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The Transposition of EU Law: 'Post-Decisional Politics' and Institutional Autonomy

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Abstract: *The transposition of EU law into national law is a significant part of the EU policy process. However, political scientists haven't devoted to it the attention that it deserves. The author, a political scientist, construes transposition as a part of the wider process of policy implementation. Following implementation theory from the field of public policy, the article outlines three sets of factors (institutional, political and substantive) that affect transposition. Secondly, the article examines the manner in which eight member states transpose EU legislation and identifies a European style of transposition. Following institutional theory in political science, it is argued that this style isn't the result of a process of convergence. Rather, it stems from the capacity of institutions to adapt to novel situations by means of their own standard operating procedures and institutional repertoires. It concludes by highlighting the partial nature of efforts at EU level to improve transposition, themselves impaired by the politics of the policy process.*

I Introduction

The EU is a law-intensive organisation¹. However, a significant proportion of the laws that it produces need to be transposed-that is incorporated-into national legislation in order to produce their full effects. Political scientists and lawyers could benefit from each others' work with regard to the process of European integration but the dialogue between them has remained rather limited. The transposition of EU law into national law is an area where this dialogue could be particularly fruitful. It has remained a major issue in the EU² despite the learning process that inevitably underpins membership of the EU and the increasing attempts to fill functional gaps resulting from the fact that the EU is a loosely-coupled implementation structure³. The increased legislative output resulting from the run-up to the establishment of the Single European Market on the one hand, and the expansion of the EC/EU's agenda on the other, have highlighted what could be termed 'transposition deficit'. The ineffective, belated and frequently non-existent transposition of directives into national law has been construed as a major problem even in areas where integration has reached much more advanced stages, such as the Single Market which became the vehicle for the re-launch of the process of integration since the mid-1980s. In late 1997, the percentage rate of non-transposition of public procurement directives was 55.6%, 60% percent in the transport sector, 50% in intellectual and industrial property, 38% in the environmental sector

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¹ E. C. Page and D. Dimitrakopoulos, 'The dynamics of EU growth: A cross-time analysis' (1997) 9 *Journal of Theoretical Politics* 3, pp.365-87.

² European Commission, *Single Market Scoreboard*, No 1, November 1997, http://www.europa.eu.int/comm/internal_market/en/update/score/index.htm.

³ B. G. Peters, 'The Commission and implementation in the European Union: Is there an implementation deficit and why?' in N. Nugent (ed.) *At the Heart of the Union: Studies of the European Commission* (London: Macmillan, 1997) p.188.

and 33.3% in technical harmonisation⁴. In effect, transposition has become what Pressman and Wildavsky⁵ called ‘decision point’ where a ‘clearance’ is required for the implementation of the policy embodied in a directive.

This is so despite the ruling of the European Court of Justice in the *Francovich* case⁶ and the role of the Commission as guardian of the Treaties⁷. Moreover, the transposition deficit seems more paradoxical in light of the customary practices of the Commission and the Council of Ministers used in the policy formulation stage of the EU policy process. While the former always tries to avoid the establishment of minorities between the member states, the latter makes consensual decisions even when qualified majority voting can be used. Why do member states whose interests seem not to be neglected in policy formulation fail to transpose EU legislation?

Transposition has a clear ‘technical’ (i.e. legal) dimension that focuses on the issue of clarity of EU legislation. Indeed, criticism at the national level deplored the lack of precision in EU law and the fact that ‘there are everywhere holes which the judges have to fill in’⁸. Vagueness is indeed an issue *per se* in the sense that it obliges national officials to make difficult choices when they transpose EU law into national legislation. Nevertheless, one should not over-estimate its importance at least because ‘an analysis of the case law of the [European] Court shows a relatively small number of cases where the real issue is one of interpretation of a secondary Community law in isolation’⁹.

However, transposition involves a number of difficult choices. These choices aren’t made in a vacuum. Rather, they are affected by interests, institutions and individuals, i.e. they are *political*. Therefore it is argued that even if vagueness ceases to be a problem, transposition will not necessarily improve. This is so because transposition is a part of the wider process of policy implementation¹⁰. Implementation theory in political science stresses the fact that implementation isn’t the orderly and neat follow-up to the formulation stage. Rather, ‘implementation is the continuation of politics by other means’¹¹ in the EU as well where ‘post-decisional politics’¹² is a dominant feature of the policy process. Although clarity is a significant source of problems, it is argued that it is only one of the factors that affect transposition. Following implementation theory, the discussion in the first section of the article examines three types of factors that affect transposition: institutional, political (in the strict sense of the term) and substantive.

How EU law is actually transposed in the member states is largely determined by national constitutional rules. The *principle of institutional autonomy*-that is the right of the

⁴ European Commission, *op. cit.* footnote 2, p.3.

⁵ J. Pressman and A. Wildavsky, *Implementation. How Great Expectations in Washington are Dashed in Oakland*, 3rd edn (Berkeley: University of California Press, 1984), p.xxiv.

⁶ Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci/Italy*. *Reports of cases before the Court of Justice of the European Communities* [1991], I, p.5357.

⁷ A. J. Gil Ibáñez, *The Administrative Supervision and Enforcement of EC Law : Powers, Procedures and Limits* (Oxford: Hart, 1999). It is important to note that this role is political too. See F. Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ (1993) 56 *Modern Law Review* 1, pp.27-31.

⁸ Lord Denning cited in R. Wainwright, ‘Techniques of drafting European Community legislation: Problems of interpretation’, (1996) 17 *Statute Law Review* 1, p.11.

⁹ *Ibid*, p.12.

¹⁰ D. Dimitrakopoulos and J. Richardson, ‘Implementing EU public policy’ in J. Richardson (ed.) *European Union: Power and Policy-Making*, 2nd edn. (London: Routledge, forthcoming).

¹¹ E. Bardach, *The Implementation Game: What Happens After a Bill Becomes a Law* (Cambridge, MA: MIT Press, 1977) p.85.

¹² D. Puchala, ‘Domestic politics and regional harmonization in the European Communities’ (1975) 27 *World Politics* 4, pp.496-520.

member states to perform the tasks that stem from membership of the EU on the basis of their own constitutional rules-embodied in the definition of the directive (art. 249 of the Treaty) and enunciated by the ECJ in the early 1970s¹³ besides its normative content,¹⁴ is meant to *facilitate* transposition-and ‘street-level’ implementation-by taking into account national ‘peculiarities’. Given that national institutions embody traditions underpinned by historically defined processes, one would expect significant differences between member states. However, the analysis of the national mechanisms and procedures used for the transposition of EU law demonstrates remarkably similar patterns and only small differences of *degree* rather than substance. Arguably, there is a European style of transposition.

More importantly, these similarities aren’t the result of a process of convergence because the national procedures and mechanisms used for the transposition of EU law have changed only marginally. Indeed, institutional theory in organisational analysis and political science underlines the fact that institutions don’t change easily. Rather, they adapt to external pressures (in this case the obligation to transpose EU law under the guidance of the jurisprudence of the ECJ and the watchful eye of the European Commission) primarily by approaching ‘reality’ by means of their *own* standard operating procedures, institutional repertoires and codes¹⁵. It will be argued that despite the functional pressure that stems from the exigencies of transposition, member states have essentially maintained their institutional autonomy. Therefore, the second section examines the precise content of the principle of institutional autonomy, identifies the choices made by national authorities in transposition and outlines the European style of transposition based on evidence from France, the UK, Italy, Germany, Greece, the Netherlands, Ireland and Sweden.

II Unpacking Transposition

A Lessons from Implementation Theory

Policy implementation isn’t the neat and orderly carrying out of authoritative decisions taken in the stage of policy formulation. Rather, ‘the bargaining and maneuvering, the pulling and hauling of the policy-adoption process carries over into the policy-implementation process’¹⁶. Precisely because of the legally binding nature of directives, the deadlines for their transposition and the existence of institutionalised ‘fixers’ like the European Commission and the ECJ, the politics of transposition is likely to be very similar to the politics of the wider implementation process which is highly defensive¹⁷ in the sense that pressure on the officials who transpose EU law will primarily focus on mitigating-or even defeating altogether-the unwanted consequences of that law.

Implementation theory¹⁸ stresses the importance of three types of factors: *institutional* (those that stem from the characteristics and the configuration of the institutions involved), *political*-in the strict sense of the term (that is factors that regard interests, the manipulation

¹³ J. Rideau, ‘Le rôle des Etats membres dans l’application du droit communautaire’ (1972) 18 *Annuaire Français de Droit International*, pp.864-903.

¹⁴ That is the respect for the constitutional order of each member state is respect for their individual historically-defined traditions.

¹⁵ J. G. March, and J. P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: The Free Press, 1989).

¹⁶ Bardach, op. cit footnote 11, p.38.

¹⁷ Ibid, p.37.

¹⁸ Pressman and Wildavsky, op. cit. footnote 6; Bardach, op. cit. footnote 11; C. Hood, *The Limits of Administration* (London: John Wiley & Sons, 1976); L. Gunn, ‘Why Is Implementation So Difficult?’ (1978) 33 *Management Services in Government* 4, pp.169-76; R. Montjoy and L. O’Toole, ‘Toward a Theory of Policy Implementation: An Organizational Perspective’, (1979) 39 *Public Administration Review* 5, pp.465-76; P. Sabatier and D. Mazmanian, ‘The Conditions of Effective Implementation: A Guide to Accomplishing Policy Objectives’ (1979) 5 *Policy Analysis* 4, pp.481-504.

of power and choice between competing values) and *substantive* (i.e. factors that concern the nature of the objective pursued)¹⁹. *Institutional factors* primarily include the number and the strength of decision points that implementation has to go through, the existence of strong co-ordinating mechanisms promoting integrated and harmonious action of the implementing institutions, the position that the implementation of a programme occupies in their internal hierarchy of tasks and the involvement of well-resourced and sympathetic implementing institutions. *Political factors* include the support of the target group, the continuous support of the political promoters of a programme and the existence of ‘fixers’, that is actors who are willing and powerful enough to intervene at critical moments of the implementation process by taking corrective action. Finally, *substantive factors* include the tractability of a policy problem, the theory that is incorporated in a programme and the specificity of a policy mandate, our understanding of the problem in question and the expertise that is necessary for the effective implementation of a programme.

B Institutional Factors

A number of institutional factors both at the level of the EU and in the member states affect transposition. Like the wider implementation process, transposition starts in the stage of policy formulation when a number of key choices are made. The content of directives is frequently vague (‘fudges’²⁰) as a result of political compromises that occur in formulation. ‘By the time a directive is adopted, it is far too late. There is very little you can do to put it right afterwards’ as one official put it²¹. Member states try to score a ‘national home run’²² – that is the adoption by the EU of their own national policy framework. This is so because a ‘home run’ minimises that country’s adjustment costs. However, as national policy traditions are not necessarily compatible with each other, conflict can lead to compromise which rests on unclear texts.

The institutional configuration of the EU is particularly prone to the production of sub-optimal policies²³ embodied in unclear legislation. This is so because the European Commission and Parliament on the one hand and the Council of Ministers on the other, reflect different institutional logics (pro-integrationist in the cases of the former and intergovernmental in the case of the latter). Although the two logics aren’t necessarily incompatible with each other, their co-existence is an uneasy one. Indeed, it doesn’t constitute a good starting point for the formulation of clear and implementable public policy because the two groups of institutions try to promote two conflicting sets of objectives at the same time. On the one hand, the representatives of the member states in the Council aim to resolve common problems while maintaining their relative autonomy. On the other hand, the Commission and the Parliament promote the expansion of EU competence along with specific policy objectives which do not necessarily coincide with those of the Council. In addition, the Council tends to avoid votes even when qualified majority voting can be used. This practice is frequently combined with the Commission’s tendency to avoid the creation of minorities in the Council of Ministers by trying to maximise the individual member states’ views that it takes ‘on board’ when drafting a new proposal or modifying an existing one²⁴.

¹⁹ These are ideal types. In practice, it is hard to distinguish between these categories of factors because one can-and does-turn into the other. Therefore, the distinction serves analytical purposes only.

²⁰ DTI, *Review of the Implementation and Enforcement of EC Law in the UK* (London: DTI, 1993) p.38.

²¹ Interview, London, 10 July 2000.

²² A. Héritier, ‘The accommodation of diversity in European policy-making and its outcomes: Regulatory policy as a patchwork’ (1996) 3 *Journal of European Public Policy* 3, pp.149-67.

²³ F. Scharpf, ‘Die Politikverflechtungs-Fälle: Europäische Integration und deutscher Föderalismus im Vergleich’, (1985) 26 *Politische Vierteljahresschrift* 4, pp.323ff.

²⁴ B. Kerremans, ‘Do institutions make a difference? Non-institutionalism, neo-institutionalism and the logic of common decision-making in the European Union’, (1996) 9 *Governance* 2, pp.228-9.

Presidencies are another crucial source of the problem of lack of clarity. Indeed, the more pending legislative a presidency manages to push through, the more successful it is believed to be. Hence, officials involved in the management of presidencies often put pressure not only on representatives of other member states in meetings of the working groups of the Council, but also on departmental officials of their own country who may object to the use of a specific term or phrase, e.g. for reasons of legal certainty or clarity²⁵. Typically, these ‘fudges’ are blamed for the use of the *copy-out technique* in transposition, whereby substantive parts of a directive are included, occasionally word for word, in the transposing texts (see below).

In addition, ‘fudges’ are produced as a result of the narrow scope of the mandate given to national negotiators. Typically, negotiators from member states with strong co-ordinating mechanisms discover that they have a limited margin for manoeuvre in Council working groups because their mandate is frequently quite narrow. Although the use of qualified majority voting²⁶ in the Council facilitates compromises,²⁷ since member states have to mobilise wider support in order to defeat a legislative proposal, the Commission’s inclusive tactics and consensual decision-making undermine its effectiveness.

The institutional configuration of the EU also facilitates transposition. As the French Conseil d’Etat noted²⁸, EU law cannot be observed with scepticism and in a passive manner because it doesn’t ‘fall from the sky’. The involvement of member states in policy formulation is crucial because it allows them to assess the changes (legislative and other) that will be necessary once a directive has been adopted. The assessment of these legislative changes at the national level is particularly important in member states where there are a large number of laws in place. When the assessment of the changes that have to be made after the adoption of a directive is incomplete, delays occur in transposition. This is important not only when directives have short deadlines for transposition, as is frequently the case,²⁹ but also in member states like the UK where the legislative output remains largely unaffected in quantitative terms despite membership of the EU³⁰.

The nature of national politico-administrative structures is another factor that affects transposition. Fragmentation undermines the effective operation of politico-administrative machineries³¹. Unlike the impact of fragmentation in the formulation stage which is marked by the lack or ineffectiveness of inter-departmental co-ordinating mechanisms, fragmentation in transposition appears primarily at departmental level. The case of the UK is quite illustrative in that respect. Unlike continental European administrations where a high proportion of officials are trained lawyers, in the UK there is a clear distinction in the operational logic of administrators, on the one hand, and departmental lawyers on the other. Typically, the Whitehall official has little or no legal training and tends to construe issues regarding transposition as ‘technical’ while the insistence of lawyers on specific terms or phrases during the process of negotiation seems to be construed as little less than obstruction.

²⁵ Interview, London, 10 July 2000.

²⁶ The view that the use of QMV undermines the efforts to draft *clear* legislation at the level of the EU is met with some scepticism by some officials. They argue that QMV has facilitated the adoption of *too many* EU laws (interview, Paris, 21 July 2000).

²⁷ National officials acknowledge that QMV has increased the unwillingness of national representatives in Council meetings to being part of minorities, even when they remain unconvinced as to the substance of a legislative proposal (interview, Dublin, 14 June 2000).

²⁸ *Rapport Public 1991*, Etudes et documents No. 43 (Paris: La Documentation française, 1991) p.15.

²⁹ This is another choice made in the stage of policy formulation, largely due to the willingness of member states to give effect to measures that they expect to be beneficial for them.

³⁰ E. C. Page, ‘The Impact of European Legislation on British Public Policy Making: A Research Note’ (1998) 76 *Public Administration* 4, pp.803-9.

³¹ See Hood, op. cit. footnote 18.

Although departments are instructed to involve lawyers in negotiations³² this view is met with hostility by administrators. This hostility is also mirrored at the organisational level by the existence of a separate hierarchy for the two groups of officials which re-produces the different mentalities.

Although the role of lawyers in Whitehall can be construed as a ‘peculiarity’ of the British system, it raises another wider issue. This issue has two dimensions, one *national*, that is the profile of the civil servants involved in the management of EU business that stems from a *novel* legal order³³ and one *European*, namely the role of the Legal Service of the European Commission in the formulation stage. The profile of the national civil servants has evolved slowly. The case of France is quite illustrative in that respect. Until the late 1980s the Ecole Nationale d’Administration did not offer courses on EC law³⁴. This has changed since 1990³⁵. Further, the weak involvement of the Legal Service of the Commission in the formative stages of the directives isn’t conducive to clarity. In a sense, the Commission desk officers share with presidencies the same objective, i.e. getting the directive through Council and Parliament, although the quest for ‘a result’ is not necessarily conducive to a clear and easily transposable (and implementable) directive.

Intra-departmental and inter-departmental mobility of officials is another source of problems in transposition. Although mobility is an essential tool for the management of human resources in public administrations, it also produces unintended consequences both in southern and northern member states. Officials move on to other posts after the end of the frequently protracted negotiations and the adoption of a directive. Hence, their experience and knowledge aren’t directly (and certainly not easily) accessible to the officials who replace them. This, in turn, negatively affects the capacity of public administrations to learn from the precious experience acquired during negotiations³⁶.

In addition, the daily workload of officials affects transposition at departmental level. The involvement of the same officials in the domestic stage of policy formulation (entailing consultations with other departments and interest groups), negotiations in Brussels and the transposition of EU legislation in addition to other-purely domestic-tasks is a kind of double-edged sword. On the one hand, when the same officials deal both with negotiations and transposition, the result of the latter is more likely to reflect the true objective of the directive (provided that other sources of distortion do not intervene). On the other hand, the involvement of the same officials in both stages of the policy process substantially increases their workload and this is a factor that accounts for some delays. This isn’t a problem faced only by new member states like Sweden where a recent government report has estimated that a significant increase of staff dealing with EU business (including transposition) is needed for the management of EU business³⁷. On the contrary, the lack of properly trained staff and the negative impact of mobility affect transposition in Greece, France and Ireland as well³⁸.

³² Cabinet Office/Regulatory Impact Unit, *The Guide to Better European Regulation* (London, n.d.), p.26.

³³ J. Rideau, *Droit Institutionnel de l’Union et des Communautés Européennes* (Paris: LGDJ, 1994).

³⁴ Conseil d’Etat, *La formation des fonctionnaires en droit communautaire: Extraits d’une étude de la Section du rapport et des études sur la formation juridique des fonctionnaires* (1988) *Revue Française d’Administration Publique* 48, p.68.

³⁵ C. Lequesne, ‘L’administration centrale de la France et le système politique européen: mutations et adaptations depuis l’Acte unique’ in Y. Mény et al (eds.) *Politiques Publiques en Europe* (Paris: L’Harmattan, 1995), p.147.

³⁶ Interviews, Athens and London, April and July 2000.

³⁷ Interview, Stockholm, 16 June 2000.

³⁸ N. Travers, ‘Rapport irlandais’ in FIDE, *Les Directives Communautaires: Effets, Efficacité, Justiciabilité*. XVIIIème Congrès, Stockholm, 3-6 June 1998, p.310; J. de Clausade, *L’adaptation de l’administration française à l’Europe*. Rapport au Ministre d’Etat, Ministre de la Fonction Publique et des Réformes Administratives, et au Ministre des Affaires Européennes (Paris: La Documentation française, 1991) p.68; A.

National authorities that transpose EU law do so within a wider context which is marked by the presence of two institutionalised fixers: the ECJ and the European Commission. Both the impact of the jurisprudence of the ECJ on the process of transposition and the role of the European Commission as gatekeeper of legality in the EU are filtered through (a) national courts and (b) the cost of litigation. National courts have broadly accepted in principle and enforced in practice the concept of state liability for non-transposition or incorrect transposition of EU law.³⁹ Nevertheless, *Francovich* is conditional. These conditions aren't always met by EU directives. Essentially it is hard to establish whether the impact of the jurisprudence of the ECJ in these cases (a) has reached non-lawyers in national administrations and (b) can supersede (or has done so already) other factors that undermine effective transposition of EU legislation. Moreover, litigation can be both expensive and time-consuming. Therefore, the impact of the jurisprudence of the ECJ on the activity of national administrations also depends on the ability and willingness of economic operators to take up these costs.

C Political Factors

There are two ways in which politics (in the strict sense of the term) affects transposition. First, outright rejection of a directive or group of directives can be politically motivated but such a position is becoming increasingly untenable in light of the Commission's role as gatekeeper of legality in the EU and the increasing limits placed on the institutional autonomy of the member states by the jurisprudence of the ECJ (see below). Therefore, the impact of politics upon transposition takes more covert forms. Member states can facilitate, delay or undermine transposition (and, indeed, implementation) by means of a number of choices that they make. Faced with an unclear text, national officials can either copy⁴⁰ it into national law thus effectively leaving unresolved the issue of clarity or elaborate by trying to facilitate subsequent steps in the implementation chain.

In the first case, officials who draft national texts effectively pass the buck-a cop-out in Ramsey's terms⁴¹-both to street-level implementors and the economic operators who must comply with or benefit from these provisions. On the contrary, those who take a bolder stance, try to interpret the directive, in an attempt to facilitate street-level implementation. This, however, entails a twofold risk: 'over-implementation' (i.e. excessive) and 'under-implementation' (i.e. deficient transposition). While 'over-implementation' entails the use of concepts, obligations, mechanisms and procedures that were never meant to be a part of the directive, 'under-implementation' entails the omission of crucial aspects of the directive thus undermining effectiveness. However, only a fine line distinguishes between 'over-implementation' and 'under-implementation'.⁴² What constitutes 'over-implementation' and what 'under-implementation' is much more than a 'technical' choice (i.e. the selection of the right legal terms and mechanisms). The terms 'over' and 'under' implies the existence of a barrier which serves as the mechanism for a test. How high this barrier is, is defined on the

Passas and A. Makridimitris, *The Greek Government and the Co-ordination of European Policy* (Athens: A. N. Sakkoulas, in Greek, 1994), pp.59-60.

³⁹ FIDE, *Les Directives Communautaires: Effets, Efficacité, Justiciabilité*. XVIIIème Congrès, Stockholm, 3-6 June 1998. Novelty consists in the application of the already existing principle of state liability in non-transposed and incorrectly transposed EU law.

⁴⁰ Copy-out is also used in cases of very precise and detailed directives, such as the directives on public procurement, that effectively restrict the choices that national officials can make.

⁴¹ L. Ramsey, 'The copy out technique: More of a 'cop-out' than a solution' (1996) 17 *Statute Law Review* 3, p.218ff.

⁴² This is why some national officials admit that the advantage of the copy-out technique is that it can lead to legal challenges in courts (national and European) whereby the content of the directive is clarified (interview, London, 10 July 2000).

basis of political factors which are linked not only to the interests affected by the specific case in question but also by wider considerations, for example perceptions regarding membership of the EU. The 'symbolic implementation' envisaged by the Conservative government in 1996⁴³ with regard to the directive on the 48-hour working week that it had fiercely opposed in the Council of Ministers and in the ECJ and its linkage to the then ongoing intergovernmental conference that led to the Amsterdam Treaty illustrates that transposition (and implementation for that matter) are used as political arguments at the highest political level in the EU.

Secondly, more mundane choices that never reach this level of publicity are equally political because they affect the interests of target groups and reflect the priorities of those that make them. The operationalisation of abstract concepts incorporated into EU directives largely relies on significant choices made during transposition, including the distribution of the regulatory burden. The transposition in UK law of the directive on part-time work is an example of this phenomenon. The directive in essence provides for the equal treatment of full-time and part-time employees. This presupposes a means of assessment, in this case a mechanism for comparing the two categories of employees. However, UK draft legislation that transposes the directive in question reportedly⁴⁴ does not contain such a mechanism thus effectively obliging interested individuals to rely on litigation for the protection of their rights.

Deciding whether to hold *consultations with the Commission* in transposition is another seemingly mundane decision. The European Commission is seen as an unhelpful and occasionally unreliable source of assistance in the transposition stage. This criticism concerns the attitude of Commission officials with regard to the provision of clarifications rather than the deadlines for the transposition of directives. Although national officials do not show great zeal in contacting the Commission in order to clarify issues during the process of transposition, when they do so they claim that help is not forthcoming⁴⁵. Clearly, a lot depends on the manner in which questions are asked and the availability of staff and time. In other words, it may well be the case that when their duties allow Commission officials to be available⁴⁶ for answering questions regarding transposition, they are unwilling to answer because they feel that their answers can be used as the means to justify choices which are not compatible with the spirit and the letter of EU law. Further, answers of lower-ranking Commission officials have (in the past) been over-ruled by their superiors.⁴⁷ The decision regarding consultations with the Commission is a political one. One national official questioned its usefulness by stating that if one is looking for an 'objective' (i.e. correct) interpretation of a directive, then 'this is a stupid thing to do because there is no objective interpreter of the law'⁴⁸. Further, raising an issue with the Commission ensures that its officials will focus on the choices ultimately made by the member state in question.

At the domestic level, the *choice of national legislative instrument* is equally a political one. Individual ministerial styles affect this choice. A bill is certainly a useful tool

⁴³ *The Guardian*, 12 November 1996.

⁴⁴ *Financial Times*, 4 July 2000.

⁴⁵ Interviews, London, Paris and Stockholm, June and July 2000.

⁴⁶ A national official who has also worked for the European Commission argued that Commission officials find it much more useful to concentrate on issues regarding street-level implementation rather than answering questions about transposition (interview, London, 31 July 2000).

⁴⁷ Nevertheless, it is important to note that this contrasts with their behaviour in street-level implementation. Indeed, the Commission then becomes not only a natural and effective focal point for national civil servants who seek and obtain advice as to how to go about implementing EU policy but also a useful resource in the hands of economic operators.

⁴⁸ Interview, London, 31 July 2000.

in the hands of an attention-seeking minister. Nevertheless, in the case of the UK where the issue of membership is contentious, the very extensive delegation of legislative power to the government contained in section 2(2) of the European Communities Act 1972 has been designed in an effort to neutralise, or at least sideline, Westminster which could otherwise function as a useful forum for those who oppose membership. The implications of the use of secondary legislation for the transposition of EU law into national legislation, a typical part of the European style of transposition (see below) are essentially fourfold.

First, the visibility of rules is undermined as more than one legal texts have to be consulted by those pursuing professional activities in the said domain, including street-level implementors. Secondly, the use of secondary legislation facilitates what Weatherill⁴⁹ called ‘bolt-on transposition’, that is the incorporation of EU law by means of *separate* legal instruments, rather than the codification of legislation in a single comprehensive instrument. This is particularly important in member states where legislative output isn’t affected in quantitative terms by membership of the EU⁵⁰ because it obscures the visibility of EU law by rendering it only one of many pieces of legislation that users must consult or comply with. Bolt-on transposition in turn allows the creation of an artificial distinction between EU-derived and purely national law. At least in the UK, this practice reflects the view, widely held by *administrators* in Whitehall, that EU legislation and the law that transposes it should be kept apart from ‘proper’ (i.e. UK) legislation⁵¹.

Thirdly, the balance of power between parliaments and executives is further altered in favour of the latter. Finally, the use of government (i.e. secondary) legislation also reflects a wider pattern of ‘depoliticisation’ of transposition which is more apparent than real. The limited direct involvement of ministers in the drafting of secondary legislation means that they are less likely to play the role of ‘fixer’ in transposition. For ministers know that it is hard, if not impossible, to make political capital by means of correct and timely transposition of EU law. This doesn’t undermine the political nature of transposition. Ministers avoid declaring openly that they have blocked the transposition of a directive not only because it reduces their bargaining power vis-à-vis the Commission but also because this would go against the co-operative culture that underpins decision-making in the Council, as illustrated by the longer adaptation periods accorded to member states who need them. This is also why the politics of transposition is predominantly *defensive*.

In turn, the implications of ‘depoliticisation’ are threefold. On the one hand, the balance of political power between elected and unelected officials shifts in favour of the latter. On the other hand, the administration becomes the main focus of groups that seek to undermine the effectiveness of EU law. This pressure on the administration inevitably highlights the problems stemming from the increasing workload and the mobility of officials discussed in the previous sub-section. Finally, since ministers are less likely to act as fixers, the role of the Commission as gatekeeper of legality becomes more important as well, especially for groups that are unable or unwilling to take national authorities to courts.

To be sure, the extent of involvement of ministers depends on the *political salience* of the issue in question for the domestic political arena. Domestic opponents of EU legislation (or membership) frequently use transposition in order to reiterate their views. This can lead to delays or even non-transposition. The cases of (a) Sweden where things tend to be ‘done with the left hand’ (i.e. the process ‘slows down a bit’) and more care is taken during consultations⁵² when a directive concerns a politically salient issue and (b) Greece where in

⁴⁹ S. Weatherill, ‘Rapport Britannique’ in FIDE, *Les Directives Communautaires: Effets, Efficacité, Justiciabilité*. XVIIIème Congrès, Stockholm, 3-6 June 1998, p.126.

⁵⁰ See E. C. Page, op. cit. footnote 30.

⁵¹ Interview, London, 10 July 2000.

⁵² Interviews, Stockholm, 15-16 June 2000.

the early 1980s ministers deliberately delayed the management of EU business-including transposition⁵³ as a result of their pre-electoral pledges, are quite illustrative in that respect.

D Substantive Factors

Formulation also affects the process of transposition by means of the introduction of *new concepts* that are alien to the legislation of the member states. This occurs because of technological progress or even as a result of the development of new market practices. For example, the notions of service contracts and concessions contracts in public procurement reflected new market practices and were new to the legislation of a number of member states. As a consequence, some of them chose to copy-out the content of directives into national legislation hoping that the Commission and the courts would clarify any remaining issues at a later stage of the implementation chain. Moreover, even when these barriers don't exist, transforming vague statements of political intentions into effective legislation is by no means an easy task⁵⁴.

The density and content of *existing national legislation* is a significant substantive factor that affects transposition by obliging national authorities to choose between bolt-on transposition and the incorporation of EU law into existing legislation. Frequently, domestic legislation rests on sensitive political compromises mirrored both by its scope and focus. In political terms it is significantly easier to expand policies (and the legislation upon which they rest) than to scale them down⁵⁵. The *scope* and the *focus* of national legislation frequently differ substantially from those introduced by EU legislation. For example, while one may regulate the behaviour of the *manufacturer*, the other may focus on *retailers*.⁵⁶ Incorporating these changes challenges the political compromise upon which national laws rest. This is one reason why the Commission, national governments and groups place increasing emphasis on consultations prior to the submission of formal legislative proposals at EU level.

III The Potential and Limits of Institutional Autonomy

A Institutional Autonomy in Context

The principle of institutional autonomy was enunciated by the ECJ in the early 1970s; it stated that 'when provisions of the Treaty or of regulations confer power or impose obligations upon the States for the purposes of the implementation of Community law, the question of how the exercise of such powers may be entrusted by Member States to specific national bodies is solely a matter for the constitutional system of each State'⁵⁷. The ECJ has subsequently refined this principle through its jurisprudence. In an effort to increase effectiveness, the ECJ has tried to limit the freedom of national authorities to utilise institutional autonomy in order to undermine transposition and implementation⁵⁸. National authorities are obliged to choose the *most effective, legally binding form* of measures ensuring *maximum publicity*. Further, the measures used for transposition must take the same form as those used for the regulation of the same issue in a given member state. Hence, the jurisprudence of the Court has restricted the capacity of national authorities to utilise institutional autonomy in order to undermine transposition. More importantly, the ECJ has

⁵³ Interview, Athens, 7 April 2000.

⁵⁴ R. Rose, 'Law as a resource of public policy' (1986) 39 *Parliamentary Affairs* 3, p.309.

⁵⁵ *Ibid*, p.307.

⁵⁶ The different scope and focus is an additional factor that explains why transposition is unnecessary only in exceptional circumstances.

⁵⁷ Joined cases C-51 to C-54/71 *International Fruit Company NV and Others v. Produktschap voor Groenten en Fruit*. *Reports of cases before the Court of Justice of the European Communities* [1971] p.1107.

⁵⁸ See Rideau, *op. cit.* footnote 33, pp.106-8.

explicitly rejected the view that member states can invoke special circumstances in order to avoid transposition (and implementation) because their involvement in the deliberations of the Council enables them to assess the implications of a draft piece of EU legislation and to make the appropriate provisions⁵⁹.

In addition to these *procedural constraints* placed on the role of the member states in transposition, *substantive limits* have appeared as well. The direct effect of directives—that is the conditional right of individuals to invoke directives in national courts—has limited their difference *vis-à-vis* regulations⁶⁰ which needn't be transposed, thus rendering the use of copy-out more likely. Further, directives have become increasingly technical and detailed thus effectively curtailing the freedom of national authorities in the process of transposition. Despite these limitations, member states make significant *procedural choices*. The following sub-section describes broad trends identified in eight member states.⁶¹

B A European Style of Transposition?

The transposition of EU law is achieved predominantly in a *reactive manner* by means of *secondary legislation*, which reflects the dominant role of national governments, marked by the *limited direct involvement of ministers*. It is the result of *multiple co-ordination* of a small number of departmental actors operating at the level of *central government* and is underpinned by a *variable degree of group involvement*. In terms of *legislative technique*, national authorities combine elaboration with 'copy-out' and 'bolt-on' transposition with the incorporation of changes into existing legislation.

The choice of the national legislative instrument is both straightforward and unproblematic in the member states examined here, essentially for two reasons. On the one hand, national constitutions define the policy areas covered by law and those covered by secondary legislation. On the other hand, constitutions provide for the delegation of legislative powers from national parliaments to governments. Thus, governments typically make extensive use of secondary legislation for the transposition of EU directives. The main reason is the *lourdeur* of parliamentary procedures and the lack of parliamentary time. This pattern has replaced in some member states, such as the UK and France, the use of administrative circulars⁶² previously used for the transposition of EU law. The jurisprudence of the ECJ⁶³ has highlighted the fact that circulars, unlike legislation, do not provide for legal certainty and cannot ensure publicity since they largely remain a means of intra- and inter-departmental communication.

However, laws are used for the transposition of EU legislation in exceptional cases for *legal* and *practical* reasons. Domestic constitutional arrangements oblige governments to use primary legislation in a small number of cases. For example, an act of parliament is necessary in the UK when the transposition of EU legislation involves the creation of new criminal offences entailing major penalties. Moreover, laws are used when the legislative process is already under way at the national level in an attempt to regulate other aspects of

⁵⁹ Case 30/72 Commission of the European Communities v. Italian Republic. *Reports of cases before the Court of Justice of the European Communities* [1973]: 161.

⁶⁰ F. Capotorti, 'Legal problems of directives, regulations and their implementation' in H. Siedentopf and J. Ziller (eds.) *Making European Policies Work*, vol. I, (Bruxelles/London: Bruylant/Sage, 1988) p.154.

⁶¹ Clearly, additional research based on case studies is necessary if a higher degree of detailed knowledge is to be achieved.

⁶² J. Usher, 'The legal framework for implementation in the United Kingdom' in T. Daintith (ed.) *Implementing EC Law in the United Kingdom: Structures for Indirect Rule* (Chichester: Wiley & Sons, 1995) p.101; R. Kovar, P. Lagarde, D. Tallon, 'L'exécution des directives de la CEE en France' (1970) 6 *Cahiers de Droit Européen* 3, p.288.

⁶³ Rideau, *op. cit.* footnote 33, pp.106-7.

the same policy area. This is a rather rare phenomenon. Hence, transposition is *predominantly reactive*.

The impact of this pattern on the relations between national legislatures and executives is a crucial issue with two basic facets. On the one hand, the weak role of national parliaments in transposition underlines the so-called democratic deficit that characterises the domestic dimension of the EU policy process. On the other hand, however, it isn't the direct result of the participation of member states in the process of integration. In most, if not all, of the polities examined here, the weakness of parliaments pre-dates the creation of the EC (or at least the most intensive stages commenced by the Single European Act). The case of France where most of the policy areas where the EC/EU is active were already excluded from the legislative domain⁶⁴ is quite illustrative in that respect. At best, the involvement of national polities in European integration—and the transposition of EU law in particular—may have *highlighted an established pattern* of formal legislative-executive relations (or enhanced it) whereby the former dominates the latter. Nevertheless, the exigencies of transposition, in particular the deadlines and the legally binding nature of the directives, have effectively enhanced the role of governments vis-à-vis parliaments and domestic groups (see below)—in a covert manner. Determined executives can, and do, evoke these characteristics of directives in order to push through EU-induced legislative changes.

The choice of the form of national legislation by means of which EU law is transposed is only one, and possibly the simplest, choice made by national authorities but the use of secondary legislation reflects a wider pattern of 'depoliticisation' of the EU policy process. The increasing use of secondary legislation, typically prepared by civil servants, reflects the dominant role of the same officials in the policy formulation stage. 'Depoliticisation' refers not only to the limited role played by *formally responsible* ministers *in practice*, but also the inability and unwillingness⁶⁵ of national parliaments to play a substantive role in transposition.⁶⁶ It doesn't imply that the role of civil servants isn't political. Rather, the term 'depoliticisation' reflects a pattern of limited direct and overt involvement of *elected* officials in transposition.

Typically, the departments that have a stake in the transposition of a directive are identified in the formulation stage of the policy process. Their activity takes place in a framework characterised by *multiple forms of co-ordination*. One can distinguish between two forms of co-ordination: substantive and legal. *Substantive* co-ordination focuses on the content of national legislation that transposes EU law and aims to resolve differences of view between departments. It is the domain of core executive bodies (such as the SGCI and the SGG in France and the Prime Minister's Unit in Sweden) or ministries of economic affairs (in Greece, the Netherlands, and Germany) whereas in Italy—a unique case—the main co-ordinator is the Ministry for the Co-ordination of EU Policies. *Legal* co-ordination focuses on the compatibility of new legislation with the jurisprudence of the ECJ and other aspects of EU legislation, constitutional provisions and other aspects of domestic law. Legal co-ordination is either the domain of legal bodies like the Conseil d'Etat in France and similar

⁶⁴ Y. Mény, 'France' in H. Siedentopf and J. Ziller, . *Making European Policies Work*, vol. II (Bruxelles/London: Bruylant/Sage, 1988) p.282.

⁶⁵ The cases of Westminster and the Irish Parliament where deputies do not scrutinise national legislation that transposes EU law are illustrative in that respect.

⁶⁶ The French government has used the services of MPs, including the former Prime Minister Michel Rocard, on three occasions. MPs act as mediators between the administration and competing interest groups in the transposition of directives relating to politically sensitive issues, such as the liberalisation of the gas market. See for example N. Bricq, *Mission de réflexion et de concertation sur la transposition de la directive européenne sur le marché intérieur du gaz*. Rapport au Premier ministre (Paris, La Documentation Française, 1999). However, they do so without fettering the role of the government that remains the dominant institutional player (interview, Paris, 21 July 2000).

institutions in Italy, the Netherlands and Greece or departments (like the ministries of justice in Sweden, the Attorney General's Office in the UK and Ireland). These forms of co-ordination are intertwined and combined with (a) sectoral *foci* of co-ordination such as the DTI in the UK and the Ministry of Justice in the Netherlands which co-ordinate the transposition of Single Market directives and (b) the assessment of the 'political' repercussions of the state of play with regard to transposition, typically the domain of ministries of foreign affairs.

The *involvement of interest groups* in the process of transposition reflects their role in the policy formulation stage. A distinction between two groups of member states can be drawn. First, in the UK, Ireland, Sweden, the Netherlands and Germany where interest groups are actively involved in policy formulation, they participate in the process of transposition as well. Contacts between civil servants and interest groups in these member states serve three purposes, namely the provision of *information* about the substance of new EU legislation, *consultation* regarding the mode of transposition and the direction of some choices involved in transposition (including scope and sanctions) and *legitimation* of the process. France is a peculiar case in the sense that the rather limited direct involvement of groups in policy formulation is followed by an institutionalised role law-making hence in transposition as well. Secondly, in Greece and Italy the weak involvement of interest groups in transposition mirrors their weakness in the formulation stage. This is one of the most prominent reasons for criticism against the Italian and the Greek negotiators who frequently ignore (not necessarily by choice) the views of economic operators and stakeholders⁶⁷.

IV The Evolution of National Systems and EU Efforts to Improve Transposition

Arguably, the European style of transposition outlined above isn't the result of a process of convergence. Rather, national systems have *adapted* to the exigencies of transposition. Institutional theory underlines the fact that institutions tend to approach reality, including novel situations, by means of their own standard operating procedures and repertoires⁶⁸. This is precisely what happened in the eight member states examined here. Very little has changed as a result of the exigencies of transposition. In fact, only three small changes can be underlined. First, some member states that in the past have used administrative circulars in order to transpose EU law have ceased this practice as a result of the jurisprudence of the ECJ. Reverting to legally binding instruments was very easy since these instruments were already part of the national legislative 'arsenal' and were used extensively for domestic purposes. Secondly, less time is being devoted to consultations with groups in Sweden while the Dutch General Administrative Law Act has been amended in the mid-1990s in a manner that leaves consultations between formal advisory boards and the administration at the discretion of the latter. Its exercise depends on the extent to which the transposition of EU legislation enables the implementing authority to make policy choices. However, in both cases the fundamental characteristics of the two consensual systems have been maintained.

Secondly, developments at EU level have reduced the need for change at the national level since EU law is under the increasing influence of the Anglo-Saxon method of drafting⁶⁹ which places emphasis on precision and clarity. Finally, national governments are now much more aware of the importance of the formulation stage of the policy process. The most effective national negotiators try to influence the Commission when it is drafting its proposals, i.e. *before* they reach the working groups of the Council, largely in response to the

⁶⁷ Interviews, Athens and Rome, April and July 2000.

⁶⁸ March and Olsen, op. cit. footnote 15, pp.34-5.

⁶⁹ See Wainwright, op. cit. footnote 8, p.12.

increasing use of qualified majority voting which undermines the capacity of individual governments to block legislative proposals.

Efforts at the level of the EU have focused on legislative drafting and the consolidation of existing legislation. The debate regarding the 'quality of EU law' has been reinvigorated after the Maastricht Treaty and the explicit introduction of the principle of subsidiarity into the Treaty. Further to the conclusions of the Presidency of the European Council meeting in Edinburgh (December 1992) the Council has adopted a resolution which stressed the importance of the systematic use of consolidation, the need for consistency and clear and simple wording in EU law⁷⁰. The IGC that led to the adoption of the Amsterdam Treaty in 1997 encouraged the use of official codification of legislative acts and urged the European Parliament, Council and the Commission to establish guidelines for improving the quality of drafting of EU legislation and to take the necessary internal organisational measures for their proper implementation (Declaration No. 39). This led in 1998 to an inter-institutional agreement⁷¹ on common guidelines for the quality of drafting of EU law emphasising the importance of clear, simple and precise drafting. The three institutions decided to foster co-operation between their respective departments responsible for ensuring the quality of drafting, agreed to instruct their legal services to draw up a joint practical guide for those involved in drafting legislation and to promote co-operation with the member states 'with a view to improving understanding of the particular considerations to be taken into account when drafting texts'. In that sense they underlined the fact that both levels of government must engage in processes of learning thus echoing the view of a senior Commission official who urged member states to ensure that individuals with drafting expertise are included in the national delegations that participate in the meetings of the working groups of the Council⁷². More concrete steps have been taken in areas where integration has reached more advanced stages. In the domain of the internal market the Commission has launched the SLIM initiative (Simpler Legislation for the Internal Market) in 1996. The objective is to involve national officials, users of EU legislation and officials of the European Commission in an effort to avoid unnecessarily complex provisions. However, only half of the simplification measures already proposed by the Commission since the Edinburgh European Council and only one third of its proposals on formal consolidation have been adopted by the Council and the European Parliament⁷³. If previous experience is anything to go by, the prospects of the successful completion of this task are not good. Unlike the European Parliament, the Council has undermined previous attempts to consolidate EU legislation. National representatives have attempted to re-open the debate on *substantive issues*⁷⁴ which consolidation is supposed to leave intact. Hence, the impact of 'politics' remains more than evident.

V Conclusion

The objective of this article was twofold. On the one hand, it sought to demonstrate that transposition is affected by *institutional*, *political* and *substantive* factors. Drawing on

⁷⁰ Council of the European Communities, Resolution of 8 June 1993 on the quality of drafting of Community legislation, *Official Journal of the European Communities* C166, 17 June 1993.

⁷¹ Interinstitutional agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, *Official Journal of the European Communities*, C73, 17 March 1999.

⁷² C.Timmermans, 'How can one improve the quality of Community legislation?' (1997) 34 *Common Market Law Review* 5, p.1249.

⁷³ Commission of the European Communities, *Better Lawmaking 1999: Report to the European Council*, COM (99) 562, pp.6-7.

⁷⁴ Commission of the European Communities, *Communication from the Commission: Follow-up to the Sutherland report. Legislative consolidation to enhance the transparency of Community law in the area of the Internal Market*, COM (93) 361, p.4.

implementation theory in public policy, it has demonstrated why transposition cannot be expected to be the smooth, linear product of the formulation stage of the EU policy process. Transposition, it has been argued, is political not only because the choices made by the member states affect subsequent stages of the EU policy process (mainly street-level implementation) but also because these choices *per se* are neither 'neutral' nor 'technical'. Therefore, it has been argued that confining its analysis to the impact of vagueness, i.e. approaching the transposition of EU law merely as an issue of legislative technique (drafting) fails to do justice to the richness of the process that produces it (formulation) and its subsequent implementation at street-level. On the other hand, since the transposition of EU law takes place on the basis of the principle of institutional autonomy, the article has sought to identify the similarities and differences between the mechanisms used in eight member states. Thus, a European style of transposition has been identified. This, it has been argued, isn't the result of a process of convergence. Rather, despite pressure stemming from the EU, member states have essentially preserved their institutional autonomy.

Both conclusions are preliminary. Additional work based on case studies is necessary if we are better to understand a stage of the EU policy process that political scientists have largely neglected.