



Transposition guide: how to implement European directives effectively

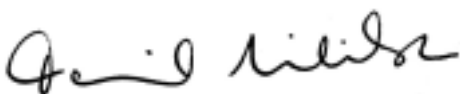


Foreword by Minister for the Cabinet Office, David Miliband

Better regulation and its potential contribution to Europe's competitiveness and growth have never received more support across the EU than now. Six Presidencies of the European Union have signed up to a joint initiative to promote regulatory reform from 2004-2006 and better regulation has moved decisively up the agendas of the EU Institutions.

In addition to actions in Brussels, Departments have strengthened their own capacities to ensure that the implementation of EU legislation in the UK is done in the least burdensome way. The new examples of good practice included within this guide reflect the progress that has been made across Whitehall in engaging more proactively with policy development at the EU level and in spreading project-management techniques for the transposition of directives. The revised guidance on Transposition Notes will improve transparency by requiring Departments to make Transposition Notes easily accessible to the public as well as to Parliament. And they will have to include within them an explicit comment on any over-implementation, which will have to be rigorously justified.

This guide clearly sets out the Government's policy on transposition and is an essential tool for policy makers and lawyers involved in handling EU legislation. It will encourage clear thinking about the practicalities of implementing legislation right from the start, in order to ensure that policies are delivered in the most proportionate and effective way.



David Miliband

Contents

Page no

Chapter 1 Introduction	3
Key points to remember	4
Government policy on transposition	4
European decision-making and transposition flowchart	6
Chapter 2 Handling a Commission proposal	7
Early thinking about implementation	7
Project planning for transposition	12
Chapter 3 Implementing a directive in the UK	14
Options for implementation	14
Drafting: Copy-out and Elaboration	15
Over-implementation	16
Checklist for the transposition of European legislation	20
Annex 1 Guidance on the provision of Transposition Notes	21
Annex 2 Transposition Note for the Electronic Signatures Directive	26
Annex 3 Template for a Transposition Note	28
Annex 4 Contact details	30

Chapter 1: Introduction

- 1.1 This guide is designed to be used by policy-makers and lawyers across government, although some of the requirements, eg to produce a Transposition Note, apply only to those laying legislation before the UK Parliament. The guide sets out the approach to take in handling Commission proposals for directives, and in transposing agreed directives into UK law. Although the advice focuses on the transposition of directives, the principles reflect good practice, which can be applied to the implementation of all types of Community legislation.
- 1.2 This chapter sets out Government policy on transposition, and the key points to remember to ensure good transposition. Chapter 2 contains guidelines on how to consider transposition issues before a directive is agreed, and Chapter 3 focuses on how to handle an agreed directive.
- 1.3 **It is vital to consider how a European proposal will be implemented in the UK throughout the regulatory process**, from formulation through negotiation to implementation. It is too late to begin thinking about the practicalities of implementation once a directive has been agreed – many potential problems can be avoided at the very earliest stage, if possible before a proposal is formally published by the Commission.
- 1.4 Think about the practicalities and use a **Regulatory Impact Assessment (RIA)** as an evidence base to support or reject a particular proposal. An RIA can be very effective as a tool, both to inform the negotiation and the transposition of a European directive.

Key points to remember

Policy makers and lawyers should work together from the start.

Commit appropriate resources to handling European legislation.

Consider at the earliest possible stage how a proposal will be implemented in the UK. Focus on practical as well as policy outcomes.

Think about how best to shape a proposal, both before and after formal publication by the Commission.

Use a Regulatory Impact Assessment to set out options, highlighting the risks attached to each and the related costs and benefits.

Ensure appropriate co-ordination and consultation within government, including devolved administrations, agencies and local authorities.

Ensure appropriate consultation with external stakeholders and encourage them to engage directly with the EU institutions.

Avoid over-implementing EU directives, unless the circumstances are exceptional and the benefits demonstrably outweigh the costs.

Government policy on transposition

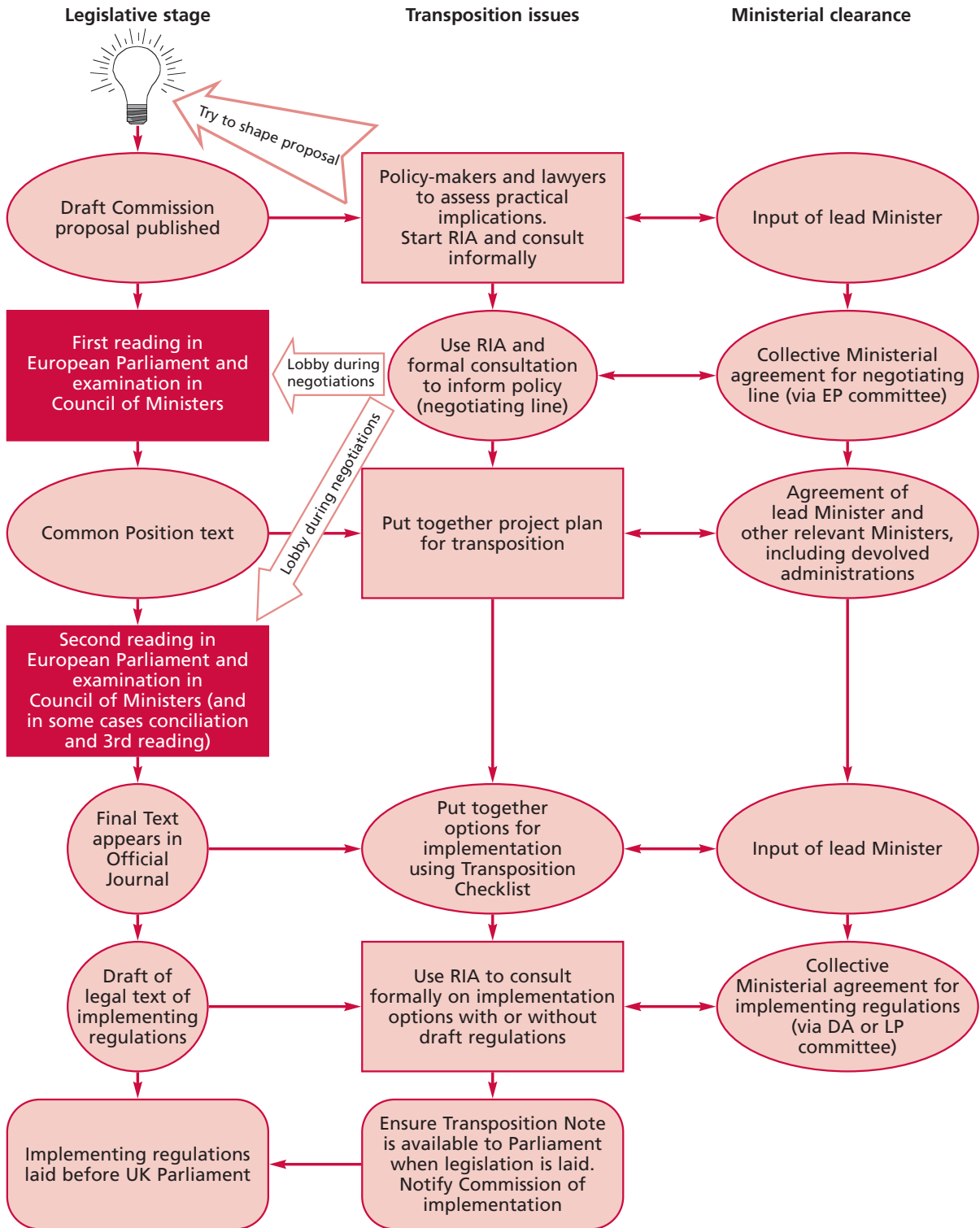
- 1.5 It is a requirement of Community law that EC legislation should be implemented in an effective, timely and proportionate manner. Where directives are concerned, the Government's policy is to transpose so as to achieve the objectives of the European measure, on time and in accordance with other UK policy goals, including minimising the burdens on business.¹
- 1.6 In order to set out clearly for Ministers and others the potential impact of a European proposal, you should set out in the form of an RIA the likely costs and benefits of all the options. Start even before the Commission formally publishes its proposal by putting together an initial assessment, develop the RIA when the proposal goes through negotiation, and refocus it at the transposition stage. If the proposal includes provisions which relate to devolved matters, you should consult with your colleagues in the devolved administrations when developing your RIA.
- 1.7 Use your RIA as a basis for discussion with the Commission, other Member States and the European Parliament before and during the negotiations. Be prepared to contribute information from your own RIA into the Commission's impact assessments and its consultation exercises.²
- 1.8 For advice on carrying out RIAs contact your Departmental Regulatory Impact Unit (DRIU), who should be kept informed on EU issues. The Cabinet Office guide *Better Policy Making: A Guide to Regulatory Impact Assessment* is also available from the Regulatory Impact Unit – 020 7276 2198 or www.cabinet-office.gov.uk/regulation

¹ Timely transposition is made more important by the targets that Member States signed up to for the Internal Market Scoreboards, which provide a snapshot of directives transposed at any given date. EU Heads of Government agreed Scoreboard targets of over 98.5% for the transposition of Internal Market Directives due by the Scoreboard date, and 100% for those for which the transposition date passed two or more years ago. DTI and Cabinet Office co-ordinate work across departments to deliver these targets.

² Commission Impact Assessments are available from the website: http://europa.eu.int/comm/secretariat_general/impact/index_en.htm

- 1.9 Ministers should also be made aware of the risks attached to each option set out in your RIA, including economic, social, environmental and legal risks. **Policy-makers and lawyers need to work closely together from the earliest possible stages to ensure risks are identified and evaluated for Ministers.** This proactive approach should ensure that considered choices can be made and solutions found for problems which may arise. The Transposition Checklist (see Chapter 3) contains the essential steps for lawyers and officials to follow to ensure that they are taking a risk-based approach to transposition.
- 1.10 Avoid instances of over-implementation, unless there are exceptional circumstances, justified by a strong cost-benefit analysis and extensive consultation with business.

European decision-making and transposition



NB: The process outlined is that of a directive being negotiated under the Codecision Procedure.

Chapter 2: Handling a Commission proposal

- 2.1 This chapter advises on how to consider transposition issues both before and after the Commission publishes its draft proposal, and how to use a project-management approach when planning for transposition.
- 2.2 Guidance on dealing with EU matters is available from your department's EU division or directly from the Cabinet Office European Secretariat on 020 7276 0086.

Early thinking about implementation

- 2.3 This section suggests some of the various ways of assessing the likely impact of a legislative proposal from the Commission. The aim is to try to ensure that the proposed legislation is proportionate and as targeted as possible.

Before the Commission formally issues its proposal

- 2.4 **Consider, with your lawyers, whether what the Commission is developing is the best way of achieving the policy.** Should the Commission be taking action or would action be better taken at national or sub-national level, according to the principle of subsidiarity? Has it consulted?
- 2.5 **Check whether the Commission has carried out an impact assessment** that considers a range of policy options and tools, including alternatives to legislation. Legislating is not necessarily the best method to use in order to achieve the relevant policy objectives and therefore alternatives should be considered as part of the impact assessment. With effect from 2005, the Commission gave a commitment that all items included in its Annual Legislative and Work Programme will be subject to an impact assessment and will have a 'road map' explaining how the consultation with stakeholders is being managed.
- 2.6 If you would prefer the Commission not to take action, **work out the costs and benefits of the proposal for the UK**, and compare with those of doing nothing. Discuss your findings with the Commission. If possible, consider the impacts on other Member States and seek allies.

See *Better Policy Making: A Guide to Regulatory Impact Assessment* for further guidance on preparing your impact assessment.³

³ The Cabinet Office RIA guide is available from www.cabinet-office.gov.uk/regulation

Effective RIAs

A good example of how RIAs can be an effective tool in shaping proposals at an early stage was a European Commission proposal to set new emissions limits for vehicles undergoing a roadworthiness test (MoT test). The UK RIA was made available to other Member States and the Commission just before formal negotiations began. It demonstrated that the proposal had many practical weaknesses, including that the proposed limit values were not suitable for the timescale, and could in fact result in vehicles incorrectly failing the test. There was support for change in the light of this evidence and the Commission withdrew the proposal.

- 2.7 If you are content for the Commission to take action, **check whether any particular problems arise at this stage** which can be sorted out before the draft emerges as a formal proposal. Are the structure and scope legally sound and is the effect clear? Would a minor change at this stage significantly reduce any unwanted impact on the UK?
- 2.8 **Think with your lawyers about how the proposal will be implemented in the UK.** Is the proposal workable on the ground? If not, use the figures worked out in your RIA to try to convince the Commission to alter its proposal. If the Commission's proposals will need implementing by means of domestic legislation, you will also need to think about whether new legislation will be needed, what form it should take and, if secondary legislation, using what powers.
- 2.9 Before a proposal is published you should ensure appropriate **informal consultation**, both within government, particularly with the relevant enforcement agencies, the devolved administrations, and with external stakeholders. Early consultation is the best way to form a consensus in favour of a particular approach, and highlight potential problems and weaknesses in the proposal. At this stage problems are more easily resolved as the text is easier to amend. Encourage stakeholders to engage with the EU institutions too.

Consultation with industry

DTI set up the VIPER group – Vehicle Industry Policy and European Regulation – to improve co-operation on policy development and regulation between the Government and the automotive industry. The stakeholder group meets regularly to discuss emerging EU regulatory proposals and acts as an early-warning mechanism on issues which are likely to have a significant impact on the industry. The group helps the Government to influence EU legislative proposals at an early stage and develop more robust RIAs. This model is working well and has been extended to other areas.

After the Commission issues its proposal

- 2.10 **Examine the draft legislation carefully with your legal advisers.** Even if you are not seeing the proposal for the first time, it is worth examining with your legal advisers how the draft reflects what you understood the policy to be and whether it is workable. You should **update your RIA** at this stage and use it to guide your consultation exercise. Your lawyers should refer to the Cabinet Office guidance on *Implementing Community Law*, which deals with legal methods of implementation. This is available from your department's EU division or from the European Secretariat on 020 7276 0086.
- 2.11 When a draft directive is published, you should carry out an open, **formal consultation** to help inform your negotiating line, using your RIA to set out the options and the associated **risks, costs and benefits**. Also consider the impact assessment carried out by the Commission and use this and your own when negotiating, both in official meetings and behind the scenes. It is unwise to finalise the detail of your negotiating position before you have a good understanding of the views of the Commission and other Member States.

- 2.12 Your RIA should accompany Ministerial correspondence seeking collective agreement on the negotiating line and the Explanatory Memorandum (EM) to the UK Parliament. For any regulatory proposal that is likely to impose a major new burden on business the Prime Minister's Panel for Regulatory Accountability will need to clear the RIA, prior to seeking EP clearance. Advice on this is available from the Cabinet Office Regulatory Impact Unit.
- 2.13 With your lawyers you need to take a **radical look at the whole area of legislation where the directive impacts**. Think about the best way to implement so that there is no overlap or contradiction with existing legislation. The best way of avoiding these traps is not to treat Community legislation as an add-on.
- 2.14 **Consider the need to consult with the devolved administrations.** 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, in consultation with the lead Whitehall department, how the obligation should be implemented and enforced in their area within the required timescale. This includes consideration of whether it would be best to implement the obligation separately or opt for UK legislation.⁴ If the legislation will require implementing in Gibraltar, consult the Foreign and Commonwealth Office on 020 7008 3310.
- 2.15 Where a devolved administration decides to implement a directive separately, it should consult the lead Whitehall department, and any other relevant departments, on its proposals. This is important to ensure that any differences of approach still produce consistency of effect and timing.
- 2.16 Even when the EU obligation is on a non-devolved matter consider the need to consult with the devolved administrations, particularly if the obligation might touch on areas which fall within devolved responsibilities. There may be occasions when a directive concerns an issue which is non-devolved, such as immigration, but contains provisions on devolved issues, such as housing, education or health, which will need to be implemented by the devolved administrations.
- 2.17 **Consider enforcement regimes.** Before making recommendations to Ministers, you will need to have decided how the UK implementing regulations will be enforced. In particular:
- **Who will enforce them?** You will need to have discussed enforcement with possible enforcement bodies (including local government) at an early stage.
 - **Levels of compliance** – Will the legislation impose criminal sanctions for non-compliance? If so, on what scale? It is for the Department for Constitutional Affairs to manage the courts – are they content?
 - **How and at what cost?** Establish whether the enforcement body has the resources and skills to meet the requirement. Under HM Treasury's New Burdens agreement, any burden on other government departments and local authorities must be quantified and costed. Your department will need to transfer funds from its own budget to fund the requirement.
- 2.18 Examples of the above considerations might include whether there are enough laboratories technically capable of carrying out the sort of testing required, or whether there are enough trained inspectors to ensure compliance with a particular requirement. These considerations will have an impact on resource planning.

⁴ The full text of the Concordat can be found on the Cabinet Office website at www.cabinetoffice.gov.uk/cabsec/previous%20years/2001/memorandum/index.htm

- 2.19 The **Enforcement Concordat**, a voluntary agreement between central and local government signed in 1998, gives some good examples of different methods of enforcement and can be found at www.cabinetoffice.gov.uk/regulation/pst/enforce/enforcecon.asp

The Concordat sets out that enforcers will:

- operate to published service standards;
 - be open about how they carry out their work;
 - be helpful in working with business to advise and assist on compliance and provide an easily accessible complaints procedure;
 - ensure that action required is proportionate to the risk; and
 - co-ordinate and liaise with other enforcers where necessary to ensure consistency.
- 2.20 **Implementation dates.** Ensure deadlines being considered for implementation are realistic, particularly if decisions of a technical nature will be decided in implementation committees after the directive has been agreed. When agreeing the transposition deadline, due regard should be paid to the views of the devolved administrations, and the procedures they will have to follow to implement the legislation.
- 2.21 Remember to build a **reasonable transposition deadline** into your negotiating position at an early stage. Many costs can be minimised if sufficient time is allowed, eg changes to labelling requirements should allow sufficient time to use up existing stocks. Make sure those affected by the legislation know what will be expected of them at the implementation date.

Consider implementation deadlines

Commission Decision 2001/471/EC required licensed slaughterhouses and cutting plant operators to apply the hazard analysis and critical control point (HACCP) approach to food safety management. The Food Standards Agency set up a stakeholder group to discuss the proposal. During Commission discussions, the Agency encouraged the adoption of a longer period for implementation for 'small' plants, due to the need to produce guidance for operators unfamiliar with HACCP principles. As a result the term 'small' was not defined in the Decision and Member States were free to interpret it in the context of their own industry structure. Following consultation, the UK chose a higher threshold than many other Member States, giving smaller plants an extra year to comply with the Regulations. During this period the Agency was able to provide guidance and training material for operators and enforcement officers.

- 2.22 **Common commencement dates** are the dates (usually twice a year on 6th April and 1st October) when regulations are commenced, ie take legal effect, for a particular sector or area of generic legislation, eg employment law. If common commencement dates apply to your particular area of legislation, consider whether it is feasible to aim to align the transposition deadline with them, recognising that this will cost negotiating capital, which could be used for more important objectives.⁵
- 2.23 **Transparency.** You should try to ensure the regulation or directive is very clear about what compliance is required, so as to avoid problems when drafting the UK implementing legislation. Talk to the Commission as late clarification of an uncertainty may leave you with inadequate time to prepare to meet the requirements of the European legislation by the date set. Reporting regimes need to be clear, as they can be a burden on business and on administrations.
- 2.24 Remember that the Commission is bound by an **Inter-Institutional Agreement on common guidelines for the quality of drafting of Community legislation** that aims to ensure well-

⁵ For more information on Common Commencement Dates, contact the Small Business Service on 020 7215 8180.

drafted legislation.⁶ Use the Guidelines. They are not just designed to make the resulting legislation conform to a standard format (although a consistent approach is helpful to enable those affected to understand the legislation). For example, the reason why ‘normative’ provisions (ie those with legal effect) should not go into recitals is because there should be a clear delineation between the Articles (which have legal effect) and the recitals (which explain the reasons for them).

- 2.25 **Do not be afraid to ask questions.** Poor drafting often conceals ideas that have not been properly developed. It is important to use the same term to cover the same concept wherever it occurs, as it is reasonable to assume that a different term has been deliberately chosen to mean a different concept. The Guidelines are an Inter-Institutional Agreement and the Council Secretariat should be able to help ensure that they are observed. Involve your lawyers in testing the text against the Guidelines. If changes are needed to the proposal to meet the Guidelines, it can be useful to suggest them early.

Guidelines on quality of drafting

The guidelines set out the general principles of good quality drafting including that:

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

- 2.26 You should keep your options under review as the proposal develops during the negotiations. Update your RIA as necessary and keep Ministers, the Cabinet Office, stakeholders and the UK Parliament (via an Explanatory Memorandum) informed of any significant changes to the proposal. Such changes may lead to a change in your negotiating position. When the directive is finally adopted your RIA should again accompany an EM to the UK Parliament.

Keeping stakeholders informed

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

⁶The guidelines can be found at www.europa.eu.int/eur-lex/en/treaties/selected/livre605.html

Transposition project plan

2.27 You should have been considering the practicalities of transposition and enforcement from the earliest stages in order to ensure UK implementation is carried out in the most effective and least burdensome way. You should also have been talking to the parts of the UK Government likely to have a role in implementing the legislation.

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

2.28 This approach should ensure that:

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

2.29 You should **set up a project team** comprising policy officials, lawyers and technical specialists from the lead Whitehall department, other Whitehall departments, agencies, devolved administrations and local government as appropriate. The group will need a project manager to co-ordinate the tasks. If your legislation requires implementation in the Isle of Man and the Channel Islands, consult the Department for Constitutional Affairs. If it requires implementation in Gibraltar, consult the Foreign and Commonwealth Office.⁷

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

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

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

⁷ For Gibraltar contact FCO on 020 7008 3310; for the Crown Dependencies contact DCA on 020 7210 8954; or see European Secretariat Guidance (00) 1.3 on Gibraltar, Overseas Territories and the Crown Dependencies.

EU Emissions Trading Directive (Directive 2003/87/EC)

The Defra team responsible for the Emissions Trading Directive used project-management techniques to manage the transposition exercise proactively, in relation to devolution issues and consultation, and meet the short transposition deadline. The Directive was adopted on 25th October 2003 and needed to be transposed by 31st December 2003, less than 10 weeks later. An early decision was taken to have only one set of transposing legislation across the UK so that a consistent approach could be taken across the jurisdictions and the exercise could be managed centrally to reduce the risks of delay. Defra consulted on the draft regulations for 8 weeks from 15 September, following the second reading in the summer, after which it was clear that major changes were unlikely to occur. Cabinet Office approval for an 8-week consultation period was obtained. This proactive approach ensured that the challenging deadline for transposition was met within the UK.⁸

- 2.31 Project teams should have buy-in from an official at a senior level (Director) who is ultimately responsible for the delivery of the transposition. This can help to provide a strategic focus, leadership and direction to the project and ensure that the project will be completed to an agreed budget and schedule. Senior ownership of the transposition can also help provide assurance to Ministers and the Management Board that the best possible approach, within the available resources, is being taken to ensure that the transposition delivers the required legislation on time.
- 2.32 The transposition of a directive is a complex process, often involving the management of overlapping priorities. You should consider training team members in programme and project management (PPM) and in using the appropriate software packages.

Programme and project management

In Defra, the Legal and Environment teams set up a joint Project to develop a Programme and Project Management (PPM) methodology for the transposition of directives. Standard PRINCE2 methodology was judged to be inappropriate but the process of transposition lends itself well to PPM disciplines. A tailored methodology has now been developed, piloted and adopted. The Project itself has now moved into a Programme phase in which all implementation of new environmental legislation will be managed through that methodology and overseen by a Programme Board, which will monitor not only the application of PPM but also look out for synergies between the Projects, both in terms of resources and intended outcomes. This is partly in response to recommendations from both the Better Regulation Task Force and Defra's own Regulation Task Force. Work is now underway with the Animal Health team to assess its suitability for implementing EU Regulations.

⁸ Transposition was, however, late in Gibraltar

Chapter 3: Implementing a directive in the UK

- 3.1 This chapter advises on the steps to follow when drafting legislation to implement a European directive, in particular how to evaluate the risks of all the options for implementation. It includes a checklist to be used by policy makers and lawyers to ensure effective transposition. It also highlights the need to make Transposition Notes available to the UK Parliament when laying the implementing legislation.
- 3.2 You will also need to read Cabinet Office guidance on *Implementing Community Law*.

Options for implementation

- 3.3 You should have **involved lawyers in the process of the negotiations**, and you and they should have been considering the implications of implementation as the proposal developed. They will have advised whether new domestic legislation (primary or secondary) would be needed to implement the proposal. Once the directive has been adopted you will need to confirm that advice and instruct your lawyers either to draft the necessary secondary legislation themselves or, in the unlikely event that primary legislation is needed, to instruct Parliamentary Counsel. Check with your lawyers whether a Regulatory Reform Order would be a suitable way of implementing some, or all, of the requirements of the directive.
- 3.4 Sometimes the directive will expressly, or by implication, leave a considerable margin of discretion to Member States, or require them to make their own provision in some respect. In other cases it will be apparent that a uniform result is intended (particularly in Single Market cases) and there is very little scope for discretion. Many directives will contain elements of both. There will also be a specific deadline for transposition into national law and for the proposal to come into force (occasionally the requirement to transpose and to enter into force may be on different dates). Full use should be made of any transitional periods available in the directive (except where there is some benefit to business or others in not doing so).
- 3.5 When considering the **full range of options for implementation**, you will need to set out the **risks and the costs and benefits** of each, covering economic, social, environmental and legal aspects.⁹ You should refocus your RIA at this stage and it should accompany Ministerial correspondence seeking collective agreement to your options for implementation and to the draft

⁹ When considering the legal risk associated with the options, you need to be aware that this is not just the risk of infraction proceedings on the part of the Commission, but also that the risks of departing from the meaning of the directive are:

- Possible damages against the state (so-called Francovich damages);
- that the proper meaning may be held to be effective against the state (which in this context has a very wide meaning) so as to override the implementing legislation ('directly effective');
- that the courts may in any case interpret the legislation consistently with the Community law obligation; and
- that UK legislation may be held to be ultra vires – that is, going beyond what is allowed where regulations are made under section 2(2) of the European Communities Act 1972, or another domestic provision which empowers Ministers to make secondary legislation to give effect to a Community obligation.

of the implementing regulations. If the measure will have a significant impact on business, charities or the voluntary sector, or over-implements the directive, you will need clearance from the Prime Minister's Panel for Regulatory Accountability prior to writing round for Ministerial clearance. The RIA should be used as a basis for **open consultation on the options**. If you have started drafting the regulations you may want to consult on these too.

- 3.6 Some options may arise from the **margin of discretion** built into the directive. In this case you will need to be clear what the margin is and implement in the way most suited to the UK and in accordance with other UK policy goals, including minimising the burdens on business. For example, if a directive requires an activity to be licensed, does it allow discretion over how often it is to be renewed (annually, every three years, or open)? Bear in mind that longer periods will reduce the cost to industry but will they achieve the (safety) objective of the legislation?
- 3.7 **It will often be useful to make a comparison with the approaches to transposition taken by other Member States during implementation**, so that the relative burdens of different approaches are well understood, and best practice can be shared across Member States. Where they have been established by the Commission, 'transposition groups' enable policy officials and lawyers to discuss concerns and exchange views during implementation.
- 3.8 The need for choices may arise from the **ambiguity of the wording** of the directive. A decision in this case needs to be taken on how to interpret the wording when drafting the implementing regulations. You should have been seeking clarity in the wording of the directive before it was adopted, but there are occasions where ambiguity arises because of the need to accommodate differing views during the negotiating process. You should consider whether to aim for legal certainty or to leave the issue to be resolved judicially.
- 3.9 Bear in mind that short-term apparent certainty may be illusory. Even if the decision is to go for a particular interpretation, it is possible that a case on the meaning of the directive can arise in any Member State, and may be referred to the European Court of Justice.

Where there is doubt about the precise legal obligation, Ministers should be presented with options, and the risk and costs and benefits attached to each. The solution chosen must be the best policy solution consistent with propriety and with the need to minimise the burdens on business and others – it may not always be the least risky one.

Drafting: Copy-out and Elaboration

- 3.10 There are two broad conceptual approaches to implementing a provision that has two or more distinct meanings (as opposed to leaving discretion to Member States): copy-out and elaboration.
- 3.11 **Copy-out** is exactly as the name suggests: the implementing legislation adopts the same, or mirrors as closely as possible the original wording of the directive. It is also possible to cross-refer to the directive provision.
- 3.12 **Elaboration** means coming down on one side or the other of choosing a particular meaning, in accordance with the traditional approach in UK legislation, according to what the draftsman believes the provision to mean. In effect, it aims to work a provision into something clearer.
- 3.13 The **general presumption should be not to elaborate directives**. 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 fit of the legislation in its domestic context.¹⁰

- 3.14 However, there will be circumstances where copy-out is not appropriate, for example:
- When the implementing regulations need to fit in with an existing legal regime, it may be helpful to address any overlaps between the existing and new legislation through elaboration.
 - When criminal penalties are being created, it is often necessary to implement with greater precision than copy-out would allow.
 - When the wording of the directive is so ambiguous that business calls for greater clarity and legal certainty from the Government.
 - When passing on the risk of resolving the ambiguity to the public is considered likely to lead to more costly implementation through the public resolving it in a risk-averse way.
 - When from a legal perspective, copy-out would be unlawful, as the directives require Member States to specify national implementing measures.
- 3.15 You should bear in mind the UK Parliament's Joint Committee on Statutory Instruments, whose role it is to scrutinise legislation laid before Parliament. The Committee will consider whether the copying-out or elaboration of provisions of a directive is appropriate, and may report adversely where it is not.
- 3.16 Make sure that the definitions and meaning of the legislation are as clear as possible. Ultimately, the final approach to implementation is a policy decision and it is vital to identify the instances where elaboration may be the right course and the reasons for it. Departures from the wording and meaning of the directive, either by drafting wider provisions for safety's sake or by narrowing it down to what the draftsman takes the meaning to be, should therefore be clearly identified, their impact assessed, explained to Ministers and included in the RIA.

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

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

Over-implementation

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

¹⁰ For further advice, lawyers should consult the GLS Guidance for Government Lawyers on Better Regulation available from COLA on 020 7210 3120.

What is Gold Plating?

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

- extending the scope, adding in some way to the substantive requirement, or substituting wider UK legal terms for those used in the directive; or
- not taking full advantage of any derogations which keep requirements to a minimum (eg for certain scales of operation, or specific activities); or
- providing sanctions, enforcement mechanisms and matters such as burden of proof which go beyond the minimum needed (eg as a result of picking up the existing criminal sanctions in that area); or
- implementing early, before the date given in the directive.

- 3.18 **It is government policy not to go beyond the minimum requirements of European directives, unless there are exceptional circumstances, justified by a cost-benefit analysis and extensive consultation with stakeholders.** Any gold-plating, as defined in the box above, must be explained in the RIA and will need to be brought to the attention of the Cabinet Office Regulatory Impact Unit for specific clearance by the Panel for Regulatory Accountability.
- 3.19 The Transposition Note accompanying the legislation should also be explicit on any gold-plating that is being proposed (see section A3.9). The Merits Committee on Statutory Instruments in the House of Lords could also report to the House on any Statutory Instrument that it considers to have inappropriately implemented a European directive.

Double-banking

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

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

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

The Fair Value and Modernisation Directives (Directives 2001/65/EC and 2003/51/EC)

During 2004, the DTI implemented the Fair Value and Modernisation Directives, concerned with companies' accounts and reports. The aim of the directives is to remove obstacles to the introduction by Member States of modern accounting practices consistent with International Accounting Standards (IAS). They supplemented and amended the requirements of existing accounting directives, which had already been incorporated into UK legislation. As part of the transposition process, officials decided to revisit former decisions that had been taken when transposing older directives. This exercise identified a Member State option in the EU's seventh company law directive concerning companies' consolidated accounts that had not previously been taken up, providing an exemption from the requirement to prepare consolidated accounts for UK parent companies owned by non-EU parents. Given the new context brought about by the use of IAS by listed companies from 2005, the DTI decided to take up the option, thereby both reducing a regulatory burden and achieving greater convergence with IAS, consistent with the objective of the new directives.

Sanctions

- 3.20 Sanctions for breach of Community obligations need to be **effective, proportionate and dissuasive**. In choosing the appropriate range and mix of sanctions for non-compliance with any implementing legislation, you should try to ensure a fair and effective regime is put in place. Non-criminal sanctions aimed at actively securing compliance should be considered, and criminal sanctions should not generally be applied across the board regardless of intent or risk of harm.
- 3.21 When implementing EC requirements, you may need to revisit the sanctions for existing domestic law to ensure a fair and effective system. You will also need to consult the Home Office, Department for Constitutional Affairs, Scottish Executive and the regulators, where appropriate, before you propose creating a new criminal offence or provisions for the investigation of offences.
- 3.22 The Joint Committee on Statutory Instruments (JCSI) may also be concerned with what it sees as inappropriate uses of criminal sanctions when implementing an EC requirement.

Guidance

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

Guidance

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

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

- 3.24 Where your legislation is goal based, it may help to provide certainty if you set out details of how those affected can comply, while leaving it open to them to find acceptable alternatives.
- 3.25 **Clear practical guidance can play a timely role in helping to avoid Commission infraction proceedings and national court cases for alleged incorrect enforcement or compliance with EC rules.** Bear in mind that guidance on new legislation should be issued at least 12 weeks before the new legislation comes into force. See www.sbs.gov.uk/content/pdf/implementationguidelines.pdf for more information.
- 3.26 **Notify the Commission electronically.** At the end of the transposition process the department’s transposition co-ordinator should use the electronic notification system to notify the Commission of the national transposition measures. For general enquiries regarding the system, contact the European Secretariat on 020 7276 0086. For access to the system, contact the UK’s Central Manager in UKRep on 0032 2287 8216.

Provision of Transposition Notes

- 3.27 Since November 2001, following a request from the UK Parliament, UK legislation enacting European legislation has to be accompanied by a Transposition Note (TN). The TN will explain how the Government has, or will transpose, the main elements of the relevant European directive into UK law.
- 3.28 **Annex 1** contains guidance on the provision of TNs for lawyers and policy-makers. This guidance explains the background to Transposition Notes, who they apply to, what they should include and also suggests ways of setting them out.
- 3.29 TNs will improve the quality of transposition, giving those involved in the implementation of the directive a better understanding of the wider context of their work. They should also ensure that all of the main elements of a directive are addressed, as well as making the process of implementing legislation clearer and more transparent.

The Transposition Checklist

Government policy for the transposition of EC measures into UK law is to seek the best policy solution consistent with propriety, including legal propriety. Such a solution is not necessarily the least risky one. In every instance of transposition of European legislation, policy makers and lawyers should ensure that they have covered the points in the checklist below as a minimum.

- Consult *Better Policy Making: A Guide to Regulatory Impact Assessment* and the guidance on *Implementing Community Law*, both prepared by the Cabinet Office.
- Invite Ministers, at the outset of the transposition process, to articulate clear policy goals for the transposition (of which minimising burdens should be one).
- Describe to Ministers the available options for transposition. Do not close off options before consideration by Ministers.
- For each option, describe and assess any risks to the achievement of the policy goals, including legal risks. Assess both the likelihood and the magnitude of any potential adverse outcome.
- Obtain legal advice on whether each option will achieve the results required by the directive. Analyse the advice robustly with your lawyers. Clearly identify for Ministers any doubts about the validity of any aspect of each option and any areas of uncertainty of interpretation in the directive itself.
- Consult external stakeholders at appropriate stages.

In relation to legal risk:

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

Annex 1 Guidance on the provision of Transposition Notes

A1.1 Transposition Notes illustrate how the main elements of a directive have been, or will be, transposed into UK law. The requirement to provide a Transposition Note (TN) began in November 2001, in response to a request by Parliament. The Government committed itself to: *“making available to Parliament a memorandum alongside primary or secondary legislation giving effect to European Directives, except where the effort required would be disproportionate having regard in particular to the potential benefit to the reader. This memorandum will set out how the Government will transpose the main elements of the relevant European Directive into UK law.”*

While the provision of TNs applies to the transposition of European directives, it is good practice to provide a TN when handling all types of European and other international legislation. This includes regulations, decisions and judgements of the European Court of Justice.

What does it mean?

- A1.2 Since November 2001, almost all legislation laid before the UK Parliament¹¹, be it primary or secondary, that transposes any European directive (by which is meant any European Community or Euratom directive) must be accompanied by a TN.
- A1.3 Every TN will need to illustrate how all of the main elements of the directive(s), which the relevant UK legislation transposes, have been or will be transposed into UK law. The main elements of a directive are those that determine the directive’s fundamental objective(s) and major effect(s), have a significant impact on UK citizens or are politically important.
- A1.4 The only occasion when legislation does not have to be accompanied by a TN is when it can be demonstrated clearly that the resources required to produce a TN are significantly greater than can be justified by the resulting added benefit to the reader.

Why do it?

- A1.5 As well as Parliament and those affected by the legislation, the Government also stands to benefit from producing TNs:
- (a) Production of and availability of TNs should give those involved in the implementation of the directive(s) a better understanding of the wider context in which their work sits.
 - (b) TNs can act as a check that, in the Government’s opinion, all of the main elements of a directive have been or will be addressed.
 - (c) TNs will increase the transparency and clarity of implementing legislation for both those producing it and those affected by it, including Parliament which may not need to ask so many questions on transposition during the passage of legislation.

¹¹ The obligation does not apply to legislation laid before the Northern Ireland Assembly or National Assembly for Wales. The obligation has not extended to the Scottish Parliament to date but proposals for a similar approach are to be placed before it in due course.

- A1.6 TNs may show up deficiencies. Where there are deficiencies in transposition, there is a risk that TNs might be used as evidence against the UK in legal proceedings, including but not limited to an infraction case and referral to the ECJ. To avoid this situation arising, departments should make sure that they reap the maximum benefit from the increased transparency and clarity created by TNs by using them as a checklist as described in paragraph A1.5 (b) above, so as to avoid any deficiencies in transposition; or to pick up on these and take any appropriate action.
- A1.7 While they will not always be easy to produce, TNs should be little more than a summary of information already known to those involved in the production of the legislation.
- A1.8 **TNs have a more specific purpose than Explanatory Memoranda (EM) or Explanatory Notes (EN). In comparison, a TN should be more specific about how the main elements of the directive(s) will be transposed into UK law and should display this information in a more structured way.**

Do I need to produce a TN?

- A2.1 All UK legislation laid before Parliament that gives effect to any European directive must be accompanied by a TN, unless Ministers make and are able to clearly demonstrate the truth of the following statement:

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

- A2.2 It is expected that departments will make the necessary resources available to produce a TN. Even in those cases where exhaustive analysis would be too resource intensive, it should be possible to reduce costs to a justifiable level by concentrating only on the main elements of the directive(s).

- A2.3 On the rare occasions that the statement made at A2.1 is clearly and demonstrably true, you may have legitimate grounds for deciding not to produce a TN. You must inform Parliament by including the following text in the EN (or the nearest equivalent document):

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

- A2.4 Such a statement is likely to provoke questions and it may be sensible to go on to explain the decision in the EN.

- A2.5 In cases where the UK legislation includes elements that have already been transposed (for example when transposing an amending directive, consolidating UK transposition or correcting errors in earlier transposition), the existing TN(s) should be revised and expanded accordingly. Where there is not an existing TN because the original directive was transposed before the requirement came into force, this does not mean a TN for the entire original directive(s) should be produced. Rather, you should use your common sense to produce a TN that covers both the new elements being transposed and any elements of the existing directive(s) and transposing legislation whose inclusion is necessary for clarity.

- A2.6 There may be occasions when UK legislation has to be produced at great speed, for instance in order to avoid missing short deadlines imposed by the threat of infraction proceedings. In such circumstances, if at all possible, time should still be made to produce a TN. The TN itself should help ensure that everything has been covered and may help speed the UK legislation's passage through Parliament.
- A2.7 It is up to officials to decide how to divide up the work involved in producing a TN. In most cases it is likely that government lawyers and policy officials will carry out the work in partnership.
- A2.8 Where more than one department is involved in the transposition of a directive, whoever produces a TN must ensure that it is cleared with all other interested departments.

How do I produce a TN?

- A3.1 Exactly how you produce a TN is up to you, so long as it meets all of the following requirements:
- It can be easily understood by an informed, but not expert, audience, such as those directly affected.
 - It clearly sets out how the Government has or will have transposed the main elements of all the relevant directive(s) into UK law.
 - It is explicit about any over-implementation that is being proposed.¹²
 - It is made available to Parliament alongside primary or secondary legislation giving effect to European directives.

Easily understood

- A3.2 While the initial audience for the TN will be Parliament, it is possible that all UK citizens affected by the legislation, be they individuals, businesses or other organisations will benefit from understanding the TN. The TN should therefore be produced in a format and using language that can be understood by both Parliament and an informed, but not expert, audience, including those affected by the legislation. It should be as short, simply expressed and jargon-free as possible.

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

- A3.3 The reader should be able to use the TN to determine quickly, easily and accurately how each of the main elements of every directive that the UK legislation transposes has been or will be transposed into UK law. If the UK legislation contains provisions for the transposition of more than one directive, its TN should illustrate how the main elements of all of these directives have been transposed. Where a decision has yet to be made as to how to transpose a main element of a directive, this should also be made clear.
- A3.4 Where possible, direct cross-references between the articles of the directive and the specific clauses of the UK legislation should be made. One of the clearest methods is to set out this information in a table. Such a table can list the articles of the directive in one column and the UK legislation that transposes it in the corresponding row in the next column.
- A3.5 Many directives are extremely complex and production of a document that is accurate, short and easily understood will by no means be easy. It is important to note that officials are not expected to reproduce and explain the whole of complicated directives, but merely give as much

¹² See 3.17 for a definition of over-implementation.

information as is necessary to understand how the main elements of the directive(s) have or will be transposed.

Example

- A3.6 This method is demonstrated by the Electronic Signatures Directive TN at **Annex 2**. This sets out how each of the main elements of the Electronic Signatures Directive have been implemented by the Government's Electronic Signatures Regulations in 2002.
- A3.7 This is a useful example, which demonstrates how a table has been successfully used to make direct cross-references between the articles of the directive and the specific clauses of the UK legislation.
- A3.8 Should you decide to set out your TN as a table, you may choose to use the template at **Annex 3**, which suggests a basis for a TN set out as a table according to this guidance.

Is explicit about any over-implementation that is being proposed

- A3.9 From March 2005, Transposition Notes should contain an explicit comment on any over-implementation that has taken place during the transposition process. In the introduction to the Note, drafters should include one of the following statements:

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

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

- A3.10 The inclusion of a statement on any over-implementation that is being proposed is designed to improve the transparency of the implementing regulations and remind officials of the risks of over-implementation. The template at **Annex 3** suggests how this statement will fit into the Transposition Note.

Made available to Parliament

- A3.11 A TN must accompany all UK Government legislation laid before the UK Parliament, be it primary or secondary, which gives effect to any European directive.
- A3.12 A TN should be copied to the devolved administrations at the same time it is submitted to the UK Parliament for information purposes only.
- A3.13 **In the case of Government Bills, Transposition Notes should be provided by departments as an annex to Explanatory Notes**, so that they are available with the text of the legislation. A reference should be included in the EN to the Bill using the following standard form of words:

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

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

- A3.14 The Transposition Notes should be included with the Explanatory Note in a single electronic document sent to Parliamentary Counsel for forwarding to the Public Bill Office.¹³
- A3.15 When the Bill receives Royal Assent, if Parliament has made any amendments that mean that the TN produced when the legislation was first laid before Parliament is out of date, the TN should be updated so that it reflects these amendments and included as an annex to the Explanatory Notes on the Act.
- A3.16 In the case of Statutory Instruments, the Transposition Note should be attached to the EM that is laid with the instrument, and copied to the relevant Committees (JCSI / SCSi and Merits Committee). The EM should explain in broad terms the approach to transposition highlighting any difficult areas, and include a brief scrutiny history of when it was considered by the EU Scrutiny Committees.¹⁴
- A3.17 You may also decide that a TN could usefully accompany any draft legislation that you publish.
- A3.18 TNs should be made available on departmental websites in a clear and accessible manner. When annexed to ENs for Bills or EMs for SIs, they are also available to the public via the HMSO website, HMSOnline.
- A3.19 You should ensure that other interested departments receive up-to-date copies as appropriate. Each department should consider creating a central library of the TNs that they have produced, which can be made available to other departments as the need arises.

Further information and queries

- A4.1 If you require any further information or have any queries relating to TNs, please contact the RIU Europe Team via email to: better.euro.reg@cabinet-office.x.gsi.gov.uk or telephone 020 7276 2175 or fax 020 7276 2157.

¹³ For detailed guidance on Explanatory Notes, see the Guide to Legislative Procedures, Appendix B, <http://www.cabinetoffice.gov.uk/legislation/legguide/index.asp>

¹⁴ For detailed information on Explanatory Memoranda, see SIP 4 (04), www.hmso.gov.uk/services/sip-circ-04-2004.pdf

Annex 2 Transposition Note for Electronic Signatures Directive

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

Article	Objective	Implementation	Responsibility
3.3	Requires member states to establish an appropriate system for supervision of certification-service providers.	Regulation 3 of the Electronic Signatures Regulations 2002 implements article 3.3 by imposing a duty on the Secretary of State to keep under review the carrying on of activities of certification-service providers specified in that article and the persons by whom they are carried on, to establish, maintain and publish a register of these certification-service providers and to have regard to any evidence of their conduct which is to detrimental to users of qualified certificates with a view to publication of any of this evidence.	Secretary of State
5.1 (a)	Requires member states to ensure that certain advanced electronic signatures satisfy the legal requirements of a signature in relation to data in electronic form in the same manner as a hand written signature.	No specific provision is needed to implement this as under the law in England and Wales, Scotland and Northern Ireland where there is a signature requirement in relation to data in electronic form this is already capable of being satisfied by an electronic signature including the type of electronic signature referred to in this article.	Secretary of State, Scottish and Northern Irish Executives
5.1 (b)	Requires member states to ensure that certain advanced electronic signatures are admissible in legal proceedings.	This has been implemented through section 7 Electronic Communications Act 2000.	Secretary of State, Scottish and Northern Irish Executives

5.2	Requires member states to ensure that electronic signatures are not denied legal effectiveness and admissibility in evidence for certain reasons.	This has been implemented through section 7 Electronic Communications Act 2000.	Secretary of State, Scottish and Northern Irish Executives
6.1 & 6.2	Requires member states to ensure that certification-service providers are liable for damage in certain circumstances even though there is no proof of negligence unless the certification-service provider proves he was not negligent.	Regulation 4 imposes liability on certification-service providers in specified circumstances notwithstanding there is no proof of negligence unless the certification-service provider proves he was not negligent.	Secretary of State
6.3 & 6.4	Requires member states to ensure that certification-service providers can exclude liability in certain conditions for limitations on the use of qualified certificates of value of transactions for which the certificate can be used.	Specific provision to implement is not necessary as certification-service providers can already exclude liability under tort and delict for these matters subject to the applicable laws on the exclusion or limitation or liability.	Secretary of State
7.1	Requires member states to ensure that in certain circumstances qualified certificates which are issued to the public by a certification-service provider established in third countries are legally equivalent to certificates issued by a certification-service provider established within the Community.	Specific provision to implement is not necessary as the definition of qualified certificate in the Regulations does not depend on where the certification-service provider who issues the certificate is established.	Secretary of State
8.2	Requires member states to ensure that certain certification-service providers are subject to specified data protection requirements	Regulation 5 imposes a duty on certification-service providers in certain circumstances to comply with specified data protection requirements. Breach of that duty is actionable by a data subject who suffers loss and compliance with the requirements can also be enforced by civil proceedings by the Crown.	Secretary of State

Annex 3 Template for a Transposition Note

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

Column 1	Column 2	Column 3	Column 4
This part of the table is here for explanatory purposes only. It need not be included in a TN			

Directive

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

In the introduction to the Transposition Note, include one of the statements on gold-plating set out in A3.9, eg:

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

Articles	Objectives	Implementation	Responsibility
<p>1st article, which comprises one of the directive’s ‘main elements’.</p> <p>Use this column to list the numbers of those articles, which comprise the directive’s ‘main elements’.</p> <p>‘Main elements’ is defined at A1.3 in attached guidance.</p>	Describe the fundamental objective(s) and major effect(s), of the article listed in this row of the first column.	<p>Describe how each of the fundamental objective(s) and major effect(s) listed in this row of column 2 has (have) been or will be implemented in the UK.</p> <p>Where possible, refer directly to the specific clauses in the UK legislation that transposes the directive.</p>	Describe who is responsible for each of the measures taken to implement the directive in the UK listed in this row of column 3.
2nd article, which comprises one of the directive’s main elements.	As above.	Where a decision has yet to be made as to how to implement a main element of a directive, this should also be made clear.	As above.
3rd article	As above.	As above.	As above.

Directive 2 (if necessary)

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

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

Annex 4 Contact details

Cabinet Office Regulatory Impact Unit

tel: 020 7276 2175
email: better.euro.reg@cabinet-office.x.gsi.gov.uk
www.cabinet-office.gov.uk/regulation

This guide makes frequent reference to Regulatory Impact Assessments as the evidence base for making decisions about transposition. This site includes guidance on how to carry out RIAs – including a chapter in the RIA Guide that deals with handling European proposals. The European section of the site has updates on the progress on regulatory reform in the EU.

Cabinet Office European Secretariat

tel: 020 7276 0086
www.cabinet-office.gsi.gov.uk/euro

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

Better Regulation Task Force

tel: 020 7276 2143
www.brtf.gov.uk

The Better Regulation Task Force is an independent body that advises the Government on action to ensure that regulation and its enforcement accord with the principles of good regulation. It produces several reports every year covering the regulation of particular sectors or thematic aspects of regulation, such as helping small firms cope with regulation or the use of alternatives to classic regulation. These reports contain examples of good and bad practice in implementing regulation.

Cabinet Office Legal Advisers (COLA)

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

RIU
Cabinet Office
6th Floor
22 Whitehall
London SW1A 2WH
Tel: 020 7276 2175
Fax: 020 7276 2157

E-mail: better.euro.reg@cabinet-office.x.gsi.gov.uk
Web address: www.cabinet-office.gov.uk/regulation/europe

Published: March 2005
© Crown copyright 2005

The text in this document may be reproduced free of charge in any format or media without requiring specific permission. This is subject to the material not being used in a derogatory manner or in a misleading context. The source of the material must be acknowledged as Crown copyright and the title of the document must be included when being reproduced as part of another publication or service.

The material used in this publication is constituted from 75% post consumer waste and 25% virgin fibre.

