



DAVIDSON REVIEW
Implementation of EU legislation

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Final Report

November 2006



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Foreword

Dear Chancellor,

In the 2005 Pre-Budget Report you asked me to examine selectively the stock of EU-sourced legislation in the UK and identify measures where unnecessary regulatory burdens can be reduced or the system simplified. This review supports the Government's wider programme of regulatory reform aimed at improving the productivity and competitiveness of the UK economy, influencing economic reform in Europe and modernising the delivery of public services.

European legislation can help the functioning of the internal market, ensure fairness for consumers and workers, and protect the environment. It is sometimes beneficial for the UK economy to set or maintain regulatory standards which exceed the minimum requirements of European legislation. There are other instances where the costs of over-implementing European legislation outweigh the benefits, with adverse consequences for UK competitiveness. I have found that inappropriate over-implementation of European legislation may not be as widespread as is sometimes claimed. There are, however, some cases of over-implementation in the stock of existing legislation that should be addressed.

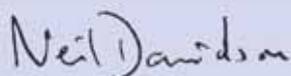
Following consultation with government departments, regulators and external stakeholders, I have made specific recommendations for removing unnecessary regulatory burdens in a number of legislative areas, including consumer sales, financial services, transport and waste legislation. Together, these simplification proposals will bring significant benefits to the UK economy and will make a practical difference to businesses, consumers and the wider public.

I recognise that much has been done by the Government in recent years to improve the systems for preventing European legislation from being inappropriately over-implemented. I have listened to the views of a wide range of stakeholders inside and outside of government and, building on earlier reforms, made a number of recommendations to improve further the implementation process in the future. These will help to strengthen the competitiveness of the UK economy while maintaining necessary regulatory protections.

Government departments, regulators, the Better Regulation Executive and external stakeholders will all need to work together to ensure successful delivery of the recommendations in this report.

Acknowledgements

I would like to thank everyone who has contributed to the review through meetings and written submissions. I am particularly grateful to the members of the review team for their considerable efforts – Mostaque Ahmed, Natasha Coates, Abigail Dean and Duncan Stone – as well as Mark Jackson for his administrative support to the review.



Lord Davidson QC

Executive summary

THE SCOPE AND APPROACH OF THE REVIEW

1 The context for the Davidson Review is the Government's drive to reduce unnecessary regulatory burdens on the private, public and voluntary sectors. The UK is currently undertaking one of the most radical regulatory reform agendas in the world. For example, following recommendations in the Better Regulation Task Force's report "Less is more",¹ the Government has undertaken a project to measure the administrative burden of regulations and departments are developing rolling programmes of simplification. There is also work taking forward the Hampton Review recommendations for a more risk-based approach to inspection and enforcement,² streamlining regulatory structures and increasing accountability.

2 The Davidson Review contributes to this regulatory reform agenda. A large proportion of regulations in the UK that significantly impact on the private, public and voluntary sectors originate from the EU. The Government is driving forward the better regulation agenda in Europe, building on the significant progress made during the UK Presidency. The focus of this review is on the manner in which European legislation is implemented in the UK.

3 Over-implementation occurs when national regulations are stricter than required by Europe. It is sometimes beneficial for the UK economy to set or maintain regulatory standards which exceed the minimum requirements of European legislation. There are, however, other instances where the costs of over-implementing European legislation outweigh the benefits, with adverse consequences for UK competitiveness. The aim of this review has been to examine selectively the stock of UK regulations that derive from Europe and to identify measures where unnecessary regulatory burdens can be reduced or the system simplified.

4 The review adopted a broad definition of over-implementation that included:

- gold-plating, such as extending the scope of European legislation;
- double-banking, i.e. failing to streamline the overlap between existing legislation in force in the UK and new EU-sourced legislation; and
- regulatory creep, such as uncertainty created by lack of clarity about the objectives or status of regulations and guidance, or over-zealous enforcement.

5 The approach has been to seek evidence of over-implementation from all sources, starting with a public call for evidence, and then to examine a selected number of case studies in detail to identify specific simplifications that will make a practical difference to those being regulated in the UK. In addition, the review has made wider recommendations on how the implementation process in the UK might be further improved in the future, building on the Government's best practice guidance that was updated in 2005. These reforms will ensure that the UK has one of the most robust systems in the EU for implementing European legislation in the least burdensome way possible, while maintaining necessary regulatory protections.

¹ *Less is More: Reducing Burdens, Improving Outcomes*, Better Regulation Task Force, March 2005.

² http://www.hm-treasury.gov.uk/budget/budget_05/other_documents/bud_bud05_hampton.cfm

OVERALL FINDINGS

6 Some commentators have in the past suggested that the UK tends to gold-plate more than other EU countries, on the basis of comparisons of transposition ratios: the number of words used in national implementing legislation divided by the number of words in the original directive. The review believes that this simplistic approach to assessing gold-plating is misconceived since it fails to take account of whether elaboration of directives increases or reduces burdens for those being regulated. Simply copying out the text of a directive may be inappropriate when implementing regulations need to fit in with existing related domestic legislation (otherwise there will be double-banking); and when the wording of the directive is so ambiguous that those being regulated call for greater clarity to minimise legal uncertainty³. Differences in legal systems, devolution and pre-existing domestic legislation across Member States will also mean that the amount of national implementing legislation needed to meet European obligations will vary across Member States.

7 The review found that properly assessing whether a particular piece of European legislation has in fact been over-implemented and whether that over-implementation is justified is not straightforward. The assessment requires careful research into the legislation and the policy reasons behind the UK's implementation, as well as consideration of how the legislation is being enforced in practice and the impacts it has on those being regulated.

8 Given the very large amount of EU-sourced legislation in the UK it is not possible, from examining a limited number of case studies, to draw definitive conclusions on the extent to which the UK may inappropriately over-implement European legislation. But as Chapter 1 explains, a number of factors indicate that inappropriate over-implementation may not be as big a problem in the UK – in absolute terms and relative to other EU countries – as is alleged by some commentators. The factors include the following:

- many allegations of over-implementation of European legislation are misplaced as they either relate to concerns about the EU measure itself or wrongly assume that certain UK legislation originated from the EU;
- it can sometimes be beneficial for the UK economy to set or maintain regulatory standards which exceed the minimum requirements of European legislation;
- evidence to support assertions that the UK implements and enforces more rigorously than other Member States is often lacking. Furthermore, the review heard similar concerns about their governments from business representatives in other European countries. Unlike in the UK, very few other EU governments currently have explicit policies or procedures to guard specifically against over-implementation – the UK is regarded by some as a leader in this field; and
- the OECD and World Bank consistently report that the UK has one of the most favourable regulatory environments for doing business in the EU.⁴

³ See Chapter 5 for a more detailed discussion of methods of transposition.

⁴ *Doing Business Survey: 2007*, World Bank, September 2006; *Regulation, competition and productivity convergence*, OECD Economics department working paper no. 509, September 2006.

9 This report highlights a number of examples to illustrate justified over-implementation, best practice implementation or action being taken by departments to reduce burdens. The examples are:

- UCITS Directive and stable net asset value money market funds (Chapter 2);
- Unfair Terms in Consumer Contracts (Chapter 3);
- Herd Register for Bovine Animals (Chapter 4);
- the extension of health and safety directives to cover the self-employed, Artists' Resale Rights Directive and Prospectus Directive (Annex B); and
- developments in Farming regulations, Air Quality, and Money Laundering regulations (Annex B).

10 The review has identified some cases of unnecessary over-implementation in the stock of existing legislation, summarised below. **Reducing these burdens will bring significant benefits to business (potentially up to £240m) and the wider public (potentially up to £430m, mostly relating to MOT test fees).**⁵

RECOMMENDATIONS FOR REDUCING UNNECESSARY BURDENS IN THE STOCK OF LEGISLATION

CASES OF GOLD-PLATING (CHAPTER 2)

Insurance Mediation Directive and parts of Distance Marketing Directive

11 The insurance mediation industry was previously subject to voluntary regulation and envisaged that the Insurance Mediation Directive (IMD) would result in a minimal regulatory regime. However, its implementation has seen the industry subjected to full Financial Services Authority regulation which started with the aim of protecting consumers rather than doing only what was necessary to implement the IMD and the Distance Marketing Directive.

12 The Financial Services Authority should reduce its rules to the level required by the directives in several areas (as specified further in the case study) and HM Treasury should consider cutting the scope of the activities caught by the insurance mediation regime. The review is encouraged by the recent announcement by the Treasury that freight forwarders will be removed from the scope of Financial Services Authority insurance mediation regulation.

MOT tests

13 The UK's MOT testing regime over-implements European requirements by imposing an annual roadworthiness test on cars that are three or more years old. The minimum European requirements are for a roadworthiness test to be carried out every other year on cars that are four or more years old. A number of EU Member States follow this approach. With 22 million vehicles tested annually in the UK, moving to the EU minimum would save motorists around £465 million per year in test fees. In addition, there would be cost savings in terms of inconvenience, time and paperwork. These cost savings to motorists would need to be balanced against potential consequences in terms of road safety and the impact on motorists' behaviour with regards to vehicle maintenance.

⁵These are initial high level estimates.

14 The frequency of the MOT testing regime in the UK has remained unchanged since 1968 and the Davidson Review considers that the time is right for the UK to revisit the costs and benefits of the current regime. By spring 2007, the Department for Transport should consult on a move towards the European minimum standards.

Animal scientific procedures

15 The UK's legislation governing animal scientific procedures goes beyond the requirements of the European Directive in a number of ways to ensure that the highest possible standards of animal welfare are applied to animals used in scientific procedures. There is evidence to suggest that the way in which the legislation has been implemented has resulted in some unnecessary regulatory burdens.

16 The Davidson Review makes recommendations to simplify the statistical returns process, and personal and project licences, which would improve the effectiveness of the current regime in helping to make the UK an attractive base for good science, while ensuring that standards of animal welfare are still the best in the world. The review is clear that stakeholders should be closely involved in implementing these proposals, and that no changes should be implemented that impair animal welfare.

Close links

17 There are two areas where firms are currently being over-burdened with making disclosures on their close links. Firstly, all firms authorised by the Financial Services Authority are required to notify their close links even where no directive requires it for that type of firm e.g. mortgage mediation. It is not clear that such notification is necessary in relation to these activities to prevent financial crime or protect consumers. This aspect of the authorisation regime should be reviewed by HM Treasury. Secondly, where directives do oblige the Financial Services Authority to monitor a firm's close links, the Financial Services Authority rules require too much unnecessary information from firms after they have been authorised and this should be reduced.

CASES OF DOUBLE-BANKING (CHAPTER 3)

Consumer sales

18 Following the implementation of the Consumer Sales and Guarantee Directive, the remedies available to consumers when they have been sold faulty goods are too complicated. It is unclear how best to choose between the various remedies available. The Department for Trade & Industry (DTI) should implement a simplified system of consumer remedies by the end of 2009 unless consultation shows a clear preference for deferring reform in this area. Subject to that consultation, DTI should ask the Scottish and English Law Commissions to produce a joint report by the end of 2008 on the reform and simplification of remedies available to consumers relating to the sale or supply of goods.

Fisheries regulation

19 There is a significant amount of UK legislation relating to the fishing industry, much of which is out of date and fragmented. In addition, the industry has been subject to a large volume of EC legislation in recent years. The review recommends that Defra should use its proposed

Marine Bill to repeal out-of-date primary fisheries and marine legislation and should aim to consolidate as much of the rest in the Bill as possible. It is also recommended that Defra consult on introducing a new system of guidance to enable the industry to better understand the substantial amount of regulation that will endure.

Waste and other regulatory regimes

20 Defra, the Environment Agency and the Department for Communities & Local Government (DCLG) are currently undertaking work to reduce double-banking between the waste, pollution control and planning regimes. The Davidson Review recommends that Defra and the Environment Agency undertake a further review of inert waste in order to adopt a more proportionate and risk-based regulatory environment.

CASES OF REGULATORY CREEP (CHAPTER 4)

Waste Framework Directive

21 The waste regulatory regime is complex and a lack of adequate guidance contributes to confusion and disputes. Further, a provision in the Waste Framework Directive that allows exemptions to be made from the standard requirement to obtain a permit is not being utilised as effectively as it could. The review recommends that Defra and the Environment Agency consult upon draft guidance on waste, follow a purposive and risk-based approach and make more effective use of the permit exemption provision.

Food hygiene training for food handlers

22 New European Regulations on food hygiene require food business operators to supervise, and train *or* instruct food handlers on food hygiene. Some local authorities insist that *all* food handlers attend formal food hygiene training courses, although this is not a legal requirement. This constitutes regulatory creep and may impose unnecessary costs on food businesses. The Davidson Review recommends that the Food Standards Agency should write to local authorities clarifying the regulatory requirements on training for food handlers. The Food Standards Agency should also ensure that all guidance material adequately reflects the flexibility in the European Regulations.

Road haulage operator licensing

23 Road haulage operators applying for a licence have to meet financial standing criteria set out in European legislation to ensure that they have the available resources to run their business responsibly and maintain their vehicles. The general requirement in the UK is to demonstrate appropriate financial standing through the proof of capital in the bank, rather than alternatives set out in the European Directive, and this may impose unnecessary costs on operators. The Davidson Review recommends that the Traffic Commissioners should amend their guidance to reflect better the flexibility in the European legislation about how operators can demonstrate appropriate financial standing.

RECOMMENDATIONS FOR BEST-PRACTICE IMPLEMENTATION OF EUROPEAN LEGISLATION IN THE FUTURE

24 Analysis of the limited number of case studies and discussions with stakeholders suggested that some factors have contributed to over-implementation of European legislation in the past. These include the need for better regulation at the EU level, UK legal system and culture, and poor engagement with EU issues (including consultation and impact assessments) by departments and regulators.

25 The review strongly supports recent reforms such as the updating of the Cabinet Office's Transposition Guide in 2005; the requirement for any significant proposal for over-implementation to be scrutinised by the Panel for Regulatory Accountability, chaired by the Prime Minister; and current proposals for revising impact assessments⁶. Together with departmental simplifications plans and delivery of the Hampton Review recommendations, these reforms will significantly reduce the chances of inappropriate over implementations in the future.

26 Building on these reforms, the review has made some recommendations to address the concerns raised by stakeholders. These will strengthen the competitiveness of the UK economy while maintaining necessary protections. The recommendations are explained in Chapter 5 (and listed in full in Annex A) and cover the following areas:

- to ensure that UK businesses and other stakeholders do not face unnecessary competitive disadvantages, departments should justify the retention of any pre-existing higher national standards when the EU sets its own standards;
- unless simplifying or reducing regulatory burdens, departments should not generally pre-empt upcoming European legislation by legislating in the same area;
- post-implementation reviews by the Commission should be more systematic and quantified. The post-implementation review in the UK needs to be timed to enable departments to best influence proposals at the European level and should involve comparisons with at least two other major Member States;
- to help manage ambiguities in European legislation, government departments and regulators should work with EU partners during negotiation and implementation to exchange views and share best practices;
- all departments should ensure lawyers and policy officials with responsibility for the implementation of European legislation have training and personal work objectives focused on better regulation;
- there should be an effective transfer of knowledge between teams negotiating and teams implementing European legislation. The implementation process should be started as early as possible and sufficiently resourced to enable guidance to be published at least 12 weeks before national implementing legislation comes into force. The Government should encourage the European Commission to ensure that there is usually a gap of at least six months between the transposition deadline and the date when European legislation comes into force;

⁶ <http://www.cabinetoffice.gov.uk/regulation/ria/consultation/index.asp>

- easy access to consolidated legislation assists compliance with the law. The Department for Constitutional Affairs should, therefore, assess the case for extending the Statute Law Database to cover secondary legislation. In the meantime, departments responsible for secondary legislation should make greater use of consolidating instruments;
- the Government should encourage the European Commission to publicise its action plans and road maps more effectively so that it reaches a wider range of stakeholders; and
- all departments and regulators should adhere to the advice provided by the Small Business Service and Cabinet Office on drafting guidance.

27 To deliver the recommendations in this report, government departments, regulators, the Better Regulation Executive and external stakeholders will need to work together. The specific proposals to reduce burdens in the stock of legislation and policies to improve further the implementation process in the future will strengthen the competitive position of the UK economy, while maintaining necessary regulatory protections. Many of the recommendations will require a continuing commitment to reform and the review hopes that the Government will regularly report on progress in delivering these reforms.

1

Introduction

This chapter explains the background to the Davidson Review, its terms of reference and discusses the extent to which over-implementation may be a problem in the UK.

THE IMPORTANCE OF BETTER REGULATION AT THE EU AND UK LEVELS

1.1 A large proportion of regulations in the UK that significantly impact on the private, public and voluntary sectors originates from the EU. European legislation can help the functioning of the internal market, ensure fairness for consumers and workers, and protect the environment. If the EU is to compete effectively in an increasingly global economy, it is vital that its rules are well designed and do not impose unnecessary burdens on those being regulated. The Government has therefore been working with EU partners to promote better regulation at the European level (progress on this front is summarised in Chapter 5).

1.2 Once laws are agreed at the EU level, the UK Government (like all other Member States) is under a legal obligation to implement them in the UK in an effective, timely and proportionate manner. It is equally important however that there is no unnecessary “over-implementation” – regulations that are stricter or more burdensome in the UK than required by European law and where it has not been demonstrated that the benefits of over-implementation exceed the costs. Over-implementation has the potential to adversely affect the competitiveness of the UK economy.

1.3 Currently, the Government’s policy is to implement European legislation without over-implementation, unless the circumstances are exceptional and justified by a robust cost-benefit analysis and extensive public consultation. Any significant proposal to exceed the requirements of European legislation must be cleared by the Panel for Regulatory Accountability, chaired by the Prime Minister, before wider Ministerial clearance. The Cabinet Office’s Transposition Guide for implementing European legislation was updated in March 2005 and contains much good practice for policy makers and lawyers (see Chapter 5).

1.4 While there is now increased scrutiny to help ensure that new European measures are not inappropriately over-implemented in the UK, the stock of existing laws may include measures that were over-implemented in the past. In the 2005 Pre-Budget Report the Chancellor of the Exchequer commissioned the Davidson Review to identify areas of over-implementation in the stock of existing EU-derived legislation and make recommendations for simplification where appropriate.

The terms of reference of the Davidson Review

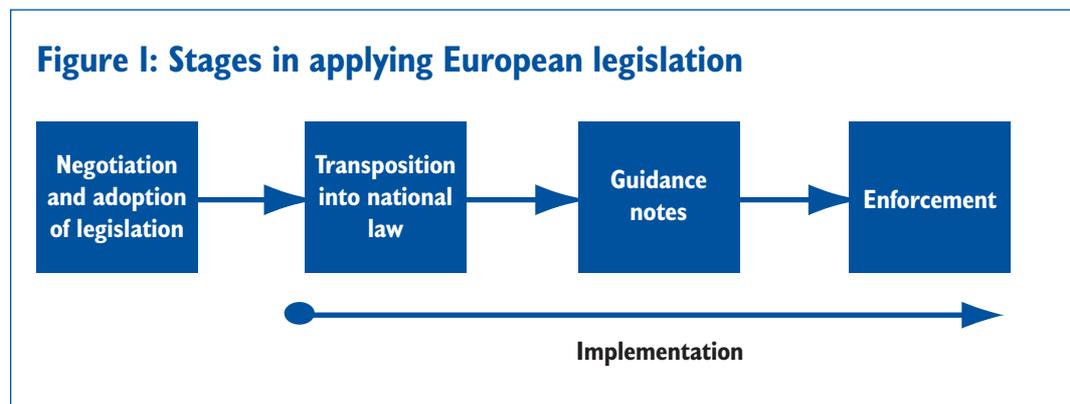
1.5 The aim of this review is to support the work of government departments to reduce the regulatory burdens for which they are responsible by:

- reviewing selected areas of existing EU-derived legislation for evidence of over-implementation in the UK, or less burdensome implementation by other Member States (while still meeting their EU obligations); and

- working with the Better Regulation Executive in the Cabinet Office, scrutinising government departments' own efforts to identify instances of over-implementation. Following recommendations in the Better Regulation Task Force's report "Less is more",¹ the Government has undertaken a project to measure the administrative burden of regulations and all departments are developing rolling programmes of simplification.

1.6 The review looked at implementation in its broadest sense from transposition – the process of writing European legislation into national law – through to enforcement, as shown in figure 1. Thus it covered three types of over-implementation:

- gold-plating, such as extending the scope of European legislation (Chapter 2);
- double-banking, i.e. failing to streamline the overlap between existing legislation in force in the UK and new EU-sourced legislation (Chapter 3); and
- regulatory creep, such as uncertainty created by lack of clarity about the objectives or status of regulations and guidance, or over-zealous enforcement (Chapter 4).



1.7 This review examines a number of case studies and sets out some specific proposals for reducing unnecessary burdens (administrative, policy and compliance costs) in the stock of EU-derived legislation. It also includes wider lessons for the best practice implementation of European legislation in the future (summarised in Chapter 5), building on the better regulation principles already set out by Government.

The review's approach

1.8 The review looked at areas where the UK has discretion in how it applies European legislation, not the pros and cons of the European legislation itself. Furthermore, the UK is under a legal obligation to implement European law in an effective, timely and proportionate manner - any suggestions that the UK should seek to "under-implement" European legislation have not been followed up or reported on.

1.9 It is possible for over-implementation to be justified on the basis that net benefits for the UK economy are higher than they would otherwise be. Hence the review has distinguished between unjustified or unnecessary over-implementation on the one hand and justified over-implementation on the other. The focus of the review was mainly on over-implementation that has occurred inadvertently, has not been highlighted and justified in consultations and cost-benefit analysis and where past justifications no longer suffice in the light of new developments.

¹ *Less is More: Reducing Burdens, Improving Outcomes*, Better Regulation Task Force, March 2005.

1.10 The Davidson Review began by launching a public call for evidence (open from 3 March to 25 May 2006) in respect of any European legislative instrument implemented in the UK to date, regardless of sector or type of instrument. This generated over 160 written responses from a wide range of respondents. In addition, the review hosted a number of useful roundtable discussions with small and large businesses to gather oral evidence, and visited some other EU Member states – Denmark, Estonia, Netherlands and Poland – who are studying similar or related issues.

1.11 A summary of the responses to the call for evidence was published in July 2006. That report also included a number of specific European legislative instruments that respondents suggested might have been over-implemented in the UK, and the relevant government department or regulator's initial responses to these suggestions. Submissions which were very general in nature, lacking in evidence or which raised concerns about forthcoming legislation or legislation currently being developed (and hence outside of the terms of reference) were not included in the July report.

1.12 Since July, the review has worked with government departments and external stakeholders to investigate the most significant cases of potential over-implementation in detail. In selecting the case studies the review considered a range of factors including the quality of evidence available, the burdens potentially arising from over-implementation (policy costs, administrative costs, compliance costs and/or “irritancy” factor), the scope for drawing out wider lessons about the implementation of European legislation, and the potential for simplification, reducing burdens, consolidation or other reform. The remaining allegations of potential over-implementation were passed on to the relevant government departments and regulators to take forward where appropriate – a brief update on some of the main developments is provided in Annex B.

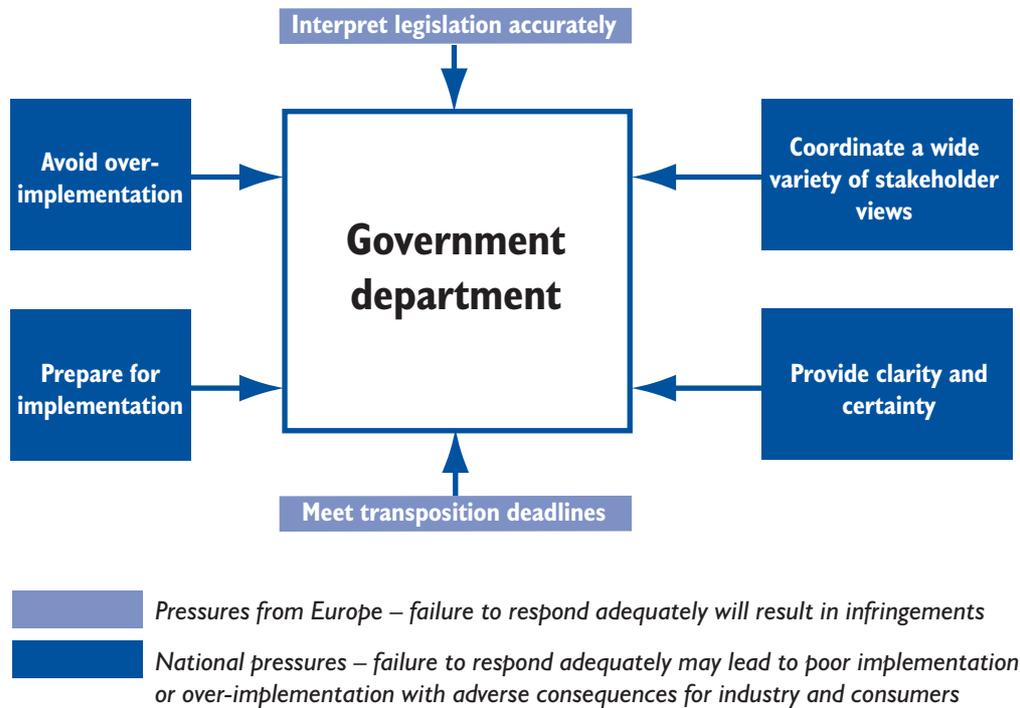
HOW WIDESPREAD IS OVER-IMPLEMENTATION?

1.13 The implementation of European legislation can be a challenging process for departments and regulators. It typically involves many different stakeholders at the national and international levels and there are pressures to avoid *under-implementation* as well as over-implementation, as figure 2 illustrates for the transposition stage.

1.14 Some commentators have in the past suggested that the UK tends to gold-plate more than other EU countries, on the basis of comparisons of transposition ratios: the number of words used in national implementing legislation divided by the number of words in the original directive. The review believes that this simplistic approach to assessing gold-plating is misconceived since it fails to take account of whether elaboration of directives increases or reduces burdens for those being regulated. Simply copying out the text of a directive may be inappropriate when implementing regulations that need to fit in with existing related domestic legislation (otherwise there will be double-banking), and when the wording of the directive is so ambiguous that those being regulated call for greater clarity to minimise legal uncertainty. Differences in legal systems, devolution and pre-existing domestic legislation across Member States will also mean that the amount of national implementing legislation needed to meet European obligations will vary across Member States.

1.15 At the beginning the, review had been advised by some in government and in trade bodies that over-implementation was an elusive topic to pin down and that there were as many myths as concrete examples. The review certainly found that assessing whether a particular piece of European legislation has been over-implemented and whether that over-implementation is justified is not straightforward. It requires careful research into the legislation and the policy reasons behind the UK's implementation, as well as consideration of how the legislation is being enforced in practice and the impacts on those being regulated.

Figure 2: Departments face several challenges in transposing accurately and on time, without over-implementing



Source: *Lost in Translation? Responding to the challenges in European Law*, National Audit Office, 2005

1.16 In line with the terms of reference, the Davidson Review has focused its efforts on examining specific areas in the stock of existing legislation which are at most risk of over-implementation, based on evidence from stakeholders and the review's own analysis. From this small sample of case studies it is therefore not possible to draw macro-level conclusions on the extent to which the UK over-implements EU legislation more widely, especially given the very large amount of EU-sourced legislation that is now in the statute books.

1.17 However, a number of factors indicate that over-implementation may not be as big a problem in the UK (in absolute terms and relative to other countries) as is alleged by some commentators:

- despite the scope of the review being clearly set out, many of the respondents to the review's call for evidence complained about issues which were not actually about over-implementation in the UK. Some were expressing dissatisfaction with the EU measure itself while others had wrongly assumed that certain UK legislation originated from the EU. This suggests that frequent allegations of excessive gold-plating of European legislation are often misplaced and represent concerns about other issues;

- it is sometimes beneficial for the UK economy to set or maintain regulatory standards which exceed the minimum requirements of European legislation. The EU may not always set the most appropriate level of regulation. The decision to introduce or maintain higher standards or stricter regulatory regimes than is required by EU directives could bring benefits as well as costs, as the examples on health and safety legislation for the self-employed and Prospectus Directive (Annex B) have shown;
- many businesses that operate across Europe said that differential implementation across Member States, thereby undermining the single market, matters more than whether there is over-implementation in a particular country;
- there is a view among some businesses and trade bodies in the UK that the UK generally implements and enforces rigorously while other Member States do not. However, hard evidence to support these assertions was often lacking. Furthermore, the review heard similar concerns about their governments from business representatives in Denmark, Germany, the Netherlands and Spain, suggesting that *perceptions* about under-implementation elsewhere may be common among businesses across Europe and so this is not uniquely a British phenomenon; and
- the OECD and World Bank report that the UK has one of the most favourable regulatory environments for doing business in the EU.² This would be at odds with the suggestion that over-implementation occurs more frequently in the UK than in other Member States. Furthermore, the review's enquiries have revealed that unlike the UK, very few other governments currently have explicit policies or procedures to guard specifically against over-implementation. A number of EU countries have expressed an interest in the work of the Davidson Review and are currently doing or planning work of their own.

1.18 Notwithstanding the above comments, the case studies show that there are some cases of unnecessary over-implementation in the stock of existing legislation and the economy would benefit from reducing these burdens.

² *Doing Business Survey 2007*, World Bank, September 2006; *Regulation, competition and productivity convergence*, OECD Economics department working paper no. 509, September 2006.

2

Gold-plating

This chapter explains the term “gold-plating” and then examines some specific cases of gold-plating.

WHAT IS GOLD-PLATING?

2.1 According to the Cabinet Office’s Transposition Guide, gold-plating is when implementation goes beyond the minimum necessary to comply with the requirements of European legislation 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 (e.g. 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 (e.g. as a result of picking up the existing criminal sanctions in that area); or
- implementing early, before the date given in the directive.

2.2 This chapter examines the following case studies of gold-plating and makes recommendations for simplification:

- Insurance Mediation Directive and parts of the Distance Marketing Directive;
- MOT testing;
- Animal Scientific Procedures Directive; and
- Close links.

2.3 A further case study on the UCITS Directive and stable net asset value money market funds (set out at the end of this chapter) illustrates action being taken to reduce burdens. The Health and Safety legislation and the self-employed¹ illustrates a justified example of gold plating.

¹See Annex B.4 for details on the Health and Safety legislation and the self-employed.

CASE STUDY: INSURANCE MEDIATION DIRECTIVE AND PARTS OF THE DISTANCE MARKETING DIRECTIVE

Introduction

2.4 The implementation of the Insurance Mediation Directive (IMD) has led to a significant change in the way that the sales of insurance are regulated and has been the subject of some controversy.² As a previously self-regulating sector, insurance brokers have found it difficult to adjust to being subject to full Financial Services Authority rules. Some businesses, which have been caught by the new regulatory regime, think that they should be outside its scope. Others are concerned by the increased costs that Financial Services Authority regulation has imposed on those who sell insurance and argue that the costs are disproportionate for small businesses. There is a strong belief among those who are governed by these rules, that the UK has over-implemented the Directive and this belief is strengthened by the lack of implementation and proactive enforcement in some other Member States.³

2.5 HM Treasury believes that the Financial Services Authority is the right regulator to enforce this regime and both are keen to engage in dialogue with the industry to ensure that where burdens can be reduced this happens. The Financial Services Authority is in the process of reviewing the Insurance Conduct of Business (ICOB) section of its handbook and is already looking at some of the issues raised in this case study.

2.6 There are a significant number of similar requirements in the Insurance Mediation Directive and the Distance Marketing Directive (DMD) in that both require disclosure of particular documents to clients and both directives will apply to a significant proportion of transactions carried out by insurance intermediaries.⁴

2.7 The IMD was adopted in 2002 with the aim of enabling insurance intermediaries to operate freely throughout the Community, to aid the functioning of the single market in the insurance field and to enhance consumer protection in this field. It was one of the directives adopted as part of the Financial Services Action Plan (FSAP) which was launched in 1999. The Directive is a minimum harmonisation measure which sets standards on the professional requirements and registration of persons carrying out the activity of insurance mediation.

2.8 The DMD was adopted in 2002 in order to extend to the financial services sector similar consumer protection as had already been adopted in the field of distance selling for other types of goods and services.

Prior position in the UK and the approach to implementation

2.9 Prior to the implementation of the IMD, insurance mediation was not an activity which required authorisation from any government department or regulator. The industry had been subject to self-regulation by the General Insurance Standards Council (GISC). The 6,000 plus firms which belonged to GISC were bound by a code of conduct developed by the industry and enforced by GISC.

² Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation. OJ L 009, 15/01/2003 p. 3 – 10.

³ See Annex B for further detail of the implementation and enforcement approaches in other Member States.

⁴ Directive 2002/65/EC of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC. OJ L 2002 271 p.16 .

2.10 In December 2001 HM Treasury announced that it was to make the Financial Services Authority responsible for regulating the selling and administration of insurance contracts. The Treasury stated in its consultation on implementation of the IMD, that the Regulatory Activities Order 2001 would be amended to give the Financial Services Authority responsibility for regulating the sale of general insurance products within the Financial Services and Markets Act 2000 (FSMA) framework.⁵

2.11 The Financial Services Authority's starting point, as set out in its consultation paper in December 2002, was to look at the potential risks of consumer detriment arising from the sale and administration of insurance contracts. Its approach to regulation was driven by the requirements that it must meet under FSMA (it's statutory duty to consult publicly on proposals and to ensure that the benefits justify the costs) and was heavily influenced by the various European directives, including the IMD, that impact on this area. Details of how the Directive was implemented in UK legislation can be found in Annex B.

Summary of the Directive's requirements

2.12 The IMD requires Member States to regulate insurance intermediaries by way of a registration system. Such a system must ensure that only those insurance intermediaries who fulfil the professional requirements of the Directive are registered. These include requirements that insurance intermediaries must be of good repute, must have appropriate knowledge and ability and must hold professional indemnity insurance. Member States are required to take measures to protect customers against financial loss due to the insolvency of the insurance intermediary. The Directive also requires certain information to be provided to the customer before he enters into an insurance contract. There are further provisions dealing with the handling of complaints by customers, the settlement of disputes and how intermediaries can passport in to carry on business in another Member State once they are authorised in their home state.

Industry criticisms of the implementation

2.13 A point raised repeatedly with the review was that the insurance intermediary industry is very different from the type of industries that the Financial Services Authority normally regulates. It consists of a large number of firms, a great proportion of whom are small and the risks involved in many of the products that they are dealing with are not as high as in many of the sectors regulated by the Financial Services Authority. The Financial Services Authority's method of regulating was said to be geared towards larger companies dealing with higher risk products and to be aimed at regulating against risks of market instability as well as ensuring consumers were protected.

2.14 The Financial Services Authority handbook is a very large and complex document. It is difficult for small firms to navigate and understand and complying with it can be a very time-consuming business. For many firms coming under statutory regulation for the first time it was an extremely daunting regulatory document to get to grips with. The Financial Services Authority has recognised the problems that this causes for the sector and produced tailored handbooks to ease their navigation of the rules, and guides to various parts of the handbook, to assist in understanding the obligations that arise under them. For many in the industry this demonstrates how incomprehensible and inappropriate the Financial Services Authority handbook is as a tool to regulate insurance intermediaries, but it is acknowledged that the guides are helpful.

⁵S.I. 2001/544

2.15 The problem is often explained in terms of a mismatch between the light-touch regulatory regime, which many thought would be the outcome of the Directive, and the Financial Services Authority's more comprehensive framework of regulation into which the IMD has been slotted. Many do not blame the Financial Services Authority for this outcome and say that once the decision was taken to pass regulation over to the Financial Services Authority it was inevitable. It was described as "using a regulatory sledgehammer to crack a nut" and "trying to force the square peg of the insurance selling business into the round hole of Financial Services Authority regulation". For example, although the IMD requires a basic complaints procedure to be set up the Financial Services Authority rules make insurance intermediaries subject to the compulsory jurisdiction of the Financial Ombudsman Service. For small firms the fees to the Ombudsman are a significant expense and although widely accepted by the insurance mediation industry as part and parcel of Financial Services Authority regulation, it is seen as an over-burdensome complaints scheme for this industry.

Extension of scope of the Insurance Mediation Directive

2.16 The Directive has been gold-plated by extending the scope of the rules on sales of insurance so that they apply to sales by direct insurers as well as sales by insurance intermediaries. HM Treasury decided to extend the scope in this way early on in the implementation process for reasons of consumer protection and fair competition. The Regulatory Impact Assessment stated clearly that this option was imposing more regulation than was required by the Directive and assessed the costs and benefits associated with it. There was also wide consultation on these issues and extensive support for the proposals at the time of the implementation. This example of gold-plating did therefore go through the proper process of being justified by a cost-benefit analysis. The insurance industry in large part no longer supports this extension of scope because they think that the regime is expensive and difficult to comply with and is not really designed to deal with direct sales by insurers.

2.17 The scope has been further extended to include all motor warranties which are contracts of insurance whereas the Directive permits those costing less than 500 euros a year to be excluded from regulation. This decision was taken to avoid market distortions that would arise if some of these contracts of insurance were regulated and some were not. This approach was widely supported by respondents to the Treasury's consultation and the review received no representations requesting that this gold-plating be removed.

2.18 Whereas the IMD refers to activities relating to the conclusion of contracts of insurance, e.g. making arrangements preparatory to the conclusion of a contract of insurance, the Regulated Activities Order (RAO) refers to a wider range of activities. Firstly, the RAO refers to dealing with *rights under* any contract of insurance compared with the IMD, which just refers to dealings preparatory to a contract of insurance. Secondly, in the IMD there is no definition of "contract of insurance" and it is not clear that it is intended to cover all the arrangements listed in the RAO definition, e.g. administration bonds and similar contracts of guarantee. The Treasury checked with the Commission whether the scope of the IMD was intended to be wide and to cover the types of arrangement that under UK law would result in dealing in rights under an insurance contract (e.g. freight forwarders arranging insurance cover for their customers and property developers arranging insurance to cover their sub-contractors) and was told that the Directive's scope was deliberately wide. It is not now clear that the Commission will take this approach in its current review of implementation of the IMD by all Member States.

Gold-plating by imposing higher standards than the Insurance Mediation Directive

2.19 The standards that the Financial Services Authority rules require a firm to comply with in order to be and remain authorised to carry out insurance mediation are stricter than those which the Directive requires. For example, the handbook sets out high-level system and control requirements such as requiring a firm to show that it has clearly apportioned responsibility between its senior managers and that its business is adequately monitored. No requirements on these issues are contained in the Directive.

2.20 The Financial Services Authority rules require more disclosure of information to the customer than the Directive requires. The Directive's requirements are set out in article 12 and include providing information to the customer about whether the advice given is on the basis of a fair analysis of the insurance products available, what the complaints procedure is and the firm's connection with any insurance providers. Rule 5.2.9 in the Insurance Conduct of Business (ICOB) section of the Handbook sets out the information which the Financial Services Authority requires those mediating insurance to provide: a policy summary; directive-required information; a policy document; information about the claims handling process; information, where relevant, about cancellation rights; information about any applicable compensation scheme. The Distance Marketing Directive requires more detailed information to be disclosed to customers where they are entering into a distance contract. However the rules require this information about the contract to be disclosed even where the contract is not a distance contract.

2.21 There are further rules and guidance setting out what this information must consist of. For example, in relation to the policy summary, ICOB 5.5.1 to 5.5.13 set out in detail what the content must be and provide for the alternative of producing a key features document. It is suggested that much of the extra, non-directive required information, is unnecessary and is not read by the consumer and results in consumers shopping around less than they otherwise would. It is expensive for firms to produce and adds to the amounts of records that they are required to keep.

2.22 The Financial Services Authority has rules on claims' handling by insurance intermediaries (at ICOB 7 in the Handbook). These are not very detailed and require an insurance intermediary, when he is acting for a customer in relation to a claim, to act with due care, skill and diligence. An intermediary is also required to avoid conflicts of interest in relation to claims where it acts on behalf of a customer, unless it can manage them by disclosure to and obtaining consent from its customer. The IMD does not contain any requirements in relation to claims handling. However the Financial Services Authority rules are not burdensome and it can be helpful for firms to have certainty about how to deal with conflicts of interest that arise in the course of their business.

2.23 The IMD requires, at article 3.6, that insurance undertakings use the mediation services of only registered intermediaries. This provision of the Directive has been implemented through the Financial Services Authority's rules and guidance at the Prudential section of the Handbook (PRU) rule 9.4. However the implementation goes further than is required by the IMD by requiring an insurer to check whether each person in the chain of providing services is authorised to do so. This requires the insurer to check with any intermediaries that they use whether any other intermediaries are acting on their behalf. They then have to find out their identity and assure themselves of the intermediary's authorisation to mediate insurance, rather than being able to rely on the intermediary with whom they deal directly, to ensure that firms and persons acting on their behalf are authorised. This results in two lots of checks being done on the same firm or person for the same reason.

2.24 The IMD requires at article 3.1 that persons who are directly involved in insurance mediation should demonstrate the knowledge and ability necessary for the performance of their duties. So the Directive imposes a very high-level duty with scope for a lot of discretion about how such a requirement is to be fulfilled. The Financial Services Authority rules on training and competence (at TC 1 and 2 in the Handbook) consist of both high-level commitments, stated in general terms (for example, a firm should commit to regularly reviewing its employees' competence) and more detailed rules and guidance covering recruitment, training, competence, supervision and record keeping. There is scope to reduce the detailed obligations imposed by the rules here.

Extension of scope of the Distance Marketing Directive

2.25 The Distance Marketing Directive has been gold-plated by extending its scope to cover transactions with insurance intermediaries which do not take place at a distance. The Financial Services Authority consulted on the proposal to extend the DMD requirements in this way and include extra requirements in order to make the system simpler to operate. This would be achieved by requiring the same disclosures in all circumstances rather than a slightly different group of documents depending on how the intermediary dealt with the consumer, and to further protect consumers by providing them with extra information to assist their choice of supplier and product.

Stricter prudential requirements

2.26 The Client Money (CASS) rules that the Financial Services Authority has imposed, require more than the IMD.⁶ The CASS rules are very detailed and prescriptive; and could be substantially reduced and made easier to comply with if the approach taken was more principles based and relied more on the fiduciary duties which the intermediary owes to its client in any event. There have been real problems ensuring compliance with these rules, as discovered in the recent audits of CASS compliance carried out by the Financial Services Authority. There is an indication of the complexity of the rules in this area by the fact that the Financial Services Authority has produced a user guide to how the rules work which takes over 30 pages to explain this part of the handbook.

2.27 The prudential rules on capital resources impose more requirements on firms than the IMD requires. The IMD gives four choices as to how a Member State should ensure that customers whose money is handled by the intermediary do not lose out financially if the intermediary becomes unable to pay. The Financial Services Authority has implemented this by requiring that firms either transfer relevant risks to the insurer or maintain segregated client accounts, thus giving the industry some choice about how to comply with the Directive's requirements. They did not take up the option of requiring the intermediary to have capital resources amounting to four per cent of the total amount of premiums they receive annually subject to a minimum of 15,000 euros. However, the Financial Services Authority rules at PRU 9.3.30 do impose a capital resource requirement on firms but this is based on a percentage of their annual income rather than the higher figure of their total *premium* income. It is a requirement imposed by the Financial Services Authority to ensure that firms have adequate financial resources rather than to comply with any directive requirements. Concerns were expressed by the industry during consultation that some minimum level of capital needed to be set to reduce the exposure that well-run firms might have, as a result of levies to the Financial Services Compensation Scheme, to failures of less well-run firms. The review notes that part of the complexity in this area arises because regulated firms asked for different options to accommodate existing business models.

⁶ See Annex B.5 for details of how these rules gold-plate the requirements of the Directive.

Recommendation 1 – Insurance Mediation Directive

The Financial Services Authority should take the following steps by July 2008:

- a) Simplify rules on product disclosure and reduce the amount of information that insurance intermediaries are required to provide to their customers when selling lower risk products; no longer require Distance Marketing Directive disclosure for face to face sales;
- b) Remove the requirement for insurers to check that each intermediary in the supply chain is authorised;
- c) Cut down the amount of data required by the Retail Mediation Activities Return;
- d) Reduce and simplify the client money rules; and
- e) Cut prescriptive rules which overlay principles and are not required by the Insurance Mediation Directive or Distance Marketing Directive back to principles only, e.g. on training and competence of staff.

The Treasury should by the end of 2007:

- f) Consult on reducing the scope of activities caught by the insurance mediation regime to exclude freight forwarders and others from Financial Services Authority regulation.

CASE STUDY: MOT TESTING**Introduction**

2.28 The Government's current policy on the gold-plating of European legislation is that in implementing new directives the UK should not exceed the minimum requirements of the European legislation unless there are exceptional circumstances, justified by a robust cost-benefit analysis and extensive public consultation. It could be argued that this policy has overlooked a certain category of over-implementation: namely when the Government maintains higher pre-existing UK standards than those required by a new European directive in the same legislative area. This over-implementation would not come within the current definition of gold-plating – if the UK's own national legislation already covered the same area as the new European requirements – as there would be no need for implementation. In this situation, how can the policy of government departments needing to justify going beyond the minimum requirements of the European legislation, be applied? The example of Council Directive 91/328/EEC, on roadworthiness tests for motor vehicles, and the UK's system of MOT testing illustrates this well.

Background

2.29 In June 1991 European Institutions adopted Council Directive 91/328/EC on the approximation of the laws of the Member States relating to roadworthiness tests for motor vehicles and their trailers. The directive's objectives were to harmonise rules on roadworthiness tests across the EU, guaranteeing that vehicles were properly checked and maintained and preventing the distortion of competition between road operators.

2.30 The directive introduced a minimum requirement regarding the frequency of testing. For cars and other light goods vehicles, this requirement was for a roadworthiness test to be carried out every other year from the car's fourth year onwards. This '4-2-2' pattern of testing was adopted as a compromise as some Member States did not test passenger cars at all, and others tested at wide intervals. The European legislation allowed Member States to introduce tighter standards by bringing forward the date of the first compulsory test, increasing the number of items to be tested or shortening the interval between two successive tests.

2.31 The UK did not transpose the Directive because it already had an established system for carrying out roadworthiness tests on vehicles – the MOT Test – which had been introduced in the 1960s. By 1968, under the Transport Act, the UK requirement for passenger cars was for an annual roadworthiness test from the car's third year onwards. This is now a stricter requirement than that imposed by the subsequent European Directive. The items tested under the MOT test hardly vary at all from the minimum requirements of the Directive, and include braking systems; steering and suspension; wheel and tyres; bodywork; visibility; lamps; exhaust and emissions. UK government officials did carry out a review involving a consultation with key stakeholders of the MOT testing regime in 1994 and concluded that the frequency of the testing regime should remain unchanged. This review was not prompted by the Directive but formed part of the department's ongoing policy reviews.

Is the over-implementation justified?

2.32 While the UK imposes stricter requirements than the minimum requirements of EU legislation on roadworthiness testing for passenger vehicles, whether this over-implementation is justified or not is less clear cut as the evidence base, particularly relating to the relationship between road safety and vehicle defects, is not yet as developed as it might be. A new fully computerised database of test results, in place since April 2006, will help to improve some of the data at the Department for Transport's disposal.

i) Comparison with other Member States

2.33 In order to assess the UK's requirements for more frequent tests the review has looked at what happens in the other 24 EU Member States. As the table 1 demonstrates, testing requirements vary considerably across the EU and a majority of Member States do go beyond the EU's minimum requirements. Twelve other Member States carry out the first vehicle test at year 3.

Table 1: Passenger Car Inspection Test Cycles in the 25 EU Member States (2006)

EU-25	Year after start of operation of vehicle									
	1	2	3	4	5	6	7	8	9	10
Austria			S		T	T	T	T	T	T
Belgium				S	T	T	T	T	T	T
Cyprus				S		T		T		T
Czech Republic				S		T		T		T
Denmark				S		T		T		T
Estonia			S		T		T		T	T
Finland			S		T	T	T	T	T	T
France				S		T		T		T
Germany			S		T		T		T	T
Greece				S		T		T		T
Hungary	S			T			T		T	T
Ireland				S		T		T		T
Italy				S		T		T		T
Latvia	S	T	T	T	T	T	T	T	T	T
Lithuania			S		T		T		T	T
Luxembourg			S	T	T	T	T	T	T	T
Malta				S		T		T		T
Netherlands			S	T	T	T	T	T	T	T
Poland			S		T	T	T	T	T	T
Portugal				S		T		T	T	T
Slovak Republic			S	T	T	T	T	T	T	T
Slovenia			S		T		T		T	T
Spain				S		T		T		T
Sweden			S		T	T	T	T	T	T
United Kingdom			S	T	T	T	T	T	T	T

Bold indicates policy is in line with EU minimum

S = First inspection after start of operation

T = Next obligatory vehicle inspection after S

Sources: CITA (Ed.), *General Questionnaire 2004, Brussels 2005*; DEKRA Automobil : GmbH (Ed.), *International Strategies for Accident Prevention, Technical Road : Safety – DEKRA Technical Paper 58/05, Stuttgart 2005, p. 21*; own research

2.34 Only Luxembourg, the Netherlands, and Slovakia have the same testing pattern as the UK. Cyprus, Czech Republic, Denmark, France, Greece, Ireland, Italy, Malta, Portugal and Spain are in line with the Directive's minimum requirements of testing at year 4 and then every other year thereafter. Some Member States move from a system of testing every other year to annual testing, once the vehicle is a certain age. For example, Spain tests vehicles over ten years of age every year, together with vehicles that had failed the previous year's test. The Netherlands has committed itself to move towards the EU minimum, unless it should appear from current EU research that this is not responsible from a road safety or environmental point of view.⁷ If the EU study, which is due to report in January 2007, concludes that current EU standards for automotive testing should be raised, for reasons of road safety or the environment, the Dutch Government would not move to a 4-2-2 pattern of testing.

⁷The EU research refers to the Autofore project. Its terms of reference are to consider strategic options for roadworthiness enforcement for 2010 and 2020. The project team will make recommendations to the 96/96/EC Technical Adaptation Commission. http://ec.europa.eu/transport/roadsafety/publications/projectfiles/autofore_en.htm

2.35 Given the fact that the frequency of vehicle testing in the UK is among the highest in the EU and that cars have changed since 1968, it could be argued that UK drivers face unnecessary costs by comparison to their counterparts in other Member States. These costs include the test fee (between £35-50) and the cost of taking the time to drive to and from a testing garage. A proper assessment of whether the current over-implementation is justified should provide as robust an estimate of the costs and benefits of the UK's current system, against those of the EU minimum requirements, as possible.

ii) Potential savings

2.36 With 22 million vehicles tested annually, it has been estimated that putting the first test back from year 3 to year 4 would save motorists around £80 million a year in test fees. In addition, there would be cost savings in terms of inconvenience, time and paperwork: the average MOT test takes just under one hour to complete. If the UK were to put the first test back to year 4, and then test vehicles every other year, in line with the minimum requirements of the EU directive, the cost savings in fees would rise to around £465 million per annum. Drivers who regularly service their vehicles regardless of the MOT test, and drivers with cars which are still under warranty, may view annual testing from year 3 onwards as an unnecessary burden.

iii) Potential costs

2.37 These cost savings to motorists would need to be balanced against potential consequences in terms of road safety. The UK has the second best road safety record in the EU after Sweden, and some stakeholders argue that the annual MOT test helps to achieve this. At present it is estimated that around 30 per cent of vehicles fail their MOT test annually (this has decreased from 37 per cent in the last 10 years), and that 18 per cent of new vehicles fail at year 3 - approximately 410,000 vehicles. Although vehicles are safer and more reliable by comparison to the 1960s, vehicle components, such as brakes, tyres and lights still wear out over time. This wear and tear is responsible for the vast majority of test failures. As this failure rate increases with the age of the vehicle, moving the first test to year 4, or testing vehicles every other year instead of annually, would increase the number of vehicles with serious defects on the road. Current estimates are that 2-3 per cent of accidents are caused by vehicle defects (about 76 per cent are caused by human error), but this could increase if the frequency of MOT testing was reduced. In 2004, there were 3,221 deaths and 31,000 serious injuries in road accidents. Changing the MOT system could lead to a rise in these figures.

2.38 Another argument linking annual MOT testing to road safety is the attitude of the motorist. While an annual MOT test may represent an unnecessary burden to conscientious motorists who service their cars regularly, other drivers rely on the annual test to pick up on any vehicle defects and would not take action to correct any known defects provided that they could still drive the car. Even drivers who do service their cars regularly may be driving with defects as the MOT test is more rigorous than some services in testing items such as brake efficiency and emissions. Furthermore some motorists only service their cars in order to pass the MOT. More work could be done to produce an estimate of how increasing the length of time between MOT tests could affect motorists' behaviour with regards to vehicle maintenance.

The current evidence base

2.39 The data at present suggest that the cost-benefit analysis supports revisiting the justification for the current system of MOT testing. However, there are gaps in the information available and more work is needed, especially relating to the likely response of motorists to the change. The direct correlation between a system of roadworthiness testing for vehicles and road

safety has not yet been established by the Department for Transport (DfT). Deaths and serious injuries from road accidents have fallen by 39 per cent in the last ten years, while the MOT testing rate has not changed, demonstrating that there are a number of other factors at play, e.g. awareness of the hazards associated with drink-driving, which need to be taken into account.

2.40 The Davidson Review considers that the Department for Transport should build up its evidence base in three key areas:

- 1) What would be the cost savings to motorists of moving to a system whereby cars were tested at year 4, and every other year thereafter? This assessment should include the time taken to get to and from the test centre, testing time and any paperwork costs that the motorist would incur, as well as MOT test fees.
- 2) What effect would reducing the MOT test frequency have on the number of vehicles on the road with serious vehicle defects? In coming up with this estimate, it is necessary to factor in how changing the MOT test frequency may impact on motorists' behaviour with regards to vehicle maintenance.
- 3) Using the above information, and taking into account the correlation analysis between roadworthiness testing and road safety available in other countries, to identify the likely impacts on road safety by changing the MOT test frequency.

Conclusions and recommendation

2.41 This case study on MOT testing demonstrates how there is the potential for over-implementation to occur where there are higher pre-existing national standards than those required by a new European directive. The Davidson Review considers the principle that the UK should not exceed the minimum requirements of European legislation, without clearly demonstrating the evidence-base for doing so, should be extended to include a presumption against maintaining existing higher UK standards in the face of a new European directive, unless the benefits justify the costs (see Chapter 5). This would help to resolve future disputes about whether pre-existing national standards are gold-plating or not. In the case of MOT testing, given the minimum standards in the European Directive and the fact that the basic MOT testing regime has remained unchanged since 1968, it would seem appropriate to reconsider the evidence-base for the frequency of the UK's testing system.

Recommendation 2 – MOT testing

DfT should review the evidence base for the UK's MOT testing regime and publish its analysis of the costs and benefits of the current regime. By Spring 2007, DfT should consult on a move towards the European minimum standards.

CASE STUDY: ANIMAL SCIENTIFIC PROCEDURES

2.42 Many European directives set minimum standards, making it clear that Member States are free to exceed these standards if they choose. Directive 86/609/EEC on the protection of animals used for experimental and other scientific procedures is such a directive. Prior to 1986, scientific procedures had been regulated under the Cruelty to Animals Act 1876, which was the first legislation in the world on this topic, and introduced a licensing and inspection system administered by the Home Office. In the same year as the 1986 Directive, the UK adopted the Animal Scientific Procedures Act (ASPA), which both implements and exceeds the requirements of the Directive and Council of Europe Convention ETS123.

2.43 Following a wide consultation the UK Government exceeded the Directive's minimum requirements in order to maintain public and political confidence and ensure that the highest possible standards of animal welfare are applied to animals used in scientific procedures. The UK is widely credited with having one of the most rigorous regulatory regimes in the world and UK establishments are subject to frequent inspections by the Animal Scientific Procedures Inspectorate. The Government promotes the fullest application of the 3Rs – the replacement of procedures with others which do not use animals, the reduction of the number of animals used and the refinement of procedures to minimise pain and suffering. The Davidson Review fully supports this approach and is not making any recommendations that would be detrimental to animal welfare.

The over-implementation

2.44 In response to the Davidson Review's call for evidence requesting examples of over-implementation, a number of stakeholders from industry and academia raised the 1986 Directive. There was agreement with the animal welfare objectives of the Act, but respondents also shared the view that the way in which the Act had been implemented had resulted in some unnecessary regulatory burdens. In terms of over-implementation, there are three main instances of gold-plating in the UK regulatory regime, as well as a perceived trend towards regulatory creep regarding the level of detail provided in project and personal licences.

i) Gold-plating: centralised system for authorisation

2.45 The first instance of gold-plating is that the 1986 Act requires a three-level licensing system, where persons, projects and establishments are authorised in advance by the Home Office. Each person who undertakes work under the Act must hold a personal licence, listing the techniques and species they may work with, and the establishment at which they may perform these regulated procedures. The programme of work, justifying and listing individual protocols, must be authorised in a project licence. The place where scientific procedures are carried out must be approved by means of a Certificate of Designation. Under the terms of the 1986 Act all authorisations and amendments to these three licences must be authorised centrally by the Secretary of State. Respondents to the call for evidence argued that this centralised system was too slow and inflexible due to the time taken for authorisation to be granted. The perception of stakeholders was that amendments to a licence or certificate could take around six weeks for the Home Office to approve. The Directive allows for more flexibility than the UK legislation and would permit a situation where either the person or the experiments were authorised by the competent authority, or "notified in advance to the authority".⁸

⁸ Article 12, Directive 86/609/EEC on the protection of animals used for experimental and other scientific procedures.

ii) Gold-plating: personal licences

2.46 The second instance of gold-plating is that the Act requires everyone carrying out scientific procedures to hold a personal licence authorised by the Home Office. All applicants for personal licences in the UK must successfully complete the appropriate Home Office accredited training (the Directive requiring that all animal users are appropriately trained), supply an application form listing the techniques and species they require authority to use, and receive supervision for a period after they receive their licence. Respondents considered that it should be easier for personal licence holders to transfer between establishments. Some respondents considered that the administration of the personal licensing system was one of the factors impeding university training of the next generation of biomedical scientists.

2.47 The EC Directive allows more flexibility than the current UK legislation and would permit an unauthorised person to conduct experiments under the supervision of an authorised person. Article 7(1) states “Experiments shall be performed solely by competent authorised persons, or under the direct responsibility of such a person, or if the experimental or other scientific project concerned is authorised in accordance with the provisions of national legislation”. However, Section 10 (4) of the Animal Scientific Procedures Act currently allows only the delegation of tasks requiring neither specialist knowledge nor skills.

iii) Gold-plating: statistical returns

2.48 The third main instance of gold-plating relates to the statistical returns that project licence holders are required to fill out annually. The Directive requires that statistics on animal use be reported to the Commission every three years whereas the UK collects an annual return. Practitioners considered the UK’s system of statistical returns form to be complex, with 166 possible codes to use, including data on the age, sex, status of development, target body system of animals used in scientific procedures and several tables to complete. It was not clear to respondents how this level of detail supported the animal welfare objectives of the legislation. Article 13 of the Directive requires less information, namely that Member States make public information on the use of animals in experiments in respect to the number and kinds of animals used, and why they were used, e.g. for the testing of drugs, prevention of disease, experiments required by legislation.

2.49 There is evidence to suggest that the current returns form takes a significant amount of time to complete. One academic with four project licences said that he spent two to three weeks working on the statistical returns in December and administrators in pharmaceutical companies with IT systems, which gathered statistics throughout the year, still spent several days at the end of the year getting the figures signed off by the project licence holders. Although the review acknowledges that the Animal Procedures Committee published its report on the Statistics of Scientific Procedures on Living Animals in Great Britain in June 2005 proposing that additional categories of statistical information be published, simplification of the statistical returns form is desirable.⁹

⁹<http://www.homeoffice.gov.uk/science-research/animal-testing/>

iv) Regulatory creep

2.50 In addition to gold-plating, practitioners also considered that the detail included on the project licence application form had substantially increased since 1986. In 1998, the 1986 Act was amended to forestall infraction proceedings by the European Commission for failure to fully transpose Directive 86/609/EEC. Some respondents could not see how the extra information contributed to the animal welfare objectives of the legislation. The excess detail meant that the majority of application forms for project licences took a long time to complete and went back and forth between establishments and the Home Office before approval was granted.

2.51 Another consequence of the amount of excess detail on the licence was that each project generated a large number of amendments. Such detail, even if intended to improve animal welfare, also increased the risk of technical infringements of the Act by licence holders, which then required processing and reporting to Home Office by the Inspectorate. Stakeholders felt that the amount of information required to obtain a Certificate of Designation, in particular, the Schedule of Premises, which listed the detailed conditions and use of each room in the establishment, had also become excessive. The regulatory creep aspect would seem to have been exacerbated by a lack of understanding among practitioners as to level of detail that applicants should provide.

The potential impact of the over-implementation

2.52 Respondents were keen to stress that the UK's rigorous regulatory system had many benefits in terms of animal welfare and that they were looking for higher welfare standards not less. However, they felt that the way in which the Act had been implemented on the ground placed unnecessary burdens on stakeholders. Establishments face significant administrative costs in the application and amendments process for project licences, personal licences, certificates of designation and statistical returns. Researchers often needed authorisation from the competent authority before they were able to adopt more refined techniques. Inspectors were spending time agreeing the wording on application forms, technical infringements and relatively minor amendments, which could be better spent on visits or giving advice to establishments on how to improve animal welfare.

Developments since the Act

2.53 The UK Government in 1986 clearly took a deliberate decision to go beyond the requirements of the European Directive in a number of areas, justifying the gold-plating on the grounds of animal welfare and the need to maintain political confidence in the UK's regulatory system. This decision is still justified. However, it is questionable as to whether some of the complexity and administrative burdens that are now embedded in the current system were fully anticipated by those drafting the Act in 1986.

2.54 There have also been a number of non-legislative developments since 1986 which may have contributed to unintentional over-implementation. For example, since 1999 all applications for project licences and major amendments have also been scrutinised by the local ethical review process (ERP), prior to vetting by the Home Office Inspectorate. The ERP was introduced to provide independent ethical advice to the certificate holder, particularly with respect to project licence applications and standards of animal care and welfare; and provide advice to licensees regarding animal welfare and ethical issues arising from their work. As a result of project licence applications going to the ERP and Inspectorate before processing by the Home Office, there is the potential for duplication in some establishments.

Recommendations

2.55 Having taken into account evidence from practitioners, animal welfare experts, Home Office officials, the current EC Directive, and the European Commission's decision to revise Directive 86/609/EEC, the Davidson Review recommends the following changes to the regulation of animal scientific procedures in the UK. No changes should be made that would be detrimental to animal welfare. The review considers that these recommendations will help to improve the effectiveness of the UK's regulatory system in helping to make the UK an attractive base for good science, while ensuring that standards of animal welfare are still the best in the world.

Recommendation 3 – Animal Scientific Procedures

- a) The administration of the personal licensing system should be revised to ensure the processing of applications for personal licences with the minimum of delay. While maintaining standards, applications from undergraduates, industrial placement students and overseas visitors, who are carrying out procedures for less than three months, should be fast-tracked upon receipt by the Home Office.
- b) Home Office should fundamentally review the amount of detailed information in applications for personal and project licences. A working group should draw up a national list of agreed wordings for personal licences covering common techniques on common species, by the end of 2007. Another working group should aim to reduce the level of detail provided in project licence applications by at least 25% by the end of 2007, but not in a way that would risk animal welfare.
- c) When considering proposals for legislative change to implement the revised Directive 86/609/EEC the Home Office should consult on delegating authorisation for amendments to mild or unclassified procedures to establishment level, with the outcomes audited by the Animal (Scientific Procedures) Inspectorate.
- d) By the end of 2007, Home Office should consult on simplifying the content of the current statistical returns form, keeping the frequency unchanged, and only retain the information requirements that go beyond those in the European Directive if the benefits of doing so justify the costs.

All of these issues and processes should be overseen and managed within the framework for implementation of the Home Office Simplification Plan, and in particular should be informed by the active participation of operational level practitioners from both industry and academia; licence holders and named persons; and, to further ensure that the protection of animals is not compromised, those with a special interest in animal welfare.

CASE STUDY: CLOSE LINKS

Background

2.56 Following the collapse of Bank of Credit & Commerce International (BCCI), a Directive was adopted in 1995 that imposed new strengthened prudential supervision of credit institutions, insurance undertakings, investment firms and undertakings for investment in transferable securities.¹⁰ One of the ways in which supervision was strengthened was to make authorisation for these categories of financial services firms dependent on the competent authority being satisfied that the company did not have any close links with other persons that would prevent them from properly exercising their supervisory functions.

2.57 When the Financial Services Authority was given statutory powers by the Financial Services and Markets Act 2000 (FSMA), Community law provisions on close links were implemented by Schedule 6 of FSMA. The Financial Services Authority is required, by paragraph 3 of that Schedule, to be satisfied that any person applying for authorisation to carry on a regulated activity does not have close links which are likely to prevent the Authority's effective supervision of the person seeking authorisation. The purpose of these provisions is to ensure that firms in the financial sector, where large amounts of capital are involved, are prevented from being used for financial crimes such as money laundering. The Directive is also aimed at protecting the stability of the financial system by enabling Member States to counter crimes such as fraud and insider offences, and to share intelligence on the perpetrators of such crimes.

2.58 The relevant Directives define "close links" as follows:

"Close links shall mean a situation in which two or more natural or legal persons are linked by:

- (i) participation, which shall mean the ownership, direct or by way of control, of 20% or more of the voting rights or capital of an undertaking; or
- (ii) control, which shall mean the relationship between a parent undertaking and a subsidiary, in all the cases referred to in Article 1(1) and (2) of Directive 83/349/EEC, or a similar relationship between any natural or legal person and an undertaking; any subsidiary undertaking of a subsidiary undertaking shall also be considered a subsidiary of the parent undertaking which is at the head of those undertakings.

A situation in which two or more natural or legal persons are permanently linked to one and the same person by a control relationship shall also be regarded as constituting a close link between such persons."

Evidence that close links reporting is overly burdensome

2.59 The information provided to the Financial Services Authority about a firm's close links is potentially very important and can be vital to protecting the financial systems of the UK and of the European Union generally. There was acceptance of this among the industry and recognition that the Financial Services Authority was faced with a difficult task in deciding what information it could realistically do without when attempting to reduce the amount of close links reporting that

¹⁰European Parliament and Council Directive 95/26/EC of 29 June 1995 amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, Directives 73/239/EEC and 92/49/EEC in the field of non-life insurance, Directives 79/267/EEC and 92/96/EEC in the field of life assurance, Directive 93/22/EEC in field of investment firms and Directive 85/611/EEC in the field of undertakings for collective investment in transferable securities (Ucits), with a view to reinforcing prudential supervision. OJ L 168, 18/07/1995 p. 7 – 13.

has to be done by authorised firms. However, the review received several submissions from trade bodies in the financial services sector stating that the requirement to continually update the Financial Services Authority on all changes to a firm's close links was overly burdensome and frustrating in that it seemed to be, in many cases, the reporting of information for information's sake. It was thought that in the majority of cases of changes to close links reported to the Financial Services Authority, it had no concern about its ability to supervise the firm effectively and the reporting was therefore a waste of time.

2.60 The firms who have to report changes in close links most frequently are:

- those who are part of a large group of companies; and
- those who regularly have a 20 per cent or more holding in a company which is usually a short-term trading position.

2.61 The first situation causes problems where the authorised firm is a subsidiary of a company based overseas and its parent has many subsidiaries, perhaps in several different jurisdictions. In this scenario the authorised firm does not hold the information about its parent's subsidiaries and it can be difficult and expensive to obtain that information.

2.62 The second situation is particularly problematic where a firm, or the group of which it is part, has both long term investments in shares and short term trading positions where large amounts of shares are held for a short time, perhaps as a hedge. This can cause the firm to go over the 20 per cent holding threshold without there being any real participation or element of control exercised over the company.

2.63 While the relevant Directives give the Financial Services Authority no discretion about requiring information about all the close links of a firm at the time that it is seeking authorisation, there is discretion about how much information on close links it should require on a continuing basis once a firm has been authorised. The Directives oblige the competent authorities to require undertakings to provide them with the information they require to monitor compliance with the following conditions:

- the close links with the firm do not prevent the effective exercise of their supervisory functions; and
- the laws and regulations of a non-member country governing persons with whom the firm has close links shall not prevent the effective exercise of their supervisory functions.

2.64 The Financial Services Authority requires authorised firms to notify them each time that their close links change, or to elect to notify them on a monthly basis. They also require firms to submit an annual report on their close links position. There are no figures available for the administrative burden caused by the in year notification requirements but there is a figure for the annual close links report which is estimated to cost approximately £2.8 million per annum.¹¹

¹¹ *Estimation of FSA Administrative Burdens*, Real Assurance Risk Management, June 2006.

Areas where the Directives are gold-plated

2.65 There are three areas where FSMA or Financial Services Authority rules gold-plate the Directives' provisions on close links:

- by requiring notification of close links even where those links arise due to a temporary trading position;
- by requiring notification of all close links even where the company with which the person is closely linked could not impinge on the Financial Services Authority's ability to effectively supervise them;
- by imposing compliance with the close links notification regime on categories of firms where no Directive requires this i.e. by extending the scope of the close links provisions.

Close links due to temporary trading position

2.66 The post-BCCI Directive, and its successor directives, contain a recital which states that for the purposes of those directives the sole fact of owning a significant proportion of a company's capital does not constitute participation if that holding has been acquired solely as a temporary investment which does not make it possible to exercise influence over the undertaking.¹² The Financial Services Authority rules on notification of close links do not fully take advantage of this limitation on what constitutes a close link.¹³ The rules take advantage of it in relation to what constitutes a parent – subsidiary relationship at the Thresholds Conditions section of the Financial Services Authority's handbook (COND 2.3.8) but there is no such provision in relation to a participation relationship. This requires all close links that consist of holding over 20 per cent of the voting rights of capital of a company to be notified to the Financial Services Authority while the firm is authorised.

Requiring disclosure of all close links not just those which threaten effective supervision

2.67 It would not be possible, or appropriate, for the Financial Services Authority to specify exactly which close links it regards as potentially problematic because close links which could give rise to supervision issues are identified relying, among other information, on intelligence gathered from confidential sources. Specifying exactly which close links needed notifying could also be counterproductive in terms of creating easy avoidance mechanisms for those who wish to avoid supervision of their activities. However, there is still room for the Financial Services Authority to consider a reduction in the close links which need to be notified by specifying a negative list of those close links which do not require disclosure as they do not impinge on effective supervision of an authorised firm. At present there is a large amount of information being provided to the Financial Services Authority on close links which is not serving any purpose.

¹² E.g. recital 5 of Directive 95/26/EC.

¹³ SUP 11.9 in the handbook, referring back to Threshold Condition 3 which is set out at COND 2.3.

Extending scope to cover extra categories of authorised firms

2.68 Not all the categories of business regulated by the Financial Services Authority are required by directives to notify their close links. Insurance intermediaries and mortgage intermediaries are not covered by any Community law provisions on close links. However, because of the way that FSMA is structured, once an activity is designated as a “regulated activity” then the Financial Services Authority is required to be satisfied about the close links of all businesses that it authorises. The Financial Services Authority must be satisfied that any person it authorises meets the threshold conditions set out in Schedule 6 to FSMA which includes the condition on close links. It may be possible for HM Treasury to amend FSMA, using an order under the Legislative and Regulatory Reform Act, to exempt certain categories of regulated activity such as insurance and mortgage mediation from the close links requirements.

Recommendation 4 – Close Links

- a) The Financial Services Authority should amend its rules so that temporarily held trading positions are not required to be disclosed as a close link, by April 2008.
- b) The Financial Services Authority should amend its rules on when close links are required to be notified post-authorisation so that some categories of close links, where no concern arises and where they can be specified on a non-discriminatory basis, do not have to be disclosed, by April 2008.
- c) The Treasury should review the application of the threshold condition on close links to regulated activities where no directive requires notification of close links, by April 2008.

CASE STUDY: UCITS DIRECTIVE AND STABLE NET ASSET VALUE MONEY MARKET FUNDS

2.69 An example of the Financial Services Authority originally taking a more restrictive and cautious approach to interpreting a directive than regulators in some other Member States is the UCITS Directive and its application to certain types of money market funds.¹⁴ The review is encouraged by the recent change of view by the Financial Services Authority which will permit these types of fund to establish themselves in the UK.

2.70 An increasingly important market in Europe is the market for stable net asset value money market funds. The accounting and pricing of these funds is such that the value of the units in the fund will be constant, unlike traditional funds where the value of units will fluctuate in line with the market. The funds invest in a diversified portfolio of high grade money market instruments and are highly liquid. They represent a very large part of the US market and are becoming increasingly important in Europe.

2.71 Although the fund managers for these funds are generally based in the UK, as are their major customers, the funds themselves are registered in Dublin and Luxembourg. This is because, until recently, the FSA took the view that the accounting methodology necessary to make these funds work was not permitted under the UCITS Directive. This was despite the fact that Ireland and Luxembourg had adopted a more liberal interpretation of this Directive without challenge and have for some years permitted these types of fund. It would be worth considering in future whether the UK should actively seek more business-friendly interpretations in similar circumstances to avoid losing business to other Member States.

¹⁴Undertakings for Collective Investments in Transferable Securities.

3

Double-banking

This chapter explains the term “double-banking”, discusses how the problem can arise and then examines some specific cases of double-banking.

INTRODUCTION

3.1 Double-banking arises where European legislation covers similar ground to that covered in existing domestic legislation and the two regimes have not been coherently merged in the implementation process. The implementation should, as far as possible, consolidate all linked instruments, aims, objectives, obligations and enforcement mechanisms to make them simple and consistent with each other. Where this does not occur there is double-banking. The interaction between the European and the UK legislation can be particularly problematic where they cover a subject area in different ways, cover it to a different extent (in terms of scope) and use different concepts.

3.2 The Cabinet Office Transposition Guide states that 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. It recommends that policymakers should aim to achieve as much consolidation as possible by merging all the relevant regulations into one.

3.3 This chapter examines the following case studies of double-banking:

- Consumer Sales Directive;
- fisheries regulation;
- waste and other regulatory regimes; and
- Unfair Terms in Consumer Contracts Directive.

3.4 The review did not receive a large amount of evidence highlighting cases of double-banking. Only a few genuine cases of this type of over-implementation were presented by respondents to the call for evidence. There seem to be several reasons for this. Where double-banking arises it makes the law more complex and difficult to use. Much of the time these complications will affect only a few of the people being regulated and their impact can be lessened by the regulator providing clear guidance on what behaviour they will regard as complying with the regime.

3.5 Double-banking is a type of over-implementation which is likely to have its greatest impact on those being regulated when they are involved in a legal dispute and the fact that there is double-banking is unlikely to be their main concern. It is a type of over-implementation that requires some legal knowledge to uncover and by its nature it is likely to be of most concern to lawyers rather than to their clients, who just want clear advice on their legal position. The problems caused by double-banking are most likely to be widely noticed when large numbers of people need to use the particular area of law on a regular basis. This could partially explain why consumer law is an area where complaints about double-banking are more prevalent.

3.6 Most government departments that the review spoke to were well aware of the problems that could be caused if they failed to create an integrated regulatory regime when they implemented a new piece of European legislation. There was wide agreement that it was highly desirable to ensure that when implementing a Community measure, the resulting legal regime was coherent and comprehensible. However, departments did not always devote sufficient resources and time to think through properly the potential complexities of how their implementation would fit into the existing domestic law.

3.7 In some instances there was a sense that making the law "neat and tidy" was a lower priority than implementing a measure on time or avoiding gold-plating. While departmental lawyers in general are keen to stress the importance of creating a coherent legal regime, their arguments may not win the day when there are competing policy priorities to be balanced.

3.8 If double-banking is to be avoided in the future then departments will need to take a more strategic approach to managing their legislation. There will need to be proper planning to enable sufficient resources to be devoted, early on in the process, to ensuring that an implementation fits properly into the legal regime rather than overlaying the existing position with a new layer of complexity. The opportunity to consolidate areas of law where there are large numbers of legal instruments also needs to be taken more frequently, and be seen as a higher priority by departments who sometimes do not realise the extent to which failure to consolidate can impact on stakeholders.

3.9 In the areas where double-banking arises it is often the case that there will be a constantly changing landscape of Community law with new measures, proposals and reviews emanating from Brussels on a frequent basis. However, this should not be used as an excuse to leave domestic law unreformed – new implementations will be made easier if they can be fitted into a properly managed and streamlined UK regulatory regime.

CASE STUDY: CONSUMER SALES DIRECTIVE

Introduction

3.10 The number of sales which are covered by the requirements in the Consumer Sales Directive is very large.¹ It covers all sales to people who are not acting in the course of their business, of almost any type of good and so would apply to the majority of retail sales across all businesses, the annual value of which is estimated at £248,372 million in 2005.² The impact of implementing this Directive is therefore very significant in that the law in the UK governing consumer sales is relied on every day in relation to large numbers of transactions.

3.11 Since the Consumer Sales Directive was implemented in the UK in 2002 there has been criticism of the law on the remedies that consumers have available to them when they buy goods which are faulty. The main problem raised by commentators, business and consumer groups is that the law on consumer remedies is too complex. It is not easy for consumers to understand what their rights are and this leads to dissatisfied customers and increased amounts of litigation.

¹ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 07/07/99 p. 12 – 16.

² *Retail Sales Business Monitor SDM28*, National Statistics, September 2006.

Requirements of the Directive

3.12 The Consumer Sales Directive was adopted in 1999 in order to ensure a uniform minimum level of consumer protection across the Member States and thereby enhance the ability and confidence of consumers to buy goods from any state within the EU. The Directive requires goods to be in conformity with the contract not only by satisfying any express terms in the contract but also by meeting certain criteria as to description, fitness, quality and performance.

3.13 The Directive sets out, at article 3, the rights of the consumer where goods do not conform to the contract. The remedies which Member States must make available to consumers are built upon the civil law systems in continental countries. In those countries consumers traditionally had two remedies where the goods supplied did not conform to the contract – a price reduction or having the contract set aside on account of the defect. The Directive adds to these existing civil law remedies two further options of requiring the seller to repair or replace the defective goods. However, the common law approach in the UK has traditionally been different, with the consumer's remedies being rejection of the goods or damages (or in some cases a combination of the two). The common law approach emphasises the right of the buyer to be compensated for the failure to perform the contract whereas the civil law looks to the specific enforcement of legal rights and duties.

3.14 In addition, the Directive provides certain rules governing commercial guarantees to ensure that consumers are able to enforce them, that they are aware of their rights under such guarantees and that they do not confuse them with their statutory rights. The focus of this case study is the implementation of the consumer remedies into UK law.

Implementation

3.15 When the Directive was being negotiated there was a great deal of concern in the UK from consumer groups and in Parliament that the Directive would result in consumers losing some of their existing rights. The pressure to maintain existing levels of consumer protection resulted in there being no appetite to take a fresh look at how existing consumer remedies from UK law and the new remedies required by the Directive could best be fitted together into one coherent legal framework. This meant that, despite efforts from DTI to create a system that would be easy to use, the remedies aspect of the implementation resulted in overlapping provisions which are complex and difficult to understand.

3.16 The implementing regulations successfully create a properly integrated system of consumer law in various other areas of the implementation. For example the amendments to the implied terms where goods are hired to consumers, while not required by the Directive, are an important step in creating a more coherent and simpler system of consumer law. By making the implied terms for consumer hire contracts the same as for consumer sales contracts it will be easier for users of the law to understand when a contract is breached.

3.17 The way in which this part of the implementation has avoided double-banking demonstrates an inherent tension which faces departments when they are implementing a directive. Sometimes a directive will impose requirements in relation to some but not all of an area of UK law where the requirements had previously been uniform. The choice then is either to allow the requirements in this area to become more fragmented and complex by making different rules apply to different circumstances, which avoids gold-plating the directive, or to apply the directive requirements uniformly across the whole area thus avoiding double-banking. However, in order to avoid double-banking in this scenario it is inevitable that an element of gold-plating will occur because the only way to standardise the requirements across the area is to raise the requirements in

the parts not covered by the directive up to the directive's standards. It would not be possible to lower the standards in the parts that are covered by the directive and impose a lower uniform set of requirements, as this would fail to implement the directive properly.

3.18 The Consumer Sales Directive was implemented by the Sale and Supply of Goods to Consumers Regulations 2002.³ In relation to consumer remedies these regulations amended the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982. This case study deals only with the amendments to the Sale of Goods Act 1979 for the sake of simplicity but the same approach was taken to amending the 1982 Act. There was clearly an attempt to integrate the new provisions into the existing body of consumer law rather than creating a separate parallel regime. In the more obvious examples of double-banking there have been new parallel regimes created which overlap but fail to mesh with the existing scheme of legislation.⁴

3.19 In the field of consumer remedies this attempt to integrate into existing law has been less successful than in the other fields covered by the Directive. The 2002 Regulations inserted a new Part 5A into the Sale of Goods Act 1979 setting out the new remedies available to a consumer, as required by the Directive. The resulting legislation, combined with the common law, means that the choices faced by a consumer about what remedies are available in what circumstances and when the consumer may change his choice of remedy are far from straightforward.

Evidence of problems with the current system

3.20 Several trade associations and individual businesses submitted evidence to the review that the current law on consumer remedies was overly complex and was causing problems in practice. In the retail sector the main challenge is to train sales staff to know what remedies a consumer is entitled to when they seek to return goods which are faulty. Often when consumers have bought a product that is faulty, they think that they are entitled to a full refund and this can give rise to confrontational situations in stores. Disputes usually arise in relation to expensive and technical products where faults might not surface until later on and there is more money at stake for both parties.

3.21 It was suggested to the review that the real impact of the legal complexity of consumer remedies was very low because retailers tended to offer full refunds to customers in order to maintain good customer relations. Further investigation found that this was not the case. Although many retailers do offer a “no quibble” guarantee for a limited period of time, usually 14 days or 28 days, the problems usually arose in cases where the consumer had held on to the goods for longer than that. Therefore, the “no quibble” guarantee did not really ameliorate the problems caused for them by the legal complexity of the remedies available to consumers. Retailers emphasised that litigation does arise as a result of the lack of common understanding between consumers and retailers as to their rights. This requires some of the large retail chains to have a team dealing with defences to this type of claim on a full time basis. Although it is the case and is widely accepted that the law which was in place before the Directive was implemented is partly to blame for this complexity, there is still evidence that the way it was implemented has added to the confusion in an already complex area.

³ S.I. 2002/3045

⁴ See for example the implementation of the Unfair Terms in Consumer Contracts Directive (1993/13/EC) and the update on simplifying the law in this area at page 51 of this report.

Box 3.1: Example of how the law on remedies works in practice

Say that a consumer buys a television and four weeks later it breaks down. They contact the retailer and the retailer promises to arrange a repair. A week later a repairman comes out and fixes that fault but only a few days later the television stops working again. The consumer complains to the retailer and a week later purports to reject the television.

The first thing the consumer must show is that there has been a breach of contract, in this case of the implied term about quality and fitness for purpose of the goods. The first complication is that how the consumer goes about proving the breach of this term, will depend on what remedy they want to pursue.

If they wish to rely on one of the new, directive-based remedies (i.e. request a repair, a replacement, a rescission or a reduction in price) they can rely on the presumption in section 48A of the Sale of Goods Act. This states that where the goods do not conform to the contract at any time within the first six months, they are presumed not to have conformed at the time of sale.

If the consumer wishes to reject the television and get a refund of the total price or to claim damages (the old UK remedies), they cannot rely on the presumption; they will have to show that the defect existed at the time of sale and did not arise later.

Is it open to the consumer to reject the television in these circumstances? In order to do so they must show that their right to reject has not been lost by acceptance. In particular they have to show that they have not retained it beyond a reasonable time. It is ultimately a question of fact whether the seven weeks that the consumer has had the television is more than a reasonable time but the case law on this issue is detailed and extensive.

If it is not open to the consumer to reject in these circumstances they may still be able to rescind. This remedy is one of the new ones introduced by the 2002 Regulations so the presumption in section 48A discussed above will apply. They will be able to rescind if they have made a request for a repair that has not been complied with within a reasonable time and without causing them significant inconvenience – which is probably the case here as the television is still faulty. If the consumer rescinds, the seller may be entitled to make a deduction from the purchase price returned to them, but on what basis such a deduction would be assessed is not clear.

Alternatively it could be found that the consumer has to request repair of the specific fault first and that until they do so they cannot rescind. Furthermore if they do go down that route and request a further repair, it means that they will not be entitled to reject the television until a reasonable time for repair has expired.

3.22 Consumer Direct provides a helpline service to consumers and has to train its staff to provide advice to consumers on the remedies available to them. The main problem the staff face is the lack of certainty that they can provide when advising consumers on their rights. The fact that there are two remedy routes which use different language, different concepts and involve different burdens of proof, does cause added difficulty and uncertainty in providing advice. Some of the subtleties are lost in order to explain the position in terms that a normal consumer can understand and it is very difficult to provide advice where a more sophisticated consumer wants to weigh up the advantages of one type of remedy over another.

CONCLUSION

3.23 Making the law on consumer remedies in sale of goods and similar contracts more coherent will benefit both consumers and business. If consumers have a better understanding of their statutory rights if they buy faulty goods, they will have more confidence in using their rights and be able to enforce them more easily. Business can also benefit through improved relations with customers, through saving money on training staff and through less litigation. Although there are clear benefits it will still be necessary to make difficult choices given that simplification of the law could lead to fewer choices for consumers about which remedies they can pursue in any given situation. The various implementation options for dealing with these complexities will need to be widely consulted on.

Recommendation 5 – Consumer Sales Directive

DTI should implement a simplified system of consumer remedies by the end of 2009 unless, following informal stakeholder consultation, there is a clear preference for deferring reform in this area until measures arising out of the review of the consumer acquis by the EU Commission are implemented. Subject to that consultation, DTI should ask the English and Scottish Law Commissions to produce a joint report by the end of 2008 on the reform and simplification of remedies available to consumers relating to the sale or supply of goods.

CASE STUDY: FISHERIES REGULATION

Introduction

3.24 The UK fishing industry dates back centuries; so does some of the legislation regulating it. One of the respondents to the review's call for evidence⁵ described it as follows:

“A very large proportion of UK primary legislation about fisheries not only pre-dates the country's accession to the then European Community and the transfer of competence on fisheries matters to Brussels but also stretches back into the 18th and 19th Centuries.”

3.25 Much EC legislation has been added on top of this UK legislation since the UK joined the EC in 1972. This is particularly so since the formation of the Common Fisheries Policy (CFP).⁶ A report⁷ that recently resulted from a joint consultation exercise by the National Federation of Fishermen's Organisations⁸ and Defra (and was submitted to the review as evidence) describes this second stream of regulation in the following terms:

“There has been an inexorable and perhaps inevitable growth in rules and regulations governing the fisheries sector following the agreement of the Common Fisheries Policy in 1982 and its subsequent application to acceding Member States in 1986, 1995 and 2004.

⁵The Association of Sea Fisheries Committees of England and Wales.

⁶The Common Fisheries Policy (CFP) is the European Union's instrument for the management of fisheries and aquaculture. It was created to manage a common resource and to meet the obligation set in the original Treaties of the then European Community which stated that there should be a common policy in this area, that is, common rules adopted at EU level and implemented in all Member States.

⁷*Simplification of Fisheries Regulations*, September 2005.

⁸The NFFO is a representative body for fishermen in England and Wales and met with the Davidson Review during the review's call for evidence period.

This growth has been accompanied by the parallel development of national regulations and administrative rules, many of which have been in pursuit of meeting Community obligations. Often measures have been adopted in piecemeal fashion and sometimes without full regard to their practicality and the consequences for the day to day operations of the fishing industry.”

“Since the new millennium, the pace of regulation has accelerated, with measures to regulate fishing effort and to assist stock recovery to the fore. Action has often been at short notice. Fishermen, and indeed all involved with the fisheries sector, are struggling to cope with the vast array of rules and regulations which now exist.”

3.26 Annex B.6.1 gives an indication of the annual volume of new EC fisheries regulation. It lists 36 regulations adopted in 2005 (not including further regulations pertaining to aquaculture, fish processing and marketing).

3.27 In 2005 there were 7,107 fishermen (and rather fewer vessels) operating from England and Wales.⁹ And in the UK, there were 573 businesses in the fish processing industry (as well as approximately 1,300 fishmongers).¹⁰ The total administrative burden figure for English fisheries regulation is £21.8 million.¹¹ The burden per industry member is relatively high given the small size of the industry.

Double-banking

3.28 The Common Fisheries Policy (CFP) is an area of exclusive community competence so the UK (and all other Member States) is limited to transposing, monitoring and enforcing EC fisheries regulation.¹² However the review has identified 30 pieces of pre-devolution primary legislation that are still wholly or partially in force in the UK. Some of these Acts amend existing ones. They are listed in Annex B.6.2. There would be little technical difficulty in consolidating into one piece of primary legislation England’s transposition, monitoring and enforcement powers. Although, in practice it is likely that such consolidation would be a substantial task.

3.29 Underneath the EC regulations and the UK primary legislation there is also a significant volume of secondary legislation pertaining to fisheries management. To illustrate the volume in one year, Annex B.6.3 lists such secondary legislation adopted in 2005 in respect of England and Wales. It is apparent from the titles of some of these instruments that they are amending pre-existing secondary legislation. However, the absence of a publicly available database of consolidated legislation in the UK makes it difficult for the fishing industry to ascertain its current legal obligations (see recommendation 19).

⁹ *United Kingdom Sea Fisheries Statistics 2005*, Marine Fisheries Agency, National Statistics & Defra, August 2006 at: <http://www.mfa.gov.uk/pdf/UKSeaFish2005.pdf>

¹⁰ *ibid.*

¹¹ Calculated in the administrative burdens measurement exercise conducted for the Government to form the basis of the 2006 Simplification Plans. See: <http://www.cabinetoffice.gov.uk/regulation/reform/simplifying/burdens.asp>

¹² EC fisheries legislation is generally directly applicable in the UK and so does not need transposition in order to have effect. Section 30 of the Fisheries Act 1981 is normally used to transpose EC fisheries legislation when limited transposition is nevertheless considered necessary – generally for enforcement purposes.

Streamlining

3.30 Defra recently undertook a first consultation on a Marine Bill.¹³ The Bill offers an opportunity to put in place a better system for delivering sustainable development of the marine environment, addressing both its use and protection. Defra considers that the Bill will provide the opportunity to take an integrated approach to fisheries management and related environmental and marine resource issues. The first consultation document states that:

“The Bill is about modernising and streamlining. It will simplify legislation, streamline administration and strengthen partnership working.”¹⁴

3.31 The review considers that the Marine Bill could be a useful tool not only for aligning the policy objectives of fisheries management and marine conservation but also for streamlining and consolidating UK legislation that is currently double-banked with itself and EC fisheries legislation. It is now Government policy to adopt a “one in one out” approach to legislation.¹⁵ This means that the existing legislative system should be adapted to incorporate new legislation, including by repealing out of date instruments or consolidating existing, related instruments. This involves taking stock of what is already on the statute book and performing a “regulatory spring clean”.

3.32 During the course of the review, on 20 June 2006, Defra announced that Sea Fisheries Committees (SFCs) “will be given a more clearly defined purpose and duties, and will be tasked with achieving sustainable development of fisheries within their jurisdiction”.¹⁶ Defra informed the review that this will be achieved via the Marine Bill and involve repealing existing SFC-focused legislation. Defra also specifically informed the review that it considers the Marine Bill an opportunity to consolidate fisheries officer enforcement powers and to amend section 30 of the Fisheries Act 1981 in order to reduce the need for secondary legislation to implement EC legislation.¹⁷ The review welcomes these particular announcements.

3.33 The review considers it important that the regulatory spring clean should be as full as possible to meet the Government’s double-banking test.¹⁸ See also recommendation 12 of this report. The benefits of this approach include making the powers and duties more accessible, transparent and comprehensible for both the fishing industry and its regulators and helping to ensure that provisions are updated to take account of the CFP and 21st century fishing industry practices. A more coherent regulatory framework would also help to ensure that fisheries policy objectives and requirements are made consistent with those of other marine policies. Further, this approach would help compensate for the large amount of new legislation that the fishing industry faces each year (as demonstrated by Annex B.6).

¹³ <http://www.defra.gov.uk/environment/water/marine/uk/policy/marine-bill/index.htm>

¹⁴ At paragraph 3.9

¹⁵ Since accepting the recommendations of the Better Regulation Task Force report, “*Regulation – Less is More*” at the time of the 2005 Budget. The report, dated March 2005, can be found at:

<http://www.brc.gov.uk/downloads/pdf/lessismore.pdf>

¹⁶ <http://www.defra.gov.uk/news/2006/060620b.htm>

¹⁷ op. cit. (footnote 12)

¹⁸ “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.” *Transition guide*, Cabinet Office, March 2005, page 17.

3.34 A full spring clean is supported by the House of Commons Environmental Audit Committee. In its report on “Proposals for a draft Marine Bill”,¹⁹ it recommends as follows:

“We press Defra to inform as much of the second consultation [on the Marine Bill] as possible with the substance of the responses on matters relating to fisheries received from the first consultation: and to extend the proposals for the Marine Bill to cover as many fisheries issues as possible in order to ensure legislative and administrative integration.”²⁰

3.35 The Davidson Review recommends that Defra aim to achieve as much consolidation of primary fisheries and marine legislation as possible with the Marine Bill, taking into account responses to the second round of consultation. Redundant provisions in existing Acts should be repealed.

European developments

3.36 The European Commission published a Communication “Towards a strategy to protect and conserve the marine environment” on 2 October 2002.²¹ On 24 October 2005 it published a proposal for a Marine Strategy Directive²² alongside a second Communication.²³ Then, on 7 June 2006, it published a Green Paper on European Union Maritime Policy;²⁴ the Directive (when adopted) will form the maritime policy’s environmental pillar.

3.37 The aim and numerous other aspects of the draft Marine Strategy Directive are yet to be finalised. Most Member States want an explicit definition of the concept of “good environmental status” (GES). They are also of the view that some flexibility is required on the timetable for achieving GES – depending on how it is to be defined as well as on specific regional and sub-regional circumstances.²⁵ The Directive also needs to be made coherent with other EC policies and legislation, such as the Water Framework Directive, the Habitats and Birds Directives and the CFP.

3.38 A number of respondents to the first Marine Bill consultation commented that the Marine Bill proposals should be aligned with the EC proposals and sought a clearer indication as to how this would be achieved.²⁶ Some saw benefits in a European approach providing the impetus for greater coherence and consistency across European Union waters. One respondent saw little advantage in having a Marine Bill in advance of EC proposals unless certain conditions were met. However, a few respondents saw benefits in moving first in order to help the UK take a lead in Europe.

¹⁹ *Proposals for a draft Marine Bill, Eighth Report of Session 2005-06*, House of Commons Environmental Audit Committee, 25 July 2006, paragraph 27

²⁰ It is also worth noting that there were a large number of responses to the first Marine Bill consultation expressing disappointment that fisheries issues were not more central to that consultation: *Summary of Responses (First Marine Bill Consultation)*, Defra, 18 October 2006, page 7

²¹ *Towards a strategy to protect and conserve the marine environment (Communication) COM(2002) 539 final*, European Commission, 2 October 2002. See: http://europa.eu.int/eur-lex/en/com/pdf/2002/com2002_0539en01.pdf

²² <http://ec.europa.eu/environment/water/marine.htm>

²³ *Thematic Strategy on the Protection and Conservation of the Marine Environment (Communication) COM(2005)504 final*, European Commission, 24 October 2005. See: <http://ec.europa.eu/environment/water/marine.htm>

²⁴ *Towards a future Maritime Policy for the Union: A European vision for the oceans and seas (Green Paper) COM(2006) 275 final*, European Commission, 7 June 2006. See: http://ec.europa.eu/maritimeaffairs/policy_en.html

²⁵ See the press release of the Environment Council meeting of 23 October 2006 at: <http://www.consilium.europa.eu>.

²⁶ *op. cit.* (footnote 20), page 9.

3.39 The Davidson Review considers that developing a Marine Bill while EC measures are still fluid presents a significant risk of creating double-banking between the EC and UK layers of regulation that could increase burdens, confusion and costs due to stakeholders potentially having to change approach twice in relatively short succession. Yet self-imposing a UK moratorium on developing marine measures while EC proposals are in the pipeline in an effort to avoid all such risk would bring UK policy-making to a halt. This could bring greater disadvantages. See recommendation 14 of this report.

3.40 In this particular instance, the review recommends that Defra actively manage the development of the Marine Bill in a manner that minimises the risk of double-banking occurring once it and proposed EC Marine and Maritime measures are adopted. This management strategy should be set out in the second round Marine Bill consultation document.

Guidance

3.41 Once the legislative regime is made simpler it will be easier for regulators to produce clearer guidance. Fisheries guidance is currently mailed to fishermen and is available via the internet and Marine Fisheries Agency (MFA) port offices. The Simplification of Fisheries Regulations report (see footnote 7) found that guidance is “often poor, difficult to follow and late.” Defra has since commenced a programme of work to improve its quality. The review welcomes this.

3.42 A code of conduct for the inspection of fishing vessels at sea,²⁷ guidance on fisheries quota management²⁸ and fishing vessel licensing²⁹ have already been published under this programme. Three further “Plain English Guidance Notes” are to follow shortly.³⁰ Together they will cover a significant proportion of the general administrative (as opposed to directly fishing-orientated) obligations that fishing industry members are under. However, the volume and frequency of Council and Commission Regulations makes it unlikely that paper booklets alone will be sufficient to enable members to understand and be kept up to date with all their current obligations. The Simplification of Fisheries Regulations report states that:

“A heavy premium is placed on taking full advantage of the advances in information technology to lift many of the burdens that have fallen on the industry in recent years.”

3.43 In this context, it is useful to consider the “Whole Farm Approach”³¹ for farmers recently developed by Defra in conjunction with the industry and regulators. It is an electronic, web-based resource that uses an “intelligent” questionnaire system to make form filling easier. Further, it reduces the quantity of data farmers need to submit, by cutting out the duplication of separately reporting much of the same information in respect of different farming-related regulations. It also provides individual farmers with tailored, relevant advice and guidance depending on the activities undertaken on the farm in question. The farming community has warmly welcomed this resource, which Defra calculates will reduce annual administrative burdens on farmers by £2.9 million by 2010.

²⁷ *Code of Conduct: Fishing Vessel Inspections at Sea*, Marine Fisheries Agency, April 2006. See: <http://www.mfa.gov.uk/pdf/code-of-conduct-at-sea-vers1-3.pdf>

²⁸ *Fisheries quota management*, Defra et al, July 2006. See: <http://www.mfa.gov.uk/pdf/FVL-FisheriesQuotaManagement.pdf>

²⁹ *Fishing vessel licensing: an introduction*, Defra et al, July 2006. See: <http://www.mfa.gov.uk/pdf/FVL-Introduction.pdf>

³⁰ On buying, selling and transportation of fish; completion of fishing logbooks, landing and trans-shipment declarations; and fishing effort control measures in relation to certain fish in certain areas.

³¹ <http://www.defra.gov.uk/farm/wholefarm/index.htm>

3.44 Farmers must comply with a significant number of technical rules and regulations which differ depending on the crops and animals they farm. These include 18 Statutory Management Requirements³² and ten standards that make up Good Agricultural and Environmental Condition.³³ Likewise, the fishing industry must comply with a large number of regulations, including those concerning total allowable catches (quota), mesh sizes, fishing gear, closed areas and seasons, minimum landing sizes, incidental and by-catch limits, number of fishing days at sea, vessel licensing, storage of fish, log books, sales notes, takeover declarations and transport documents.

3.45 The obligations that apply to any given activity will depend on certain variables: species caught, quantity, fishing ground, vessel type, date, etc. While certain administrative requirements will be similar across the different types of fishing activity (such as on logbooks, landing and transshipment declarations and the buying, selling and transportation of fish), non-administrative requirements will vary substantially depending on the above-mentioned variables. A “Whole Fish Approach” would make compliance with all these obligations easier.

3.46 Most long-range sea-going vessels will already house a computer and there is currently a proposal to require skippers to maintain electronic logbooks. It is, however, recognised that not all inshore skippers have access to a computer on board or at home. They do, however, typically visit an MFA port office at least once a week. Developing an electronic fisheries resource for access in a variety of formats (online, online from MFA port offices, DVD, through print-outs of tailored guidance, etc.) will help to ensure that all fishermen are able to benefit from it.

Recommendation 6 – Fisheries Regulation

Defra should:

- a) aim to achieve as much consolidation of primary fisheries and marine legislation as possible with the Marine Bill, taking into account responses to the second round of consultation. Redundant provisions in existing Acts should be repealed;
- b) actively manage the development of the Marine Bill in a manner that minimises the risk of double-banking occurring once it and proposed EC Marine and Maritime measures are adopted. This management strategy should be set out in the second round Marine Bill consultation document; and
- c) formally consult the fishing industry by mid 2008 on the effectiveness of the “Plain English Guidance Notes” and on the option to develop a resource similar to the “Whole Farm Approach” that enables users to access guidance tailored to their individual activities and to record and report information necessary to discharge their duties electronically.

³²Council Regulation (EC) No 1782/2003 at Annex III

³³ibid. at Annex IV

CASE STUDY: WASTE AND OTHER REGULATORY REGIMES

3.47 This case study is related to the Waste Framework Directive (WFD) case study at page 53³⁴ and focuses on whether there is currently double-banking between the waste regime on the one hand and the Integrated Pollution Prevention Control (IPPC), landfill, groundwater and planning regimes on the other. The regulation of inert waste is considered in particular.

Waste/IPPC

3.48 The Environmental Permit Programme (EPP) aims to merge and streamline the regulatory regimes for Waste Management Licensing (WML) and Pollution Prevention and Control (PPC).³⁵ Among other benefits, this will enable a site to have a single environmental permit for these activities. The review welcomes this development, which Defra calculates will bring an annual administrative burden saving of £8.9 million, and Defra's stated intention to consider extending the EP to other environmental licences. It also welcomes the Environment Agency's (EA) commitment to allow businesses to apply for permits and submit information electronically by April 2008.

3.49 However, the review considers it unfortunate that the new environmental permitting regulations (which will replace, among other legislation, the WML Regulations 1994) might have to be amended shortly after adoption. This could be necessary to incorporate the recommendations of the WML exemptions review, due to the work not being conducted in parallel.

Planning/Pollution Control

3.50 In relation to the development of land, the waste and planning regimes currently require similar information to be provided in respect of both planning permission and WML applications which, in practice, are often considered in isolation of each other. This duplication can make the development of land, especially brownfield, more lengthy and burdensome than it need be and could act as a barrier to the delivery of the forthcoming recommendations of the Barker Review of Land Use Planning.³⁶

3.51 The review therefore welcomes the fact that Defra and DCLG are jointly consulting until 6 December 2006 on options for improving and streamlining the planning/pollution control interface.³⁷ This consultation runs in parallel to the second EPP consultation, which is welcomed. EPP stakeholders consider the reviews to be interlinked.³⁸

3.52 The Davidson Review recommends that Defra and DCLG should move quickly to incorporate the final outcomes of their planning and pollution control interface review into the environmental permit and planning systems, as appropriate, after the proposed outcomes have been subject to a final, quantitative regulatory impact assessment. Whether legislative changes to these systems will be necessary will depend upon the nature of the final outcomes of that review.

³⁴The Waste Framework Directive case study contains a section setting out the background to the waste regime.

³⁵Defra's EPP webpage is at: <http://www.defra.gov.uk/environment/epp/index.htm>

³⁶http://www.hm-treasury.gov.uk/independent_reviews/barker_review_land_use_planning/barkerreview_land_use_planning_index.cfm

³⁷*Consultation on Options for improving the way planning and pollution control regimes work together in delivering new development*, Defra and DCLG, August 2006. See: <http://www.communities.gov.uk/index.asp?id=1502826>

³⁸See paragraph 2.100 of the second EPP consultation document.

Inert waste

3.53 “Inert waste” is waste that does not react with other matter that it comes into contact with in a way likely to give rise to environmental pollution or harm human health.³⁹ It is safer than “hazardous” or “non-hazardous” waste and subject to a number of possible exemptions from EC obligations that the latter two types of waste are not. It should be noted, however, that in practice authorities need to ensure that materials that are held out as inert waste are in fact inert. There is a growing problem of illegal activity where waste is being wrongly termed inert and directed to more lightly regulated destinations.

3.54 One possible inert waste exemption is in the IPPC Directive,⁴⁰ which provides for an exemption of “landfills of inert waste” from its scope.⁴¹ Other examples can be found in the Landfill Directive.⁴² Its Annex I lays down general requirements for all classes of landfill. Some obligations contained in that Annex are qualified by stating that they, “may not apply to landfills for inert waste”⁴³ or that, “in the case of landfills for inert waste these requirements may be adapted by national legislation”.⁴⁴ Stakeholders would like more clarity over what engineering and operational requirements are required in practice for inert landfills.

3.55 Activities involving the disposal or use of inert waste are currently regulated in a number of different ways, such as by a PPC permit, waste management licence (WML) or WML exemption. The costs faced by business in disposing of or using inert waste will differ depending on which type of regulation the activity is subject to. One stakeholder submitted evidence stating that the cost base for exempt sites is typically around 50% less than for permitted sites due to fewer operational and post-closure requirements and no engineering requirements.⁴⁵ This can lead to producers of inert waste preferring to supply the less heavily regulated (and therefore cheaper) activities. This in turn can result in businesses that wish to acquire inert waste for use in their activities, such as quarry operators who require it for restoring quarries after mining operations have ceased in order to meet planning conditions, facing shortages.

3.56 One of the differences between how a PPC-permitted inert landfill on the one hand, and a WML-exempted recovery activity on the other, are normally regulated is that waste arriving at the PPC-permitted landfill will need to meet Waste Acceptance Criteria. This requires that the waste is tested to demonstrate that it is inert, unless it is on a list of wastes that do not require such testing. Stakeholders complained that the testing process was expensive and currently took a long time.

3.57 In addition, the landfill tax can contribute to inert waste being driven away from PPC-permitted landfills to less heavily regulated recovery activities where waste is less easily tracked and monitored.⁴⁶ The interaction with the landfill tax is made more complicated due to the fact that its definition of inert waste is inconsistent with that of the Landfill Directive.

³⁹ For a full definition see Article 2(e) of the Landfill Directive (link given in footnote 42 below). However, a differing definition is used in the UK in relation to Landfill Tax - see the Landfill Tax (Qualifying Material) Order 1996 (S.I. 1996/1528).

⁴⁰ Consolidated Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control at: <http://europa.eu.int/eur-lex>

⁴¹ At paragraph 5.4 of Annex 1

⁴² Consolidated Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste at: <http://europa.eu.int/eur-lex>

⁴³ See paragraph 2.

⁴⁴ See paragraph 3.4.

⁴⁵ *Trent Valley Study Area – Understanding the Arisings, Flows and Destinations of Inert Materials*, Egniol Limited, February 2006

⁴⁶ Guidance on landfill tax can be found at: <http://www.hmrc.gov.uk>

3.58 Another issue that stakeholders commented upon in evidence was the classification of an activity as either waste recovery or disposal. Quarry owners considered that using inert waste to restore quarries after use in accordance with planning conditions should be deemed recovery rather than disposal, which would result in regulation and the costs of these activities being reduced.⁴⁷ They argued that such an activity should fall within the WFD's recovery category of: "Land treatment resulting in benefit to agriculture or ecological improvement".⁴⁸ Defra pointed out that ECJ case law states that "the essential characteristic of a waste recovery operation is that...the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources."⁴⁹ Quarry owners would have to satisfy the authorities that this was the case in these circumstances.

3.59 The review is pleased to note the Defra family response in the review's Summary of Responses to the Call for Evidence: "The Department, EA and DCLG recognise there are issues about inert waste management activities that require further consideration."⁵⁰ The EPP referred to above should help deliver a framework that better enables a risk-based approach to be taken to different waste-related activities. Defra's 2006 Simplification Plan will list the "proportionate regulation of inert waste" as a potential simplification activity as part of the Environment Agency's proposed Modernising Waste Regulation Programme. They have also established an Inert Landfill Sub-Group,⁵¹ hosted by the EA and chaired by an industry member.⁵²

Recommendation 7 – Waste and other regulatory regimes

- a) Defra and DCLG should move quickly to incorporate the final outcomes of their planning and pollution control interface review into the environmental permit and planning systems, as appropriate, after the proposed outcomes have been subject to a final, quantitative regulatory impact assessment; and
- b) Defra and the EA should conduct a full review of the regulation of inert waste with the aim of adopting a more proportionate and risk-based regulatory landscape. As part of this review, stakeholders should be formally consulted by the end of 2007 on options for reform. The review should, as a minimum, cover the following issues:
 - the appropriate use of inert waste exemptions in EC legislation;
 - the creation of a more level playing field between different activities involving inert waste (proportionate to the risk posed) – this should also be considered as part of Defra's forthcoming WML exemption review;
 - how implementation of the waste acceptance criteria might be made more efficient;
 - inconsistencies with the landfill tax regime; and
 - the quality of guidance (see also recommendation 8), including the issue of when an activity should be classified as recovery or disposal.

⁴⁷ In particular, obligations stemming from compliance with the Landfill, IPPC and Groundwater Directives

⁴⁸ Annex IIB, R 10

⁴⁹ Case C-6/00, paragraph 69 *Abfall Service AG -v- Bundesminister für Umwelt, Jugend und Familie* at: <http://www.curia.europa.eu>

⁵⁰ In Annex A at page 48

⁵¹ Notes of meetings can be accessed via: <http://www.defra.gov.uk/environment/waste/hazforum/meetings>

⁵² See: <http://www.environment-agency.gov.uk/subjects/waste/1030716/1095197/?lang= e>

CASE STUDY: UNFAIR TERMS IN CONSUMER CONTRACTS DIRECTIVE

3.60 The way in which the Unfair Terms in Consumer Contracts Directive was implemented is a prime example of an implementation which gave rise to double-banking.⁵³ This case study looks at the general lessons that can be taken from this implementation but does not seek to recommend any specific steps to amend the implementing legislation, as this area has already been comprehensively dealt with by the Law Commissions in their report of February 2005.

3.61 The Directive was adopted in 1993 to ensure that consumers were able to take advantage of the single market without fear of losing their right to be protected from unfair contract terms where they purchased from a supplier outside their own country. There was very wide divergence between the approaches that Member States took to this issue at the time and the Directive sought minimum levels of harmonisation but enabled countries to retain higher standards of protection in their national law.

Prior position in the UK

3.62 Before the Directive was implemented, the UK had a well developed regime which protected all parties to a contract, whether business or consumer, from the effects of certain exemption clauses where they would be deemed unfair. This was contained in the Unfair Contract Terms Act 1977 and the majority of contractual terms which purport to exclude or restrict liability are likely to be subject to it. This legislation also applies to notices that purport to exclude liability in tort for negligence. So the UK legislation applied to a wide range of contracts but only covered a narrow range of terms within those contracts.

The Directive's requirements and its implementation

3.63 The Directive applies only to consumer contracts and it applies only to terms that have not been individually negotiated between the parties. It requires Member States to ensure that terms cannot be enforced where they are unfair and result in a significant imbalance between the parties' rights and obligations. The Directive was implemented through the Unfair Contract Terms in Consumer Contracts Regulations 1999.⁵⁴

3.64 The implementation resulted in two separate and major pieces of legislation dealing with unfair contract terms, namely the Unfair Contract Terms Act and the 1999 Regulations. The two pieces of legislation take quite different approaches to unfair terms and have caused confusion because they contain inconsistent and overlapping provisions and use different language and concepts to produce similar but not identical effects. This is further complicated by the scope of application of each piece of legislation being different and the Act being drafted in a very dense and highly technical style. The very fact that the statutory controls over unfair terms are split between two pieces of legislation also complicates matters and hinders understanding of the legal position.

⁵³ Council Directive 93/13/EEC of 5th April 1993 on unfair terms in consumer contracts, OJ L 95, 1993 p.29 – 34.

⁵⁴ S.I. 1999/2083

3.65 A short outline of how the two regimes differ gives some idea of how complex this implementation has made the law in this area:

- the Act applies only to exclusion and limitation of liability and indemnity clauses whereas the Regulations apply to any kind of term other than the definition of the main subject matter of the contract and the adequacy of the price;
- the Act makes certain exclusions or restrictions in a contract of no effect at all whereas the Regulations do not do this to any type of term;
- the Act subjects certain clauses to a reasonableness test before they can be enforced and puts the burden of proving that a term is reasonable on the party seeking to rely on the clause. In contrast the Regulations subject certain terms to a fairness test (which is not the same as the reasonableness test in the Act) and put the burden of establishing that the clause is unfair on the consumer; and
- the Act does not apply to certain types of contract even when they are consumer contracts and the Regulations apply to consumer contracts of all kinds.

Steps taken to rectify the position

3.66 DTI realised that the regime was overly complex and in 2001 asked the English and Scottish Law Commissions to rewrite the law of unfair contract terms as a single regime in a clearer and more accessible style. The Law Commissions carried out extensive consultation and as a result produced a report with recommendations and a draft Bill for the Government in February 2005.⁵⁵ Combining the two regimes into one, more consistent regime is not a straightforward task. Complex issues of policy and law had to be considered and resolved in order to come up with a simplified legislative scheme which delivered the required policy goals. Where insufficient time and resources are assigned to enable this work to be done within the deadline for transposition of a directive there is a real danger of double-banking and its attendant problems arising.

3.67 The review welcomes the fact that following publication of its summary of responses to the call for evidence in July 2006 the Government has now formally accepted the recommendations set out in the Law Commissions' report and is seeking Parliamentary time to bring forward the draft bill on unfair contract terms in the next session.

⁵⁵ *Unfair Terms in Contracts*, the Law Commission and the Scottish Law Commission, February 2005 (LAW COM No 292) (SCOT LAW COM No 199).

4

Regulatory creep

This chapter explains the term “regulatory creep” and then examines some specific cases where it has occurred.

WHAT IS REGULATORY CREEP?

4.1 Laws on the statute book can be embellished by government departments, regulators, industry bodies and even by businesses themselves. This is most commonly done through guidance, but it can also occur through practice, culture or insufficient understanding of the law.

4.2 “Regulatory creep” is used in this report to describe the situation where the requirements imposed by a regulator are unclear, more stringent than their equivalents in implementing legislation or where there is confusion as to their legal status (and hence the necessity for those regulated to comply with them). The resulting uncertainty can create additional burdens and costs.

4.3 Over-zealous enforcement of laws can be considered as one form of regulatory creep. The Government is taking forward the Hampton Review recommendations for a more risk-based approach to inspection and enforcement,¹ streamlining regulatory structures and increasing accountability. This should help to reduce this form of regulatory creep in the future.

4.4 This chapter examines the following case studies of regulatory creep (with background material for these studies appearing in Annex B to this report):

- Waste Framework Directive;
- food hygiene training;
- herd register for bovine animals; and
- road haulage operator licensing.

CASE STUDY: WASTE FRAMEWORK DIRECTIVE

Background

4.5 A small business workshop² recently found that waste regulation was considered the fourth equal (out of 36) greatest EC-derived regulatory barrier hampering small and medium-sized enterprises from growing or running their business. Waste regulation was also the issue raised most often in the responses to the call for evidence – 27 respondents in all.

¹http://www.hm-treasury.gov.uk/budget/budget_05/other_documents/bud_bud05_hampton.cfm

²Held on 8 June 2006 and organised by the European Commission’s representation in the UK and the DTT’s Small Business Service.

4.6 The Environment Agency (EA) estimates that turning some of industry's rubbish into useful resources and products could save the UK economy up to £2 billion per year.³ To help put this into perspective, Defra informed the review that the annual turnover of the UK waste industry is approximately £5 billion. The waste regulatory regime will, to a certain extent, have a bearing on how much of the £2 billion saving can be achieved.⁴

4.7 The objectives of EC waste regulation, which are contained within the recitals of the Waste Framework Directive (WFD),⁵ need to be kept in mind:

“Whereas the essential objective of all provisions relating to waste disposal must be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste;

Whereas the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources;”

4.8 These objectives need to be considered against the overriding objectives of the EU,⁶ which necessitate an appropriate balance to be found between the environmental, social and economic pillars of sustainable development. In this area of policy achieving the protection of the environment, natural resources and human health can go hand in hand with bringing about savings to the economy (as the figures above show).

4.9 The application of the waste definition is important because the classification of a substance as a waste is the trigger for the imposition of various obligations on business, such as the need to pay for a site or mobile plant licence, register as a waste carrier, apply the waste duty of care and meet the requirements of the Waste Incineration Directive. A tailored and proportionate approach is needed that takes into account the environment and health objectives, the competitiveness objectives and the incentives required to encourage the better conservation of natural resources. However, it must also be an approach that recognises the significant challenges that Defra and the EA face in practical terms in tackling sham recovery, illegal waste activities and in maintaining a level playing field. The review considers a purposive approach to waste regulation to be one that focuses on outcomes by appropriately considering and balancing all of these objectives.

4.10 This approach needs to be applied at every point in the regulation of waste, such as: deciding whether a substance should be defined as waste at all; if so whether it needs a waste licence (soon to become an “environmental permit” – see below); the terms of that permit; whether it has ceased to be waste; etc. In particular, authorities need to be careful that the way a substance is regulated does not incentivise businesses and individuals to send it to landfill – contrary to the objectives of the landfill tax – rather than to re-use and recycle it. This outcome often has additional knock on effects, such as the excavation and transport of virgin replacement materials which runs counter to the aims of the aggregates levy. These type of impacts could mean that the overall environmental effects are worse than had the substance been less heavily regulated.

³ *Turning the Nation's Rubbish into Profit*, Head Office Press Release, Environment Agency, 10 May 2006. See: <http://www.environment-agency.gov.uk/news/1384150>

⁴ So, for example, the respondents to Defra's recent Waste Strategy Review Consultation considered that after better fiscal measures and incentives, the best way to accelerate the development of markets for recycled materials is to revise how waste is defined and categorized: *Summary of Responses to Consultation on the Review of England's Waste Strategy*, Defra, August 2006, page 46. See: <http://www.defra.gov.uk/corporate/consult/wastestratereview/responses-summary.pdf>

⁵ Consolidated version of Council Directive of 15 July 1975 on waste (75/442/EEC) at: <http://europa.eu.int/eur-lex>

⁶ See Article 2 of the EC Treaty and Article 2 of the Treaty on European Union for the high level objectives.

Stakeholder concerns

4.11 In their responses to the call for evidence, stakeholders were mostly keen to ensure that waste-related obligations are not applied (or, if they need to be, applied lightly) to activities that are essentially safe to the extent that this is possible under EU law. The various concerns can be grouped into four categories. They are:

- i. the absence of up-to-date guidance on waste has created uncertainty for business as well as barriers and lost opportunities regarding the utilisation of materials in subsequent production processes;
- ii. the EA categorises substances as waste too readily;⁷
- iii. more effective use should be made of the WFD's provision allowing exemption from the need to obtain a waste management licence (WML) if certain criteria are met; and
- iv. there is currently double-banking and gold-plating in and between the waste, Integrated Pollution Prevention Control (IPPC), landfill, groundwater and planning regimes. This concern is considered on page 48 of this report.

Guidance

Current guidance

4.12 The WFD was amended in 1991 to give an EC-wide definition of waste: "any substance or object which the holder discards or intends or is required to discard". The WFD is transposed by the Environmental Protection Act 1990 and the Waste Management Licensing Regulations 1994 (WML Regs 1994).⁸

4.13 Circular 11/94 was adopted in 1994 to provide UK-wide guidance on the amended WFD,⁹ including the definition of waste. Over time it was superseded by European Court of Justice (ECJ) case law. The principal criticism of business regarding guidance on waste has, for a number of years, been that there is none.¹⁰ Guidance is all the more critical in this area given that the copy-out method was principally used to transpose the WFD. Circular 11/94 itself states that:

"This verbatim transposition avoids the need to interpret the Directive in the Regulations. However, it also makes it even more important to have clear guidance on the meaning of these provisions so that they are interpreted consistently by WRAs and other regulatory authorities, and there is a common understanding of their effect."¹¹

⁷The Environment Agency is designated as competent authority in England and Wales for implementing most of the requirements of the WFD.

⁸S.I. 1994/1056

⁹*Circular 11/94*, Department of the Environment, Welsh Office & Scottish Office Environment Department, 19 April 1994

¹⁰The exception to the rule is: *The Definition of Waste: developing greenfield and brownfield sites*, Environment Agency, April 2006. Although limited to specific activities, provisional (it anticipates the update to Circular 11/94) and subject to caveats (pending the resolution of planning issues) it has been broadly welcomed by businesses in the specific sector concerned. However, they are reluctant to use it until the caveats have been removed. See: http://www.environment-agency.gov.uk/commondata/acrobat/dowv10506_1386151.pdf

¹¹At paragraph 1.4 of Annex 1

4.14 The only guidance on waste that can currently be obtained from the Defra website is a summary of orders made by the ECJ in various waste-related cases.¹² This is not an adequate substitute for guidance on waste as most of the orders do not contain the criteria that the Court used in its judgments for coming to its decisions.

4.15 ECJ case law on the distinction between waste and products as well as waste and by-products settled down somewhat in the years 2000¹³ and 2002¹⁴ respectively. A strong case for updating the guidance on the definition of waste could be made from June 2000: the date the first judgment was published. Defra has informed the review that a higher priority was placed on complying with WFD infraction case C-62/03 (see below) and negotiating the European Waste Thematic Strategy and proposed revisions to the WFD.¹⁵ Defra's current position is that draft updated guidance will be consulted upon by the end of 2006. This is dependant upon progress with negotiations on the proposed revision of the WFD and the European Commission's forthcoming guidance on by-products being published by this date.¹⁶

A purposive approach

4.16 Circular 11/94 sought to be outcome-focused and so should its successor. The Circular states that:

“When interpreting EC legislation, greater regard is generally had to its aim or purpose than would be had when interpreting UK legislation.”¹⁷

4.17 The Circular considered that the assumption behind the WFD was that when a substance falls out of the normal commercial cycle or chain of utility then there is no longer the necessary self-interest on the part of a holder to ensure that adequate provision is made to safeguard health and the environment.¹⁸

4.18 However, many of the respondents commenting on waste issues considered that they did not encounter a purposive and outcome-based approach to interpreting EC legislation on the ground. Such an approach is all the more important in countries like England and Wales where the traditional method of interpretation has been (and still is) a literal one.

¹² See: <http://www.defra.gov.uk/environment/waste/topics/ecj-definition.pdf>

¹³ Due to joined cases C-418/97 and C-419/97 (referred to as “ARCO Chemie”), 15 June 2000 at: <http://www.curia.europa.eu>

¹⁴ Due to case C-9/00 (referred to as “Palin Granit”), 18 April 2002 at: <http://www.curia.europa.eu>

In fact, Defra helped pave the way for allowing residues to be deemed by-products. For example, it intervened in ARCO Chemie and argued that production residues that comprise part of the commercial cycle and which may be used as raw material without further processing in the same way as any other raw material of non-waste original should be deemed a by-product (and so not waste) rather than a waste residue. See paragraph 78 of the ARCO Chemie judgment.

¹⁵ On which Defra and the Devolved Administrations are consulting until 5 January 2007. See: <http://www.defra.gov.uk/corporate/consult/waste-directive/index.htm>

¹⁶ For details see: <http://ec.europa.eu/environment/waste/strategy.htm>

¹⁷ At paragraph 1.3 of Annex 1

¹⁸ Paragraph 2.14 of Annex II: “Waste appears to be perceived in the Directive as posing a threat to human health or the environment which is different from the threat posed by substances or objects which are not waste. This threat arises from the particular propensity of waste to be disposed of or recovered in ways which are potentially harmful to human health or the environment and from the fact that the producers of the substances or objects concerned will normally no longer have the self-interest necessary to ensure the provision of appropriate safeguards. It leads the Department to the view that the purpose of the Directive is to treat as waste, and accordingly to supervise the collection, transport, storage, recovery and disposal of, those substances or objects which fall out of the commercial cycle or out of the chain of utility.”

4.19 Stakeholders generally desire simple, positive criteria that are firmly linked to the aims and objectives of the WFD to make it less burdensome for them to decide whether they can treat their substance(s) as a product or by-product rather than a waste. The Dutch took such an approach when they brought out waste guidance in 2001. A translation of the ten Dutch criteria can be found at Annex B.7 (it should be noted that these criteria have been superseded by the Palin Granit case and are currently being updated). Guidance based upon a long list of complicated, negative criteria such as the caveats contained in ECJ judgements would not be of much use to stakeholders.¹⁹

By-products

4.20 By-products are substances that, like products, are not waste but are differentiated from products by their creation not being the primary aim of the manufacturing or extraction process in question. The UK has played an active and progressive role in the development of ECJ jurisprudence on waste. As noted above in footnote 14, the UK helped pave the way for the creation of a category of by-products (as opposed to waste residues) in the Palin Granit case. It also intervened in a later case²⁰ to persuade the Court that a by-product can be used by an entity other than the one that produced it.²¹ In this case, the European Commission had taken the opposing, more restrictive, view. As stated above, the Commission is shortly due to bring out guidance on what it considers constitutes a by-product.

A joined-up approach

4.21 Although the EA has been formally designated as competent authority in England and Wales for implementing most WFD requirements, Defra is responsible for, among other things, negotiating and transposing an amended WFD and for representing the UK in the ECJ on waste issues. This requires it to have its own position on the meaning of the term “waste”. It is therefore important that Defra guidance on the principles of waste regulation (such as the forthcoming successor to Circular 11/94) should be joined up with EA guidance on specific waste issues (such as the guidance mentioned at footnote 10 above).

4.22 The review also hopes that the successor to Circular 11/94 will be a useful tool to help address the inconsistencies that currently exist in waste classification across the UK. For example, the Scottish Environmental Protection Agency (SEPA) considers that “goods given to charity shops are generally waste”,²² whereas Defra and the EA consider that such goods are not waste because they are not “discarded” but, instead, continue to be used in their present form.²³

¹⁹ So, for example, rather than repeat the phrase from paragraph 30 of case C-129/96 that: “there is nothing in that directive to indicate that it does not apply to disposal or recovery operations forming part of an industrial process where they do not appear to constitute a danger to human health or the environment” it would be better to devise a positive criterion around paragraph 87 of ARCO Chemie as the Dutch have done with their criterion 8.

²⁰ Case C-121/03 at: <http://www.curia.europa.eu>

²¹ *ibid*, paragraph 61

²² *IS IT WASTE, Understanding the definition of waste*, SEPA, 4 August 2006. See: http://www.sepa.org.uk/pdf/guidance/waste/is_it_waste_v2.pdf

²³ In fact, this is also the position adopted by Circular 11/94, at paragraph 2.36 on page 43.

End-of-waste

4.23 It is important for business to be in a position to know precisely when their waste-related obligations end so that they can use or market a product as a non-waste, helping them decide whether recovering it would be financially viable. It is also important for consumer confidence in the quality of recycled and re-used materials that waste recovery meets suitable quality standards.

4.24 The European Commission floated the idea, in a publication from May 2003,²⁴ that objective criteria could be developed to indicate when a given waste should no longer be considered to be waste because recovery had occurred. In September 2005, the Waste & Resources Action Programme (WRAP)²⁵ published a protocol drafted with the EA and industry for determining when inert waste ceases to be waste for the purposes of aggregates production.²⁶ This is known as the quality protocol for aggregates.

4.25 In December 2005, the European Commission published another Communication alongside the proposal for an amended WFD.²⁷ Article 11 of that proposal would allow the Commission to develop EU-wide end-of-waste criteria. The Communication envisages the first waste flows to be addressed by this system to include compost, recycled aggregates and possibly tallow. The EA and WRAP are consulting until 4 December 2006 on a second end-of-waste protocol on compost.²⁸ They have announced that up to ten protocols will be developed in their current cycle of work.²⁹

4.26 Stakeholders that mentioned end-of-waste protocols were supportive of this work to define precisely when waste ceases to be waste. Since the publication of the review's Summary of Responses to the call for evidence³⁰ the EA confirmed to the review that, subject to securing funding, it intends to develop protocols for many of the materials mentioned on page 44 of the Summary of Responses. The review welcomes this.

4.27 It is apparent from what is said above that end-of-waste protocols/criteria are starting to be developed in parallel at the UK and EU levels in respect of the same materials.³¹ European criteria will eventually supersede at least some of the national protocols and it is likely that they will differ from the UK protocols in a number of respects. While this brings the risk that UK businesses will have to bear change-over costs, it may also increase the UK's opportunity to influence the development of European criteria.

²⁴ *Towards a thematic strategy on the prevention and recycling of waste COM(2003) 301 final*, European Commission, Brussels, 27 May 2003. See: http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0301en01.pdf

²⁵ Funded by Defra, the Scottish Executive, the Welsh Assembly Government and the Northern Ireland Executive.

²⁶ *The quality protocol for the production of aggregates from inert waste*, WRAP, Highways Agency & Quarry Products Association, September 2005 at: <http://www.wrap.org.uk>

²⁷ *Taking sustainable use of resources forward: A Thematic Strategy on the prevention and recycling of waste COM(2005) 666 final*, European Commission, Brussels, 21 December 2005. See: http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0666en01.pdf

²⁸ See: <http://compostqp.dialoguebydesign.net/>

²⁹ Op. cit. (footnote 3)

³⁰ In which the WFD was covered in Annex A, on pages 43-45.

³¹ For details of the development of the European Protocols, see the DG Joint Research Centre presentation of September 2006 at: http://ec.europa.eu/environment/waste/pdf/end_of_waste.pdf

4.28 The review recommends that, for UK end-of-waste protocols still to be finalised or developed, the costs and benefits of the UK adopting them in advance of European criteria be taken into account and communicated to stakeholders, bearing in mind the risk that the European criteria may differ.

Waste classification

4.29 The second main concern respondents raised was that the EA classifies substances as waste too readily. It is worth stating that it is not the purpose of this review to make a finding on whether a particular substance has been rightly or wrongly classified in any given situation. This is particularly the case where the substance in question is currently subject to judicial proceedings. The review is not in a position to consider all the competing arguments (relating to considerations of environmental, health, competition and economic impact). Instead, the review has focused on the general approach to classification.

4.30 Some respondents claimed the UK is more burdensome in its implementation of waste legislation than other Member States. It should be noted, however, that the same accusation was made of the Dutch Government in the context of the Dutch gold-plating review.³² In fact, the UK initially under-implemented the WFD by narrowing the scope of the definition so that it would not, for example, cover agricultural or quarrying waste. This was reversed following a judgment from the ECJ.³³ Under Community law, any substance is capable of being termed waste when “discarded” within the meaning of the WFD.

4.31 There is some feeling in the EA that where there is a grey area as to whether a substance is waste in the first place. Efforts are best focused on developing standards and specifications to provide confidence in the quality of recycled materials. This would help to reduce the stigma associated with what is or used to be waste – a significant barrier to increasing rates of re-use and recycling.³⁴

4.32 The current cost of a WML for recycling activities varies between £2,470 and £10,102, with additional annual subsistence charges ranging between £490 and £5,833.³⁵ When these and other costs (including recovery costs) are considered in conjunction with the stigma attached to something that was once “waste”, then there is a significant danger that classifying a substance in the grey area as waste as a matter of course will divert it from being re-used or recycled to being land-filled.

4.33 In determining whether a substance is classified as waste under the WFD, the national competent authority needs to consider all of the circumstances of the case.³⁶ While the development of end-of-waste protocols is welcomed, the review recommends that the EA remain open to considering arguments presented to it that a substance is not waste from the outset (particularly when new evidence comes to light).

³² *Gold-plating: Final Report*, ECORYS, OdenKamp Adviesgroep & Europa Instituut, Rotterdam, 10 April 2006. In practice, little comparative data currently exists that would allow an objective determination of which Member States implement EU laws in the most or least burdensome way. Given enforcement practice is a crucial determinant it is unlikely that such a definitive ranking will ever be possible.

³³ Case C-62/03 at: <http://www.curia.europa.eu>

³⁴ For example, builders of houses will not want to re-use or recycle materials on the building site if this will result in a significant risk of the warranty certificates for the houses being withheld by the warranty providers. It is currently difficult and costly to surrender a WML or PPC permit, but without such surrender it is unlikely that a guarantee will be provided.

³⁵ *Waste Management Licences (Charging) Scheme 2006/2007*, Environment Agency, May 2006. See: <http://publications.environment-agency.gov.uk/pdf/GEHO0606BKWO-e-e.pdf?lang=e>

³⁶ See, for example, paragraph 73 of ARCO Chemie: op. cit. (footnote 13).

4.34 In fact, the EA has recently demonstrated that when presented with additional evidence it is prepared to review its classifications. One of the substances raised in responses to the call for evidence and noted in Table A of the review's Summary of Responses, was flue gas desulphurisation gypsum (FGD gypsum).³⁷ Respondents reported that the classification of this substance as waste had the potential to close down lucrative markets, encouraged the extraction of more virgin raw material as a substitute and also encouraged the production of unrefined desulphurisation waste at coal fired power stations that would then have to be land-filled. On 12 September 2006, the EA concluded that Gypsum from FGD abatement, produced to a European specification and which is certain to be used for the manufacture of plasterboard, should no longer be classified as a waste in England and Wales.

Exemptions from Waste Management Licences

4.35 Article 11 of the WFD allows Member States to make exemptions from the need to obtain a WML for certain disposal and recovery activities, provided that general rules are adopted for each activity and that the activity will not endanger human health or the environment. Since 1994 when 43 exemptions were originally provided, five new exemptions have been added and five substantially amended. Other exemptions have undergone more minor amendments. In fact, Schedule 3 of the WML Regs 1994 (which contains the exemptions), has been amended 15 times in relation to England and Wales (22 times when one includes Scottish amendments).³⁸

4.36 It is common for Statutory Instruments (S.I.s) to be amended numerous times. However, the absence in the UK of a database giving access to consolidated versions of all amended legislation means that, in practice, it is impossible for most stakeholders to become aware of the law that they are currently governed by. UK stakeholders referred to Schedule 3 from the EA website only see the original version and so are not made aware of the subsequently added and amended exemptions.³⁹ Defra has notified the review that it will itself take the stopgap measure of producing a consolidated version of the WML Regs 1994 as part of the Environmental Permit Programme (EPP).⁴⁰ The review welcomes this. Nevertheless, the new regulations will soon become out of date again as further amendments are made. See recommendation 19 of this report.

4.37 The UK was in fact the only Member State to have notified the European Commission that it was making use of Article 11 by 2003.⁴¹ Defra believes that the UK is only one of two Member States currently making extensive use of it. Notwithstanding the UK taking the lead in

³⁷ In 2004 the EU-15 Member States utilised approximately 7.5 million tonnes of this substance to produce plaster board, floor screeds, cement set retarder, etc. – *Production and Utilisation of CCPs in 2004 in Europe (EU 15)*, ECOBA at: <http://www.ecoba.com>

³⁸ By the Environment Act 1995; the following S.I.s: 1995/288, 1995/1950, 1996/634, 1996/972, 1996/1279, 1998/606, 2000/793, 2002/2980, 2003/2635, 2005/894, 2005/1728, 2005/1806, 2005/2900, 2006/937; and the following S.S.I.s: 2000/323, 2003/170, 2003/171, 2003/593, 2004/275, 2005/22, 2006/128.

³⁹ <http://www.environment-agency.gov.uk/subjects/waste/1416460/1334460/?lang=e>

⁴⁰ The EPP is considered at page 48 of this report.

⁴¹ In the 2003 Communication referenced in footnote 24, the European Commission states in respect of Article 11: "So far, the Commission has received only one notification from Member States that this Article is being used for non-hazardous waste."

this area, there is still more that could be done to utilise the exemption more effectively, as the respondents to the EPP consultation (see page 48 of this report) pointed out.⁴²

4.38 The EA considers that the number of formal exemptions could be significantly extended. Its regularly updated guidance on low risk waste activities lists many examples of different waste types that could benefit from one of the existing exemptions as well as some new activities.⁴³ It states that the Agency does “not believe it is in the public interest to expect the operators of those activities to obtain a waste management licence”. It considers that “low risk waste recovery activities should be regulated through exemptions from licensing” and goes on to state that this “may help promote the use of waste as a resource”.

4.39 The review welcomes this risk-based approach taken by the EA. It has, for example, recently been applied to the use of combusted poultry litter as fertiliser (one of the substances listed in the review’s Summary of Responses – at page 44). However, the fact that the activities mentioned in the EA’s guidance are not formal exemptions does create some uncertainty for business.

4.40 Defra is due to consult on a review of the formal exemptions in late 2006/early 2007 and has been able to confirm that it will consider in its consultation suitable mechanisms by which the list of exempt activities can be updated more quickly and efficiently in the future. Defra has also been able to confirm that activities contained within the EA’s guidance will be considered in particular for exemption. This is welcomed by the review.

4.41 The review recommends that Defra should, while taking into account the responses to its proposed consultation on WML exemptions, ensure that if an activity falls within the scope of Article 11 and any risk it poses can be mitigated by the adoption of general rules then it should be formally exempted.⁴⁴

⁴² “There is, however, considerable unease about the state of the current exemption system under WML with concern that the system is too restrictive, failing to take into consideration new technologies, but also that it fails to ensure illegal/damaging activities are controlled. Many welcomed the review proposed for later in 2006 to clarify issues on what can be made exempt. Many respondents acknowledged the need for a simplified approach to exemptions. There was a general perception that the current system is confusing.” (paragraph 2.52 of the second EPP consultation document).

⁴³ *Guidance on Low Risk Waste Activities, Version 13*, Environment Agency, September 2006. See: http://www.environment-agency.gov.uk/commondata/acrobat/app_asept06_1098102.pdf

⁴⁴ It should be noted that using Article 11 is conditional upon the environment and health conditions of Article 4 of the Directive being met.

Recommendation 8 – Waste Framework Directive

- a) Defra and the Environment Agency should publish for stakeholder consultation draft updated guidance on waste, including on its definition, by the end of 2006 or by the time the European Commission publishes its guidance on by-products, whichever is the later. Once adopted, it should be updated as necessary;
- b) The guidance should adopt a purposive, risk-based approach and utilise criteria of a similar style to those adopted by the Dutch to help businesses and regulators decide when a substance is a product or by-product. The guidance should be clear, concise and make use of examples to aid understanding;
- c) The Environment Agency should make its waste classification decisions using a purposive, risk-based approach and on a case by case basis;
- d) For UK end-of-waste protocols still to be finalised or developed, the costs and benefits of the UK adopting them in advance of European criteria should be taken into account and communicated to stakeholders, bearing in mind the risk that the EU criteria may differ; and
- e) Defra should, while taking into account the responses to its proposed consultation on waste management licence exemptions, ensure that if an activity falls within the scope of Article 11 of the Waste Framework Directive and any risk it poses can be mitigated by the adoption of general rules then it should be formally exempted.

CASE STUDY: FOOD HYGIENE TRAINING FOR FOOD HANDLERS

The issue

4.42 In recent years the UK Government has adopted clear guidelines to prevent departments from going beyond the minimum requirements of European legislation, unless they can justify the evidence-base for doing so. However, some over-implementation takes the form of regulatory creep occurring at the level of local enforcement or inspection, which by its very nature is not subject to public scrutiny during the transposition process. The example of the training requirements for food handlers in European legislation on food hygiene, and how they have been applied in practice by different local authorities, was identified from evidence received during this review as an example of regulatory creep.

Background

4.43 In 2004, the EU adopted a number of directly applicable regulations on food hygiene, which came into effect on 1 January 2006. The EC regulations replaced and revoked previous Community directives on food hygiene and, as such, UK regulations which implemented these directives also had to be revoked on that date. Enforcement of the EC regulations in the UK is provided for via the Food Hygiene (England) Regulations 2006 and equivalent legislation relating to other parts of the UK. The EC regulations aim to ensure a high level of consumer protection and require businesses to put in place, implement and maintain food safety procedures based on the Hazard Analysis Critical Control Point (HACCP) principles. Responsibility for enforcement of this legislation in the majority of food businesses rests with local authorities.

4.44 The food sector is dominated by small firms. 60 per cent of food businesses in the UK are in the catering sector, 80 per cent of which are micro-businesses employing ten staff or less. As a result, the Food Standards Agency invested a lot of effort into developing new guidance material, such as food safety management packs, to help small food businesses in particular comply with the new legislation.⁴⁵

The over-implementation

4.45 In response to the review's call for evidence, a number of food industry respondents asserted that enforcers were imposing requirements on training for food handlers that went beyond the requirements in Regulation 852/2004.⁴⁶ This Regulation carried forward the training requirements for food handlers present in its predecessor, Directive 93/43/EEC, which was implemented in the UK by the Food Safety (General Food Hygiene) Regulations 1995.⁴⁷ The training provisions in Regulation 852/2004 relate to both food handlers and those with responsibility for the necessary HACCP-based systems. The requirements are that:

“Food business operators are to ensure that food handlers are supervised and instructed and/or trained in food hygiene matters commensurate with their work activity”; and that, “those responsible for the development and maintenance of procedures based on the HACCP principles or for the operation of relevant guides have received adequate training in the application of the HACCP principles.”⁴⁸

4.46 Regulation 852/2004 is the cornerstone of food hygiene legislation and is directly applicable to all food businesses in the UK. The main concern raised with the review was that some local authorities, or some enforcement officers, were insisting that all food handlers attend formal training courses in basic food hygiene. Furthermore, some enforcers required handlers to attend refresher training courses every three to five years and managers or supervisors to have a higher level of qualification, implying that these were specific legal requirements.

Impact of the over-implementation on food businesses

4.47 The impact of the regulatory creep clearly depends on how widespread it is. The review has tried to assess whether it is just the case of individual enforcement officers being over-zealous in their application of training requirements, or whether local authorities require food handlers to attend training courses as a matter of local policy.

4.48 Our initial research has indicated that the problem does not seem to be restricted to over-zealous individuals. Oxford City Council's website states that “All food handlers handling open high risk foods must complete Level one training within three months of starting work.”⁴⁹ Greenwich Council's website states that “everyone who manages and handles food in catering and manufacturing businesses should attend the (basic food hygiene) course.”⁵⁰ Birmingham City Council directly quotes the EC legislation but goes on to suggest that formal training is desirable:

⁴⁵ See Food Standards Agency website on food hygiene: <http://www.food.gov.uk/safereating/>

⁴⁶ Regulation (EC) No. 852/2004 of the Parliament and of the Council on the hygiene of foodstuffs

⁴⁷ S.I. 1995 No. 1763

⁴⁸ Regulation 852/2004, Annex II, Chapter 12

⁴⁹ <http://www.oxford.gov.uk/environment/FoodHygiene.cfm>

⁵⁰ <http://www.greenwich.gov.uk/Greenwich/Business/HealthAndSafety/FoodSafety/FoodHygieneCertificate.htm>

“The Basic Food Hygiene Certificate is the best type of training for most food handlers involved in handling high risk open food”. Norwich City Council’s website suggests that “all staff have at least the Basic Food Hygiene Certificate, supervisors have at least the Intermediate level” and that “managers and proprietors are trained to the Advanced level.” A quick check on the websites of roughly 10 per cent of other local authorities in England revealed that around 25 per cent were implying that it is a legal requirement for food handlers to attend formal training courses.

4.49 The impact of regulatory creep may also vary according to the size of the business. Larger companies may be more familiar with the detail of food law and have robust systems and procedures in place, and hence may be confident enough in their dealings with enforcement officers to challenge any requests for formal training if they have alternative arrangements in place. Smaller operators, who are more reliant on advice received from enforcement officers may be less able to distinguish between best practice and regulatory requirements, and less willing to challenge an enforcement officer for fear of damaging the relationship. Smaller operators may, therefore, incur disproportionate costs by sending all food handling staff on formal training courses instead of taking up the option to supervise and instruct and/or train them on the premises (if the operator has the right skills and knowledge to do so). One restaurant manager in London estimated that an enforcement officer’s insistence that he attend a basic food hygiene course in 2005, despite 30 years’ experience, cost him £400 as he had had to close the restaurant whilst on training. Another compliance officer from a medium-sized bakery had put together an accredited training course for all staff costing £3,000.

Possible reasons for over-enforcement

4.50 Before discussing possible reasons for over-implementation, it should be clarified that there are some valid reasons as to why enforcement officers may require food handling staff in certain businesses to attend formal training courses. First, in small businesses, the dividing line between those responsible for HACCP procedures and handlers may not be as clear as in larger businesses, and the EC Regulation requires training for the former group (although this does not necessarily have to be formal training). Second, it may be reasonable for those inspecting food handling staff in higher risk environments, for example those in hospitals or nursing homes, to encourage a higher level of training. If the enforcement officer judged that the in-house supervision and instruction or training of staff had not been sufficient, in that handlers were not able to demonstrate the appropriate food hygiene competencies, and the business was not able to identify an alternate means to achieve compliance, then the enforcement officer may have good reason to suggest attendance at a formal training course.

Guidance at EU and national levels

4.51 One of the generic causes of regulatory creep, encountered during the review, can be that UK guidance does not clarify unclear EU-level legislative provisions. As a result, enforcers or businesses end up interpreting the requirements in an over-cautious manner, leading to regulatory creep. With respect to training for food handlers, the European legal provisions are not unclear, but there is a range of guidance on how to apply the Regulations at both the European and domestic level.

4.52 The European Commission’s guidance document on Regulation 852/2004, produced in November 2005, explained that training should be appropriate to the size and nature of the business and could be achieved in different ways including, “in-house training, the organisation of training courses, information campaigns from professional organisations or from the competent authorities, guides to good practice, etc.” Similarly, further Commission guidance on HACCP was

clear that “appropriate training does not necessarily involve participation in training courses. Training can also be achieved through information campaigns from professional organisation or competent authorities, guides to good practice, etc”. The European guidance, though issued later in the regulatory process than desirable, is therefore clear that attending a formal training course is not a legal requirement and that compliance focuses more on food handlers having the relevant knowledge, however it has been gained, so they are able to put it to use in practical situations.

Guidance for enforcers

4.53 There is a range of guidance materials for enforcers on food safety. Enforcement authorities must have regard to provisions in the statutory Food Law Code of Practice. The Code does not make any explicit reference to the flexibility within the EC legislation on training. The Food Standards Agency has issued Food Law Practice Guidance to complement the Code which states, in respect of HACCP-based systems, that for managers, ‘formal training is not the only route.’ For staff the Guidance says, “in practical terms, on the job training might be appropriate, attendance at a formal training event is not necessary” to achieve the objective of the legislation to have the required competencies.

4.54 Enforcers are also required to take into account, when relevant, the use of Industry Guides to Good Hygiene Practice by food businesses. Such Guides provide guidance on compliance with the legislation and on good practice which food business operators can follow if they choose. Guides are provided for in Regulation 852/2004 which sets out requirements for their development and dissemination. Member States are encouraged to develop industry guides and assess them to ensure their integrity before they are disseminated.⁵¹ The Industry Guides, developed since 1997, divide staff into different categories and recommend instruction or training accordingly. The current version of the Catering Guide does suggest that all staff involved in preparing open unwrapped food should receive formal training, and only waiters and counter staff could be instructed instead. The Industry Guides are currently being updated, and could better reflect the flexibility in the legislation. LACORS has recently published guidance for enforcers on the issue of training, instruction and supervision of food handlers on its website reflecting the current legislative requirements.⁵² This guidance makes it clear that attending training courses or obtaining qualifications are not legal requirements.

Guidance for business

4.55 The Food Standards Agency has also produced a range of guidance material for food businesses on how to comply with food hygiene legislation which is, for the most part, clear on the regulatory requirements on training for food handlers. The Food Standards Agency website states clearly that, “there is no legal requirement to attend a formal training course although many businesses may want their staff to do so.”⁵³ The Food Standards Agency has also produced useful booklets, such as “Food Hygiene: A Guide for Businesses” which distinguishes clearly between legal requirements and good practice.⁵⁴ This booklet states that “staff do not have to attend a formal training course, though these are useful” and that operators “could use a pack produced by the Food Standards Agency, or an industry guide to good hygiene practice, to train staff”. This booklet is available from some local authorities’ websites. The main guidance pack on the new Regulations for small caterers is the “Safer Food Better Business Pack”. This has a section for managers to complete on “training and supervision”, but it is clear that food business operators can use the pack to train their staff, rather than send them on formal training courses.

⁵¹ Regulation (EC) No. 852/2004, Articles 7 and 8

⁵² LACORS guidance on Annex II Chapter XII of EC 852/2004, issued September 2006.

⁵³ <http://www.food.gov.uk/foodindustry/regulation/hygleg/hygleinfo/foodhygknow/>

⁵⁴ <http://www.food.gov.uk/multimedia/pdfs/hygienebusinessguide.pdf>

4.56 As regards accredited training, new National Occupational Standards for food safety, reflecting the requirements of the new EC Regulations, were approved in 2005 and 2006. Revised food standards qualifications, specifically focusing on catering, food manufacturing and food retailing, are now available. The new courses were developed by the Sector Skills Council, in collaboration with the Food Standards Agency. As around 450,000 certificates in basic food hygiene are granted each year, the Food Standards Agency anticipates that the revised courses will deliver a better skills base in the food industry.

4.57 While the Food Standards Agency's guidance does not go beyond the legislative requirements, the range of different guidance material available to food businesses, as reflected by what is on different local authorities' websites, may contribute to some of the confusion on the part of the food industry as to what the regulatory requirements are. Some local authorities make reference to the Industry Guides (chiefly the Catering Guide), some offer up the Food Standards Agency's guide for food businesses and others offer different guidance material on the now-revoked Food Safety (General Food Hygiene) Regulations 2005. The guidance materials are not as consistent as they might be in terms of offering advice on training requirements for food handlers.

Other reasons for over-enforcement

4.58 There are other possible causes of regulatory creep in the area of food hygiene. There may be a lack of understanding on the part of enforcers as to the legislative requirements or a lack of awareness that formal training courses are not necessarily the most effective way of teaching staff food hygiene. Another possible factor could be fear. Serious outbreaks of food poisoning in Scotland and Wales may have increased the pressure on enforcement officers to be over-zealous in their application of the legislation. If a food handler has attended a formal training course, and has got the certificate to prove it, the audit trail may be easier to demonstrate than if the handler had been verbally instructed in food hygiene by a supervisor. A few stakeholders suggested that enforcement officers may promote training courses as a mechanism to raise revenue for the authority or the Chartered Institute of Environmental Health (the professional body to which many enforcement officers belong).

4.59 Finally, some trade associations suggested that the insistence on formal training was illustrative of a wider recent trend towards regulatory creep on food safety issues. A few raised concerns about food safety award schemes adopted by local authorities, and new "Scores on Doors" schemes being piloted in a number of areas in the UK with support from the Food Standards Agency. While local food safety award schemes are optional and may encourage best practice on the part of the industry and improve transparency for local consumers, it was felt that the design of some of the schemes encouraged regulatory creep. For example, in the 'Safer Food Award' scheme run by Norwich Council (which is not one of the Food Standards Agency-supported pilots), a business that achieved basic compliance with the legislation might only be awarded one out of five stars by the local authority. To get four or five stars, the business would have to demonstrate that it was "meeting or exceeding the industry standard."⁵⁵ While recognising the potential contribution of award schemes to improving food safety, the review hopes that the Food Standards Agency will avoid a model for any national "Scores on Doors" food safety scheme, covering all food businesses, which could encourage regulatory creep.

⁵⁵ http://www.norwich.gov.uk/webapps/atoz/service_page.asp?id=1074

Conclusions and recommendations

4.60 The Davidson Review has found that there is evidence to suggest over-enforcement of the training requirements in European food hygiene legislation by local authorities in some parts of the UK. Food handlers' attendance at even a Level 1 food hygiene training course is not a legal requirement and businesses are being given the impression by some local authorities that it is, thus amounting to regulatory creep. It is, however, important to recognise that where a food business does not use formal training, it must nonetheless be able to demonstrate the measures it has in place to ensure that its food handlers have the appropriate knowledge in relation to food hygiene in order to achieve compliance. This regulatory creep is not universal and the Food Standards Agency guidance material is helpful in clarifying the regulatory requirements. The new LACORS guidance and the revised standards for food safety training will also start to make an impact. The Government's implementation of the recommendations in the Hampton Review on inspection and enforcement, in particular the Regulators' Compliance Code, will help local authorities take a more risk-based approach to enforcement.⁵⁶ In the meantime, the Davidson Review recommends:

Recommendation 9 – Food hygiene training for food handlers

- The Food Standards Agency should write to heads of enforcement at all local authorities reminding them that food handlers' attendance at formal training courses is not a legal requirement and that there are alternative routes available to food business operators to comply with the legislative requirements. The Food Standards Agency should encourage local authorities to review and, if necessary, update any guidance material for food businesses, including that placed on their websites concerning training requirements for food handlers.
- The Food Standards Agency, while working with industry on updating the Industry Guides to Good Hygiene Practice published since 1997, should ensure that advice on the training requirements for food handlers in Regulation 852/2004 better reflects the flexibility in the Regulation and that advice on compliance and advice on good practice in this regard are clearly distinguished.

CASE STUDY: HERD REGISTER FOR BOVINE ANIMALS

Introduction

4.61 EC law requires keepers of certain farm animals to maintain a register to record births, deaths, movements and other herd details. There are approximately 58,000 beef and dairy herds in England. The administrative burden of maintaining a bovine herd register⁵⁷ for all of these herds is approximately £14 million, which works out at approximately £241 per herd per year.

4.62 This case study concerns Regulation 1760/2000 of the European Parliament and the Council of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and products (the Regulation).⁵⁸ As the recitals of the Regulation show, it replaced prior EC legislation that imposed similar obligations.

⁵⁶ http://www.cabinetoffice.gov.uk/regulation/reform/enforcement_concordat/compliance_code.asp

⁵⁷ For a copy of the register see: <http://www.defra.gov.uk/corporate/regulat/forms/ahealth/hrb1.pdf>

⁵⁸ See the consolidated version at: <http://europa.eu.int/eur-lex>

4.63 The aims of the Regulation are stability in the beef market; traceability of cattle (including so that the European Commission can better control EC aid schemes); cattle and consumer health; and consumer confidence in the wake of the BSE crisis.

The EC obligation

4.64 The key provision of the Regulation is Article 7:

“Article 7

1. With the exception of transporters, each keeper of animals shall:

– keep an up-to-date register

...”

4.65 “Keeper” is defined by the Regulation as “any natural or legal person responsible for animals, whether on a permanent or on a temporary basis, including during transportation or at a market.”

The transposition

4.66 Article 7 of the Regulation was transposed by Regulation 29 of the Cattle Identification Regulations 1998.⁵⁹ These are Defra’s seventh most burdensome regulations (in terms of administrative burden). It is very difficult for farmers and landowners in England to ascertain exactly what the regulations currently require of them. This is because the regulations have been amended five times in respect of England alone,⁶⁰ yet there is no publicly available website giving access to a consolidated version (see Recommendation 19 of this report). Defra has, however, confirmed to the review that it will itself consolidate (in April 2007)⁶¹ all the implementing regulations,⁶² which together with their amendments, currently transpose the Regulation in England. The review welcomes this.

4.67 The implementing regulations use the “reference method” of transposition, i.e. they simply refer to the article of the EC law in question and bolt on an enforcement mechanism. The principal part of the relevant regulation in the Cattle Identification Regulations 1998 (as amended) is as follows:

“29 Records

(1) Any person who contravenes or fails to comply with any of the following provisions of the Council Regulation and, in the case of a register, fails to complete and keep that register in accordance with this regulation, shall be guilty of an offence–

(a) Article 7.1, first indent (keeping of a register);

(b) Article 7.3 (provision of information);

(c) Article 7.4 (production and retention of the register)”.⁶³

⁵⁹ S.I. 1998/871

⁶⁰ By S.I.s 1998/1796, 1998/ 2969, 1999/1339, 2001/1644 & 2006/1538

⁶¹ See: <http://www.defra.gov.uk/corporate/consult/cattle-cir/index.htm>

⁶² These also include the Cattle Database Regulations 1998 and the Cattle (Identification of Older Animals) (England) Regulations 2000 and their amending regulations.

⁶³ It also refers to Schedule 2, which sets out the recommended form in which records should be kept.

4.68 While this method of transposition can produce a concise implementing instrument, it is less transparent than other methods. It also makes it easier to bypass the normal process by which the responsible policy official and lawyer decide and record how best to interpret the provisions of the EC law. If this occurs then a writer of guidance who was not involved in the negotiation or transposition of the EC law may have to guess the purpose originally behind the wording.

The regulatory creep

4.69 In the current circumstances, the Rural Payments Agency (RPA) – the Defra Agency responsible for writing the guidance on cross-compliance requirements for claims made under the Single Farm Payment Scheme – did not have a recorded interpretation of the Regulation to hand. Rather, its policy officials worked with those who had put together related guidance in the past.⁶⁴ When the issue was subsequently raised with Defra officials responsible for cattle identification policy they advocated a different interpretation.

4.70 The relevant part of the guidance in question (Cross Compliance Handbook) is as follows:

“Landowners should note that where they provide land for grazing but they are not required to become the registered keepers of the animals on CTS (due to a valid CTS link being in place), they will be liable for on-farm animal records (Herd Register) as well as all other cross-compliance standards on their holding, including the land being grazed.”⁶⁵

4.71 This sentence advises landowners, as well as the keepers, who have bovine herds on their land to maintain a register despite Article 7 of the Regulation (which only requires the “keeper” to maintain one). A purposive approach to interpreting the Regulation would have concluded that the maintenance of two identical registers would not have furthered the aims of the Regulation, but merely brought duplication. This sentence in the guidance is an instance of involuntary regulatory creep. The negotiator’s knowledge was not utilised and a misunderstanding between the RPA and Defra meant that the RPA’s wrong interpretation was not corrected.

4.72 One of the factors that contributed to the RPA’s interpretation of the Regulation is the Regulation’s poor quality of drafting and lack of internal consistency, a common problem with EC legislation. In this case, Article 3 of the Regulation sets out the elements of the bovine identification system that the Regulation then expands upon in later Articles. Article 3 reads as follows:

Article 3

The system for the identification and registration of bovine animals shall comprise the following elements:

- (a) ear tags to identify animals individually;
- (b) computerised databases;
- (c) animal passports;
- (d) individual registers kept on each holding.”

⁶⁴ Such as the Cattle Keeper’s Handbook, which can be found on the RPA’s website: <http://www.rpa.gov.uk>

⁶⁵ *Single Payment Scheme, Cross Compliance Handbook for England, 2006 edition supplement*, Defra & the RPA, May 2006, page 16 at: <http://www.defra.gov.uk/farm/capreform/pubs/pdf/CrossCompSupp02.pdf>

4.73 Article 3(d) refers to holdings, rather than keepers, when qualifying the obligation to maintain a register. On its own, it could be taken to suggest that the owner of a holding who allows cows to graze on his or her land should maintain a register. But Article 7 is the substantive provision on registers and should therefore be determinative. Further, the correct, purposive interpretation as regards who should maintain a register would have been confirmed by referring to the recitals of the Regulation. Recital 21 is the relevant one. It, like Article 7, refers to “keepers” rather than “holdings”:

“Keepers of animals, with the exception of transporters, should maintain an up-to-date register of the animals on their holdings.”

The effect

4.74 The regulatory creep, had it not been resolved (see below), could have cost every landowner in England who has another person’s herd grazing on his or her land an unnecessary administrative burden of approximately £241 per herd. In fact, in many cases the landowner would have found it very difficult, if not impossible, to record the breed, ear tag number, movements, etc. of cattle that he or she had in practice very little to do with.

4.75 Defra was unable to provide the review with figures as to how many extra herd registers the guidance might have required. It is likely that the number would be several thousand. There are many owners of fields throughout England who permit keepers to graze cattle on their land for part of the year. And there are large landowners that have many herds grazing on their land during the course of a year. For example, approximately 115 herds of cattle graze on English land belonging to the National Trust. The regulatory creep would have compelled the National Trust to complete 115 registers in addition to those maintained by the keepers, which would have cost the organisation approximately £28,000.

The resolution

4.76 The regulatory creep was initially picked up Jim Webster, President of the Cumbria Country Land & Business Association, shortly after the guidance was published. He alerted officials in the RPA that he considered that regulatory creep had occurred. He also authored an article in the farming press in July 2006.⁶⁶ The Davidson Review raised the issue with Defra in August 2006. Shortly afterwards, on 5 September 2006, the RPA announced that landowners would no longer have to maintain herd registers if not the keeper of the herd.⁶⁷ The RPA stated in its announcement that the text in question from the guidance should be replaced with the following:

“The keeper will be liable for all animals that are, or should be, registered to them on CTS. Landowners should note that where they provide land for grazing but are not required to become the registered keeper of the animals (due to a valid CTS link being in place) they will not be liable for breaches of SMRs 7 and 8, but they will be liable for all other cross compliance standards on their holding, including the land being grazed.”

⁶⁶ <http://www.farmersguardian.com/story.asp?sectioncode=44&storycode=3402>

⁶⁷ <http://www.rpa.gov.uk/rpa/index.nsf/vContentByTaxonomy/EE2189CA45746F4D802571E00031C6AE?OpenDocument>

4.77 Defra and the RPA acted swiftly in remedying the regulatory creep in this instance. In order to prevent regulatory creep occurring in the future, departments and regulators should log the considered interpretation of material phrases in EC legislation at the time that the legislation is negotiated and transposed. This is particularly important where the copy-out and reference methods of transposition are used. In this fashion writers of guidance, who may not sit in the department that negotiated or implemented the law but instead in one of its executive agencies, NDPBs or consultants, will be able to refer back to the expert interpretation. This outcome can most easily be achieved by applying programme and project management (PPM) techniques to both the negotiation and implementation processes and making the resulting documentation available to writers of guidance. See Recommendation 18 of this report.

CASE STUDY: ROAD HAULAGE OPERATOR LICENSING

The issue

4.78 During the course of the review, many respondents suggested that the risks of regulatory creep are higher when there are very broad criteria set down in legislation that leave the regulator to clarify how these criteria should be interpreted in guidance. European Directive 96/26 on admission to the occupation of road haulage operator requires applicants to demonstrate good repute, financial standing and professional competence before a licence is granted. A number of respondents felt that the requirements on road haulage operators to demonstrate financial standing were more stringent than those required by the EC Directive, as operators were obliged to hold the necessary capital in the form of a fixed bank deposit or overdraft facility. As this requirement stemmed from guidance issued by the competent authority and enforcement activities, rather than the UK's implementing legislation, this was felt to constitute regulatory creep.

Legislative background

4.79 The objectives of the financial standing criteria in the EC directive are to ensure that operators' businesses can be run responsibly and that sufficient resources are available to maintain the vehicles safely. The 1996 Directive sets out a range of financial criteria that the authorities should have regard to, the amounts per vehicle that each operator should have access to (£6,200 for first vehicle; £3,400 for each additional vehicle), and requires that competent authorities should check these regularly – at least every five years.⁶⁸ Article 3b states:

“For the purposes of assessing financial standing, the competent authority shall have regard to: annual accounts of the undertaking, if any; funds available, including cash at bank, overdraft and loan facilities; any assets, including property, which are available to provide security for the undertaking; costs, including purchase cost or initial payment for vehicles, premises, plant and equipment and working capital.”

4.80 The UK's Goods Vehicles (Licensing of Operators) Act 1995 does not replicate the detail in the directive on how to assess financial standing criteria. An operator of sufficient financial standing is defined, as it is in the Directive, as someone who has “available to him sufficient financial resources to ensure the establishment and proper administration of the road transport undertaking”, and “capital and reserves of an amount” equal to that set out in the Directive. Traffic Commissioners serve as the competent authority in the UK and are responsible for producing

⁶⁸ Directive 96/26 consolidated other directives on admission to the occupation of road haulage operator and road passenger transport operators.

guidance on financial standing criteria and determining whether the criteria have been met in difficult cases. Traffic Commissioners are supported by staff in the Vehicle Operator Services Agency (VOSA) who carry out licence administration work and take more routine licensing decisions under delegated authority from the Commissioners.

Guidance

4.81 The Traffic Commissioners issue public guidance notes in the form of a Practice Direction on how to comply with the financial standing criteria, as well as STC Guidance Notes for VOSA staff. The easiest way of demonstrating financial criteria is to supply three months' worth of bank statements, so that the average balance over this period can be calculated, supported by any overdraft or credit facility. According to the Practice Direction, a working capital loan facility or revolving credit agreement would also be acceptable. Larger companies with a turnover of more than £5.6 million are able to submit audited annual accounts as a substitute for bank statements. The guidance rules out the following as evidence: bank letters (other than formal overdrafts); physical assets (e.g. buildings); cash; and states that guarantees should be considered on their merits. It is clear from the Practice Direction that bank deposits are not strictly compulsory, although there may be reason to require one due to the operator's previous history. It could also be argued that the guidance goes beyond the minimum requirements of the Directive. For example, bank guarantees are not sufficient, unless in the form of a formal overdraft facility, and physical assets are not acceptable as evidence.

4.82 While the Practice Direction is clear that there are alternative ways of demonstrating financial standing criteria than proof of capital in the bank, STC Guidance Notes for VOSA staff and the actual application form for operators would appear to be less flexible. The application form for a licence requires operators to submit one or more of the following: original bank or building society statements; audited accounts for limited companies or plcs (provided that the annual turnover is at least £5.6 million), or an invoice finance agreement, supported by a signed agreement with the finance form. The STC Guidance states "The most reliable indication of money available is cash held in a bank account of the licence holder, supplemented by the unused portion of any overdraft facility".

Impact on business

4.83 The perception of industry stakeholders who contacted the review was that there was little flexibility in the UK's requirements surrounding financial standing, and that smaller operators (beneath the threshold for audited accounts) had to have the funds available in the bank. It was felt that this represented an additional fixed cost to UK firms, and created a competitive disadvantage when bidding for work.

4.84 The impact on small firms was disproportionate, as larger firms found it relatively easy to move money between accounts to demonstrate financial standing, and therefore had an impact on their growth. One small operator with 32 vehicles had wanted to buy two more, but was only able to finance one, due to the need to hold cash in reserve at the bank. A second operator with 18 employees had to keep £47,000 in the bank as proof of financial standing, capital that he would rather have used to improve his stock. The money could not be moved in case the operator was called before a public inquiry or subject to a random inspection. A number of operators also felt that the growth in repair and maintenance schemes with manufacturers reduced the need for large sums of money to be available in bank deposits.

Comparison with other EU Member States

4.85 Practice varies across the EU considerably when assessing applications for financial standing and the European Commission has been consulting on revised criteria for road haulage operators. In 2005 the Asser Institute in the Netherlands carried out a study for the European Commission on the admission to the occupation of road transport operator which showed that the competent authorities in many other Member States used external verification procedures for assessing financial standing, such as auditors.⁶⁹ Sweden, Denmark and Lithuania all accepted standard bank guarantees on the minimum amounts required. France accepted a bank guarantee for up to 50% of the required amount, requesting that the rest be in available capital.

4.86 The report claimed that bank deposits were only compulsory in the UK and Luxembourg; other Member States requested them as an alternative means of proof, or when the capacity of the firm to fulfil its obligations to creditors was questionable. The report did highlight that some other Member States went beyond the minimum requirements of the European Directive. For example, Germany required certificates guaranteeing that various payments to public bodies were up to date, and Spain checked operators every two years rather than every five.

Conclusions

4.87 The analysis of whether any over-implementation has taken place in the UK has been complicated by different accounts from stakeholders and the regulator as to what actually was required of road haulage operators to provide evidence of sufficient financial criteria. The difference in opinion has contributed to the regulatory creep and may be due to a number of factors including: differences in the STC guidance and Practice Direction and a possible lack of awareness of the flexibility in the regulatory requirements among VOSA staff or road haulage operators. The current guidance material available does suggest that the UK's interpretation of the financial standing criteria is more stringent than the minimum required by the European Directive, and that the way it is being applied by the regulator may have led to unnecessary regulatory burdens for business. The Davidson Review would therefore recommend that:

Recommendation 10 – Road haulage operator licensing

DfT, together with Traffic Commissioners, should review their interpretation of the proof of financial standing as set out in the EU directive and identify any unnecessary regulatory burdens on business. The Traffic Commissioners should then consult on revised guidance on financial standing criteria by the end of 2007. Such a review will need to consider any proposals to amend the financial standing requirements in the European directive which may be put forward following the European Commission's recent consultation.

⁶⁹ *Study on admission to the occupation of road transport operator: review of current arrangements in member states and acceding countries*, Asser Institute, June 2005.

5

Lessons for the future

This chapter discusses the factors that can lead to over-implementation, assesses current Government policy in this area and makes recommendations to further improve the implementation process in the future.

FACTORS THAT CAN LEAD TO OVER-IMPLEMENTATION AND CURRENT GOVERNMENT POLICY

5.1 Analysis of the limited number of case studies and discussions with stakeholders suggested some factors that have contributed to over-implementation of European legislation in the past. These include the need for better regulation at the EU level, the UK legal system and culture, and poor engagement with EU issues (including consultation and impact assessments) by departments and regulators.

5.2 Over the years the Government has responded to such concerns by tightening up its policy and scrutiny mechanisms to help prevent over-implementation in the future. For example, since November 2001, UK legislation enacting European legislation has had to be accompanied by a Transposition Note explaining how the Government has, or will transpose, the main elements of the relevant European directive into UK law.

5.3 Currently, the Government's policy is to implement European legislation so as to achieve the objectives of the European measure on time and without over-implementing, unless the circumstances are exceptional and justified by a strong cost-benefit analysis and extensive public consultation. The Cabinet Office's Transposition Guide for implementing European legislation was updated in March 2005. Its main points are summarised in box 5.1. Any major proposals to exceed the requirements of European legislation must now be cleared by the Panel for Regulatory Accountability, chaired by the Prime Minister, before wider Ministerial clearance. The Merits Committee on Statutory Instruments in the House of Lords can also report to the House on any Statutory Instrument that it considers to have inappropriately implemented a European directive.

5.4 The Transposition Guide highlights a number of examples of good practice by departments and regulators to illustrate these principles. Stakeholders outside of government who were aware of and commented on the Guide felt that it provides an effective framework for implementing European legislation, although there was some scepticism as to whether this guidance was always being followed by departments.

Box 5.1: Transposition Guide: how to implement European directives effectively¹

The key points in the Cabinet Office's Transposition Guide are:

- Considerations on how a European proposal might be implemented in the UK should take place at the earliest possible stage, with policy makers, lawyers and enforcement agencies working together.
- Project management techniques should be adopted for setting clear milestones and allocating resources.
- Regulatory Impact Assessments (RIAs) must be produced to set out implementation options, highlighting the risks and benefits of each one. The RIA should also be used to inform the political decision on the UK negotiating line, and for lobbying the European Commission and other institutions subsequently.
- There must be appropriate coordination and consultation both within Government (including devolved administrations, agencies and local authorities) and with external stakeholders.
- It will often be useful to work with other Member States to understand different approaches to implementation and share best practice.
- Departments should take a risk-based approach to implementation and avoid over-implementing European legislation, unless there are exceptional circumstances, justified by a cost-benefit analysis and extensive consultation with stakeholders.

5.5 Following consultation, the Government is currently revising the impact assessments process to ensure that costs and benefits of new proposals are clear and up to date throughout the policy making process.² The proposed revised impact assessment includes a specific reference to justifying any over-implementation of European legislation. Departmental simplification plans and delivery of the Hampton Review³ recommendations also impact on the implementation of European legislation.

5.6 The review strongly supports all these reforms and believes that, if successfully implemented across all departments, they will go a long way towards preventing inappropriate over-implementation of European legislation in the future. As a result of investigating a number of case studies and extensively engaging with a wide range of stakeholders, the review has some suggestions for further strengthening and/or clarifying the policies and procedures for preventing inappropriate over-implementation. These will ensure that the UK has one of the most robust systems in the EU for implementing European legislation in the least burdensome way possible, while maintaining necessary regulatory protections.

¹ <http://www.cabinetoffice.gov.uk/regulation/documents/pdf/europe/tpguide.pdf>

² <http://www.cabinetoffice.gov.uk/regulation/ria/consultation/index.asp>

³ http://www.hm-treasury.gov.uk/budget/budget_05/other_documents/bud_bud05_hampton.cfm

Improving implementation in the future

5.8 This section discusses the following issues:

- gold-plating and double-banking;
- better regulation at the EU level;
- legal system, culture and management of risks;
- project management and communication between negotiators and implementers; and
- communication with external stakeholders and transparency.

Gold-plating and double-banking

5.9 According to the Transposition Guide, gold-plating occurs when implementation goes beyond the minimum necessary to comply with the requirements of European legislation. As the case study on MOT testing (Chapter 2) has highlighted, the existence of higher pre-existing national standards can mean that departments do not need to implement EU legislation as such. As this technically falls outside the current definition of “gold-plating”, departments may be reluctant to reassess the pre-existing higher UK standards in the light of new minimum standards set by the EU, leading to potentially unnecessary costs for the UK economy.

Recommendation 11:

The definition of gold-plating in the Cabinet Office’s Transposition Guide should be extended to include situations where existing UK legislation contains higher standards than a European measure. Higher national standards should only be retained if it can be demonstrated, after consultation with stakeholders, that the benefits of doing so justify the costs.

5.10 The Consumer Sales Directive and Fisheries legislation case studies in Chapter 3 have shown that double-banking can occur when the implementation of European legislation is treated as an add-on to existing legislation, rather than an opportunity to revisit and rationalise the regime into a more coherent whole. The Transposition Guide says that policymakers and lawyers need to take a radical look at the whole area of legislation where European legislation impacts. The review agrees with this and believes it can be further clarified.

Recommendation 12:

To avoid double-banking, departments should review all related existing UK legislation well before transposition. Departments should create one coherent regulatory scheme where possible, either by amending the existing legislation or repealing it and starting afresh with a new regime. The Transposition Guide should be updated to reflect this recommendation.

5.11 Copy-out and elaboration as techniques of transposition were raised with the review in relation to double-banking and gold-plating.⁴ The current Transposition Guide suggests that the general presumption should be to copy-out, except where there is a clear justification for doing otherwise. The Guide then goes on to list circumstances where copy-out is not appropriate, including when implementing regulations need to fit in with an existing legal regime, where the wording of the directive is so ambiguous that business calls for greater precision, and 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.

5.12 The majority of those in Government and in business who commented on this issue felt that a case-by-case approach to the use of copy-out, elaboration or a mixture of the two is appropriate. They made the point that the use of copy-out alone transferred the risk of interpreting ambiguous or at least vague legislation to the private sector with the apparent expectation that the issue of clarity would be resolved through litigation. For many businesses this was not a satisfactory situation and could result in unnecessary burdens if companies and their lawyers adopted an over-cautious approach to compliance in the absence of clear judicial guidance. The risk of regulatory creep also increases with copy-out if guidance is then used by enforcers to clarify legal requirements. The current Transposition Guide's general presumption in favour of copy-out was therefore unhelpful.

Recommendation 13:

The Cabinet Office's Transposition Guide should be amended to require active consideration of whether copy-out, elaboration or a mixture of transposition methods is appropriate, having regard to the impact on those being regulated and the fit of the legislation in its domestic context.

5.13 A number of respondents to the review raised the issue of the UK acting as the "first mover", i.e. deciding to legislate in an area even though it was known that the EU was going to produce a measure in the same area in the future. The Integrated Pollution Control (IPC) regime and the UK Emissions Trading Scheme (ETS) regimes were cited as examples in this respect.

5.14 Some in Government made the point that the European Commission is a relatively small organisation with little contact with stakeholders and national parliaments, and so should not be relied upon to be the exclusive maker of policy in areas of shared competence. They suggested that the national interest was the main driver for the UK moving first, although there could be additional benefits in terms of influencing the Commission or other Member States. A few external stakeholders also felt that on occasion there could be significant benefits to be gained from moving first, particularly in the development of new environmental technologies, which could then be exported to other Member States.

⁴ "Copy-out" is the style of transposing European legislation by adopting the same wording as the directive or by mirroring it as closely as possible. This can involve cross-referring to the relevant provision in the directive. "Elaboration" is the style of transposition sometimes adopted to deal with provisions of a directive that are ambiguous, unworkable or do not fit with existing UK law. The implementing legislation reformulates the words to make the relevant provisions clearer and more certain, in accordance with the traditional UK legislative drafting approach.

5.15 The review acknowledges these points but also notes the concerns of a number of businesses that UK industry can face real competitive disadvantages by moving first and/or incurring costs of changing systems twice if the final EU measure differs from UK standards. Business felt that the Government should reflect very carefully before starting national schemes ahead of EU schemes, whose provisions were yet to be agreed.

5.16 The presumption against pre-empting European legislation set out in recommendation 14 below should apply where the European Commission is set to publish a legislative proposal in the same area in the near future or has already done so and the proposal has entered the EU legislative process. The presumption could be displaced if it can be demonstrated that there are likely to be net benefits for the UK in legislating first, after taking into account all the potential costs, including the extra transitional costs that business and other stakeholders would likely to be faced with in changing their systems twice. This presumption should not usually apply where a department is planning to simplify the UK legislation or reduce the regulation applied in the UK towards the minimum required by Community law, as benefits can accrue from the simplification before the new European measure needs to be implemented.

Recommendation 14:

Unless simplifying or reducing regulatory burdens, departments should not generally pre-empt upcoming European legislation by legislating in the same area. The Transposition Guide should be updated to reflect this recommendation.

Better regulation at the EU level

5.17 Respondents to the review's call for evidence suggested that problems with implementation often began at the EU level. There are three main features of the EU system that can lead to unintentional over-implementation in the UK.

5.18 First, the volume and timing of European legislation makes it hard for national regulators to regulate and engage stakeholders as effectively as they might. For example, 42 measures have been adopted under the Financial Services Action Plan since its announcement in March 2000 of which 40 have been implemented in the UK to date. In addition, EU guidance or clarification on how to comply with legislation was sometimes produced late, leaving regulators with the difficult choice of whether to issue guidance to business on compliance which may then be out of step with the European version.

5.19 Second, overlaps and inconsistencies in European legislation are carried through to national legislation, making a simple, consistent UK regime difficult to achieve. For example, the term pollution is defined differently in various EU environmental directives. There was confusion among stakeholders as to the bearing that the Urban Waste Water Treatment Directive and the Waste Framework Directive had on the inclusion of certain treatment plants under the Integrated Pollution Prevention and Control (IPPC) regime.

5.20 Third, the process by which European legislation was negotiated and drafted in Brussels meant that its wording was often ambiguous (to achieve political consensus) and increased the chance of over-implementation.

5.21 There are positive signals from the European Commission to address some of these issues. As part of its better regulation initiative, the Commission has started to focus more on consolidating and simplifying the acquis than producing new legislation. A number of reviews by the Commission to address overlapping and complex European directives are also underway, for

example, the reviews of the consumer acquis and food labelling. The Commission is also looking at how the IPPC Directive interacts with the Waste Incineration, Large Combustion Plants and Landfill Directives.

5.22 Most recently, the Commission announced on 14th November 2006 that it will propose to the European Council to fix an administrative burden reduction target of 25%, to be achieved jointly by the EU and Member States by 2012. It will reinforce the scrutiny of impact assessments through the creation of an Impact Assessment Board. A number of related initiatives were also announced, such as the addition of 43 new initiatives to its rolling simplification programme for the period 2006-2009.⁵

5.23 Post-implementation reviews and evaluations provide a useful check on how legislation is working in practice and whether actual costs and benefits are similar to those anticipated in ex-ante impact assessments. They are also important because policy choices which may have been suitable in the past may need to be reconsidered in the light of changing political, economic, social and technological developments. Risks which were considered high when the UK originally implemented European legislation may now, in light of other Member States' approaches and the Commission's approach, be acceptable. Post-implementation reviews are also helpful in terms of building up an evidence-base to influence future policy making in the EU.

5.24 Most new directives now have review periods built in by the Commission. However, the Davidson Review believes that more can be done by the Commission in this area to improve the quality of post-implementation reviews. It is also clear from discussions with the Better Regulation Executive and departments that post-implementation reviews are not currently done on a systematic basis by UK government departments.

5.25 The Government's proposed revision for impact assessments includes a specific requirement to set out the date of the post-implementation review. Where the implementation is of a European measure, the Davidson Review believes that the post-implementation review needs to be timed to enable the UK to best influence proposals at the European level. A review of the implementation of a European measure should include an analysis of all related UK legislation so as to aid identification of double-banking. It should involve consultation with those people who are regulated by the legislation and departments should compare implementation practices with at least two other major Member States to draw lessons on methods of implementation and enforcement. The guidance on transposition and regulatory impact assessments should be updated to reflect this recommendation.

Recommendation 15:

- a) The Government should encourage the European Commission to carry out and publish post-implementation evaluations of all significant European legislation. It should also encourage the Commission to adopt standard methodologies for assessing the benefits, costs and effectiveness of legislation, underpinned by quantitative analysis.
- b) For EU-derived legislation, the date of the post-implementation review required by UK Government policy should normally tie in with the timetable of the Commission's own review of the legislation. Departments should compare implementation practices with at least two other major Member States to draw lessons on methods of implementation and enforcement.

⁵ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1562&format=HTML&aged=0&language=EN&guiLanguage=en>

5.26 The Commission is bound by the 2003 Inter-Institutional Agreement on common guidelines for the quality of drafting of Community legislation. However, it is widely acknowledged that the EU legislative process and practice (e.g. last-minute amendments by the Council or Parliament, without risk-assessment) still leads to poorly worded or ambiguous legislation. Management of such legislation is a challenging task for national governments and regulators. The more widespread use of “transposition groups”, which are groups established by the Commission and Member States to enable officials from different Member States to exchange views during the transposition of European legislation, is a useful development which should be encouraged.

5.27 Initiatives such as the network of environmental lawyers – “NEEL”⁶ – set up by Defra during the UK Presidency, are also a very important way of developing contacts and understanding with officials in other Member States on a more long term basis. Seeing how other Member States are approaching transposition encourages a better understanding of how continental legal systems (which have significant influence on European case law) interpret European legislation.

5.28 European networks enable officials to exchange views freely about the development of Community law and the implementation of specific pieces of legislation in their field. They can provide a useful shortcut to finding out how different Member States are dealing with common problems in applying European measures and enable practical solutions to be shared.

Recommendation 16:

To help manage ambiguity in European legislation, departments should encourage the European Commission to set up transposition groups, or work with other Member States to set up networks of European lawyers. Departments’ and regulators’ websites should list the different fora for exchanging views and best-practice between Member States on implementation and enforcement issues.

Legal system, culture and management of risks

5.29 If the UK interprets directives more forcefully than other Member States then this can put UK businesses at a disadvantage. Equally, the UK should not invite infraction proceedings by the European Court of Justice for not implementing EU directives in an effective, timely and proportionate manner.

5.30 A number of stakeholders inside and outside of Government suggested that there has been a tendency among UK civil servants (policy makers and lawyers) to be risk-averse by placing too much weight to infraction risks and not enough on the risks of over-implementation. They thought that this was also reinforced by the legal system in the UK. The purposive approach to interpretation of legislation in the legal systems of other Member States was seen to be an advantage when it came to negotiating the legislation in Brussels, and interpreting the legislation more flexibly in their national legislation. As the approach to interpretation of UK legislation is to start with the natural meaning of the words rather than looking to the purpose behind the legislative provisions, UK civil servants generally tended to take a more literal approach to

⁶ NEEL was established by DEFRA lawyers in 2005 and launched with a Conference in October 2005. It has been crucial to the success of the network to involve the right people in each of the Member States and this has been achieved through policy contacts and through embassies. It has proved essential to have the six monthly plenary sessions to keep people in touch and these have been successfully embedded with each upcoming Presidency committing to hold a session.

interpretation. It was suggested that this and a preference for legal certainty led to more prescriptive and detailed legislation, sometimes with the encouragement of business, and at times an over-cautious interpretation of EU provisions.

5.31 Some stakeholders noted that, as UK courts are becoming increasingly confident in purposive interpretation of European legislation and UK lawyers are becoming more used to this approach, the situation is changing. A purposive interpretation involves an assessment of the underlying reasons and policy aims of a piece of legislation when deciding how to interpret its words and requires the words to be interpreted in line with the purpose of the legislation rather than their literal meaning where the two interpretations conflict.

5.32 The Transposition Guide makes it clear that policy-makers and lawyers need to work closely together from the earliest possible stages of European proposals and to weigh up the risks involved in the various implementation options. It says that where there is doubt about the precise legal obligation or choice about how to implement it, Ministers should be presented with options, the risks and costs and benefits attached to each. The solution chosen should 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.

5.33 The risks that need to be assessed are not purely legal risks. Nor should the risk of infringement proceedings against the UK be weighed too heavily in the balance, as sometimes happens at present. Other risks such as the damage to the competitiveness of UK businesses that may result from one possible interpretation of a provision, should be given proper weight. Assessing the risks attached to various options and knowing how other Member States are proposing to implement the measure will be particularly helpful. It is obviously essential to have properly engaged with those affected by the measure so that their view of the risks involved can be taken into account.

5.34 The review believes that the approach of balancing the risks of the various implementation options should be embedded by appropriate training for policy makers and lawyers. Furthermore, including appropriate objectives geared towards achieving better regulation in individuals' work objectives will help to incentivise officials to take the proper approach to implementation and balance the risks associated with the various options. This should help to embed culture change because their performance each year will be measured against their achievement of those objectives. The review welcomes the work of the Government Legal Service Better Regulation Group, which is already developing generic better regulation objectives that can be adapted and used by lawyers across government departments and providing helpful guidance on implementation.

Recommendation 17:

All departments should ensure that lawyers and policy officials with responsibility for implementation of European legislation:

- adhere to the Cabinet Office's Transposition Guide;
- have at least one better regulation focused work objective;
- are properly trained in the implementation of European measures;
- put different implementation options to Ministers with an assessment of the policy and legal risks associated with each option; and
- discover and understand the potential impacts on those being regulated.

Project management and communication between negotiators and implementers

5.35 At the start of the negotiation process, if enough consideration is not given to implementation and how the directive will impact on the ground, over-implementation may result. This includes not consulting stakeholders (regulators and businesses) early enough and not using their input to shape the UK's negotiating strategy.

5.36 Business also voiced concerns that legislation and guidance was often produced late, leaving them little time to prepare for implementation. The Government has committed to publishing guidance a minimum of 12 weeks before new regulations come into force. But some regulators stated that meeting this requirement is challenging when departments have not finalised the regulations.

5.37 Many respondents to the review considered that these problems can be avoided through more effective programme and project management (PPM), including better and timely communication between negotiators of directives, enforcement agencies and external stakeholders.

5.38 In theory those doing the negotiating should factor in any difficulties that may be encountered during implementation; and those doing the implementation should know what the negotiation of certain articles had been designed to achieve. In practice, the processes of negotiation and implementation have sometimes been seen as separate projects and the corporate memory of those doing the negotiating was lost once the EU had adopted the legislation. This compounds problems during transposition over how to interpret the legislation. Regulatory creep is likely to happen when there are differences and/or poor coordination between the lead department and the regulator, to the extent that gaps between the policy intention and enforcement appear.

5.39 The review notes that some departments in recent years have strengthened their project management systems in relation to the implementation of European legislation. For example, in Defra it is now mandatory to use PPM (including engagement of delivery bodies and other stakeholders) for all transposition of European legislation in the Environment Directorate-General. When such a system is also used in the negotiation of European legislation, the promotion of knowledge transfer, the pinpointing of key issues and a good record of decision making occur, all of which can aid effective implementation. Defra is seeking to strengthen and formalise partnership working by piloting the extension of PPM to negotiations.

5.40 Successful implementation requires adequate resources and staff who have the right mix of skills and expertise. Use of PPM with ownership/oversight by senior officials can also help in securing appropriate resources, thereby dealing with concerns that in departments fewer resources appear to be provided for dealing with European measures than equivalent UK legislation.

Recommendation 18:

- a) All departments should embed senior level oversight of each significant EU measure to ensure that:
- there is effective transfer of knowledge between negotiating and implementing teams;
 - the implementing process is started as early as possible and sufficiently resourced to enable guidance to be published at least 12 weeks before national implementing legislation comes into force; and
 - programme and project management techniques are used to assist in delivering these outcomes.

- b) The Government should encourage the European Commission to ensure that there is usually a gap of at least six months between the transposition deadline and the deadline for bringing European legislation in the Member States into force.

Communication with stakeholders and transparency

5.41 The review noted that a number of European governments (including Denmark, France, Netherlands and Poland) provide easily accessible, free databases of consolidated legislation on their websites. In the UK, although the Office of Public Sector Information provides access to recent UK legislation as it is enacted, there currently is no free database available of all consolidated legislation,⁷ i.e. as it is amended.

5.42 The review heard frequent complaints about the lack of access to consolidated versions of regulations implementing Community law, and lack of access to consolidated UK legislation more widely. These complaints came especially from smaller businesses, who felt that compliance with their legal obligations was made very difficult where they did not have easy access to the law as it currently stood. Their compliance costs were also increased by the need to pay for legal advice. For example, Schedule 3 of the Waste Management Licensing Regulations 1994 has been amended 23 times. A UK business might therefore need to read 24 separate statutory instruments together to understand how this aspect of waste management law currently affects them. The case studies on fisheries legislation (Chapter 3) and bovine herd registers (Chapter 4) also illustrate the problem.

5.43 The Department for Constitutional Affairs has been developing for many years a Statute Law Database (SLD). The starting point of SLD was to consolidate and publish all the statute law in force since the beginning of 1991. SLD does not carry any secondary legislation made prior to 1991 but all legislation, primary and secondary, made or enacted since 1991 (with some limited exceptions) has been loaded and new legislation is now being added soon after it is published. At present, only primary legislation is being consolidated on SLD so it excludes the majority of legislation that implements Community law. It will take until the end of 2008 for the consolidation of primary legislation to be completed. The SLD is now available to users in Government and quasi-governmental organisations. It is also being piloted for release to the public, with the aim of launching by the end of 2006. The public will have free online access to the database in the form in which it is currently available to Government users.

5.44 The body of existing secondary legislation is large, with some 12,000 pages added annually. Its complexity is made greater by the widespread practice of repeatedly amending a principal instrument without regularly consolidating it. For those reasons, the Davidson Review recognises that the task of putting all secondary legislation, with updated and amended versions, onto an accessible electronic database is a formidable one, and one that would need to be fully costed before the Government could undertake it. The review therefore recommends:

Recommendation 19:

Once the DCA's web-based Statute Law Database is publicly available (due by the end of 2006), DCA should assess the case for extending it to cover secondary legislation. In the meantime, departments responsible for secondary legislation should make greater use of consolidating instruments.

⁷The only way, currently, to access consolidated UK legislation is to take out an annual subscription to commercial services, which costs many thousands of pounds.

5.45 Some departments suggested that persuading businesses to get engaged at the early stages of EU policy proposals can be difficult. On the other hand, businesses frequently commented that they were unaware of what is coming up in the pipeline from the EU and this created uncertainty. While the EU now publishes action plans and road maps for future policy areas, these do not appear to be reaching many businesses. Improved awareness of and access to this information can help with medium to long-term planning by businesses and other stakeholders, as well as helping to ensure effective engagement at the right stages of EU and UK policy development.

Recommendation 20:

The Government should encourage the European Commission to publicise its action plans and road maps more effectively so that they reach a wider range of stakeholders.

5.46 The case studies on waste and food hygiene in Chapter 4 illustrate the importance of clear, accessible and timely guidance in preventing regulatory creep. The Cabinet Office and the Small Business Service (SBS) have produced advice to departments and regulators on drafting guidance.⁸ This advice includes the importance of drawing a distinction between best practice guidance and guidance that must be followed in order to comply with the regulations. The review believes that more needs to be done by departments and regulators to ensure that this advice is uniformly applied in practice.

Recommendation 21:

All departments and regulators should adhere to the advice provided by the Small Business Service and Cabinet Office on drafting guidance.

5.47 **To deliver the recommendations in this report, Government departments, regulators, the Better Regulation Executive and external stakeholders will need to work together. The specific proposals to reduce burdens in the stock of legislation and policies to improve further the implementation process in the future will strengthen the competitive position of the UK economy while maintaining necessary regulatory protections. Many of the recommendations in this report will require a continuing commitment to reform and the review hopes that the Government will regularly report on progress.**

⁸ *Getting your message across: Advice on drafting guidance*, SBS and Cabinet Office, 2005.



List of recommendations

RECOMMENDATIONS FOR REDUCING UNNECESSARY BURDENS IN THE STOCK OF LEGISLATION

1. Insurance Mediation Directive

The Financial Services Authority should take the following steps by July 2008:

- a) Simplify rules on product disclosure and reduce the amount of information that insurance intermediaries are required to provide to their customers when selling lower risk products; no longer require Distance Marketing Directive disclosure for face to face sales.
- b) Remove the requirement for insurers to check that each intermediary in the supply chain is authorised.
- c) Cut down the amount of data required by the Retail Mediation Activities Return.
- d) Reduce and simplify the client money rules.
- e) Cut prescriptive rules which overlay principles and are not required by the Insurance Mediation Directive or Distance Marketing Directive back to principles only e.g. on training and competence of staff.

The Treasury should by the end of 2007:

- f) Consult on reducing the scope of activities caught by the insurance mediation regime to exclude freight forwarders and others from Financial Services Authority regulation.

2. MOT testing

The Department for Transport (DfT) should review the evidence base for the UK's MOT testing regime and publish its analysis of the costs and benefits of the current regime. By Spring 2007, DfT should consult on a move towards the European minimum standards.

3. Animal Scientific Procedures

- a) The administration of the personal licensing system should be revised to ensure the processing of applications for personal licences with the minimum of delay. While maintaining standards, applications from undergraduates, industrial placement students and overseas visitors, who are carrying out procedures for less than three months, should be fast-tracked upon receipt by the Home Office.
- b) Home Office should fundamentally review the amount of detailed information in applications for personal and project licences. A working group should draw up a national list of agreed wordings for personal licences covering common techniques on common species, by the end of 2007. Another working group should aim to reduce the level of detail provided in project licence applications by at least 25% by the end of 2007, but not in a way that would risk animal welfare.

- c) When considering proposals for legislative change to implement the revised Directive 86/609/EEC the Home Office should consult on delegating authorisation for amendments to mild or unclassified procedures to establishment level, with the outcomes audited by the Animal (Scientific Procedures) Inspectorate.
- d) By the end of 2007, Home Office should consult on simplifying the content of the current statistical returns form, keeping the frequency unchanged, and only retain the information requirements that go beyond those in the European Directive if the benefits of doing so justify the costs.

All of these issues and processes should be overseen and managed within the framework for implementation of the Home Office Simplification Plan, and in particular should be informed by the active participation of operational level practitioners from both industry and academia; licence holders and named persons; and, to further ensure that the protection of animals is not compromised, those with a special interest in animal welfare.

4. Close Links

- a) The Financial Services Authority should amend its rules so that temporarily held trading positions are not required to be disclosed as a close link, by April 2008.
- b) The Financial Services Authority should amend its rules on when close links are required to be notified post-authorisation so that some categories of close links, where no concern arises and where they can be specified on a non-discriminatory basis, do not have to be disclosed, by April 2008.
- c) The Treasury should review the application of the threshold condition on close links to regulated activities where no directive requires notification of close links, by April 2008.

5. Consumer Sales Directive

DTI should implement a simplified system of consumer remedies by the end of 2009 unless, following informal stakeholder consultation, there is a clear preference for deferring reform in this area until measures arising out of the review of the consumer acquis by the EU Commission are implemented. Subject to that consultation, DTI should ask the English and Scottish Law Commissions to produce a joint report by the end of 2008 on the reform and simplification of remedies available to consumers relating to the sale or supply of goods.

6. Fisheries

Defra should:

- a) aim to achieve as much consolidation of primary fisheries and marine legislation as possible with the Marine Bill, taking into account responses to the second round of consultation. Redundant provisions in existing Acts should be repealed;
- b) actively manage the development of the Marine Bill in a manner that minimises the risk of double-banking occurring once it and proposed EC Marine and Maritime measures are adopted. This management strategy should be set out in the second round Marine Bill consultation document; and
- c) formally consult the fishing industry by mid 2008 on the effectiveness of the “Plain English Guidance Notes” and on the option to develop a resource similar to the “Whole

Farm Approach” that enables users to access guidance tailored to their individual activities and to record and report information necessary to discharge their duties electronically.

7. Waste and other regulatory regimes

- a) Defra and DCLG should move quickly to incorporate the final outcomes of their planning and pollution control interface review into the environmental permit and planning systems, as appropriate, after the proposed outcomes have been subject to a final, quantitative regulatory impact assessment.
- b) Defra and the EA should conduct a full review of the regulation of inert waste with the aim of adopting a more proportionate and risk-based regulatory landscape. As part of this review, stakeholders should be formally consulted by the end of 2007 on options for reform. The review should, as a minimum, cover the following issues:
 - the appropriate use of inert waste exemptions in EC legislation;
 - the creation of a more level playing field between different activities involving inert waste (proportionate to the risk posed) – this should also be considered as part of Defra’s forthcoming waste management licence exemption review;
 - how implementation of the waste acceptance criteria might be made more efficient;
 - inconsistencies with the landfill tax regime; and
 - the quality of guidance (see also recommendation 8), including the issue of when an activity should be classified as recovery or disposal.

8. Waste Framework Directive

- a) Defra and the Environment Agency should publish for stakeholder consultation draft updated guidance on waste, including on its definition, by the end of 2006 or by the time the European Commission publishes its guidance on by-products, whichever is the later. Once adopted, it should be updated as necessary.
- b) The guidance should adopt a purposive, risk-based approach and utilise criteria of a similar style to those adopted by the Dutch to help businesses and regulators decide when a substance is a product or by-product. The guidance should be clear, concise and make use of examples to aid understanding.
- c) The Environment Agency should make its waste classification decisions using a purposive, risk-based approach and on a case by case basis.
- d) For UK end-of-waste protocols still to be finalised or developed, the costs and benefits of the UK adopting them in advance of European criteria should be taken into account and communicated to stakeholders, bearing in mind the risk that the EU criteria may differ.
- e) Defra should, while taking into account the responses to its proposed consultation on waste management licence exemptions, ensure that if an activity falls within the scope of Article 11 of the Waste Framework Directive and any risk it poses can be mitigated by the adoption of general rules then it should be formally exempted.

9. Food hygiene training for food handlers

- a) The Food Standards Agency should write to heads of enforcement at all local authorities reminding them that food handlers' attendance at formal training courses is not a legal requirement and that there are alternative routes available to food business operators to comply with the legislative requirements. The Food Standards Agency should encourage local authorities to review and, if necessary, update any guidance material for food businesses, including that placed on their websites concerning training requirements for food handlers.
- b) The Food Standards Agency, while working with industry on updating the Industry Guides to Good Hygiene Practice published since 1997, should ensure that advice on the training requirements for food handlers in Regulation 852/2004 better reflects the flexibility in the Regulation, and that advice on compliance and advice on good practice in this regard are clearly distinguished.

10. Road haulage operator licensing

The Department for Transport, together with the Traffic Commissioners, should review their interpretation of the proof of financial standing as set out in the EU Directive and identify any unnecessary regulatory burdens on business. The Traffic Commissioners should then consult on revised guidance on financial standing criteria by the end of 2007. Such a review will need to consider any proposals to amend the financial standing requirements in the European Directive which may be put forward following the European Commission's recent consultation.

RECOMMENDATIONS FOR BEST-PRACTICE IMPLEMENTATION OF EUROPEAN LEGISLATION IN THE FUTURE

11. Pre-existing national standards

The definition of gold-plating in the Cabinet Office's Transposition Guide should be extended to include situations where existing UK legislation contains higher standards than a European measure. Higher national standards should only be retained if it can be demonstrated, after consultation with stakeholders, that the benefits of doing so justify the costs.

12. Coherence between domestic and European legislation

To avoid double-banking, departments should review all related existing UK legislation well before transposition. Departments should create one coherent regulatory scheme where possible, either by amending the existing legislation or repealing it and starting afresh with a new regime. The Transposition Guide should be updated to reflect this recommendation.

13. Transposition methods

The Cabinet Office's Transposition Guide should be amended to require active consideration of whether copy-out, elaboration or a mixture of transposition methods is appropriate, having regard to the impact on those being regulated and the fit of the legislation in its domestic context.

14. Pre-empting upcoming European legislation

Unless simplifying or reducing regulatory burdens, departments should not generally pre-empt upcoming European legislation by legislating in the same area. The Transposition Guide should be updated to reflect this recommendation.

15. Post-implementation reviews in Europe and the UK

- a) The Government should encourage the European Commission to carry out and publish post-implementation evaluations of all significant European legislation. It should also encourage the Commission to adopt standard methodologies for assessing the benefits, costs and effectiveness of legislation, underpinned by quantitative analysis.
- b) For EU-derived legislation, the date of the post-implementation review required by UK Government policy should normally tie in with the timetable of the Commission's own review of the legislation. Departments should compare implementation practices with at least two other major Member States to draw lessons on methods of implementation and enforcement.

16. Managing ambiguity in European legislation

To help manage ambiguity in European legislation, departments should encourage the European Commission to set up transposition groups, or work with other Member States to set up networks of European lawyers. Departments' and regulators' websites should list the different fora for exchanging views and best-practice between Member States on implementation and enforcement issues.

17. Better regulation training and work objectives for policy makers and lawyers

All departments should ensure that lawyers and policy officials with responsibility for implementation of European legislation:

- adhere to the Cabinet Office's Transposition Guide;
- have at least one better regulation focused work objective;
- are properly trained in the implementation of European measures;
- put different implementation options to Ministers with an assessment of the policy and legal risks associated with each option; and
- discover and understand the potential impacts on those being regulated.

18. Joining up negotiation and implementation; timely implementation

- a) All departments should embed senior level oversight of each significant EU measure to ensure that:
 - there is effective transfer of knowledge between negotiating and implementing teams;

- the implementing process is started as early as possible and sufficiently resourced to enable guidance to be published at least 12 weeks before national implementing legislation comes into force; and
 - programme and project management techniques are used to assist in delivering these outcomes.
- b) The Government should encourage the European Commission to ensure that there is usually a gap of at least six months between the transposition deadline and the deadline for bringing European legislation into force in the Member States.

19. Statute Law Database

Once the DCA's web-based Statute Law Database is publicly available (due by the end of 2006), DCA should assess the case for extending it to cover secondary legislation. In the meantime, departments responsible for secondary legislation should make greater use of consolidating instruments.

20. Communication from the European Commission

The Government should encourage the European Commission to publicise its action plans and road maps more effectively so that they reach a wider range of stakeholders.

21. Guidance

All departments and regulators should adhere to the advice provided by the Small Business Service and Cabinet Office on drafting guidance.

B

Further case studies and background information

This annex includes a few small case studies to further illustrate justified over-implementation, best practice implementation or action being taken by departments to reduce burdens. It also provides some background information to some of the case studies presented in the main report and some updates on issues covered in the Summary of Responses of the review.

- B.1 developments since publication of the “Summary of responses to call for evidence”;
- B.2 the Artist’s Resale Rights Directive;
- B.3 the Prospectus Directive;
- B.4 health and safety legislation and the self-employed;
- B.5 further information on the Insurance Mediation Directive;
- B.6 further information on the fisheries case study; and
- B.7 further information on the Waste Framework Directive case study.

B.1 Developments since publication of the “Summary of responses to call for evidence”

The Davidson Review’s call for evidence ran from 3 March to 25 May 2006. A summary of the responses to the call for evidence was published in July 2006.¹ Annex A of that report included a number of specific European legislative instruments that respondents suggested might have been over-implemented in the UK, and the relevant government department or regulator’s initial responses to these suggestions.

Since July, the review has worked with government departments and external stakeholders to investigate a number of case studies of potential over-implementation in detail and these have been presented in chapters 2 to 4 of this final report. The remaining allegations of potential over-implementation were passed on to the relevant government departments and regulators to take forward where appropriate. This section provides a brief update on some of the developments since then.

B.1.1 Farming Regulations

Defra has informed the review that it will adopt legislation amending and consolidating the Cattle Identification Regulations 1998 in April 2007. This will include new measures for dealing with late passport applications for calves (see the entry at page 60 of the Summary of Responses).

There are also European-level developments in relation to measures that were initially enacted to help manage the BSE crisis. The European Commission recognises that there has been a decline in the number of BSE cases in the EU due to control measures taken. It is currently reviewing

¹ http://www.cabinetoffice.gov.uk/regulation/reviewing_regulations/davidson_review

Transmissible Spongiform Encephalopathy (TSE) regulations and considering options further to the lifting of the ban on exporting cattle and bovine products from the UK (which came about in May 2006). Defra has informed the review that it will be working with the Commission to explore the extent to which better regulation can be delivered in the new climate while continuing to protect human health.

The European Commission is also currently reviewing the Animal By-Products Regulation with a view to removing disproportionate provisions, clarifying its scope and requirements to avoid duplication with other legislation and to introduce some flexibility into control measures. Again, Defra has informed the review that it is actively engaged in consultation with the Commission in relation to this work.

B.1.2 Air Quality Strategy

Further to page 57 of the Summary of Responses, Defra has informed the review that it received around 150 responses to its air quality strategy consultation. Work is nearing completion on taking all the comments into account and on providing more evidence on areas of debate. Publication of a new air quality strategy is envisaged for spring 2007.

B.1.3 Money laundering regulations

Since July there have been several important initiatives aimed at reducing the burdens imposed on business and customers by the rules on detection and reporting of money laundering. HM Treasury have also carried out public consultation on their proposals for implementation of the Third Money Laundering Directive.²

At the beginning of September the Financial Services Authority's changes to their Handbook came into effect. They replaced their detailed Money Laundering Sourcebook with high-level provisions in their Senior Management Arrangements, Systems and Controls Sourcebook. The new regime puts more emphasis on firms taking a risk-based approach and on the importance of senior management engaging with anti-money laundering issues. At the same time a new edition of the Joint Money Laundering Steering Group Guidance was adopted to ensure that industry and regulatory approaches to money laundering are well aligned.

The Financial Services Authority has also been working with industry to clarify their supervisory expectations and to ensure that a risk-based approach to regulation works in practice and is clearly understood by firms that they regulate. As part of this process Financial Services Authority staff, particularly supervisors, have been taking part in a substantial re-training programme to reflect the evolution of thinking on how best to fight financial crime.

The Financial Services Authority has also made some progress on improving the part of the money laundering regime which deals with identification of customers. They have stated, in their published guidance to supervisors, that they should take advantage of the flexibility in the regime to ensure that the ability to provide identification documents does not act as a significant barrier to financial inclusion. They are taking steps to explain to customers the reasons for identification checks and to give advice to those having difficulty proving their identity.

² Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. OJ L 309, 25.11.2005, p. 15.

HM Treasury's consultation paper on implementing the Third Money Laundering Directive (published in July 2006) states that it is the Government's intention to, unless the consultation responses provide a convincing reason not to, take advantage of all available derogations in the Directive at an estimated saving of up to £28 million. They are working with the Money Laundering Advisory Committee and the Financial Services Authority to simplify implementation of identification requirements across all sectors. They also highlight that the Directive itself contains some simplification measures as it promotes a risk-based approach to both the customer due diligence measures and the monitoring requirements. This over time should produce cost efficiencies in terms of firms and supervisors targeting their resources at areas of higher risk and away from areas of lower risk.

B.2 The Artist's Resale Right Directive (2001/84/EC)

The purpose of the Artist's Resale Right Directive was to reduce distortions in competition resulting from the fact that the right of artists to receive a royalty on the resale of their works existed in only some Member States. The Directive therefore required Member States to give artists the right to receive such royalties in certain specified circumstances.

In implementing the Directive the Patent Office decided to go beyond the strict minimum required in two respects –

- A minimum price threshold of €1,000 was selected, which is less than the €3,000 required by the Directive;
- The liability to pay the resale right was imposed on both the art-market professional involved in the sale of the work and the seller of the work, they were made jointly and severally liable under the UK regulations, whereas the Directive permitted Member States to impose liability on either one party or the other.

The decision to over-implement this Directive was a conscious policy choice taken following extensive consultation with the industry and after the results of an independent study, commissioned by the Patent Office to look at the likely impact of the new right in the UK, had been considered.

Clearly not all of those consulted were in favour of the policy route chosen for this implementation and as the regulations implementing the Directive³ only came into force on 14th February 2006. It is too soon to judge whether the assessments of the impact of the measure on the UK art market were correct. The creation of a new intellectual property right for artists was a reasonably controversial step and the policy choices surrounding that new right, quite legitimately, received close public scrutiny.

This implementation is instructive as the Patent Office followed Cabinet Office guidance and this process enabled stakeholders to see why this particular way of implementing was chosen. In the consultation paper, regulatory impact assessment and explanatory memorandum to Parliament, there was an assessment of the impact that these regulatory burdens could potentially have on the UK art market and the participants within that market. There was transparency in setting out the options for implementation and the costs and benefits associated with the various policy options which were considered in the light of the evidence from research commissioned by the Patent Office and from the consultation responses.

³ The Artist's Resale Right Regulations 2006 (S.I. 2006/346).

B.3 The Prospectus Directive (2003/71/EC)

The review asked for evidence of examples of best-practice in the implementation of European legislation and for examples of where over-implementation by the UK was largely supported by the industry. The Prospectus Directive was put forward as an example of best-practice in several responses. The Directive was implemented by the Prospectus Regulations 2005 (S.I. 2005/1433) which amended Part 6 of the Financial Services and Markets Act 2000.

The Prospectus Directive was a maximum harmonisation directive and so did not afford large amounts of discretion to the UK in its implementation. However, it did contain several options to impose extra requirements, the majority of which the UK took up and was supported by business. There was also language in the Directive which was deliberately vague in order to accommodate the different views of Member States. Although the implementing regulations used the technique of copying out the wording in the Directive for the majority of the provisions. In some important instances business required greater clarity and therefore the language was elaborated. This elaboration was regarded as helpful by the responses received – particularly in relation to what is meant by “an offer to the public”.

Representatives of the financial services industry commented both in their written submissions and in meetings with the review team that the Directive was a good example of the Treasury and Financial Services Authority engaging with business early on in the process, listening to their views and taking sensible decisions to maintain higher UK standards where appropriate. They said that the benefits of the extra burdens – a combination of consumer protection and financial stability – clearly exceeded their costs, and that they supported the decision to gold-plate in this instance.

B.4 Case Study: health and safety legislation and the self-employed

The issue

During the Davidson Review’s “call for evidence” a number of responses highlighted that there may on occasion be good reasons to over-implement EU legislation. These reasons included a recognition that the EU may not always set the most appropriate level of regulation; that higher standards may be necessary to ensure consistency with domestic legislation and that over-implementation can help to achieve a level playing field between UK business. The UK’s decision to exceed the minimum requirements of a number of EC Directives on health safety by extending their scope to include the self-employed is an example of gold-plating that has been justified in these terms.

European legal background

Following the 1986 Single European Act, there was a significant increase in the amount of European legislation on health and safety. Between 1984 and 1993 more than half of the health and safety regulations laid before Parliament were European in origin. One example was the new Framework Directive on Health and Safety (89/391/EC), which was designed to put in place a consistent structure of Community law on health and safety across all Member States. Its daughter directives include the Display Screen Equipment Directive (90/270/EC), Temporary Work at Heights Directive (2001/45/EC), and the Physical Agents (Vibration) Directive (2002/44/EC).

These directives are structured on the basis of employers’ obligations to workers. For example, the duty to take measures to prevent or reduce risks to their health and safety at work. A worker is defined as “any person employed by an employer, including trainees and apprentices but excluding

domestic servants”. The self-employed are excluded from the scope of the directives due to the treaty base under which European health and safety legislation is made. In 2003, the Council did adopt a Recommendation (2003/134/EC) on the improvement of the protection of health and safety of self-employed workers, but Recommendations do not have any legal force.

UK regulatory framework

By contrast, the UK regulatory framework for health and safety, in particular the 1974 Health and Safety at Work Act, places general duties on everyone “at work”, including the self-employed: on employers towards employees and third parties, and employees to themselves and each other. For example, Part 1, Section 3 of the Act covers the general duties of employers and the self-employed to persons other than their employees and states that, “It shall be the duty of every self-employed person to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that he and other persons (not being his employees) who may be affected thereby are not thereby exposed to risks to their health and safety”.

The UK regulations that transpose these EU directives on health and safety gold-plate their requirements in a number of ways with regards to the self-employed, a few of which are outlined below. The Management of Health and Safety at Work Regulations 1999 implement the Framework Directive.⁴ Regulation 3(2) requires every self-employed person to make an assessment of the risks to his own health and safety at work, and the risk to the health and safety of others arising from his work. Other requirements that apply to the self-employed include the requirement to co-operate on health and safety issues where two or more employers share a workplace.

The Control of Vibrations at Work Regulations 2005 implement the 2002 Physical Agents (Vibration) Directive. Under the regulations the self-employed have to carry out and record a risk assessment on the level of vibration, and reduce vibration as far as reasonably practicable; and comply with exposure limits set out in the regulations. Under Regulation 3(3) of the 2005 Work at Height Regulations, many of the duties imposed by the directive on an employer are extended to the self-employed. These include the duty to plan and supervise work at height appropriately, provide appropriate safety equipment and avoid, so far as reasonably practicable, people falling from height.

Is the over-implementation justified?

The range of employment undertaken by the self-employed varies in work that would be categorised as high risk, such as farming or construction, to low risk, such as office-based consultancy work. In view of the differences across the sector would an approach that focused more on risks and the exposure of third parties to risk through their work be more appropriate?

There are currently around 3.8 million self-employed persons in the UK, up from 2 million in 1974.⁵ However, while the over-implementation may affect a large number of people on paper, the extra costs imposed may be fairly low for the following reasons. Firstly, the self-employed are not required to meet the full requirements of the regulations in terms of record-keeping and documentation. For example, under the Work at Height Regulations, self-employed persons would have to carry out a risk assessment but only employers with five or more employees have to record their findings. And secondly, because self-employed persons bid for work from larger organisations,

⁴ The 1999 Management of Health and Safety at Work Regulations 1999 replace the 1992 implementing regulations.

⁵ <http://www.hse.gov.uk/statistics/employment/index.htm>

they are often required to provide details of risk assessments, method statements and health and safety policies in any case to satisfy the larger organisation's health and safety policy.

In terms of any potential competitive disadvantage, the application of health and safety legislation to the self-employed varies across the EU. In some Member States such as Denmark, the self-employed (defined as companies with no employees) have to comply with parts of health and safety legislation, e.g. requirements relating to the handling of chemicals or drugs, and the requirement between employers sharing the same workplace to cooperate. In the Netherlands, a limited number of regulations on health and safety currently apply to the self-employed, although the Dutch Government is committed to increasing their application, on the grounds that the same level of protection should be extended to all workers at places of work where there are serious dangers. Other Member States where provisions have been extended to include the self-employed include Spain and Ireland.

Views of stakeholders

The factors outlined above may explain why business representative bodies, contacted by the review, were relatively unconcerned by the over-implementation. The Federation of Small Businesses considered that it was a good discipline for the self-employed to get into the habit of thinking about health and safety risk assessments to improve their attractiveness to potential employers and facilitate the growth of their businesses. The CBI felt that including the self-employed would help achieve consistency in the obligations of large employers to micro-businesses; and would ensure that all those involved at a workplace would have a mutual consideration of good health and safety practice. The Professional Contractors Group, which represents freelance contractors, following a discussion with members, concluded that "this particular piece of gold-plating is not overly burdensome." Finally the Federation of Window Cleaners felt that the over-implementation was necessary to ensure a level-playing field for SMEs.

The Health and Safety Executive (HSE) explained that the decision to extend the provisions to cover the self-employed was broadly risk-based, and not just taken to achieve consistency with the 1974 Health and Safety at Work Act. For example, the Display Screen Equipment Regulations did not place any duties on the self-employed, on the ground that there were no risks to third parties. The scope of other implementing regulations was extended to provide equity of protection to those affected by the work of a self-employed person, as well as equity of protection to the self-employed. From 2004-05 the self-employed suffered 51 fatalities at work, including 26 in agriculture, hunting, forestry and fishing and 15 in construction. Finally, the employment status of workers was very changeable, depending on whether or not they worked under the direction of someone else. In construction, a worker could be self-employed one day and employed on a building site the next. The gold-plating helped to ensure that the guidance on the scope of the UK and European legislation remained relatively simple.

Conclusions

The extension of provisions in EU legislation to cover the self-employed does constitute gold-plating, albeit gold-plating about which stakeholders would appear to be relatively unconcerned. Going forward, when implementing EC directives, the HSE should continue to consult on whether it is appropriate to extend their scope to the self-employed, and ensure that the benefits justify the costs. In low-risk sectors, the HSE should consider exempting the self-employed from the legislation.

B.5 Further information on the Insurance Mediation Directive

Supervision by other Member States

The authorities responsible for supervision of insurance mediation in each Member State take very different approaches to their role. Whilst some are quite similar to the UK in that they operate in a proactive inspection regime and investigate compliance with the rules on a regular basis, some will only investigate where specific problems are raised by consumers.

The following six countries are either not very proactive or not proactive at all in investigating firms for breaches of the Insurance Mediation Directive: Germany, Sweden, Finland, Belgium, Spain and Denmark. In Germany there is no regular system of supervision but they inspect when they receive a tip-off from any interested party that there may be a compliance issue. The same basic approach is followed in Sweden and Finland with their supervision being essentially reactive. In Belgium and Spain there is a low level proactive approach with the power for the regulatory authority to investigate at their own instigation being exercised only rarely and most investigations arising out of client complaints. In Denmark there are no regular inspections or investigations of insurance mediators and where breaches are found the sanction tends to be a warning or a fine rather than any threat of removal of their licence.

In some other countries supervision is more in line with how the Financial Services Authority operates: France, Estonia, Latvia and Lithuania. These four countries all conduct regular inspections of insurance mediators to ensure compliance with their rules regardless of whether there are any suspected breaches or not.

Dates of implementation by other Member States

The deadline for implementation of the IMD was 15th January 2005. There were several Member States who did not manage to implement by the due date and some who have still not transposed the requirements into their national law. The Commission is now carrying out a comprehensive review of the transposition by all Member States to see if the Directive has been properly implemented and will consider whether to issue infringement proceedings against any states.

The following countries implemented the IMD by the due date: Austria, Czech Republic, Denmark, Estonia, Ireland and the UK. The remainder, except Germany, have all now notified the Commission that the IMD has been transposed into their national law. However there were a significant number of very late implementations which, no doubt, contributed to the perception that IMD implementation was having a larger impact on intermediaries in the UK than in other Member States.

Instruments implementing the Directive in the UK

As financial services are a matter that is reserved to the UK Parliament under the devolution settlements the implementation applies to the whole of the UK.

Two statutory instruments were made to implement this Directive. Firstly the FSMA 2000 (Regulated Activities) (Amendment) (No. 2) Order 2003 (S.I. 2003/1476) amended the Regulated Activities Order to designate insurance mediation activities as regulated activities. It also makes provision for appointed representatives and members of a designated professional body to carry on insurance mediation activities without being authorised persons. This order also amends FSMA itself and legislation made under FSMA to include provision for the new regulated activity.

Secondly the Insurance Mediation Directive (Miscellaneous Amendments) Regulations 2003 (S.I. 2003/1473) made further amendments to FSMA related legislation and to FSMA itself. Its main focus was on passporting rights.

The remainder of the IMD was implemented through Financial Services Authority rules. The rules which apply to insurance intermediaries can be found in the following sections of the Financial Services Authority handbook:

SUP (supervisory requirements), ICOB (insurance conduct of business), PRIN (principles), SYSC (systems and controls), COND (minimum standards for authorisation), APER and FIT (approved persons), PRU (financial safeguards), TC (training for staff), CASS (holding client money), FEES (fees for Financial Services Compensation Scheme, Financial Ombudsman Service and the FSA), DISP (dispute resolution) and ECO (e-commerce).

The Financial Services Authority Client Money Rules

The Client Money rules (CASS) which the Financial Services Authority have imposed require more than the IMD in the following ways:

- they set out the express terms that an agency agreement between an insurance intermediary and an insurer must contain CASS 5.2.3;
- they require a firm who is to hold money as agent for an insurer to inform its effected clients about the agency;
- by imposing conditions, such as minimum capital requirements, on the use of a non-statutory trust for client money CASS 5.4.4;
- by specifying the contents of the trust deed on which the firm must accept client money if it opts to use a non-statutory trust;
- they include very prescriptive rules on segregation of client money (CASS 5.5.1 – 5.5.15). Some but not all of these are necessary to implement the directive;
- by including rules on withdrawal of commission from bank accounts;
- they require a mediator to ensure that it holds in its client bank account an amount equal to that which it reasonably estimates is held by its appointed representatives and other agents;
- by setting out detailed and prescriptive rules covering what would be covered by the intermediary's fiduciary duty regarding: interest payable on client money, transfer of money to a third party, client bank accounts;
- by including detailed rules on reconciliation calculations and their timing (CASS 5.5.63 & 64);
- by including detailed rules which apply where a firm has a mandate from a client to control their assets or liabilities; and
- by imposing through the rules a duty to keep safe any property of the client that they are entrusted with.

B.6 Background information on the fisheries case study

B.6.1. EC Fishing Regulations (not including those pertaining to aquaculture, processing and marketing) adopted in 2005⁶

EC Regulation Title	Regulation Number
Council Regulation of 21 December 2005 for the conservation of fishery resources through technical measures in the Baltic Sea, the Belts and the Sound, amending Regulation (EC) No 1434/98 and repealing Regulation (EC) No 88/98	2187/2005
Commission Regulation of 23 December 2005 fixing the standard values to be used in calculating the financial compensation and the advance pertaining thereto in respect of fishery products withdrawn from the market during the 2006 fishing year	2181/2005
Commission Regulation of 23 December 2005 fixing the amount of private storage aid for certain fishery products in the 2006 fishing year	2180/2005
Commission Regulation of 23 December 2005 fixing the amount of the carry-over aid and the flat-rate aid for certain fishery products for the 2006 fishing year	2179/2005
Commission Regulation of 23 December 2005 fixing the reference prices for certain fishery products for the 2006 fishing year	2178/2005
Commission Regulation of 23 December 2005 fixing the Community selling prices for the fishery products listed in Annex II to Council Regulation (EC) No 104/2000 for the 2006 fishing year	2177/2005
Commission Regulation of 23 December 2005 fixing the Community withdrawal and selling prices for the fishery products listed in Annex I to Council Regulation (EC) No 104/2000 for the 2006 fishing year	2176/2005
Council Regulation of 20 December 2005 establishing measures for the recovery of the Southern hake and Norway lobster stocks in the Cantabrian Sea and Western Iberian peninsula and amending Regulation (EC) No 850/98 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms	2166/2005
Council Regulation of 20 December 2005 establishing a recovery plan for Greenland halibut in the framework of the Northwest Atlantic Fisheries Organisation	2115/2005
Council Regulation of 21 November 2005 amending Regulation (EC) No 27/2005, as concerns herring, Greenland halibut and octopus	1936/2005
Council Regulation of 6 October 2005 on the conclusion of the Protocol setting out the fishing opportunities and financial contribution provided for in the Agreement between the European Economic Community and the Islamic Federal Republic of the Comoros on fishing off the Comoros for the period from 1 January 2005 to 31 December 2010	1660/2005

⁶ This list was compiled by the review after only a cursory search and should not be taken to be comprehensive.

Commission Regulation of 27 September 2005 correcting Regulation (EC) No 2104/2004 laying down detailed implementing rules for Council Regulation (EC) No 639/2004 on the management of fishing fleets registered in the Community outermost regions	1570/2005
Council Regulation of 20 September 2005 amending Regulation (EC) No 850/98 as regards the protection of deep-water coral reefs from the effects of fishing in certain areas of the Atlantic Ocean	1568/2005
Commission Regulation of 22 September 2005 extending the emergency measures for the protection and recovery of the anchovy stock in ICES sub-area VIII	1539/2005
Council Regulation of 3 August 2005 amending Regulation (EC) No 27/2005, as concerns herring, mackerel, horse mackerel, sole and vessels engaged in illegal fisheries	1300/2005
Commission Regulation of 15 July 2005 prohibiting fishing for sandeel with certain fishing gears in the North Sea and the Skagerrak	1147/2005
Commission Regulation of 1 July 2005 establishing emergency measures for the protection and recovery of the anchovy stock in ICES Sub-area VIII	1037/2005
Commission Regulation of 30 June 2005 amending Regulation (EC) No 628/2005 imposing a provisional anti-dumping duty on imports of farmed salmon originating in Norway	1010/2005
Council Regulation of 27 June 2005 amending Regulation (EC) No 1255/96 temporarily suspending the autonomous common customs tariff duties on certain industrial, agricultural and fishery products	989/2005
Council Regulation of 21 June 2005 relating to the conclusion of the Protocol setting out, for the period from 1 July 2004 to 30 June 2007, the fishing opportunities and financial contribution provided for in the Agreement between the European Economic Community and the Republic of Côte d'Ivoire on fishing off the coast of Côte d'Ivoire	953/2005
Council Regulation of 13 June 2005 amending Regulation (EC) No 827/2004 as regards the prohibition of imports of Atlantic bigeye tuna from Cambodia, Equatorial Guinea and Sierra Leone, and repealing Regulation (EC) No 826/2004 prohibiting imports of blue-fin tuna from Equatorial Guinea and Sierra Leone and Regulation (EC) No 828/2004 prohibiting imports of swordfish from Sierra Leone	919/2005
Council Regulation of 30 May 2005 amending Regulation (EC) No 27/2005, as concerns fishing opportunities in Greenland, Faroese and Icelandic waters and fishing for cod in the North Sea, and amending Regulation (EC) No 2270/2004, as concerns fishing opportunities for deep-sea sharks and roundnose grenadier	860/2005
Commission Regulation of 25 May 2005 amending Council Regulation (EC) No 2406/96 laying down common marketing standards for certain fishery products	790/2005
Commission Regulation of 19 May 2005 adapting certain fish quotas for 2005 pursuant to Council Regulation (EC) No 847/96 introducing additional conditions for year-to-year management of TACs and quotas	776/2005

Council Regulation of 26 April 2005 establishing a Community Fisheries Control Agency and amending Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy	768/2005
Commission Regulation of 22 April 2005 imposing a provisional anti-dumping duty on imports of farmed salmon originating in Norway	628/2005
Commission Regulation of 22 April 2005 revoking Regulation (EC) No 206/2005 imposing definitive safeguard measures against imports of farmed salmon	627/2005
Commission Regulation of 14 April 2005 amending Regulation (EC) No 206/2005 imposing definitive safeguard measures against imports of farmed salmon	580/2005
Council Regulation of 17 February 2005 on the conclusion of the Protocol defining for the period 1 January 2004 to 31 December 2006 the tuna fishing opportunities and the financial contribution provided for in the Agreement between the European Economic Community and the Democratic Republic of Madagascar on fishing off Madagascar	555/2005
Council Regulation of 16 March 2005 amending Regulation (EC) No 2792/1999 as regards a specific action for transfers of vessels to countries hit by the tsunami in 2004	485/2005
Commission Regulation of 15 March 2005 amending Council Regulation (EEC) No 3880/91 on the submission of nominal catch statistics by Member States fishing in the north-east Atlantic	448/2005
Commission Regulation (EC) No of 1 March 2005 laying down detailed rules for the marking and identification of passive fishing gear and beam trawls	356/2005
Council Regulation of 17 February 2005 amending Regulation (EC) No 88/98 as regards the extension of the trawling ban to Polish waters	289/2005
Commission Regulation of 4 February 2005 imposing definitive safeguard measures against imports of farmed salmon	206/2005
Council Regulation of 18 January 2005 on the conclusion of the Agreement in the form of an Exchange of Letters concerning the extension of the Protocol setting out the fishing opportunities and financial contribution provided for in the Agreement between the European Economic Community and the Islamic Federal Republic of The Comoros on fishing off The Comoros for the period from 28 February 2004 to 31 December 2004	172/2005
Council Regulation of 22 December 2004 fixing for 2005 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required	27/2005

B.6.2. Fisheries-focused Acts of Parliament which are Totally or Partially in Force⁷

Name of Act of Parliament	Year
Sea Fisheries (Shellfish) (Amendment) Act	1997
Sea Fish (Conservation) Act	1992
Sea Fisheries (Wildlife Conservation) Act	1992
Salmon Act	1986
Diseases of Fish Act	1983
Fisheries Act	1981
Import of Live Fish (England and Wales) Act	1980
Fishery Limits Act	1976
Salmon and Freshwater Fisheries Act	1975
Sea Fisheries (Shellfish) Act	1973
Sea Fish Industry Act	1970
Sea Fisheries Act	1968
Sea Fish (Conservation) Act	1967
Sea Fisheries (Shellfish) Act	1967
Sea Fisheries Regulation Act	1966
Fishery Limits Act	1964
Sea Fish Industry Act	1962
Fisheries Act	1955
Sea Fish Industry Act	1951
Sea Fish Industry Act	1938
Diseases of Fish Act	1937
Whaling Industry (Regulation) Act	1934
Seal Fisheries (North Pacific) Act	1912
Sea Fisheries (North Pacific) Act	1895
North Sea Fisheries Act	1893
Fisheries Act	1891
Seal Fishery Act	1875
Sea Fisheries Act	1868

⁷ This list was compiled by the review after only a cursory search and should not be taken to be comprehensive.

Public Works and Fisheries Acts Amendment Act	1863
White Herring Fisheries Act	1771

B.6.3. Fisheries-focused Statutory Instruments⁸ adopted in 2005⁹

Name of Statutory Instrument	S.I. No.
The Incidental Catches of Cetaceans in Fisheries (England) Order 2005	2005/17
South-west Territorial Waters (Prohibition of Pair Trawling) (Amendment) Order 2005	2005/49
The Sea Fishing (Restriction on Days at Sea) Order 2005	2005/393
The Calshot Oyster Fishery Order 2005	2005/1400
The Stanswood Bay Oyster Fishery Order 2005	2005/1402
The Registration of Fish Buyers and Sellers and Designation of Fish Auction Sites Regulations 2005	2005/1605
Scallop Fishing (Wales) Order 2005	2005/1717
The Sea Fishing (Enforcement of Community Control Measures) (Amendment) Order 2005	2005/2624
The Fishery Products (Official Control Charges) (England) Regulations 2005	2005/2991
Fishery Products (Official Controls Charges) (Wales) Regulations 2005	2005/3297

B.7 Background information on the Waste Framework Directive case study

Dutch Criteria for Designating a Substance as Not Being a Waste¹⁰

1. The substance is equivalent to a similar primary raw material.
2. The substance contains the same characteristics as that raw material.
3. The substance does not contain contaminants other than those contained in the similar primary raw material.
4. The substance can be used directly in a production process that can only exist on the basis of primary raw materials, without requiring a waste-related pre-treatment.
5. In terms of nature and composition, the substance is suitable for the use that is made of it (according to its original purpose).
6. The substance is produced on purpose, and its production is controlled.

⁸ Not including Scottish Statutory Instruments.

⁹ This list was compiled by the review after only a cursory search and should not be taken to be comprehensive.

¹⁰ Published in the the Dutch Government gazette (staatscourant) of 25 October 2001. It should be noted that these criteria were published before the Palin Granit case that set out a test for determining when a substance was a by-product rather than a residue.

B Further case studies and background information

7. Using the substances does not create any additional risk compared with using the regular primary raw material.
8. Special precautions are not required to use the substance.
9. The substance does not have a negative value.
10. There is a regular market for the substance.



The Reviewer and call for evidence

Lord Davidson QC: biography

Neil Davidson was called to the Scottish Bar in 1979 and has been a QC since 1993. He was called to the English Bar in 1990 and was Solicitor-General for Scotland from 2000-2001. On 21 March 2006 Neil was appointed Advocate General for Scotland - the chief legal adviser to the United Kingdom Government on Scottish Law.

During his time in practice Neil has covered a broad range of commercial and public law work.

His commercial practice included international business advisory work, international commercial arbitration and a wide range of intellectual property work. He was a founder/director of the City Disputes Panel during 1994-2000 and a founder of the Advocates' Business Law Group.

In public law work, Neil argued many of the human rights cases from Scotland before the Privy Council and has a considerable experience in judicial review and local government work. He co-authored the first work on Judicial Review in Scotland.

Call for evidence

The review published a call for evidence on 3 March 2006.¹ The questions in the call for evidence are reproduced below.

1. General

- 1a) Do you think that the over-implementation of EU legislation is a significant issue for the UK? Please give details of why/why not.
- 1b) At what stage in the process of bringing EU legislation into effect in the UK do you consider that over-implementation is most likely to occur and why? For example is it during transposition, the provision of guidance, or enforcement?
- 1c) What principles do you think should be applied when implementing EU legislation to help ensure that no unnecessary burdens are introduced? For example, cost-benefit analysis, consultation, use of copy-out² etc.
- 1d) The review has adopted a broad definition of what constitutes “over-implementation”, covering gold-plating, double-banking, regulatory creep and over-enforcement, as defined on the previous page. Are there any other types of over-implementation that should be included within the scope of the review?

¹http://www.cabinetoffice.gov.uk/regulation/documents/davidson_review/evidence.pdf

²Copy-out is when implementing legislation adopts the same wording as the directive.

2. Examples of over-implementation

The following question invites you to submit specific examples of over-implementation to the review. As your examples will provide the basis for our choice of legislative areas to look into, please be as specific as you can about:

2a) The type of over-implementation that has occurred (gold-plating, double-banking, regulatory creep, over-enforcement).

For example, if you consider that the EU legislation has been gold-plated, please specify whether this was due to the UK legislation having a broader scope than the original EU Directive, or being implemented early.

2b) The EU legislation that has been over-implemented and the corresponding UK legislation (Please provide reference numbers where known).

2c) The industry/sectors affected by the legislation.

2d) What extra burdens result from the over-implementation and the impact on your organisation or members? Do they have a disproportionate impact on a certain part of the sector, e.g. SMEs?

2e) Why you think that the over-implementation occurred, e.g. unclear definitions in the original EU directive, or higher pre-existing national standards.

2f) Your views on whether the over-implementation was justified and why/why not.

3. Simplification

One of the main aims of this review is to help government departments to reduce the regulatory burdens for which they are responsible, through identifying further proposals to be included in departmental simplification plans. Simplification plans cover a wide range of proposals, including proposals to deregulate, consolidate legislation, repeal legislation or streamline regulatory regimes.

3a) For each example of over-implementation provided, where possible, please outline how the regulatory burdens could be reduced. Please give an indication of the impact of your proposal.

4. International comparison

The review will consider whether other Member States have implemented certain areas of EU legislation in a smarter and less burdensome way than the UK.

4a) Do you have any specific examples of other Member States implementing European legislation in a way that resulted in less burdensome regulation than in the UK? Please be as specific as possible about whether this was due to differences in the actual legislation or how it is enforced in practice.

4b) Do you feel that this has resulted in a competitive disadvantage or benefits for UK businesses or other stakeholders? If yes, please say how and to what extent.

4c) Do you consider that other Member States have advantages when implementing EU legislation due to the different nature of the UK legal system by comparison to other Member States? Do you consider that newer

Member States have administrative advantages by adopting legislation wholesale rather than in a piecemeal manner?

- 4d) Do you have any examples of best practice of the implementation of EU legislation here in the UK when compared with other Member States, i.e. legislation that minimises the burdens on UK stakeholders?

5. Other Information

- 5a) Please give details of any reports, contacts, or other information that you consider of relevance to the review.
- 5b) Please outline any other issues to do with the implementation of EU legislation, which have not been mentioned so far, that you think the review should consider.

D

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E

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