

Guidelines on best practice on Transposition of EU Directives

Background

Following consideration of a Working Paper on Transposition and Infringements, the Inter-Departmental Coordinating Committee on European Affairs (ICCEUA) decided that a set of agreed Guidelines on Transposition should be developed. These Guidelines should:

- be based on the EU Commission recommendations for best practice
- incorporate principles and process elements
- the principles element should:
 - (a) fully integrate the principles of Better Regulation and the Regulatory Impact Assessment model;
 - (b) take into account the increasing influence of the Courts and evolving case law on the transposition process;
 - (c) take account of the Oireachtas Scrutiny Process and provide Early Warning to government of EU legislation likely to be difficult and/or costly to transpose.
- the process element should set out in simple steps how best to transpose a Directive

The Transposition and Scrutiny processes adopted in other countries (in particular the UK and Scandinavia) were taken into consideration in the drafting of the Guidelines.

Agreed Guidelines on Transposition

Process and Principles

1. Following the formal circulation of a draft EU Directive and its assignment to a Lead Department, the Departmental officials involved in the negotiation of the Directive should, if practicable, also be closely involved in its transposition. If this is not possible, the negotiators should keep the officials responsible for transposing the Directive fully informed throughout the negotiations. This is especially important for the correct application of the Regulatory Impact Assessment (RIA), and for interpreting the European Commission's Impact Assessment.

Regulatory Impact Assessment (RIA)

2. The Government Decision of 21 June 2005 requires that RIAs (Annex 1) should be applied to all draft EU Directives and certain significant draft EU Regulations when they are published by the European Commission. RIAs must be conducted on Directives/significant Regulations as early as possible and before they are agreed so that the information they generate can inform Ireland's negotiating position and thus minimize potentially negative implications for Ireland. The RIA must, therefore, be applied to draft Directives (and draft Regulations where appropriate) after the Commission has published the proposed Directive (or Regulation) and its own impact assessment (which only covers cross-national impacts), but before negotiations have been completed.

Screening RIA and (if required) Full RIA

3. Where significant impacts are identified in the Screening RIA, a full RIA must be conducted (see Guidelines on the preparation of RIAs available at www.betterregulation.ie). The RIA should be completed in time to influence the negotiations on the Directive. The RIA must also be updated, as required, during the negotiation process and transposition into Irish Law, to take account of significant changes to the original draft Directive. Additional Impact Assessments carried out by the Council, or the European Parliament (to take account of Amendments), should be taken into account in the national RIA. Information gained through the RIA could be

used to influence decisions in relation to whether or not to avail of a derogation or exemption from provisions of an EU Directive/Regulation in rare cases.

Oireachtas Scrutiny

4. The EU Scrutiny Act, 2002 provides the legislative basis for the scrutiny of EU Business. Guidelines have been agreed and circulated to all Departments in relation to implementation of measures set out in the Act. In relation to all measures as defined in the Act, the text of the draft measure and accompanying information note (which will have taken into account the RIA model) should be laid before both Houses of the Oireachtas. It should also be forwarded to the European Scrutiny Sub-Committee for consideration. The Sub-Committee, having considered the proposal, may agree to refer it to a Sectoral Committee of the Oireachtas if deemed necessary for further scrutiny.

Following completion of negotiations/scrutiny and on receipt of a new Directive

5. The EU Co-ordinator in the Department to whom the Directive has been assigned should inform the Department of the Taoiseach, the Department of Enterprise, Trade and Employment and the Department of Foreign Affairs, giving the name of the Lead Officer with responsibility for the transposition and the deadline for completion.

Implementation Schedule

6. The Lead Officer should draw up a planning schedule for the implementation of the Directive. This should include the references for the Directive, the persons in the Department responsible, the other Departments involved (where applicable), the measures to be taken to transpose the Directive (these will have been identified in the RIA) and the planned time schedule, including any Dáil deliberations. This schedule should be forwarded to the EU Co-ordinator in the Department. The schedule should be updated and resubmitted on a monthly basis indicating where there are delays/difficulties.

Drafting of Legislation/Transposition Process

7. Preparation for drafting of legislation should start before or as soon as the Directive is published in the Official Journal of the EU. Where legislation is required to transpose the Directive, the RIA should be attached to the Memorandum to Government seeking permission to draft Heads of a Bill. This would considerably reduce the need for retrospection. Consideration as to whether implementation/transposition should be by way of primary legislation or Ministerial regulations (either pursuant to the European Communities Act 1972 or by other primary legislation which contains a specific power to implement/transpose EU legislation by regulations made under it) or through other alternatives to regulation, should be identified by the RIA. In line with the principles of Better Regulation and the Government Decision on RIA, if the Department proposes to introduce additional regulatory changes in the legislation transposing a Directive or Regulation, the RIA should be updated as appropriate. Early consultation with the Attorney General's Office on this issue is necessary. Factors which would influence this choice would be whether indictable offences will be created as sanctions to implement/transpose the EU legislation in question (in which case, primary legislation is necessary) or whether the EU legislation contains diverse policy choices or derogations/abrogations from the EU measure itself to be adopted by the Member State (in which case primary legislation will be necessary). In transposing a Directive due account should also be taken of any views that might have been expressed by Oireachtas Committees in the Scrutiny of the draft Directive and of views expressed as part of the consultation process during the RIA.

Communication with the EU Commission

8. Departments should stay in close contact with the relevant Commission DGs when they are transposing a Directive, particularly complex Directives that require intensive consultation and primary legislation. The Commission should be made fully aware of any difficulties arising in the transposition process and the measures decided on nationally to deal with these difficulties. Consultation with the AGO should take place in relation to this on any legal issue as early as possible.

9. Directives that are successfully transposed through the NEMS system should be notified automatically to the Department of the Taoiseach and the Department of

Foreign Affairs. Departments should keep an up-to-date record of all Directives that have been transposed.

Early Warning

10. Where EU legislation is likely to be difficult (requiring, for example, extensive consultation with interested stakeholders) and/or costly to transpose, the relevant Minister should inform Government, the Department of the Taoiseach and the Department of Foreign Affairs at least 3 months before the transposition deadline. Such issues should have been identified in advance by the RIA. The Department of the Taoiseach will inform the ICCEUA. Departments should ensure that the timely transposition of EU Directives is embedded in their Business Planning Process and should follow Commission “Best practice” in relation to Directives that have not been transposed on time.

Infringements Imposed for Late or Incorrect Transposition

11. Where a Lead Department expects the Commission to launch infringement proceedings against Ireland, every effort should be made to have the Commission take a more political and strategic view, taking into account fully the subsidiarity principle. It is essential, at this stage, that a close working relationship with the Commission be maintained to avoid misunderstandings.

12. Infringement proceedings taken against Ireland by the EU Commission under Article 226 of the Treaty (Annex 1) should be promptly brought to the attention of the relevant Minister and to the attention of the Department of the Taoiseach. Every effort must be made to avoid the infringement proceedings being taken to Court under Article 226. The Department responsible should consult immediately with the Attorney General’s Office upon receipt of any formal notice or reasoned opinion preceding Article 226 proceedings as to any legal matter in such preliminary notification before proceedings issue. Upon receipt of formal documentation from the European Court of Justice such documentation must be sent to the Chief State Solicitor’s Office immediately.

13. Where a European Court of Justice judgment is given under Article 226, a concerted effort must be made to close the matter as soon as possible and to meet the concerns of the Court. This will require close contact with the Commission.

Regular reports should be provided (see below) on the efforts that are being made to resolve the matter and to avoid any action under Article 228 (Annex 1).

14. If the Commission launches action under Article 228, the Department of the Taoiseach and the Department of Foreign Affairs should be notified immediately. The early conclusion of infringement proceedings taken against Ireland under Article 228 of the Treaty should be treated as a Departmental priority for business planning purposes. The Management Committee of the Department should include the efforts undertaken to resolve the matter as a standing item on its agenda.

Monitoring the Process

15. The Minister of State at the Department of the Taoiseach is responsible for monitoring the transposition of all internal market Directives. He chairs the monthly meetings of the ICCEUA.

16. Each Department should have a designated EU Co-ordinator who is a member of the ICCEUA.

17. Each Department should operate a database for their own Directives, similar to that operated by the Department of Enterprise, Trade and Employment, so that up to date information regarding transposition is readily accessible. Up-to-date information on the progress made in transposing Directives should be publicly available on each Departmental website.

18. All Departments should submit a monthly report on the current state of play on transposition and infringement proceedings to the Department of the Taoiseach (through the ICCEUA Co-ordinator). These details should be available from the implementation schedule submitted by the Lead Officer in each Department and /or the Departmental database (if established).

19. The Minister of State for European Affairs will circulate a summary of these Departmental reports to the Cabinet Committee on European Affairs, on a regular basis. The summary will highlight those Directives which are overdue and which are particularly challenging to transpose. The report will also highlight the Directives where infringement proceedings are at an advanced stage in the legal process.

ANNEX 1

Regulatory Impact Assessment (RIA)

RIA is a tool used to assess the likely effects of a proposed new regulation or regulatory change. It involves a detailed analysis to ascertain whether or not the new regulation would have the desired impact. It helps to identify any possible side effects or hidden costs associated with regulation and to quantify the likely costs of compliance on the individual citizen or business. It also helps to clarify the costs of enforcement for the State.

Treaty Establishing the European Community (Treaty of Amsterdam)

Article 226

If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

Article 228

1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.
2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its reservations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In doing so it shall specify the amount

of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court of Justice finds that the Member State concerned has not applied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 227.