PRINCIPLES FOR DEPARTMENTS ON REVIEWING OVER-IMPLEMENTATION OF EU LEGISLATION

The Government’s policy on implementation of EU legislation is to implement so as to achieve the objectives of the European measure, on time and in accordance with other UK policy goals, including minimising the burdens on business. The Cabinet Office’s Transposition guide (available online at www.cabinetoffice.gov.uk/regulation/documents/pdf/europe/tpguide.pdf) sets out the approach that departments should take when implementing new EU measures.

The Davidson Review is scrutinising areas of existing EU-derived legislation for evidence of over-implementation in the UK or smarter implementation by other Member States. The review aims to support the productivity of the UK economy by ensuring that EU legislation has not been implemented in a way that results in unnecessary regulatory burdens. Further information on the Davidson Review can be found at www.cabinetoffice.gov.uk/regulation/davidson_review.

The Review will selectively examine case studies for evidence of over-implementation but departments should be looking for areas where they can reduce the regulatory burden they impose, including reviewing their legislation which is EU derived. Evidence of over-implementation of EU measures may be found in the RIA prepared for implementation of the measure, evidence submitted through the Better Regulation portal or other channels and previous reports by Government or others.

Once a potential case of over-implementation has been identified the following principles and questions should be considered. Only some of them will be relevant to the issues in each case and there is no requirement to consider them all.

In relation to comparisons with other Member States’ implementation of the EU measure:

- The need to ensure that UK businesses are not disadvantaged when competing against businesses in other EU states due to the way that the UK has implemented EU measures;
- Risks which were initially rejected by the UK when making its implementation choices may now, in light of other Member States’ approach and the Commission’s approach, be acceptable;
- Seek evidence from the Commission, businesses which operate across EU borders and regulators or government departments in other Member States of lighter-touch regulatory approaches in other jurisdictions, and assess whether a similar approach would be appropriate in the UK.

In relation to whether transposition of the measure has given rise to goldplating (when implementation goes beyond the minimum necessary to comply with an EU directive):

- Does the implementation meet the standards set out in the current Cabinet Office transposition guide?
- Is there wording in the UK implementing legislation which differs from the EU measure in such a way as to indicate a change in scope?
Does analysis of the transposition note show that the UK legislation is doing more than required to implement the EU measure?
Where the EU measure has not been copied out are there good reasons for adopting another drafting approach?
Has the UK taken full advantage of any derogations in the EU measure and if not why not?
Does the enforcement mechanism or do the sanctions imposed go beyond the minimum necessary?
Do any original justifications for gold-plating still apply?
Has the implementation or other UK legislation given rise to double-banking (where EU and domestic regulatory regimes cover the same ground):
- Does the implementing legislation overlap with related domestic legislation?
- Have the two regimes been made fully consistent or merged into one and if not is this causing extra costs to be incurred?

If there is regulatory creep around the legislation (where regulation is extended through non-statutory means):
- What kind of guidance or best practice notes around the regulation exist and who issues them?
- Is that guidance and its status clear?
- If more than one piece of guidance covers the area could the number be reduced?
- Is there confusion between standards, guidance and regulation which is creating additional burdens and cost?

Is there a case for a strategic simplification of the whole area of regulation:
- Has the whole area of legislation become too complex due to repeated add-ons to the existing regulation either to implement domestic policy or new EU measures in the same field?
- Is there a case for stripping away the legacy of historic regulation and starting with a clean sheet to implement the EU measures from first principles?

Contact details
If you have any questions about the Review or the principles outlined above, please contact the Davidson Review Team in the Better Regulation Executive on 020 7276 2532, or email BRE-Davidson.Review@cabinet-office.x.gsi.gov.uk