

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 legislation are fully coherent with the underlying policy objectives, do not create new barriers to the smooth functioning of the EU Single Market and 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 law. The view from “below” on the effectiveness of these policies may be a valuable input to improving them further.

Assessment and recommendations

Since the 2004 review, there has been a significant improvement in timely transposition. France used to be a “poor performer” in the EU with regard to transposition. It has made up considerable ground in transposing directives and has achieved its policy goal of reducing its transposition deficit to below 1%. This can be put down to the introduction of rigorous planning and monitoring arrangements. The government has set up a system that monitors transposition very closely and shows quite clearly who is ahead or lagging behind within the framework of a contact group. The SGAE (General Secretariat for European Affairs) holds regular monitoring meetings, keeps a scoreboard and has a network of contacts drawn from both government departments and ministerial staff. The High Level Group on Transposition enables the SGG and the SGAE to take stock of progress every quarter, prior to the deadlines. It is important to maintain the frequency of High Level Group meetings as well as political pressure via the European Inter-ministerial Committee.

Recommendation 7.1. Maintain pressure on the monitoring of the transposition of EU directives by ministries.

Box 7.1. Comments from the 2004 OECD report: Transposition of EU directives

Recommendation

Improving legal certainty by... making up for time lost in the transposition of Community directives.

In recent years France has taken a considerable time to transpose European directives, with more than 90 directives that have not been transposed and more than a dozen that have not been dealt with after more than 2 years. The situation slightly improved recently. At the end of the first semester of 2003, France's rate of delay was ranking 10 out of 15 in Europe.

This situation is a source of legal uncertainty, because it can raise doubts as to the standard in force if there is a temporary contradiction between a European directive and national law. The reasons for these delays are difficult to understand but there are a great number of them. Apart from directives which have come up against internal resistance against their implementation for a long time, such as those relating to certain public services, it appears that implementing any new directive in France requires the whole existing regulatory system to be re-examined, which is very fraught. Business circles think that implementing directives gives rise to "goldplating", with increasingly improved regulations, whereas in some cases direct "*verbatim*" implementation could be all it needs.

Source: OECD (2004).

Quality control needs to be stepped up. In terms of transposition, the focus has been mainly on reducing delays (successfully). The main weakness of the current monitoring system is its failure to cover the quality of transposition (this is not unique to France). Quality control relies heavily on the European Commission, carried out at the end of the process. Enhancing the quality of transposition requires action at an earlier stage in the process (*i.e.* upstream, as soon as the negotiation starts) and the use of impact assessment by lead ministries. The interviews raised two specific issues, the first being goldplating and the other the transposition problems stemming from the quality of the actual directives.

Transposition quality requires improvements to the impact assessment system, including consultation arrangements. The simplified impact statement (*fiche d'impact simplifiée*, or FIS) is basically a legal analysis. It lists the domestic legislation to be drawn up or amended if the directive were adopted. It is based on a correlation table linking each provision in the directive to a piece of domestic legislation (to be drawn up or amended). France is to be commended for using such a table, as many other countries have less formal arrangements. However, it would be advisable to strengthen and broaden the implementation of the entire system. Drawing up an impact statement that is regularly updated throughout the negotiations makes it possible to assess the legislative changes entailed by a directive, in order to plan ahead for the transposition process and prevent (as far as possible) the adoption of a directive that would be hard to incorporate into the French legislative framework. It would also be advisable to tie in the work undertaken nationally with the impact assessments drawn up by the European Commission (one source of difficulty, highlighted by several OECD interviewees, is the legal quality of the directives themselves). Downstream, the impact statement could be more clearly integrated into the practical transposition exercise and used, for instance, to back up the impact studies required for proposed domestic legislation (Chapter 4). The discussions under way in the SGAE on a reform of the system are highly appropriate.

Box 7.2. 2004 OECD report: Consultation and impact assessment for EU directives

In France, prior public consultation and impact assessment of the proposed directives remain minimal. This does not make it any easier to understand the objectives of the European policy at an internal level, all the more so since European projects are often the means for national governments to overcome internal resistance and have legislation passed for difficult measures. It can then partly deny responsibility for them pleading that they are valid because of their supranational European context. However, formal consultation of parliament for matters which come under the law, following the *Council of State*'s recommendation, has meant that the situation has improved considerably.

Recommendation 7.2. Continue to reflect on the interaction between impact assessment undertaken at the European Commission level and the national level, and on integration of impact assessment in the transposition process.

France should be more active in developing Better Regulation issues at the EU level. It could take forward the major discussions launched during its Presidency of the Council of the European Union [importance of access to legislation in the work on “Regulatory Governance”, including the interface between EU and domestic legislation; interaction between the EU system of *ex ante* assessment (impact studies) and its counterparts in Member States; the interface between impact assessment and administrative simplification; and access to legislation via information technology as an element in its own right]. A lack of resources appears to be hindering the ability to follow up actively on these various issues at the EU level.

Recommendation 7.3. Reinforce France's role in discussions on Better Regulation at the EU level. Consider how to secure adequate resources to support this objective.

Background

General context

The weight of EU law

As in the other EU Member States, the output of domestic regulations is substantially affected by the output of rules at the EU level. EU-origin regulations as a share of France's regulatory stock have been estimated at over 50%.

The case law of both the *Constitutional Council* and the *Council of State* stresses the need to comply with transposition requirements, in terms of both deadlines and compliance with EU obligations. For instance, the *Constitutional Council* has inferred from the Amendment to the Constitution on 25 June 1992, specifically mentioning France's membership of the European Communities and the European Union, that there is a “constitutional requirement” on the legislator to transpose directives into domestic law.² Similarly it reserves the right, following its decision of 27 July 2006 on copyright, to verify that a transposed act complies with the provisions of the relevant directive. As for the *Council of State*, after specifying in a 1984 Decree³ that the Government could not introduce regulations that were inconsistent with the aims of a directive for which the transposition deadline had expired, it stated in a 1989 Decree (*Alitalia company*) that the

authorities could not retain in domestic legislation, beyond that same deadline, regulatory provisions that had become inconsistent with such aims.

Leading trends in the arrangements for negotiating and transposing EU directives

Over the past few years, the French Government has reviewed the arrangements for negotiating and transposing directives in order to improve the transposition rate. This was because France had a substantial backlog in terms of transposing EU directives, as highlighted in the 2004 OECD report which listed numerous problems (Box 7.1). At the time, more than 90 directives had not been transposed and more than a dozen had not been dealt with after more than 2 years.

This review of the system was prompted largely by the Circular of 27 September 2004 from the prime minister,⁴ setting out a procedure common to all ministries and based on an integrated approach, starting at the negotiating stage. There are four components to this procedure:

- better appraisal of the legal impact of European legislation, as far upstream as possible at the negotiation stage;
- better planning of the transposition workload;
- a new inter-ministerial network of contacts focusing on the transposition process; and
- monitoring arrangements, including the appointment of *chargés de mission*, reporting to the legal department of SGAE, to monitor transposition.

The experience gained from France's Presidency of the Council of the EU (second half of 2008) proved useful: ministries had to take a pro-active approach to projects on the president's agenda, and realised that involvement was advisable well upstream in the negotiating process. Several interviewees stressed the need to develop this kind of pro-active approach and use impact assessments to further "empower" the French delegation for the negotiations. It remains to be seen whether this effort will be maintained across all the ministries. The recent provisions of Article 260 of the Treaty on the Functioning of the European Union, based on the Treaty of Lisbon, are a new source of pressure and encouragement to act in that Member States may henceforth, as of the first referral to the Court of Justice of the European Union, be ordered to make a penalty payment for delayed transposition.

Negotiating EU regulations

Institutional framework and processes

France's negotiating positions with regard to EU regulations are conveyed by the Permanent Representation once they have been subject to a process of inter-ministerial dialogue and finalised under the supervision of the General Secretariat for European Affairs (SGAE). This is to ensure that France speaks with a single voice in European fora. The SGAE appoints a lead ministry for the negotiations and centralises information to and from the European institutions. This includes forwarding government instructions to the Permanent Representative in Brussels and ensuring that the relevant ministries receive feedback throughout the negotiations. Another aspect of the SGAE's role is to follow European issues on a daily basis, including the work of the European Parliament. It has thus become a centre of expertise on European issues.

During preparations for the negotiating process, the SGAE harmonises the positions of French administrative authorities and, in the event of differences, arbitrates as necessary. Preparations for the negotiations are not confined to ministries alone. They may also include the relevant independent administrative authorities (such as ARCEP, the French Telecommunications and Posts regulator), which are in practice closely involved with specific ministries in negotiating European regulations in their own fields. In cases of disagreement between ministries on the more politically sensitive issues, the SGAE asks the prime minister to arbitrate, for instance by raising matters with members of the government within the Inter-ministerial Committee on Europe (CIE). This meets on a monthly basis and is chaired by the prime minister.

The role of parliament

The procedures for consulting parliament were summarised in a Circular on 22 November 2005, currently under revision to reflect the Amendment to the Constitution on 23 July 2008 and the Treaty of Lisbon. The government must forward to the Parliamentary Committees on European Affairs (Box 7.3) any proposals for or drafts of acts of the European Communities and the European Union as soon as they have been transmitted to the Council of the European Union. The Parliamentary Committees on European Affairs may decide to approve the drafts of or proposals for EU legislation or oppose their adoption in a resolution.

This disclosure requirement has been extended. Until the Amendment to the Constitution on 23 July 2008 it applied solely to acts containing provisions of a statutory nature as specified in the Constitution (see Chapter 4), but now the Government must also lay before parliament, on its own initiative or at the request of the Chair of the Committee on European Affairs, any “requisite document”, without further details. Some 500 European instruments are laid before parliament in this way every year. Since 2002, the SGAE has been attaching simplified impact statements (FIS) to the proposals for and drafts of European acts laid before parliament (see below).

Box 7.3. Parliamentary committees on European affairs

The National Assembly, like the Senate, has a Committee on European Affairs to monitor EU affairs under Article 88-4 of the Constitution. Established following the Amendment to the Constitution on 23 July 2008, these Committees have replaced the Delegations for the European Union.

The Committees have a mandate to provide information on and monitor EU work, on behalf of France’s Permanent Representation, by holding regular hearings (members of the government, European officials, key figures) and publishing information reports. They appraise all drafts of and proposals for EU legislation, and discuss proposed opinions of the Parliamentary Assemblies in terms of their conformity with the principle of subsidiarity. They may also give the European perspective on domestic Bills and proposed legislation in areas covered by the European Union. They also help to foster co-operation between Member State Parliaments and the European Parliament.

Ex ante impact assessment (negotiation stage)

Since 2004, ministries have had to draw up a simplified impact statement (FIS) right from the drafting and negotiating stages of EU legislation. The Circular dated 27 September 2004 from the prime minister (*ibid.*) states that “*every draft act of the European institutions should give rise to an ex ante analysis of its legal, budgetary, technical or administrative impacts including, where necessary, its implications for local*

authorities, as well as its consequences for the sector concerned". To that end, the lead ministry must provide, at the invitation of the SGAE and within three weeks of European legislation being laid before both Assemblies, a simplified impact statement on that legislation. This FIS is required for draft directives and for framework regulations/decisions tabled by the European Council. The FIS is forwarded for validation to the SGAE, which then forwards it to parliament. If the draft has implications for local authorities, the SGAE also forwards the FIS to local authority associations. The 2004 Circular recommends that this initial analysis be fleshed out at each successive stage and adapted when significant amendments are made to the joint proposal adopted by the Council or following amendments proposed by the European Parliament.

The simplified impact statement is a basically a legal analysis. It lists the domestic legislation to be drawn up or amended if the directive were adopted. It is based on a correlation table linking each provision in the directive to a piece of domestic legislation (to be drawn up or amended). The statement sets out any transposition problems that have already been identified. These may be questions as to the choice of an appropriate level for the legislation in the hierarchy of domestic rules and regulations, or interpretation problems or possible inconsistencies with regard to domestic law that might arise from the proposed wording of the EU instrument. The FIS must include an initial assessment of implications other than those of a legal nature.

Transposing EU directives

Institutional framework and processes

The Circular of 27 September 2004 from the prime minister is the benchmark for ministries on transposing EU law into domestic legislation. The onus for preparing for that transposition is on ministries acting either alone or as lead ministries when a directive covers more than one policy area. In principle, the responsibility for transposition lies with the ministry that led the negotiation. The ministries forward the correlation tables to the European Commission when expressly required to do so by the directive but do not make them public. The SGAE monitors the transposition in liaison with the contacts appointed in each ministry, in liaison with the European Commission.

Legal provisions and the role of parliament

Parliament is involved in the transposition of directives that have statutory implications. The transposition then takes the form of a Bill laid before one of the two Assemblies, and follows the ordinary legislative process (see Chapter 4). Again, parliament will have been informed at the negotiating stage. There are no special transposition arrangements as in some other EU countries.⁵

Ex ante impact assessment (transposition stage)

The simplified impact statement, drawn up at the negotiating stage, must be updated as it goes through the transposition process. The Framework Act of 15 April 2009 makes it mandatory for ministries to conduct impact assessments and, in this regard, to look at whether their draft legislation is consistent with European law as a whole. Discussions are under way in the SGAE to reform these arrangements, particularly in terms of the changes made to impact assessments in 2009. Another question relates to the link between impact assessments by the European Commission and those conducted for transposition purposes.

There has been a marked increase in the output of simplified impact statements laid before parliament: 12 in 2005, 120 in 2006, 97 in 2007 and 102 in 2008. An FIS should include more than just legal analyses but, in practice, ministries confine them to a simple legal statement. Correlation tables are drawn up for around half of them. The *Warsmann* report in January 2009 pointed out that their quality can also vary markedly across ministries.

Monitoring transposition

Transposition monitoring is based on inter-ministerial co-ordination schedules and arrangements. Each lead ministry provides input to the scoreboard drawn up by the SGAE, on at least a quarterly basis. The inter-ministerial network of contacts, drawn from government departments or ministerial staff, is known as the “High Level Group” and holds quarterly meetings under the auspices of the SGG and the SGAE. The aim is to identify potential problems and call on ministries to act by the deadlines set for transposition. Any problems or delays in transposition may be addressed at the political level, first in the monthly CIE meetings, then in the Council of Ministers which addresses such matters on a six-monthly basis.

Responsibility for checking the quality of transposed legislation lies with the legal directorates of the ministries concerned, the focus being mainly on the legal aspects. The SGAE may take part in this at the request of a ministry, or in the event of inter-ministerial disputes. However, it cannot conduct such verifications on a systematic basis. The emphasis appears to have been mainly on delays in transposition rather than quality. The EU Internal Market Scoreboard published by the European Commission in July 2009 ranks France fourth among the Member States for the number of internal market directives (23 in all) transposed incorrectly. A 2007 report by the *Council of State* entitled “Better integration of Community regulations into domestic law” included recommendations that the unconditional provisions of a directive be written directly into domestic law without amendment. These recommendations were taken up in the 2009 *Warsmann* report on the quality and simplification of the law.

Assessment: Progress

The European Commission’s Internal Market Scoreboard⁶, published in December 2009, indicates that France has a transposition deficit of 0.7 % (below the 1% target set by the Commission), with 10 directives overdue for transposition (European Communities, 2010). The situation has improved considerably since the 2004 OECD report, when the deficit stood at 4.1%, or 62 directives overdue. As well as directives that had not been notified as implemented, there were 20 directives that had not been correctly transposed as of 1 November 2009. There were 83 infringement proceedings under way against France in May 2009 (compared with an average of 47 against Member States as a whole), 76% of them relating to directives.

Link with the European Commission’s policy on regulatory governance

Both the SGG and the SGAE attend the High-level Group on Better Regulation which liaises with the European Commission and a range of international bodies working in the field of regulatory quality, including the OECD. The DGME acts as a Single Point of Contact (SPOC).⁷

During its EU Presidency (second half of 2008), France highlighted the potential importance of access to legislation in work on “Regulatory Governance”, including the

interface between EU and domestic law. Two other major aspects singled out for the next few years are, first, the linkages between the EU system of *ex ante* impact assessment and its counterparts in Member States and, second, the linkages between impact assessment and administrative simplification. France also seized the opportunity, during its EU Presidency, to promote access to legislation via information technologies as a separate component of its Better Regulation programme (endorsed by the Competitiveness Council in September 2008). Having completed its EU Presidency, France appears to be encountering problems in providing the resources required for more “forceful” follow-up of the dossiers it launched (taking into account the substantial resources made available by some other countries for the dossiers launched during their own EU Presidencies).

It is worth noting, in the wider context of the European institutions, that the SGAE monitors the work of the European Parliament.⁸ Together with the Ministry of European Affairs and France’s Permanent Representation to the European Union (PR), it co-ordinates contacts made with MEPs on behalf of the French Government. Within each ministry, one or more *chargés de mission* follow the work of the European Parliament and, more specifically, the work of the Parliamentary Committees in areas falling within the remit of their ministerial department. They convey the French Government’s position to parliament. In addition to these direct contacts, there are also position papers drawn up by the ministries and validated by the SGAE on the key dossiers before the European Parliament, in particular those connected with legislation subject to the co-decision procedure. At the beginning of each EU Presidency, the SGAE chairs a meeting with all of the ministries to draw up a list of items on the European Parliament agenda that are priorities for the French Government.

Notes

1. Not to be confused with the generic use of the term “regulation” for this project.
2. Constitutional Council 10 June 2004 N° 2004-496 DC “Act on Confidence in the Digital Economy”.
3. 28 September 1984, National Confederation of Societies for the Protection of Animals in France and French-speaking countries.
4. Circular of 27 September 2004 from the Prime Minister on the procedure for transposing into domestic law the directives and framework decisions negotiated within the framework of the European institutions.
www.circulaires.gouv.fr/index.php?action=afficherCirculaire&hit=10.
5. The United Kingdom, for instance, has put in place transposition arrangements based on a special Act that provides for the use of secondary legislation.
6. The transposition deficit is the percentage of internal market directives not yet transposed and notified as such to the European Commission compared with the total number of directives to be transposed.

7. The role of SPOC is threefold: reporting to the SGAE and ministries on progress in the European project on Reducing Administrative Burdens in the European Union; gathering reactions from ministries on possible areas for simplification proposed by the Commission and forwarding French reactions, via SGAE, to DG ENTR; and keeping the Commission informed of progress in France.
8. Circular of 21 March 1994 from the Prime Minister on relations between French administrations and European institutions.

