Chapter 7

The interface between member states and the EU

An increasing proportion of national regulations originate at EU level. Whilst EU regulations[1] 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 EU is a major driver of Better Regulation in Spain. Implementation of the Services Directive was mentioned by a number of stakeholders as a driver of positive internal change. It is less clear whether the EU is considered a major source of regulations (a point which is often emphasised by other EU countries), with most interviewees expressing greater concern about Spanish production.

The State has overall responsibility for the negotiation and transposition of EU directives, and the system seems to be broadly effective. There is a clear central co-ordination framework for negotiations. In particular, Spain has a good record in transposition, ranking fourth in the EU's latest Internal Market scoreboard. This positive achievement would appear to be based in part on supporting tools and processes, including a centralised database and correlation tables, which have been mandated by the 2009 RIA Guidelines. Unlike in some other EU countries, gold-plating (going beyond the strict requirements of a directive) does not appear to be a major issue. Impact assessment is applied as a matter of course (as for domestic origin legislation) for both the negotiation and the transposition phase, which many other countries do not do.

Spain's decentralisation nevertheless can pose challenges for the efficient implementation of EU policy. Because in many policy areas competences are allocated at different levels, transposition can be complex, and as the OECD peer review team were told, "there is no magic solution" to address the issues arising from a split in responsibilities across the levels of government for the same directive. The institutional mechanisms for bringing the State and the ACs together (Conference of European Affairs and other mechanisms) are not always effective. In some cases, *ad hoc* Committees are created in order to guarantee the correct implementation of directives among all Public Administrations. An example is the

"Better Regulation Committee" related to the transposition of the Services Directive. There can be failures to transpose all the provisions of a directive, with the issue ending up in court.

A further strengthening of the framework seems desirable. The Council of State suggests that areas for attention include late participation in the negotiating phase; the lack of a sound basis for negotiations; and internal disconnection between the negotiating and the transposition phase. Among other recommendations, it suggests a more structured forward planning, and enhancing RIA practices applied to EU legislation. The OECD peer review team also heard that public consultation and communication on EU matters can be ineffective and cut short prematurely.

Recommendation 7.1. Consider a review of the framework for the management of EU regulations, from negotiation to transposition.

Spain is one of the larger EU member states and its voice needs to be heard in Brussels. It is understandable that Spain's voice has so far been relatively muted, as many of its own Better Regulation policies are only now being strengthened, and there is an issue of resources. However it is not the only country to face resource issues. Making a contribution to the future of regulatory management by the EU institutions would contribute to a stronger domestic regulatory management, given the importance of EU regulations.

Background

General context

The central government notes that it is quite difficult to define the impact of European regulations impact on national legislation in percentage terms. It judges that specific sectors affected by EU rules are likely to be the same as in other member states (agriculture, environment, statistics…). However, the analysis of the six priority areas for the National Action Plan for Administrative Burden Reduction, has highlighted the extremely high impact of European statistics regulation on the national regulatory framework. If Spain wants to reduce burdens significantly in this area, it judges that prior simplification is needed at the EU level.[2]

Negotiating EU regulations

Institutional framework and processes

The State is responsible for negotiating Spain's interests in the EU. Arrangements are similar to those of many other EU countries, with a clear central co-ordinating function but with responsibilities for the actual negotiations allocated to the relevant ministry. The main co-ordinator is the Secretariat of State for the European Union, under the auspices of the Ministry of Foreign Affairs and Co-operation. It co-ordinates all actions that are carried out by the AGE in EU affairs.[3] The Inter-Ministerial Commission for Affairs of the European Union (CIAUE) plays a specific co-ordinating role with regard to economic affairs.

Various mechanisms are in place at different levels within the State administration (AGE) to resolve disagreements over responsibilities or the negotiating stance. Agreement may be reached bilaterally between ministries, but if not, the Secretary of State for the EU steps in. The bodies preparing the work of the Council of Ministers may also be addressed to settle differences. In particular, the Government Delegate Commission for Economic Affairs (CDGAE), the General Commission of Secretaries of State and Sub-Secretaries (CGSySb), and, in exceptional cases the Council of Ministers itself, operate in this respect.

There appears to be room for improvement in the organisational structure and the procedures for the participation of the Spanish government in EU decision-making. The Council of State suggests in a recent report[4] that there are some weaknesses: late participation in the negotiating phase; the lack of a sound basis for negotiations; and internal disconnection between the negotiating and the transposition phase. Among other recommendations, the Council of State suggests a more structured forward planning, and enhancing RIA practices in relation to the European legislative programme and its transposition and implementation at the national and regional levels.

The role of the Autonomous Communities

Whilst the State is overall responsible for EU negotiations, AC interests may be affected. Responsibilities and procedures for handling this reflect provisions of the Spanish Constitution and the case law of the Spanish Constitutional Court. If specified in their Statutes of Autonomy, the ACs have the right to be informed of developments related to international treaties and agreements related to their competences, which includes EU matters.

Mechanisms to give effect to these provisions have been established and continue to be developed. The Conference for European Affairs (*Conferencia para asuntos relacionados con la Comunidad Europea*, CARCE) is the main channel for the inclusion of the ACs in the elaboration of the Spanish policies at the European level. The CARCE was institutionalised in 1992.[5] In 1994 the Internal Participation Agreement was adopted through Sector Conferences. In 1996, the possibility of regional civil servants taking part in specific EU committees was acknowledged, and the Department for Regional Affairs was set up in the Permanent Representation of Spain to the EU (REPER). Finally, in 2004, an agreement was reached regarding regional participation in the meetings of certain Council bodies; in the meantime, the first meeting of the Conference of Government Leaders, which took place in 2004, focused on the creation of channels to foster the participation of ACs in EU decision-making bodies when debating matters that affect their competences.

Regulatory agencies

As in other countries, some regulatory agencies, because of their technical expertise, play an active role in EU discussions, preparing the technical ground for meetings of the Council on draft regulations.

The role of Parliament

The Joint Commission for the European Community (*Comision Mixta para la Union Europea*) contributes to the elaboration and implementation of EU law. The Commission is formed by an equal number of members of the two chambers and plays an active role in the preparation, discussion and approval of EU regulations.

Public consultation

Formally, consultation of interested parties follows the same procedures as for domestic legislation (see Chapter 3). The OECD peer review team heard some evidence to the effect that public consultation on EU proposals is not strong, and that stakeholders sometimes find it easier to obtain information directly from Brussels, via their representative bodies. The Consumers' Association, for example, told the team that it is regularly solicited by its European association (BEUC) to comment on Commission initiatives. Some interviewees said that there was a tendency to stop the debate once decisions had been made in Brussels, and that some directives were simply "given up "to be settled at the EU level.

Ex ante impact assessment

As for domestic legislative proposals, ministries must produce reports on the need and appropriateness of the proposal; on their gender impact; an economic report; and other assessments, according to the 2009

RIA Guidelines. However, there is no centrally managed knowledge of how ministries and departments contribute to the preparation of impact assessments at the EU level, nor the use they make of them.

Transposing EU regulations

Institutional framework and processes

As with negotiation, the state is overall responsible for the full, correct and timely transposition of EU law. At the same time, the competences of the ACs are taken into account.

Responsibility for the transposition of Community regulations is established in accordance with the content of each EU directive and the distribution of competences between ministries. Once the directive is published, the Ministry for Foreign Affairs and Co-operation, via the Secretary of State for the European Union, first names the responsible ministry and, if appropriate, other affected ministries involved in the transposition. The ministries concerned must show their agreement or disagreement with the allocation. The lead ministry may suggest, if appropriate, that responsibilities should also be allocated to other levels of administration (regional and local).

A written procedure for the resolution of responsibility conflicts exists and is usually effective. If differences are not settled in this way, co-ordination meetings are held. Should this channel also fail, the General Commission of Secretaries of State and Sub-Secretaries is informed, where the final solution will be adopted. These are exceptional cases.

The role of the Autonomous Communities

Whilst the State is overall responsible for the proper and timely transposition of directives, practical responsibilities for taking this forward rest with the level of government which has the relevant competence- either the State or the ACs. The OECD peer review team heard that issues can arise, with occasional deadlocks which may ultimately have to be resolved by the courts.[6]

The Territorial Policy Ministry reports on the suitability of the competence framework with regard both to the development of state regulations as well as the efforts of the ACs to incorporate EU legislation into their respective regulatory frameworks. As part of the process for developing state and AC regulations, the Council of State and councils created in the ACs have a particularly significant role. Broadly speaking their functions include assessing compliance of their regulatory framework with EU legislation, as well as the distribution of competences and, as a general rule, compliance with the legal system as a whole. The ACs have increasingly become directly involved in the processes of the EU, whether through national channels and collaborative institutions, or by establishing representative offices in Brussels.

Legal provisions and the role of Parliament

The State must determine the appropriate norm to secure the so called "useful effect "(*efecto util*) of the EU legislation. The Council of State has stated in this respect that the transposition act must have the same legal status as existing domestic norms regulating the area in question.

Transposition usually occurs by direct transposition of the directive itself into a new legal instrument, and not by amending existing domestic provisions.[7] Transposition is carried out using the same instruments and processes as for national origin legislation. There are no specific (fast track) procedures. In order to keep the transposition delays to a minimum and ensure the highest compliance with the EU law, the government issued an Agreement in 1990 listing instructions to the AGE, which is in charge of the main transposition dossiers. The Agreement grants priority to the transposition process and recommends that the authorities speed up ongoing projects so as to facilitate the transposition.

The same checks and processes are applied as for domestic regulations (see Chapter 4). Notably, the opinion of the Council of State is compulsory in relation to the preparation of draft bills and regulatory

proposals for the implementation of EU law.[8] The Council of State thus oversees constitutional and legal aspects. It also focuses on ensuring that the transposition process is not used to add unnecessary additional requirements (gold-plating).

Public consultation

In general, procedures are followed and tools used as during the domestic legislative process (see chapter three). There are no written guidelines governing the transposition procedures. However the Commission Recommendation of 12 July 2004, on the transposition into national law of Directives affecting the internal market, acts as a reference instrument. During the preparation phase of transposition acts, subnational administrations and interested parties and sectors are consulted via the standard domestic hearing process. In the recent past, transposition proposals have increasingly been posted on the website of the lead ministry.

Ex ante impact assessment

The 2009 RIA Guidelines apply to any legislative initiative of the Spanish government, including acts transposing and implementing EU law. An Annex on EU law to the Guidelines provides desk officers with a description of the formal steps to be followed when transposing EU directives – including establishing correlation tables (*tablas de correspondencia*). Such information refers mainly to juridical considerations (not least in case of an infringement procedure), but it clearly constitutes one of the innovative elements of the Guidelines.

Monitoring transposition

Transpositions are monitored using a centralised database which offers information on the transposition status of each Directive at any moment, as well as the general status of the transposition procedures for directives. The database is administered by the Secretary of State for the EU, who exerts pressure on the ministries in case of delays in the transposition process.

Correlation tables used to be prepared when the ministry responsible for the transposition considered it necessary. When available, these tables were communicated to the European Commission, but they are not published for general information purposes. The 2009 RIA Guidelines make the establishment of such tables mandatory.

The Spanish government does not consider "gold-plating" to be an issue of particular concern, and efforts are made to normally take the less burdensome option. Parliament may, however, use the opportunity of transposition to legislate on additional issues.

Spain's performance in transposition is good relative to the EU average, ranking fourth in the EU's Internal Market scoreboard. It has met the transposition objectives established by the European Council for directives affecting the internal market (see Box 7.1). The government notes that the speed of transposition depends on a range of factors. These include the issue to be regulated; the interests at stake; the status of the transposition regulation; transposition repercussions in the legal system; the transposition deadline established by the directive, etc. It notes, however, that the transposition of the Services Directive has been done ahead of many other EU countries.

Box 7.1. Spain's performance in the transposition of EU Directives

In the November 2009, Internal Market Scoreboard, Spain performs comparatively well being ranked 4th together with Finland, the Netherlands and Slovakia. Its transposition deficit here only amounts to 0.5%. In terms of the general transposition deficit rate of all directives, *in force* Spain performs below the EU 15 average.

ES	Nov-97	May-98	Nov-98	May-99	Nov-99	May-00	Nov-00	May-01	Nov-01	May-02	Nov-02	May-03
Transposition deficit as % in terms of Internal Market Directives	4.7	3.3	2.7	1.8	2.2	1.5	1.6	1.8	1.3	1.5	1.6	1.2
	Jul-04	Jul-05	Dec-05	Jul-06	Nov-06	Jul-07	Nov-07	Jul-08	Nov 08	May 09	Nov 09	
	0.8	1.4	1.5	1.7	1.4	1.9	1	0.8	1.0	0.8	0.5	

Source: European Commission.

Interface with Better Regulation policies at EU level

There appears to have been relatively little proactive engagement so far with EU level initiatives.[9] Some other EU countries are actively engaged, for example helping to shape and develop the Commission's impact assessment and administrative burden reduction policies. Spain's relative late start in the deployment of Better Regulation probably explains this. The government reports that engagement is growing, but currently (human) resources are not sufficient to allow for a permanent link with the EU level.

Notes

1. Not to be confused with the generic use of the term "regulation" for this project.
2. The 2000 OECD report noted that a large part of the Spanish legal framework is based on European law and judicial decisions, and that the Council of State had estimated that even before the Maastricht and Amsterdam Treaties, more than 54% of the legal framework was related to EU directives, regulations, and decisions.
3. See: Art. 11.2 of Royal Decree 1124/2008 regulating the basic organic structure of the Ministry of Foreign Affairs and Co-operation.
4. See: Council of State (2008), Informe Sobre la Insercion del Derecho Europeo en el Ordenamiento Español, esp. pp.90ff, at *www.consejo-estado.es/pdf/Europa.pdf* (last accessed 24 February 2010).
5. Law 2/1997.
6. An example was given by the Energy agency in relation to the internal market for electricity. The national grid is the responsibility of the central state, but the distribution grid is with the ACs. Failure by the ACs to meet the obligations of the directive for a single electricity market (which requires access to and use of the grid both nationally and at the distribution/regional level) led to a court action by power producers. The agency said that there were no magic bullets

and no clear mechanisms for dealing with this kind of issue, if there is failure to reach consensus with the ACs (although it helps if the issue affects the territory of several ACs).

7. By "direct" is meant that no reference is made to the original directive. The rule is "translated" in Spanish judicial terms, so the Spanish rule is complete by itself. This is done sometimes through a new rule or by amending old ones. This approach is considered by the Spanish government to be simpler, as it does not require to consider the directive to know what is in force.

8. See: Organic Law 3/1980 on the Council of State.

9. Some of the sectoral agencies are heavily engaged, due to their specific missions, alongside their counterparts in other EU member states.

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