



Lost in Translation? Responding to the challenges of European law

REPORT BY THE COMPTROLLER AND AUDITOR GENERAL | HC 26 Session 2005-2006 | 26 May 2005

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7 April 2005

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EXECUTIVE SUMMARY



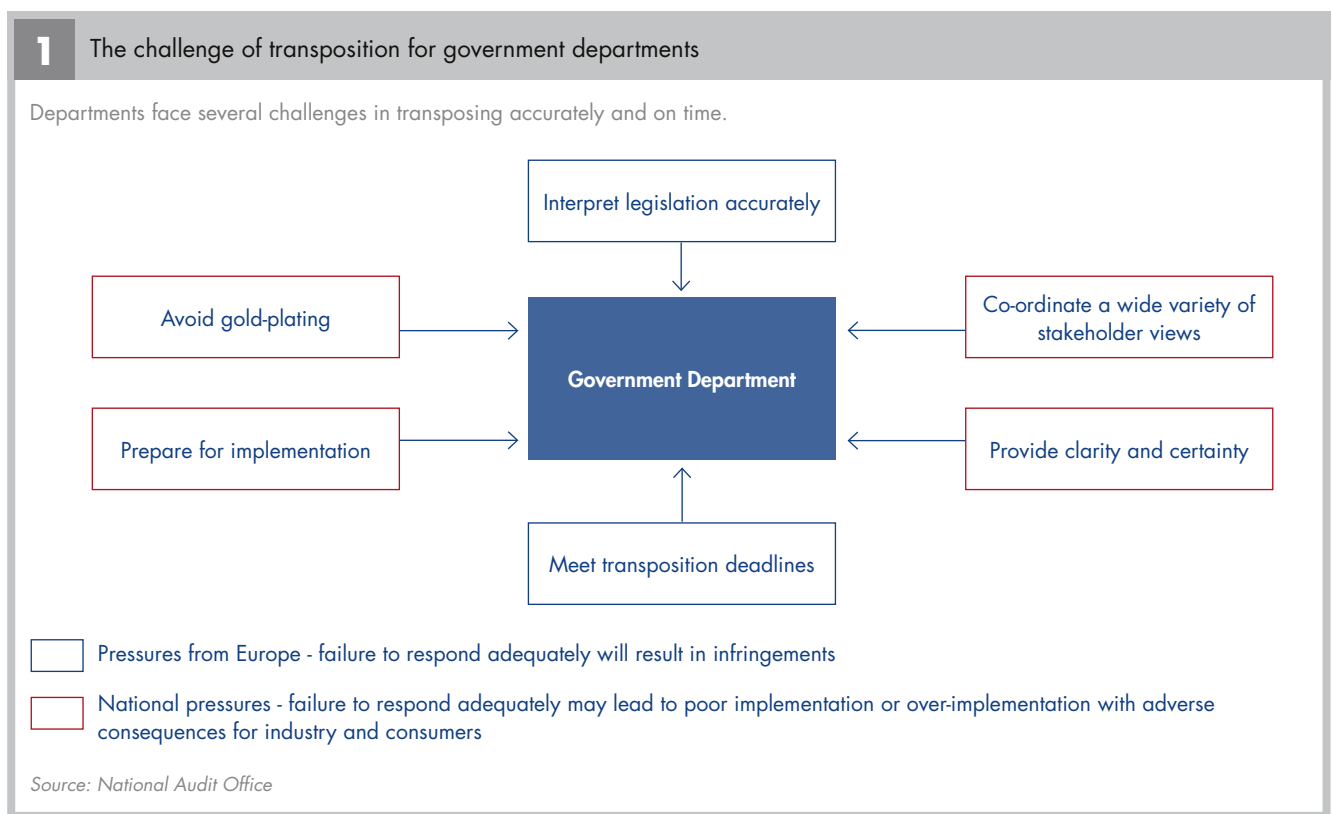
1 As a member of the European Community the UK must respect European Community law.¹ In the UK, the Department for Environment Food and Rural Affairs (the Department) is responsible for implementing more European law than any other government department, around 30 per cent of the total. Community law comes in two main forms – Regulations and Directives – which in most cases need to be given effect by domestic legislation in UK law - a process referred to as “transposition”.² This report focuses on the way the Department handles the transposition of European legislation into UK law and prepares for subsequent implementation.

2 Although the Department is responsible for a significant amount of European law, a number of other government departments also have European legislation within their remit, and they too will have to transpose this legislation in readiness for implementation. These other departments are likely to face similar challenges to those identified in this report, and thus the lessons drawn from this report have wider application.

3 Departments have to strike a balance when transposing and implementing European law.

- On the one hand, the European Commission expects Member States to implement European law in full and on time, and institutes infringement proceedings if this does not happen.
- On the other hand, UK government policy is to avoid unnecessary over-implementation (commonly known as “gold-plating”).

Figure 1 shows the pressures on departments as they work to get transposition right first time. Getting transposition wrong can incur avoidable costs for taxpayers, industry and consumers; and it can lead to environmental and other adverse effects. Use of specialists, including lawyers, from negotiation onwards, can shorten transposition timescales and help manage uncertainty.



1 The legislation considered in this study is adopted under the European Community Treaty. It is all, therefore, European Community law. The Department has little to do with the other two pillars which make up the three pillars of the European Union i.e. foreign and security, and justice and home affairs. The terms European law and Community law are used interchangeably throughout this report.

2 The word “transposed” is sometimes used to describe only the process by which the requirements of European Community Directives are given effect in national law, and not to encompass the process by which necessary “top-up” domestic legislation is made to ensure that directly applicable European Community Regulations can be properly applied and enforced e.g. by enacting criminal penalties for breach. In this report we use the work “transpose” to cover both situations.

4 In looking at the Department’s performance in transposing and preparing for implementation, we examined the following issues:

- accuracy in understanding and interpreting Community law (Part 2 of our Report);
- timeliness of transposition and implementation (Part 3); and
- communication with key players (Part 4).

Our work centred on eight case studies of recent Community law handled by the Department, shown on pages 2 and 3. In selecting these case studies we chose recent high profile examples where the legislation had significant impacts on industry and consumers or had the potential to make significant improvements to the environment or to the animal health and welfare regime.

More detail on these case studies can be found at Appendix 1.



1 Nitrates Directive (1991/676/EEC)

An environmental measure designed to reduce water pollution by nitrates from agricultural sources



2 Landfill Directive (1999/31/EC)

This provides for measures, procedures and guidance to prevent or reduce adverse effects from the landfill of waste



3 Ozone Depleting Substances Regulation (2037/2000/EC)

This Regulation implements the Montreal Protocol in the EU and requires the removal of ozone depleting substances from fridges as well as banning the export of fridges outside the EU



7 Emissions Trading Directive (2003/87/EC)

This aims to set up an EU-wide emissions trading scheme to help tackle emissions of carbon dioxide and other greenhouse gases

Source: National Audit Office



4 Water Framework Directive (2000/60/EC)

This aims to achieve good ecological and chemical status in all inland and coastal waters by 2015



5 Pig Welfare Directives (2001/88/EC and 2001/93/EC)

These Directives build on existing minimum standards for the protection of pigs



6 Animal By-Products Regulation (1774/2002/EC)

This Regulation lays down rules for the disposal of animal by-products not intended for human consumption



8 Environmental Liability Directive (2004/35/CE)

This aims to prevent and restore environmental damage, by creating liability for damage under the polluter pays principle

Key findings

5 The Department has a difficult job in transposing and implementing a high volume of European legislation; getting it right first time is not an easy task. Recent problems with high profile legislation, for example the Regulation dealing with the removal of ozone depleting substances from fridges, which led to the fridge mountains of 2002, have drawn the Department into the spotlight. The Department recognises the challenges posed by timely, accurate transposition, and although our case studies show that its past success has been mixed there are also examples of good practice, notably from more recent examples particularly in programme and project management.

6 **Figure 2** sets out the key learning points from our work and examples of where the Department has demonstrated success. The Department should now work to improve the overall quality and timeliness of transposition by using the points below for all European legislation, to achieve timely and accurate transposition every time. Our key findings and recommendations for the Department are set out below.

Better planning and monitoring of transpositions may help reduce the number of infringements the Department receives from the European Commission

7 The UK has a relatively good record for the timely transposition of legislation compared to other Member States. The Commission monitors whether Member States are meeting deadlines for the transposition of EC law through an Internal Market Scoreboard published annually (Figure 5 on page 13).³ In 2004 the UK was one of only five countries (ranking third out of 15 countries) to meet the European Council's target of 1.5 per cent or less of all Directives for which transposition is still outstanding.

8 In 2002 and 2003 the Department received notification of 61 new infringement proceedings from the Commission⁴ - over a third of all infringements received by the UK for this period. In part this reflects the large proportion of European law for which the Department is responsible (around 30 per cent):

- Missed transposition deadlines accounted for 38 (62 per cent) of the Department's infringement cases, for which the Commission accepts no excuse.
- The 23 infringements relating to the quality or accuracy of transposition or implementation may reflect errors or a disagreement or uncertainty as to the meaning of the European law, which can only be resolved by referring an infringement to the European Court of Justice. In some of these cases, however, infringements proceedings could have been avoided or brought to a close sooner.

Statistics from the Commission show that over half of all infringement proceedings take more than two years to close, and one in six take more than five years.

9 Infringement proceedings are worth avoiding because they are resource intensive and administratively expensive to deal with. Ultimately, an infringement proceeding can lead to a substantial fine for the Member State, but these are rare and to date the UK has not been penalised in this way. If and when the new EU Constitution becomes law,⁵ however, there is a provision to speed up infringements for non-transposition, making fines more likely. Our work shows that continuing improvements in project management, particularly at the transposition phase, and better monitoring of the processes at a senior level, would play a key part in reducing the level of infringements received from the Commission. Inevitably areas of disagreement, which can lead to infringement, may continue to exist; however, these should be the result of conscious decisions by the Department based on a full risk assessment.

Providing more certainty where possible can help industry and consumers

10 European laws usually require transposition into national laws and guidance.⁶ The subject matter and nature of negotiations, and the multi-lingual character of the European Union, can lead to highly technical, complex legislation which can be ambiguous or unclear. Accurate transposition, therefore, is difficult but vital.

³ The Scoreboard only measures the transposition of single market measures – in practice this covers environment, agriculture and health and safety amongst other things.

⁴ Article 226 letter of formal notice stage. This figure excludes pre article 226 letters.

⁵ For the EU Constitution to become law all 25 Member States must first ratify it – not until all 25 have agreed can the Constitution become law.

⁶ Directives will always require transposition, however Regulations are directly applicable in Member States and only require national legislation to ensure they are enforceable in national law.

2 Learning points for departments, drawing on good practice examples from Defra

References to paragraphs and examples in the body of the report are provided in brackets.

Achieve timely, accurate transposition

- 1 Provide clear, accessible guidance and advice (3.9)
- 2 Collate comprehensive data on transposition progress, implementation and infringements (3.11)
- 3 Monitor progress at senior levels (3.11)
- 4 Adopt programme and project management early, particularly by:
 - Using a transposition project plan (3.18)
 - Early identification and management of key risks to transposition (3.21)
- 5 Have sufficient resources in place for high profile, complex legislation (3.24)

Good practice examples

- The Department has begun a quarterly report to Ministers on transposition progress (3.12)
- The Department rolled out Programme and Project Management in 2003 and is now adapting these techniques to European processes (3.13)
- The Environmental Liability Directive team had a transposition project plan (Case Example 12)

Manage uncertainty

- 1 Follow Cabinet Office guidance by:
 - Involving lawyers early (Figure 10)
 - Preparing a comprehensive Regulatory Impact Assessment (2.8)
 - Being clear about the proposals in your consultation (Figure 14)
- 2 Work with others to aid interpretation (2.10):
 - Member States
 - Devolved administrations
- 3 Give explicit consideration as to whether copy-out or elaboration is the best transposition policy (2.13)

Good practice examples

- The Animal By-Products regulation team involved lawyers early (Figure 10)
- The Water Framework Directive team worked well with other Member States (Case Example 3)
- The Emissions Trading Directive team worked with the Devolved administrations on common interpretation (Case Example 4)

Improve communication with key players

- 1 Follow the Cabinet Office code of practice on consultation (Figure 14)
- 2 Use a variety of consultation methods (4.6)
- 3 Learn from consultation exercises and disseminate good practice (4.8)
- 4 Issue guidance on implementation in a timely fashion (4.12)
- 5 Make use of technical expertise in Competent Authorities (4.17)
- 6 Work with devolved administrations and take account of their timetables in transposition plans (4.19)

Good practice examples

- The Department has appointed a consultation co-ordinator (4.9)
- The Landfill Directive team used innovative consultation methods (4.6)
- The Nitrates Directive team disseminated a paper on lessons learned (4.8)
- The Water Framework Directive team made good use of expertise in the Environment Agency (4.17)

Source: National Audit Office

11 Until legislation is transposed clearly and accurately by the Department, those affected by the changes will be uncertain as to how to prepare for or adhere to the new requirements. Delays in key decisions or in transposing the legislation therefore increase uncertainty for key players such as industry, and this can lead to gaps in capability and infrastructure which in turn threaten successful implementation. For example, on the **Landfill Directive** industry could not fully prepare for implementation until the Department had made decisions regarding the timing and extent of new criteria for accepting hazardous waste to landfill. The decision on timing was made only four months before industry needed to be ready for a major change in landfill practice, in part due to the consultation going out four months later than planned. This late decision increased uncertainty for industry which in turn hindered their preparations. In contrast, on the **Water Framework Directive** the Department identified uncertainties in advance, set out a timetable for their resolution, and communicated these to key players.

12 Uncertainty can also be managed by issuing clear and timely guidance to those affected, but the Department has a mixed record in this respect. During 2003, there were 85 new regulations within the Department's area of responsibility, both European and national. Of these only 16 adhered to Cabinet Office and Small Business Service advice by having guidance in place 12 weeks before the regulations came into force. Provisional figures for 2004 suggest that of 121 new regulations, 34 had guidance in place 12 weeks before regulations came in. On the **Animal By-Products Regulation**, for example, guidance notes were issued to key industry sectors a year after legislation had come into force and some guidance had yet to be issued 18 months after the Regulation came into force. Such delays leave industry uncertain about how to prepare for new regulations, and they increase work for the Department in dealing with ad hoc queries until guidance is issued.

A desire to provide greater certainty needs to avoid over-implementation

13 Over-implementation or gold-plating can occur for a number of reasons such as adding requirements or implementing early.⁷ The general rule set by the Cabinet Office is that the objectives of European law should be achieved in a timely manner but it is not acceptable to go beyond the minimum requirements unless the benefits are greater than the costs. Proposals for legislation are vetted by the Cabinet Office's Regulatory Impact Unit, which examines departments' Regulatory Impact Assessments particularly for evidence of gold-plating.

14 A dilemma for Member States is whether to "copy-out" European legislation (by direct translation or a simple cross-reference to the original Directive) or "elaborate" (by adding detail in the domestic legislation). Recent work published by the British Chamber of Commerce,⁸ and the Bellis report⁹ commissioned by the Foreign Secretary has found that the more common approach in the UK is to elaborate, as a way of providing greater clarity and certainty. Of our case studies that had been transposed, three used the "copy-out" method and four used predominantly "copy-out" with some elements of "elaboration".¹⁰ Areas of elaboration in our case studies were mainly to provide clarity for those implementing the legislation or to make explicit areas that were only implicit in the European laws as originally worded, for example the **Emissions Trading Directive** for which the UK law is longer than its German or Spanish equivalents.

15 It is rare for transposition or implementation to occur ahead of time, in part reflecting the Department's desire to avoid accusations of gold-plating. Another potential source of gold-plating is by providing sanctions that go beyond the minimum needed. Our research found that provisions for enforcement in England, in the case studies we examined, were consistent with those in other Member States' national legislation. However, there may be a difference between the provisions built into the law and how they are applied in practice: this post-implementation activity is outside the scope of this report.

7 Gold-plating can also occur if enforcement of the legislation is stronger than required or carried out in other Member States. This can only be tested after implementation, and is thus outside of this report's scope.

8 British Chamber of Commerce published study of 100 pieces of legislation entitled "How much regulation is gold plate: a study of UK elaboration of EU Directives" by Tim Ambler, Francis Chittenden and Mikhail Obodovski.

9 Implementation of EU legislation, an independent study for the Foreign Commonwealth Office by Robin Bellis. November 2003.

10 The pre-budget report (December 2004) stated 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." It also called for "greater clarity, consistency and better communication to make regulation less burdensome".

A more systematic approach to managing European Legislation could reduce inconsistencies in transposition practice

16 One reason for the Department's mixed record in transposition is the unsystematic approach it has adopted to the management of European legislation. Our case studies found examples of good practice in organising projects and managing key players - but we also found poor practice which led to delays and poor implementation.

17 Poor project planning was a key factor in many of the case studies we examined. Policy teams had prepared a transposition project plan or equivalent planning document for only three of our eight case studies, and we found little evidence of systematic risk assessments at the transposition phase. An exception on both counts was the management of the **Environmental Liability Directive**. In addition, we found that Regulatory Impact Assessments were of variable quality, with insufficient internal review a problem in one case.¹¹ Some more recent examples show that the Department can manage the transposition phase better, particularly through the use of programme and project management, but in general there was scope for improvement.

18 The Department's engagement with key players throughout the transposition process has also been variable:

- We found several good examples of the Department using innovative methods to communicate with key players but we also found examples of consultations that missed key issues or stakeholders.
- The "competent authorities" (those public bodies responsible for implementation), and the devolved administrations (in Scotland, Wales, Northern Ireland) and the authorities in Gibraltar, are particularly important to timely and effective transposition and implementation. The Department has been improving the consistency with which it involves the Environment Agency - the competent authority for many pieces of European legislation - particularly through the development of the Concordat on working together.

- The Department has had less success, however, in helping the devolved administrations to meet timetables for transposition: a quarter of all infringements for late transpositions were caused by the devolved administrations.

19 Dealing with European legislation uses a significant amount of the Department's resources, and officials have many other demands on their time. There are no targets for the management of the legislative process, however, and no routine or regular monitoring of transposition deadlines by senior Department managers. This may decrease the importance attached to these tasks. There are a number of separate databases which record aspects of transposition and implementation, which could aid this process, but they need rationalising and cleansing. Internal guidance should be tailored to the Department's needs and made more accessible.

The Department has taken steps to improve its management of European legislation

20 The Department set up a Taskforce in 2003 to look at all aspects of regulation including European law. As a result of the Taskforce's report, published in April 2004, the Department created a Better Regulation Team to take forward the Taskforce's recommendations. Other new units within the Department, responsible for Programme and Project Management and European Union and International Co-ordination, should also improve handling of European law.

21 Following the Taskforce's report, the Department set up a Ministerial Challenge Panel on Regulation in October 2004.¹² This group meets every six weeks and examines around four regulatory proposals on each occasion,¹³ to consider whether the correct regulatory approach has been adopted and that the impacts of any regulation have been sufficiently taken into account. The Panel does not seek to examine every piece of regulation but instead aims to raise awareness of cross-departmental issues.

¹¹ For more work on Regulatory Impact Assessments across government please refer to the National Audit Office publication "Evaluation of Regulatory Impact Assessments Compendium Report 2004-05" by the Comptroller and Auditor General HC 341 2004-05.

¹² This panel comprises the Regulation Minister and the Departmental Board member who champions regulation, along with representatives from the Department for Trade and Industry, the Environment Agency and the Cabinet Office's Regulatory Impact Unit.

¹³ This work is supported by a filter panel comprising the Board Regulation Champion and others which look at 10 – 15 proposals every six weeks in order to select the four for consideration by the Ministerial Challenge Panel on Regulation.



RECOMMENDATIONS

22 The Department's Taskforce made useful recommendations which fit well with the findings set out above. In addition we recommend that the Department should:

i **Develop a more systematic approach to engaging stakeholders**

Policy areas responsible for implementing each European law should develop an engagement strategy which identifies the relevant stakeholders and how best to engage with them. This document could also be used to help highlight and resolve uncertainties as early as possible. In addition, the Department should share best practice in engaging with stakeholders, to improve the consistency of this engagement.

ii **Issue more timely external guidance, providing more certainty to affected parties**

The Department should issue all guidance on legislative changes at least 12 weeks prior to new legislation coming into force. Where there will be major changes as a result of new legislation, the Department should give industry as much certainty as possible in advance, make clear any uncertainties that remain, and set a timetable for resolving them.

iii **Adapt its Programme and Project Management tools to the phases and challenges of European legislation**

The Department's Regulation Taskforce recommended a programme and project management approach to provide a structured environment for negotiating and implementing and delivering EU proposals. The need for such a systematic approach has been borne out by our work, and we endorse this Taskforce recommendation as being particularly important. The Department is making good progress in rolling out Project and Programme Management for all policy areas, and is adapting Programme and Project Management tools to the implementation of European environmental legislation. If successful, this pilot should be rolled out across the Department and to all phases of the European legislative process.

iv **Rationalise, adapt and disseminate internal guidance on transposition**

There is a large amount of guidance both within the Department and from others on the process of negotiating, transposing and implementing European law. This guidance needs to be brought together and condensed, tailored to the Department's needs, and made accessible from a single point such as the Department's intranet. Guidance should include a Departmental checklist specifying what needs to be done at each stage of the process.



v Reinforce Regulatory Impact Assessments as a useful tool for planning transposition and implementation

The new Better Regulation Unit within the Department provides an opportunity to make Regulatory Impact Assessments an essential policy tool to facilitate a risk-based approach to transposition and implementation. The RIA should be used to identify the issues, highlight uncertainties and engage with stakeholders. We recommend that the Unit has more involvement with the development of these assessments, to improve their quality and consistency across the Department.

vi Improve its data on European legislation and its progress

A single, comprehensive database would provide better information on the volume and types of legislation, its stage in the negotiation, transposition and implementation process and whether infringement proceedings have been raised. This would provide a better tool for monitoring progress at senior levels within the Department.

vii Increase senior level oversight of transposition and implementation.

Management of the Department's responsibilities for European law would be improved if there were targets for achieving timely transposition and implementation and avoiding infringements. More regular and routine reporting to senior officials would also increase the attention and priority given to European deadlines, so that more are met and transposition is of consistently high quality. Responsibility for data, and for progress reporting and chasing, should rest with a single unit within the Department.

viii Improve the co-ordination with the devolved administrations to achieve a timely response to legislation wherever possible

The Department needs to continue its efforts to share information with the devolved administrations to improve co-ordination, with particular emphasis on meeting Commission deadlines. Co-ordination should start early in the transposition process. Whilst the devolved administrations are responsible for transposition in their respective countries, the Department might explore the scope for joint transposing legislation where appropriate. The Department should monitor the progress of the devolved administrations, to see whether transposition for the whole of the UK is on track, and factor this into project planning.

PART ONE

The challenge posed by European Community law



1.1 The UK has been a member of the European Community since 1973, and as a Member State the UK must respect European Community law.¹⁴ This report examines the success with which the Department for Environment, Food and Rural Affairs (the Department) has implemented European law. The Department is responsible for implementing a significant proportion of European law affecting the UK, and many of the Department's policies are influenced by European law. Although this report is based on case studies from the Department for Environment, Food and Rural Affairs, many of the challenges it highlights will be relevant for all Departments with responsibility for implementing European law.

Community law needs to be transposed into UK law

1.2 Community law comes in two main forms – Regulations and Directives – which in most cases need to be given effect by domestic legislation in UK law i.e. “transposed”¹⁵ (Figure 3).

1.3 This report focuses on the way the Department deals with Regulations and Directives, which follow a similar procedure from negotiation, through adoption and transposition, to implementation and enforcement (Figure 4 overleaf). We use the term transposition to describe the process by which Member States turn Community law into national law, and implementation to describe the process of applying and enforcing that legislation on the ground.

3 Types of Community law

Regulations: These are directly applicable in UK law and their requirements do not therefore need to be transposed into domestic legislation. However, in the UK some form of so called “top-up” legislation is usually necessary, in particular to ensure effective sanctions are in place.¹⁶

Directives: These are binding on all Member States to which they are addressed as to the result to be achieved, but leave to the national authorities the choice of form and methods. They have no effect in national law until they are transposed into UK law.¹⁷

Source: National Audit Office

NOTE

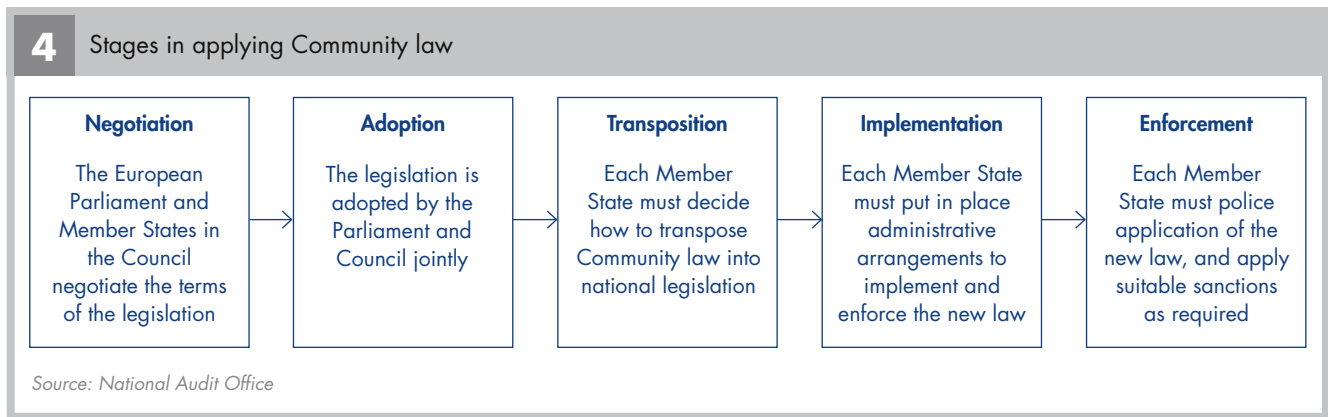
Decisions are a further type of law-making. These are binding on the specific individuals, organisations, or nations to which they are addressed. However, they do not give rise to laws or regulations in the statutory sense and so are excluded from this study.

¹⁴ The legislation considered in this study is adopted under the European Community Treaty. It is all, therefore, European Community law. The Department has little to do with the other two pillars which make up the three pillars of the European Union i.e. foreign and security, and justice and home affairs. The terms European law and Community law are used interchangeably throughout this report.

¹⁵ The word “transposed” is sometimes used to describe only the process by which the requirements of European Community Directives are given effect in national law, and not to encompass the process by which necessary “top-up” domestic legislation is made to ensure that directly applicable European Community Regulations can be properly applied and enforced e.g. by enacting criminal penalties for breach. In this report we use the word “transpose” to cover both situations.

¹⁶ All Member States are required, as a matter of Community law, to establish sanctions. Some Member States, however, have constitutions which provide for sanctions automatically and therefore do not need any national legislation in addition to the Regulations. The UK does not have such a constitution and therefore often has to create national legislation incorporating sanctions.

¹⁷ Though the Courts can sometimes give a Directive “direct effect” if a Member State fails to transpose it.



1.4 The majority of European law is developed using the “co-decision” procedure.¹⁸ This procedure gives the European Parliament the power to adopt instruments jointly with the Council of Ministers. It is a complicated process which involves the key institutions of the European Community:

- **The European Commission** (the Commission) – proposes the legislation and acts as guardian of the treaties which underpin the European Community.
- **The European Parliament** (the Parliament) – debates and amends new legislation and adopts it jointly with the Council.
- **The Council of the European Union** (Council of Ministers or the Council) – debates and amends new legislation and adopts it jointly with the Parliament.
- **The European Court of Justice** – responsible for ruling on Member States’ compliance with European law, often after a referral from the European Commission.

1.5 Community law-making is complex and can be a long process:

- For our eight case studies the UK was one of 15 Member States negotiating the terms of proposed legislation.¹⁹ Since 1 May 2004 the UK is now one of 25 Member States. Alongside the ambiguity which results from negotiation of a legal text between this number of parties, legislation may embody compromises and, together with differences in language, this may result in uncertainties and gaps in the Regulation or Directive.
- Although some Community law can progress from proposal to law in just a few years, more complex laws can spend a long time in gestation before final adoption as Community law, and there may well be a further lengthy period before transposition and national implementation are required.

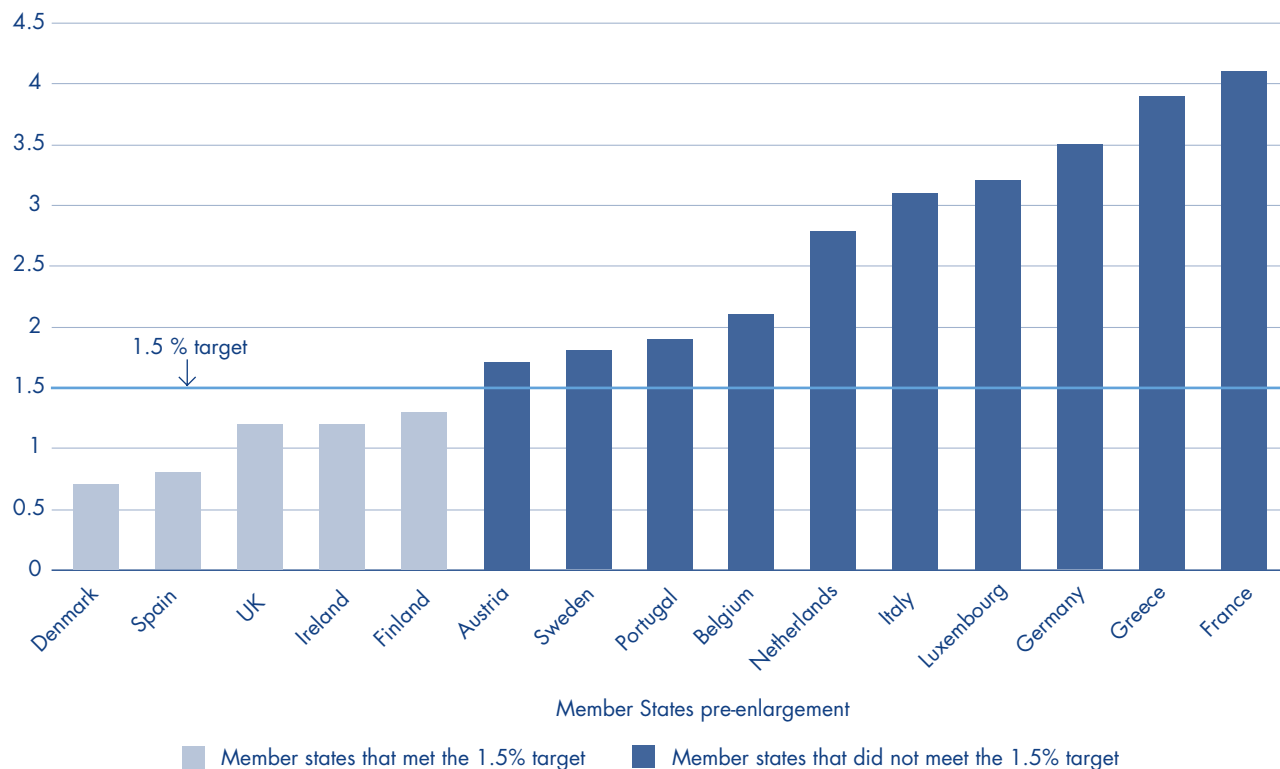
1.6 The UK has a relatively good record for timely transposition compared to other Member States. The Commission monitors whether Member States are meeting deadlines for the transposition of Community law, through an Internal Market Scoreboard published annually. The Scoreboard only measures the transposition of single market measures but in practice this covers environment, agriculture and health and safety amongst other things. In 2004 the UK was one of only five countries (ranking third out of 15 countries) to meet the European Council’s target of 1.5 per cent or less of all Directives for which transposition is still outstanding (**Figure 5**).

18 The adoption of the EU constitution would mean that the co-decision procedure will also apply to agriculture which is currently outside the scope of the co-decision process.

19 With the exception of the Nitrates Directive which was negotiated prior to the access of Sweden, Finland and Austria.

5 2004 Internal Market Scoreboard

Percentage of transpositions outstanding



Source: European Commission Internal Market Scoreboard

The Department has an important role in dealing with European law

European law has a significant impact on the Department's work

1.7 European law has a significant impact on the Department's work:

- Around 30 per cent of the new European law to be transposed and implemented by the UK over the next three to five years lies within the Department's responsibility. This legislation covers a range of topics including environmental quality, public health, animal welfare, and fisheries.

- Around two thirds²⁰ of the regulations administered by the Department originate in Europe. Over the two year period 1 January 2002 to 31 December 2003 the Department was due to transpose 63 Directives into domestic law. This does not include Regulations.

1.8 Within the Department, individual policy teams have prime responsibility for transposition and implementation of Community laws, supported by a number of other secretariats and legal advisers.

20 Departmental Regulation Taskforce report.

There are other players involved

1.9 Other UK government organisations have key roles in the formation and implementation of Community law:

- **The United Kingdom Permanent Representation to the European Union** (known as UKRep) – represents the UK’s interests in the European Union, negotiating and lobbying on behalf of the UK.
- **The Regulatory Impact Unit (RIU)** – part of the Cabinet Office, works with other government departments, agencies and regulators to help ensure that regulations are fair and effective and that all new and existing regulation is necessary, meets the principles of good regulation, and imposes the minimum burden.
- **European Secretariat (Cabinet Office)** – is responsible for co-ordinating official advice on EU issues to the Prime Minister and other Ministers. It also co-ordinates the response to any infringement proceedings against the UK.
- **Devolved administrations** – much European law needs to be transposed and implemented separately by England, Wales, Scotland and Northern Ireland in order to comply.²¹ Failure to do so would result in infringement proceedings against the UK as a whole.
- **Gibraltar** – some Directives must be transposed and enacted by the Gibraltar legislature, and again any failure would result in infringement proceedings against the UK.
- **Competent authority** – this is the body or institution which has the authority to ensure practical application and enforcement of Community law in a Member State. There are approximately 40 different competent authorities within the Department’s remit, the principal ones being the Environment Agency, the Rural Payments Agency and the State Veterinary Service.

1.10 New legislation may also have significant consequences for industry, non-governmental organisations and the general public. The Department needs to consult them about proposed legislation and to help prepare them for implementation.

²¹ Under the Concordat on the Co-ordination of European Policy, it is the responsibility of the lead Whitehall Department to notify the devolved administrations at official level of any new EU obligation which concerns devolved matters. It is then for the devolved administrations to consider how the obligation should be implemented and enforced in their area within the required timescale.

²² Transposition should, according to UK policy, also be in accordance with other UK policy goals, including minimising the burdens on business.

²³ These are sometimes referred to within the UK as “infractions”.

²⁴ This is assessed on a case by case basis based on the costs and benefits as outlined in the Regulatory Impact Assessment.

²⁵ Better policy making: A guide to regulatory impact assessment (Cabinet Office RIU).

Departments have to strike a balance when implementing European law

1.11 Departments have to strike a balance when they implement European law; the European Commission looks to Member States to implement European law in full and on time, whilst UK government policy is to transpose so as to achieve the objectives of the European measure on time²² but also to avoid unnecessary over-implementation (commonly known as “gold-plating”).

1.12 The European Commission may institute infringement proceedings²³ if it considers that a Member State has not fully implemented Community law. Regulations and Directives lay down specific requirements and the dates by which Member States must transpose provisions into national law and implement them (that is, bring the law into force and apply it on the ground). There are several reasons for infringement:

- **Late transposition:** the European law has not been transposed into national law by the deadline, or transposition has occurred but the Member State has failed to notify the Commission – such matters lead automatically to an infringement proceeding.
- **Poor transposition:** the Commission considers that the national legislation fails to correctly give effect to the requirements of the European law.
- **Poor implementation:** the Commission considers that the Member State has not fully implemented the legislation.

If the European Court of Justice finds a Member State to have infringed its obligations under Community law then that country could be subject to sizeable fines. The detailed stages of infringement proceedings are described in Appendix 2.

1.13 At the same time, Departments must be careful to avoid gold-plating. Gold-plating can happen in a number of ways (**Figure 6**). Cabinet Office guidance to UK policy makers, however, states that although the objectives of European law should be achieved in a timely manner it is not acceptable to go beyond the minimum requirements unless the benefits²⁴ are greater than the associated costs.²⁵ The Cabinet Office Regulatory Impact Unit will review proposals and aims to identify any instances of gold-plating which will either need to be removed or justified.

6 Types of over-implementation or gold-plating

Over-implementation occurs when implementation goes beyond the minimum necessary. This could be in a number of ways:

- Extending the scope of the European law in national law or adding requirements to those in the European legislation.
- Implementing earlier than required by the European legislation.
- Not taking advantage of derogations that are available.
- Providing sanctions and enforcement mechanisms that go beyond the minimum needed.²⁶

Source: *Transposition Guide: How to implement European Directives effectively*. Cabinet Office RIU

Recent problems have attracted attention, but improvements are planned

Some recent high profile legislation has drawn the Department into the spotlight

1.14 Legislation from Europe often attracts the attention of the media and Parliament. In the last few years a number of high profile pieces of Community law which encountered problems have fallen within the Department's responsibility:

- The "Fridge Mountain" of 2002 attracted much attention: a change in the rules on the disposal of fridges led to fridges being stored by local authorities, at a cost of £46 million, until a long term solution could be found.
- More recently, the introduction of the Animal By-Products Regulation in 2003 led to confusion amongst the farming community as to new rules on the burial of dead farm animals and how they should meet these new requirements.
- Similarly, the ban on the co-disposal of hazardous with other waste in July 2004²⁷ led to a large reduction in the number of landfill sites that can accept hazardous waste. As a result, hazardous waste has to travel longer distances and costs more to dispose of.

The number of infringement proceedings suggest scope for improvement

1.15 The number of infringement proceedings against the UK provides some indication of the quality of transposition and implementation, although not all infringements automatically mean that the UK has breached its obligations:²⁸

- Infringements for late transposition or implementation are automatic, and the Commission accepts no excuse.
- On the quality of transposition or implementation, some infringements result from errors by Member States but in other cases a proceeding indicates a potential difference of view between the Commission and the Member State as to the correct interpretation of Community law.

Infringement proceedings may be settled administratively between the Member State and the Commission. In other cases, infringements are taken to the Court, and a ruling found for or against the Member State. Ultimately, if a Member State is found to be non-compliant and does not address the problem, it can be fined. Fines are very rare, however, and although the Court has ruled against the UK, to date the UK has never been fined. However, this could change as there is a provision in the new EU constitution to fast-track infringement proceedings for non transposition through to fines.

1.16 The Department has been subject to many infringement proceedings. In part this reflects the large proportion of European legislation for which the Department is responsible; it also reflects the fact that the Environment Directorate General within the Commission initiates a greater proportion of infringements than other Directorates General. Over the years 2002 and 2003, there were 61 *new* infringement proceedings²⁹ raised against the UK for legislation within the Department's area of responsibility, three times the level of any other government department during this time. At any one time the Department will have a number of open infringement cases to deal with. For example in June 2004 the Department had 59 open infringement cases.³⁰

²⁶ Enforcement is a post-implementation activity which is outside the scope of this report. The sanctions that have been provided for are covered in paragraph 2.21.

²⁷ Part of the 2002 Landfill Regulations.

²⁸ In addition to infringements that are a result of the Commission's concerns over transposition or implementation, infringement proceedings can also be initiated as a result of a member of the public writing to the Commission about concerns over the way in which a Member State has transposed or implemented legislation.

²⁹ At the Article 226 letter of formal notice stage (not including pre-article 226 letters).

³⁰ This figure does not include the pre-article 226 stage of which there were another 27 cases.

1.17 Regardless of the rights or wrongs of the case, infringement proceedings are administratively expensive, reduce the credibility of the UK within the European Union and are best avoided; the Commission calculate that half of all infringement proceedings take more than two years to close, and 13 per cent take over five years.³¹

A recent review demonstrates the importance the Department attaches to this issue

1.18 In 2003 the Department set up a Taskforce to review how it could become a better regulator. The Taskforce looked at all aspects of regulation, not just those relating to European law. The Taskforce’s final report was made available in April 2004 and a summary of its key recommendations is at **Figure 7**.

1.19 The Secretary of State has welcomed the recommendations and the Department is drawing up an action plan to give effect to the Regulation Taskforce’s recommendations.

How we approached this review

1.20 This report examines how well the Department has achieved its aim of implementing European Community law in a timely and accurate way. We focus on the process of transposition, in which Community law is given effect in the UK by domestic legislation, and the preparation for implementation. Our report does not cover the negotiations which lead up to the creation of new Community law; nor do we examine whether subsequent implementation has been successful, or the effectiveness of the policies pursued through each piece of legislation.

1.21 In looking at the Department’s performance in transposing law and preparing for implementation, we examined the following issues:

- **Accuracy** in understanding and interpreting Community law (Part 2 of this Report). Accurate interpretation and transposition reduce the risk of infringement proceedings, and can provide greater certainty to those responsible for implementing the new law.
- **Timeliness** of transposition and implementation (Part 3). Missed deadlines are the most common reason for infringement proceedings, whilst early implementation brings the risk of gold-plating.

- **Communication** with key players (Part 4). The Department needs to consult and inform those most affected by or involved in implementation, to take account of their views and to help them prepare for the new law.

1.22 Our work centred on recent examples of Community law handled by the Department (Appendix 1). We used a variety of methods including consulting with a variety of different stakeholders for each case study (see Appendix 3 for our methods).

7 Defra Regulation Taskforce – key recommendations

The executive summary of the Taskforce’s report suggested that the Department should focus on the following five key areas:

- **Organising to deliver:** This involves three urgent actions: putting in place clear accountabilities at the top of the Department for improving regulatory performance; instituting a regulatory challenge function; and establishing a new, properly resourced Better Regulation Unit.
- **Communicating Defra’s desired strategic outcomes:** This is vital for policy-makers, regulators and customers.
- **Improving policy development:** Effective use of policy tools, such as impact assessments, to encourage imaginative use of alternatives to classic regulation; early involvement in Europe; greater understanding of customer concerns, including those of the public; and a deeper knowledge of how business works.
- **Improving the handling of policy to implementation:** Organising around the concept of the regulatory lifecycle, and preparing staff to work in multidisciplinary teams which cross organisational boundaries.
- **Modernising delivery:** Clearer accountability for service delivery; sharper performance management; and streamlining of the Defra family of regulators.

In addition the Taskforce also made recommendations for promoting the better regulation agenda in Europe and playing as full a role as possible in the formation of new policy:

- A much wider programme of conversation with EU institutions and other Member States’ ministries and delivery agencies, with the aim of influencing at an early stage other EU partners and increasing understanding and openness towards the full range of interventions and delivery methods.
- Defra should assist businesses to operate and influence effectively in Europe, including by instigating a programme of seminars and training.

Source: Defra Regulation Taskforce report

31 Internal Market Scoreboard July 2004.



PART TWO

Clear and accurate interpretation



2.1 Both Directives and Regulations can require Member States to interpret Community law into national law:

- **Directives** afford Member States some flexibility to transpose Community law into national law in a way that fits with national policy and national needs. Member States must interpret what is required of them by the Directive, and make choices where national discretion is permitted, before drawing up national transposing legislation. For example, on the **Nitrates Directive** Member States had a choice as to whether to treat their whole territory as nitrate vulnerable or to designate specific nitrate vulnerable zones. England chose the latter approach initially and designated eight per cent of land as nitrate vulnerable³² whereas six other Member States took the whole territory approach.
- Although **Regulations** are directly applicable, and so do not need to be interpreted and transposed in the same way as Directives, they may require national legislation to provide effective sanctions as all Member States are required as a matter of Community law to establish sanctions.³³ Regulations will also require interpretation as to their meaning, in deciding how to apply them in practice.

The Department, therefore, has a role in interpreting Community law. This Part explores the nature of this challenge and the Department's record in interpreting Community law clearly and accurately.

European legislation can be complex or ambiguous

2.2 The subject matter and nature of European negotiations can lead to highly technical, complex legislation. It is quite common to have legislation that has unclear elements within it because key terms within the law may not be defined or may be left open to interpretation (**Figure 8**).

8 European laws may contain gaps or ambiguities

Water Framework Directive – The aim of this Directive is to achieve good ecological and chemical status in all inland and coastal waters by 2015. However, “good status” is not clearly defined in the Directive.

Animal By-Products Regulation – Certain rules applied to “wild” animals but “wild” was not defined. In addition, a derogation (an option to defer or be exempt) applied to “remote” areas but “remote” was left to each Member State to define. On which parts of animals were covered, the word “hoof” was used and a question was asked about where the hoof stopped and the leg began. Debates over definition also occurred relating to the term “former food stuffs”, what counts as “raw” and the definition of “catering” waste.

Source: National Audit Office

³² Rising to 55 per cent in 2002 following a European Court of Justice ruling against the UK.

³³ Some Member States may have constitutions which provide for sanctions automatically in the case of Regulations.

2.3 The Commission has no legal power to clarify legislation once it has been adopted but will refer cases to the European Court of Justice if it feels that the requirements of the Directive have been breached. This approach puts the onus on Member States to arrive at their own, correct, interpretation of each European law. To help accuracy and eliminate uncertainty, therefore, the Department has a legal Directorate of almost a hundred lawyers to assist its policy and operational branches.³⁴

Misinterpretations can lead to infringements and other costs

Misinterpretation has led to significant problems in some cases in the past

2.4 The likely consequence of misinterpreting a Directive is that the Commission will bring an infringement proceeding against the UK for “poor transposition” or “poor implementation”. Of the 61 new infringement cases opened on European law within the Department’s responsibility in 2002 and 2003,³⁵ 23 were for reasons of accuracy of transposition and implementation rather than timeliness of transposition.

2.5 Misinterpretation can be costly because it can lead to delays in implementation, inaccurate implementation and prolonged infringements. The Department has inherited from its predecessor departments a number of cases resulting from decisions to adopt interpretations which were subsequently rejected by the European Court of Justice (**Case examples 1 and 2**).

2.6 **Figure 9** shows that the infringement case on the Nitrates Directive spanned over nine years and has been prolonged for a number of reasons. All six of the Member States that originally opted to designate 100 per cent of their land as nitrate vulnerable, as opposed to the partial designation adopted by the other Member States including the UK, have avoided infringement proceedings on this Directive.

CASE EXAMPLE 1

Ozone Depleting Substances Regulation

Uncertainty over interpretation resulted in a lack of preparedness by industry

The Departments of Trade and Industry and Environment, Transport and the Regions found the scope of this Regulation unclear about whether Chlorofluorocarbons (CFCs) in foams in fridges had to be recovered. While trying to clarify this with the Commission, the then Departments took the interim view that foam in fridges would not have to be recovered and decided that it could not advise industry on whether or not to invest in new disposal machinery until the Commission provided clarification. In June 2001, seven months before the Regulation came into force, the Commission informed the Department that insulating foam was included and had to be recovered. The result was a lack of preparedness by industry for the new rules, because industry did not want to commit to investing in new disposal equipment until there was certainty about disposal requirements in the UK. Once there was certainty, there was not enough time to put the new infrastructure in place. As a result, fridges had to be stored by local authorities as an interim measure at a cost of around £46 million.

CASE EXAMPLE 2

Nitrates Directive

Misinterpretation of this Directive resulted in an additional round of implementation

For this Directive, misinterpretation has led to a prolonged infringement case and the need to carry out two rounds of implementation instead of one.

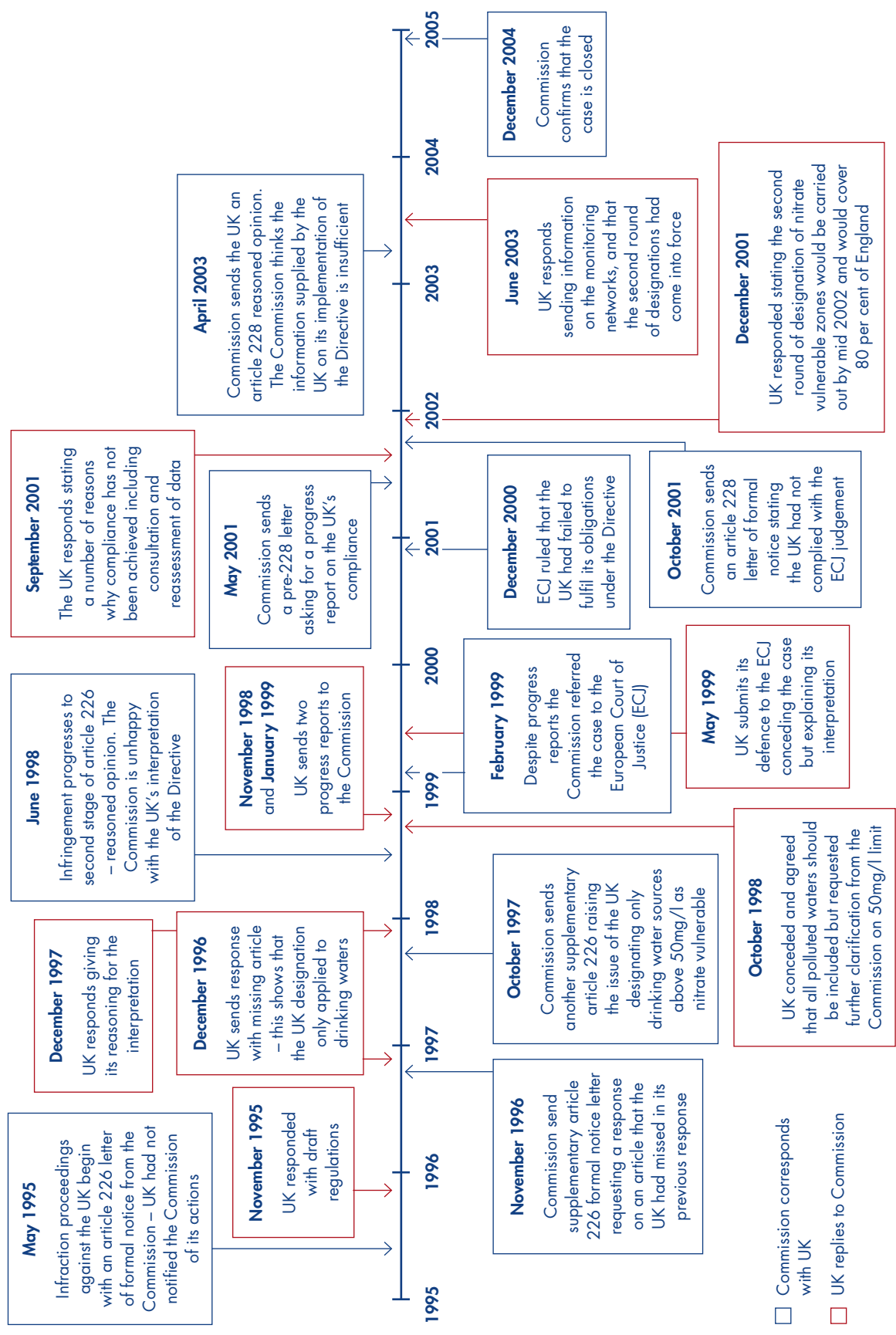
The Ministry of Agriculture, Fisheries and Food and the Department of the Environment concluded in 1995, based on legal advice, that the test to see whether nitrate levels were above a set limit should apply only to waters abstracted to produce drinking water. However, in 2000 the European Court of Justice deemed that this interpretation was incorrect and that the test should apply to all water sources.

The ruling by the European Court of Justice meant that the Department had to go through a second designation of nitrate vulnerable zones involving another round of mapping and consultation. This second designation resulted in 55 per cent of England being identified as nitrate vulnerable, compared to the eight per cent originally considered to be vulnerable.

³⁴ Transposition and interpretation of European law is only part of the work of the Legal Directorate General, which also handles international law, Parliamentary Bills, and domestic legislation and advice.

³⁵ Out of 168 for all of the UK over the same period.

9 Timeline charting the infringement case on the Nitrates Directive



Source: National Audit Office

2.7 The UK conceded in October 1998 that all waters should be included and not just those intended as drinking water sources. It took the Department until December 2002, however, to map, consult upon and bring into force the second designation of nitrate vulnerable zones. Even once the new zones were operational the Commission progressed the infringement case to the next stage (article 228 Reasoned Opinion) because it was concerned that not enough land had been designated as nitrate vulnerable and because the UK had not provided sufficient information on the methodology used to designate zones. This concern arose, in part, because the UK told the Commission in December 2001 that at least 80 per cent of land³⁶ would be designated as nitrate vulnerable but the actual designation after the full mapping exercise was only 55 per cent.

More recent examples show that the Department and the European Commission are working to overcome this challenge

2.8 Although there is no specific guidance within the Department or Whitehall on managing uncertainty, Cabinet Office guidance on transposition suggests ways of reducing uncertainty such as:

- involving lawyers from an early stage (see Figure 10);
- preparing a comprehensive Regulatory Impact Assessment;³⁷
- thorough consultation; and
- preparing a transposition project plan.

2.9 There will inevitably be occasions when the Department disagrees with the Commission about the interpretation of legislation which could result in infringement proceedings. However, these cases should be the result of a conscious decision by the Department based on a full risk assessment including financial, legal and other risks such as environmental.

10 Involving lawyers early can help

Bringing lawyers on board from negotiation onwards gives teams a better chance of sticking to timetables and can help to reduce uncertainty, whereas short timetables for lawyers to draft regulations can lead to delays.

One particularly good example of involving lawyers was on the **Animal By-Products Regulation**. Here, the instructions to the Departmental lawyers, asking them to draft the UK Regulations 2003, were so clear and comprehensive that they have been adopted by the Government Legal Service as an example of good practice. They were developed following early discussion between the policy team and lawyers and set out clearly and simply all the provisions that the team needed and the reasons for them.

Use of specialists has been given recent emphasis by the Government in its Professional Skills for Government programme launched by the Cabinet Office in October 2004.

Source: National Audit Office

2.10 The European Commission adopted an Action Plan for simplifying and improving the regulatory environment in June 2002. The plan contains action points for the Commission, other Community Institutions (European Parliament and Council) and Member States. Key elements include:

- systematic use of impact assessment by the Commission when preparing policy proposals;
- establishment of minimum standards for external consultations carried out by the Commission; and
- a programme to simplify and update the existing body of European law.

The UK government welcomed the Action Plan, calling for its full implementation. As part of the implementation of the Action Plan, the Commission is now bound by an inter-institutional agreement (between the European Parliament, the Council of the European Union and the European Commission) on better law making.³⁸ The agreement includes “promoting simplicity, clarity and consistency in the drafting of laws” among its common commitments and objectives.

³⁶ On the basis of a rough mapping exercise.

³⁷ A Regulatory Impact Assessment (RIA) is a tool which informs policy decisions. It is an assessment of the impact of policy options in terms of the costs, benefits and risks of a proposal.

³⁸ www.cabinet-office.gov.uk/regulation/europe/beteureg/comact/actionpl.asp.

2.11 Examples from our case studies (**Case examples 3 and 4**) show that the Department is working with others across the EU and within the UK to achieve clarity.

Deferring decisions on interpretation can create uncertainty

2.12 In some cases, the Department has opted to wait for advice from the Commission or for others to take a lead, before making firm decisions on how legislation is to be transposed or implemented. This has, on occasion, led to decisions being taken late, which has put industry in a position of uncertainty where they feel unable to invest until they receive clarification (**Case example 5**).

Waiting to take decisions increases the risk that deadlines will be missed. It is also contrary to Cabinet Office guidance,³⁹ which suggests that communicating consistently with the Commission is vital because late clarification may leave departments and industry with insufficient time to prepare (**Case example 6 overleaf**).

CASE EXAMPLE 3

Water Framework Directive

Working with others can improve clarity

The Common Implementation Strategy (CIS) was a Commission idea to facilitate a common interpretation of the Directive. The Department and the UK environment agencies took, and continue to take, an active role in the CIS. The UK co-chairs the working group on ecological status and Member States are working to define “good ecological status”, a key area of uncertainty in the Directive, across the European Union by 2006.

Additionally the Department’s Regulatory Impact Assessment for this Directive makes clear the uncertainties that remain, the reasons for them and ways in which the Department aims to address or resolve them. Stakeholders we consulted told us that where uncertainties cannot be eliminated, they preferred to have them clearly identified and for the Department to have a planned approach to addressing them.

CASE EXAMPLE 4

Emissions Trading Directive

By working with others, the Department was able to meet tight timetables

The timetables were particularly short for transposition (the Directive was adopted 25 October and needed to be transposed by 31 December 2003). The UK, therefore, liaised with other Member States to seek consistency in the interpretations of the Directive.

Despite the devolved subject matter of this Directive, a decision was also taken to implement in the same way across the UK and have one set of transposing legislation, rather than one each for England, Wales, Scotland and Northern Ireland. Not only did this deliver a consistent approach, it also helped the UK to meet the transposition deadline.⁴⁰

CASE EXAMPLE 5

Ozone Depleting Substances Regulation

Waiting for certainty from the Commission gave industry insufficient preparation time

Clarification that the insulating foam in fridges was covered by this Regulation only came seven months before the European law entered into force. Despite the uncertainty surrounding this issue the Department waited for clarification from the Commission, which they have no requirement to provide, and made no provisions for including the foam until this was received. Other countries, such as Germany, took the decision that insulating foam was included and developed the necessary technology to respond, whereas UK industry had insufficient time to prepare for the changes.

The EFRA Committee published a report⁴¹ in June 2002 following its enquiry into the disposal of refrigerators. On the subject of the inclusion or otherwise of insulating foam, the Committee reported that the Government had mishandled the implementation of the Regulation in part by arguing about the semantics of whether the foam had to be recovered because it was not “practicable” to do so when in fact the practicality of dealing with the foam was demonstrated by practice in other European countries. The Government subsequently denied mishandling in its reply⁴² which reiterated the lack of clarity in the original Regulation as the cause of delay.

³⁹ Transposition Guide: How to implement European Directives effectively.

⁴⁰ England, Wales, Scotland and Northern Ireland transposed on time, meaning the UK met the Directive’s transposition deadline. Gibraltar’s transposition, however, was late, therefore the UK as Member State is deemed to have missed the deadline.

⁴¹ *Disposal of Refrigerators* The Environment, Food and Rural Affairs Committee Fourth Report of Session 2001-02 HC 673.

⁴² *Disposal of Refrigerators* Government’s reply to the Fourth Report of Session 2001-02 published in October 2002 HC 1226.

CASE EXAMPLE 6

Landfill Directive

Delays in decisions have increased uncertainty for those implementing this Directive

This Directive introduces significant changes to the way the UK manages its waste. A key provision for the UK is the ban on the co-disposal of hazardous waste with non hazardous waste from July 2004. This ban was clearly set out in the Directive in 1999, giving both the Department and industry five years to plan for its coming into force in 2004. This was a major change for the waste industry affecting both waste managers and waste producers who needed as much certainty as possible on the new requirements.

The Landfill Directive sets out general principles in respect of the criteria and procedures for accepting waste at landfills ("Waste Acceptance Criteria" or WAC). The WAC determine what type of waste can be accepted in different classifications of landfill sites.

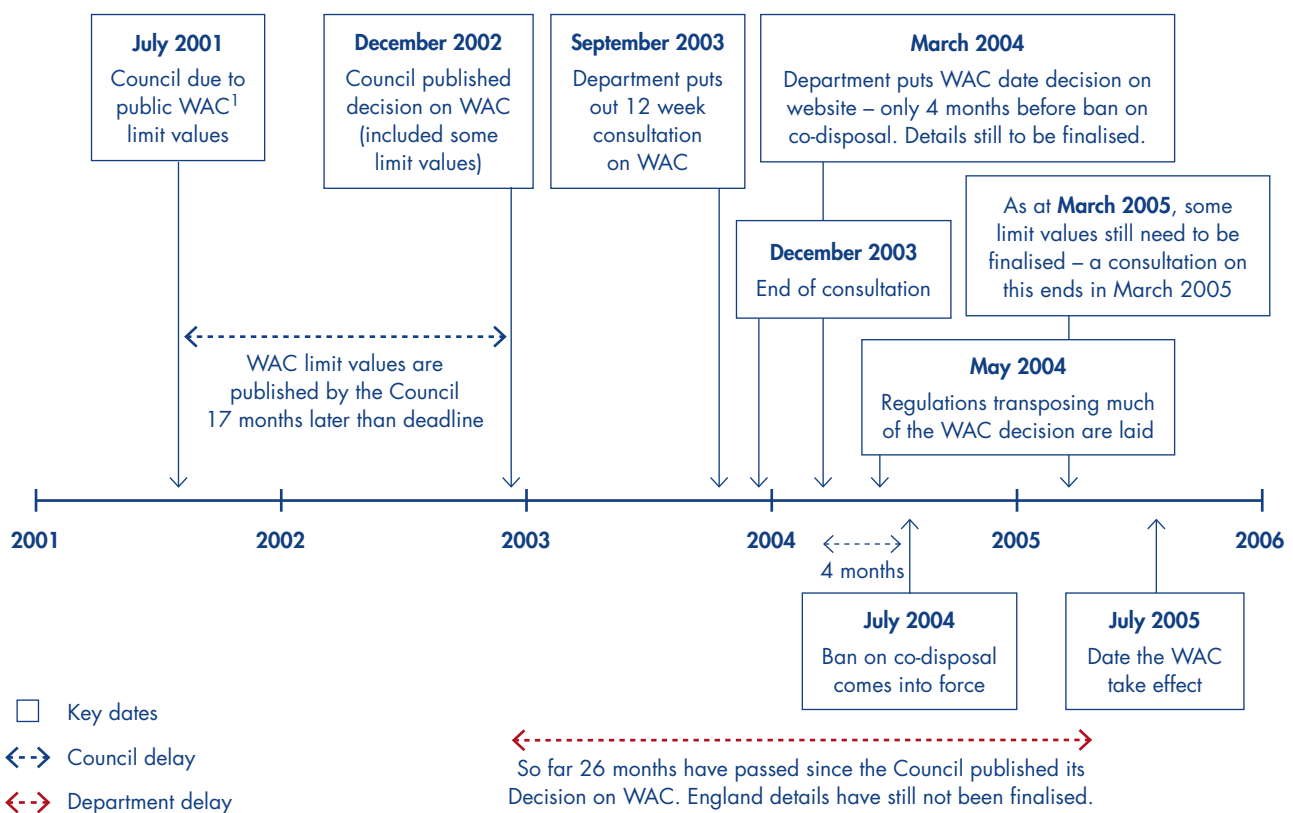
The Council decided that more detailed criteria were required to be developed by a technical committee. However, there was a delay by the Council in publishing these detailed criteria which gave some of the WAC limit values. In addition, the Department did not put out

a consultation on these values until September 2003, nine months after the limit values had been published and four months later than the planned date of the consultation.

While the detailed Waste Acceptance Criteria are not linked directly to the co-disposal ban, there is little doubt that the delay in finalising and implementing these criteria resulted in uncertainty for industry which impeded industry preparations; waste managers were unable to prepare until they knew treatment levels and this had a knock-on effect for waste producers who did not know what facilities would be offered by waste managers.

The uncertainties associated with the Landfill Directive were not resolved by the Department as quickly as they could have been. Although the majority of the WAC Council Decision was transposed by the Department on time there are still elements, including some limit values, which are outstanding. **Figure 11** shows the delays and related uncertainties associated with the Waste Acceptance Criteria.

11 Timeline charting prolonged uncertainties on the Landfill Directive



Source: National Audit Office

NOTE

¹ The Waste Acceptance Criteria (WAC) determine what type of waste can be accepted in different classifications of landfill sites

Clarifying legislation can lead to accusations of gold-plating

2.13 One way of managing uncertainty is through the method by which the European legislation is transposed into national law. Cabinet Office guidance⁴³ suggests that a risk-based approach to transposition is adopted and within this suggests two broad approaches to the legal drafting of legislation transposing Community law:

- “Copy-out” adopts the same, or very similar, language as the Directive. It is also possible to refer directly to the Directive’s provisions.
- “Elaboration” aims to work a provision into something clearer by adding more detail or clarification.

In general the common law tradition in the UK has meant that the preferred approach has been “elaboration” rather than “copy-out” of Community law, although both approaches are used. Our case studies showed that both “copy-out” and “elaboration” are used within the Department; three of the seven case studies that have been transposed used only the “copy-out” method and the other four used a mixture of the two.

2.14 Lawyers can reduce uncertainty by providing clarity through transposition, though this will almost certainly lead to longer transposing legislation. For example, on the **Animal By-Products Regulation** the ban on the feeding of animal by-products to other animals, which is implicit in the Regulation, is made explicit in the Statutory Instrument to make it absolutely clear that this disposal route is not permitted. Alternatively, lawyers can let any ambiguities flow through to the transposing legislation, allowing the Court to decide upon the correct interpretation. The latter approach (copy-out) means that there may be more uncertainty for stakeholders - as shown in **Case example 7**.

CASE EXAMPLE 7

Large Combustion Plants Directive

“Copy-out” of the Directive meant guidance was needed to provide additional clarity

The Directive was transposed in November 2002 using the copy-out approach. Whilst this has avoided accusations of gold-plating it has led to an increase in questions from industry about what the transposing legislation means because the national legislation provides no more clarity than the Directive itself. The Department did, however, consult with industry over interpretations and then issued guidance on what it considered to be the correct interpretation. Only the European Court of Justice can give a final ruling on the meaning of European legislation, and thus any greater certainty the Department purported to give would have been illusory.

In contrast, the elaboration method often leads to accusations of gold-plating. The British Chamber of Commerce report found⁴⁴ that “elaboration” does not mean gold-plating has occurred, and in fact they reported no examples of gold-plating. The Report did, however, note that the UK tendency to use the “elaboration” method does lead to longer transposing legislation compared to other countries and that, in their view, the level of elaboration was excessive.

2.15 The **Emissions Trading Directive** provides an example of longer transposition in the UK and the reasons for this. The Directive itself had 8,592 words; the UK Statutory Instrument which transposed the Directive had 21,522 words, whereas the German transposition had 6,763 words⁴⁵ and the Spanish transposition had 14,517 words. Whilst the three transpositions cover broadly the same headings, the UK version also includes substantial sections covering the devolved administrations, which have no equivalent sections in the German or Spanish instruments, and substantial sections providing for appeals against regulator’s decisions; these together account for around a quarter of the Instrument’s length. The UK Instrument also provides additional detail or precision about how the Directive will be implemented: but this does not necessarily mean that there are additional obligations or requirements being placed on industry.

⁴³ Transposition Guide: How to implement European Directives effectively.

⁴⁴ A report by Tim Ambler, Francis Chittenden and Mikhail Obodovski published by the British Chamber of Commerce was a study of 100 pieces of legislation entitled “How much regulation is gold plate: a study of UK elaboration of EU Directives”.

⁴⁵ This low figure may be due, in part, to the extensive use of compound nouns in the German language, for example ‘Greenhouse Gas Emission allowance’ translates to Treibhausgasemissionszertifikaten i.e. from four words to one word.

2.16 Neither approach (copy-out or elaboration) is an indicator of gold-plating nor will either approach ensure that gold-plating does not take place. The copy-out approach could also lead to gold-plating because with copy-out the responsibility for clarification is transferred to those who are implementing the legislation, such as industry, who may then take a precautionary approach and implement more fully than necessary to minimise the risk of penalties.

2.17 Accusations of gold-plating are common wherever the Department has done more than the absolute minimum to meet the requirements of the European law, as shown in **Case example 8**.

CASE EXAMPLE 8

Pig Welfare Directives

The addition of a voluntary best practice code led to accusations of gold-plating

When transposing the Directives, the Department took the opportunity to update the “Code of Recommendations for the Welfare of Livestock: Pigs”; this code is a national initiative and is not a requirement of the Directives. The code contains recommendations that are based on good practice and highlights the latest developments in husbandry techniques. This led to accusations by some stakeholders of “gold-plating” as they felt the code went further than the Directive required. However, the Department felt that to have the implementing regulations for the Directives and the code, which forms the guidance to the regulations, debated together was an efficient use of time and resources.⁴⁶

2.18 In some cases the Department may feel that additional clarification is needed to meet all the requirements of the legislation. For example in the **Animal By-Products Regulation** “additional” record-keeping requirements were added to the Statutory Instruments in England and the devolved administrations which were not a requirement of the European Regulation. The Regulation requires Member States to ensure that the Regulation is complied with, and the Department considered that without these additional record-keeping requirements this would not be possible.

2.19 The recent Bellis Report,⁴⁷ commissioned by the Foreign Office, looked at the different forms of legal system and reached the conclusion that the traditions enshrined in the UK legal system may make us more inclined to choose the elaboration method over the copy-out one. The report found no evidence of over-implementation and in fact found cases where the UK approach has led to under-implementation. The report went on to recommend that copy-out should be the preferred method of transposition in order to avoid over-implementation. The government’s response⁴⁸ to the Bellis Report, stated that elaboration should be avoided, but a risk-based approach should be adopted so that clarity is provided where necessary. In the Department, lawyers advise on a case by case basis whether elaboration is to be used, and transpositions are often a mixture of copy-out and elaboration.

⁴⁶ The Code also fits with guidance from the Better Regulation Task Force which encourages alternatives to traditional regulation such as self regulation through codes of practice. Better Regulation Task Force report “Imaginative Thinking for Better Regulation” September 2003.

⁴⁷ Bellis Report, Foreign and Commonwealth Office “Implementation of EU Legislation”, November 2003.

⁴⁸ Synthesis Report on the Bellis Study, January 2004.

2.20 The pre-budget report in December 2004 commented 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”. However, the report also called for “greater clarity, consistency and better communication to make regulation less burdensome”. If copy-out does become the more common approach then it may be necessary to provide clarity elsewhere through, for example, guidance or codes of practice.

The UK has taken a similar approach to enforcement as other Member States in its national legislation

2.21 The majority of Directives and Regulations do not contain any specific penalties that should be imposed if the requirements of the legislation are not followed. It is usually left to each Member State to determine what type of penalties should be provided (civil or criminal) and at what level they should be set. In our eight case studies all but one left the type and level of penalties up to the Member State’s discretion.⁴⁹

2.22 We compared enforcement provision adopted in England against those adopted in seven other Member States⁵⁰ for seven of our eight case studies.⁵¹ Although the provisions varied between countries and from one case study to the next, the provision for penalties built into the English legislation was in most cases similar to or less stringent than those in the other countries. For example on the **Ozone Depleting Substances Regulation** the penalty in the English Statutory Instrument is a fine,⁵² whereas in six of the seven other Member States there is the possibility of imprisonment, in three cases for up to six years, as well as a fine.



49 Subject to the requirement of Community law that sanctions should be effective, proportionate and dissuasive. In addition the EU framework decision on environmental crime sets minimum levels for sanctions.

50 Austria, Belgium, Denmark, Finland, Germany, Portugal and Sweden as a sample of the 14 other Member States in the EU prior to enlargement on 1 May 2004.

51 The eighth case study (Environmental Liability Directive) is not yet due for transposition and has not been transposed by any Member State to date.

52 Up to a maximum of £5,000.

PART THREE

Timely transposition and implementation



3.1 UK policy is to transpose and implement European law on time. This Part is about the challenge of meeting European timetables, the mechanisms the Department has to meet deadlines and why the Department has struggled to meet timetables in the past.

Timely transposition and implementation can present significant challenges

The Department does not have complete control over timetables

3.2 Timetables are not finalised until negotiations are concluded and the legislation is adopted. Although transposition dates are often included in the original Commission proposal, giving Member States some notice about timing, these are likely to change during negotiations, during which the UK is now one voice in 25. The time between the formal adoption of the Community law and the deadline for transposition is often short: for example, on the **Emissions Trading Directive** only two months were allowed for transposition.

3.3 In some cases Member States may be able to take advantage of a derogation that delays implementation of a particular aspect of the legislation (or exempts the Member State entirely from an article). On some occasions transitional measures may be negotiated which allow a Member State an extra period over which they must bring implementation up to the required standard, but negotiating these concessions takes time.

3.4 For the UK to meet the deadlines contained in Community law all the devolved administrations must also meet the timetable, and in some cases this will also include Gibraltar. Where a deadline has been missed in any part of the UK the infringement is directed to the UK as a whole. The devolved administrations are responsible for implementation in areas of devolved competence, whilst the Department is responsible for the UK's response to any infringement proceedings resulting from a failure of a devolved administration to transpose in time. The Department therefore has an interest in doing what it can to assist timely transposition throughout the UK.

The timing of transposition has been influenced by fear of accusations of gold-plating

3.5 It is rare for transposition or implementation to occur ahead of time, in part reflecting internal and external pressures to avoid what would be seen as gold-plating (**Case example 9 overleaf**).

CASE EXAMPLE 9

Landfill Directive

The Department chose a later date for the Waste Acceptance Criteria to avoid gold-plating

The Department had a choice between bringing in detailed Waste Acceptance Criteria in July 2004 or July 2005. Despite advice from waste managers and the Environment Agency that the earlier date would make more sense, because it coincided with the ban on co-disposal of hazardous and non hazardous waste, the Department chose the 2005 date in part to avoid charges of implementing earlier than required. Waste producers were happy with this later date as it gave them more time to prepare.

Missed deadlines have been a major cause of infringement proceedings

3.6 Late transposition accounted for 62 per cent (38 out of 61) of the new infringement proceedings incurred by the Department in the period 1 January 2002 to 31 December 2003. Such infringements are always picked up by the Commission as soon as the deadline has passed, whereas cases of poor transposition or poor implementation require the Commission to have more detailed information and reach an opinion on the approach the Member State has taken.

3.7 Late transposition was fairly common in our case studies, but for a variety of reasons. Of the six Directives we examined in detail, four⁵³ missed their deadline for transposition into national law in at least one part of the UK, and another missed implementation dates⁵⁴ - the final Directive case study has yet to be transposed but is currently on track to meet the transposition deadline.

3.8 Timely transposition could become even more important if and when the new EU Constitution becomes law.⁵⁵ The Constitution provides for the fast-tracking of infringement proceedings for non-transposition through to fines. As over half of the Department's infringements are for non-transposition, this could have a considerable financial impact upon the Department.

Better strategic mechanisms could help meet deadlines

More accessible guidance and better monitoring will help

3.9 There is a wide range of guidance from both the Cabinet Office and the Department about the negotiation, transposition and implementation of European law. Within the Department a range of divisions provide advice and guidance on negotiation, transposition and implementation of European law:

- **Better Regulation Unit.** This unit was established in June 2004 to improve the regulatory process by co-ordinating the delivery of recommendations from the Regulatory Taskforce report (see Figure 7) as well as improving the quality and use of Regulatory Impact Assessments.
- **EU & International Co-ordination Division.** This division co-ordinates the transposition of all Directives for which the Department has the lead and co-ordinates the Department's response to all infringements.
- **Europe Environment Division.** This division co-ordinates Environment Council business, prompting policy divisions to undertake Regulatory Impact Assessments and to engage with other Member States and the EU institutions. The division is also responsible for some cross-cutting legislation such as the Environmental Liability Directive. On the agriculture side there is an **EU Agriculture Branch** which co-ordinates EU agriculture business.
- **Legal Services Directorate General.** This Directorate employs qualified lawyers to advise on the full range of legal issues from commercial contracts to judicial review and the drafting of legislation.

We found it unclear what each section does and how this is distinct from the others. Policy leads were also unclear as to what each division did and how each related to their work in negotiating, transposing and implementing European law.

53 Pig Welfare Directives; Water Framework Directive; Landfill Directive; Emissions Trading Directive. The Emissions Trading Directive was transposed on time by legislation made by the Department applying throughout the UK. Gibraltar, however, failed to transpose on time and therefore the UK as Member State is deemed to have missed the transposition deadline.

54 Nitrates Directive.

55 For the EU Constitution to become law all 25 Member States must first ratify it – not until all 25 have agreed can the Constitution become law.

3.10 Some of the divisions have their own section of the Departmental intranet, whilst others, including the EU International Co-ordination Division, do not. Despite some excellent guidance and good knowledge held by these divisions there is no central point for queries and no one place on the intranet where everything is linked. Guidance promulgated by these divisions is general and is not tailored to the Department, for example by including Departmental examples or contacts.

3.11 The Department does not monitor the negotiation, transposition and implementation of European law as systematically as it could. In part this is due to a number of databases which are of variable quality, do not link up, or provide a comprehensive view:

- The Better Regulation Unit in the Department keeps a database of upcoming regulation within the Department's area of responsibility.
- The Departmental Regulation Taskforce secretariat created a database of all current regulation, both European and domestic, relating to the Department. This database is now being maintained by the Departmental Better Regulation Unit.
- The EU and International Co-ordination Division has created a database showing transposition progress, and it also monitors all infringement proceedings. The transposition database requires some cleansing so that the details of entries are correct. The infringement database did not agree with Cabinet Office records of Departmental infringements.⁵⁶
- The Department and the Environment Agency have created a joint "EU Initiatives Database" which is a register of European *environmental* legislation under development or expected to be developed.

Senior departmental officials do not use these various databases to monitor the timeliness of transposition or the timeliness and accuracy of implementation for Directives and Regulations. A single comprehensive database may be a more suitable tool for monitoring the development, transposition, and implementation of legislation and possible infringements.

3.12 The EU and International Co-ordination Division has started to produce a quarterly report for Ministers showing the transposition and implementation status of Directives and whether the Department is on track or behind schedule. This is the first time that transposition and implementation have been monitored at a high level, although it currently does not extend to Regulations.

Programme and Project Management will be a useful tool if tailored to the requirements of the European legislative process

3.13 The Department has already introduced Programme and Project Management (PPM) and has made it mandatory for its most significant 40 projects (**Figure 12**).

12 Programme and Project Management

Programme and Project Management (PPM) is a government-wide initiative which was introduced to address perceived weaknesses in Whitehall's capacity to deliver mission-critical programmes and projects. In January 2004 the Department set up a PPM Unit to support implementation of this technique across the Department.

A **Programme** is a collection of Projects which are managed together and all contribute to a common outcome (or set of outcomes).

A **Project** is a related group of work activities organised at the direction of a Project Manager using a set of Project Plans which, when carried out, achieve a certain aim or set of objectives.

Programmes and Projects will have a number of features including a Senior Responsible Owner, a Board, a project initiation document, a project plan (including success criteria, contingency plans, and timelines), a risk register, reporting requirements and a method of learning lessons.

The PPM section of the Department's website sets out what is required and provides a toolkit for each of the stages; start-up, initiation, management and closure. The PPM Unit acts as the focal point for support to, and information on, Programme and Project Management.

Source: National Audit Office

⁵⁶ There were eight cases contained on the Cabinet Office database that were not on the Departments' for a variety of reasons such as the fact they had been classified as "dormant" or "closed" on the Department's database. For one omission there was no explanation.

3.14 To date PPM has not been applied early enough in the European legislative process, more often being used only for implementation and not for negotiation and transposition. The Department has a project to introduce PPM to European environmental legislation within the Environmental Protection Directorate General. This project has involved tailoring project management techniques and documentation to the process of transposition, using a Directive within the environmental field as a pilot.⁵⁷ All future transpositions in the environment field are now required to use the techniques developed through that pilot. The Department is beginning to develop similar techniques for the negotiation of new European legislation, and considering how best to apply these on other areas of Departmental business.

Project planning can be improved

Essential processes take time and need to be programmed

3.15 The Cabinet Office Regulatory Impact Unit's code of practice on consultation⁵⁸ should be followed for all consultations on European law. This Code requires the Department to consult widely throughout the process of introducing new regulations and to allow a minimum of 12 weeks for written consultations.⁵⁹ It is common to have more than one consultation during the transposition of legislation⁶⁰, particularly for complex pieces of legislation. For example the **Water Framework Directive** went through three rounds of consultation.

3.16 Consultations can be problematic for timetables:

- On the **Emissions Trading Directive** and the **Animal By-Products Regulation**, timetables were very short and so Ministerial approval was sought to reduce the 12 week consultation period on the draft enforcing legislation.
- In contrast, on the **Pig Welfare Directives**, permission was not sought to reduce the consultation time and transposition deadlines were missed.

- Similarly, the third consultation on the **Water Framework Directive** lasted for the full 12 weeks leaving the Department with less than two months to consider a response before the transposition deadline which was, as a result, missed by 11 days.

Although there has been a lack of clarity over when to seek more flexibility in the length of consultations, the Department has now appointed a consultation co-ordinator who will be the first point of contact if officials wish to conduct a consultation for less than 12 weeks. However, with good project planning this should reduce the need for shorter consultation periods. It is important that in adopting a risk-based approach to transposition the Department balances the need to meet deadlines with the need to carry out thorough consultations.

3.17 The legislative process also includes key processes such as preparing Explanatory Memorandums and Regulatory Impact Assessments, debating legislation in both Houses of Parliament, Ministerial clearance or sign off by key officials. These are all standard Departmental procedures and should be incorporated into project plans and timetables from an early stage (**Case example 10**).

Poor project planning is a key factor in missed deadlines

3.18 The Cabinet Office suggests that departments prepare a transposition project plan for each piece of legislation. We found, however, that transposition project plans were not always in place or detailed enough to act as a useful project management document. In the eight case studies we examined:

- Three out of the six Directives⁶¹ did not have a transposition project plan or equivalent planning document.
- Neither of the Regulations had detailed planning documents for the phases prior to implementation.

⁵⁷ The Highly Active Sealed Sources Directive 2003/122/Euratom.

⁵⁸ Revised in January 2004.

⁵⁹ The Code of Practice on Consultation (Figure 14) by the Regulatory Impact Unit recognises that there may be circumstances that require a consultation period of less than 12 weeks. The Department requires any instances such as this to be approved by a Minister.

⁶⁰ Cabinet Office guidance states that consultation should also occur throughout the formation of European legislation to inform the negotiating line. This guidance is followed by the Department.

⁶¹ Nitrates Directive, Landfill Directive, Pig Welfare Directives.

CASE EXAMPLE 10

Pig Welfare Directives

The legislative process needs to be factored into timetables

The Department chose to update the “Code of Recommendations for the Welfare of Livestock: Pigs” at the same time as transposing the Directives even though it was not a requirement of the Directives. As both the implementing regulations and the Code had to be approved by Parliament, by way of debates in both Houses, the time it took to transpose the Directives was extended due to waiting for slots in the Parliamentary timetable. This was one of a number of factors contributing to the Directives’ late transposition.

3.19 A core component of a transposition plan should be a timetable for transposition; Programme Project Management techniques also advocate detailed timetables. However, the timetables on a number of our case studies often comprised only a basic outline of what needed to be done, and by when, with no consideration of the interconnectedness of elements or links to resources. The timetables on several of our case studies⁶² were not detailed enough to act as a project management tool; they did not break down tasks sufficiently or assign responsibility for tasks to specific individuals:

- The **Nitrates Directive** only had a very basic timetable of what needed doing when; this was the only form of project planning on this Directive.
- On the **Ozone Depleting Substances Regulation** we found no formal planning documents.
- The **Pig Welfare Directives** only had a list of approximate dates by which certain things needed to happen.

None of these examples had any detailed project planning and none highlighted in advance the impact of missing dates on the eventual timeliness of the transposition and implementation.

3.20 More recently, however, the EU International Co-ordination Division within the Department has started issuing a pro-forma transposition project plan to the relevant policy division once a Directive has been adopted. Once completed, this form should contain basic information about the Directive: the basis for transposition, what the position of the devolved administrations is and contact points. It is not a detailed project management tool, though, and only contains outline timetables and key dates. However, the pro-forma could be a vehicle by which the Department informs the devolved administrations of forthcoming legislation so they can plan for their legislative processes accordingly. There is no equivalent pro-forma for Regulations.

3.21 The challenges posed by European law could be better managed if risks to the success of the projects are considered at an early stage. We found, however, that it was rare for key risks to be identified in the transposition phase (or indeed before this point). The Department’s risk strategy, launched in 2002, combined with Programme and Project Management techniques being introduced across the Department since 2003, should help to embed a culture of risk awareness and management within the Department.

62 Nitrates Directive, Landfill Directive, Ozone Depleting Substances Regulation, Animal By-Products Regulation, Pig Welfare Directives.

3.22 As part of the process of negotiating, transposing and implementing Community law there are risks specific to this process, such as uncertainty, missing deadlines, and engaging with stakeholders which will need to be managed. Risk registers for the transposition phase of our case studies were very rare. Where registers did exist they were only for the implementation phase and these were developed after some key dates had already been missed. **Case example 11** shows what can happen when detailed project planning and management is not used for the transposition phase.

CASE EXAMPLE 11

Animal By-Products Regulation

A lack of project management in the early phases of this Regulation caused some problems

The policy team did not have a coherent approach to the project management of the “transposition” phase of this Regulation. Although the Department has recently adopted a programme management approach to the implementation of the Animal By-Product Regulations, this was not in place during the development of the enforcing legislation. Lack of project management exacerbated other problems with these Regulations including:

- **Timing problems:** The consultation on the enforcing Regulations for England began less than 14 weeks prior to the 1 May 2003 which was when the Regulation came into force. Even with a reduced consultation period of eight weeks, this left the Department little time following the consultation response deadline to deal with any issues arising.
- **Issues taking over:** The impact of the Regulation on the retail industry was overlooked until very late in the process – the management of the issues that arose from this took a lot of time and reduced the time available for transposition and implementation more generally.

Because project management procedures require time and effort up front to put in place, they were delayed until after the Regulations came into force and a fire fighting approach was necessary between January and September 2003. Detailed early planning, including the identification of risks and their impact on timetables, would have helped manage the introduction of this complicated piece of legislation.

3.23 More recent examples (**Case examples 12 and 13**) show that the Department can better manage the transposition phase and is starting to use programme and project management successfully.

CASE EXAMPLE 12

Environmental Liability Directive

This Directive has a substantial planning document for the transposition phase which outlines roles and responsibilities and has detailed timelines. It also includes a full consideration of risk for the transposition phase, created immediately after the Directive had been adopted.

CASE EXAMPLE 13

Emissions Trading Directive

The Department managed the consultation phase to help meet deadlines

The Department had only two months to transpose this Directive. The Department managed this short timetable by proactively managing the consultation phase. Because it was clear to the team that the implementation would be 31 December 2003 and that, following the second reading in the summer, major changes to the Directive were unlikely to occur, they consulted on the draft transposing regulations for eight weeks starting 15 September 2003. This was before the Directive was formally adopted at the end of October and for less than the recommended 12 week period.⁶³ This proactive approach by the Department enabled the deadline for transposition to be met,⁶⁴ unlike in other Member States.

The Emissions Trading Directive features on the list of the 40 priority projects subject to Programme and Project Management. However, these techniques could have been used more extensively during the negotiation and transposition of the Directive; in particular there was no formal consideration of risk until the implementation phase.

⁶³ As an exception to the usual 12 week rule which the Cabinet Office acknowledges may be breached in some circumstances such as where there are “timetables unavoidably dictated by EU” (Code of Practice on Consultation - Figure 14).

⁶⁴ With the exception of Gibraltar.

Greater flexibility in staffing would help

3.24 Unlike for a UK Bill, teams are not generally created for the purpose of negotiating, transposing and implementing Community law. Policy teams within the Department have responsibility for European law as one of many competing responsibilities which means that other aspects of a policy team's job may take priority. Within the Department many others, in addition to policy teams, will be integral to transposing and implementing European law such as economists, lawyers, and specialists such as vets. These resource requirements and the demands on the team's time need to be managed to enable the timely transposition and implementation of Directives and Regulations. We found occasions where a deadline was approaching and there were not enough resources to complete all the tasks, see **Case example 14**.

3.25 Securing adequate resources was highlighted as a key challenge by the policy teams involved in our case studies. However, there are examples where this has been achieved by the Department adopting a more flexible approach to resourcing projects, responding to the needs of the project and the time available:

- On the **Emissions Trading Directive** the policy lead was seconded into the team from the Departmental legal section and a full time economist was brought into the team, giving a cross specialist team of ten people which included economists, lawyers and consultants.

CASE EXAMPLE 14

Animal By-Products Regulation

Limited resources made it very hard for the Department to deal with this complex piece of legislation

The policy team identified a risk that there would not be enough resources to implement on time in December 2002. However, no additional resources were provided during the six months during which the team was trying to deal with a wide range of stakeholders with many queries regarding interpretation and implementation, resolve issues surrounding the disposal of waste foodstuffs containing meat, negotiate transitional measures, draft enforcing legislation, provide training to local authorities and others and manage the authorisation of premises. As a result, many stakeholders felt they were left with significant unresolved issues surrounding the disposal of raw and cooked meat when the Regulations came into force.

- On the **Landfill Directive** the team employed a technical consultant to complete the Regulatory Impact Assessment to go with the draft regulations in May 2003. As a result the Assessment was produced in four weeks and was regarded by the Regulatory Impact Unit in the Cabinet Office to be of a high standard. This released resources for use on other parts of the transposition and implementation process.

3.26 Departmental targets are not set for the delivery of European law nor is there monitoring of European deadlines or quality of transposition by senior departmental officials. In contrast, Departmental guidance states that questions and correspondence from Members of Parliament should be replied to within 15 days. For Parliamentary questions the expected turnaround is 2-3 days. By setting such targets the Department clearly signals the importance of this work.

3.27 For high profile pieces of legislation, the volume of correspondence can, understandably, be very large. However, as shown in **Case example 15**, this work is not necessarily factored into resource planning by the Department even though it is a priority.

3.28 Items of correspondence are unpredictable in their extent and timing, although it is likely that at the time when legislation requires transposing and implementing the level of interest in it will increase. This work should be factored into timetables and planned for, particularly on pieces of legislation that are likely to attract a high level of interest. Other events can also subvert timetables, for example the Foot and Mouth outbreak in 2001 was a factor contributing to the late transposition of the **Pig Welfare Directives** because the outbreak contributed to a lack of the legal and veterinary resources needed for transposition.

CASE EXAMPLE 15

Animal By-Products Regulation

Between January 2001 and December 2003 the policy team, which comprised of seven members, had 220 Parliamentary questions and 350 Ministers Correspondence on the **Animal By-Products Regulation**. In addition, in 2003 they had almost 900 pieces of correspondence that had to be dealt with officially. In total, the branch had eight times more correspondence than other branches in their division. There was no recognition of this large load through the provision of additional resources.

PART FOUR

Good communication with key players



4.1 The Department will need an effective relationship with a wide range of people and organisations, to ensure that the UK achieves the objectives of European measures, on time and in accordance with other national policy goals (**Figure 13**).

Effective engagement is crucial

Engaging well with stakeholders is key to the successful implementation of legislation

4.2 An effective relationship with key parties can help bring about success:

- **Consultation during development.** Key players are likely to have detailed knowledge of the subject matter, leading to proposals which are workable and which consider all the issues.
- **Information about implementation.** Many key parties will have a role in implementing changes, and their involvement is needed for preparedness, timely implementation and subsequent compliance.

A failure to involve key parties could jeopardise implementation and could lead to infringement proceedings from the Commission. The UK Code of Practice on Consultation recommends that all departments should consult widely, both formally and informally, beginning as early as possible in the policy development process.

4.3 On the other hand, effective engagement can be challenging for a number of reasons:

- **Volume.** The sheer number of different stakeholders can make it difficult to identify and consult with everyone who might be relevant.
- **Variety of views.** Stakeholder's views may not always be reconcilable. For example there may be a tension between industry and the environmental groups or even within different industry sectors.
- **Short timetables.** Pressure of deadlines mean that stakeholders need to be brought on board quickly, but interpreting complex legislation takes time. The Department may need to make a trade-off between timely consultation and the ability to provide clarity.

13 Who are the key players?

In most cases the key players outside of government will include:

- Industry (including retail, food manufacturing, chemical, construction, farming) and the relevant business associations
- Other Non Governmental Organisations such as the voluntary sector and lobby groups
- Members of the public

And within government:

- The competent authority for the piece of legislation such as the Environment Agency, local authority or State Veterinary Service
- Devolved administrations
- Other government departments

Source: National Audit Office

Stakeholders should be involved at certain key stages in the process

4.4 Stakeholders should help inform both the negotiation and transposition phases of the legislation. Formal consultations are a key way in which their input is sought and Cabinet Office guidance suggests they should take place:

- At the first reading of a Commission proposal for a new Community law, during the negotiation phase;
- Once the proposal has been adopted a consultation should take place on the transposing regulations.

4.5 There is a Code of Practice on Consultation, published in January 2004 by the Regulatory Impact Unit (**Figure 14**).

The Code provides general principles of good consultation but does not provide detailed guidance on the “who, how or when” of consultations; information that could be usefully added by departments to tailor the Code to departmental people and processes.

The Department has used a variety of communication methods, but could spread good practice more widely

Innovative efforts to communicate with key players have helped

4.6 In addition to formal consultations, there are other ways in which key parties can be engaged, for example through public meetings, web forums, surveys, focus groups, regional events and targeted leaflet campaigns and then through training, advice and support on the imminent changes. The Department recognises that effective engagement is important and our case studies show that it has approached this challenge in a variety of ways:

- On the **Landfill Directive** the Department held a series of road-shows across England to inform local authorities about the Landfill Allowance Trading Scheme. The idea of these road shows was to explain the Directive, face to face, to facilitate discussions and highlight and address the concerns of local authorities.
- Similar training events were held for the **Animal By-Products Regulation**, to give technical training to those enforcing the legislation and raise awareness for others affected by the Regulation.
- On the **Water Framework Directive** the Department formed a number of stakeholder implementation groups to discuss a range of issues raised by the Directive. For example, such groups discussed the idea of establishing a communications strategy to explain the requirements of the Directive to the industries affected. These implementation groups were welcomed by members, who found them to be inclusive and effective. The Department also used other forms of communication on this Directive such as stakeholder forums, bilateral meetings between the Department and specific stakeholders, and comprehensive web pages.

14 Code of Practice on Consultation

The Cabinet Office Code of Practice has six consultation criteria:

- 1 Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
- 2 Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
- 3 Ensure that your consultation is clear, concise and widely accessible.
- 4 Give feedback regarding the responses received and how the consultation process influenced the policy.
- 5 Monitor your department’s effectiveness at consultation, including through the use of a designated consultation co-ordinator.
- 6 Ensure your consultation follows better regulation best practice, including carrying out a regulatory impact assessment if appropriate.

These criteria must be reproduced within all consultation documents.

Source: Cabinet Office

4.7 Successful communication does not necessarily guarantee that all the key players will be satisfied with the outcome. On the **Environmental Liability Directive** the Department ran two sets of stakeholder implementation groups; one for business and one for environmental organisations. All involved with the process felt the consultations were thorough and involved all key players, but because the outcomes struck more of a chord with the business groups than environmental groups one set of stakeholders was unhappy with the outcome. The fact that one group of stakeholders is less happy than another may be inevitable.

The Department could do more to share and encourage good practice in engaging key players

4.8 The Department has developed and applied much good practice and many innovative ideas for engaging with key players, but there are still some inconsistencies in approach. The Department’s engagement with its stakeholders is variable and much could be learned from those teams who have been more successful. The Department does have examples of sharing best practice and learning from others:

- On the **Environmental Liability Directive** the relevant policy team gave a presentation, as part of the Department's twice-yearly look at forthcoming Presidencies of the European Council,⁶⁵ to Departmental policy leads on the lessons learned from the negotiation of the Directive. This provided a useful analysis of both aspects that went well and areas for improvement.
- Similarly the Nitrates policy team produced a document following the second phase of implementing the **Nitrates Directive** entitled "Nitrate Vulnerable Zone Communications Strategy: Success and Lessons" which was disseminated across the Department.
- On the **Animal By-Products Regulation** the Department used a number of different methods to help develop controls to permit the composting industry to handle food waste, an industry that was undeveloped in the UK. Methods included a risk assessment, a steering group with expert representation, site visits, an expert panel of representatives from all relevant sectors and conferences organised with the Composting Association to keep the large audience abreast of developments. This project was highlighted by the Department's Sustainable Development Unit as a "Beacon Project" because it had a cross-cutting approach which joined up several areas within the Department in addition to contributing towards the departmental aim for sustainability.

However, despite these ad hoc examples, the Department has no systematic way of sharing best practice and learning from others where good stakeholder engagement has taken place, and there is no central point that others can go to for ideas on what works and what does not, more generally across the European legislative process.

4.9 The Departmental intranet contains useful guidance on consultation exercises which is clear and links through to other key documents that will be useful for those preparing consultations. The comprehensiveness of this section could be replicated for others areas of the Department's business, in particular for guidance and advice on the negotiation, transposition and implementation of European law. The Department has appointed a consultation co-ordinator to help improve the quality and consistency of consultations.

Some consultations by the Department have missed key issues

4.10 The Department has to co-ordinate more consultations than any other department across government, organising nearly one fifth of all consultations across government departments in 2003-04 including a significant number relating to European law. Our case studies show that, on occasion, the Department has missed key issues and players due to the low quality of these consultations (**Case examples 16 and 17 overleaf**).

Untimely guidance to those affected by legislation has hindered implementation

4.11 The Department places considerable emphasis on complying with the Cabinet Office's 12-week consultation rule (Figure 14). The Department had a compliance rate with this rule of 81 per cent, four per cent higher than the cross-government average despite having the highest number of consultations of any Department.

65 The Presidency of the European Council currently operates on a rotating basis through all the Member States, changing every six months.

CASE EXAMPLE 16

Animal By-Products Regulation

Overlooking a key issue on this Regulation caused problems with stakeholders

The Regulation made significant changes to the way in which animal by-products could be disposed of, including a ban on burying dead animals on farms and new disposal routes for waste foodstuffs containing meat.

The complexity of the changes meant that they affected around 17 different sectors including the farming community, slaughterhouses, incinerators, pet food plants and retail outlets.

The retail sector was missed out of one of the later consultations. The Department did not identify the fact that all waste foodstuffs containing meat could no longer go straight to landfill without being treated until January 2003 - a major change for the retail industry. Early consultations which had included the retail sector had not highlighted this issue.

The issue was missed by the Department for several reasons including:

- **Lack of detail in the Regulatory Impact Assessment (RIA).** The consultation contained a partial RIA which did not clearly show the expected impacts of the Regulation on each sector.⁶⁶ Both partial and final RIAs lacked clarity and took insufficient account of the consultation response of small stakeholders despite recognising that the impact on small businesses would be great, and that the majority of businesses affected were small. The RIA suggests that prior consultation was weak because it uses language like “we think that” and “it may be that” rather than stating to what extent these opinions have been informed by consultees.
- **Lack of oversight by the Department.** The Departmental Better Regulation Unit made no comments on the quality of this RIA, despite being sent the draft RIA in January 2003. This role was left to the Cabinet Office Regulatory Impact Unit (RIU), which received the draft RIA in February. The RIU made detailed comments, but was concerned at the lateness of their involvement. The Department would have benefited from more timely preparation of the RIA, more active involvement of the departmental regulation team and earlier involvement of the RIU.

As a result of overlooking the impact of the Regulation on waste foodstuffs containing meat, one large group of stakeholders in the retail sector was disenfranchised - much time and effort has been spent subsequently in negotiations with this group to resolve issues surrounding the changes. In addition, transitional measures had to be negotiated by the Department to allow additional time for the retail sector to prepare for the changes; this increased the administrative effort needed by the Department thus detracting from implementation on the ground.

CASE EXAMPLE 17

Ozone-Depleting Substances Regulation

Consultation did not highlight the impact of this Regulation on the second hand fridge market

Despite consultation with industry the Department was unaware of the impact the Regulation would have on the second hand fridge market. The Regulation banned the export of second hand fridges to countries outside of the European Community, whereas previously 40 per cent of all second hand fridges were taken back by retailers because they could make money from their export; this willingness ended once the market for these fridges disappeared. This added to the number of disposed fridges awaiting treatment to remove ozone-depleting substances, thus increasing the size of the “Fridge Mountain”. The implications of the ban on take-back schemes, and the removal of insulating foam, may not have been identified during the consultation because only three weeks were allowed instead of the usual 12; the response rate was 20 per cent.

4.12 The Department has had less success in following Cabinet Office advice to issue guidance on new legislation 12 weeks before legislation comes into force. In November 2000 the Small Business Service (SBS) also published guidance for government departments requiring that they give advice to businesses about new legislation at least 12 weeks before it comes into force. During 2003 there were 85 new regulations within the Department’s area of responsibility, both European and national. Of these only 16 had guidance in place 12 weeks before the regulation came into force.⁶⁷

⁶⁶ This was only developed for the final RIA which was laid before Parliament with the final enforcing regulations.

⁶⁷ Provisional figures for 2004 suggest that of 121 new regulations, 34 had guidance in place 12 weeks before regulations came in.

4.13 This poor record is borne out by some of our case studies (**Case examples 18, 19 and 20**).

CASE EXAMPLE 18

Ozone Depleting Substances Regulation

Late guidance to industry contributed to delays in infrastructure

Guidance to local authorities and other operators on the collection and disposal of waste fridges was available in November 2001, but draft guidance to industry on the specification for the treatment and reprocessing plants for fridges was not issued until March 2002; three months after the changes in the rules on disposal of fridges came into force. As a result there was a delay while industry developed the necessary infrastructure and this delay led to the build-up of fridges needing storage by local authorities, the so-called "Fridge Mountain".

CASE EXAMPLE 19

Animal By-Products Regulation

Guidance notes were only issued one year after the legislation came into force

Guidance notes for key sectors were issued a year *after* the legislation had come into force and some guidance has still to be issued. This is because of the complexity of the subject matter, the number of sectors involved, lack of departmental resources and late negotiation of transitional measures.

The result is confusion for the sectors affected, and the Department has had to spend extensive time dealing with ad hoc queries over implementation until the more general guidance is issued.

A key change resulting from the Regulation is that dead farm animals can no longer be buried on-farm. The Department planned to set up a new disposal route in the form of a National Fallen Stock Scheme.⁶⁸ Under the Scheme, farmers pay a rate depending on the size of their farm, and any dead animals would be collected and disposed of in a way that adheres to the Regulation. However, ironing out the details of this Scheme with both farmers and the Commission has meant that, after announcing that a Scheme would go ahead in July 2003, the Scheme was not up and running until November 2004. This left an 18 month period between the ban on on-farm burial⁶⁹ and the start of a national collection scheme during which time farmers were confused as to when the national scheme would start and may have had difficulty in disposing of their dead animals.

4.14 In contrast, there are other examples (**Case examples 21 and 22**) where the Department has issued clear and timely guidance that is helpful for users.

CASE EXAMPLE 20

Landfill Directive

The Department acknowledged the complexity of the changes associated with this Directive and the uncertainties for industry and so produced an interpretation of the landfill regulations as amended by the Waste Acceptance Criteria decision. Although this is a useful document which helps to clarify the position for industry and reduces uncertainty, it was not produced until September 2004, two months after the ban on co-disposal.

CASE EXAMPLE 21

Nitrates Directive

Guidance was issued to farmers in July 2002, four months before the second designation of nitrate vulnerable zones came into force. The guidance took a variety of forms including hard copy booklets posted to farmers, website guidance, a CD Rom, workshops, promotion at national events and a technical helpline. As a result, compliance in the new zones was high from the outset (around 80 per cent).

CASE EXAMPLE 22

Water Framework Directive

Technical guidance is already being issued, in some cases over two years in advance, to help the Environment Agency and local authorities develop the necessary monitoring arrangements by 2006. Although this guidance will require updating nearer the time it does give stakeholders a strong indication of what will be required. More generally, extensive help is available through a Frequently Asked Questions section on the Department's web pages. These provide a very useful stop gap before guidance is issued but should not act as a substitute for timely guidance.

68 Run by a not-for-profit Company and funded initially by the Department and the devolved administrations but in the long term it will be funded by subscriptions charges from farmers.

69 1 May 2003.

The Department has a mixed record in involving competent authorities

4.15 A “competent authority” is the public body or institution which is given functions under a Directive or Regulation which are necessary for its application, such as issuing permits and enforcing their requirements. There are approximately 40 different bodies which have a role in enforcing legislation within the Department’s remit. Some of these bodies are responsible for enforcing more of the Department’s legislation than others, especially the Environment Agency, the Rural Payments Agency (for the Common Agricultural Policy), the State Veterinary Service (for animal health), the Sea Fisheries Inspectorate (for fisheries) and local authorities (in a variety of roles). And one piece of European law can require a number of bodies to apply or enforce it. It is important, therefore that their roles and responsibilities are identified early and are clearly defined.

4.16 The Environment Agency is the competent authority for a number of our case studies and holds technical information that can improve the quality of negotiations and ensure that implementation plans will be enforceable. We found in some cases (**Case examples 23 and 24**) that the Department has had limited success in involving the Agency.

4.17 In other cases, however, the Agency has been brought in early and good use has been made of the Agency’s technical expertise. For example:

- On the **Environmental Liability Directive** the Department and the Environment Agency worked together to produce the Regulatory Impact Assessment. In particular the Agency used its technical expertise in this area to produce six case studies which demonstrated costs and benefits to stakeholders.
- On the **Water Framework Directive** policy officials from the Department were accompanied in European expert working group negotiations by a senior technical expert from the Agency. This provided greater technical expertise in negotiations and involved the competent authority early on.

4.18 These more recent examples show that considerable improvement has been made. Further improvements should be facilitated by a Concordat between the Department and the Agency, agreed in June 2003, which provides the basis for effective working together on international activities affecting the environment.

CASE EXAMPLE 23

Landfill Directive

The Department and the Agency both produced guidance to industry but to different timetables

Industry was keen to obtain guidance on the requirements of the Directive as soon as possible in order to prepare for the ban on co-disposal and changes to treatment of hazardous waste.

As competent authority the Agency is responsible for enforcing the new legislation and so was keen to make requirements clear by way of guidance. However, the Agency could not provide such guidance in full until legislation was in place for the Waste Acceptance Criteria. This did not happen until June 2004, and so the Agency provided interim guidance prior to details being finalised which has been updated as more details are known. The Department produced its own interpretation of the legislation, but not until September 2004. This has proved confusing for industry who want as much certainty and guidance as possible in this area.

CASE EXAMPLE 24

Nitrates Directive

The Agency were not asked to comment on draft consultation documents

The Environment Agency had no opportunity to comment on the Department’s draft consultation document for the second round of nitrate vulnerable zone designations, despite being the competent authority responsible for the Directive’s monitoring and enforcement. In addition, the Agency’s response to the consultation advised that the whole of England should be designated as a nitrate vulnerable zone rather than 80 per cent, a view shared by the majority of respondents. Although the Department gave consultees a choice between 80 per cent or 100 per cent designation, the Department designated a lower figure than either of those (55 per cent) because the refined mapping process showed a lower percentage of land to be nitrate vulnerable. Because the consultation went out before the mapping was completed, the 55 per cent figure was never subject to consultation.

The Department could do more to assist timely transposition in the devolved administrations

4.19 The Department co-ordinates the UK's response to all infringement proceedings, even if they are a result of the actions of the devolved administrations or Gibraltar. Any fines as a result of infringement would fall to the authority responsible for the breach. However, these provisions have never been used because the UK has yet to face a fine. Nonetheless, the time taken to resolve infringements means it is in the Department's long term interest to co-ordinate timely and accurate transposition and implementation throughout the UK. Currently the Department does not plan for the time it takes the devolved administrations to transpose, nor do they necessarily check that their transposition is on track.

4.20 It is particularly important for the Department to plan for the transposition by the devolved administrations because of any differences in the legislative process between England and the devolved administration. For example, in Wales,⁷⁰ all legislation has to go through full scrutiny, translation into Welsh and debate in plenary. This process can take up to six months from the time a text is agreed. In England the negative resolution procedure applies to much of the Department's transpositions, meaning that the legislation can be laid before Parliament only 21 days before it needs to come into force.

4.21 In many cases the devolved administrations will adopt similar or identical transposing legislation to England and in a large majority of cases England will be the first country to complete transposition. Project planning within the Department, however, does not take account of the fact that the devolved administrations often wait for England's Statutory Instrument to be drafted and then take their lead from that. In a quarter of the 38 new infringements for late transposition in 2002 and 2003, the infringement related to one of the devolved administrations (**Case example 25**).

CASE EXAMPLE 25

Landfill Directive

Northern Ireland was so late in transposing this Directive that the infringement case went all the way to the European Court of Justice: the UK lost the case and was ordered to pay costs.⁷¹ Northern Ireland eventually transposed this Directive in December 2003, 29 months after the deadline (July 2001) and 18 months after England transposed in June 2002.

4.22 It is possible for all parts of the UK to work together and produce one single piece of transposing legislation. This can speed up the transposition process and was the case for the **Emissions Trading Directive**. However, on all our other case studies the UK produced more than one Statutory Instrument to transpose the European requirements into national legislation.⁷² Since devolution, legislation at UK level in areas of devolved competence is rare and the devolved administrations may wish to make their own legislation where they have the power to do so.

4.23 Although the Department is not legally required to co-ordinate the devolved administration's responses, with the exception of any response to an infringement proceeding, there are Concordats that provide for close co-operation between England, Scotland, Wales and Northern Ireland. On our case studies the co-operation between England and the devolved administrations was good, varying from ad hoc contact to more formal steering groups. All methods, however, involved working together in some way to develop similar approaches to legislation. The result was that the legislation across the devolved administrations for our case studies was similar; in particular the sanctions imposed were the same, but there were some differences in definitions and each was tailored for the relevant bodies in each devolved administration.

⁷⁰ Powers as bestowed upon the Assembly by the UK Parliament in the Government of Wales Act.

⁷¹ Though in practice these are not, by convention, collected.

⁷² On two case studies there are only three pieces of legislation as England and Wales transposed jointly and for another example England, Scotland and Wales transposed together.

APPENDIX 1

Case studies



Nitrates Directive 1991/676/EEC. This is an environmental measure designed to reduce water pollution by nitrates from agricultural sources, predominantly fertiliser and manure. It requires Member States to designate all or part of their area as nitrate vulnerable zones. Within these zones farmers must follow certain rules regarding the timing and amount of fertiliser and manure that can be used. It was adopted by the Commission in 1991 and should have been transposed into national law by 1993.



Landfill Directive 1999/31/EC. The aim of this Directive is to provide for measures, procedures and guidance to prevent or reduce negative effects from the landfill of waste. It enforces a number of changes both to the operation of landfill sites and the management of waste. In particular it requires the classification of landfill sites as hazardous, non hazardous or inert, a ban on co-disposal of hazardous and non hazardous waste and the pre-treatment of waste going to landfill. It also sets binding targets for the reduction of biodegradable municipal waste going to landfill. The Directive was adopted in April 1999, and had to be transposed into national law by July 2001. Different aspects of the Directives come into force on different dates e.g. the ban on co-disposal came into force in July 2004.



Ozone Depleting Substances Regulation 2037/2000/EC. This is the Regulation to implement within the European Community the 1987 Montreal Protocol on substances that deplete the ozone layer, a multi-lateral environmental agreement designed as a global response to the threat of depletion in the stratospheric ozone layer. This Regulation required, amongst other things, the removal of ozone depleting substances from domestic fridges and freezers from the 1 January 2002. It also prohibited the export of CFCs outside of the European Community from 1 October 2000. It was agreed in June 2000 and came into force in October 2000.



Water Framework Directive 2000/60/EC. This aims to introduce an integrated and co-ordinated approach to water management with a view to achieving good ecological and chemical status in all inland and coastal waters by 2015. The way in which this is to be achieved is by establishing a river basin district structure within which environmental objectives will be set. There are a series of important milestones before the 2015 deadline, which include the characterisation of river basins by December 2004, starting public participation in 2006 and finalising river basin management plans by 2009.

Source: National Audit Office



Pig Welfare Directives 2001/88/EC and 2001/93/EC. These Directives were introduced to build on existing minimum standards for the protection of pigs. The most significant of the new requirements is a ban on the close confinement of sows, an increase in the minimum weaning age and permanent access for all pigs to materials that allow them to manipulate. The Directives applied from 1 January 2003.



Animal By-Products Regulation 1774/2002/EC. This Regulation lays down rules for the disposal of animal by-products not intended for human consumption. The aim is to protect public and animal health and maintain consumer confidence in the livestock industry by ensuring safe disposal of animal by-products. Key changes include a ban of "on-farm" burial of fallen stock, a ban of the disposal of former food stuffs containing animal by-products to landfill and the introduction of controls over incinerators and composting and biogas plants. The Regulation was adopted in October 2002 and applied in Member States from the 1 May 2003.



Emissions Trading Directive 2003/87/EC. The objective of this Directive is to set up an EU-wide emissions trading scheme as one of the policies being introduced across Europe to tackle emissions of carbon dioxide and other greenhouse gases. It was agreed on 22 July 2003 and came into force on 25 October 2003. The Directive was due to be transposed by Member States into national law by 31 December 2003.



Environmental Liability Directive 2004/35/CE. The aim of this Directive is to prevent and restore significant environmental damage. Where damage has been caused to land, water and EU protected biodiversity, those that have caused it will be liable to restore the environment or reimburse the competent authority if it undertakes the remediation (the polluter pays principle). The Directive was proposed in January 2002 and was adopted in April 2004.

APPENDIX 2

Infringement proceedings

1 Article 226 in the Treaty establishing the European Community provides that:

“If the Commission considers that a Member State failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.”

2 This gives rise to three stages:

- The Commission issues a letter of formal notice requesting the Member State submit its observations on the matters raised by the Commission.⁷³
The matters are either concern over late transposition, quality of transposition or quality of implementation.⁷⁴
- If the Commission is not satisfied with the response it will issue a reasoned opinion which the Member State must comply with.
- If the State does not comply, the matter will be referred to the European Court of Justice (ECJ) who will declare whether the Member State has fulfilled its obligations.

3 The Member State, if found not to have fulfilled its obligations, must begin the process of complying with a judgment immediately and must be completed as soon as possible. This is laid down in article 228 of the Treaty:

“If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgement of the Court of Justice”.

4 If the Member State does not comply then the same process begins again under article 228 resulting in a second hearing of the ECJ. If the Court finds that the Member State has not complied then the Member State may be subject to a lump sum or periodic penalty payment.

⁷³ In practice there is often an informal “pre 226” stage where the Commission writes to the Member State asking for its comments on complaints.

⁷⁴ The sending of a letter of formal notice does not therefore automatically mean that the UK has breached its obligations.

APPENDIX 3

Our study methods

1 This study examined the challenges departments face when transposing and implementing European law. We highlighted these challenges through a number of specific pieces of legislation which the Department for Environment, Food and Rural Affairs (Defra) had responsibility for transposing and implementing. In each case we examined the main outcomes for each of the chosen pieces of legislation and then explored what had led to those outcomes in terms of the timeliness, cost and quality of transposition.⁷⁵ This helped us to identify and understand the challenges that departments face. We then explored each of these challenges in more detail.

The main methods used in the course of this study were:

Case studies

2 We examined eight European Directives and Regulations which Defra has responsibility for transposing and implementing (see Appendix 1), to understand the challenges of dealing with European law and then illustrate these challenges in the report. This provided both good practice examples and areas for improvement. These case studies were chosen on the basis that they are high profile, relatively recent legislation that will lead, in the main, to significant changes to industry and other bodies. The case studies chosen also spanned the various stages of the European process: negotiation, transposition and implementation.

File review

3 We reviewed the departmental files relating to the eight case studies we examined. This provided us with information on a number of issues such as timing of decisions, project planning, legal advice, and stakeholder meetings.

Use of existing reports and guidance

4 A variety of published reports were used to inform our study. These included Defra's Regulation Taskforce report, the Foreign Office's Bellis Report on the implementation of EU legislation, and the British Chamber of Commerce report entitled "How much regulation is gold-plate?" We also referred extensively to Cabinet Office guidance on consultation, transposition and better regulation and drew on the Better Regulation Taskforce reports "Environmental Regulation: Getting the Message Across" and "Avoiding Regulatory Creep" of July 2003 and October 2004 respectively.

Data analysis

5 We used data held on databases at the Department to make calculations on numbers and types of infringement cases and on the number of Directives transposed on a yearly basis. We reconciled this data against similar information held by the Cabinet Office. The Small Business Service provided us with statistics it collates on stakeholder guidance produced by Defra and the other UK government departments which we then analysed.

⁷⁵ For the Directive which has yet to be transposed we examined the level of preparedness for this process.

Stakeholder consultation

6 We consulted with various organisations with an interest, or active involvement, in our case studies. This included the competent authorities responsible for implementation and enforcement, and members of industry groups affected by the changes. We also consulted those with a more general interest in the transposition and implementation of European law. Our framework of questions focused on the level of stakeholder engagement with the Department, the quality and timeliness of guidance and the impact of new legislation on stakeholders' businesses and their preparedness for this.

7 The following organisations were consulted:

ADAS (consultancy to rural and land-based industries)
 Biffa Waste Services Ltd
 Better Regulation Taskforce
 British Chamber of Commerce
 British Meat Processors Association
 British Pig Executive
 British Retail Consortium
 Cabinet Office (Regulatory Impact Unit and European Secretariat)
 Chartered Institution of Water and Environmental Management
 Chemical Industries Association
 Compassion in World Farming
 Confederation of British Industry
 Corus (Environment Section)
 Country Land and Business Association
 Department of Trade and Industry
 Drinking Water Inspectorate
 English Nature
 Engineering Employers Federation
 Environment Agency
 Environmental Industries Commission
 Environmental Services Association
 Farm Animal Welfare Council
 Federation of Small Businesses
 Friends of the Earth
 Institute for European Environmental Policy
 Local Authorities Co-ordinators of Regulatory Services

Local Government International Bureau
 London Business School
 MJ Carter Associates (environmental consultancy)
 National Pig Association
 National Farmers Union
 Ofwat
 Royal Society for the Protection of Birds
 Royal Society for the Prevention of Cruelty to Animals
 Shanks Waste Solutions
 State Veterinary Service
 UK Renderers Association
 Water UK
 Water Voice

Focus Group with Defra officials

8 We held a half day focus group with Departmental representatives from each of our eight case studies to establish which challenges were most important to them when transposing the Directives and Regulations we examined and how these challenges might be overcome. This helped us structure the study to reflect challenges faced by both the Department and external stakeholders.

Consultation with other departments

9 We conducted interviews with officials from the Cabinet Office and the Department of Trade and Industry. The Cabinet Office provided us with cross-governmental guidance on a variety of issues such as transposing European legislation, consultation with stakeholders and producing Regulatory Impact Assessments. Testing our findings against other departments helped us to validate the challenges we had identified as generic to Whitehall and not just particular to Defra.

International data

10 We asked the Supreme Audit Institutions of the fourteen other Member States (not including the ten accession countries who joined the EU on 1 May 2004) to complete a survey on how sanctions for the eight case studies we looked at are laid out in their national legislation. From this information we could consider whether or not the UK has more stringent sanctions placed on industry than other Member States.