

Chapter 7

The interface between member states and the European Union

An increasing proportion of national regulations originate at European Union level. Whilst European Union regulations¹ have direct application in member states and do not have to be transposed into national regulations, European Union directives need to be transposed, raising the issue of how to ensure that the regulations implementing European Union law are fully coherent with the underlying policy objectives, do not create new barriers to the smooth functioning of the EU Single Market, avoid “gold plating” and the placing of unnecessary burdens on business and citizens. Transposition also needs to be timely, to minimise the risk of uncertainty as regards the state of the law, especially for business.

The national (and subnational) perspective on how the production of regulations is managed in Brussels itself is important. Better Regulation policies, including impact assessment, have been put in place by the European Commission to improve the quality of EU regulations. The view from “below” on the effectiveness of these policies may be a valuable input to improving them further.

Assessment and recommendations

The EU is important for Finland both in terms of stimulating efforts to improve regulatory management, and the need to cope with EU origin legislation which has to be absorbed into the system. European Union initiatives are a motor for Better Regulation in Finland. The Services Directive, for example, has encouraged a review of issues such as one-stop-support for small to medium-sized enterprises. The recently adopted programme for reducing administrative burdens on business was encouraged by the EU programme. A significant and increasing proportion of Finnish law (perhaps up to 80% in some areas) derives from EU origin legislation. This is an aspect of Better Regulation for Finland that needs special emphasis and attention. This is recognised by the government: a more proactive EU stance is identified as an objective in the Government Strategy Document.

An impressively inclusive and co-ordinated approach has been put in place to deal with EU regulatory affairs. For an executive consisting of highly autonomous ministries, Finland has an inclusive and co-ordinated approach to the development and agreement of its negotiating positions on European Union proposals. Ministries, the parliament and other stakeholders are consulted in a process which is carefully orchestrated from the Prime Minister’s Office. The OECD’s 2003 report had already noted that the institutional structures and processes established to co-ordinate relations with the EU on regulatory

matters appear to be consistent, coherent and functioning at a high level. This review confirms the previous analysis. Why does it work effectively? The institutional framework would appear to be a key ingredient: the strong role of the PMO, which cannot be ignored by other ministries and which has an overview of key policy issues across government; a strong Cabinet Committee on EU affairs that meets weekly (and other institutional support such as the Justice ministry's EU unit); and the pro-active engagement and support of the parliament in formulating negotiating positions, which helps to identify important impacts and issues to take into account in negotiation.

Recommendation 7.1. Consider whether it is possible to transplant the successful ingredients of European Union management in order to strengthen domestic Better Regulation management (for example, strong central co-ordination by the PMO).

There are, however, some weaknesses in Finland's approach to the development of EU legislation which compromise the effective and straightforward transposition of adopted directives later on. Influencing the development of EU directives needs to start early, before formal negotiations begin. Finland may need to strengthen its presence at the early and informal stages of policy making in Brussels, as well as later when effective negotiation can help to prune back an over detailed draft or ensure that needed flexibilities are built into the text. Finland may also need to put more effort into building alliances with like-minded member states. As negotiations within the Council evolve and amendments are proposed by the European Parliament, it is not clear whether the co-ordinated and inclusive approach to establish a negotiating position is re-engaged, or whether the responsible ministry is left to carry on alone.

Recommendation 7.2. Improve capacities to influence the development of EU legislation: with the Commission (at all levels) before proposals are published; and with like-minded member states (at all levels) to build alliances on key issues. Take the initiative in developing alliances. Ensure that back home the negotiating position is collectively reviewed and refreshed regularly to take account of developments. Do not leave the lead ministry alone in the process. Check that the officials carrying out key negotiations have the capacities (and if necessary seniority) to negotiate effectively.

The effective application and updating of impact assessment on draft EU proposals would help to secure a strong Finnish position as negotiations unfold. Responsible ministries already carry out a summary form of impact assessment on EU proposals. Improvements to this process could help to secure a more effective and durable negotiating position. An effective impact assessment (at least on the more significant EU drafts) would capture, early on, the views of relevant stakeholders both inside and outside the government (including those who will later have to implement and enforce the directive), identify all relevant likely impacts, and ensure that these were comprehensively assessed (including cost benefit analysis). If the initial impact assessment is well done, updates to take account of drafting developments would be relatively straight forward and less time consuming. The information could be used systematically to identify potential allies among other member states in negotiation. The European Commission's own impact assessments and the views of the EU Impact Assessment Board should be taken into account.

Recommendation 7.3. The Prime Minister’s Office should review the current process for carrying out impact assessments on EU drafts with a view to strengthening it, particularly as regards the early consultation of the widest range of stakeholders, strengthening the analysis of potential impacts, and ensuring that updates are carried out when there are significant changes in the development of the draft in Brussels. Target priority legislation, where Finnish interests are most exposed, for full treatment of this kind. Ensure that the results are used in the development and update of the briefs used by Finnish negotiators.

Training and guidance on EU affairs is available, but might need to be strengthened. Finnish training on EU matters is offered to officials and appears especially strong for the judiciary. The Justice ministry has an EU unit which provides legal guidance and it has produced a legal drafter’s guide to the EU. It is not clear, however, that the EU training or guidance for officials is adequate to cover all the (policy as well as legal) issues that it would be helpful to address. Training and guidance in some other EU countries is broad and significant (for example, a full policy as well as legal guidance document in the UK, and training in negotiating techniques in Ireland). The Justice ministry’s initiative to integrate all the guidance for domestic impact assessments has been a hit. Could this approach be extended to the EU dimension?

Recommendation 7.4. Review the current training and guidance offered to officials on EU matters with a view to broadening and strengthening this. Ensure that policy issues and negotiating techniques are covered as well as legal aspects.

The role of the parliament is significant in establishing the Finnish negotiating position. The Finnish parliament plays a substantial role in the establishment of the Finnish position on EU matters. This is one of the strengths of the Finnish system. The considerable efforts that are put into the process by the government as well as the parliament to establish a shared position for negotiation needs to be carried through as negotiations unfold, taking account of the parliament’s heavy legislative work load.

Recommendation 7.5. Review the arrangements for ensuring that the parliament is kept in touch with negotiating developments, based on priority dossiers, so as to avoid overload of the system.

The transposition of EU directives is a sore point and needs attention. Transposition is left to ministries without any central guidance. A large number of stakeholders drew attention to the fact that the default option for transposition is to transplant an adopted directive word for word into Finnish law, which complicates the latter. Improving Finland’s capacities to influence and negotiate effectively for clearer and shorter texts (as recommended above) would help to prevent at least some of the problems. Negotiators need to focus on implementation from the outset. Finland might also review how other countries with similar cultures and legal systems approach transposition as this could reveal flexibilities that have not previously been exploited, and reduce the costs and burdens associated with transposition. Impact assessment carried out at the transposition stage could also help to identify more effective approaches.

Recommendation 7.6. Ensure that negotiation briefs include issues that will be important for implementation later on, and if possible that negotiators are in direct touch with colleagues who will be involved in implementation. Review the approaches taken to transposition by like-minded member states. Ensure that impact assessment and as part of this, consultation of key stakeholders is carried out to inform transposition of significant directives. Monitor progress.

Background

General context

A significant, and increasing, proportion of Finnish law originates in EU legislation. Some ministries estimate that perhaps 80% of the legislation they produce per annum derives from, or directly relates to, the EU.

The overall system for managing EU affairs, which is more carefully orchestrated than arrangements for domestic policy and rule making, is spoken of highly by the parliament and a range of other stakeholders. Alongside this, there is a recognition of the need for specific improvements and a desire to do even better. There was widespread agreement among interviewees that Finland needs to pay closer attention to the shaping of EU policies and draft legislation, “catching” issues at the earliest possible stage; and that it also needs to take another look at the transposition of directives so as to avoid difficulties (the two issues are linked, since the outcome of negotiations on a specific directive largely set the frame for its implementation).

The government has identified the improvement of its influencing capacity in Brussels as a strategic priority in order to increase the chances of its views and specificities being taken into consideration before proposals are adopted by the European Commission, and of its voice being heard in the subsequent Council negotiations. Greater effectiveness in Brussels at the negotiating stage is linked to a widespread concern that the transposition of EU obligations into national law are often difficult to implement in the Finnish legal system. EU directives are deemed too detailed and prescriptive to implement effectively. Some other EU Member States certainly see the negotiating phase as a time when flexibilities can be inserted in draft directives so as to bring EU proposals closer to existing national rules and to facilitate transposition.

In April 2009, the government adopted a report on Finland’s EU policy². This report analyses the significance of EU membership to Finland, and sets out basic principles and key objectives for Finland’s EU policy. It considers ways to develop influence in the EU. It is intended that the report will help to define Finland’s objectives at EU level for the coming period and outline far-reaching visions for the future development of the EU. It is also proposed that the findings and information contained in the report will serve as a basis for encouraging discussion and debate among citizens on EU membership and will feed into a future project aimed at developing the co-ordination of EU issues, and of tools for better exerting influence in the EU.

A 2009 report by the National Research Institute of Legal Policy in Finland³ supports the need to take another look at the issues so as to pinpoint just what needs doing better. It found that while officials involved in negotiation in Brussels tend to have good working relationships with Commission officials and do negotiate effectively, a major challenge facing Finland relates to its ability to address key issues early enough. The 2003 OECD report noted an apparent paradox in Finland’s relationship with the EU. It has an excellent record of transposition but at the same time, there was frustration among Finnish officials

regarding the “experience of dealing with complex laws without clear explanation of their purpose”.

Negotiating European Union regulations

Institutional framework and processes

The institutional structure for co-ordinating EU affairs is set out in Figure 7.1. The Finnish constitution places responsibility for negotiation of EU matters in the remit of the Cabinet. The Prime Minister’s Office (PMO) has a substantive, not just a co-ordinating role in this respect:

- it prepares the general guidelines of Finnish EU policy and co-ordinates preparation and handling of all issues relating to the EU in the ministries;
- it handles the distribution of EU documents, maintenance of a register of documents, filing of documents and information services. These services are used by civil servants preparing EU affairs, mainly ministries;
- it is responsible for action relating to any institutional questions and the general development of the EU;⁴
- it is responsible for the preparation of European Council meetings and co-ordination of issues considered at the Council meetings; and
- the Prime Minister chairs the Cabinet Committee on EU Affairs (see below).

A Cabinet Committee on European Union Affairs meets weekly to discuss key EU affairs and set Finland's priorities.⁵ This is flanked by official level committees, comprising a Committee for EU Affairs chaired by the PMO (which also meets weekly as needed), and a network of 40 sectorally based sub-committees chaired by the relevant ministries (which the PMO also attends). The ministries are represented by Permanent Secretaries or their deputies. The sub-committees may include representatives from various interest groups, which allows them to voice their opinions. Decisions are generally taken by consensus. They may be submitted for a final decision to the Cabinet. There are also horizontal co-ordinating networks and working groups within and across ministries, which often reflect EU Council formations (for example, competitiveness). The PMO is also represented in such horizontal work.

The Government Secretariat for EU Affairs within the PMO oversees this work.⁶ It serves as the secretariat for the Cabinet Committee on European Union Affairs and as the chair and secretariat for the Committee for EU Affairs; and is represented on the sub-committees. The Secretariat's duties also include preparation for European Councils. It ensures the flow of information between Finland’s Permanent Representation in Brussels and the government, and is involved in training, information dissemination and documentation relating to EU affairs. It also nominates national experts to EU institutions.

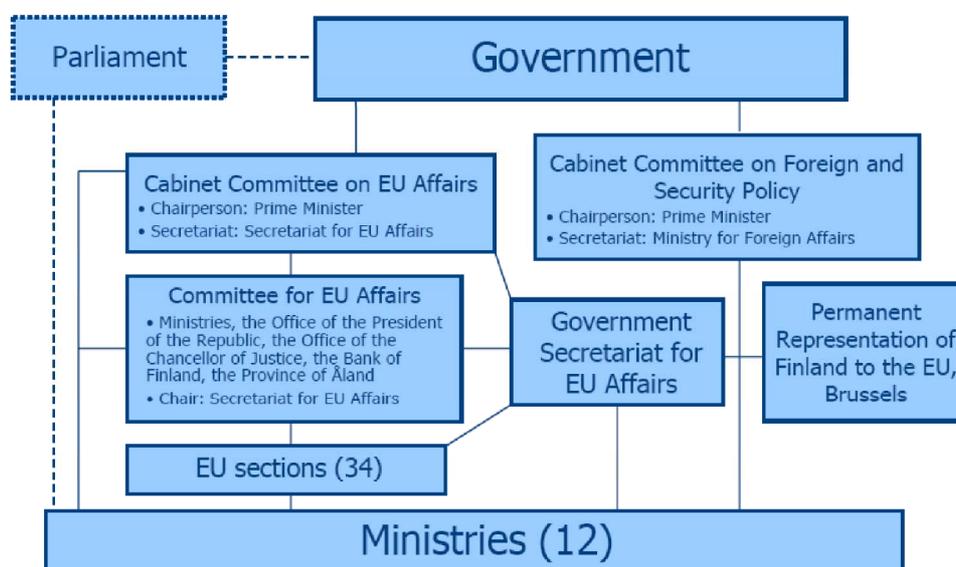
The Ministry of Justice also has an EU Unit, which was founded in the early 1990s prior to Finland’s accession to the EU.⁷ This Unit acts as an expert on issues of EU law and provides guidance, assistance and advice to individual ministries regarding EU legislation – both during the negotiation phase when draft texts are being negotiated and debated, and during the transposition and implementation phases once agreement has been reached in

Brussels. The unit has developed co-operative links and structures within different ministries to aid it in fulfilling its role. It also co-ordinates with the parliament.

Individual ministries take the lead in the monitoring, preparation and transposition of affairs relating to the EU in their areas of competence. Once a draft law has been published by the EU Commission, the Government Secretariat for EU Affairs assigns the file to the competent ministry. The issue is discussed as necessary by the relevant EU section official sub-committee, and if a position cannot be agreed at this level, it goes to the Cabinet Committee on European Affairs (and if necessary, to the Cabinet).

The Permanent Representation of Finland to the European Union in Brussels has a staff of approximately 100. Half of the staff consists of civil servants, who work in Brussels for 2-4 years. The other half are local recruits. Training is available on dealing with EU legislation, including for the judiciary (see Chapter 2). The OECD peer review team heard, however, that more training would be useful.

Figure 7.1. Co-ordination of European Union affairs within the Finnish government



Source: www.valtioneuvosto.fi/eu/suomi-ja-eu/asioiden-kasittely/pdf/en.pdf.

The role of the parliament

Since the early days of membership, the parliament has played a key role in formulating Finland's stance on EU issues. Its role is determined by the constitution.⁸ Whilst day-to-day negotiations are handled by the lead ministry and the Permanent Representation in Brussels, the government is constitutionally obliged to consult the parliament for a negotiating position and opinion on EU legislative matters. Once it receives notice from the European Commission that a draft regulatory proposal is published, the government sends a communication on the proposal to the parliament. The parliamentary committees have guaranteed access to information and updates on EU developments including the agendas and results of EU Council meetings.

Three structures are involved in the parliament's scrutiny process:

- **The Grand Committee**

This is the key EU parliamentary committee. A core role of this Committee is to ensure that the government does not enter into binding commitments which the parliament will not ratify. It ensures that parliament has a say in EU decision making and that parliamentary supervision is carried out. It considers all EU documents and information provided by the government (except for foreign and security policy). It has 25 full members and 13 substitute members. It normally meets twice a week to deal with matters submitted by the government, to hear directly from ministers, to obtain statements from other parliamentary committees and to give feedback to the government.

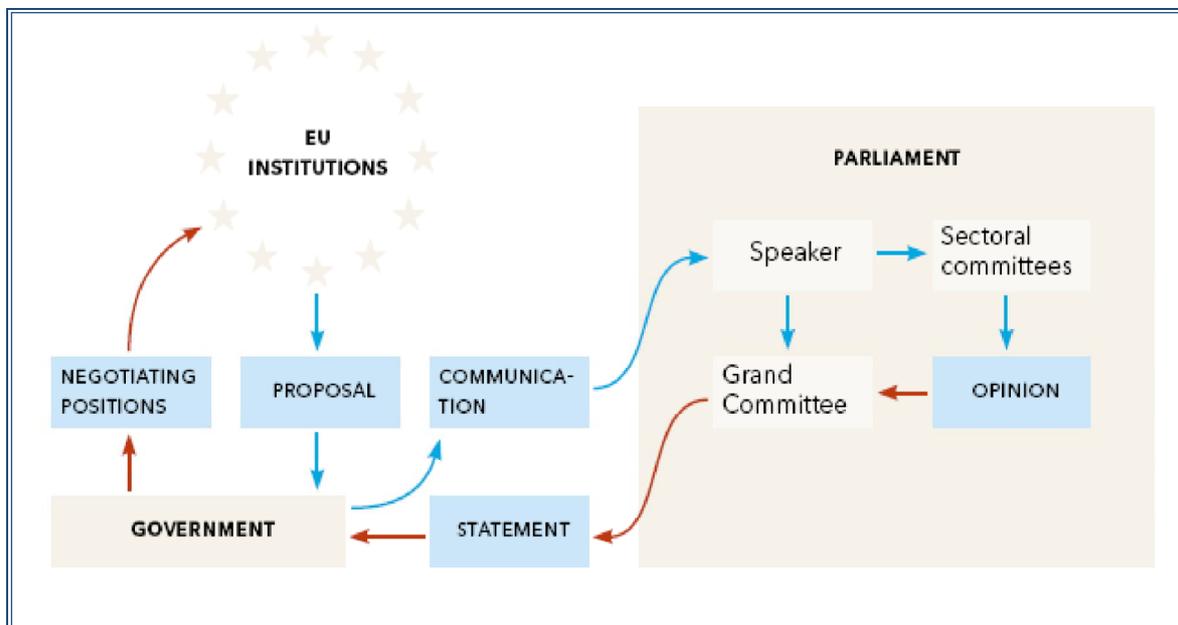
- **The Foreign Affairs Committee**

Its main task is to prepare the parliament's decisions on government proposals regarding significant international treaties, including treaties of the EU. It monitors the EU's Common Foreign and Security Policy.

- **The Sectoral Committees**

Their task is to consider and monitor sectoral EU policy issues, to arrange hearings with the relevant ministry and other stakeholders, and to issue written opinions to the Grand Committee. There are 14 permanent sectoral committees. Ordinarily, draft EU law is considered by one or more of these committees before referral to the Grand Committee.

Figure 7.2. Flow of information and consultation in EU legislative matters



Source: Parliament of Finland – Parliamentary Scrutiny of European Union Matters in Finland.

The government communicates with the parliament through what are known as letters. The parliament then writes statements in response outlining its views and opinions:

- **“U” letters** (section 96 of the Constitution) are matters that according to the Constitution would otherwise (were it not for membership of the EU), fall within the competence of the parliament. These communications summarise the contents of the proposal and its regulatory, economic and other impact as regards Finland. The communication should also refer to any impact assessment carried out at the EU level.
- **“E” letters** (section 97 of the Constitution) are EU legislative matters with broader significance in terms of principle, scope or political controversy; such matters must be brought before the parliament by a report of the government, before they have proceeded to a stage where a proposal is issued at the EU level – in other words, before a “Green paper” issued by the EU can be developed further into a draft directive. As with the “U letters”, the report sent by the government should include reference to any impact assessment carried out by the Commission and, so far as possible, the preliminary findings or results of any impact assessment that is being carried out in Finland.

Close co-operation between the parliament and the government is an important asset in Finland’s EU policy. Thanks to this system, Finland’s representatives can draw upon the direct support of the parliament when matters are discussed in the EU. For this to work well, it is important that the government ensures that the parliament is provided with timely information on EU issues.

Ex ante impact assessment (negotiation stage)

Once the European Commission has issued its proposal, the ministry in charge draws up a memorandum in accordance with guidelines laid down by the Ministerial Committee for EU Affairs. This must lay out the main substantive, legal, economic and political aspects of the proposal. It must also cover the main regulatory, economic and other impacts of the proposal as regards Finland. The Commission’s own impact assessment is used in this process, as appropriate (and where it exists). The memorandum is the anchor document in the flow of information and consultation on EU matters. It is used as the basis for the E- and U- letters which are deployed in the later stages of the process.

Transposing European Union regulations

Institutional framework and processes

Responsibilities are dispersed, as they are in most other EU countries. Ministries are individually responsible for transposition of EU regulations within their competence. The allocation of responsibilities for the transposition of EU regulations is based on the general division of labour between ministries⁹. The Prime Minister’s Office deals with eventual conflicts regarding responsibilities. The Justice ministry and the Foreign Affairs ministry (MOFA) play supporting roles in the transposition process. The Justice ministry has issued the “Legal Drafter’s Guide to the European Union – Guidelines for Drafting National Legislation”¹⁰ which deals with transposition and other EU related law drafting issues. MOFA oversees the notification process to the European Commission and is responsible for following up on infringement proceedings launched by the European Commission:

- Once a directive has been transposed, notification is sent by the relevant ministry to MOFA, which then processes and inserts this information into the European Commission's notification system. MOFA also checks to ensure that where relevant, the Åland Islands have been heard and consulted.
- MOFA is responsible for managing infringement proceedings initiated by the European Commission. If a new case is initiated by the European Commission, it calls a meeting with the relevant ministry or ministries to determine the government's position. A note on the case is drafted and presented to the EU section dealing with legal affairs (official sub-committee) and, if deemed necessary on the basis of the political, legal or financial interest of the case, to the Cabinet Committee on EU affairs. The actual replies to the European Commission are drafted by MOFA. MOFA also drafts a bi-annual report on the infringement and EU court cases, and presents this to the parliament, which may seek a hearing with MOFA. Taxation, the environment and social affairs are the main areas where infringement cases arise.

There is no centralised monitoring of transposition or compilation of statistics on transposition.

For complex or important transpositions, it is quite common to set up a working party (involving both ministries and stakeholders). This has been the case of the Services Directive, as in other EU countries. In April 2008, a cross-ministerial working group chaired by the MEE for the implementation of the directive was established, with responsibility for taking forward the framework law for its transposition and co-ordination among relevant ministries. The line ministries have been required to screen their sectoral legislation for those aspects which do not “fit” with the directive. This has apparently been a challenging task.

Legal provisions and the role of the parliament

There are no special regulatory instruments for the transposition of EU laws, and the same process is followed as for national laws. Transposition is generally carried out by primary law (unlike in some other EU countries where more use is made of secondary regulations). The parliament's role follows the process for national laws (see Box 4.4., Chapter 4). It debates the proposal during a first reading in plenary session. Proposals are finally accepted or rejected in the second plenary session reading. Acts accepted or adopted by parliament are then submitted to the President for confirmation – which must be decided within 3 months of submission. If not confirmed, the Act reverts to the parliament for further consideration. If the parliament re-adopts the Act without material alterations, it enters into force without confirmation from the President. It must however be signed by the President.

Ex ante impact assessment (transposition stage)

There are no special requirements, either for impact assessment or for related processes such as consultation of stakeholders. Consultation may be undertaken on highly technical directives.

Monitoring transposition

Speed of transposition

Finland has among the highest rates of transposition of EU Internal Market legislation into national law in the EU. The most recent European Commission Internal Market scoreboard¹¹ shows that Finland has met the 1% transposition deficit target (it achieved a score of 0.4%) and has reduced the number of open infringement proceedings by 25% since May 2006. Its position, however, has deteriorated in relation to transposition of long-overdue directives (those more than 2 years overdue). A total of 30 infringement cases were open against Finland as of May 2009. About 80% of the cases concern directives (incorrect transposition or application, and belated transposition), and the remaining 20% concern other EU legislation.

One reason for the relative difficulties is that Finnish law tends to be broader in scope than EU legislation, and directives are normally transposed within a larger legislative proposal. This has led to infringement procedures for incorrect transposition, or for delays in transposing by the due date.

Correlation with national regulations

Correlation tables may be drawn up and published by the responsible ministry, but this is not a requirement.

Goldplating

The OECD peer review team heard a number of comments on this issue. Considerable frustration (echoing what was heard on the 2003 OECD mission) was expressed by Finnish officials regarding the experience of transposition. Much EU legislation is too detailed (“where is Better Regulation at the EU level?”), and there is little apparent room for discretion in transposition. The usual Finnish approach, in order to avoid later difficulties with the Commission, is transposition of EU directives through a direct translation of the original EU text into Finnish. This approach may be leading to over implementation and have a negative impact on business competitiveness in the EU internal market. At the same time, the OECD peer review team heard that high Finnish standards were often at risk from harmonisation.

Interface with Better Regulation policies at the European Union level

The Finnish government made a number of comments on this matter.¹² It underlines the direct link between improvements in the quality of EU legislation (clarity, consistency, efficiency) and the quality of transposition. Better Regulation applied at the EU level is thus very important. There is a need to “join up” the EU and the national impact assessment processes. The quality of the EU’s own impact assessments is crucial for securing quality regulation at the national level (this entails early consultation with stakeholders among other factors). The OECD peer review team heard that there are issues with EU impact assessments, which vary in quality and cannot always be used effectively. Finland intends to play a more pro active role in the EU’s legislative work.

Finland has put special effort into the improvement of “comitology” procedures. It seeks to ensure that principles of better law-making are applied not only in the drafting of the original directive, but also in the implementing measures which are drafted in the committees set up by directives. A Finnish initiative led to the adoption by the EU institutions of a statement in connection with the latest comitology reform. In the statement

the institutions drew attention to the important role played by implementing measures in legislation. In addition, they considered that the general principles for the quality of drafting should apply to new comitology procedures.¹³

The OECD peer review team had the impression that, with the notable exception of those officials who are regularly and automatically engaged in EU and international work, others appear to be somewhat disconnected from developments in Better Regulation elsewhere in Europe. There does not appear to be a significant body of knowledge or interest around ministries concerning issues such as the latest developments in risk management, or administrative burden reduction inside government.

Notes

1. Not to be confused with the generic use of the term “regulation” for this project.
2. Government Report on EU Policy, Prime Minister’s Office Publication 20/2009.
3. Hyvärinen, Anna, (2009), *How does the Finnish government influence decision-making on new EU legislation*, Publication no. 241, National Research Institute of Legal Policy, Helsinki.
4. For example, it considers any issues concerning the amendment of the Treaties of the European Union.
5. The rules for membership are set out in the Government *Rules of Procedure*: standing members include the ministers of foreign affairs, economy and employment, agriculture and forestry, justice, the minister with designated responsibility for foreign trade, and three other ministers – two designated by government and the third minister within whose mandate a particular issue for discussion lies. The government can designate a further minister as a member of the committee, and any other minister may take part in the consideration of issues as they wish (though they would not be full-time members of the committee). In addition, given its particular status within the Finnish system, the chairman of the government of Åland has the right to be heard by the committee, when an EU issue is within the jurisdiction of the Åland Province, or is otherwise of particular importance to Åland. Due consideration of Åland’s possibilities for wielding influence is an important part of the implementation of Finland’s EU policy.
6. The Secretariat was transferred from the Ministry of Foreign Affairs in 2000.
7. Finland acceded to the EU in January 1995.
8. Parliament’s approval is required for treaties and other international obligations that are “significant”.
9. The Åland province has legislative power in areas which fall under its competence according to the Act on the Autonomy of Åland, and thus also the responsibility for transposing EU regulations which fall within these areas.
10. This is an unofficial English translation of the title of these guidelines, which are available in Finnish on the website of the Ministry of Justice: *Lainlaatijan EU-opas Kansallisten säädösten valmistelua koskevat ohjeet*. www.om.fi/1146646930588.
11. Internal Market Scoreboard, July 2009 No. 19, European Communities, Belgium. The “Scoreboard” sets out progress made by EU member states in relation to the transposition of EU Directives and in particular, whether they are in line with the 1% average transposition deficit target.
12. Finnish government reply to OECD questionnaire.
13. Statement by the European Parliament, the Council and the Commission 2006/C 255/01.