

Chapter 7

The interface between member states and the European Union

An increasing proportion of national regulations originate at EU level. Whilst EU regulations¹ have direct application in member states and do not have to be transposed into national regulations, EU directives need to be transposed, raising the issue of how to ensure that the regulations implementing EU 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 current approach to the negotiation and transposition of EU regulations does not deliver effective results. Portugal’s transposition record is below the EU average. Portugal needs to be encouraged to develop a more formal approach including guidelines, to help ministries address EU issues in a more structured way (both at the stage of preparing and negotiating EU regulations, and at the stage of transposing EU regulations). The UK’s EU Guidelines may provide some ideas. Denmark also offers an interesting case of how efforts at the negotiation, through a thorough process involving all stakeholders, can promote a smoother transposition process. There is also likely to be an issue of capacity-building in ministries, and if so this too will need to be addressed.

Recommendation 7.1. Portugal should elaborate a stronger policy and guidance for its approach to the negotiation and transposition of EU regulations, after consulting with stakeholders within and outside the administration. This is now being taken forward. Since the OECD review in spring 2008, the government of Portugal has adopted a resolution to create a stronger institutional framework for monitoring the transposition of EU directives, which constitutes a positive step in that direction.

Background

General context

The share of national legislation originating in EU rules is roughly estimated at 50% (an estimate similar to that of other EU countries). This can be higher in some areas, such as the environment.

Negotiating EU regulations

Individual ministries co-operate with the Portuguese Permanent Representation in the Council to negotiate EU regulations. Officials seem however less aware of the Brussels machinery compared to other EU countries. The OECD team heard several calls for increased guidance and stronger involvement at an early stage of EU policy making. The situation is different in the areas covered by independent regulatory authorities (such as financial services), which have more adequate resources and expertise to engage in EU negotiations and can be involved by ministries in the negotiation process, beyond consultation.

Transposing EU regulations

The Ministry of Foreign Affairs co-ordinates the transposition of EU regulations, which is under the responsibility of individual ministries. The Department for European Affairs of the Ministry of Foreign Affairs allocates responsibility for transposition to the relevant ministry. During the drafting stage, it monitors the process and tracks deadlines. It provides a monthly note on the transposition process, which is circulated to ministries and outlines difficulties. It can also provide some guidance to the ministries on an *ad hoc* basis. At the time of the OECD review in spring 2008, there was no standard guidance material available to ministries.

Transposition can be done by law, decree law, or regional law when autonomous regions are concerned. Each ministry has an international cabinet, which supervises this process. A working group is usually set up to prepare a draft. It is often made up of the experts who were involved in the negotiation process. This can be followed by a consultation of external stakeholders, which has become common practice in some ministries, such as the Ministry of Environment. The working group or technical unit responsible for preparing the text also performs the *Simplex* Test at this stage. This has been the case of the ongoing transposition of the Services Directive for example.

Portugal has reduced the backlog of EU directives that needs to be incorporated into national law, from 80 directives in May 2005 to 41 in June 2008. It records the lowest transposition rate among EU countries, with a rate of 98.62% against an EU average of 99.36% (Box 7.1). According to government officials, the delays are due to the length of the political process for enacting primary laws through parliament, rather than delays in the preparation of draft laws.

At the end of 2008, the government adopted a resolution² to reinforce the institutional framework for the transposition of directives. The resolution provides for the establishment of “*Sistema de Controlo dos Actos Normativos*” (SCAN, System for Control of Normative Acts) to monitor deadlines with respect to transposition of directives and adoption of secondary regulations. CEJUR is to co-ordinate SCAN (with the support of the Department for European Affairs of the Ministry of Foreign Affairs with respect to EU directives). A network of contact points will be set up throughout ministries and co-ordinated by CEJUR.

Regular reports will be presented both on the production of secondary regulations and transposition of EU directives.

Box 7.1. Portugal's performance in the transposition of EU directives

Internal Market directives

Portugal complies at a comparatively weak level. In the scoreboard of August 2008, it is ranked last of the 15 member states of the EU reviewed in this project with a transposition deficit of 1.9%. However, there has been progress since July 2007 where the deficit again amounted to 4.4%.

All directives

Portugal also performs at a comparatively weak level. With a deficit of 1.3% in August 2008, it is towards the end of the EU-15 ranking. Only Luxembourg and Greece have a worse performance.

Its lowest transposition rates can be found within the sectors of energy and transport, the Internal Market and employment and social affairs.

Portugal's performance at a glance

Transposition deficit as % in terms of Internal Market Directives

Nov-97	May-98	Nov-98	May-99	Nov-99	May-00	Nov-00	May-01	Nov-01	May-02
5.9	5.9	5.6	5.7	4.9	6	4.4	2.7	2.5	2.1
Nov-02	May-03	Jul-04	Jul-05	Dec-05	Jul-06	Nov-06	Jul-07	Nov-07	Jul-08
3.1	3.7	1.9	3.4	3.1	3.7	3	4.4	2.3	1.9

Source: European Commission

Directives for which no national measures (implementing all adopted directives) have been notified as %

Aug-00	Mar-01	Oct-01	May-02	Oct-02	Apr-03	Oct-03	Apr-04	Nov-04	May-05	Nov-05
12.3	5.6	4.05	3.97	3.96	4.15	2.15	1.5	2.36	2.16	2.24
May-06	Nov-06	Mar-07	May-07	Jul-07	Oct-07	Nov-07	Feb-08	Apr-08	Jun-08	Aug-08
2.4	2.07	2.91	2.54	1.79	1.51	1.25	1.27	1.46	1.38	1.33

Source: European Commission.

Notes

1. Not to be confused with the generic use of the term “regulation” for this project.
2. Resolution of the Council of Ministers 197/2008 of 30 December 2008.