The Committee will meet at 2.00 pm in Committee Room 5.

1. **Christmas Day and New Year’s Day Trading (Scotland) Bill**: The Committee will consider the Bill at Stage 2.

2. **Custodial Sentences and Weapons (Scotland) Bill**: The Committee will consider motion S2M-5408 in the name of David Davidson MSP—

   That the Justice 2 Committee considers the Custodial Sentences and Weapons (Scotland) Bill at Stage 2 in the following order: sections 43 to 46, section 1, schedule 1, sections 2 to 42, sections 47 to 49, schedule 2, section 50, schedule 3 and the long title.

3. **Justice and home affairs in Europe**: The Committee will consider a paper by the Clerk.

4. **Tribunals, Courts and Enforcement Bill (UK legislation) (in private)**: The Committee will consider a draft report.

Tracey Hawe
Clerk to the Committee
Papers for the meeting—

**Agenda Item 1**

Marshalled List (to follow)

Groupings (to follow)

Members are reminded to bring with them copies of the Bill, Explanatory Notes and Policy Memorandum, available from Document Supply or from the Parliament’s website ([http://www.scottish.parliament.uk/business/bills/59-xMasDay/index.htm](http://www.scottish.parliament.uk/business/bills/59-xMasDay/index.htm)) together with any papers from the Stage 1 process that are considered relevant (such as the Committee’s Stage 1 Report).

**Agenda Item 3**

Paper by clerk and annexes  J2/S2/07/2/1

**Agenda Item 4**

Draft report (PRIVATE PAPER)  J2/S2/07/2/2

**Documents circulated for information—**


Letter from Minister for Justice to Annabel Goldie MSP on criminal convictions of UK national elsewhere in the EU, dated 11 January 2007
Background

1. This paper provides the Committee with a brief update following the last evidence taking session with the Minister on 13 June 2006 and invites the Committee to consider whether it wishes to respond to two consultations from the European and External Relations Committee.

2. As members may recall, a watching brief has been maintained by this Committee on three particular issues within the criminal justice dossier, namely the Framework Decision on Certain Procedural Rights in Criminal Proceedings (otherwise known as Minimum Standards in Criminal Proceedings), the Green Paper on Bail (formally entitled Mutual Recognition of Non-Custodial Pre-Trial Supervision Measures) and the Green Paper on Sentencing.

3. The Justice 1 Committee has taken an active interest in applicable law in divorce matters and has undertaken a considerable amount of work on this particular EU dossier and has also discussed proposals in relation to succession and wills and mediation and maintenance obligations.

Developments in the dossiers being tracked by the Committee

Procedural Rights in Criminal Proceedings

4. This initiative sought to set common standards throughout the EU covering issues such as access to legal advice and to free interpretation and translation. The initiative has been under discussion in working group for a considerable time.

5. In the view of the Executive, the potential implications for Scotland are likely to be in relation to the interface with the initial 6-hour detention period. The Executive is concerned that a right to legal advice or assistance during the initial six-hour detention period that the police have in which to question suspects, after which they have to be charged or released, could give rise to increased legal aid costs and a fundamental reorganisation of police procedure.

6. Discussions are still ongoing and the issues have been passed to the German presidency for whom it is now a priority.
Proposal for a Council Framework Decision on the European Supervision Order in Pre-Trial Procedures Between Member States in the European Union

7. At present, different alternatives to pre-trial detention exist in different states (for example a requirement to report regularly to the police or a restriction on travel) which cannot be transferred across borders. Essentially the aim of this proposal is to allow non-resident suspects to go back to their home States instead of awaiting trial in custody or being subject to other supervision measures in another State where an offence was alleged to have been committed.

8. A Green Paper was initially published in 2004 and responses (including a response from the Scottish Executive) were considered by the Commission. After further consideration and discussion, it was decided to progress the policy option for a new legislative instrument for the mutual recognition of pre-trial measures incorporating a specific return or pre-trial transfer mechanism. Such an instrument would be recognised and enforced in another Member State pending the return of the defendant for trial. On this basis, the proposal for a Council Framework Decision was published in August 2006 and the Commission is now working on this (the European Supervision Order).

9. The proposal is not yet law and discussions have still to take place in Council. The proposal was discussed and reported on by the House of Commons Select Committee on European Scrutiny who assessed the instrument as being “legally and politically important.” That Committee has kept the instrument under scrutiny pending responses from the Minister on issues raised.

Green Paper on Sentencing (approximation, mutual recognition and enforcement of criminal sanctions in the European Union)

10. Although a Green Paper on Sentencing was published in 2004, to which the Scottish Executive responded, no proposals have emerged from the Commission in this regard yet. It is expected that a draft Framework Decision will be published during 2007.

Action

11. The Committee is invited to highlight its interest in these EU dossiers in its legacy paper to a successor committee.

European Commission’s Legislative and Work Programme for 2007

12. The Convener of the European and External Relations Committee, Linda Fabiani MSP, wrote to subject committee Conveners in November 2006 seeking their views on any policy initiatives contained in the European Commission’s Legislative and Work Programme for 2007 which are expected to have a significant impact on Scotland. Responses are sought by Friday 26 January. A copy of the letter is provided at Annexe A.

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1 http://www.publications.parliament.uk/pa/cm200506/cmselect/cmeuleg/34-xxxvii/34x25.htm
13. The Commission’s 2007 Work Programme sets out its strategic initiatives together with its priority initiatives. The Scottish Parliament’s European Officer has prepared an analysis of the Work Programme, highlighting issues which may be of particular interest to subject committees. A copy of his paper is provided at Annexe B.

14. Responses from subject Committees are intended to inform the establishment of the European Policy Tracker, a new Scottish Parliament system for monitoring EU developments of significance to Scotland.

15. The Commission’s Work Programme for 2007 contains relatively few justice and home affairs related strategic initiatives. Those included in the programme relate to migration initiatives and anti-terrorism measures. Although these developments are of significance for Scotland, responsibility for both matters is reserved.

16. The one Justice related strategic priority contained in the Commission’s Work Programme which would be likely to have a direct impact on the Scottish criminal justice system is a proposed Framework Decision on the protection of witnesses and individuals who cooperate with the judicial process.

17. In its Work Programme, the Commission states that “at present the provisions for witness protection vary across Member States. This disparity can have serious consequences, particularly given the increase in trans-border organised crime and terrorism.”

18. The proposal is expected to be published in May 2007 and as such it would be for a successor committee to consider its terms.

Action

19. The Committee is invited to—

   • note the inclusion in the Commission’s Work Programme of a proposed Framework Directive on witness protection; and

   • recommend to the European and External Relations Committee that this dossier be included in the European policy tracker.

The Hague Programme

20. In November 2004, the European Council agreed a five-year programme of action on justice and home affairs, including policies on visas, asylum and immigration and police and judicial cooperation in criminal matters (“the Hague Programme”). In June 2005, the Council adopted an Action Plan to give effect to the Programme and in 2006 reported on the implementation.

21. The Commission’s Work Programme for 2007 does not show the continuing work on these dossiers which emerged following agreement of the Hague Programme.
22. As outlined earlier in this report, the Justice 2 Committee has maintained a watching brief on several dossiers included in the criminal judicial co-operation and policing side of the Hague Programme. The Justice 1 Committee has scrutinised several dossiers on the civil judicial co-operation side. Some of these issues are discussed in annex 1 of the European Officer's paper. Due to the protracted nature of negotiations between Member States, it may take some time before agreement is finally reached on any of these legislative proposals.

**Action**

23. The Committee is invited to recommend to the European and External Relations Committee that the following dossiers be added to the European policy tracker as being of interest to the Justice 2 Committee —

- Procedural Rights in Criminal Proceedings
- Proposal for a Council Framework Decision on the European Supervision Order in Pre-Trial Procedures Between Member States in the European Union (the European Supervision Order)
- Follow-up to the Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union

**Inquiry into the transposition and implementation of European Directives in Scotland**

24. In a separate consultation, the Convener of the EERC wrote to subject committee conveners in December 2006 inviting views on the main conclusions and themes of a reporter-led inquiry report by Jim Wallace MSP. Responses are again requested by Friday 26 January. A copy of the letter is provided at **Annexe C**.

25. The initial focus of Mr Wallace’s inquiry was on ‘gold plating’ of EU directives when transposed into Scots law. His report also considered the role of the EERC and subject committees in scrutinising the transposition and implementation of EU directives. A copy of the report is provided at **Annexe D**.

**Action**

26. The Committee may wish to respond to the EERC by highlighting the importance of tracking EU policy proposals from an early stage, engaging with the Commission and working in collaboration with the Scottish Executive and Westminster counterparts as appropriate to ensure Scotland’s interests are effectively represented.
27. The Committee is invited to consider whether it wishes to make any further comments to the EERC in connection with conclusions and themes of Mr Wallace's paper.
Dear Convener,

EUROPEAN COMMISSION’S LEGISLATIVE AND WORK PROGRAMME 2007

At its meeting on Tuesday 7 November 2006, the European and External Relations Committee began its consideration of the European Commission’s legislative and work programme for 2007. As part of this process, the Committee has agreed to consult key stakeholders on those policy initiatives within the work programme which they expect to significantly impact on Scotland. The Committee would like to extend the same invitation to appropriate subject committees.

The purpose of the Committee’s consideration of the legislative and work programme is to identify, to monitor and include in our own work programme, those key policy initiatives which will potentially impact on Scotland. It is envisaged that this process will be done on an annual basis, with some policy initiatives falling off the Committee’s work programme, others carrying over into subsequent years and new initiatives being added. The policy initiatives identified from this legislative and work programme will also inform our legacy paper.

This process will also help to inform the population of the European policy tracker which was considered by the Convener’s Group at its meeting on 23 February 2006. The European Officer will have responsibility for managing the tracker and providing intelligence on a regular basis on the priorities which have been identified through this consultation process. The tracker will be available initially on SPEIR.

As part of its consultation on the legislative and work programme, the Committee is keen to canvas the views of other parliamentary committees on which policy initiatives have the greatest potential impact on Scotland. The European Officer is currently preparing a detailed analysis of the legislative
and work programme and this will be forwarded to you to assist in this process. It is expected that this will be available for the beginning of December.

The Committee will consider responses to its consultation at a meeting on Tuesday 13 February 2007 and so I would be grateful if you could respond to this request by **Friday 26 January 2007**. I attach a link to the legislative and work programme: http://ec.europa.eu/atwork/programmes/index_en.htm

Yours sincerely

LINDA FABIANI
CONVENER
European issues for the year ahead
Assessment of the Commission Work Programme for 2007

Introduction
1. Each year the European Commission produces a detailed work programme for the year ahead, outlining both legislative proposals (directives, regulations etc) and non-legislative proposals (action plans, green papers etc).

2. The 2007 Work Programme sets out a series of strategic initiatives (the core actions for the year ahead) together with a series of priority initiatives (to be adopted over the next 12 to 18 months). Less than half of the proposals entail new law, the remainder focus on promoting debate (possibly leading to legislation in later years) and the exchange of good practice.

3. The work programme also takes the better regulation initiative to a new level by identifying simplification initiatives and withdrawals of pending legislation (47 existing pieces of EU legislation will be so affected), whilst a further ten pieces of proposed legislation will be abandoned.

Overview
4. The year 2007 marks the 50th anniversary of the founding of the EU, an event that will be celebrated with the Berlin Declaration (March 2007) to be signed by Heads of State and Government. Against this backdrop, the German Presidency (Jan – Jul) has committed itself to re-launching a debate on the Constitutional Treaty

5. The key priorities of the work programme itself (which are outlined in greater detail over the page) are:
   - Economic development (including reviews of the Lisbon Agenda the Single Market and the Social Agenda)
   - Energy (including the first Strategic Energy Review)
   - Climate change (including Green and White Papers, and revision to various emission directives)
   - Health (including an overarching strategy and a white paper on cross-border health care, as well as a green paper on diet)
   - Maritime issues (including a general strategy as well as policies on ports and fishing)

Structure of paper
6. All the issues in the work programme can be expected to have some impact on Scotland. This document outlines the issues over which the Scottish Parliament has competence and can exert influence as they develop. Non-legislative proposals are included since they commonly give forewarning of legislation to come, allowing for early engagement. It is this early engagement that allows for maximum influence.
7. All the proposals of interest to the Scottish Parliament are listed on page 4. Thereafter, the proposals of interest to the relevant committee are discussed in turn. For each proposal, information is provided on the background of the issue, details of the proposal and its likely impact on Scotland.

8. Given the nature of European policy development, there are a number of issues currently under consideration in the European institutions which would also be expected to continue their progress in the year ahead. There are also issues that have simply not appeared in the Work Programme for 2007, but are likely to continue or commence. These issues are detailed in Annex I.

Parliament engagement

10. The upcoming elections will impact upon the ability of the Parliament to engage immediately with issues in the front end of the year. However, the gestation period for most proposals is such that it will allow issues to be picked up after the election. A number of Communications will be adopted that will indicate further actions to follow in 2008 and 2009.

Dr Ian Duncan
European Officer

December 2006
A guide to terms

The Commission proposals fall into two broad categories, legislative and non legislative. The second group will commonly give forewarning of legislation to come. The nature of each type of proposal is outlined below.

- **Communication.** A commission Communication is non legislative. It is commonly deployed to give early warning or an outline of Commission thinking, or to summarise the results of an earlier consultation. Road maps and action plans are commonly published in this form. Communications will therefore appear throughout the legislative process. As such they are vital for gaining early warning of the likely course of a proposal, and the legislative milestone along the way. Communications are also used in areas where the Commission has limited or no competence, but believes it can add value to the process, whilst ‘Interpretative Communications’ are issued to clarify issues of confusion around an EU law.

- **Green Paper.** The Commission issues its consultations in the form of Green Papers, which are non legislative. A green paper is commonly produced early in the legislative process, and input at this stage can have a greater impact. The results of this consultation grant legitimacy to the Commission’s further actions and are commonly summarised in a communication or a white paper.

- **White Paper.** Although non legislative, a white paper will commonly summarise the Commission’s chosen course of action and legislative proposals. At this stage there is still opportunity to affect the broad thrust of policy development.

- **Directive** (or Framework Decision in the Justice area). A legislative proposal, which is often the result of the stages outlined above. Once a directive is issued it will debated by the Council and where the co-decision procedure operates, by the Parliament. This stage can take several years, depending upon the complexity or controversy of an issue. There is still an opportunity to influence the detail of the law at this stage through amendment but it is harder to influence the broad purpose. Once passed a Directive will then have to go through domestic transposition.

- **Regulation.** A legislative proposal which will commonly progress more rapidly through the legislative stages. Once passed it requires no transposition.
<table>
<thead>
<tr>
<th>Proposal</th>
<th>Type</th>
<th>Adoption date</th>
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<tbody>
<tr>
<td><strong>Enterprise &amp; Culture</strong></td>
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<tr>
<td>Strategic Energy Review</td>
<td>Communication</td>
<td>January</td>
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<tr>
<td>Strategic Energy Technology Plan</td>
<td>Communication</td>
<td>November</td>
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<tr>
<td>Lisbon Agenda Review</td>
<td>Communication</td>
<td>October</td>
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<tr>
<td>Single Market Review</td>
<td>Communication</td>
<td>May</td>
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<tr>
<td>Social Agenda review</td>
<td>Communication</td>
<td>November</td>
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<tr>
<td>Sustainable Production &amp; Consumption</td>
<td>Communication</td>
<td>November</td>
</tr>
<tr>
<td>Movement of highly skilled workers</td>
<td>Directive &amp; Action Plan</td>
<td>September</td>
</tr>
<tr>
<td>European Research Area</td>
<td>Communication</td>
<td>March</td>
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<tr>
<td><strong>Local Government &amp; Transport</strong></td>
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<tr>
<td>Urban Transport</td>
<td>Green Paper</td>
<td>September</td>
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<td>Green Public Procurement</td>
<td>Communication</td>
<td>October</td>
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<tr>
<td>PPP concessions</td>
<td>Directive</td>
<td>October</td>
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<tr>
<td><strong>Environment &amp; Rural Development</strong></td>
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<td>Climate change post 2012</td>
<td>Green Paper</td>
<td>April</td>
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<tr>
<td>Climate change adaptation programme</td>
<td>White paper</td>
<td>November</td>
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<tr>
<td>Review of national emission ceilings</td>
<td>Directive</td>
<td>July</td>
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<tr>
<td>Emissions Trading Scheme</td>
<td>Directive</td>
<td>October</td>
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<tr>
<td>Review of emissions directives</td>
<td>Directive</td>
<td>December</td>
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<tr>
<td>Regulating carbon capture</td>
<td>Directive</td>
<td>November</td>
</tr>
<tr>
<td>Implementation/Enforcement of environmental law</td>
<td>Communication</td>
<td>December</td>
</tr>
<tr>
<td>Maritime policy</td>
<td>Communication</td>
<td>November</td>
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<tr>
<td>Ports policy</td>
<td>Communication</td>
<td>November</td>
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<tr>
<td>Discards in fishing</td>
<td>Communication</td>
<td>February</td>
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<tr>
<td>Combating unregulated fishing</td>
<td>Communication</td>
<td>July</td>
</tr>
<tr>
<td>Animal Health Policy Strategy</td>
<td>Communication</td>
<td>July</td>
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<tr>
<td>Animal by-products</td>
<td>Regulation</td>
<td>December ’06</td>
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<tr>
<td><strong>Health</strong></td>
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<td>European Health Strategy</td>
<td>White Paper</td>
<td>June</td>
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<tr>
<td>Cross-border health issues</td>
<td>Communication</td>
<td>June</td>
</tr>
<tr>
<td>Strategy for Social Services</td>
<td>Communication</td>
<td>November</td>
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<tr>
<td>Diet &amp; physical activity</td>
<td>White Paper</td>
<td>April</td>
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<tr>
<td><strong>Justice</strong></td>
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<tr>
<td>Witness protection</td>
<td>Framework</td>
<td>May</td>
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<tr>
<td></td>
<td>decision</td>
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</tbody>
</table>
**Title:** The protection of witnesses and individuals who cooperate with the judicial process  

**Nature of proposal:** Framework Decision(s)  

**Expected date of adoption:** May 2007

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**Background**

The role of witnesses in criminal proceedings is often crucial to securing the conviction of offenders. Member States have a duty to protect witnesses from intimidation and interference by providing them with specific measures of protection aimed at ensuring their safety. Such protection is particularly important in areas of organised crime and terrorism.

At present the provisions for witness protection vary across Member States. This disparity can have serious consequences, particularly given the increase in trans-border organised crime and terrorism.

**Details of proposal**

Areas of currently being considered:

- Analyse impact on existing rules at Member State level, and international level (Council of Europe).
- Increasing EU influence over national policies/priorities by financial grants, support to joint projects etc.
- Introduction of minimum standards/common guidelines to strengthen witness protection.
- Creating the first binding legislative instrument at international level – leading to approximation of national laws but still keeping national particulars of Member States. This would provide a role for EU bodies such as Europol at an operational level in witness protection.

**Impact on Scotland**

The Scottish Executive recently published a report, ‘Provision of Support to Victims and Witnesses of Crime in Scotland’ (Sept 2006), which concluded that an appropriate context and structure of legislation, policy and working structures were required to promote the rights of witnesses. Also necessary was a mix of service provision and support at different stages. Presently a range of service providers (statutory, voluntary and private) is involved in meeting the needs of witnesses. The Scottish Executive is likely to utilise the data in this report as it engages with the EU proposal.

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1 A Framework Decision has the same standing as a Regulation.
### Annex I.

Proposals of interest to Justice Committees currently under consideration by the European institutions.

<table>
<thead>
<tr>
<th>Proposal</th>
<th>Type</th>
<th>Background</th>
<th>Current status</th>
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</thead>
<tbody>
<tr>
<td><strong>JUSTICE</strong></td>
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<tr>
<td>Drugs &amp; Civil</td>
<td>Green Paper</td>
<td>Consultation to establish scale of problem across the EU and to solicit views on common approaches at EU level.</td>
<td>The EU is currently in the middle of its Action Plan on Drugs (2005-08) and the overarching Drugs Strategy (2005-12). The Commission intend to issue a report on the contributions received from the Green Paper and suggest ways forward, both of which will be published in 2007. An impact assessment will also be conducted in 2007, and the two together will feed into the development of the second drugs action plan to be developed in 2008 covering 2009–12. The year 2008 will also be important because there will be a re-assessment of the decisions taken at the Special Session of the General Assembly of the UN on drugs (UNGASS) in June 1998.</td>
</tr>
<tr>
<td>Society</td>
<td>(Sept 2006)</td>
<td></td>
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<tr>
<td>Rights of the child</td>
<td>Communication</td>
<td>The action plan set out a framework to facilitate the implementation of the rights of the child within the EU.</td>
<td>The action plan outlined a number of Community level actions. The Communication will be considered by the Parliament and Council. A number of legislative proposals are likely to emerge in late 2007 early 2008.</td>
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<tr>
<td>(July 2006)</td>
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</tr>
<tr>
<td>Alcohol policy</td>
<td>Communication</td>
<td>The objective of the Communication was to explore means to reduce the health/social harm due to alcohol consumption and to establish an EU-wide strategy.</td>
<td>The Commission does not intend to legislate in this area, rather it will seek to complement national policies and strategies. However, it will establish an Alcohol and Health Forum by June 2007 to support, co-ordinate and add value to national strategies.</td>
</tr>
<tr>
<td>(March 2006)</td>
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<tr>
<td>Topic</td>
<td>Type</td>
<td>Date</td>
<td>Details</td>
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<tr>
<td>Jurisdiction and <em>ne bis in idem</em></td>
<td>Green Paper</td>
<td>March 2006</td>
<td>The consultation sought views on conflicts of jurisdiction between the courts of the Member States in criminal matters in the light of the <em>ne bis in idem</em> principle (double jeopardy), i.e. to prevent the risk of an individual being tried several times for the same offence in different States. The Commission had intended to bring forward a framework decision proposal by the end of 2006, but their timetable has slipped. This is likely to appear early in 2007.</td>
</tr>
<tr>
<td>The Passerelle (bridging) Clause – erosion of the national veto in the Justice Area</td>
<td>Proposal</td>
<td>September 2006</td>
<td>The Commission, frustrated at the slow progress of Justice legislation, proposed moving the decision-making process from third pillar (unanimity in Council) to first pillar (QMV) using a bridging clause(Article 42) of the EU Treaty. This controversial issue has already generated much debate in Council and Member States. This is an issue for the Council alone, and debate will continue into 2007.</td>
</tr>
<tr>
<td>Succession &amp; Wills</td>
<td>Green Paper</td>
<td>March 2005</td>
<td>The consultation sought views on inheritance where more than one Member State legal jurisdiction was involved. The idea of a ‘European certificate of inheritance’ was also explored. The consultation on this issue is likely to continue into early 2007. It is likely that the Commission will propose legislation either late 2007 or early 2008.</td>
</tr>
<tr>
<td>Matrimonial issues</td>
<td>Green Paper</td>
<td>July 2006</td>
<td>The consultation sought to examine the legal and practical issues arising in international situations in the area of property rights of married and unmarried couples. The results of the consultation will be published in 2007, together with legislative recommendations.</td>
</tr>
</tbody>
</table>
European Supervision Order (‘Euro-Bail’) Framework Decision (August 2006)

The European supervision order would be a decision issued by a judicial authority (i.e. a court, a judge, etc.) in one Member State that must be recognised by a competent authority in another. The aim is to let the suspect benefit from a pre-trial supervision measure in his/her natural environment (residence).

Debate continues in the European Parliament Civil Liberties Committee and Council on this issue, and will continue into 2007. A consensus is likely to emerge toward the end of 2007.
Annex II. Early informal indication of 2007 Work Programme priorities of selected bodies

Scottish Executive
- Strategic Energy Review
- Green Paper on Climate Change
- Health Strategy White Paper
- Follow-up to the Maritime Green Paper
- Single Market Review
- next phase of Lisbon Strategy

UKREP
- Modernisation of the European economy (renewed Lisbon strategy, internal market reform)
- European Framework for economic migrants
- Strategic energy review
- New maritime policy
- Sustainable production and consumption
- Social stock take
- Climate change policy

LGIB (local government)
- Public services and procurement: consideration of future law in the field of social services; target-setting for national green procurement; a new law on the award of concessions.
- Environment, climate change and energy policy: Action Plan on sustainable production and consumption; implementation and enforcement of EU environment law; Green Paper on climate change; strategic review of Europe’s energy policy; new laws on vehicle emissions.
- Migration issues: new laws on labour migration, conditions of entry and residence for highly skilled workers, sanctions against employers of illegally resident migrants; evolution of the European Asylum System.
- Employment and social policy: mid-term review of the Social agenda; report on the social challenges facing people in Europe deriving from globalisation, ageing population, multiculturalism, poverty and exclusion, etc; development of common principles in creating a flexible but secure labour market (“flexicurity”); European e-inclusion strategy.
- Public health, consumer policy and fair trading: White Paper on health strategy, and efforts to improve the efficiency, effectiveness and accessibility of health services throughout the EU; White Paper on nutrition; animal health strategy 2007-13 (will include enforcement by local authorities); revision and better enforcement of laws on safety of toys; revision of food labelling laws.
- Regional policy and urban, rural and coastal communities: 4th report on economic and social cohesion; assessment on how regional
policy programmes support the Lisbon agenda (earmarking of programmes financed by the structural funds); revised laws concerning regional and state aids; revised law on compliance in the CAP direct support schemes; Green paper on urban transport; actions towards a comprehensive EU maritime strategy; EU ports strategy.

• **Education, research and innovation:** a new higher education programme; development of the European Research Area.

**Ongoing priorities**

- Structural funds and other funding programmes
- Implementing the Lisbon strategy
- Review procedures in the award of public contracts
- Action Plan on energy efficiency
- Thematic Strategy on Waste and Recycling
- Demographic future of Europe
- Tackling alcohol-related harm
- Constitutional Treaty and governance, including securing commitments to better consultation and reducing EU red tape

**Scotland Europa**


- Communication on Green Public Procurement
- Communication on implementation and enforcement of environmental law
Dear Convener,

INQUIRY INTO THE TRANSPOSITION AND IMPLEMENTATION OF EUROPEAN DIRECTIVES IN SCOTLAND

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

Yours sincerely,

Linda Fabiani
Convener, European and External Relations Committee
European and External Relations Committee

Reporters Report on the Inquiry into the Transposition and Implementation of European Directives in Scotland

Introduction

1. At its meeting on 25 October 2005 the Committee agreed that Jim Wallace MSP would act as its Reporter on an inquiry into the transposition and implementation of EU directives in Scotland.

2. This is the Reporter’s final report to the Committee and it is hoped that it is useful in both highlighting some key issues and themes as well as identifying areas where there may be scope to develop the Committee’s scrutiny function in relation to the EU legislative process.

3. The Reporter would like to thank Professor Alan Page who has acted as an adviser on this inquiry and whose in-depth knowledge and analysis in this area has been invaluable.

Format of the Inquiry

4. The inquiry initially focused on the transposition and implementation of four specific directives and Professor Alan Page was asked to conduct a comparative analysis of how the Scottish Executive, UK and Irish Governments transposed these directives into law and this is attached as Annexe A.

5. A call for written evidence was launched between 22 November 2005 and 3 February 2006 to which nine responses were received. A further late response was also received and all are available on the Committee’s web pages at: http://www.scottish.parliament.uk/business/committees/europe/inquiries/tied/eur-tied-home.htm.
The Clerks have also drafted a summary of this evidence\(^2\) and this was considered by the Committee at its meeting on 12 September 2006.

6. The Reporter also carried out a number of fact-finding visits to Brussels, Dublin, Copenhagen and Westminster and a full list of those organisations and parliamentary colleagues with whom he met can be found at Annexe B. In addition to these fact-finding visits the Reporter also met with a number of key stakeholders in Scotland including SEPA and NFUS. The reporter would like to thank all those involved for taking the time to meet with him and for their extremely helpful advice and comments.

7. Finally, the reporter met with Lord Davidson who recently carried out a review on the implementation of EU legislation at UK level and whose final report was published on 28 November 2006\(^3\).

**Drinking Water Directive**

8. In the course of his inquiry the Reporter identified a number of issues in relation to the drinking water directive and the Committee agreed at its meeting on 12 September 2006 to write to the Scottish Executive inviting its views on these issues. A copy of the Convener's letter is attached as Annexe C.

9. The Reporter received detailed advice from the Parliament’s legal office which would suggest that the regulations would appear to be a partial implementation of Council Directive 98/83/EC on the quality of drinking water intended for human consumption in respect of private water supplies for domestic purposes only.

10. It would also appear that the transposition is late; it is not clear how the Regulations are intended to work in some circumstances; and that as well as being late the transposition may be incomplete. This would assume, of course, that the Regulations are driven by the 'need' to implement the Drinking Water Directive rather than as is suggested in Annex A by the desire to strengthen the regulation of private water supplies. The Committee awaits the response from the Executive. However, the reporter suggests that this lack of clarity illustrates the need for greater transparency in the transposition process.

**Waste Incineration Directive**

11. In his analysis of the waste incineration directive Professor Page point out that although it has been transposed in identical terms it is interpreted differently in different parts of the United Kingdom. In particular, DEFRA has taken the view that small waste oil burners are

\(^2\) EU S2/06/12/2, Annexe B

\(^3\) http://www.cabinetoffice.gov.uk/REGULATION/reviewing_regulation/davidson_review/
not covered by the directive on the basis that these are not ‘technical units' within the meaning of the directive.

12. The reporter raised this issue with the Deputy Minister for Environment and Rural Development. In her response (Annexe D) the Deputy Minister states that: ‘The Commission expressed the view that DEFRA’s treatment of small waste oil burners under the Directive appeared to run contrary to the aim of the Directive to minimise incineration as a waste disposal method and that, consequently, the UK had failed to fulfil its obligations under the Waste Incineration Directive. The Executive’s views on this issue…are consistent with the views expressed by the Commission.'

Fish Sellers and Buyers Directive

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

Public Contracts Directive

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

The implementation of EU obligations

15. Under the devolution settlement the devolved administrations are responsible for implementing EU obligations which concern devolved matters. The functions transferred to the Scottish Ministers under section 53 of the Scotland Act include functions in relation to observing and implementing obligations under Community law, the intention being that the Scottish Executive should assume the role of the United Kingdom government in the implementation of EU obligations in the devolved areas, for which purpose it has access to the powers conferred by section 2(2) of the European Communities Act, now extended by the Legislative and Regulatory Reform Act 2006. Part of the thinking behind giving the Scottish Executive the power to

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4 Memorandum of Understanding, paragraph 20.
5 Scotland Act, s57(1); see also Schedule 5, paragraph 7(2), which excepts ‘observing and implementing... obligations under Community law’ from the reservation of relations with the European Communities.
implement EU obligations was that it would enable obligations to be implemented in a manner which best serves Scottish needs.\textsuperscript{6}

16. The implementation of obligations is not a matter for the Scottish Executive alone. In contrast to most other devolved law-making powers, the powers conferred by section 2(2) of the European Communities Act continue to be exercisable in relation to devolved matters by United Kingdom Ministers concurrently with their Scottish counterparts.\textsuperscript{7} This means that the United Kingdom government, whose responsibility for complying with Community law is not affected by devolution, can intervene to give effect to Community obligations should this be necessary. It also means that the Scottish Executive has the option of relying on Westminster in the implementation of obligations should it so choose: ‘If the devolved administrations wish, it is open to them to ask the UK government to extend UK legislation to cover their EU obligations.’\textsuperscript{8}

17. The implementation of EU obligations relies heavily on cooperation between the United Kingdom government and the devolved administrations. The practical arrangements are set out in the Memorandum of Understanding and the supplementary Concordats on Coordination of European Policy Issues. These require the lead Whitehall department to notify the devolved administrations at official level of any new EU obligation which concerns devolved matters and which it will be the responsibility of the devolved administrations to implement in Scotland, Wales or Northern Ireland.

18. It is then for the devolved administrations to consider, in bilateral consultation with the lead Whitehall department, and other departments and devolved administrations if appropriate, how the obligation should be implemented and administratively enforced within the required timescale. This includes consideration of whether to implement the obligation separately or opt for GB or UK legislation. Under the concordat between DEFRA and the Scottish Executive, which is the only concordat we have identified to address the issue, the Executive undertakes to let Defra know within four weeks of the notification of a requirement to implement an EU obligation whether it intends to use the option to implement through use of UK/GB instruments.\textsuperscript{9}

The Scrutiny Role of the European and External Relations Committee

19. Given the above the Committee has agreed that the transposition and implementation of EU directives is an important area of scrutiny. However, given limited resources it currently focuses on two criteria:

\textsuperscript{6} Bulmer, Burch et al, , Carter, Hogwood and Scott, \textit{British Devolution and European Policy-Making} (2002), 85
\textsuperscript{7} Scotland Act, s57(1).
\textsuperscript{8} Memorandum of Understanding OU paragraph 20.
\textsuperscript{9} Para 22
• The Scottish Executive’s performance in adhering to the timetables and deadlines for the transposition and implementation of our Community obligations; and

• The Scottish Executive’s justification for relying on section 57(1) of the Scotland Act.  

20. The Committee’s predecessor agreed with the Executive that it would provide, every two months, a list of all EC/EU obligations in devolved areas that were to be transposed and then implemented. The document provides information on lead departments, deadlines and information on the use of section 57(1).

21. However, the Committee’s predecessor also agreed in its legacy paper that ‘future progress can be made in terms of comparative analysis of EC legislation and SSIs.’ Further, in giving evidence to the Subordinate Legislation Committee’s regulatory framework inquiry, Professor Page identified a number of other areas which might be examined in relation to transposition and implementation. These included ‘differential implementation’, ‘gold plating’, the effectiveness of consultation between the UK government and devolved administrations, and the effectiveness of consultation with outside interests.

22. It is also recognised that the resources required to conduct a detailed analysis of the transposition of all legislation within the Parliament would be substantial. The Committee’s predecessor estimated that: ‘about 15% of the estimated 350 Scottish Statutory Instruments received each year are driven by the EU.’

The Role of Subject Committees

23. The Parliament’s subject committees also have a role in the scrutiny of EU legislation and there are some examples where they have sought to exert influence both at the policy development stage and in relation to transposition and implementation of EU directives. For example, the Enterprise and Culture Committee responded to a Commission consultation on the reform of EU state aid guidelines policy: http://www.scottish.parliament.uk/business/committees/enterprise/inquiries/eusa/ec05-eusa-submission.htm. The Committee subsequently received an acknowledgement and an invite to a follow-up meeting with the relevant Head of Division which the Parliament’s European Officer attended.

24. The Justice Committee’s agreed to track a number of civil law proposals from the Commission following the Scottish election in 2003.

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

11 EU/S2/03/1/3
For example, the Justice 1 Committee agreed to track the implementation of a regulation in relation to parental responsibility and considered a note from the Executive on the draft regulation in November 2003 which set out the provisions and their possible implications. In the period before the regulation came into force on 1 March 2005 the Committee also sought assurances from the Executive regarding the implications of the regulation for its plans for reform of family law.

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

Fact-Finding Visits

Ireland

26. In Ireland, all Commission proposals are sent to the Irish Parliament’s standing committee on EU affairs with a one page “scrutiny note” from the appropriate Government Department explaining the potential impact on Ireland. The EU Affairs Committee then identifies those legislative proposals which merit greater scrutiny by the appropriate subject Committee. This approach is very resource intensive but it ensures that all European legislative proposals are considered by the Parliament.

27. The view of some stakeholders that the Irish Parliament’s scrutiny function in relation to EU legislation is expanding and that there is increasing engagement between stakeholders and the parliamentary committees in relation to this process.

Denmark

28. The scrutiny of European legislation is viewed as a priority within the Danish Parliament and this is reflected in the resources allocated to the process. Indeed, the reporter’s findings confirmed that the Danish model is widely respected as being both comprehensive and rigorous.

29. The Danish Parliament’s European Affairs Committee is responsible for mandating the Danish Government on all EU legislative proposals ahead of a European Council. The appropriate Government Minister will appear before the Committee seeking agreement for the Danish position on the proposal. This “position” is formulated following consideration by one of 35 EC special committees and the Government’s Foreign Affairs Committee in consultation with key stakeholders.

12 J1/S2/06/34/1
stakeholders. As such, the Parliament mandates the Government to negotiate with the EU Council and this results in a more consensual approach to the eventual transposition and implementation of EU directives. It should be noted that this is in keeping with Denmark’s traditional consensual political system and emphasis on coalition government.

House of Commons

30. Scrutiny of European matters is carried out in the House of Commons mainly by the European Scrutiny Committee (ESC) and the three European Standing Committees to which it refers documents for debate.

31. The main purpose of the scrutiny system is to hold UK Ministers to account for their actions in the Council and to provide the House with opportunities to influence them. The system concentrates on the analysis of documents and around 1,200 EU documents are deposited annually including the Commission’s Green and White papers as well as draft legislation.

32. The ESC’s main role is to assess the political and legal importance of each EU document and to determine which are debated. Within ten working days of a document being deposited in the parliament, the Committee receives an Explanatory Memorandum (EM) on it from the relevant Minister. This sets out, among other things, the likely impact of the proposal and the UK Government’s policy towards it.

33. The ESC may recommend that some proposals merit further consideration, either by a debate in one of the three European Standing Committees or, exceptionally, on the floor of the House of Commons. Under the scrutiny reserve resolution passed by the House of Commons, Ministers should not agree to proposals which the Committee has not cleared or which are awaiting debate.

34. One of the main issues to arise from the reporter’s visit to the House of Commons was the involvement of the devolved administrations in the drafting of EMs where proposals relate to devolved competencies. The ESC raised this issue with the UK Government in 2002 when it recommended that: ‘the Government relax the confidentiality provision in the concordat sufficiently to be able to indicate in EMs whether discussions have taken place with devolved institutions and, as far as possible, on what subjects.’

35. The Government responded by stating that: ‘In future, where an Explanatory Memorandum states that a minister from one or more devolved administrations also has an interest, the Government intends this to indicate that those devolved administrations have been

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13 European Scrutiny in the Commons, Thirtieth Report of Session 2001-02, para.106.
consulted on the terms of the Explanatory Memorandum and on its subject matter.\textsuperscript{14}

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

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

House of Lords

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

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

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

Brussels

41. The European Commission published a series of initiatives on better regulation on 14 November. The initiatives covered the issues of reducing administrative costs, simplifying and codifying European

legislation and ensuring better quality Commission impact assessments.

42. The Commission proposed to cut the administrative burden for companies by 25% by 2012. They have proposed that this target should be adopted by the next Spring European Council to ensure buy-in and assistance from member states. This is the overarching aim and the Commission hopes that initiatives such as simplification and codification and better impact assessments will ensure that this target can be met. A 25% cut in the administrative burden would result in an increase of 1.5% in EU GDP generating around €150 billion for the European Union economy.

43. To enable this target to be achieved the Commission will launch an Action Programme to measure administrative costs and reduce administrative burdens generated by existing legislation in the European Union. This Action Programme sets out the way in which a cut of 25% in the administrative burden can be achieved along with a common methodology for how costs will be measured along with common principles for reducing these burdens.

44. Since 2005 impact assessments have been made compulsory for all major initiatives from the European Commission. The Commission has now made a proposal to establish an Impact Assessment Board (IAB). The IAB would work under the direct authority of the Commission President and will be responsible for examining draft impact assessments and offering advice to the appropriate departments on where improvements can be made. These boards will have to approve impact assessments before a proposal will be adopted by the Commission.

45. The Commission has also proposed that the programme simplifying EU legislation which began in October 2005 should continue with a further 43 initiatives being added for review. By the end of 2006, 51 initiatives will have undergone review and have either been repealed, recast, codified or reviewed. The 43 initiatives proposed means that if completed the Commission will be very close to its target of reviewing 100 initiatives by October 2008.

46. The Commission’s Better Regulation Agenda has also seen the introduction of compulsory consultation process with key stakeholders prior to legislative proposals being adopted.

47. Key to the European Commission’s proposals will be the input and cooperation of member states. In addition legislative regions such as Scotland will also be required to participate. The Scottish Executive has already adopted a Better Regulation agenda in part due to the Commission’s involvement in this area.
48. The United Kingdom Government has taken a proactive role in the Better Regulation field by establishing the Better Regulation Executive (BRE) based in the Cabinet Office. The BRE is responsible for developing the UK Government's Transposition Guide which provides guidance to UK Government Departments on how to implement European directives effectively. The BRE is also responsible for taking a close look at Government Department's regulatory proposals when these would cost over £20 million to the private or voluntary sectors.

49. Any regulatory proposal of this nature would have to go before the UK Government's Panel for Regulatory Accountability which is chaired by the Prime Minister with the Chancellor of the Exchequer also being a member. The panel is responsible for considering any domestic or European legislation which breaches the threshold. If the Panel is dissatisfied with a regulatory proposal it has the power to refuse to sanction its progress.

Consultation

50. In both Dublin and Copenhagen, there was a high level of consultation on European related issues with stakeholders. This consultation takes place at the start of the EU legislative process and allows the respective Governments to shape an informed policy position for their member state.

51. For instance in Ireland it is now a requirement for a Regulatory Impact Assessment (RIA) to be produced for all EU legislative proposals. The RIA provides preliminary analysis of a proposal from an Irish perspective and is produced in consultation with key stakeholders. Once a Directive has been agreed at EU level, the RIA is updated ahead of the transposition process.

52. Within Denmark, as discussed above, when a proposal is published by the European Commission, it is considered by one of the 35 EC Special Committees whose membership includes key stakeholders.

53. The EERC may wish to consider whether there is greater scope for wider consultation with stakeholders both at the policy development stage as well as at the transposition and implementation stage. This is a view supported by SEPA in evidence to the Subordinate Legislation Committee on its regulatory framework inquiry:

> Given that most Scottish environmental legislation transposes EU law, it is important that agencies such as SEPA are consulted during the development of the originating European proposals to ensure that these are practicable, enforceable and deliver the desired outcome. Similarly, there is arguably a greater need for SEPA to input to the prior assessment of the impact, costs and benefits of new approaches and laws i.e. as part of the regulatory impact assessment. The earlier the consultation, the easier it is to inform the overall principles.\(^\text{15}\)

\(^\text{15}\) SL/S2/05/5/1
Gold Plating

54. In both Ireland and Denmark (and in common with what is often said in the United Kingdom) there is a perception within the business community that it is over-burdened by regulation. There is also a common belief that business in other European Union Member States is less burdened. For example, the Irish Business and Employers Federation (IBEF) doubted whether there was a level playing field across Member states.

55. The European Commission has committed itself to working more closely with Member states to ensure that the interpretation of directives is consistent across the European Union. The Commission currently monitors transposition on a country by country basis through a system called conformity checking.

56. When the European Commission produces draft legislation it usually includes an article committing all Member States to the production of a correlation table to be sent to the European Commission which illustrates how a Directive has been implemented into domestic legislation. However, when the proposal is discussed at EU Council level the commitment to provide correlation tables is normally removed by Member States. The retention of correlation tables would allow a better judgement to be made on whether gold plating had taken place in the transposition of a Directive.

57. However, the Commission’s focus is on ensuring that legislation is sufficient to enact directives and there is no monitoring of ‘gold plating’. Indeed, in the environmental field this is specifically allowed for under Article 176 of the Treaty Establishing the European Community.

58. A recent study of ‘gold plating’ by the Foreign Policy Centre and the Federation of Small Businesses (FSB) found that: ‘There can be no doubt that there are a number of cases where Whitehall has extended the scope of the original directive.’ Through an analysis of eight directives it is suggested that: ‘Gold-plating occurs in various forms, including extending the scope of EU directives by including extra pieces of legislation in the statutory instrument; widening the scope of the EU directive to cover extra requirements; and introducing targets and deadlines.’

59. However, the UK Government’s policy as stated in the Cabinet Office’s guide on transposition is not to go beyond the minimum requirements of European directives unless there are exceptional circumstances,

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16 Sarah Schaefer and Edward Young, Burdened by Brussels or the UK? Improving the Implementation of EU Directives, A joint publication by the Foreign Policy Centre and the Federation of Small Businesses (September 2006).
17 Transposition guide: how to implement European directives effectively, Regulatory Impact Unit, Cabinet Office, march 2005
justified by a cost-benefit analysis and extensive consultation with stakeholders.

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

What is important is that Parliament is in full possession of the facts when it is making the law; that MPs and Peers know which bits of a bill or SI are necessary to meet the minimum required by an EU directive and which bits are being proposed by the Government on its own initiative – what we are doing because we must in order to meet our Community obligations and what we have chosen to do in addition. Parliament needs the best possible information on which to reach informal decisions.\textsuperscript{18}

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

\textit{Davidson Review}

62. The Davidson review was commissioned in the Chancellor’s Pre-Budget Report 2005 to: ‘look at how the UK implements European legislation and how this affects the competitiveness of the UK economy.’\textsuperscript{19} The review generated over 160 written responses between March and May 2006. A summary of responses was published in July 2006 and: ‘The vast majority of those who responded said that over-implementation of European legislation was a significant issue where additional UK requirements or complexity had resulted in a competitive disadvantage for UK firms.’\textsuperscript{20} In contrast: ‘A minority of those responding, mainly from outside the private sector, argued that “under-implementation was a more important issue than over-implementation.”

63. In relation to devolution, the review notes that: ‘A few respondents took the view that the Scotland Act, which imposes a more strict obligation on Scottish Ministers to comply with European legislation, may cause Scottish Ministers to be more risk averse in implementing European legislation. Devolution was also cited by some as another factor increasing the burden for those operating across UK borders.’\textsuperscript{21}

64. In launching his report Lord Davidson stated that:

\begin{quote}
In some cases, additions made during the transposition of European legislation provide benefits to business such as greater legal clarity and the streamlining of existing domestic legislation. However, there are examples where UK implementation could be less burdensome without harming the intended protection provided by the regulation. My proposals should enable
\end{quote}

\textsuperscript{18} Select Committee on Modernisation of the House of Commons, \textit{Scrutiny of European Business}, Second Report of Session 2004-05
\textsuperscript{19} Davidson Review: Summary of responses to call for evidence, p4.
\textsuperscript{20} Ibid., p15
\textsuperscript{21} Ibid. p.18
business to compete more effectively. My hope is that they will also reduce the chance of unnecessary over-implementation in the future.22

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

Enforcement of EU obligations

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

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

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

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

70. The Commission also acknowledged that another potential problem in assessing whether directives are properly transposed and then enforced was that there are not always specified minimum levels of information required by an inspection. For example, in the environmental field there are non-binding guidelines. This position will be reviewed in 2007.

71. Another issue is that it is up to a member state to set the level on sanction for a breach of a directive. This means that a breach of EU legislation may not result in the same penalty across the European Union. A recent European Court of Justice ruling has given the

Annexe D

Commission the right to set minimum penalties for breaches and a proposal establishing a minimum framework for penalties in the environmental sector will be published in the next six months.

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

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

Differential Implementation

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

- Obligations may be framed in such a way as to leave the Scottish Executive no ‘margin of appreciation’ or scope for what has been termed ‘differential implementation’.

- The United Kingdom government may nevertheless be opposed to such implementation. DEFRA, for example, is said to be more opposed than some other Whitehall departments to the differential implementation of obligations. And even if the United Kingdom government is not directly opposed, the need ‘to ensure that any differences of approach nonetheless produce consistency of effect and, where appropriate, of timing’ 23 may act as a disincentive to the Scottish Executive going its own way.

- Even though obligations may be framed in such a way as to leave room for differential implementation, and the United Kingdom government may not be opposed to it, the Scottish Executive may nevertheless fail to take advantage of the scope for this. This may be, for example, because it lacks the resources to exploit that scope and has therefore decided to rely

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23 EU Concordat, para.B4.17
on Whitehall as much as possible; because the need to secure agreement makes it easier to follow the Whitehall lead; because of the threat of litigation or enforcement proceedings; or for any one of a number of other possible reasons.

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

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

Consultation between the UK Government and the Scottish Executive

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

It has become an accepted tenet of European policy making that if national interests are to be fully taken into account in the negotiation of Community obligations they have to be voiced at an early stage in the process. The same is no less true of devolved interests.\(^{24}\)

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

78. Professor Page suggests that: ‘Despite assurances that this process works well there is evidence this is not always the case.’ Specifically, he points to a Cabinet Office report\(^ {25} \) which suggests that further work should be carried out to investigate whether the traditional systems of consultation and policy development within Whitehall and between Whitehall and devolved administrations are as robust as they might be when dealing with European legislative processes.\(^ {26} \)

\(^{24}\) SL/S2/05/5/1
\(^{26}\) SL/S2/05/5/1
79. UK government policy on transposition emphasises the importance of appropriate co-ordination and consultation within government including the devolved administrations. It recommends preparing a project plan for eventual transposition of the legislation which should be agreed where appropriate with the devolved administrations.\(^{27}\)

**Engaging at an early stage in the EU legislative process**

80. The focus of the Committee in the first two sessions has been on the later stages of the legislative process with little consideration given to influencing the formulation of policy ‘upstream’. However, given that the Parliament now has a European Officer based in Brussels there is greater opportunity for the Committee to identify key issues at an earlier stage in the European policy process.

81. At its meeting on 7 November the Committee agreed to consult key stakeholders on the Commission’s legislative and work programme for 2007. The aim of this process is to identify and to monitor those key policy initiatives within areas of devolved competence which will potentially have a significant impact on Scotland. The policy initiatives identified from this legislative and work programme will also inform the Committee’s legacy paper. The European Officer will have responsibility for providing intelligence on a regular basis on these priorities.

82. The Committee may wish to consider conducting detailed scrutiny of legislative proposals from the Commission which have been identified as having a potentially significant impact on Scotland. This would include consulting widely with stakeholders.

83. The Committee would then track the specific issues they have chosen to engage with as they pass through the European legislative process. This engagement would involve the Committee continuing to press any particularly Scottish issues which might arise from the proposed EU legislation. The Committee’s engagement would involve scrutinising the Scottish Executive to ensure Scottish interests are represented at the UK level, for example, through contributing to Explanatory Memoranda and Regulatory Impact Assessments. The Committee may also wish, where appropriate, lobbying the UK Government and the European Commission directly to ensure Scottish interests continue to be considered.

**The Transposition Process**

84. Once a piece of EU legislation has been agreed, the Committee would be expected to transfer its attention to the transposition and

\(^{27}\) Regulatory Impact Unit, Transposition Guide: *How to Implement European Directives Effectively* (2003), paragraph 2.23
implementation process in Scotland. This would involve scrutinising the Scottish Executive’s proposals for transposition and where it is deemed necessary inviting key stakeholders to give evidence to the Committee on the Executive’s proposals for transposition.

85. The Committee may wish to give consideration to whether the provision of a transposition note by the Scottish Executive would facilitate greater scrutiny within this process. Since 2001, the UK Government has been required to produce a Transposition Note with all pieces of legislation which transpose an EU Directive. The Transposition Note should show how each element of the Directive has been, or will be, transposed into UK law. This will allow greater transparency but also highlight areas of over or under-implementation.

86. At present, although the UK government is required to produce a transposition note when implementing an EU directive the Scottish Executive is not. Indeed, it would appear that the Executive produces transposition notes only rarely.

87. For example, although the Statutory Instrument which introduced the EC Fertilisers Regulations at Westminster (SI 2006/2486) were accompanied by a transposition note, the Executive did not provide such a note with the equivalent instrument in Scotland even though the regulations are virtually word for word on both sides of the border.

88. Following the adoption of a piece of legislation into Scottish law which transposes EU obligations, the Committee may wish to revisit - by consultation with stakeholders - that transposition after a certain period of time to examine whether the aim of the European Directive has been met by the Scottish implementing legislation. This approach might help to address perceived gold plating and enforcement issues.

89. In adopting such a system of scrutinising proposed EU legislation from the very start of the process until its conclusion when it is transposed into Scottish law and subsequently implemented it is expected that the Committee may adopt a different approach towards each particular issue. That is it may decide an issue is so important that they wish to track it throughout the whole process. For other issues the Committee might wish to engage at particular points in the process.

Main Themes and Conclusions

90. As it is clearly an issue not only in the UK but in other Member States the Committee may wish to consider that there is a need for greater transparency within the transposition process to allow greater scrutiny of ‘gold plating’.

91. For example, the Committee may wish to give further consideration to whether the wider provision of Transposition Notes for EU related legislation laid before the Scottish Parliament may be useful in
identifying gold plating. The Committee may wish to consult with the Subordinate Legislation Committee on this issue.

92. It was also apparent to the reporter that while there is much debate on ‘gold plating’ the manner in which regulations are interpreted and enforced is also significant in determining whether there is a ‘level playing field’. The Committee may also consider whether there is a need for greater scrutiny in this area.

93. It was clear from the reporter’s fact-finding visits that the level of parliamentary scrutiny of EU directives by Member States both at the legislative proposal stage and in relation to transposition and implementation is much higher than in the Scottish Parliament. This is in many respects unsurprising given that Scotland is not a Member State. However, at the same time there is clearly a significant amount of European legislation within areas of devolved competence and it may be that there is a need for greater scrutiny by the Scottish Parliament in this area. This will, of course, depend on available resources especially in relation to the workload of both the EERC and relevant subject committees.

94. The Committee may wish, therefore, to consider whether there is a wider role for the Parliament in scrutinising European legislative proposals which relate to devolved matters. This would involve identifying significant legislative proposals from the Commission at an early stage and utilising the European Officer to provide intelligence from Brussels.

95. In particular, the Committee may wish to consider whether there is a need for greater scrutiny of the Scottish Executive in ensuring that Scottish interests are effectively represented both in terms of the transposition of Directives and in influencing the UK Government’s negotiating position on proposed EU legislation which relates to devolved matters. For example, whether the Scottish Executive is effectively contributing to Explanatory Memoranda and Regulatory Impact Assessments drafted by the UK Government on European proposals which relate to devolved matters.

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

Jim Wallace MSP
Committee Reporter
Inquiry into the Transposition and Implementation of European Directives in Scotland

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

Fish Sellers and Buyers

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

The Scottish and English Regulations are very similar. There are some minor differences between them but these are not in my view significant. They reflect differences in Scots law and administration rather than differences in policy. As originally made, there was one substantive difference between the two sets of regulations, but the Scottish Regulations were amended almost immediately to bring them into line with the English Regulations.\(^{28}\)

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

The House of Lords Select Committee on the Merits of Statutory Instruments drew the English Regulations to the special attention of the House on the grounds that they gave rise to issues of public policy likely to be of interest to the House, and that they might inappropriately implement European legislation.\(^{29}\) The Committee’s concern was that the Regulations would impose a disproportionate burden on buyers of direct sale fish from smaller vessels. The implication is that if there is over-implementation it is over-implementation that is common to all four sets of Regulations.

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\(^{28}\) By the Registration of Fish Sellers and Buyers and Designation of Auction Sites (Scotland) Amendment Regulations 2005 (SSI 2005/438)

\(^{29}\) Fifth Report, 2005-06, HL 18, paras 11-18.
The Community obligations are in the form of regulations which are ‘directly applicable’ in national law. In principle, therefore, there is no need to transpose their provisions, although it is not uncommon to make provision for their administration and enforcement as here. This may explain why the Sea Fisheries (Control of Catches) Regulations 2003 (SI 2003/345), which implement the regulations in Ireland, make no provision for the registration of buyers and sellers or the designation of auction sites.

Waste Incineration


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

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

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

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

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

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

**Public Contracts**


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

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

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

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

Conclusions

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

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

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

- The lack of any real discretion in the implementation of obligations, which may reflect a failure to articulate or press Scottish interests when

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30 Case C-63/02 Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland.
the UK negotiating line was being worked out or subsequently in the course of negotiations in Brussels.

- Opposition to differential implementation on the part of Whitehall departments.\textsuperscript{31} DEFRA is said to be less willing than some other Whitehall departments to let the devolved administrations go their own way.

- A tendency to play safe in the face of potential state liability.\textsuperscript{32} The lack of objective justification for differential treatment may give rise to claims, which is said to be a factor in agriculture.

- A pragmatic decision to let the Whitehall machinery take the strain.\textsuperscript{33}

\textbf{Alan Page}

\textbf{19 November 2006.}

\textsuperscript{31} Sloat, \textit{Scotland in Europe} (2002), 208
\textsuperscript{32} Rawlings, \textit{Delineating Wales} (2003), 436.
\textsuperscript{33} \textit{Ibid.}