

Chapter 7

The interface between member states and the European Union

Regulations emanating from the EU are of growing importance for member states, with an increasing proportion of national regulations originating at EU level. Whilst EU regulations¹ have direct application in member states and do not have to be transposed into national regulations, EU directives need to be transposed, raising the issue of how to ensure that the regulations implementing EC law are fully coherent with the underlying policy objectives, do not create new barriers to the smooth functioning of the EU Single Market, avoid “gold plating” and the placing of unnecessary burdens on business and citizens. Transposition also needs to be timely, to minimise the risk of uncertainty as regards the state of the law, especially for business.

The national (and subnational) perspective on how the production of regulations is managed in Brussels itself is important. Better Regulation policies, including impact assessment, have been put in place by the European Commission to improve the quality of EC regulations. The view from “below” on the effectiveness of these policies may be a valuable input to improving them further.

Assessment and recommendations

EU-origin regulations make up an important and growing share of the regulatory stock. The effective management of EU-origin regulations is therefore vital if the United Kingdom is to control its regulatory burdens. The EU is currently sometimes perceived as an “add on” to domestic work.

Recommendation 7.1. The management of EU regulations should be a priority for Better Regulation policy.

It should be noted that this recommendation is being given effect. The government’s April 2009 statement includes, among the key actions to reinforce better regulation in support of economic recovery, a commitment to “working closely with EU partners to further embed the EU Better Regulation agenda and to ensure that current pressures on business are taken into account when new European Regulation is being considered.”

The institutional structures for handling EU regulations are well-established and appear to work smoothly. The orchestrating role of the Cabinet Office, combined with support from the BRE’s Europe team, and clear guidance, appear to be appreciated and provide the right balance in principle between central direction and departmental

ownership of the process. The 2006 Davidson Review picked up weaknesses in the process and this has now been turned into a clear guide for departments (covering both negotiation and transposition). Linking *ex post* transposition with *ex ante* negotiation of EU regulation is a good idea, perhaps especially important in the United Kingdom context of frequent staff changes, but also relevant for the consideration of other countries where the processes are disconnected.

Recommendation 7.2. An evaluation of the application of the Davidson Review’s recommendations in practice would be helpful at this stage.

Nevertheless, capacities to manage EU regulatory processes may need reinforcement. It is important that departments should own the process of managing EU regulations falling within their remit. This also means that they should have the capacities and internal structures to do this well. It may be a reflection of this that the United Kingdom’s record of transposition is mid ranking. The United Kingdom appears to face a few issues. The civil service tradition of short postings (for fast track and senior civil servants, often not more than three years in one place) raises a continuity challenge – the official responsible for negotiating a draft EU directive is unlikely to be the official carrying out the transposition. There is a need to secure continuity of information and understanding across the two processes when this happens. Legal resources for supporting policy officials in the negotiation phase may also need reinforcement. Lawyers’ input is needed at this stage as well as for transposition, for example to ensure that non-controversial technical aspects such as transitional provisions are drafted so as to avoid problems at the implementation stage. Departments with a particularly heavy load of EU regulations, for example DEFRA which is responsible for the environment as well as agriculture, need the capacities and resources to do a consistently good job.

Box 7.1. Comments from the 2002 OECD report: Transposition of EU-origin regulations

The common-law-based United Kingdom approach to detail and precision is sometimes at odds with the civil-law style of EU regulations. British implementation of EU directives is also often accused of ‘gold-plating’ EU directives. This critique is sometimes focussed on the sheer length of the directives when implemented into United Kingdom law. This “enlargement” of the directives, however, may also be due to British practice of writing penalties and sanctions into the law and of complementing directives with guidance to provide the regulated with as much certainty as possible (e.g. examples of the types of behaviour that would be considered in compliance or not with the regulation).

Recommendation 7.3. Consideration should be given to how departments, especially those with a heavy EU workload, can be better supported in the management of EU regulations.

The United Kingdom is one of the few EU member states to require ex ante impact assessment of EU regulations, but the approach could be strengthened. The United Kingdom requires *ex ante* impact assessment of EU regulations to inform decision making throughout the process, from establishing the negotiating position in the European Council through to deciding on the best way to transpose and implement the directive in the United Kingdom. Its efforts in this regard need to be encouraged. It is not clear that the approach works well in practice.

Recommendation 7.4. The BRE should consider monitoring the application of impact assessment to EU regulations, in order to identify the issues that need attention.

Monitoring of transposition by departments is fragmented and lacks formality. Monitoring is perhaps not strong or systematic enough to capture emerging issues. Transposition rates are monitored by the Cabinet Office and the BERR Europe team (responsible for Single Market policy) – not the BRE. The Cabinet Office keeps in touch with departments and informs the European Commission when directives have been transposed. No single central record is kept of transposition rates. There is no dedicated page on departmental websites for EU regulations and how they are to be transposed.

Recommendation 7.5. The United Kingdom should consider whether a more formal approach to monitoring transposition could help in improving transposition rates.

The United Kingdom is commendably active at the EU level, but it is such a large agenda that the approach could benefit from prioritisation. The issue of impact assessment, by the European Commission as well as at national level, should be a priority, alongside the current focus on reducing administrative burdens. Encouraging the European Parliament and the European Council to take a greater interest in Better Regulation is also important. The European Council is of course made up of United Kingdom and other member state representatives, so more effort might be needed to ensure that important Better Regulation issues embedded in draft texts for Council approval are vigorously defended. A strong forward look mechanism to catch upcoming EU issues is important.

Recommendation 7.6. Actions to help the development of Better Regulation at EU level should be prioritised.

It should be noted that this recommendation is being given effect. The government's April 2009 statement includes, among the key actions to reinforce better regulation in support of economic recovery, a commitment to "working closely with EU partners to further embed the EU Better Regulation agenda and to ensure that current pressures on business are taken into account when new European Regulation is being considered."

Background

General context

The United Kingdom estimated the proportion of EU-origin regulations to be around 40% in 2002 (OECD, 2002). It is now estimated at around 50%, based on calculations for the baseline to the simplification plans, more in some areas such as health. Government lawyers consider that their workload is increasing due partly to more EU-origin regulations. The perceived increasing weight of EU-origin regulations was a recurring comment to the OECD team. Available data does, however, need to be cautiously interpreted, for example taking account of how EU-origin regulations are transposed into national regulations.

Negotiating EU regulations

Institutional framework and processes

A longstanding institutional structure supports the process inside government. The European and Global Issues Secretariat of the Cabinet Office, supported as necessary by the Cabinet Office Legal Advisers (COLA) orchestrates the process and co-ordinates collective agreement among ministers when this proves necessary. The Cabinet Office works jointly with the BRE (Europe team) to deliver the government's policy for the management of EU origin regulations. Departments are also supported by their Better Regulation unit (large departments that have to deal with significant amounts of EU regulations such as DEFRA may have more specialist units in place as well). There is a Cabinet committee (the NSID[EU] Committee) to get collective agreement on EU issues, (e.g. negotiating positions, transposition).

The role of the parliament

The parliament cannot directly amend proposals from the EU. However, the co-ordination of UK government positions for the negotiation of EU regulations is a joint responsibility of the government and the parliament. Scrutiny committees of both houses must clear the government's position on proposals before the government can vote on them in the EU Council of Ministers. The parliament can therefore exert influence on the government's position by refusing to clear scrutiny (imposing a scrutiny reserve). Several parliamentary committees play a role in the process:

- The House of Commons Select Committee on European Legislation examines all draft European Commission proposals for their legal and political importance. Debate mostly takes place in one of the associated three European standing committees.
- The House of Lords Select Committee on the European Communities and its six subject-orientated subcommittees examine all draft European Commission proposals.
- The Joint Committee on Statutory Instruments comments on the legal accuracy of every piece of secondary legislation that transposes an EU directive.
- The House of Lords Merits of Statutory Instruments Committee is the only parliamentary committee to consider whether the transposition of EU-origin legislation has implemented it appropriately, for example in a way that is effective but creates the least burden on business or the enforcement agency.

Ex ante impact assessment (negotiation stage)

The government's policy is to treat EU regulations in the same way as national regulations. Impact assessments are therefore required for proposed EU regulations in order to fix the UK negotiating position (impact assessment guidance and the EU transposition guide underline this). Officials are encouraged to start work on an impact assessment of a proposed European Commission directive as soon as it is adopted. The impact assessment must be attached to the letter from the lead minister to the relevant Cabinet committee, when it seeks clearance for the government negotiating line in Brussels.

Transposing EU regulations

The Davidson Review: improving transposition policy

There has been criticism from business for many years that government handling of transposition puts it at a competitive disadvantage in Europe. This was picked up in the 2002 OECD review. Complaints have centred on “regulatory creep” (actions that add unnecessarily to the burden of regulation), such as gold plating (implementation that goes beyond the requirements of a directive), unnecessarily early implementation, and keeping higher ranking regulations in place. The government responded in 2005 by launching a review to examine the existing stock of EU origin regulations, and to identify measures where unnecessary burdens could be reduced or the system simplified.

The Davidson Review was published in November 2006. It found a number of areas for improvement although it also concluded that business was often complaining about the underlying policy, rather than the regulation giving effect to the policy, and that gold plating was not as widespread as claimed. The report made a number of recommendations which the government accepted, including:

- Specific simplification proposals in ten areas of legislation, including consumer sales, financial services, transport, food hygiene and waste legislation. Most of these recommendations are now being addressed in departmental simplification plans.
- General recommendations to promote best practice in transposition.

Institutional framework and processes

Responsibility lies with each department. The Davidson Review led to a comprehensive revision of the government’s transposition guide for officials which incorporated most of the recommendations.² The guide is also intended to help external stakeholders including citizens “to understand government policy on implementation and hold departments to account”.

Box 7.2. Transposition guide

The guide provides a transposition checklist and action tree. In fact, it covers both negotiation and transposition, and underlines the following points:

- Start considering implementation issues early on (when the European Commission is developing a proposal, or at the latest when it is being negotiated in the European Council). It is too late once a directive has been agreed in Council and must be transposed.
- Carry out an impact assessment for the final version of the UK negotiating position, showing risks, costs and benefits.
- 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 stakeholders. Any gold-plating must be explained in the impact assessment and will need to be brought to the attention of the BRE and (if it imposes a significant burden) be cleared by the PRA).
- Identify those departments, agencies and external stakeholders which have an interest in the policy from the outset and co-ordinate their involvement in the negotiation and implementation phases.

- Do not pre-empt upcoming EU regulations by legislating in the same area.
- Encourage the European Commission to publicise its action plans and roadmaps so they reach a wide range of stakeholders. Encourage UK stakeholders to engage with EU institutions. Check whether the European Commission is producing an impact assessment that considers a range of policy options including alternatives to legislation, and that the risks of action versus inaction have been weighed up.
- Follow the principles of risk-based enforcement set out in the Hampton Report.

Legal provisions and the role of the parliament

Under the European Communities Act 1972, EU law, including legislative instruments made under the EU treaties such as directives and regulations, and decisions of the European Court of Justice, are given full effect in UK law and supremacy over other UK laws. Legislation to implement EU obligations in the United Kingdom is generally made either through acts of the parliament, or through secondary legislation made by ministers under this act. The parliament has a potentially important role, through relevant committees and other processes in the scrutiny of regulations used to transpose EU-origin regulations.

Ex ante impact assessment (transposition stage)

Once a directive has been adopted, the original impact assessment must be updated.

Monitoring transposition

Speed of transposition

The government underlines that its policy is to transpose on time. There is, however, no central monitoring of transposition, and no record is kept of transposition rates. The BRE will intervene if it considers that the lead department is not taking the most efficient approach. Other departments may intervene as part of the Cabinet Committee clearance process. BERR and the Cabinet Office co-ordinate work across government departments to deliver the EU internal market transposition targets. The Cabinet Office receives a list of EU directives for which the transposition deadline is approaching. The BRE contacts departments to ensure that they are on track to meet the Internal Market transposition delivery targets.

Box 7.3. United Kingdom performance in the transposition of EU directives

Overall transposition deficit

The latest EU Internal Market Scoreboard which considers internal market directives ranks the United Kingdom 6th (together with Finland and France) among the 15 original member states, with a transposition deficit of 0.9%. This is above the EU-15 average of 0.85%.

Performance in specific policy areas

The level of transposition in the United Kingdom in terms of adopted directives is particularly low in the policy field of competition, as well as energy, transport, employment and social affairs. For directives in force, competition no longer shows up as a problem, but environment appears as a weak spot.

* www.berr.gov.uk/europeandtrade/europe/enforcing-singlemkt-rules/Transpositioneudirectives/page46228.html

Table 7.1. The United Kingdom’s performance in transposition of internal market directives over time

United Kingdom	Nov-97	May-98	Nov-98	May-99	Nov-99	May-00	Nov-00	May-01	Nov-01	May-02
Transposition deficit as % of internal market directives	4.6	3.8	3.8	3.3	2.8	3	2.7	3.3	2.8	1.5
	Nov-02	May-03	Jul-04	Jul-05	Dec-05	Jul-06	Nov-06	Jul-07	Nov-07	Jul-08
	1.4	1.5	1.2	1.4	1.4	1.3	0.7	1.2	1	0.9

Correlation with national regulations

Since November 2001, following a request from the parliament, UK regulations enacting EU regulations must be accompanied by a transposition note which explains how the government is transposing the main elements of the relevant EU directive into UK law. Where possible, officials are encouraged to make direct cross-references between the articles of the directive and the specific clauses of UK regulation, preferably listing the articles of the directive in one column and the UK regulation that transposes it in the corresponding row in the next column. This is similar in form to correlation tables requested by the European Commission. UK transposition notes are sometimes used as correlation tables and sent to the European Commission with the implementing legislation.

Transposition notes are published on departmental websites. Judging from a random sample review of departmental websites, transposition notes are fairly easy to find, but each department has its own approach and does not necessarily follow the general guidance.³

Double banking

The transposition guide advises officials to avoid “double-banking” *i.e.* when EU legislation covers the same ground as existing domestic legislation, though possibly in different ways and to a varying extent. Usually such parallel jurisprudence is dealt with by changing the relevant national legislation simultaneously with implementation of the new directive. In the United Kingdom however, the alternation or abolition of existing legislation is sometimes only possible by passing this as separate piece of legislation that has to go through the parliament. Government priorities for passing other bills through the parliament has led to the simultaneous existence of UK and EC laws, also called “double-banking”. BRE account managers will discuss potential double banking issues with colleagues in departments working on transposition.

Goldplating

The transposition guide also explains what counts as goldplating and how to avoid it. In addition, it requires that impact assessments refer to any goldplating. “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 goldplating must be explained in the impact assessment and needs to be brought to the attention of the Better Regulation Executive for specific clearance by the Panel for Regulatory Accountability”.

Interface with Better Regulation policies at the EU level

The United Kingdom has an active policy to work with the European Commission, the European Parliament and other member states to address the quality of the stock and flow of EU regulation, and to support and shape the EU's own policies for Better Regulation such as impact assessment. The United Kingdom encouraged the European Commission to set a 25% EU burden reduction target by 2012, and helped to identify forty regulations for attention (from simplifying the payments system for the Common Agricultural Policy, to reforming social legislation for European road transport). Efforts have also been directed at implementation in the national context. The 2007 departmental simplification plans show how departments are seeking to reduce burdens of existing legislation originating from the EU. Most recently, the BRE has published 25 ideas to improve EU law to contribute to the development of an EU administrative burden reduction programme.⁴

The BRE seeks to draw generic issues together, as well as highlighting specific issues for the attention of the European Commission. Otherwise departments go their own way. Some departments with a large EU interface are very active.

Box 7.4. The contribution of one department (DEFRA) to Better Regulation at the EU level

DEFRA's administrative burdens

DEFRA estimates the total reduction in administrative burdens between 2005 and 2010 required to meet its net 25% domestic target is GBP 114.5 million. These include for example, UK implementation of recently adopted EU regulations such as REACH (regulation on chemicals and their safe use), as well as regulations under negotiation such as the draft Soil Framework Directive.

The EU context for administrative burdens

DEFRA is contributing to ongoing EU discussions on the European Council commitment to reduce administrative burdens by 25% by 2012. For example, environment is one of the 13 priority areas measured by the European Commission. In this area, DEFRA estimates that a large part of the United Kingdom's environmental administrative burdens derives from five existing EU directives:

- Integrated pollution prevention control 1996 (96/61/EC – DEFRA lead).
- Waste electrical and electronic equipment 2002 (2002/96/EC – BERR lead).
- End of life vehicles 2000 (2000/53/EC – BERR lead).
- Environmental impact assessment 1997 (97/11/EC – DCLG lead).
- Control of major accident hazards 2003 (2003/105/EC – HSE lead).

The way forward

Existing as well as new EU regulations need to be tackled in the environmental and other fields. It is important to find smarter ways of “exploiting the relationship between Better Regulation policies and successful environmental outcomes”. This must take account of the increasing complexity of relationships between different measures aimed at tackling climate change. The United Kingdom's Climate Change Simplification Project (now the responsibility of the recently created Department for Energy and Climate Change) is one approach, which addresses three key instruments – the EU emissions trading scheme, climate change agreements, and the proposed Carbon Reduction Commitment. The aim is to eliminate overlap, simplify existing legislation, and reduce burdens to a minimum.

Making progress on reducing the administrative burden from EU environmental legislation necessitates further co-operative work between member states and the Environment Directorate-General. Co-operation has started between the Environment Directorate-General (which has established some administrative support) and member states, to examine the stock of legislation in order to remove unnecessary burdens. It would be helpful if the Environment Directorate-General could draw up formal proposals to structure this co-operation, for example, through arrangements to share good practice. This could also help to develop a longer term view of the most effective approach to EU environmental legislation. The Network of European Environmental Agencies, in which the United Kingdom is represented by the Environment Agency, is also active in this regard. The United Kingdom experience underlines the need to bring together a broad group of experts to share best practice. The EU High-Level Group on Better Regulation should also be engaged. Last but not least, the European Parliament's engagement is also needed.

Notes

1. Not to be confused with the generic use of the term “regulation” for this project.
2. www.berr.gov.uk/files/file44371.pdf.
3. The DEFRA website puts its transposition notes with the relevant impact assessments. The two-column format is not generally respected. The Department of Health website also has transposition notes on the same webpage as the relevant impact assessments. The BERR website has its own transposition guide. Transposition notes can be found with the relevant impact assessments, but are sometimes hard to find. The transposition notes respect the column format.
4. www.berr.gov.uk/files/file47148.pdf.