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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND  
THE COUNCIL**

**Implementation of the two Joint Political Declarations on explanatory documents about  
Member States' transposition of directives**

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## Implementation of the two Joint Political Declarations on explanatory documents about Member States' transposition of directives

### 1. INTRODUCTION

The European Union cannot achieve its policy objectives unless EU law is implemented effectively. While Member States are responsible for transposing directives accurately and on time, it is the Commission's role as Guardian of the Treaties to check that this is done. For this purpose, the information that Member States give the Commission must be clear and precise as has been underlined by the Court on several occasions<sup>1</sup>.

To this end, in September 2011 the Member States and the Commission issued a Joint Political Declaration on explanatory documents<sup>2</sup>. In October, the European Parliament, the Council and the Commission issued a further Joint Political Declaration<sup>3</sup>. These two declarations establish a new framework under which Member States provide supporting information about how they have transposed directives<sup>4</sup> into their law.

The second declaration calls on the Commission to report back to the European Parliament and to the Council by 1 November 2013.

This Report reviews the application of the declarations over the last two years.

### 2. THE JOINT POLITICAL DECLARATIONS

The first declaration reiterates the general principle that Member States are responsible for implementing EU law and the Commission for overseeing its application. For this purpose, Member States may, in justified cases, be asked to include explanatory documents when they notify the Commission of their transposition measures. The function of these documents is to clarify the relationship between the parts of a directive and the corresponding parts of national instruments. They may take the form of correlation tables or other documents serving the same purpose.

The second declaration confirms the agreement between Member States and the Commission on the new framework and sets out a new standard recital to be inserted into directives for which the submission of explanatory documents has been justified<sup>5</sup>.

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<sup>1</sup> Judgment of the Court of Justice of 16 July 2009 in case C-427/07, point 107 and the case-law cited therein.

<sup>2</sup> Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents ( OJ C 369, 17.12.2011, p. 14).

<sup>3</sup> Joint Political Declaration of 27 October 2011 of the European Parliament, the Council and the Commission on explanatory documents (OJ C 369, 17.12.2011, p. 15).

<sup>4</sup> These declarations followed lengthy discussions on mandatory 'correlation tables' which the Commission had been requesting in its proposals for directives since 2003. In most cases, the request had not been granted by the Council.

<sup>5</sup> The recital reads as follows: 'In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified'.

The new framework is intended to improve the quality of information on the transposition of directives. The need to provide explanatory documents, and whether the corresponding request is proportional to it, is examined on a case-by-case basis taking into account the complexity of the directive and its transposition.

The European Parliament asked the Commission to systematically give Parliament the reasons for its decision either to seek or not to seek explanatory documents for any given dossier<sup>6</sup>.

### **3. PUTTING THE NEW FRAMEWORK INTO PLACE**

The new framework came into force on 1 November 2011. All new and pending directive proposals in the ordinary legislative procedure since then have been covered by the new rules. To be consistent, the Commission also applies the new framework to delegated and implementing acts.

The Commission issued internal guidance to all its departments on applying the new rules. The guidance includes criteria and a tentative checklist to be used to assess whether explanatory documents should be requested.

The Explanatory Memorandum for each new proposal for a directive should give reasons why explanatory documents are to be requested or not.

Operationally, the Commission has:

- amended the template for directives so that there is an automatic alert to the need to assess whether explanatory documents are to be requested;
- adapted the IT tool to accept explanatory documents; it does not stop national transposition measures being reported if these documents are not provided but the Member States can upload correlation tables if they wish;
- identified proposals that were adopted but which did not include proper justification or which contained outdated wording on correlation tables, and has instructed the relevant departments to amend these proposals in line with the new policy by submitting the relevant justifications to the Council and Parliament, as co-legislators. If the justification was not included in the proposal as adopted, it has been sent to the co-legislators later in the form of a non-paper. Pending proposals adopted by the Commission with a binding obligation in the legal text to provide a correlation table have been rectified or will be rectified by giving the relevant justification in a letter to the co-legislators.

### **4. CURRENT STATE OF PLAY**

Since 1 November 2011, the Commission has adopted 67 proposals for a directive and requested explanatory documents in relation to 29 of these proposals. On 1 November 2011, another 48 proposals were pending before the co-legislators. In 19 of these cases, the Commission requested explanatory documents. Since 1 November 2011, 38 directives have been adopted by the co-legislators and for 15 of these (see Annex), the Commission's request for explanatory documents was agreed to by the co-legislators.

### **5. CHALLENGES FACED DURING THE LEGISLATIVE PROCEDURE**

Although the declarations reflect a clear understanding by the legislator of the policy on explanatory documents, negotiations on some recent proposals have demonstrated differences

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<sup>6</sup> Letter from the President of the European Parliament to the President of the Commission of 17.11.2011.

of interpretation. In one particular case, following intensive discussions between the co-legislators, a derogation was eventually agreed by the insertion of a provision, in addition to the standard recital, committing Member States to provide more detailed information on transposition<sup>7</sup>. In another case, an ad hoc solution was found outside the scope of the political declarations as the issue of explanatory documents had not been addressed at the right point in the legislative procedure. In that case, the Commission stated its position in a separate letter to Member States instead of the standard recital<sup>8</sup>.

## 6. CONCLUSION

Under the new framework on explanatory documents, the Commission systematically provides the legislator with a justification when explanatory documents are requested. The legislator has honoured these requests as regards the directives which have been adopted.

A full assessment of the new framework is not yet possible. Although the new framework has applied since 1 November 2011 and the first proposal with the standard recital was adopted in December 2011, it only has to be transposed by the Member States by 25 December 2013<sup>9</sup>. Others will follow in 2014. It will not be possible to assess how Member States are honouring their commitments before then.

A fuller assessment will therefore only be possible once the Commission has received explanatory documents for a representative number of directives. The Commission will report to the European Parliament and the Council on this in its Annual Report on monitoring the application of EU law.

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<sup>7</sup> Article 162 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC states as follows: 'Where the documents accompanying notification of transposition measures provided by Member States are not sufficient to assess fully the compliance of the transposing provisions with certain provisions of this Directive, the Commission may ... require Member States to provide more detailed information regarding the transposition and implementation ...'.

<sup>8</sup> During the legislative procedure on a proposal for a legislative framework for offshore oil and gas operations (COM(2011) 688), the legal form changed from a Regulation to a Directive and the standard recital was not inserted.

<sup>9</sup> Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.