

# The Copy/Paste approach to transpose EU directives

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# 1. The copy/paste approach to transpose EU Directives

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## **Copy/paste approach: concept**

- EU members frequently transpose EU directives by using a copy/paste approach
    - Insertion of the full text of the directive into the national framework without adapting it
    - Text of the national legislation becomes almost the same or follows closely the text of the transposed directive
  - But it is also common to adapt the text of the EU directive instead of using a copy/paste approach
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## Copy/paste approach: pros and cons

- **Pros:**

- Provides for a more common legal framework among Member States
- Clarity and access: citizens and companies of EU are able to better understand the legal framework wherever they are
- Allows a speedier transposition; less transposition works

- **Cons:**

- Less effective piece of legislation due to its non-resemblance to the national legislative framework
  - Clarity may be at stake: interpretation may be more difficult due to the use of legal terms different from the national ones
  - More room for conflicts if the new legislation does not fit into the national framework
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## 2. 6 topics on the copy/paste approach to transpose EU Directives

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## 1st topic: Is transposing always required?

- Is it required/advisable to draft and approve a piece of legislation even when transposing is unnecessary from a legal standpoint?
  - This is the case when the national legal framework complies with the directive obligations prior to its transposition
  - **Response:**
    - It is not required to transpose what is already included in the national framework (e.g. French Ministry of Foreign Affairs considered unnecessary to transpose Directive 2008/114 on critical infrastructures)
    - It may be advisable in subject matters where effectiveness is critical: reading a single piece of legislation to understand the overall picture of the regulation without searching for additional legislation may increase effectiveness of the legislation
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## **2nd topic: The structure of the EU directive should be closely followed or adapted?**

- Should a specific new piece of national legislation be approved to transpose each directive?
  - This is the case when the directive is divided into parts and the national legislation is divided in different parts
  - It is also the case when some of the provisions of the directive are set forth in annexes and national legislation includes its contents into provisions
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## **2nd topic: The structure of the EU directive should be closely followed or adapted?**

**Ex1:** Directive 2010/75 on industrial emissions (integrated pollution prevention and control) was transposed in Spain by the *Real Decreto Legislativo 1/2016, de 16 de diciembre*, with a different structure (e.g. different chapters/*títulos*)

**Ex2:** Directive 2010/75 on industrial emissions (integrated pollution prevention and control) adopted procedures for public participation in permit procedures and such procedures for public participation were set forth in its annex IV. This is a part of the permit procedure and the provisions could therefore be included in the articles referred to such procedure by national legislation (as in *artículo 16* of *Real Decreto Legislativo 1/2016, de 16 de diciembre* in Spain)

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## 2nd topic: The structure of the EU directive should be closely followed or adapted?

- **Response:**

- In general, the structure and wording may be adapted, if required
  - If/when possible, structure should be preserved: it allows for a better and swifter understanding of how directives provisions were transposed
  - The transposition should be included in an existing law if the subject matter is the same or close (Directive 89/665 on review procedures to the award of public supply and public works contracts is transposed in Portugal by the Code of Administrative Justice with a much wider scope)
  - Several different directives should be transposed by a single act if the subject matter is the same or close (In Portugal, *Decreto-Lei 127/2013 de 30 de Agosto* transposed several directives on environmental subjects)
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### **3rd topic: Should national drafting style be used to transpose EU directives?**

- Should national legislative techniques be used for the transposition?
- Is it advisable to use national drafting styles instead of EU legislative drafting style?

**Ex:** Certain provisions of Directive 2009/81 on procedures for the award of contracts and in the fields of defence and security have more than one paragraph in each number (e.g. article 5-1). This is not accepted in Portuguese drafting style and therefore *Decreto-Lei 104/2011, de 6 de outubro* uses a number for each paragraph.

- **Response:** Using of national drafting style is advisable in order to i) enhance clarity and ii) provide for a better insertion and interpretation of the provisions within the national framework
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## 4th topic: Should the “whereas” of the Directive be used in the national legislation?

- The “whereas” of the directives provides important information on the reasoning of the provisions adopted
- In general, they also contribute for a more accurate interpretation of the national legislation, which is bounded by the directive
- National legislations do not always have a “national preamble”
- When they have, it usually does not provide as many data as the directive’s “whereas”

**Ex:** Directive 2009/81 on procedures for the award of contracts and in the fields of defence has an extensive “whereas” aimed to explain the purpose of its provisions. In Belgium, the *Loi 13 août 2011, as amended*, does not have a preamble.

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## 4th topic: Should the “whereas” of the Directive be used in the national legislation?

- **Response:** the content of the “whereas” of the directives should be more used to reason preambles of national legislations
    - It allows to better understand the provisions of the legislation
    - It provides instruments to a more accurate interpretation of the national legislation in accordance with the EU legislation
    - But it should not be “copy/pasted”
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## 5th topic: Should national laws copy/paste the list of definitions of the directive?

- Many European national frameworks do not use so extensive “lists” of definitions as the EU directives
  - Definitions are inserted in articles related to the subject matter rather than in specific articles for definitions
  - Articles with definitions are not as extensive as in directives

**Ex:** Directive 2010/75 on industrial emissions (integrated pollution prevention and control) lists a huge number of definitions

- Some of them are already defined by other EU legislation (e.g. “poultry”)
  - Some others are not definitions but provisions of the regulation (e.g. “substantial change”)
  - Others do not really need to be defined by law (e.g. “diesel engine” or “soil” as *“the top layer of the Earth’s crust situated between the bedrock and the surface. The soil is composed of mineral particles, organic matter, water, air and living organisms”*)
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## 5th topic: Should national laws copy/paste the list of definitions of the directive?

- **Response:**

- No need to repeat the list of definitions of the directives. Should be used when it is advisable to better understand/explain the provisions of the legislation
  - Very often, definitions are not required to be transposed:
    - ✓ Not required when the national framework already provides an acceptable definition
    - ✓ Not required if the definition is not used by the provisions of the legislation
    - ✓ Not required if the definition states what is obvious
  - If the definitions is required, it may be advisable to include it in a specific article instead of an article aimed to list definitions (e.g. when the legal term is only used in a specific article/chapter of the law)
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## 6th topic: How to deal with legal terms not matching with national laws?

- In some cases, the legal terms used by the directive do not match with the legal terms used by national legislation

**Ex:** Directive 2010/75 on industrial emissions (integrated pollution prevention and control) defines “*licença*” as “*uma **autorização** escrita para explorar a totalidade...*”. “*licença*” and “*autorização*” are two different types of permits under Portuguese Law, but they were used as if they were the same by EU legislation.

- **Response:**

- Use the national legal terms (even if you have to use several/different legal terms) to comply with the directive
  - If it is not a legal term widely used by the national framework, consider to amend the national legal term to be fully in line with EU legislation
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## 3. Conclusions

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- There is not a general answer of yes/no to the copy/paste approach
  - Different values need to be balanced when choosing to use the copy/paste technique or not (clarity/effectiveness/interpretation)
  - In certain topics (e.g. using of “whereas”) the text of the directives should be more used
  - In other topics, national legislation should adapt the directive text or consider if avoiding copy/paste would contribute to clarity/effectiveness/interpretation of the legislation (e.g. legal terms which do not match; definitions; drafting style)
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**Obrigado!**

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