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HANSARD SOCIETY BRIEFING PAPER ISSUES IN LAW MAKING

7 : European Union Legislation: The Regulatory Environment

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1 Introduction: The Hansard Society is continuing its series of Briefing Papers on the legislative process by turning attention to legislation emanating from the European Union (EU). EU laws now account for 50 per cent of all 'significant' legislation enacted in the UK every year.¹ They touch virtually every aspect of our lives and have a significant impact on business and the economy, but there are few who understand the EU legislative process or how Brussels interacts with Westminster. There is also a widespread perception that the EU is remote, complex and bureaucratic. But as the Hansard Society argued in its 1992 report, *Making The Law*, 'We cannot afford to treat national law – nor national legislative process – in isolation from EC law.'

This paper, the first of two which will consider European legislative issues, focuses particularly on the nature of regulations originating in Brussels, examines how they are incorporated into British law and looks at initiatives to simplify the regulatory environment. The European Commission (the Commission) stated earlier this year that the EU's member states 'need to further develop their approach to regulation to ensure that the defence of public interests is achieved in a way that supports and does not hinder the development of economic activity'.² Regulatory reform has been highlighted as a key policy priority during the UK's presidency of the EU, which started on 1 July 2005. We conclude with a look to the future of Europe's regulatory framework, exploring changes that the UK may wish to effect.

2 The nature of EU regulations: The EU is neither an international organisation nor a federal government. Its power to legislate stems from the European treaties that stipulate the objectives of the Union, of which the most important is the creation and maintenance of the internal market. Instead of 25 different sets of rules governing trade between member states, the internal market has created a single set of rules that aims to

create a level playing field with free movement of goods, persons, services and capital. A significant part of what the EU does is consequently concerned with regulating this market and this inevitably requires a large amount of legislation. The EU also regulates in a number of other areas not related to the single market, such as justice and home affairs. However, its powers vary from area to area, so that while there is a high degree of EU control over trade policy, the EU has far fewer powers in social policy and almost none in foreign and security policy.

Although this paper does not look in detail at the EU's decision-making process, some explanation of the types of law originating in Brussels is necessary to understand the relationship between EU legislation and the UK regulatory environment. The Commission proposes new legislation and acts as the guardian of the treaties that underpin the European Community. Proposed legislation is subsequently either adopted directly by the Commission, or requires the involvement of the European Parliament and the Council of Ministers before becoming law. The European Court of Justice (ECJ) is responsible for ruling on member states' compliance with European law, often after a referral from the Commission, although proceedings can also be initiated by other member states. EU legislation can take several forms: directives, regulations and decisions arising from ECJ rulings.

(i) **Directives** are binding as to their objectives (i.e. the result to be achieved), but the form and method of their implementation is left to national authorities in each member state. Directives are usually broad and ambitious in scope (compared to the more specific

in association with



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regulations), and this means that they are often the form of legislation which has the greatest practical impact on business. Generally, directives are addressed to every member state and specify a timeframe for implementation. Additionally, the ECJ's jurisprudence means directives can be directly applicable, which allows individuals to pursue legal action against their government if it fails to implement a directive correctly. Directives add a particular complexity to the UK regulatory framework when they are 'gold plated', a process which involves the addition of extra provisions (see paragraph 3).

(ii) **Regulations**, unlike directives, stipulate general provisions, which are then applicable to particular circumstances. They are by far the most common form of legislation: out of 17,332 documents issued between 1998 and 2002, 11,851 were regulations.³ They are binding in their entirety – meaning that member states must apply them in full – and usually specify a date by which their objectives must be implemented. Crucially, regulations are directly applicable in all member states, meaning they 'can be parachuted into the domestic legal system without parliamentary involvement'.⁴ Those of a technical nature, or relating to legislation which is already in force, are frequently adopted directly by the Commission.

(iii) **Decisions arising from ECJ rulings** form the third component of EU legislation. Even though it is not enshrined in any of the treaties, the ECJ ruling in the *Cassis de Dijon* case (1978) established the doctrine that European case law (i.e. law based on ECJ decisions) supersedes pre-existing domestic laws. In reality, this means that if EU regulations conflict with UK legislation, the operation of the domestic law must be suspended (however, it does not mean that the law is void).

Member states are responsible for applying and transposing Community legislation (i.e. regulations, directives and decisions based on ECJ rulings) at national level. Following a request from the British Parliament, since November 2001 UK legislation enacting European legislation has had to be accompanied by a Transposition Note that explains how the main elements of the relevant European legislation will be transposed into UK law. Britain has one of the best track-records in the EU when it comes to implementing directives. It has a reputation for doing so swiftly and for taking EU legislation seriously; the UK, for example, is widely regarded as having more rigorous Anti-Money Laundering Requirements than other major financial centres due to its implementation of the EU's Second Money Laundering Directive. Several European countries, including France and Italy, have yet to implement the directive.

BOX A THE WORKING TIME DIRECTIVE

Council Directive 93/104/EC on the organisation of working time was adopted on 23 November 1993. Based on Article 118a of the Treaty of Rome, it set the goal of promoting improvements in the standards of health and safety of workers in the EU and, among other provisions, stipulated a maximum 48 hour working week averaged over a reference period. The directive was implemented in the UK by the Working Time Regulations 1998 (Statutory Instrument 1998/1833) which came into force on 30 September 1998.

The original directive gave member states an 'opt-out' provision, under which individual workers can waive the right to work no more than 48 hours per week. In January 2004, the European Commission published a 10-year review of the directive and noted that the main characteristics of the system governing working time in the UK have remained unchanged despite the entry into force of

the directive, 'mainly as a consequence of using the opt-out': 'In fact, the United Kingdom is the only member state where weekly working time had increased over the last decade.'⁵

In May 2005, Members of European Parliament voted 378 to 262 in favour of abolishing the opt-out from the directive by 2010. The Parliament backed trade union complaints that the system was open to abuse by firms using the opt-out to oblige staff to work longer. Despite Labour's 19 MEPs voting in favour of the abolition, the Government insisted the opt-out maintained Britain's flexible labour market and the following month secured enough support to prevent a vote taking place on the issue at a meeting of EU employment ministers. It is expected the issue will be relegated to the bottom of the EU agenda during Britain's presidency despite widespread union opposition.

Indeed, Italy has recently eased the rules on false accounting and granted amnesty on the illegal accumulation of offshore funds.⁶

In 2004 the UK was one of only five member states (ranking third out of 15) to meet the European Council's target of 1.5 per cent or less of all directives for which transposition was still outstanding.⁷ However, many businesses and politicians complain of over-regulation and claim, moreover, that Whitehall adds further regulation to directives in the transposition phase in a manner which restricts UK companies and reduces their competitiveness in the internal market.

3 Gold Plating: Directives, unlike regulations, leave the method of implementation up to the member states. A dilemma for member states in implementing directives is whether to 'copy-out' European legislation (by direct translation or a simple cross-reference to the original directive) or 'elaborate' (by adding detail in the domestic legislation). The latter practice is known as gold plating. According to the British Chamber of Commerce (BCC) there is a 'relative elaboration ratio' for the UK of 334 per cent.⁸ As a consequence, a directive that is two pages in Portugal may be as many as 64 pages in the UK. Therefore, in many cases where business, politicians or members of the public complain about the bureaucracy of Brussels, they are paradoxically complaining about a domestic practice.

Critics argue such practices mean the Government imposes its own agenda on the terms of directives and, by adding further layers of regulation, disadvantage British businesses and reduce their competitiveness. The Government points to the pressures 'to provide legal certainty and avoid possibilities of challenge in the courts'.⁹ In addition, the subject matter and nature of negotiations, as well as the multi-lingual character of the European Union, can lead to highly technical, complex and ambiguous legislation which necessitates clarification. The National Audit Office (NAO) suggests that the copy-out approach can also lead to gold plating because 'the responsibility for clarification is transferred to those who are implementing the legislation, such as industry, who may then take a precautionary approach and implement more fully than necessary to minimise the risk of penalties'.¹⁰

Unsurprisingly, attitudes to gold plating are often contingent on political viewpoint. The BCC is 'unconvinced of the logic of transposing the clear into the obscure and also of the blanket use of English law as a rationale for elaboration and possible gold plating'.¹¹ They argue small and medium-sized enterprises are disproportionately affected as larger businesses often have sophisticated mechanisms in place to handle complex regulation and have lobbying and legal resources that ensure their interests are protected. The Trades Union Congress, on the other hand, maintains that the Government has 'not taken a gold plating approach' in recent years when implementing employment related EU directives and believes that on a number of occasions 'the UK Government has failed to implement directives in full'.¹²

The Government line is that action is needed to curb gold plating. In his 2005 Budget, the Chancellor said Britain should 'avoid' it. The Prime Minister went further, telling the House of Commons Liaison Committee that 'with all regulation that now comes from Europe we have made it clear there should be an end to gold plating'.¹³ In March 2005, the Government published revised guidelines for implementing EU law 'in the clearest and least burdensome way possible'¹⁴ and which, according to the Prime Minister, 'establishes the principle that transposed UK laws should mirror, as closely as possible, the wording of the original EU directive...[and] puts in place more checks and balances against over-implementation'.¹⁵

BOX B GOLD PLATING: PESTICIDE RESIDUES

Commission Directive 2002/42/EC of 17 May 2002 regulates the maximum levels of pesticide residues in certain foods. The directive contains 1,167 words. The regulation for England and Wales implementing the directive (2002/2723) has 27,046 words. By contrast, Scotland's regulation implementing the directive contains 1,791 words, while Northern Ireland's has 3,367 words. The UK regulations cover five additional forms of pesticide. The England and Wales regulation details levels for the seven pesticides specifically for every known variety of fruit, vegetables and some animal products. Scotland and Northern Ireland's do not.

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4 Complexity in the regulatory environment: Critics of the system claim excessive regulation has been directly responsible for the slower growth experienced in Europe compared to many other economies and cite the IMF claim that improvements in the EU regulatory framework could deliver as much as a seven per cent increase in GDP and a three per cent increase in productivity in the longer term.¹⁶ According to the BCC, since 1997 new regulations have cost companies nearly £30 billion and some 40 per cent of those regulations originated in Brussels.¹⁷

The 2004 study *Make it Simple, Make it Better*, by the Better Regulation Task Force (BRTF), (an independent body launched in 1997, which advises government whether regulation and its enforcement are proportionate, consistent, targeted and transparent), detailed the effects of a complex regulatory environment. The study pointed out regulation of this nature was harder to enforce and claimed that it might lead to a concentration on paperwork rather than meeting the spirit of the law. But complexity is perhaps inevitable when legislation is drafted for 25 countries. A draft directive on, for instance, waste disposal, will have to take into account local practices among all the member states. Furthermore, member states have different legal systems, all of which have to be duly consulted and considered before a common measure can be agreed.

There is also the issue of how the Commission drafts legislation. The Bellis Report (2003), commissioned by the Foreign Office, highlighted the central problem that no single body has responsibility for the integrity of the text of draft legislation. The report argued that the EU needs a permanent body of independent and experienced lawyers to ensure the correct drafting and legal basis for regulatory proposals. It pointed to the 1993 directive on extending copyright to 70 years across Europe as an example of bad drafting, which led to confusion about implementation: in countries where the copyright was fewer than 70 years before the directive, 'expired' rights (e.g. copyright for 65 year old books) were suddenly brought back into force, disrupting the plans of publishers and others.

It is, of course, easy to point to problems with the regulatory environment, although they should be set against the many benefits that derive from such a large single market of free trading nations. A certain amount of regulation to ensure fair and free trading is, according to many commentators from across the political spectrum, a small and necessary price to pay.

5 UK reform initiatives: Since the 1980s successive governments have been developing procedures to ensure that departments consider the likely impact of new regulations on those affected. Regulatory Impact Assessments (RIAs) were introduced in 1998 in an

BOX C TRANSPOSITION, DEFRA AND THE NAO

The difficulty of transposing European legislation into UK law was recently highlighted by the National Audit Office in a critical report on the performance of the Department for Environment, Food and Rural Affairs (DEFRA). According to the NAO, DEFRA, which is responsible for about 30 per cent of legislation coming from Europe, is doing better than previously but still not well enough. Throughout 2002 and 2003, there were 61 new infringement proceedings raised by the European Commission against the UK for legislation within DEFRA's area of responsibility, three times the level of any other Government department during this time.

Examples of poor practice identified by the NAO included:

- The Ozone Depleting Substances Regulation (2037/2000/EC): Slow decision making by DEFRA meant there were no facilities for disposing of fridges and freezers

in an environmentally acceptable way. The resulting fridge mountains cost £46 million to clean up;

- The Animal By-Products Regulation (1774/2002/EC): Guidance notes were only issued a year after the law came into force, leading to 'confusion' for farmers needing to dispose of stock.

The NAO recommended that the department develop a more systematic approach to engaging stakeholders; issue more timely external guidance, providing more certainty to affected parties; issue all guidance on legislative changes at least 12 weeks prior to new legislation coming into force in accordance with Cabinet Office and Small Business Service; and increase senior level oversight of transposition and implementation.¹⁸

effort to prevent unintended and unwanted outcomes, and are required for any proposed UK or EU legislation that ‘has an impact on businesses, charities or voluntary bodies’.¹⁹ As their name suggests, they are designed to assess the costs imposed on business and other bodies by proposed legislation. Before a regulatory Bill is even presented to Parliament, assessments should have minimised the potential burden on businesses. The Regulatory Impact Unit (RIU) is part of the Cabinet Office and assesses RIAs for proposed legislation.

The chairman of the BRTF offered a damning indictment of the current situation: ‘Over-zealous interpretation of regulation by Government regulators and industry bodies is one of the factors leading to layers of red tape winding their way around businesses and the public. This regulatory creep is the “hidden menace” of red tape’.²⁰ Earlier this year the BRTF published its major review of regulatory burdens and called on the Government to introduce ‘new procedures for measuring and then reducing the administrative burdens faced by businesses and other organisations in the UK. We also want government to strengthen controls over the introduction of new regulation and to simplify existing regulations, including removing unnecessary ones’.²¹

The Government has committed itself to implementing the BRTF’s recommendations. In May 2005, the Chancellor Gordon Brown, published the Government’s new ‘risk based approach’ to regulation to reduce barriers holding enterprise back: ‘The modern enterprise challenge is to enhance the flexibility needed for a successful economy and tackle the regulatory concerns we know all industrial economies face without sacrificing the standards a good society needs.’²²

6 Updating EU legislation: Part of the drive to simplify the EU regulatory environment stems from the desire to get rid of obsolete regulation. Every year, some regulations are either time-bound to lapse or otherwise repealed (in 2002, 833 regulations were repealed). However, at present there is no swift mechanism to amend unworkable or obsolete regulations. The only way to amend a regulation in force is by an amending regulation or directive. In other words, the instrument for simplifying the regulation in force has to go through

the same negotiation, assent and implementation processes as other regulations or directives. Where a regulation has been found to be harmful to competitiveness, for instance, more timely mechanisms are needed. Post-legislative scrutiny, which the Hansard Society has argued for in the context of the Westminster Parliament (see *Issues in Law Making Paper 6*), could also be usefully applied at the EU level, in order to assess more consistently the effects, costs and benefits of a regulatory measure. Such monitoring and evaluation of legislation, perhaps two to three years after its implementation, would allow some assessment as to whether the forecasts of RIAs had been accurate.

Another possibility would be to press for greater use of ‘sunset clauses’ which would involve provisions ceasing to have effect after a certain point. An assessment would then have to be made to determine whether the measure should be reintroduced, and there would be the opportunity to carry out further scrutiny, taking into account any changed circumstances. The most obvious drawback of sunset clauses, however, is that if they are widely used, they can take up significant time and resources in the legislative process.

7 EU reform initiatives: Over the last five years, the EU has launched a strategy to improve the regulatory environment in an attempt to reinforce competitiveness, growth and sustainable development. The current agenda dates back to the 1992 Edinburgh European Council which made the task of simplifying and improving the regulatory environment one of the Community’s main priorities. However, in the years that followed, the complexity of the task and a lack of political impetus meant little progress was made. In 2000, at the Lisbon European Council, the EU set itself the ambitious goal of becoming the most competitive knowledge-based economy in the world by 2010. The Commission recognised that in order to achieve that goal a new drive to streamline the regulatory environment was necessary. Successive European Council summits renewed the Commission’s mandate to develop ‘a strategy for further co-ordinated action to simplify the regulatory environment’.²³

Guided by reactions to its White Paper on European Governance, the Commission proposed a compre-

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hensive Action Plan for 'simplifying and improving the regulatory environment' in June 2002.²⁴ This plan was in line with the aim set out at the Gothenburg European Council that 'policy-makers must identify likely spill-over - good and bad - onto other policy areas and take them into account. Careful assessment of the full effects of a policy proposal must include estimates of its economic, environmental and social impacts inside and outside the EU'.²⁵

To ensure high-quality legislation, a new Impact Assessment system was introduced which requires the Commission to assess systematically the likely economic, environmental and social implications of its proposals and to highlight the potential trade-offs. This new assessment system aims to help the Commission improve the quality and transparency of its proposals and to identify balanced solutions consistent with Community policy objectives. In addition, the plan proposed closer legislative collaboration between the institutions, better public access to legislation under preparation, and the simplification and reduction of Community legislation in general.

Developing this final point, the Commission launched a rolling programme to streamline and simplify the regulatory environment in 2003 by reducing the substance of EU legislation as well as its volume through consolidation, codification and the removal of

obsolete legislation. The Commission described the project as the beginning of 'a long-term process of gradual modernisation and simplification of existing legislation and policies - not to deregulate or cut back the *acquis* (the body of EU law), but to replace past policy approaches with better-adapted and proportionate regulatory instruments'.²⁶ In March this year the Commission adopted *Better Regulation for Growth and Jobs in the European Union*, which builds on past initiatives and states 'that, both for existing legislation and for new policy initiatives, the extent of the legislator's intervention should remain proportionate to the political objective pursued' because 'growth and employment will not be stimulated by carrying on as before'.²⁷

8 The UK presidency of the EU: The Prime Minister gave a clear indication in May 2005 that regulatory reform would be at the top of the EU agenda under the UK's Presidency, asserting 'Europe has done itself more damage through what is perceived as unnecessary interference than all the pamphlets by Eurosceptics could ever do'.²⁸ This has been most recently demonstrated by the controversy surrounding the EU Directive on Food Supplements.

In June 2005, Tony Blair set out the UK Government's vision for the future of the EU in a speech to the European Parliament. He praised

BOX D TIMETABLE FOR EUROPEAN REGULATORY REFORM

A timetable for reform was published by HM Treasury in May 2005 before both the French and Dutch rejections of the Constitutional Treaty and the June 2005 EU budget stalemate.

Objective: Greater use of risk-based regulatory practice in European law making process, and share best practice with other member states, during the UK's presidency of the European Union and beyond.

July to December 2005: During the UK's presidency, priorities will include:

- working to ensure that comprehensive impact assessments are undertaken for all new EU legislation and that, for the first time, a method of clearly and transparently measuring the administrative burdens of EU proposals is developed;
- following consultation with business, the Government will

submit dossiers of proposals for the simplification of EU regulations and work with the Commission to create a timetable for delivering regulatory simplification in 2006;

- working with other member states and the Commission to ensure that EU laws can be implemented and enforced according to a new risk-based approach; and
- consulting on applying a risk-based approach to the UK's implementation of the financial services action plan.

2006 onwards: The UK will build on the outcomes of its presidency by:

- working with the Commission and member states to promote the use of risk-based regulatory practice throughout Europe; and
- develop a clearer voice for business in the EU rule-making process through the Commission's proposed Independent Advisory Network.

moves to reduce ‘unnecessary regulation’, committed the UK to promoting the reform agenda agreed at the Lisbon Summit and made it clear that the UK’s priorities were to make the European economy more dynamic and outward looking.

Subsequently, Cabinet Office Minister, John Hutton MP, expounded the Government’s plan of action during the UK Presidency, in which he stated that the Government would work to ensure that the European institutions in general, and the Council of Ministers in particular, attach greater weight to Impact Assessments. In addition, he emphasised the Government’s desire to make progress on the simplification process currently underway and to ensure businesses are consulted earlier, principally when new legislation is being drafted.

- 9 Conclusion:** As the UK’s agenda for reform indicates, regulation is now a topic which is rising up the political agenda. Depending on the viewpoint taken, regulation can mean many things: to some it is an essential requirement to ensure a level playing-field in one of the world’s greatest free-trading blocs; to others it is a symptom of dead-hand bureaucratic meddling which stifles growth and enterprise; or, conversely, it is a vital safeguard to protect workers, consumers and the environment. Although the topic of regulatory reform may seem relatively dry, the issues that arise go to the heart of ideological divisions over the role of the EU.

At its widest, the debate over the effects of EU legislation relates to the different political and economic models promoted by the member states (often caricatured as the ‘Anglo-Saxon free market model’ versus the ‘European social model’). It is, in some ways, a proxy for a more fundamental debate over competing national and political interests about the direction of the EU.

This broader context aside, there is a widespread view shared by many countries, and particularly so in the UK, that the EU’s regulatory environment should be simplified and improved. The generally positive reaction to the Prime Minister’s speech to the European Parliament in June 2005 shows that there is perhaps more common ground on these issues than is commonly supposed and, since 2000, the ‘Lisbon Agenda’ has provided a direction for change, although progress on its aims has been relatively slow.

In fact, the problem of an overly complex regulatory environment cannot be laid solely at the door of ‘Brussels’. As this paper has shown, when it comes to directives, the UK frequently complicates the picture by elaborating, and adding to, EU directives. Thus, what might actually be a UK provision, devised and agreed by UK ministers and civil servants, can be mistakenly viewed as a foreign measure, foisted on an unwilling country. There is also a contradiction in the UK Government’s position: it promotes its stance and record on regulation while simultaneously stressing the need for deregulation, implying that, as critics argue, there is indeed a problem to address.

Although it is the UK Government that decides on many of the issues relating to the transposition and implementation of EU legislation, and determines our relationship with the European Union, Parliament also has an important part to play. Most obviously this involves scrutinising EU legislation and looking at its impact on the UK economy and society. The mechanisms that Parliament employs to hold ministers to account in this sphere, and their effectiveness, are crucial. Although there is undoubtedly some good work being undertaken, there have been numerous calls for improvement and our next paper will consider this subject in more detail.

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- ²⁴ *Action plan: Simplifying and Improving the Regulatory Environment*, COM(2002) 278 final, p.3
- ²⁵ *A European Union Strategy for Sustainable Development*, European Commission (2002), p.26
- ²⁶ *Updating and simplifying the Community acquis*, COM(2003) 71 final, p.3: As part of this initiative, from October 2003 the BRTF began reviewing EU legislation by 'calling upon stakeholders to suggest specific regulations or Directives that they want to see reviewed, and the problems associated with them.' BRTF press release (Oct 2, 2003)
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