



HM Government

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TRANSPOSITION GUIDANCE

How to implement European Directives
effectively

Withdrawn

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How to implement European Directives effectively

Who is this guidance for?

- 1.1 On 15 December 2010, the government announced Guiding Principles for EU Legislation. This guidance has been drafted for use by policy makers and lawyers across government. It explains what you need to do to implement EU legislation to meet the requirements in these Guiding Principles¹. It can also be referred to by, but is not binding on, officials in the devolved administrations.
- 1.2 The Guiding Principles for EU Legislation apply to the transposition of all Directives. The requirements of this guidance are not ends in themselves, but exist solely to ensure that the Guiding Principles are used to achieve the best possible outcome for the UK. In interpreting and applying this guidance, ministers are expected to take a proportionate approach to ensure best use of departmental resources. Although the guidance focuses on the transposition of Directives, the Guiding Principles reflect good practice, which should be applied to the implementation of all types of EU legislation, where practicable.

What do the Guiding Principles mean for transposition?

- 1.3 The Guiding Principles are aimed at ensuring the UK systematically transposes so that burdens are minimised and UK businesses are not put at a disadvantage relative to their European competitors. The Principles state that, when transposing EU law, the government will:
 - ensure that (save in exceptional circumstances) the UK does not go beyond the minimum requirements of the measure which is being transposed
 - wherever possible, seek to implement EU policy and legal obligations through the use of alternatives to regulation;
 - endeavour to ensure that UK businesses are not put at a competitive disadvantage compared with their European counterparts;
 - 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 or going beyond the minimum requirements of the measure that is being transposed. If departments do not use copy-out, they will need to explain to the Reducing Regulation Committee (RRC) the reasons for their choice;
 - 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

¹ For the text of the Guiding Principle for EU Legislation, see page 27.

- include a statutory duty for ministerial review up to five years after it came into force for measures with impacts on business significant measures (greater than +/- £5 million net annualised).

The complete Guiding Principles for EU Legislation can be found at the end of this guidance.

How will the Guiding Principles work in practice?

- 1.4 Before starting transposition, departments must satisfy the Reducing Regulation Committee (RRC) that they have identified the aims of the EU law and the relevant policies of the UK government, and how the two will be brought into harmony so that transposition (save in exceptional circumstances) does not go beyond the minimum requirements of the measure being transposed, avoids creating unintended consequences in the UK and does not create an unnecessary risk of infraction.
- 1.5 In considering how best to transpose a measure in a manner which (save in exceptional circumstances) avoids going beyond the minimum requirements officials should provide ministers with robust advice as to the legal risks involved. While the UK must fully transpose all EU law obligations by which it is bound, the fact that transposing in a particular way carries some risk of infraction proceedings does not mean that this option should be ignored. Officials should instead provide ministers with a full and frank assessment of the nature and scope of the legal risks involved so as to allow a fully informed view to be taken as to how best to transpose in a particular case.
- 1.6 The legal text for UK transposition should only be finalised once the policy framework has been agreed by the RRC.
- 1.7 The European Affairs Committee should be kept informed.
- 1.8 When reviewing departments' approach to transposing and implementing EU law, the RRC will expect departments to apply the following principles:
 - 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;
 - proposed implementation applies the Guiding Principles and meets the standards in this guidance;
 - proposed implementation complements domestic legislative objectives; and
 - proposed implementation delivers the outcomes required by the directive, but does so in a way that (save in exceptional circumstances) avoids going beyond the minimum requirements; thereby minimising the cost to business. This should be supported by evidence.

How do I implement a Directive?

- 1.9 The remainder of this guidance is split into two parts to give further advice on the Guiding Principles and how you can make sure they are applied, so that you transpose effectively.
- 1.10 To give ministers greater oversight of transposition and encourage stronger project management, the Reducing Regulation Committee (and the applicable domestic policy Committee, where necessary), scrutinises transposition proposals. The Committees see proposals at least twice – for information at planning stage, and for clearance at consultation stage. They may also need to clear proposals at final or implementation stage if they change as a result of consultation. Further information is also provided on the statutory duty for Ministerial review. Also included are suggested methods for providing clarity to your plans for transposition when seeking Ministerial clearance.

What other areas do I need to consider?

Devolved administrations, Gibraltar, Isle of Man, Channel Isles	page 22
Parliamentary scrutiny	page 23
Justice and Home Affairs	page 23
Infractions	page 23

Part 1: What are the Guiding Principles for transposing EU legislation and how do I apply them?

- 2.1 Further guidance on each of the Guiding Principles for transposing EU legislation is provided, in turn, over the following pages.

Guiding Principle: ensure that (save in exceptional circumstances) the UK does not go beyond the minimum requirements of the measure which is being transposed.

- 2.2 When transposing EU legislation the aim should be to avoid going beyond the minimum requirements of the measure being transposed. Taking such an approach will ensure that the UK does not create unnecessary legislative burdens and place UK business at a competitive disadvantage.
- 2.3 This principle should only be departed from where there are exceptional circumstances which would justify it. Such circumstances would include where going beyond the minimum requirements would serve UK interests by, for example, reducing the regulatory burden imposed on business.
- 2.4 In considering how best to transpose, officials should provide ministers with robust advice as to the legal risks involved. While the UK must fully transpose all EU law obligations by which it is bound, the fact that transposing in a particular way carries some risk of infraction proceedings does not mean that this option should be ignored. Officials should instead provide ministers with a full and frank assessment of the nature and scope of the legal risks involves so as to allow a fully informed view to be taken as to how best to transpose in a particular case.

How do I use alternatives to legislation?

Guiding Principle: wherever possible, seek to implement EU policy and legal obligations through the use of alternatives to regulation.

- 2.5 The government is committed to regulating only where it is plainly necessary to do so, and only having demonstrated
- 2.6 The government's approach to EU legislation encapsulates the same philosophy. When a Directive specifies the objectives to be achieved, while leaving the "form and methods" to the discretion of each Member State, there may be potential to seek to implement through the use of alternatives to regulation. It may also provide that certain decisions or "implementing measures" will be specified at a later date by the Commission under the comitology procedure.
- 2.7 In practice, most Directives leave no discretion as to whether to implement by way of legislation or other binding provision. This is one reason why policy makers and Ministers are expected to engage with the Commission, MEPs and other Member States

at the earliest possible stage in the negotiating process in order to try and shape EU legislation so that it imposes the lightest regulatory burden possible. However, on occasion a Directive may be implemented in a manner that may be more flexible than command-and-control regulation, e.g. self-regulation, co-regulation or legally binding guidance.

- 2.8 It should be borne in mind that there are limits in EU law to the situations and alternative methods that can be used instead of regulation. You should therefore always seek to establish the legal risks of implementing by a non-regulatory means. The existence of a degree of legal risk is not, however, a basis for ignoring the possibility of avoiding regulation when transposing. Officials should instead provide ministers with robust advice as to the nature and scope of the legal risks involved so as to allow a fully informed view to be taken as to how best to transpose in a particular case.
- 2.9 When considering how to transpose an EU Directive, you should therefore:
- Start from the position that the UK should not go beyond the minimum requirements of the Directive;
 - assess whether the wording of the Directive leaves any room for a non-regulatory implementation within the UK, or parts of it;
 - if there is no such room, say so (in the impact assessment);
 - if there is such room, explore non-regulatory options as you would for domestic measures and record the analysis in an impact assessment (see Reducing Regulation Made Simple² for further advice and information on alternatives to regulation).

How do I avoid over-implementation or gold-plating?

Guiding Principle: *endeavour to ensure that UK businesses are not put at a competitive disadvantage compared with their European counterparts*

- 2.10 Government policy is that you should not to go beyond the **minimum requirements** of European Directives, unless there are exceptional circumstances, justified by a cost-benefit analysis and consultation with stakeholders. Any gold-plating, as defined below, must be explained in your impact assessment and will need to be cleared by the Reducing Regulation Committee.

² www.gov.uk/government/uploads/system/uploads/attachment_data/file/31626/10-1155-reducing-regulation-made-simple.pdf

What is gold-plating?

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

- extending the scope, adding in some way to the substantive requirement, or substituting wider UK legal terms for those used in the Directive; or
- not taking full advantage of any derogations which keep requirements to a minimum (e.g. for certain scales of operation, or specific activities); or
- retaining pre-existing UK standards where they are higher than those required by the Directive; or
- providing sanctions, enforcement mechanisms and matters such as burden of proof which are not aligned with the principles of good regulation; or
- implementing early, before the date given in the Directive.

- 2.11 The impact assessment accompanying the legislation should be explicit about identifying any gold-plating that is being proposed.

Strengthened guidance on the use of proportionate sanctions when implementing European Directives

- 2.12 In June 2016, the European Union referendum took place and the people of the United Kingdom voted to leave the EU. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in the future once the UK has left the EU.
- 2.13 When transposing, Member States generally have broad discretion as to exactly how they will apply the relevant EU law obligations. In some rare cases an EU measure may stipulate that Member States must impose a particular type of sanction. In most cases, the legislation will be silent and Member States are simply required to take measures to ensure the application and effectiveness of EU law. Member states therefore have a broad discretion provided that sanctions are effective, dissuasive and proportionate; and equivalent to those applicable to infringements of national law of a similar nature and importance. Any new sanction should therefore only be contemplated if absolutely necessary and it should be framed so as not to impose excessive or unfair penalties on citizens.
- 2.14 When transposing it is essential that the lead department considers carefully what type of sanctions are effective, dissuasive and proportionate. Indeed it should be the department's aim to avoid sanctions if at all possible and instead look to regulatory remedies. If sanctions are required, they should be the minimum necessary with only civil penalties for a breach. The presumption is that for any regulatory regime criminal sanctions should only ever be contemplated if a failure to do so would result in a clear violation of our EU obligations.
- 2.15 If there are already domestic sanctions for equivalent conduct then the lead department should have regard to the type and level of penalties imposed. However, the fact that penalties of a particular type are already imposed for equivalent breaches of domestic law does not mean that the lead department should assume the same penalties should

be applied when transposing. Again the key question is what type of sanctions will be effective, dissuasive and proportionate, and the presumption remains that civil penalties should be used wherever possible. If necessary, the domestic sanctions can be amended to ensure equivalence, subject to the requirement that they be effective, dissuasive and proportionate.

- 2.16 Where there are already sanctions for equivalent breaches of domestic law the lead department should consider whether the same sanctions could be relied upon when transposing.
- 2.17 In light of these considerations, the creation of a new criminal offence (which for these purposes includes the creation of a new offence, the amendment or repeal and re-enactment of an existing one, or the creation of a power in primary legislation to create or extend a criminal offence in subordinate legislation) in any transposition will be very rare.
- 2.18 Any proposal to create a new criminal law must be approved explicitly by the relevant Cabinet Committee, either HAC or RRC or where appropriate both. Prior to seeking that agreement a Justice Impact Assessment will need to be completed and the Ministry of Justice consulted as appropriate. If this has not been done the Cabinet Committee Secretariat will not allow the proposals to go forward for agreement. Time to complete each stage of this process will need to be factored in at the planning stage.

How do I bring EU legislation into harmony with existing UK law?

- 2.19 Cabinet Committees will want to see how you have aligned the aims of EU legislation with domestic policy priorities so that transposition neither has unintended consequences in the UK nor risks infraction. The legal text for UK transposition should also only be finalised once the policy framework has been agreed through Cabinet.

What is double banking?

Double-banking occurs when European legislation covers the same ground as existing domestic legislation, though possibly in different ways and to a varying extent. The term “ground” has to be interpreted widely and includes:

- the areas of risk the legislation seeks to provide for, e.g. fire safety;
- the areas of activity the legislation impacts upon, e.g. consumer credit; and
- the nature of the control, e.g. risk assessment.

The test is whether maximum streamlining has been achieved between the new and existing regimes, and the opportunity has been taken to disapply domestic rules and guidance which serve less of a purpose under the new framework. Aim to achieve as much consolidation as possible by merging all the relevant regulations into one.

- 2.20 To avoid double-banking, you need to take a radical look at the whole area of legislation on which the Directive impacts. You should therefore review all related existing UK legislation well before transposition. Think about the best way to implement so that there is no overlap or contradiction with existing legislation. The best way of avoiding these traps is not to treat EU legislation as an add-on, but instead to create one coherent regulatory regime wherever possible, either by amending the existing legislation or repealing/revoking it and starting afresh with a new regime.

Creating a coherent regulatory regime

The Unfair Commercial Practices Directive (Directive 2005/29/EC) overlapped with existing consumer protection legislation in the UK. When implementing the Directive, the former DTI carried out a large exercise, considering over 200 pieces of legislation, to establish where there was scope for simplification. It concluded that provisions in 29 pieces of legislation needed amendment or repeal to comply with the Directive (and its provisions on maximum harmonisation). The former DTI announced its decision in December 2006 to repeal provisions in 23 of these pieces of overlapping legislation, as they were replaced by the Unfair Commercial Practices Directive.

How do I compare plans for UK transposition with EU counterparts?

- 2.21 In addition to the above, the RRC will look for a comparison of UK implementation with that of other EU Member States. The aim of such comparison is to aid the identification of best practice and ensure that plans for transposition will (save in exceptional circumstances) avoid going beyond the minimum requirements of the Directive; thereby ensuring that the UK is not put at a competitive disadvantage compared with its EU counterparts.
- 2.22 There are a number of ways in which you might wish to consult other Member States and this, along with the most appropriate Member States for comparison, will change according to the scope and content of the Directive.
- 2.23 Some ideas you may wish to consider include:
- establishment of a Commission Committee made up of Member State representatives;
 - engaging with Commission transposition groups specific to your Directive;
 - chairing a domestic group of industry representatives;
 - informal contact with your counterparts in other Member States.

Working with other Member States

The UK actively participated in the review and recast of the Industrial Emissions (Integrated Pollution and Control) Directive, which was adopted in November 2010. The Directive lays down rules on prevention, control and reduction of pollution as a consequence of industrial activities in order to achieve a high level of protection for the environment as a whole. The Directive establishes a Committee made up of Member State representatives through which various aspects of implementation will be decided. In addition, it continues and enhances an information exchange process amongst Member States through which conclusions on best available techniques (BAT) for pollution control are reached. Furthermore, Defra chairs a grouping of UK industry representatives who have shown themselves able to identify any perceived disparity within the EU in respect of industrial pollution control. By those means, together with informal contacts, Member States comparisons can be drawn.

How do I use copy-out?

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

- 2.24 Lawyers and policy makers should work together to draft the implementing legislation. There are two broad approaches to transposing a Directive – copy-out and elaboration:
- **Copy-out**, as the name suggests, is where the implementing legislation adopts the same wording as that of the Directive or where it cross-refers to the relevant Directive provision.
 - **Elaboration** means implementing in a way that uses language that differs from the wording of the Directive in order to clarify its meaning for legal or domestic policy reasons.
- 2.25 Ministers recognise that Directives often set objectives that leave it to the discretion of Member States as to how those objectives are achieved. Cabinet Committees will scrutinise approaches to copy-out on a case by case basis.
- 2.26 In some cases departments may therefore depart from copy-out to take advantage of flexibility in the Directive. One clear example of this will be where departing from copy-out would allow the UK to transpose in a way which reduces the regulatory burden for business.
- 2.27 Whether copy-out can be used is subject to some legal principles. Implementation by way of copy-out is sufficient if it guarantees the full application of the Directive. Whether copy-out can be used depends, therefore, on the content of the Directive, hence ministers' decision to take a case by case approach.

- 2.28 You should consult lawyers and take particular care in the following four cases:
- **Where a provision of a Directive is intended to create rights for individuals**, the legal position needs to be sufficiently precise and clear so that people can determine the full extent of their rights;
 - **Where a provision of a Directive is intended to create obligations** which have to be complied with. In these cases, the obligations must be sufficiently clear so that they can be understood;
 - **Where transposition of a Directive requires the creation of criminal offences** copy-out will rarely provide sufficient legal certainty and will risk the offences being unenforceable;
 - **Where the Directive's requirements are applied by administrative authorities**, in order to avoid breaching the rule on sub-delegation. The rule on sub-delegation is a common law presumption that when Parliament gives a power to a specified person, that person should not delegate the exercise of the power to anyone else.
- 2.29 As stated above, any departures from copy-out should be clearly identified; their impact assessed, included in the impact assessment, and reported to the relevant domestic Cabinet Committee and the RRC. The use of a transposition table is suggested as one possible way of demonstrating how copy-out has been applied and providing explanation where it has not³.
- 2.30 You should also bear in mind that the Joint Committee on Statutory Instruments (JCSI) scrutinises secondary legislation laid before Parliament, partly to ensure that drafting is not defective. The Committee will consider whether the copying out of provisions of a Directive is appropriate.

Joint Committee on Statutory Instruments

This Committee considers the technical drafting aspects of secondary legislation to check that Directives have been transposed properly. It will report to each House in any instance where the authority of the parent Act has been exceeded or where a statutory instrument has been poorly drafted, and may ask officials to provide oral or written evidence to provide further explanation.

Lords Secondary Legislation Scrutiny Committee

This Committee considers the policy merits of secondary legislation and will adversely report to the House where it finds that secondary legislation inappropriately implements EU legislation. The Committee is particularly interested in knowing whether the relevant stakeholders have been consulted in drawing up the legislation, how it will be implemented, and the justification for any gold-plating. The Minister responsible for the statutory instrument may be called to account on any concerns the Committee may have. You can find guidance on what the Committee thinks a good Explanatory Memorandum should look like on its website at: www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/

³ For more on transposition tables, see Part 2

What is the right implementation date?

Guiding Principle: 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

- 2.31 UK Common Commencement Dates⁴ are two dates each year (6 April and 1 October) on which new domestic legislation is introduced in the UK. These provide business and other stakeholders with greater clarity and awareness about forthcoming regulatory changes, helping them to plan and budget for new measures and to reduce costs.
- 2.32 Common Commencement Dates do not apply to UK legislation which is implementing a Directive. However, where possible, bringing implementation forward in the UK by a matter of weeks to coincide with a Common Commencement Date can be justified if it can be demonstrated that the benefit of early implementation outweighs the cost. Stakeholder representations made during the consultation period might also provide an argument for early implementation on a Common Commencement Date.
- 2.33 Where provisions introduced by Directives are unequivocally advantageous to business, implementation can be sought as early as possible. For Directives that contain a mixture of measures – some of which are advantageous to business and some a burden or cost-neutral – statutory instruments should be drafted in such a way as to transpose the advantageous provisions as soon as possible while holding back the burdensome or cost-neutral ones until the transposition deadline.

How do I conduct a Ministerial review?

Guiding Principle: include a statutory duty for Ministerial review every five years (where appropriate)

- 2.34 Previously, all legislation implementing a Directive would include a statutory review clause for the impacts to be reviewed every five years to check on whether the original policy objectives (including expected benefits and costs) are being achieved, and whether any changes or improvements could be made, or whether the legislation is redundant. It is also helpful in building up an evidence base to influence future policy-making in the EU.
- 2.35 Statutory guidance⁵ for section 31 of the Small Business, Employment and Enterprise Act 2015 provides example factors that should be considered in relation to whether a statutory review duty would be appropriate, including setting out that the scale of net impacts of legislation will be a key factor in support of making a Ministerial statement rather than including a statutory review clause.

⁴ www.gov.uk/government/publications/common-commencement-dates-a-guide-for-policy-makers

⁵ www.gov.uk/government/publications/small-business-enterprise-and-employment-act-statutory-review-requirements

- 2.36 The principal focus of statutory reviews should be on identifying areas where implementation and enforcement could be improved to reduce burdens or increase effectiveness, learning from experience both in the UK and EU countries.
- 2.37 Reviews should be carried out in a way that is proportionate, considering in particular the scale of the expected (and actual) costs resulting from the Directive. You should also consider whether there may be unexpected costs arising as an unintended consequence of the original legislation. Where a Commission review of the Directive is planned, the statutory review should be planned so as to enable the results to feed into and influence that process.
- 2.38 The report on the statutory review, setting out the conclusions reached, must be cleared by the Reducing Regulation Committee and European Affairs Committee before publication. When clearance has been obtained, the report must be published (usually on legislation.gov.uk). In planning for the review, you must allow sufficient time to ensure that it can be completed within the statutory deadline for publication.

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Part 2: How do I implement a Directive?

- 3.1 To deliver greater ministerial oversight of transposition, the Guiding Principles for EU legislation state that the RRC should see proposals at key stages during transposition. The statutory duty for review is a requirement once the requirements have come into force.

What do I do once my Directive has been published on the Official Journal of the EU?

- 3.2 The successful transposition of a Directive starts with good handling of the initial Commission proposal and a properly considered negotiating position and strategy. It is very important to consider **early on** how a proposed Directive will be implemented in the UK, including in the devolved administrations. This will help to ensure that UK implementation is carried out in the most effective and least burdensome way. Departments should in particular consider, at an early stage, how the UK can best seek to transpose in a way which avoids going beyond the minimum requirements of the measure in question; thereby reducing the regulatory burden on business.
- 3.3 Make sure you talk to the parts of government likely to have a role in implementation from the earliest possible stages. Full consideration of practical implementation issues, e.g. who will enforce the requirements, can prevent problems arising on transposition.
- 3.4 Within two weeks of a Directive appearing in the Official Journal of the EU, you must write to the RRC for information and Secretaries of State for any other affected departments outlining your intended approach to transposition. You should complete an outline **transposition project plan** (see [page 24](#)) setting out how you intend to address the Guiding Principles for EU legislation and indicating your timeline and milestones for implementation. You may also decide to include the first draft of a transposition table at this stage. This initial notification to RRC is not a formal write-round for clearance, but provides ministers with the opportunity to comment or require changes to be made to implementation plans.
- 3.5 To ensure timely notification to the RRC you should consult and work with your assigned lawyers, EU team or Better Regulation Unit on completing the project plan in the run up to or immediately after a Directive is agreed at Council.
- 3.6 The project plan should be completed working back from the transposition deadline specified in the EU legislation and setting out key milestones. At this stage you do not need to attach an impact assessment. However, an impact assessment will be expected at the next write round stage (i.e. consultation and/or final clearance).
- 3.7 When completing the project plan, you may not be sure of the precise dates for some of the milestones. For example, you may not know exactly when you will launch a public consultation or make or lay regulations before Parliament. You should therefore provide estimates. You can update the plan with more precise details as you progress through transposition.

3.8 This approach should ensure that:

- policy teams think about transposition at an early stage and consider the necessary timetable before the Commission adopts a proposal;
- an early assessment can be made of the resources required to handle implementation;
- involved parties (including devolved administrations, other government departments, lawyers and other relevant specialists) are committed to a project plan and in particular to the timetable with its stages and milestones for transposition at an early stage; and
- Ministers have a clearer oversight of transposition plans and more opportunity to engage with the transposition process.

Do I need to consult?

- 3.9 When transposing EU legislation, it will often be desirable to carry out a formal written consultation to seek the views of stakeholders on the options for transposition. In some cases, however, formal written consultation may not be the most effective or proportionate way of seeking input from interested parties, e.g. when the scope of an exercise is very narrow and the level of interest highly specialised. Further guidance can be found in the Cabinet Office guidance on 'Consultation Principles'⁶.
- 3.10 When carrying out a formal written consultation, in outlining your plans for transposition in your draft consultation document, you will need to reflect the RRC's responses to your project plan received at initial notification. The consultation document will need to include an impact assessment (IA) and you may wish to include a transposition table (further detail on [page 27](#)).
- 3.11 Cabinet Committee clearance will need to be obtained before a formal written consultation document can be published. The relevant Minister must seek collective agreement from the RRC, plus the relevant domestic Cabinet Committee(s) and any other affected departments.

⁶ www.gov.uk/government/publications/consultation-principles-guidance

What do I do after consultation?

- 3.12 Once you have completed consulting stakeholders, (informally or through formal written consultation as appropriate), the Minister responsible for making the implementing instrument will need to consider the responses received during consultation and any government response to be published. You will need to advise the Minister on responses and revise plans for implementation accordingly.
- 3.13 Documents required to support implementation of the Directive usually include an impact assessment and any other documents that will require clearance prior to being made (e.g. transposition table if used and any other relevant documents that will be provided to Parliament).
- 3.14 You will need to seek Cabinet Committee clearance of all the above documents from the RRC, plus relevant domestic Cabinet Committee(s) and Secretaries of State of any other affected departments if the proposals have changes since consultation stage.
- 3.15 Once clearance has been obtained, the supporting documents may need to be amended to reflect the conditions set out in the round up letter granting clearance. For further information, see Cabinet Committee guidance⁷.
- 3.16 You will now be ready to complete your plans for transposition. Here it will be important to follow Parliamentary and internal departmental procedures for making and laying statutory instruments, ensuring that, unless otherwise justified, the implementation date is on (rather than before) the deadline specified in the EU legislation (further detail in paragraph 2.21).
- 3.17 You should ensure that each of the above steps is completed before the legal deadline set in the EU legislation. This will also avoid a risk of infraction by the European Commission and possibly a fine from the ECJ.
- 3.18 You will need to notify the European Commission electronically at the end of transposition. You should use the electronic notification system to notify transposition and your departmental transposition coordinator should be able to provide assistance. The lead Whitehall department is also responsible for notifying Gibraltar's transposition. Note that where there is an obligation to adopt and publish by a certain date the measures necessary to comply with the EU obligation (often well before the implementation date) there may be a two stage notification process, first when you have adopted and published the measures and secondly when they come into force.
- 3.19 There is a commitment to publish guidance at least 12 weeks before the legislation takes legal effect (further detail in paragraph 4.20). Clear practical guidance can help business and others comply with new legislation.
- 3.20 If the original transposition created a new criminal offence (which for these purposes includes the creation of a new offence, the amendment or repeal and re-enactment of an existing one, or the creation of a power in primary legislation to create or extend a criminal offence in subordinate legislation) then the continued need for that offence must be considered in accordance with the standing guidance explicitly and must be brought

⁷ https://civilservicelearning.civilservice.gov.uk/sites/default/files/cabinet_office_collective_agreement_process_guidance_0.pdf

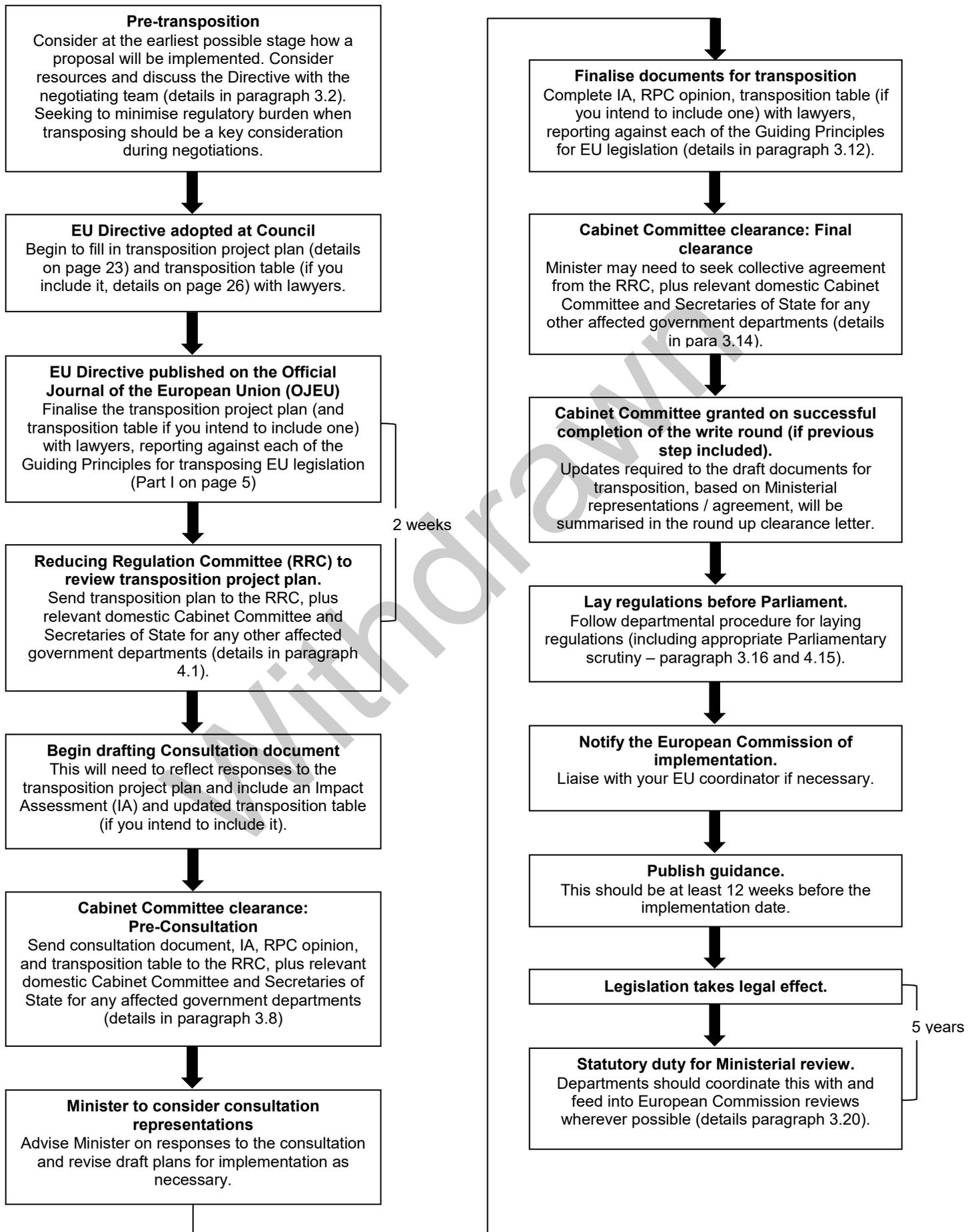
back to the relevant Cabinet Committee for approval. Prior to doing so the MoJ should be consulted and a Justice Impact Assessment will need to be completed.

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Transposition checklist

<p>Pre-transposition (see para 3.2)</p>	<ul style="list-style-type: none"> • Consider at the earliest possible stage how a proposal will be implemented and enforced in the UK, including by the devolved administrations. • Commit appropriate resources to handling the transposition. • Discuss the Directive with the negotiating team and lawyers to ensure an adequate link between negotiation and transposition. Any issues that may impact on transposition should be reflected in the transposition project plan. • Consider how to transpose in a manner which avoids going beyond the minimum requirements of the Directive. • Any issues that may impact on transposition should be reflected in your transposition project plan. • Make use of project management techniques to ensure timely implementation and effective stakeholder engagement at key stages.
<p>Initial RRC notification (see para 3.3)</p>	<ul style="list-style-type: none"> • Write to the Reducing Regulation Committee (RRC) (for information only) within 2 weeks of the legislation appearing in the Official Journal of the EU, including a covering letter, transposition project plan and transposition table if you include one. • Ensure that your covering letter discusses how the proposed approach to implementation addresses the Guiding Principles – Cabinet Office has issued a template which should be followed when drafting this covering letter.
<p>Initial RRC notification (see para 3.3)</p>	<ul style="list-style-type: none"> • Prepare an impact assessment (IA). • For significant measures (with net annual business impacts greater than +/- £5 million) seek an opinion from the Regulatory Policy Committee (RPC) on your IA. Ensure you allow sufficient time in your project plan to re-work your impact assessment should you receive a negative opinion from the RPC. • Seek RRC (and relevant domestic policy Cabinet committee(s)) clearance to consult, addressing how the Guiding Principles have been applied. The Cabinet Office template which should be followed when drafting this covering letter. Ensure you attach the consultation document, a consultation stage IA and any relevant RPC opinion.
<p>Final clearance (see para 3.12)</p>	<ul style="list-style-type: none"> • Allow time to seek RRC (and relevant domestic Cabinet committee(s)) clearance of the final proposed legal text – in case this is required. Address in your clearance letter the Guiding Principles. For significant measures, ensure you attach a final IA with a positive RPC opinion and updated transposition table. • Produce guidance which sets out for those affected exactly what their legal obligations are, at least 12 weeks before the legislation takes effect. • Notify the Commission of implementation. • Produce a Transposition Note for the UK Parliament.
<p>Review (see para 3.19)</p>	<ul style="list-style-type: none"> • Review the impact of the legislation implementing a Directive every 5 years, drawing on, and incorporating, the post-implementation review process.

Flowchart for the transposition of EU legislation



What is the role of the Reducing Regulation Committee (RRC)?

- 4.1 Since its creation in May 2010, the Reducing Regulation Cabinet Committee (RRC) has had responsibility for clearing regulations implementing EU obligations. As transposition is the domestic implementation of EU obligations, the RRC and the relevant domestic Cabinet Committee are responsible for scrutinising plans for transposition and will be responsible for issuing clearance at each relevant step.
- 4.2 RRC must give explicit approval to any proposal to create or extend the criminal law as part of any transposition.
- 4.3 To give ministers greater oversight of transposition and encourage stronger project management, the Guiding Principles for EU legislation state that the RRC should see proposals at key stages during transposition: planning, consultation and final Committee clearance as appropriate (further detail in the transposition checklist and flowchart).
- 4.4 Cabinet Committees typically require six working days to review proposals (9 during recess), with a further 2-3 days for the Chair to give the matter full consideration. You are advised to factor this into your timescales from the outset.
- 4.5 The RRC is able to reject the proposed approach to transposition at consultation and/or final clearance of scrutiny. You should therefore build sufficient time into your project plan to allow for this possibility, so as to ensure that final clearance will be granted before the legal deadline for transposition. Failure to meet the deadline could result in the UK being infracted and fined (further detail in paragraph 4.17). The government is under a legal obligation to meet the transposition deadline.

What is the role of officials?

- 4.6 It is a requirement of EU law that Member States' domestic legislation implements Directives in an effective and timely manner. Your approach to transposition should be discussed in advance with the lawyer assigned to your transposition team, your departmental EU unit, your departmental Better Regulation Unit (BRU) and, as appropriate, with the Better Regulation Executive (BRE).
- 4.7 The independent Regulatory Policy Committee (RPC) should comment on impact assessments (IAs) for transposition proposals with significant impacts on business or civil society organisations⁸ before consultation and/or final Cabinet clearance; only those IAs assessed as 'fit for purpose' may proceed to Cabinet clearance. You will need to build into your project plan sufficient time for the RPC to comment on IAs prior to their inclusion in the Cabinet Committee write round, as well as planning for the possibility of receiving a negative opinion and the subsequent need to resubmit the IA to the RPC. RPC opinions should be referenced and attached to the clearance letter copied to the RRC.
- 4.8 It is essential that you allow sufficient time for consultation where appropriate and securing RRC clearance (including RPC scrutiny of IAs). You should also allow time to develop a different approach to transposition if the Cabinet Committee / RRC rejects your plans and withholds clearance. The timescales in your project plan should allow for

⁸ In this context, significant means measures with equivalent annual net direct impacts greater than +/- £5 million.

these possibilities, so that there will be no risk of triggering infraction as a result of missing the legal transposition deadline if the RPC or Cabinet Committees do not give you a positive response at the first attempt.

What about the devolved administrations and Gibraltar?

- 4.9 The link between negotiation and transposition will be important when considering the devolved administrations, the Channel Islands, Isle of Man and Gibraltar. You should observe the 'Concordat on Coordination of European Union Policy Issues'⁹ which sets out how Whitehall departments and the devolved administrations should work together on the negotiation and implementation of European legislation. It is important to keep in close contact with the devolved administrations throughout the legislative process, so that they too can prepare for any implementation in good time.
- 4.10 You should formally notify the devolved administrations as early as possible at official level of any new EU obligation which they will need to implement. For matters falling within their responsibility, it is for the devolved administrations to consider, in consultation with the Whitehall departments and other devolved administrations, if appropriate, how the obligation should be implemented and enforced within the required timescale, including whether the devolved administrations should implement separately, or opt for GB or UK legislation.
- 4.11 Where a devolved administration opts to implement separately, it will have a responsibility to consult the lead Whitehall department, and other departments, as necessary, on its implementation proposals, to ensure that any differences of approach nonetheless produce consistency of effect and, where appropriate, of timing.
- 4.12 If the proposal applies to Gibraltar, you should liaise with the EU-Gibraltar desk in the FCO, who can ensure that the government of Gibraltar is notified. You should keep FCO updated on progress and inform them of any applicable legislation once agreement in Council has been obtained and no later than two weeks after it appears in the OJEU. The UK is responsible, as the Member State, for Gibraltar's compliance with EU legislation.
- 4.13 The EU Treaties apply to Gibraltar by virtue of Article 355(3) of the Treaty on the Functioning of the European Union (TFEU). Whilst in principle the Treaty applies to Gibraltar, under the United Kingdom's Act of Accession of 1972, certain significant Treaty provisions do not apply to Gibraltar. These include:
- the free movement of goods (Articles 28-37 of The Functioning of the European Union (TFEU), together with Directives adopted under Article 114 TFEU which have as their objective the removal of barriers to free movement of goods);
 - common commercial policy (Articles 206-207 TFEU);
 - the Common Agricultural Policy and the Common Fisheries Policy;
 - all Community rules relating to value added taxes and other turnover taxes; and

⁹ www.ofmdfni.gov.uk/memorandum_of_understanding_and_concordate_on_co-ordination_of_eu_issues_-_march_2010.pdf

- all regimes whose proceeds contribute to EU finances including the Common Agricultural Policy, the Common Customs Tariff, value added tax and the “fourth resource”, a contribution to the EU budget based on gross national product.

- 4.14 Gibraltar is also outside the common customs territory (and, in consequence, EU rules on customs).
- 4.15 If you have any questions over whether legislation will apply in Gibraltar, please consult your legal advisers. You can also contact the EU-Gibraltar desk in the FCO on 020 7008 2502 and 020 7008 4395.

What about Parliamentary scrutiny?

- 4.16 You will need to make sure that you allow sufficient time for proper Parliamentary scrutiny of transposition measures, taking the 21 day rule into account where it is appropriate to do so. Most transposition proposals are scrutinised using the negative procedure, which means that the implementing legislation enters into force unless there is a resolution passed in either House praying that it be annulled. Occasionally, however, the affirmative procedure is followed, which means that the Statutory Instrument cannot be made unless it receives positive approval from each House or, more rarely, remain in force unless that approval is obtained within a certain period, usually 28 or 40 days. Comprehensive guidance on preparing Statutory Instruments and the Parliamentary procedures relating to them can be found in ‘Statutory Instrument Practice’¹⁰.

What about Justice and Home Affairs matters?

- 4.17 In EU Justice and Home Affairs (JHA) matters, the UK approach is governed by the JHA Opt-In Protocol, set out in the Lisbon Treaty. This is of significant political importance. Policy leads of all departments should be alert to any elements of JHA policy in their dossiers (such as migration, civil, criminal judicial and police cooperation, as set out under Title V of the TFEU) in order that the opt-in remains protected.

What about the risk of infraction?

- 4.18 An Assessment of the legal risks surrounding the means by which a directive is transposed is a vital part of the transposition process; however the fact that transposing in a particular way carries some risk of infraction proceedings is not a reason for ignoring a particular transposition option. Ministers should instead be given robust advice as to the nature and scope of the legal risk involved so as to enable a fully informed decision on transposition to be made.
- 4.19 Where infraction proceedings are brought it is extremely important that the correct procedures are followed.
- 4.20 The European Affairs Committee needs to be informed as soon as possible where there is a risk of infraction due to late implementation.

¹⁰ Latest version can be found at www.opsi.gov.uk/si/sip-circulars/sip-circ02-2010.pdf

- 4.21 Where a proposed response to an infraction would involve making domestic legislation, the measure will often need to be sent to the Regulatory Policy Committee for an opinion on the impact assessment and subsequently cleared through the RRC. This may entail longer clearance than simply submitting to the European Affairs Committee. Where you are leading on an infraction which would involve making domestic legislation, you should ensure that you address this in your Preliminary Assessment for the infraction, in line with Cabinet Office guidance on infractions.

Transposition project plans & transposition tables

Title	<i>[Insert title of EU legislation and link to the EU legal text]</i>
EU Legislation Ref.	<i>[Insert EU legislation reference number]</i>
Lead Department	<i>[Insert name of lead department]</i>
Lead Minister	<i>[Insert name of lead Minister]</i>
TRANSPOSITION PROJECT PLAN / MILESTONES	
[Insert date]	Date the EU legislation was adopted
[Insert date]	Published in the Official Journal of the EU <i>[include link to legislation]</i>
Dependencies and Issues	<i>[Any implementation requirements which are dependent on further action e.g. confirmation by the European Commission of information requirement, establishment of a national administrative authority]</i>
Method of Transposition	Existing legislation, New primary legislation, New secondary legislation, Other / Administrative Act (please highlight)
[Insert date]	Pre-consultation RRC clearance <i>[If formal consultation is taking place, allow sufficient time for RPC opinion on the IA (the RPC opinion and IA will need to be included in the write round), followed by contingency time for any necessary revisions]</i>
[Insert date]	Consultation <i>[Consultation should usually lasts for at least 12 weeks]</i>
[Insert date]	Final RRC clearance <i>[Allow sufficient time for RPC opinion (which will need to be included in the write round), followed by contingency tie for any necessary revisions]</i>
[Insert date]	Lay regulations <i>[Please consider whether there are any restrictions on this date e.g. UK Parliamentary recesses, any restrictions the Devolved Administrations or Gibraltar may face when implementing their own legislation or as a consequence of UK regulations.]</i>
[Insert date or N/A]	Expected date for transposition in NI/Scotland/Wales (if applicable) <i>[You will need to contact the Devolved Administrations early to discuss timing of implementation. The Welsh Assembly government may need time to translate legislation into Welsh]</i>
[Insert date or N/A]	Expected date for transposition in Gibraltar (if applicable)
[Insert date]	Expected date for publication of guidance <i>[This should be at least 12 weeks before the legislation comes into force.]</i>

[Insert date]	Planned date for notifying the Commission of transposition		
[Insert date]	UK legislation enters into force		
[Insert date]	Final transposition deadline (from EU legislation)		
[Insert date(s)]	Other milestones post-implementation <i>[You should set out here any other key milestones that are related to the implementation of the Directive / Regulation e.g. appointment of an enforcement authority or statutory reporting to the Commission.]</i>		
[Insert date]	Proposed date for Ministerial review		
Lead Official:		Contact No:	
Lead Lawyer:		Contact No:	

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What is a transposition table?

- 5.1 The Guiding Principles set out that you should always use copy-out for transposition where it is available, except where doing so would adversely affect UK interests. The role of the RRC will be important in ensuring that the principle of copy-out is adhered to. In order to promote transparency and inform Cabinet Committees one method of demonstrating how copy-out has been applied is the inclusion of a transposition table in your clearance letters. The structure of a transposition table and how it can be applied for each step of transposition is set out below.
- 5.2 A transposition table provides the RRC with an article-by-article overview demonstrating where copy-out has been applied, where it has not and an explanation for the need to elaborate which can then being scrutinised. Members of Cabinet Committees may ask for such a table if they are not included with your clearance letters.

How do I produce a transposition table?

- 5.3 Transposition tables might prove to be a valuable tool to add clarity to your plans for transposition. If proportionate, you should include it when submitting to the RRC and other relevant domestic Cabinet Committees at each stage of Cabinet Committee notification and/or clearance. The development of a transposition table will be iterative – you will need to populate or update the table with varying degrees of detail, depending on the clearance stage and level of feedback from ministers and stakeholders. Transposition tables can also be easily converted into Transposition Notes for domestic Parliamentary Scrutiny purposes.
- 5.4 At initial RRC notification (within two weeks of new EU legislation appearing in the Official Journal) for example, the transposition table will contain limited information. You may wish to include the transposition table if you conduct a formal written consultation (or as part of informal consultation as appropriate) in order to inform stakeholders where and how copy-out has been applied, and identify the relevant article of the directive with the national provision in the proposed UK legislation. This may act as a useful tool for securing stakeholder views on the approach to transposition. At final clearance, the tables will provide a comprehensive overview of the approach to copy-out, reasoning if copy-out has not been used and corresponding national provisions.
- 5.5 Transposition tables are aimed initially at informing Cabinet Committees and the RRC of your plans to copy-out. However, later in transposition, if you decide to include a table in your consultation document, the audience will include all those affected by the legislation – individuals, business and other organisations. It is important that the transposition table is understood by all. It should therefore be produced in a format and using language that can be understood by both officials and an informed, but not expert, audience, including those affected by the legislation. It should be as simply expressed and jargon-free as possible.

Initial notification to RRC

Article	Copy out (yes/no)	If no – Reason for Elaboration	National Provision
Article 1 [include description]	[Indicate if you are using copy-out, i.e. yes or no]	[n/a if 'yes', or reason for not using copy-out if 'no']	[n/a at this stage]
Article 2 [include description]	As above	As above	

Pre-consultation clearance – further detail

Article	Copy out (yes/no)	If no – Reason for Elaboration	National Provision
Article 1 [include description]	[Indicate if you are using copy-out, i.e. yes or no]	[n/a if 'yes', or reason for not using copy-out if 'no']	[corresponding Regulation number and description, if drafted prior to consultation]
Article 2 [include description]	As above	As above	As above

Final clearance – article by article comparison

Article	Copy out (yes/no)	National Provision	If no – Reason for Elaboration
Article 1 [include description]	[Indicate if you are using copy-out, i.e. yes or no]	[corresponding Regulation number and description, if drafted prior to consultation]	[n/a if 'yes', or reason for not using copy-out if 'no']
Article 2 [include description]	As above	As above	As above

Guiding Principles for EU Legislation

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. ensure that (save in exceptional circumstances) the UK does not go beyond the minimum requirements of the measure which is being transposed;
 - b. wherever possible, seek to implement EU policy and legal obligations through the use of alternatives to regulation;
 - c. endeavour to ensure that UK businesses are not put at a competitive disadvantage compared with their European counterparts;
 - d. always use copy out for transposition where it is available, except where doing so would adversely affect UK interests e.g. by putting UK businesses at a competitive disadvantage compared with their European counterparts. If departments do not use copy out, they will need to explain to the RRC the reasons for their choice;
 - e. 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
 - f. 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 infringement.
5. The legal text for UK transposition should only be finalised once the policy framework has been agreed by the RRC.
6. The European Affairs Committee should be kept informed.
7. 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 Guiding 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, but does so in a way that (save in exceptional circumstances) avoids going beyond the minimum requirements; thereby minimising the cost to business. This should be supported by evidence.

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