Chapter 8

The interface between subnational and national levels of government

Multilevel regulatory governance – that is to say, taking into account the rule-making and rule-enforcement activities of all the different levels of government, not just the national level – is another core element of effective regulatory management. The OECD's 2005 Guiding Principles for Regulatory Quality and Performance "encourage Better Regulation at all levels of government, improved co-ordination, and the avoidance of overlapping responsibilities among regulatory authorities and levels of government". It is relevant to all countries that are seeking to improve their regulatory management, whether they are federations, unitary states or somewhere in between.

In many countries local governments are entrusted with a large number of complex tasks, covering important parts of the welfare system and public services such as social services, health care and education, as well as housing, planning and building issues, and environmental protection. Licensing can be a key activity at this level. These issues have a direct impact on the welfare of businesses and citizens. Local governments within the boundaries of a state need increasing flexibility to meet economic, social and environmental goals in their particular geographical and cultural setting. At the same time, they may be taking on a growing responsibility for the implementation of EC regulations. All of this requires a pro active consideration of:

- The allocation/sharing of regulatory responsibilities at the different levels of government (which can be primary rule-making responsibilities; secondary rule-making responsibilities based on primary legislation, or the transposition of EC regulations; responsibilities for supervision/enforcement of national or subnational regulations; or responsibilities for service delivery).
- The capacities of these different levels to produce quality regulation.
- The co-ordination mechanisms between the different levels, and across the same levels.

Assessment and Recommendations

Complex structures at the subnational levels heighten the need for a coherent Better Regulation policy. Over the past three decades, France has moved forward in a decentralisation process intended to shift new powers and responsibilities to local officials and subnational levels of government. In addition, the basic structure is built upon great diversity at the communal level – the essential tie-in point for the needs of SMEs and individuals. This heightens the need for regulatory governance policy. Strategically, France is striving to strike a balance between a number of different principles: subsidiarity/equality at the subnational level, central concentration of power/decentralisation. France is not the only Member State of the European Union with a complex frame of reference. It is, however, undergoing a period of substantial changes. In talks with the OECD, a number of stakeholders have stressed the importance of formulating common-sense guidelines, so as not to get lost in a fog of principles.

Box 8.1. Excerpts from the 2004 report: Regulatory powers of the subnational levels

Recommendation

Clarifying and rationalising the distribution of competences generated by decentralisation.

In a number of OECD countries, decentralisation allows for setting up rules which are closer to users. France has undertaken a significant decentralisation effort in the past 20 years where numerous competences have been transferred to local authorities, which is in many ways a positive move. However, the inextricable confusion of competences across four levels of government is detrimental to an efficient regulatory process. A clearer distribution of regulatory competences among the various levels of local authorities, with rigorous block allocations, would help to clarify the situation. In addition, improved awareness and exercising by local authorities of regulatory practices should be developed in light of new responsibilities entrusted to them. The process of decentralising responsibilities must be accompanied by clear and effective accountability requirements at all local levels, administrative as well as judicial.

Assessment

The way in which powers are co-ordinated between the central state and local authorities reflects the ambiguities and the difficult renunciations of a unitary state committed to a process of decentralisation of which neither the unitary state nor some of the players in the institutions necessarily accept all the consequences. This makes it all very complicated, reducing potential gains from decentralisation. In addition, decentralisation transfers major areas of competence to local levels which are often dispersed and very small for some municipalities with human and financial resources that are not adequate for quality legislation.

The French move towards decentralisation and bringing regulatory power to a local level has a number of praiseworthy, positive aspects. It has enabled the Republic to loosen its fetters and gives a considerable level of autonomy to local bodies. However, it has also created a tangle of powers that it is often difficult to unravel. *Ex post* co-ordination and control systems do not currently provide a really satisfactory answer to the level of complexity thus created. Simultaneously managing three levels of local authorities has turned out to be a source of complexity and administrative management costs. France seems to be trapped in its contradictions by trying to gain as many features of a federal state to draw benefits from it while maintaining the institutional framework of a unitary state at four management levels, none of which she can do without.

Source: OECD (2004).

Substantial progress has been made towards including subnational governments in the process of making regulations. The Advisory Board for Regulatory Evaluation (*Commission consultative sur l'évaluation des normes – CCEN*) has recently been established so that proposed regulations from the centre can take account of the financial consequences downstream (thereby avoiding unfunded mandates). Strengthening consultation with local governments would help identify impacts of draft laws and decrees at the local level, beyond financial impacts.

Recommendation 8.1. Consider monitoring and an extension of the scope of the work of the Advisory Commission on Evaluation Standards (CCEN).

Another way forward would be to encourage wider dissemination of the principles and practices of regulatory governance within subnational entities themselves. At present, there is very little swapping of good practices between subnational governments as compared to what can be done in other countries. Subnational governments could exchange ideas and good practices with regard to the drafting of model administrative acts that could benefit them all, for example, or methods for conducting public consultations, without running counter to the ban on one local authority's having jurisdiction over another. Subnational governments in some other countries are currently testing ways to initiate this joint brainstorming process, encouraged by the central government in the Netherlands, Denmark and Portugal, for example.

Recommendation 8.2. Encourage the development of good practice exchanges between local governments.

Better dissemination of local law would enhance the accessibility of subnational administrative provisions, in respect of both local government instruments and those of locally based central-government outposts. The publication of such provisions does not appear to meet minimal criteria for proper accessibility. A stock-taking initiative would also provide an opportunity to check the situation with regard to regulatory inflation at the local level.

Recommendation 8.3. Improve communication on local regulations by identifying possible measures (*e.g.* legal portals, gradual codification of local regulations,)

Subnational entities are starting to be incorporated into the central government's administrative simplification initiatives.

Recommendation 8.4. Efforts should be continued to incorporate subnational entities into the central government's administrative simplification initiatives.

Background

Structure, responsibilities and funding of local governments

France is traditionally a unitary and centralised state, in which authority is exercised by a power base in Paris. It is the state's role to impose certain guidelines, such as the sovereign principle of the state's rights and obligations and the principle of equal treatment throughout the country. Nevertheless, the decentralisation process has altered the landscape by transferring powers and areas of authority to local elected officials and subnational governments. It has also given rise to new forms of institutional interface between the central and subnational governments.

Structure of local governments

France has three levels of decentralised government[1]: communes (36 686 at 1 January 2009), *départements* (96 mainland *départements* and 4 overseas *départements*) and regions (22 mainland regions and 4 mono-departmental overseas regions: Guadeloupe, Martinique, French Guiana and Réunion). On the mainland, the three levels of decentralised government each have a deliberative assembly elected via direct universal suffrage by citizens of the respective entities (municipal council, general council and regional council) and a chief executive elected by the relevant assembly (mayor or chair of the general or regional council).

The division of France into regions, *départements* and municipalities is supplemented by a multitude of overlapping groupings of municipalities. The creation of these groupings stems essentially from the desire of various governments to remedy the division or fragmentation of the municipalities (half of which have a population of under 380). Instead of the merger policies instituted in other countries such as Denmark, France has chosen the path of co-operation in order to pool the resources of communes.

Responsibilities and powers of subnational governments

Regions, *départements* and communes enjoy decentralised responsibilities stemming *inter alia* from the decentralisation acts of 1982, 1983 and 2004. The first wave of decentralisation raised the status of regions to that of a territorial entity and repealed the state's jurisdiction over all acts of subnational governments (repeal of systematic prior control). The second big step, in 2003, saw a broad swath of responsibilities transferred to subnational governments (essentially regions and *départements*) (Box 8.2).

Box 8.2. How responsibilities are shared between subnational governments

Most decentralised responsibilities, apart from vocational training (regions), social welfare (*départements*) and urban planning rules (*communes*), are shared, whether they involve delivering a public service, distributing financial aid to businesses or individuals or making capital investments. In practice, the division of responsibilities often appears complex and ambiguous.

Regions are primarily responsible for economic development, vocational training, apprenticeship, land-use planning, up*per se*condary schools, the environment (nature reserves, regional parks), culture (heritage), regional rail transport and, if they so request, major infrastructure (maritime and inland waterway ports, airfields, navigable waterways).

Départements are primarily responsible for social and medico-social welfare (organisation and benefits for the disadvantaged and the elderly, social and occupational integration of beneficiaries of minimum income support (*revenu minimum d'insertion, RMI*) and the future income support allowance

for low-wage workers (*revenu de solidarité active, RAS*), lower secondary schools, road infrastructure, culture (including museums), sport (equipment), the environment (nature reserves, waterway management, waste treatment plans, water management schemes, etc.), road transport and school bussing, fire and first aid services and, if they so request, major infrastructure (seaports, airfields).

Communes (or in some cases groups of communes) have responsibility for all locally-focused areas of government action. They are involved in town planning, housing, elementary schools, the management of waste, water and energy, urban transport, road safety (traffic and parking), culture (museums), child care (day care centres, recreational facilities), sport (equipment), tourism, road works and, if they so desire, infrastructure (airfields, marinas).

The Constitution recognises the regulatory power of subnational governments, but this power is neither general nor absolute. First, the scope and the very procedures whereby subnational governments exercise their responsibility are set by parliament and national regulatory authorities. In addition, the primary responsibility for regulatory law enforcement measures lies with those national regulatory authorities. Moreover, local regulatory power is still subject to administrative control by the representative of the state, who can petition an administrative judge, who then settles any dispute. The prefect, who represents the state within a *département*, receives copies of the main measures enacted by local governments and their public establishments and may refer to the administrative tribunal any that he or she deems contrary to the law. This control is preceded, however, by a prior dialogue phase which in most cases leads to withdrawal of the contested act before it is referred to the courts. In the event of doubts over the compliance of a decision within his or her authority, the chief executive of a local government can also confer with the prefect's staff and ask them to review the proposed act. This legal advisory function plays an important role in the quality of the measures enacted by local governments.

Reforms

A reform was undertaken in order to clarify: (1) the interface between subnational governments and the state; and (2) the interface between local authorities. The first segment led to the formation of a working group headed by Senator Alain Lambert, whose recommendations, which were released at year-end 2007, followed up on the creation of an advisory body to assess the impact of regulatory provisions on subnational governments (see below). During the second segment, following the report of the Balladur committee, the government in October 2009 introduced a bill in the Senate (examination of which began in January 2010). This draft legislation calls for reform of how members of the general (*département*-level) and regional councils are elected, measures to bolster inter-communal initiatives and creation of a new structure ("metropolitan areas", *métropoles*) for urban areas with populations of over 500 000 which would replace pre-existing entities (communes, communities and General Council). The bill would also establish the principle of specialisation of responsibilities for regions and *départements*, with communes alone retaining general responsibility.

Funding

The resources of subnational governments consist of tax revenues, state transfers, transfers from the European Union and other governments, and service charges and levies.[2] Subnational governments enjoy borrowing autonomy, but they may earmark the proceeds for new capital investment alone. Overlapping responsibilities mean that the

same project may be funded by more than one subnational government at once, and perhaps by the state as well.

- Taxes account for just over half the resources of subnational governments (three-quarters of them being direct taxes). Tax rates are set by multiple policymakers (most frequently, each level will add an additional levy to the common tax), in addition to the central government, which supervises the mechanisms through ceilings and the "rate linkage" principle intended to control rate increases. The state also intervenes in local taxation by granting tax exemptions to certain categories of households or businesses, which it then offsets with financial transfers.

- Transfers and grants account for roughly 35% of the resources, and the vast majority of them may be used freely. The largest of these is the global operating grant (*dotation globale de fonctionnement*)[3] which has been built up by reforms that have incorporated a variety of other grants that used to be distinct (OECD, 2006).

So-called "deconcentrated" state services

Central-government services based in the regions and *départements* coexist with their counterparts in the subnational governments. Prefects are appointed by the President of the Republic and represent the state in the regions and *départements.* They have authority over the deconcentrated (*i.e.* locally-based) services of the various ministries at the regional, inter-departmental and sub-departmental levels (except for education, the administration of justice and tax collection). At the communal level, the mayor is both the chief executive of the commune and an agent of the central government, with respect to certain powers (such as vital records and the organisation of elections).

The decentralisation acts, while granting greater institutional recognition and responsibilities to regional councils, sought to enhance the effectiveness of the deconcentrated administrative apparatus. The regionally deconcentrated services of the various ministries were consolidated into eight power centres, and the regional prefect was asked to co-ordinate the policies implemented by each of the centres. The regional prefect was also assigned an organisational and co-ordinating role *vis-à-vis* departmental prefects – a function that should in no way be construed as implying any hierarchy amongst prefects.

Table 8.1. Deconcentration and decentralisation

Schematic presentation of deconcentrated services of state administrations and subnational governments

	Deconcentrated services of central government administrations	Subnational governments
Regions (26)	Regional prefect Secretary-General for regional affairs Deconcentrated services (Regional directorates for infrastructure, housing, agriculture, education, etc.)	President of the Regional Council General director of services Directorates (education, economic development, communications, etc.) Economic and Social Council (representatives of businesses, unions, associations and qualified individuals)
Départements (100)	Departmental prefect Secretary-General of the Prefecture Sub-prefects of *arrondissements* Deconcentrated services (departmental directorates for infrastructure, housing, etc.)	President of the General Council General director of services Directorates (roads, communications, environment, social assistance, agriculture, culture and tourism, education, etc.)
Municipalities (36 600)	Mayor	Mayor

Source: OECD (2006), *OECD Territorial Reviews: France*, OECD Publishing, Paris.

Regulatory governance policies at the subnational level

Efforts by local authorities consist above all of introducing e-Government tools to facilitate access to public services. Because the development of electronic services depends on each locality, the situation varies widely from one to another. Within local governments, mechanisms or procedures are being instituted to get citizens more involved in policymaking, especially in respect of project planning. Local authorities have set up these procedures on a voluntary basis. Moreover, brainstorming sessions, at the central level in particular, have explored how to deliver better access to subnational administrative acts (see Chapter 3).

Access to subnational acts

The publication of administrative acts in subnational entities is subject to strict legislative and regulatory provisions. It produces two legal effects: it is one of the conditions for acts to take effect, and it also defines the deadline for third-party filing of legal challenges to regulatory or individual acts. Publication (in an official compilation or bulletin) and posting at appropriate locations are the two ways to satisfy legal publication requirements. With respect to the communes, the code of subnational governments stipulates that in communes having a population of 3 500 or more, mayoral orders of a regulatory nature shall be published in a compilation of administrative acts (*Recueil des Actes Administratifs*, RAA) having at least quarterly editions. For their part, directives, instructions and circulars issued by deconcentrated authorities of the central government must be published in an official bulletin having at least quarterly editions. Since the enactment of Act N° 2002-276 of 27 February 2002 on grass-roots democracy, these conventional provisions may be supplemented by additional arrangements for digital media.

Public consultation: Grass-roots democracy

Citizen consultations can be conducted at the initiative of local elected assemblies within a framework stipulated by law. The deliberative assemblies of subnational entities

possess a participatory democracy mechanism instituted by legislation: consultation of the electorate, which has been possible in the communes since 1992, was extended to all subnational entities by Act N° 2004-809 of 13 August 2004 on local freedoms and responsibilities. No area under the responsibility of the deliberative assembly or its executive was excluded. Local elected officials are therefore free to decide to consult the electorate before imposing regulations in an area under the responsibility of their subnational government. Consultations of the electorate are governed strictly by law under an electoral procedure (campaign, dissemination of information, polling station rules, organisation of ballots).

Local referenda are another tool available to subnational authorities. The electorate's participation in policymaking in areas under the responsibility of subnational governments was bolstered considerably by the Constitutional Act of 28 March 2003 on the decentralised organisation of the Republic and Organic Act N° 2003-705 of 1 August 2003 on local referenda. When they decide to submit to a local referendum a proposal intended to settle an issue under the responsibility of the subnational government or an act under the authority of the executive in connection with the powers he or she wields on the community's behalf, the subnational authorities relinquish their decision-making power, deferring to the electorate. The proposal submitted to local referendum shall be adopted if at least half of the registered voters take part in the vote and if the proposal is approved by a majority of the votes cast.

Co-ordination mechanisms

Associations of local elected representatives comprise a cornerstone of the representation of subnational governments to the state and central government, as well as a forum for pooling and exchanging good practices. A large number of local executive managers and members of local authority assemblies are also members of parliament. This helps the local authorities' voice to be heard more clearly at the centre of power. Their action may focus on the implementation of particular regulations (such as the Service Directive, for instance). It does not specifically tackle issues of regulatory quality or administrative simplification.

Co-ordination between the central and subnational administrations

Administrative simplification initiatives

OECD interviews showed that local authorities were keen to become involved more closely in the administrative simplification initiatives being undertaken by the government. Subnational governments are beginning to be included in administrative simplification programmes. In the programme for simplifying administrative procedures, three out of 15 measures require their input (see Chapter 5).

Consultations on proposed regulatory provisions

Another source of concern is consultation with subnational governments and consideration of the implications for them of new legislative or regulatory provisions. A variety of mechanisms enable the government to consult with local authorities about proposed regulatory provisions:

- Informal consultation, in particular with national associations of elected officials.
- Formal, mandatory consultation involving specialised committees instituted by legislative or regulatory provisions. For instance, in respect of water regulations,

proposed laws or decrees must be reviewed by the National Water Board, whose members include representatives of local authorities.

- Formal consultation of the National Board of Executives (*Commission nationale des exécutives*, CNE). Chaired by the prime minister and instituted on 4 October 2007, the CNE is an official forum for concertation and exchange between the government and the heads of the three main national associations of elected officials (the French Mayors' Association, the Assembly of French *Départements*, and the Association of French Regions). The Board meets two or three times a year, at the government's initiative or at the joint request of the heads of the three national associations.

The amended 2007 Budget Act instituted the Advisory Board for Regulatory Evaluation (*Commission consultative d'évaluation des normes*, CCEN), the membership and *modus operandi* of which were set forth by decree.[4] This is a special advisory body whose purpose is to fine-tune the analysis of the financial impact of regulations on subnational governments, and it forms part of the broader impact study (Chapter 4). The CCEN took stock of its initial activity in its first annual report, which listed 66 referrals in 2008 (46 decrees and 20 orders). The CCEN notes that the institution of the new Board has started to cause changes in practice, prompting administrations to expand their knowledge in the area and improve their grasp. It also noted an instability in the definition of a "text involving subnational governments" and in the interface between the responsibilities of the CCEN and the CFL (which is consulted about draft decrees involving the resources of subnational governments) (CCEN, 2009).

Box 8.3. Advisory Board for Regulatory Evaluation (CCEN)

The CCEN is a follow-up to the recommendations of the 2007 *Lafon* report on simplification of the activity of subnational governments[5] and to the 2007 *Lambert* report[6] on the financial interface between the central and subnational governments, which was commissioned by the prime minister as part of the RGPP. The *Lambert* report noted: "Apart from technical standards, the legislative and regulatory activity of the state, in the broad sense, which is excessive and at times inconsistent, especially in the realm of transferred responsibilities, frequently induces consequences on the action of local authorities in terms of costs, procedures or organisation". It called for establishment of a commission that would get subnational governments involved in the formulation of draft regulations of relevance to them (see Chapter 4).

The CCEN, which was set up officially in September 2008 under the auspices of the Local Finances Committee (*Comité des finances locales, CFL*), draws two-thirds of its members from local elected officials and the other one-third from representatives of the Ministries. It meets once a month. Ministries are required to refer to it regarding the financial impact of proposed regulations involving subnational governments, as is the SGAE in respect of the financial impact of proposed Community provisions having a technical and financial impact on subnational governments. The government may also consult the Board about draft legislation or amendments concerning subnational governments. It must submit the proposed provisions, along with a cover report and a financial impact sheet outlining the direct and indirect financial repercussions of the proposed measures for each level of subnational government. The CCEN must render its opinion within five weeks – a deadline that may be extended once by decision of the Chair, except if the prime minister requests it as a matter of urgency. In a case of absolute necessity, the deadline may be shortened to 72 hours, as an exceptional measure and solely at the request of the prime minister.

Co-ordination between subnational administrations

The main form of co-operation is known as inter-communality, which the central government began to encourage greatly in the 1990s. This involves municipalities that join forces via public inter-communal co-operation establishments (*établissements publics de coopération intercommunale*, EPCIs[7]), to which the member communes transfer certain responsibilities. While they do not constitute a new category of subnational government, ECPIs do have legal personality and financial autonomy and operate in their areas of responsibility on behalf of the member communes. In 2006, 86.5% of the population was covered by such a community. Adding to these communities are other forms of co-operation which in some cases predated them, and which may overlap, but which have not been dismantled. There exist, for instance, many associations of municipalities (*syndicats de communes*) empowered to handle specified technical issues and able to enlist the participation of groups and not strictly municipal entities.

Box 8.4. Co-operation between municipalities

There are various types of groups of municipalities:

- Associations (*syndicats*) of municipalities, which in most cases predated communities;
- Communities of municipalities, associating municipalities in rural areas;
- Metropolitan communities (*communautés d'agglomération*), uniting municipalities to form a metropolitan area with a population of over 50 000; and
- Urban communities, uniting municipalities to form an ensemble of over 500 000 people.

Associations of municipalities were set up to administer certain public services (water, sanitation, transport, electricity, etc.) At the same time, "*inter-communality*" groupings of municipalities began spouting up in the 1970s and started becoming more numerous in the late 1990s as a result of legislation passed in 1992 and 1999. Municipalities join forces in public inter-communal co-operation establishments (*établissements publics de coopération intercommunale, EPCIs*) to deliver certain services – either technical services, as in the case of associations of municipalities, or broader undertakings such as economic development or town planning. Inter-communality has been encouraged by higher state subsidies for municipalities that join forces, transfer powers to communities and accept the principle of a single business tax (*taxe professionnelle*). EPCIs differ from territorial entities in a number of respects. The persons administering them are not elected directly but are delegated by municipal councils. Their powers are limited. Lastly, to create an EPCI requires central-government approval (*via prefects*). EPCIs have their own tax revenue. This can be either additional, consisting of an extra share of local taxes, or unique, when business tax (the chief local tax) is earmarked for the community. The 1999 legislation gave municipalities belonging to the same community ten years to harmonise their business tax rates.

Source: OECD (2007), *OECD Economic Surveys: France*, Volume 2007/13, June 2007, OECD Publishing, Paris.

Each level of subnational government exercises responsibilities assigned to it by law, and those responsibilities must be complied with. Any initiative involving more than one entity must also comply with the prohibition against one subnational government having jurisdiction over another. In practice, all this might make it difficult to implement shared regulatory governance initiatives.

Notes

1. Since the constitutional revision of 28 March 2008, "territorial communities of the Republic" are defined in Article 72 as communes, *départements*, regions, special-status communities and overseas territorial communities. The special-status communities are the communes of Paris, Lyon and Marseille (because, in particular, of their high population and their geographic and economic importance), along with Corsica (because of its specificity, including the fact that it is an island). Also included are the overseas territorial communities (French Polynesia, Saint-Pierre and Miquelon, Wallis and Futuna, Mayotte and, since 15 July 2007, Saint Martin and Saint Barthélemy). Lastly, mention should be made of New Caledonia, which is a *sui generis* community governed by Title XIII of the Constitution (Articles 76 and 77).
2. Pricing income stems primarily from the sale of goods or services to users (*e.g.* urban transport, school restaurants). Local communities may also derive revenue from their heritage (*e.g.* communes with forests).
3. The global operating grant (DGF) is paid to communes, intercommunal co-operative public establishments (*établissements publics de coopération intercommunale*, EPCIs), *départements* and regions. It is comprehensive and may be used freely. For each level of subnational government, the DGF comprises a fixed portion and one or more equalisation components. In all, the DGF combines 12 grants (4 for communes, 2 for EPCIs, 4 for *départements* and 2 for regions), which in turn are composed of multiple components or fractions.
4. Decree N° 2008-994 of 22 September 2008. Provisions relating to the CCEN are codified in Articles L. 1211-4-2 and R. 1213-1ff of the General Code of Subnational Governments (*Code général des collectivités territoriales*, CGCT).
5. Lafon, 2007.
6. Lambert, 2007.
7. There are different categories of intercommunal co-operative public establishments (EPCIs):
   - A first group comprises single-purpose intercommunal associations (*syndicats intercommunaux à vocation unique*, SIVUs) and multi-purpose intercommunal associations (*syndicats intercommunaux à vocation multiple*, SIVOMs), which bring together neighbouring communes in order to administer services (for example: sanitation, school bussing).

- A second group consists of EPCIs having their own powers of taxation: these include communities of communes (*communautés de communes*), "agglomeration" communities (having a population of 50 000 around a central town of 15 000), urban communities (*communautés urbaines*, having a population of over 500 000) and new agglomeration associations (*syndicats d'agglomération nouvelle*).

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