



HM Government

Department for Business, Enterprise
& Regulatory Reform

Transposition guide: how to implement European directives effectively



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Transposition guide: how to implement European directives effectively

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Foreword

In the 2005 pre-Budget Report the Chancellor of the Exchequer asked Lord Davidson of Glen Cova QC to examine selectively the stock of EC-sourced legislation in the UK and identify measures where unnecessary regulatory burdens could be reduced or simplified. Lord Davidson reported in November 2006, concluding that while the over-implementation of European legislation may not be as widespread in the UK as is sometimes claimed, there were still areas of existing legislation where regulatory burdens could be removed. In addition, the report identified generic factors that could lead to unnecessarily burdensome regulatory regimes and set out recommendations for how these issues could be addressed. The Government subsequently accepted all the recommendations in full.¹



This revised guide has been updated to incorporate Lord Davidson's recommendations and should improve further the UK's implementation of EC obligations, ensuring that policy objectives are met in the most proportionate and cost-effective way to strengthen the competitiveness of the UK economy.

Earlier versions of this guide have proved indispensable for policy-makers and lawyers involved in handling EC legislation. This updated edition is also intended to enable those most affected by European legislation – businesses, citizens, the third sector – to understand the Government's policy on implementation and to hold departments to account.

A handwritten signature in black ink, which appears to read 'Paul Drayson'. The signature is fluid and cursive, written in a professional style.

Lord Drayson

*Minister of State for Business
and Regulatory Reform*

¹ http://www.hm-treasury.gov.uk/media/E/F/davidson_review281106.pdf

Chapter 1: Overview

1.1 This guide is designed to be used by policy-makers and lawyers across Government, although some of the requirements apply only to those laying legislation before the UK Parliament. Although the advice focuses on the transposition of directives, the principles reflect good practice, which can be applied to the implementation of all types of Community legislation.

1.2 This chapter sets out overall Government policy on transposition, and the key points to remember to ensure good transposition. Chapter 2 contains guidelines on how to consider transposition issues before a directive is agreed, and Chapter 3 focuses on how to handle an agreed directive.

Government policy on transposition

1.3 It is a requirement of Community law that EC legislation should be implemented in an effective, timely and proportionate manner. The Government's policy is to transpose directives into UK law so as to achieve the objectives of the European measure, on time and in accordance with other UK policy goals, including minimising the burdens on business.²

1.4 It is vital to start considering implementation issues early on in the policy formulation process, preferably while the European Commission is still working on its proposal, or, at the latest, while it is being negotiated in the Council of Ministers and the European Parliament. It is too late to begin thinking about the practicalities of implementation once a directive has been agreed and must be transposed into UK law.

1.5 Avoid going beyond the minimum necessary to comply with a directive unless there are exceptional circumstances, justified by a strong cost-benefit analysis and extensive consultation with business.

1.6 Identify those departments, agencies and external stakeholders which have an interest in the policy from the outset and coordinate their involvement in the negotiation and implementation phases.

² Timely transposition is made more important by the targets that Member States signed up to for the Internal Market Scoreboards, which assess Member States' performance in transposing Internal Market Directives on time. EU Heads of Government agreed targets that no more than 1.5% of Internal Market Directives should be late in being transposed by the Scoreboard deadline, and none should be more than two years late. BERR and Cabinet Office coordinate work across Government departments to deliver these targets.

Working with the devolved administrations

1.7 You should observe the **Concordat on Coordination of European Union Policy Issues**³ which sets out how Whitehall departments and the devolved administrations should work together on the negotiation and implementation of European legislation. It is important to keep in close contact with the devolved administrations throughout the legislative process, so that they too can prepare for any implementation in good time.

1.8 You should formally notify the devolved administrations at official level of any new EC obligation which they will need to implement. For matters falling within their responsibility, it is for the devolved administrations to consider, in consultation with the Whitehall departments and other devolved administrations, if appropriate, how the obligation should be implemented and enforced within the required timescale, including whether the devolved administrations should implement separately, or opt for GB or UK legislation. Where a devolved administration opts to implement separately, it will have a responsibility to consult the lead Whitehall department, and other departments, as necessary, on its implementation proposals, to ensure that any differences of approach nonetheless produce consistency of effect and, where appropriate, of timing.

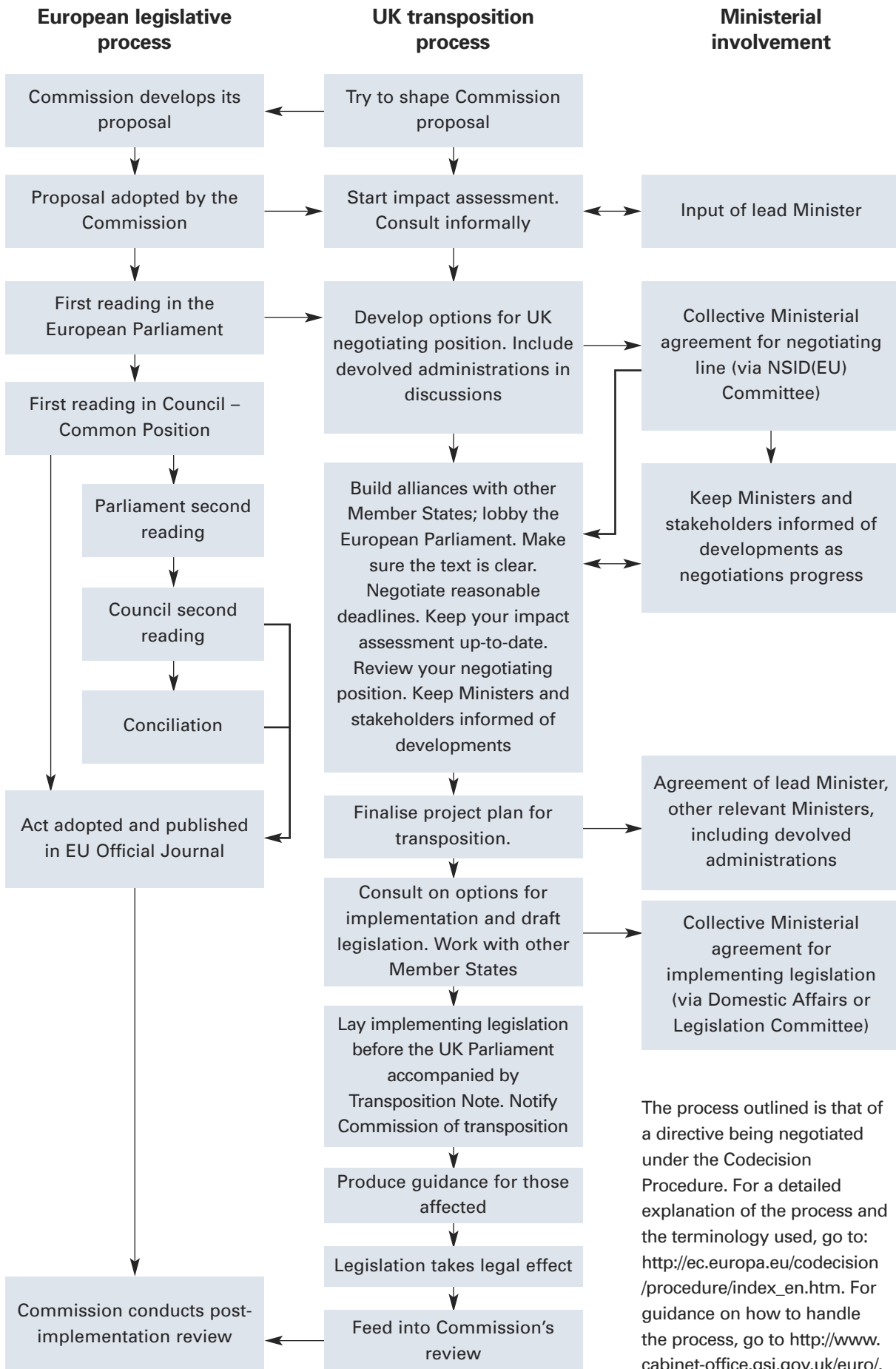
1.9 Even when the EC obligation is on a non-devolved matter, consider the need to consult the devolved administrations, particularly if the obligation might touch on areas which fall within devolved responsibilities. There may be occasions when a directive concerns an issue which is non-devolved, such as immigration, but contains provisions on devolved issues, such as housing, education or health, which will need to be implemented by the devolved administrations.

³ See Part II, Section B of the Memorandum of Understanding between the UK Government and the devolved administrations at <http://www.justice.gov.uk/guidance/mou.htm>

TRANSPPOSITION CHECKLIST

1	Commit appropriate resources to handling European legislation.
2	Ensure policy-makers, lawyers and economists work together from the start.
3	Ensure officials are trained in how to handle EU negotiations and produce impact assessments.
4	Consider at the earliest possible stage how a proposal will be implemented and enforced in the UK.
5	Try to shape the Commission policy before a proposal is published. Refer to Commission roadmaps and action plans to find out which proposals are in the pipeline.
6	Establish which departments have an interest in the policy and coordinate their involvement. Consult the devolved administrations and relevant enforcement bodies throughout the process and consider whether the Government of Gibraltar should be notified. Consult external stakeholders at relevant stages. Encourage external stakeholders to engage directly with the EU institutions and respond to Commission consultations.
7	Seek NSID(EU) Committee clearance on your negotiating position and provide an Explanatory Memorandum to the UK Parliament on the Commission proposal.
8	Think Small First: try to negotiate exemptions for small and medium-sized enterprises, where appropriate.
9	Seek alliances with other Member States in the Council of Ministers to achieve UK Government objectives in negotiations. Lobby the European Parliament during negotiations.
10	Try to negotiate deadlines which give those affected enough time to prepare for a new regime.
11	Set out the costs, benefits and risks associated with the various options for implementation for Ministers in an impact assessment. Do not close off options before consideration by Ministers.
12	Invite Ministers, at the outset of the transposition process, to articulate clear policy goals for the transposition (of which minimising burdens should be one).
13	Weigh up the risks of legal challenges for the Government for a “wrong interpretation” of the directive against the costs for economic operators resulting from legal uncertainty.
14	Avoid going beyond the minimum necessary to comply with a directive, unless the circumstances are exceptional and the benefits demonstrably outweigh the costs.
15	Make use of project management techniques to ensure timely implementation and effective stakeholder engagement at key stages.
16	Compare approaches to transposition taken by other Member States. Encourage the Commission to set up transposition groups to share best practice.
17	Produce guidance which sets out for those affected exactly what their legal obligations are at least 12 weeks before the legislation takes legal effect.
18	Notify the Commission of transposition.
19	Produce a Transposition Note for the UK Parliament.
20	Time your post-implementation review, so you can feed your findings into the Commission’s own review.

European decision-making and transposition



Chapter 2: Handling a Commission proposal

Early thinking about implementation

2.1 The successful transposition of a directive starts with good handling of the initial Commission proposal and a properly considered negotiation position and strategy. It is very important to consider early on how a proposed directive will be implemented in the UK, including in the devolved administrations. This will help to ensure that UK implementation is carried out in the most effective and least burdensome way. Make sure you talk to the parts of the UK Government likely to have a role in implementation from the earliest possible stages. Full consideration of practical implementation issues – e.g. who will enforce the requirements – can prevent problems arising on transposition.

While the Commission is drafting its proposal

2.2 Get involved early in discussions with Commission officials in order to learn how their policy is developing. Often the best opportunity to influence a Commission policy is when it is in the early stages of development. Therefore it is important to maintain good lines of communication with Commission officials.

2.3 Consider, with your lawyers, whether the Commission’s line of thinking is the best way of achieving the policy objective. Should action be taken at the EU level or would action be better taken at national or sub-national level, according to the principle of subsidiarity⁴? If you are content that there is a case for action to be taken at the EU level, check whether any particular problems arise at this stage which can be sorted out before formal proposals emerge. Are the structure and scope legally sound and is the effect clear? Consider the risks – **would a minor change at this stage significantly reduce either costs or benefits in the UK?**

2.4 Consider whether the Commission’s likely approach would affect any domestic legislation which is going through or is planned. It is Government policy that, unless simplifying or reducing regulatory burdens, **departments should not generally pre-empt upcoming European legislation by legislating in the same area.** The problem with the UK legislating first in an area where a European measure is imminent is that the two pieces of legislation are very likely to be inconsistent and the UK will then need to change its legislation again within a short timeframe. This can result in competitive disadvantages for UK industry as they may need to incur the costs of changing their systems twice, once to comply with the initial UK scheme and then to comply with the new European scheme. This presumption against acting

⁴ The Commission defines subsidiarity as “a guiding principle for defining the boundary between Member State and EU responsibilities (*Who should intervene?*). Basically the EU shall take action only if the objectives of the proposed action cannot be sufficiently achieved by the Member States and can be better achieved at the European level.” You can find European Secretariat guidance on subsidiarity at <http://www.cabinet-office.gsi.gov.uk/euro/eurosec3.html>

as “first mover” can be dropped if you can show that there are likely to be net benefits for the UK in legislating first, despite the risk of increased costs due to a need for business to change their systems twice.

2.5 Seek the views of other Government departments, the devolved administrations and external stakeholders to consider the potential impacts, including possible problems and weaknesses. Consider with the relevant enforcement bodies how the policy would be implemented in the UK, in particular, whether it would be workable on the ground. Early consultation can help form a consensus in favour of a particular approach and you should do your best to consult interested parties. At this stage, problems are more easily resolved as the text is easier to amend.

2.6 In parallel to its Annual Legislative and Work Programme, the Commission generally publishes roadmaps for its proposals in advance of publishing the proposals themselves. These roadmaps should set out the policy options, expected impact assessment work and the consultation timetable. They are a useful resource for determining initial Commission thinking on particular policy areas. You should therefore encourage the Commission to publicise its action plans and roadmaps, so that they reach a **wide range of stakeholders**. You should also alert UK stakeholders to upcoming Commission proposals and encourage them to engage with the EU institutions based either on the Commission’s roadmap or formal consultation document.⁵

Industry engagement with the Commission at the policy development stage

The Vehicle Industry Policy and European Regulation (VIPER) Group was established in 2003 by the former DTI’s Automotive Unit to provide a ‘one stop policy shop’ for the automotive sector. It effectively monitors the policy formulation process in the UK and Europe, scanning the horizon and facilitating discussions to ensure industry is engaged in policy formulation and implementation at an early stage. As part of the process, representatives of a cross-section of the industry (including all the major vehicle manufacturers) are brought together on a regular basis with officials from across Government including BERR, Defra, DfT and HMT.

Groups such as VIPER provide a useful forum to engage with the Commission when it is developing policies and before it adopts proposals for legislation. VIPER helps to reinforce the Government’s commitment to the principles of Better Regulation and the emphasis at all points is on maximum transparency. Since its inception, VIPER has helped to frame UK policy on a wide variety of issues, from the implementation of the End of Life Vehicles Directive to the European Commission’s latest proposals on air quality. In 2005 VIPER enabled the UK Government to engage with the automotive sector throughout the lifetime of the European Commission’s CARS21 group which sought to enhance the industry’s global competitiveness whilst sustaining further progress in safety and environmental performance. The success of the VIPER model has led BERR to replicate it in a number of other industrial sectors.

⁵ The Commission publishes all its consultation documents on its website, Your Voice In Europe: http://ec.europa.eu/yourvoice/index_en.htm

2.7 Check whether the Commission is producing an impact assessment that considers a range of policy options, including alternatives to legislation. Make sure the risks of taking action versus the risks of inaction have been weighed up. With effect from 2005, the Commission has given a commitment that all significant items, including those in its Annual Legislative and Work Programme⁶ will be subject to an impact assessment. The Commission has comprehensive guidelines⁷ on what impact assessments should cover and how they should be carried out.

When the Commission publishes its proposal: developing a UK negotiating position

2.8 Once the Commission publishes its proposal, it is presented to the European Parliament and the Council of Ministers for their consideration, amendment and agreement. At this stage you must provide options to your Minister about the negotiating line that the UK Government should take. The final version of the UK negotiating line will require clearance by NSID(EU) committee⁸, and must be accompanied by an impact assessment. Please refer to Cabinet Office guidance on handling NSID(EU) correspondence⁹.

2.9 Try to estimate the likely costs and benefits of the draft Commission proposal for the UK using the Commission's roadmap to help you. If requested to do so by the Commission, you should consider sharing UK data on the likely impact of a policy. In cases where you think that the Commission is not sufficiently aware of the impact of a potential proposal on the UK, you should consider taking the initiative to lobby the Commission directly to consider UK data.

2.10 Examine the draft legislation carefully with your legal advisers. Even if you are not seeing the proposal for the first time, it is worth examining with your legal advisers how the proposal reflects what you understood the policy to be and whether it is workable.

2.11 Your lawyers should refer to the Cabinet Office Legal Advisers guidance on *Implementing Community Law*, which deals with **legal issues** that arise when implementing. This is available on the European area of the Legal Information Online Network intranet site¹⁰ or from the Cabinet Office Legal Advisers on 020 7210 3021. You will also need to think about whether new domestic legislation would be needed to implement the Commission's policy; whether it should be implemented by secondary legislation; what constraints the implementing powers might impose and whether primary legislation is needed.

2.12 Seek the views of interested parties, including the devolved administrations, other relevant departments and external stakeholders to help inform the UK negotiating line. It is unwise to finalise the detail of your negotiating position before you have a **good understanding of the standpoints of other Member States**, so try to sound out their views as early as possible.

⁶ http://ec.europa.eu/atwork/programmes/index_en.htm

⁷ http://ec.europa.eu/governance/better_regulation/impact_en.htm

⁸ <http://www.cabinetoffice.gov.uk/secretariats/committees>

⁹ <http://www.cabinet-office.gsi.gov.uk/euro/>

¹⁰ <http://www.knowledgenetwork.gsi.gov.uk/lion2/areapres.nsf/70601a68a73227d480256e8c004bca59/60f6d08ec0ef622f802571cb003bc882?OpenDocument>

Consultation with small businesses

BERR's Enterprise Directorate maintains a database of nearly 4000 small businesses, willing to work with policy officials on European matters. The Small Firms Consultation Database is an opportunity for small firms to influence new regulations at an early stage, by providing feedback on any potential impact the changes may have on them. Enterprise Directorate, on policy officials' behalf, will contact owners and managers of SMEs. Officials can invite SMEs to: take part in informal discussions in person or over the phone; attend a focus group or test panel or; respond to targeted consultations about proposed new regulations. For further information contact Enterprise Directorate's Outreach Team at regulation@berr.gsi.gov.uk

2.13 Consider enforcement regimes. Before making recommendations to Ministers on the UK negotiating position, you will need to have decided how any UK implementing regulations would be enforced in the UK, in particular:

- **Who will enforce them?** You will need to have discussed enforcement with possible enforcement bodies (including the devolved administrations and local government) at an early stage.
- **Levels of compliance** Will the legislation impose civil penalties or criminal sanctions for non-compliance? If so, on what scale? The Ministry of Justice is responsible for courts and tribunals – are they content?
- **How and at what cost?** Establish whether the enforcement body has the resources and skills to meet the requirement. According to HM Treasury guidance¹¹, any burden on other government departments and local authorities must be quantified and costed. Your department will need to transfer funds from its own budget to fund the requirement.
- **How can the principles of risk-based enforcement be applied?** The Philip Hampton report, *Reducing administrative burdens: effective inspection and enforcement*¹² sets out these principles. Reporting regimes should be clear, risk-based and as light-touch as possible to meet the aims of the directive while minimising the burden on business and on administrations. A statutory Regulators' Compliance Code will come into force in April 2008. The Code will elaborate the principles of risk-based enforcement and inspection set out in the Hampton report and will require national and local regulators to have regard to the Code's requirements when carrying out their regulatory functions.

2.14 Examples of the above considerations might include whether there are enough laboratories technically capable of carrying out the sort of testing required, or whether there are enough trained inspectors to ensure compliance with a particular requirement. These considerations will have an impact on resource planning.

¹¹ Consolidated budgeting guidance: http://www.hm-treasury.gov.uk/documents/public_spending_reporting/budgeting_classification/psr_bc_consolidated_budgeting.cfm

¹² http://www.hm-treasury.gov.uk/budget/budget_05/other_documents/bud_bud05_hampton.cfm

2.15 Considering all these issues will enable you to provide well-considered and reasoned options to your Minister about the negotiating line that the UK should adopt. **Set out the risks, costs and benefits of the options in an impact assessment.** Your impact assessment should accompany Ministerial correspondence seeking collective agreement from NSID(EU) committee on the negotiating line. For advice on carrying out impact assessments, contact your department's Better Regulation Unit. Guidance is also available from the Better Regulation Executive at <http://bre.berr.gov.uk/regulation/>.

2.16 You must also provide an Explanatory Memorandum on the proposal, accompanied by the impact assessment, to the EU Scrutiny Committees¹³ in the UK Parliament which have a **Scrutiny Reserve Resolution**. This means Ministers should not agree to proposals which the Committees have not cleared or which are waiting for debate. For more information, please refer to the Cabinet Office Guidance on Parliamentary Scrutiny of European Union Documents¹⁴.

2.17 For any regulatory proposal that is likely to impose a major new or disproportionate burden on business the **Panel for Regulatory Accountability** will need to clear the impact assessment and the negotiating position, prior to seeking clearance from NSID(EU) Committee. A major regulatory proposal is any proposal likely to cost UK business £20 million or more per year and/or have a disproportionate impact on any sector.

Consider whether the Government of Gibraltar should be notified

2.18 If the proposal applies to Gibraltar, the lead Whitehall department should discuss with the EU-Gibraltar desk in the FCO, who can ensure that the Government of Gibraltar is notified. The UK is responsible, as the Member State, for Gibraltar's compliance with EC legislation.

2.19 The EC Treaties apply to Gibraltar by virtue of Article 299(4) of the Treaty Establishing the European Community (TEC). EC legislation can normally be taken to apply to Gibraltar¹⁵, with the exception of the following:

- Provisions relating to the Community Customs Territory, and by extension, EC measures relating to the free movement of goods¹⁶
- Common Commercial Policy
- Provisions on VAT
- Common Agricultural and Fisheries Policies

2.20 If you have any questions over whether legislation will apply in Gibraltar, please consult your legal advisers. You can also contact the EU-Gibraltar desk in the FCO on 0207 008 3310 and 0207 008 2502. The Cabinet Office guidance note on *Gibraltar, Overseas Territories and the Crown Dependencies* is also a useful resource.¹⁷

¹³ For information on the Commons European Scrutiny Committee, go to: http://www.parliament.uk/parliamentary_committees/european_scrutiny.cfm

For information on the Lords European Union Select Committee, go to: http://www.parliament.uk/parliamentary_committees/lords_eu_select_committee.cfm

¹⁴ <http://www.cabinetoffice.gsi.gov.uk/euro/eurosec14.html>

¹⁵ EC legislation may not in fact be applicable to Gibraltar if there is no relevant subject matter to which the legislation could apply (for example, EC legislation concerning railways is not applicable to Gibraltar because it does not have a railway).

¹⁶ Directives based on Article 94/95 do not apply to Gibraltar except to the extent that they concern matters other than free movement of goods, e.g. services or competition

¹⁷ <http://www.cabinet-office.gsi.gov.uk/euro/eurosec3.html>

While negotiating the directive

2.21 At the time of publication, the European Union has twenty-seven Member States. It is therefore essential to **seek alliances in the Council** to achieve UK Government objectives in negotiations. Talk to your opposite numbers from other Member States and see how you can work together. Pay particular attention to the country that holds **the Presidency** since it is responsible for chairing the negotiations and drafting compromise texts. You should **make use of the UK impact assessment when lobbying** other Member States to win support for the UK position. It may be that you can alert them to potential outcomes in their own Member States which the Commission impact assessment has not identified.

2.22 Commission impact assessments are a valuable evidence base for officials negotiating EU legislation and **it is important that they are discussed in Council negotiations before the proposals themselves are debated**. If necessary, you should lobby the Chair of meetings to follow this practice.

2.23 Clarification should be sought from the Commission if its impact assessment does not meet its own guidelines, particularly if it:

- Lacks evidence of thorough consultation – see the Commission’s own minimum standards for consultation¹⁸
- Fails to include viable options
- Does not include adequate quantification of effects

2.24 Try to persuade the **European Parliament** of the UK view, bearing in mind that Members of the European Parliament are likely to be more open to influence the earlier you approach them. Be prepared to share your impact assessment with UK and other Members of the European Parliament.

2.25 The Council and Parliament have committed themselves to carrying out impact assessments on substantive amendments to Commission proposals. If either the Parliament or Council proposes substantive amendments to a Commission proposal, you should therefore press for an impact assessment on the amendment to be carried out to clarify what the implications of any changes might be.¹⁹ This may expose ambiguities in the proposed amendments and contribute towards clearer language being agreed in the negotiations.

2.26 Your department’s EU division, the Cabinet Office European Secretariat and the UK Permanent Representation to the EU (UKRep) should all be able to provide you with more detailed advice on how to handle EU negotiations.

2.27 Clarity and quality of drafting: Try to ensure that the draft directive is very clear about what compliance is required, so as to avoid problems when drafting the UK implementing legislation. If anything is unclear, talk to the Commission early on as late clarification of an uncertainty may leave you with inadequate time to meet the requirements of the European legislation.

¹⁸ http://ec.europa.eu/governance/better_regulation/consultation_en.htm

¹⁹ The Council and Parliament committed to carrying out impact assessments on substantive amendments in an Inter-Institutional Agreement on Better Lawmaking in 2003: http://ec.europa.eu/governance/better_regulation/ii_coord_en.htm

2.28 Do not be afraid to ask questions: Poor drafting often conceals ideas that have not been properly developed. It is important to use the same term to cover the same concept wherever it occurs, as it is reasonable to assume that a different term has been deliberately chosen to mean a different concept.

2.29 The Commission, Council and Parliament are bound by an Inter-Institutional Agreement on common guidelines for the quality of drafting of Community legislation that aim to ensure well-drafted legislation.²⁰ The guidelines set out the general principles of good quality drafting, including that:

- Community legislative acts shall be drafted clearly, simply and precisely;
- the drafting of Community acts shall be appropriate to the type of act concerned, and in particular, whether or not it is binding (regulation, directive, decision, recommendation or other act); and
- the drafting of acts shall take account of the persons to whom they are intended to apply, with a view to enabling them to identify their rights and obligations unambiguously, and of the persons responsible for putting the acts into effect.

2.30 The **Council Secretariat**, staffed by permanent officials who support the work of the Council, should be able to help ensure that the Guidelines are observed. **Involve your lawyers** in testing the text of the draft directive against the Guidelines. They can help you identify ambiguities and flaws in draft legislation as it develops. If changes are needed to the proposal to meet the Guidelines, it can be useful to suggest them early.

2.31 The legal services of the Parliament, the Council and the Commission have also jointly produced a detailed Joint Practical Guide for persons involved in the drafting of legislations in the Community institutions²¹.

2.32 Minimum harmonisation directives set minimum standards or levels of protection which Member States must achieve, while permitting them to exceed the requirements of the directive in national implementing legislation which implements the directive if they wish. These contrast with **maximum harmonisation directives** which do not allow Member States to go beyond the requirements set out in the directive. Many directives consist of a mixture of maximum harmonisation and minimum harmonisation clauses.

2.33 When negotiating minimum harmonisation directives, **take care to avoid agreeing to any clauses which would constrain the ability of the UK Government to alter pre-existing standards in the area being regulated once the directive comes into force.** N.B. A situation in which UK business is put at a competitive disadvantage to that of other Member States because Community legislation prevents the Government from bringing its standards into line with other EU countries should be avoided wherever possible. Any minimum harmonisation directive should therefore enable the UK to alter the requirements in its implementing legislation on the basis of impact assessment at a later date, provided that the minimum requirements set out in the directive continue to be met.

²⁰ The Guidelines can be found at: <http://www.europa.eu.int/eur-lex/en/treaties/selected/livre605.html>

²¹ The Guide can be found at <http://europa.eu.int/eur-lex/en/about/techleg/guide/pdf/en.pdf>

2.34 You should keep your options under review as the proposal develops during the negotiations. Update your impact assessment as necessary and keep Ministers, the Cabinet Office, the devolved administrations, stakeholders and the UK Parliament (via an Explanatory Memorandum submitted to the EU Scrutiny Committees) informed of any significant changes to the proposal or your negotiating position.

Keeping stakeholders informed

During the negotiation of the Markets in Financial Instruments Directive, HMT used roundtables and drafting groups to communicate with industry. The roundtables were held every six weeks to keep people updated on the Directive's progress. The drafting groups were smaller groups of individuals that acted as a sounding board for drafting amendments by the UK and other Member States. The close contact with industry ensured that the UK went into negotiations well prepared and able to suggest drafting amendments that were practical. Lobbying of the Commission and other Member States was more effective due to the greater coordination between the messages coming from industry and government. For example, a joint effort between government and industry ensured that the relevant provisions of the directive reflected the specificities of the trading of commodity derivatives, a large part of which takes place in the City of London.

2.35 Think Small First: In Budget 2007²², the Chancellor of the Exchequer committed Government to consider applying exemptions, either complete or partial for small businesses where possible, for both domestic and European regulations. You should therefore press for exemptions for SMEs during negotiations, where they would be appropriate.

Negotiating reasonable implementation deadlines

2.36 Allowing time for those affected to prepare: When the Council and Parliament have agreed the directive, it is published in the Official Journal of the EU where all EU legal acts are listed. The text of the directive specifies the deadline when its provisions must take legal effect in the Member States. It is important to try to negotiate a reasonable implementation deadline at an early stage. Due regard should be paid to the views of the devolved administrations, and the procedures they will have to follow to implement the legislation. **Many costs can be minimised if sufficient time is allowed** e.g. changes to labelling requirements should allow enough time to use up existing stocks.

2.37 Allowing time for timely guidance to be produced: The Government has committed to producing guidance a minimum of 12 weeks before legislation takes legal effect. However, this requirement can be difficult for regulators to meet if departments have still not finalised the implementing legislation. It is therefore useful to have **a gap between the deadline for producing national implementing legislation and the date by which the legislation must take legal effect**. Some directives do, in fact, stipulate two deadlines, rather than one. You should encourage the Commission and Member States to include a gap of **at least six months**

²² Budget 2007, Chapter 3, Paragraphs 3.62 and 3.67: http://www.hm-treasury.gov.uk/budget/budget_07/report/bud_budget07_repindex.cfm

between the deadline for transposing the directive into national law (i.e. producing the implementing legislation) and the deadline when it must take legal effect.

Common Commencement Dates

2.38 Common Commencement Dates are two dates each year (6 April and 1 October) on which new domestic legislation is introduced in the UK. This provides business and stakeholders with greater clarity and awareness about forthcoming regulatory changes, helping them to plan and budget for new measures and to reduce costs.

2.39 UK Common Commencement Dates **do not** apply to UK legislation which is implementing a directive. However, bringing implementation forward in the UK by a matter of weeks to coincide with a UK Common Commencement Date can be justified if it can be demonstrated that the benefit of early implementation outweighs the cost.

2.40 If implementing legislation which impacts on business will not be aligned with one of the two UK Common Commencement Dates²³, notify your Better Regulation Unit and ask that they include notification of the legislation in the EU section of the Department's Annual Common Commencement Date statement, with a link to the guidance. If you have any queries on this, please contact Enterprise Directorate's Outreach Team on 020 7215 6032.

Review Periods

2.41 The Commission now builds review periods into most of its new draft directives. You should encourage the Commission to do this for all significant European legislation. For more information on post-implementation reviews, see Paragraphs 3.41 - 3.43 in Chapter 3.

²³ <http://www.dti.gov.uk/bbf/small-business/regulation-and-tax/info-officials/ccds/page37983.html>

Chapter 3: Implementing a directive in the UK

3.1 This chapter advises on the steps to follow when drafting legislation to implement a European directive, in particular, how to evaluate the risks of all the options for implementation, both for Government and for external stakeholders. It highlights the importance of good project planning to ensure a smooth transition between negotiation and implementation and to allow for the provision of timely guidance to business and proper Parliamentary scrutiny. Above all, legislation should be proportionate, clear and not go beyond the minimum requirements of the directive.

Transposition project plan

3.2 Put together a project plan for the eventual transposition of the legislation. Your plan should set out the timing and resources required in order to transpose the legislation properly and on time. It should be agreed with Ministers, other Departments, Cabinet Office and, where appropriate, the devolved administrations, ideally no later than adoption of the Common Position by the Council.

3.3 Make sure that you allow sufficient time for proper **Parliamentary scrutiny** of transposition measures, taking the 21 day rule into account, where it is appropriate to do so. Most transposition measures are scrutinised using the negative procedure which means that the implementing legislation enters into force unless there is an objection from the House. Occasionally, however, the affirmative procedure is followed which means that the Statutory Instrument will not remain or enter into force unless it receives positive approval from the House within a certain period, usually 28 or 40 days. Comprehensive guidance on preparing Statutory Instruments and the Parliamentary procedures relating to them can be found in *Statutory Instrument Practice*²⁴.

3.4 This approach should ensure that:

- policy teams think about transposition at an early stage and consider the necessary timetable (before final adoption);
- an early assessment can be made of the resources required to handle implementation;
- involved parties (including devolved administrations, other government departments, lawyers and other relevant specialists) are committed to a project plan and in particular to the timetable with its stages and milestones for the transposition at an early stage; and
- implementation in Gibraltar is factored in. See paragraphs 2.18 – 2.20 in Chapter 2.

²⁴ <http://www.opsi.gov.uk/si/si-practice.doc>

3.5 You should **set up a project team** comprising policy officials, lawyers and technical specialists from the lead Whitehall department, other Whitehall departments, agencies, devolved administrations and local government as appropriate. The group will need a project manager to coordinate the tasks and make sure they are delivered on time.

3.6 The project team should draw up the plan setting out:

- **the objectives** – to identify what needs to be transposed and how;
- **who will do what** – to ensure the involvement of those who are key to implementation and to ensure that all who may be affected are consulted. This will help to identify the resources required, particularly by highlighting any overlapping priorities and points of high activity;
- **timescale/key milestones** – to identify what needs to be done by when, for example, any additional time needed by the devolved administrations to implement the legislation in Scotland, Wales and Northern Ireland;
- **risks** to the plan – e.g. will a requirement to carry out thorough consultation of stakeholders cause a delay in the implementation of the directive? Set out the action to be taken to try to mitigate the risks identified.

3.7 Keep your agreed plan up-to-date by meeting regularly to review it, assessing issues as they arise and taking early action to resolve problems.

3.8 Senior oversight Successful implementation requires adequate resources and staff who have the right mix of skills and expertise. A senior official (director level) should have oversight of the project team and be ultimately responsible for the delivery of the transposition. He/she can help to provide a strategic focus, leadership and direction to the project, ensure that there is an effective transfer of knowledge between negotiating and implementing teams and that the implementing process is started as early as possible and is sufficiently resourced. Senior ownership of the transposition can also help provide assurance to Ministers and the Management Board that the best possible approach, within the available resources, is being taken to ensure that high-quality implementing legislation is produced on time.

3.9 Programme and project management techniques The transposition of a directive is a complex process, often involving the management of overlapping priorities. Transposition team members should therefore receive training in programme and project management (PPM) to help them organise the work involved.

Emissions Trading Directive (Directive 2003/87/EC)

The Defra team responsible for the Emissions Trading Directive used project-management techniques to manage the transposition exercise proactively, in relation to devolution issues and consultation, and meet the short transposition deadline. The Directive was adopted on 25 October 2003 and needed to be transposed by 31 December 2003, less than 10 weeks later. An early decision was taken to have only one set of transposing legislation across the UK so that a consistent approach could be taken across the jurisdictions and the exercise could be managed centrally to reduce the risks of delay.

Defra consulted on the draft regulations for 8 weeks from 15 September, following the second reading in the summer, after which it was clear that major changes were unlikely to occur. This proactive approach ensured that the challenging deadline for transposition was met within the UK.²⁵

3.10 Handover arrangements It is important to ensure that there is continuity of knowledge in the team between the processes of negotiation and transposition. If possible, it is better to keep some of the same people involved in both parts of the process so that the historic knowledge of how the negotiations progressed is not lost when it comes to implementation. In any event it is essential that proper records of why decisions were taken in negotiations are kept and that papers which may assist with the interpretation of provisions in the directive remain accessible for the team responsible for transposition.

Programme and project management

In Defra, the Legal and Environment teams set up a joint Project to develop a Programme and Project Management (PPM) methodology for the transposition of directives. A tailored methodology has now been developed, piloted and adopted. The Project itself has now moved into a Programme phase in which all implementation of new environmental legislation will be managed through that methodology and overseen by a Programme Board which will monitor not only the application of PPM but also look out for synergies between the Projects, both in terms of resources and intended outcomes. Representatives from the devolved administrations sit on the Project Boards, guaranteeing early involvement and an opportunity to build any particular time constraints into the timetables. Defra is now looking at ways of bringing the application of PPM for EU negotiations into their mainstream policy cycle development work so that the techniques are applied as standard throughout the Department.

Options for implementation

3.11 Once the directive has been adopted you should confirm earlier legal advice on the best approach to implementation. Following this, instruct your lawyers either to draft the necessary secondary legislation themselves or, in the unlikely event that primary legislation is needed, to instruct Parliamentary Counsel. Check with your lawyers whether a Legislative Reform Order or secondary legislation made under section 2(2) of the European Communities Act 1972 would be a suitable way of implementing some, or all, of the requirements of the directive.

3.12 You should refocus your impact assessment at this stage and it should accompany Ministerial correspondence seeking collective agreement to your options for implementation and to the draft of the implementing legislation.

²⁵ Transposition was, however, late in Gibraltar.

3.13 If the measure will have a significant impact on business, charities or the voluntary sector, or goes beyond the minimum requirements of the directive, you will need clearance from the **Panel for Regulatory Accountability**, prior to writing round for Ministerial clearance. The impact assessment should be used as a basis for **consultation on the options**. If you have started drafting the implementing legislation you may want to consult on this too.²⁶

Drafting the implementing legislation: dealing with ambiguity

3.14 Lawyers and policy-makers should work together to draft the implementing legislation. When transposing some provisions of a directive, it may be possible to copy out the wording directly from the text of the directive.

3.15 If, however, the meaning is not clear, it may be better to elaborate on the wording of the directive. In an ideal world, it should have been possible to clarify the wording of the directive before it was adopted, but there are occasions where ambiguity arises because of the need to accommodate differing views during the negotiating process. You may also decide it would make sense to elaborate on the wording in order to address any overlaps between the new legislation and any existing legislation, so that the implementing legislation fits in better with the existing legal regime.

3.16 If the provisions of the directive are ambiguous, you may choose to stick with the wording in the directive to reduce the risk of legal challenges from the Commission (or before the national courts)²⁷ which might disagree with your interpretation. However, **leaving the wording unclear could merely serve to transfer the risk to business**. Faced with legal uncertainty, economic operators may decide that costly legal advice is necessary to find out what their legal obligations are. Alternatively, they could also adopt a burdensome regime because the minimum requirements are not clear and they are keen to avoid incurring penalties. You should therefore try to ensure that the meaning of the legislation is as clear as possible. When the new legislation imposes criminal penalties, clarity is especially important, so that those bound by the law understand exactly what behaviour will result in sanctions.

3.17 In some cases, in particular where a Community instrument contains long and detailed technical annexes, it might be judged appropriate to implement by cross-reference to the terms of the instrument, rather than repeating them in the domestic legislation. However, in every case, officials and lawyers should consider which method of transposition is appropriate, having regard to the need for transparency and the importance of producing clear and coherent legislation.

²⁶ In Northern Ireland there are particular consultation requirements associated with statutory equality duties under section 75 of the Northern Ireland Act 1998.

²⁷ When considering the legal risk associated with the options, you need to be aware that this is not just the risk of infraction proceedings by the Commission (and the consequent risk of fines being applied by the ECJ), but also the risks that national courts:

- will, in any event, interpret UK legislation consistently with the Community law obligation, insofar as it is possible to do so (so-called “consistent interpretation”);
- will find that that UK legislation that is contrary to Community law and which cannot be consistently interpreted is *ultra vires* (unlawful) and that individuals may be able to rely on directly effective rights under the Directive against the State (“direct effect”); and
- may award damages against the State (so-called Francovich damages) where an individual suffers harm as a result of faulty implementation of a Directive.

3.18 Where there is doubt about the precise legal obligation, Ministers should be presented with options, and the risks, costs and benefits attached to each, covering economic, social, environmental and legal aspects. Instances where wider provisions have been drafted for safety's sake or provisions have been narrowed down to what the draftsman takes the meaning to be, should be clearly identified and included in the impact assessment. The solution chosen must be the best policy solution consistent with the need to minimise the burdens on business and others – **it may not always be the least risky one.**

Assessing the legal risks for the Government and business

- Set out your appreciation of the likelihood of a legal challenge being mounted, including by whom (i.e. who might have locus and desire to challenge) and in what manner (e.g. infraction proceedings, judicial review).
- Set out the likely timescale of such a challenge (e.g. when it might arise, how long it might take for the outcome to be known and how much time there would be for any adjustment to the regime necessary to comply with an adverse ruling).
- Give your assessment of the likely consequences of the challenge process (e.g. uncertainty during the challenge process, impact on business and Government).
- Indicate who would be the defendant in such a challenge, and, if different, who would bear the final liability (e.g. the Government, non-governmental organisation, a firm, an individual etc).
- Indicate the chances of success and specify what an adverse outcome might entail (e.g. invalidity of the UK legislation, claim for damages, financial penalty under Article 228/EC; need to change systems to comply with an adverse ruling).

3.19 Sometimes the directive will deliberately leave a **margin of discretion** to Member States, or require them to make their own provision in some respect. In such cases, you will need to be clear what the margin is and implement in the way most suited to the UK in accordance with other UK policy goals, in particular, minimising the burdens on business. For example, if a directive requires an activity to be licensed, there may be discretion over how often it is administered. Use your impact assessment to work out the optimum solution which achieves the objectives of the directive in the least burdensome way.

Using flexibility in a directive to minimise burdens

Commission Decision 2001/471/EC required licensed slaughterhouses and cutting plant operators to apply the hazard analysis and critical control point (HACCP) approach to food safety management. The Food Standards Agency set up a stakeholder group to discuss the proposal. During Commission discussions, the Agency encouraged the adoption of a longer period for implementation for 'small' plants, due to the need to produce guidance for operators unfamiliar with HACCP principles. Since the term 'small' was not defined in

the Decision, Member States were free to interpret it in the context of their own industry structure. Following consultation, the UK chose a higher threshold than many other Member States, giving smaller plants an extra year to comply with the regulations. During this period the Agency was able to provide guidance and training material for operators and enforcement officers.

3.20 In other instances, it will be apparent that a uniform result is intended (particularly in Single Market cases) and there is very little scope for discretion. Many directives will contain both prescriptive elements and aspects where there is flexibility.

3.21 It will often be useful to make a comparison with the approaches to transposition taken by other Member States during implementation, so that the relative burdens of different approaches are well understood, and best practice can be shared across Member States. Encourage the Commission to establish a **transposition group** where Member States can keep in close contact about the approach that they are taking to implementation. Utilise any existing networks and contacts available to you to find out whether other Member States are encountering similar problems in implementing a directive and how they are proposing to resolve any ambiguities in its provisions.

Working with other Member States

The Network of EU Environmental Lawyers (NEEL), set up by Defra during the UK Presidency in 2005, is a good example of this type of cooperation. NEEL members have a legal role relating to environmental law and they work in member state administrations, accession country administrations and the EU institutions. Prospective members are invited to contact elndefra@defra.gsi.gov.uk.

The Network of Heads of European Environment Protection Agencies was set up in 2003 as a forum for those organisations involved in the day-to-day implementation of environmental policy across Europe to exchange views and experiences. In 2006, the Network considered how obstacles or barriers to good environmental regulation arise at EU and Member State levels. They have developed a simple diagnostic 'checklist' to help those developing and implementing policy and regulation to identify and overcome potential barriers. The checklist can be easily applied to other policy areas and complements the information found in this guide. For more information, see the report, *Barriers to good environmental regulation*²⁸.

3.22 You should bear in mind the views of the UK Parliamentary committees which scrutinise secondary legislation since they will challenge the Government if they feel the quality is poor.

²⁸ <http://publications.environment-agency.gov.uk>

Joint Committee on Statutory Instruments

This Committee considers the technical drafting aspects of secondary legislation to check directives have been transposed properly. They will report to the House any instance where the authority of the parent Act has been exceeded or where the Statutory Instrument has been poorly drafted and may ask officials to provide oral or written evidence to provide further explanation.

Lords Committee on the Merits of Statutory Instruments

This Committee considers the policy merits of secondary legislation and will adversely report to the House where it finds that secondary legislation inappropriately implements EU legislation. The Committee is particularly interested in knowing whether the relevant stakeholders have been consulted in drawing up the legislation, how it will be implemented and the justification for any gold-plating. The Minister responsible for the Statutory Instrument may be called to account on any concerns the Committee has. You can find guidance on what the Committee thinks a good Explanatory Memorandum should look like on its website at http://www.parliament.uk/parliamentary_committees/merits.cfm

Directive on Assessment of the Effects of Certain Plans and Programmes on the Environment (2001/42/EC)

The Environmental Assessment of Plans and Programmes Regulations 2004, and parallel regulations in Wales, Scotland and Northern Ireland, used copy-out to transpose the Strategic Environmental Assessment Directive (2001/42/EC), thereby minimising much of the risk inherent in interpreting the terminology used. However, when implementing the regulations, departments had to agree a common interpretation of parts of the Directive that gave rise to uncertainty. This has been incorporated into UK practical guidance. This demonstrates that while copy-out can minimise the risks at transposition level, this does not necessarily remove the need for important decisions regarding the interpretation of a directive to be taken on implementing the regulations, when a further risk-balancing exercise may be required.

Over-implementation

3.23 Try to avoid instances of over or under-implementation. There may be pressures to preserve the existing domestic legislative framework; to provide legal certainty and avoid possibilities of challenge in the courts; and to implement different parts of a directive in different ways where it covers the responsibilities of more than one domestic department. These pressures can lead departments to over-implementation and in particular to **gold-plating or double-banking**.

What is gold-plating?

Gold-plating is when implementation goes beyond the minimum necessary to comply with a directive, by:

- extending the scope, adding in some way to the substantive requirement, or substituting wider UK legal terms for those used in the directive; or
- not taking full advantage of any derogations which keep requirements to a minimum (e.g. for certain scales of operation, or specific activities); or
- retaining pre-existing UK standards where they are higher than those required by the directive; or
- providing sanctions, enforcement mechanisms and matters such as burden of proof which are not aligned with the Macrory principles²⁹ (e.g. as a result of picking up the existing criminal sanctions in that area); or
- implementing early, before the date given in the directive. *(N.B. Bringing implementation forward in the UK by a matter of weeks to coincide with a UK Common Commencement Date can be justified if it can be demonstrated that the benefit of early implementation outweighs the cost.)*

3.24 It is Government policy not to go beyond the minimum requirements of European directives, unless there are exceptional circumstances, justified by a cost-benefit analysis and extensive consultation with stakeholders. Any gold-plating, as defined in the box above, must be explained in the impact assessment and will need to be brought to the attention of the Better Regulation Executive for specific clearance by the Panel for Regulatory Accountability.

Taking advantage of derogations

Taking account of the fact that Great Britain is a recognised EU protected zone the Forestry Commission has used a provision in the Plant Health Directive (Council Directive 2000/29/EC) to exempt small producers and processors of relevant material, except those who intend to consign some or all of their production to a destination outside Great Britain, from the requirement to register and to be subject to official examinations. While there is no charge for registration, official examinations are subject to time-based fees.

The exemption also means that consignments moved within Great Britain are not required to be accompanied by a plant passport. Businesses are therefore also relieved of the costs of producing plant passports and retaining records of their issue and receipt.

²⁹ http://bre.berr.gov.uk/regulation/reviewing_regulation/penalties/index.asp

3.25 The Transposition Note accompanying the legislation should also be explicit on any gold-plating that is being proposed (see section A1.24 – A1.25 of Annex 1). The Merits Committee on Statutory Instruments in the House of Lords or the Joint Committee on Statutory Instruments could report to the House on any SI that they consider to have inappropriately implemented a European directive.

What is double-banking?

Double-banking is when European legislation covers the same ground as existing domestic legislation, though possibly in different ways and to a varying extent. The term “ground” has to be interpreted widely and includes:

- the areas of risk the legislation seeks to provide for, e.g. fire safety;
- the areas of activity the legislation impacts upon, e.g. consumer credit; and
- the nature of the control, e.g. risk assessment.

The test is whether maximum streamlining has been achieved between the new and existing regimes, and the opportunity has been taken to disapply domestic rules and guidance which serve less of a purpose under the new framework. Aim to achieve as much consolidation as possible by merging all the relevant regulations into one.

3.26 To avoid double-banking, you need to take a radical look at the whole area of legislation where the directive impacts. You should therefore review all related existing UK legislation well before transposition. Think about the best way to implement so that there is no overlap or contradiction with existing legislation. The best way of avoiding these traps is not to treat Community legislation as an add-on, but instead to create one coherent regulatory regime wherever possible, either by amending the existing legislation or repealing/revoking it and starting afresh with a new regime.

Creating a coherent regulatory regime

The Unfair Commercial Practices Directive (Directive 2005/29/EC) overlaps with existing consumer protection legislation in the UK. When implementing the Directive, the former DTI carried out a large exercise, considering over 200 pieces of legislation, to establish where there was scope for simplification. It concluded that provisions in 29 pieces of legislation needed amendment or repeal to comply with the Directive (and its provisions on maximum harmonisation). The former DTI announced its decision in December 2006 to repeal provisions in 22 of these pieces of overlapping legislation, as they were replaced by the UCPD.

Streamlining legislation while protecting the public and the environment

The Environmental Permitting Programme is a joint Defra, Welsh Assembly Government and Environment Agency initiative, which, working with stakeholders, has developed a new radically streamlined and simplified permitting system. In the first instance, it re-transposes 14 directives and streamlines waste management licensing and pollution prevention control into a single system. The resulting savings are estimated as £90 million over 10 years. Subsequent expansion of the new system (to other environmental permitting systems) will be considered, subject to public consultation and impact assessment.

Sanctions

3.27 Sanctions for breach of Community obligations need to be **effective, proportionate and dissuasive**. In choosing the appropriate range and mix of sanctions for non-compliance with any implementing legislation, you should try to ensure a fair and effective regime is put in place. Non-criminal sanctions aimed at actively securing compliance should be considered, and criminal sanctions should not generally be applied across the board regardless of intent or risk of harm.

3.28 You will find the final report of the Macrory Review of Penalties³⁰ useful. The Review makes a number of recommendations which aim to ensure that regulators have access to a flexible set of modern, fit-for-purpose sanctioning tools that are consistent with the risk-based approach to enforcement outlined by the Hampton Review. The Government accepted these recommendations in full in 2006.

3.29 When implementing EC requirements, you may need to revisit the sanctions for existing domestic law to ensure a fair and effective system. You will also need to consult the Ministry of Justice, Scottish Executive, Northern Ireland Office and the regulators, where appropriate, before you propose creating a new civil penalty or criminal offence or provisions for the investigation of offences.

3.30 Whether you are considering the introduction of criminal sanctions, civil penalties or rights of appeal, you must contact the Ministry of Justice at an early stage in the development of your proposal to discuss and agree the consequences of your proposal for the workload of the courts and legal aid. Remember that new civil or criminal offences are likely to result in increased work for the police, courts and tribunals and may have an impact on legal aid costs.

3.31 The Joint Committee on Statutory Instruments may also be concerned with what it sees as inappropriate uses of criminal sanctions when implementing an EC requirement. The Lords Statutory Instruments Merits Committee is particularly interested in transparency in the implementing legislation.

³⁰ http://bre.berr.gov.uk/regulation/reviewing_regulation/penalties/index.asp

Following the publication of the report, the Better Regulation Executive has been working on introducing primary legislation in Parliament through the Regulatory Enforcement and Sanctions Bill. The bill will cover the core recommendations of the Macrory Review of Regulatory Penalties.

3.32 Whenever sanctions are imposed by UK legislation it is important that those bound by the legislation can easily understand what behaviour will result in penalties. This is particularly important when the sanction imposed is a criminal penalty. Guidance should therefore be clear about what constitutes a criminal offence and the sanctions which apply to that offence. If the directive is amended at any time, it is equally important that you make those bound by the law in question aware of the new rules by updating the relevant guidance.

Guidance

3.33 Consider carefully whether you should produce guidance for business, enforcers and others. Try to keep any guidance as short, simply expressed and non-prescriptive as possible. Its purpose should be to provide clear 'signposts' to enable those affected to follow the legislation. Try to involve users in drawing up any guidance.

Guidance for SMEs

NetRegs is a website that provides comprehensive and clear web-based guidelines on how to comply with environmental legislation. It is a partnership between the UK environmental regulators – the Environment Agency in England and Wales, the Scottish Environment Protection Agency and the Environment and Heritage Service in Northern Ireland.

The smaller the business the less likely it is that it has the time and resources to deal with the amount and complexity of legislation. NetRegs tackles this by providing free environmental guidance specifically tailored for small and medium-sized businesses throughout the UK.

NetRegs currently covers over 100 business sectors. It helps SMEs to understand, in plain language, what key environmental legislation affects their businesses. It then helps to identify the practical things SMEs need to do to comply with the law and prevent accidental pollution incidents. <http://www.netregs.gov.uk/>

3.34 Laws on the statute book can be embellished by Government departments, regulators, industry bodies and even by businesses themselves. This is most commonly done through guidance. You must avoid producing guidance which imposes requirements that are unclear or more stringent than their equivalents in the implementing legislation. When drafting guidance, be careful to distinguish between statutory requirements and what is considered to be best practice. Confusion about the legal status of requirements in guidance can create additional burdens and costs.

Health and Safety Executive Guidance

HSE produced effective guidance to provide business with greater clarity in the transposition of the Physical Agents (Vibration) Directive. The Directive says that “the employer shall assess, and if necessary, measure the levels of mechanical vibration”. Assessment can be done using sample data, e.g. from the equipment manufacturer, a trade association or other source. Measurement, on the other hand, would require a trained person with suitable measuring equipment to measure actual vibration exposure at the workplace, which could be fairly costly. HSE believes the measurement would not be necessary for the majority of cases.

To make this issue clearer for employers, and to avoid unnecessary cost, HSE proposed to provide guidance. Through the use of benchmarks (e.g. a list of vibration exposure values for a wide range of tools and work activities) most employers would be able to assess which control measures were necessary without the need for actual measurement of the vibration level.

3.35 Clear practical guidance can help business and others comply with new legislation.

Guidance on new legislation should therefore be issued at least 12 weeks before it comes into force. You should refer to BERR’s guidance³¹ on drafting guidance for small business to help you.

3.36 If the law changes, it is important that stakeholders are made aware of any different requirements. There are a variety of ways of doing this e.g. a press release to trade journals, press notice, updating guidance on your website etc. Whichever route you choose, you should ensure your stakeholders are kept up-to-date with any change in the law. The means chosen will depend on the particular stakeholders you need to reach.

3.37 Notify the Commission electronically. At the end of the transposition process the department’s transposition coordinator should use the electronic notification system to notify the European Commission of the national transposition measures. The lead Whitehall department is also responsible for notifying Gibraltar’s implementation to the Commission. For general enquiries regarding the system, contact the European Secretariat in the Cabinet Office on 020 7276 0086. For access to the system, contact the UK’s Central Manager in UKRep on 0032 2287 8216.

Provision of Transposition Notes

3.38 Since November 2001, following a request from the UK Parliament, UK legislation enacting European legislation has to be accompanied by a Transposition Note which explains how the Government is transposing the main elements of the relevant European directive into UK law.

³¹ <http://www.dti.gov.uk/bbf/small-business/regulation-and-tax/Information%20for%20Officials/Preparing%20Guidance%20for%20Small%20Firms/page38008.html>

3.39 Annex 1 contains guidance on the provision of Transposition Notes for lawyers and policy-makers. This guidance explains the background to Transposition Notes, who they apply to, what they should include and also suggests ways of setting them out.

3.40 Transposition Notes improve the quality of transposition, giving those involved in the implementation of the directive a better understanding of the wider context of their work. They also ensure that all of the main elements of a directive are addressed, as well as making the process of implementing legislation clearer and more transparent.

Post-implementation review

3.41 Post-implementation reviews provide a useful check on how legislation is working in practice and whether actual costs and benefits are similar to those anticipated in ex-ante impact assessments. They are also important because policy choices which may have been suitable in the past may need to be reconsidered in the light of changing political, economic, social and technological developments. Risks which were considered high when the UK originally implemented European legislation may now, in light of other Member States' approaches and the Commission's approach, be acceptable. Post-implementation reviews are also helpful in terms of building up an evidence base to influence future policy-making in the EU.

3.42 Most new directives have review periods built in by the Commission. However, the quality of the evaluation work itself could be improved. It is Government policy that officials should encourage the Commission to carry out and publish post-implementation evaluations of all significant European legislation.

3.43 You will need to specify the date for a post-implementation review in your impact assessment. Try to tie this in with the timetable of the Commission's own review of the legislation. When conducting the review, compare implementation practices with at least two other major Member States to draw lessons on methods of implementation and enforcement.

Annex 1: Guidance on the provision of Transposition Notes

A1.1 Since November 2001, almost all legislation laid before the UK Parliament, be it primary or secondary, that transposes any European directive (by which is meant any European Community or Euratom directive) must be accompanied by a Transposition Note.³²

What does it mean?

A1.2 Transposition Notes illustrate how the main elements of a directive have been, or will be, transposed into UK law. The main elements of a directive are those that determine the directive's fundamental objective(s) and major effect(s), have a significant impact on UK citizens or are politically important. The requirement to provide a Transposition Note began in November 2001, in response to a request by Parliament. The Government committed itself to:

“making available to Parliament a memorandum alongside primary or secondary legislation giving effect to European directives, except where the effort required would be disproportionate having regard in particular to the potential benefit to the reader. This memorandum will set out how the Government will transpose the main elements of the relevant European Directive into UK law.”

Why do it?

A1.3 As well as Parliament and those affected by the legislation, the Government also stands to benefit from producing Transposition Notes:

- a) Production of and availability of Transposition Notes should give those involved in the implementation of the directive(s) a better understanding of the wider context in which their work sits.
- b) Transposition Notes can act as a check that, in the Government's opinion, all of the main elements of a directive have been or will be addressed.
- c) Transposition Notes will increase the transparency and clarity of implementing legislation for both those producing it and those affected by it, as well as Parliament which may not need to ask so many questions on transposition during the passage of legislation.

³² This requirement was extended to the Scottish Parliament in 2007. The obligation does not apply to legislation laid before the Northern Ireland Assembly or National Assembly for Wales.

A1.4 Transposition Notes may show up deficiencies. Where there are deficiencies in transposition, there is a risk that Transposition Notes might be used as evidence against the UK in legal proceedings, including but not limited to an infraction case, actions for Francovich damages and referral to the European Court of Justice. To avoid this situation arising, departments should make sure that they reap the maximum benefit from the increased transparency and clarity created by Transposition Notes by using them as a checklist as described in paragraph 1.3 (b) above, so as to avoid any deficiencies in transposition; or to pick up on these and take any appropriate action.

A1.5 While they will not always be easy to produce, Transposition Notes should be little more than a summary of information already known to those involved in the production of the legislation.

A1.6 Transposition Notes have a more specific purpose than Explanatory Memoranda or Explanatory Notes. In comparison, a Transposition Note should be more specific about how the main elements of the directive(s) will be transposed into UK law and should display this information in a more structured way.

Do I need to produce a Transposition Note?

A1.7 All UK legislation laid before Parliament that gives effect to any European directive must be accompanied by a Transposition Note, unless Ministers make and are able to clearly demonstrate the truth of the following statement:

“In the Government’s view, the resources required to produce a Transposition Note are significantly greater than can be justified by the resulting added benefit to the reader.”

A1.8 It is expected that departments will make the necessary resources available to produce a Transposition Note. Even in those cases where exhaustive analysis would be too resource intensive, it should be possible to reduce costs to a justifiable level by concentrating only on the main elements of the directive(s).

A1.9 On the rare occasions that the statement made at A1.7 is clearly and demonstrably true, you may have legitimate grounds for deciding not to produce a Transposition Note. You must inform Parliament by including the following text in the Explanatory Note (or the nearest equivalent document):

“It is normal practice to make available to Parliament, alongside primary or secondary legislation giving effect to European directives, a transposition note that sets out how the Government will transpose the main elements of those directives into UK law. However, in the present case a transposition note has not been made available. This is because, in the Government’s view, the resources required to produce a Transposition Note are significantly greater than can be justified by the resulting added benefit to the reader.”

A1.10 Such a statement is likely to provoke questions and it may be sensible to go on to explain the decision in the Explanatory Note (for Acts/Bills) or Explanatory Memorandum (for Statutory Instruments).

A1.11 In cases where the UK legislation includes elements that have already been transposed (for example, when transposing an amending directive, consolidating UK transposition or correcting errors in earlier transposition), the existing Transposition Note(s) should be revised and expanded accordingly. Where there is not an existing Transposition Note because the original directive was transposed before the requirement came into force, this does not mean a Transposition Note for the entire original directive(s) should be produced. Rather, you should use your common sense to produce a Transposition Note that covers both the new elements being transposed and any elements of the existing directive(s) and transposing legislation whose inclusion is necessary for clarity.

A1.12 There may be occasions when UK legislation has to be produced at great speed, for instance, in order to avoid missing short deadlines imposed by the threat of infraction proceedings. In such circumstances, if at all possible, time should still be made to produce a Transposition Note. The Transposition Note itself should help ensure that everything has been covered and may help speed the UK legislation's passage through Parliament.

A1.13 While the provision of Transposition Notes only applies to the transposition of European directives, you may sometimes find it useful to produce a transposition note for other types of European and other international legislation to provide extra clarity if the implementing legislation is particularly complex.

How do I produce a Transposition Note?

A1.14 Exactly how you produce a Transposition Note is up to you, so long as it meets all of the following requirements:

- It can be easily understood by an informed, but not expert, audience, such as those directly affected.
- It clearly sets out how the Government has or will have transposed the main elements of all the relevant directive(s) into UK law.
- It is explicit about any over-implementation that is being proposed.
- It is made available to Parliament alongside primary or secondary legislation giving effect to European directives.

A1.15 It is up to officials to decide how to divide up the work involved in producing a Transposition Note. In most cases it is likely that Government lawyers and policy officials will carry out the work in partnership.

A1.16 Where more than one department is involved in the transposition of a directive, whoever produces a Transposition Note must ensure that it is cleared with all other interested departments.

Easily understood

A1.17 While the initial audience for the Transposition Note is Parliament, it is possible that all those affected by the legislation, be they individuals, businesses or other organisations will benefit from understanding the Transposition Note. It should therefore be produced in a

format and using language that can be understood by both Parliament and an informed, but not expert, audience, including those affected by the legislation. It should be as short, simply expressed and jargon-free as possible.

Clearly sets out how the main elements of all the relevant directive(s) are transposed

A1.18 The reader should be able to use the Transposition Note to determine quickly, easily and accurately how each of the main elements of every directive that the UK legislation has been or will be transposed into UK law. If the UK legislation contains provisions for the transposition of more than one directive, its Transposition Note should illustrate how the main elements of all of these directives have been transposed. Where a decision has yet to be made as to how to transpose a main element of a directive, this should also be made clear.

A1.19 Where possible, direct cross-references between the articles of the directive and the specific clauses of the UK legislation should be made. One of the clearest methods is to set out this information in a table. Such a table can list the articles of the directive in one column and the UK legislation that transposes it in the corresponding row in the next column.

A1.20 Many directives are extremely complex and production of a document that is accurate, short and easily understood will by no means be easy. It is important to note that officials are not expected to reproduce and explain the whole of complicated directives, but merely give as much information as is necessary to understand how the main elements of the directive(s) have or will be transposed.

Example

A1.21 This method is demonstrated by the Electronic Signatures Directive Transposition Note at **Annex 2**. This sets out how each of the main elements of the Electronic Signatures Directive have been implemented by the Government's Electronic Signatures Regulations in 2002.

A1.22 This is a useful example, which demonstrates how a table has been successfully used to make direct cross-references between the articles of the directive and the specific clauses of the UK legislation.

A1.23 Should you decide to set out your Transposition Note as a table, you may choose to use the template at **Annex 3**, which suggests a basis for a Transposition Note set out as a table according to this guidance.

Is explicit about any over-implementation that is being proposed

A1.24 From March 2005, Transposition Notes should contain an explicit comment on any over-implementation that has taken place during the transposition process. In the introduction to the Note, drafters should include one of the following statements:

“These regulations do what is necessary to implement the Directive, including making consequential changes to domestic legislation to ensure its coherence in the area to which they apply.”

“These regulations do more than is necessary to implement the Directive in the following areas...”

A1.25 The inclusion of a statement on any over-implementation that is being proposed is designed to improve the transparency of the implementing regulations and remind officials of the risks of over-implementation. The template at **Annex 3** suggests how this statement will fit into the Transposition Note.

Made available to Parliament

A1.26 A Transposition Note must accompany all UK Government legislation laid before the UK Parliament, be it primary or secondary, which gives effect to any European directive.

A1.27 A Transposition Note should be copied to the devolved administrations at the same time it is submitted to the UK Parliament for information purposes only.³³

A1.28 In the case of Government Bills, Transposition Notes should be provided by departments as an annex to Explanatory Notes, so that they are available with the text of the legislation. A reference should be included in the Explanatory Note to the Bill using the following standard form of words:

“This Bill includes provisions [giving effect to] / [implementing] the following European Community Legislation: [relevant details of the relevant Directive(s)]. A Transposition Note setting out how the Government will transpose into UK law the main elements of [this] / [these] Directive(s) is annexed to these Explanatory Notes.”

The Explanatory Note should also explain in broad terms the approach to transposition highlighting any difficult areas, and include a brief scrutiny history of when it was considered by the EU Scrutiny Committees.

A1.29 The Transposition Notes should be included with the Explanatory Note in a single electronic document sent to Parliamentary Counsel for forwarding to the Public Bill Office.³⁴

A1.30 When the Bill receives Royal Assent, if Parliament has made any amendments that mean that the Transposition Note produced when the legislation was first laid before Parliament is out of date, the Transposition Note should be updated so that it reflects these amendments and included as an annex to the Explanatory Notes on the Act.

A1.31 In the case of Statutory Instruments, the Transposition Note should be attached to the Explanatory Memorandum that is laid with the instrument, and copied to the relevant Committees (Joint Committee on Statutory Instruments and the Lords Merits Committee).

³³ The Scottish Executive will need to submit its own transposition note to the Scottish Parliament.

³⁴ For detailed guidance on Explanatory Notes, see the Guide to Legislative Procedures, Appendix B, on the Cabinet Office website: http://www.cabinetoffice.gov.uk/secretariats/economic_and_domestic/legislative_programme/guide.asp

The Explanatory Memorandum should explain in broad terms the approach to transposition highlighting any difficult areas, and include a brief scrutiny history of when it was considered by the EU Scrutiny Committees. You should ensure that Parliament has adequate time to scrutinise Statutory Instruments, as set out in *Statutory Instrument Practice*.³⁵

A1.32 You may also decide that a Transposition Note could usefully accompany any draft legislation that you publish.

A1.33 Transposition Notes should be made available on departmental websites in a clear and accessible manner. When annexed to Explanatory Notes for Bills or Explanatory Memoranda for Statutory Instruments, they are also available to the public via the Office of Public Sector Information website (www.opsi.gov.uk).

A1.34 You should ensure that other interested departments receive up-to-date copies as appropriate. Each department should consider creating a central library of the Transposition Notes that they have produced, which can be made available to other departments as the need arises.

Using Transposition Notes to notify the Commission of transposition

A1.35 Some directives include an obligation to notify the Commission of what are alternatively described as correlation, correspondence or concordance tables. In addition, the Interinstitutional Agreement on better law-making³⁶ indicates that the Council will encourage the Member States to draw up tables illustrating the correlation between directives and transposition measures. The electronic notification system (see 3.37 in Chapter 3) includes in the dropdown menu for the field "Type of Act" the option "Concordance table". The transposition co-ordinator can use this option to attach the transposition notes and notify them to the Commission.

Further information and queries

A1.36 If you require any further information or have any queries relating to Transposition Notes, please contact the European Secretariat on 0207 276 0086 or the BRE Europe Team on 020 7215 0184.

³⁵ For detailed information on Explanatory Memoranda and the parliamentary scrutiny procedures for Statutory Instruments, go to: <http://www.opsi.gov.uk/si/si-practice.doc>

³⁶ http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/c_321/c_32120031231en00010_005.pdf

Annex 2: Transposition Note for Electronic Signatures Directive

This is a useful example of a Transposition Note, which demonstrates how a table has been successfully used to display the information.

Article	Objective	Implementation	Responsibility
3.3	Requires member states to establish an appropriate system for supervision of certification-service providers.	Regulation 3 of the Electronic Signatures Regulations 2002 implements article 3.3 by imposing a duty on the Secretary of State to keep under review the carrying on of activities of certification-service providers specified in that article and the persons by whom they are carried on, to establish, maintain and publish a register of these certification-service providers and to have regard to any evidence of their conduct which is detrimental to users of qualified certificates with a view to publication of any of this evidence.	Secretary of State

Article	Objective	Implementation	Responsibility
5.1 (a)	Requires member states to ensure that certain advanced electronic signatures satisfy the legal requirements of a signature in relation to data in electronic form in the same manner as a hand written signature.	No specific provision is needed to implement this as under the law in England and Wales, Scotland and Northern Ireland where there is a signature requirement in relation to data in electronic form this is already capable of being satisfied by an electronic signature including the type of electronic signature referred to in this article.	Secretary of State, Scottish and Northern Irish Executives.
5.1 (b)	Requires member states to ensure that certain advanced electronic signatures are admissible in legal proceedings.	This has been implemented through section 7 Electronic Communications Act 2000.	Secretary of State, Scottish and Northern Irish Executives
5.2	Requires member states to ensure that electronic signatures are not denied legal effectiveness and admissibility in evidence for certain reasons.	This has been implemented through section 7 Electronic Communications Act 2000.	Secretary of State, Scottish and Northern Irish Executives
6.1& 6.2	Requires member states to ensure that certification-service providers are liable for damage in certain circumstances even though there is no proof of negligence unless the certification-service provider proves he was not negligent.	Regulation 4 imposes liability on certification-service providers in specified circumstances notwithstanding there is no proof of negligence unless the certification-service provider proves he was not negligent.	Secretary of State

Article	Objective	Implementation	Responsibility
6.3 & 6.4	Requires member states to ensure that certification-service providers can exclude liability in certain conditions for limitations on the use of qualified certificates of value of transactions for which the certificate can be used.	Specific provision to implement is not necessary as certification-service providers can already exclude liability under tort and delict for these matters subject to the applicable laws on the exclusion or limitation or liability.	Secretary of State
7.1	Requires member states to ensure that in certain circumstances qualified certificates which are issued to the public by a certification-service provider established in third countries are legally equivalent to certificates issued by a certification-service provider established within the Community.	Specific provision to implement is not necessary as the definition of qualified certificate in the Regulations does not depend on where the certification-service provider who issues the certificate is established.	Secretary of State
8.2	Requires member states to ensure that certain certification-service providers are subject to specified data protection requirements.	Regulation 5 imposes a duty on certification-service providers in certain circumstances to comply with specified data protection requirements. Breach of that duty is actionable by a data subject who suffers loss and compliance with the requirements can also be enforced by civil proceedings by the Crown.	Secretary of State

Annex 3: Template for a Transposition Note

Should you decide to set out your Transposition Note as a table, you may choose to base it on this template, which outlines a basis for a Transposition Note set out as a table according to this guidance. This is a basic outline only and should only be used in conjunction with the guidance as a whole.

Column 1	Column 2	Column 3	Column 4
<i>This part of the table is here for explanatory purposes only. It need not be included in a Transposition Note.</i>			

Directive

Name the directive, which the relevant UK legislation transposes. If the relevant UK legislation transposes more than one directive, deal with one directive at a time. This means starting a new section of the table for each directive as demonstrated below.

In the introduction to the Transposition Note, include one of the statements on gold-plating set out in A3.11, e.g.

“These regulations do not go beyond what is necessary to implement the Directive, including making consequential changes to domestic legislation to ensure its coherence in the area to which they apply.”

Articles	Objectives	Implementation	Responsibility
<p>1st article, which comprises one of the directive's "main elements".</p> <p>Use this column to list the numbers of those articles, which comprise the directive's 'main elements'.</p>	Describe the fundamental objective(s) and major effect(s), of the article listed in this row of the first column.	<p>Describe how each of the fundamental objective(s) and major effect(s) listed in this row of column 2 has (have) been or will be implemented in the UK.</p> <p>Where possible, refer directly to the specific clauses in the UK legislation that transposes the directive.</p>	Describe who is responsible for each of the measures taken to implement the directive in the UK listed in this row of column 3.
2nd article, which comprises one of the directive's main elements.	As above.	Where a decision has yet to be made as to how to implement a main element of a directive, this should also be made clear.	As above.
3rd article	As above.	As above.	As above.

Directive 2 (If necessary)

If the relevant UK legislation transposes more than one directive, start a new section of the table for each directive, as demonstrated here.

Articles	Objectives	Implementation	Responsibility
1st article	As above.	As above.	As above.
2nd article	As above.	As above.	As above.

Annex 4: Contact details

Help in your own department

Your first point of contact for general better regulation queries should be your department's **Better Regulation Unit**. Your department should also have an **EU Better Regulation Coordinator**, located in either your department's BRU or Europe team who will be able to provide you with advice on achieving good regulatory outcomes at the European level. The Better Regulation Executive will be able to provide you with relevant contact details. You will also wish to seek the advice of your departmental lawyers throughout the transposition process.

Better Regulation Executive in BERR

Tel: 020 7215 0184

<http://bre.berr.gov.uk/regulation>

The Better Regulation Executive's Regulatory Reform Directorate supports and challenges government departments to improve their performance on better regulation. Each team is tasked with shadowing the activities of a specific group of departments and can provide advice on better regulation. Your Better Regulation Unit will be able to put you in contact with the team which deals with your department's business.

Cabinet Office European Secretariat

Tel: 020 7276 0086

www.cabinet-office.gsi.gov.uk/euro

The European Secretariat is responsible for coordinating the Government's position on EU policy and is also a source of expertise on EU procedures and mechanisms. Due to the confidential nature of some of its material, its website is available only to officials with access to the government secure intranet: it has European meeting agendas, contact details and a wide range of guidance on EU procedures such as co-decision and comitology.

Cabinet Office Legal Advisers (COLA)

COLA are able to provide, through Departmental lawyers, advice and second opinions on specific transposition issues. Policy officials should speak in the first instance to their usual Departmental lawyers, who in turn should contact the appropriate Desk Officer for their Department, whose details can be found in the European Action Zone on LION, or speak to the Head of COLA on 020 7210 3120.

EU-Gibraltar team, Foreign and Commonwealth Office

The EU-Gibraltar desk officers can advise you on working with Gibraltar.

Tel: 0207 008 3310 and 0207 008 2502

Enterprise Directorate's Outreach Team in BERR

Tel: 020 7215 6032 or 5679

Email: regulation@berr.gsi.gov.uk

Enterprise Directorate's Outreach Team is able to provide help and advice on contacting small businesses at the early policy development stage; developing the Small Firms Impact Test; advice on preparing guidance for small businesses and; guidance on common commencement date policy.

**Department for Business, Enterprise
& Regulatory Reform
1 Victoria Street
London SW1H 0ET**

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<http://bre.berr.gov.uk/regulation/>