

## Chapter 4

### The development of new regulations

Predictable and systematic procedures for making regulations improve the transparency of the regulatory system and the quality of decisions. These include forward planning (the periodic listing of forthcoming regulations), administrative procedures for the management of rule-making, and procedures to secure the legal quality of new regulations (including training and guidance for legal drafting, plain language drafting, and oversight by expert bodies).

*Ex ante* impact assessment of new regulations is one of the most important regulatory tools available to governments. Its aim is to assist policy makers in adopting the most efficient and effective regulatory options (including the “no regulation” option), using evidence-based techniques to justify the best option and identify the trade-offs involved when pursuing different policy objectives. The costs of regulations should not exceed their benefits, and alternatives should also be examined. However, the deployment of impact assessment is often resisted or poorly applied, for a variety of reasons, ranging from a political concern that it may substitute for policy making (not true – impact assessment is a tool that helps to ensure a policy which has already been identified and agreed is supported by effective regulations, if they are needed), to the demands that it makes on already hard pressed officials. There is no single remedy to these issues. However experience around the OECD shows that a strong and coherent focal point with adequate resourcing helps to ensure that impact assessment finds an appropriate and timely place in the policy and rule-making process, and helps to raise the quality of assessments.

Effective consultation needs to be an integral part of impact assessment. Impact assessment processes have – or should have – a close link with general consultation processes for the development of new regulations. There is also an important potential link with the measurement of administrative burdens (use of the Standard Cost Model technique can contribute to the benefit-cost analysis for an effective impact assessment).

The use of a wide range of mechanisms, not just traditional “command and control” regulation, for meeting policy goals helps to ensure that the most efficient and effective approaches are used. Experience shows that governments must lead strongly on this to overcome inbuilt inertia and risk aversion. The first response to a problem is often still to regulate. The range of alternative approaches is broad, from voluntary agreements, standardisation, conformity assessment, to self regulation in sectors such as corporate governance, financial markets and professional services such as accounting. At the same time care must be taken when deciding to use “soft” approaches such as self regulation, to ensure that regulatory quality is maintained.

An issue that is attracting increasing attention for the development of new regulations is risk management. Regulation is a fundamental tool for managing the risks present in society and the economy, and can help to reduce the incidence of hazardous events and their severity. A few countries have started to explore how rule-making can better reflect the need to assess and manage risks appropriately.

## Assessment and recommendations

### *Procedures for producing regulations*

**There is a shortage of up-front information and systematised processes for developing regulations.** Internal consultation is a key element for the coherent evolution of the legislative framework. In much of the EU, such consultation is mandatory and formalised. That said, the most useful approach is probably to combine formal and informal upstream consultation. Internal consultation is often entrusted to inter-ministerial committees (*ad hoc* or permanent) responsible for specific policy formulation, and it relies on ICT (for example, a government intranet) to make it effective. Recent years have seen a clear improvement in systematising the production of regulations, but implementing the process still seems to be highly decentralised. Luxembourg needs in particular to introduce an application for paperless production of regulatory texts – one that will carry the process from the sponsoring ministry through all the intervening stages to final publication in the *Mémorial* (for now, the procedure is entirely paper-based).

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**Recommendation 4.1. Strengthen upstream co-operation among ministries. Publish the government programme and any changes to it, in particular drafts of laws (and of important regulations) to give them greater visibility and allow stakeholders the chance to make their opinions known. Examine the potential of electronic systems for more effective data sharing between ministries and with parliament. Improve online tools. Make clear who will have the lead in implementing these mechanisms.**

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**It should be noted in this context that all draft laws and all proposals for laws are published in the form of “Parliamentary documents”,** which can be consulted on paper and at the website of the Chamber of Deputies (*www.chd.lu*), and which will include any amendments, the opinion of the Council of State, the report of the competent committee, and the opinions of professional associations.

**Legal quality control also requires attention.** Upstream control of legal quality is not assured, and the resources currently in place are inadequate relative to the task. As one interviewee told the OECD team, “it is not a disaster, but we could do better”. Legal quality depends above all on the work of the Council of State, which becomes involved in the procedure only very late.

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**Recommendation 4.2. Review the legal control process to have it start as soon as possible in the procedure. Review the structures and capabilities for quality control, by establishing a panel of jurists within government (following the United Kingdom's example) or a strengthened partnership with CSA or SCL in the early stages of the process of developing regulations, and boost their resources.**

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**There are no fixed deadlines for the Council of State to issue its opinion – an essential step before a regulatory draft can proceed.** In practice, response times vary, depending on the text in question. This can hold up the legislative process for as long as two or three years. Many interviewees raised this issue, stressing the need for reform.

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**Recommendation 4.3. Establish a timeframe for the Council of State to issue its opinions.**

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**Ex ante impact assessments are a weak link in the regulatory process, and the CSA is now working to strengthen them.** There has nevertheless been progress. There is now an integrated impact assessment form, and it is being filled out more or less completely. The culture is slowly taking hold, but much remains to be done.

**A better performance based on sound policy decisions must start with a clear political statement of the importance of impact assessment.** As a first step, the government must demonstrate the political will to support the procedure, for otherwise stakeholders within the administration will not change their attitude. Other EU countries (e.g. Finland) have found it useful to communicate clearly in the government programme that this process is deemed essential. To reinforce the message, it would be helpful to draw the link between administrative simplification and impact assessments, as reducing red tape is already seen as important. The Cabinet could at the same time affirm its support. Luxembourg might consider whether a law would be useful to make impact assessments mandatory (as France and Spain have done).

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**Recommendation 4.4. Identify ways of reinforcing communication on the importance of producing impact assessments at the initial stage of developing regulations so as to avoid the need for *ex post* clean up. Consider how impact assessments can be made compulsory.**

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**The requirements for impact assessments need to be reinforced.** Impact assessments must take into account the “regulatory cycle”, *i.e.* the planning, implementation and evaluation stages. Some very specific elements of this process, as discussed below, have proven their worth in other EU countries and should be reinforced in Luxembourg.

**Strengthening the upstream institutional framework and sanctions is essential.** There must be an organism responsible for guaranteeing the quality of impact assessments before they are presented to Cabinet. This could be the CSA or the SCL, or a mixed body derived from both entities. In any case, it must be centrally positioned, with access to the process of preparing policies and regulations, so that it can intervene promptly and decisively as “gatekeeper”, *i.e.* it must have the power to reject an inadequate study and to insist on a proper assessment before a draft is submitted to Cabinet. In Luxembourg it is probably neither necessary nor useful to create a new body. Nevertheless, consideration should be given to strengthening the human resources available for this work. Their role should be clearly distinguished from the process of verifying general procedures for developing regulations. These are intended to ensure that formal procedures are duly observed and are concerned only marginally with the substance and the quality of the assessments, which is a separate task.

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**Recommendation 4.5. Review and strengthen institutional arrangements for producing high-quality impact assessments.**

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**Ministries need more support if they are to produce high-quality impact assessments.** As in most other EU countries, ministries are responsible for carrying out impact assessment, and this in turn gives them a sense of ownership. In order for results to come up to expectations, ministries need to be offered specialised training. The introduction of special courses could also be useful to strengthen networking amongst officials, forge links between ministries, and share experience. The CSA already offers courses, and it would be interesting to compare these with the ones provided in other small countries. For example, Ireland offers regular, well-structured courses that have been very well received

and are attracting growing numbers of civil servants. Training needs to be backed by guidelines for ministries to use in preparing assessments. Those guidelines could be part of the practical handbook on legislative and regulatory procedure, but whether they are instructions or not, should be supported by concrete examples, must be clear and – to promote a sense of ownership of the process by ministers and officials who “don’t see the use of it” – should contain a forthright explanation of the logic and the importance of assessments for better regulatory governance.

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**Recommendation 4.6. Review training courses for possible improvements, and ensure that they are part of compulsory training and are taken by the largest possible number of civil servants. Incorporate these into the revision of the general manual.**

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**The recently overhauled impact assessment statement seeks to correct some of the defects of the previous version; improvements should be pursued.** The current impact assessment form was revised in 2010. The change took place after the OECD mission and thus could not be evaluated. The CSA has instituted a quantified assessment of administrative burdens, using the Standard Cost Model, but it should consider going further. For example, the environment and sustainable development do not figure among the areas covered by the assessment, nor does the impact on the economy beyond the SME sector.

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**Recommendation 4.7. Consider further changes to the impact assessment format. Review the standard form to include all fields important to decision making (e.g. the environment). Review the methodology to highlight the need for quantification, if possible, or at least for a sound qualitative evaluation of all costs and benefits of a proposed regulation.**

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**The stages of the process should also be reviewed.** The process needs to be clearly targeted. A balance must be struck between the scope of application of the mechanism and the proportionality of the effort, with care taken not to make the process too cumbersome.

**The mechanism contains no obligation for consultation with outside stakeholders, nor any requirement for publication.** If impact assessments are to be of real use in decision making, public consultation is essential in order to gather the necessary inputs. The current explanatory note highlights the importance of stakeholder consultation, which is the first item on the impact statement form. Releasing and publishing assessments would reinforce the message to stakeholders that the process is taken seriously, and at the same time, allowing their contents to be shared with all parties involved in the regulatory production chain, in particular the Council of State and the Chamber of Deputies, which currently have no access to the assessments.

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**Recommendation 4.8. Make public consultation and publication of impact assessments mandatory.**

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**Lastly, the mechanism must be evaluated if it is to be effective.** Regular evaluation of the mechanism is essential for ensuring not only that the assessments are conducted properly, but that they are useful as tools for decision-making and provide the desired backing for optimal drafting of regulations. Evaluations should be planned systematically. The Court of Auditors might be willing to assist in this regard.

**Recommendation 4.9. Evaluate the impact assessment mechanism regularly, and publish the evaluations. These could be included in the CSA's published reports on progress with simplification.**

### *Alternatives to regulation*

It would be useful to reinforce the message that the alternatives to regulation must be considered systematically, as well as the option of a risk-based approach, at a stage which is not too late in the decision-making process. Several participants stressed the need to take better account of the danger of producing too many regulations. There does not seem to exist a systematic assessment of the “zero regulation” option, and a risk-based approach to the development of regulations is not evident either – an approach that could also help limit overproduction. It is not enough to mention alternatives in the impact statement: the pressure has to be maintained.

## Background

### *The hierarchy of rules in Luxembourg*

Rules in Luxembourg include laws (which may be initiated either by government or by parliament) and regulations (reserved to government initiative).

#### **Box 4.1. The legislative and regulatory structure in Luxembourg**

##### **The Constitution**

The first Luxembourg Constitution was drafted in 1841, two years after the country's independence in 1839. The current constitution dates from 17 October 1868. It has undergone several amendments since then.

##### **Laws**

A law is defined as a rule voted by the Chamber of Deputies that has been promulgated by the Grand Duke. The initiative for a law may come either from the Chamber of Deputies or from the government. The law of 12 March 2009 amended the Constitution by deleting from the legislative process the requirement that the Grand Duke must sanction laws by affixing his approval to the texts adopted by parliament.

##### **Regulations**

*Grand Ducal regulation.* The Constitution gives the Grand Duke the general power to issue the regulations needed to execute laws and treaties. The sole constitutional condition for the formal validity of Grand Ducal regulations is that they be countersigned by a minister. The Constitution, however, is supplemented by other texts. In particular, the Royal Grand Ducal order of 9 July 1857 on the organisation of government requires that all measures submitted to the Grand Duke must have been debated within the Council of Ministers. Failure to observe that rule will nullify the regulation.

*Ministerial regulation.* The members of the government may take measures for applying the provisions of laws or Grand Ducal regulations, provided they do not expand the scope of application of the instrument for which they are issued, for example by introducing additional obligations or sanctions.

*Regulation issued by public institutions.* The law may grant public institutions (for example CSSF or the Insurance Commission) the power to issue regulations within their field of specialisation. The law may subject these regulations to approval of the oversight authority or may even provide for their nullification or suspension in case of illegality.

*Order (Arrêté).* Orders concern individual decisions adopted by the Council of Government (Grand Ducal order) or by a minister (ministerial order).

### *Trends in regulatory output*

Luxembourg does not seem to suffer from significant regulatory inflation (a major problem for some other EU countries). Several interview participants suggested to the OECD team that Luxembourg is not a great producer of rules, in contrast to the EU, the regulatory output of which weighs heavily on the country and on its capacities to cope with that output. The problem cited by some participants had to do, rather, with problems in preparing or transposing texts into clear, understandable and accessible laws (see Chapter 5). This can of course be laid in part to overproduction but also to the shortage of personnel with a sound mastery of legal drafting (see Chapter 2).

**Table 4.1. Production of new laws and regulations, 2000-08**

	2000	2001	2002	2003	2004	2005	2006	2007	2008
Laws	75	91	96	119	118	110	118	96	97
Transposing one or more Community directives	12	8	11	8		16	23	25	21
Grand Ducal regulations	292	269	233	266	257	229	275	278	301
Transposing one or more Community directives	120	37	42	93		83	59	61	45
Regulations of the Government in Council	2	6	3	1	3	6	2	2	4
Ministerial regulations	28	31	29	27	39	260	384	311	18
Grand Ducal orders	14	12	11	11	30	9	2	21	18

*Note:* laws approving international conventions are included in the total number of laws (6 in 2008).

*Source :* Ministère d'État, Département aux relations avec le Parlement, Service central de législation, *Rapport d'activité 2008*, March 2009.

### *Procedures for making new regulations*

#### *Legislative programming*

Following the June 2009 elections, the government (as it does following all general elections) set a timetable for implementing the reforms contained in the government programme 2009-14. At the beginning of the legislative session, a timetable of reforms is established for the first half of the session. The General Secretariat of the Council of Government reports twice a year on progress against that timetable. The Central Legislation Service provides a weekly update of draft bills, for tracking bills introduced in the Legislature. These two documents (timetable of reforms and list of bills) are internal government documents and are not published. Unlike the situation in some other EU countries, then, there is no “public face” to this programming. The OECD team also found that upstream inter-ministerial co-ordination of drafts was often ineffective.

#### *Procedures for preparing draft laws and regulations*

Preliminary draft bills are prepared by the various ministerial departments and transmitted to the Prime Minister. The preliminary draft is then communicated to the General Secretariat of Government, assisted by a group of senior officials known as the “Pre-Council”. They are circulated to the different ministerial departments within a week after the weekly meeting of the Council of Government. That circulation is done in hard copy (departments must send 50 copies of preliminary drafts), as the Luxembourg

administration does not have an application for dematerialising the preparation of legal texts. After approval by the Government in Council, the department initiating the bill transmits it, if it is considered urgent, to the Chamber of Deputies and to the Council of State, together with any amendments to the initial draft. Under ordinary procedures, the Council of State's opinion should be available at the time the draft bill is tabled in the Chamber of Deputies. Other advisory bodies such as the professional chambers and the Economic and Social Council may intervene in the preparatory phase, as provided by law.

A practical guide to legislative and regulatory procedure exists, and it is now being revised.

Since 2004, the General Secretariat of Government has tried to systematise the process of preparing laws. The preliminary draft bill must be accompanied by a set of documents and if the file is incomplete the General Secretariat will not place it on the agenda of the Council of Government. These documents are the following:

- Preamble (statement of reasons).
- Commentary on the articles.
- Opinion from the Minister of the Civil Service and Administrative Reform for all drafts affecting an administration's personnel organisation or reorganisation.
- Opinion of the advisory bodies, if necessary (professional chambers, Economic and Social Council).
- Impact assessment report relating to “Better Regulation” and equal opportunities between men and women.
- Financial report on the expected fiscal impact (in which case the preliminary draft is submitted for an opinion from the Minister of the Treasury).
- A note to the Council of Government comprising:
  - A succinct summary of the purpose and contents of the bill.
  - A description of amendments that it would make to existing legislation, or any changes from a previous version already approved by the Council of Government.
  - Mandatory indication as to whether the draft contains aspects that fall within the competence of another ministerial department and if there has been appropriate consultation with such department(s).
  - The list of questions to be settled or decisions to be taken by the Council of Government.

As in the case of legislation, the Council of State plays an advisory role in the normal regulatory procedure. Its opinion is required for all draft Grand Ducal regulations other than those adopted in an emergency. Certain Grand Ducal regulations may be legally required to be put for consultation to the Conference of Presidents of Parliament. The professional chambers may be asked for their opinion on any draft Grand Ducal regulation that affects

their members. As for the Economic and Social Council, it intervenes only on an exceptional basis.

#### Box 4.2. The procedure for developing rules in Luxembourg

##### Draft bills (at government initiative)

- The Grand Duke advises the Chamber of Deputies of the draft bills he intends to submit for adoption. Upon approval by the Council of Government, the member of government concerned is authorised to begin the legislative process.
- Once approved by the Council of Government, the draft bill is submitted to the Council of State for its opinion.
- Next, the initiating ministry prepares a Grand Ducal order authorising it to table the bill in the Chamber of Deputies.
- The Ministry of State informs the initiating ministry of the date of sovereign signature of the tabling order, whereupon the member of government concerned is authorised to place the bill in the hands of the president of the Chamber, in a public sitting, or to submit it via the clerk of Parliament.
- Once the draft bill is printed as a parliamentary document, it becomes a public document and may be consulted by any interested person.
- The initiating ministry is informed of the draft's approval by the Council of Government (extract from the minutes) and sends a letter requesting the Minister for Relations with Parliament to seek the opinion of the Council of State.
- Draft bills approving an international convention do not need to go through the Council of Government, as the minister concerned already has full powers from the Grand Duke to sign the convention.
- The bill may be tabled in the Chamber either before or after its submission to the Council of State. In practice, however, most bills are tabled in the Chamber before the Council of State is consulted and/or before its opinion is received.
- In no case may the Chamber take a definitive vote on the entire bill before the Council of State has communicated its opinion.
- In practice, parliamentary committees await receipt of the Council of State's opinion before examining the bill in depth.
- Unless the committee or the Chamber decides otherwise, the committee's preparatory work will be done in closed sitting and the committee may decide, by unanimous vote, to keep its deliberations secret.
- The opinion of the Council of State is communicated to the committee examining the bill, and the committee will finalise its report or propose amendments on the basis of that opinion.
- The final parliamentary report is written; it contains an analysis of the documents received and of the committee's deliberations, as well as the substantiated conclusions and the text that the committee will put to the Chamber for vote.
- As a general rule, the Chamber will never take a definitive vote on the entire bill until it has

received the opinion of the Council of State.

- If the Chamber takes a vote on the bill without having received that opinion, the Council of State, having been so informed, has three months to issue its opinion on the draft bill or on any amendments to the initial text.
- Unless the Chamber decides otherwise, at least three days must elapse between presentation of the report and the beginning of debate in public sitting.
- The Chamber fixes the date for the plenary debate after considering the report of the committee concerned.
- Once the committee has adopted its report, the Conference of Presidents will place the draft bill on the agenda in a public sitting.
- Immediately after presentation of the committee report, representatives of the various political groupings and the listed speakers will speak to the bill; the minister responsible for the bill will be the last to speak, unless he insists on intervening immediately after the *rapporteur*.

#### **Draft bills (at parliamentary initiative)**

- Every deputy has the right to propose a bill, signing it and submitting it to the Bureau of the Chamber. The Chamber decides whether to receive a proposed law, at the proposal of the Conference of Presidents.
- The proposal is transmitted to the government, which may issue an opinion, and is then referred by the Conference of Presidents to a committee.
- The proposal is placed on the agenda of a meeting of the committee and then, within six months after submission, the question of whether to pursue the legislative procedure will be discussed at a public sitting.
- If the Chamber is in favour of pursuing the legislative procedure for the proposal, the Conference of Presidents will refer it to a committee for examination. It is also submitted to the Council of State and the interested professional chambers for their opinion.
- If the Chamber decides not to pursue the legislative procedure for the proposal, the proposal will be deemed dismissed. A proposal that the Chamber has dismissed or not adopted may not be reintroduced during the same session.
- Any report favouring a parliamentary initiative that would increase public expenditure, directly or indirectly, must indicate the funds or the expenditure cuts needed to cover the outlay or the forgone revenue that the proposal would entail.
- A deputy may withdraw his or her proposal before the vote to pursue the legislative procedure, in which case the Chamber is so informed.
- Withdrawal of the proposal after the vote on legislative procedure must be decided by the Chamber at the proposal of the Conference of Presidents.
- A proposed bill cannot be withdrawn after the first constitutional vote.
- Draft bills are assigned by the president of the Chamber to one of the standing committees.
- That committee will consider it and make its report promptly, if it decides not to submit any amendments for the (supplementary) opinion of the Council of State. The report is distributed

to members of the Chamber.

- The report is presented at a public sitting of the Chamber by the committee *rapporteur*. After hearing the report, the Chamber will hold a public debate dealing with the principle, the bill as a whole, its individual articles, and any amendments.
- The initiator and the committee *rapporteur* will defend their respective points of view.
- Any member of the Chamber may intervene in the debate. Deputies may present amendments during the debate; they must be drafted in writing and submitted to the president of the Chamber, and they must be supported by at least five Deputies.
- If the Chamber decides to send the amendments to the Council of State or to a parliamentary committee, debate may be suspended until the Council of State has issued its opinion or the committee has drafted its supplementary report.

#### **Regulatory procedure**

- As the Grand Duke is authorised by the Constitution to exercise regulatory power, Grand Ducal regulations are always a government initiative.
- After preparing a draft regulation, the initiating ministry transmits the file, with all the required documentation, in 50 copies, to the Prime Minister (Minister of State) for submission to the Council of Government for approval.
- Upon approval by the Council of Government, the “preliminary draft Grand Ducal regulation” becomes the “draft Grand Ducal regulation” and may be introduced into the procedure.
- For this purpose the initiating minister sends a letter to the Minister for Relations with Parliament (on behalf of the Prime Minister).
- The letter of submission to the Council of State must be accompanied by the documentation constituting the file.
- The Central Legislation Service transmits the file to the Council of State for its opinion and to the members of government concerned by the regulation for information.
- The Council of State sends its opinion to the Prime Minister – Central Legislation Service, for communication to the initiating minister and the other members of government concerned.
- Once the Council of State's opinion is received, the initiating minister will amend the draft text in accordance with any observations in that opinion.
- The opinion of a professional Chamber is required for any draft Grand Ducal regulation that would principally affect its members.
- If the Council of State's opinion does not give rise to any major amendments in the initial text that would require a supplementary opinion, the initiating minister may publish the measure with the force of law.

#### *Verifying legal quality*

Draft bills are examined by the Central Legislation Service and by the Council of State. The SCL has limited resources, with only one jurist on its 15-member team (the others having various university degrees) and it is not in a position to exert proper control over the

legal quality of all texts. The SCL does not currently provide technical assistance to the ministries, except on a voluntary and informal basis, even though the drafting quality of the texts could be improved by consulting the SCL during their preparation. As was noted during the interviews, such consultation could be more effective than an *ex post* opinion issued after the draft has been finalised. The Council of State, which belongs neither to the executive nor the legislative branch, also reviews the quality of draft bills and regulations as an external legal auditor.

Legal quality control is limited, then, by the fact that it comes so late in the production process: this observation applies both to the Council of State’s review, which comes only after the text has already been adopted by the Government in Council, and to that of the SCL. Lack of time is also cited as an obstacle to legal quality control. The legal quality of texts is heavily dependent on the legal drafting skills of the ministerial departments. Basic training for new officials includes sessions on legal drafting. The technical support provided to drafters is however limited, as the OECD team was told by several participants. Drafters have a practical guide that was prepared by the SCL in 2003 in collaboration with the Council of State and the Secretariat of the Chamber of Deputies. That guide details the steps in preparing new draft laws and regulations, but it does not explain the technical aspects of drafting texts.

### *The special role of the Council of State*

The role of the Council of State goes beyond that of a legal audit of the constitutionality of the texts submitted to it. It pronounces itself on both the substance and the form of drafts (including questions of legal drafting and conditions of application), and even, at times, on the appropriateness of the proposal. Its response times vary, depending on the texts. They are not specified, a fact that can hold up the legislative process (in some cases, those times can be as long as two or three years). The so-called “formal” objections of the Council of State are particularly important, as they may foreshadow subsequent refusal to waive the second constitutional vote.<sup>1</sup>

While its opinion is not binding, the Council of State has a second important lever at its disposal: this is the power to waive the second vote by the Chamber of Deputies. According to the Constitution, all bills must be submitted to a second vote unless the Chamber, in agreement with the Council of State, decides otherwise at a public sitting (which is rare). The Council of State justifies its refusal of the waiver, either in a public session or in writing. If it refuses the waiver, the Chamber of Deputies must wait at least three months before taking a definitive vote adopting the law. This mechanism was designed to counterbalance the powers of a unicameral parliament. In principle, the Council of State reserves its right of suspensive veto for proposals it deems to be in conflict with higher-ranking national and international rules, or to have serious legal defects. In effect, the opinion of the Council of State constitutes a kind of jurisprudence that ministries take into account.

### *Ex ante impact assessments*

#### *Background and current approach*

The first impact assessments in Luxembourg were conducted in the late 1990s. Since the budget law of 8 June 1999, any preliminary draft bill with budgetary implications must be accompanied by a report assessing its short, medium and long-term fiscal impact. All such drafts must be submitted, with the impact report, for the opinion of the Minister of

Treasury and Budget. Since 1998 the initiators of laws and regulations must also complete an equal opportunities impact form.

This mechanism was reviewed and validated in January 2006 by the plenary assembly of the CSA. Currently, a comprehensive impact assessment report covering several criteria (Box 4.3) is mandatory and must be transmitted with the draft law or regulation to the Council of Government. The purpose of that report, as described by the CSA, is “to measure the economic impact – *i.e.* the administrative and financial burdens – that laws and regulations would impose on the persons or businesses affected.”

The current impact assessment form was revised by the CSA in April 2010, as the previous one had not produced the desired results. During its November 2009 mission (when the previous form was still in effect), the OECD team received the following observations. The form is supposed to be easy to understand and use, but completing it often amounts to simply ticking the boxes without much concern as to substance, and the ministries have not really asserted ownership over it. The forms are completed “at the last minute”, because this is an obligation. As one participant commented, “the text isn't going to change”, and the assessment will thus have little influence on the decision taken. The assessment form, while simple enough in its structure, nevertheless covers a broad field and completing it can be a daunting task. The methodology is largely qualitative, and it could be improved if some of the elements were quantified with, for example, some economic analysis and cost/benefit figures.

The revised assessment form:

- Simplifies and reduces the number of elements that must be reported.
- Establishes a three-part structure: “Better Regulation”, “Equality of Opportunities”; and “Services Directive”.
- In the “Better Regulation” section, a significant portion is devoted to administrative simplification, including innovative features such as regrouping formalities, interagency data sharing, and tacit authorisation. The explanatory note to the impact assessment form also stresses the importance of consulting stakeholders at least eight weeks before the preliminary draft is submitted to the Council of Government.

The assessment form is targeted at proposals originating with the central executive branch (governmental administration), either as draft laws or draft Grand Ducal regulations, as well as all administrative procedures that affect businesses. The initiators of the draft in question must briefly describe the purpose of the draft and the bodies consulted on the matter. As in other EU countries, this procedure does not apply to parliament-initiated legislative proposals, which fall under parliamentary authority.

The preliminary draft of a law must also be accompanied by a statement of reasons (preamble), a commentary on the articles, the opinion of the Ministry of the Civil Service and Administrative Reform (for all drafts affecting an administration's personnel organisation or reorganisation), the opinions of the bodies consulted (if there are any at this stage), as well as a draft decision and, if appropriate, a draft press release. There must also be a memorandum to the Council of Government briefly summarising the objective and content of the file, with a description of the proposed changes to existing legislation or to an earlier version of the proposal already approved by the Council of Government, an indication as to whether the proposal contains aspects that fall to another ministerial

department and, if so, whether that department has been consulted, and a list of questions to be settled with respect to the decisions to be taken by the Council of Government.

The Luxembourg government stresses the essential message of the OECD and of the 2001 Mandelkern Commission report to the European Commission to the effect that the impact assessment is not a substitute for the political decision but, on the contrary, allows that decision to be taken in full knowledge of the situation.

The impact report form has been designed as a simple exercise and, consistent with its name, it amounts essentially to a series of boxes to be ticked, and not to a full-blown impact assessment. Ticking the boxes can readily be reduced to a last-minute formality, completed just before the text is transferred to the Secretariat of Government. The OECD interviews found that this was frequently the case and that, among ministerial departments, the impact assessment was for the most part an unfamiliar exercise, of little apparent value added. There is great resistance to quantified impact analysis. The forms are completed, but their content is not of much use. The fact that the forms are not published makes them even less useful for public debate, including parliamentary debate, and their lack of visibility makes administrations even less inclined to fill them out carefully. In April 2010 the CSA updated the report form to make it more effective. At the same time, it rolled the equal opportunities form into the updated impact evaluation form.

### *Institutional framework*

The impact assessment forms for draft bills and regulations are supposed to be completed by the initiating ministerial department, as they are in most other EU countries and as they must be to ensure a sense of ownership. A Simplification Co-ordination Committee (CCS) has been established to examine the impact forms. It comprises two officials of the Ministry of State (of which the CSA is part), two officials from the Ministry of the Civil Service and Administrative Reform, two officials of the Ministry of the Middle Classes and Tourism, and two officials of the Ministry of Economy and External Trade.

The CCS issues an opinion on the basis of the impact evaluation forms submitted by the General Secretariat of the Council at the time the initiating Ministry submits the preliminary draft law. This formal opinion must allow the authors of legislative and regulatory proposals to improve and simplify their texts. When faced with complex and specialised cases, the CCS will consult with experts. With texts of Community origin, it checks to see that the principle of “the whole directive and nothing but the directive” has been observed. The impact assessment form and the formal opinion of the CCS are presented to the Council of Government, together with the corresponding draft of the law or Grand Ducal regulation.

### *Support and training*

The CSA has issued an explanatory note on the points to be observed in the course of preparing the impact assessment study, and this is available at its website ([www.simplification.lu](http://www.simplification.lu)).<sup>2</sup> That note invites officials to turn to the CSA with any questions. The CSA also offers four continuing training courses each year, open to all officials, dealing with the principles of Better Regulation and use of the impact assessment form. On average, some 15 government officials and employees take this one-day course. The course will be made part of the compulsory initial training course for all government officials and employees as of January 2011.

### *Methodology*

The procedure involves two stages:

- The initiator of the measure completes the form so that the CCS can offer an informal opinion. The CCS may make recommendations to the initiating Ministry (on consultation, use of the SCM, etc.) or it may submit the draft text for the opinion of the CSA plenary.
- The form must be attached to the text submitted to the Council of Government, at which time the CCS renders a formal opinion.

The impact assessment form requires quantification of any new administrative burdens introduced by the proposed regulation. For drafts identified as significant by the *ex ante* procedure, the CSA may undertake a quantified assessment of administrative burdens, with the agreement of the ministry concerned, using the Standard Cost Model or the common methodology of the European Union. The criteria underlying this choice will include the importance of the proposal's economic, environmental or social repercussions, its consequences for major interest groups, and significant policy reform in one or more economic sectors. For the moment, however, no support is available to help with the cost/benefit analysis.

### *Public consultation and publication*

The impact assessment form is strictly an internal government document. Only the financial form is published and communicated to the Council of State and the Chamber of Deputies. Moreover, the process differs from the public consultation procedures conducted during preparation of draft laws or regulations.

### *Alternatives to regulation*

The impact assessment form includes a question as to whether alternatives have been considered. The very first section of the form asks the initiator of the draft to identify the consequences of the “no regulation” option. That question is also included in the training offered by the CSA, and may be put forward by the CCS in its opinion on draft laws and regulations. These instructions are not binding.

### *Risk-based approaches*

As in most other EU countries at the present time, there is no provision for taking account of risk before beginning the formal process of preparing rules.

## Notes

1. An emergency procedure allows the government not to send a draft Grand Ducal regulation to the Council of State. There are limitations to this possibility. On one hand, the initiating ministry must substantiate resort to the emergency procedure. The General Secretariat of the Council of Government verifies that substantiation, the pertinence of which may as a general rule be examined by the administrative tribunal and the administrative court in case of appeal. On the other hand, the law that the regulation is intended to implement must not specifically require that the Council of State's opinion be sought. The emergency procedure is requested for around half of draft Grand Ducal regulations. It is not applicable for laws and their amendments.
2. [www.simplification.public.lu/analyse-flux/Note\\_explicative\\_de\\_la\\_fiche\\_d\\_impact.pdf](http://www.simplification.public.lu/analyse-flux/Note_explicative_de_la_fiche_d_impact.pdf)