



## EU Legislation: Government action on 'gold-plating'

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Section IADS

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Standard Note 3328, "Gold plating' and EU Law in the UK", 16 December 2004, looked at the way the UK implemented – and often over-implemented - EU law.

The present Government pledged to change the way in which EU law is transposed into national law in order to avoid this 'gold-plating' and to minimise the burden of over-regulation on UK businesses. The main elements of the Government's principles on the implementation of EU law are:

- Work on the implementation of an EU directive should start early, straight after agreement is reached in the EU
- Early transposition of EU regulations will be avoided except where there are compelling reasons
- EU directives will normally be directly copied into UK law ('copy-out'), except where it would adversely affect UK interests
- Ministers must conduct a review of domestic legislation implementing an EU directive every five years.

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### 1 What is gold-plating?

Gold plating is, in the European Commission's own words, "exceeding the requirements of EU legislation when transposing Directives into national law".<sup>1</sup> Elaboration of the EU law in the UK implementing instrument does not necessarily mean gold plating; it is intended to provide clarification, but may amount to over-implementation. The previous Labour government described gold plating as follows:

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

- extending the scope, adding in some way to the substantive requirement, or substituting wider UK legal terms for those used in the directive; or
- not taking full advantage of any derogations which keep requirements to a minimum (e.g. for certain scales of operation, or specific activities); or
- retaining pre-existing UK standards where they are higher than those required by the directive; or
- providing sanctions, enforcement mechanisms and matters such as burden of proof which are not aligned with the Macrory principles<sup>29</sup> (e.g. as a result of picking up the existing criminal sanctions in that area); or
- implementing early, before the date given in the directive. (*N.B. Bringing implementation forward in the UK by a matter of weeks to coincide with a UK Common Commencement Date can be justified if it can be demonstrated that the benefit of early implementation outweighs the cost.*)<sup>2</sup>

In reply to a question in the House of Lords in July 2010 asking whether the Government intended to "re-examine European Union legislation on the statute book to ensure it contains no "gold plating"; and, if so, whether they intend to re-transpose any legislation", Baroness Wilcox said that a review of EU law would be part of a "one in, one out" rule for all new regulation, in order to identify regulatory savings:

European directives will be within the scope of these reviews, and consideration will be given to the level and methods of transposition. If less burdensome methods of complying with a directive are identified, suitable amendments to legislation will be made where appropriate.

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<sup>1</sup> Commission Communication: Review of the "Small Business Act" for Europe, COM(2011) 78 final, 23 February 2011. For information on what it has meant for the UK, see Library Standard Note 3328, "Gold plating" and EU Law in the UK", 16 December 2004.

<sup>2</sup> BIS, "[Transposition guide: how to implement European directives effectively](#)", 2007 p.28

Separately, the Government will seek to influence the European Commission in its reviews of the effectiveness of existing EU legislation.<sup>3</sup>

## 2 Reducing the burden on business

Boosting economic growth in a time of economic crisis has been difficult for the UK Government as for most EU governments.<sup>4</sup> In 2010 the Government appeared to have focused its efforts on a raft of domestic changes. An *Open Europe* report in June 2010 noted that the “the Conservatives, and now the Coalition, have so far chosen to focus their deregulation efforts almost entirely on the domestic level”, neglecting the European dimension.<sup>5</sup> However, the Government has said it wants to reduce regulation and ease the burden of EU law on business and enterprise.

A Department for Business, Innovation and Skills (BIS) press release in December 2010 announced “Government ends ‘gold-plating’ of European Regulations”, and set out how the Secretary of State for Business, Vince Cable, aimed to achieve this:

The key to the new measures will be the principle of copying out the text of European directives directly into UK law. The direct ‘copy out’ principle will mean that British interpretations of European law are not unfairly restricting British companies.

The new measures are part of a wider Government policy to tackle EU regulations at the source. Government will be talking with business organisations about the European Commission’s plan for future legislation, working closely with other European countries to make sure that regulations work well on the ground and improving how evidence is used by the European Parliament and Council.<sup>6</sup>

The press release outlined a five-yearly review process of EU legislation, involving a consultation with businesses. The key elements of the Government’s new approach to implementing EU law 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 for early implementation. This will ensure that British businesses are not put 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 eg by putting UK businesses at a competitive disadvantage.
- A statutory duty will be placed on ministers to conduct a review of domestic legislation implementing a European directive every five years.

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<sup>3</sup> [HL Deb 22 July 2010 cWA239](#)

<sup>4</sup> See House of Lords [European Union Committee - Fifth Report “The EU strategy for growth and the UK National Reform Programme”](#), 11 January 2011 for information on the EU and UK strategies for growth.

<sup>5</sup> [Open Europe](#), “Still out of control? Measuring eleven years of EU regulation” June 2010, Sarah Gaskell & Mats Persson, Edited by Stephen Booth

<sup>6</sup> [BIS](#), 15 December 2010

This will allow businesses to influence any necessary improvements based on their own practical experience of applying the rules.<sup>7</sup>

Dr Adam Marshall, Director of Policy at the British Chambers of Commerce (BCC), welcomed the moves:

Business will welcome the coalition's efforts to improve the quality of legislation and end the so called 'gold-plating' of European directives. Favouring the 'copy out' of European legal texts could certainly help to reduce unnecessary complication by government departments. [...] However, government officials and ministers will have to oversee a real culture change in Whitehall to make these recommendations a reality and lighten the load on British business.<sup>8</sup>

In his [first speech as Prime Minister to the World Economic Forum](#) at Davos on 28 January 2011, David Cameron spoke of the problem of EU over-regulation, saying that Europe urgently needed "an aggressive, pan-continental drive to unleash enterprise" and to be bold about deregulation. He thought that removing small businesses from EU accounting rules would alone save them around two billion euros. He called for a "genuine single market", continuing: "Nearly twenty years since Europe agreed to the free movement of people and services we've still got companies employing teams of lawyers just so they can trade across the nearest border". Europe, Mr Cameron said, had been its own worst enemy but it also had the power to make it easier for businesses to start up and prosper. Problems in the EU had held back the economy, he said, noting that economies like Brazil, China and India were "steaming ahead", while in Europe the "drag on growth" had persisted. He also called for a "genuine single market" in Europe and said the stress tests for banks had to be more stringent. He warned that it would not be easy to re-invigorate the economy but to do so Europe needed a "change of direction" because "huge deficits don't just fall out of the sky".

The speech was described in [The Guardian](#) as "an attempt to both to lift the gloom at home ... and to convince Europe that it could compete with the fast-growing economies of the developing world". Jeremy Warner of [The Daily Telegraph](#) was less optimistic about the prospects for the Prime Minister's recommendations:

Unfortunately, his prescription for what Europe must do to correct the position, though self evidently the right one, is the exact opposite of the way Europe is responding. Cameron wants a strongly deregulatory agenda to unleash the power of enterprise and markets. Much of what comes out of the EU only pushes in the other direction.

There were some good ideas in the Cameron speech. He wants Europe to adopt the one in one out approach to regulation, where if one regulation is introduced, another is scrapped, and he wants small business to be made immune to any major new initiatives with costs for business. His chances of getting these things? About zero, I should think.<sup>9</sup>

### 3 New Guiding Principles on EU law

The Government's new [Guiding Principles for EU Legislation](#), adopted on 15 December 2010, state:

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<sup>7</sup> Ibid

<sup>8</sup> [Chamber View blog](#), "BCC: Efforts to Stop "Gold-Plating" of EU Regulations will be Supported by Business", 16 December 2010

<sup>9</sup> [Daily Telegraph](#) 28 January 2011, "It's hard to share Cameron's optimism on Europe"

## **General Principles**

1. The Government's approach is to look at the cumulative impact of new EU measures.
2. Wherever possible, the Government will argue for alternatives to regulation at European level, drawing on behavioural science insights.
3. The Government will engage with the European Commission before it has adopted proposals to increase UK influence on the drafting of legislative proposals.
4. The Government will build alliances with other Member States and relevant MEPs and other EU-level stakeholders to increase the UK's effectiveness in negotiation.

Ministers must ensure that:

a) they are well sighted on all EU measures relevant to their department, from the initial Commission proposal through to transposition and implementation; and

b) their department assesses from the outset the impact on the UK of the proposed legislation and effectively project manages the process from negotiation to transposition.

5. When transposing EU law, the Government will:

a) wherever possible, seek to implement EU policy and legal obligations through the use of alternatives to regulation;

b) endeavour to ensure that UK businesses are not put at a competitive disadvantage compared with their European counterparts;

c) always use copy out for transposition where it is available, except where doing so would adversely affect UK interests e.g by putting UK businesses at a competitive disadvantage compared with their European counterparts. If departments do not use copy out, they will need to explain to the RRC the reasons for their choice;

d) ensure the necessary implementing measures come into force on (rather than before) the transposition deadline specified in a directive, unless there are compelling reasons for earlier implementation; and

e) include a statutory duty for Ministerial review every five years.

## **Operating Principles**

1. Before starting transposition, departments must satisfy the Reducing Regulation Committee (RRC) that they have identified the aims of the EU law and the relevant policies of the UK Government, and how the two will be brought into harmony so that transposition neither has unintended consequences in the UK nor risks infraction.

2. The legal text for UK transposition should only be finalised once the policy framework has been agreed by the RRC.

3. The Regulatory Policy Committee must clear impact assessments for all transposition proposals.

4. The European Affairs Committee should be kept informed.

5. When reviewing departments' approach to transposing and implementing EU law, the RRC will expect departments to apply the following principles:

a) within two weeks of publication in the Official Journal the RRC to have been notified and provided with a pro forma including an outline project plan to the obligations coming into force;

- b) proposed implementation applies the above principles and meets the standards in the Government's guide to European policy-making;
- c) proposed implementation complements domestic legislative objectives; and
- d) proposed implementation delivers the outcomes required by the directive and is supported by evidence showing it will minimise the cost to business.

## 4 'Copy-out'

'Copy out' is the direct copying of the text of an EU directive without amendment. There can be problems with a word for word transposition, which the European Commission identified as follows:

... transposition without accompanying legal and administrative measures to ensure effective implementation and enforcement of the directive will not be sufficient. It is at times necessary, in order to achieve in practice the result required by the directive, to make transposing legislation more detailed than broadly phrased obligations in the directive. In doing so great care must be taken not to restrict the scope of the obligations contained in the directive.<sup>10</sup>

The [Davidson Review](#) on the implementation of EU legislation published in November 2006 looked at the use of copy-out and issues surrounding its use:

5.11 Copy-out and elaboration as techniques of transposition were raised with the review in relation to double-banking and gold-plating.<sup>4</sup> The current Transposition Guide suggests that the general presumption should be to copy-out, except where there is a clear justification for doing otherwise. The Guide then goes on to list circumstances where copy-out is not appropriate, including when implementing regulations need to fit in with an existing legal regime, where the wording of the directive is so ambiguous that business calls for greater precision, and when passing on the risk of resolving the ambiguity to the public is considered likely to lead to more costly implementation through the public resolving it in a risk-averse way.

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

Footnote 4: 4 "Copy-out" is the style of transposing European legislation by adopting the same wording as the directive or by mirroring it as closely as possible. This can involve cross-referring to the relevant provision in the directive.

"Elaboration" is the style of transposition sometimes adopted to deal with provisions of a directive that are ambiguous, unworkable or do not fit with existing UK law. The implementing legislation reformulates the words to make the relevant provisions clearer and more certain, in accordance with the traditional UK legislative drafting approach.

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<sup>10</sup> European Commission, "[Guide to the Approximation of European Union Environmental Legislation](#)"

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

The Government wants to use the ‘copy-out’ technique for implementation whenever possible, “except where doing so would adversely affect UK interests (e.g. by putting UK businesses at a competitive disadvantage compared with their European counterparts)”.<sup>11</sup>

## **5 Further reading**

Will Burrows, Canter Levin and Berg Employment Solutions, [Gold plating EU Directives – and TUPE](#), 15 February 2011

[Daily Telegraph, 16 December 2010](#), Richard Tyler, “EU laws must be copied out to avoid 'gold-plating', says Vince Cable”

BIS, [“One-in, One-out: Statement of New Regulation”](#), April 2011

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<sup>11</sup> [“Reducing Regulation Made Simple: Less regulation, better regulation and regulation as a last resort”](#), December 2010