

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

There is a reasonably robust process and regulatory framework for the management of EU origin regulations. This area provides an especially strong test of Belgium’s capacities to co-ordinate in areas where this is necessary, and the outcome is overall encouraging. The structures that have been put in place include the recent establishment of a network of “euro-co-ordinators” – one per ministry in the federal government and one per region and community – to act as contact point within their administration, for the cross-government network.

Timely transposition of EU directives, however, remains an issue. Belgium has only recently reached the EU target of 1% transposition deficit. A working group has been established to increase synergies between the political level (cabinets) and administrative levels. The OECD peer review team heard numerous comments to the effect that this was an area needing a boost. Whilst the euro-co-ordinator network had been an excellent initiative, it probably represents more than one full-time job if important issues are to be addressed (for example, time should be set aside to evaluate infraction dossiers to see what lessons might be learnt).

Recommendation 7.1. (federal government, all governments): Establish a strategic review of the framework for transposition of EU directives. Consider whether resources for the euro-co-ordinator network need to be boosted. Review the role of the Council of State (should they intervene at an earlier stage as regards competences?). Consider how the processes of negotiation and transposition can be brought closer together in practice. Promote the interest of high-level officials and politicians in the management of EU regulations.

Note: It should be noted that large parts of this recommendation - review of transposition system, role of the Council of State were given effect after the OECD peer review team mission.

Background

General context

In Belgium, the federal state is not the only authority which may conclude international treaties. The federated entities (communities and regions) have an autonomous right to conclude international treaties and reach international agreements (including and not least with regard to the EU) on issues that are within their competence. When matters for negotiation fall under the responsibility of different Belgian governments (federal state, regions, and/or communities), the representatives of the different governments negotiate on an equal footing. The coherence of Belgium's foreign policy is secured through a range of agreements and formal co-operation processes. These include a requirement to exchange information through the Inter-ministerial Conference on Foreign Policy.² A 1994 co-operation agreement between the federal state, regions and communities³ defines the rules for concluding "mixed" treaties (*i.e.* treaties signed by several Belgian governments). The Federal Public Service for Foreign Affairs plays an important co-ordination role.

The management of EU origin regulations is a particularly important area for co-ordination, as many areas of EU regulation (energy and the environment, for example) cover policy areas where competences are split between the different Belgian governments. As a result the negotiation and transposition of EU directives often involve several Belgian governments. A wide range of structures, formal and informal, political and within the administration, exist to take EU issues forward. Negotiation and transposition form a continuum, with significant links between the two processes. Co-ordination mechanisms (some of which are specific for EU matters) have been established both at political and administrative levels:

- *Political level.* The Concertation Committee, the ministerial councils of the federal level, the regions and the communities ensure political level co-ordination. The *Concertation Committee* (see Chapter 2) is the highest level as it consists of the heads of all Belgian governments. The agenda of its monthly meeting systematically includes the review of EU directives. From the sectoral point of view, several Inter-Ministerial Conferences deal with the transposition of directives in their area of competence. For example, the Inter-ministerial Economic Committee (IEC) may be involved in the transposition of directives (*e.g.* the Services Directive). The IEC consists of the federal Minister of Foreign Affairs and ministers designated by regional and community governments. It has established a

working group on mixed treaties charged with determining the competences of the federal state, communities and regions.

- *Administrative level.* Key players are the FPS for Foreign Affairs, the Permanent Representation to the EU, and a network of “euro-co-ordinators”. The FPS for Foreign Affairs is the general co-ordinator and has set up an inter-federal working group which it chairs, and which meets every two months. It includes representatives of the Permanent Representation to the EU, the euro-co-ordinators, the strategic cell and administrators from the FSP for Foreign Affairs, other departments of the federal government and community/regional governments, the Council of State, the official journal, and the federal parliament.

The OECD peer review team were told that the interest of high-level officials and politicians in the management of EU regulations needed to be encouraged.⁴ Not least this would raise pressure for a more effective performance, building on the stock of goodwill that already existed among officials. It was important for Belgium to devote further efforts at reinforcing mechanisms for the negotiation and transposition of EU directives.

There is no specific provision for impact assessments on draft EU directives (either at the negotiation or transposition stage). It was suggested to the OECD peer review team that there should be specific efforts to carry out impact assessment at the transposition stage.

Negotiating EU directives

The first step at the beginning of the negotiation process is to identify responsibilities of the different governments. This is done by the inter-federal working group headed by the FPS for Foreign Affairs. Co-operation also takes place through sectoral and regional co-ordination mechanisms and informal networks. Flexible approaches are used during negotiation.

Transposing EU regulations

On the administrative level, the FPS for Foreign Affairs is the general co-ordinator, while each Belgian department – either on the federal or on the federated level – is responsible for those elements of the transposition that are within its competence. The allocation of responsibilities agreed at the negotiation stage is confirmed at a meeting of the inter-federal working group. A “pilot authority” is designated to co-ordinate and monitor progress when transposition is shared between entities of the same government, or between different governments. If there is disagreement, the FPS for Foreign Affairs sets up a specific co-ordination process, whereby a pilot authority is appointed to monitor the transposition of the directive.

Directives can be enacted either by government orders and/or parliament acts. Depending on the issues, several parliaments can be involved in the process.

Key developments

Following the 2000 Action plan for transposition, the Council of Ministers and the *Concertation Committees* set up a more structured process for the transposition of EU directives.⁵ This included the development of a network of euro-co-ordinators, and the creation of a databank accessible to all Belgian administrations involved in the transposition of directives.

- *Euro-co-ordinators* have been set up in all Belgian governments (with one euro-co-ordinator per FPS in the federal government and one euro-co-ordinator per region and community). They are responsible for monitoring transposition within their administration and act as contact point both within their administration, for the cross-government network, and more broadly in the EU. In principle they are not involved directly in developing transposition texts (this is done within departments, following the usual procedures for preparing new legislation). This has improved the monitoring process of transposition and helped identifying potential difficulties, for example, with respect to deadlines and sharing of responsibilities across governments.
- *The Eurtransbel* databank includes information on timetable, process, lead authority etc. Reviews by the FPS for Foreign Affairs suggest that the databank is now commonly used and adequately filled in for published directives and for draft directives.

The transposition deficit has been given enhanced attention with the upcoming Belgian Presidency of the EU Council (second half of 2010). Belgium aims to respect the 1% transposition deficit and “zero-tolerance” norms. A strategic review of transposition was mandated by decisions of the federal ministerial councils of May 2008 and September 2008, as well as by a decision of the *Concertation Committee* in February 2009.

The federal government has created a new group to monitor the transposition of directives. A decision of the Council of Ministers of 6 February 2009 set up the Transposition High-Level Working Group to increase synergies between the political and the administrative levels. This body operates at the federal level between meetings of the Councils of Ministers examining transposition, and the meetings of the administrative network of euro-co-ordinators (including the working groups which meet at the administrative level). The Working Group includes members of the policy cells of the ministers concerned and the euro-co-ordinators. It is chaired by a member of the policy cell of the Minister for Foreign Affairs and the State-Secretary for European Affairs. The Working Group meets every two months to monitor the directives that remain to be transposed using a fiches system, to check the competences for the recently published directives and to discuss of any issue that affects the transposition process.

On 6 February 2009, the federal Council of Minister decided that the concerned departments in general have to, within a week of the publication, indicate their competence and, within a month of publication, register in the inter-federal *Eurtransbel* databank the details of the process manager (*the transposer*) and a realistic transposition planning timeframe and to follow up implementation. In that way, possible potential delays could be identified in time. An alert function will be integrated into the *Eurtransbel* databank which will automatically alert when there would be negative discrepancies between the planning and progress to the bodies concerned and to the FPS Foreign Affairs. Until the integration of an automatic alert-system, FPS Foreign Affairs does it manually.

Role of the Council of State

As part of its general advisory role on all draft legislation, the Council of State examines the draft texts (federal, community and regional) which transpose directives. This includes a check that the formal allocation of competences has been respected, although it does not formulate a formal opinion on competences at the beginning of the transposition process. It was suggested to the OECD peer review team that the Council might usefully intervene at an earlier stage on competences, to avoid problems downstream. The Council

of State is included in the inter-federal network of euro-co-ordinators. The Council's guide on law drafting has a chapter on transposition, which is used as a reference by all Belgian administrations.

Monitoring transposition

The Minister for Foreign Affairs and the State Secretary for European Affairs have a general competence for reporting to the federal Council of Ministers and to the *Concertation Committee* on transposition. The other ministers have individual competences for transposition of the directives in their area of work. Directives to be transposed are put on the agenda of the Council of Ministers, twice every two month and on the agenda of the *Concertation Committee* every month. It is up to the competent federal ministers to report once every two months to the Council of Ministers on the state of affairs concerning the transposition process of individual directives. It is up to the Minister for Foreign Affairs and the State Secretary for European Affairs to report twice every two months to the federal Ministerial Council and once every month to the *Concertation Committee* on the general state of affairs. The Minister for Foreign Affairs and the State Secretary for European Affairs reports to the federal Ministerial Council and the *Concertation Committee* include:

- identification of directives that are difficult to transpose and could result in delays;
- list of published directives with the allocation of responsibilities according to competences (within the federal administration and among federated entities);
- progress in transposition of internal market directives with respect to the European Commission scoreboard;
- use of *Eurtransbel* databank (operational since July 2005); and
- progress in transposition of complex directives that are not related to the internal market and infraction cases.

In addition, regions and communities have set up their own process for monitoring transposition within their competence. The Walloon and Flemish regions have edited their own guidelines for the transposition of EU directives. The Region of Brussels Capital is working in order to edit its own guidelines.

Correlation tables (to check the provisions of directives with national law) are not systematically used (it depends on the responsible government). They tend to remain internal documents within each government as an aid to transposition and are notified to the Commission when a directive specifically requires it.

Issues with transposition

The OECD peer review team heard that there was a “serious need” for further training and awareness raising with regard to transposition. There was a particular issue over the need to raise awareness of deadlines so as to avoid a last minute rush. Consultation (either internal or external) may be carried out too late to have an effective influence on transposition. The team also heard that the EU Services Directive was an important opportunity to leverage change, but the tight deadline set for transposition meant that it was hard to take advantage of this opportunity. Co-operation agreements could be used to greater effect in this regard (as well as for other directives requiring inter-government

co-operation). Transposition of this directive was a particular issue for local governments as it required that they screen all local regulations. This was both an opportunity for a “good clean up” as well as a huge task.

Belgium’s federal structure can generate challenges for transposition, leading to delays. Some directives cover policies and issues that engage the competences of more than one authority. This may complicate the allocation of responsibilities and can take time to sort out. In addition, when different entities are involved in transposition, they all need to complete the process before it can be “closed”, and this may require that draft bills are enacted by each relevant parliament. Another source of delay can stem from collective agreements. Transposition of directives relating to an issue covered by a collective agreement may take time as it requires that the social partners first modify the agreement and then that the agreement be given force of law by a royal order. The OECD peer review team also heard that issues may arise from the fact that negotiation and transposition are often carried out by different people (negotiations are often carried out by the ministerial cabinets; transposition by the administration).

A safeguard mechanism may be triggered once a judgement on infringement has been released, which allows the federal state to take over if transposition has not been carried out by a region or community. This is an exception, albeit so far unused, to the equal footing relationship between the federal state and the federated entities.

The transposition issue is reflected in the EU Internal Market Scoreboard. Belgium has reached its aim. At the end of 2009, it had reduced its transposition deficit rate to 0.9% in terms of Internal Market Directives.⁶ This is a considerable improvement over the last decade (at the end of 1997 the transposition deficit reached 8.5%) and represents the best result ever achieved by Belgium.

The OECD review did not raise specific issues of goldplating. It is to be mentioned that the Council of Ministers of 11 February 2004 prohibited goldplating, in order to avoid late transposition. In practice, unless the goldplating causes no late transposition, goldplating is tolerated. Some interviewees pointed out that in many cases governments have little room for manoeuvre (especially for “technical” directives), which reduces the scope for differences between the legal texts used for transposition across the country.

Interface with Better Regulation policies at EU level

The OECD peer review team were told that the Services Directive raised issues as well as opportunities. It would be helpful if the Commission were to devote some effort at promoting consultation and co-operation between member states on its application. The Directive set unrealistic deadlines for transposition, as it takes time to put the necessary provisions into place, and the lack of time for this could result in a missed opportunity to make real progress in Better Regulation. The different terminologies used in the Directive were a complicating factor. Another more general issue raised was the quality of draft EU regulations, which was qualified as suboptimal, posing issues for transposition downstream. Finally, it was pointed out that the EU required transposition of directives even where these had no practical application whatsoever (the case was cited of coal mines in relation to Brussels Capital Region, which has none; even so, transposition was still required). Belgium’s Presidency of the EU in the second half of 2010 is of course an opportunity to play a stronger role in relation to advancing the EU Better Regulation agenda.

Notes

1. Not to be confused with the generic use of the term “regulation” for this project.
2. When the federal government considers starting negotiations in view of signing a treaty which is not on an issue within its exclusive competence, it has to inform immediately the Inter-ministerial Conference of Foreign Policy. If communities and regions do not intend to participate in the negotiations, they have to inform the Inter-ministerial Conference. In such cases they have the option of signing or not signing the treaty, but cannot amend the text. Communities and regions can ask the federal government to open negotiations on a given subject through the Inter-ministerial Conference. Mixed treaties are signed by the federal Minister of Foreign Affairs and by the minister designated by the government of the communities and regions involved.
3. Co-operation agreement of 8 March 1994 between the federal state, the communities and the regions relating to modalities for concluding mixed treaties.
4. G. DIERICKX, P. BURSENS, S. HELSEN, *Omzetting, toepassing en toepassingscontrole van het Europees beleid in België. Naar een structurele toepassing van de wijze waarop België zijn Europese verplichtingen nakomt*, Academia Press, 2003, 315 pp.
5. This has been done by a series of decisions: decisions of the Council of Ministers of 11 February 2004 and of 1 October 2004, decision of the Concertation Committee of 9 November 2004, and decisions of the Council of Ministers of 22 July 2008 and 12 September 2008.
6. See Internal Market Scoreboard n°20: http://ec.europa.eu/internal_market/score/index_en.htm.



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