



How the UK Government deals with EU Business

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Section IADS

Since the UK joined the European Economic Community (EEC) in 1973, successive UK governments have had an ambivalent attitude towards the EC/EU and the UK's place in it. They have expressed a desire to be engaged in the European Union in order to exert influence within it; have also sought to distance the UK from some of its effects, yet at the same time over-implemented many of its laws.

Observers might conclude that for historical reasons, UK governments are simply not used to or very good at collaborating with other governments in law and policy-making, and therefore do not do it with much conviction. Others argue that it is not a matter of belief, tradition or culture, but of out-dated or inappropriate structures and mechanisms. The UK Government's relationship with the EU and its handling of EU business could be affected by a combination of all of these.

The previous Labour Government commissioned two major reviews of the ways in which the UK deals with EU business and the implementation of EU law. The present coalition Government has also introduced changes, via legislation (e.g. the *European Union Act 2011*) and procedures (e.g. using 'copy-out' for the transposition of EU law into UK law). UK Government Departments have issued "guiding principles" on their approach to EU measures, which purport to maximise the UK's influence in Brussels and end the gold-plating of UK measures implementing European ones.

This Note looks at UK Government and Civil Service structures and culture; what happens at the UK-EU interface, and methods for transposing EU law into UK law.

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1 Historical overview of government EU machinery

1.1 Introduction

The government structure and machinery for dealing with the UK's membership of the then European Economic Community (EEC) were established as early as 1961, when the UK made its first moves towards joining it. The proposed framework was, as Simon Bulmer and Martin Burch state, "a classic Whitehall arrangement of a Cabinet committee, underpinned by several levels of official-level committees, including one to evaluate the legal implications".¹ The machinery was abandoned after President de Gaulle rejected UK membership in 1963, but it was reinstated in the early 1970s, when negotiations for UK accession re-started, the main difference being the moving of the coordination role from the Treasury to the Cabinet Office.

As the EU's influence in a wider range of policy areas increased in the 1980s and 90s, the 'European dimension' became a feature of all Government departments, but centred on the Cabinet Office European Secretariat (COES). By 2000, under the previous Labour Government, every Government department had to deal with EU business and almost every department had EU co-ordination facilities, although there was no central approach to dealing with EU business and no central coordination. The COES had a relatively small senior staff of just nine for most of the 1990s. Bulmer and Burch described other key coordination mechanisms in 1998 as follows:

- A well established official network for dealing with European business with an inner core of key departments and players. The network centres on the Cabinet Office European Secretariat (COES) and its contact list for official committees. The key organisational players remain situated, as they always have been, in the COES, Foreign and Commonwealth Office (FCO), the Department of Trade and Industry (DTI), the Ministry of Agriculture Fisheries and Food (MAFF), the Treasury and the UK Permanent Representation to the EU (UKRep).
- Subsidiary nets have emerged on specific areas of business: the EU's Common Foreign and Security Policy (CFSP) centred on the FCO; Justice and Home Affairs (JHA) cooperation centred on the Home Office; monetary union (EMU) centred on the Treasury and often contained within it in an effort to suppress its potential for division within government. With these subsidiary hubs, oversight is inevitably more problematic.
- There have been very few formal organisational innovations in the handling of European business *above* departmental level. Indeed significant innovations in the coordinating machinery are hard to trace. Most arrangements have developed from small beginnings as the need arises. The possible exceptions are the COES and its attached team of Cabinet Office Legal Advisers (COLA), based in the Treasury Solicitor's Department. COES is the one long established pro-active secretariat in the Cabinet Office, with the remit to pre-empt divisions emerging between departments over EU policy.

¹ Queen's Papers on Europeanisation, No. 9/2000, "[Coming to Terms with Europe: Europeanisation, Whitehall and the Challenge of Devolution](#)", Simon Bulmer and Martin Burch, Department of Government, University of Manchester, "Adaptation of UK central government 1951-99"

- Over time the involvement of Prime Minister's Office has increased. The establishment of the European Council in 1975, and its subsequent development into the key strategic policy body of the EU, reinforced prime ministerial power within the government. The head of the COES has become the key official adviser to the prime minister on European policy.
- A degree of territorial decentralisation in the formulation of policy emerged in the 1990s. The Scottish Office in particular became aware of the need to develop triangular relationships with both London and Brussels, albeit within a UK government context. As with the emergence of the GORs in England, the growth of the EU structural funds was a key stimulus.

The structure, which was very similar to the coordinating structure proposed in 1961, was as follows:

Cabinet

DOP Defence and Overseas Policy

EDOP (European sub-committee, chaired by Foreign Secretary)

Ministerial consideration of European policy, e.g. IGC. Comprised of main affected ministries.

EQO (senior officials' coordinating committee)

Relatively infrequent oversight meetings - also smaller ad hoc meetings and occasional special groups, e.g. to oversee IGC negotiations. Chaired by Head, Cabinet Office

European Secretariat.

Friday meetings (Permanent Representative, Head of COES and affected Departments)

Examines tactics on short-/medium-term issues arising in the EU. Held in Cabinet Office.

EQO (official committee)

Detailed coordination of policy at official level. Chaired by Cabinet Office European Secretariat. Many meetings on ad hoc basis.

EQO(L) (lawyers)

Coordination of legal advice on policy and of responses to Commission infraction proceedings, ECJ litigation etc. Chaired by Cabinet Office Legal Adviser from the Treasury Solicitor's Department².

According to Bulmer and Burch the UK Government machinery needed to work "according to the timetable and rhythms of the EU rather than those of Whitehall and Westminster", but that "the logic of Whitehall [had] prevailed". The benefits of informal, ad hoc meetings chaired by the COES were, in their opinion, that ad hoc meetings were more flexible, could be called in a "just in time" manner. "Much EU business does not require inter-departmental

² Bulmer and Burch, Figure 2: "The ministerial- and official-level coordinating framework for handling European policy 1998"

coordination and is handled according to a ministry-specific logic". The authors summarised the strengths and weaknesses of the British approach to handling EU business:

Strengths of the machinery

- its effectiveness in distributing information around government;
- its well co-ordinated and well briefed approach, with all negotiators in Brussels "singing from the same hymn sheet";
- its highly prepared nature;
- its good record on implementation, facilitated by the role of COLA, which has kept the UK as one of the best performers in avoiding infringement proceedings launched by the European Commission for failure to transpose or implement EC legislation;
- its strong tactical awareness, facilitated through the COES, UKRep and the Friday meetings; and
- the skill of the inner cadre of officials in using the Brussels network to get views across (better than Germany but not as good as France).

Weaknesses of the machinery

- the tendency of some not well versed in the EU policy style to be cautious about networking and engaging at the key, early stages of policy discussions;
- a kind of reserve in Commission advisory groups etc., where counterparts from different state traditions may have a greater willingness to put forward policy ideas than the "neutral" British official;
- a bias, doubtless encouraged by the lack of language skills, to rely on bilateral contacts with northern European countries in building alliances;
- a tendency to be over-prepared, but early coordination may weaken the scope to cut deals in end-game negotiations and leave Britain in a more isolated position;
- a tendency to conform to the Whitehall norms of policy-making at the cost of flexible and effective bargaining in the quite different policy-making environment of the EU itself; and
- weakness in terms of the long-term strategic planning of European policy. These weaknesses cannot be wholly divorced from the political climate over the first 25 years of UK membership of the EU. Nevertheless, the predominance of Whitehall logic is striking.

Strengths at the policy/machinery interface

It is the infrequency with which Whitehall's capacity has been combined with European initiatives that is striking over the period from 1973 to the present.

- Under Mrs Thatcher the single market agenda was successfully prosecuted by Whitehall and politicians. It assumed a dominance in the economic ideas and agenda for the EU from the mid-1980s.

- Tony Blair has placed great emphasis on cultivating bilateral relations (and multilateral ones via the Socialist Party Confederation) as a way of developing a more influential voice within the EU. But the legacy of the EMU opt-out and of the preceding period of British isolation proved difficult to overcome.
- The new government, including the FCO, has consulted more widely on policy in an open-minded approach, for instance with seminars on institutional reform.
- The UK government is unlikely to make concessions too easily in an EU budgetary system which retains a bias against UK financial interests.

Weaknesses at the policy/machinery interface

- Pre-Blair, European policy was often seen as a threat.
- There was also an unwillingness by ministers to understand the significance of rhetoric, kite-flying, bilateral relations and constitutional politics to the cultivation of a European diplomacy.
- When combined with domestic political divisions, the UK government at worst could be completely isolated: pursuing a totally different political agenda from partners, and with little scope for having an influence except negatively (through securing opt-outs, or proposing à la carte integration).
- There has been a tendency for Treasury rules, institutionalised through the EuroPES system, to entrench resistance to additional EU expenditure, regardless of the merits of the proposal. Treasury rules determine the national interest.
- The Whitehall machinery works well but when it is given a negative task, such as when blocking decisions as part of the 1996 policy of non-cooperation on Europe, it almost risks becoming a liability.

1.2 The ‘Step Change’ Programme

Successive EU Treaty changes introduced more decision-making by Qualified Majority Voting (QMV) and enhanced European Parliament (EP) powers via the [co-decision procedure](#) (under the Lisbon Treaty, co-decision is renamed the Ordinary Legislative Procedure or OLP). Some have argued that the decision-making changes contributed to an increasing ‘Europeanisation’ of national policies, as national vetoes were reduced.

The Government of Tony Blair responded to these changes by establishing new structures within government to help it to better project its concerns in the EU decision-making institutions and processes. In September 1998 the Labour Government announced a ‘Step Change’ in Britain’s relations with Europe.³ The aim of the initiative, which was co-ordinated by the FCO, was to enhance Britain’s influence in the EU, to build alliances and promote UK interests at both national level and, after devolution, at sub-national level; to emphasise a new, positive approach to the EU. The Step Change programme was a ten-year project, but it aimed to achieve by 2002 a change in the UK’s position on Europe with a more committed, pro-active approach, projecting Britain’s national and regional interests in EU decision-making and changing other Member States’ perception of the UK. It gave rise to intensified EU contacts by Government Departments, the Cabinet, ministers and officials with their counterparts in the EU and applicant States.

³ FCO, *Departmental Annual Report 1998-1999*, “Objective 5: A strong UK role in a strong Europe - The Step Change initiative”

The Cabinet Office Better Regulation Unit became the Regulatory Impact Unit (RIU) in the Government's new approach to regulatory quality and control. The changes involved developing a forward programme of regulatory proposals, including EU proposals, to help government reduce the cumulative burden of regulation and uncertainty, and a stronger UK voice in Europe to ensure that the Council of Ministers took into account the cumulative impact of EU legislation.

The work of the COES was integrated with that of the Prime Minister's Office. From August 2000 the Secretariat gained more resources and senior staff,⁴ a head at Permanent Secretary level, an office at Number 10 and the title of Prime Minister's Adviser on Europe.⁵ The Secretariat was more closely involved with the Prime Minister's Policy Unit (PMPU). The Step Change programme was overseen by the Ministerial Group for European Co-ordination (MINECOR), chaired by the Minister for Europe, then Keith Vaz. According to the FCO's *Departmental Annual Report 1999-2000*:

The FCO has worked closely with all Government Departments to promote the UK's policy priorities at the EU level. [...] Step-Change has helped deliver significant results in 1999. The UK retained its budget abatement (worth about £2 billion a year) and secured its best ever regional funding deal at the Agenda 2000 negotiations in March 1999.

The UK showed itself to be a leading European player in the area of justice and home affairs at the Tampere Special Summit in October 1999, with joint initiatives with Germany and France on migration and asylum issues, and with Denmark and Sweden on crime prevention and youth crime. At the Helsinki European Council in December 1999 key decisions on defence, enlargement and institutional reform fully reflected FCO policy priorities. And at the Lisbon Special Summit in March 2000, the UK secured agreement on a far-reaching agenda to modernise Europe's economic and social structures to meet the challenges of the 21st century.⁶

The changes were in part a response to the increasing involvement of heads of government in EU policy-making via the European Council, but the Blair Government was significantly more active than previous governments in intergovernmental liaison, bilateral meetings at head of state level, coalition and alliance building. Tony Blair held regular meetings with the French and German leaders, then Gerhard Schröder and Jacques Chirac, who were often the driving force behind EU policy initiatives, and also sought allies elsewhere in Europe where he felt it was to the UK's advantage.⁷

To improve contacts between UK officials and their EU counterparts, the Bilateral Department of the EU Division in the FCO was set up and was responsible for embassies and diplomatic posts in the Member States (formerly the West European Department of the FCO). Thus, all EU-related matters were brought into one management structure, which was further enhanced in 2002 and 2004, when the FCO organised itself into theme-based, rather than country-based, Directorates. The Bilateral Department was then closed and its work distributed to relevant parts of the EU Directorate. The Minister for Europe assumed a

⁴ The Secretariat personnel increased from 9 senior officials to 16, with four senior staff and 12 desk officers.

⁵ Sir Stephen Wall, succeeded in 2004 by Kim Darroch, who was succeeded in 2012 by Sir Jon Cunliffe.

⁶ FCO, *Departmental Annual Report 1999-2000*, "Objective 5: A strong UK role in a strong Europe"

⁷ *International Affairs*, Vol. 81, No. 4, July 2005, J. Smith, "A missed opportunity? New Labour's European policy 1997-2005",

greater profile, particularly in MINECOR, which brought together the departmental ministers responsible for Europe, including the Europe ministers in the devolved administrations. Certain Government Departments, such as the Home Office, DTI and DEFRA, became much more aware of EU matters, as Treaty amendments in the Amsterdam and Nice Treaties brought about a further transfer of intergovernmental matters to the EU's 'first pillar'. The Home Office above all had to engage with the EU more, as Europe took on a greater role in immigration, asylum, the combating of organised crime and, since 9/11, anti-terrorism measures. The FCO's *Departmental Annual Report 1999-2000* noted: "Now in its third year, this FCO-led initiative is delivering substantial benefits by promoting UK interests in the EU, and helping us to shape the EU agenda".⁸

In June 2003 a Cabinet Committee on European Strategy (EUS) was established, to be convened and chaired by the Prime Minister. Its remit was to oversee the Government's European strategy, including preparations for UK entry into Economic and Monetary Union (EMU), progress on the Intergovernmental Conference (IGC) on the future of Europe and the presentation of the Government's European policy. If this Committee was an attempt to separate the euro issue from the control of the Treasury, many would argue that it did not really succeed.

The larger Ministerial Group on EU Policy (EUP) was chaired by the Foreign Secretary, and covered conventional EU issues and policies. It met relatively rarely, its terms of reference being to determine the UK's policies on EU issues and to oversee the UK's relations with other Member States and principal EU partners. Bulmer and Burch commented on the institutional constraints on the Labour Government's Europe policy:

A particular feature of the organization of Whitehall since 1997 is the way that executive authority is split between the prime minister and his staff, on the one hand, and the Chancellor of the Exchequer and the Treasury, on the other. This fault line is one of the central features of the Blair government (Naughtie 2001; Scott 2004) and it has had consequences for the economic aspects of European policy. The Treasury still has a constraining effect on European initiatives and this has expenditure implications [...] But it is in relation to monetary issues that the Treasury has had an impact on the adaptation of the UK to EU pressures through the development and evaluation of the five economic tests required before the government can recommend joining the Euro-zone. As under the Major government, the Treasury has kept charge of the development of policy in relation to the European currency. This factor reflects an important division of authority within UK government. It serves as a continuing constraint on the pace and content of policy development and institutional adaptation.⁹

The authors thought, however, that under Blair 'Europeanisation' had increased:

The Labour Government has sought to work with the grain of Europeanization rather than against it. Thus, our evidence shows that since 1997 institutional opportunities have been seized and cultural changes have been promoted in a way that contrasts with the earlier passive and defensive adaptation, with its emphasis on reception rather than projection.¹⁰

⁸ FCO, *Departmental Annual Report 1999-2000*, "Objective 5: A strong UK role in a strong Europe"

⁹ S. Bulmer and M. Burch, "The Europeanization of UK Government: From Quiet Revolution to Explicit Step-Change?", *Public Administration*, 83 (4), 2005

¹⁰ *Ibid*

Tony Blair's more executive style of leadership enabled him to be more authoritative about the EU in most Government Departments, with the notable exception of the Treasury, which Bulmer and Burch thought had initially remained significantly detached. As to whether Step Change had resulted in a more successful UK engagement with the EU, they concluded

... measuring the effects of diplomacy and enhanced networking is a notoriously difficult thing to do. The government's policy on the Iraq war hampered the building of alliances with key EU partners, namely France and Germany, owing to their different responses. Similarly, Gordon Brown's decision in June 2003 that the five economic tests had not been met, maintained the UK's absence from the Euro-zone. The re-emergence of a budgetary row in June 2005, especially with President Chirac, had echoes of the disputes with partners during the early years of Mrs Thatcher's government. It fell to Blair, as incoming President of the European Council, to try to restore harmony.

Thus, while the UK has managed to make an impact on the EU's work, notably in defence and the Lisbon Process of enhancing Europe's economic competitiveness, thereby placing a firmer British imprint upon the EU, the picture remains mixed.

So, has all this amounted to a step change? In procedures – yes. In endurance – not yet clear. In outcome – mixed.¹¹

Dennis MacShane, Europe Minister 2002-05, wrote of UK relations with Europe under Blair:

Instead of thinking and acting strategically to shape a coherent pro-European Labour government, too many ministers seemed keener to indulge in Brussels-bashing, using language not much different from their Tory predecessors. Blair went through a succession of Europe ministers - nine in as many years - and never built up the importance of the EU in government by giving Europe full cabinet status. Successful European politics require that one likes Europeans.

Blair set up a committee of ministers who were meant to make their departments more European, but then allowed Straw to close it down".

"In part, Blair was lumbered with a generation of ministers who spent their formative years ranting against Europe and its works. Read Alastair Campbell's diaries for a constantly dismissive approach to working positively with Brussels or with any major EU leader who did not see Europe through the British prism. I recall cabinet committee meetings in which ministers spent 50 of the 55 minutes working out how to stop a directive reducing the patient-killing long hours in the NHS which had been agreed a decade previously. Listening to John Reid rant against European efforts to save patients' lives was a low point, and when Blair conceded a referendum to the barely hidden Eurosceptic voices in government, including the Foreign Office, it was game over for any serious Labour leadership on or in Europe".¹²

1.3 Government – EU interface: UKRep

The [UK Permanent Representation to the EU](#) (UKRep) negotiates and lobbies in Europe on behalf of the UK, and government departments consult UKRep on the conduct of EU

¹¹ S. Bulmer and M. Burch, *ibid*

¹² [Guardian review of Stephen Wall's book "A Stranger in Europe: Britain and the EU from Thatcher to Blair"](#), 2008

business and EU developments. The Permanent Representation is the crucial formal and informal link between the Government and the EU institutions. At its weekly meetings,¹³ attended by the head of UKRep and the head of the Cabinet Office EU Secretariat, as well as representatives from the FCO and key ministries, government departments review major EU policy issues and coordinate a tactical approach to EU policy. The Government has described UKRep's role as follows:

The UK's Permanent Representation to the EU is the Government's interface in Brussels with the EU Institutions. Its job is to present the UK's interests to these Institutions, and to advocate these interests, both bilaterally, and in multilateral discussions in the Council of Ministers, and supporting Committees of Ambassadors and working groups. The Permanent Representation follows the full range of issues in which the EU enjoys competence. It is headed by three officials of Ambassadorial rank. The Permanent Representative supervises the work of Political, Communication and Visits, Economic and Finance, Justice and Home Affairs and Legal Sections. The Deputy Permanent Representative supervises the work of Competitiveness and Markets, Regions and Agriculture, and Social and Environment Sections. The Ambassador to the Political and Security Committee supervises the work of the two External Relations Sections (the Common Foreign and Security Policy and the near abroad; trade, wider world and development), and the Military Section. The staff of the UK Permanent Representation are drawn from 16 government departments, with the FCO providing the overall platform, and acting as parent department to the mission. Individual sections receive instructions from a variety of lead Ministries, according to the matter at hand.¹⁴

Historically, the FCO has had a close relationship with UKRep and supplied around half its staff. In written evidence to the Foreign Affairs Committee in February 2011, Professor Hussein Kassim, of the School of Politics, Social and International Studies, University of East Anglia, wrote about the FCO's important but declining role in UKRep under the last Government:

... as a result of internal restructuring and other changes, the FCO no longer shadowed all areas of EU policy, intervened in policy areas where there is no direct FCO interest, or, since every department established its own link to UKREP, controlled communications between Whitehall and Brussels.[33] Not only did the FCO cut back its coverage of European matters in London, but it has "pulled back ... from day-to-day monitoring of the work at UKREP in which [it does not] have a strategic interest". It is not as strongly represented among UKREP staff as in the past,[34] nor does it formulate the instructions sent to UKREP. At the same time as it has become more independent of the FCO, UKREP retains its centrality in coordination [...]—the centrepiece of the UK system.¹⁵

¹³ The weekly meetings were introduced following UK accession in 1973. The Permanent Representation is an EU Treaty requirement and a UK representation to the Communities can be traced back to the 1950s.

¹⁴ Foreign Affairs Committee report on "The Role of the FCO in Government", April 2011

¹⁵ FAC written evidence, 27 April 2011, "[The Role of the FCO in UK Government](#)", 1 February 2011. **Footnotes:** 33 "The FCO has decreasingly involved itself in non-FCO business.[...] The FCO rarely gets involved in domestic EU business unless it has major implications for our overall [foreign] relations. But the FCO is still important for information gathering etc. UKREP, the Treasury and lead ministries will all be important to this as well." 34 UKREP officials working to COREPER I areas noted that there was not a single FCO official working on their floor.

UKRep advances national aims and interests in EU negotiations in the Council of Ministers, and seeks to exert influence in the Commission and the EP. UKRep staff are seconded from a wide range of domestic government departments and the diplomatic service, although they officially come under the operational authority of the FCO.

Anthony Forster and Alasdair Blair, in *The Making of Britain's European Foreign Policy* (2002), commented (p. 59):

... the staff of the Permanent Representation, particularly the Permanent Representative, particularly a key role in policy decisions and negotiating tactics. To this end, they are not just considered people who are on the receiving end of national instructions, but are rather considered important contributors to policy-making objectives. This is primarily because their local knowledge of the other member states and the EU institutions is of assistance in determining whether a national position is a realistic one.

Many staff are also recruited in Brussels for their “valuable local knowledge” ([UKRep website](#)).

Sir Jon Cunliffe is the UK's Permanent Representative to the EU. He represents the UK's interests at weekly meetings of heads of mission from all 27 Member States. This group is called the Committee of Permanent Representatives or Coreper II and it deals largely with political, financial, justice, policing and foreign policy issues. The Deputy Permanent Representatives to the EU meet in the Committee of Deputy Representatives, also known as Coreper I, which deals mainly with social, environmental and economic issues. A third grouping, the Political and Security Committee (PSC), brings together ambassadorial level representatives from each Member State to discuss Common Foreign and Security policy (CFSP) and defence issues.

The rest of the UKRep team is broadly structured around these three formations with smaller teams within each group to deal with specific issues. Alongside these thematic teams, there is a group of staff who work on cross-cutting issues, for example providing legal advice, lobbying MEPs or arranging ministerial visits.¹⁶

The three Ambassadorial level representatives are supported by a team of ten senior managers, known as Counsellors. Eight of these manage teams that are responsible for promoting UK interests in a specific area of EU policy. In these thematic teams, most staff represent the UK in regular meetings with their counterparts from the other Member States, known as working groups. They discuss co-operation at the EU level prior to Council meetings of national Ministers who aim to find agreement on a way forward. In some cases this means that UKRep staff are negotiating detailed EU legislation; in others it may mean they are discussing how the EU should co-ordinate its response to events elsewhere in the world.

These thematic teams work closely with the three UK teams responsible for representing the devolved administrations, which have individual offices close to UKRep's main offices in Brussels. This co-operation aims to ensure that UKRep represents the interests of the UK as a whole. The individual UKRep teams are as follows:

- [Regions & agriculture](#)

¹⁶ [UKRep website](#)

- [Economics, finance & taxation](#)
- [Common Foreign & Security Policy](#)
- [Development, trade & enlargement](#)
- [Competitiveness & Markets](#)
- [Justice & home affairs](#)
- [Legal advice](#)
- [Political & Institutional Affairs](#)
- [Social & environment](#)
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A Political Counsellor has a team which covers cross-cutting issues such as relations with the EU institutions, ministerial visits, press and communications. There is also a team of legal advisors, headed by a Counsellor, who provide legal advice to UKRep staff on EU policies when needed.¹⁷

The UK's Permanent Representative or his/her deputy (depending on the Council formation) usually accompanies ministers to Council meetings and provides advice as needed. While the Permanent Representative has the right to take part in ministerial meetings of the Cabinet that deal with EU policy, he/she is not formally considered to be a member, just an observer.

It could be argued that the head of UKRep should have a greater role in Cabinet consideration of EU policy, given his/her position at the interface of the EU and government.

2 UK Civil Service culture

2.1 Direct experience of Europe

By the late 1990s there were more civil servants dealing with EU policy-making than with any other cross-departmental policies. Bulmer and Burch observed a difference between a small group of officials who had experience in Brussels and the “wider group of all those dealing with the EU”, but “Common to all of them is a norm that key to the effective working of the system are the established Whitehall traditions of sharing information, departmental lead and settling business at the lowest possible level”. They concluded:

Co-ordination works, despite an apparent lack of resource at the centre, because of traditional norms of sharing information across Whitehall. These ensure that there is a strong understanding that intelligence on developments in Brussels and in the UK on European related matters is shared amongst departments. (It contrasts strongly with the practice in Germany where intelligence is a resource which may be used by one ministry against another). Where an inter-ministerial disagreement over policy develops, there is a strong understanding that the Cabinet Office should be brought in to help broker a solution at an early stage to ensure that a single policy is articulated in

¹⁷ [UKRep website](#)

Brussels. This norm reflects the way in which the dynamic of Whitehall prevails in the Europeanisation process.

Anthony Forster and Alasdair Blair also commented that “direct experience of Europe has been crucial in gaining an understanding of the rhythm and working practices of the EU, and to cultivating relations with other individuals through networking”.¹⁸ Forster and Blair noted further that “The effective projection of British negotiating objectives is greatly improved by increasing the knowledge and understanding within Whitehall of how the EU works”.

The smaller group of officials, largely those with Brussels experience from the FCO, what was then MAFF and the DTI, and to some extent the Treasury, had “slightly different skills and understanding about how the EC/EU works, and an awareness of what the critical issues are and how business should be handled in both Whitehall and Brussels”. They attributed their better and more realistic understanding of the EU to their Brussels experience (on secondment as detached national experts, DNEs, in UKREP or in Commission *cabinets*) and to their better language skills. The authors found that direct experience of Brussels was “crucial to an effective representation of British interests in the EU” and to “effective *projection* of British European policy”. Training in EU skills was uneven and had “become more fragmented as a result of decentralised budgeting within government” and increasing budgetary pressures in departments – EU training programmes were clearly not a priority – although both sets of authors note the establishment of the European Fast Stream training scheme, which was set up in 1991 to prepare UK candidates for work in the EU institutions.

Sir Stephen Wall, who was Tony Blair’s Europe Advisor and Head of the European Secretariat in the Cabinet Office, also drew attention to various aspects of the Whitehall culture in an [interview with Mark Leonard and Rob Blackhurst published by the Foreign Policy Centre](#),¹⁹ which he thought had undergone a “dramatic change in the last 20 years or so”:

When I was dealing with European issues in the early 1980s, you had two or three departments that really knew about Europe: The Foreign Office (because the Foreign Office was responsible for dealing with foreigners), the Ministry of Agriculture (because the CAP was an important part of life) and the DTI (because an important part of trade and industry had aspects of the Single Market).

The Home Office, for example, had no experience of the European Union. Basically, negotiations within Whitehall were infinitely more difficult than negotiations in Brussels. It was much harder to hammer out a deal in Whitehall because people tended to come with absolutely firm departmental positions: that was the British position that had to prevail in Brussels. But then, of course, over the years, more and more people have had experience of serving in the UK Representation. Now when you have discussions in Whitehall, clearly we have British positions, but we also (and increasing majority voting has been a factor) have learnt that you can't just say "well this is the British position" You have to say "who are our allies?" "How do we make alliances?" "What is the endgame going to look like?"

Stephen Wall was doubtful that Whitehall had “internalised” the fact that so much UK domestic policy is now a “product of opinions reached in Brussels”: “There is still a tendency

¹⁸ *The Making of Britain’s European Foreign Policy* (2002) p. 58.

¹⁹ Undated, but it must have been between 2004 and 2006 as he talks about the EU of 25.

to think of people who know about the EU as European specialists, whereas really, anybody embarking on a Whitehall career now needs to be a European specialist". The Foreign Office's predominant co-ordinating role had changed, he thought, because most of the EU's legislative business is carried out in specialist councils and FCO ministers cannot be experts in all areas dealt with in these councils. He also thought that the move towards more practical co-ordination work at European Council level (Heads of State and Government) was "not necessarily desirable in terms of the effective management of the European Union", particularly an expanding EU. He acknowledged the increasing co-ordinating role of the Cabinet Office (reflecting this larger focus on European Council direction), while the Foreign Secretary remained the senior minister responsible for co-ordinating at ministerial level.

Chris Heaton-Harris, a eurosceptic Conservative MP and former MEP, believes the UK Civil Service does not serve the interests of the UK in Europe because of its independence from government. He wrote of "the need for a change in the way the Foreign and Commonwealth Office (especially) and our Diplomatic Service are staffed":

In the United States, when the Presidency changes hands, so do a large number of top government jobs that would be filled by civil servants under the British model. In the US, the people in these roles are political appointees and ensure that the political change demanded by the country at the polling booth is reflected in those top "administration" jobs that actually deliver the policies of the new President.

In the UK, we need to have a debate about whether we should have a smaller version of a similar system. Surely the person in charge of advising the Prime Minister in foreign affairs and the head of the UK Representation in Brussels (which conducts negotiations on important political matters on a daily basis) should both be political appointees selected by the Prime Minister himself, from whomever he chooses, though subject to a confirmation process in the Houses of Parliament.²⁰

David Lidington thought the UK's influence in the EU could be enhanced by having more UK nationals in the UK civil service and announced a Government campaign to encourage joiners:

More British nationals in the EU civil service can transform our influence.

The UK represents 12% of the EU's population yet it currently only makes up 4.8% of the EU's Civil Service workforce. In 2011 British applicants accounted for only 2.6% of all applicants, lower than any other EU Member State

I believe that a shortage of British staff undermines our influence in the EU. The EU affects each and every one of us. If we want the EU to serve our interests, then we need the thoughts, ideas and innovation that this country produces in such numbers to be equally represented

We need British nationals to join now to become the future leaders of the EU. Getting the UK better represented in EU institutions is an important issue for the government, including the Foreign Secretary. And that is why the Foreign

²⁰ Foreign Policy Centre, The new British Politics and Europe: Conflict or Cooperation?"The "Natural Law" that governs Britain's relationship with Europe", August 2011.

Office is leading a campaign to encourage British nationals to consider a career in the EU institutions.²¹

2.2 Legal expertise

Whitehall officials, unlike their counterparts elsewhere in the EU, have not typically been lawyers. Dionyssis G. Dimitrakopoulos commented in 2001:

Typically, the Whitehall official has little or no legal training and tends to construe issues regarding transposition as 'technical' while the insistence of lawyers on specific terms or phrases during the process of negotiation seems to be construed as little less than obstruction.²²

The Cabinet Office/Regulatory Impact Unit "Guide to Better European Regulation" (1999, p.26) instructed departments to involve lawyers in the negotiation of EU measures, but Dimitrakopoulos suggests that there has been some hostility towards this from civil service administrators, and that "This hostility is also mirrored at the organisational level by the existence of a separate hierarchy for the two groups of officials which re-produces the different mentalities". He also believed the tradition of moving officials around government departments could have a negative effect in terms of learning from experience:

Intra-departmental and inter-departmental mobility of officials is another source of problems in transposition. Although mobility is an essential tool for the management of human resources in public administrations, it also produces unintended consequences both in southern and northern member states. Officials move on to other posts after the end of the frequently protracted negotiations and the adoption of a directive. Hence, their experience and knowledge aren't directly (and certainly not easily) accessible to the officials who replace them. This, in turn, negatively affects the capacity of public administrations to learn from the precious experience acquired during negotiations.²³

The *Bellis Report* in 2003 recommended among other things that civil servants joining government legal departments should be trained in drafting by the Government Legal Service and that lawyers should be more involved centrally in the implementation of EU legislation (see more below on *Bellis Report*).

2.3 Civil Service independence from government

Dennis MacShane, former Labour Europe Minister, writing in December 2005 in "[Britain's Voice in Europe: Time for Change](#)", was critical of the UK's traditionally apolitical civil service:

Influence in Europe is based on political networking. This poses problems for the British system of government which seeks to create a civil service which is insulated fully from political belief, connections and networks. This proclaimed neutering of state service from any contamination by political affiliation makes little sense in most other European countries.

²¹ [David Lidington blog, 20 March 2012](#)

²² *European Law Journal*, volume 7, number 4, pp 442 -458, 2001, "[The Transposition of EU Law: 'Post-Decisional Politics' and Institutional Autonomy](#)", Dionyssis G. Dimitrakopoulos

²³ FN36: Interviews, Athens and London, April and July 2000.

Civil servants in most EU member states are of high quality, selected after rigorous examinations, and open to talent with promotion based on merit. But few on the continent believe that serving the public good and the state requires the civil servant to become a political eunuch.

He contrasted this with the traditions elsewhere in the EU, pointing out that other traditions were not considered unfavourable to the national interest:

In France, graduates of the *Ecole nationale d'administration* – the elite training college for France's top administrative class – move easily between civil service positions, working in ministerial cabinets, becoming elected politicians themselves, or transferring to business.

In Spain, foreign ministers are often experienced diplomats linked to one of the two big parties. In Germany and Austria, the idea of democracy is based on competing democratic political parties and it is normal for senior federal or regional civil servants to be identified with a political party.

No-one disputes their integrity, nor their disinterest in seeking the best solutions to the problems they are confronted with. But neither is there any pretence that adult, mature citizens who help shape the decisions or guide the policy for their country are without political belief or affiliation.

MacShane believed the UK approach “makes it difficult for Britain to maximise networking influence in Europe prior to EU policy decisions being made”. He suggested the setting up of a European Networking Centre “to support MPs, political parties, the EEF, BCC and regional development agencies as well as with the TUC in order to promote UK ideas and influence in EU decision making processes”. He stressed the importance of experience in Europe, suggesting the Government should insist that top civil servants have some work experience in the EU and a working knowledge of an EU language, instead of simply relying on “expert, often technically brilliant diplomats in Brussels”:

What is needed is enhanced presence in national capitals and understanding of the inter-action of national and Brussels priorities. Prevention or early intervention is better than long defensive battles in the corridors of Brussels because Britain did not spot the dangers in a proposal before it was well down the path of being launched.

While the coordination of Whitehall officials in their approach to EU dossiers was, he thought, “efficient and well-managed”, ministerial coordination was lacking. The FCO had set up a ministerial coordination committee, which allowed junior ministers from the departments to meet each other and discuss common problems. This was closed in 2003 and a cabinet sub-committee “theoretically” took over the coordination work, which in MacShane's view concentrated more on stopping EU measures being applied the UK than discussing a strategic approach to the EU and how best to maximise UK influence and leadership in Europe. Cabinet Ministers were unwilling to delegate EU work “for fear that shoving responsibility and leadership further down the ministerial chain of authority would lead to mistakes or media coverage that could reflect badly on the most senior minister in the departmental team”.

3 Present Government coordination of EU policy

The Cabinet Office and the FCO have leading roles in the UK Government's dealings with Europe and the UK's relations with the EU, although under the last Government the FCO's influence declined somewhat. In written evidence to the Foreign Affairs Committee, Professor Hussein Kassim questioned their relationship:

The role of the Foreign and Commonwealth Office (FCO) in the coordination of the UK's EU business has changed significantly over the past 13 years in ways that raise important questions about the division of labour in European affairs between King Charles Street, Number 10 and the Cabinet Office, as well as the FCO's responsibilities, and the available expertise and level of resource the FCO devotes to this important policy area.²⁴

Turning to the present Government, Kassim thought "the decline of the FCO's influence in UK European policy appears to have been partly reversed,²⁵ even if the streamlining of units dealing with Europe continued". He continued:

The Foreign Secretary has taken a strong lead in setting European policy and the PM is less interventionist than his immediate predecessors. The resurgence of the FCO featured significantly among interviewees. Although an overwhelming majority averred that the Cabinet Office was the de facto centre of the UK system, several commented on the FCO's new assertiveness.

3.1 Cabinet Office

The [Government's draft Cabinet Manual](#) of December 2010 summarises the ways in which the Cabinet coordinates EU business:

312. Where EU policy affects the interests of more than one department, the UK line is agreed collectively, usually through the relevant Cabinet committee. Clearance is sought for the UK line to take in negotiations, and any significant changes to this should a compromise position emerge in negotiations. The Cabinet Secretariat and the FCO provide support for this process. The Prime Minister's senior adviser on Europe usually leads the Cabinet Secretariat's work in this area. Legal coordination is provided by Cabinet Office legal advisers in the Treasury Solicitor's European Division, which also conducts all UK litigation before the ECJ.

313. The UK Permanent Representation to the EU (UKRep) negotiates and lobbies in Europe on behalf of the UK. UKRep is consulted by departments on the conduct of EU business. The UK's Permanent Representative (who leads UKRep) or his or her deputy (depending on the Council formation) will usually accompany ministers to meetings of the Council of Ministers and provide advice as needed.

European and Global Issues Secretariat

The role of the [European and Global Issues Secretariat](#) is "to coordinate the collective agreement of the Government's International Economic (including G20/G8, international trade and development issues) and European policy and to provide advice on these matters to the Prime Minister, Deputy Prime Minister and the Cabinet Office Minister for Government

²⁴ FAC written evidence, 27 April 2011, "[The Role of the FCO in UK Government](#)", 1 February 2011

²⁵ FN 36: You saw at the same time, more and more people were being seconded to UKREP from line ministries, with particular skills that FCO officials did not possess.

Policy".²⁶ The unit is headed by a Permanent Secretary for European and Global Issues, and there is a Deputy Head of the Secretariat and three Deputy Directors (one for economic affairs, two for European affairs). The Cabinet Office website summarises the Secretariat's aims and objectives as follows:

In supporting the Cabinet Office objective to 'drive the coherence, quality and deliverance of policy and operations across Departments' we:

- support the Prime Minister, Deputy Prime Minister and the Cabinet Office Minister for Government Policy in their dealings with other heads of Government on International Economic issues and EU matters (including their attendance at international summits and meetings eg European Councils, G20/G8 summits and UN events) and in their consideration of these policy issues
 - pursue high-level negotiations and contacts with officials in other EU Member States, and Accession States, as well as more widely in the international community in pursuit of British interests in the EU and on international economic policy
 - provide the Secretariat to the Cabinet Committees leading on EU and international economic issues including: European Affairs Committee (chaired by the Foreign Secretary) and the Banking Reform Committee (chaired by the Chancellor). The Secretariat also has an interest in matters considered by other Cabinet Committees but particularly the National Security Council, Economic Affairs Committee and the Reducing Regulation Sub-Committee)
 - hold regular meetings, which the Head of the Secretariat chairs, with the UK's Ambassador to the EU and other senior Whitehall officials
 - chair ad hoc meetings of officials to address individual policy issues
- act as a focal point within Government for handling advice and guidance on international economic and EU matters. This includes coordinating the Government's work on Parliamentary scrutiny of EU business (further information including copies of Government explanatory memoranda on EU documents and letters Ministers send to the two Parliamentary scrutiny committees can be found at <http://europeanmemorandum.cabinetoffice.gov.uk>) and responses to legal proceedings brought against the UK by the European Commission.²⁷

European Affairs Committee

Its membership is as follows:

Secretary of State for Foreign and Commonwealth Affairs (Chair)
Secretary of State for Energy and Climate Change (Deputy Chair)
Chancellor of the Exchequer
Secretary of State for the Home Department, and Minister for Women and Equalities
Secretary of State for Defence
Secretary of State for Business, Innovation and Skills
Secretary of State for Communities and Local Government
Secretary of State for International Development
Chief Secretary to the Treasury

²⁶ <http://www.cabinetoffice.gov.uk/unit/support-cabinet-prime-minister-and-deputy-prime-minister>

²⁷ [Cabinet Office European and Global Issues Secretariat](#)

Minister of State - Cabinet Office
Parliamentary Secretary to the Treasury and Chief Whip
Minister of State – Europe
Minister of State – Foreign and Commonwealth Office)
Deputy Chief Whip (Comptroller of HM Household)

The terms of reference of the European Affairs Committee are to consider issues relating to the EU.

The Secretary of State for Business Innovation and Skills chairs the **Reducing Regulation sub-Committee**, which has the task of considering issues relating to reducing regulation. This sub-committee reports to the European Affairs Committee on issues relating to European regulation.²⁸

European Affairs sub-Committee

This sub-committee is chaired by the Minister for Europe and its Terms of Reference are “To provide political guidance on European Union issues, as tasked by the cabinet Committee on European Affairs, and coordinate Ministerial/Departmental activity on other issues (e.g. bilateral relations)”.

Joint Ministerial Committee (Europe)

The Joint Ministerial Committee was established by the Memorandum of Understanding between the UK Government and the devolved administrations in Northern Ireland, Scotland and Wales after 1999. Its purpose is to provide central coordination of the overall relationship between the administrations. Under the Labour Government the JMC(E) largely replaced the various Cabinet Office Ministerial Sub-committees on Europe, mainly to save time.

Most EU issues are dealt with by the Joint Ministerial Committee (Europe) or JMC(E), which discusses EU issues, including the Government’s priorities for meetings of the European Council, and which is chaired by the Foreign Secretary.²⁹ This Committee is not, strictly speaking a Cabinet Committee and is consultative rather than decision-making. Its membership is the Cabinet and the Devolved Administrations. Although Secretaries of State and occasionally the Attorney General may attend, mostly attendees are Ministers of State, Under-Secretaries and Ministers from the Devolved Administrations. JMC(E) meets roughly every two to three months but more regularly during a UK EU Presidency and usually two weeks before a European Council meeting. Minutes of the meetings are only published internally and there are no press releases on Committee discussions. The JMC(E) last met on 13 June 2011, but the Government does not divulge details of such meetings.³⁰

A Scottish Affairs Committee report in March 2010 summarised the role and effectiveness of the JMC(E) as follows:

112. Scottish Ministers are formally consulted on EU matters by the UK Government through Ministerial Committees. The Joint Ministerial Committee (Europe) (JMC(E)) ... is one of the principal mechanisms for consultation on UK positions on EU issues which affect devolved matters. It enables Ministers from the devolved administrations to make UK Ministers aware of their priorities within the EU and to contribute towards the UK negotiating line. As defined by

²⁸ [Cabinet Office lists of committees in December 2011](#)

²⁹ [Cabinet Office Draft Manual, December 2010](#)

³⁰ [See HC Deb 10 January 2012 c42W](#)

the Memorandum of Understanding between the UK and the devolved administrations, the Committee's objectives are to:

- take stock of relations;
- share information, and
- address particular issues or problems that have not been resolved.[185]

113. Unlike the domestic and plenary JMCs, the JMC(E) has met regularly over the past eight years. There is a general sense that it has been a more successful forum than the other JMCs and that it has worked well.[186] The Committee generally meets four times a year in the fortnight preceding each European Council meeting. It is supported by a secretariat drawn from the Cabinet Office and the devolved administrations.[187] The meetings are attended by UK Government departments as well as the devolved administrations in order to discuss and agree lines for the UK to adopt. All scrutiny documents are shared with the devolved administrations to allow them to participate fully in preparatory discussions.[188] However, all documents and discussion at the JMC(E) are confidential.[189]

114. Chris Bryant MP, Minister for Europe, admitted that it was challenging to organise dates for the JMC(E) that were suitable for all Ministers.[190] He said that he contacted the devolved administrations ahead of the meeting to see if they wished any specific matters to be placed on the agenda. Quite often issues or problems raised during those phone calls would be resolved by the time of the meeting.[191] The presumption was that an unresolved issue would only come to JMC(E) when there had been an impasse elsewhere.[192] The Minister also told us that even when there were differences of opinion at the meetings, the UK position was better informed for having an "effective and open discussion" on matters of dispute.[193]

115. In its written evidence to us, the UK Government refers to the JMC(E) as a "useful, efficient and effective meeting for all administrations." It continues: "We have ensured that the meeting has a strong focus on coordinating matters of high interest to the DAs [devolved administrations] and that DAs and UK Departments have the opportunity to suggest agenda items [...] In addition, senior officials from the UK Government and the DAs meet six times per year to make sure that the right issues are raised at ministerial level and to ensure a comprehensive sharing of information in advance of these meetings".[194] Agreements made at the JMC(E) were not legally binding "although the expectation is that administrations will support positions that they have contributed to and agreed".[195].³¹

The Welsh Affairs Committee also commented in March 2010 on the usefulness of the JMC(E) for its "practical, problem-solving work" and its "symbolic value in embedding the principle of mutual respect and the expectation of proper consultation across Whitehall and with the Welsh Assembly Government".³²

The role of the European Affairs Committee in relation to the JMC(E) could be clarified. The Northern Ireland and Welsh Secretaries do not sit on the European Affairs Committee and the Scottish Secretary is only present in his "ministerial support" capacity. Would the

³¹ Scottish Affairs Committee 4th Report 2009-10, "[Scotland and the UK: cooperation and communication between governments](#)"

³² [11th Report, 16 March 2010](#)

presence of devolved representation on this committee save time later and clarify issues better at an earlier stage?

3.2 Foreign and Commonwealth Office (FCO)

There is a lot of civil service infrastructure in place to facilitate agreeing common UK positions on EU matters across different departments and the devolved administrations, but the FCO is the lead Government department in the context of establishing the UK position on the following EU matters:

- The relationship with the EU's Institutions—the European Council and the Council of Ministers, the European Commission, the European Parliament and the Court of Justice of the European Union. The competences and powers of these institutions are set out in the EU Treaties, and therefore the FCO also leads on the policy towards those treaties and negotiation of any changes to them.
- The strategic overview of EU enlargement policy and accession negotiations. The FCO hosts quarterly meetings for senior officials across Whitehall on EU enlargement. At these meetings the FCO provides updates on the progress of accession negotiations. All elements of the Government's EU enlargement policy are discussed and departments have the opportunity to feed in comments or raise any concerns. The FCO consults government departments closely on the detail of accession negotiations. The lead Whitehall department on any given "chapter" of the negotiations must consent for the UK to agree to it being closed. By consulting with policy experts in this way, the Government as a whole is able to maintain effective conditionality on accession negotiations.
- The European Neighbourhood Policy is the EU's policy framework for its relations with the countries neighbouring the EU to the east and the south. The Neighbourhood Policy falls outside the scope of enlargement and pre-accession policy. The FCO consults other Whitehall departments closely on Neighbourhood Policy issues as they arise—for example in preparing the UK's response to the European Commission's annual reports.
- EU external policy, working in particular with the Cabinet Office. This includes both the EU Common Foreign and Security Policy (such as policy on major international issues such as Iran, Burma or Sudan) and Common Security and Defence Policy. It also leads on the question of the EU's relations with other global actors, and lobbies the EU institutions on how best to use Europe's various tools of external action (such as the External Action Service, EU budget spend, and Summits with third countries). Additionally, the FCO provides centralised advice and guidance for Whitehall departments on external representation, sharing best-practice and legal recommendations. The FCO also drives UK policy on the development of the European External Action Service, ensuring the Service complements UK foreign and development policy objectives.³³

Europe Directorate

In the FCO is the Directorate General Europe and Globalisation, under which there is a Europe Directorate. There are two Directors for Europe and six Europe Directorates covering different areas and policies: internal, external, future of European Mediterranean, Western Balkans and enlargement, parliamentary and communications.

Government Legal Service

³³ Foreign Affairs Committee, ["The Role of the FCO in Government"](#), April 2011

The Government Legal Service (GLS), which comprises around 1,900 qualified lawyers working in around thirty UK Government departments, has a significant role in EU business and offers its staff specialist training in EU law. The [GLS](#) says of its work in EU matters:

European Union law has a bearing on virtually every aspect of our work, making it vital for the GLS to keep abreast of changes and developments within the EU.

GLS involvement in EU law embraces almost every area – from assisting in the negotiation of EU measures in Brussels to drafting statutory instruments to implement EC Directives, or from advising on the implications of EU law for domestic policy to preparing cases which go before the European Courts.

The Treasury Solicitor is also the Head of the Government Legal Service. GLS lawyers are mostly employed by the department in which they work, or by the Treasury Solicitor's Department (TSol).

National Security Council

The Ministerial Committee on National Security, International Relations and Development (EU) was replaced in May 2010 by the [National Security Council](#) and has no sub-committee on Europe.³⁴

Comment on the FCO's role in EU matters

Some observers believe it might be time to redefine the roles and responsibilities of the Cabinet Office and the FCO in relation to the handling of EU business. It seems logical that the FCO no longer monopolises EU matters, since EU and domestic business are so closely interwoven and often inter-dependent. Should the FCO or the Cabinet Office or some other body be the overall administrative coordinator of things European?

The Foreign Affairs Committee Report on *The Role of the FCO in UK Government* noted some ambiguities in the FCO's role in dealing with EU business:

133. The FCO's institutional position in the Government's handling of EU business is ambiguous. On the one hand, the FCO is officially the lead Government department on the EU. The Europe Minister has always been an FCO Minister, and the FCO has traditionally played a cross-Whitehall oversight and coordinating role as regards other departments' work on EU matters. The UK's Permanent Representative to the EU has always been an FCO diplomat. On the other hand, the Cabinet Office also plays an inter-departmental role; and, among areas of EU business, the FCO leads on only some.^[254] The FCO's role in the Government's handling of EU business is thus another area which raises the issue of whether the department is 'just another line ministry' or part of the centre of Government.

134. We received three submissions on the FCO's role in the Government's handling of EU business from academic specialists, who all said that the FCO's role had diminished in recent years compared to the Cabinet Office. Our witnesses said that this was due, among other factors, to the increasing importance of the Prime Minister and the European Council in EU business; to the growing technicality of much EU business; to a reduction in FCO capacity on European matters in Whitehall; and to the increasing ability of many

³⁴ See [Ministerial Committees of the Cabinet, Composition and Terms of Reference](#), Dep 2327, July 2009

Whitehall departments to operate 'on their own' in EU business, rather than requiring FCO guidance. Our witnesses suggested that, at least until the change of Government in 2010, the FCO had largely acquiesced in the strengthening of the Cabinet Office's EU role in Whitehall. They said that the FCO's most important locus in the Government's handling of EU business was increasingly the UK Permanent Representation to the EU, which works increasingly as an 'all of Government' operation and deals direct with the Head of the European and Global Issues Secretariat in the Cabinet Office, who is also the Prime Minister's adviser on EU affairs.[255]

135. The Foreign Secretary told us that, under the present Government, the FCO "is coming back into its proper role in the determination of European policy".[256] A Cabinet Committee on European Affairs has been re-launched, with the Foreign Secretary in the chair (and with the Secretary of State for Energy and Climate Change as deputy chair).[257] The Foreign Secretary told us that written clearance of other departments' EU policy now comes to him for signature. There is also a lower-level Ministerial Committee for more day-to-day EU matters which is chaired by the Europe Minister. The FCO told us that its "central role in these Committees places it at the heart of formulation of Government policy on the EU".[258] Overall, the Foreign Secretary said that "the Foreign Office [was] in a more central role in the determination of European policy, and arguably [had] a more central role than at any time since we joined the European Union".[259]

136. Some witnesses were sceptical that the FCO could again play a cross-Government coordinating role on EU business, partly because of other departments' reluctance to see it as an 'honest broker' as opposed to a line ministry with its own interests. The Foreign Secretary told us that the FCO and the Cabinet Office were now working jointly, thereby removing duplication. He said that the Prime Minister's Adviser on EU affairs now copies to him, the Foreign Secretary, the advice that he sends to the Prime Minister.[260]

254 These are: the EU institutions, including the EU Treaties which govern them, and therefore also Treaty amendment; EU enlargement overall, although relevant departments lead the negotiation of individual chapters of any Accession Treaty; and EU external policy, including the Common Foreign and Security Policy, which includes the Common Defence and Security Policy; see Ev 86-87 [FCO].

255 Ev w1 [Dr Scott James], w89 [Professor Hussein Kassim], w92 [Professor Dr Sonja Puntscher Riekmann]

256 Q 294

257 HC Deb, 3 June 2010, col 601

258 Ev 86; 259 Q294; 260 Q 294

Professor Hussein Kassim concluded that the role and status of the FCO in coordinating EU policy has changed significantly since the 1990s and that these changes raise important questions about the FCO's responsibilities:

- Are the responsibilities of 10 Downing Street, the Cabinet Office and the FCO sufficiently well demarcated?
- If the FCO no longer plays the traditional role of strategic thinking about the UK's European policy, has this function been lost to the system or has it moved elsewhere within Whitehall?
- Is Europe prominent enough within FCO priorities?
- Does the FCO have sufficient resources to manage its European

responsibilities?

- Should the FCO's functions be reduced to the promotion of trade or is traditional diplomacy still important?
- Is the FCO's more central role in coordination compatible with its interests as a ministry?

The executive summary of a written submission from Dr Scott James, King's College London, specified a need for the FCO and the Cabinet Office to clarify their relationship:

- Since 2001 the EU policy making process in the UK has undergone fundamental reform, strengthening the strategic capabilities of the Cabinet Office to the extent that it has become the Prime Minister's first source of advice and expertise on EU policy.
- Although the FCO retains important formal responsibilities for managing EU policy, its role and influence within Whitehall has been challenged by three developments: increasing EU expertise and networking by departmental policy leads; rationalisation and reorganisation within the FCO's Europe Directorate; and the waning influence of the formal EU cabinet sub-committee.
- These changes are driven in part by longer-term structural developments that have undermined foreign ministries across Europe: the growing importance and frequency of European Council summits; the increasingly technical and specialist nature of EU policy dossiers; and the tendency to reach preliminary agreements through informal pre-Council discussions.
- The FCO has responded by developing a niche role which seeks to add value to UK EU policy in three respects: by reallocating resources to the UK Permanent Representation in Brussels (UKRep); maintaining and exploiting the UK's wider diplomatic network of European embassies; and leading efforts to encourage departments to engage more effectively with EU counterparts.
- The reforms have had three unintended consequences: exacerbating the existing conflict of interest between the Cabinet Office's coordination and strategic roles; further blurring the division of responsibilities for EU policy within and between the Cabinet Office and FCO; and contributing to bureaucratic overload by raising expectations beyond that which could be realistically met.
- The report recommends that the FCO should concentrate at what it is best at, namely strengthening its wider diplomatic network, renewing efforts across Whitehall to promote more effective strategic networking, and refocusing its activities on formulating and articulating a clearer strategic vision for European integration.
- It also recommends that collaboration between the Cabinet Office and FCO could be reinforced by convening a new inter-ministerial committee on EU policy strategy to be chaired by the Prime Minister; and by redefining the role and position of the Minister for Europe so that they are based in *both* the Cabinet Office and FCO.

4 Negotiation, transposition and implementation of EU law

4.1 Previous Government guidance

There has been a plethora of government guidance notes and rules on how to conduct European business, published both by the Cabinet Office and the departments. These were rationalised by 2000 to around 25. In September 2007 the Department for Business, Enterprise & Regulatory Reform published a "[Transposition guide: how to implement European directives effectively](#)". The guidance set out in detail how government departments should approach EU business at the drafting stage of a proposal. Much of the advice concerned early intervention with the Commission, which is the main player at the beginning of EU policy development:

While the Commission is drafting its proposal

2.2 Get involved early in discussions with Commission officials in order to learn how their policy is developing. Often the best opportunity to influence a Commission policy is when it is in the early stages of development. Therefore it is important to maintain good lines of communication with Commission officials.

2.3 Consider, with your lawyers, whether the Commission's line of thinking is the best way of achieving the policy objective. Should action be taken at the EU level or would action be better taken at national or sub-national level, according to the principle of subsidiarity⁴? If you are content that there is a case for action to be taken at the EU level, check whether any particular problems arise at this stage which can be sorted out before formal proposals emerge. Are the structure and scope legally sound and is the effect clear? Consider the risks – **would a minor change at this stage significantly reduce either costs or benefits in the UK?**

2.4 Consider whether the Commission's likely approach would affect any domestic legislation which is going through or is planned. It is Government policy that, unless simplifying or reducing regulatory burdens, **departments should not generally pre-empt upcoming European legislation by legislating in the same area.** The problem with the UK legislating first in an area where a European measure is imminent is that the two pieces of legislation are very likely to be inconsistent and the UK will then need to change its legislation again within a short timeframe. This can result in competitive disadvantages for UK industry as they may need to incur the costs of changing their systems twice, once to comply with the initial UK scheme and then to comply with the new European scheme. This presumption against acting as "first mover" can be dropped if you can show that there are likely to be net benefits for the UK in legislating first, despite the risk of increased costs due to a need for business to change their systems twice.

2.5 Seek the views of other Government departments, the devolved administrations and external stakeholders to consider the potential impacts, including possible problems and weaknesses. Consider with the relevant enforcement bodies how the policy would be implemented in the UK, in particular, whether it would be workable on the ground. Early consultation can help form a consensus in favour of a particular approach and you should do your best to consult interested parties. At this stage, problems are more easily resolved as the text is easier to amend.

2.6 In parallel to its Annual Legislative and Work Programme, the Commission generally publishes roadmaps for its proposals in advance of publishing the proposals themselves. These roadmaps should set out the policy options, expected impact assessment work and the consultation timetable. They are a useful resource for determining initial Commission thinking on particular policy areas. You should therefore encourage the Commission to publicise its action plans and roadmaps, so that they reach a **wide range of stakeholders**. You should also alert

UK stakeholders to upcoming Commission proposals and encourage them to engage with the EU institutions based either on the Commission's roadmap or formal consultation document.⁵

2.7 Check whether the Commission is producing an impact assessment that considers a range of policy options, including alternatives to legislation. Make sure the risks of taking action versus the risks of inaction have been weighed up. With effect from 2005, the Commission has given a commitment that all significant items, including those in its Annual Legislative and Work Programme⁶ will be subject to an impact assessment. The Commission has comprehensive guidelines⁷ on what impact assessments should cover and how they should be carried out.

When the Commission publishes its proposal: developing a UK negotiating position

2.8 Once the Commission publishes its proposal, it is presented to the European Parliament and the Council of Ministers for their consideration, amendment and agreement. At this stage you must provide options to your Minister about the negotiating line that the UK Government should take. The final version of the UK negotiating line will require clearance by NSID(EU) committee⁸, and must be accompanied by an impact assessment. Please refer to Cabinet Office guidance on handling NSID(EU) correspondence⁹.

2.9 Try to estimate the likely costs and benefits of the draft Commission proposal for the UK using the Commission's roadmap to help you. If requested to do so by the Commission, you should consider sharing UK data on the likely impact of a policy. In cases where you think that the Commission is not sufficiently aware of the impact of a potential proposal on the UK, you should consider taking the initiative to lobby the Commission directly to consider UK data.

2.10 Examine the draft legislation carefully with your legal advisers. Even if you are not seeing the proposal for the first time, it is worth examining with your legal advisers how the proposal reflects what you understood the policy to be and whether it is workable.

2.11 Your lawyers should refer to the Cabinet Office Legal Advisers guidance on *Implementing Community Law*, which deals with **legal issues** that arise when implementing. This is available on the European area of the Legal Information Online Network intranet site¹⁰ or from the Cabinet Office Legal Advisers on 020 7210 3021. You will also need to think about whether new domestic legislation would be needed to implement the Commission's policy; whether it should be implemented by secondary legislation; what constraints the implementing powers might impose and whether primary legislation is needed.

2.12 Seek the views of interested parties, including the devolved administrations, other relevant departments and external stakeholders to help inform the UK negotiating line. It is unwise to finalise the detail of your negotiating position before you have **a good understanding of the standpoints of other Member States**, so try to sound out their views as early as possible.

2.13 Consider enforcement regimes. Before making recommendations to Ministers on the UK negotiating position, you will need to have decided how any UK implementing regulations would be enforced in the UK, in particular:

- **Who will enforce them?** You will need to have discussed enforcement with possible enforcement bodies (including the devolved administrations and local government) at an early stage.
- **Levels of compliance** Will the legislation impose civil penalties or criminal sanctions for non-compliance? If so, on what scale? The Ministry of Justice is responsible for courts and tribunals – are they content?
- **How and at what cost?** Establish whether the enforcement body has the resources and skills to meet the requirement. According to HM Treasury

guidance¹¹, any burden on other government departments and local authorities must be quantified and costed. Your department will need to transfer funds from its own budget to fund the requirement.

• **How can the principles of risk-based enforcement be applied?** The Philip Hampton report, *Reducing administrative burdens: effective inspection and enforcement*¹² sets out these principles. Reporting regimes should be clear, risk-based and as light-touch as possible to meet the aims of the directive while minimising the burden on business and on administrations. A statutory Regulators' Compliance Code will come into force in April 2008. The Code will elaborate the principles of risk-based enforcement and inspection set out in the Hampton report and will require national and local regulators to have regard to the Code's requirements when carrying out their regulatory functions.

2.14 Examples of the above considerations might include whether there are enough laboratories technically capable of carrying out the sort of testing required, or whether there are enough trained inspectors to ensure compliance with a particular requirement. These considerations will have an impact on resource planning.

2.15 Considering all these issues will enable you to provide well-considered and reasoned options to your Minister about the negotiating line that the UK should adopt. **Set out the risks, costs and benefits of the options in an impact assessment.** Your impact assessment should accompany Ministerial correspondence seeking collective agreement from NSID(EU) committee on the negotiating line. For advice on carrying out impact assessments, contact your department's Better Regulation Unit. Guidance is also available from the Better Regulation Executive at <http://bre.berr.gov.uk/regulation/>.

2.16 You must also provide an Explanatory Memorandum on the proposal, accompanied by the impact assessment, to the EU Scrutiny Committees¹³ in the UK Parliament which have a **Scrutiny Reserve Resolution**. This means Ministers should not agree to proposals which the Committees have not cleared or which are waiting for debate. For more information, please refer to the Cabinet Office Guidance on Parliamentary Scrutiny of European Union Documents¹⁴.

2.17 For any regulatory proposal that is likely to impose a major new or disproportionate burden on business the **Panel for Regulatory Accountability** will need to clear the impact assessment and the negotiating position, prior to seeking clearance from NSID(EU) Committee. A major regulatory proposal is any proposal likely to cost UK business £20 million or more per year and/or have a disproportionate impact on any sector.

Footnotes

4 The Commission defines subsidiarity as "a guiding principle for defining the boundary between Member State and EU responsibilities (*Who should intervene?*). Basically the EU shall take action only if the objectives of the proposed action cannot be sufficiently achieved by the Member States and can be better achieved at the European level." You can find European Secretariat guidance on subsidiarity at <http://www.cabinet-office.gsi.gov.uk/euro/eurosec3.html>

Transposition guide: how to implement European directives 12 effectively

6 http://ec.europa.eu/atwork/programmes/index_en.htm

7 http://ec.europa.eu/governance/better_regulation/impact_en.htm

8 <http://www.cabinetoffice.gov.uk/secretariats/committees>

9 <http://www.cabinet-office.gsi.gov.uk/euro/>

10 <http://www.knowledgenetwork.gsi.gov.uk/lion2/areapres.nsf/70601a68a73227d480256e8c004bca59/60f6d08ec0ef622f8025711cb003bc882?OpenDocument>

11 Consolidated budgeting guidance: http://www.hm-treasury.gov.uk/documents/public_spending_reporting/budgeting_classification/psr_bc_consolidated_budgeting.cfm

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

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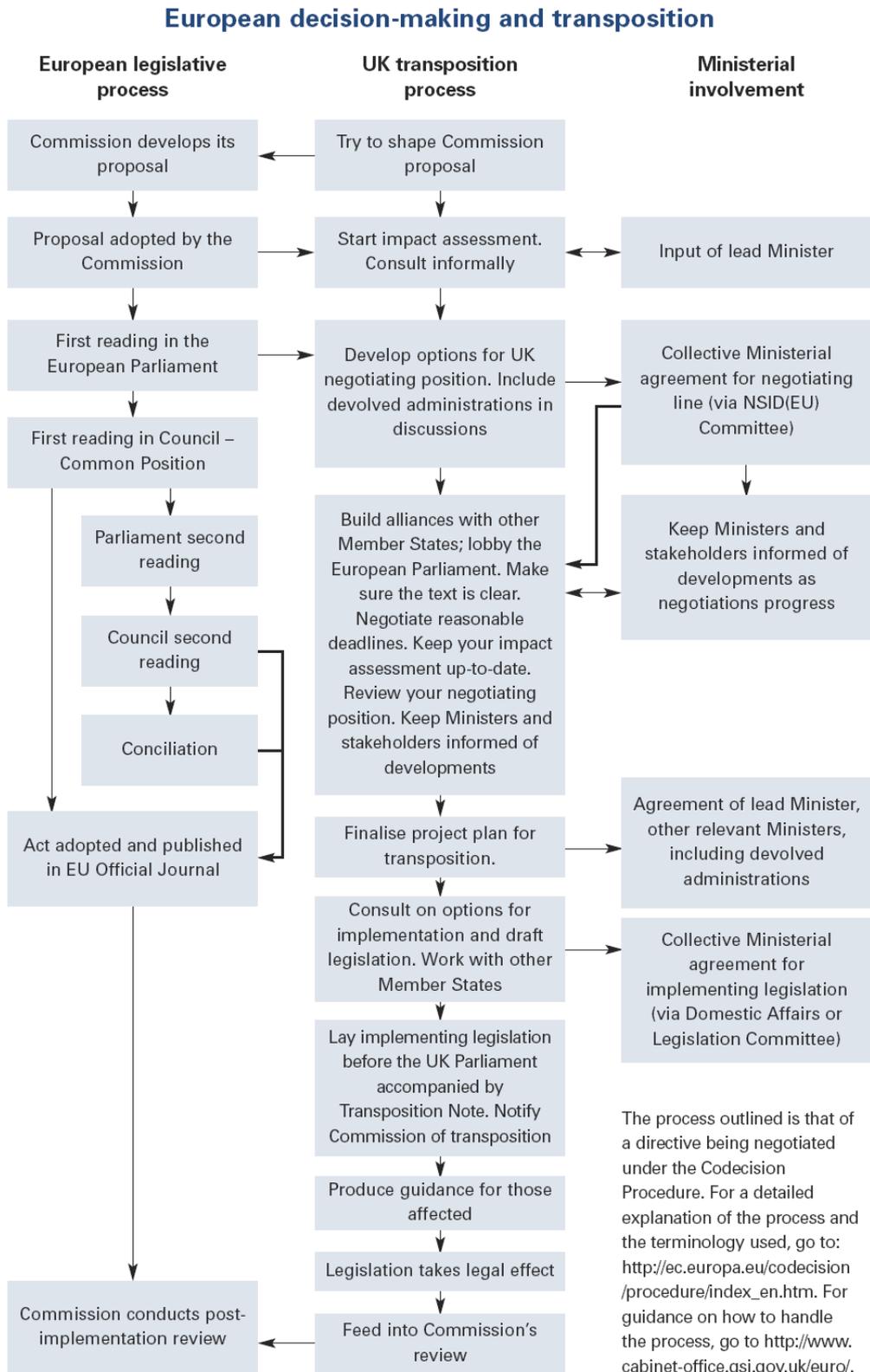
13 For information on the Commons European Scrutiny Committee, go to: http://www.parliament.uk/parliamentary_committees/european_scrutiny.cfm

For information on the Lords European Union Select Committee, go to: http://www.parliament.uk/parliamentary_committees/lords_eu_select_committee.cfm

14 <http://www.cabinetoffice.gsi.gov.uk/euro/eurosec14.html>

4.2 Decision-making processes

The following diagram from the [BERR website](#) summarises the EU decision-making process in relation to the UK transposition process.



UK governments have tended to focus on influencing the Commission and other Member States in the Council, but is sufficient attention paid to influencing the European Parliament, which has equal power with the Council of Ministers in legislating in an increasing number of policy areas? What does “building alliances with relevant MEPs” mean in practice, and could it be improved?

Where a proposal is subject to the Ordinary Legislative Procedure (co-decision), a significant proportion of EP amendments to legislation end up in the adopted EU measure. There is considerable scope for influence before the EP’s first reading, as at this point it is possible for any MEP to table any amendment he/she wishes. By the second reading, MEPs may only work with the first reading text or amend new elements introduced by the Council, but they cannot introduce totally new amendments. The scope of influence will then be limited to areas of disagreement between the Council and the EP. Although UK governments have not generally been very interested or forthcoming in their relations with the EP, this might be worth exploring further.

4.3 Regulatory Impact Assessments

Since the 1980s UK governments have sought to make sure departments consider the likely impact of EU regulation, and the last Labour Government introduced Regulatory Impact Assessments (RIAs) in 1998 to try and avoid unintended or unwanted outcomes or costs. RIAs are required for any UK or EU proposal which “has an impact on businesses, charities or voluntary bodies” and any proposal affecting costs in the public sector unless the costs are beneath a threshold of around £5 million. The Regulatory Impact Unit (RIU) is part of the Cabinet Office and assesses RIAs for proposed legislation.³⁵

The idea of RIAs was to evaluate EU proposals in terms of their potential costs and benefits and to make sure the benefits outweighed the costs.³⁶ Open Europe commented that “Ideally, an IA should assist policy makers in thinking through the consequences of proposals, improving the quality of advice to Ministers and encouraging informed public debate”.³⁷ In 2005 the Blair Government introduced the Regulatory Reform Agenda, which included the aim of working across Europe to improve the quality of EU regulation. Gordon Brown said at the launch of the agenda that the Government was adopting a “risk-based approach which targets only the necessary few”.³⁸ Open Europe did not think the Government had used its bargaining powers nearly enough:

Negotiation theory holds that in the interaction between domestic and international (EU) politics, governments strengthen their bargaining power if they can convince their negotiation partners that their mandate from voters and business at home is very restricted – and that they are ready to stick to that mandate.²²⁸

The Commission’s so-called Roadmaps, which outline Commission proposals for the coming 12 to 18 months and their likely impacts, ought to act as an early warning system to the Government of what proposals are in the pipeline. This

³⁵ Hansard Society Briefing Paper, Issues in Law Making, 7 : [European Union Legislation: The Regulatory Environment](#), OCTOBER 2005

³⁶ See [BERR guide to impact assessments](#)

³⁷ Open Europe, “Out of control? Measuring a decade of EU regulation”, February 2009, Mats Persson, Stephen Booth & Sarah Gaskel, Edited by Lorraine Mullally, [Impact Assessments](#)”

³⁸ Treasury press release, 24 May 2005, “Chancellor launches Better Regulation Action Plan”

would allow the Government to provide the Commission with evidence of the impact of the proposal. Even at this stage, policy-makers should indicate that a costly proposal simply will not be accepted in the light of hard evidence. The earlier this dialogue is opened the better.

FN 228 See for example: Putnam, Robert D, "Diplomacy and Domestic Politics: The Logic of Two-Level Games" *International Organization*, Vol. 42, No. 3. Summer, 1988, p. 427-460

4.4 Transposition Notes

Since November 2001, UK legislation enacting EU legislation has been accompanied by a Transposition Note explaining how the Government has transposed the main elements of the EU measure into UK law or how it proposes to do so (almost all EU laws are implemented in the UK by means of Statutory Instruments). SI practice has since then required an explanatory memorandum (EM) to accompany each SI subject to affirmative or negative resolution, and for a Transposition Note to be attached to the EM on an SI, explaining in broad terms the approach to transposition, highlighting any difficult areas.³⁹ The terms of reference of the House of Lords Select Committee on the Merits of Statutory Instruments, appointed 17 December 2003, included a power to draw the special attention of the House to an instrument which it considered to be inappropriately implementing EU legislation.

There seems to have been in the past at least a lack of understanding of the meaning and implications of an EU directive between government ministers and civil servants. In evidence to the [Lords Constitution Committee report, "Parliament and the Legislative Process", 16 June 2004 \(HL 173-II, Q292\)](#), the former Conservative agriculture minister, Douglas Hogg, explained how he had tried to bridge that gap in his presentation of information on transposition of EU directives for ministerial decision:

"the problem is both in Parliament but it is even more in the ministries because what of course happens is that departments have to translate into statutory language through statutory instruments the Directives which come out of Europe. Some are direct right across and some have to be interpreted and ministers are asked to approve it and you will appreciate that ministers really have not got a clue. So what I did, and it survived not one day beyond my departure, was to require a spreadsheet and on the spreadsheet on the left-hand column was the European Directive. On the right-hand, in the next column, was what the officials recommended we did about the Directive to show what our language was like. The next column was to be a statement by the officials as to whether we were going beyond or under-shooting the Directive language and the next column was to be an explanation as to our stance, one way or the other. The object of this was to enable ministers to actually understand what their officials were proposing. The official said it was not possible. I said, "Go away and do it," and it was done with a lot of grumbling and it was done in a way which enabled junior ministers, who do sign these things, to understand in broad terms what was happening with the legislation. I would strongly recommend that you look at that to see whether it could be reactivated because it is one way in which ministers can get a grip on what is being proposed and you could say that that document should be furnished to the European Scrutiny Committees and they would have an idea as to what they were being asked to approve. But as I say, it was my positive suggestion, which did not survive BSE!"

³⁹ This requirement stems from a proposal made by the Trade and Industry Committee. See 12th Report 1998-99, "The 1999 Post Office White Paper", HC 94, para 19.

Perhaps Douglas Hogg's spreadsheet idea should be revived to provide more clarity for ministers about EU proposals and to ensure that officials and ministers understand the issues and implications.

4.5 The Bellis Report

The *Bellis Report*, "Implementation of EU Legislation", drawn up by a Government lawyer, Robin Bellis, was published on 24 November 2003. An [FCO press release](#) outlined its main recommendations as follows:

- Increased use of cross-Whitehall "EU Directive project teams" along the lines of the existing (UK) Bill project teams.
- The "copy-out" of ambiguous EU legislation into UK law (rather than elaborating the text with clarifications).
- Further strengthening of departmental drafting expertise.
- Establishment of an independent body of lawyers with drafting expertise at the EU level. They should be independent and appointed in the same way as judges and advocates general of the European Court of Justice.

The then Foreign Secretary, Jack Straw, asked for responses to the Bellis recommendations within six months, and a summary of views expressed in consultations from October to December 2003 is contained in Deposited Paper 05/247 of 24 January 2004. The Government's response to the Bellis Report was set out in the 2004 Pre-Budget Report and included the following commitments:

- all emerging European legislation, and measures to implement this legislation in the UK, with significant costs for businesses, will be given tough scrutiny by the Prime Minister's Panel for Regulatory Accountability (PRA);

the transposition of European directives into UK law must avoid costly additions to the requirements for businesses, meet only the minimum standards and scope necessary to comply with the European legislation, and take advantage of derogations when less burdensome for business, except where there is a strong cost benefit rationale for doing otherwise, specifically approved by PRA.

- Transposition should mirror as closely as possible the original wording of the directive except where there is a clear justification for doing otherwise, having regard to the impact on business and the workability and fit of the legislation in its domestic context. The Government will publish revised transposition guidelines for European legislation early next year;

a comparison with other Member States' approaches to transposition will be required during implementation so that the relative burdens of different approaches are well understood, and the Government will be exploring the scope for introducing this on a comprehensive basis, and for sharing best practice across Member States, with the Commission;

- all departments will publish annual implementation plans for European legislation, so that the effects on UK businesses are transparent;
- legal advice will take into account the policy context consistently and rigorously, with

specific consideration of the costs and benefits for businesses;

- the Government will take into account the approaches taken by other Member States when implementing directives and the potential impacts on the competitiveness of UK businesses; and
- the Government proposes to work with the European Commission and other Member States to create stronger enforcement mechanisms, which will provide incentives for Member States to implement legislation on time.⁴⁰

4.6 The Davidson Review

The [Davidson Review](#) of November 2006, headed by Lord Davidson QC, was commissioned by the Labour Government in November 2005 to look into the implementation of EU legislation and ensure that it was not causing unnecessary regulatory burdens. The Review looked at selected areas of EU-derived legislation for evidence of over-implementation ('gold-plating') in the UK, or "smarter" implementation by other Member States. It also scrutinised Government Departments' efforts to identify instances of over-implementation in their simplification plans and, where possible, proposed further simplification measures.

The [Davidson Review final report](#) was published on 28 November 2006. It found that while the unnecessary over-implementation of EU legislation may not be as widespread in the UK as had sometimes been claimed, there were areas where regulatory burdens could be removed. The recommendations were as follows:

11. Pre-existing national standards

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

12. Coherence between domestic and European legislation

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

13. Transposition methods

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

14. Pre-empting upcoming European legislation

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

15. Post-implementation reviews in Europe and the UK

⁴⁰ [Select Committee on Modernisation of the House of Commons Written Evidence](#), Note from the Clerk of Delegated Legislation, Liam Laurence Smyth, 7 February 2005

a) The Government should encourage the European Commission to carry out and publish post-implementation evaluations of all significant European legislation. It should also encourage the Commission to adopt standard methodologies for assessing the benefits, costs and effectiveness of legislation, underpinned by quantitative analysis.

b) For EU-derived legislation, the date of the post-implementation review required by UK Government policy should normally tie in with the timetable of the Commission's own review of the legislation. Departments should compare implementation practices with at least two other major Member States to draw lessons on methods of implementation and enforcement.

16. Managing ambiguity in European legislation

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

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

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

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

18. Joining up negotiation and implementation; timely implementation

a) All departments should embed senior level oversight of each significant EU measure to ensure that:

- there is effective transfer of knowledge between negotiating and implementing teams;
- the implementing process is started as early as possible and sufficiently resourced to enable guidance to be published at least 12 weeks before national implementing legislation comes into force; and
- programme and project management techniques are used to assist in delivering these outcomes.

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

19. Statute Law Database

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

20. Communication from the European Commission

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

21. Guidance

All departments and regulators should adhere to the advice provided by the Small Business Service and Cabinet Office on drafting guidance.⁴¹

An OECD report on “Better Regulation in Europe” in 2010 commented on some of the Labour Government’s efforts to tackle the deficits identified in the Davidson Review:

The institutional structures for handling EU regulations are well-established and appear to work smoothly. The orchestrating role of the Cabinet Office, combined with support from the BRE’s Europe team, and clear guidance, appear to be appreciated and provide the right balance in principle between central direction and departmental ownership of the process. The 2006 Davidson Review picked up weaknesses in the process and this has now been turned into a clear guide for departments (covering both negotiation and transposition). Linking ex post transposition with ex ante negotiation of EU regulation is a good idea, perhaps especially important in the United Kingdom context of frequent staff changes, but also relevant for the consideration of other countries where the processes are disconnected.

AND

Nevertheless, capacities to manage EU regulatory processes may need reinforcement. It is important that departments should own the process of managing EU regulations falling within their remit. This also means that they should have the capacities and internal structures to do this well. It may be a reflection of this that the United Kingdom’s record of transposition is mid ranking. The United Kingdom appears to face a few issues.

The civil service tradition of short postings (for fast track and senior civil servants, often not more than three years in one place) raises a continuity challenge – the official responsible for negotiating a draft EU directive is unlikely to be the official carrying out the transposition. There is a need to secure continuity of information and understanding across the two processes when this happens. Legal resources for supporting policy officials in the negotiation phase may also need reinforcement. Lawyers’ input is needed at this stage as well as for transposition, for example to ensure that non-controversial technical aspects such as transitional provisions are drafted so as to avoid problems at the implementation stage. Departments with a particularly heavy load of EU regulations, for example DEFRA which is responsible for the environment as well as agriculture, need the capacities and resources to do a consistently good job.

In December 2010 a [Department for Business, Innovation and Skills \(BIS\) press release](#) in December 2010 announced that the Government would put an end to the ‘gold-plating’ of EU Regulations” by using the copy-out method of transposition:

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.

⁴¹ Select Committee on Modernisation of the House of Commons Written Evidence, 16 March 2005, [Note from the Clerk of Delegated Legislation implementation and transposition of EU legislation](#), p 92

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.

4.7 New Government guidance

The coalition Government published new [Guiding Principles for EU Legislation](#) on 15 December 2010, which aim to “[maximise] the UK’s influence in Brussels and [end] goldplating of EU legislation in the UK”.

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 Reducing Regulation Committee (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. Twice a year, Ministers will report to the Foreign Secretary on their department's early influencing priorities and engagement strategies, showing how they are seeking both to influence the Commission's policy agenda and ensure that important future EU measures (legislative and non-legislative) are justified, that the policy objectives of a regulatory proposal cannot be achieved through non-regulatory means and proposals are drafted to maximise benefits and minimise risks to the UK. The European Affairs

Committee, following consultation with the RRC, can then, in turn, agree cross-Government early influencing priorities for joined-up lobbying.

2. Departments will endeavour to seek clearance for their proposed UK negotiating position promptly. Departments should analyse the order of magnitude of likely impacts of different negotiating options to help Ministers make evidence-based decisions. The analysis should be proportionate to the proposal and time available and be presented succinctly.

3. The Government will work with EU partners to hold the EU institutions to account on the commitments they have made on consultation, impact assessment, the "think small first" principle and reviews in order to improve the quality of EU regulation.

4. Before starting transposition, departments must satisfy the 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.

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

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

7. The European Affairs Committee should be kept informed.

8. 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.

5 Impact of the EU Court of Justice

5.1 Court of Justice rulings

The European Court of Justice is ultimately the sole arbiter over the interpretation of EU law. Court of Justice decisions cannot overturn national laws, but they may oblige the State concerned to amend or withdraw a domestic law that is found to be incompatible with EU law, and in such instances the EU's impact is felt more strongly than in the routine adoption of EU laws.

European Court rulings have considerable political power, and, as Dionyssis Dimitrakopoulos and Jeremy Richardson noted in "Implementing EU public policy",⁴² "the European Court of Justice has developed a very significant jurisprudence on the rights and the obligations of national governments in the implementation process". The Court's rulings often dissuade Member States from enacting laws that might conflict with a legal precedent. The Government cannot simply accept or reject European Court rulings, even when they apply to other Member States, and they are generally incorporated into judicial decisions in UK

⁴² *European Union: Power and Policy-Making* edited by Jeremy Richardson, 2001

courts. National courts generally cooperate with European Court rulings, although there have been instances where higher and constitutional courts in some Member States have been less willing to accept ECJ jurisdiction in certain areas.

According to research by Diana Panke in October 2007,⁴³ European Court judgments themselves “do not threaten states with increasing top-down non-compliance costs, but they can be enforced with a threat of sanctions, if states maintain non-compliance for more than a year after the ECJ ruling. The shadow of sanctions darkens severely, if the Commission not only sends a second letter of formal notice, but also a second reasoned opinion”.

5.2 Court rulings and legal drafting

Government Departments are aware of the need to avoid infraction proceedings and departmental guidance emphasises the need to ensure compliance with EU law when transposing and implementing it in the UK. This is both to ensure that EU law is properly transposed and to avoid possibly costly damages claims if it is not.

BERR [guidelines \(2007\)](#) noted the publication of the cautionary TSol handbook, *The Judge Over Your Shoulder*, which was updated in 2006 (4th edition) to take account of the *Human Rights Act 1998* and EC/EU law.⁴⁴ This pointed out that “Administrative law has developed a series of tests for measuring the lawfulness of an exercise of public law powers”, including “Compatibility with the Convention rights and EC law”. The need to take account of EC (EU) law is a constant refrain in this publication, as is the possibility of “direct effect”, whereby individuals may rely on EU provisions in national courts even where the provisions have not been implemented in national legislation. The handbook also reminds civil servants that “The decisions of the ECJ on matters of EC law form part of the national law of Member States” and “A failure by the Government to give proper effect to EC law conferring rights on individuals may give rise to a claim for damages”.

UK legal drafting, unlike that in other EU Member States, is in a highly precise and technical style. However, some experts believe there are risks in using very precise language to express an EU obligation in UK law, since the European Court may not share the UK view on what the Directive actually means. The UK could therefore be in danger of being found guilty of inadequate implementation of EU law and possibly liable to damages for any consequences of incomplete implementation. The [Davidson Review](#) (p.81) considered this aspect, among other things:

Legal system, culture and management of risks

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

5.30 A number of stakeholders inside and outside of Government suggested that there has been a tendency among UK civil servants (policy makers and lawyers) to be risk-averse by placing too much weight to infraction risks and not enough on the risks of over-implementation. They thought that this was also reinforced by the legal system in the UK. The purposive approach to

⁴³ “Why the ECJ restores compliance faster in some cases than in others: Comparing Germany and the UK”

⁴⁴ Gavin Drewry, “The jurisprudence of British Euroscepticism: A strange banquet of fish and vegetables”, Utrecht Law Review, September 2007

interpretation of legislation in the legal systems of other Member States was seen to be an advantage when it came to negotiating the legislation in Brussels, and interpreting the legislation more flexibly in their national legislation. As the approach to interpretation of UK legislation is to start with the natural meaning of the words rather than looking to the purpose behind the legislative provisions, UK civil servants generally tended to take a more literal approach to interpretation. It was suggested that this and a preference for legal certainty led to more prescriptive and detailed legislation, sometimes with the encouragement of business, and at times an overcautious interpretation of EU provisions.

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

5.32 The Transposition Guide makes it clear that policy-makers and lawyers need to work closely together from the earliest possible stages of European proposals and to weigh up the risks involved in the various implementation options. It says that where there is doubt about the precise legal obligation or choice about how to implement it, Ministers should be presented with options, the risks and costs and benefits attached to each. The solution chosen should be the best policy solution consistent with propriety and with the need to minimise the burdens on business and others – it may not always be the least risky one.

5.33 The risks that need to be assessed are not purely legal risks. Nor should the risk of infringement proceedings against the UK be weighed too heavily in the balance, as sometimes happens at present. Other risks such as the damage to the competitiveness of UK businesses that may result from one possible interpretation of a provision, should be given proper weight.

Assessing the risks attached to various options and knowing how other Member States are proposing to implement the measure will be particularly helpful. It is obviously essential to have properly engaged with those affected by the measure so that their view of the risks involved can be taken into account.

6 Further reading

- Foreign Policy Centre, [“The new British Politics and Europe: Conflict or Cooperation?”](#) ed. Adam Hug, August 2011
- Library [Standard Note, 5943](#), [“EU Legislation: Government action on ‘gold-plating’](#) 19 April 2011
- OECD 2010, [“Better Regulation in Europe: United Kingdom](#)
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