



Making EU law into UK law

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The *European Communities Act 1972* authorises the implementation of EU law as national law in the UK and for its transposition via primary or secondary legislation or by other means.

Transposition Notes set out how the Government intends to transpose an EU Directive into UK law.

In 2013 the UK Government published updated guidance on transposition and the effective implementation of EU Directives in an effort to avoid 'gold-plating' EU law when it is transposed into UK law.

At the end of the national transposition process Member State governments must inform the European Commission as to how they have implemented an EU obligation.

The Commission, as 'guardian of the Treaties' assesses whether Member State have implemented EU law correctly. Failure to notify, late or poor implementation may incur financial penalties under the EU Treaties.

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Contents

- 1 Legal basis for the implementation of EU law in the UK 2**
- 2 Parliamentary scrutiny 3**
 - 2.1 Scrutiny committees 3
 - 2.2 New parliamentary powers 3
- 3 Transposition of EU law 4**
 - 3.1 Guiding Principles 4
 - 3.2 Transposition Notes 6
- 4 Notifying the European Commission 8**
 - 4.1 Procedure 8
 - 4.2 Failure to notify 8
 - 4.3 Late transposition of EU law 9
 - 4.4 Improving data communication 10

1 Legal basis for the implementation of EU law in the UK

The *European Communities Act 1972* (ECA) allows EU specified instruments to become part of UK law without the need for separate enactment of each and every EU instrument. Section 2(1) of the ECA gives the statutory authority for Treaty provisions and directly applicable secondary legislation (e.g. regulations) automatically to have legal effect in UK domestic law without further enactment:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to or to which this subsection applies.

EU legislation which is not directly applicable (e.g. directives and decisions) can be enacted either by primary (Act of Parliament) or secondary legislation (Order, Statutory Instrument). The vast majority of EC legislation is enacted by Statutory Instrument (SI) under Section 2(2) ECA. This Section confers authority on ministers, government departments or Her Majesty in Council to make, with certain exceptions contained in Schedule 2 of the Act, subordinate legislation. Section 2(2) ECA states:

(2)Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision—

(a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

(b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above; and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the EU and to any such obligation or rights as aforesaid.

In this subsection “designated Minister or department” means such Minister of the Crown or government department as may from time to time be designated by Order in Council in relation to any matter or for any purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council.

[Schedule 2](#) ECA sets out the procedure for adopting subordinate legislation to implement EU law. Subordinate legislation made under this section can also repeal or amend existing legislation if this is incompatible with EU law. EU regulations are supposed to be directly applicable, but if they are not, SIs or administrative rules or regulations may be used.

2 Parliamentary scrutiny

2.1 Scrutiny committees

The UK Parliament has a European Scrutiny Committee and three European (standing) Committees in the Commons, and a European Union Committee with (currently, six) sub-committees in the Lords. For information on the scrutiny role and responsibilities of these committees, see the Commons [Guide, October 2012](#), and the Lords [EU Committee website](#). The Commons Guide outlines the Committee’s wider remit as follows:

In addition to its work directly related to documents and Council meetings, the Committee updates its knowledge of wider developments in the EU by means of visits to the EU institutions; visits to each Presidency country shortly before it takes up the Presidency of the Union and to candidate countries; participation in COSAC, which brings together the European affairs committees of all the national parliaments in the EU, together with MEPs; and regular informal meetings with UK MEPs and Members of the Lords EU Select Committee.

The National Parliament Office in Brussels is the “eyes and ears” of the UK Parliament with regard to EU matters. It has two members of staff from the Commons and one from the Lords. It publishes a weekly account of EU news and a digest of EU-related business in the House (these are not publicly available).

2.2 New parliamentary powers

The [European Union Act 2011](#) which gained Royal Assent in July 2011, introduced new provisions requiring parliamentary approval for certain EU decisions that would transfer power from the UK to the EU. This might involve an Act of Parliament and possibly a national referendum. The 2011 Act has been used three times so far to gain parliamentary approval via an Act of Parliament for EU measures before the UK Government could agree to their adoption in the Council. This Act does not transpose EU law into UK law; it merely

approves/does not proposals before the government can agree to their adoption. Transposition follows in the usual ways (see below).

The Secondary Legislation Scrutiny Committee [Guidance for Departments on Statutory Instruments](#) noted in June 2012:

32. The Legislative and Regulatory Reform Act 2006 enabled SIs to make “ambulatory references” to EC legislation, which allow updates to an underlying EC Directive to have automatic effect in the UK. This mechanism has been of concern to the Lords because it takes future SIs out of the normal legislative scrutiny process [See for example HL debate 28 October 2009 cols 1231-43].

This mechanism should only be used for technical updates, which usually appear in an Annex to the Directive, such as adding items to a list of banned chemicals. The agreed Whitehall position on the use of the power is set out in Appendix 1 of the Merits Committee’s 25th Report of session 2008-09. The Explanatory Memorandum should make it clear if an ambulatory reference is being introduced. If the power is applied to anything other than simple technical updates the Committee expects to see a full explanation of why this is proposed, including how any risks, including the potential for unintended consequences, are to be managed in the absence of further Parliamentary scrutiny.

3 Transposition of EU law

Transposition is the conversion of EU legislation into national law. This is part of the process of implementing the EU law. When Government departments transpose EU directives, there are two methods they can use: ‘copy-out’ or ‘elaboration’. Copy-out transcribes the directive into UK law with no additions or changes. Elaboration augments the wording of the directive, to provide greater clarity, for example, but this can result in over-implementation or ‘gold-plating’. The present Government prefers copy-out (see Guidance below).

3.1 Guiding Principles

The Government’s [Guiding Principles for EU Legislation](#), published in 2013, set out the following principles and procedures for the dealing with EU law with a view to implementing it effectively and avoiding ‘gold plating’:

General Principles

1. The Government’s approach is to look at the cumulative impact of new EU measures.
2. Wherever possible, the Government will argue for alternatives to regulation at European level, drawing on behavioural science insights.
3. The Government will engage with the European Commission before it has adopted proposals to increase UK influence on the drafting of legislative proposals.
4. The Government will build alliances with other Member States and relevant MEPs and other EU-level stakeholders to increase the UK’s effectiveness in negotiation.

Ministers must ensure that:

- a. they are well sighted on all EU measures relevant to their department, from the initial Commission proposal through to transposition and implementation; and

- b. their department assesses from the outset the impact on the UK of the proposed legislation and effectively project manages the process from negotiation to transposition.
5. When transposing EU law, the Government will:
 - a. ensure that (save in exceptional circumstances) the UK does not go beyond the minimum requirements of the measure which is being transposed;
 - b. wherever possible, seek to implement EU policy and legal obligations through the use of alternatives to regulation;
 - c. endeavour to ensure that UK businesses are not put at a competitive disadvantage compared with their European counterparts;
 - d. always use copy out for transposition where it is available, except where doing so would adversely affect UK interests e.g. by putting UK businesses at a competitive disadvantage compared with their European counterparts. If departments do not use copy out, they will need to explain to the RRC the reasons for their choice;
 - e. ensure the necessary implementing measures come into force on (rather than before) the transposition deadline specified in a directive, unless there are compelling reasons for earlier implementation; and
 - f. include a statutory duty for Ministerial review every five years.

The *Operating Principles* draw attention to the Reducing Regulation Sub-Committee (RRC), which is for measures that regulate or deregulate business or civil society organisations, and for the transposition of EU legislation, including transposition plans. It is chaired by the Secretary of State for Business, Innovation and Skills:

1. Twice a year, Ministers will report to the Foreign Secretary on their department's early influencing priorities and engagement strategies, showing how they are seeking both to influence the Commission's policy agenda and ensure that important future EU measures (legislative and non-legislative) are justified, that the policy objectives of a regulatory proposal cannot be achieved through non-regulatory means and proposals are drafted to maximise benefits and minimise risks to the UK. The European Affairs Committee, following consultation with the RRC, can then, in turn, agree cross-government early influencing priorities for joined-up lobbying.
2. Departments will endeavour to seek clearance for their proposed UK negotiating position promptly. Departments should analyse the order of magnitude of likely impacts of different negotiating options to help Ministers make evidence-based decisions. The analysis should be proportionate to the proposal and time available and be presented succinctly.
3. The government will work with EU partners to hold the EU institutions to account on the commitments they have made on consultation, impact assessment, the "think small first" principle and reviews in order to improve the quality of EU regulation.
4. Before starting transposition, departments must satisfy the RRC that they have identified the aims of the EU law and the relevant policies of the UK government, and how the two will be brought into harmony so that transposition neither has unintended consequences in the UK nor risks infraction.
5. The legal text for UK transposition should only be finalised once the policy framework has been agreed by the RRC.
6. The Regulatory Policy Committee must clear impact assessments for all transposition proposals.

7. The European Affairs Committee should be kept informed.
8. When reviewing departments' approach to transposing and implementing EU law, the RRC will expect departments to apply the following principles:
 - a. within two weeks of publication in the Official Journal the RRC to have been notified and provided with a pro forma including an outline project plan to the obligations coming into force;
 - b. proposed implementation applies the Guiding Principles and meets the standards in the Government's guide to European policy-making;
 - c. proposed implementation complements domestic legislative objectives; and
 - d. proposed implementation delivers the outcomes required by the directive, but does so in a way that (save in exceptional circumstances) avoids going beyond the minimum requirements; thereby minimising the cost to business. This should be supported by evidence.

3.2 Transposition Notes

If a UK bill intends to implement an EU directive, the Explanatory Notes on the bill should “include in the form of an annex a set of ‘transposition notes’, illustrating how the Government intends to transpose the main elements of the directive into UK law. The transposition notes should be included in the explanatory notes placed in the Libraries of both Houses on publication of the bill”.¹

Government [guidance on SIs](#) in November 2006 outlined the importance of Transposition Notes showing exactly how an EU directive has been transposed:

4.11.2 It is a requirement that all legislation laid before the UK Parliament that transposes any European directive should be accompanied by a Transposition Note which should be annexed to the Explanatory Memorandum (see Section 4.12)

4.11.3 Every transposition note will need to illustrate how all of the main elements of the Directives(s), which the instrument transposes, have been or will be transposed into UK law. The main elements of a Directive are those that determine the Directive's fundamental objectives(s) and major effects(s), have a significant impact on UK citizens or are politically important. The only occasion when legislation does not have to be accompanied by a transposition note is when it can be demonstrated clearly that the resources required to produce the transposition note are significantly greater than can be justified by the resulting added benefit to the reader.

4.11.4 Transposition notes have a more specific purpose than Explanatory Memoranda (see Section 4.12)) or Explanatory Notes (see paragraphs 2.13.1 – 2.13.13). In comparison, a transposition note should be more specific about how the main elements of the Directives(s) will be transposed into UK law and should display this information in a more structured way. The Explanatory Notes should, however, include a statement that a transposition note is available and say where it can be obtained.

4.11.5 A transposition note should be laid at the same time as the instrument annexed to the Explanatory Memorandum to that instrument.

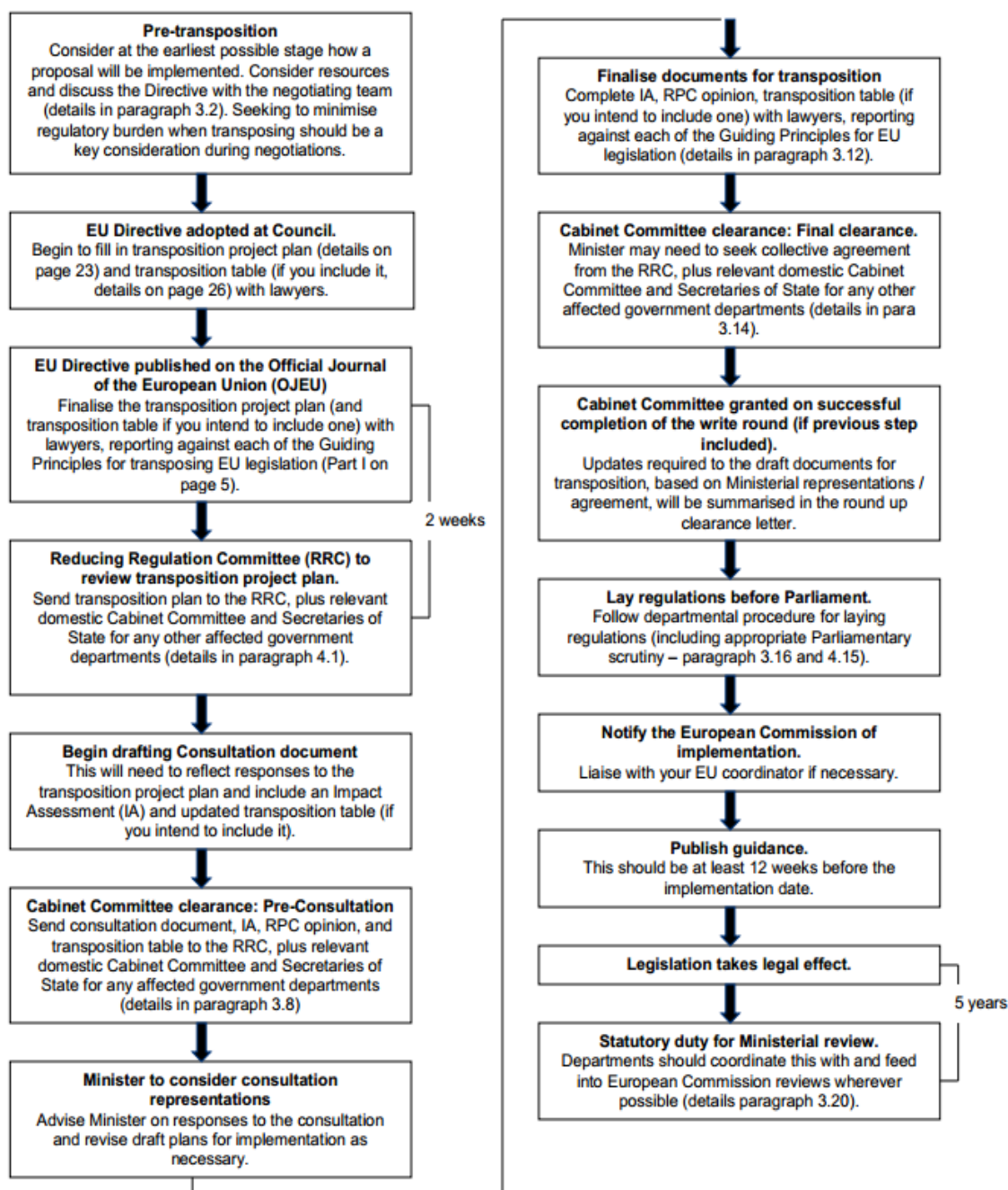
¹ Cabinet Office [Guide to Making Legislation](#), July 2013

4.11.6 Detailed information and guidance on the preparation of transposition notes is prepared by the Cabinet Office Better Regulation Executive and can be accessed at:

www.cabinetoffice.gov.uk/regulation/documents/pdf/tpguide.pdf.

The Government's *Transposition Guidance: How to implement European Directives effectively*, April 2013, contains detailed guidance on the transposition process for EU directives, including the following flowchart.

Flowchart for the transposition of EU legislation



4 Notifying the European Commission

4.1 Procedure

When the EU Directive has been transposed, the Government notifies the Secretariat-General of the European Commission electronically. Member States used to inform the Commission about adopted national laws in writing by post. However, to speed things up the Commission set up an electronic notification system, MNE.² The database Asmodée II on the is used to analyse progress in the transposal of directives for which the deadline has expired.

The UK Government's *Transposition Guidance* states:

3.19 You will need to notify the European Commission electronically at the end of transposition. You should use the electronic notification system to notify transposition and your departmental transposition coordinator should be able to provide assistance. The lead Whitehall department is also responsible for notifying Gibraltar's transposition. Note that where there is an obligation to adopt and publish by a certain date the measures necessary to comply with the EU obligation (often well before the implementation date) there may be a two stage notification process, first when you have adopted and published the measures and secondly when they come into force.

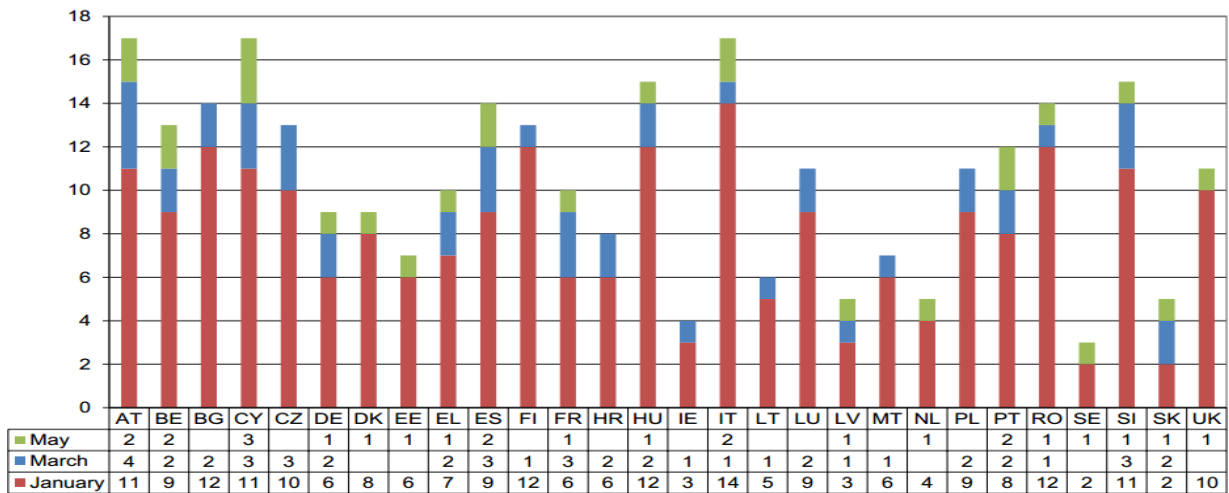
The Commission verifies on a monthly basis the measures taken by the Member States to incorporate EU directives into their law. It scrutinises national laws and texts to ensure that they really do implement the measures required. EU directives contain deadlines for the implementation of their rights and obligations into the national law of the Member States to ensure the full availability of those rights and obligations to citizens and enterprises.

4.2 Failure to notify

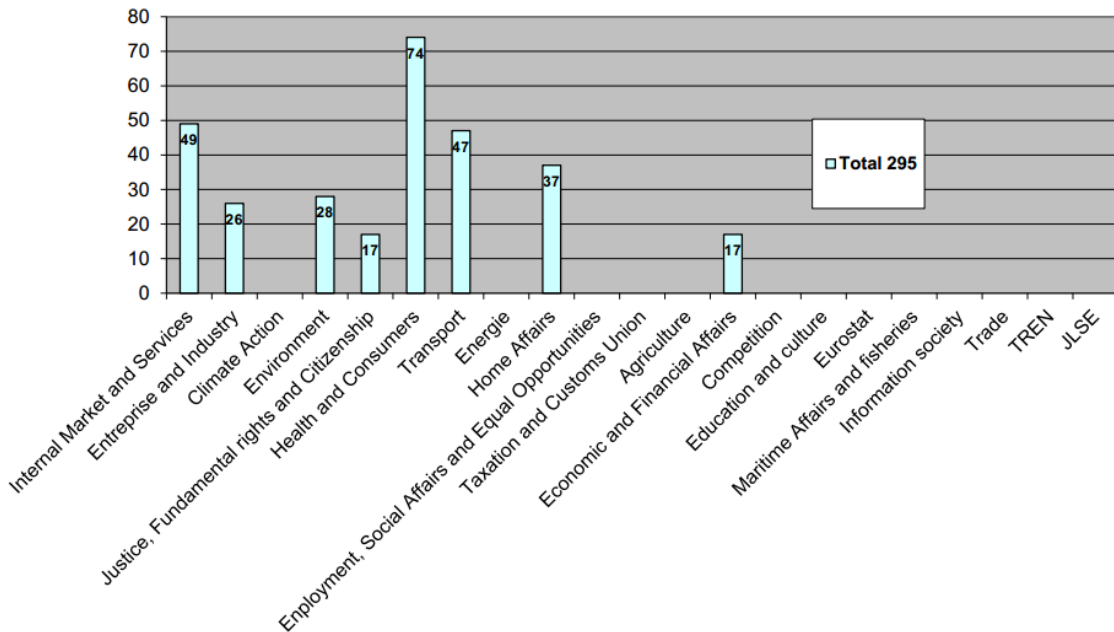
If the Commission finds that a Member State has failed to notify a measure implementing a directive, it may open an infringement case for "non-communication". The Commission publishes information on the number of notifications received from each Member State incorporating EU directives into their law. It also publishes information [by Member State](#) and [by sector](#) on the number of formal notices for non-communication that it has sent to governments:

² MNE: national measures of execution. This is the application used by all the Member State administrations to officially notify the national measures transposing directives and transmit electronic versions of their national execution measures to the Commission.

Letters of formal notice for non-communication sent by country (2014)



2014
Letters of formal notice for non-communication sent by sector



The Commission is particularly vigilant about the transposition of Single Market rules.³ Failure to notify national measures can trigger a process that can lead to infringement proceedings and daily financial penalties under Article 260(3) of the [Treaty on the Functioning of the European Union](#) (TFEU).

4.3 Late transposition of EU law

The following table from the Commission's [31st annual report on monitoring the application of EU law](#), 1 October 2014 (COM(2014) 612 final) shows occurrences of late transposition by Member State as at 31 December 2013 (irrespective of the year when the infringement was opened).

³ See [Single Market scoreboard](#).



Late transposition may also incur a penalty The Commission's 2013 annual report noted that a number of States, including the UK, had incurred fines under Article 260(3) TFEU:

In 2013, the Commission continued to refer a number of late transposition infringements to the Court of Justice with a request for daily penalties under Article 260(3) TFEU. Nine Member States were involved in 14 such decisions in 2013: Belgium, Bulgaria, Estonia, Romania, the United Kingdom (two cases each) and Austria, Cyprus, Poland and Portugal (one each). The proposed daily penalty range from EUR 4 224 to EUR 148 177,92. Most of the penalty proposals for late transposition of directives have been made in the policy area of energy.

4.4 Improving data communication

The Commission has set out new developments in the notification systems in [Interoperability Solutions for European Public Administrations](#), in which it states that the current services, which include MNE, will be integrated in a new application being developed as NIF2, with a tentative future designation of THEMIS:

The objective of THEMIS is to provide a one-stop solution for Commission services and Member states' administrations with regard to all aspects of the application of EU law; starting from the transposition process of directives into national legislation and the notification and subsequent review of the corresponding legal acts, through dialogue based problem resolution triggered either by complaints or own-initiative of the Commission, onto the full bi-directional flow of information in the context of infringement proceedings. Reporting and statistical tools will be part of the package. THEMIS will be integrated with the future 'dorsale décisionnelle' system supporting the Commission decision-taking process.

The services in the scope of this project charter will represent the common external module of the future THEMIS system.

System-to-system data exchanges between administrations and the Commission will reduce extra manual data encoding. This will allow Member States to transmit data directly from their back-office systems according to the following principles of the European Interoperability Framework: security and privacy, multilingualism, administrative simplification, transparency,

preservation of information, openness, reusability, effectiveness and efficiency. History of all data exchanges with the Member States' administrations should be accessible to either party.

All services will be strongly integrated to ensure a consistent and reliable workflow.⁴

NIF2 external services will also provide increased interoperability, communicating data on transposition of directives to all citizens via the EU law database, [EUR-Lex](#).

On 26 June 2014 the Commission has adopted a [proposal ... establishing a programme on interoperability solutions for European public administrations, businesses and citizens \(ISA²\)](#) (COM(2014) 367 final).

⁴ European Commission, [Application of EU law: provision of cross-sector communication and problem solving tools](#).