reserve’ involves that ministers should not agree to EC legislation before the Parliament has had an opportunity to scrutinise it.
- Legislation that transposes European directives is subject to an open consultation procedure, and in principle at least 12 weeks should be provided for this. It is possible that this could slow down the transposition process, but on the other hand, it could lead to better solutions for transposition.
- One possible cause for transposition delays is the recent devolvement in the UK. In some cases, it is necessary to adopt separate transposition measures for the devolved administrations. Since this is a relatively new phenomenon, difficulties could arise in managing the different responsibilities.
- The debate on transposition in the UK is not so much about timely transposition. Since the UK score is usually good, there rather seems to be a concern that the UK is too zealous in transposing on time. The debate is more about ‘gold-plating’ or ‘elaboration’, and it is generally regarded as important that the UK does not do more than is required by the directive.

Appendix: List of interviewees

- Lady Justice Arden, Royal Courts of Justice
- Philip Bovey, DTI
- Natasha Coates, Cabinet Office
- Alison Rose, Cabinet Office
- Liam Laurence Smyth and Gunnar Beck, House of Commons
- Stephen Parker, Treasury Department
- Frances Nash, Treasury Solicitors
- Clive Fleming, DTI
- Simon Manley, Foreign & Commonwealth Office

13 Germany

13.1 General overview of the constitutional and political system

Germany is a federal republic in which political parties and interest groups play a central role in national policy-making. Like other federalist systems Germany's political system is far more complex than the structure of a centralized unitary state, such as the UK, France, and the Netherlands. It is a country with seventeen governments. Each of the sixteen constituent states of Germany's federalism has the full outfit of government. A minister-president heads each state and is elected in the state parliament. Each state has its own constitution, government, legislation, and administration. Most of the states have a constitutional court. In contrast to the pre-unification period, in which Germany comprised ten economically relatively homogeneous states and West Berlin, the post-1990 federalism has been characterized by sharp economic disparities between the poor states in the eastern part of the country, and wealthier states in the western part. The difference between the poorest and the richest state is 'twice the difference between the poorest and the wealthiest state in the USA' (Schmidt, 2003: 57).

13.1.1 Constitutional characteristics

The codified character of German law means that there is little judge-made or common law. The judge in a codified system is only to administer and to apply the codes. He fits the particular case to the existing body of law as found in them, i.e. the judge may not set precedents and thus make law, but he must be only a neutral administrator of the existing codes. This lies at the base of the 'dominant philosophy of legal positivism, or analytical jurisprudence' (Conradt, 2001). Legal positivism contends that existing general law as found in the codes sufficiently encompasses all the rights and duties of citizens. Judicial review is not necessary. Politics, accordingly, must be kept strictly distinct from law.

13.1.2 Political characteristics

One key feature of the political system in Germany is the *Kanzlerdemokratie*. Article 65 German constitution says that the Federal Chancellor determines and is responsible for the general guidelines of policy. Federal Ministers are appointed and dismissed by the Federal President upon the proposal of the Federal Chancellor. Within these limits each Federal Minister conducts the affairs of his department independently and on his own responsibility. The Cabinet resolves differences of opinion between Federal Ministers. It is the Federal Chancellor who conducts the proceedings of the Federal Government in accordance with rules of procedure adopted by the Government and approved by the Federal President.

The second key feature is Germany's federal structure. The power of the states is institutionalized in the *Bundesrat*, the collective representation of the states at the federal level. Here the states play a key role in the lawmaking process. This largely reflects the central position of the upper house in federal legislation, which turns Germany into a 'case of strong symmetrical bicameralism' (Lijphart, 1999: 214, 314). Although legislative power is mainly concentrated in the federation¹⁰⁹, the *Länder* have conferred a considerable

¹⁰⁹ First, it enjoys exclusive legislative powers according to Art. 73 German Constitution (foreign affairs, citizenship, immigration, currency, air transport). Secondly, it has exercised legislative power in almost all

number of legislative competences to the federal state to ensure equal living conditions in the whole republic. They have kept competences in particular in cultural matters, police law, local government, construction law and commercial law, but also in transport, social policy, food, and utility policies.

Furthermore, Germany is a densely organized society. Interest groups are a 'vital factor in German policy making process' (Conradt, 2001: 131). Germany is a 'neo-corporatist' state (Lehmbruch, 1979: 147-188), i.e. there is a strong corporatist tradition of institutionalized cooperation between government and industry, regulator and operator¹¹⁰. These associations become in effect 'quasi-governmental groups, training, licensing, and even exercising discipline over their members with state approval' (Héritier, Knill and Mingers, 1996: 59). In addition to parliamentary recruitment and extensive consultations between government and interest groups, the practice of appointing group representatives to the many permanent ministerial advisory committees and councils affords the interest groups still more input into the lawmaking process.

Another key feature is the role of parties in Germany. Germany has been notorious for the dominant part played by the political parties on all levels of government.¹¹¹ However, the role played by parties differs from one policy area to the other. In some of these areas the role of political parties is strong, for example in social and transport policy, in others moderate or weak (Schmidt, 2003: 49). Examples of the latter include mainly policy domains governed by experts, such as monetary policy and competition policy.

13.1.3 Political administrative characteristics

German administrative units are very hierarchical but not centralized. The bureaucratic pyramid is very steep, but there is little actual direct control from the top of the activities in the middle and at the base. It is highly fragmented and 'discourages comprehensive policy planning or major reform initiatives that require extensive interdepartmental, interministerial, or federal-state cooperation' (Mayntz and Scharpf, 1975: 69-76). Because the top political officials in each ministry have little staff, they cannot exercise the control in practice they have in theory. However, the small size of each section and the practice of making the section head personally and legally responsible for the section's decisions make success or failure highly visible (Schmidt, 2003).

fields of concurring legislation according to Art 74 German Constitution which can only be exercised by the Länder, as long as the Federation does not legislate. Concurring legislative powers include most legislative subjects, such as civil law, criminal law, court organization and procedure, the legal profession, foreigners' residence, public welfare, economic affairs, labour relations, land law, and road traffic. Thirdly, the Federation has the right to enact skeleton or framework legislation carried out in detail by the Länder according to Art. 75 German Constitution which includes general principles of higher education, legal status of the press, nature conservation, regional planning. Once the Federation has exercised its power to legislate relevant law of the Länder becomes void.

¹¹⁰ Corporatism is an old term in social and political thought, referring to the 'organization of interests into a limited number of compulsory, hierarchically structured associations recognized by the state and given a monopoly of representation within their respective areas' (Schmitter, 1981: 300).

¹¹¹ One indicator of the important role played by political parties is the attention given to the parties in the German constitution (Art. 21 I German constitution). A second indicator of the major part played by the parties is that they are entitled to receive subsidies from public budgets of up to one-half of their total annual revenue. A third indicator of powerful role for the parties can be derived from the weakness of plebiscite institutions at the level of the federation.

Despite the decentralized structure of the state, civil servants generally share a common background and training. Recruitment to the service is closely tied to the educational system. The higher level, still the monopoly of the university-educated, was once restricted in that a legal education was required. Today lawyers still dominate the upper ranks, and surveys have shown that they remain the ‘most privileged of the privileged’ (Brinkmann, 1973: 150). A recent comparative study shows that over 60 percent of top German civil servants have been lawyers, as compared to approximately 20 percent of high-ranking American bureaucrats (Aberbach et al., 1990: 7). But there are no graduates of elite schools whose members are distributed throughout the various ministries, as in Britain and France since there are no elite schools.

Given the background of German civil servants are a status-conscious group of people committed to the Republic and the EU and to the values and processes of them respectively (Pag and Wessels, 1988; Anderson, 2005). The civil servant’s perception of the political character of the job, however, has increased. In a comparative study of top administrators, German respondents were found to be as equally conscious of the ways in which work affects the stability and effectiveness of the democracy, as are civil servants in Britain, and more aware than Italian bureaucrats (Putnam, 1973: 257-290). A study of assistant section heads in the Economics Ministry found that most recognized and accepted the political character of their job. 67 percent perceived that they were involved ‘in politics’ and were not merely administering the laws as ‘neutral’ agents of a state above society, parties and parliament (Conradt, 2001: 217).

13.2 Political or public discussion concerning EU directives and their transposition

In August 2002, the European Commission stated that Germany had only transposed 95.2% of EC directives. According to the 2004 Internal Market Scoreboard from 13 July, Germany has not notified 3.5% of directives, placing it close to the bottom of the transposition league. Moreover, Germany is considered to be the second worst ‘offender regarding the number of directives whose transposition is over two years late’ (Asser Instituut, 2004e: 19).

In 2004, a federal government committee (*Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung*) has been discussing the reform of the German federal legal system, including issues related to speeding up the processes of to implementation of EC directives, as well as making the negotiations in Brussels more effective. The main aim of this committee, however, has been to disentangle the relations between the Bund and the Länder. This committee, however, was dishonored in December 2004. A remake is currently under consideration.

13.3 Description of judicial instruments

In Germany EC directives are implemented in accordance with constitutional law and the legal procedures relation to national law and ministerial orders, as set out in the German constitution, or the state constitutions. The draft laws and ordinances are developed by the Ministry which is competent with respect to the subject matter of the EC directive and they are then agreed with the relevant Ministries (Asser Instituut, 2004e: 6) There is no specific ‘implementation act’ (Asser Instituut, 2004e: 6). The EC directives are either implemented as laws (*Gesetze*) or ministerial orders (*Rechtsverordnungen*).

Law (*Gesetz*)

More than 75 percent of all EC measures requiring further transposition into national law fall within the competence of the federal state (Winkel, 1997:116; Brinkmann, 2000), i.e. fall under the exclusive competence of the federation (*Bund*).

The draft law formulated by a civil servant in a ministry is circulated within the Ministry and then a consultation process starts which involves other federal Ministries which are concerned in the specific case, the Länder ministries and also associations concerned. Then the lead Ministry redrafts the law and again consults with the other federal ministries concerned, among them always the Ministry of Justice and the Ministry of the Interior (Asser Instituut, 2004e: 13). These constitutional ministries (*Verfassungsressorts*) scrutinize all draft bills drawn up by the other Federal Ministries as to their compatibility with the German federal constitution of the Bund (*Grundgesetz*). Then the cabinet votes on it and submits it to the chamber of the Länder (*Bundesrat*).

Table 13.1: German legal instruments

	<i>Gesetz</i>	<i>Verordnung</i>	<i>Verwaltungsvorschrift</i>
	Law	Ministerial order	Circular
Main features	Issues for which the Constitution calls for settlement through law	Provisions issued by government with explicit authorization through law (<i>Ermächtigungsgrundlage</i>)	Provisions issues by a minister without explicit authorization by law
Advice constitutional ministries	Required	Required	n.a.
Parliamentary approval	Required	Not required	n.a.
Procedure	Simple majority in Parliament		
Remarks		Fastest instrument	

The Government thus has an opportunity to take the counterproposals of the Bundesrat into consideration or attach to the draft a written statement of its position on these proposals. The comments of the Federal Government on any objections the Bundesrat may put forward are known as a counterstatement; like the comments of the Bundesrat, which have to be submitted within 6 weeks, this counterstatement is attached to the original bill. Thus the following documents are submitted to the Bundestag: the draft bill drawn up by the Federal Government together with an explanatory memorandum; the comments of the Bundesrat; and the counterstatement of the Federal Government on the comments of the Bundesrat. The documents submitted to the Bundestag at the beginning of the legislative process thus already reveal important aspects which may possibly give rise to conflict between the Federation and the Länder at a later stage.

Once copies of the bill have been distributed, the bill is considered by the parliamentary groups. As soon as the parliamentary groups have given the bill their initial consideration, the Council of Elders of the German Bundestag decides the date on which the bill will be given its first reading in the plenary.

The Bundestag generally deals with bills in three readings in the plenary. During the first reading, a debate is only held if this is recommended by the Council of Elders or demanded by one of the parliamentary groups. Debates tend to be held on bills of topical interest or political significance if the Government wishes to state its reasons for introducing them and if the parliamentary groups wish to make public their initial position.

The bill is always referred to one or more committees of the Bundestag at the end of the first reading. If a particular bill covers different subjects, it is referred to one or more committees in addition to the committee responsible. These committees submit their comments and proposed amendments to the committee responsible, which is required to take these into account in its report to the plenary. The deliberations of the committee responsible conclude with the submission of a report and recommendation to the plenary, on the basis of which the bill is given a second reading.

Often bills cannot be dealt with conclusively during committee discussions even if the preparatory work by the parliamentary groups has been very detailed. If the subject matter of the bill is very complex, and the bill concerns a politically controversial piece of legislation, then a public hearing of experts and representatives of interest groups is held. This is now almost always the case when a bill of any importance is introduced.

Once the committee has discussed the bill the rapporteurs begin the second part of their work. They submit a written report to the plenary of the Bundestag in which they present the course the discussions have taken in the committee responsible and the committees asked to give their opinions. In their report, the rapporteurs focus in particular on reasons why the committee may have deviated from the Government's bill.

Once the committee has completed its work, the parliamentary groups must decide what position to take on the bill in its present form. Although the experts from the parliamentary groups are thoroughly familiar with the bill, it is important that all Members now have an opportunity to form an opinion on the bill. Further discussions are held if necessary by the relevant working groups or working parties, and after the executive committees of the parliamentary groups have been informed, the topic is placed on the agenda at a full meeting of each parliamentary group.

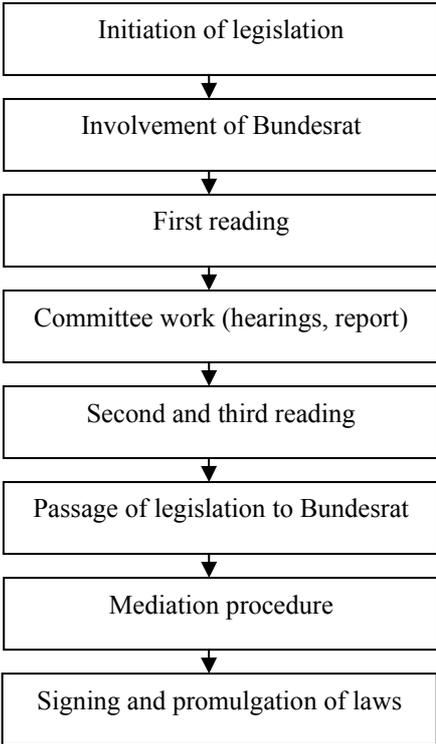
As a matter of principle, the Bundesrat participates in the passage of every law adopted by the Bundestag. The extent of its participation, however, depends on whether the bill in question is one to which the Bundesrat may lodge an objection or one requiring the Bundesrat's consent.

The Bundesrat may therefore exercise an absolute veto in cases a bill requires the consent of the Bundesrat. If it refuses to give its consent, then the bill has failed. The Bundestag cannot override this veto, no matter how large a majority of its Members supports the bill, and even if support for the bill is unanimous. A bill is considered to require the consent of the Bundesrat if it substantially affects the interests of the Länder. A bill may fall into this category if it affects the finances of the Länder or if it has a particular effect on the Länder's implementation of legislation, the organization of the Land administrative authorities or the implementation of any other measures by the Länder. As most federal laws are not implemented by the Federation itself but by the Länder 'in their own right' (Art. 83 of the German constitution), the Länder put in place the necessary authorities and administrative procedures for this purpose; if federal lawmakers wish to adopt specific provisions in this regard, they must first seek the consent of the Bundesrat. In practice, approximately half of all the laws passed require the consent of the Bundesrat (Binkmann, 2000).

The purpose of the mediation procedure, which is convoked in case of disagreement between upper and lower chamber, is to amend the bill in question in such a way that the Bundestag and the Bundesrat are equally satisfied with the final result. The Mediation Committee is a body composed of Members of the Bundestag and members of the Bundesrat. It comprises 16 Members of the Bundestag, who reflect the relative strengths of the parliamentary groups in the Bundestag, and 16 members of the Bundesrat, one for each Land. When the deliberations are over, the Mediation Committee submits a compromise proposal to the Bundestag and the Bundesrat.

In keeping with Article 82 of the German constitution, the above law was sent to the Federal Government to be signed by the appropriate Federal Minister and the Federal Chancellor. This procedure, referred to as countersignature, is laid down in Article 58 of the German constitution and ensures the validity of orders and directives of the Federal President. Following countersignature, the law was sent to the Federal President to be signed. Finally, it is promulgated in the Federal Law Gazette (*Bundesgesetzblatt*) and takes effect according to the relevant provisions.

Figure 13.1: Federal law making process (Art. 76-78 Constitution)



Ministerial Order (*Rechtsverordnung*). Ministerial orders have statutory status and have the status of laws in a material sense. The major difference from laws made by parliament is that they can be declared void due to illegality not only by the constitutional court, but by any court. A ministerial order is normally passed by the government executive. An explicit legal authorization, specified in the law as to contents, end and extent, is required. Article 80 of the German constitution states that a ministerial order must be based upon an enabling power set out within an existing law (*Ermächtigungsgrundlage*) in order to be passed into German law for a minister or the government of the federal state as a whole or a government of a Land to legislate by way of ordinances (Streinz and Pechstein, 1995: 136). It ‘ranks’ lower than a law. A ministerial order simplifies legislation and keeps laws free of individual provisions, thus enabling the executive to ‘carefully rule on technical and practical items and to use the administration’s expert knowledge’ (Pag and Wessels, 1988: 170). This method

of ministerial order is, in fact, to a certain extent indispensable for transposing EC directives in time (Scheuing, 1985).

To note, administrative instructions (*Verwaltungsvorschriften*) have been used as a third kind of instrument to transpose EU directives up to the early 90s. Two kinds of such instructions could be differentiated: those ruling internal organization and procedures and those forming the higher executive to subordinated bodies regarding the interpretation of laws and the use of discretion. Several ECJ ruling in the late 1980s and early 1990s, however, have made clear that these administrative instructions (also known as circulars) were not adequate for transposition of EU directives.

Techniques

In exceptional cases, clauses have been included in laws which provide for the automatic transposition of EC directives at the moment that they enter into force in the EC. In rare cases where EC law must be implemented word for word, ‘automatic implementation’ allows the smooth implementation of a directive (Asser Instituut, 2004e: 15). An automatic implementation clause has been included, for example, in the Road Traffic Ordinance (*Strassenverkehrs-Zulassungs-Ordnung*).

13.4 The national policy cycle concerning directives

13.4.1 General overview of the process

The coordination of EU policy making in Germany is ensured at different levels of government by a set of institutions in the broad meaning of the term. Although the different coordination mechanisms have not been officially established by law, they have a long tradition and have influenced the structure of the federal government’s decision making process to a considerable extent.

13.4.1.2 National treatment of Commission proposal

In general, the negotiations at the EU level are lead by the Federal Government. The lead Ministry which is responsible for a given issue will conduct the German negotiations. If more Ministries are concerned, the joint procedure rules of the Federal Government (*Gemeinsame Geschäftsordnung der Bundesregierung*) provides the distribution of responsibilities between the relevant Ministries. The subsidiary Ministry will agree with the lead Ministry with respect to the position on given provisions of the EC directive.

The principle of ministerial responsibility would suggest that all ministers are equal in the face of the EU. But because of the evolution of EU policy fields, but also results from the historical evolution of the ministries in the Federal Republic some are more equal than others.

Due to the original ECSC and EEC treaties with their concentration on a few economic policy areas, only the Ministry for Economics had established a European affairs division. In absence of a foreign minister until 1955, the Federal Ministry for Economics took on the lead-role in the day to day policy management for the European Coal and Steel Community (Maurer, 2003). These original arrangements established the Ministry of Economics in a strong position on matters of functional – economics – integration, although there had been no formal agreement on the division of labour with the Chancellor’s Office. The entry into force of the Rome Treaties ‘ pushed the Ministries of Economics and Foreign Affairs to an agreement on European policy responsibilities, reached in 1958’ (Koerfer, 1988: 553-568). The Ministries for Agriculture, Finance

and Foreign Affairs created European departments and directorates during the 1960s. In 1993, after the entry into force of the Maastricht Treaty, the Ministry of Foreign Affairs established a separate European affairs division. In addition, the Ministries of Justice and of the Interior provide legal expertise to the so called ‘Musketeers’ (Fisahn, 2001). The involvement of other ministries only became relevant within the context of the SEA and – with regard to the creation of divisions dealing with substantial aspects of co-operation in the fields of justice and home affairs – with the entry into force of the Maastricht Treaty.

With a view to instructing the Permanent Representation of the German position in Brussels, the Ministry of Finance – until 1998 the Ministry of Economics – coordinates the meetings in relation to COREPER I, whereas the Ministry of Foreign Affairs is responsible for the management of the Berlin based work in relation to COREPER II (Bulmer, Maurer and Paterson, 2001).¹¹² In order to give instructions to COREPER I and its subsequent working units, every ministry has a European Delegate (*Europa-Beauftragter*). They meet on a monthly basis. Since October 1998 the location and the chairmanship have been transferred from the Ministry of Economics to the Ministry for Foreign Affairs. Below this level, there are regular contacts between the heads of division (*Referatsleiter*) in order to settle disputes between the ministries concerned on issues related to the Council’s working group meetings.

The Chancellor claims a certain ‘domaine reserve’ within the European Council. He disposes of a so called ‘guidance competence’ (*Richtlinienkompetenz*), which can be defined as a capability to set the strategic guidelines of the federal government in general, to resolve inter-ministerial disputes, and to determine the final governmental approach on a given issue (Scheuing, 1989).

Although according to Art 32 German constitution external relations are the exclusive power of the Federation at national level, the Länder gradually could make their voice heard in European law making. During the negotiations on the Rome Treaties, the Länder and the federal government also agreed on the institution of a ‘Länder observer’ (*Länderbeobachter*), who is located in Berlin as well as in Brussels, to provide information to the Bundesrat and the Länder. The Länder observer is entitled to participate at each meeting of the Council of Ministers and to report on the latter’s proceedings to the Länder and the Bundesrat (Bulmer, Maurer and Paterson, 2001). However, due to its rather modest administrative support, until 1998 there were only two full-time and one part-time civil servants working in its Berlin and Brussels offices, the Länder observer did not become a key position in the decision making process between Brussels and the Länder governments (Dette-Koch, 1997:169-175).

The principle of subsidiarity, as provided in Art. 5 of the EC Treaty was an important demand of the German Länder. A new version of Art. 23 German constitution, allows the Länder to act as German representatives in the Council when their exclusive competences are concerned in the legal act in question. The direct participation of the Länder in the external representation of Germany in European affairs has been made possible through the amendment of Art. 146 (Art. 203) TEC at Maastricht that allows Länder ministers to be representatives in the Council.

These provisions were complemented by two Acts, one of which is the Act on cooperation of the Federation and the Länder regarding European affairs¹¹³, the other one is the Act on cooperation of the

¹¹² There are exceptions: COREPER II meetings with regard to the Councils on ECOFIN, Budget, Finance and Tax policy are coordinated by the Ministry of Finance. The same rule applies to the instructions for the German COREPER II.

¹¹³ *Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union* (EuZBLG), BGBl 1993 I S. 313.

Federal Government and the Bundestag¹¹⁴, and by an Agreement between the Federal Government and the Governments of the Länder.¹¹⁵ The involvement of the Länder is now as follows (Maurer, 2003):

- the Länder have to be informed through the Bundesrat by the Federal Government in matters concerning the European Union,
- the Bundesrat has to be involved in the decision making process of the Federation in so far as it would have to be involved in a corresponding internal measure or in so far as the Länder would be internally responsible,
- in case of federal legislative power, if Länder interests are affected the opinion of the Bundesrat has to be taken into account,
- if Länder legislative powers, the establishment of their authorities or their administrative procedures are essentially affected the opinion of the Bundesrat shall prevail while, at the same time, the responsibility of the Federation for the country as a whole shall be maintained,
- if Länder exclusive legislative powers are essentially affected the exercise of rights of Germany as EU member is transferred by the Federation to a representative of the Länder while, once again, the responsibility of the Federation for the country as a whole shall be maintained.

As a response to the growing amount of EC legislation after the entry into force of the SEA, the Länder also opened information or liaison offices in Brussels between 1985 and 1987. Initially being criticized by the federal government as instruments of an ‘competitive foreign policy’ (*Nebenaussenpolitik*), they quickly became a necessary tool for the Länder to secure and pass on information from the European Commission and the German Permanent Representation during the decision preparation phase. Compared with the Länder observer, the Länder offices have far more administrative staff. In autumn 1997, there were 141 civil servants working in the offices of which 90 belonged to the higher service. Länder offices in Brussels have the following tasks: information gathering, attention for the special interests for each Land and presentation (Bulmer, Maurer and Paterson, 2001).

Besides the special cooperation between the Länder which have established a joint office in Brussels, all Länder are interested in coordinating as much as possible their activities in Brussels. They have therefore installed working parties on special topics. There is also a common interest in taking into account the workload on the information sources (EC authorities) and in asking them once only for information, not sixteen times (Streinz and Pechstein, 1995: 152)

The participation of the Bundestag in the elaboration and negotiation of European legislation is nearly non-existent. This is firstly a consequence of the system of separation of powers organized by the German constitution, which assigns external power to the government and not to the legislature. Secondly, the fact that even the information of the Bundestag is not systematically organized seems to be the consequence of neglect on the side of the Bundestag itself. Only in the last years have two parliamentary committees of the Bundestag been established: on EC matters, and on EU law (a branch of the law committee).

¹¹⁴ *Gesetz über die Zusammenarbeit von Bundestag und Deutschem Bundestag in Angelegenheiten der Europäischen Union* (EuZBBG), BGBl 1993 I S. 311.

¹¹⁵ *Vereinbarung vom 29. Oktober 1993 zwischen der Bundesregierung und den Regierungen der Länder über die Zusammenarbeit in Angelegenheiten der EU in Ausführung von Paragraph 9 des Gesetzes über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der EU*, Bundesanzeiger No. 226 of 1993, p. 10425; supplemented by the Vereinbarung of 8 June 1998 in order to deal in future with framework decisions of Art. 43(2) (b) TEU as adopted in Amsterdam.

13.4.1.3 National transposition

The decisive actors in the German implementation of EU directives are the same as in the preparation and making phases of the EC policy cycle. Winkel (1997: 116), however, states that these actors tend to be ‘more concerned about the first two stages of European decision-making and are less sensitive to what comes after a given agreement’. To underline is that the coordination ministry shifts from the Ministry of Economics/Finance to the Ministry for Foreign Affairs with the government change in 1998.

Commission drafts of proposals for new or amended EC legislation are transmitted from the Permanent Representation to the Ministry of Economics and, since October 1998, to the Ministry of Finance. At the ministerial stage of policy development, a complex process of bargaining and negotiation takes place among the experts at the base, the section head, the department and subdepartment chiefs, and the executive. Any policy matter is attributed to one department of a ministry (the *Referat*, the basic working unit, roughly corresponding to a division of the Commission), as well as to the Bundestag and Bundesrat. Thus, for each directive there is a head of a department who is responsible for implementation. The competent department works out the draft of the legal act. If several departments or ministries are concerned, the principle of ‘*Federführung*’ is applied, i.e. one department is assigned the leadership and the final responsibility for the preparation. A civil servant responsible for the preparation and negotiation of a draft legislative act is also likely to draft the implementation measure (*Referentenentwurf*) (Maurer, 2003).

The influence of interest groups, parties and consultants is most directly felt at the executive and departmental levels. The sections are relatively insulated and secure in the knowledge that they have as much expertise, if not more, as anyone else in the ministry.

Technical issues are dealt with in one or two meetings per month of the so-called Group of European Specialists presided by the Ministry for Foreign Affairs. Here, technical policy issues are discussed and exchanged by officials in charge of the transposition of the EU legislation.

Where certain sections lag behind the time schedule required by a EC directive, these cases are discussed at high-level in regular meetings within the ministry but also within the federal government. These meetings take place about twice every month, attended by the relevant directors and subsequently, monthly meetings of the secretaries of state for Europe (*Europastaatssekretäre*) (Bulmer and Paterson, 1987). Currently, a new database is being put in place in order to better deal with the administrative challenges. The average implementation duration of the individual ministries is not documented.

13.4.2 Bureaucratic consultative and coordinating bodies

The bulk of the political coordination is carried out by the Interministerial Committee of State Secretaries on European Affairs (*Europastaatssekretäre*). Table 13.2 provides an overview of the various committees in Germany, including this committee. It was set up in 1963 in order to deal with ‘controversies in relation to European Affairs’ (Sasse, 1977:12). Meeting approximately on a bi-monthly basis, it brings together the State Minister dealing with European Affairs in the Chancellery and the Permanent Representative of Germany in Brussels. Other ministries participate in the meetings when the chair considers it as appropriate.

Table 13.2.: Interministerial coordination bodies for EU policy-making including transposition:

Body	Level	Frequency	Chair	Nature of issue
Cabinet	Ministerial	Agenda items as needed	Chancellor	Important political matters
Committee of State	State permanent secretaries	Approx. monthly	Minister of State for	Political

Secretaries for European Affairs			Europe, AA, BMF	
Group of European Specialists	European specialists	Approx. 1-2 months	AA	Exchanges on policy by officials
Preparation of COREPER I	Section heads	weekly	BMF	Instructions to COREPER I

Source: Bulmer, Maurer and Paterson (2001).

In October 1998 the secretariat shifted from the Ministry of Economics to the Ministry for Foreign Affairs underlining the latter's strengthened role in coordinating German EU policy. The minister's main task is to settle controversial questions and to prepare dossiers of a political and strategic nature with regard to the Council of Ministers meetings. Decisions taken by the Council of Ministers are taken by common accord and are politically binding for the ministries.

o coordinate European policy making between the federal state and the Länder more efficiently, every Land government nominated its own European affairs Commissioner (*Europabeauftragter*) or European affairs delegate (*Europabevollmächtigter*) occupying a post either as a minister or as a state-secretary. Such delegates act as a 'bridge' between their Land and the other levels of European policy making by representing their Land in the 'Europe chamber' of the Bundesrat, a special institution for the coordination of the Bundesrat's European policy, and vis-a-vis the federal government (Maurer, 2003). For this reason, most of these posts have been located at the Representation of the Länder at the federal state level in Berlin.

13.4.3 The role of compulsory advisory bodies

The only compulsory advisory bodies in the transposition process are the so-called constitutional ministries: Ministry of Justice and the Ministry of Interior. The lead ministry in the transposition process drafts the law or the ordinance and consults next to the other federal ministries concerned always the Ministry of Justice and the ministry of the Interior. They scrutinize all draft bills and ordinances as to their compatibility with the German federal constitution of the Bund (*Grundgesetz*).

13.4.4 The role of parliament

Originally, the Bundestag disposes of very limited scrutiny powers (Schmidt, 2003). The federal government has to inform the two parliamentary chambers before any decision that would become binding law in Germany. These general rules have been never applied effectively for three reasons: First, the Art. 2 EEC procedure focused on information of parliament about European affairs but has not foreseen a right of consultation. Consequently, the parliament can not affect the federal government's stance in the Council of Ministers. Second, both houses have only informed about relevant EC documents at a rather late stage. 'About 65 per cent of EC documents debated on the Bundestag's floor between 1980 and 1986 were already in force at the time of debate' (Ismayr, 1992: 330). Consequently, scrutinizing the government in EC affairs has been limited to some kind of 'ex-post' control and has not provided parliamentarians with an effective involvement in EC policy making. Third, the Bundestag has been shown little interest in scrutinizing European affairs. Furthermore, the first parliamentary institution for dealing exclusively with EC affairs – the EC Committee set up in 1991 – faced almost the same structural problems as its predecessors,¹¹⁶ since it

¹¹⁶ Integrations-Ältestenrat, and the Sub-Committee on European Affairs of the Foreign Affairs Committee

was not empowered to give the Bundestag a central voice vis a vis the government. The EC Committee has been only rarely nominated as committee in charge (Brinkman, 2000).

In clear contrast to the Bundestag, the Bundesrat adapted its institutional structure and instruments at a rather early stage of the European integration process. The European Union Affairs Committee (EUAC) (*Ausschuss für Fragen der Europäischen Union*) was established on 1 November 1993, though its general tasks and structure date back to 20 December 1957 when the Bundesrat created the first parliamentary Committee for European issues. Unlike in the Bundestag, the members of the committee can be replaced by civil servants. The EUAC normally holds a meeting every three weeks to prepare the decisions of the Bundesrat. If a decision must be made on an EU document before the next Bundesrat plenary session is scheduled then the so called 'European chamber' (*Europa Kammer*) will be convened. If operating, the chamber replaces and acts on behalf of the Bundesrat's plenary.

As a general rule, the EUAC is always nominated as committee in charge. Consequently, it exercises much more power in setting the Bundesrat's EU agenda than its counterpart in the Bundestag.

13.4.5 The role of other, subnational or functional governments

According to the ECJ the duties and obligations flowing from the EC Treaty in a federal state not only bind the federal level but the federation as a whole, i.e. including the Länder or other entities such as local authorities.¹¹⁷ This EC law position is in line with German legal doctrine according to which the Länder are under a constitutional duty to implement EC law if they have the power for a given subject according to the German constitution. This follows from Art 23 German constitution the duty of the Länder to federal loyalty (*Bundestreue*). This unwritten legal principle derived directly and explicitly from the notion of federalism. It is meant to establish for the Länder, in their relations with each other and with the 'greater whole', respect with regard to the whole interest of the Federation and the concerns of the Länder.¹¹⁸

13.4.6 The role of interest groups

In principle, the relevant subject matter association or unions are already informed when the EU plans to put in place a new EC directive. This will provide them with an opportunity to already present their position and interest in Brussels during negotiations at the EU level. During the law-making procedure, they participate in accordance with the usual procedures defined by German law.

13.5 Conclusions

- Since implementation in Germany depends to a large extent on previous involvement in the decision-making process of the law to be implemented, involvement of the Länder as regards the rules and practices of decision-making at national and European level are crucial. Transposition of EC legislation by up to seventeen governmental actors is certainly more complicated, cumbersome and time-consuming than by only one central governmental actor.

¹¹⁷ ECJ Case C-8/88 *Germany v Commission* (1990) ECR I-2321 at 2359; Case 9/74 *Casagrande* (1974) ECR 733 AT 779. To a considerable extent in Germany the local authorities are in charge of application of EU law such as of provisions of freedom of movement of migrant workers and of federal legislation; the local authorities issue residence permits and decide on social benefits.

¹¹⁸ BVerfG 92, 203

- Germany has been notorious for the dominant part played by the political parties on all levels of government. An often reoccurring picture is that the first and second chambers consists of different political majorities, which leads often to deadlock or the so-called *Politikverflechtungsfalle* (Lehmbruch). Political or public discussion concerning, among other things, EU directives and their transposition fail because of strategic positioning of political parties in those chambers leering with one eye to the next regional elections. In 2004, a federal government committee (*Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung*) has been discussing the reform of the German federal legal system, including issues relating to speeding up the processes relating to implementation of EC directives, as well as rending the negotiations in Brussels more effective. But since this discussion was combined with a discourse about disentangling the relations between the Bund and the Lander, the committee did end up in stalemate and was dishonored in December 2004. A very sensitive issue here was higher education, a policy field that falls under the concurrent legislative authority of the *Bund* and the *Lander*. Powerful minister presidents of the *Länder* lurking to at least preserve if not further increase existing legislative competences could not cooperate on the proposal put forward by the federal government. Party politics further aggravated the situation considerably.
- The lead in the negotiation phase and the transposition phase is performed by different coordinating ministries. With a view to instructing the permanent representation of the German position in Brussels, the Ministry of Finance – until 1998 the Ministry of Economics- coordinates the meetings in relation to COREPER I, whereas the Ministry of Foreign Affairs is responsible for the management of the Berlin based work in the relation to COREPER II. However, there are exceptions: CORPER II meetings with regard to the Council on ECOFIN, Budget, Finance and Tax policy are coordinated by the Ministry of Finance. The same rules applies to the instructions for the German COREPER II. Adopted texts are then transmitted from the permanent representation to the Ministry of Economics, and since October 1998, to the Ministry of Finance. But the major part of the political coordination, then, is carried out by the interministerial committee of State Secretaries on European Affairs. Meetings are only bi-annual and furthermore, the secretariat shifts continuously from one ministry to another. In October 1998, with the new socialist government the secretariat shifted from the Ministry of Economics to the Ministry for Foreign Affairs. The 1-2 meetings per months by the Group of European Specialists headed by the Ministry of Foreign Affairs to discuss technical issues concerning the transposition of EU legislation are also not very frequent.
- Interdepartmental and interministerial meetings are not very frequent. Political coordination meetings carried out by the interministerial committee of State Secretaries on European Affairs take place only bi-annually. Technical coordination meetings by the Group of European Specialists headed by the Ministry of Foreign Affairs only 1-2 per months.

14 Italy

14.1 General overview of the constitutional and political system

The Constitution sketches the main features of a bicameral parliamentary system, which is to be a unitary state, though it also prescribes the division of the national territory into 20 regions (Putnam, 1993). In October 2001 the Italian constitution was modified providing Italy with a federal framework. Article 5 of the constitution enshrines both the principles of national unity and autonomy.

14.1.1 Constitutional characteristics

Since 2001, after the amendment of the Italian constitution, Italy has shifted from a unitary state to a decentralized state with more independent provinces and regions. The regions have gained a considerable number of legislative competences following Article 117.3 of the Italian constitution.¹¹⁹ Article 117.4 of the Italian constitution mentions the areas that fall exclusively under the legislative competence of the regions. This is a rest category including everything which does not fall under the central government's authority. As long as the regions and provinces do not act in these fields, however, the central government has still the right to act.

14.1.2 Political characteristics

Italian parliamentary regime shows three main political institutions: the Parliament, the Government and the President of the Republic. While legislative and executive powers are in the hands of the first two institutions respectively, the President of the Republic is symbol of the nation and guardian of the Constitution.¹²⁰

The Italian Parliament is made up of two chambers: the upper chamber is called *Senato della Repubblica* (315 members), the lower *Camera dei Deputati* (630 members). Both chambers are elected every five years and they present some internal articulation, as MPs can sit in permanent as well as in *ad hoc* commissions. Until the mid-1990s, the Government and its leader were in a weak position in front of the Parliament and political parties: political competition between the numerous parties was in fact not limited to specific situations (elections) but it was an ever-lasting and pervasive attribute of domestic politics. Institutional barriers to 'insulate' government from the encompassing political struggle were weak so that the former was continuously exposed to threats coming from the parties forming governmental coalition. The Constitution

¹¹⁹ The areas include: International and European union relations of the regions; foreign trade; protection and safety of labour; education, without infringement of the autonomy of schools and other institutions, and with the exception of vocational training; professions; scientific and technological research and support for innovation in the productive sectors; health protection; food; sports regulations; disaster relief service; land-use regulation and planning; harbours and civil airports; major transportation and navigation networks; regulation of media and communication; production, transportation and national distribution of energy; complementary and integrative pensions systems; harmonization of the budgetary rules of the public sector and coordination of the public finance and the taxation system; promotion of the environmental and cultural heritage, and promotion and organization of cultural activities; savings banks, rural co-operative banks, regional banks; regional institutions for credit to agriculture and land development.

¹²⁰ The President of the Republic detains some power in the legislative process that will be analysed in the related section.

designed ‘weak institutions and strong parties’ (Bindi and Cisci, 2005: 146). This penetration of political institutions by political groups (*partitocrazia*) was thus a typical feature of the Italian political system during the First Republic (Giuliani and Piattoni, 2001). The consequences have been the very short duration of cabinets and the high level of conflict within the latter. In the 1996-2000 legislatures, some forty different political groups were represented in parliament, with an eight party coalition in government. As a consequence, the ‘over fifty –five cabinets of the republic have been large and unstable four-five party coalitions, with some of the parties further subdivided into influential streams, each one with its own agenda and leaders’ (Bindi and Cisci, 2005: 147).

14.1.3 Political administrative characteristics

The executive power belongs to the Government, which is formed by the Council of Ministers (*Consiglio dei Ministri*) led by the Prime Minister (*Presidente del Consiglio*). The latter is appointed by the President of the Republic after lengthy consultations with party leaders. The lack of a direct investiture of the Chief of the Executive in a ‘polarized pluralist system’ (Sartori, 1982) determined a situation in which for a long time - i.e. since 1948 to the transition from the so called ‘First’ to the ‘Second Republic’ during the 1990s - the Prime Minister did not emerge as an actor able to firmly lead the cabinet and the related majority in Parliament towards the accomplishment of governmental program, being much more devoted to conciliate the different interests of the numerous parties represented in governmental coalitions (Gallo and Hanny, 2003). The latter were in fact usually made up of more than three parties, due to the high number of competing political formations and to proportional electoral rule. However, after the crisis of traditional parties in the early-1990s and the modification of the electoral system in 1993, such a situation has started to change so that in recent years the Chief of the Executive has acquired a more prominent and effective role (Bindi and Cisci, 2005).¹²¹

The Council of Ministers is a collegial body but is often referred to as an ineffective centre for policy coordination. The ‘level of collegiality has usually been low’ (Bindi and Cisci, 2005: 146), while interministerial competition has always been predominant.

According to the revised constitution of October 2001 every Italian region has a directly elected assembly (*Consiglio regionale*), provided with legislative powers and an executive body (*Giunta regionale*). All regions have legislative and administrative powers, but only the *Regioni a Statuto speciale* (Val D’Aosta, South Tyrol, Friuli, Sicily and Sardinia) enjoy exclusive legislative competencies as compared to the concurrent legislative competencies characterizing the other regions (Bindi and Cisci, 2005: 148). Giuliani and Piattoni (2001: 120) characterize Italian bureaucracy as bureaucratic and particularistic, ‘coupled with a low level of professionalism and its crisis-driven approach stand in clear contrast to the technical and ‘impartial’ problem-solving approach of the EU’. However, bureaucratic inefficiency is not only an Italian peculiarity.

¹²¹ This change was also induced by the reform of the Presidency of the Council of Ministers in 1988 (Law 400/88).

14.2 Political or public discussion concerning EU directives and their transposition

From 1987 onwards the Italian government started preparing systematically for the preparing and implementation of European legislation.¹²² The reforms started with the *legge Fabbri* and the *legge La Pergola* which both strengthen Italian participation and its coordination in the EU policy-making process and the national actors involved including ministerial, regional and local administrations and parliamentary bodies. A decree of the Prime Minister No. 150 of 1990 deals with the organization of the prime minister's administrative infrastructure and the tasks for the department for the coordination of European affairs in the prime minister's office. In 1997, the *leggi Bassanini* introduced a 'kind of administrative federalization of the system' (Gallo and Hanny, 2003: 276) changing the relationship between the regions in EU affairs considerably. Moreover, the constitutional reform in 2001 further increased the power of Italian regions.

Although, in 1992 the minister responsible for the coordination of Community policies, Mr Costa stated in an article in the daily paper *Il sole 24 ore* of 17 September 1992 that Italy had to prepare itself to be among the leading European countries when it comes to the transposition of Community directives into domestic law, current figures show that this is still an ambitious aim to meet in the early future. After the first reform package was adopted in the late 1980s, Italy has still a considerable implementation deficit.

14.3 Description of judicial instruments

To address the implementation deficit in Italy, there are a handful instruments to transpose national legislation. Laws and legislative decrees represent 60% of all Italian implementing measures whereas ministerial orders are applied in about 40% of the cases¹²³.

Table 14.1: Italian legal instruments

	<i>Legge</i>		<i>Decreto legislativo</i>	<i>Decreto legge</i>	<i>Decreto ministeriale</i>
	Law	Law with the format of omnibus bill	Ordinance	Government decree	Ministerial order
Main features	Issues for which the Constitution asks for settlement by law	Transposes a number of directives covering different policy areas	Government measure with the material status of law based on parliamentary authorization (<i>legge delegata</i>)	Provisions issued by the cabinet before approval by parliament to become law	Provisions issued by the minister
Legal scrutiny	required	required	required	required	
Parliamentary approval	required	required	required	required	n.a.
Procedure					
Remarks	Long and cumbersome	Rarely used	Complex matters	Urgent matters	

Law (legge)

In Italy there are two kinds of law: constitutional and normal law. According to Article 138 of the Italian constitution the procedure of a constitutional law is cumbersome, i.e. has two readings.¹²⁴

¹²² In 1992 there were 78 directives waiting for transposition.

¹²³ In 2004, for example, out of 87 notified Italian transposition measures 52 were ministerial orders; 31 ordinances and 1 law.

¹²⁴ Applicable to amendment of constitutions, amendments of statutes of regions, boundaries of regions etc.

In practice the process of adoption of a normal law usually starts with the draft of a governmental bill (*disegno di legge*) or a law proposal formulated by a MP (*progetto di legge*).

After the bill has been presented in one of the two chambers, the ordinary procedure for approval is defined as follows: the Assembly passes on the bill to pertinent committees to be analyzed and evaluated. In this case committees are asked to formulate an opinion about the law proposal before returning it to the assembly. To become law, a bill must be approved – article by article - in the same identical form by the two chambers; if one of the chambers modifies the legislative text, it must be re-transferred to the first assembly for a further vote on the amended text. At the end of legislative process the bill must undergo the final approval by the President of the Republic that, in case of constitutional or formal irregularities has the possibility to send the bill back to chambers. However, this may not be considered as an actual veto power in the hand of the Head of the State as Parliament can overcome its act by approving the bill again, even without changing any part of the text.

However, in reality things are more complicated and the legislative process can assume different forms, as legislative burden on the Parliament together with the complexity of many law proposals made the transferal of the latter to committees a frequent practice, with the commissions playing diversified roles. In fact committees can perform three different tasks (Bindi and Cisci, 2005). As just illustrated, 1) they may be asked to formulate an opinion about a law proposal (*Commissione in sede referente*) or 2) they can draft the final version of a bill and submit it to chambers (*Commissione in sede redigente*): in these two cases the adoption of a bill follows the ordinary procedure once it returns to the assembly. In the last case, however, the legislative process is substantially modified as 3) committees can pass themselves a bill (*Commissione in sede deliberante*), which has not to be further approved by the whole assembly.

Omnibus bill

This instrument follows the procedure as a bill. Whereas a law normally only covers one European directive, this omnibus bill transposes a number of directives covering different policy areas. One example is the omnibus bills in the late 1980s through which transposed ca. 100 directives of different kind in once.¹²⁵

Ordinance (decreto legislativo) based on an authorization law (legge delegata)

Parliament may delegate the Government to legislate, especially in case of very complex issues specifying in the delegation law (*legge delegata*) the limits of legislative power of the cabinet as well as the main lines to be followed by the latter in the preparation of subsequent legislative decrees (*decreti legislativi*). Ordinances contain detailed provisions that fall under the legislative authority of the parliament. They need to be ratified by parliament

Government decree (decreto legge)

When urgent action is needed, a decree (*decreto legge*) may be issued by the cabinet, and such decree is immediately in force though it has to be later approved by Parliament to become ordinary law. Moreover, government decrees normally are issued to authorize ministers to draft a ministerial order.

Ministerial order (decreto ministeriale)

¹²⁵ Law 42/87 transposed 97 directives and law 183/87 100 directives.

Ministers may issue ministerial orders. These orders are approved by the lead minister without approval of the Council of Ministers. But, they need an authorization to do so via government decree (*decreto legge*).

To note Pasquino (2002: 149) underlines that the law-making process in Italy is very unreliable. The structural reason here lies in that all legislation must as a first step be referred to rather powerful parliamentary committees. Sometimes those standing committees are given the power to pass legislation without even going through the floor vote. Another reason why the Italian law-making process is somewhat erratic is that there is too much legislation that comes before the parliament for approval. ‘This is due largely to the nature of the Italian legal and bureaucratic system’ (Pasquino, 2002: 150). Even minor decisions have to be translated into laws, or small specific laws (*leggine*).

Apart from formal rules, legislative process is usually made up of interactions between members of cabinet (ministers), their administrative agencies and the social groups involved in the proposed regulation.

14.4 The national policy cycle concerning directives

14.4.1 General overview of the process

In the post-Maastricht period, the Italy’s coordination of administrative and political actors in the preparation, making and implementation of European legislation has been shaped by a set of regulations: *legge Fabbri*, *legge La Pergola* and *leggi Bassanini*.

14.4.1.1 National treatment of Commission proposals

In the process, both at the level of the cabinet and of the interministerial bodies, the two most important ministers are the Minister of Foreign Affairs and the Minister for the Coordination of European Union policies. On the one hand, the Minister of Foreign Affairs is heading a structure specifically appointed to examine EU policy and has the responsibility for the relations with third countries and international organizations. The Italian system is organized on the basis of the predominance of the Minister and the Ministry of Foreign Affairs. It has acted through Bureaus 1 and 5 and the Permanent Representation in Brussels. However, in the late 1990s the role of the Permanent Representation has been reshaped¹²⁶: it must now transmit the available information about EU political and administrative processes to the department for the coordination of EC policies and not to the Foreign Affairs Ministry (della Cananea, 2001: 111).

On the other hand, the Minister for the Coordination of EU policies has no portfolio and acts under the Prime Minister. Following the *Legge Fabbri*¹²⁷ Italy has a department of EU affairs since 1990. This department (*Dipartimento per le Politiche Comunitare*) is headed by a minister without portfolio under the Italian minister president who is responsible for European affairs and European integration issues.¹²⁸ It is divided into six offices.¹²⁹ The tasks of the minister for European Affairs are derived from the delegated tasks by the Italian prime minister.

¹²⁶ For a detailed overview of the Italian Permanent Representation’s work consult della Cananea (2000).

¹²⁷ *Legge Fabbri*, n. 183/1987

¹²⁸ Legislative decree 30 juli 1999, *Suppl. Ord. Gaz. Uff.* 1 september 1999, n. 205.

¹²⁹ Office I: Economic issues and sector policies for the European Union; Office II: External relations for the European Union; Office III: Economic cooperation and development cooperation between the European

Recently, the Minister for the Coordination of EU policies tends to acquire more power in the phase of policy formulation although his main competence lies within the field of implementation of EU policies. More and more, the Directorate General for European Integration, however, oversees European integration activities related to issues and negotiations of the treaties of the EU, European Community, the ECSC and Euroatom. In particular, the Directorate General is increasingly responsible for formulating Italy's position with the EU's institutions and bodies and oversees relations with the European Commission and other institutions of the European Union.

There are two scenarios when it comes to Italian European policy making (Giuliani and Piattoni, 2001): If an issue negotiated at the European level is of only one ministry's interest, it prepares the Italian contribution, which is then channeled via the specialized units of the Foreign Affairs Ministry in Rome to the Italian Permanent Representation in Brussels (Senato della Repubblica, 1991). If the Commission's proposal falls under the competences of more than one ministry, the coordinating bodies mentioned above produce a coherent Italian contribution. It is the responsibility of the interministerial Committee for Economic Prospects (CIPE), in which the Minister for European Affairs takes part, and the coordination department of the prime minister's office to merge the different positions in the ministerial administration. In theory, the minister of European Affairs has to inform the regions and the parliament on European matters.

The member of Italian delegations participating in EC policy-making are proposed by the different ministries and are officially appointed by the Foreign Affairs Ministry, and not by the Minister of European Affairs or the coordination department of the prime minister (Gallo and Hanny, 2003). Behind the formal distribution of competencies and the coordination tasks there is apparently 'fragmented access for different ministerial units to the European level' (Gallo and Hanny, 2003: 279). Most of these units have direct contacts with their Brussels counterparts and quite often ignore the formal competencies of coordinating bodies at the national level. Gallo and Hanny (2003: 279) argue that a major problem for the definition of coherent national positions within the ministerial administration in the preparation phase of EC policies seems to be a kind of 'privatisation' of information. Important details concerning difficulties with the implementation are always well known somewhere in the administrative apparatus, but seldom spread among all interested actors in the system.

The monopoly of the central state over EU affairs, however, has remained stable. Regions have demanded a greater role in the preparation of EC policies (della Cananea, 2000: 108). In 1995 a special body has been set up to enable regions to participate in EU policy coordination, the *Conferenza Stato-Regioni* and regions have been allowed to establish permanent offices in Brussels. The 'state-as-a-unit paradigm' which has long influence EU policy making in Italy under the supervision of the Foreign Affairs Ministry has been abandoned (Sirianni, 1997). The amendment of the Italian constitution in 2001 led to a growing role for the regions and provinces, though limited to areas of relatively minor significance.

14.4.1.2 National transposition

In Italy, the transposition of EC directives into national law takes place by means of the annual 'Community law' (*legge comunitaria annuale*) which was created by another reform package the *Legge La Pergola* (Law

Union and third countries. Implementation of internationalization policies for local areas; Office IV: Common foreign and security policy. European correspondent; Office V: EU cooperation for justice and home affairs; Office VI: Judicial and institutional affairs.

86/1989). Whereas in the past implementation of EC legislation relied on a variety of techniques, the Community law offers a specific and 'systematic method for the harmonizing of domestic regulations to EC norms' (Bindi and Cisci, 2005: 150). By 31 of March of each year, the government – namely the Minister for EU affairs – submits to Parliament a bill including all legislative texts in need of national implementing measures. The law allows different techniques to be chosen for direct and indirect transposition: (1) parliamentary abrogation or modification existing domestic legislation; (2) delegation of legislative powers at to the government; (3) authorization to the government to adopt regulations in subject areas beforehand regulated by primary sources, and (4) administrative acts (Giuliani and Piazotta, 2001).

Whereas the preparation of EC law within the ministerial bureaucracy tries to ensure the effective integration of different views, the situation is slightly different with regard to the transposition of EC law. Whereas the Foreign Affairs Ministry dominates the preparation phase, the coordination department for Community policies in the Prime Minister's office plays a decisive role in the transposition phase (Sepe, 1995). The prime ministerial department for Community policies organizes the drafting of the annual *legge comunitaria*, the main instrument for introducing EC decisions into the national legal apparatus. This *legge* is presented at the beginning of each year to the Italian parliament by the Minister of European Affairs or the Prime Minister. The specific legal measures are initially drafted in the lead ministry, i.e. mostly affected by the EC legislation. Note that the interdepartmental conflicts of competences could be mentioned as functional obstacles for the transposition. The distribution of the directives between ministries is not always rational and functional: the ministries keep directives that should fall within the competence of other ministries or the competence of several ministries.

Nevertheless, the coordination department brings them together into one draft text and sends it to the parliament. From here on the draft text follows the same logic as ordinary Italian legislation, depending on the performance of different ministerial and regional bodies (Ziller, 1988: 141). The department for the coordination of Community policies only returns in the case of complaints from by the European Commission.

The procedures following the different legal instruments to transpose EU legislation are outlined in section 14.3.

The *Legge La Pergola* was designed to improve the transposition rates of European legislation in Italy. It brought in a more systematic approach but, if the annual Community law itself became held up in parliament, the consequences for transposition could be serious (Giuliani and Piattoni, 2001: 118). The instability of the political system hindered the timely presentation of the bill and delayed its parliamentary approval. The zenith of inefficiency was reached with the 1995 Annual Community law: first added to the 1996 bill, it was then attached to the 1997 bill only to be finally approved in April 1998 (Giuliani and Piattoni, 2001: 118).

14.4.2 Bureaucratic consultative and coordinating bodies

Gallo and Hanny (2003) identify three coordinating bodies that play a role in the national preparation and implementation of European decisions: the interministerial Committee for Economic Prospects (CIPE), which is considered to be a 'heavyweight' among the Italian interministerial committees, the Minister for European Affairs in the Ministry for Foreign Affairs and the department for the coordination of the Community policies in the prime minister's administration. But, in Italy there is no dominant body charged with the interministerial coordination of European affairs, such as exists in France with the SGCI or with the

Cabinet Office European Secretariat in the UK. Intra- and interministerial coordination thus remain unsolved problems in the Italian government (Bindi and Cisci, 2005: 152).

Whereas the Ministry of Foreign Affairs coordinates the policy-making process, the Ministry for the Coordination of EC policies has become more and more central figure in the transposition process. It was created in 1980 within the Presidency of the Council. Its lack of resources was such that it was once defined 'cinderella of the Italian Ministries' (Grottanelli de Santi, 1992: 186). In 1995 it was suppressed and its tasks attributed to the Undersecretary of State for Economics; in 1996, they were further shared between the Undersecretary of State at the Presidency of the Council and the Undersecretary of State for Foreign Affairs charged with European Affairs. In 1998, the renamed Minister for Community policies was reintroduced and given enhanced means and political role. They concern above all the transposition of EC directives into national law. Apparently, the fortunes of the department for Community policies have varied over the years: it is only from 1998 that it was given substantial new means and resources (Bindi and Cisci, 2005: 151).

In the ministries, the level of intra-ministerial coordination on European affairs varies from no coordination at all (Ministry of Environment) to little coordination (Ministries for Telecoms, Health, Treasury and Transport) to the only example of effective coordination: Ministry of Finances where the *unita di indirizzo* has been set up in 1999 at the Director General's level to coordinate EU issues (Bindi and Cisci, 2005: 152). The lack of intraministerial coordination and interministerial rivalry have prevented any attempt at creating a body entrusted with interministerial coordination on EC matters (Bindi and Cisci, 2005: 152).

14.4.3 The role of compulsory advisory bodies

There are hardly any compulsory advisory bodies in the Italian transposition process.

14.4.4 The role of parliament

With the mentioned reform laws the parliament has the right to be regularly informed about EC laws which is in preparation or adopted at the European Council of Ministers since 1987. It has the right to ask the government or individual ministers for an 'evaluation of the conformity of EC law with the national legal system' (Gallo and Hanny, 2003: 281) or to hear them on concrete policy issues and to be informed about the general development of the Union. Furthermore, the parliament has the right to submit comments on these matters to the government. With the *legge Fabbri* the parliamentary committees and the regions have received regularly all the draft EC decision that the Minister of European Affairs receives from the permanent representation via the Foreign Affairs Ministry in Rome. With the extension of its formal rights of access to and information and the incorporation of EC law, with the instrument of the *legge comunitaria*, the procedures in both houses have been improved and the parliament regained some control over the activities of the ministerial bureaucracy in comparison to the former 'unsystematic delegation of legislative competencies to the government for the incorporation of EC decisions (Gallo and Hanny, 2003: 282; Seppe, 1995: 325).

In 1990, the parliament set up a special committee for EC affairs (*Commissione speciale per le politiche comunitarie*). Both were ad hoc committees, equal to the standing committees in size, structure and functions, but without full legislative power. The permanent committees thus had the primary responsibility for reviewing proposals for European legislation in their subject area (Bindi and Cisci, 2005: 153). In August 1996, the ad hoc committee of the chamber of deputies was transformed into the standing committee of EU

policies. With the Community law 1995-97, the parliament's scope of action in European affairs was expanded. However, notwithstanding the so-called 'perfect bicameralism' of the Italian parliament, as far as control over EU affairs is concerned there is a clear imbalance between the two chambers (Bindi and Cisci, 2005: 154). While in the chamber of deputies the committee on European policies now coordinates the other standing committees and is in charge of the examination of 'Community law', in the Senate the *Giunta per gli affari delle Comunità Europee* is still a consultative body.

14.4.5 The role of other, subnational or functional governments

For a long time, the Italian regions had a very weak role in European affairs, both in the making and transposition of EC law (Bindi and Cisci, 2005: 155).

Article 9 of Law No 183/1987 started to stipulate that the regions have to be consulted on the proposals for regulations and directives submitted by the institutions of the EC. They have the right to submit their observations which have no binding result for the policy adopted by the Italian government however. Furthermore, since 1987, Italian regions and autonomous provinces have their own regional offices in Brussels to maintain direct contacts with administrative units and political actors at the European level.¹³⁰

Furthermore, Law No 400/1988 which concerns the organization of the Prime Minister's Office established the Permanent Conference for the Relations between the State and the Regions. This conference is responsible for informing and consulting the regions on issues of general policy that may affect their competence.

The Italian regions only recently do actively participate in the process of the formulation of the Italian policy on EU affairs. Information rights for the regions and new mechanisms for the cooperation of national and sub-national administrative units have been established. The main aim here has been to institutionalize regional access to the national preparation on the European level. The *legge comunitaria* of 1998 introduced an obligation for the government to inform the parliament and the regions and autonomous provinces at an earlier stage. However, the regional opinions expressed still have not been binding for the central government (Gallo and Hanny, 2003: 283). Furthermore, the regions seem to receive draft EC laws from the Foreign Affairs Ministry via the Minister of European Affairs 'only at the point when these drafts have already been prenegotiated at the European level' (Gallo and Hanny, 2003: 283). Consequently, any input would be too late to be effective.

14.4.6 The role of interest groups

In the transposition process, interest groups are only consulted in exceptional cases by the Ministry of Foreign Affairs and the Ministry for Regional affairs.

14.5 Conclusions

- Italy has been slow to create effective and efficient mechanisms for coordinating the formulation and transposition of EU law despite its centrality. Fragmentation and duplication seem to be very dominant in Italian EU policy-making.

¹³⁰ Decree of the President of the Republic of 31 March 1994 GURI 167

- The absence of one undisputed coordinating institutional is predominant problem. In the post-Maastricht period, there is a shift of activities and coordination competencies in the national preparation and transposition phases. Whereas the Foreign Affairs Ministry dominated the scene for decades, the prime minister's office has become already the crucial actor in the transposition phase. This administrative fragmentation has lead to struggles for direct access to the EC policy-making process at the European level. This situation has been aggravated in a way that the fortunes of the department for Community policies have varied over the years: it is only from 1998 that it was given substantial new means and resources.
- The Italian law-making process in very unreliable. The structural reasons can be found in the rather powerful parliamentary committees. Sometimes those standing committees are given the power to pass legislation without even going through the floor vote. Moreover, there is too much legislation that comes before the parliament for approval. Because of Italian legal and bureaucratic system, even minor decisions have to be translated into laws, or small specific laws (*leggine*)
- The personal and partisan competition among those who should have favored a smooth connection with Brussels, compounded by endemic governmental instability, reduces the credibility of the Italian government at the EU level and diminished its complying capacity at the national level

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Glossary of terms (on judicial instruments and techniques)

annex method: the text of a directive is annexed to a very short legal text, which puts it into the national legal order. Users have to consult the annex for obligations or rights stemming from the directive.

authorization law: the adoption of a law delegating the transposition of one or more directives to a specific actor, including sometimes procedural requirements and a time frame (sometimes also called a blanket provision law)

copying: creating a legal measure which is equivalent to the wording of the directive.

elaboration: the tendency to make directives more specific and detailed when transposing (it does not go as far as gold plating).

gold plating: when transposition goes beyond the minimum necessary to comply with a directive by adding national elements to the legal measure, which aims to transpose a directive. The national additions may include: (1) extending the scope, (2) not taking full advantage of any derogations which keep requirements to a minimum, (3) providing sanctions, enforcement mechanisms and matters such as burden of proof which go beyond the minimum needed, or (4) implementing early, before the date given in the directive.

incorporation: putting the directive into the system (corpus) of already existing national law (also sometimes called *re-wording* or *re-writing*).

one-to-one transposition: taking over the text of a directive in a national legal measure. Sometimes this is done through the *annex method*. See also *copying*.

one-to-one with some (terminological) adjustments: taking over the text of a directive making with some adaptations in terms and/or formulations used in the directive, which stem from existing national law.

package law: combining several directives into one legal measure, which transposes these directives (is also sometimes called an *omnibus bill* when the proposal has the intended status of law and has not yet passed parliament).

referencing: transposing by passing a legal measure which refers directly to a directive (see also the *annex method*).

re-word* or *re-writing method: working out the contents of a directive using the terms, formulations and style used in national law.

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