'Reinventing' EU legislation to revive the EU? Review of Helen Xanthaki, Legislative Drafting for the EU. Transposition Techniques as a Roadmap for Better Legislation and a Sustainable EU

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1. *It is time for the EU to talk to its citizens. Directly*

> *It is time for the EU to talk to its citizens. Directly. Blocking the populist voices of the past. It can do so via its policies using EU legislation as a tool. It is time for change. For better transposition legislation. For better EU legislation. Let's do this. Starting with transposition.* (Xanthaki, 2024, p. 24).

This book is Xanthaki's call for action to drive change FOR the EU via a new way of drafting of EU legislative texts and their transposition. At first sight it sounds complicated, over-ambitious, far-fetched, impossible. Xanthaki claims that EU legislation can make a difference in the European project, if used purposefully to communicate with citizens and member states in a more direct way. Her argument is straightforward: if we want a sustainable EU, member states and citizens are partners in the process and play an active role. To achieve this, the EU must use its tools (legislation) in a way to communicate directly to all of them what they gain and what they need to do and why. Xanthaki's argument runs deeper than just the technicalities of transposition: it is about reforming EU legislative drafting in a way that can rejuvenate the partnership and the collaboration between the EU institutions, the member states and EU citizens.

The discussion starts with a reminder that the measure of success of regulation and legislation (at any level) is defined by the triptych of efficacy, effectiveness and efficiency. EU legislation is efficacious if it achieves the desired regulatory results, it is effective if it is applied and works, it is efficient if it makes sense from a cost-benefit perspective. Equally important is the acknowledgement that 'legislation is simply a tool for regulation', a mechanism that EU regulators use to achieve the results they want to achieve. And here comes Xanthaki's take on how legislative texts and the way in which they are drafted can make a difference in the bigger scheme of things:

> For the purposes of achieving the desired regulatory results … EU law-makers communicate the regulatory message to all of the nations and peoples of the EU. They express what rights and obligations EU citizens acquire by virtue of the legislative text, and they state what modification of action or behaviour is sought by the EU for the purposes of achieving efficacy of regulation. This communication is crucial. (p. 2-3)

Is this new? Isn't that what the EU, or member states, already try to do? So how is this idea novel? Indeed, the core idea that legislation is a special form of communication is not new per se. However, 'redesigning' or 'rethinking' EU legislation around this idea and rethinking the transposition process, is not just new, it is revolutionary. To justify this statement, allow me to contextualise: few would disagree that EU legislation is bureaucratic, rigid, costly, top down and unfriendly – and has been so for years. What is done about it? Not much unfortunately. The volume of EU law is constantly increasing, its structure, layout, density remain as opaque, incomprehensible and confusing as ever. Even learned scholars might struggle to understand what a Regulation or a Directive is all about, if it does not fall within their area of disciplinary expertise. But do you need to have a nobel prize or a PhD in law to understand legislation? Apart from that, no change or improvement is visible to make legislation more accessible or understandable, especially to the untrained eye. The Better Regulation agenda, despite its merits, focuses more on procedure (impact assessment, consultation, evaluation etc) and does not even identify the accessibility and understandability of the text as an issue. On the second front, there is ample evidence of the 'dysfunctional' relationship between EU legislative texts and transposing legislation and their impact on EU integration. Here the EU is more active,

with infringement measures, regular follow up and monitoring or transposition measures etc. But none of these seem to make a visible difference when it comes to more effective EU integration. So, yes, 'rethinking' EU and transposition legislation from the perspective of the users is new and occupies a disciplinary space that has not been filled before.

So, can EU legislation be 'revamped' in a way to send a signal of change and offer a solid basis for a sustainable and long-lasting EU? Xanthaki claims that it can, and we take her word for it. But let's explore how she proposes that this can happen.

2. Xanthaki's pathway to effective and user-centered EU legislation

This book is about how EU legislation can become a forward-moving force rather than an ever increasing administrative burden. Xanthaki, a leading scholar in the field of legislative studies and legislative drafting, brings her disciplinary expertise and brilliance in the field of EU drafting and tansposition and by doing this fills an important gap. In terms of academic literature, she moves beyond the descriptive accounts of how things are done at EU and national levels or the comparative approaches on transposition to a whole new level, by examining HOW things can be done differently or better. In terms of disciplinary discussion, European law and European better regulation so far only marginally consider legislative drafting concerns. These fields evolve in parallel with few points of contact and minimal cross-fertilisation. Xanthaki changes that. And she does it by approaching and exploring transposition as a legislative drafting task.

Xanthaki's approach rests on solid methodological ground: she applies Thornton's five stages of legislative drafting to the transposition task. The journey starts with understanding the transposition task (Chapter 2), analysing it (Chapter 3), designing the transposition measures (Chapter 4), composing and developing the transposition law (Chapter 5) and verifying its effectiveness (Chapter 6). The books then moves on to discuss how this methodology can be relevant for EU accession (Chapter 7) or even EU exit (Chapter 8). Last but not least, her approach is applied in the drafting of Regulations and Directives. But I will come to this in a minute.

Let me start by a comment on the method: Thornton's 5 stages of drafting are a staged, phronetic, incremental, thinking process on how to approach drafting tasks. The genius in Thornton's approach is how he gradually moves from the 'context' to address more detailed or specialised dilemmas, all in good time. Why is this important? Because starting with the bigger picture and them zooming in to the details is the only way to allow drafters to make evidence-based decisions that best promote effectiveness and efficacy. By delving straight into the drafting details, as often happens in practice when this staged approach is not followed, critical design details will be missed with a detrimental impact on the effectiveness of the text. This proven and tested method is now applied at the complex processes taking place for the transposition of EU legislation. Let's take a closer look at how this works.

Stage 1 is essentially about understanding the context and the regulatory goals of legislation. In national contexts, this comes in the form of drafting instructions. In an EU context, the drafting instructions are the actual EU legislative text. Xanthaki stresses the need for the drafter to understand the overarching policy goals as it is otherwise to grasp the policy context of the legislative text. *'Context is important for understanding what the aim of the EU regulatory effort is, as a means of assessing whether these aims coincide with those at the national context, whether they have*

already been achieved at the national context, or whether they are partially achieved at the national context'. This initial task is tricky to the extent that the text of EU legislation does not consistently introduce adequately concrete and clearly expressed policy goals. Xanthaki makes a call for reforming current purpose clauses in this direction. A recent example from Directive 2022/2381 on improving the gender balance among directors of listed companies and related measures shows that what Xanthaki is talking about is present in some legislative texts, albeit this is the exception rather than the rule.

> Article 5
>
> Objectives with regard to gender balance on boards
>
> 1. Member States shall ensure that listed companies are subject to either of the following objectives, to be reached by 30 June 2026:
>
> (a) members of the underrepresented sex hold at least 40 % of non-executive director positions;
>
> (b) members of the underrepresented sex hold at least 33 % of all director positions, including both executive and non-executive directors.
>
> 2. Member States shall ensure that listed companies which are not subject to the objective laid down in paragraph 1, point (b), set individual quantitative objectives with a view to improving the gender balance among executive directors. Member States shall ensure that such listed companies aim to achieve such individual quantitative objectives by 30 June 2026.
>
> 3. The number of non-executive director positions deemed necessary to achieve the objective laid down in paragraph 1, point (a), shall be the number closest to the proportion of 40 %, but not exceeding 49 %. The number of all director positions deemed necessary to achieve the objective laid down in paragraph 1, point (b), shall be the number closest to the proportion of 33 %, but not exceeding 49 %. Those numbers are set out in the Annex.

With purpose clauses like the one above, Member states know what they have to achieve and what is the benchmark for their (legislative) performance and the effectiveness of the Directive. Companies also know what they are expected to do and why. They also know that this is a common goal across the EU and that their peers across Europe have to meet the same goals. These simple facts immediately change the landscape: once the regulatory goal is clear, all stakeholders become part of a community where each contributes to a worthy, common, goal. From a transposition perspective, the regulatory goal that needs to be achieved is clear without any need for interpretation. So national drafters can move on to the next task, which is about how best to achieve this goal.

Following the understanding of the transposition task, comes the analysis of potential legislative solutions. This is essentially a legal analysis task, involving the analysis of both EU and national legislative provisions to see whether, how and to what extent existing mechanisms are in place and how they can be aligned to achieve the 'new' goals or whether new solutions (provisions) are necessary. This is when national drafters, in ight of the regulatory goal and context, can translate policy into concrete legislative solutions and selective the most effective one. Under this stage, Xanthaki suggests a thorough pre-legislative scrutiny of the:

1. *Conceptual effectiveness of the solution*
2. *Effectiveness of the legislative concept*
3. *Effectiveness of the legislative communication*
4. *Effectiveness of legislative expression*
5. *Effectiveness of presentation*
6. *Effectiveness of monitoring*

Then comes the design of the transposition law. *The conceptual design involves a decision on the concepts that will form part of the text, and their prioritisation in a sequence that enhances effectiveness.* And this is the crux of where and how modern drafting approaches things differently. As Xanthaki says, … *despite the prevalent but erroneous view that drafting is all about writing and words, it is the design that constitutes the heart of drafting. Once the design is compiled, words and syntax will fall into place. In fact, if the design is not fit for purpose, any perfection in the legislative communication will be lost in a legislative text that cannot contribute to the achievement of the desired regulatory results and, as such, is ineffective. If the design does nurture effectiveness, then erroneous choices of legislative expression (words and syntax) can be salvaged by clarity of context, clarity of structure, and clarity of objectives.* In other words, design determines how the elements of the legislative text will work together to produce the desired results.

At this point, Xanthaki presents her revolutionary 'layered approach' to structure and explains how a technical and intelligible text can be made relevant both for lay, professional and expert users it addresses. In her words, *drafters of legislative texts can now begin to think what regulatory or legal message is relevant to each group, and structure the text accordingly.* Applying the layered approach is transformative, as it makes the legislative text user-centric and prioritises context and key (legislative) messages over detail and procedure. Without losing any of its substance and weight, the layered approach to structure prioritises the legislative messages in a way that everyone can find what they need. Simply brilliant.

The next stage is about composing and developing the transposition law. It is when drafters actually put pen to paper and start expanding their content. This is where words, syntax and grammar, the usual 'tools' of the drafting trade come into play in the pursuit of clarity. Having structured the text in a layered way, part of the job is done. But it is still very important *to mobilise the legislative expression that can best communicate each transposition regulatory message to each concrete user group.*

Stage 5 of the drafting process is about early detection of potential regulatory and legislative errors through internal and external verification, including user testing to ensure that the legislative text can be effective.

The straightforward logic of Thornton's stages of drafting and Xanthaki's compelling narrative are overwhelmingly convincing. But then comes the most important test: can they be applied in practice? Throughout the chapters, Xanthaki uses several examples and case studies to illustrate her points. A case study on the Victims Directive and the challenges that definitions entail both for the EU and the national legal orders is revealing of the challenges at hand. But what is an even further

revelation is when she 'redrafts' an entire Regulation and a Directive to demonstrate how her theory can be applied. Through a detailed commentary of all contents of a Regulation and Directive, starting from the title, Xanthaki explains what her approach would do differently and redrafts the whole text. The end result? A shorter more concise text, to the point, with clear headings addressing the identified user groups and a language that focuses on the message rather than legalese. In her words, this reflects *a change of drafting philosophy, where the users lead on drafting dilemmas, rather than tradition or esoteric legalese*. And yes, it is revolutionary.

3. Can Xanthaki's approach promote more effective EU legislation?

A few years back I attempted to unpack the concept of effectiveness of EU legislation and used the European Equality Directives as a case study (Mousmouti, 2014). As a methodology I used the effectiveness test' (Mousmouti, 2012 y 2019), an analytical tool allowing to scrutinise the potential of legislation for effectiveness through four key elements: the purpose, content, context and results of legislation. Equality legislation presented an interesting case study for legislative effectiveness to the extent that it exemplified the tension between the need for legislation to regulate complex social relationships and behaviours and the need to ensure effectiveness in a tangible and measurable way.

My analysis highlighted a number of challenges associated with the way in which the Equality Directives had been conceptualized, designed and drafted and – quite surprisingly – most of these resonate to a great extent with Xanthaki's analysis of transposition challenges. Let me summarise:

The first set of challenges pertained to the clarity of the overall purpose of European legislation. My analysis showed that while Directives aim to introduce common results and guide the member states towards their achievement through minimum common standards, these results are rarely explicit. Purpose clauses do not make the common result sought explicit in a way that can clearly guide their transposition, interpretation and implementation and they appear to play a secondary rather than substantive role and have a limited contribution to the correct transposition, interpretation and application of European law.

A second set of challenges related to choices of design and drafting. Many new concepts of European law are introduced through definitions or other legal formulations. However, often definitions are too broad or open-ended, reflecting either a lack of consensus on their content, the wish to leave room for different approaches or capitalising on the advantages of obscurity. In other words, definitions might have a determined content or an indefinite one. Although this is a relatively common (and realistic) legislative practice, especially in the European context, the need to ensure minimum and equal standards of protection across the EU raises a valid question with regard to this choice, especially when it concerns concepts essential for the fulfillment of the purpose of legislation. In the opposite case, member states can adopt very different standards. This has the further implication that, through the trend towards 'copy-out' transposition options, many of these vague definitions may end up almost intact in national legislation. And although this might make 'formal' transposition evident, it does not promote legislative effectiveness. Although it is clear that Directives do not always aim to harmonise national legislation in the member states, it is important from the perspective of legislative effectiveness to ensure that the minimum standards, the rules and the basic concepts introduced by European legislation are sufficiently clear.

A third set of challenges pertained to the limited effort invested not only in collecting information on the results of Directives but also in identifying the progress achieved in practice and the degree of achievement of the purpose of legislation. Existing reporting obligations on the Commission are primarily oriented to monitoring the transposition and application of legislation rather than to identifying broader outcomes and results. In other words, the focus lies on whether and how European legislation became effective in member states rather than whether it has produced the desired results. If the purpose of legislation is considered fulfilled the moment it has been correctly transposed, then this might make sense. If not, and if there is a need to look into possible discrepancies between legislative provisions and the actual protection offered on the ground or if there is an interest in understanding what European legislation has actually achieved, then this is clearly insufficient and more analytical effort is required.

Would these issues be addressed if Xanthaki's approach had been followed? Most probably yes. The need for a clear and measurable purpose would have been addressed in Stage 1 of her approach; the conceptual, legal and monitoring challenges would have been identified in Stages 2 and 3, while these and other potential shortcomings would have been spotted during Stage 5. What my retrospective analysis highlighted as challenges would have been identified and addressed while legislation was being conceptualised and drafter, rather than ad hoc. To answer the question I raised in this section titled, yes, Xanthaki's approach demonstrates a very good potential to promote more effective EU legislation.

4. After all these years, don't we know all we need to know about transposition?

Transposition lies at the very heart of the complex EU legal ecosystem: it is the 'sympraxis' of the EU and national legal orders in order to achieve the desired policy results. Legislative action is required both by the European and the national legislator: the two are bound in a relationship of mutual dependence. In this unique 'relationship', the former determines the results to be achieved and introduces the minimum standards to be adhered to, while the latter chooses the most appropriate ways and means to transpose European Directives and ensure their correct application and implementation. If effectiveness is what legislation seeks to achieve, then both legislators (European and national) play an important –and distinct- role in the effort to make European legislation effective. The European legislator determines the end results and the standards to be achieved through a concrete set of rules and mechanisms set out in Directives. In turn, the national legislator legislates to transpose the European provisions correctly and do so in a way to achieve the required end results and make them effective in the legal culture and circumstances of a given member state.

The study of the practice of transposing legislation shows that national legislators have devised over the years several ways to transpose Directives in their legal systems. Following a recent trend towards 'clear' transposition options, several legislators prefer to 'copy-out' rather than 're-write' Directives and this makes the bond between the legislative choices of the European and the national legislator even more visible: many provisions drafted to function in the context of a European legal instrument may be transplanted, almost intact, in national legislation. *…Co-legislating carries with it co-responsibility for the effectiveness of the EU and national texts.*

This dynamic relationship between the European and the national legislator, and the close link between European and national legislation, is not reflected in the

existing ex-post facto focus on compliance, enforcement and implementation of European legislation. What is new in Xanthaki's approach is that it redefines this relationship not in terms of hierarchy but as one where EU and national legislators have a complementary role , each dealing with a different part of the puzzle. In this way, the symbiotic relationship between EU and national legislators does not have to be a 'blame game' but a team building exercise where the actions of all players matter equally and can make a difference. Xanthaki's approach offers a fresh look into this relationship: the focus is no longer on 'who sits where' or 'who is to blame' but on the dilemmas that each co-legislator has to address. This new understanding of the relationship is fundamental, if we want to do things differently from now on. Because every new approach needs a new mindset.

5. Good as it may sound, is such a reform feasible?

In the European continent legislation is highly venerated and lawmaking is seen as (very) serious business. The mere quantity of laws at EU and national levels proves beyond any doubt the reliance on the law as an instrument of reform. Acknowledging that the way things are at the moment is not ideal, is a good starting point for self-reflection. Is there an alternative? Xanthaki tells us, quite convincingly, that yes, things can be done differently. But even if we take her word for it, is such a change feasible?

Legal systems are associated to specific form and function of rules and distinct regulatory cultures and traditions are linked to distinct legislative styles. Style is an 'inherent quality' of legislation that includes wording, structure, superstructure and legal-cultural identity, and drafting conventions. The latter are born from experience and prescribe principles upon which structure, form and style are based with the aim to capture best drafting practice and bring coherence and consistency. Both legislative styles and conventions are very influential in the way legislation is designed and drafted. There is no doubt that good style is important but let's not forget that its function is to help communication – not to dictate substantive choices. Legal scholars and drafters tend to stick religiously to drafting styles and 'to the way things are done'. Which brings us to the inevitable question: how realistic and feasible it is to change the way in which we legislate at EU and national levels?

Path dependence, the costs associated to it, the fact that people learn and invest in a given way of doing things, regulatory culture, tradition and resistance to change often come in the way of any legislative reform. Legislation is, to an important extent, bound to its historical evolution, and to its past, and resistance to change is one of the main barriers to legislative reform. Even if this is not a 'healthy' attitude it cannot be ignored and Xanthaki's approach will probably generate resistance at different levels. Can this model have a chance?

Xanthaki does not leave this question without an answer. She addresses the technicalities and the pathways on how this new approach can be injected into existing agendas. She offers a practical way forward. She highlights, time and time again, that her approach does not interfere with the decision making powers of any of the actors involved. It does not tell them what to do but it proposes a different way of thinking about how to do it. It is inevitable that leadership, political will be necessary. In the current 'crazy' world we live in and with the current turmoil is there time, energy and political appetite for reforming the way in which legislative drafting is done at EU and national levels?

There is no way to know if something can be effective, unless it is subjected to the cruel test of reality. If this new approach can deliver the change it claims, it might be worth investing in it. Experimentation could be a good way to test its potential. Devising a series of pilot projects involving EU and national levels, with consistent measuring of impact might be a way of small scale testing that could show if it is worth pursuing further. It would also be a way to refine the approach, convince sceptics and gather evidence about the value of this approach. It is my belief that Xanthaki's approach deserves a chance to prove its potential.

6. Conclusions

Legislative Drafting for the EU achieves a fine balance between theory and practice and examines the transposition of EU legislation as a series of drafting dilemmas. It adds to legislative studies and lawmaking theory, enriches drafting practice and takes a fresh approach on an 'old' and tired issue. Xanthaki actively demonstrates not just how this new approach is feasible but also how the 'revamped' legislative instruments will look. This book bears gifts for different audiences: EU lawmakers can reflect on what they do and how to do it better; policy officers and legislative drafters at national level can redefine the job description of their transposition tasks and specify the type of decision making they have to engage with. Last but not least, stakeholders and other groups now have a clear agenda on what to lobby for when demanding legislative reform. No new and complex processes, we have enough of that, but a new way of thinking about legislation and about who it talks to.

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