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ARTICLES

Transposing European Union Law in the United Kingdom: Administrative Rule-Making, Scrutiny and Better Regulation

Robert Thomas and Gary Lynch-Wood*

The obligation of the Member States of the European Union (EU) to transpose EU law, in particular directives, into their own national legal systems can present a challenge for national governments. By considering the transposition of EU legislation in the United Kingdom (UK), this article examines the constitutional, legal and administrative aspects of the transposition process. In recent years, there has been debate in the UK as to whether or not there is over-implementation of EU law. By situating this debate within the broader context of the better regulation agenda, which has developed at both the national and EU level, the article examines the evidence whether or not the UK over-implements EU law. In particular, the article considers the recent report of the UK Government's Davidson review into the implementation of EU legislation and its implications.

1. Introduction

The transposition of EU law into national law is a defining feature of EU membership. After all, the EU institutions are themselves only responsible for administering a comparatively small amount of EU law. In the EU's system of indirect administra-

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tion, considerable weight is placed on the ability of Member States to administer the many public law functions over which the EU has the ability or competence to legislate. Despite its length and complexity, the EU's law-making procedure is only part of the broader process for implementing EU law; in many cases, and particularly with regard to directives, Member States must transpose and implement EU law in their own national legal systems. Effective and timely domestic implementation is essential to ensuring that EU law is capable of being enforced equally in each Member State, that Member States fulfil their obligations under the Treaties and that EU citizens are able to rely upon the protections given to them through such laws. While the EU Commission can institute infraction proceedings against a Member State for failing to transpose a directive, much trust inevitably resides in Member States. Given their different legal cultures and internal administrative structures, each Member State will naturally transpose EU law in its own particular way.

The transposition exercise raises a number of important questions for all Member States: how exactly are EU obligations to be transposed into national law? How do Member States approach transposition? To what extent, if at all, is there either over- or under- implementation of EU law? And what is the best way to ensure that transposition is effective and accurate? Such questions have arisen recently in the UK where the transposition of EU law has emerged as a discrete political issue and where also the appropriate level of EU membership remains a contested and at times politically divisive topic. From one perspective, the transposition of EU law has been perceived as a problem precisely because transposing measures may go further than is necessary to meet EU legal obligations. Such over-implementation, or 'gold-plating', may impose additional costs on UK businesses and put them at a competitive disadvantage to their continental counterparts. From a different perspective, it has been argued that the transposition of EU law may result in under-implementation, thereby weakening regulatory programs, the effectiveness of EU law and protection for individuals.

This article examines the transposition of EU law in the UK and considers the debate over transposition in the UK.[1] This topic raises a number of interrelated themes. First, there are the UK's domestic constitutional arrangements for transposition. As a parliamentary democracy without a written constitution, the obligation

[1] For previous treatments, *see* T. Daintith (ed.), *Implementing EC in the United Kingdom: Structures for Indirect Rule* (London, Chancery Law Publishing, 1995); T. Daintith and A. Page, *The Executive in the Constitution: Structure, Autonomy and Internal Control* (Oxford, Oxford University Press, 1999), pp. 264-268 and 280-285. For recent treatments of transposition in other Member States, *see*, e.g., R. Lampinen and P Uusikylä, 'Implementation Deficit – Why Member States Do Not Comply with EU Directives' (1998) 21 *Scandinavian Political Studies* 231; P. Bursens, 'Why Denmark and Belgium have Different Implementation Records: On Transposition Laggards and Leaders in the EU' (2002) 25 *Scandinavian Political Studies* 173; E. Mastenbroek, 'Surviving the Deadline: the Transposition of EU Directives in the Netherlands' (2003) 4 *European Union Politics* 371; T. van den Brink, 'Implementing European Union Law in the Netherlands: the Current System, its Limitations and Possible Alternatives' (2006) 12 EPL 111.

on the UK Government to transpose EU law is not to be found in any over-arching higher constitutional requirement but in the statute, the European Communities Act 1972, passed to give effect to UK membership of the EU. The focus of attention here has often been the clash and subsequent accommodation between domestic constitutional principles and EU membership: the journey from 'UK Parliamentary sovereignty v. the supremacy of EU law' to 'UK Parliamentary sovereignty subject to EU membership' is well-known.[2]

Set against this constitutional foreground, the actual processes through which the UK for the most part achieves transposition – secondary legislation, being the great mass of detailed rules made by officials within government departments to give effect to their Ministers' policy objectives – may seem something of a backwater even to administrative lawyers.[3] However, administrative rule-making now comprises the principal source of administrative law; in a legal system that has been increasingly 'statutorified', the transposition of EU law into the domestic legal system represents a 'double statutorification': rules agreed at the EU level need to be implemented into national law through further rules.[4] The UK's administrative rule-making processes utilised to transpose EU law itself raises significant issues: the guidance provided to officials concerning transposition; the degree of consultation appropriate; whether officials should merely 'copy-out' the EU text or 'elaborate' upon it; the adequacy of domestic political processes for scrutinizing national law that transposes EU law; and the role of the courts.

Moreover, as a state that has since 1998 pursued the devolution of power to Scotland, Wales and Northern Ireland, the constitutional framework for transposition within the UK is more complex than might at first appear. With devolution and the establishment of a Scottish Executive, Welsh Assembly Government and the Northern Ireland Executive, transposition is no longer the sole preserve of Whitehall.[5] What are the exact divisions of responsibility for transposition within the UK's multi-layered polity, including financial penalties for non-implementation? And how is transposition handled by the devolved administrations and with what degree of consultation with Whitehall?

Secondly, the transposition of EU law in the UK needs to be situated against the backdrop of the current regulatory reform movement or the 'better regulation' agenda. At the centre of this agenda is the recognition that while effective

[2] *See*, e.g., P.P. Craig, 'Sovereignty of the United Kingdom Parliament after *Factortame*' (1991) 11 YBEL 221; D. Nicol, *EC Membership and the Judicialization of British Politics* (Oxford, Oxford University Press, 2001).

[3] M. Taggart, 'From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55 UTLJ 575.

[4] On 'statutorification', *see* G. Calabresi, *A Common Law for the Age of Statutes* (Cambridge, MA: Harvard University Press, 1982).

[5] 'Whitehall' is shorthand for the UK's central government departments located in central London.

and well-focused regulation can play a vital role in correcting market failures, promoting fairness and increasing competition, inefficient and over-burdensome regulation can impose significant costs without improving regulatory outcomes. The EU itself has in recent years increasingly come to emphasize the importance of better regulation and the UK has, along with other Member States, been a prime mover in this context. While this agenda has various dimensions, it has an obvious connection with the transposition of EU law as over-implementation can add significantly to the regulatory burden. Guarding against and removing unnecessary over-implementation of EU legislation is an important element of the UK Government's better regulation agenda.

This second theme is closely linked to the third: the Government's handling of the transposition of EU law as both an administrative and political issue. The UK's transposition record has been criticized as mixed with some transpositions being poorly organized leading to delays and unsuccessful implementation. The Government has also received political criticism for its approach towards transposition. In particular, successive UK governments have faced repeated claims from the business sector that in implementing EU law, they have gone further than is required by EU law. However, despite the frequently voiced concerns by UK business groups that the UK gold-plates EU law and implements more thoroughly than other Member States, the issue of whether or not the UK does in fact over-implement EU law has not until recently been addressed in a systematic way; allegations of gold-plating have not usually been underscored by persuasive empirical data. While a number of studies of the transposition of EU law have been undertaken, it has not been until the Davidson review published in 2006 that the Government has specifically sought to ascertain whether or not over-implementation occurs.[6] The principal conclusion of the Davidson review was that inappropriate over-implementation may not be as big a problem in the UK as is sometimes alleged. To appreciate the report and to assess its implications, the issue of transposition needs to be addressed first.

The argument of this paper – that the UK's performance in transposing EU law has improved and that over-implementation is generally avoided – may appear to some as complacent. However, while a detailed consideration of administrative practice will reveal some examples of poor transposition, it will also indicate that the UK Government has sought to improve the transposition of EU law. The importance which the Government places on avoiding over-implementation is now backed up by greater Parliamentary oversight. This is not though to imply that

[6] Department for Trade and Industry, *Review of the Implementation and Enforcement of EC Law* (London, DTI, 1993); Cabinet Office, *Improving the Way the UK Handles European Legislation: Pilot Quality Assurance and Transposition Conference* (London, Cabinet Office, 2002); R. Bellis, *Implementation of EU Legislation: An Independent Study for the Foreign & Commonwealth Office* (London, Foreign & Commonwealth Office, 2003); National Audit Office, *Lost in Translation? Responding to the Challenges of European Law* (2005-06 HC 26); N. Davidson, *Davidson Review: Implementation of EU Legislation* (London, Better Regulation Executive, 2006).

UK transposition cannot be improved. In this respect the recommendations of the Davidson review require consideration.

The paper is organized as follows. The first section examines the nature of transposition, the place of transposition within the UK's constitution and government policy and practice as regards transposition. The second section examines existing constitutional mechanisms for scrutinizing transposing measures whereas the third section considers the policy debate concerning better regulation and its significance as regards the transposition of EU law. The last substantive section discusses the conclusions and implications of the Davidson review.

2. UK Transposition

The Transposition Exercise

To appreciate better the transposition of EU law, it is important to understand the nature of the transposition exercise itself. Directives are, of course, binding as to the result to be achieved but leave to the Member State the choice of form and methods of implementation.[7] However, the drafting quality of directives and other EU laws may, for various reasons, be less than perfect. The inherent difficulty of effective rule-making in combination with the inevitable political deals and compromises struck between Member States, the translation of texts into various languages, the laborious and complicated decision-making procedures, the influence of different national interests and the lack of a single expert drafter throughout the process may produce texts which are vague or even of poor and indifferent quality.[8] To this must be added the differences in legal culture between common law and Continental systems. From the UK legal tradition, which typically prioritizes precision in statutory drafting, EU law-drafting has often been viewed as lacking in 'precision … there are everywhere holes that judges have to fill in.'[9] In addition, much of the rules produced are of a technical and complex nature. The EU institutions have been undertaking work to improve the quality of their legislation. In particular, in 2003 an inter-institutional agreement on better law-making committed the EU institutions to improving the quality of EU law by promoting simplicity, clarity

[7] EU Treaty, Art. 249.

[8] *See*, e.g., R. Barendts, 'The Quality of Community Legislation' (1994) 1 *Maastricht Journal of Comparative Law* 101; A.E. Kellermann, 'Proposals for Improving the Quality of European and National Legislation' (1999) 1 *European Journal of Law Reform* 7; H. Xanthaki, 'The Problem of Quality in EU Legislation: What on Earth is Really Wrong?' (2001) 38 CML Rev 651.

[9] *Bulmer Ltd* v. *Bollinger SA* [1974] Ch 401, 411 (Lord Denning MR).

and consistency in legislative drafting.[10] Nevertheless, Member States may have to transpose EU law that is ambiguous.

Transposition requires active work by the national government if the directive's stated objectives are to be achieved and often raises a number of complex administrative questions: how is the directive to operate within an established administrative context? How is it to be implemented and enforced, with what level of resources and within what time-frame? How are complex and technical provisions in a directive to be implemented? How are ambiguous and undefined provisions, perhaps the result of political compromises during negotiation, to be clarified and interpreted? Finally, while the transposition exercise may be viewed as a technical exercise of giving effect to an EU directive in domestic law, it is usually part of the broader process of policy implementation.[11]

The transposition exercise therefore poses a challenge for UK government departments with conflicting pressures – both European and domestic – and in accommodating such pressures some balance must inevitably be struck (*see* fig. 1). In terms of European pressures, the EU Commission expects the UK, and all other Member States, to implement directives lawfully and on time; if this not does occur, then it may institute infringement proceedings. Delays in implementation pose both legal risks and potential financial penalties. At the same time, there are also domestic pressures. The Government must prepare adequately for implementation, avoid unnecessary over-implementation, co-ordinate a wide variety of views from stakeholders and also provide clarity and certainty for those individuals and businesses affected. A failure in transposition can impose costs on taxpayers and businesses, lead to protracted and administratively complex infraction proceedings, and have adverse consequences in terms of failing to achieve policy purposes. Given the nature of the conflicting pressures, it is understandable if transposition may sometimes be less than perfect.

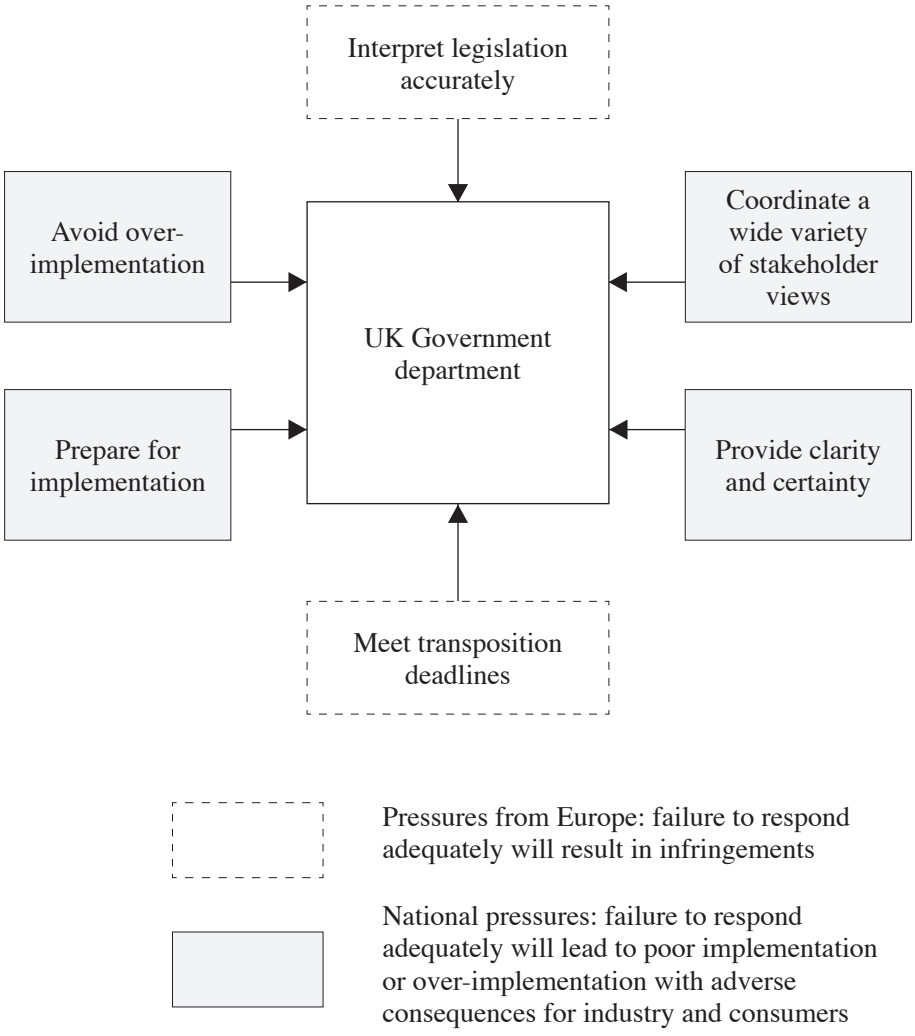
The UK's Constitutional Framework for Transposition

In the UK, EU law can be given legal effect through one (or some combination) of three ways: primary legislation; secondary legislation made under s. 2(2) of the European Communities Act 1972, which enables the government to make provision for implementing any EU obligation; or through other secondary legislation made under some other Act of Parliament which confers appropriate powers to make secondary legislation. While enacting primary legislation in order to implement EU law always remains an option and has in the past been utilised, it is used very

[10] Council of the European Union, *Inter-Institutional Agreement on Better Law-making* (12175/03).

[11] D.G. Dimitrakopoulos, 'The Transposition of EU Law: 'Post-Decisional Politics' and Institutional Autonomy' (2001) 7 ELJ 442.

Fig. 1: The challenge of transposition for UK government departments



Source: National Audit Office, *Lost in Translation? Responding to the Challenges of European Law* (2005-06 HC 26), p. 1.

infrequently largely because of immense pressures on the legislative timetable.[12] The Government has itself described the use of primary legislation for transposition purposes as an 'unlikely event' whereas a Parliamentary select committee has noted that it 'would not wish … the Government to introduce more European legislation by primary rather than secondary legislation.'[13] At the same time, it is not difficult to see the influence of political considerations in the choice of means to effect transposition: secondary legislation is a relatively low-visibility activity, an important consideration when Ministers are implementing contentious EU measures from which they may have little to gain politically. If transposition did confer political capital, then Ministers would undoubtedly use primary legislation introduced in the House of Commons with which they would be closely associated with. The vast majority of EU obligations are then given effect by secondary legislation made under s. 2(2) of the 1972 Act.

The s. 2(2) rule-making power enables a designated Minister to make regulations, or Statutory Instruments (SIs), which make provision for the purpose of implementing any EU obligation and for the purpose of dealing with matters arising out of or related to any such obligation.[14] As this provision provides the basic legal mechanism for implementing EU law which is not automatically part of UK law and, in order to do so, enables the government to amend primary legislation, it is clearly of some constitutional significance. For the most part, s. 2(2) has withstood the test of time in providing the UK with a reliable, though not always transparent, method of transposing EU law. There are though some limits to the exercise of the power: it may not be used to impose or increase taxation; to make retrospective legislation; to confer any power to make further secondary legislation or to create a new criminal offence the punishment for which exceeded certain maxima.[15] Recently, the s. 2(2) rule-making power has been broadened to enable EU obligations to be implemented not just by way of regulations but also through an order, rules or a scheme.[16]

[12] For examples of the use of primary legislation: the EU Directive on the use of animals in scientific research was implemented by the Animals (Scientific Procedures) Act 1986. The Trade Marks Directive was implemented by the Trade Marks Act 1994. 'Third Pillar' EU measures adopted concerning Justice and Home Affairs often require primary legislation. For instance, the Anti-terrorism, Crime and Security Act 2001 implemented certain EU anti-terrorism measures; similarly, the Crime (International Cooperation) Act 2003 included provisions designed to fulfil UK commitments under various EU agreements. On some occasions, EU law may be transposed through a combination of different methods, for instance, through other rule-making powers.

[13] Cabinet Office, *Transposition Guide: How to Implement European Directives Effectively* (London, Cabinet Office, 2005), para. 3.3; House of Lords Select Committee on the European Union, *Review of Scrutiny of European Legislation* (2002-03 HL 15), para. 96.

[14] European Communities Act 1972, s. 2(2).

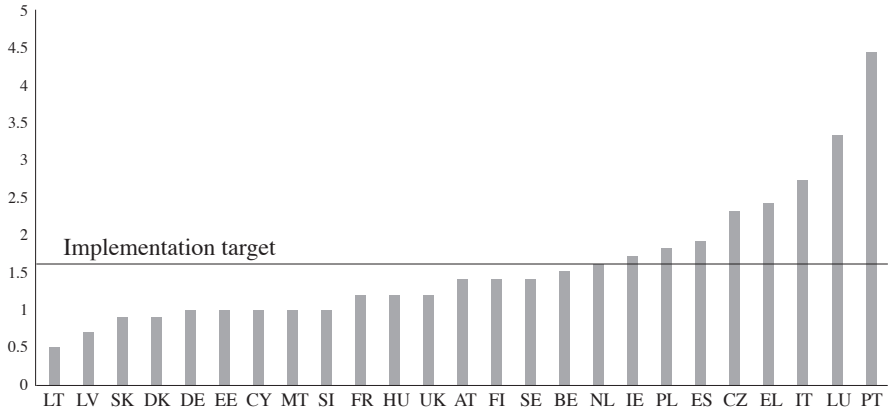
[15] European Communities Act 1972, Sch. 2.

[16] Legislative and Regulatory Reform Act 2006, s. 27.

The Volume of Transposition

The UK has a comparatively good record for the timely transposition of EU law. According to the Commission's internal market scoreboard for 2007, which examines how quickly and how well each Member State transposes internal market directives into national law, the UK was within the EU's target that Member States have a transposition deficit of 1.5 per cent or less (*see* fig. 2).[17]

Fig. 2: Internal market scoreboard 2007



One question that has been frequently asked concerns the proportion of UK laws that are passed in order to give effect to EU legislation. The Government does not itself collect reliable statistics in this regard and estimates therefore vary as to the proportion of domestic law that has its origins in the EU. For instance, it was suggested in 1998 that 77 per cent of major regulations were driven by the EU.[18] The Government's own estimate is that around half of all UK legislation with an impact on business, charities and the voluntary sector stems from EU legislation.[19] It is, however, difficult accurately to assess how many UK laws owe their origins

[17] European Commission, *Internal Market Scoreboard No. 16* (Brussels, 2007). M. Haverland and M. Romeijn, 'Do Member States Make European Policies Work? Analysing the EU Transposition Deficit' (2007) 85 *Public Administration* 757 have criticized the reliability of the internal market scoreboards; however, their research also indicated that the UK was, from their sample of five Member States, the best performing.

[18] Open Europe, *Less Regulation: 4 Ways to Cut the Burden of EU Red Tape* (London, Open Europe, 1998).

[19] Hansard HL Deb., Vol. 683 col. 184WA 29 June 2006 (Lord Triesman, Parliamentary Under-Secretary of State, Foreign and Commonwealth Office).

to the EU. UK laws that are implemented as a result of EU legislation might have been brought into UK law anyway and existing laws might adequately implement all or parts of an EU measure. There is no necessary correlation between the number of EU measures adopted over a particular period of time and the number of SIs needed to implement these measures.[20] Furthermore, while directives must be transposed into national law, in practice many EU regulations, which unlike directives are directly applicable, are nevertheless implemented in the UK through secondary legislation.

In 1998, it was suggested that out of those SIs most likely to show some European origin, EU law was responsible for less than one in six pieces of general secondary legislation in the UK.[21] More recently, the Government has noted that analysis of SIs implemented annually under the European Communities Act suggests that on average around 9 per cent originate from EU law.[22] While this issue would benefit from more detailed statistical investigation, it would appear that the volume of UK laws passed to transpose EU legislation is less than is normally thought.

Transposition: Policy and Administration

How then do administrators handle transposition? UK government policy on transposition is contained in its 'Transposition Guide'. The importance of a government-wide policy as regards transposition is that it seeks to ensure uniformity of approach by government departments. According to the guide, it is government policy is to implement EU legislation in an effective, timely and proportionate manner; over-implementation is to be avoided unless there are exceptional circumstances, justified by a strong cost-benefit analysis and extensive consultation.[23] Officials should think early about implementation, construct a transposition project plan, use a Regulatory Impact Assessment (RIA) to set out options with regard to transposition, commit appropriate resources to handling European legislation, involve legal advisers throughout the process, ensure co-ordination and consultation within government and consult with external stakeholders and encourage them to engage directly with the EU institutions.

[20] For example, 26 individual SIs were required to implement Council Directive 70/157 on the approximation of the laws of the Member States relating to the permissible sound level and the exhaust system of motor vehicles. In contrast, only one SI was required to implement Council Directive 89/654 concerning the minimum safety and health requirements for the workplace. See further V. Miller, *EU Legislation* (London, House of Commons Library, Standard Note IA/2888, 2006).

[21] E.C. Page, 'The Impact of European Legislation on British Public Policy: A Research Note' (1998) 76 *Public Administration* 803, 805.

[22] Hansard HL Deb., Vol. 683 col. 184WA 29 June 2006 (Lord Triesman, Parliamentary Under-Secretary of State, Foreign and Commonwealth Office). According to the Office of Public Sector Information, in 2006, a total of 4,134 SIs were made in the UK.

[23] Cabinet Office (2005), no. 13 *above*, paras 1.5-1.10.

A central issue is exactly how a directive is to be transposed into national law: should the transposing measure simply adopt the same wording as the directive (known as 'copy-out') or should it provide more specific detail in order to provide clarity and further guidance (known as 'elaboration')? In order to avoid accusations of over-implementation, the Transposition Guide states that the general presumption should be not to elaborate directives.[24] However, a drawback of copy-out is that it can create uncertainty for those affected by the regulations as ambiguous terms will remain undefined. Copy-out may minimize the risks inherent in transposition but it does not necessarily absolve the need to provide further detail and guidance because it may prompt questions from businesses about what the transposing regulations mean if they provide no more clarity than the directive. In turn government departments may feel compelled to provide such clarification in administrative guidance rather than in the transposing legislation.[25] At the same time, copy-out may also lead to gold-plating because the responsibility for clarifying any ambiguity will be transferred to those responsible for implementing the legislation such as the enforcement agency and industry, who may take a precautionary approach and implement further than is necessary in order to avoid the risk of any sanction.[26] On the other hand, elaboration of EU directives can be unhelpful and misleading as it gives false comfort to those affected when the elaboration can potentially be set aside by the courts.[27] Furthermore, attempts to restrict the scope for subsequent interpretation of directives through precise drafting can lead to national regulations that are excessively prescriptive and complex.

In recent years, the UK Government has come out strongly in favour of copy-out. For instance, in 2004, the Chancellor of the Exchequer announced that transposition should mirror as closely as possible the original wording of the directive except where there is a clear justification for doing otherwise, having regard to the impact on business and the workability and fit of the legislation in its domestic context.[28]

[24] *Ibid*., para. 3.13.

[25] For instance, the Strategic Environmental Assessment Directive was copied out into UK law but when implementing the relevant regulations, government departments had to agree a common interpretation of uncertain provisions in the directive, which was subsequently issued through guidance. *See* the Strategic Environmental Assessment Directive 2001/42/EC; Environmental Assessment of Plans and Programmes Regulations SI 2004/1633; Department for Transport, *Strategic Environmental Assessment for Transport Plans and Programmes* (London, DfT, 2004); Office of the Deputy Prime Minister, *A Practical Guide to the Strategic Environmental Assessment Directive* (London, ODPM, 2005).

[26] *See* L.E. Ramsey, 'The Copy Out Technique: More of a 'Cop Out' than a Solution?' (1996) 17 *Statute LR* 218.

[27] Bellis, n. 6 *above*, p. 16.

[28] HM Treasury, *Pre-Budget Report December 2004: Opportunity for All: The Strength to Take the Long-term Decisions for Britain* (Cm.6408, 2004), para. 3.40. *See also* Financial Services Authority, *Better Regulation Action Plan: What We Have Done and What We Are Doing* (London, FSA, 2005), p. 6: 'when implementing directives … our basic approach is to 'copy out' the text

There may though, as the Transposition Guide recognizes, be circumstances where copy-out is inappropriate. For instance, when implementing regulations need to fit within an existing legal regime, it might be necessary to address any overlaps through elaboration. The creation of criminal penalties may require greater precision than copy-out allows. The Transposition Guide also recommends that government departments should take advantage of derogations which keep requirements to a minimum, streamlining between new and existing domestic regimes, and making comparisons with the approaches to transposition taken by other Member States. Any major proposals to exceed EU requirements have to be approved by the Panel for Regulatory Accountability, a Cabinet Committee chaired by the Prime Minster which scrutinizes new regulatory proposals.

The Government has also sought to improve the transposition process in a number of ways. Government departments will produce both a RIA to provide an assessment of the likely impact of the transposing measure and a transposition note (TN) explaining how the directive is to be transposed into UK law.[29] The intention behind the provision of TNs is to improve the quality of transposition by giving those involved a better understanding of the transposition context and ensuring that the main elements of the directive are addressed as well as making the transposition process clearer and more transparent. Any TN should contain an explicit comment on any over-implementation that has taken place during the transposition process.[30] The government should consult on transposition.[31] Government departments also should issue guidance on transposing measures at least 12 weeks before it comes into force.[32] Providing clear guidance to affected parties can play a timely role in helping to avoid infraction proceedings for alleged incorrect enforcement or compliance. Furthermore, transposing measures should, if possible, come into force on a common commencement date so that businesses can plan for new regulation.[33]

How effective has the UK been in transposing EU law? While the UK Government has a relatively good record for timely transposition, it has been criticized by UK businesses and others for not being as effective in influencing and han-

in our Handbook, adding interpretive guidance where that will be helpful. This avoids placing unintended additional obligations on firms. We will not gold-plate EU requirements. We will only add additional requirements when these are justified in their own right.'

[29] RIAs have recently been renamed 'Impact Assessments'. On Transposition Notes, *see* Cabinet Office (2005), n. 13, Annex 1.

[30] *Ibid*.

[31] Cabinet Office Better Regulation Executive, *Code of Practice on Consultation* (London, Cabinet Office, 2005).

[32] Small Business Service, Department of Trade and Industry, *Getting Your Message Across: Advice on Drafting Guidance* (London, DTI and Cabinet Office, 2005).

[33] Small Business Service, Department of Trade and Industry, *Common Commencement Dates: Guidance for Co-ordinators and Officials* (London, DTI and Cabinet Office, 2005), p. 8.

dling EU legislation as it could be. This is in addition to criticisms that once EU negotiations have been finalized, transposition into domestic law is insufficiently planned or goes further than is necessary in order to meet European requirements. The Government itself has identified some concerns with regard to the effectiveness of transposition. For instance, a 2002 Cabinet Office study concluded that general problems encountered at the later stages of the legislative process might be avoided by greater consideration of certain factors at earlier stages.[34] The study recommended that government departments needed to ensure that their EU business was given appropriate priority within their existing resources and that policy teams should be headed by officials experienced in EU decision-making processes to ensure effective planning. As one of the causes of problems at later stages of the transposition exercise was a lack of consultation at the negotiation stages, ongoing work to improve consultation practice by Whitehall needed to be strengthened. Greater use of consultation and RIAs from an early stage would help officials negotiating directives to be more aware of the likely eventual issues of transposition and implementation. Furthermore, at negotiations at the EU level, the UK has often been represented by a junior official without sufficient support, including legal support; by comparison, preparations for a domestic Parliamentary Bill are supported by a Bill team headed by a senior administrator with lawyers involved from beginning to end. These recommendations were accepted by the Government as part of its commitment to improve the way EU proposals are formulated, negotiated and implemented.

What little empirical research has been undertaken on the transposition of EU legislation by civil servants suggests a number of themes.[35] First, officials have little discretion in the broad outlines of national transposing measures; as the transposition exercise gives little room for manoeuvre, consultation with stakeholders can be highly constrained by the imperative behind the EU legislation. While officials are aware that there may be several ways of implementing complex directives, this is not seen by officials as an opportunity to over-implement. Instead, officials view the transposition exercise more as a puzzle as to what the directive means and what are the best technical ways of bringing it into effect without at the same time provoking dissatisfaction amongst domestic stakeholders rather than as an opportunity to impose additional regulation. Secondly, the imprecision and lack of clarity of EU law compared with UK law can present a real challenge as the terminology of EU legislation can make it very difficult to understand and interpret for UK implementation. Thirdly, while officials are fully aware that the EU Commission has an interest in ensuring that EU rules are transposed into national law, the prospect of domestic judicial challenges also comprises an incentive not to exceed the scope of a directive when drafting transposing legislation.

[34] Cabinet Office (2002), n. 6 *above*.

[35] E.C. Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-making* (Oxford, Hart Publishing, 2001), pp. 61-63 and 119-120.

Transposition by DEFRA

To investigate more closely the transposition of EU law, attention might, for two reasons, be focused on the performance of the Department for Environment, Food and Rural Affairs (DEFRA). First, given its areas of responsibility – agriculture, animal welfare, the environment, food, fishing etc – it is unsurprising that DEFRA has more experience than other government departments in handling EU law; as two-thirds of its regulations originate from the EU, it is the most 'Europeanized' Whitehall department.[36] Secondly, as the National Audit Office (NAO) has recently investigated DEFRA's performance in transposing EU law, more is known about this government department's transposition record than that of other government departments.[37]

According to the NAO, DEFRA's transposition record had been mixed. The NAO's report found that in some transpositions, DEFRA's approach had been unsystematic. Poor project planning, the lack of thorough RIAs, variable engagement with key stakeholders and no monitoring of transposition deadlines by senior managers had produced delays, inconsistencies in transposition practice and poor implementation. The NAO found that in 2003 DEFRA failed to issue guidance for 80 per cent of its transposing measures.[38] Furthermore, the NAO concluded that DEFRA's record in involving competent authorities – those bodies responsible for enforcing the transposed directives, such as the Environment Agency – was mixed.

By way of illustration of sub-optimal transposition, consider the episode of the Ozone Depleting Substances Regulations, which required the removal of ozone depleting substances from fridges.[39] DEFRA considered this regulation unclear as to whether it required the removal of insulating foam in fridges and sought clarification from the EU Commission; an interim view was taken that the regulation did not extend to the removal of insulating foam. While industry had pressed DEFRA for a clear interpretation of the regulation, this did not come from the EU Commission until seven months before it came into force. As a consequence, industry had been reluctant to invest in new disposal equipment and 'fridge mountains' began to grow as local authorities had to store the fridges at a cost of GBP 46 million. According to a Parliamentary select committee, the Commission was partly to blame for its prevarication but the overwhelming responsibility for mishandling the regulation lay with DEFRA.[40] Civil servants had argued over the semantics of the regulation,

[36] DEFRA, *Delivering the Essentials of Life: DEFRA's Five Year Strategy* (Cm.6411, 2004), p. 80.

[37] See National Audit Office, n. 6. The National Audit Office scrutinizes public spending by the UK government on behalf of Parliament.

[38] *Ibid*., para. 4.12.

[39] 2037/2000/EC.

[40] House of Commons Environment, Food and Rural Affairs Committee, *Disposal of Refrigerators* (2001-02 HC 673).

overlooked how other Member States had interpreted the regulation, ignored legal advice and warnings from interested parties and failed to put in place contingency plans.[41]

The NAO did identify some positive features of DEFRA's transposition performance. These included: the early involvement of lawyers in the transposition process; the adoption of programme and project management techniques to manage the risks posed by transposition; and working with other Member States. DEFRA's own regulation taskforce had recommended in 2004 that a programme and project management approach be adopted to provide a structured environment for negotiating, implementing and delivering EU proposals; within this framework, lawyers, policy makers and regulators work together at the earliest possible stage to create new approaches to the practice of transposing of EU legislation and its implementation.[42] Overall, the NAO concluded that DEFRA could do more to enhance its performance including better planning and monitoring of transposition and more effective engagement with stakeholders. However, NAO reports, with the prospect of a hearing before the powerful House of Commons Public Accounts Committee, can provide a powerful stimulus propelling government departments into action. Following the NAO report, DEFRA stated that it had taken action to: develop a more systematic approach to engaging stakeholders; issue timely guidance; adapt its programme and project management tools to the phases and development of EU legislation; disseminate internal guidance on transposition; reinforce RIAs as a useful tool for planning transposition; improve its data on EU law; and increase senior level oversight of transposition and implementation.[43] While the NAO found some shortcomings in DEFRA's transposition record, corrective action was soon put into action to improve its implementation of EU law.

Transposition and Devolved Government

In considering UK transposition of EU legislation, mention must also be made of the position regarding transposition by the devolved administrations in the UK, namely the Scottish Executive, the Welsh Assembly Government and the Northern Ireland Executive. The devolved administrations have their own responsibilities to

[41] In response, the government denied mishandling the regulation and argued that the uncertainty arose from the wording of the regulation; DEFRA considered that requiring industry to recover CFCs from fridges without an agreed interpretation would have led to accusations of 'gold-plating.' *See* House of Commons Environment, Food and Rural Affairs Committee, *Disposal of Refrigerators: Government's Reply to the Committee's Fourth Report of Session 2001-02* (2001-02 HC 1226).

[42] DEFRA, *Regulation Taskforce* (London, DEFRA, 2004), para. 7.19.

[43] *See* House of Commons Public Accounts Committee, *Lost in Translation? Responding to the Challenges of European Law* (2005-06 HC 590), ev. 14-15. *See also* HM Treasury, *Treasury Minutes on the 27th Report from the Committee of Public Accounts 2005-06* (Cm.6775, 2006).

transpose EU legislation that falls within their devolved areas of responsibility.[44] Full UK transposition of an EU obligation that concerns the responsibilities of the devolved administrations may then require transposition by the UK Government as well as the devolved administrations. While there may be differential transposition between Whitehall and the devolved administrations, it is apparent that in many instances, transposition by the devolved administrations will, for various reasons, closely parallel that of Whitehall: the limited discretion available to the devolved administrations; opposition from Whitehall toward differential implementation by the devolved administrations; a tendency to play safe in the face of state liability; and a pragmatic decision to let the Whitehall machine take the strain.[45]

Given the need to ensure compliance with EU law, such 'devolved transposition' is in practice managed by the Concordat on Co-ordination of European Union Policy, an inter-institutional agreement between the UK government and the devolved administrations.[46] Under the concordat, the lead Whitehall department must formally notify the devolved administrations of any new EU obligation which concerns devolved matters; the devolved administrations must then consider how the obligation is to be implemented and enforced in consultation with the lead department.[47] Devolved administrations do not then have any formal voice in the EU decision-making process but rely on consultations with Whitehall. However, while Whitehall should consult with devolved administrations, it is not apparent that this is always the case. In 2002, the Government noted that traditional systems of consultation were not as robust as they might be and that there was scope for this to be improved significantly.[48] Given the emphasis within the concordat on confidentiality regarding consultations between Whitehall and the devolved administrations, it is difficult to assess the extent to which devolved interests are taken into account as required by the concordat.[49]

If the devolved administration opts for separate implementation of the EU obligation, then it must consult with the Whitehall department on its proposals

[44] Scotland Act 1998, s. 57 and Sched. 8, para. 15; Government of Wales Act 1998, s. 106; Government of Wales Act 2006, s. 59. The position as regards the Northern Ireland Executive is that the government departments of the Executive have been designated, under the European Communities Act 1972, s. 2(2), for the purpose of implementing EU law.

[45] *See* House of Lords Select Committee on the Constitution, *Devolution: Inter-Institutional Relations in the United Kingdom* (2002-03 HL 28), paras 180-184; R. Rawlings, *Delineating Wales: Constitutional, Legal and Administrative Aspects of National Devolution* (Cardiff, University of Wales Press, 2003), pp. 435-437; Scottish Parliament European and External Relations Committee, *Report of an Inquiry into the Scrutiny of European Legislation* (Session 2, SP Paper 783, 2007), paras 45-52.

[46] *See* generally R. Rawlings, 'Concordats of the Constitution' (2000) 116 LQR 257.

[47] Deputy Prime Minister, *Concordat on the Co-ordination of European Policy* (Cm.5240, 2001), paras B4.16-B4.17.

[48] Cabinet Office (2002), n. 6 *above*, p. 3.

[49] Scottish Parliament European and External Relations Committee, n. 46 *above*, para. 30.

'to ensure that any differences of approach nonetheless produce consistency of effect and, where appropriate, of timing.'[50] Even where transposition does not fall within devolved matters, the Whitehall department will need to liaise closely with the devolved administrations concerning implementation particularly if the EU obligation touches on areas which fall within devolved responsibilities.[51]

As regards infraction proceedings, the responsibility for any financial penalty will fall to the devolved administration if it is responsible for failing to implement an EU obligation that falls within its devolved responsibilities.[52] In practice, devolved administrations tend to wait and see how the Whitehall department intends to transpose EU measures and then use this as their template for their own implementing measures. This practice may though delay effective and timely transposition.[53] It has therefore been recommended that Whitehall government departments should encourage the devolved administrations to transpose EU obligations in parallel rather than sequentially through improved co-ordination earlier in the transposition process and greater monitoring of devolved administrations to ensure transposition for the whole of the UK will meet Commission deadlines.[54]

3. Scrutiny of Transposition Measures

What forms of external scrutiny are UK laws that transpose EU legislation subject to? Here it is appropriate to consider the three principal forms of external scrutiny: consultation; judicial control; and parliamentary control.

Consultation

While the Government is not obliged to consult on transposing measures, it will normally do so.[55] However, the utility of such consultation might be questioned.

[50] Deputy Prime Minister, n. 47 *above*, para. B4.17.

[51] *Ibid*., para. B4.16.

[52] *Ibid*., paras B4.22-B4.25.

[53] For instance, as regulations made under s. 2(2) are subject to annulment, they can become law within weeks; however, in Wales, all legislation has to go through full scrutiny, be translated into Welsh and then debated in plenary, a process that can take six months.

[54] *See* NAO, n. 6 *above*, paras 4.19-4.23; House of Commons Public Accounts Committee, n. 43 *above*, para. 8. Since the NAO report, the Department of Environment Northern Ireland and the Scottish Executive Environment and Rural Affairs Department established transposition co-ordination units, based on DEFRA's own transposition unit, in order to improve the co-ordination and monitoring of the transposition of EU legislation. See House of Commons Public Accounts Committee, n. 43, ev. 15.

[55] There are though examples of government not consulting on transposition measures, which have prompted the House of Lords Merits of Statutory Instruments Committee, *The Management of*

There is much less freedom for manoeuvre for the government when transposing EU law; it is therefore all the more important that there is adequate consultation when EU directives are being considered initially rather than just at the transposition stage.[56]

Judicial Control

What, if any, is the role of the courts as regards transposing measures? The British courts have long demonstrated their willingness to give effect to EU law by recognizing its supremacy.[57] Furthermore, the courts have traditionally been reluctant to strike down secondary legislation.[58] But what of transposing measures that go beyond the requirements of EU law? A recent decision – *Oakley* v. *Animal Ltd* – nicely illustrates legal (and political) debate over this issue.[59] This involved a directive to approximate national laws on registered designs which allowed Member States to derogate and retain in force existing legislation for designs registered under existing legislation; the UK had transposed the directive under s. 2(2) and decided to retain existing legislation.[60] The case therefore raised an issue of more general importance: can s. 2(2) be used to issue regulations which brought about a result not required by an EU obligation? At first instance, a deputy High Court judge answered this question in the negative; the option to retain existing legislation was unlawful. While the judge adopted a narrow construction of s. 2(2), the judgment was also peppered with constitutional concerns about the use of s. 2(2) redolent of past criticisms of the use (and perceived abuse) of delegated legislation.[61] According to the judge, contrary to what had been anticipated in 1972, very great use was now being made of s. 2(2) by the executive to change the law by delegated legislation with little, if any, scrutiny by Parliament, the pre-eminent

Secondary Legislation (2005-06 HL 149), para. 87 to recommend that consultation should be mandatory.

[56] *Ibid*., para. 113. At the same time, the 12 week consultation period in the UK compares favourably with the 8 week period required within the EU.

[57] *See*, e.g., *R.* v. *Secretary of State for Transport Ex p. Factortame* (No. 2) [1991] 1 AC 603; *R.* v. *Secretary of State for Employment Ex p. Equal Opportunities Commission* [1995] 1 AC 1.

[58] *See* D.G.T. Williams, 'Subordinate Legislation and Judicial Control' (1997) Pub.L.R. 77; T. ST J.N. Bates, 'The Future of Parliamentary Scrutiny of Delegated Legislation: Some Judicial Perspectives' (1998) 19 Statute L.R. 155; Taggart, n. 3 *above*, at 620-624.

[59] *Oakley Inc* v. *Animal Ltd* [2005] Eu. L.R. 713 (High Court Chancery Division (Patents Court)); [2006] 2 W.L.R. 294 (Court of Appeal).

[60] EC Directive 98/71/EC; Registered Designs Regulations (SI 2001/3949); Registered Designs Act 1949.

[61] *See* Taggart, n. 3 *above*, at 576-580 discussing Lord Hewart of Bury, *The New Despotism* (London, Benn, 1929). *See* more recently, G. Ganz, 'Delegated Legislation: A Necessary Evil or a Constitutional Outrage?' in P. Leyland and T. Woods, (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons* (London, Blackstone, 1997), p. 60.

source of constitutional legitimacy in the UK; any use of such a 'Henry VIII' clause needed to be scrutinized closely by the courts.[62]

The implications of this ruling were potentially considerable: it could have meant that the Government was unable to use s. 2(2) to exercise any similar option to retain existing legislation and that any significant policy choice in the transposition of EU law would in future require primary legislation. The status of many other s. 2(2) regulations would also have been jeopardized. In other words, a potentially positive development for those concerned about gold-plating with the financial ability to pursue legal challenges but a negative one for the Government given its interest in effective and speedy transposition and the shortage of Parliamentary time.[63] In the event, the Court of Appeal overturned the judge's construction of s. 2(2), rejecting his interpretation as too narrow, irrational and non-purposive; this provision was itself *sui generis* as it flowed directly from the UK's treaty obligations to give effect to EU law.[64] The implementation of directives, as Art. 249 of the EC Treaty itself recognizes, usually involves some policy choice; to require that such choices – elaboration of the directive – be made only by primary legislation would not only be contrary to the language of s. 2(2) but also 'practically absurd' given the pressures on the Parliamentary timetable.[65] The Court of Appeal did though accept that there were some limitations on the exercise of s. 2(2): this power could only be used for the purpose of making regulations arising out of or relating to an EU obligation; it could not therefore be used by a Minister either to amend the law without at the same time bringing into force a relevant EU law obligation or, for instance, amending the whole of contract law just because a directive related to some corner of contract law.

By reversing the somewhat adventurous High Court judgment, the Court of Appeal has confirmed the correctness of the Government's interpretation of its powers under s. 2(2). This judicial support for the *status quo* appears to have been prompted by an unwillingness for the courts to become involved in examining the (in-)appropriateness of policy choices involved in transposition and to impose any

[62] 'Henry VIII' clauses are statutory powers which enable the executive to make subordinate legislation which itself counts as if it were primary legislation and thereby enabling the executive in effect to amend primary legislation but without going through the legislative process; the labels stems from that monarch's supposed penchant for exercising absolute power. See generally Lord Rippon, 'Henry VIII Clauses' (1989) 10 Statute L.R. 205; House of Lords Select Committee on Delegated Powers and Regulatory Reform, *Henry VIII Powers to Make Incidental and Consequential and Similar Provision* (2002-03 HL 21); N.W. Barber and A.L. Young, 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty' [2003] P.L. 112.

[63] The importance of the litigation to the government is illustrated by the fact that the Government was represented before the Court of Appeal by its chief Law Officer, the Attorney-General.

[64] In particular, Art. 10 of the EC Treaty which states that Member States are to 'take all appropriate measures … to ensure fulfilment of the obligations…resulting from action taken by the institutions of the Community.'

[65] *Oakley Inc* v. *Animal*, n. 59 *above*, para. 44 (May LJ).

additional burdens on Parliamentary time. Moreover, this position also exemplifies the broader judicial approach toward delegated legislation: the courts prefer, absent some egregious error, to leave such matters to the executive and legislature. However, it is to be noted that while the courts appear unwilling to become involved in examining whether or not transposing measures over-implement European requirements, the mere prospect of a judicial challenge, with its potential for adverse publicity and delay, may nevertheless provide a strong incentive for government departments to avoid over-implementation.

Parliamentary Control

How then does the UK constitution's traditional mechanism for exerting political control over secondary legislation – Parliamentary scrutiny either on the floor of either House of Parliament or through Committee – operate in relation to national rules that transpose EU law? Where transposition is to be achieved through primary legislation, the full legislative scrutiny process comes into play, which involves full consideration by Parliament.[66] However, as noted above, this is very much the exception. By comparison, regulations made under s. 2(2) are subject to the negative resolution procedure (also known as annulment). Such a measure does not need to be approved by Parliament and can only be annulled if either House passes a resolution calling for it to be annulled within a period of 40 days after the measure was laid before Parliament.

Parliamentary control of secondary legislation transposing EU law obligations would though appear to suffer from something of a 'double-whammy': Parliament's scrutiny of both delegated legislation and of European business more generally has, for various reasons, long been recognized to be notoriously weak. Despite their importance, neither topic attracts sufficient political attention. In both areas the executive is pre-eminent and Parliament does not possess either the time or the necessary resources effectively to scrutinize the sheer volume of material produced. Parliamentary scrutiny of delegated legislation has long been recognized to be less than fully effective with Parliament acting as a bystander while the executive in effect legislates.[67] The scrutiny of EU business by Parliament has, given the importance of the EU, also been considered inadequate and compared unfavourably with the work of legislatures in other Member States, such as the

[66] On the UK Parliament's legislative process, *see* The Hansard Society, *The Report of the Hansard Society Commission on the Legislative Process* (London, Hansard Society, 1993); House of Commons Select Committee on Modernisation of the House of Commons, *The Legislative Process* (2005-06 HC 1097).

[67] *See*, e.g., S.A. deSmith, 'Delegated Legislation in England' (1949) 2 *Western Political Quarterly* 514; J.D. Hayhurst and P. Wallington, 'The Parliamentary Scrutiny of Delegated Legislation' [1988] P.L. 547; R. Baldwin, *Rules and Government* (Oxford, Oxford University Press, 1995), pp. 65-74; P. Tudor, 'Secondary Legislation: Second Class or Crucial?' (2000) 21 Statute L.R. 149; Page, n. 35 *above*, Ch. 8.

Nordic countries. While there are specialist committees in both Houses concerning European business – the House of Commons European Scrutiny Committee and the House of Lords EU Select Committee – scrutiny of European affairs tends to be seen as a minor activity whereas it should be part of the mainstream of Parliament's work.[68] Furthermore, both of these committees focus on scrutinizing EU documents and policy rather than the transposition of EU law into national law. It is not therefore surprising to discover the House of Lords EU Select Committee in 2002 noting that Parliamentary '[s]crutiny of secondary legislation implementing EU legislation … is weak and needs to be strengthened' and expressing the hope that Parliament 'do more to scrutinize the delegated legislation by which European law is implemented'.[69]

In 2003, the House of Lords Merits of Statutory Instruments Committee was appointed, in part, to remedy this deficiency. The Merits Committee scrutinizes secondary legislation and may draw a draft SI to Parliament's attention if it *inter alia* inappropriately implements EU legislation.[70] This ground provides a basis for the Merits Committee to consider whether or not a SI represents gold-plating in the UK's implementation of EU requirements. Reporting an instrument to the House is especially important in the case of instruments subject, like those adopted under s. 2(2) of the 1972 Act, to the negative resolution procedure which would otherwise be 'lost in oblivion' unless there was some process of bringing them to Parliament's attention.[71] The fact that an instrument is reported does not though necessarily mean that it will be either debated or rejected. If an instrument is debated, Parliament will only be able to reject and not revise or amend the text; in any event, Parliament only occasionally rejects delegated legislation. However, it would be erroneous to assume that this is devoid of all effect. As the former Attorney-General, Lord Goldsmith, has explained, Parliamentary committees scrutinizing statutory instruments may sound like dull bodies but 'Government lawyers who draft such instruments shake with fear at the prospect of having their instrument publicly criticised'.[72] Government departments therefore seek to avoid having any instrument reported on adversely by the Merits Committee.

[68] *See*, e.g., House of Commons Select Committee on Modernisation of the House of Commons, *Scrutiny of European Business* (2004-05 HC 465); D. Jones, *UK Parliamentary Scrutiny of EU Legislation* (London, Foreign Policy Centre, 2005); Open Europe, *Getting a Grip: Reforming EU Scrutiny at Westminster* (London, Open Europe, 2006).

[69] House of Lords Select Committee on the European Union, n. 13, para. 96. *See also* House of Commons European Scrutiny Committee, *European Scrutiny in the Commons* (2001-02 HC 152), para. 112.

[70] House of Lords Merits of Statutory Instruments Select Committee, *Committee Terms of Reference*, para. (3)(d).

[71] Hansard HL Deb. Vol. 687, col. 806, 29 November 2006 (Lord Filkin, Chairman of the House of Lords Merits of Statutory Instruments Committee).

[72] Lord Goldsmith QC, Attorney-General, *Government and the Rule of Law in the Modern Age* (LSE Law Department and Clifford Chance Lecture series on the Rule of Law, 2006) p. 20.

From its work to date, the Merits Committee has reported a small number of SIs on the basis that they inappropriately implement EU legislation. In the 2004-05 parliamentary session, the Merits Committee reported only reported one SI out of a total of 40 for inappropriately implementing EU legislation.[73] In the following session, the Committee reported three instruments out of a total of 139 on this ground.[74] Some examples might give more of a flavour of the Committee's work in this respect. In 2004, the Committee reported the Horse Passports (England) Regulations 2004, introduced to implement a directive intended to protect the human food chain and the trade in pedigree horses, on the ground that they were drafted in such a way as to require 800,000 horses to be issued with passports, whereas the total number of horses which fell into the categories to be protected was more like 210,000. The Government argued that the regulations did not in fact go beyond the requirements of the relevant directives.[75] In 2007, the Committee reported regulations that over-implemented a directive concerning the minimum level of insurance for car users for third party liability; the UK regulations specified a level of cover at GBP 1 million – in excess of the EUR 1 million required by the directive and the Government had failed adequately to explain this.[76] In another report, the Committee questioned whether DEFRA, in seeking to make good previous partial implementation of EU law, was imposing disproportionate compliance requirements.[77] Other examples in which the Committee reported SIs for inappropriately implementing EU legislation could be drawn from areas such as intellectual property and financial services law.[78]

The Merits Committee has also sought to improve the clarity of drafting of transposing measures. The Committee has noted that the practice of drafting transposing measures by reference to the originating EU instrument is unsatisfactory when the EU instrument itself is inaccessible or has been repeatedly amended.[79] Those affected by regulations (particularly those required to obey or enforce

[73] House of Lords Merits of Statutory Instruments Committee, *Special Report: The Work of the Committee in Session 2004-05* (2004-05 HL 106), para. 9.

[74] House of Lords Merits of Statutory Instruments Committee, *Special Report: The Work of the Committee in Session 2005-06* (2005-06 HL 275), para. 4.

[75] House of Lords Merits of Statutory Instruments Committee, *10th Report* (2003-04 HL 107) and *13th Report* (2003-04 HL 127).

[76] House of Lords Merits of Statutory Instruments Committee, *22nd Report* (2006-07 HL 115).

[77] *See* House of Lords Merits of Statutory Instruments Committee, *5th Report* (2005-06 HL 18) as regards the Registration of Fish Buyers and Sellers and Designation of Fish Auction Sites Regulations SI (2005/1605).

[78] House of Lords Merits of Statutory Instruments Committee, *20th Report* (2005-06 HL 99); House of Lords Merits of Statutory Instruments Committee, *13th Report* (2004-05 HL 72).

[79] For instance, the Committee has drawn attention to the Transmissible Spongiform Encephalopathies (No. 2) Regulations 2006 (SI 2006/1228) which placed enforcement responsibilities on local authority officers. The Committee expressed concern that, in order to fulfil their responsibilities, officers might need to be familiar not only with the principal Community Regulation but also with

them) should be able to understand their obligations from the face of the national instrument itself.[80]

Parliamentary oversight by the Merits Committee can occasionally combine with other forms of oversight. By way of illustration, there is the transposition of the Energy Performance Directive, which requires Member States to ensure that, when residential properties are sold, an Energy Performance Certificate (EPC) is made available to prospective purchasers.[81] Under the directive, an EPC for an individual property must be obtained every ten years; its purpose to enable prospective purchasers to appreciate the property's energy efficiency. However, the Government decided that an EPC should be obtained every time a property is sold, which might mean that the EPC would have to be updated several times during the ten year period if the property is sold several times.[82] Predictably, there were accusations that the directive had been gold-plated. For instance, the Government's own independent champion for better regulation, the Better Regulation Commission, argued that by going beyond the directive, the Government would impose additional administrative costs which were not warranted by a cost-benefit analysis.[83] The Government subsequently published a RIA to justify its policy.[84] However, the Merits Committee nevertheless concluded that the Government had failed to explain why it had gone further than required by the EU directive.[85] In response, the government initially argued that it was not gold-plating but 'green-plating' the directive; 'climate change is important enough to justify going further than European requirements'.[86] However, when the Royal Institute of Chartered Surveyors launched a judicial review challenge against the transposing measures, the Government decided to consult further on the issue and to introduce temporary provisions under which the maximum age of an EPC could be up to one year to ensure that no-one was required to produce a second EPC for the same property

28 other Regulations listed in a Schedule to SI 2006/1228, in order to be certain as to the meaning of expressions not defined in SI 2006/1228.

[80] House of Lords Merits of Statutory Instruments Committee, No. 74 (2005-06 HL 275), para. 15.

[81] Energy Performance of Buildings Directive (2002/91/EC) OJ L 1/65 4 January 2003.

[82] Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations (SI 2007/991).

[83] Better Regulation Commission, *Energy Performance Certificates and Residential Property* (London, BRC, 2007).

[84] Department for Communities and Local Government, *Regulatory Impact Assessment: Energy Performance of Buildings Directive Article 7-10* (London, DCLG, 2007).

[85] House of Lords Merits of Statutory Instruments Committee, *18th Report* (2006-07 HC 92), para. 34.

[86] Hansard HC Deb., vol. 460 col. 646 16 May 2007 (Yvette Cooper MP, Minister for Housing and Planning); House of Lords Merits of Statutory Instruments Committee, *20th Report* (2006-07 HC 102), p. 6.

before the consultation had completed.[87] Parliamentary scrutiny and tactical use of judicial review can then prompt government to reconsider over-implementation.

This is not to imply that other Parliamentary committees do not examine the implementation of EU laws that fall within their remit or that they are always critical of over-implementation. For instance, the House of Commons Environment, Food and Rural Affairs Committee has criticized DEFRA's minimal implementation of the Environmental Liability Directive on the basis that the department's own analysis had suggested that an overall public benefit could result from going further than the directive; fearful of criticisms of gold-plating, DEFRA had not been robust as it could have been in defending the environment.[88] Elsewhere, the Committee's predecessor has suggested that the department should investigate how other Member States implement directives in order to learn best practice and prevent any adverse impact on business competitiveness.[89]

There is little doubt of the value of the Merits Committee. It scrutinizes domestic laws that transpose EU legislation and notifies Parliament of any inappropriate implementation. It is though only one Committee and responsibility for considering whether or not national laws appropriately implement EU legislation is only one of its functions; overall, Parliament's role in relation to both European scrutiny and the implementation of EU law is more constrained than it should be.

4. Transposition and the Better Regulation Agenda

Better Regulation in the UK

In addition to its constitutional and administrative dimensions, there is another central aspect of UK transposition of EU legislation that deserves highlighting: its relevance to the broader regulatory reform or 'better regulation' agenda. The central thrust of this reform programme is that regulation of the private, public and voluntary sectors can be made more effective and better focused.[90] While there are constant demands for more regulation, for instance, to protect the environment, workers or consumers, poorly designed or overly complicated regulation can impose excessive costs and inhibit productivity.[91] The task of government is to ensure a

[87] House of Lords Merits of Statutory Instruments Committee, *24th Report* (2006-07 HL 129).

[88] House of Commons Environment, Food and Rural Affairs Committee, *Implementation of the Environmental Liability Directive* (2006-07 HC 694).

[89] House of Commons Agriculture Select Committee, *Environmental Regulation and Farming* (1999-2000 HC 212), para. 16.

[90] For an assessment, *see* R. Baldwin, 'Is Better Regulation Smarter Regulation?' [2005] PL 485.

[91] For a recent journalistic treatment of UK regulation, *see* R. Clark, *How to Label a Goat: The Silly Rules and Regulations that are Strangling Britain* (Petersfield, Harriman House, 2006).

proper protection while at the same making sure that the impact on those being regulated is proportionate. The underlying assumption and rationale of the better regulation agenda is that if businesses spend fewer resources on the administrative tasks involved in complying with regulation, the 'saved' resources could be more productively deployed in running the business. This would then contribute towards the long-term goal of achieving faster productivity growth. The costs imposed by regulation can be considerable. The Better Regulation Commission has suggested that complying with the information requirements of UK regulations is estimated to cost some GBP 20-40 billion per annum, which can hamper business by channelling resources away from more efficient uses and acting as a constraint on innovation, productivity and growth.[92] All regulation should therefore comply with the 'better regulation principles': proportionality; accountability; consistency; transparency; and targeting.[93] When designing regulatory schemes, governments should ensure that they are using the correct tools to achieve the desired outcomes and to ensure that benefits are maximized while the negative effects of regulation are minimized.

The better regulation agenda in the UK can be traced back to 1985 when the Government accepted the negative effects of regulation on business and the need to reduce administrative burdens.[94] Since then, the agenda has received increased impetus under the Labour Government. The better regulation 'tool-kit' now contains several tools used by government with the aim of reducing, improving and simplifying regulation: regulatory impact assessments; Regulatory Reform Orders by which burdensome legislation can be repealed; the measurement of administrative burdens of regulations; the development of simplification plans by government departments; the introduction of risk-based approaches to enforcement and implementation; and the introduction of targets to reduce administrative burdens.[95]

The Transposition Guide is also a key part of the better regulation agenda to guard against over-implementation of EU law. Furthermore, as a sizeable proportion of new legislation with a non-negligible impact on UK businesses originates in the EU, the UK government has been pressing for better regulation at European level.

[92] Better Regulation Task Force, *Regulation – Less is More: Reducing Burdens, Improving Outcomes* (London, BRTF, 2005).

[93] Better Regulation Commission, *Principles of Good Regulation* (London, BRC, 2006).

[94] *See* Baldwin, n. 90 *above*.

[95] Better Regulation Executive, *Impact Assessment Guidance* (London, BRE, 2007); Legislative and Regulatory Reform Act 2006, s. 1; HM Government, *Simplification Plan Initiatives* (London, HM Government, 2006); P. Hampton, *Reducing Administrative Burdens* (London, HM Treasury , 2005); Better Regulation Task Force, *Regulation – Less is More: Reducing Burdens, Improving Outcomes* (London, Cabinet Office, 2005), Better Regulation Executive, *Administrative Burdens – Routes to Reduction* (London, BRE, 2006); Department for Business, Enterprise and Regulatory Reform, *Next Steps on Regulatory Reform* (London, DBERR, 2007). *See also* National Audit Office, *Reducing the Cost of Complying with Regulations: The Delivery of the Administrative Burdens Reduction Programme, 2007* (2006-07 HC 615). *See* further <www.cabinetoffice.gov.uk/regulation/>.

For instance, a 2004 report by the Better Regulation Taskforce examined in detail how EU legislation could be made simpler and better.[96]

Better Regulation in the EU

Better regulation has also increasingly become a major policy area for the EU institutions since the 1990s.[97] The Treaty of Amsterdam (1995) set out the principles of good regulation to be respected at the European level while the 2000 Lisbon Council of Europe emphasized that in order for the EU to become the world's most competitive and dynamic knowledge-based economy, it had to ensure better regulation. In 2001, the Mandelkern report on better regulation suggested the implementation of an action plan for better regulation based on seven areas: impact assessment; consultation; simplification; organizational structures for better regulation; alternatives to regulation; access to regulation; and national implementation of EU legislation.[98] These recommendations were reinforced by the Commission's white paper on European governance and taken forward by the 2002 Action Plan for Better Regulation.[99] In the white paper, the Commission pledged to improve the regulatory state.[100] The Commission stated that it would simplify further existing EU law and encourage Member States to simplify the national rules which give effect to EU provisions.[101] Admitting that the EU's policies and legislation were becoming increasingly complex, the Commission stated that the EU 'will rightly continue to be judged by the impact of its regulation on the ground. It must pay constant attention to improving the quality, effectiveness and simplicity of regulatory acts.'[102]

In 2004-05, six Presidencies of the EU signed up to a joint initiative to promote regulatory reform and better regulation has moved decisively up the agendas of the EU institutions and other Member States.[103] In 2005, the European Commission took another step towards the delivery of its commitment to cut unnecessary red-tape and over-regulation. It adopted a 'strategy for the simplification of the

[96] Better Regulation Taskforce, *Make it Simple – Make it Better* (London, BRTF, 2004).

[97] *See* the Commission's better regulation website: <ec.europa.eu/governance/better_regulation/index_en.htm>.

[98] The Mandelkern Group on Better Regulation, *Final Report* (Brussels, 2001).

[99] EU Commission, *European Governance White Paper* (Brussels, 25 July 2001, COM(2001) 428 final); EU Commission, *Action Plan: Simplifying and Improving the Regulatory Environment* (Brussels, 5 June 2002, COM(2002) 278 final).

[100] European Governance White Paper, no. 99.

[101] *Ibid*., p. 5.

[102] *Ibid*., p. 20.

[103] *See* House of Lords EU Select Committee, *Ensuring Effective Regulation in the EU* (2005-06 HL 33)

regulatory environment'.[104] Focused on the Lisbon agenda objectives and anchored on a broad consultation of stakeholders and Member States, this new strategy developed a methodology for streamlining and modernizing the Community *acquis*, and contained a series of commitments. In particular, the Commission set out a simplification rolling programme of 100 initiatives covering over 220 legislative instruments to be repealed, codified, recast or reviewed over the period 2005-2008. This is designed to complement the Simpler Legislation for the Internal Market (SLIM) agenda established in 1998 designed to reduce the burden of EU legislation through simplification.

As regards the transposition of EU law into national laws, the Commission has recognized that transposition by Member States is of special interest from the better regulation perspective. In 2001, the Mandelkern report recommended that both the EU institutions and the Member States should pay more attention to the precision, clarity and coherence of European legislation during the negotiating process. This should include early and continued consideration of transposition by the Member States and a better balance between detailed and technical regulation on the one hand and national freedom of choice and form on the other.[105] More recently, the Commission has noted that any efforts it makes to simplify and improve the regulatory environment will not deliver the desired results unless EU laws are applied correctly and effectively in the Member States.[106] Alongside its role in monitoring the application of EU law by the Member States, the Commission therefore intends to take more preventive action with Member States, following-up with Member States at an earlier stage in order to facilitate correct transposition of key directives. Furthermore, Member States will need to produce correlation tables for the Commission which link directives and national rules in order to promote transparency in transposition exercises. Finally, in order to avoid gold-plating, the Commission has noted that it may be preferable to use EU regulations rather than directives as a powerful simplification tool. The use of a (directly applicable) regulation removes the scope for Member States to elaborate on the EU rules, enables immediate application and guarantees that all actors are subject to the same rules at the same time.

Gold-plating

The link between the better regulation agenda and the implementation of EU legislation is apparent: transposition of EU law beyond what is required can add to the regulatory burden on those affected. Both the UK and the EU have

[104] EU Commission, *Implementing the Community Lisbon programme: A Strategy for the Simplification of the Regulatory Environment* (Brussels, 25 October 2005 COM(2005) 535 final).

[105] Mandelkern report, n. 98 *above*.

[106] EU Commission, *A Strategic Review of Better Regulation in the European Union* (Brussels, 14 November 2006 COM(2006) 689 final), p. 9.

recognized the potentially adverse implications of the over-implementation of EU law in Member States to the broader policy agenda of improving the regulatory environment. However, the question remains: to what extent, if at all, has the UK engaged in over-implementation of EU legislation?

According to the Transposition Guide, gold-plating can arise through a variety of different ways including: extending the scope of a directive; adding in some way to its substantive requirements; substituting wider UK legal terms for those used in the directive; failing to take full advantage of any derogations which keep requirements to a minimum; providing for sanctions or enforcement mechanisms that exceed the minimum needed; and implementing earlier than is necessary.[107] Gold-plating may occur for a number of reasons: there may be pressure to preserve the existing legal framework; the language of the directive may require a certain amount of interpretation in order to be transposed into national law; an ambiguously worded directive may, for instance, need to elaborated upon in order to provide legal certainty and precision; and where a directive covers the responsibilities of more than one government department, it may be necessary to implement different parts of a directive in different ways. Furthermore, the government might decide to use the transposition of the directive to introduce other changes on which it has consulted or it might be that giving effect to the directive requires consequential policy changes to be made in other, related areas.

For many years, there have been allegations that the UK gold-plates EU legislation made by business groups, a sector not normally known for warm enthusiasm of regulation. While business has heard much from government about reducing the regulatory burden, it has been unimpressed with the lack of governmental action. One broadly held view is that the implementation of EU law is normally much more rigorous in the UK than in several other Member States and UK businesses are consequently penalized. This view has gained some currency even within the highest levels of the Government. In 2004, the former Prime Minister, Tony Blair, noted that '[t]he problem is cultural. For decades civil servants and politicians have prided themselves in dotting every i and crossing every t when legislating administrative rules. We need to change that approach to end gold-plating of European regulations'.[108] Of course, some evidence of over-implementation, as identified by reports of the Merits Committee, has already been presented. However, the Merits Committee has only been scrutinizing new transposing measures since 2003; it has not examined the bulk of existing EU sourced legislation on the UK statute book.

More recently business groups have sought to produce evidence of gold-plating. Two particular reports are worth highlighting. A report prepared for the British Chambers of Commerce in 2004 examined the elaboration of EU directives by

[107] Cabinet Office (2005), n. 13 *above*, p. 17.

[108] Tony Blair PM, Prime Minister's Speech to the Confederation of British Industry, Birmingham, 18 October 2004.

UK transposing measures to determine the extent of over-implementation of EU law.[109] The study examined 'transposition ratios', i.e. the number of words in national transposing measures divided by the number of words in the original directive; the implication being that if national measures implementing directives contain more words than the directive, then this amounts to unnecessary over-implementation. From a sample of 100 directives, the study concluded that the average UK transposition ratio was 334 per cent. In other words, the UK adds considerably more words, and perhaps a higher regulatory burden, than is necessary. As the UK's transposition ratio is higher than in other Member States, the study concluded that it over-implements EU law more than Member States. However, while the report has been said by some to provide overwhelming evidence of UK gold-plating, there are some concerns with regard to the methodology employed by the research.[110] The basic problem is that a comparison of transposition ratios does not take into account whether or not the elaboration of EU law actually increases, reduces or has no impact on the regulatory burden. EU law may need to be elaborated upon in order to provide additional detail and precision; this may lead to longer transposing measures but it does not necessarily imply an additional regulatory burden. Furthermore, UK transposition measures might also include provisions covering the devolved administrations, which may have no equivalent in other Member States.[111] Examination of transposition ratios is not therefore a reliable indicator of gold-plating.

A report prepared jointly for the Foreign Policy Centre and the Federation of Small Businesses concluded that gold plating does present a significant problem to the small business community: it takes time and money away from key wealth and job creators; furthermore, it contravenes the essence of the single market by putting UK businesses at a competitive disadvantage.[112] From an examination of the transposition of eight directives, the report noted that there had been some cases where the national transposing measure had extended the scope of the original directive, which had imposed both real and perceived costs on business. At the same time, the report also noted that where over-implementation had occurred, this could have been because it fitted better with governmental priorities or because

[109] T. Ambler, F. Chittenden and M. Obodovski, *How Much Regulation is Gold Plate? A Study of UK Elaboration of EU Directives* (London, British Chambers of Commerce, 2004). For a follow-up report on EU regulation itself, *see* T. Ambler, F. Chittenden and C. Hwang, *Is EU Regulation Good For Us? A Study of EU Regulations 2003/4* (London, British Chambers of Commerce, 2005).

[110] D. Stephen, *Regulation by Brussels? The Myths and the Challenges* (London, European Movement Policy Paper 2, 2004).

[111] Furthermore, differences in national languages may be important. For instance, the NAO, n. 6 *above*, para. 2.15 noted that the UK SI transposing the Emissions Trading Directive had more than double the number of words of the directive while its German equivalent had less; this might in part be explained by the extensive use of compound nouns in the German language.

[112] S. Schaefer and E. Young, *Burdened by Brussels or the UK? Improving the Implementation of EU Directives* (London, Foreign Policy Centre and the Federation of Small Businesses, 2006).

the policy outcome was regarded as desirable; furthermore, in several cases, the problem with the transposing measure had been a lack of clarity rather than new burdens imposed. The report concluded by recommending that the government establish an independent body to assess the regulatory burden more generally and the implementation of EU law in particular.

Whatever the criticisms of the methodology of such research, it is clear that such reports exert an influence in terms of reinforcing a perception that the UK over-implements EU legislation, a point which highlights the (party) political dimension to transposition. Spurred on by concerns within the business community over gold-plating, the main opposition party in the UK, the Conservative Party, has consistently criticised the Labour Government for over-implementing EU legislation. Given the Conservative Party's business friendly predisposition toward free market economics and the party's continuing internal divisions over European integration, the issue of over-implementation presents an unpalatable combination of interference from the EU, concerns as to over-regulation and a sense that the UK implements and then enforces EU law more effectively than other Member States.[113] The Conservative Party has therefore stated that it would stop gold-plating at its source and introduce legislation which would enable the courts to strike down existing national measures that gold-plated EU legislation. The possibility of legal action would provide a strong incentive for officials not to gold-plate and afford those affected a legal means of redress.[114] The European Communities (Deregulation) Bill proposed by Conservative Members of Parliament would then have obliged the courts to strike down any transposing measures made under s. 2(2) of the 1972 Act which either imposed a higher compliance cost or heavier sanction for failure to comply than in one or more other Member State(s). Furthermore, the Bill proposed that the courts could also declare invalid any regulations without either a time limit or sunset clause.[115]

Whether or not this proposal would have been workable is a moot point: is it possible to collect valid and comparable evidence concerning compliance costs across all Member States? Government commissioned research has concluded that it is very difficult methodologically to undertake a cross-country survey measuring

[113] Most recently, the Conservative Party's Economic Competitiveness Group has suggested that it would be possible to save GBP 14 billion per year by cutting regulation and dis-applying EU regulations affecting employment and social policy. *See* Conservative Party Economic Competitiveness Group, *Freeing Britain to Compete: Equipping the UK for Globalisation – Submission to the Shadow Cabinet* (London, Conservative Party, 2007). *See also* 'Tory Plan for Red Tape 'Tax Cut'', BBC News website, 12 August 2007; 'Tories Reopen EU Divisions with Attack on Red Tape', *The Times*, 13 August 2007.

[114] J. Tate and G. Clark, *Reversing the Drivers of Regulation: The European Union* (London, Policy Unit, Conservative Research Department, 2005), pp. 45-46.

[115] European Communities (Deregulation) Bill 2006 (HC Bill 183). Similar Bills were introduced by Conservative MPs in 2003 and 2004.

the administrative cost to business of complying with EU legislation.[116] Supposing such difficulties could be overcome, would the courts, given their reluctance to examine such issues be the most appropriate forum for making such assessments? In any event, in the UK constitution, the political party out of power stands little, if any, chance of success in ensuring that its proposals become law; the Bill did not therefore become law. However, the stance taken by the Conservative Party and the repeated allegations made by business groups that the UK gold-plates EU law did raise the political pressure on the government to make some response in order to establish whether or not over-implementation in fact occurs.

5. The Davidson Review

In 2005, the Government responded to such pressure by establishing the Davidson review of the implementation of EU legislation. The purpose of the review was to look for evidence of over-implementation in the transposition of EU legislation.[117] The review clearly saw itself as contributing to the better regulation agenda. Following a public call for evidence and responses from government departments, the review sought to determine whether or not the UK over-implements EU law. The review identified three forms of over-implementation: gold-plating, which involves extending the scope of European legislation; double-banking, which involves a failure to streamline the overlap between legislation that is currently in force in the UK and new EU sourced legislation; and regulatory creep, which is the uncertainty created by lack of clarity about the objectives or status of regulations and guidance, or over-zealous enforcement.

The Review's Findings and Recommendations

The Davidson review acknowledged that over-implementation of EU legislation is an elusive topic to pin down requiring careful research into the legislation and the policy background behind its implementation in addition to its enforcement and impact on those being regulated.[118] Furthermore, there are as many myths as

[116] Cabinet Office, *Implementation and Administrative Costs – How to Improve the Regulatory Environment for Companies* (London, Cabinet Office, 2003), p. 36.

[117] Davidson Review, n. 6 *above*. For the review's public call for evidence, see Davidson Review, *Summary of responses to call for evidence* (London, BRE, July 2006). The report's author, Lord Neil Davidson QC, was appointed in 2006 as Advocate General for Scotland, the chief legal adviser to the UK Government on Scottish law.

[118] The Davidson review therefore rejected as simplistic the 'transposition ratio' method of assessing over-implementation, as deployed by Ambler, Chittenden and Obodovski, n. 109 *above*, by a comparison of the number of words used in the national implementing legislation as divided by the number of words in the original directive.

concrete examples of over-implementation. While the review conducted detailed case-studies of the transposition of EU legislation in the UK, it noted that it was not possible to draw macro-level conclusions on the extent to which the UK over-implements EU legislation more widely, especially given the voluminous amount of EU-sourced legislation in the UK statute books. However, the review's general conclusion was that there were a number of factors indicating that over-implementation was not as big a problem as is sometimes alleged.[119] First, many allegations of gold-plating are merely criticisms of EU law; many critics express dissatisfaction with the EU measure itself rather than its transposition while others had wrongly assumed that certain UK legislation originated from the EU. This suggests, the review noted, that frequent allegations of gold-plating are often misplaced and represent concerns about other issues. Secondly, the introduction of regulatory standards that exceed the minimum requirements of EU law can sometimes be beneficial; in certain circumstances over-implementation can bring benefits as well as costs. Thirdly, for many businesses operating across Europe, what matters more is differential implementation across Member States rather than over-implementation in a specific country. Fourthly, while businesses have argued that the UK implements and enforces EU law more rigorously than elsewhere, there is little evidence to support such assertions. Fifthly, as both the OECD and the World Bank consider the UK to have one of the most favourable regulatory regimes in the EU, this is at odds with the view that the UK over-implements EU law any more than other Member States. Furthermore, few other Member States have formal, specific policies to guard against over-implementation, such as the UK's Transposition Guide.

The Davidson review did though identify some specific instances of over-implementation in ten areas including consumer sales, financial services, transport, food hygiene and waste legislation and made specific recommendations to the government to review such rules. The review noted that some factors had contributed to over-implementation in the past: the need for better regulation at the EU level; the UK legal system's predisposition toward precision in legislative drafting; and poor engagement with EU issues by the Government and regulatory bodies.

The Davidson review also made a number of recommendations with regard to improving future transposition. First, the definition of gold-plating should be extended to include situations where pre-existing UK legislation contained higher standards than a subsequent EU measure.[120] Secondly, to avoid double-banking, government

[119] The general conclusion of the Davidson review is then the same as that of the Merits Committee, which has stated that it did not think that the practice of 'gold-plating' was widespread in the preparation of statutory instruments, *see* Merits Committee, n. 55 *above*, para. 111.

[120] For instance, the requirement in the UK for cars to undertake annual MoT tests was introduced before the UK joined the EU whereas the requirement under EU law that MoT tests need only be bi-annual under EU law was introduced in 1991. Press coverage of the report focused on this particular issue. *See* 'Less Frequent MoTs Would Save Millions for Motorists' *The Times*, 29 November 2006.

departments should also review all existing legislation well before transposition and should create a single regulatory scheme where possible. Thirdly, as regards the presumption in favour of copy-out, the review found that this transferred the risk of interpreting vague and ambiguous legislation to business, which could result in unnecessary burdens if they adopted an over-cautious regulatory regime. The presumption in favour of copy-out should therefore be replaced by an active consideration of whether copy-out or elaboration is appropriate in light of the impact of the legislation on those regulated. Fourthly, in order to avoid imposing undue costs on business, government should not generally pre-empt upcoming European legislation by legislating in the same area. Fifthly, to promote better regulation at the EU level, the Commission should undertake post-implementation evaluations of all significant European legislation and also adopt standard methodologies for assessing the benefits, costs and effectiveness of legislation. Sixthly, to help manage ambiguity in European legislation, the Commission could set up transposition groups, or work with other Member States to establish networks of European lawyers.

As regards the influence of legal culture on transposition, the review noted that UK civil servants have a reputation for being risk-averse by placing too much weight on infraction risks and not enough of the risks of over-implementation and that this was reinforced by the legal culture's preference for the literal rather than the purposive approach toward statutory interpretation. The risks posed by transposition are not purely legal; they also concern the possible damage to the competitiveness of business arising from over-implementation. The review therefore concluded that the approach of balancing such risks of various implementation options should be embedded within the transposition exercise and that officials provide ministers with the different options together with an assessment of their policy and legal risks. The review further recommended better project management of transposition through the use of programme and project management techniques and better communication between those officials negotiating measures at EU and those implementing it.

Assessing Davidson

What then is to be made of the Davidson review? Business groups, irked by the principal finding of the review, were disappointed that the review did not recommend an independent body to monitor the implementation of EU law.[121] However, if the findings of the Davidson review are to be accepted, it is apparent that many of the allegations that the UK has over-implemented EU law have been exaggerated. From a political perspective, Davidson may be said to have served the purpose of diffusing allegations of gold-plating by concluding, from a detailed review, that this was not in general a problem while at the same time identifying some examples of over implementation. From an administrative perspective, the review's recom-

[121] *See* '"Gold-plating" Not as Bad as Business Thinks', *Financial Times*, 29 November 2006.

mendations, accepted in full by the Government, should surely enhance the process of transposition.[122] A revised version of the Transposition Guide was subsequently published which incorporated the recommendations.[123]

However, the limited scope of the Davidson review should be noted. Davidson focused exclusively on over-implementation and entirely ignored under-implementation of EU law. This is hardly surprising: identification of under-implementation could potentially lay the UK Government open to infraction proceedings, political criticism at the EU level and undermine its reputation for effective transposition. There was a further limitation of the Davidson review: while the review sought to identify examples of over-implementation, it did not examine whether the actual enforcement of EU law, as opposed to its transposition into national law, is stronger or more vigorous than required or carried out in other Member States. As over-implementation may in practice occur when regulations are enforced rather than when they are transposed, this was an important omission from the scope of the review.

6. Concluding Comments

Transposing EU legislation poses a particular challenge to all Member States. While the UK's transposition record has been criticized, the UK overall has a good record for transposing EU law. Debate in the UK over the implementation of EU legislation has typically fastened on the idea that the Government goes further than is necessary. The Davidson review, however, concluded that this view is generally not supported by the evidence. The question might be asked: why doesn't over implementation of EU law occur more frequently in the UK? After all, judicial control is virtually non-existent while Parliamentary scrutiny exists but is limited. The answer would appear to be that executive internal control, in the form of the through the Transposition Guide, has, on the whole, been effective in guarding against over-implementation. Rather than officials seeking to impose further regulation on the back of EU law, the broader picture is of risk-averse civil servants concentrating too much on the legal risks posed by failing to transpose properly and being insufficiently attentive to the risks of over-implementation.

[122] HM Treasury, *Pre-Budget Report December 2006: Investing in Britain's potential: Building our long-term future* (Cm.6984, 2006), para. 3.46. Indeed, shortly after Davidson was published, government departments provided updates on their delivery of the Davidson Review's specific proposals in their simplification plans, which contribute to the objective of reducing administrative burdens. *See*, e.g., Home Office, *Simplification Plan* (London, Home Office, 2006), p. 16; Department for Transport, *Transport – Lightening the Load: Simplification Plan* (London, DfT, 2006), pp. 15-16.

[123] Department for Business, Enterprise & Regulatory Reform, *Transposition Guide: How to Implement European Directives* (London, BERR, 2007).

However, revised guidance, following the Davidson review, and Parliamentary oversight from the Merits Committee, should remedy this.

Looking to the future, one must look to Member States and the EU institutions to continue to promote better regulation at the EU level: to tackle it at source rather than further downstream; the EU has made a major commitment to ensure better regulation as well as to simplify and improve the quality of EU law. Perhaps the most effective instrument in the better regulation tool-kit is post-implementation evaluation of regulation. Increased use of post-implementation evaluation may facilitate better scrutiny of the quality of regulation and also identify whether in practice over-implementation of EU law occurs. Finally, this paper has only provided a broad overview of the transposition of EU law in the UK; more detailed and contextual case-studies are required in order to investigate further how specific transposition exercises are conducted.

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