How to Succeed in the Senior Civil Service

Module 9 - Understanding the European Union

9.1. Introduction

Even after Brexit, senior executives in government, local government, businesses and charities often need a basic understanding of the structure, working practices and legislation of the European Union. These notes aim to meet that need.

The EU is neither a traditional international organisation like the UN or the OECD, nor is it a true nation state like France or the United Kingdom. Rather, it is a new and different form of *supranational association* which needs to be understood on its own terms and not by comparison to other, perhaps more familiar models. This is particularly important when looking at European legislation, which is binding and is often agreed by some form of majority voting. This, along with the fact that European law has supremacy over national law – in other words, if the two conflict, then European law wins out – makes for a very different dynamic.

Working the European Union machine is therefore quite different to working the Whitehall machine. Some of the more obvious differences between the UK and 'Europe' are as follows:

- Within the UK Parliamentary system, Parliament and the Government are uniquely powerful. Within Europe, both Ministers and officials are negotiators, applicants or supplicants.
- There is no UK equivalent of the *Qualified Majority Voting* (QMV) system, or of the need for unanimity.
- Where QMV applies, one country alone cannot block progress and will usually be isolated if it tries. It makes much more sense to choose constructive engagement with other negotiators with a view, if necessary, to assembling a blocking minority and then making it stick.

- There is no UK equivalent of *the Council of Ministers* or *the Commission*. It is a great mistake to treat the Commission as though it were simply some sort of supra-national civil service – it clearly also has a political role.
- The Commission is vertically organised, so there can sometimes be poor working level co-ordination within the Commission, whether between or within directorates-general. This gives significant power to the cabinets of the various Commissioners. Incidentally, seven of the Commissioners are also Vice-Presidents of the Commission, and each Vice-President is responsible for bringing together a group of Commissioners with related subject responsibilities.
- It is also notable that the Commissioners, their cabinets and their officials ('Services') are very open – arguably more accessible to lobbyists and industry than their equivalents in national governments. Partly because the Services are thinly staffed, they have very little information of their own. It can be very helpful if you are the person who briefs them. But watch out for competitive lobbying from the opposition, whoever they may be.
- Relations between civil servants and Members of the European Parliament are also different. Unlike within Westminster, direct contact with MEPs of all parties (and all countries) is not only allowed, it is to be encouraged.
- The UK's Mission (our permanent representatives in Brussels and Luxembourg) are also very happy to meet and help British lobbyists who need advice on operating the Brussels machine.
- EU officials in the Council, Commission and Parliament are almost always very pro-European, as are a large proportion of officials in other national delegations. Even if you hate the very idea of European integration or the single currency, you may find you get a more receptive audience for your lobbying if you hide your views and couch your comments and arguments in 'communautaire' (EU-friendly) language.

It is important, too, to realise that the dispersed nature of power in the EU means that policy making is a painstaking - and indeed often painful - process in which policies have to trudge wearily between the Commission, national capitals, national parliaments and the European Parliament. This is quite different from the UK where a weak legislature and strong executive normally mean that policy making involves intense and very public debate followed by last minute decision making and quick implementation. Neither is necessarily superior but UK Ministers, in particular, often fail to adapt to the way in which EU policies steadily firm up over time, and can perhaps be tweaked but seldom substantially altered once they are proceeding through the policy machine.

9.2 Lobbying & Informal Contacts

For anyone working in a policy area with a European dimension, lobbying and information gathering has no beginning and no end – it should be a continuous, planned process whose focus shifts according to the state of play of a particular dossier.

- Get in early. EU policies are like supertankers – a small nudge early on can make an enormous difference to the end position, but the later you leave it the harder you have to push to make any difference at all. Produce the first bit of paper, and then you will have set the agenda.
- Maintain good personal contacts with Commission and other Member State officials, relevant industry groups and other interested parties (consumer groups, NGOs, etc). Not only does this mean you'll have a better understanding of their position, but it will also increase the chances of your hearing about new developments in the policy area early on. If your contacts respect you, you will also be better placed to put your point of view across.
- You should identify and build alliances with opposite numbers in other Member States. (Civil servants should use UKRep and other Embassies to help develop those alliances.) But don't just talk to 'friends' – after all, it is not them you need to convince.
- Don't forget the European Parliament! This institution has a very important influence over the European agenda, with the vast majority of legislation jointly adopted by it and the Council. Identify the key MEPs in your policy area (UKRep can help a lot here) – often those on the relevant committee – and develop a relationship with them. Often, you can be one of their most reliable sources of information.
- Effective lobbying is a two-way street. Always try to be able to offer some information on others' positions or facts about the issue at hand in exchange for what you want.
- Get UK industry to make full use of Europe-wide trade associations in lobbying the Commission, and encourage them to get their opposite numbers in other countries to seek support from their national governments.
- Consult interested parties in the UK. In addition to keeping them up to date with progress, the information they can give you on likely effects will help inform both your lobbying and your negotiating strategies and offer alternative ways of achieving the same end. Consider all forms of consultation, not just a formal paper document – focus groups; email lists; web sites; workshops; seminars; etc.
- It is often helpful to get several Government departments on your side. The Treasury can be particularly helpful e.g. in encouraging other Finance Ministries to object to another country's attempt to subsidise (i.e. pay *state aid* to one of its industries).
- Do not forget to lobby cabinets as well as the Services: the two operate fairly independently. UKRep will help you do this.

9.3 Negotiating

Formal negotiation takes place first at a technical level in Council working groups. Here, officials from all the Member States and the Commission, chaired by the Presidency, seek to resolve as many of the issues as possible. When they have achieved all they can, the dossier will be passed up to COREPER (the Committee of Permanent Representatives) and then to Ministers in the Council for final agreement (or referral back for more work).

[Here is the key advice that was given to UK officials – pre-Brexit – to help them become successful negotiators:

- *You should have a clear, prioritised strategy, agreed by Ministers. Ideally this will have already informed your lobbying activities.*
- *Be clear about the outcomes you are trying to achieve, the areas of national interest that you want to promote and protect, and the principles you want to see applied. Develop some awareness of potential fall-back options and try to give your negotiators as much flexibility as possible. Be aware that under QMV it may not be possible to protect all your interests in a complex negotiation, so that there may be occasions when Ministers decide to vote against a proposal. And keep close to the Cabinet Office at all stages of the negotiation, as the secretariat to the European Affairs Committee plays a key role.*
- *Ensure excellent communication between negotiators on the ground and the policy leads in London. They must never stray beyond the ministerially agreed mandate.*
- *You may not personally believe in European integration. But overt Euroscepticism can raise hackles in Brussels. However, this doesn't mean that the national interest doesn't matter. There is generally a great deal of willingness to accommodate particular national difficulties. Wherever possible, back up your arguments with facts – often obtained through national consultation.*
- *Be aware of the dynamic of the negotiation. The very beginning is usually the time for declarations of principle, but things move quickly into discussions of detail. As the process accelerates and the pressure to reach agreement grows it becomes almost impossible to introduce new elements or to reopen points already agreed.*
- *Know when to give up on a point that is of little real importance. Multiple interventions on minor points of detail can quickly exhaust the patience of others around the table, and can often best be dealt with by a quiet word with the Presidency or the General Secretariat.*
- *Try to keep a feel for that intangible but vital commodity, negotiating capital. Making concessions on items you have portrayed as important to you earns you capital. Winning a point (or even fighting it too hard) spends it.*
- *Aim to maintain your informal contacts and use them between formal sessions and, where appropriate, in the margins of those sessions too. Generally, the best way to garner support is to float an idea informally first, then, when you have secured sufficient support (usually involving the Presidency and, if at all possible, the Commission), raise it in a formal session.*

Don't forget that what you are negotiating is law. Keep close contact with your lawyers to make sure the text really does mean what you think it does. They can also help you keep in mind how the text before you will be turned into national law. Negotiation and transposition are not separate processes, and the need for fair but effective enforcement must be addressed whilst directives are being negotiated.]

(Further information about transposition may be found in the ANNEX to this note.)

9.4 'Competence' - EU Impact on UK Policies

Often the first question you need to ask when working on EU issues is whether or not there is EU competence in this policy area. This is the jargon phrase for whether or not the EU already has a role/responsibility in a particular and, if so, how much of one.

Some areas are of *exclusive competence* for the EU – the EU is the only body with the right to develop policy in this area and the Commission speaks for the EU. The best examples here are agriculture and international trade. One good (but alas not definitive) clue is if people talk about a 'Common XXX Policy'.

Other areas of policy are of *mixed competence* for the EU – it has a significant role, but so do the Member States and they can speak for themselves in international discussions. Good examples include environmental policy and development aid.

The third category, logically, is that of *national competence*, where the EU has no significant role (often being limited to information exchange, exhortation, and so on). Examples here are military matters, healthcare provision and education. It is also true to say that there is a tendency over time for the EU to try to extend its competence – to transform mixed competence into exclusive, and national competence into mixed.

In attempting to answer the competence question, you must remember that even in the areas of pure national competence there can be overspill. Just because an EU public authority is commissioning a brand-new hospital (healthcare provision), it doesn't mean that it can ignore EU rules on public procurement or state aids. If there is exclusive EU competence, then the probable implication is that a member state cannot do anything at a national level that has a legal effect, and even some exhortation or tax/spend options may not be feasible. Its main option in this instance is to try to persuade the EU to act as the member state would like, which has its own problems and risks.

If there is mixed competence then you will probably need more expert advice on whether there is a conflict or not, usually from your lawyers. If there is no conflict, or only national competence, and there is no overspill, then the situation is much less complex. However, you may find that member states will check with the Commission to ensure it also agrees there is no problem. (It'll probably find out about the policy sooner or later – many Commission officials regularly listen to other member states' equivalents of *the Today programme* and read papers such as *the Financial Times* – so it's best to make sure there won't be problems down the line).

Other typical EU issues that may have implications for national policy are:

- **Transposition/Gold plating**. This issue is considered in some detail in the ANNEX to this note.
- **Environmental impact** – there are rules on carrying out environmental impact assessments on a range of projects;
- **Subsidies** – Public authorities may not provide support in cash or kind to someone in a way, or for purposes, that run counter to the rules on **state aids**;
- **Public procurement** (purchasing goods and services by the state, broadly defined) – there are some strict rules which require the state to ensure that companies from other Member States are able to find out about, and tender for, significant public procurement on an equal basis;

- **Free movement of goods, services, labour and capital** – there is a general prohibition on establishing legal or practical barriers to these 'four freedoms' without good reason, such as public security, or protection of the environment. In some areas, failure to notify such barriers to the Commission can result in them being invalid and unenforceable in the courts. (This follows a case in the Netherlands where failure to notify technical standards for supply of breathalysers resulted in all who had been convicted of drink driving on the basis of tests by those breathalysers having their convictions quashed…!)
- **Competition law** – deliberately or accidentally putting up barriers to competition. See *Understanding Regulation* (www.regulation.org.uk) for more detail.

Every government department has experts that can guide you in all of these areas. Your role is to get in touch with them early, before you make any mistakes!

9.5 Institutions & Structure

You can survive quite well in Brussels without understanding the history and every last detail of the institutions, treaties and legislation. But it is best to have the following basic knowledge if you want to be truly effective.

History

The European Union was established as a legal entity in 2010 under the terms of **the Treaty on the Functioning of the European Union (TFEU)** otherwise known as the Lisbon Treaty.

Its predecessor was the European Economic Community, later renamed **the European Community** (the EC) which was established in 1958 by the Treaty of Paris. The European Union (the EU) was formed in 1992 by the Maastricht Treaty, but it wasn't at first a legal entity, but instead consisted of three 'pillars':

- The two European Communities:
  a) The European Atomic Energy Community.
  b) The European Community.
- Common Foreign and Security Policy
- Police and Judicial Co-operation

The 2007 Lisbon Treaty, which came into force on 1 January 2010, abolished these three pillars.

There are two other key structures:

- Almost all member states (one of the exceptions being the UK) plus Iceland, Norway and Switzerland have removed all internal border controls and are generally referred to as **the Schengen area** after the Convention that originally introduced this approach.

- A majority of Member States (but again not including the UK) had by early 2011 entered into **Economic and Monetary Union** (EMU) and adopted the Single Currency (the Euro) on terms agreed in the Treaty of Maastricht in 1992. Member states joining the EU after 2011 are required to join the EMU.

Current membership of the Schengen Area and EMU can be found in Wikipedia. Key dates in the history of the EU can be found below.

Institutions

For most purposes, there are five main institutions that influence the Union in various ways.

(UCL's European Institute published an excellent briefing paper describing the way in which the EU was approaching the Brexit negotiations. But it also includes a very helpful description of how the various institutions work together.)

1. **The Council of the European Union** is, with the Parliament, one of the two main law-making and decision-making bodies in the EU. It is often referred to as 'The Council of Ministers' and should not be confused with the Council of Europe, which was established after the Second World War with the aim of protecting Europe against totalitarianism.

The Council (usually together with the European Parliament) agrees legislation, budgets and other rules for most of the more familiar activities of the EU, such as the single market, common policies like those on agriculture and fishing, environmental protection, trade and the free movement of goods, persons, services and money.

In addition, the Council is the main EU institution responsible for intergovernmental cooperation on common foreign and security policy (assisted by the High Representative for Common Foreign and Security Policy) and on justice and home affairs.

The Council brings together representatives of all the Member State governments and is the forum in which these representatives assert their interests and reach compromises. These meetings happen regularly at a range of levels – expert *officials* from capitals, diplomats from the *Permanent Representations* (broadly speaking, member states' Embassies), *Ministers* and, at least four times a year, at the level of *Presidents and Prime Ministers* in the European Council. These *summits* are chaired by the President of the European Council.

Ministerial Council meetings (Environment, Competitiveness, Agriculture, etc.) take place between one and 15 times a year, depending on the Council. Each meeting is attended by the appropriate Minister from each Member State (or their permanent representative) and the relevant Commissioner. The Council is chaired by a rotating **Presidency** from amongst the Member States (of which more below) – changing every six months. Most of the work is done in the 300 plus working groups, which in turn feed into COREPER – the Committee of Permanent Representatives – and thence to Ministers. The Council is also assisted by permanent staff called the General Secretariat of the Council, not to be confused with the Secretariat-General of the Commission - see further below.

The member state that holds the Presidency of the Council has a key role. In order to provide consistency, and to support smaller member states, the Presidencies are divided into 18-month long blocks of three, known as ***'trios'***. The trio that began on 1 July 2017, for instance, was comprised of the UK (Presidency from 1 July) and its two successors, Estonia and Bulgaria. A

further Presidency then began on 1 January 2019. Each trio sets long-term goals and prepares a common agenda determining the topics and major issues that will be addressed by the Council over an eighteen-month period. On the basis of this programme, each of the three countries prepares its own more detailed six-month programme. Note, by the way, that the Presidency has the ability to stall progress in policy areas where it is in a minority.

Confusingly (very confusingly!) however, the Lisbon Treaty created ...

- a new permanent President of the European Council, as well as
- a High Representative for Foreign Affairs and Security Policy, to work alongside
- the President of the Commission.

Council Voting:- Most Council decisions are taken by **Qualified Majority Voting (QMV)**. Your departmental experts will be able to tell you the current definition of a 'qualified majority' including the number of votes currently available to be cast by each member state.

2. **The European Parliament (EP)**, which usually shares decision-making with the Council, is made up of directly elected representatives from the Member States, roughly in proportion to population. Most decisions are prepared in committees (usually in Brussels) and finally voted on in the regular plenary sessions (usually in Strasbourg).

The Parliament's principal roles are to:

- examine and adopt European legislation. Most legislation is now agreed under the codecision procedure, where Parliament shares power with the Council;
- approve the EU budget;
- exercise democratic control over the other EU institutions, for example by setting up committees of inquiry;
- assent to important international agreements such as the accession of new EU Member States and trade or association agreements between the EU and other countries.

As with national parliaments, the EP has specialist committees to deal with particular issues (foreign affairs, budget, environment and so on). Most of its work is in fact done through these committees.

It is well worth visiting the Parliament buildings in Brussels, if only to be astonished by their scale. There are also daily visits to the Parliament Chamber, with audio guides in the 24 (!) official EU languages - details from *the Infopoint* at the West entrance to the central of the three Parliament buildings.

3. **The European Commission** is headed by 28 senior figures, one from each of the member states, but formally (and very often actually) independent of national allegiance, making up the College of Commissioners. Each has a small group of officials – *their cabinet* – to assist them monitor and drive the development of policy. The President of the Commission usually chairs the College's weekly meetings. A staff of about 33,000 - divided between around 36 Directorates-General and Services (including the Secretariat-General, press and translation service) - support the College.

The European Commission does much of the day-to-day work in the European Union. In most areas of EU business, it is the only body that can draft proposals for new legislation, which it presents to the European Parliament and the Council. The Commission makes sure that EU

decisions are properly implemented and supervises the way EU funds are spent. It is also charged with ensuring that everyone abides by the European treaties and European law. With the major exception of competition policy, it doesn't generally have a large role in actual implementation or enforcement on the ground – this is primarily a Member State responsibility. In certain areas (see the section on competence), the Commission also has the role of representing the EU in external (i.e. with non-EU countries) negotiations and meetings.

4. **The Court of Justice of the European Union** is the final arbiter of all questions of European law. The CJEU ensures the consistent and accurate interpretation of European law across the EU. If national courts are in doubt about how to apply EU rules they must ask the Court of Justice. Member States, certain EU institutions and individuals can also bring proceedings against EU institutions before the Court.

The CJEU is actually comprised of three courts: **the European Court of Justice**, **the General Court** and **the European Civil Service Tribunal**. They all serve different purposes.

The General Court's main task is to consider cases brought by companies and individuals against the EU institutions, and by member states against the European Commission or the European Central Bank. Its most important work is in the field of competition, intellectual property and external trade law.

The Civil Service Tribunal hears disputes involving employees of the EU institutions.

The court sits in Luxembourg, and you must take care not to confuse it with the non-EU bodies, *the European Court of Human Rights* in Strasbourg and *the International Court of Justice* in The Hague.

5. **The European Court of Auditors**, also located in Luxembourg, is the body that checks how EU money is spent, both directly by other institutions and, where appropriate, by Member States (for example agricultural subsidies or regional development aid).

These five key institutions are flanked by five other bodies of varying importance:

The European Central Bank (responsible for monetary policy and managing the euro);
The Economic and Social Committee (expresses the opinions of organised civil society on economic and social issues);
The Committee of the Regions (expresses the opinions of regional and local authorities);
The Ombudsman (deals with citizens' complaints about maladministration by any EU institution or body);
The European Investment Bank (helps achieve EU objectives by financing investment projects).

A large number of agencies (such as the European Medicines Evaluation Agency, European Food Safety Authority and so on) and other bodies complete the system.

9.6. EU Legislation

The primary legislation of the EU is in the treaties themselves. These provide for five kinds of 'act'.

- **Opinions** and **Recommendations** are non-binding guidance.
- **Decisions** are binding in their entirety upon those to whom they are addressed (individuals, companies, countries).
- **Regulations** are binding in their entirety and are generally and directly applicable in all Member States.
- **Directives** set out the result to be achieved but leave the choice of form and methods to the national authorities in each Member State to which they are addressed – in other words, they always require transposition into national law.

Codecision: Most EC legislation is adopted through a process called codecision. This can be quite a complex procedure, but the basic outline is given below. Be careful though – this is a simplified description and there can be many twists and turns on the road, and some steps may happen more or less at the same time. In addition, if all parties agree, the process can be stopped at any point after the European Parliament's (EP) First Reading and the proposal adopted. Indeed, huge attempts are in practice made to get agreement at first reading stage, which necessitates an informal institutional negotiation called *a trilogue*.

- The Commission makes a proposal for legislation to the EP and the Council.
- The EP gives its First Reading opinion on the proposal, in the form of a series of amendments. (Note that the opinion is adopted on the basis of a simple majority of MEPs voting in the plenary session.)
- The Commission gives its views on the EP's amendments and changes its proposal accordingly.
- The Council adopts its *Common Position*, taking into consideration the EP's amendments. The voting is usually by Qualified Majority (though sometimes unanimity applies throughout) if the Commission concurs, otherwise unanimity is needed. It then forwards the Common Position to the EP, along with an explanation of its reasons.
- The EP then has three months to examine the Common Position, along with the Commission's views on it. Within this period it adopts its Second Reading amendments. This time only amendments achieving the support of an absolute majority of MEPs (that is, half of all MEPs plus one) go through.
- The Council now has three months to decide which of the EP amendments it will take on board. The Council can usually adopt those amendments on which the Commission has expressed a positive opinion by QMV (though sometimes unanimity applies throughout) but the Council needs unanimity for those where the Commission has expressed a negative opinion. If all amendments are accepted, the process ends and the proposal is adopted.
- If one or more amendments are rejected, then conciliation starts. The Conciliation Committee must meet within six weeks of the rejection and reach a conclusion within a further six weeks. It is made up of representatives of the Member States (usually chaired by a Minister, with other Member States represented by the Permanent Representative or his deputy) plus an equal number of MEPs. The Commission is tasked with assisting the Committee.
- If conciliation is successful, the Council (QMV or sometimes unanimity) and the EP (absolute majority) must each then adopt the modified text within another six weeks.

9.7. Comitology

Once legislation has been agreed, there will often be an ongoing need to update it to account for technical progress/changes, to oversee its implementation and to draw up guidance. This is generally done by the Commission, assisted (or interfered with, depending on your point of view) by a committee made up of representatives of the Member States. This goes by the delightfully uninformative name of comitology and can have significant effects on policy in the UK.

Although these are technical committees, it is important that you understand when the stakes are high – for instance for UK manufacturing and jobs, or for the environment – and you might need to send more senior representatives in order to maximise the chances of a good outcome for the UK. UKRep can provide very helpful assistance and advice if you alert them to the significance of the negotiation.

9.8 Transposing EU Legislation into UK law

See ANNEX.

9.9 Key Dates

1945 - *Second World War ends.*

(Deaths in EU countries were Germany 7 , Poland 6 , France 0.6 , Italy 0.5 and UK 0.5 million.)

1952 - Treaty of Paris (1951) between 6 countries - Belgium, France, Germany, Italy, Luxembourg and the Netherlands - enters into force. European Coal and Steel Community (ECSC) created. The aim was to prevent territorial disputes over natural resources - one of the causes of the Second World War.

1958 - Treaties of Rome (1957) enter into force. European Atomic Energy Community (Euratom) and European Economic Community (EEC - later renamed the European Community - the EC) created.

1973 - **Denmark, Ireland and the UK join the communities**. Total now 9.

1974/5 - *Greek, Portuguese and Spanish military dictatorships end ... whereupon ...*
1981 - ... Greece joins, and then ...
1986 - ... Portugal and Spain also join. Total now 12.

1987 - Single European Act (1986) enters into force.
1993 - Maastricht Treaty (1992) enters into force. European Union (EU) created.
1993 - Single Market 'completed'.

1995 - Austria, Finland and Sweden join the EU, bringing the total to 15.
1999 - Amsterdam Treaty (1997) enters into force.

1999 - **Economic and Monetary Union** starts.
2000 - Pre-enlargement Inter-Governmental Conference (IGC) starts.
2002 - Treaty of Paris (and hence the ECSC) expires.

2002 - Introduction of **Euro coins and notes**.

2004 - Enlargement:- Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia all join, bringing the total to 25.
2007 - Bulgaria and Romania join, bringing the total to 27.

2010 - **The Lisbon Treaty (Treaty on the Functioning of the European Union - TFEU)** comes into force. European Community and European Atomic Energy Community abolished.

2013 - Croatia joins, bringing the total to 28.
2016 - (23 June) UK votes to leave the EU
2017 - (29 March) UK gives notice of its intention to leave the EU
2020 – (31 January) Brexit - UK leaves the EU, reducing the total to 27

Corrections

I am conscious that the information is this briefing paper can easily become out of date. I would therefore greatly appreciate it if you would please tell me about any errors or relevant developments. My email address is ukcs68@gmail.com .

ANNEX

Transposing EU Legislation

This note was prepared to help those tasked with transposing EU legislation into UK law before Brexit. It is therefore mainly of historic interest, though it may be found helpful if ministers decide, in future, to implement our own version of EU legislation. They would need to reconcile a number of possible tensions.

One source of tension would be the desire of those who are to be regulated for regulatory certainty. Small firms in particular do not want to have to go to court to resolve ambiguities or to find out how the law applies to unusual circumstances. So even if the Directive itself is not very detailed (and they often are) you end up drafting to cope with every eventuality, whereupon everyone complains about the length and complexity of your proposal. It is truly a no-win situation.

Another tension arises when you try to define the businesses, employees and activities that are within the scope of the UK regulation. EU legislators often kindly leave such decisions, within limits, to national governments, but this can be a poisoned chalice. If you spread your net too wide then you will again be accused of over-regulating and 'gold-plating' the Directive. But if you exempt things which you could have caught, you are then likely to face a legal challenge from the Commission or from someone who might have benefited from a wider interpretation.

There is therefore often no risk-free route to implementation and you must offer Ministers a range of strategies and help them choose the right one in all the circumstances. You should not necessarily recommend the option which is legally watertight. It can often be wise to take a small risk of legal challenge in return for coming up with a solution which makes sense within our economy and society, even if it is not the route chosen by other member states.

Read on if you would like more detailed advice and information about these subjects ...

Detail

As noted above, there is understandable concern that the Government should not "gold-plate" - that is add unnecessary additional detail or rules to - European legislation. But this is in tension with the concern, of those who are to be regulated, for regulatory certainty. Those concerned about gold-plating applaud the French and Italian approach. Their legislation often says little more than "This directive shall apply:- You sort out the detail". But many UK citizens are reluctant to accept laws as interpreted by officials, whilst small firms in particular do not want to have to go to court to resolve ambiguities or to find out how the law applies to unusual circumstances. So even if Directives themselves are not very detailed (and they often are), UK Ministers usually ask civil servants to draft to cope with every eventuality, whereupon everyone complains about the length and complexity of your proposal. It is truly a no-win situation.

As an example, I understand that DTI (now BEIS) did indeed once merely "copy out" a Directive to do with personal protective clothing - only to be told by the relevant trade body that "copying out" was in fact "copping out"!

'Goal-based' regulation is sometimes used as a compromise route between gold plating and regulatory certainty. One good example is the HSE's requirement that health and safety should be assured **'so far as is reasonably practical' (SFAIRP)**. This avoids excessive detail, whilst allowing common sense regulatory decisions to be taken in the light of the circumstances of the individual business. And see further below.

But the Government announced, in December 2010, that 'British businesses will no longer be at a disadvantage compared to their European competitors, with an end to the 'gold-plating' of European legislation when it is made into UK law. The key to the new measures, introduced by Business Secretary Vince Cable, will be the principle of copying out the text of European directives directly into UK law. This direct 'copy out' principle will mean that the way European law is interpreted does not unfairly restrict British companies. The key elements of the principles are:

- Work on the implementation of an EU directive should start immediately after agreement is reached in Brussels. By starting implementation work early, businesses will have more chance to influence the approach, ensuring greater certainty and early warning about its impact.
- Early transposition of EU regulations will be avoided except where there are compelling reasons to do so. British businesses will then not be at a disadvantage to their European competitors.
- European directives will normally be directly copied into UK legislation, except where it would adversely affect UK interests, such as putting UK businesses at a competitive disadvantage.
- Ministers will conduct a review of European legislation every five years. The review process would involve a consultation with businesses and provide a unique opportunity

to improve how European legislation is implemented, to ensure that it poses as small a burden as possible on business.'

It remains to be seen whether this brings about a significant change in the UK's approach to the transposition of EU into UK law, or whether the announcement was mere window dressing.

Definitional problems can create another tension, for it is usually necessary to define the businesses, employees and activities that are within the scope of the UK regulation. EU legislators often kindly leave such decisions, within limits, to national governments, but this can be a poisoned chalice. If Ministers spread their net too wide then they will again be accused of over-regulating and "gold-plating" the Directive. But if they err on the side of exempting things which they could have caught, they are then likely to face legal challenge from the Commission or from someone who might have benefited from a wider interpretation.

A third tension is caused by the suspicion of the European Commission and/or other member states that we may be seeking to slide out of our community obligations. There was a particularly worrying example of this in the SFAIRP infraction proceedings that were taken in the European Court of Justice (the ECJ) against the UK Government, represented by the Health and Safety Executive (HSE). The problem, in short, is that European law imposes close to an absolute duty upon employers to safeguard their employees' health and safety whereas, in the UK, the HSE requires employers to safeguard health and safety "so far as is reasonably practical" (SFAIRP). The European Commission believed that we were trying to wriggle out of the responsibilities imposed by the relevant European law, and referred the UK to the European court. The case took years to get to court, but the UK eventually emerged victorious (in June 2007) from what had been a very important piece of litigation - though probably not the last in this area.

Reports, Reviews and Guidance

A very thorough *Efficiency Scrutiny Report - a Review of the Implementation and Enforcement of EC Law in the UK* - was published in July 1993. Its Executive Summary said that:

We have found little evidence to support the allegation that the UK deliberately adds requirements when transposing EC law. UK implementing legislation does, however, tend to go beyond the requirements of the EC directive for two main reasons. First, ... there is a tendency to carry over existing national provisions, wider scope and tougher penalties than in other Member States ... Second, the UK legal system is based on a tradition of precise drafting which aims to eradicate doubt in contrast with the purposive approach of continental jurisprudence on which EC law and that of other Member States is based.

The review team nevertheless made 102 recommendations aimed mainly at improving the way in which the UK approached the negotiation of Directives, planned and communicated their implementation, and trained enforcers. ("Many of the business concerns ... have arisen from misunderstandings or misleading advice from suppliers and consultants.")

The most recent review of whether the UK has over-implemented European legislation was The Davidson Review carried out by a team led by Lord Davidson QC. They reported in 2006 and they too concluded that "over-implementation may not be as widespread in the UK as is sometimes claimed". But, like the earlier review team, they did find some examples, and made a number of useful proposals.

END OF MODULE 9