



SUBORDINATE LEGISLATION COMMITTEE

AGENDA

3rd Meeting, 2007 (Session 2)

Tuesday 23 January 2007

The Committee will meet at 10.30am in Committee Room 6.

1. **Executive responses:** The Committee will consider Executive responses in relation to the following instruments—

the Police (Injury Benefit) (Scotland) Regulations, **(SSI 2006/610)**

the Environmental Impact Assessment (Scotland) Amendment Regulations 2006, **(SSI 2006/614)**

the Products of Animal Origin (Third Country Imports) (Scotland) Regulations 2007, **(SSI 2007/1)**.

2. **Instruments subject to approval:** The Committee will consider the following—

the Local Government Finance (Scotland) Order 2007.

3. **Instruments subject to annulment:** The Committee will consider the following—

the Non-Domestic Rate (Scotland) Order 2007, **(SSI 2007/2)**

the Argyll and Bute Council (Pilotage Powers) Order 2007, **(SSI 2007/3)**

the Road Works (Inspection Fees) (Scotland) Amendment Regulations 2007, **(SSI 2007/4)**

the Drugs Assessor (Qualifications and Experience) (Scotland) Regulations 2007, **(SSI 2007/8)**.

4. **Instruments not laid before the Parliament:** The Committee will consider the following—

Act of Sederunt (Ordinary Cause, Summary Application, Summary Cause and Small Claim Rules) Amendment (Miscellaneous) 2007, **(SSI 2007/6)**

Act of Sederunt (Rules of the Court of Session Amendment) (Miscellaneous) 2007, **(SSI 2007/7)**

the Health Act 2006 (Commencement No. 1) (Scotland) Order 2007, **(SSI 2007/9)**

the Health and Social Care (Community Health and Standards) Act 2003 (Commencement No. 1 and Savings) (Scotland) Order 2007, **(SSI 2007/10)**.

5. **Inquiry into the transposition and implementation of European Directives in Scotland:** The Committee will consider a draft response to the Convener of the European and External Relations Committee.
6. **Inquiry into the regulatory framework in Scotland (in private):** The Committee will consider its draft report.

Ruth Cooper
Clerk to the Committee
Tel: 0131 348 5212

The following papers are relevant to this meeting:

Agenda Items 1 – 4

Legal brief (Private)

SL/S2/07/02/1

Agenda Item 1

Executive responses

SL/S2/07/03/2

Agenda Items 2 - 4

Copies of instruments (circulated to Members only)

Agenda Item 5

Draft response to the Convener of the European and External Relations Committee and relevant documents

SL/S2/07/03/3

Agenda Item 6

Draft report (Private)

SL/S2/07/03/4

SUBORDINATE LEGISLATION COMMITTEE

3rd Meeting, 2007 (Session 2)

Tuesday 23 January 2007

Executive Responses

The Police (Injury Benefit) (Scotland) Regulations, (SSI 2006/610)

1. On 16 January 2007 the Committee asked the Executive –

(a) “In relation to regulation 16(1), introductory paragraph, 3rd line, what purpose is served by the inclusion of the words “or wife” after “husband” in regulation 16(1) given that in paragraph 1 of the glossary of expressions in Schedule 1 on page 29, “husband” includes “wife”? Regulation 13 (page 7) to which regulation 16 relates uses the term “spouse”.

(b) Comparing the drafting of paragraph (1) of regulation 16 with paragraph (5) of that regulation it is noted that the latter paragraph refers to a “widow or widower” whereas paragraph (1) refers only to a “widow”. Why does paragraph (5) include the words “or widower” as in the glossary “widow” includes “widower” (unless the context otherwise requires)? Paragraph (7) on page 11 refers only to a “widow” who does not fall within paragraph (5).

It is not clear whether given the inclusion of the words “or widower” in paragraph (5), paragraph (7) applies only to widows or whether it is intended that the wider interpretation of the word in accordance with the glossary should apply.

(c) With reference to regulation 24(2) on page 16, to explain the reference to “regulation (*sic*) 55(5) of the Pension Schemes Act 1993”. It is assumed that the drafter intended to refer to section 55(5) of the 1993 Act but section 55(5) of that Act is not a regulation-making power and does not seem relevant.

(d) to explain the words in regulation 25 (2) “under this paragraph”, given that paragraph (2) does not confer any discretion.

(e) to explain why regulation 28(4)(i) refers to a reduction in a police officer’s pension “in consequence of paragraph 7 of Schedule 3”, as this paragraph does not appear to make any provision for such a reduction.

(f) in Schedule 2, there are references to “paragraph 7(3) of Schedule 3 to the Regulations.” There does not appear to be any such paragraph. A similar point arises in paragraph 17(b) of Schedule 2 on page 30.

(g) in schedule 3, paragraph 7 commences “for the purposes of sub-paragraph (1)”. To which sub-paragraph does this refer?

- (h) to explain the sub-paragraph reference in Schedule 3, paragraph 8(5). Sub-paragraph (5) is simply a definition provision. Should this be a reference to sub-paragraph (4) of paragraph 8?
- (i) to explain the references in Schedule 6 to a “hearing” when it does not appear in the rest of the schedule. It is not clear whether a “hearing” differs from an interview or examination and, if so, why provisions such as paragraph 4(2) omit any reference to a “hearing”.
- (j) to explain the difference in approach between Scotland and England in relation to the appeal procedure in Schedule 6.
- (k) to explain the delay between the making of the English and the Scottish Regulations.”

The Scottish Executive responds as follows:

2. The Executive thanks the Committee for these comments on the Regulations.
 - (a) We accept that the words “or wife” in regulation 16(1) are otiose given the definition of “husband” in the glossary of expressions. Notwithstanding this error, we consider that the meaning of regulation 16(1) is sufficiently clear, given the explicit reference to “husband or wife”. It is noted that regulation 13 uses the word “spouse”.
 - (b) We accept that the words “or widower” in regulation 16(5) are otiose given the definition of “widow” in the glossary of expressions; however, the meaning of regulation 16(5) is sufficiently clear given the explicit reference to “husband or wife”. With regard to regulation 16(7), although we concede that the construction is not particularly clear, we do not think that the context requires the term “widow” to be construed differently from the definition in the glossary of expressions.
 - (c) As the Committee correctly concludes, the reference to “regulation 55(5)” in regulation 24(2) is incorrect in both its reference to “regulation” and the actual section stated. We acknowledge that the reference is incorrect and will undertake to correct it at the next available opportunity.
 - (d) In regulation 25(2), we confirm that “under this paragraph” ought to have referred to paragraph (1).
 - (e) We confirm that regulation 28(4)(i) ought to have referred to paragraph 6.
 - (f) The references in Schedule 2 ought to have been made to paragraph 8(3).
 - (g) This reference ought to have been “for the purposes of paragraph 6”.
 - (h) We confirm that the reference in Schedule 3 ought to have been to paragraph 8(4).

- (i) The hearing and the interview are the process whereas the examination refers to a medical examination of the appellant.
- (j) The difference in approach to appeals procedures arises because different contractors are used by this Agency and the Home Office for the provision of police medical boards.
- (k) Other competing priorities delayed the introduction of this amendment.

3. We are grateful to the Committee for drawing the above points to our attention and confirm that we intend to rectify these Regulations by adding amendments to Schedule 5 of the New Police Pension Scheme Regulations which are to be laid very soon.

The Environmental Impact Assessment (Scotland) Amendment Regulations 2006, (SSI 2006/614)

1. On 16th January 2006 the Committee asked the Executive the following –
 - (a) in relation to implementation of the “Public Participation Directive” (“PPD”)—
 - a. to explain how Article 3.5(b) is implemented in relation to roads and forestry;
 - b. to explain the way in which Article 3.8 of the PPD is implemented in relation to roads and whether thresholds might apply to any other subject areas covered;
 - (b) why, insofar as the instrument amends regulations with UK application (SI 1999/367), no extent provision was made;
 - (c) given that the delay in commencing consultation appears to have led to the delay in implementation, why there was a delay in commencing consultation; and
 - (d) why the Transposition Note does not cover implementation of Article 3.8 and 3.9 of the PPD.

The Scottish Executive responds as follows:

Question (a) a.

Roads

2. Article 3.5(b) replaces paragraph 5 of Article 7 of Directive 85/337/EC with the following:-
3. “The detailed arrangements for implementing this Article may be determined by the Member States concerned *and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project*”.
4. The wording in italics was added to the previous version of Article 7(5).

5. On checking the terms of section 20B of the Roads (Scotland) Act 1984 it was considered that it had already been drawn widely enough to comply with the amended Article 7 and no further transposition was therefore required.

6. Section 20B(5) provides:

(5) The Scottish Ministers shall also –

(a) arrange for the information which they have given to the EEA State to be made available within a reasonable time to –

(i) the authorities referred to in Article 6(1) of the Directive; and

(ii) members of the public in the EEA State who are likely to be concerned; and

(b) ensure that those authorities and members of the public concerned are given a reasonable opportunity to express an opinion before they decide whether to proceed with the project.

7. Paragraphs 7(1A) and 13(1A) of Schedule 1 to the Roads (Scotland) Act 1984 are to be amended by regulation 6(5)(a) of the Environmental Impact Assessment (Scotland) Amendment Regulations by the insertion of a new sub-paragraph (c) as follows:

(c) where section 20B applies and the EEA State has indicated in accordance with subsection (4) of that section that it wishes to participate in the environmental impact assessment procedure, any opinion on that statement or the project which is expressed in writing by the EEA State, by a member of the public in the EEA State or by any of the authorities referred to in Article 6(1) of the Directive and is received by the Scottish Ministers within any period specified for the purpose by them.

Forestry

8. Article 3.5(b) of the Public Participation Directive replaces paragraph 5 of Article 7 of Directive 85/337/EC (which deals with cases where projects may have effects in other EEA states) with the following (the text in italics represents the difference between this and the previous version of the paragraph):

9. "The detailed arrangements for implementing this Article may be determined by the Member States concerned *and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project.*"

10. We consider that the requirements of the substituted paragraph are already met by the terms of the Environmental Impact Assessment (Forestry) (Scotland) Regulations 1999 ("Forestry Regulations"), and that no further transposition is required. Regulation 14, as amended by Regulation 11(5) of the Environmental Impact Assessment (Scotland) Amendment Regulations 2006, provides for the Scottish Ministers to provide all relevant information to an affected EEA State. Paragraph (5)(a) of that Regulation

requires the Scottish Ministers to make this information available (among others) to the public concerned in the territory of the EEA State likely to be significantly affected, and paragraph (5)(b) requires that the Scottish Ministers ensure that the public concerned are given an opportunity, before the determination of the application for consent, to forward to them, within a reasonable time, their opinion on the information supplied. Regulation 15(2) prevents the Commissioners from determining an application for consent until after the expiry of any period of consultation with an EEA State in accordance with regulation 14 and paragraph (3) of that Regulation requires the Commissioners, in determining an application, to take into account, among other things, any representations received by them in relation to the application. In our view, these provisions are such as to enable the public concerned in the territory of an affected Member State to participate effectively in the environmental decision-making procedure contained in the Forestry Regulations, and fully implement Article 3.5(b) of the Public Participation Directive without further amendment.

Question (a) b.

Roads

11. Article 3.8 adds a new category to the list in Annex I of the Directive of projects subject to mandatory environmental impact assessment.

12. Sections 20A(2) and 55A(2) of the Roads (Scotland) Act 1984 provide that if the Scottish Ministers determine that a project falls within Annex I or is a relevant project falling within Annex II and should be made subject to an environmental impact assessment, they shall prepare an environmental statement and publish it in accordance with certain provisions of the Act.

13. “Annex” is defined in section 20A(9) as meaning “an Annex to the Directive”.

14. The definition of “the Directive” in the same subsection has been amended by regulation 6(1)(f)(ii) so that it now reads:

15. “the Directive” means Council Directive No. 85/337/EC on the assessment of certain public and private projects on the environment as amended by Council Directive No. 97/11/EC and Council Directive No. 2003/35/EC.

16. This updated definition of the Directive means that a determination under section 20A or section 55A will be made in accordance with Annex I and Annex II as amended by Council Directive 2003/35/EC.

Thresholds- other subject areas

17. The new paragraph 22 to Annex 1 which is inserted by Article 3.8 of the PPD applies to all projects listed in Annex 1 and not only in relation to roads. However, in relation to Land Drainage, Forestry and Marine Fish Farms the projects covered come under Annex II of the Directive and so any thresholds set out in Annex I would not apply.

Question (b)

18. We note the comment made by the Committee. We appreciate that the insertion of an extent clause may have been preferable. In terms of the legal effect the provisions would only be capable of applying to Scotland given the context and the provisions of section 101 of the Scotland Act 1988.

Question (c)

19. The Executive considers that, given the similarities between Scottish EIA consent regimes and their counterparts elsewhere in the UK, there was merit in maintaining a consistency of approach with measures being drawn up by the UK Government Departments in transposing this EC Directive, so far as practicable. This co-ordinated approach led to some delays arising, and we introduced our proposals, including draft regulations, for consultation at the earliest opportunity.

Question (d)

20. In reference to transposition of Articles 3.8 and 3.9 we would refer the Committee to the two paragraphs at the end of the sections of the Transposition Note covering Planning and Land Drainage, Roads, Forestry and Fish Farms.

The Products of Animal Origin (Third Country Imports) (Scotland) Regulations 2007, (SSI 2007/1)

1. On 16 January 2007, the Subordinate Legislation Committee, having considered the above instrument, asked the Executive to explain the following-

(b) with reference to regulation 2(5), to explain why it has omitted to cite paragraph 1A of Schedule 2 to the European Communities Act 1972 (ECA) as an enabling power; and why the amendments to the ECA made by the Legislative and Regulatory Reform Act 2006 have not been included in footnote (a) on page 3; and

(c) to explain the vires for regulations 5(2),(7) and (9) and 16(3) which, particularly in the case of regulation 5(2), appear to deal with matters reserved under the Scotland Act.

The Scottish Executive responds as follows:-

2. The Executive welcomes the opportunity to provide clarification in relation to the matters raised in the Committee's letter.

Question (a)

3. On an initial view, it appeared that the recitation of section 2(2) as an enabling power may automatically import Schedule 2, including the provisions of the new paragraph 1A. On that view, it may therefore be unnecessary to cite paragraph 1A separately. Nevertheless, the implications of the Legislative and Regulatory Reform Act

are presently under consideration by the Executive with a view to reaching a final view on our practice in this area.

4. The failure to include amendments to the 1972 Act made by the Legislative and Regulatory Reform Act 2006 is due to an oversight, and the Executive is grateful to the Committee for drawing this matter to its attention. It is intended that this will be addressed as a printing issue.

Question (b)

5. The Products of Animal Origin (Third Country Imports) (Scotland) Regulations 2007 make provision in relation to the importation into Scotland of products of animal origin, and for the enforcement of those provisions. Import and export control of animal products is excepted from the reservation of import and export control generally contained in Head C.5 of Schedule 5 to the Scotland Act.

6. Regulation 5(2), (7) and (9) confers functions on the Commissioners for Her Majesty's Revenue and Customs, whilst regulation 16(3) makes provision as to the time of importation of certain products for the purposes of the application of the Customs and Excise Management Act 1979. As the prohibition and regulation of movement of animal products into and out of Scotland is devolved, the Executive considers that it has the vires to legislate in relation to this subject matter. In the Executive's view, this includes power to confer limited functions on the Commissioners for Her Majesty's Revenue and Customs insofar as, as in this case, it is done for the purpose of creating or enforcing rules in relation to the devolved purpose of the prohibition and regulation of movement of animal products into and out of Scotland.

SUBORDINATE LEGISLATION COMMITTEE

3rd Meeting, 2007 (Session 2)

Tuesday 23 January 2007

Draft Response

Inquiry into the Transposition and Implementation of European Directives in Scotland

Dear Convener

1. Thank you for offering the Subordinate Legislation Committee the opportunity to input into consultation on the *Reporter's Report on the Inquiry into the Transposition and Implementation of European Directives in Scotland*.

2. The Subordinate Legislation Committee is currently concluding what has been a large scale inquiry into the Regulatory Framework in Scotland. European issues were integral to phase 1 inquiry considerations and their examination has assisted the Committee to some degree with its continual assessment of its own European scrutiny function. The Committee also considers that European issues relevant to the SLC's scrutiny function could be further examined by its successor committee, once the extensive technical and procedural elements of the regulatory inquiry have concluded.

3. The Committee's experience of examining regulations implementing European Community law this session, together with a number of the phase 1 inquiry recommendations I thought may be useful for the purposes of your inquiry. I have therefore set out the main points arising from these areas below.

The SLC's scrutiny function

4. The Committee has a remit to consider and report on any subordinate legislation laid before the Parliament and it is specifically charged with a duty to examine instruments for their compatibility with EC law.

5. From its scrutiny experience, the SLC would wish to draw attention of the European and External Relations Committee to the following points—

- The Reporter's report has highlighted the fact that transposition notes are not provided routinely with instruments. This has been a disappointment to the Subordinate Legislation Committee over this session as it considers that transposition notes lead to greater transparency and assist greatly the SLC's consideration of any instrument implementing European law.

- The Committee draws attention to the "open" procedure provided for under section 2(2) of the European Communities Act. The Executive has at its

disposal under this provision the choice to make an instrument to implement European law subject either to negative or affirmative procedure. Negative procedure is chosen frequently, which has a direct impact on the lead Committee's consideration, in that regulations can be in force at the time of its consideration. The Committee is also aware of the available choice, under section 2(2) of the ECA, of using primary rather than secondary legislation to implement European law.

- Also in relation to section 2(2) of the European Communities Act, the Committee has encountered the Executive using this provision rather than using domestic legislation to enact a European directive. The Committee's understanding is that it was intended that section 2(2) of the ECA should be used only on those occasions where it could not be enacted via domestic legislation.

- The SLC has a role in relation to the scrutiny of delegated power and has often encountered new powers specifically designed to provide delegated powers for the provision of implementing obligations in a specified field. It is not always clear why the Executive has sought specific powers rather than rely on section 2(2) of the Act.

- As stated in the Reporter's report, the implementation of EU obligations relies heavily on cooperation between the United Kingdom government and the devolved administrations. The SLC has found that on the occasions where cooperation has been weaker, the Scottish Executive has had difficulty in meeting the Scottish Parliament's timescales for the scrutiny of statutory instruments.

- The Committee considers that there can be merit in there being as little deviation as possible between *certain* provisions made at Westminster and in Scotland. For example, the Committee considers that in general, provisions in similar instruments involving timescales and penalties, should for the sake of transparency and accessibility be consistent. This view is stated without prejudice to the Scottish Executive in general retaining freedom to legislate in its own style with respect to obligations.

Phase 1 inquiry recommendations

- The Committee noted the Reporter's examination of the Regulatory Impact Assessments and in particular the relevant processes in Ireland. The Subordinate Legislation Committee recommended at phase 1 of its inquiry that the Parliament and its Committees should have a role in scrutinising any RIA produced by the Scottish Executive, given that the RIA is the Executive's main tool in improving regulation. Due to evidence it heard from stakeholders during its phase 1 evidence taking, the Committee also considered that there should be provision for the Scottish Parliament to analyse whether an RIA has been produced by the Scottish Executive in adequate time to inform policy choices. Finally, the Committee considered that there should be explanation in relation to any instrument which does not have an accompanying RIA. These

recommendations could have particular relevance to the Parliament's examination of European policy implementation.

- In evidence at phase 1 the Committee heard from agencies and stakeholders in relation to the issue of effective consultation on proposed regulations. The Committee was particularly interested in information highlighted by SEPA in relation to the Aarhus Convention, the European Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. In its written submission to the Committee, SEPA stated that "It may be worth considering whether the spirit of the Aarhus Convention requirements should usefully be extended to other areas." The Committee also noted and supported SEPA's suggestion that consultations should be logged onto the websites of the regulators in addition to the Executive's website and that a summary of the general principles ought to be provided.

- In supporting the evidence heard on the importance of consultation, the SLC recommended that there should be a requirement for the Executive to explain, when consultation has not been carried out in relation to any statutory instrument, the reasons why it has not been undertaken. The Committee has agreed not to pursue a statutory requirement for this, but supports a statement on consultation being included in any Executive Note that accompanies an instrument, as a matter of standard practice.

- Finally, the SLC called for the Improving Regulation in Scotland Unit to be relocated to the First Minister's Office in order to enhance its profile and powers. The Committee considered that its effectiveness would improve should it be given this central position. This may be of relevance in the context of implementing European law.

I hope that this information is useful to your Committee. Should you have any questions about this submission please do not hesitate to contact me.

Sylvia Jackson
Convener

Conveners:

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Local Government and Transport Committee
Education Committee
Enterprise and Culture Committee
Communities Committee
Health Committee
Environment and Rural Development Committee

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6 December 2006

Dear Convener,

INQUIRY INTO THE TRANSPOSITION AND IMPLEMENTATION OF EUROPEAN DIRECTIVES IN SCOTLAND

At its meeting on Tuesday 5 December the European and External Relations Committee considered a report from Jim Wallace MSP on his reporter led inquiry on the transposition and implementation of European Directives in Scotland. The initial focus of the inquiry was on 'gold plating' and Professor Alan Page who was the committee's adviser conducted a comparative analysis of four specific directives. The reporter also conducted a number of fact-finding visits to Copenhagen, Dublin, Brussels and Westminster during which he looked in more detail at the scrutiny of European legislation in different Parliaments. From these visits he has identified a number of issues in relation to the role of the Scottish Parliament in scrutinising European legislation especially at the early stage of the process and the Committee would welcome your Committee's views on the main conclusions and themes of his report which is attached. It would be useful if you could respond by **Friday 26 January 2007** and your committee's views will help to inform our final report. We will also be taking oral evidence on the report in January and February.

Yours sincerely,



Linda Fabiani
Convener, European and External Relations Committee

European and External Relations Committee

Reporter's Report on the Inquiry into the Transposition and Implementation of European Directives in Scotland

Introduction

1. At its meeting on 25 October 2005 the Committee agreed that Jim Wallace MSP would act as its Reporter on an inquiry into the transposition and implementation of EU directives in Scotland.
2. This is the Reporter's final report to the Committee and it is hoped that it is useful in both highlighting some key issues and themes as well as identifying areas where there may be scope to develop the Committee's scrutiny function in relation to the EU legislative process.
3. The Reporter would like to thank Professor Alan Page who has acted as an adviser on this inquiry and whose in-depth knowledge and analysis in this area has been invaluable.

Format of the Inquiry

4. The inquiry initially focused on the transposition and implementation of four specific directives and Professor Alan Page was asked to conduct a comparative analysis of how the Scottish Executive, UK and Irish Governments transposed these directives into law and this is attached as **Annexe A**.
5. A call for written evidence was launched between 22 November 2005 and 3 February 2006 to which nine responses were received. A further late response was also received and all are available on the Committee's web pages at:
<http://www.scottish.parliament.uk/business/committees/europe/inquiries/tied/eur-tied-home.htm>.
The Clerks have also drafted a summary of this evidence¹ and this was considered by the Committee at its meeting on 12 September 2006.
6. The Reporter also carried out a number of fact-finding visits to Brussels, Dublin, Copenhagen and Westminster and a full list of those organisations and parliamentary colleagues with whom he met can be found at **Annexe B**. In addition to these fact-finding visits the Reporter also met with a number of key stakeholders in Scotland including SEPA and NFUS. The reporter would like to thank all those involved for taking the time to meet with him and for their extremely helpful advice and comments.

¹ EU S2/06/12/2, Annexe B

7. Finally, the reporter met with Lord Davidson who recently carried out a review on the implementation of EU legislation at UK level and whose final report was published on 28 November 2006².

Drinking Water Directive

8. In the course of his inquiry the Reporter identified a number of issues in relation to the drinking water directive and the Committee agreed at its meeting on 12 September 2006 to write to the Scottish Executive inviting its views on these issues. A copy of the Convener's letter is attached as **Annexe C**.
9. The Reporter received detailed advice from the Parliament's legal office which would suggest that the regulations would appear to be a partial implementation of Council Directive 98/83/EC on the quality of drinking water intended for human consumption in respect of private water supplies for domestic purposes only.
10. It would also appear that the transposition is late; it is not clear how the Regulations are intended to work in some circumstances; and that as well as being late the transposition may be incomplete. This would assume, of course, that the Regulations are driven by the 'need' to implement the Drinking Water Directive rather than as is suggested in Annex A by the desire to strengthen the regulation of private water supplies. The Committee awaits the response from the Executive. However, the reporter suggests that this lack of clarity illustrates the need for greater transparency in the transposition process.

Waste Incineration Directive

11. In his analysis of the waste incineration directive Professor Page point out that although it has been transposed in identical terms it is interpreted differently in different parts of the United Kingdom. In particular, DEFRA has taken the view that small waste oil burners are not covered by the directive on the basis that these are not 'technical units' within the meaning of the directive.
12. The reporter raised this issue with the Deputy Minister for Environment and Rural Development. In her response (**Annexe D**) the Deputy Minister states that: 'The Commission expressed the view that DEFRA's treatment of small waste oil burners under the Directive appeared to run contrary to the aim of the Directive to minimise incineration as a waste disposal method and that, consequently, the UK had failed to fulfil its obligations under the Waste Incineration Directive. The Executive's views on this issue...are consistent with the views expressed by the Commission.'

² http://www.cabinetoffice.gov.uk/REGULATION/reviewing_regulation/davidson_review/

Fish Sellers and Buyers Directive

13. With regards to the Fish Sellers and Buyers Directive, Professor Page points out that the House of Lords Select Committee on the Merits of Statutory Instruments had concerns that the Regulations, which are very similar in Scotland and England, would impose a disproportionate burden on buyers of direct sale fish from smaller vessels.

Public Contracts Directive

14. The regulations which implement this Directive in both Scotland and England are almost identical, the Scottish Regulations being almost a carbon copy of the rest of the United Kingdom Regulations. Professor Page notes that: 'this is the first example we have encountered of Scotland opting for the separate implementation of EC Directives after devolution in an area previously regulated on a UK-wide basis, but not so far as can be judged with a view to implementing them differently', an issue we come back to later in this report.

The implementation of EU obligations

15. Under the devolution settlement the devolved administrations are responsible for implementing EU obligations which concern devolved matters.³ The functions transferred to the Scottish Ministers under section 53 of the Scotland Act include functions in relation to observing and implementing obligations under Community law,⁴ the intention being that the Scottish Executive should assume the role of the United Kingdom government in the implementation of EU obligations in the devolved areas, for which purpose it has access to the powers conferred by section 2(2) of the European Communities Act, now extended by the Legislative and Regulatory Reform Act 2006. Part of the thinking behind giving the Scottish Executive the power to implement EU obligations was that it would enable obligations to be implemented in a manner which best serves Scottish needs.⁵
16. The implementation of obligations is not a matter for the Scottish Executive alone. In contrast to most other devolved law-making powers, the powers conferred by section 2(2) of the European Communities Act continue to be exercisable in relation to devolved matters by United Kingdom Ministers concurrently with their Scottish counterparts.⁶ This means that the United Kingdom government,

³ Memorandum of Understanding, paragraph 20.

⁴ Scotland Act, s57(1); see also Schedule 5, paragraph 7(2), which excepts 'observing and implementing... obligations under Community law' from the reservation of relations with the European Communities.

⁵ Bulmer, Burch et al, , Carter, Hogwood and Scott, *British Devolution and European Policy-Making* (2002), 85

⁶ Scotland Act, s57(1).

whose responsibility for complying with Community law is not affected by devolution, can intervene to give effect to Community obligations should this be necessary. It also means that the Scottish Executive has the option of relying on Westminster in the implementation of obligations should it so choose: 'If the devolved administrations wish, it is open to them to ask the UK government to extend UK legislation to cover their EU obligations'.⁷

17. The implementation of EU obligations relies heavily on cooperation between the United Kingdom government and the devolved administrations. The practical arrangements are set out in the Memorandum of Understanding and the supplementary Concordats on Coordination of European Policy Issues. These require the lead Whitehall department to notify the devolved administrations at official level of any new EU obligation which concerns devolved matters and which it will be the responsibility of the devolved administrations to implement in Scotland, Wales or Northern Ireland.
18. It is then for the devolved administrations to consider, in bilateral consultation with the lead Whitehall department, and other departments and devolved administrations if appropriate, how the obligation should be implemented and administratively enforced within the required timescale. This includes consideration of whether to implement the obligation separately or opt for GB or UK legislation. Under the concordat between DEFRA and the Scottish Executive, which is the only concordat we have identified to address the issue, the Executive undertakes to let Defra know within four weeks of the notification of a requirement to implement an EU obligation whether it intends to use the option to implement through use of UK/GB instruments.⁸

The Scrutiny Role of the European and External Relations Committee

19. Given the above the Committee has agreed that the transposition and implementation of EU directives is an important area of scrutiny. However, given limited resources it currently focuses on two criteria:
 - The Scottish Executive's performance in adhering to the timetables and deadlines for the transposition and implementation of our Community obligations; and

⁷ Memorandum of Understanding OU paragraph 20.

⁸ Para 22

- The Scottish Executive's justification for relying on section 57(1) of the Scotland Act.⁹

20. The Committee's predecessor agreed with the Executive that it would provide, every two months, a list of all EC/EU obligations in devolved areas that were to be transposed and then implemented. The document provides information on lead departments, deadlines and information on the use of section 57(1).
21. However, the Committee's predecessor also agreed in its legacy paper that 'future progress can be made in terms of comparative analysis of EC legislation and SSIs.'¹⁰ Further, in giving evidence to the Subordinate Legislation Committee's regulatory framework inquiry, Professor Page identified a number of other areas which might be examined in relation to transposition and implementation. These included 'differential implementation', 'gold plating', the effectiveness of consultation between the UK government and devolved administrations, and the effectiveness of consultation with outside interests.
22. It is also recognised that the resources required to conduct a detailed analysis of the transposition of all legislation within the Parliament would be substantial. The Committee's predecessor estimated that: 'about 15% of the estimated 350 Scottish Statutory Instruments received each year are driven by the EU.'

The Role of Subject Committees

23. The Parliament's subject committees also have a role in the scrutiny of EU legislation and there are some examples where they have sought to exert influence both at the policy development stage and in relation to transposition and implementation of EU directives. For example, the Enterprise and Culture Committee responded to a Commission consultation on the reform of EU state aid guidelines policy: <http://www.scottish.parliament.uk/business/committees/enterprise/inquiries/eusa/ec05-eusa-submission.htm>. The Committee subsequently received an acknowledgement and an invite to a follow-up meeting with the relevant Head of Division which the Parliament's European Officer attended.
24. The Justice Committee's agreed to track a number of civil law proposals from the Commission following the Scottish election in 2003. For example, the Justice 1 Committee agreed to track the implementation of a regulation in relation to parental responsibility and considered a note from the Executive on the draft regulation in November 2003 which set out the provisions and their possible

⁹ The power that enables Westminster to implement EC obligations in a devolved area on a UK wide basis.

¹⁰ EU/S2/03/1/3

implications. In the period before the regulation came into force on 1 March 2005 the Committee also sought assurances from the Executive regarding the implications of the regulation for its plans for reform of family law.

25. The Justice 1 Committee have also contributed substantive comments to the subsidiarity and proportionality check which was carried out by the House of Lords European Union Committee on the draft proposal for a Council regulation on divorce.¹¹ The Committee also conducted a short inquiry on the green paper and submitted its views to the Commission.

Fact-Finding Visits

Ireland

26. In Ireland, all Commission proposals are sent to the Irish Parliament's standing committee on EU affairs with a one page "scrutiny note" from the appropriate Government Department explaining the potential impact on Ireland. The EU Affairs Committee then identifies those legislative proposals which merit greater scrutiny by the appropriate subject Committee. This approach is very resource intensive but it ensures that all European legislative proposals are considered by the Parliament.
27. The view of some stakeholders that the Irish Parliament's scrutiny function in relation to EU legislation is expanding and that there is increasing engagement between stakeholders and the parliamentary committees in relation to this process.

Denmark

28. The scrutiny of European legislation is viewed as a priority within the Danish Parliament and this is reflected in the the resources allocated to the process. Indeed, the reporter's findings confirmed that the Danish model is widely respected as being both comprehensive and rigorous.
29. The Danish Parliament's European Affairs Committee is responsible for mandating the Danish Government on all EU legislative proposals ahead of a European Council. The appropriate Government Minister will appear before the Committee seeking agreement for the Danish position on the proposal. This "position" is formulated following consideration by one of 35 EC special committees and the Government's Foreign Affairs Committee in consultation with key

¹¹ J1/S2/06/34/1

stakeholders. As such, the Parliament mandates the Government to negotiate with the EU Council and this results in a more consensual approach to the eventual transposition and implementation of EU directives. It should be noted that this is in keeping with Denmark's traditional consensual political system and emphasis on coalition government.

House of Commons

30. Scrutiny of European matters is carried out in the House of Commons mainly by the European Scrutiny Committee (ESC) and the three European Standing Committees to which it refers documents for debate.
31. The main purpose of the scrutiny system is to hold UK Ministers to account for their actions in the Council and to provide the House with opportunities to influence them. The system concentrates on the analysis of documents and around 1,200 EU documents are deposited annually including the Commission's Green and White papers as well as draft legislation.
32. The ESC's main role is to assess the political and legal importance of each EU document and to determine which are debated. Within ten working days of a document being deposited in the parliament, the Committee receives an Explanatory Memorandum (EM) on it from the relevant Minister. This sets out, among other things, the likely impact of the proposal and the UK Government's policy towards it.
33. The ESC may recommend that some proposals merit further consideration, either by a debate in one of the three European Standing Committees or, exceptionally, on the floor of the House of Commons. Under the scrutiny reserve resolution passed by the House of Commons, Ministers should not agree to proposals which the Committee has not cleared or which are awaiting debate.
34. One of the main issues to arise from the reporter's visit to the House of Commons was the involvement of the devolved administrations in the drafting of EMs where proposals relate to devolved competencies. The ESC raised this issue with the UK Government in 2002 when it recommended that: 'the Government relax the confidentiality provision in the concordat sufficiently to be able to indicate in EMs whether discussions have taken place with devolved institutions and, as far as possible, on what subjects.'¹²
35. The Government responded by stating that: 'In future, where an Explanatory Memorandum states that a minister from one or more

¹² European Scrutiny in the Commons, Thirtieth Report of Session 2001-02, para.106.

devolved administrations also has an interest, the Government intends this to indicate that those devolved administrations have been consulted on the terms of the Explanatory Memorandum and on its subject matter.¹³

36. However, there would appear to be little scrutiny within the Scottish Parliament as to the extent of the Scottish Executive's contribution to EM's which relate to devolved competencies and this is a matter which the Committee may wish to raise with Ministers.

37. The EM should also include a Regulatory Impact Assessment (RIA) if the proposal imposes burdens on business and this is sometimes submitted separately. The Committee may, therefore, also wish to raise with Ministers whether they are consulted on RIAs which relate to devolved competencies especially where there may be significant burdens on Scottish business.

House of Lords

38. The primary purpose of the House of Lords European Union Committee is to scrutinise EU law in draft before it is agreed in the EU. On this basis it seeks to carry out its work at the earliest possible stage in the EU decision-making process. Unlike the House of Commons the Committee does not give detailed consideration to all European documents. Rather, the Chairman conducts a "sift" and decides which should be referred to one of the seven sub-committees for further examination. About a quarter of the documents are referred to the sub-committees.

39. The sub-committees look at the policy implications of proposals; whether they are properly matters which the EU (rather than the UK) should be legislating for ("Subsidiarity") and whether they have been subject to a proper cost analysis ("Regulatory impact of assessment"). Draft reports setting out conclusions and recommendations are then prepared and agreed by the sub-committees, and approved by the Select Committee, before they are published. A number of these reports are subsequently debated in the House.

40. The Select Committee has also recently agreed to conduct an inquiry into the European Commission's annual Legislative and Work Programme for 2007 with a view to flagging up at an early stage any potential problems with the proposals. It is also intended to inform its scrutiny of the Commission's Annual Policy Strategy (APS) for 2008.

Brussels

¹³ European Scrutiny in the Commons: Government's Observations on the Committee's Thirtieth Report of Session 2001-2002, para.40.

41. The European Commission published a series of initiatives on better regulation on 14 November. The initiatives covered the issues of reducing administrative costs, simplifying and codifying European legislation and ensuring better quality Commission impact assessments.
42. The Commission proposed to cut the administrative burden for companies by 25% by 2012. They have proposed that this target should be adopted by the next Spring European Council to ensure buy-in and assistance from member states. This is the overarching aim and the Commission hopes that initiatives such as simplification and codification and better impact assessments will ensure that this target can be met. A 25% cut in the administrative burden would result in an increase of 1.5% in EU GDP generating around €150 billion for the European Union economy.
43. To enable this target to be achieved the Commission will launch an Action Programme to measure administrative costs and reduce administrative burdens generated by existing legislation in the European Union. This Action Programme sets out the way in which a cut of 25% in the administrative burden can be achieved along with a common methodology for how costs will be measured along with common principles for reducing these burdens.
44. Since 2005 impact assessments have been made compulsory for all major initiatives from the European Commission. The Commission has now made a proposal to establish an Impact Assessment Board (IAB). The IAB would work under the direct authority of the Commission President and will be responsible for examining draft impact assessments and offering advice to the appropriate departments on where improvements can be made. These boards will have to approve impact assessments before a proposal will be adopted by the Commission.
45. The Commission has also proposed that the programme simplifying EU legislation which began in October 2005 should continue with a further 43 initiatives being added for review. By the end of 2006, 51 initiatives will have undergone review and have either been repealed, recast, codified or reviewed. The 43 initiatives proposed means that if completed the Commission will be very close to its target of reviewing 100 initiatives by October 2008.
46. The Commission's Better Regulation Agenda has also seen the introduction of compulsory consultation process with key stakeholders prior to legislative proposals being adopted.
47. Key to the European Commission's proposals will be the input and co-operation of member states. In addition legislative regions such as Scotland will also be required to participate. The Scottish Executive

has already adopted a Better Regulation agenda in part due to the Commission's involvement in this area.

48. The United Kingdom Government has taken a proactive role in the Better Regulation field by establishing the Better Regulation Executive (BRE) based in the Cabinet Office. The BRE is responsible for developing the UK Government's Transposition Guide which provides guidance to UK Government Departments on how to implement European directives effectively. The BRE is also responsible for taking a close look at Government Department's regulatory proposals when these would cost over £20 million to the private or voluntary sectors.
49. Any regulatory proposal of this nature would have to go before the UK Government's Panel for Regulatory Accountability which is chaired by the Prime Minister with the Chancellor of the Exchequer also being a member. The panel is responsible for considering any domestic or European legislation which breaches the threshold. If the Panel is dissatisfied with a regulatory proposal it has the power to refuse to sanction its progress.

Consultation

50. In both Dublin and Copenhagen, there was a high level of consultation on European related issues with stakeholders. This consultation takes place at the start of the EU legislative process and allows the respective Governments to shape an informed policy position for their member state.
51. For instance in Ireland it is now a requirement for a Regulatory Impact Assessment (RIA) to be produced for all EU legislative proposals. The RIA provides preliminary analysis of a proposal from an Irish perspective and is produced in consultation with key stakeholders. Once a Directive has been agreed at EU level, the RIA is updated ahead of the transposition process.
52. Within Denmark, as discussed above, when a proposal is published by the European Commission, it is considered by one of the 35 EC Special Committees whose membership includes key stakeholders.
53. The EERC may wish to consider whether there is greater scope for wider consultation with stakeholders both at the policy development stage as well as at the transposition and implementation stage. This is a view supported by SEPA in evidence to the Subordinate Legislation Committee on its regulatory framework inquiry:

Given that most Scottish environmental legislation transposes EU law, it is important that agencies such as SEPA are consulted during the development of the originating European proposals to ensure that these are practicable, enforceable and deliver the desired outcome. Similarly, there is arguably a greater need for SEPA to input to the prior assessment of the impact, costs

and benefits of new approaches and laws i.e. as part of the regulatory impact assessment. The earlier the consultation, the easier it is to inform the overall principles.¹⁴

Gold Plating

54. In both Ireland and Denmark (and in common with what is often said in the United Kingdom) there is a perception within the business community that it is over-burdened by regulation. There is also a common belief that business in other European Union Member States is less burdened. For example, the Irish Business and Employers Federation (IBEF) doubted whether there was a level playing field across Member states.
55. The European Commission has committed itself to working more closely with Member states to ensure that the interpretation of directives is consistent across the European Union. The Commission currently monitors transposition on a country by country basis through a system called conformity checking.
56. When the European Commission produces draft legislation it usually includes an article committing all Member States to the production of a correlation table to be sent to the European Commission which illustrates how a Directive has been implemented into domestic legislation. However, when the proposal is discussed at EU Council level the commitment to provide correlation tables is normally removed by Member States. The retention of correlation tables would allow a better judgement to be made on whether gold plating had taken place in the transposition of a Directive.
57. However, the Commission's focus is on ensuring that legislation is sufficient to enact directives and there is no monitoring of 'gold plating'. Indeed, in the environmental field this is specifically allowed for under Article 176 of the Treaty Establishing the European Community.
58. A recent study of 'gold plating' by the Foreign Policy Centre and the Federation of Small Businesses (FSB) found that: 'There can be no doubt that there are a number of cases where Whitehall has extended the scope of the original directive.'¹⁵ Through an analysis of eight directives it is suggested that: 'Gold-plating occurs in various forms, including extending the scope of EU directives by including extra pieces of legislation in the statutory instrument; widening the scope of the EU directive to cover extra requirements; and introducing targets and deadlines.'

¹⁴ SL/S2/05/5/1

¹⁵ Sarah Schaefer and Edward Young, *Burdened by Brussels or the UK? Improving the Implementation of EU Directives*, A joint publication by the Foreign Policy Centre and the Federation of Small Businesses (September 2006).

59. However, the UK Government's policy as stated in the Cabinet Office's guide on transposition¹⁶ is not to go beyond the minimum requirements of European directives unless there are exceptional circumstances, justified by a cost-benefit analysis and extensive consultation with stakeholders.

60. A report by the House of Commons Select Committee on Modernisation of the House of Commons stated in relation to 'gold-plating' that:

What is important is that Parliament is in full possession of the facts when it is making the law; that MPs and Peers know which bits of a bill or SI are necessary to meet the minimum required by an EU directive and which bits are being proposed by the Government on its own initiative – what we are doing because we must in order to meet our Community obligations and what we have chosen to do in addition. Parliament needs the best possible information on which to reach informal decisions.¹⁷

61. The Committee may wish to consider that this equally applies to the Scottish Parliament's scrutiny of EU related legislation.

Davidson Review

62. The Davidson review was commissioned in the Chancellor's Pre-Budget Report 2005 to: 'look at how the UK implements European legislation and how this affects the competitiveness of the UK economy.'¹⁸ The review generated over 160 written responses between March and May 2006. A summary of responses was published in July 2006 and: 'The vast of majority of those who responded said that over-implementation of European legislation was a significant issue where additional UK requirements or complexity had resulted in a competitive disadvantage for UK firms.'¹⁹ In contrast: 'A minority of those responding, mainly from outside the private sector, argued that "under-implementation was a more important issue than over-implementation.'

63. In relation to devolution, the review notes that: 'A few respondents took the view that the Scotland Act, which imposes a more strict obligation on Scottish Ministers to comply with European legislation, may cause Scottish Ministers to be more risk averse in implementing European legislation. Devolution was also cited by some as another factor increasing the burden for those operating across UK borders.'²⁰

64. In launching his report Lord Davidson stated that:

¹⁶ *Transposition guide: how to implement European directives effectively*, Regulatory Impact Unit, Cabinet Office, march 2005

¹⁷ Select Committee on Modernisation of the House of Commons, *Scrutiny of European Business*, Second Report of Session 2004-05

¹⁸ Davidson Review: Summary of responses to call for evidence, p4.

¹⁹ *Ibid.*, p15

²⁰ *Ibid.* p.18

In some cases, additions made during the transposition of European legislation provide benefits to business such as greater legal clarity and the streamlining of existing domestic legislation. However, there are examples where UK implementation could be less burdensome without harming the intended protection provided by the regulation. My proposals should enable business to compete more effectively. My hope is that they will also reduce the chance of unnecessary over-implementation in the future.²¹

65. The report recommends specific simplification proposals in ten legislative areas including consumer sales, financial services, transport, food hygiene and waste legislation. The Committee may wish to consider asking the Executive whether they expect to be consulted on the UK Government's response to the review as it relates to devolved matters.

Enforcement of EU obligations

66. A further issue to emerge during the reporter's fact-finding visits is whether a level playing field exists in relation to the enforcement of EU legislation. This point was also made by Professor Page in his analysis of the implementation of the Waste Incineration Directive which he suggests: 'despite the commitment to uniformity of treatment the Directive bears differently on businesses in different parts of the United Kingdom, which is a cautionary reminder that a "level playing field", which was the aim here, is not simply a matter of the rules themselves but of the way in which they are interpreted and applied.'

67. More widely, while it would appear that there is agreement that most Member states are transposing EU directives in a timely and satisfactory manner there is not the same confidence that the legislation is being adequately enforced.

68. The European Commission acknowledged that they rely on member states to report to them on whether a Directive has been enforced. This is largely because they have no inspectorate powers in member states; they therefore, rely on citizens and NGOs to make a complaint when they think a member state is failing to enforce a directive.

69. In addition, in terms of environmental legislation it was clear that the Commission were keen to ensure that the desired results and environmental standards were met and in a sense if this happened enforcement wasn't such an issue.

70. The Commission also acknowledged that another potential problem in assessing whether directives are properly transposed and then enforced was that there are not always specified minimum levels of information required by an inspection. For example, in the

²¹ <http://www.cabinetoffice.gov.uk/REGULATION/news/2006/061128.asp>

environmental field there are non-binding guidelines. This position will be reviewed in 2007.

71. Another issue is that it is up to a member state to set the level on sanction for a breach of a directive. This means that a breach of EU legislation may not result in the same penalty across the European Union. A recent European Court of Justice ruling has given the Commission the right to set minimum penalties for breaches and a proposal establishing a minimum framework for penalties in the environmental sector will be published in the next six months.

72. In both Ireland and Denmark enforcement of EU obligations lay with local and regional regulators. This means that member state governments are devolving responsibility for ensuring compliance. Some stakeholders in Ireland suggested there was a lack of accountability in terms of the regulators.

73. In both Ireland and Denmark there was a suggestion that perhaps in other member states enforcement of EU directives is not so rigorous.

Differential Implementation

74. One of the main issues to emerge from the reporter's inquiry is 'differential implementation', i.e. the freedom the Scottish Executive has to go its own way and to 'tailor Scottish solutions to Scottish problems'. In his comparative analysis of four statutory instruments Professor Page found that three of those essentially follow the lead set by Westminster. While this may mean that there are no distinctive Scottish interests that need to be taken into account in the implementation process it may also mean that there are distinctive Scottish interests but that they have not been taken into account. Professor Page suggests three reasons or sets of reasons which are not mutually exclusive as to why the Scottish interest may not be taken into account:

- Obligations may be framed in such a way as to leave the Scottish Executive no 'margin of appreciation' or scope for what has been termed 'differential implementation'.
- The United Kingdom government may nevertheless be opposed to such implementation. DEFRA, for example, is said to be more opposed than some other Whitehall departments to the differential implementation of obligations. And even if the United Kingdom government is not directly opposed, the need 'to ensure that any differences of approach nonetheless produce consistency of effect and, where appropriate, of timing²²' may act as a disincentive to the Scottish Executive going its own way.

²² EU Concordat, para.B4.17

- Even though obligations may be framed in such a way as to leave room for differential implementation, and the United Kingdom government may not be opposed to it, the Scottish Executive may nevertheless fail to take advantage of the scope for this. This may be, for example, because it lacks the resources to exploit that scope and has therefore decided to rely on Whitehall as much as possible; because the need to secure agreement makes it easier to follow the Whitehall lead; because of the threat of litigation or enforcement proceedings; or for any one of a number of other possible reasons.

75. Professor Page suggests that whatever the exact reason the analysis underlines the importance of the effective parliamentary scrutiny at the devolved level of both the negotiation and implementation of European obligations with a view to ensuring:

- that obligations are framed in such a way as to allow distinctive Scottish interests to be taken into account in their implementation, and
- that those interests are in fact taken into account in their implementation.

Consultation between the UK Government and the Scottish Executive

76. In a briefing paper for the Subordinate Legislation Committee's *Regulatory Framework Inquiry* Professor Page states that:

It has become an accepted tenet of European policy making that if national interests are to be fully taken into account in the negotiation of Community obligations they have to be voiced at an early stage in the process. The same is no less true of devolved interests.²³

77. However, as the Committee is aware the Scottish Executive as a devolved administration has no guaranteed voice in the Community decision-making process. Rather, the emphasis is on consultation with the UK Government as set out in the Memorandum of Understanding which governs relations between the UK Government and the devolved administrations. The UK Government commits itself to involving the devolved administrations as fully as possible in discussions about the formulation of the UK's policy position on all EU and international matters which touch on devolved matters.

²³ SL/S2/05/5/1

78. Professor Page suggests that: ‘Despite assurances that this process works well there is evidence this is not always the case.’ Specifically, he points to a Cabinet Office report²⁴ which suggests that further work should be carried out to investigate whether the traditional systems of consultation and policy development within Whitehall and between Whitehall and devolved administrations are as robust as they might be when dealing with European legislative processes.²⁵
79. UK government policy on transposition emphasises the importance of appropriate co-ordination and consultation within government including the devolved administrations. It recommends preparing a project plan for eventual transposition of the legislation which should be agreed where appropriate with the devolved administrations.²⁶

Engaging at an early stage in the EU legislative process

80. The focus of the Committee in the first two sessions has been on the later stages of the legislative process with little consideration given to influencing the formulation of policy ‘upstream’. However, given that the Parliament now has a European Officer based in Brussels there is greater opportunity for the Committee to identify key issues at an earlier stage in the European policy process.
81. At its meeting on 7 November the Committee agreed to consult key stakeholders on the Commission’s legislative and work programme for 2007. The aim of this process is to identify and to monitor those key policy initiatives within areas of devolved competence which will potentially have a significant impact on Scotland. The policy initiatives identified from this legislative and work programme will also inform the Committee’s legacy paper. The European Officer will have responsibility for providing intelligence on a regular basis on these priorities.
82. The Committee may wish to consider conducting detailed scrutiny of legislative proposals from the Commission which have been identified as having a potentially significant impact on Scotland. This would include consulting widely with stakeholders.
83. The Committee would then track the specific issues they have chosen to engage with as they pass through the European legislative process. This engagement would involve the Committee continuing to press any particularly Scottish issues which might arise from the proposed EU

²⁴ Cabinet Office, *Improving the Way the UK Handles European Legislation, Pilot Quality Assurance Study and Transposition Conference*, Synthesis Report, October 2002, recommendation 5.

²⁵ SL/S2/05/5/1

²⁶ Regulatory Impact Unit, *Transposition Guide: How to Implement European Directives Effectively* (2003), paragraph 2.23

legislation. The Committee's engagement would involve scrutinising the Scottish Executive to ensure Scottish interests are represented at the UK level, for example, through contributing to Explanatory Memoranda and Regulatory Impact Assessments. The Committee may also wish, where appropriate, lobbying the UK Government and the European Commission directly to ensure Scottish interests continue to be considered.

The Transposition Process

84. Once a piece of EU legislation has been agreed, the Committee would be expected to transfer its attention to the transposition and implementation process in Scotland. This would involve scrutinising the Scottish Executive's proposals for transposition and where it is deemed necessary inviting key stakeholders to give evidence to the Committee on the Executive's proposals for transposition.
85. The Committee may wish to give consideration to whether the provision of a transposition note by the Scottish Executive would facilitate greater scrutiny within this process. Since 2001, the UK Government has been required to produce a Transposition Note with all pieces of legislation which transpose an EU Directive. The Transposition Note should show how each element of the Directive has been, or will be, transposed into UK law. This will allow greater transparency but also highlight areas of over or under-implementation.
86. At present, although the UK government is required to produce a transposition note when implementing an EU directive the Scottish Executive is not. Indeed, it would appear that the Executive produces transposition notes only rarely.
87. For example, although the Statutory Instrument which introduced the EC Fertilisers Regulations at Westminster (SI 2006/2486) were accompanied by a transposition note, the Executive did not provide such a note with the equivalent instrument in Scotland even though the regulations are virtually word for word on both sides of the border.
88. Following the adoption of a piece of legislation into Scottish law which transposes EU obligations, the Committee may wish to revisit - by consultation with stakeholders - that transposition after a certain period of time to examine whether the aim of the European Directive has been met by the Scottish implementing legislation. This approach might help to address perceived gold plating and enforcement issues.
89. In adopting such a system of scrutinising proposed EU legislation from the very start of the process until its conclusion when it is transposed into Scottish law and subsequently implemented it is expected that the Committee may adopt a different approach towards each particular issue. That is it may decide an issue is so important that they wish to

track it throughout the whole process. For other issues the Committee might wish to engage at particular points in the process.

Main Themes and Conclusions

90. As it is clearly an issue not only in the UK but in other Member States the Committee may wish to consider that there is a need for greater transparency within the transposition process to allow greater scrutiny of 'gold plating'.
91. For example, the Committee may wish to give further consideration to whether the wider provision of Transposition Notes for EU related legislation laid before the Scottish Parliament may be useful in identifying gold plating. The Committee may wish to consult with the Subordinate Legislation Committee on this issue.
92. It was also apparent to the reporter that while there is much debate on 'gold plating' the manner in which regulations are interpreted and enforced is also significant in determining whether there is a 'level playing field'. The Committee may also consider whether there is a need for greater scrutiny in this area.
93. It was clear from the reporter's fact-finding visits that the level of parliamentary scrutiny of EU directives by Member States both at the legislative proposal stage and in relation to transposition and implementation is much higher than in the Scottish Parliament. This is in many respects unsurprising given that Scotland is not a Member State. However, at the same time there is clearly a significant amount of European legislation within areas of devolved competence and it may be that there is a need for greater scrutiny by the Scottish Parliament in this area. This will, of course, depend on available resources especially in relation to the workload of both the EERC and relevant subject committees.
94. The Committee may wish, therefore, to consider whether there is a wider role for the Parliament in scrutinising European legislative proposals which relate to devolved matters. This would involve identifying significant legislative proposals from the Commission at an early stage and utilising the European Officer to provide intelligence from Brussels.
95. In particular, the Committee may wish to consider whether there is a need for greater scrutiny of the Scottish Executive in ensuring that Scottish interests are effectively represented both in terms of the transposition of Directives and in influencing the UK Government's negotiating position on proposed EU legislation which relates to devolved matters. For example, whether the Scottish Executive is effectively contributing to Explanatory Memoranda and Regulatory Impact Assessments drafted by the UK Government on European proposals which relate to devolved matters.

96. It is also clear that there is scope for greater co-operation with the European scrutiny committees at Westminster in considering both legislative proposals at an early stage and the transposition and implementation of Directives and the Committee may wish to give consideration as to how to take this forward, for example, through strengthening the UK European Chairs forum.

Jim Wallace MSP
Committee Reporter

Inquiry into the Transposition and Implementation of European Directives in Scotland

As part of the reporter's inquiry, I was invited to carry out a comparative analysis of four sets of implementing regulations: the Registration of Fish Sellers and Buyers and Designation of Auction Sites (Scotland) Regulations 2005 (SSI 2005/286), the Waste Incineration (Scotland) Regulations 2003 (SSI 2003/170), the Public Contracts (Scotland) Regulations 2006 (SSI 2006/1) and the Private Water Supplies (Scotland) Regulations 2006 (SSI 2006/209). The transposition of each set of regulations for Scotland was analysed by the Directorate of Legal Services. I then compared the regulations with their rest of the United Kingdom equivalents. I also compared them where possible with their Irish equivalents.

Fish Sellers and Buyers

These regulations make provision for the implementation and enforcement of Article 9 of Council Regulation (EEC) 2847/93 and Article 22 of Council Regulation (EEC) 2371/2002, which relate to first marketing and purchasing of fish. They are paralleled in England by the Registration of Fish Buyers and Sellers and Designation of Auction Sites Regulations 2005 (SI 2005/1605), and in Wales and Northern Ireland by the Registration of Fish Buyers and Sellers and Designation of Fish Auction Sites (Wales) Regulations 2006 (SI 2006/1495 (W 145)) and the Registration of Fish Buyers and Sellers and Designation of Fish Auction Sites (Northern Ireland) Regulations 2005 (SR 2005/419).

The Scottish and English Regulations are very similar. There are some minor differences between them but these are not in my view significant. They reflect differences in Scots law and administration rather than differences in policy. As originally made, there was one substantive difference between the two sets of regulations, but the Scottish Regulations were amended almost immediately to bring them into line with the English Regulations.²⁷

The Welsh and Northern Irish Regulations duplicate the English Regulations, to the extent of replicating errors in the latter. The Welsh Regulations were made almost a year to the day after the English Regulations.

The House of Lords Select Committee on the Merits of Statutory Instruments drew the English Regulations to the special attention of the House on the grounds that they gave rise to issues of public policy likely to be of interest to the House, and that they might inappropriately implement European legislation.²⁸ The Committee's concern was that the Regulations would impose a disproportionate burden on buyers of direct sale fish from smaller

²⁷ By the Registration of Fish Sellers and Buyers and Designation of Auction Sites (Scotland) Amendment Regulations 2005 (SSI 2005/438)

²⁸ Fifth Report, 2005-06, HL 18, paras 11-18.

vessels. The implication is that if there is over-implementation it is over-implementation that is common to all four sets of Regulations.

The Community obligations are in the form of regulations which are 'directly applicable' in national law. In principle, therefore, there is no need to transpose their provisions, although it is not uncommon to make provision for their administration and enforcement as here. This may explain why the Sea Fisheries (Control of Catches) Regulations 2003 (SI 2003/345), which implement the regulations in Ireland, make no provision for the registration of buyers and sellers or the designation of auction sites.

Waste Incineration

These Regulations implement Directive 2000/76/EC of the European Parliament and of the Council on the incineration of waste. The equivalent English and Welsh Regulations are the Waste Incineration (England and Wales) Regulations 2002 (SI 2002/2980).

The two sets of regulations are again very similar. Such differences as there are appear to be mainly a consequence of the fact that waste incineration is regulated separately in Scotland rather than a decision to implement the Directive differently in Scotland.

The Executive explained its approach to the implementation of the Directive in a letter to the Committee's predecessor in the first session:

'The Waste Incineration Directive will be implemented using secondary Scottish legislation. It will be similar to legislation in other parts of the UK in order to achieve a common approach and therefore a level playing field for Scottish business. The Scottish Executive usually drafts separate statutory instruments to implement Directives whenever the subject matter is devolved. This follows consultation with Scottish stakeholders and ensures that our regulations take full account of any special circumstances north of the Border.

As Directive 2000/76/EC covers devolved matters, there is no reason why the regulations to transpose the Directive should not be different to the rest of the UK, provided they transpose the Directive in full. The Executive has already carefully considered this in relation to this Directive and has concluded that, other than reflecting regulatory differences in Scotland, the implementing regulations should take the same approach as the rest of the UK. This reflects policy that environmental regulations affecting businesses should be consistent, whenever appropriate, throughout the UK. It is not necessary to use Section 57(1) procedures to achieve this common approach nor is it the practice of the Scottish Executive to do so' (EU/03/2/7).

Although the Directive has been transposed in identical terms, it emerged in the course of the inquiry that it is interpreted differently in different parts of the United Kingdom. The Directive applies to incineration and co-incineration

plants (Article 2(1)). Incineration plant is defined as any 'stationary or mobile technical unit dedicated to the thermal treatment of wastes' (Article 3.4). DEFRA has taken the view that small waste oil burners are not covered by the Directive on the grounds that these are not 'technical units' within the meaning of the Directive, an interpretation not shared by the Scottish Executive. The upshot is that despite the commitment to uniformity of treatment the Directive bears differently on businesses in different parts of the United Kingdom, which is a cautionary reminder that a 'level playing field', which was the aim here, is not simply a matter of the rules themselves but of the way in which they are interpreted and applied.

The most striking feature of the corresponding Irish Regulations, the European Communities (Incineration of Waste) Regulations 2003 (SI 2003/275), is their brevity. They simply state that the Environmental Protection Agency should not grant a licence to an incineration or co-incineration plant unless it is satisfied that the requirements of the Directive will be complied with and that it should attach such conditions to licences as are necessary to give effect to the Directive.

Public Contracts

These Regulations implement Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 89/665/EEC on the co-ordination of laws relating to the review procedures for the award of public supply and public works contracts. The equivalent rest of the United Kingdom Regulations are the Public Contracts Regulations 2006 (SI 2006/5).

The two sets of Regulations are almost identical, the Scottish Regulations being almost a carbon copy of the rest of the United Kingdom Regulations. The former were made on 4 January 2006, the latter on 9 January 2006; they both came into force on 31 January 2006. The regulatory impact assessments accompanying the Regulations are also almost identical.

Interestingly, this is the first example we have encountered of Scotland opting for the separate implementation of EC Directives after devolution in an area previously regulated on a UK-wide basis, but not so far as can be judged with a view to implementing them differently.

A comparison of the corresponding Irish Regulations, the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (SI 2006/329), reveals that the Irish have preferred a 'copy out' approach to the transposition of Directive 2004/18/EC. While administratively less burdensome, it leaves the burden of working out what the Directive means to those interested in its provisions. In contrast to the United Kingdom, the opportunity has not been taken to re-enact the European Communities (Review Procedures for the Award of Public Supply and Public Works Contracts) Regulations 1992 (SI 1992/38), which continue to give effect to the Remedies Directive in Ireland.

Private Water Supplies

These Regulations implement Council Directive 98/83/EC on the quality of water intended for human consumption in respect of private water supplies in Scotland. The Directive was implemented in respect of the public water supply by the Water Supply (Water Quality) (Scotland) Regulations 2001 (SSI 2001 No 227). We have not been able to identify equivalent Regulations in other parts of the United Kingdom, which suggests that in making these Regulations the Scottish Executive has been driven as much by a desire to strengthen the regulation of private water supplies as by the 'need' to implement the Drinking Water Directive. This is a tentative conclusion, but one I am supported in by the fact that the deadline for implementation has long passed and by the fact that in enforcement proceedings brought by the Commission before the European Court of Justice the United Kingdom was found to have failed to implement the Directive in Wales and Northern Ireland but not in England or Scotland.²⁹ Reading between the lines, my sense is that all four administrations started out with a common commitment to strengthening the regulation of private water supplies but that that commitment survived only in Scotland.

Conclusions

Many transposition measures parallel their rest of the UK equivalents. Of the sample we have looked at, the Waste Incineration (Scotland) Regulations 2003, the Registration of Fish Sellers and Buyers and Designation of Auction Sites (Scotland) Regulations 2005, and the Public Contracts (Scotland) Regulations 2006 all fit this description. The exception is the Private Water Supplies (Scotland) Regulations 2006.

A number of factors may be adduced in explanation of this lack of difference:

- The absence of distinctive Scottish interests, which from the Committee's perspective is the most reassuring explanation. If there are no distinctive Scottish interests it makes sense not to reinvent the wheel. The Committee's predecessor had no objection in principle to the use of UK- or GB-wide legislation in devolved areas, provided there were no specific Scottish interests to be accommodated. This was said, however, in the context of the use of section 57(1) to implement obligations and not cases in which obligations are implemented separately but in effectively the same terms. The Committee may want to satisfy itself that there are indeed no distinctive Scottish interests where obligations are being implemented separately as well as through section 57(1).

²⁹ Case C-63/02 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*.

- The lack of any real discretion in the implementation of obligations, which may reflect a failure to articulate or press Scottish interests when the UK negotiating line was being worked out or subsequently in the course of negotiations in Brussels.
- Opposition to differential implementation on the part of Whitehall departments.³⁰ DEFRA is said to be less willing than some other Whitehall departments to let the devolved administrations go their own way.
- A tendency to play safe in the face of potential state liability.³¹ The lack of objective justification for differential treatment may give rise to claims, which is said to be a factor in agriculture.
- A pragmatic decision to let the Whitehall machinery take the strain.³²

Alan Page

19 November 2006.

³⁰ Sloat, *Scotland in Europe* (2002), 208

³¹ Rawlings, *Delineating Wales* (2003), 436.

³² *Ibid.*

Meetings undertaken as part of the inquiry

Ireland

Officials from the Department of Environment, Heritage and Local Government

Officials from the Department of the Taoiseach dealing with Better Regulation and the European Union

Irish Business and Employers Federation

Environment Protection Agency

Denmark

Officials from the Ministry of Foreign Affairs and the Ministry of Economic and Business Affairs

Elisabeth Arnold, Chair of the European Affairs Committee of the Danish Parliament

Steen Gade, Member of the Environment and Regional Planning Committee of the Danish Parliament

Brussels

Charles Pirotte, DG Environment Legal Affairs and Governance

Jonathan Stoodley, Secretariat General, European Commission Head of Unit Application of Community Law

European Policy Centre

Simon Mordue, Vice President Verheugen's Cabinet, Commissioner for Enterprise Deputy Head of Cabinet, Special responsibility for the better Regulation agenda

London

The Lord Grenfell, Chairman, House of Lords European Union Committee

Michael Connarty MP, Chairman, House of Commons European Scrutiny Committee

Officials from the Better Regulation Executive

Others

The Lord Davidson, Chair of the Davidson Review on Better Regulation

Scottish Environment Protection Agency

National Farmers Union Scotland

Argent Energy