

## Chapter 6

### Compliance, enforcement, appeals

Whilst adoption and communication of a law sets the framework for achieving a policy objective, effective implementation, compliance and enforcement are essential for actually meeting the objective. An *ex ante* assessment of compliance and enforcement prospects is increasingly a part of the regulatory process in OECD countries. Within the EU's institutional context these processes include the correct transposition of EU rules into national legislation (this aspect will be considered in Chapter 7).

The issue of proportionality in enforcement, linked to risk assessment, is attracting growing attention. The aim is to ensure that resources for enforcement should be proportionately higher for those activities, actions or entities where the risks of regulatory failure are more damaging to society and the economy (and conversely, proportionately lower in situations assessed as lower risk).

Rule-makers must apply and enforce regulations systematically and fairly, and regulated citizens and businesses need access to administrative and judicial review procedures for raising issues related to the rules that bind them, as well as timely decisions on their appeals. Tools that may be deployed include administrative procedures acts, the use of independent and standardised appeals processes,<sup>1</sup> and the adoption of rules to promote responsiveness, such as “silence is consent”.<sup>2</sup> Access to review procedures ensures that rule-makers are held accountable.

Review by the judiciary of administrative decisions can also be an important instrument of quality control. For example, scrutiny by the judiciary may capture whether subordinate rules are consistent with the primary laws, and may help to assess whether rules are proportional to their objective.

#### Assessment and recommendations

**The enforcement of laws and regulations deserves special consideration.** Risk assessment, co-ordination of inspections and a results-based implementation policy are all tools that can reduce unnecessary burdens on businesses presenting a low risk of non-compliance, and they can make the inspection system more effective and less costly.

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**Recommendation 6.1. Review the regulatory enforcement policy to identify potentially more effective approaches.**

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**Appeals channels are well-conceived, and, a mediator was instituted in 2004.** The OECD team was not able to unwrap this in detail, but there would seem to be no major problems with the system. Knowledge of the system is acquired mainly by word of mouth. It would be timely to consider the publication of information on channels of appeal against

administrative decisions, taking into account the Luxembourg context, in which foreigners figure prominently among its population and workforce.

## Background

### *Compliance and enforcement*

#### *Monitoring regulatory enforcement*

It is up to each ministry to monitor enforcement of regulations pertaining to its field of activity.

#### *Monitoring regulatory enforcement by inspection agencies*

Inspection is the responsibility of the ministries or regulatory agencies, which may call upon the police or customs officials to conduct on-site inspections and to issue fines. Ministries and regulatory agencies may sue and be sued for breach of a regulation. The Luxembourg government reports that risk assessment is an approach widely used by regulatory agencies.

### *Appeals*

#### *Judicial appeals*

In Luxembourg there are two types of jurisdiction: the judicial one (civil and criminal cases) and the administrative one. Under Luxembourg law, administrative jurisdictions have the particular feature that they are competent, in principle, to consider only matters that have been expressly devolved to them by law. Thus, special laws have removed administrative disputes from the purview of the courts and assigned them to the administrative jurisdictions.

In cases involving incompetence, acts in excess of authority, improper exercise of authority, breaches of the law or of procedures designed to protect private interests, the Administrative Tribunal decides on appeals against administrative decisions in respect of which no other remedy is available in accordance with laws and regulations. In principle, the administrative tribunal hears appeals for annulment. A *recours en réformation* (asking the tribunal to quash and replace an administrative decision) is possible in cases expressly provided by law. Interested parties may also file an appeal before the administrative tribunal in challenges against an administrative decision equivalent to rejection of an application when the three-month time limit has expired without a decision having been rendered.

The administrative tribunal also hears challenges involving direct taxation by the State and municipal taxes and levies. It decides appeals against decisions of the director of taxation in specific cases where the law provides for such an appeal, which must be filed within three months. If six months has elapsed after a claim for reimbursement or reduction, without a definitive decision, the appellant may consider the claim rejected and may file an appeal before the administrative tribunal.

As with the decisions of other administrative jurisdictions (such as the Superior Council of Social Insurance), decisions of the administrative tribunal may be appealed to the Administrative Court.

### *Non-judicial appeals (administrative appeals)*

The non-contentious administrative procedure was established by the law of 1 December 1978,<sup>3</sup> supplemented by a Grand Ducal decree of 8 June 1979 on the procedure to be followed by State and municipal administrations. These two texts establish the following fundamental rules: the right to be heard; access to information; the right of the citizen to be assisted or represented in the course of administrative proceedings; the obligation of the administration to substantiate its decisions; and the obligation of the administration to indicate available avenues of recourse.

### *The Ombudsman*

The Ombudsman (or mediator) instituted by the organic law of 22 August 2003 is empowered to hear all claims submitted by physical or legal persons concerning the functioning of State and municipal administrations, as well as public enterprises of the State or the communes, with the exception of their industrial, financial and commercial activities. This decision must have been taken in connection with a case of direct concern to the person seeking the Ombudsman's services. Appointed by and reporting to the Chamber of Deputies, the Ombudsman is independent and is answerable neither to the administration nor to the government. The position of Ombudsman was created as part of an administrative reform policy intended to bring administration closer to the citizens and to improve its relations with them.

An applicant may not lodge a complaint with the Ombudsman without having first filed an administrative appeal. The invocation of the Ombudsman does not suspend the time limits applicable to other avenues of recourse legally available, and the Ombudsman intervenes only with the administration or administrations in question. Citizens may submit their complaints to the Ombudsman directly, either in writing or orally (through the Office of the Ombudsman), or indirectly through a member of the Chamber of Deputies. If a complaint appears justified, the Ombudsman will advise the citizen and the administration that issued the challenged decision and will make recommendations for friendly settlement. If in the exercise of his duties the Ombudsman finds systemic dysfunction or incoherence or shortcomings at the administrative or regulatory level, he is empowered to make official recommendations to the public agencies in question. The Annual Report of the Ombudsman for 2008/09 contains 39 such recommendations. Follow-up to the recommendations is monitored by the Petitions Committee of the Chamber of Deputies. The Ombudsman receives around 900 formal complaints and 2 000 contacts every year.

## Notes

1. Administrative review by the regulatory enforcement body, administrative review by an independent body, judicial review, ombudsman.
2. Some of these aspects are covered elsewhere in the report.
3. In adopting this law, Luxembourg has followed resolution (77) 31 of the Council of Europe on protection of the individual in relation to the acts of administrative authorities.