

How to reconcile the drafting rules and practices of the Member-States with the rules and practices of the EU?

Part 3: Legislation adopted by EU Member States to comply with their EU obligations

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Summary

- 1. Context of the question**
- 2. The question**
- 3. Possible answers**

Context of the question

- **A great number of EU legislation is dependent on MS implementation – e.g., transposition of directives**
 - **Objective: an effective and a harmonized application of EU legislation**
 - **Several problems emerge: translation problems, differences in legal language, intelligibility and quality of the drafting of EU legal texts**
 - **But also: differences in legal drafting itself**
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Legal drafting rules and practices of the EU are different from the national rules – resulting from:

- **Specificities of the EU legislative process**
- **The “melting pot” of national drafting rules and practices which vary considerably between the MS (hybridization)**

However, the way through which EU law is actually transposed in the MS is largely determined by national constitutional rules and drafting practices

Specific drafting problems emerge in cases of misalignment of EU/MS rules and practices – examples:

- **Definitions;**
 - **Numbered paragraphs, unnumbered paragraphs;**
 - **Referencing;**
 - **Internal structure;**
 - **Headings;**
 - **Delegation clauses**
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- **If self-executing acts: a matter of correct implementation of EU law by national judges and administration. (Problems of accessibility and interpretation)**
 - **The core problem is the transposition of EU law (directives, sometimes, decisions) into national law, which is a significant part of the EU policy process**
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The question

- **On the one hand: national drafting practices are part of a MS identity – protected under art 4/2 TEU; principle of MS procedural autonomy; principle of subsidiarity**
 - **On the other hand: Commission strict approach; CJEU consistently holds that MS may not plead national provisions or practices to justify (perceived) failure to comply with obligations and time limits laid down in Directives**
 - **Result: in several cases, the practices of the EU are integrated into the Member State's drafting rules**
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- This leads to harmonization not only of the contents of the laws themselves but also of the structure of the legal acts themselves as well as of the legal drafting techniques
 - The EU-influenced rules are applied in the MS even outside EU implementation
 - Ex: adoption of lists of definitions
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Positive aspects:

- **Coherence and accessibility/ legal certainty for non-national EU citizens/ investors**
 - **Emergence of European-wide common drafting rules, reinforcing the emergence of a common European legal space**
 - **Better law-making practices adopted at the EU level can be “exported”**
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Problems:

- **Loss of diversity/identity of national drafting traditions**
 - **Copy-out transposition – MS do not use discretion**
 - **Adoption of solutions not suited for a particular Member State**
 - **Unnecessary complexity / erosion of national legal certainty / loss of accessibility to national citizens**
 - **When such harmonization is not possible or desired, the differences can also be considered as non-compliance (unrelated to any opposition to the substance of the rules and only identified after the approval of the legal text).**
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Answers to the question

How to reconcile the drafting rules and practices of the Member-States with the rules and practices of the EU?

With difficulty...

No easy answer: Too complex to be solved with a single solution

- **One must recognize that EU drafting matters to MS implementation and the interdependence of two drafting processes (national and supranational) – they are not independent**
 - **Sincere cooperation: neutral sense – vertical: top-down / bottom-up / horizontal**
 - **Effort by all the involved parties and strict adherence to drafting rules of clear and simple writing**
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- **EU law doesn't 'fall from the sky': The MS must influence EU legislation according to its traditions**
 - **But: EU must recognize the importance of national drafting rules to ensure correct implementation – during the legislative process**
 - **Participation of national drafters in the EU procedure (screening) / dialogue with the Commission during transposition**
 - **Tolerance of a certain degree of divergence between EU legislation and transposing national laws**
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- **National entities responsible of the formal legal drafting of the transposing legal acts should participate in the EU's decision-making procedure (through the respective Member State), namely during the preparation of the national language version of the secondary legislation, allowing a cross-harmonization of the national and EU's legislative drafting rules and practices.**
 - **Commission can be contacted to be asked to take into account national drafting traditions when evaluating correct transposition**
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Muito obrigado!

Thank you very much!

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