

Lost in Translation? Responding to the challenges of European law

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EXECUTIVE SUMMARY



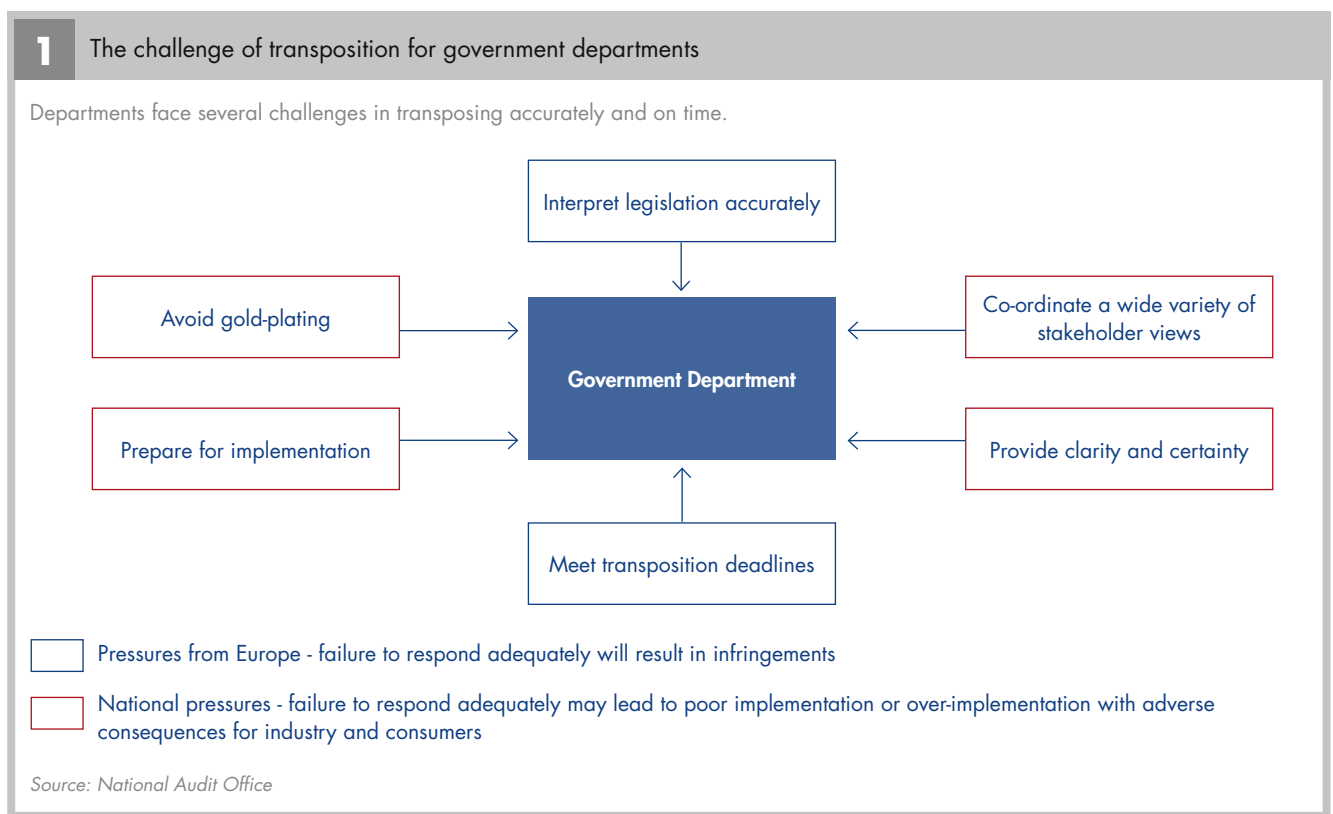
1 As a member of the European Community the UK must respect European Community law.¹ In the UK, the Department for Environment Food and Rural Affairs (the Department) is responsible for implementing more European law than any other government department, around 30 per cent of the total. Community law 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.