

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

The small size of its government, in comparison with other EU countries, is a major challenge for Luxembourg. How can it best be organised to achieve optimal efficiency in the process of negotiating and transposing European directives? The fact is that Luxembourg has to deal with the same number of directives, and hence the same volume of work, as any other EU country.

The negotiating process does not seem to pose any major problems. The negotiating process unfolds in accordance with the EU framework, and Luxembourg focuses its efforts on the most important cases.

The real problem arises downstream, with transposition, where Luxembourg falls short of the target set by the European Commission. A more structured approach was recently instituted, with an electronic support tool, to overcome delays in the transposition of directives. There has been some progress recently. Transposition is normally done via the legislative route, and there are no special provisions for “fast tracking” transposition such as those that exist in the United Kingdom and some other countries.

However, the amended law of 9 August 1971 on the execution and enforcement of decisions and directives and the enforcement of regulations of the European Community in

economic, technical, agricultural, forestry, social and transportation matters allows the transposition of certain technical provisions by Grand-Ducal decree.

Nevertheless, Luxembourg “is transposing rather well” in terms of its rate of infractions. This is one of the lowest among EU members.

Overregulation could be a problem. “The whole directive and nothing but the directive” is the rule of thumb promulgated by the government, in an effort to reconcile the need not to go beyond what is strictly necessary for transposition and the need to be thorough enough to avoid infraction proceedings. This principle is well known throughout the administration, but there is no clear consensus on how to implement it. It would seem that some parts of the government are experiencing difficulties (“some ministries are drowning in texts”). Other participants suggested that the quality of transposition was rather good. The same officials are responsible for negotiating a directive and then transposing it. This is an asset, in principle, but when it comes to making a choice, priority will be given to negotiation. The problems with transposition were not clearly identified for the team but are probably of different types, and it would be useful to assess them. The government programme calls for an analysis of the current system of transposition in order to identify problems and develop solutions.

In the future, electronic monitoring of transposition should make it possible to verify the extent to which the rule of thumb quoted above has been applied, in order to measure its effective observance.

Recommendation 7.1. Evaluate the transposition procedure, for directives generally and for each ministry and/or sector, to identify where the problems lie. Consider whether existing legal provisions are one of the reasons behind transposition difficulties. Discuss the issue with other countries with limited means, such as Ireland and Finland.

Background

General context

As in the other EU member states, the output of domestic regulations is substantially affected by the output of rules at the EU level. According to statistics on the number of legal and regulatory texts (see Chapter 4), texts transposing one or more European directives amounted to between 16% and 30% (depending on the year) of the new laws and Grand Ducal regulations over the period 2005-08.

Negotiating EU regulations

Institutional framework and processes

In the negotiation phase of draft bills in the various committees of the Council of the European Union, negotiations are conducted by the competent ministers. The Ministry of Foreign Affairs is responsible for co-ordination, compiling information from and for European institutions and chairing the Inter-Ministerial Committee for European Policy Co-ordination (CICPE) which meets 4 to 6 times a year. In effect, the CICPE, established in 2005, initially held six meetings a year, and then in 2009 moved to a four-meeting schedule. In practice, ministries establish priorities as to the negotiation topics that are of greatest interest to Luxembourg, and devote their resources to those issues.

Once the EU College of Commissioners has adopted a draft bill, the Ministry of Foreign Affairs so advises the competent ministry or ministries. Within one month, the ministries must prepare descriptive fact sheets concerning these drafts.² These fact sheets are intended to encourage ministries to familiarise themselves with the provisions of draft directives or regulations (including their legal impacts) at the stage of adoption by the European Commission, to anticipate any problems that might arise during transposition, and to clarify questions of competence at a preliminary stage. The descriptive fact sheets are regularly presented to the CICPE.

In the negotiation phase, ministries may consult stakeholders in civil society about the draft bills that concern them. Advance consultation of this kind facilitates subsequent transposition of the directive emerging from the negotiations for, pursuant to the law of 1924 on professional chambers, these bodies must be consulted on the law or Grand Ducal regulation transposing a directive before any law or regulation affecting their particular profession is adopted.

The role of Parliament

A recent agreement between the government and the Chamber of Deputies on European policy co-operation has reinforced the potential for involving parliamentarians in the process of negotiating European directives, by ensuring that Deputies receive better information on negotiations underway. The memorandum setting out this agreement came into force in July 2008 and on 7 May 2009 it was incorporated into the rules of procedure of the Chamber of Deputies. That agreement was also designed to create conditions allowing the Chamber of Deputies to oversee observance of the principle of subsidiarity, which the Treaty of Lisbon accords national parliaments.

Under the terms of that agreement, “the government shall keep the Chamber of Deputies promptly and continuously informed on all European questions of particular importance for the Grand Duchy of Luxembourg.” That information may be provided either orally or in writing, such as through explanatory notes that make it possible to assess the eventual consequences that European acts may have for Luxembourg. It may relate either to substance or to procedure. It must allow the Chamber of Deputies to make a timely decision on its position, which it will communicate to the government. In these cases, the Chamber of Deputies must be kept constantly informed of progress with these files.

The Chamber of Deputies or the parliamentary committees may summon government members participating in meetings of the European Council or the Council of the European Union to provide an explanation, in advance of the meetings, of the status of outstanding files and of the government's positions on them. After these meetings the government will report on the outcomes, at the request of the competent committee of the Chamber. The government undertakes to transmit to the Chamber of Deputies, upon receipt, all documents provided by European institutions as well as documents, reports, communications and information on the agenda of the various meetings of the EU Council of Ministers. What is involved here is an information procedure, and not a negotiating mandate given by the Chamber of Deputies to the government.

Ex ante impact assessments (negotiation stage)

Drafts at the negotiating phase are not subjected to any *ex ante* impact assessment. The descriptive fact sheet that ministries must prepare contains some elements of analysis, as it must indicate the legal implications and identify the general effects that the draft will have on Luxembourg.

It was suggested that ministries should consider various elements of the *ex ante* impact assessment, such as general criteria for Better Regulation, at the time European texts are being negotiated, and specifically in the context of drafting the chapter on “general effects on Luxembourg” in the descriptive fact sheet. That fact sheet is prepared by the various interested ministries in the wake of a proposed Community directive.

Interface with Better Regulation Policies at the EU level

Institutional framework and process

Responsibility for transposing Community directives falls to the competent ministries concerned by the subject matter. The Ministry of Foreign Affairs, as co-ordinator, identifies the ministry or ministries that will be responsible for transposition of a specific directive. Where several ministries are concerned, the Ministry of Foreign Affairs identifies one ministry to take primary responsibility and co-ordinate the transposition effort with the other ministries concerned.

In principle, transposition is done via the legislative route. However, some technical provisions are transposed into Luxembourg law by Grand Ducal decree rather than by law. The principal difficulty encountered by ministries is that they tend to be short-staffed. As a result, resources are often concentrated on negotiations that are important for Luxembourg, and transposition work is consequently delayed. In some cases, the solution is to transpose the text word for word.

Ex ante impact assessment (transposition stage)

The impact assessment form that ministries must complete covers all draft laws and regulations including those for transposing European directives (see Chapter 4).

Over-regulation

According to some interview participants, transposition can in certain instances give rise to “gold plating”. The government's administrative simplification programme addresses this problem. One of the government's broad principles of regulatory quality is “the whole directive and nothing but the directive”. The ministries are broadly familiar with that principle, although it is difficult to measure how effectively it is observed.

According to other participants, the principle of “the directive and nothing but the directive” is sometimes applied too rigidly, thereby preventing transpositions from making use of significant regulatory options allowed by the directives, particularly with a view to achieving a high level of consumer protection.

Monitoring transposition

Within the government, the transposition of directives is monitored by the Inter-Ministerial Committee for European Policy Co-ordination (CICPE), and transposition issues are now looming ever larger on its meeting agendas. The Ministry of Foreign Affairs also presents regular reports to the Council of Government. To date the ministries have not had an electronic tool for systematic monitoring and the process has relied mainly on files and information transmitted by the ministries. A weekly progress report has however been instituted. Each year the government presents to Parliament a report on European policy, as well as a report on transposition of European directives and the enforcement of Community law. It is up to Parliament to decide if and when it will debate the report. So far this report

has always been examined by the Committee on Foreign and European Affairs, Defence, Co-operation and Immigration.

The government statement for the period 2009-14 calls for reinforcing the mechanism for monitoring transposition of Community law, through four main measures:

- Strengthening the attributes of the CICPE. That committee is supposed to ensure co-ordination between the ministries responsible for transposing directives. In particular, it must fulfil the upstream task of alerting ministries to legislative proposals under preparation within the European bodies, and must assign them the job of preparing the measures needed to transpose the results within established time frames.
- Introduction of the computerised tools needed for monitoring the transposition of European directives, and infringement procedures.
- An analysis of the current transposition system in Luxembourg to identify and resolve any problems.
- Regular examination (at least bimonthly) of transposition files during meetings of the Government in Council.

Results

The European Commission's Internal Market Scoreboard³ for December 2009 shows Luxembourg with a transposition deficit of 1.4% (above the 1% target set by the European Commission), representing 22 directives for which transposition is overdue. While Luxembourg is one of the five countries that have not yet achieved the 1% target, its situation has recently improved significantly: in December 2008 its deficit was 2.2% (36 directives overdue), and in December 2007 it stood at 2.8% (45 directives overdue). This progress has been made possible by the introduction of a more systematic process by the Ministry of Foreign Affairs, in particular the transposition fact sheet and a weekly monitoring table. Moreover, Luxembourg “is transposing rather well”: it had seven directives not correctly transposed as of 1 November 2009, one of the lowest numbers of any member State.. There were 31 infringement proceedings underway against Luxembourg in May 2009 (compared with an average of 47 against member states as a whole).

Link with the European Commission's policy on regulatory governance

The OECD team heard several interview participants describe the importance of effective regulatory governance within the EU. Generally speaking, Luxembourg is strongly in favour of reinforcing that policy in order to ensure greater control over EU regulatory output (“we cannot turn off the EU law tap”) and stricter procedures for *ex ante* impact assessment of draft directives, without falling into “monstrous procedures”. They also pointed to ever-shorter transposition deadlines, the fact that some draft directives are available only in English, and a lack of consistency in the definitions used in different directives.

According to the Luxembourg government, it would be useful if the draft legislative acts emanating from the European Commission could be transmitted more promptly to the European Parliament, the Council and national parliaments. The Ministry of Foreign Affairs suggests that, as soon as they are adopted by the College of Commissioners, draft

legislative acts should be e-mailed to the permanent Representatives to the European Union.

Notes

1. Not to be confused with the generic use of the term “regulation” for this project.
2. The fact sheet contains the following information: name of the draft legislative act, date of its adoption by the Commission and by the Council, transposition deadlines, legal basis, decision-making procedure, persons in charge, objective and content, legal implications, effects on Luxembourg, and potential transposition difficulties.
3. The transposition deficit shows the percentage of notifications of internal market directives not yet transposed and notified to the Commission in relation to the total number of directives that should have been transposed.