

**POST-LEGISLATIVE SCRUTINY OF LEGISLATION
DERIVED FROM THE EUROPEAN UNION**

Lydia Clapinska

<u>CONTENTS</u>	page
INTRODUCTION	4
Methodology.....	5
Structure.....	5
Sources.....	6
Acknowledgements.....	6
PART 1: THE CONCEPT OF EVALUATION	7
Legislative methodology.....	7
Developments in post-legislative scrutiny of national legislation.....	8
PART 2: THE NATURE OF EUROPEAN LEGISLATION	12
The European legislative process.....	12
How EU legislation ends up in UK domestic law.....	13
Volume of EU-derived legislation.....	15
The quality of EU legislation.....	17
The differing aims of post-legislative scrutiny in the domestic and EU context.	19
PART 3: UK SCRUTINY OF EU-DERIVED LEGISLATION	20
Early responses to the scrutiny challenge of the ‘new legal order’.....	20
Pre-legislative scrutiny of EU-derived legislation.....	21
Post-legislative scrutiny of EU-derived legislation.....	25
Transposition of EU Directives into UK law.....	26
Evaluation as part of better regulation.....	30
The link between impact assessment and evaluation.....	32
The evaluation gap.....	34
PART 4: POST-LEGISLATIVE SCRUTINY IN THE EUROPEAN UNION	35

The journey towards recognition of evaluation as part of better regulation in the European Union.....	35
Simplification.....	38
Tools for evaluation.....	39
<i>Review clauses</i>	39
<i>Impact assessment</i>	41
Respective Roles of the Institutions and Member States in Evaluation – Where should the responsibility lie?.....	43
<i>The Commission</i>	44
<i>The Parliament</i>	47
Is there scope for a new independent evaluation body?.....	48
PART 5: CONCLUSIONS: THE WAY FORWARD	50
A changed climate.....	50
A shared responsibility.....	50
BIBLIOGRAPHY	53
Books and journal articles.....	53
Reports.....	55
European documents.....	56

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INTRODUCTION

The fundamental purpose of this thesis is to assess critically how legislation deriving from the European Union is, and should be, reviewed after it has been brought into force. The inspiration for this paper derives from two factors, first, the recent explosion in interest in ‘better regulation’ in Europe and second, the growing interest in post-legislative scrutiny of domestic legislation in the UK. There are numerous drives and endeavours towards ‘better lawmaking’ and ‘better regulation’ but what do these concepts actually mean and are there corresponding attempts to monitor not only the drives towards improving the quality of legislation but the actual effectiveness of legislation once it has been brought into force? The working hypothesis for this paper is that too little attention has been given to the review of EU legislation after it has been brought into force at both the national and EU level. The overarching research questions may be expressed as follows:

1. What work is already undertaken at national and EU level in terms of monitoring the effects of past legislation in order to ensure that it has met its objectives and is working in practice as intended?
2. How does this evaluation work fit in with the drives towards better regulation and better lawmaking?
3. What has been the effect of impact assessments and could this form of analysis be used as a basis for future review of measures?

4. What further work should be undertaken in terms of evaluation of past measures and which body should take lead responsibility for this work in order to ensure a coherent approach?

5. Is there scope for a new independent body to assist the EU institutions (and Member States) with evaluating past legislation?

Methodology

This paper is written from the British perspective and this is reflected in the focus of the research which is on two levels, covering the analysis of UK domestic scrutiny of European legislation and the analysis of scrutiny processes undertaken at EU level, namely by the European Commission and the European Parliament. The justification for this methodology has its foundations in the belief that it is only by understanding and analysing existing scrutiny processes at both levels that the gaps can be revealed and also that a way forward, by building on what already exists, can be forged. The other aspect of the reasoning behind the methodology is that it is necessary to examine the respective roles of the Institutions of the EU and the UK Parliament in order to ascertain where responsibility for post-legislative scrutiny of European legislation should lie. Rather than undertake a rigid comparative analysis between some or all of the EU Member States (which risks being predominantly descriptive), the preferred approach in this paper is to focus more deeply on the scrutiny system in the UK, as just one Member State, but one which has quite a progressive approach towards better regulation. Of course, where innovative approaches by other Member States have been identified, these are included in the analysis. It is worth noting at this preliminary stage that in the UK context, the term ‘post-legislative scrutiny’ is preferred while in the European context, the term ‘ex post evaluation’ or ‘ex post assessment’ is more likely to be used. All of these terms are used interchangeably in this paper and are taken to have the same broad meaning (unless the context indicates otherwise), that is, the review of legislation in practice after it has been brought into force.

Structure

The structure of the paper reflects the methodology. This paper is divided into five parts. Part 1 provides a brief, critical introduction to the concept of evaluation and

also considers developments in post-legislative scrutiny of national legislation in the UK. Part 2 examines the nature of EU legislation with a view to suggesting the different purposes of post-legislative scrutiny at national and EU level and also demonstrating the impact of EU legislation on the UK. Part 3 analyses developments in pre-legislative and post-legislative scrutiny in the UK of legislation derived from the EU, with an additional focus on the particular challenges that arise in relation to the transposition of Directives, and on the dawn of impact assessment culture. Part 4 critiques the explosion of interest in better regulation in Europe and how evaluation ties in with this before analysing what is and should be done in terms of post-legislative scrutiny of EU legislation by the Institutions, especially the Commission and Parliament. Part 5 contains the conclusions with an emphasis on what the future may hold for evaluation of EU legislation after it has been brought into force.

Sources

This paper draws on a wide variety of sources. The key concepts addressed are of important practical significance, which required analysis of UK Parliamentary and Governmental reports and debates and many very recent EU documents as well as more traditional academic material. In order to enhance the research for this paper and also to gain practical insights into scrutiny processes at EU level, the author also visited Brussels to carry out interviews with officials in the European Parliament and European Commission to hear first hand about evaluation initiatives, the challenges faced and the hopes for the future.

Acknowledgements

I am very grateful to the following people for providing information and inspiration for this paper: Mr William Robinson, Legal Reviser, European Commission Legal Service, Mr Lars Mitek-Pedersen, Head of the Better Regulation and Impact Assessment Unit, European Commission Secretariat General; Mr Robert Bray, Legal Administrator to the Legal Affairs Committee of the European Parliament; Mr Bevis Clarke-Smith, Head of the Legal Revisers Group, European Commission Legal Service; Mr Charles Carey, Research Counsel, Parliamentary Counsel Office, London; Professor Christian von Bar, University of Osnabrück, Germany; Marie-Hélène Fandel, Analyst, European Policy Centre, Brussels. Specific contributions are acknowledged at the appropriate parts of the text.

PART 1: THE CONCEPT OF EVALUATION

Post-legislative scrutiny is like motherhood and apple pie in that everyone appears to be in favour of it. However, unlike motherhood and apple pie, it is not much in evidence.¹

Legislative methodology

The first sentence in the quotation above is a logical statement, if evaluation of legislation is considered to be a key component of legislative methodology and this is a difficult argument to refute. In manufacturing, industry and across the private sector, ‘quality control’ is a familiar phrase – checking that your product or service works in practice is fundamental to the success of any business. However, when it comes to legislation, this process of assessment or evaluation seems to be a concept which is only just beginning to gain ground. Professor Luzius Mader explains that evaluation of legislation is particularly concerned with normative contents and their consequences in the social reality and he advocates the following methodical approach:

- (1) the analysis and definition of the problem that legislative action presumes to solve;
- (2) the determination or clarification of the goals of legislation;
- (3) the examination of legal instruments or means that can be used to solve the problem and the choice of such instruments (based – among other things upon a prospective evaluation of their possible effects);
- (4) the drafting of the normative content;
- (5) the formal enactment;
- (6) the implementation;
- (7) the retrospective evaluation; and
- (8) if necessary or appropriate, the adaptation of legislation on the basis of the retrospective evaluation.²

¹ House of Lords Select Committee on the Constitution, 14th Report, (2003-04), *Parliament and the Legislative Process*, HL 173-I, p 42.

Steps (1) to (8) form part of one continuous process. Mader describes it as a “reiterative learning process” in which the evaluation of effects is a fundamental prerequisite, ensuring the legislator’s responsiveness to social reality and the social adequacy of legislative action.³ It is interesting to juxtapose this eminently sensible approach and reasoning with the reality. In the UK, it has been observed that Parliament lacks systematic feedback from those groups and individuals affected by laws to enable it to learn from its mistakes. Bills tend to be treated as self-contained entities, virtually in isolation from what has gone before and from what may happen later, whereas most Bills are only an exclamation point in a continuous process of developing and applying policy.⁴ Although these observations were made in 1976, they still ring true in 2006. Mader’s steps (7) and (8) are not often followed and it is even difficult in many cases to find documentary evidence of step (2). With regard to EU legislation, the problems are exacerbated, as we shall see, with problems frequently arising at step (6) and a lack of clear ownership of responsibility for stages (7) and (8). It has long been recognised that it is proposals for new EU measures that receive the bulk of attention from the main EU institutions, while the review of legislation approved in the past tends to be neglected even though such a review could improve future legislation.⁵ Luzius Mader has written that, in short, the evaluation of legislation is “a pragmatic effort to improve the legislator’s assumptions and knowledge about the effects of legislation” but cautions that “it aims more at plausibility in this field, not at certainty or scientific proof”.⁶

Developments in post-legislative scrutiny of national legislation

The UK Parliament first made calls for “post-legislation” committees more than thirty five years ago when the House of Commons Select Committee on Procedure published a report noting that:

² Mader, L, *Evaluating the Effects: A Contribution to the Quality of Legislation*, Statute Law Review, 2001, Volume 22, Number 2, 119 at 121.

³ *Ibid.*, at 122.

⁴ Study of Parliament Group, Evidence on House of Commons Procedure, 1976, para 19, submitted to the House of Commons Select Committee on Procedure and printed with its First Report of Session 1977-78, as Appendix 1 to the Minutes of Evidence (HC 588-III, pp 1-20).

⁵ Mather, G & Vibert, F, European Policy Forum, *Evaluating Better Regulation: Building the System*, A report for the City of London Corporation, September 2006, p 4 to 5.

⁶ Mader, L, *Evaluating the Effects: A Contribution to the Quality of Legislation*, Statute Law Review, 2001, Volume 22, Number 2, 119 at 124.

Pressure of Government business in each session often reduces the chance of securing a place in the legislative programme for a Bill to amend an Act passed within recent years. For this reason, years may pass before Parliament has an opportunity to consider legislation embodying amendments to a recent Act, the need for which has become imperative following, for example, a judgment in the courts, difficulties in interpretation, impracticality in everyday use, or the nature of the delegated legislation made under its authority.⁷

This reasoning is still relevant today and the calls for some form of post-legislative scrutiny are still being made. In October 2004, the House of Lords Constitution Committee published its report, 'Parliament and the Legislative Process' in which the Committee recommended that most Acts other than Finance Acts, should normally be subject to review within three years of their commencement, or six years following their enactment, whichever is the sooner.⁸ In a House of Lords debate following the publication of this report, Lord Norton of Louth who was Chairman of the Constitution Committee at the time the report was made, stated that:

The implementation stage of legislation constitutes a Parliamentary black hole. By addressing it... there is the potential to develop a new and significant role for Parliament, ensuring that it plays a role at all stages of the legislative process.⁹

Post-legislative scrutiny is the subject of a project currently being undertaken by the Law Commission of England and Wales.¹⁰ The Law Commission published a consultation paper on post-legislative scrutiny in January 2006.¹¹ The focus of the Law Commission project is on the post-legislative scrutiny of primary, domestic

⁷ House of Commons Select Committee on Procedure (1970-71), *The Process of Legislation*, HC 538, p viii.

⁸ House of Lords Select Committee on the Constitution, 14th Report, (2003-04), *Parliament and the Legislative Process*, HL 173-I, para 180.

⁹ House of Lords Hansard, 6 June 2005, vol 672, no 10, col 752.

¹⁰ The author of this paper must declare an interest at this point, as the lawyer with responsibility for the Law Commission project on post-legislative scrutiny.

¹¹ Law Commission Consultation Paper No 178 (2006), *Post-legislative Scrutiny*.

legislation. In preparing its consultation paper, the Law Commission undertook an extensive pre-consultation exercise in order to gain insights into different aspects of post-legislative scrutiny from Parliamentarians, Parliamentary Counsel, Parliamentary clerks, Government officials, academics and others, based on the premise that, in general, post-legislative scrutiny referred to the review of Acts of Parliament once they have been brought into force.¹² Although ‘post-legislative’ scrutiny undoubtedly means different things to different people, the Law Commission extracted from its early consultation that the main motivation for post-legislative scrutiny was that legislation should be reviewed after it has been brought into force to see whether it is working out in practice as intended and if not to discover why and to address how any problems can be remedied quickly and cost-effectively.¹³ The ultimate benefit is that it has the potential to improve the accountability of governments for legislation and lead to better and more effective law.¹⁴ The Law Commission also identified a scrutiny spectrum ranging from narrow through to broad forms of review. This was set out as follows:

A narrow form of review might be limited to considering:

- Have all the provisions been brought into force?
- Has the legislation given rise to difficulties in interpretation?
- Has the legislation had unintended legal consequences?

A broader form of review would address the question whether the Act has delivered what was intended in practical as well as legal terms. This would involve questions such as:

- Have the policy objectives been achieved?
- Has the legislation had unintended economic or other consequences?
- Has it been over-cumbersome?
- Do any steps need to be taken to improve its effectiveness/operation?
- Have things changed so that it is no longer needed?¹⁵

¹² *Ibid.*, p 6.

¹³ Law Commission Consultation Paper No 178 (2006), *Post-legislative Scrutiny*, p 30.

¹⁴ *Ibid.*, p 32

¹⁵ Law Commission Consultation Paper No 178 (2006), *Post-legislative Scrutiny*, p 47.

The Law Commission consultation paper reveals that although post-legislative scrutiny of domestic legislation is undertaken at times by Government departments, Parliamentary committees, the Law Commission, the courts and others, the overall picture is that it is not systematic and there are many gaps.¹⁶ However, it is apparent that the momentum for post-legislative scrutiny is increasing. Part of the reason for this is that as a evaluation can be seen as part of current Government's better regulation agenda. Indeed the Government is supportive of the idea. Speaking on behalf of the Government during the House of Lords debate on 6 June 2005, Baroness Amos said:

Parliament and Government have a common interest in strengthening post legislative scrutiny. From the Government's point of view, it could help to ensure that the Government's aims are delivered in practice and that the considerable resources devoted to legislation are committed to good effect.¹⁷

It may be argued that in the context of legislation emanating from the European Union, it is not the 'Government's aims' that are at stake but nonetheless, as will be demonstrated below, there are powerful reasons why post-legislative review of European-derived legislation is at least as desirable as that of domestic legislation, although the purposes and benefits may differ.

¹⁶ *Ibid.*, p 13.

¹⁷ House of Lords Hansard, 6 June 2005, vol 672, no 10, col 769.

PART 2: THE NATURE OF EUROPEAN LEGISLATION

*EU legislation comes into being in what can be called organized chaos where politicians and diplomats have the upper hand while lawyers have a relatively weak position.*¹⁸

The European legislative process

The legislative process in the Community is complex and depends both on the Treaty under which the measure is adopted and on the provision of that Treaty applicable to the case in question.¹⁹ The legislative process is described in great detail in a number of works.²⁰ For the purposes of this paper, it is sufficient to provide an overview of the roles of the Community institutions as a basis for considering the roles they might play in the evaluation of legislation after it has been brought into force. As Craig and de Búrca have noted, the distinguishing characteristic of the different legislative procedures is the degree of power afforded to the European Parliament.²¹ Decision-making within the EU has always been characterised by the institutional balance between the Commission, Council and the European Parliament and it is a balance that is dynamic rather than static and which has changed over time.²² Most legislation of importance passed by the Community now is subject to the co-decision procedure which was introduced by the Maastricht Treaty and amended by the Amsterdam Treaty.²³ This procedure may be summed up as follows²⁴: A proposal is sent by the Commission to both the Parliament and the Council. The Parliament can propose amendments at the first reading of the measure. If the Council approves, the proposed act can be adopted at that stage. If the Council does not approve, it can adopt a 'common position' which is communicated to the Parliament. The Parliament can subsequently agree to the common position at second reading, or not take a decision,

¹⁸ Sandström, G, *Guest Editorial: Knocking EU Law into Shape*, 2003, *Common Market Law Review*, 40, 1307 at 1307-8.

¹⁹ Hartley, T C, (2003), 'The Foundations of European Community Law', 5th edition, Oxford University Press, Oxford, p 41.

²⁰ *Ibid.*, p 41 to 47; Craig, P & de Búrca, G, (2003), 'EU Law: Text, Cases and Materials', 3rd edition, Oxford University Press, Oxford, chapter 4.

²¹ Craig, P & de Búrca, G, (2003), 'EU Law: Text, Cases and Materials', 3rd edition, Oxford University Press, Oxford, p 139.

²² *Ibid.*, at p 175.

²³ Craig, P, *Britain in the European Union*, p 95, in Jowell, J and Oliver, D, (2004), 'The Changing Constitution', 5th edition, Oxford University Press, Oxford, p 92.

²⁴ *Ibid.*

or reject the common position in which case the act will not be adopted. Alternatively, further amendments may be suggested for approval by the Council. If the Council does not approve, a meeting of the Conciliation Committee is convened during which equal numbers of representatives from the Council and Parliament are tasked with reaching an agreement on a joint text. If it is able to do so, this must then be approved by the Parliament and Council. The Commission has the right of legislative initiative, which means that it has a major influence over the development of the Community's legislative agenda. In the context of this paper, the procedure described above forms the backdrop to a very difficult but vital question: how on earth is one to assess the transformation of the original proposal, resulting from the amendments voted by the European Parliament and introduced after the discussions and compromises in the Council?²⁵

How EU legislation ends up in UK domestic law

In order to assist with subsequent analysis, it is pertinent to include here a quick rundown of the main ways in which legislation emanating from the EU ends up in UK domestic law. The Treaty Establishing the European Community contains a number of provisions empowering the institutions of the Communities to make legislation of different kinds. The three main types of legislation are set out in Article 249 (ex Article 189) of that Treaty²⁶:

Article 249

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

²⁵ Gallas, T Gallas, T, *Evaluation in EC Legislation*, Statute Law Review, 2001, Volume 22, Number 2, pp 83 to 95, at 94 to 95.

²⁶ Foster, N, (2005), 'Blackstone's EC Legislation', 16th edition, Oxford University Press, Oxford, p71.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

It can be seen from this Article that Community regulations can be “parachuted into the domestic legal system without [national] parliamentary involvement”.²⁷ On the other hand, the implementation of directives does require the involvement of national Parliaments. This distinction is directly relevant to the issue of where responsibility should lie for the evaluation of European-derived legislation after it has come into force. The distinction also explains the use in the title of this paper of ‘legislation derived from the European Union’ which has been selected in order to include consideration of that secondary legislation which is enacted as a result of the obligation of member states to transpose Community directives into domestic law. It is the directive that is most frequently responsible for inspiring domestic implementing legislation.²⁸ And as will be shown in part 3, the transposition of directives gives rise to particular problems.

The European Communities Act 1972 was enacted by the UK Parliament to endorse the incorporation of Community principles into domestic law. The central plank of the Act is section 2(1) which provides:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the

²⁷ Double, P, *The Impact of European Community Law on the British Legislative Process*, p 77, in Brazier, A, (2004), ‘Parliament, Politics and Law Making: Issues and Developments in the Legislative Process’, Hansard Society, London

United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression ‘enforceable Community right’ and similar expressions shall be read as referring to one to which this subsection applies.

The main way which a directive is given legal effect in the UK is by use of the broad power in section 2(2) of the European Communities Act 1972 which allows for the making of provisions:

- (a) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or
- (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above...

This power is usually exercised by regulations made by a Minister of the Crown.²⁹ Greenberg has noted that despite the constitutional importance and breadth of the power in section 2(2) of the European Communities Act there is nothing unusual or specific about the form of instrument made under it which allows it to be readily identified - on its face it is the same as any other set of regulations made by statutory instrument.³⁰ This point has direct bearing on the issue of whether the purposes of post-legislative scrutiny of European-derived legislation are or should be any different from those in relation to purely domestic legislation.

Volume of EU-derived legislation

Before embarking upon arguments as to why and how post-legislative scrutiny of EU-derived legislation could be improved, it is worth pausing for a moment to gauge the impact that EU-derived legislation has had on the UK. Ascertaining the actual

²⁸ Greenberg, D, (2004), ‘Craies on Legislation’, 8th edition, Sweet & Maxwell, London, p 702.

²⁹ The other way is by Order in Council which is used if the constitutional or professional significance of the instrument is such as to make an Order in Council seen more appropriate – *ibid.*, p 164.

volume of legislation derived from the European Union is a surprisingly elusive task. In a recent Parliamentary question, Lord Stevens of Ludgate asked Her Majesty's Government: "How much of all United Kingdom legislation has its origins in European Union legislation." The Parliamentary Under-Secretary of State of State, Foreign and Commonwealth Office, Lord Triesman replied that:

The UK welcomes the European Commission's continued commitment to the better regulation agenda in particular its rolling programme to simplify existing legislation and the withdrawal so far of around 70 pending proposals. The Government also welcomes the European Council invitation to the Commission to cut administrative burdens on business by 25 per cent.

We estimate that around half of all legislation with an impact on business, charities and the voluntary sector stems from legislation agreed by Ministers in Brussels. Parliamentary analysis of UK statutory instruments implemented annually under the European Communities Act 1972 suggests that on average around 9 per cent of all statutory instruments originate in Brussels.³¹

In 2002, the Cabinet Office had already estimated that about half of all UK legislation which imposes costs on businesses, charities and the voluntary sector originates from the European Union.³² In July 2004, Mr Connarty MP asked a Parliamentary Question the purpose of which was to ascertain the evidential basis for this estimation and received the following answer from the Government: "The evidential base for this statement was an analysis of Regulatory Impact Assessments (RIAs), which showed that about half of measures that imposed non-negligible costs on business, charities and the private sector originated from the European Union."³³ Despite this confirmation from Government, the figure of 50% has been challenged as a distortion. Richard Corbett MEP has reported, on behalf of the European

³⁰ Greenberg, D, (2004), 'Craies on Legislation', 8th edition, Sweet & Maxwell, London, p 165.

³¹ House of Lords Hansard, 29 June 2006, WA 183.

³² Cabinet Office, (October 2002), *Improving the way the UK handles European legislation: Pilot quality assurance study and transposition conference – synthesis report*, p2.

³³ House of Commons Hansard, 22 July 2004, 490W.

Movement, that taken as a whole, the amount of UK legislation that is formed at European level is around 9%.³⁴ This figure is based on a House of Commons Library estimate as detailed in a Written Answer to a Parliamentary Question in 2005.³⁵ It is unclear but certainly unlikely that this figure includes all of the secondary legislation spawned by the requirement to transpose EU Directives. What is clear is that Brussels does produce a huge amount of material. Over a thousand European documents are deposited in Parliament each year.³⁶ In terms of EU legislation, the breakdown for 2005 was that there were 88 new Directives and 461 Regulations, totalling 5583 pages in the Official Journal.³⁷ Although estimates of precisely how much UK domestic law now owes its origins to Europe inevitably involve a degree of empiricism, the influence of Europe on UK law making is now an established fact and is far more broad ranging than was anticipated in the parliamentary debates when the decision to join was made.³⁸

The quality of EU legislation

There are a number of factors, unique to the EU context, that jeopardise the quality of EU legislation. A key point is that quality, per se, has not traditionally been considered a priority. As Dr Helen Xanthaki has observed, the main aim of EU drafters has been to achieve the actual passing of legislation agreed by Member States whose differences in interests and legal systems have rendered the procedure of passing legislation at the EU level a “rather lengthy and painful sequence of sensitive compromises”.³⁹ Gustaf Sandström agrees that the focus on political and diplomatic compromises is partly to blame but also points to the “inadequate resources devoted to legislative drafting”.⁴⁰ Other factors are that it is commonplace for the European Commission’s first draft of an act to be prepared by a technical expert rather than a

³⁴ Corbett, R, (February 2006), European Movement Policy Paper 5, *The EU – Who makes decisions? A guide to the process and the UK’s role*, p 2.

³⁵ House of Commons Hansard, 22 March 2005, WA col. 796-7.

³⁶ House of Commons Select Committee on the Modernisation of the House of Commons, 2nd Report, (2004-05), *Scrutiny of European Business*, HC 465-I, para 4.

³⁷ I am grateful to Mr Charles Carey, Research Counsel, Parliamentary Counsel Office, 36 Whitehall, London, for providing this data, based on information from the Office for Official Publications of the European Communities.

³⁸ Double, P, *The Impact of European Community Law on the British Legislative Process*, p 74, in Brazier, A, (2004), ‘Parliament, Politics and Law Making: Issues and Developments in the Legislative Process’, Hansard Society, London

³⁹ Xanthaki, H, *The Problem of Quality in EU Legislation: What on earth is really wrong?* 2001, *Common Market Law Review*, 38, 651 at 651.

lawyer and that no one person has responsibility for ensuring that the text as a whole hangs together.⁴¹ Another complicating factor, as identified by Timmermans⁴², results from the fact that each legal act must be based upon the legal base granting the relevant competence. Decision-making procedures often vary according to the legal base, making it difficult to use more than one legal base for one act. This may cause legislation to be artificially split up and may therefore increase the risk of inconsistent and incoherent rules. Perhaps the biggest problem is that of language. This was cited more frequently than any other factor during the author's research trip to Brussels. EU legislation applies to 450 million people in 25 countries and exists in 20 languages which all have equal status, meaning that legislation is drafted in all 20 languages, rather than there simply being one original language version and 19 translations. The difficulties are compounded by the fact that due to work arrangements most drafters write in a foreign language.⁴³

In contrast, the UK does not have the same concerns about the drafting quality of its domestic legislation. Sir Edward Caldwell, former First Parliamentary Counsel, has identified a number of arrangements in the UK which have a bearing on the quality of domestic legislation: professional expert legal drafters are employed by the Government to draft all primary legislation and some important or complex subordinate legislation; the distinction between responsibility for the policy underlying legislation and responsibility for preparing the required legislative text is firmly maintained; Government legislation is prepared within the privacy of the government machine which tends to give those responsible for preparing it more room to explore solutions than might otherwise be the case; and except in the case of emergency legislation, the Parliamentary process is long and draft legislation is submitted to close scrutiny, both by the Members of each House of Parliament and by outside interests over many months.⁴⁴

⁴⁰ Sandström, G, *Guest Editorial: Knocking EU Law into Shape*, 2003, *Common Market Law Review*, 40, 1307 at 1309.

⁴¹ *Ibid.*

⁴² Timmermans, C, *How can one improve the quality of Community legislation?* 1997, *Common Market Law Review*, 34, 1229 at 1233.

⁴³ Robinson, W, *How the European Commission drafts legislation in 20 languages*, May 2005, *Clarity*, (Journal of the international association promoting plain language drafting), No. 53, p 4.

⁴⁴ Caldwell, E, *Comments* in Kellerman, A, et al, (1998), 'Improving the Quality of Legislation in Europe', Kluwer, The Hague, pp 79 to 83 at 80.

The differing aims of post-legislative scrutiny in the domestic and EU context

The marked contrast in quality of UK legislation and EU legislation has implications for the purposes of post-legislative scrutiny of both. Professor Mader's legislative methodology⁴⁵ is clearly relevant in both contexts. In terms of the evaluation of UK domestic legislation in the UK, there has been no question and arguably no need for an evaluation of the quality of drafting, rather the focus, as we have seen, is whether the legislation is working in practice as intended.⁴⁶ However, in the EU context, due to the challenges of achieving good quality legislation, evaluation may be seen to have a broader purpose, in also assessing the drafting quality of legislation as well as its practical operation. This analysis roughly equates to the identification by Jean-Claude Piris of two aspects of the quality of Community legislation.⁴⁷ The first aspect concerns the substance of the law, which relates to legislative policy and the second aspect is the form of legislation which concerns the quality of legislative drafting and accessibility. Using these terms, it is arguable that post-legislative scrutiny of EU legislation should concern substance and form whereas the emphasis of post-legislative of UK legislation is predominantly on substance. At the intersection, a further dimension is that of the particular challenges relating to UK domestic scrutiny of legislation derived from the EU, which is prepared at EU level and then implemented at domestic level. The scrutiny challenge of this type of legislation is considered next in Part 3.

⁴⁵ See p 7 above.

⁴⁶ See p 10 above.

⁴⁷ Piris, J-C, *The Quality of Community Legislation: The Viewpoint of the Council Legal Service*

PART 3: UK SCRUTINY OF EU-DERIVED LEGISLATION

Given the gargantuan size of their task, the [European scrutiny committees of the UK Parliament] do a sterling job, but their work is often not given the attention it deserves, either in Parliament or further afield.⁴⁸

Early responses to the scrutiny challenge of the ‘new legal order’

In order to understand the adequacy of scrutiny at domestic level, it is helpful to consider briefly the reaction of the UK Parliament to the challenges presented by the ‘new legal order’ brought in by membership of the European Economic Community. In 1963, the European Court of Justice ruled that the European Community, through the express will of Member States in the Treaty of Rome, "constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights albeit within limited fields and the subjects of which comprise not only the Member States but also their nationals".⁴⁹ The United Kingdom entered into the European Economic Community on 1 January 1973. Interestingly, neither the Treaty of Accession nor the European Communities Bill made any mention of Parliamentary scrutiny of European legislation. One reason cited for this is that the constitutional basis of the EEC and the evolution of its institutions from 1957 to 1972 were alien to the United Kingdom.⁵⁰ However, the ‘new legal order’ meant that “for the first time a substantial volume of legislation effective in the United Kingdom is now adopted by a process in which Parliament appears to have no indispensable constitutional role”.⁵¹ As a cautious approach to procedural innovation has always been a powerful British parliamentary tradition⁵², it is perhaps unsurprising that it was only after the European Communities Act 1972 became law that each House of

⁴⁸ Jones, Sir D, (2005) *UK Parliamentary Scrutiny of EU Legislation*, The Foreign Policy Centre, London, p 3. Available at <http://fpc.org.uk/fsblob/432.pdf> (last visited 5 September 2006).

⁴⁹ Case 26/62 *Algemene Transport-en Expeditie Onderneming van Gend en Loos NV v Nederlandse Belastingadministratie* [1963] ECR 1.

⁵⁰ Blackburn, R & Kennon, A, (2003), ‘Griffith & Ryle on Parliament: Functions, Practice and Procedures’, 2nd edition, Sweet & Maxwell, London, p 646.

⁵¹ Bates, T.St.John N, *The Scrutiny of European Secondary Legislation at Westminster (1975-76)* 1 *European Law Review* 22.

⁵² *Ibid.*, at p24.

Parliament appointed separate select committees to suggest procedures for parliamentary scrutiny.⁵³

By 1974, special committees had been set up by both Houses of Parliament.⁵⁴ These provided a means of scrutinising EC activity. However, as Professor the Lord Norton of Louth has observed, Parliament was developing the means to engage in a form of pre-legislative scrutiny.⁵⁵ This differed from our current UK understanding of pre-legislative scrutiny⁵⁶ in that the UK Parliament was operating at one remove from the actual decision-makers and furthermore, there was nothing beyond the pre-legislative stage – there was no legislative stage for the UK Parliament and it was not called upon to give its assent to measures promulgated by Community institutions.⁵⁷ This observation may beg the question that if there is no formal legislative stage for which national Parliaments are responsible, can there and should there be a post-legislative stage? This question will be addressed below, but first it is necessary to assess the scrutiny that is currently undertaken by the UK Parliament.⁵⁸

Pre-legislative scrutiny of EU-derived legislation

The main purpose of the scrutiny system in the House of Commons is to ensure that the House of Commons has the opportunity to seek to influence UK Ministers on EU proposals and to hold UK Ministers to account for their activities in the Council of Ministers. It is only UK Ministers who are directly accountable to the House of Commons; none of the institutions of the European Union, not even the Council of Ministers collectively, is answerable to any national parliament.⁵⁹ In the House of Commons, scrutiny work of EU documents is now undertaken by the European Scrutiny Committee, the remit of which is to “assess the legal and/or political importance of each EU document, decide which EU documents are debated, monitor

⁵³ Blackburn, R & Kennon, A, (2003), ‘Griffith & Ryle on Parliament: Functions, Practice and Procedures’, 2nd edition, Sweet & Maxwell, London, p 647.

⁵⁴ Bradley A W & Ewing K D, (2003) ‘Constitutional and Administrative Law’, 13th edition, Longman, Harlow, England, p 138.

⁵⁵ Norton, P, (2005), ‘Parliament in British Politics’, Palgrave Macmillan, London, p 139.

⁵⁶ See above at p X of this paper.

⁵⁷ Norton, P, (2005), ‘Parliament in British Politics’, Palgrave Macmillan, London, p 139.

⁵⁸ For a historical analysis of the scrutiny methods adopted by Parliament between 1972 and 1993, see Denza, E, *Parliamentary Scrutiny of Community Legislation* (1993) 14 Statute Law Review 56.

⁵⁹ Department of the Clerk of the House, (June 2005), *The European Scrutiny System in the House of Commons. A short guide for Members of Parliament by the staff of the European Scrutiny Committee*, p 12. Available at <http://www.parliament.uk/documents/upload/TheEuroScrutinySystemintheHoC.pdf>

the activities of UK Ministers in the Council, and keep legal, procedural and institutional developments in the EU under review”.⁶⁰ In practical terms, this involves the analysis of all 1,000 or so documents that are deposited in the UK Parliament each year.⁶¹ Originally, the Scrutiny Committee considered legislative proposals from the European Commission, but the wide ambit of ‘documents’ in its terms of reference also includes consultation papers, proposed common positions and joint actions under the second and third pillars of the EU, the draft of the annual budget and related matters.⁶² An Explanatory Memorandum, signed by a Government Minister, accompanies each document and sets out the Government’s policy on the document and its impact on the UK. Objectively, the system provides for wide coverage, rapid scrutiny where necessary and a published analysis of all documents found to be of legal and political importance.⁶³ Documents can be referred for further consideration by one of the three European Standing Committees in the House of Commons. The format of these Committees allows for the questioning of the responsible Minister and debate and attendance (but not voting) is allowed by any Member of the House of Commons.⁶⁴

A different scrutiny system exists in the House of Lords. The formal terms of reference of the House of Lords European Union Select Committee are "to consider European Union documents and other matters relating to the European Union".⁶⁵ The EU Committee consists of a single Select Committee and 7 Sub-Committees which deal with specific EU policy areas. The Chairman of the Select Committee conducts a weekly ‘sift’ of all of the EU documents deposited in Parliament and decides which should be referred to the sub-committees. About a quarter of all the EU documents are

(last visited 2 September 2006).

⁶⁰ From the homepage of the European Scrutiny Committee:
http://www.parliament.uk/parliamentary_committees/european_scrutiny.cfm (last visited 2 September 2006).

⁶¹ House of Commons Select Committee on the Modernisation of the House of Commons, 2nd Report, (2004-05), *Scrutiny of European Business*, HC 465-I, para 4.

⁶² Norton, P, (2005), ‘Parliament in British Politics’, Palgrave Macmillan, London, p 140.

⁶³ *Ibid.*, para 20.

⁶⁴ Department of the Clerk of the House, (June 2005), *The European Scrutiny System in the House of Commons. A short guide for Members of Parliament by the staff of the European Scrutiny Committee*, p 4. Available at <http://www.parliament.uk/documents/upload/TheEuroScrutinySystemintheHoC.pdf> (last visited 2 September 2006).

⁶⁵ From the homepage of the House of Lords European Union Select Committee:
http://www.parliament.uk/parliamentary_committees/lords_eu_select_committee.cfm (last visited 2 September 2006).

referred to the sub-committees.⁶⁶ The sub-committee may simply take note of the document, or may conduct a more substantial enquiry and draft a report or write letters to Ministers. The House of Lords system therefore allows for more detailed scrutiny of selected documents. The different working methods in the two Houses means that their scrutiny systems are “complementary rather than competing”.⁶⁷

The scrutiny systems in both Houses of Parliament are underpinned by the Scrutiny Reserve Resolution. Although it existed in earlier forms, the current text was agreed in 1998. It is intended to ensure that Ministers do not agree to EU legislation in Council unless the scrutiny work of the committees is complete.⁶⁸

It is pertinent to question the value of these procedures. Writing in 1993, Denza thought that the value of the scrutiny process is in part that it forces those with more direct power to consider their positions and their arguments carefully and to defend them in the face of public questioning by a committee whose members may have long experience of the subject-matter involved.⁶⁹ Other commentators have expressed greater cynicism. Writing ten years later, Bradley and Ewing wrote that while the procedures no doubt ensure that at least some Parliamentarians are well informed about European issues, “in no sense do they provide effective scrutiny of EC legislation”.⁷⁰ Bradley and Ewing then proceed to draw on the comments of the House of Commons Procedure Committee which they imply were as relevant in 2003 as in 1978 when they were first published:

The ability of the House to influence the legislative decisions of the Communities is inhibited by practical as well as legal and procedural obstacles. The practical obstacles stem from the sheer volume of EEC legislation, the complexity of the Community’s

⁶⁶ House of Lords Select Committee on the European Union, 1st Report, (2002-03), *Review of Scrutiny of European Legislation*, HL Paper 15, p 11.

⁶⁷ Department of the Clerk of the House, (June 2005), *The European Scrutiny System in the House of Commons. A short guide for Members of Parliament by the staff of the European Scrutiny Committee*, p 4. Available at <http://www.parliament.uk/documents/upload/TheEuroScrutinySystemintheHoC.pdf> (last visited 2 September 2006).

⁶⁸ House of Lords Select Committee on the European Union, 1st Report, (2002-03), *Review of Scrutiny of European Legislation*, HL Paper 15, p 10.

⁶⁹ Denza, E, *Parliamentary Scrutiny of Community Legislation* (1993) 14 Statute Law Review 56 at 62.

own decision-making structure, and the very limited time available for the consideration of many of the proposals, including some of the most important. The legal and procedural obstacles include the fact that national parliaments have no right to be consulted, and the absence of direct control by national parliaments over legislation made by the Commission on its own authority. Moreover, the collective nature of decisions by the Council of Ministers necessarily weakens the responsibilities of the Government to Parliament for Council decisions to which they assent.⁷¹

Another problem with the scrutiny system is that “MPs are not overly eager to take on such unglamorous work and those who do participate in the standing committees are often extreme partisans on one side or the other of the domestic European debate”.⁷² This view is confirmed by a former Leader of the House of Commons, Peter Hain, who stated in 2004 that:

...the sad fact is that European Scrutiny is something of a minority interest: the great majority of Members take little interest in the reports of the European Scrutiny Committee or in the debates which it recommends. Meetings of the European Standing Committee...are badly attended and seen to be irrelevant. European issues are seen as something separate and avoidable, while they should be in the mainstream of our political life...There is a worrying and widening gap between our citizens and the institutions of the European Union; and this is not good for our democracy.⁷³

⁷⁰ Bradley, A W & Ewing, K D, (2003), ‘Constitutional and Administrative Law’, 13th edition, Longman, Harlow, England, p 138.

⁷¹ HC SO 119 as cited *ibid*.

⁷² Adonis, A (1993), ‘Parliament Today’, 2nd edition, p 156, as cited in Craig, P, *Britain in the European Union*, p 95, in Jowell, J and Oliver, D, (2004), ‘The Changing Constitution’, 5th edition, Oxford University Press, Oxford.

⁷³ House of Commons Select Committee on the Modernisation of the House of Commons, (2003-04), *Scrutiny of European Matters in the House of Commons: Government Memorandum from the Leader of the House of Commons*, HC 508, p 1.

There is general consensus among scholars and observers alike that the European Union has weakened national parliaments.⁷⁴ The UK Parliament is not alone in facing the scrutiny challenge of the new legal order. It is clear that due to the voluminous number of draft legal acts from Brussels, members of national parliamentary committees are only able to take a selective approach, thus rendering national parliaments “reactive institutions” in the EU legislative process.⁷⁵ However, in comparison with other member states, it has been contended that the UK Parliament’s system of scrutinising EU business is one of the most effective.⁷⁶ The so-called ‘Nordic Model’ is also often cited as providing a particularly thorough degree of scrutiny of EU matters. This was considered by the House of Commons European Scrutiny Committee. In Denmark, Finland and Sweden, the Parliaments all mandate their Governments to conduct negotiations in the Council, reflecting a consensual style of policy making.⁷⁷

Post-legislative scrutiny of EU-derived legislation

At this juncture, the reader could be forgiven for wondering what hope there is for post-legislative scrutiny of EU legislation, against the backdrop of limitations highlighted at the pre-legislative stage and the non-existence of a legislative stage in the domestic context. However, those very factors strengthen the arguments in favour of national review of EU derived legislation.

Lord Grenfell, Chairman of the House of Lords European Union Committee gave written evidence on behalf of his committee to the House of Lords Constitution Committee for its report, *Parliament and the Legislative Process*. He noted that:

As far as post-legislative scrutiny is concerned, the closest we come to this is when we call Ministers to account after they have

⁷⁴ Duina, F & Oliver, M, *National Parliaments in the European Union: Are There Any Benefits to Integration?* European Law Journal, Vol. 11, No.2, March 2005, 173-195, at 173. The authors of that article agree that this proposition is generally accurate but also put forward benefits of integration for national parliaments, a discussion of which is beyond the scope of this paper.

⁷⁵ Maurer, A et al, *National Systems’ Adaption to the EU System: Trends, Offers and Constraints*, p 73, in Kohler-Koch, B, (2003), ‘Linking EU and National Governance’, 1st edition, Oxford University Press, Oxford.

⁷⁶ Hansard Society Briefing Paper, *Issues in Law Making*, 8: Scrutiny of European Union Business, (February 2006), p 4.

agreed measures in the Council. I should perhaps only comment here that it must be a key theme of any post-legislative scrutiny... that one of its primary purposes be to hold Ministers to account for the success of their legislative and other initiatives.⁷⁸

Some of the inquiry work of parliamentary committees at Westminster does cover the implementation of legislation derived from the European Union. For example, the Environment, Food and Rural Affairs Committee has considered the transposition of the End of Life Vehicles Directive and the Waste Electrical and Electronic Equipment Directive and the implementation CAP reform in the UK. However, there is not very much to examine in this section as overall, it may be observed that there is very little UK parliamentary post-legislative scrutiny of legislation derived from the EU, although it may be argued that the need is great, particularly with regard to instruments that transpose Directives.

Transposition of EU Directives into UK law

The transposition of EU Directives into domestic law poses particular problems for Member States including the UK. It has been observed by Timmermans that with regard to Directives, “sometimes the Community legislator deliberately uses vague notions (or vague definitions) in order to allow for a large variety of solutions existing in Member States for which harmonization was not deemed necessary”.⁷⁹ Conversely, Craig and de Búrca argue that Directives are not vague and that the ends which Member States have to meet will be set out in considerable detail.⁸⁰ Some may hold the view that precise wording is not so important since a Directive has to be transposed at the national level, but the stronger, refuting argument is that this proposition “disregards the fact that national law must be interpreted in conformity with the directive, which will in any event often take precedence by virtue of the

⁷⁷ House of Lords Select Committee on the European Union, 1st Report, (2002-03), *Review of Scrutiny of European Legislation*, HL Paper 15, p 56.

⁷⁸ House of Lords Select Committee on the Constitution, 14th Report, (2003-04), *Parliament and the Legislative Process*, HL 173-II, p 147.

⁷⁹ Timmermans, C, *How can one improve the quality of Community legislation?* 1997, *Common Market Law Review*, 34, 1229 at 1232.

⁸⁰ Craig, P & de Búrca, G, (2003), *EU Law Text, Cases and Materials*, 3rd edition, Oxford University Press, Oxford, p 115.

principle of direct effect.”⁸¹ Directives, in contrast to Regulations, require particular attention by national authorities as they merely set aims allowing national authorities to exercise their autonomy in the process of implementation; however the autonomy is not boundless and national authorities must ensure full application in fact and law.⁸² It is also worth recalling that the European Court of Justice has held that Directives have direct effect, enabling individuals to rely on them in actions against the State and that a Member State can be liable in damages for non-implementation of a directive.⁸³

In 2003 Robin Bellis prepared a report on the implementation of EU legislation and compared approaches to transposition of Directives by the UK, France, Spain and Sweden.⁸⁴ He noted that all Member States had problems from time to time with transposition. However, he found that while France, Spain and Sweden were inclined to copy out the provisions of the Directive into domestic law, without modification, the UK was more prone to elaboration of the provisions of the Directive.⁸⁵ The British media has picked up on this phenomenon of over-implementation by the UK, citing examples such as the 12 page Abattoirs Directive which the UK Government transformed into 96 pages of implementing regulations while the French were able to do it in seven.⁸⁶ The Financial Times also reported recently that small businesses in the UK are adversely affected by the overuse of EU rules.⁸⁷ In its report on the scrutiny of European business, the House of Commons Modernisation Committee considered the criticism often levied against the UK, that it is over-zealous in its transposition of EU Directives into domestic law.⁸⁸ In his evidence to the Modernisation Committee for this inquiry, Chris Huhn MEP summed up the complaint of elaboration or “gold-plating” as follows: “During [the transposition] process, it is quite possible for [Government] departments to hang all sorts of

⁸¹ Sandström, G, *Guest Editorial: Knocking EU Law into Shape*, 2003, *Common Market Law Review*, 40, 1307 at 1310.

⁸² Xanthaki, H, *Transposition of EC Law for EU Approximation and Accession*, 2006, *European Journal of Law Reform*, Vol VII, no 1/2, pp 89 to 110 at 103. (This article is yet to be published – I am grateful to Dr. Helen Xanthaki for kindly providing an advance copy).

⁸³ Craig, P & de Búrca, G, (2003), *EU Law Text, Cases and Materials*, 3rd edition, Oxford University Press, Oxford, p 115.

⁸⁴ Bellis, R, (November 2003), *Implementation of EU Legislation: An independent study for the Foreign and Commonwealth Office*.

⁸⁵ *Ibid.*, p 16.

⁸⁶ O’Keefe, J, *Making a silk purse out of a sow’s ear*, 6 April 2006, *Law Society Gazette*, p 14.

⁸⁷ Willman, J, *UK small businesses hit by overuse of EU rules*, 6 September 2006, *Financial Times*, p 3.

⁸⁸ House of Commons Select Committee on the Modernisation of the House of Commons, 2nd Report, (2004-05), *Scrutiny of European Business*, HC 465-I, para 102.

decorations onto the Christmas tree before it arrives as a statutory instrument.”⁸⁹ As Robin Bellis noted, this is sometimes deliberately as a matter of policy and in the “spirit of helpfulness – to make the scope of the rights conferred clear or preserve the integrity of the statute book”⁹⁰ However, Bellis argues that the negative side is that elaboration of Directives is unhelpful and misleading and can give false comfort to those affected when the elaboration can be set aside by courts in implementing the direct effect of the Directive provision.⁹¹

In order to help address the problem of over-implementation, the Cabinet Office in 2005 published a Transposition Guide for use by Government departments. It states that: “It is Government policy not to go beyond the minimum requirements of European directives, unless there are exceptional circumstances, justified by a cost-benefit analysis and extensive consultation with stakeholders.”⁹² In 2003, the House of Lords Select Committee on the Merits of Statutory Instruments was set up to consider every statutory instrument which is laid before each House of Parliament. The Committee can decide whether to draw special attention of the House to a particular instrument on a number of grounds including whether the instrument, “inappropriately implements European Union legislation”.⁹³ The Committee argued that the Horse Passports (England) Regulations 2004 fell into this category.⁹⁴ They were introduced to implement a Directive intended to protect the human food chain and the trade in pedigree horses. The regulations were drafted in such a way as to require 800,000 horses to be issued with passports, whereas the total number that actually fell into the categories to be protected, the Committee argued, was more like 210,000. The Minister argued that the regulations did not in fact go beyond the requirements of the relevant Directive and the domestic regulations are now in force. This example brings home very keenly, it is argued, the case for looking back to see whether in fact the method of implementation by the UK has proved to be more

⁸⁹ *Ibid.*

⁹⁰ Bellis, R, (November 2003), *Implementation of EU Legislation: An independent study for the Foreign and Commonwealth Office*, p 16.

⁹¹ *Ibid.*

⁹² Regulatory Impact Unit, Cabinet Office, (March 2005) *Transposition Guide: how to implement European directives effectively*, p 17.

⁹³ House of Lords Select Committee on the Merits of Statutory Instruments, 1st Special Report, (2003-04), *Inquiry into Methods of Working*, HL 18.

⁹⁴ See summary in House of Commons Select Committee on the Modernisation of the House of Commons, 2nd Report, (2004-05), *Scrutiny of European Business*, HC 465-I, para 105.

burdensome than originally intended by the framers of the Directive and if so, what lessons can be drawn for future implementation. There is an evaluation gap here as such review is not routinely undertaken, although it would certainly be beneficial.

As noted above⁹⁵, there is nothing unusual or specific about the form of instrument usually used to transpose Directives into UK domestic law; on their face they are the same as any other set of regulations made by statutory instrument. It therefore right to question whether any different considerations should come into play when making the case for post-legislative scrutiny of legislation derived from the EU, as against domestically derived legislation. Lord Filkin, Chairman of the House of Lords Select Committee on the Merits of Statutory Instruments has shed light on the distinction:

...there is a significant difference between our ability to have purchase on statutory instruments that originate from EU legislation compared to those that originate from the UK Parliament. In the latter case, it is conceivable that, in the light of our scrutiny, Departments could make significant changes to the ways in which they implement regulation emanating from statute. In the case of EU-originating legislation, the purchase of the Lords or the UK Parliament is much more limited.⁹⁶

Although the Merits Committee is concerned with the scrutiny of legislation at the pre-legislative stage, the relevance of this distinction can be extrapolated to the post-legislative stage and serves to highlight the particular importance of undertaking post-legislative scrutiny of EU derived legislation.

In the latest acknowledgement of the need to address the problems associated with the transposition of Directives, the Government has commissioned an evaluative project which is currently being undertaken and which is headed by the former Solicitor General for Scotland, Lord Davidson QC. The Davidson Review is scrutinising areas of existing EU-derived legislation for evidence of over-implementation in the UK and

⁹⁵ See p 15 above.

aims to support the productivity of the UK economy by ensuring that EU legislation has not been implemented in a way that results in unnecessary regulatory burdens.⁹⁷ The review is supported by the Better Regulation Executive within Cabinet Office and early in 2006, called for evidence of ‘over-implementation’ of EU legislation. In July 2006, an interim report summarising the responses to the call for evidence was published.⁹⁸ The report explains that over-implementation is a broad term that encompasses not just gold plating but also double banking and regulatory creep.⁹⁹ Double banking is where European legislation covers similar ground to that of existing UK legislation but where the two regimes have not been fully streamlined in the implementation process to consolidate all linked instruments, aims, objectives, obligations and enforcement mechanisms to make them simple and consistent with each other. Regulatory creep is where requirements imposed by the regulator are unclear, more stringent than their equivalents in the implementing legislation or where there is confusion as to their legal status and hence the necessity for those regulated to comply with them. Arguably the Davidson Review itself may be seen as a form of post-legislative scrutiny. As the interim report notes, “the critical issue is whether or not the UK has implemented European legislation effectively and in the least burdensome way possible for achieving its objectives”.¹⁰⁰ The review is a welcome development and it may be that when the final report is published, it will provide a framework or at least guidance for the way in which the UK implementation of EU legislation can be monitored in a more systematic way.

Evaluation as part of better regulation

In 1997, the Better Regulation Task Force¹⁰¹ was set up as an independent body to advise the Government on action to ensure that regulation and its enforcement accord with the five principles of good regulation: proportionality, accountability,

⁹⁶ Letter from Lord Filkin, Chairman of the House of Lords Select Committee on the Merits of Statutory Instruments, as published in House of Lords Select Committee on the European Union, 9th Report, (2005-06), *Ensuring Effective Regulation in the EU*, HL Paper 33, Appendix 2, p 37.

⁹⁷ http://www.cabinetoffice.gov.uk/regulation/reviewing_regulation/davidson_review/ (last visited 9 September 2006).

⁹⁸ *Davidson Review: Summary of responses to call for evidence* (July 2006)

http://www.cabinetoffice.gov.uk/regulation/reviewing_regulation/davidson_review/summary.asp (last visited 9 September 2006).

⁹⁹ *Ibid.*, p 8.

¹⁰⁰ *Davidson Review: Summary of responses to call for evidence* (July 2006), p 9.

http://www.cabinetoffice.gov.uk/regulation/reviewing_regulation/davidson_review/summary.asp

consistency, transparency and targeting.¹⁰² In March 2005, the Better Regulation Task Force published 'Regulation - Less is More' which recommended radical reforms aimed at reducing regulatory burdens. The Report described one of the important changes that the Government needed to make to the existing machinery for managing its regulatory programme as follows:

Departments and regulators should undertake more frequent and better post-implementation reviews of regulation, including reviews of how the UK has implemented EU law. Such reviews should assess whether the measure is working as expected, whether the costs and benefits are as predicted, whether there have been unintended consequences and whether there is scope for simplification. The results of these reviews should feed into future policy making and simplification proposals.¹⁰³

This sensible reasoning clearly demonstrates one way in which evaluation can be seen as a part of better regulation. The fact that evaluation is recognised as part of better regulation is a positive development for the potential of post-legislative scrutiny of legislation derived from the EU. This is because the concept of better regulation enjoys broad support from the Government.¹⁰⁴ This is evidenced by the acceptance by the Government¹⁰⁵ of all of the recommendations made by the Better Regulation Task Force in its Report, including Recommendation 3, which was based on the reasoning above:

The Task Force recommends that, by September 2006, all departments, in consultation with stakeholders, should develop a rolling programme of simplification to identify regulations that can be simplified, repealed, reformed and/or consolidated. The simplification programmes should include:

¹⁰¹ The Task Force was put on a permanent footing in January 2006 and renamed the Better Regulation Commission.

¹⁰² See <http://www.brc.gov.uk> (last visited 9 September 2006).

¹⁰³ Better Regulation Task Force, (March 2005), *Regulation – Less is More. Reducing Burdens, Improving Outcomes. A BRTF report to the Prime Minister*, p 33.

¹⁰⁴ There is a dedicated Better Regulation Executive within Cabinet Office. See <http://www.cabinetoffice.gov.uk/regulation/> (last visited 9 September 2006).

¹⁰⁵ Better Regulation Executive, (July 2005), *Formal Government Response to 'Regulation – Less is More. Reducing Burdens, Improving Outcomes' – A Better Regulation Task Force Report*, p 8.

- proposals to reduce administrative burdens,
- revisiting the implementation of EU directives, particularly framework directives.

Departments should undertake post-implementation reviews of all major pieces of legislation, the results of which should feed into their rolling simplification programme...

In accepting this recommendation, the Government added that, “when undertaking a post implementation review, departments should consider the scope for simplification, including revisiting EU Directives as part of the European programme of simplification where relevant”.¹⁰⁶ The last part of this sentence indicates a very welcome willingness to connect with better regulation initiatives at the EU level, which are considered in Part 4 of this paper.

The link between impact assessment and evaluation

It is important to consider the extent to which Government departments (as opposed to Parliament) are already obliged to undertake post-legislative review of legislation derived from the European Union. The role of regulatory impact assessments, (RIAs) provides the key to this analysis. RIAs were introduced in 1998 in an 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” and about 160 RIAs are issued by Government departments each year.¹⁰⁷ The Cabinet Office Better Regulation Executive Guidance on RIAs¹⁰⁸ recommends that RIAs should address post-implementation review; the purpose of such a review is described as being to establish “whether implemented regulations are having the intended effect and whether they are implementing policy objectives efficiently. The [review] is not intended to review the effects of the policy itself or to determine whether the intended policy is still desirable”.¹⁰⁹ It is worth noting three points in relation to RIAs. First,

¹⁰⁶ *Ibid.*, at p 9.

¹⁰⁷ Hansard Society Briefing Paper, Issues in Law Making, 7: *European Union Legislation: The Regulatory Environment*, (October 2005), p 5.

¹⁰⁸ http://www.cabinetoffice.gov.uk/regulation/ria/ria_guidance/post_implementation_review.asp (last visited 9 September 2006).

¹⁰⁹ *Ibid.*

that the primary purpose of the RIA is to provide “a framework for analysis of the likely impacts of a policy change and the range of options for implementing it”.¹¹⁰ Second, the RIA is not updated to reflect changes that may be made during the legislative process, including amendments to Bills. The RIA is, as Robert Baldwin has described, “ a pre-implementation tool”.¹¹¹ Third, the RIA is governed by guidance only, which is not followed in every case. This last point is confirmed by the National Audit Office which monitors the quality of RIAs and reported recently that from its sample of ten RIAs, six did not give any details of monitoring and evaluation procedures.¹¹² Despite these limitations, the potential usefulness of the RIA procedure in relation to post-legislative scrutiny should not be underestimated. This potential is slowly becoming recognised.

In its most recently published evaluative report on RIAs¹¹³, the National Audit Office found, once again, that monitoring and evaluation are “often tackled poorly” and stated that: “Robust monitoring and evaluation strategies will help departments to identify those regulations which are effective, those that need to be adjusted, and those which can be removed without compromising benefits”.¹¹⁴ The National Audit Office report also addressed the use of ex post evaluation and stated that Government departments had concentrated on ex-ante impact assessment, with limited efforts to evaluate the impact of legislation after it comes into force, and concluded that: “Departments do not, therefore, have sufficient oversight of whether their regulations are delivering the intended impacts and there is no systematic feedback on the robustness of the assumptions used in the RIA”.¹¹⁵ However, as Robert Baldwin has observed, “it is arguable that the RIA is seen as the key regulatory tool by the UK Government, the European Union and the OECD”.¹¹⁶ In making the link between evaluation and better regulation, Baldwin goes on to conclude that, “advancing towards smarter regulation may require... a new emphasis on post-implementation review and adjustment”, however he warns that: “In multi-actor, multi-strategy

¹¹⁰ <http://www.cabinetoffice.gov.uk/regulation/ria/overview/index.asp> (last visited 9 September 2006)

¹¹¹ Baldwin, R, *Is Better Regulation Smarter Regulation* (2005) Public Law Autumn 485 at 511.

¹¹² National Audit Office, *Evaluation of Regulatory Impact Assessments Compendium Report* (2004-05) HC 341, p 22.

¹¹³ National Audit Office, *Evaluation of Regulatory Impact Assessments 2005-06*, HC 1305, p 13.

¹¹⁴ *Ibid.*, at p 20.

¹¹⁵ National Audit Office, *Evaluation of Regulatory Impact Assessments 2005-06*, HC 1305, p 13.

¹¹⁶ Baldwin, R, *Is Better Regulation Smarter Regulation* (2005) Public Law Autumn 485 at 490.

networks of regulation...the tools of such evaluation and adjustment will have to be used with an awareness of their limitations – an awareness that is not less than should be applied to pre-implementation tools such as the RIA”.¹¹⁷

The evaluation gap

The analysis in this part has shown that while there is a growing awareness of the need for post-legislative scrutiny of legislation derived from the EU, there is not yet much evidence of this taking place in practice. There is an evaluation gap which falls at the post-implementation stage, which means that the reiterative learning as described by Professor Mader in his legislative methodology cannot take place effectively. However, the realisation of evaluation as a critical part of better regulation is in itself a positive development and the growing culture of impact assessment represents a step in the right direction in terms of evaluation. The next question is how much of the responsibility for evaluation of EU legislation should be assumed at EU level, by the Community institutions themselves. This is considered next in part 4.

¹¹⁷ *Ibid.*, at 511.

PART 4: POST-LEGISLATIVE SCRUTINY IN THE EUROPEAN UNION

*At European level thought should be given on how to insert monitoring into all stages of the law-making process. However, the first step is for all of the authorities concerned to become aware of the problem.*¹¹⁸

The journey towards recognition of evaluation as part of better regulation in the European Union

The Lisbon Agenda was formulated in 2000 when the EU “set itself a new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world”.¹¹⁹ Although the concept of better regulation was not specifically mentioned in the Presidency Conclusions, the Lisbon Agenda in requiring an optimal regulatory environment in order to achieve its macroeconomic goals and social objectives, gave rise to the better regulation initiative.¹²⁰ By the end of 2001, the Mandelkern Group on Better Regulation had published their final report.¹²¹ The Report identified better regulation as “a drive to improve the policymaking process through the integrated use of effective tools” and made recommendations in seven key areas: “policy implementation options, impact assessment, consultation, simplification, access to regulation, structures and implementation of European regulation”.¹²² Although, perhaps surprisingly, evaluation did not feature as a “key area” in the Report, the Group were asked to make proposals on specifying a common method for evaluating the quality of regulation. The Group declined to do so, considering that, although examining policy implementation options, performing regulatory impact assessment and conducting consultation formed a common method of ex ante evaluation, it is “currently not possible to extend this to ex post evaluation given the great differences in national structures, legal systems and institutional

¹¹⁸ Gallas, T, *Evaluation in EC Legislation*, Statute Law Review, 2001, Volume 22, Number 2, p 95.

¹¹⁹ Presidency Conclusions, Lisbon European Council, 23 –24 March 2000, p 2.

¹²⁰ Allio, L & Fandel, M-H, European Policy Centre Working Paper No. 25, *Making Europe work: improving the transposition, implementation and enforcement of EU legislation*, June 2006, p 8.

¹²¹ Mandelkern Group on Better Regulation Final Report 13 November 2001.

¹²² *Ibid.*, p ii - iii.

arrangements”.¹²³ However, the Group did give some guidance and stated that, when done well, ex post evaluation “provides clear information on the effectiveness and appropriateness of the regulation, disclosing weaknesses and other shortages, enabling the review to decide what action, if any, to take”.¹²⁴ Ex post evaluation, the Report went on to suggest, could be carried out in the context of a simplification programme, or when new regulation is being prepared. It is clear that evaluation, per se, was not given high priority in the Report. It reflects a tendency at EU level to sideline evaluation, rather than treat it as a desirable contribution to better regulation and better legislation in its own right. This approach can be seen again in the 2003 Interinstitutional Agreement on Better Lawmaking in which the European Parliament, the Council and the Commission agreed to improve the quality of law-making by means of a series of initiatives and procedures.¹²⁵ Under the heading of “Improving the quality of legislation”, the Agreement states that:

The three Institutions, exercising their respective powers, will ensure that legislation is of good quality, namely that it is clear, simple and effective. The Institutions consider that improvements of the pre-legislative consultation process and more frequent use of impact assessments (both ex ante and ex post) will help towards this objective.¹²⁶

This statement discloses an ambiguity - it is not clear whether the reference to ex post assessment is intended to refer to evaluation of the legislation or to evaluation of the ex ante impact assessment. Assuming it is the former, the statement provides a link between evaluation and the quality of legislation, in the sense of its substance – whether it is effective, and its form – whether it is clear and simple. The link was spelled out more explicitly by the European Economic and Social Committee (EESC) in its report on better implementation of EU legislation¹²⁷, an own-initiative opinion in which the Committee stated that: “The EESC considers implementation and

¹²³ *Ibid.*, p 11.

¹²⁴ Mandelkern Group on Better Regulation Final Report 13 November 2001, p 12.

¹²⁵ Council of the European Union, Interinstitutional Agreement on better law-making, OJ 2003, C321/1, 23 September 2003.

¹²⁶ *Ibid.*, at p 10.

¹²⁷ Opinion of the European Economic and Social Committee on How to improve the implementation and enforcement (own-initiative opinion), INT/262, Brussels, 28 September 2005.

enforcement of legislation to be inextricable elements of better lawmaking and therefore a political priority...screening of existing and already implemented EU law will be helpful in the process of better lawmaking. This is an illustrative example of the interaction between simplification and improving implementation and enforcement”.¹²⁸ Importantly, the McCarthy Report on implementation has very recently noted that: “Better regulation for the Internal Market is about ensuring good quality, effective legislation, which does not stifle innovation and lead to unnecessary burden and costs, in particular for SMEs, public authorities or voluntary groups”.¹²⁹ The McCarthy Report was followed up by the Frassoni Report¹³⁰, which noted that the correct and swift implementation of European legislation is an integral and essential part of better regulation. However, that Report also acknowledges that the quality of legislation and the clarity of obligations for Member States is often not satisfactory owing to fact that legislation is often the result of difficult political compromises.¹³¹ This echoes the particular scrutiny challenges that arise in relation to European legislation as discussed in part 2 of this paper.

These developments show how the concepts of better lawmaking, better regulation and evaluation have been interwoven by different contributions to the debate. The European Policy Forum has noted that although better regulation has been recognised as an important part of the Lisbon Agenda, “there are signs that it has become more a fashionable and popular buzzword that goes down well with the general public and with business than a genuine concept which is being vigorously implemented”.¹³² The underlying reason for this observation may be that ‘better regulation’ as a concept lacks a universal definition and therefore acts as umbrella term to cover a myriad of initiatives (which are often broad concepts themselves) including deregulation, improving the regulatory environment, reducing administrative burdens, cutting costs for business, improving the quality of impact assessment, improving transparency in

¹²⁸ *Ibid.*, pp 10 to 11.

¹²⁹ European Parliament Report on the Implementation, Consequences and Impact of the Internal Market Legislation in Force (2004/2224(INI)), Committee on the Internal Market and Consumer Protection, Rapporteur: Arlene McCarthy, Final A6-0083/2006, 23 March 2006.

¹³⁰ European Parliament Report on the Commission's 21st and 22nd Annual reports on monitoring the application of Community law (2003 and 2004) (2005/2150(INI)), Committee on Legal Affairs, Rapporteur: Monica Frassoni, Final, A6-0089/2006, 24 March 2006.

¹³¹ *Ibid.*, p 3.

¹³² Allio, L & Fandel, M-H, European Policy Centre Working Paper No. 25, *Making Europe work: improving the transposition, implementation and enforcement of EU legislation*, June 2006, p 7.

decision-making and accessibility to regulation, improving the quality of legislation, reducing the quantity of legislation and simplification. The explosion in initiatives in these areas means it is difficult to cut through them and discover what action is actually being taken, by whom and how effectively. Many initiatives are still at the ideas stage.

Simplification

The value of evaluation work has been recognised most clearly in the context of simplification, which is an important aspect of better regulation, and which has a relatively long history in the European Union. For example, in 1996, the SLIM initiative (Simpler Legislation for the Internal Market) aimed to identify ways in which Community and national legislation could be simplified.¹³³ Simplification in itself necessitates a form of post-legislative scrutiny as existing legislation is reviewed. This concept was recognised in a Commission Communication in 2005 on a strategy for the simplification of the regulatory environment which stated that: “The Commission will exercise its right of initiative to design proposals for simplification. In conformity with better regulation practices, this will entail thorough ex post evaluations and in-depth stakeholder consultation and careful assessment of various options to demonstrate the added value of proposed measures in relation to growth and jobs”.¹³⁴ This form of post-legislative scrutiny has a particular purpose as it will initially be a screening exercise for the potential to simplify particular acts rather than a form of systematic evaluation to assess the effectiveness of the legislation in practice. As a result of the screening of 42 policy sectors, the Commission has already identified more than 200 legal acts with a potential for simplification and has adopted more than 35 initiatives with simplification implications.¹³⁵ During an interview with Mr Lars Mitek-Pedersen, Head of the Better Regulation and Impact Assessment Unit, Commission Secretariat General¹³⁶, Mr Mitek-Pedersen emphasised that simplification initiatives should be based on a real need faced by users of the

¹³³ Xanthaki, H, *The Slim Initiative*, 2001, Statute Law Review, Volume 22, Number 2, pp 108 to 118.

¹³⁴ Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment*, COM (2005) 535 final, 25 October 2005, p 9.

¹³⁵ *Ibid.*, p 3.

¹³⁶ The interview was conducted by the author at the European Commission in Brussels on 7 September 2006.

legislation, and that the exercise should be informed by input from stakeholders. In assessing legislation suitable for simplification, he explained that it is difficult to come up with uniform criteria but administrative costs imposed by legislation are increasingly perceived as a critical factor. The process of simplification, he said, requires a flexible and creative approach. The aims of simplification are laudable. Once suitable measures for simplification have been identified, the Commission can pursue simplification methods such as repeal, codification, recasting (amending and codifying legal acts) and modification of the regulatory approach.¹³⁷ However, simplification is often linked with the drives towards improving the form of legislation and therefore the emphasis is not on the evaluation of the substance of the legislation in practice. However, the outcomes of simplification may also be triggered in the context of post-legislative scrutiny, the purpose of which is to measure the effectiveness of legislation after it has been brought into force.

Tools for Evaluation

If there is to be a more systematic way of scrutinising EU legislation after it has been brought into force, it is wise to consider the existing tools available for evaluation and whether there is potential for their role to be enhanced.

Review clauses

Some Directives contain review clauses which means that a mechanism for post-legislative scrutiny is built into the legislation itself. One example is Article 33 of Directive 95/46 EC on the protection of individuals with regard to the processing of personal data. Article 33 provides that:

The Commission shall report to the Council and the European Parliament at regular intervals, starting not later than three years after the date referred to in Article 32(1), on the implementation of this Directive, attaching to its report, if necessary, suitable proposals for amendments. This report shall be made public.

¹³⁷ Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment*, COM (2005) 535 final, 25 October 2005, pp 6 to 7.

The Commission shall examine, in particular, the application of this Directive to the data processing of sound and image data relating to natural persons and shall submit any appropriate proposals which prove to be necessary, taking account of developments in information technology and in the light of the state of progress in the information society.

A joint proposal for the amendment of this Directive was prepared by Austria, Finland, Sweden and the United Kingdom.¹³⁸ The UK Government also responded to a questionnaire from the Commission.¹³⁹ Furthermore, in September 2000, some six months after the Data Protection Act 1998 (based on the Directive) came into force, the UK Home Office carried out a public consultation exercise to help it make an early appraisal of the Act's impact. The first Commission report highlighted the various issues raised by Member States but suggested that these could be involved by better implementation of the Directive rather than requiring amendments to the Directive itself.¹⁴⁰ Subsequently, the Commission forwarded its Report to Parliament and it was referred to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs for information. That Committee was then authorised by the President of the Parliament to draw up an own-initiative report on the subject, which resulted in the adoption of a draft resolution.¹⁴¹

The data protection Directive provides a good example of the operation of a review clause, in that there was subsequent follow-up by the European Parliament and the UK Government also took it upon itself to evaluate implementation. However, it is important to recognise the limitations of review clauses in Directives. During an interview with Mr Robert Bray, Legal Administrator to the Legal Affairs Committee of the European Parliament¹⁴², Mr Bray pointed out that where a review clause in a

¹³⁸ Data Protection Directive (95/46/EC) Proposals for Amendment made by Austria, Finland, Sweden and the United Kingdom Explanatory Note (September 2002), available at <http://www.dca.gov.uk/ccpd/dpdamend.htm> (last visited 9 September 2006).

¹³⁹ <http://www.dca.gov.uk/ccpd/saguide.htm> (last visited 9 September 2006).

¹⁴⁰ Report from the Commission - First Report on the implementation of the Data Protection Directive (95/46/EC) COM (2003) 265 final, 15 May 2003, p 7.

¹⁴¹ European Parliament Report on the First Report on the implementation of the Data Protection Directive (95/46/EC), final A5-0104/2004, 24 February 2004.

¹⁴² Interview carried out by the author at the European Parliament in Brussels on Thursday 7 September 2006.

Directive is not complied with, Parliament will react but sometimes reviews are carried out in compliance with the review clause but then not taken up. Mr Bray said that committees in Parliament are able to produce own-initiative reports to follow up reviews of legislation. However, the quota system governing the number of own-initiative reports that can be produced and the fact that they are resource-intensive and time-consuming to prepare means that the opportunity for Committees to follow up reviews and evaluation work is limited.

Impact assessment

The Mandelkern Group defined ‘evaluation’ as consisting of two main types – ex ante evaluation where tools such as regulatory impact assessment and consultation are used and ex post, where the effectiveness of the regulation is examined, often against a checklist.¹⁴³ This interpretation anticipates impact assessment as the first step in a two stage process of evaluation. It has been observed that not only has impact assessment been introduced in all the old fifteen Member States and in some new Member States like Poland, but also that impact assessment has become “the cornerstone of better regulation initiatives”.¹⁴⁴ Furthermore, the three Institutions agree on the “positive contribution of impact assessments in improving the quality of Community legislation”.¹⁴⁵ Research for this thesis has not revealed any kind of scientific basis for this assertion. Arguably, evaluation of the impact assessment itself coupled with evaluation of how the resulting legislation is working in practice would reveal an improvement in the quality of legislation in both its substance and its form, but of course part of the problem is the difficulty in measuring such a nebulous concept as ‘quality of legislation’. The Commission uses integrated impact analysis – a form of assessment that aims to include social and environmental concerns as well as economic analysis of the costs and benefits of regulatory proposals - to evaluate all items in its work programme.¹⁴⁶ Although there has been significant progress in both the quality and quantity of impact assessments, the Commission itself has recognised

¹⁴³ Mandelkern Group on Better Regulation, Final Report, 13 November 2001, p 82.

¹⁴⁴ De Francesco, F, *Towards an ‘Impact Assessment State’ in Europe?* Paper presented at the 56th Political Studies Association Annual Conference, Reading, April 2006. (The author of this paper is grateful to Mr De Francesco for permission to cite his text).

¹⁴⁵ Council of the European Union, Interinstitutional Agreement on better law-making, OJ 2003, C321/1, 23 September 2003, p 11.

¹⁴⁶ Mather, G & Vibert, F, European Policy Forum, *Evaluating Better Regulation: Building the System*, A report for the City of London Corporation, September 2006, p 2.

that “more needs to be done to ensure that impact assessments are as comprehensive and rigorous as possible”.¹⁴⁷ In 2005, the Parliament, Council and Commission reached an Interinstitutional agreement on better lawmaking¹⁴⁸ in which the institutions agreed a common approach on how to assess the potential impacts of the legislation that they process and adopt.¹⁴⁹ They agreed that not just initiatives but substantive amendments should also be subject to impact assessment that would map out potential impacts in an integrated and balanced way across social, economic and environmental factors and also potential short and long-term costs and benefits, including regulatory and budgetary implications.¹⁵⁰ This is an ambitious aim and it remains to be seen whether it is achievable.

There have been calls for the quality of impact assessments themselves to be reviewed as a part of developing “external quality control arrangements for identifying, ex post, good and bad practice in impact assessment by the institutions and highlighting where assessments do not meet the standards required”.¹⁵¹ The Doorn Report also called for the Commission to subject the quantitative results of the impact assessment to a regular critical analysis with a view to ascertaining whether the methodology used produces reliable predictions, and to report to Parliament on the results.¹⁵² Although the impact assessment of impact assessment may sound like a “bizarre and circular” concept,¹⁵³ this is undertaken by the National Audit Office in the UK in relation to national impact assessments.¹⁵⁴ This has been described as a “peculiar and innovative characteristic of the British system... and one of the rare cases in the EU of systematic ex-post review of regulatory tools and institutions”.¹⁵⁵ And yet, ironically,

¹⁴⁷ Commission Staff Working Document Annex to the Report from the Commission “Better Lawmaking 2005” pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (13th Report) COM 2006 289 final, p 7.

¹⁴⁸ Council of the European Union, Interinstitutional Agreement on better law-making, COM (2002) 276 final, 29 November 2005.

¹⁴⁹ *Ibid.*, para 1.

¹⁵⁰ *Ibid.*, para 4.

¹⁵¹ A joint statement of the Irish, Dutch, Luxembourg, UK, Austrian and Finnish Presidencies of the European Union, *Advancing regulatory reform in Europe*, 7 December 2004, p 9.

¹⁵² European Parliament Report on Better lawmaking 2004: application of the principle of subsidiarity – 12th annual report (2005/2055(INI)), Committee on Legal Affairs, Rapporteur: Bert Doorn, final, A6-008/2006, 23 March 2006. (The Doorn Report), p 8, para 27.

¹⁵³ Toner, H, *Impact Assessments and Fundamental Rights Protection in EU Law*, 2006, *European Law Review*, 31(3), 316 to 341, at 340.

¹⁵⁴ As described in Part 3 above.

¹⁵⁵ Italian, Irish and Dutch Presidencies of the Council of the European Union, A report prepared for the EU Directors of Better Regulation Group, *A Comparative Analysis of Regulatory Impact Assessment in Ten EU Countries*, Dublin, May 2004, p 53.

there is no systematic ex-post review of EU legislation in place at either EU or national level. However, it is suggested that there is untapped potential for using impact assessment as a basis for later review. There does not yet appear to be evidence of this practice at EU level. Furthermore, given the developments in both impact assessment in the UK and at EU level, there could be scope in the future to marry UK and EU level assessments in order to provide an even more comprehensive basis for review.

Respective Roles of the Institutions and Member States in Evaluation – Where should the responsibility lie?

The European Economic and Social Committee has recognised the value of systematic post-legislative scrutiny and made it clear where the responsibility for it should not lie:

Ex-post evaluation of directives and applied EU law has to be carried out systematically. As consultation is crucial for better lawmaking, similar procedures have to be foreseen for the process of ex-post evaluation. The original legislative bodies should not be responsible for such evaluations, which may also include the future need and relevance of certain rules.¹⁵⁶

This approach can be criticised as it neglects the potential value of evaluation as a reiterative learning exercise with the potential to feed back into the legislative process via the legislators. Conversely, in the UK, the House of Lords European Union Committee has recommended that “ex post assessment of the regulatory impact of EU legislation should be the rule rather than the exception and that the first such assessment should be carried out by the Commission no more than one year after the entry into force of the instrument in question”.¹⁵⁷ This dichotomy of views illustrates starkly the problem of ownership of responsibility when it comes to evaluation of

¹⁵⁶ Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment*, COM (2005) 535 final, 25 October 2005, p 13.

¹⁵⁷ House of Lords Select Committee on the European Union, 9th Report, (2005-06), *Ensuring Effective Regulation in the EU*, HL Paper 33, para 74.

legislation, crudely put: one has the feeling that everybody thinks it should be done but nobody wants to do it themselves! The European Policy Forum has observed that:

Those with the most to learn from the evaluation of past successes and failures are the Commission with its responsibility for new initiatives, and the Member States themselves whose citizens carry the cost of any miscast legislation. A mechanism is needed to draw them in so that lessons can be absorbed in the most important places.¹⁵⁸

While there is undoubtedly merit in this observation, it is argued that the best approach to ex post evaluation of legislation, as part of better regulation, is that it is a responsibility that should be shared. This is a view that has been posited by the President of the Commission, José Manuel Barroso who has stated that he intends the “better regulation effort to become a common effort not only of the European institutions, but also of the Community and the Member States – a mutual learning process in which we compare experiences and regulate better on all levels”.¹⁵⁹ Lars Mitek-Pedersen, Head of the Better Regulation and Impact Assessment Unit, Commission Secretariat General during an interview for this paper¹⁶⁰, reiterated that better regulation is a shared responsibility between the Commission, the other EU institutions and the Member States. The particular roles of the Commission and Parliament are now considered in turn.

The Commission

Tito Gallas has written that:

When tackling the subject of ex post assessment, what first comes into mind is the image of the Commission as the ‘guardian of the treaties’, the Commission monitoring the application of EC law.

¹⁵⁸ Mather, G & Vibert, F, European Policy Forum, *Evaluating Better Regulation: Building the System*, A report for the City of London Corporation, September 2006, p 52.

¹⁵⁹ Barroso, J M, *Uniting in peace: the role of Law in the European Union*, Jean Monnet lecture, European University Institute, Florence, 31 March 2006.

¹⁶⁰ The interview was conducted by the author at the European Commission in Brussels on 7 September 2006.

This is in fact a task of crucial importance; legislation has not only to be made, it has, above all, to be applied.¹⁶¹

It is true that the Commission has in place procedures to check the application of Community law in the Member States and that it also has the power to initiate enforcement proceedings against Member States which it considers to be in breach of their obligations under Community law.¹⁶² However, as Gallas has postulated, “this Commission monitoring examines compliance with an EC law, not its efficiency”.¹⁶³ During an interview with Lars Mitek-Pedersen, Head of the Better Regulation and Impact Assessment Unit, Commission Secretariat General, Mr Mitek-Pedersen explained that the Commission had a long history of traditional economic evaluation as governed by the horizontal Financial Regulation, particularly within spending programmes and that every operational Directorate-General within the Commission contained an evaluation unit. He thought that the dawn of impact assessment brought a new, wider perspective to evaluation as did other actions of the Commission's better regulation agenda, namely simplifying existing legislation and strategic planning and programming. Mr Mitek-Pedersen explained that transposition problems have always been on the Commission's radar but the Commission needs to know where the problems lie so that they can be resolved at Member State level or at EU level as appropriate. He was also of the view that evaluation work in this context could be reinforced but represented positive potential for both the Commission and Member States as it could feed into evidence-based policy making for new initiatives and simplification initiatives. Mr Mitek-Pedersen recalled that the Commission had in recent years taken a progressively more strategic perspective on evaluation cutting across Directorates-General within the Commission.

That it would be preferable for the Commission to undertake evaluation work itself is underlined by a recent experiment in which the Enterprise Directorate-General within the Commission contracted out evaluation work concerning four Directives to a

¹⁶¹ Gallas, T, *Evaluation in EC Legislation*, Statute Law Review, 2001, Volume 22, Number 2, pp 83 to 95 at 93.

¹⁶² Craig, P & de Búrca, G, (2003), ‘EU Law: Text, Cases and Materials’, 3rd edition, Oxford University Press, Oxford, Chapter 10.

¹⁶³ Gallas, T, *Evaluation in EC Legislation*, Statute Law Review, 2001, Volume 22, Number 2, pp 83 to 95 at 93.

private management company. The company published a lengthy report¹⁶⁴ which, on reading, appears to be of limited worth. The report itself acknowledges its limitations, recognising that the analysis simply provides information on the costs of companies related to meeting specific requirements contained in the four Directives analysed and departs from the common use and understanding of the concept of ex-post evaluation.¹⁶⁵ Part of the problem may be that there is at present no best practice in terms of evaluative process or method.¹⁶⁶ There have been calls for post-legislative scrutiny of EU legislation to be a distinct goal of the Commission. The European Policy Centre recently recommended that: “The Commission should systematically carry out and publish ex-post evaluations of EU legislation, including major comitology decisions. It should draw up a set of binding guidelines describing minimum standards and methodologies for assessing the benefits, costs and effectiveness of legislation, including unintended consequences. Ex-post evaluations should include quantitative analysis wherever possible”.¹⁶⁷ Most significantly, the Doorn Report¹⁶⁸, has recently called on “the Commission to report to Parliament, no later than three years after the entry into force of new legislation, on the impact of the legislation in practice; is above all interested in the question whether the legislation has fulfilled the original purpose, what effects it has had on the international competitiveness of the relevant sector, not least in the light of different regulations (or the absence of regulation) in competing countries, and how the legislation is complied with in practice”.¹⁶⁹ This is huge step forward in the recognition of the importance of post-legislative scrutiny at EU level and it is to be welcomed.

¹⁶⁴ European Commission, Enterprise Directorate-General: *Ex-Post Evaluation of EC Legislation and its Burden on Business*, Final Report, May 2005.

¹⁶⁵ *Ibid.*, see Executive Summary.

¹⁶⁶ Mather, G & Vibert, F, European Policy Forum, *Evaluating Better Regulation: Building the System*, A report for the City of London Corporation, September 2006, p 22.

¹⁶⁷ Allio, L & Fandel, M-H, European Policy Centre Working Paper No. 25, *Making Europe work: improving the transposition, implementation and enforcement of EU legislation*, June 2006, p 31.

¹⁶⁸ European Parliament Report on Better lawmaking 2004: application of the principle of subsidiarity – 12th annual report (2005/2055(INI)), Committee on Legal Affairs, Rapporteur: Bert Doorn, final, A6-008/2006, 23 March 2006. (The Doorn Report).

¹⁶⁹ *Ibid.*, p 8, para 27.

The Parliament

In the context of discussion about monitoring implementation, Mr Robert Bray, Legal Administrator to the Legal Affairs Committee of the European Parliament¹⁷⁰ which has responsibility for better regulation, explained that if Members of the European Parliament are informed (if at all) about problems with implementation, it tends to be interest groups which feed through the information. The Doorn Report¹⁷¹ however recently stressed the need for Parliament, and in particular, the rapporteur responsible to play a more active role in monitoring the implementation of European legislation in the Member States and to suggest that Parliament should set up a proper transposition-monitoring procedure in close cooperation with its national partners.¹⁷² There is at least one example of post-legislative scrutiny by the Parliament, on the environmental directive known as the ‘Seveso directive’¹⁷³ in which the Parliament appointed a committee of inquiry, the work of which culminated in an assessment of the transposition and application of the directive and an evaluation of its results. The committee also developed some principles for an all-round waste policy and translated the principles into demands to the Commission to draft legislative proposals in this matter.¹⁷⁴ This form of evaluation is particularly valuable as it led to concrete outcomes. It is worth noting that there is little point in undertaking evaluation for its own sake; there must be a response to the outcomes of evaluation otherwise it becomes a pointless exercise. The McCarthy Report also recognised the vital role of the Parliament in evaluation:

Introducing a system of both ex-ante and ex-post assessment, of EU laws, can lead to a better regulation cycle, enabling legislators to review and evaluate whether the legislation has achieved its objectives. The European Parliament must be fully involved in this

¹⁷⁰ During an interview conducted by the author in the European Parliament in Brussels on 7 September 2006.

¹⁷¹ European Parliament Report on Better lawmaking 2004: application of the principle of subsidiarity – 12th annual report (2005/2055(INI)), Committee on Legal Affairs, Rapporteur: Bert Doorn, final, A6-008/2006, 23 March 2006.

¹⁷² *Ibid.*, at p 8, paras 28 and 29.

¹⁷³ (78/319/EEC).

¹⁷⁴ Ex post evaluation work on the ‘Seveso directive’ as described by Gallas, T, *Evaluation in EC Legislation*, Statute Law Review, 2001, Volume 22, Number 2, p 94.

process, and needs resources to enable the Committees to perform a scrutiny of EU law.¹⁷⁵

The publication of three seminal reports on better regulation in 2006, the Doorn Report, the McCarthy Report and the Frassoni Report, is very significant and demonstrates a growing awareness in the European Parliament of the need to evaluate legislation and the benefits it can offer to improving both the legislative process and the quality of the resulting legislation.

Is there scope for a new independent evaluation body?

There have been calls in the past for an external review body to help improve the quality of EU legislation. Sandström called for such a body to have a role in scrutinising proposals for new legislation.¹⁷⁶ Setting up a new body would imply a major institutional operation, requiring Treaty reform; however, a less formal committee without institutional status would risk having no authority.¹⁷⁷ Serious consideration was given to the proposition by the Koopmans Working Group and subsequently by the Intergovernmental Conference in 1997, during which it became apparent that the establishment of an independent review body was a bridge too far.¹⁷⁸ The UK was almost alone in supporting the proposal as a way of strengthening the organisation of the legislative process at EU level.¹⁷⁹ There has also been some academic flirtation with the idea of a European Law Reform Commission. It is interesting to note that the Council of Europe in 1968 directed its Legal Committee to consider the idea of a permanent Law Commission.¹⁸⁰ This was followed up by calls for such a body in order to prepare the ground for the codification of European civil

¹⁷⁵ European Parliament Report on the Implementation, Consequences and Impact of the Internal Market Legislation in Force (2004/2224(INI)), Committee on the Internal Market and Consumer Protection, Rapporteur: Arlene McCarthy, Final A6-0083/2006, 23 March 2006 (The McCarthy Report),

¹⁷⁶ Sandström, G, *Guest Editorial: Knocking EU Law into Shape*, 2003, *Common Market Law Review*, 40, 1307 at 1312.

¹⁷⁷ Kellerman, A, et al, (1998), 'Improving the Quality of Legislation in Europe', *Kluwer Law International*, The Hague

¹⁷⁸ De Wilde, E L H, *Deficient European Legislation is in Nobody's Interest* (2000) *European Journal of Law Reform*, Vol.2, No.3, 293 at 313.

¹⁷⁹ *Ibid.*

¹⁸⁰ Chloros, A G, *Principle, Reason and Policy in the Development of European Law* (1968) 17 *International and Comparative Law Quarterly* 849 at 876.

law.¹⁸¹ More recently, the former Chairman of the Law Commission for England and Wales noted that there are no similar law reform bodies among other European countries apart from the Republic of Ireland and suggested that “perhaps for the 21st century it is time for a European Law Reform Commission”.¹⁸² Indeed, in the current better regulation climate, there may be scope for an independent body with an evaluation function. In the context of discussion¹⁸³ about the idea of a new independent agency to assist with evaluation work, Mr Mitek-Pedersen, Head of the Better Regulation and Impact Assessment Unit, European Commission Secretariat General, explained that the Commission would not be in favour of an independent agency that would have any involvement at the proposal stage or assessing the quality of impact assessment in real time (i.e. during the phase of preparation of Commission initiatives) as this would hamper the Commission's right of initiative and would be inconceivable in the present Community system. However, he was personally open to the idea of an external agency to be involved with ex post assessment to audit the quality of impact assessments and legislation. This would be akin to the work already undertaken by the Court of Auditors. The McCarthy Report, in March 2006, actually called for the Commission to set up an independent audit body to structure and guarantee the quality and independence of economic impact assessments of EU legislation.¹⁸⁴ It is conceivable that if such a body were set up, its function could also extend to reviewing legislation after it has been brought into force, or at least advising on how this might be done and providing guidance on best practice. The rumblings of support for an independent review body are at a very early stage but it is contended that they reflect the fact that the importance of post-legislative scrutiny of European legislation is slowly but surely making its way up the European political agenda.

¹⁸¹ *Ibid.*, at 875.

¹⁸² Sir Roger Toulson, *Law Reform in the 21st Century*, lecture given to Bradford University, May 2006 – to be published in *Legal Studies*, later in 2006.

¹⁸³ During an interview conducted by the author at the European Commission in Brussels on 7 September 2006.

¹⁸⁴ European Parliament Report on the Implementation, Consequences and Impact of the Internal Market Legislation in Force (2004/2224(INI)), Committee on the Internal Market and Consumer Protection, Rapporteur: Arlene McCarthy, Final A6-0083/2006, 23 March 2006 (The McCarthy Report), para 7.

PART 5: CONCLUSIONS: THE WAY FORWARD

A changed climate

It is an exciting time for the development of post-legislative scrutiny of European derived legislation at both the national and EU level. There has been movement away from a culture in which there was some acceptance of the old adage, “laws are like sausages, it is better not to see them being made”.¹⁸⁵ Transparency is now demanded in the interests of democratic processes and accountability. There used to be a front-end focus on the Community machinery producing vast quantities of legislative output, which at its peak rose to 80 directives and 1500 regulations a year in the lead up to the deadline for completing the internal market.¹⁸⁶ Now the emphasis is shifting to the end-user of this legislative output. The European Economic and Social Committee has defined better lawmaking as “meaning, primarily, looking at a situation from the viewpoint of the user of the legal instrument”.¹⁸⁷ Implicit in this definition is the need for some form of evaluation or ‘quality control’ to see whether the end product of the legislative machine is actually working in practice.

A shared responsibility

The first research question was to examine what work is already undertaken at domestic and EU level in terms of monitoring the effects of past legislation in order to ensure that it has met its objectives and is working in practice as intended. The answer also links in with the fourth question about the role of impact assessment. The analysis in this paper has revealed that very little post-legislative scrutiny work is undertaken in real terms. It has been necessary, particularly at UK level, to examine the scrutiny systems that are already in place as a way, first of all, of revealing the evaluation gap, and second, on a more positive note of exposing the potential for evaluation of EU-derived legislation. The utility of regulatory impact assessment as a tool for better regulation (in the sense of improving the quality of legislation) and as a basis for evaluation must not be underestimated. It is already becoming embedded in

¹⁸⁵ Attributed to former German Chancellor, Otto Von Bismarck (1815-98).

¹⁸⁶ Burns, T, *Better lawmaking? An evaluation of lawmaking in the European Community* in Craig, P & Harlow, C, (1998), ‘Law making in the European Union’, IALS & Kluwer Law International, London, p 436.

UK regulatory soil and it is a useful tool which should be adapted to give consideration to monitoring and review more effectively, especially in relation to instruments transposing Directives, for which scrutiny prior to enactment is limited. Similarly, at EU level, there is really very little evidence of real work in terms of evaluating the effects of legislation once it has been brought into force, although there are a few examples. Impact assessment offers hope here too not least as a starting point for a later review. The fact that there are drives towards assessing the quality of impact assessments indicates that the review of legislation to which the impact assessment relates cannot be far behind.

The second research question posed at the beginning of this paper was: how does evaluation work fit in with the drives towards better regulation and better lawmaking? The analysis has revealed that evaluation and subsequent adaptation of the legislation if necessary has not been a feature of the legislative methodology as described by Professor Mader¹⁸⁸, at national or EU level. This paper was not able to accommodate a full examination of all initiatives that could be described as falling within the broad and unwieldy aim of better regulation, but the analysis was sufficient to disclose that rather than riding on the crest of the better regulation wave, the concept of evaluation has been lingering in the undercurrent. However, there are signs that it is beginning to be swept along with the better regulation agenda and this is true for the EU and national context.

The fourth research question concerns the future - what further work should be undertaken in terms of evaluation of past measures and which body should take lead responsibility for this work in order to ensure a coherent approach? This is perhaps the most difficult question. At the national level there are Parliamentary and Governmental systems in place that could, with political will, be adapted to allow for more systematic scrutiny of EU derived legislation. At EU level, it may be premature to talk about mechanisms when responsibility is still an issue and when evaluation is still very much in its infancy and at a conceptual stage. However, the first steps have

¹⁸⁷ Opinion of the European Economic and Social Committee on *Better lawmaking*, Official Journal C 24, 31 January 2006, p 39, para 1.1.2.

¹⁸⁸ See page 7 above.

been taken – the three European Parliament reports¹⁸⁹ this year alone drawing attention to the need for evaluation bear testament to that. The next logical step (some would argue giant leap) is for the ideas to be translated into action. Any procedural change at EU or national level is bound to be evolutionary rather than revolutionary but it will be better to have a carefully thought out review system which is capable of feeding back its results into the legislative process, with a view to improving legislation, rather than imposing a burdensome system in haste. To pick up on the last research question, there is scope for a new independent body to assist the EU institutions (and Member States) with evaluating past legislation, such a body would also have the added advantage of being able to provide a focal point for evaluation and perhaps to give guidance on the continuing efforts to improve the quality of legislation and critically, to provide a link between the institutions of the EU and Member States.

In the final analysis, to borrow de Wilde's words: deficient European legislation is in nobody's interest.¹⁹⁰ It is for this reason that post-legislative scrutiny of legislation derived from the EU should be a shared responsibility between the institutions and the Member States. Evaluation has woven a way through swathes of material on better regulation but not as the principle thread to colour the approach. However, better regulation should be about ensuring good quality legislation to which, it must be recognised, evaluation can make a valuable contribution.

¹⁸⁹ The MacCarthy Report, the Doorn Report and the Frassoni Report.

¹⁹⁰ De Wilde, E L H, *Deficient European Legislation is in Nobody's Interest* (2000) European Journal of Law Reform, Vol.2, No.3, 293.

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