

Implementing EU Obligations in Scotland



A guide for Scottish Government officials

European Relations Division
Directorate for Culture, Europe & External Affairs
The Scottish Government

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Table of Contents

Introduction	3
Part 1: The Role of the Scottish Government in implementing EU obligations.....	4
Legislative competence to implement EU obligations.....	4
Liaising with the UK Government.....	4
Informing the Scottish Parliament.....	5
The role of the European Relations Division.....	6
Part 2: The Nature of EU Obligations.....	7
Primary law.....	7
Secondary law	7
Part 3: Transposing EU Directives	9
Publication of new Directives.....	9
Understanding the provisions of the Directive and the areas of law affected.....	9
Planning the Transposition of a Directive	9
Approach to Transposition.....	10
Method of Transposition	13
Instructing a Scottish Statutory Instrument to transpose a Directive.....	13
Part 4: Notification of Transposing Measures and Post-transposition Review	18
Notifying implementing measures to the European Commission.....	18
Late transposition	18
Impact Assessment – review of transposing legislation.....	19
Annex A: Checklist	20
First steps (see page 9)	20
Deciding an approach (see pages 10 – 12).....	20
UK-wide transposition (see page 12).....	20
Scottish transposition (see pages 13 – 14).....	21
SSI Tracker (see page 15).....	21
Policy Scrutiny (see pages 14 – 16)	21
Notifications (see pages 17 – 18)	22
Impact Assessment (see page 18)	23
Annex B: Example Transposition Note.....	24

Introduction

This guidance has been prepared by the European Relations Division in the Directorate for Culture, Europe and External Affairs, to assist policy officials in the Scottish Government in exercising their responsibility for implementing EU obligations in their policy areas.

This guidance only relates to the practical steps required to implement EU obligations in Scotland in devolved areas.

Additional guidance for policy officials is available at the following links:

Influencing EU Policy

<http://www.gov.scot/Topics/International/Europe/Policies/Strengthening-Relationships/Obligations/Influencing-EU-Policy>

Explanatory Memoranda

<http://www.gov.scot/Topics/International/Europe/Policies/Strengthening-Relationships/Obligations/Explanatory-Memoranda>

Handling Infractions

<http://www.gov.scot/Topics/International/Europe/Policies/Strengthening-Relationships/Obligations/Handling-Infractions>

Part 1: The Role of the Scottish Government in implementing EU obligations

Legislative competence to implement EU obligations

1. Whilst international relations, including relations with the European Union and its institutions, are not within the legislative competence of the Scottish Parliament¹, the function of implementing EU obligations of the UK which are exercisable by UK Government Ministers under section 2(2) of the European Communities Act 1972, are exercisable in devolved areas by Scottish Ministers by virtue of section 53 of the Scotland Act 1998.

2. UK Government Ministers, however, retain the power to implement EU obligations in devolved areas in Scotland under section 57(1) of the Scotland Act 1998.

Liaising with the UK Government

3. The Memorandum of Understanding (“MoU”) on Devolution² sets out the underlying principles for relations between the UK Government and the Devolved Administrations and covers the co-ordination of international relations, including relations with the EU institutions.

4. Paragraphs **B4.17 – B4.21** of the Concordat on Co-ordination of EU Policy (Annex B to the MoU) set out the underlying principles governing the implementation of EU obligations by the UK Government and the Devolved Administrations. Policy officials with responsibility for implementing EU obligations in devolved areas should be familiar with these principles, some of which are summarised below:

- It is the responsibility of the lead Whitehall Department to formally **notify** the Scottish Government, at official level, of any new EU obligation which concerns devolved matters and for which it will be the responsibility of the Scottish Government to implement in Scotland.
- Whitehall Departments are to **liaise closely** with the Scottish Government about the implementation by UK legislation of EU obligations in reserved areas, particularly where these could touch on areas which fall within the responsibility of the devolved administrations.

¹ See section 29 of, and paragraph 7 of Part I of Schedule 5 to, the Scotland Act 1998 (c.46).

² The Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee (October 2013) (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf)

- For matters within devolved competence, it is for the Scottish Government to consider, **in bilateral consultation** with the lead Whitehall Department (and other Departments and the other Devolved Administrations if appropriate) how EU obligations should be implemented – including whether the Scottish Government should implement separately or opt for a UK-wide implementation.
- Where any discretionary provision or derogation is provided, and the Scottish Government wishes to exercise that discretion in Scotland, the Scottish Government should **consult** the lead Whitehall Department if there are wider UK policy implications.

5. It is, therefore, essential that all policy officials in the Scottish Government who have responsibility for implementing EU obligations know the identity of the main contact in their counterpart Whitehall Department and maintain good working relations. Nonetheless, policy officials should take the initiative and keep themselves abreast of developments in EU obligations.

Informing the Scottish Parliament

6. The Scottish Parliament may enact legislation to implement EU obligations in areas which are within its legislative competence. The Parliament also scrutinises subordinate legislation made or proposed by the Scottish Ministers which contains provision to implement EU obligations in Scotland. The Parliament's subject-matter committees also take a close interest in EU legislation coming forward in their areas.

7. In addition, the Europe and External Relations Committee ("EERC") has a role in examining cross-cutting EU issues and the Scottish Government's overall handling of the implementation of EU obligations.

8. The Scottish Ministers with portfolio responsibility for the EU (the Cabinet Secretary for Culture, Europe and External Affairs and the Minister for Europe and International Development) are regularly, requested to report to the EERC on the status of the Scottish Government's implementation of EU obligations. They do so on the basis of a briefing provided by the European Relations Division. It is therefore essential that when a policy official is aware of an EU obligation affecting a devolved area which requires to be implemented, that they notify the European Relations Division and keep it up to date on the status of the implementing measure.

The role of the European Relations Division

9. The **European Relations Division** in the Scottish Government oversees the implementation of EU obligations across the Scottish Government.

10. Its responsibilities include:

- Liaising closely with the UK Cabinet Office over the implementation of EU obligations affecting devolved areas.
- Monitoring the EU Official Journal on a regular basis and passing on information on to policy teams regarding the publication of new Directives.
- Providing advice and support on the implementation of EU obligations.
- Reporting to the Scottish Parliament on a regular basis on the implementation of EU obligations in devolved areas.
- Formally notifying the UK Government and the European Commission of measures adopted by the Scottish Government to implement EU obligations.

11. It is essential that you ensure that any developments regarding the implementation of EU obligations are communicated to the European Relations Division. In particular, once you have transposed EU obligations, you must always notify the European Relations Division, who will in turn notify the European Commission. Failure to notify the Commission will result in an automatic infraction. For more information on notification, please refer to paragraphs 87-91 of this guidance.

12. For more information on the European Relations Division and the wider work that we do, visit www.gov.scot/topics/international/europe and read the [Action Plan on European Engagement](#).

Part 2: The Nature of EU Obligations

13. EU law can be divided into two classes: 'primary law' and 'secondary law'.

Primary law

14. EU primary law comprises the EU Treaties that form the legal basis that enable the EU institutions to adopt further measures, including secondary law.

15. By virtue of section 2(1) of the European Communities Act 1972, provision made by the EU Treaties has effect in the UK without any further enactment.

16. The Scottish Government does not therefore need to make any further legislative provision to implement the provisions of the EU Treaties in Scotland.

Secondary law

17. EU secondary law comprises measures adopted by the EU institutions under the powers conferred on them by the EU Treaties. There are three forms of EU secondary legislation – Regulations, Directives and Decisions.

18. The distinction between each form of EU secondary legislation is important as it affects whether further legislation is needed to implement them in Scotland.

Regulations

19. Regulations are directly applicable in the Member States of the EU and are immediately enforceable as part of Scots law by virtue of section 2(1) of the European Communities Act 1972 without the need for any further implementing measures. Regulations are, therefore, the same across all of the Member States.

20. Regulations supersede any existing law in Scotland (and in the rest of the UK) which is inconsistent with them. Steps must therefore be taken to ensure that any domestic laws are amended so as to comply with the provisions of Regulations.

21. A Regulation might also require a Member State to appoint a person or body to perform or enforce certain functions set out in the Regulation or to make provision for a breach of its provisions to be subject to a particular sanction or penalty under domestic law. In such cases, where the Regulation relates to a devolved area, the lead policy official must consider, in conjunction with the Scottish Government's Legal Directorate ("SGLD") and the lead Whitehall Department, whether additional steps are needed to ensure that Scots law is consistent with the Regulation and that the Regulation can be properly applied and enforced.

22. If you require further assistance with a particular Regulation then please contact your solicitor in SGLD or the European Relations Division.

Directives

23. Directives require Member States to achieve particular outcomes. A Directive may also set out in detail all the things that must be done, or put in place, by the Member State to ensure that those outcomes are achieved.

24. Directives often set minimum standards to be applied in all Member States but also allow individual Member States to impose more stringent standards (provided these do not conflict with the general principles of the EU and its Treaties).

25. Each Directive will, following its publication in the Official Journal of the EU, require Member States to bring into force the domestic laws, regulations and administrative provisions needed to ensure that these things are achieved within a specified period (typically two years from the date of the publication of the Directive).

26. The process of bringing these domestic provisions into force is called “transposition”. If any of the provisions needed to ‘transpose’ the requirements of an EU Directive fall within the legislative competence of the Scottish Parliament, the Scottish Government must consider how best to transpose this EU obligation.

27. Directives focus more on the intended result of the legislation, leaving the Member States a degree of flexibility regarding how those ends are achieved. So whilst the outcomes to be achieved will be the same in all Member States, each Member State may seek to achieve these outcomes in slightly different ways.

28. Directives may be implemented in the same way throughout the whole of a Member State. Alternatively, Directives are often implemented in different ways in different parts of a Member State. For example, in devolved areas, Scotland may take a different approach to other parts of the UK if this is considered appropriate.

Decisions

29. Decisions deal with particular issues and are binding only on those Member States, organisations or individuals to which they are addressed. They are issued either by the European Commission or the Council of Ministers of the EU.

30. Since Decisions are bespoke, any measures needed to give effect to them will depend on the particular terms of the Decision in question.

31. If you require further assistance with a particular Decision then please contact your solicitor in SGLD or the European Relations Division.

Part 3: Transposing EU Directives

Publication of new Directives

32. From [playing a role in the negotiation and formulation of an EU Directive](#) which concerns devolved, policy teams should be aware when it is likely that a new Directive will be published in the EU Official Journal. Although the lead Whitehall Department will be expected to notify the Scottish Government of any new EU Directive which concerns devolved matters and which it will be the responsibility of the Scottish Government to implement in Scotland³, you should strive to keep yourself updated on forthcoming developments of EU legislation in their areas.

33. In addition, the European Relations Division will monitor the Official Journal of the EU on a regular basis and will pass information on to policy teams regarding the publication of new Directives affecting your policy areas where possible.

Understanding the provisions of the Directive and the areas of law affected

34. When faced with a new Directive, the first step is for you to familiarise yourself with the provisions of the Directive in order to understand its objectives and consider the ways in which these objectives can be achieved in Scotland.

35. In most cases, there will already be domestic legislation applying in the area, and it is important for the lead policy team to know and understand this existing framework before considering what changes must be made to transpose the objectives of the Directive.

Planning the Transposition of a Directive

36. Even though a Directive may not require to be transposed immediately (depending on the transposition deadline specified in the Directive) you will need to allow sufficient time to thoroughly consider all the relevant policy implications in order to decide how the Scottish Government will transpose the Directive.

37. You may also find it helpful to attend a transposition working group in Brussels, a useful way to tap into the thoughts of other Member States and sub-national administrations. Check the website of the appropriate Directorate-General of the Commission for details of such opportunities, and contact the Scottish Government's Office in Brussels for advice.

³ Paragraph B4.17 of the Memorandum of Understanding on Devolution

Approach to Transposition

38. After carefully evaluating the objectives of the Directive at hand and what this means for Scotland, you should now decide how best to transpose its provisions into Scots law.

Consider what is the best approach for Scotland

39. As Directives provide flexibility as to the manner in which they can be transposed, the Scottish Government is not obliged to transpose a Directive in a devolved area in the same way as might be adopted in another part of the UK by the UK Government or one of the other Devolved Administrations, or by any of the other Member States. **The paramount consideration is, therefore, considering how the Directive can best be transposed in Scotland.**

40. Although the Scottish Government is free to adopt a different approach to transposing a Directive, it is useful to see what approaches are being adopted by the UK Government, the other Devolved Administrations and some of the other Member States.

41. It is likely that the lead UK Government Department will have drafted transposing legislation, and you may be able to transpose in Scotland more efficiently by drawing on such a draft as a guide for a separate Scottish instrument. However, always take into account that the UK Government's approach may not necessarily be the best one for Scotland.

42. In any case, it is essential that you keep in close contact with your counterparts in the UK Government and other devolved administrations to ensure you are aware of their approach to transposition and they are of yours.

Who Transposes – the Scottish or UK Government?

43. If it is considered that it would be more effective or expedient for some provisions of a Directive (falling within devolved competence) to be transposed by means of UK-wide legislation, rather than by separate Scottish legislation, then UK Government Ministers could be invited, under section 57(1) of the Scotland Act 1998, to take forward the necessary transposing provision for Scotland using section 2(2) of the European Communities Act 1972.

44. However, where the subject-matter of the Directive falls largely within a devolved area, there is a strong presumption in favour of transposing measures being taken forward by the Scottish Government by separate Scottish legislation.

45. Nonetheless, in certain circumstances, it may be more appropriate for some provisions of a Directive (which fall only partly within devolved competence) to be transposed for the whole of the UK by the UK Government. This could occur, for example, where it is desirable to confer a single set of powers on a Scottish public authority to enforce the requirements of a Directive (or a Regulation) but the subject-matter of those requirements is partly devolved and partly reserved.

Issues to consider

46. In deciding whether it would more appropriate for the transposition of a Directive affecting a devolved area to be taken forward by the UK Government, you should consider the following matters:

- Would a separate form of transposition allow the Scottish Government to adopt a better form of regulation which would support sustainable economic growth?
- Would a UK Government transposition lead to a better outcome for Scotland?
- Is it a good use of resources for the Scottish Government to transpose in a separate fashion?
- Does the Directive impact on both devolved and reserved responsibilities in Scotland?
- If a Directive impacts on both devolved and reserved responsibilities in Scotland, would a separate form of transposition cause disproportionate difficulties for persons affected?
- If the Directive impacts on local government, what are the views of representative bodies, including the Convention of Scottish Local Authorities (“COSLA”)?
- What are the views of Scottish stakeholders with an interest?
- Is there a preference for a UK regulatory framework rather than two separate sets of identical rules?
- What would be the views of the Scottish Ministers and the Scottish Parliament of allowing the UK Government to legislate in an area within their responsibility?
- Are there specific issues in Scotland that would suggest a separate form of transposition would better address the objectives of the Directive?
- Are the other Devolved Administrations in favour of a UK-wide transposition?
- Is the subject-matter of the Directive already regulated on a UK-wide basis and are there good reasons for continuing this?

47. In all cases, you should consider which approach will lead to a better outcome for Scotland. Where there is a doubt about the precise legal route to take, submit the options to the portfolio Minister explaining the advantages and risks attached to each approach.

Practical steps to take before agreeing to a UK-wide transposition

48. Before agreeing to a UK-wide transposition, you should:

- Consult with your solicitors in the Legal Directorate;
- Consult with the European Relations Division (EUObligations@gov.scot);
- Consult appropriately with stakeholders likely to be affected by the transposition of the Directive;
- Consult with the lead UK Government Department and the other Devolved Administrations; and
- Seek clearance from the Scottish Minister with portfolio responsibility **and** the Cabinet Secretary for Culture, Europe and External Affairs.

49. If it has been agreed that a Directive will be transposed on a UK-wide basis, you should:

Immediately

- Advise the European Relations Division (EUObligations@gov.scot).
- Ensure the relevant portfolio Minister writes to the Convenor of the Scottish Parliament Committee within whose subject-matter the Directive falls as well as the Convenor of the European and External Relations Committee.

Throughout the transposition period

- Ensure the lead UK Government Department consults the Scottish Government and our stakeholders on the transposing measures.
- Seek to influence the substance of the transposing measures so that they address any Scottish issues.
- Monitor the progress of the transposing measures being taken forward by the lead UK Government Department and advise the European Relations Division.
- Notify the European Relations Division when the transposing measures are made and when they are due to come into force.

Method of Transposition

50. Where it is decided that the Scottish Government will transpose a Directive in a devolved area, lead policy teams must consider the method by which the Directive should be transposed. The three main methods of transposition are through the legislative measures of a **Scottish Statutory Instrument (“SSI”)** or an **Act of the Scottish Parliament** or through **administrative measures**.

51. Section 2(2) of the European Communities Act 1972 contains a specific power for Scottish Ministers to transpose a Directive falling within a devolved area by SSI. The vast majority of Directives are transposed in this fashion but it is also open to the Scottish Government to transpose a Directive through the enactment of primary legislation – an Act of the Scottish Parliament.

52. Do not automatically assume, however, that legislation will be required: administrative measures may suffice where the existing domestic legal framework already complies with the objectives of the Directive. Provided the Directive is fully transposed, innovative solutions may be considered to ensure that the Scottish Government is fulfilling its EU obligations while placing minimal burden on those affected.

53. Further guidance on the procedures in relation to Scottish Bills and Scottish Statutory Instruments can be found in the [Scottish Government Bill Handbook](#) and the [Guidance on Scottish Statutory Instruments](#) respectively.

54. SGLD will also be able to guide you on the type of instrument to use and the parliamentary procedure which will apply.

Instructing a Scottish Statutory Instrument to transpose a Directive

55. Where you are taking forward the transposition of a Directive through an SSI, you should follow the general [SSI Guidance](#) for policy officials on instructing an SSI.

Consultation

56. For an SSI transposing a Directive, consultation with stakeholders will be key, particularly where the SSI may include provisions which go beyond the minimum requirements of the Directive. These should be widely consulted on – setting out a clear rationale as to why this approach has been taken. Proper engagement with stakeholders will help to ensure that any concerns about over or under-implementation are dealt with at an early stage.

57. Where the transposition of a Directive will confer powers or responsibilities on local government or will have implications for local government, you should consult and engage with representative bodies of local authorities as appropriate, including COSLA, at an early stage, and consider how their views can be incorporated into the planning and drafting of the transposing measure.

58. You should also consider whether the transposition may affect the Scottish islands and rural communities in a particular way and ensure that the appropriate bodies are consulted.

Derogations

59. You should carefully read the Directive to see if it gives Member States any discretion to deviate from its requirements. Any such discretion is commonly referred to as a 'derogation'. In particular, the Directive might say that a Member State may impose standards that are stricter than those specified in the Directive, or it might say particular activities may be exempted from its scope (or from particular Articles). You should assess whether it would be desirable to make use of any such permitted derogations from the requirements of the Directive.

60. Where appropriate, you should consult with your counterparts in the UK Government over the use of derogations – particularly those which require the approval of the European Commission.

Ancillary provision

61. If you decide that the best way to transpose a Directive would be to transpose its provisions by means of new standalone legislation, you will also need to consider whether any consequential modifications are needed to existing regimes. You might instead decide to modify an existing regime so that the regime (as modified) also delivers the new requirements of the Directive. However, if that existing regime catches some activities that do not fall within the scope of the Directive, you should assess whether or not it would be desirable to also impose the same new requirements (equivalent to those in the Directive) on those activities as well.

Technical standards

62. If any proposed implementing legislation will contain provision which imposes a technical standard (for example, water pipes need to be [X] mm wide or fishing nets need to be made of a particular type of rope), then a draft of the instrument which contains those provisions must be communicated to the European Commission in advance. This enables other Member States and the Commission to raise concerns as to whether the proposed measure is a potential barrier to trade.

63. This notification must take place whilst the legislation is still in the draft stages. Once notified, the draft legislation cannot be brought into force until a minimum period of 3 months (or, in some cases, 6 months) has expired ("the minimum standstill period"). It should also be noted that, in some circumstances, the minimum standstill period could be extended to 12 or 18 months. If a technical standard has not been notified in accordance with the Technical Standards Directive, it will be unenforceable, so it is vital that a draft of the proposed legislation is communicated to the Commission in good time, so that the relevant standstill period (extended or otherwise) has expired, before a final version of the legislation is passed, made, or otherwise laid in draft before the Scottish Parliament.

64. You should consult with SGLD if unsure whether the provisions of any proposed implementing legislation contains a technical standard.

65. The Department for Business, Innovation & Skills holds the portal for notifying a draft of any instrument containing a technical standard to the European Commission and can be contacted at 9834@bis.gov.uk. Further information can be found on the [BIS website](#) and in the [BIS Guidance for policy officials](#).

66. Please contact the European Relations Division for further assistance if required.

Impact Assessments

67. You must also consider what impact assessments should be carried out on their proposed legislation transposing a Directive. Further details are set out in the general [SSI Guidance](#) for policy officials on instructing an SSI but, in particular, you should be aware of the need to carry out, where required, a Business and Regulatory Impact Assessment and an Equality Impact Assessment.

Business and Regulatory Impact Assessment

68. All policy changes, whether derived from EU legislation or otherwise, which may have an impact upon business, charities or the voluntary sector must be accompanied by a Business and Regulatory Impact Assessment (“BRIA”). The BRIA will help you think through and analyse the costs and benefits of the proposed manner of the transposing legislation.

69. The BRIA should be undertaken as early as possible in the transposition process so that it informs the transposing instrument.

Equality Impact Assessment

70. Equality Impact Assessments (“EQIAs”) help to ensure that:

- the needs of people with 'protected characteristics' (race, sex, disability, age, sexual orientation, gender reassignment, religion or belief) are proactively addressed where possible;
- barriers faced by people in equality groups (for example in relation to accessing opportunities and services) are broken down; and
- equality groups are not likely to be adversely affected by policies.

71. EQIAs also help to ensure that Scottish Government complies with its legal duty to assess the impact of applying new policy policies against the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and

- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

72. If required, an EQIA should be undertaken as early as possible in the transposition process so that it informs the transposing instrument.

73. For more information, you should email the Equality Unit at MainstreamingEquality@gov.scot.

Better Regulation

74. The Scottish Government is committed to producing better regulation and reducing unnecessary burdens on business, and actively pursues policies which promote this.

75. You should pay attention to the five principles of the Scottish Government's policy on Better Regulation and ensure that transposing legislation is: Proportionate, Consistent, Accountable, Transparent and Targeted.

76. Further guidance is available at <http://www.gov.scot/Topics/Business-Industry/support/better-regulation> and please contact the Better Regulation team at BetterRegulation@gov.scot for more information.

Consultation with the UK Government and other Devolved Administrations

77. In some cases, it might be desirable for provisions which transpose aspects of a Directive in devolved areas to be coordinated with provisions which transpose other aspects of the Directive (whether in reserved areas or in other parts of the UK).

78. You should therefore maintain contact with the lead UK Government Department once they become aware of the new Directive.

79. The UK Government will likely to be willing to share a draft of its transposing instrument with the other Devolved Administrations and this should help inform how the Scottish Government goes about the transposition.

80. When transposing an EU Directive, you should be cautious of going beyond the requirements of text and imposing more burdens and restrictions than necessary. However, sometimes it may be preferable to modify an existing domestic regime to give effect to the provisions of a Directive and, in doing so, EU obligations might potentially be imposed more widely than is required by the Directive. Advice should be sought from SGLD in relation to any such proposal.

81. You should always consider what is most appropriate to achieve the best outcome for Scotland.

SSI tracker

82. Where it has been decided that a provision of a Directive is to be transposed for the first time by means of an SSI, you should immediately enter the details on the SSI Tracker. The SSI Tracker is a tool for managing secondary legislation and monitoring its progress. It is vital that the entry specifies each Directive being

transposed and the transposition deadline as this information is relied on by the European Relations Division for reporting to Ministers and the Parliament on progress and notifying the Commission (see paragraphs 87-91 below).

83. For more information, please see the [SSI Tracker Guidance](#). Any queries concerning the SSI process should be directed to the SSI Programme Manager at legislation@gov.scot.

Guidance

84. You should consider carefully with stakeholders whether guidance for those affected by the transposing instrument will be necessary to help explain the consequences of the transposing instrument.

85. The purpose of the guidance should be to provide clear 'signposts' to enable those affected to follow the terms and understand the purpose behind the legislation. When drafting guidance, be careful to distinguish between statutory requirements and what is considered to be best practice, as confusion about the legal status of requirements in guidance can create additional burdens and costs.

86. It may be helpful, when taking a different approach to the UK, to clearly set out the differences from the UK approach, for the benefit of businesses which operate UK-wide.

Part 4: Notification of Transposing Measures and Post-transposition Review

Notifying implementing measures to the European Commission

87. Once a measure transposing a Directive (whether a Scottish Statutory Instrument, an Act of the Scottish Parliament or an administrative measure) has been passed, it must be notified to the European Commission **ahead of or by** the transposition deadline. Failure to do so could lead to enforcement action by the European Commission for the failure to notify.

88. The European Relations Division is responsible for communicating this to the Commission using an electronic notification system – it is therefore absolutely essential that you inform the European Relations Division of transposition as soon as it is adopted (i.e. passed or made) and before it comes into force.

89. By the transposition deadline, you should email the European Relations Division and attach a PDF version of the transposing instrument/measure, using the EU Obligations mailbox (EUObligations@gov.scot).

90. If the Directive is particularly complex, and has multiple provisions, you may also wish to submit a transposition note for the Commission's benefit and which sets out exactly which provisions of the transposing instrument/measure transpose the corresponding parts of the Directive. The European Relations Division will notify this to the Commission along with the transposing instrument. An example of a basic transposition note is available in Annex B.

91. Once the transposing legislation has been notified to the European Commission, an automatic email will be generated, confirming the date of receipt and providing a reference number for the notification. The European Relations Division will forward this confirmation to you which should be retained with the records for transposing the Directive. It is important that you keep this for your records, as it should be cited in all correspondence with the Commission, including for infractions correspondence.

Late transposition

92. Timely transposition is essential. When a Directive is transposed late, the European Commission may launch infringement proceedings and may request that the Court of Justice of the European Union imposes fines on the Member State in question.

93. If you become aware that a Directive in a devolved area will not be transposed in accordance with the transposition deadline, you should inform the European Relations Division and also ensure that the responsible Minister writes to the Convenor of the relevant subject-matter Committee of the Scottish Parliament

advising of this, explaining the reasons for late transposition, the new timescale for transposition and identifying any possible implications.

94. The correspondence with the Parliament should also be copied to the European Relations Division's mailbox (EUObligations@gov.scot), the Clerk to the Scottish Parliament's European and External Relations Committee (europe@scottish.parliament.uk), and the Clerk to the Scottish Parliament's Delegated Powers and Law Reform Committee (DPLR.Committee@scottish.parliament.uk).

95. Guidance on how to deal with EU Infractions is available at: <http://www.gov.scot/Topics/International/Europe/Policies/Strengthening-Relationships/Obligations/Handling-Infractions>.

Impact Assessment – review of transposing legislation

96. Once a Directive has been transposed into domestic law, it is essential that lead policy team's monitor and review the effectiveness of the transposing legislation.

97. An impact review provides a useful check on how legislation is working in practice and whether actual costs and benefits are similar to those originally anticipated. Policy decisions may need to be reconsidered in light of changing political, economic, social and technological developments. Impact reviews are also helpful in terms of building up an evidence base to influence future policy making in the EU. Most new Directives have review periods built in by the European Commission. If possible, schedule the Scottish Government review to coincide with the Commission's own review.

98. Stakeholders often play a key role in reviewing the effectiveness of implementation, so it is essential to liaise with them on whether any aspect of implementation could be improved.

Annex A: Checklist

Below are listed the key considerations that you should have in mind at each stage of the transposition process, as well as important actions.

First steps (see page 9)

- Familiarise** yourself with the provisions of the Directive and the existing framework in Scotland, before considering how best to achieve the Directive's objectives in Scotland.
- Allow for **sufficient time** to transpose the Directive before its transposition date.
- Notify the **European Relations Division** as soon as possible on EUObligations@gov.scot
- Consult with **SGLD** at an early stage and maintain regular contact throughout.

Deciding an approach (see pages 10 – 12)

- Consider which approach will lead to a **better outcome for Scotland**.
- Would a separate form of transposition allow the Scottish Government to adopt a better form of regulation which would support sustainable economic growth?
- Or, would a UK Government transposition lead to a better outcome for Scotland?
- What are the **views of representative bodies, including COSLA, and other stakeholders with an interest?**
- Where there is a doubt about the precise legal route to take, **submit the options to the portfolio Minister** explaining the advantages and risks attached to each approach.
- Before agreeing to a UK-wide transposition under s.57(1) **always seek clearance from your portfolio Minister and the Cabinet Secretary for Culture, Europe and External Affairs.**

UK-wide transposition (see page 12)

- Immediately advise the European Relations Division** of your approach to transposition and keep them up to date of progress.
- Ensure the relevant portfolio Minister writes to the **Convenor of the Scottish Parliament Committee** within whose subject-matter the Directive falls as well as the **Convenor of the European and External Relations Committee**.
- Work closely with your UK counterparts** to ensure that their policy and legislative approach is compatible and will still result in a good outcome for Scotland.
- Consult with stakeholders and work to ensure that Scottish-specific interests (both those of Scottish Ministers and stakeholders) continue to be represented** throughout the transposition and implementation process.
- Monitor the progress of the transposing measures being taken forward by the lead UK Government Department and advise the European Relations Division.

Scottish transposition (see pages 13 – 14)

- **Immediately advise the European Relations Division** of your approach to transposition.
- Do not automatically assume that legislation is required - administrative measures may suffice where the existing domestic legal framework already complies with the objectives of the Directive.
- **Work closely with your UK counterparts** to ensure that their policy and legislative approach is compatible with the Scottish legislation.
- Engage **representatives of local authorities**, including COSLA, , who may have responsibility for implementation and delivery 'on the ground' in order to harness their practical expertise and to gauge their thoughts on whether unexplained or unnecessary over-implementation may be occurring.
- **Consult widely with stakeholders** on your approach.
- Notify the European Relations Division when the transposing measures are made and when they are due to come into force.

SSI Tracker (see page 15)

- It is essential that the **SSI Tracker is kept up to date** with your progress, any policy issues encountered and any changes to the Implementation Plan.
- **Agree with your solicitor who will update which fields.** The Policy Issues page is specifically for policy officials to edit.
- Any **issues which may impact on the timetable** should be assessed against **the risk rating on the Policy Issues screen.**
- Any queries concerning the SSI process should be directed to the SSI Programme Manager (legislation@gov.scot).

Policy Scrutiny (see pages 14 – 16)

Business and Regulatory Impact Assessments (BRIA)

- If a BRIA is required, you should **start the BRIA process as early as possible** in the policy cycle and refresh the assessment as required, including during the implementation and evaluation phases.
- **Detailed guidance** on Business and Regulatory Impact Assessments, including guidance notes, a template and a toolkit, can be found at: <http://www.scotland.gov.uk/Topics/Business-Industry/support/better-regulation/guidance>. For further information, you should contact the Better Regulation team (BetterRegulation@gov.scot).

Equality Impact Assessment (EQIA)

- If an EQIA is required, you should **start the process as early as possible** in the policy cycle and refresh the assessment as required, including during the implementation and evaluation phases.
- Detailed guidance including a template, checklist and FAQs, can be found [here](#) or email the Equality Unit on MainstreamingEquality@gov.scot.

Technical Standards

- If your legislation will include any technical specifications, you will **need to inform the European Commission** of this **while the legislation is still in the draft stages**.
- Once the text of a draft technical regulation has been notified to the Commission, the instrument containing it cannot be adopted until the relevant standstill period has expired. The minimum standstill period is 3 months but it might be extended to 12 or 18 months. So if you wish to include a technical regulation, you must factor this period into your timetable.
- **Consult with SGLD** if you are unsure whether your regulations include Technical Standards.
- The Department for Business, Innovation & Skills holds the portal for notifying a draft of any instrument containing a technical standard to the European Commission and can be contacted at 9834@bis.gov.uk. Further information can be found on the [BIS website](#) and in the [BIS Guidance for policy officials](#).

Guidance

- Consider carefully with your stakeholders whether it will be necessary to produce **guidance for those affected by the legislation** and who should be involved in the producing such guidance.
- It may be helpful, **where you are taking a different approach to the UK, to clearly set out the differences from the UK approach** for the benefit of businesses which operate UK-wide.

Notifications (see pages 17 – 18)

- Once the transposing legislation has been finalised and **no later than one week before it is due to come into force, e-mail the European Relations Division (EUObligations@gov.scot)** to bring this to our attention, **attaching a pdf version of the legislation** to be notified to the European Commission.
- If the Directive is particularly complex and has multiple provisions, you may also wish to submit a **transposition note** (please see example transposition note in Annex B) for the European Relations Division to notify to the Commission and which sets out exactly which provisions of the transposing legislation implement which parts of the Directive.
- The European Relations Division will forward on to you the automatic e-mail which confirms the date of notification to the Commission and the notification reference number. **It is important that you keep this e-mail for your records. You should cite this reference number and the date of notification in all**

correspondence with the Commission, particularly for infractions correspondence.

Impact Assessment (see page 18)

- Once a Directive has been transposed into domestic law, it is essential that you monitor and review the effectiveness of the transposing legislation.
- **Liaise with your partners and stakeholders** on whether any aspect of implementation could be changed or improved in some way.

Annex B: Example Transposition Note

The Public Water Supplies (Scotland) Regulations 2014 (“the Regulations”) consolidate the Water Supply (Water Quality) (Scotland) Regulations 2001 and make new provision in relation to, among other things, the monitoring of drinking water abstraction points.

The Regulations aim to protect human health from the adverse effects of any contamination of water supplied by Scottish Water for human consumption purposes by ensuring that it is wholesome. In so far as the Regulations apply to water supplied by Scottish Water for human consumption purposes, they continue to apply the measures necessary to deliver the requirements of Council Directive 98/83/EC on the quality of water intended for human consumption⁴ (“the Directive”) in Scotland.

The table below sets out how the Regulations transpose the relevant Articles of the Directive in so far as it applies to water supplied by Scottish Water for human consumption purposes.

Article	Requirement	Provision
Article 1	Objective	None required
Article 2	Definitions	Regulation 2(1)
Article 3	Exemptions	Regulation 1(4)
Article 4	General obligations	Regulation 4 (read with regulations 17 to 23)
Article 5	Quality standards	Schedule 1 (read with regulation 4)
Article 6	Point of compliance	Regulations 6 and 13 (read with regulation 5) Regulations 17 to 23
Article 7	Monitoring	Regulations 4 to 15 (read with Schedules 1 to 3)
Article 8	Remedial action etc.	Regulations 17 to 23
Article 9	Derogations	Regulations 24 to 28
Article 10	Quality assurance etc.	Regulations 33 and 34
Article 13	Information	Regulations 37 and 39
Annexes		Schedules 1 to 3

⁴ OJ L 330, 5.12.98, p.32, as last amended by Regulation (EC) No 596/2009 (OJ L 188, 18.7.2009, p. 14).



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