

Chapter 4

The development of new regulations

Predictable and systematic procedures for making regulations improve the transparency of the regulatory system and the quality of decisions. These include forward planning (the periodic listing of forthcoming regulations), administrative procedures for the management of rule-making, and procedures to secure the legal quality of new regulations (including training and guidance for legal drafting, plain language drafting, and oversight by expert bodies).

Ex ante impact assessment of new regulations is one of the most important regulatory tools available to governments. Its aim is to assist policy makers in adopting the most efficient and effective regulatory options (including the “no regulation” option), using evidence-based techniques to justify the best option and identify the trade-offs involved when pursuing different policy objectives. The costs of regulations should not exceed their benefits, and alternatives should also be examined. However, the deployment of impact assessment is often resisted or poorly applied, for a variety of reasons, ranging from a political concern that it may substitute for policy making (not true-impact assessment is a tool that helps to ensure a policy which has already been identified and agreed is supported by effective regulations, if they are needed), to the demands that it makes on already hard pressed officials. There is no single remedy to these issues. However experience around the OECD shows that a strong and coherent focal point with adequate resourcing helps to ensure that impact assessment finds an appropriate and timely place in the policy and rule making process, and helps to raise the quality of assessments.

Effective consultation needs to be an integral part of impact assessment. Impact assessment processes have – or should have – a close link with general consultation processes for the development of new regulations. There is also an important potential link with the measurement of administrative burdens (use of the Standard Cost Model technique can contribute to the benefit-cost analysis for an effective impact assessment).

The use of a wide range of mechanisms, not just traditional “command and control” regulation, for meeting policy goals helps to ensure that the most efficient and effective approaches are used. Experience shows that governments must lead strongly on this to overcome inbuilt inertia and risk aversion. The first response to a problem is often still to regulate. The range of alternative approaches is broad, from voluntary agreements, standardisation, conformity assessment, to self regulation in sectors such as corporate governance, financial markets and professional services such as accounting. At the same time care must be taken when deciding to use “soft” approaches such as self regulation, to ensure that regulatory quality is maintained.

An issue that is attracting increasing attention for the development of new regulations is risk management. Regulation is a fundamental tool for managing the risks present in society and the economy, and can help to reduce the incidence of hazardous events and their severity. A few countries have started to explore how rule-making can better reflect the need to assess and manage risks appropriately.

Assessment and recommendations

General context

Widespread concern in Belgium over regulatory inflation is an important driver of Better Regulation initiatives. For some time now, Belgian governments have been conscious of the upward trends in production, and the negative effects of this for regulatory quality and the complexity of the regulatory framework. Regulatory inflation is partly the result of the federalisation process, but there are other reasons which are not specific to Belgium. These include a tendency to respond to any issue or crisis by a regulation, and regulations prepared at short notice under “urgency” procedures which are of poor quality and need subsequent revision, as well as the weight of EU origin regulations in the system. Is there adequate awareness of the important contribution of Better Regulation policies in tackling these issues?

At the federal level and in the Walloon Region, the regular use of programme laws undermines regulatory quality. The federal government recognises that in practice these laws (which are adopted twice a year) can be unhelpful to transparency and the general quality of the legislative process. An agreement exists between the federal government and the parliament to limit the use of programme laws to budgetary issues, a provision which is also included in the Chamber regulations (*règlement de la Chambre*). In principle, only urgent and technical issues can be included in programme laws.

Recommendation 4.1. (federal government, Walloon government): Consider action to limit the use of programme laws to their intended purpose. Ensure that these laws are processed transparently (see also Chapter 3).

Procedures for making new regulations

Whilst each government has defined its own procedure for making new regulations, there are strong unifying elements. The Council of State reviews the draft regulations of all governments (legal check), as does the *Inspectorate of Finance* (legal and budget check). This nationwide aspect is backed up *ex post* (after enactment), by the Constitutional Court (for primary regulations) and the *Court of Cassation* (secondary regulations), which may check conformity with the constitution.

A useful development has been the trend in Flanders and Wallonia to merge legal and broader regulatory quality processes. The divisions that often exist between the different procedures for reviewing draft regulations on their way to adoption (legal quality checks, constitutional checks, impact assessments etc.) mask the fact that the overall objective is to make an efficient and effective regulation, fit for its purpose. Strategic oversight of these different processes by a single entity is helpful.

Apart from Flanders, visibility of the forward planning agenda is limited. In all governments, policy statements and ministerial policy notes, at the beginning of the legislature, outline the upcoming programme of work. The Flemish government has established more specific forward planning and monitoring mechanisms through an online regulatory agenda.

Recommendation 4.2. (governments apart from Flanders): Consider setting up a more visible and regularly updated forward planning process for regulations, to promote transparency.

The efficiency of the scrutiny process can be significantly reduced in a number of ways. Issues include a tendency for ministerial cabinets to be heavily involved; the scope for some important regulations not to be subject to a sufficiently rigorous process; short deadlines and lack of prioritisation; and insufficient publicity for the Council of State opinions. These issues are considered more closely below.

There is a tendency for ministerial cabinets to be heavily involved. Shared among governments is a tendency for draft texts to be prepared by the ministerial cabinets. This means that procedures to secure quality can be circumvented as officials are less involved.

It is not clear whether all significant regulations are well covered by the process. This applies in particular to programme laws, significant secondary regulations, and collective agreements (which are significant in labour regulations). Parliamentary proposals account for about 25% of (federal) laws, but only a few go to the Council of State.

Short deadlines and lack of prioritisation limit the extent and efficiency of the scrutiny system. The advice of the Inspectorate of Finance is requested on a large number of decisions but there is no prioritisation of cases to define the most important ones. A large number of draft regulations are submitted to the Council of State under the “urgency procedure” (95%) which severely limits its capacity to carry out effective checks. The OECD peer review team were told that a missing element was “a nice but strong minded policeman” within the administration to act as a preliminary check and gatekeeper before regulations were sent for formal controls to the official bodies.

The Council of State plays a particularly important role in ex ante scrutiny of draft regulations, but its opinions are not widely publicised. The Council of State is the main body responsible for ensuring overall control of legality. It must be consulted on all draft laws, decrees and ordinances as well as orders initiated by a Belgian government. The OECD peer review team were told that the government would pay more attention to regulatory quality if the Council of State’s opinions were given greater publicity, beyond their inclusion in the documents attached to a draft law tabled before parliament. The Council of State is currently considering how to give its advice greater publicity.

Recommendation 4.3. (all governments): Consider how law drafting can be more firmly established as the responsibility of officials in the administration, subject of course to political and ministerial oversight and direction.

Recommendation 4.4. (all governments): See also Chapter 3. Ensure that all significant regulations are covered by the same process. Consider, in discussion with parliaments, how and to what extent laws initiated by parliaments can be the subject of equivalent robust procedures.

Recommendation 4.5. (all governments): Consider preliminary internal reviews by officials in the administration to relieve the load on the formal control bodies. Establish criteria for prioritising cases. For example in the case of the Inspectorate of Finance, this could be thresholds to identify regulations with the most important budgetary consequences. Consider how use of the urgency procedure can be minimised, in order to allow time for the Council of State and Inspectorate of Finance to carry out effective checks.

Recommendation 4.6. (all governments, Council of State): Systematically publicise (at least in part) the opinions of the Council of State on its website. Consider also systematically publicising the government's response to Council of State opinions (as happens in some other countries with similar structures such as the Netherlands).

Ex ante impact assessment of new regulations

General context

*Belgian governments have taken important steps to integrate ex ante impact assessment in the development of regulations. Ex ante impact assessment is a relatively new policy in Belgium, and still a work in progress. Although steps have been taken to enlarge the scope of impact assessments, these are still for the most part confined to evaluating administrative burdens. The federal government introduced the *Kafka Test* to measure administrative burdens in 2004. The governments of the Walloon Region and the French Community have also adopted the *Kafka Test*. Other impact assessment procedures, with a broader scope, have also been established by the Flemish government in 2005 and by the federal government in 2007. A variable geometry is at work, with different governments sometimes adopting different versions of the same processes.*

*The federal government's *Kafka Test* has proved a good starting point for raising awareness of impact assessment and its potential. It has forced officials to consider the impact of their proposals on citizens and businesses with respect to administrative burdens. More practically, it has made a real contribution to the reduction in administrative burdens. Factors for success have included a simple structure based on a short questionnaire, and a gatekeeper role for the Secretariat of the Council of Ministers in the Federal Chancellery, which ensures that tests are included in dossiers sent to the Council of Ministers.*

*The experience of the Walloon government and the French Community government with their version of the *Kafka Test* has also been positive, supported by significant efforts to set a strong operational context for the test. These governments have taken and adapted the federal government *Kafka Test*, with a similar objective of building up experience in impact assessment. The Walloon Better Regulation unit *EASI-WAL* sees the Test as an initial step to change mentalities in the administration. *EASI-WAL* has made significant efforts to support the Test, with a methodological guide, training courses, and additional criteria for improving the quality of the regulation such as abrogation of obsolete texts.*

*The simplicity of the *Kafka Test* is a strength, but also a limitation, and there are other challenges. The test only considers administrative burdens, and does so in a very simple way, via a relatively undemanding questionnaire. Quantification of burdens is not explicitly*

required or encouraged. Another issue is that the *Kafka* Test, which was designed to start at the very beginning of the rule-making process and continue up to presentation to the Council of Ministers, may only be completed just before the meeting of the Council of Ministers. The institutional challenge function prior to the adoption of a regulation in practice is limited compared with many other countries, as the decision has been taken to put the most significant work into checking regulations *ex post*, once they have been adopted, through an *ex post* measurement process for administrative burdens. There is no consultation of stakeholders, and no external publication of the *Kafka* Test (which could add another perspective on the system). The test needs to evolve, become more robust, and consider a larger range of impacts. At the federal level at least, this last point means finding a way of associating the future evolution of the test with the roll-out of the Sustainable Development Impact Assessment (see below).

The federal government has also launched a Sustainable Development Impact Assessment, but this is still at an early stage of implementation. The Sustainable Development Impact Assessment (SDIA) is an ambitious initiative. It covers economic, social and environmental impacts, evaluates short and long-term effects, and seeks to address the full-range of spatial effects (from impact on the local levels within Belgium to impact in other countries). It sets a two-stage process to allow for an initial screening of regulations through a set of indicators, and for an in-depth analysis of selected regulations. The federal government made it a formal requirement in early 2007 and the FPS for Sustainable Development has produced a range of guidance materials. However, the process has been applied so far in practice only to a limited number of draft regulations.

The highly ambitious objectives set for the Sustainable Development Impact Assessment, combined with significant exemptions, are likely to stand in the way of progress. As in many other OECD countries, the Belgian federal government has identified the important strategic need to develop processes in support of sustainability (the German federal government, for example, has also identified this need). However, will this overload the capacity of the system to cope? Will the significant exemptions mean that the assessment is only used in exceptional cases? The results of two years experience so far have been very modest. There is no clear evidence that the process has yet changed the course of a draft proposal. In essence, the federal government is seeking to establish a process (a form of “super impact assessment”) which is highly sophisticated by international standards, on to a culture and administration which has so far only had the modest experience of a limited test for administrative burdens. This is not to question the objective of broadening the scope of impact assessment, but to caution that this needs to be developed in proportion with capacities to cope, and with a much more developed support system.

Another issue for attention is that the federal government now has two separate institutional anchors for impact assessment. The Sustainable Development Impact Assessment process is overseen by the FPS for Sustainable Development (one of the horizontal ministries), and the *Kafka* Test is overseen by the ASA in the Federal Chancellery. There is no formal link between the two processes, apart from the fact that the SDIA is (like the *Kafka* Test) attached to draft proposals going to the Council of Ministers. Both require the co-operation of (highly autonomous) other ministries. It does not make sense to continue, at least over the longer term, with two separate processes.

Meanwhile, Flanders has opted for a different and broader approach to ex ante impact assessment. The Flemish government has established a “comprehensive” *ex ante* impact assessment with some quantification and consideration of options, together with a quality control system. The system has “teething problems” typical of what is often encountered in

other OECD countries. It is proving difficult to change attitudes and persuade officials (and ministerial cabinets) to take the assessment seriously and carry it out at a sufficiently early stage in the development of regulations (it is often treated more as an *ex post* note of justification for a decision which has already been taken). A very positive recent development is the conclusion of the Inter-Institutional Agreement between the Flemish government, the Flemish Parliament, SERV (social and economic council) and strategic advisory boards, which provides for stronger interaction with consultation and the parliamentary process (including information exchanges and methodological support to promote the more active use of RIA by advisory bodies and parliament members). This initiative, however, will only be effective if efforts to encourage the administration upstream to carry out higher quality and timely impact assessments are sustained over time. Circulating the regular evaluations made of the process is a good starting point. The review of RIA which the DMW completed at the end of 2008 emphasised the need for stronger political support and further guidance to officials. Flanders also has an impact assessment for administrative burdens of new legislation (compensation rule) since 2005. The compensation rule is linked with the impact assessment.

All the different initiatives suffer, to a greater or lesser degree, from a range of problems including timeliness, limited coverage and weak institutional frameworks. Reflecting the often limited reach of general procedures for the development of regulations, many draft regulations are currently exempted from any form of impact assessment. The involvement of politicians in rule drafting makes the implementation of impact assessment particularly difficult. Impact assessment is often done too late and becomes an *ex post* justification for decisions which have already been reached. This often causes implementation problems downstream and requires revisions to the law in the worst cases. Institutional frameworks are weak and generally unable to challenge poorly implemented assessments. Quantification is limited, but the ASA and the DMW are working on the development of measurement methodologies. Measurement of administrative burdens is important as they are to a large extent “invisible costs” which are difficult to estimate without quantification. Transparency is also weak with often limited efforts to consult with stakeholders and little effort at publication. Strengthening impact assessments will require strong high-level commitment and further culture change.

Where to next in the development of Belgian impact assessments?

Impact assessment is a relatively new process in the Belgian Better Regulation landscape and needs more time to mature. The problems with the current systems are typical of the experiences of many other OECD countries, and sharing experiences with European neighbours would be a useful exercise, both for reassurance that Belgium is not alone and also to identify solutions to the practical challenges that could be applied in the Belgian context. Belgian governments should certainly not give up on setting an objective of a more developed impact assessment which takes them beyond current arrangements. They must evolve progressively towards a large range of impacts, make the assessments public. All governments need to identify issues that stand in the way of a more robust impact assessment process, and take steps to deal with these, drawing on international best practice.

As a first step, there is a need to fix the various problems which weaken the effectiveness of the current processes. This includes (see above) the issues of timeliness to ensure that assessments influence final decisions, exemptions to ensure that processes cover all significant regulations, and the need to strengthen the institutional challenge function so that assessments are of high quality. Resource constraints on Better Regulation units also

mean that processes need to be as efficient as possible, notably by applying the principle of proportionality (capturing all significant regulations but letting the insignificant ones go, for example, through pre-checks).

The different approaches to impact assessment across Belgian governments are a rich source of experiences which need to be shared. This has already happened, with the shared deployment of the *Kafka* Test by the federal and Walloon governments. Sharing experiences also minimises the risk of fragmentation of processes over time, as governments can re use the successful approaches deployed by their neighbours. The existing general co-operation agreement between the federal government and the other governments could be a starting point for this, provided that this provides sufficient focus for this important issue.

Where policy issues are shared or overlap, co-ordinated impact assessments for the underlying regulations would add value to the process. Impact assessment processes currently reflect the division of competences between governments – they are applied to the regulations flowing from the competences specific to each government. With the exception of the sustainability impact assessment, which is a work in progress, the processes do not seek to take a Belgium wide view.

Recommendation 4.7. (all governments): Identify the issues that stand in the way of a more robust impact assessment process, and take steps to deal with these, drawing on international best practice.

Recommendation 4.8. (all governments): Ensure that experiences are systematically shared, starting with the 2003 co-operation agreement.

Recommendation 4.9. (federal government): The federal government should re-assess its ambitions in respect of the SDIA test and take stock of how to evolve toward a broader, integrated and realistically achievable approach.

Recommendation 4.10. (Flanders government): Flanders should stick with its ambition of a broadly based process. It should not be discouraged by the challenges of setting up a full impact assessment process, and decide to confine itself to a more limited version that only covered administrative burdens.

Recommendation 4.11. (Walloon government): The Walloon government should set itself the objective of moving toward a broader process, beyond administrative burdens.

Recommendation 4.12. (Brussels Capital Region government): The government of Brussels-Capital Region should introduce *ex ante* impact assessment in the procedures for making new regulations.

Recommendation 4.13. (all governments): A long term goal which could start to be discussed now between governments is the identification of policy areas where there is a shared interest in the outcome, and hence the need to combine efforts on impact assessment for regulations linked to these policies.

Alternatives to regulations

Consideration of alternatives to regulation is included in some but not all of the impact assessment mechanisms. Against the background of significant regulatory inflation, it is in Belgium's interest to ensure that alternatives to regulation are given maximum attention at an early stage in the development of policies.

Recommendation 4.14. Ensure that part of the upgrading of impact assessment processes (see above) includes a clear and enforceable commitment to reviewing alternatives to regulation.

Background

General context

The structure of regulations in Belgium

There is no hierarchy between Belgian governments and each government legislates in its area of competence. This means that primary regulations issued by the federal state (called "laws") and primary regulations issued by regions and communities (called "decrees", or "ordinances" in the case of Brussels-capital region) are on an equal footing. Each government has a sub-structure of secondary regulations, also on an equal footing with each other. Collective agreements, which stand below secondary regulations in the hierarchy, are extensively used in the social and labour sector. Primary regulations at the federal level include "programme laws" which contain budget-related provisions relating to various policy areas. The federal government recognises that these laws, which have been adopted twice a year since the 1970s, are unhelpful to transparency and the general quality of the legislative process.¹ There are also "framework laws", similar to what exists in many other EU countries, which set broad requirements regarding a policy area, leaving specifics to be fleshed out in secondary regulations.

Box 4.1. The structure of regulations in Belgium

Hierarchy of regulations

The hierarchy of regulations is:

- International regulations including the Treaty of Rome and derived EU legislation.
- Constitution.

- Law, decree and ordinance.
- Royal order and government order.
- Ministerial order.
- Collective agreement.
- Circular.
- Rulings and orders of community commissions (in Brussels) and provincial rulings and orders.
- Municipal rulings and orders.

International/supranational regulations and the constitution

In a decision of 27 May 1971 the *Court of Cassation* stated that international and supranational regulations (which include EU related regulations) have primacy over internal regulation, including the constitution. The constitution is the highest regulation among Belgian regulations.

Primary regulations (laws, decrees and ordinances)

These are issued by the federal state and federated entities and have equal standing. Primary federal regulations are called “laws”. They can be initiated by a minister, a minister and a secretary of state together or by one or several members of the federal parliament (House of Representatives, Senate), and are enacted by the federal parliament. Primary regulations adopted by the parliaments of the communities (Flemish, French and German-speaking) by the parliament of the Flemish Region and the parliament of the Walloon region are called “decrees”. Primary laws adopted by the parliament of the Brussels-capital region are called “ordinances”. Decrees and ordinances are initiated by a member of the government or council of the relevant federated entity.

Secondary regulations (orders)

“Royal orders” and “ministerial orders” are made by the federal government under powers delegated by a law. Royal orders are promulgated by the monarch to implement federal laws, while (federal) ministerial orders are promulgated by a minister to implement a royal order. Similarly (regional and community) “ministerial orders” and “governmental orders” are instruments made by the governments of regions and communities under powers delegated by a decree or ordinance. As for primary regulations, there is no hierarchy between secondary regulations of the federal government and of governments of the federated entities.

Collective agreements

They relate to all social issues which social legislation has delegated to “social partners” (*i.e.* representatives of businesses and trade unions). For example, collective agreements set rules on labour hours (supplementary hours and vacations), minimum wages, bonuses additional to basic salaries. Collective agreements can be concluded at different levels: national or inter-sectoral level (covering all employers and employees), sectoral level (covering only employers and employees in a specific sector), and enterprise level (agreement between an individual employer and its employees). The National Labour Council discusses national or inter-sectoral agreements. The biannual inter-professional agreement is a framework agreement which sets policy objectives for the following two years. These objectives are set through regulations or inter-professional collective agreements. Collective agreements can be given the force of law (*i.e.* become a requirement on all third parties) by a royal

order (which cannot however modify the text). In 2008, 42% of the 2 640 royal decrees published in the official journal related to giving force of law to labour collective agreements (ASA, 2009).

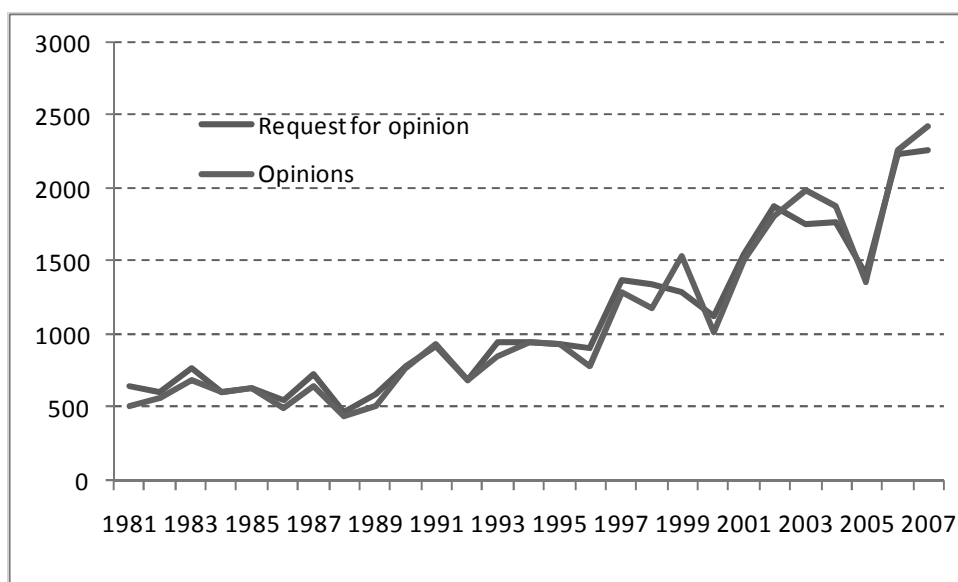
As well, a number of legal arrangements make it a requirement for the Central Council of Economy (*Conseil central de l'économie - CCE*), which brings together representatives of the social partners, to give an opinion on defined socio-economic issues. For example, it has produced reports on product standards and accounting requirements for companies (to cite just two of a wide range of issues covered). The CCE is purely consultative, its advice is not binding, and the final decision is in the hands of the executive and legislative powers.

Circulars

Circulars are internal guidance notes made by a federal minister, or the government of a region or community, and which apply only to their respective administration.

Trends in the production of new regulations

There is a strong concern in Belgium over “regulatory inflation”. The growth in the number of regulations can be seen in the number of regulations published every year in the official journal as well as the total number of pages of the journal. Another indicator can be found in the statistics published by the Council of State on the number of request for opinions on draft regulations which it receives every year. They have grown significantly over the past 25 years, especially since the second part of the 1990s (Figure 4.1). Regulatory inflation is partly explained by the federalisation process, which has extended the competences of regions and communities, and generated regulations to give effect to the exercise of these competences. The production of EU regulations is also often considered another explanation. The effect is reinforced by Belgian federalism as many directives need to be implemented by federated entities as well as the federal state. The OECD peer review team also heard from a number of stakeholders of a growing tendency to issue regulations in a rush, in response to a crisis (leading to the need to revise regulations that were prepared too hastily).² The ASA however, notes that although the production of regulations is upwards, administrative burdens are coming down, and that important issues may not have much to do with the number of regulations. Harmonisation needs to be tackled, as well as inflation. Companies may be confronted with different regulations across the federated entities, and regulations contain varying definitions of SMEs.

Figure 4.1. Number of opinions formulated by the legislative section of the Council of State (1980-2007)

Source: Conseil d'Etat, *Rapport annuel 2006-07*. Available at www.raadvst-consetat.be.

Table 4.1. Number of requests for opinions received by the legislative section of the Council of State (2002-08)

	Federal authorities				Community and regional authorities			
	Laws	Royal orders	Ministerial orders	Total	Decrees Ordinances	Government orders	Ministerial orders	Total
2002-03	136	649	85	870	457	443	0	900
2003-04	155	529	98	782	209	645	0	854
2004-05	178	590	110	878	138	318	19	475
2005-06	224	886	131	1241	306	544	46	896
2006-07	135	1062	148	1345	279	534	45	858
2007-08	89	437	111	637	246	575	76	897

Note: Community and regional governments include: Flemish government, French community, German-speaking community, Walloon region, Brussels-capital region, Common Community Commission, French Community Commission. Opinions on draft laws, decrees and ordinances do not include opinions on proposals initiated by the parliaments and on amendments.

Source: Compiled from statistics published in *Conseil d'État, Rapport annuel 2006-07* (available at www.raadvst-consetat.be), and communication from the Council of State to the OECD.

Procedures for making new regulations

There are strong similarities across governments in the procedures for development of new regulations. The initiative can come either from the parliament or the government. As in some other EU countries, the process is highly decentralised within governments, reflecting strong ministerial autonomy, and the coalition based nature of the political system puts a premium on internal consultation to secure consensus. A feature that is perhaps unique to Belgium is that ministerial cabinets (the political element of governments), rather than line officials play a major role as they often are directly involved in drafting, and associated procedures including consultation and impact assessment.

Whilst each government has defined its own procedure, there are strong unifying elements. The Council of State reviews the draft regulations of all governments (legal check), as does the *Inspectorate of Finance* (budget check). This nationwide aspect is backed up *ex post* (after enactment), by the Constitutional Court (for primary regulations) and the *Court of Cassation* (secondary regulations), which may check conformity with the law.

Box 4.2. The law-making process in Belgium

The initiative for federal legislation can come from one or several members of the House of Representatives, one or more members of the Senate, or from the King (in practice his ministers or state secretaries). When initiated by the parliament, they are referred to as “*wetsvoorstel*” or “*proposition de loi*”, while when initiated by the government they are referred to as “*wetsontwerp*” or “*projet de loi*”. All draft laws are prepared both in Dutch and French throughout the process.

Preparation of draft laws initiated by the federal government

- *Internal consultation.* This is the first step, done at an early stage with ministers and secretaries of state directly affected by the project. It is then extended to all partners of the coalition to ensure that there is sufficient consensus to support the project. This dialogue takes place in the framework of the Working Group on Policy Co-ordination. The Working Group produces a report, which is attached to the dossier.
- *Impact assessment.* Done before submission to the Council of Ministers. Preparation of the *Kafka* Test (to estimate administrative burdens) and of the SDIA Test (sustainability).
- *Budgetary check.* Also done before submission to the Council of Ministers. *Finance Inspectorate* approval is required for all draft laws, royal orders and ministerial orders as well as circulars and decisions which are submitted to the Council of Ministers or Minister of Budget. Finance inspectors control the legality of expenses, the availability of credits, compliance of expenses with government decisions as well as the appropriateness and efficiency of proposed expenditure. In case of a negative opinion, the relevant Minister can appeal to the Minister of Budget or the Minister of Public Administration. If they confirm the negative opinion, the last appeal is the Council of Ministers itself.
- *Consultation of stakeholders external to the government* (governments of regions and communities, advisory boards, trade unions, etc.). In many cases this is done after the first reading of the text in the Council of Ministers.
- *Legal check.* Done at the end, after required consultations have been carried out and after debate in the Council of Ministers. The legal section of the Council of State scrutinises draft laws regarding the legal quality of the draft and its compatibility with existing law. It does not make any assessment regarding the political or policy aspects. Its opinion is mandatory for all drafts prepared by the government. Although its opinion is not binding, it is usually taken into account. If the Council formulates important comments, the dossier must be presented again to the Council of Ministers.

The Secretariat of the Council of the Ministers checks that the dossier submitted to the Council of Ministers include the required elements, namely:

- introduction and/or historical status (“*rétroacte*”);
- general presentation of the regulation;

- opinion of relevant internal and/or external consultation bodies;
- opinion of the *Finance Inspectorate*;
- prior agreement of other coalition members and of the Minister of Budget;
- *Kafka Test*;
- SDIA Test (sustainability test);
- report of the relevant working group(s): working group on policy co-ordination and/or *ad hoc* working group;
- text of the proposed regulation; and
- members of the government who initiated the project.

Following approval by the Council of Ministers, the draft is signed by the King and sent to the parliament (usually to the House of Representatives). It is examined in the relevant commission and put up for debate in plenary session. There are three possible procedures: (i) monocameral procedure (House is exclusively competent for a certain number of subjects such as budget of accounts, size of the army); (ii) bicameral procedure (House and Senate are equally competent for “fundamental” legislation such as constitutional revisions, laws on the basic structure of the Belgian state, laws on the organisation of courts, the Council of State and the Constitutional Court); and (iii) optional bicameral procedure (the Senate may ask to examine a bill and senators may propose amendments to the House, but the House has the last word). The Senate has the possibility of a second reading for most bills. For this reason, it is considered to be a “chamber of reflection”.

Laws, decrees and ordinances are promulgated by the King and published in the official journal.

Preparation of draft laws initiated by the governments of the federated entities

Similar procedures have been established in the regional and community governments or council. As for federal laws, the opinion of the Council of State must be requested as the final stage. Draft regulations are submitted to the budget minister, the *Inspectorate of Finance* (prior to first hearing in the government meeting) and to the Council of State (after first hearing)³ The chancellery acts as a gatekeeper (for formal requirements) to the agenda of the government meetings.

Preparation of draft laws initiated by parliaments

Draft laws can be initiated by one or more members of parliament (House of Representatives, Senate, parliaments of the regions and communities). Drafts are examined by the relevant Commission. The opinion of the Council of State is optional, and can be requested by the President of the relevant assembly. Consultation is mandatory in any of the following cases:

- It is requested by one third of the members of the relevant assembly.
- It is requested by half of the members of a linguistic group (House of Representatives, Senate, Council of Brussels capital region, Assembly of the Common Community Commission).
- It is requested by at least 12 members of the parliamentary commission of consultation (“*commission parlementaire de concertation*”).

Forward planning

Each government issues a policy statement agreed by the coalition parties (which may take the form of a government statement and/or ministerial policy notes) at the beginning of a legislature. These may be published on the government portal and on relevant minister's websites, and form the working basis for government action over the legislative term (four years for the federal government, five years for the other governments). Policy notes are updated annually and published on the ministries' websites. The parliamentary debates on the policy notes are open to the public.

EU regulations and the regulatory agenda of the Flemish government are subject to specific forward planning and monitoring mechanisms. A database on EU regulations collects all proposals and upcoming EU regulations, and keeps track of the transposition process (for more see Chapter 7). The Flemish government introduced a regulatory agenda in 2007. This gives an overview of upcoming projects which require preparation of primary and secondary regulations and their timing, based on the main issues of the annual ministerial policy notes. It also gives an overview of draft regulations approved by the Council of Ministers.⁴ It is sent for information to the strategic advisory boards (see Chapter 3). Progress on the federal government programme is monitored mostly at a political level, by the strategic cells of the ministers, the cabinet of the Prime Minister and the cabinet of the Minister of Budget.

Administrative procedures (federal level)

General procedures for making new federal regulations are laid down in several circulars related to the operation of the Council of Ministers. They provide for an early dialogue within government to ensure that there is sufficient consensus among the coalition partners to support the initiative. This dialogue starts with the ministries directly affected and is extended to all government members in the framework of a working group on policy co-ordination.

Key parts of the rule-making process are examination of the draft law or order by the *Inspectorate of Finance*, before hearing in the Council of Ministers, and by the Council of State after the first hearing in the Council of Ministers (last stage of the process). There are also various legal requirements related to the consultation of external stakeholders (see Chapter 3). The Chancellery of the Prime Minister acts as gatekeeper to the Council of Ministers as it checks that procedures have been carried out (including internal and external consultation requirements, impact assessment) before including a draft regulation on the agenda of the meeting of the Council of Ministers. Frequent short deadlines can limit the extent and efficiency of the scrutiny system. Notably, the advice of the *Inspectorate of Finance* is requested on a large number of decisions but there is no prioritisation of cases.

Legal quality

Consultation of Council of State

The Council of State is the main body responsible for ensuring overall control of legality. The legislative section of the Council of State must be consulted on all draft laws, decrees and ordinances as well as orders initiated by a Belgian government (except in cases of duly justified urgency). It is usually the last body to be consulted in the development of regulations (following discussion of the text in the Council of Ministers). With respect to regulations initiated by parliament members, the President of the relevant assembly or a

minimum number of Parliament members can request the Council's opinion. The Council's opinion is exclusively legal and technical, and does not seek to comment on the policy/political aspects. It is not binding, nor is the government (or parliament where appropriate) required to respond.

The Council's opinions are initially confidential to the government. It is for the requesting minister to decide to communicate them or not to third parties. The opinions are, however, attached to the file accompanying the draft laws, decrees and ordinances when these are sent to parliament. Regarding regulations adopted by parliament, the Council's opinions are published in the parliamentary documents. Opinions on secondary regulations are published in some cases in the official journal, but are usually not made public. Governments have no obligation to provide a reply to the Council's legal objections. They do it in some cases, but not systematically.

The Council's legislative section always examines the following three points:

- *Conformity with rules of procedures.* It checks that all mandatory procedures have been completed (e.g. discussion in Council of Ministers, consultation of various advisory bodies, opinion of the *Inspectorate of Finance* and agreement of the minister in charge of budget).
- *Conformity with hierarchy of rules and allocation of competences.* It checks that the text is in conformity with supra-national and constitutional legal requirements, and that it has adequate legal foundations (in particular have secondary regulations an adequate legal foundation in the superior regulation?). It also checks that the proposal respects the distribution of competences between the federal authority, communities and regions.
- *Relevant competent authority.* It checks that the text is issued by the relevant competent authority.

In addition to these three mandatory points, the legislative section ensures an overall control of legality of the text. This includes examining the internal coherence of the text (in particular does the text reflect the objectives of the authors). The Council of State also checks that the Dutch and French drafts concur with each other. Short deadlines for delivering the advice often limit the extent of these additional controls.

According to the law, the Council of State has to release its opinion within 5 days, 30 days (urgency procedures) or without any specified delay, depending on the case. The average timeline for the ordinary procedure (no specified delay) is three months. In practice, the deadline can sometimes be extended, with the express authorisation of the authority seeking the opinion. If the advice is not given within the deadline, it can be ignored. In 2007, urgency procedures accounted for 95% of the opinions delivered by the legislative section (80% in 30 days and 15% in 5 days). The Council of State considers that the prevalence of the urgency procedure significantly reduces its capacity to exercise fully its advisory mission.⁵ A number of interviewees also raised this concern with the OECD peer review team.

Other legal quality support

The Council of State also promotes legal quality through action at an earlier stage of the regulatory process. It has published a comprehensive manual on the technical aspects of drafting, which is available on its website and used by all governments (Box 4.3).⁶ It can

also provide legal expertise upon request to ministers or the administration. Other bodies may play a role in ensuring legal quality at an early stage. The legal department of the Prime Minister's Office checks the internal coherence of the text and gives legal and technical advice on request. Regional governments have their own legal and linguistic departments, which give opinions on draft regulation and provide *ad hoc* advice to departments. The *Finance Inspectorate's* opinion can also include some legal aspects, which are often picked up by the Council of the State.

Box 4.3. Guide to legislative drafting

The Council of State has published a guide on legislative drafting, which is structured into six parts:

- General rules relating to consolidation and correct use of language.
- General rules relating to regulatory drafting: choice of regulation, degree of detail to give to the provisions, form of provisions (independent provisions, modification provisions, and repealing or withdrawal provisions).
- Rules of regulatory drafting, including title, preamble, enacting terms and appendices.
- Rules applicable to specific problems such as treaty approval, transposition of EU directives, legislation by reference, co-ordination and codification.
- Forms and templates.
- Outline of the procedure for consulting the legislative section of the Council of State.

Source: Council of State (available at www.radvst-consetat.be).

Regulatory quality: regional and community initiatives

Whilst procedures are largely similar to, and often shared with, the federal state, the Flemish and Walloon governments have tended to merge legal quality and broader regulatory quality checks, as part of a recent reinforcement of processes and institutional arrangements for regulatory quality. For example, they each require that draft regulations be sent to their Better Regulation unit (in Flanders the DWM checks the quality of impact assessment while in Wallonia *EASI-WAL* gives an opinion on the quality of the text). The French and German-speaking communities also deploy procedures in support of legal quality, proportionate to their size.

Flanders

In 2007, the Flemish government set up units for regulatory quality within each department. The objective was to centralise regulatory capacity within each policy area so as to ensure that regulations were no longer developed in a fragmented matter. The units are seen as “pioneers” or “champions” for the promotion of regulatory quality within each department and across departments. They centralise legal drafting know-how and must co-operate with other policy areas in the development of impact assessments. As of late 2008, there were 22 units within departments, under different arrangements (one unit – one policy area, several units per policy area). In three policy areas a network of contact people has been established in lieu of the units.

In mid-2008, the DWM conducted an evaluation of regulatory quality units. Key conclusions were:

- The units have promoted co-operation within each policy area but co-operation across policy areas is much more difficult. Co-operation between units needs to be developed.
- While internal quality control can be developed within each policy area, central quality control continues to be necessary.
- Preparation of good quality regulations requires a combination of general knowledge on regulatory drafting and specialised expertise, which implies that a project group be set up for each regulatory initiative. The role of the regulatory quality unit needs to be clearly defined in each case (in particular time-table and task-sharing arrangements between the unit, the administration official and the cabinet of the minister).
- Agencies are not sufficiently involved in the process of making regulations which will have an effect on their activity.
- The development of these units has taken place within existing resources, and lack of time and resources has been an issue. This was confirmed in meetings with the OECD peer review team. In some cases the structure of the units has been established, but the units remain “virtual” for lack of explicit allocated resources (they are embedded in the workload of officials).

Interviews of the OECD team confirmed that the units promote the development of Better Regulation within each department, but are still work in progress. Based on the evaluation results, the DWM has suggested a number of proposals to improve the regulatory process and enhance the performance of the units. This includes strengthening political support and clarifying the role of the units so as to reinforce their capacity within the policy area. The DWM has suggested that arrangements be formalised each time a new minister is appointed, to clarify the role of the unit, set up working arrangements for the development of regulations (including the respective role of officials, cabinet staff and the units), and identify regulatory management activities (forms policy, impact assessment and administrative simplification). The DWM has also suggested that agreements on the regulatory process be detailed once the annual policy documents and the related regulatory agenda are approved (in particular to better identify multi-sectoral policies).

Walloon Region

The Department of Legal Affairs provides legal assistance to administrations and ministerial cabinets. It develops common practices with respect to preparation and drafting of regulations. *EASI-WAL* also promotes legal quality through the opinion it gives on draft decrees and orders (a process established in early 2006). The Walloon government sends all draft decrees and orders adopted in first hearing to *EASI-WAL* to screen the quality of the text (existence of deadlines, supporting documents, consultation with stakeholders, clarity and readability of the text, definition of terms, structure of the text and overlapping regulations). The official or member of the ministerial cabinet systematically includes a response to *EASI-WAL*'s comments in the note sent for second hearing. As of February 2009, *EASI-WAL* had released 250 opinions (*EASI-WAL*, 2009). In addition, *EASI-WAL*

provides some general guidance on drafting, in particular through a 17-page brochure describing 10 “golden principles for the promotion of more readable regulations”.

The Walloon government has also developed an online legal glossary to promote harmonisation of concepts in Walloon regulations. The objective is to reduce legal insecurity for users deriving from the use of a same term with different meanings. The *ATLAS* (*Assistance terminologique en ligne pour une administration simplifiée* – Online Terminology Assistance for Administrative Simplification) is a semantic glossary of terms, collecting existing and proposed definitions for the use of officials or members of a ministerial cabinet responsible for drafting regulations, and more broadly for a wide user-community. This is a participative tool open to all voluntary contributors, accessible to all from *EASI-WAL*'s website (with contributions validated by *EASI-WAL*).⁷ The glossary currently includes over 300 terms.

Communities

The Ministry of the French Community includes a Directorate of Legal Affairs which ensures legal coherence of regulations, in particular through guidance, support and control on drafting. Each of the five other directorates of the ministry has lawyers providing expertise to drafters. In the Ministry of the German-speaking Community, where the development of regulations is much more informal given the small size of the administration, an inter-departmental group of eight lawyers is responsible for drafting regulations.

Regulatory quality: the role of parliaments

The legal units of parliaments carry out a general quality control on all draft laws as well as amendments, before they are adopted in parliamentary commissions. In addition, in the House of Representatives, if a committee has adopted amendments, it may only vote on the whole of the bill after at least forty-eight hours, starting from the time when a draft of the adopted text including all the adopted amendments is made available. This allows the legal service to suggest to the committee further legal and drafting improvements. When a serious problem is identified, they can recommend that the president of the chamber send it to the Council of State. This is a potentially helpful provision as it means that there is the possibility of Council of State review and advice on parliamentary drafts as well as government drafts.

Ex ante impact assessment of new regulations

Policy on impact assessment

The introduction of impact assessment procedures in Belgium dates back to the 1998 Federal Programme Law on Entrepreneurship, which stipulated that the impact of new federal regulation should be screened for administrative burdens. The explicit objective was to put in place a tool that would make officials think about the potential effects of regulations on citizens and businesses. Impact assessment is not limited to the federal government as regional and community governments have introduced impact assessment procedures or are considering doing so. With the exception of the process in Flanders, impact assessment remains mostly focused on administrative burdens, although there have been recent efforts to extend its scope beyond the latter (in particular, to cover sustainability impacts). A variable geometry is at work, with different governments sometimes adopting

different versions of the same processes. Impact assessment processes reflect the division of competences between governments. They are applied to the regulations flowing from the competences specific to each government. With the exception of the sustainability impact assessment, which is a work in progress, the processes do not seek to take a Belgium wide view.

With respect to federal regulations, the circular on the operation of the Council of Ministers now requires that all texts presented to the latter include a *Kafka Test* and an “SDIA Test”. The *Kafka Test*, which was made a requirement in 2001 and refined in 2004, screens proposals for their impact on administrative burdens for businesses and citizens. The SDIA Test, which was made a mandatory requirement in 2007, screens the impact of draft regulations in terms of sustainable development. In addition a gender test (impact of regulations on men and women) is under development by the federal Minister for Equality of Chances.

Regional and community governments have made formal commitments to include impact assessment in the development of regulations⁸ and put procedures in place. The governments of the Walloon Region⁹ and of the French Community have adopted the *Kafka Test*, while Brussels-Capital Region and the German-speaking Community are considering adopting it too. The Flemish government has developed its own regulatory impact analysis tool.

Kafka Test (federal government, Walloon government, French Community government)

General presentation

The *Kafka Test* aims to capture whether draft regulations will increase or reduce administrative burdens on citizens, businesses and non-profit organisations.

The *Kafka Test* was originally conceived as a dynamic process, to help inform the development of regulations at an early stage of drafting, and to be updated to take account of the views of consulted bodies and government working groups. The test has been designed to be easy to fill out by drafters. It is part of the documents that must be joined to the dossier of a draft regulation going to the Council of Ministers (or to the Walloon government). In practice however, the Test is often done at a late stage, just before a proposal goes to the Council of Ministers.

Institutional framework, guidance and training

At the federal level, officials in charge of drafting regulations are responsible for filling in the *Kafka Test*. These are currently often members of ministerial cabinets. The ASA is responsible for ensuring that the Test is carried out, in collaboration with the Ministry for Enterprise and Simplification which takes political responsibility for the process. The ASA provides ministries with an opinion on the quality of the analysis *ex post*, but not on the underlying policy decision for a new regulation. The Secretariat of the Council of Ministers is responsible for checking that the dossier presented in the Council of Ministers includes the Test (it does not run any other checks, for example on the quality of replies). The ASA is responsible for carrying out *ex post* quantitative and qualitative evaluations of the Test. The ASA has prepared two evaluation reports, which were discussed by its steering committee. The ASA has also provided guidance on *Kafka Test*, through general

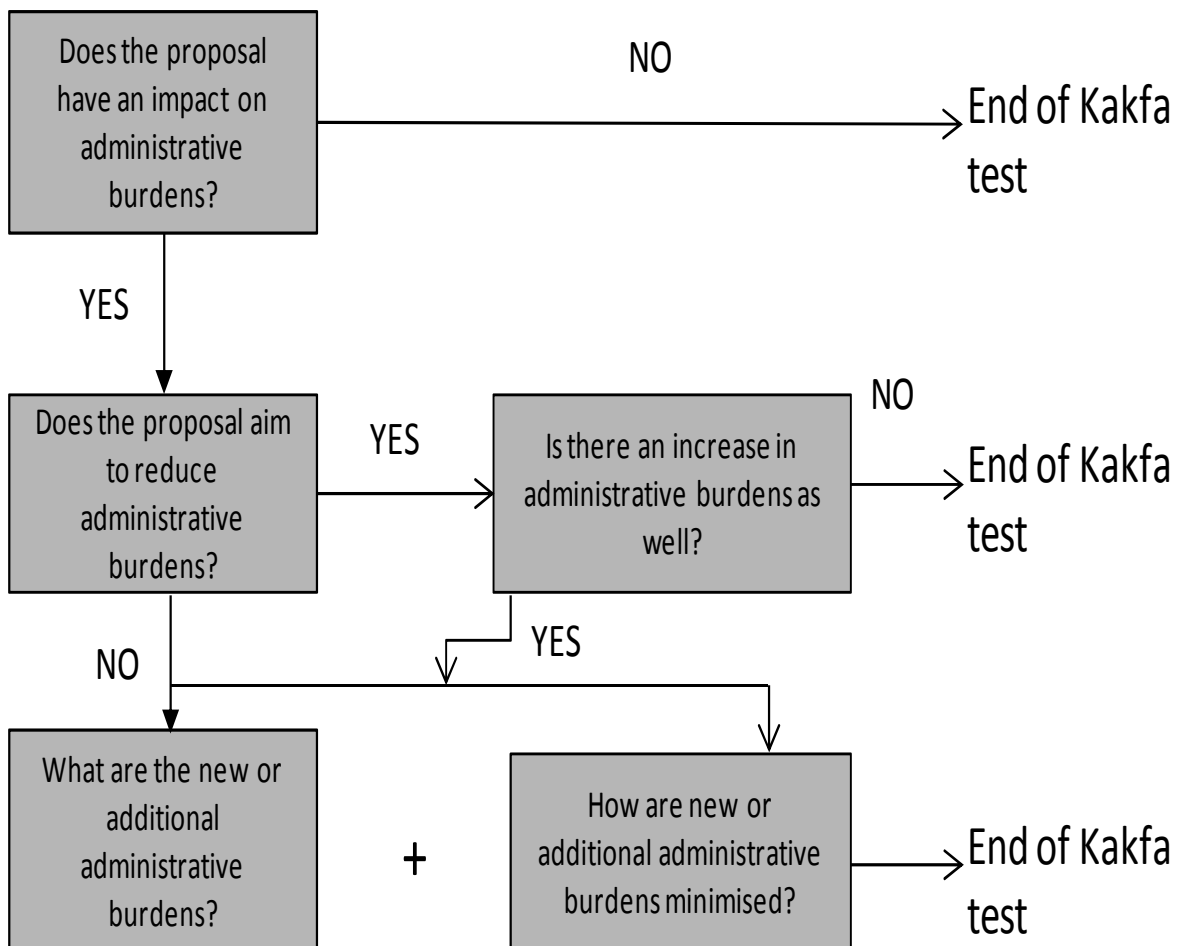
information sessions and tailor-made workshops for ministerial departments, as well as setting up a helpdesk to provide general information and training sessions.

In Wallonia, *EASI-WAL* has put in place tools to support the introduction of the Test. A methodological guide is available on line, and integrated in the step-by-step online application for filling in the test. *EASI-WAL*¹⁰ has also organised training courses for both government officials and members of ministerial cabinets. It has a general responsibility for giving an opinion on all draft decrees and orders regarding administrative simplification, and as part of this it examines the *Kafka* Test and may provide guidance and make suggestions to law drafters. The ASA participated in the introduction of the Test in the Walloon region through co-operation with *EASI-WAL* (organisation of workshops and the helpdesk).

Methodology and process

The *Kafka* Test is qualitative. It consists of four main questions to check whether a proposal has an impact on administrative burdens and, if relevant, to describe the burden reduction or the new or supplementary burden. Four parameters are used: (i) number of required formalities; (ii) size of the target group affected by the regulation; (iii) time required to fill in the obligations; and (iv) frequency of the requirement (Figure 4.2).

Figure 4.2. Structure of the *Kafka* Test



In the Walloon region the process starts with a pre-check to identify the need (or not) for a *Kafka* Test. In practice the Test is carried out at the same time as the text is sent for opinion to the *Inspectorate of Finance*, so as the result can be used for discussion at inter-cabinet meetings before the first reading by the government. The Walloon version of the *Kafka* Test includes additional criteria for improving the quality of the regulation (codification, abrogation of obsolete texts, readability and structure).

Public consultation and communication

The process does not specifically provide for public consultation (which takes place through the institutionalised consultative committees). The *Kafka* Test is considered a working document. It is attached to the new draft regulation but is not publicised with the regulation and is not communicated to external stakeholders.

SDIA (federal government)

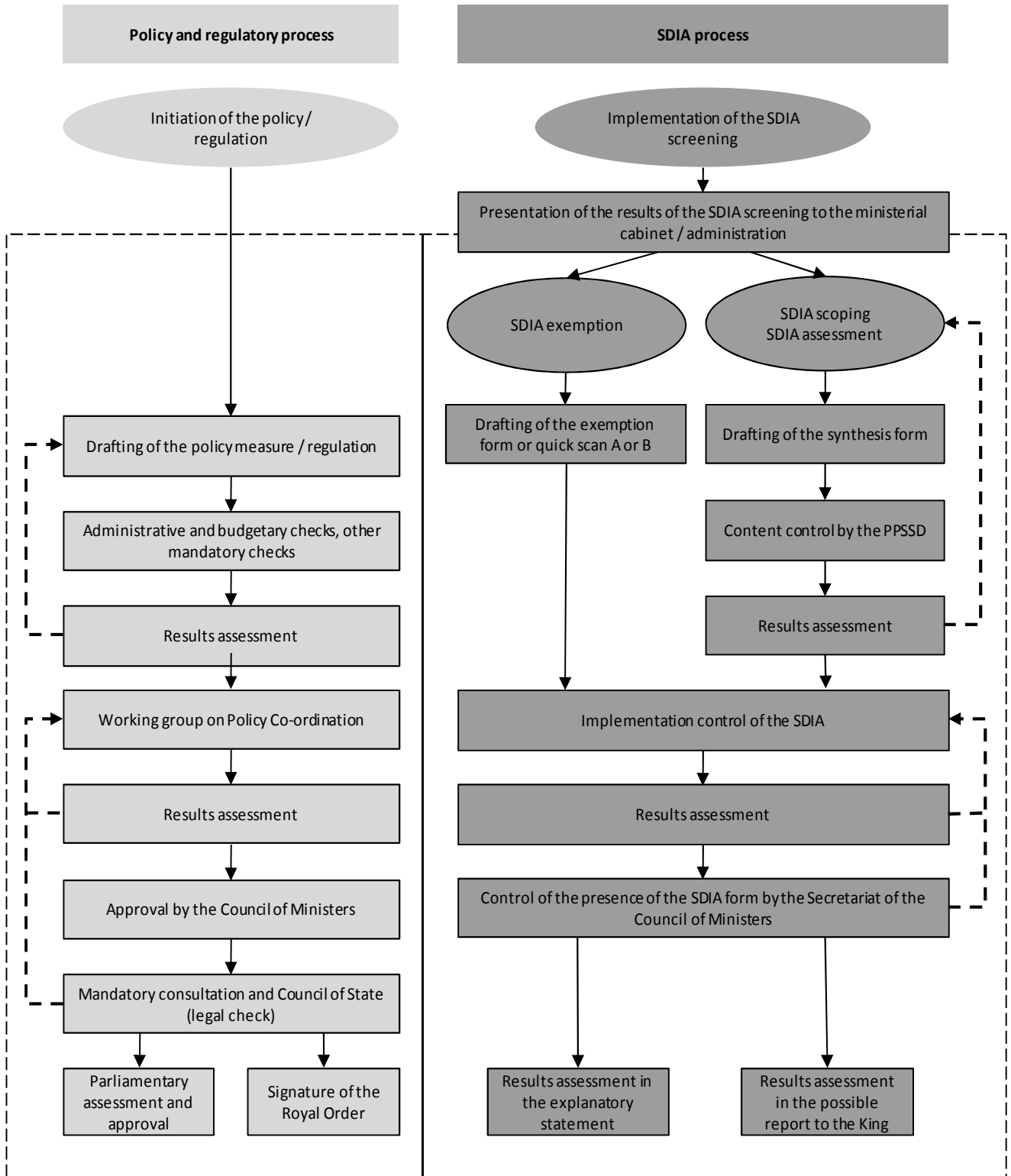
In January 2007, the federal government adopted a proposal of the Secretary of State for Sustainable Development to apply a “sustainability test” for major political decisions put on the agenda of the Council of Ministers (to take effect as of 1 March 2007). The Sustainable Development Impact Assessment (SDIA)¹¹ was defined in the royal order of 22 September 2004 to be a process for the examination by government departments of the possible social, economic and environmental effects of a proposed policy, before the final decision is taken. The SDIA was originally developed as an instrument for promoting sustainable policy, but the test also aims to promote a broader vision in the development of major regulations, as well as encouraging co-ordination and co-operation across the government (including information exchanges to improve implementation). There are a number of exemptions (in its preparatory work in 2006 the FPS Sustainable Development estimated these at 70% of texts submitted to the Council Ministers).

The SDIA has not yet taken off. It is a formal requirement in the development of federal regulations (integrated in the circular on the operation of the Council of Ministers), but has not yet produced any tangible results. Out of a total of 2002 dossiers sent to the Council of Ministers from early 2007 to the end of April 2007, 546 included SDIA form (28%). However most of these forms (97%) were the exemption form. Only one in-depth SDIA has yet been carried out, and a minority of dossiers are subject to a quick scan.

Institutional framework, guidance and training

The PPS for Sustainable Development has developed the methodology and a number of tools (forms regarding exemptions, quick scan and screening guidelines). It has organised training for around 100 federal civil servants in spring 2007 when the SDIA procedure was launched.

Figure 4.3. SDIA process



Source: PPS Sustainable Development (EIDDD: manuel de screening).

Methodology and process

The SDIA aims at evaluating the impact of a proposal on: (i) current and future generations; (ii) Belgium and other countries in the world; and (iii) social, economic, and environmental aspects. The process includes two major steps, screening and scoping:

- The first step (screening) aims at identifying regulations requiring an in-depth analysis, with the underlying assumption that SDIA should be done only when necessary. The law drafter first has to check whether the proposed text belongs to one of the categories for exemption, in which case it has to fill in an exemption form to be submitted with the dossier going to the Council of Ministers. If the measure is not exempted, it has to go through a “quick scan”, which consists in a matrix of 33 indicators. For each indicator, the law drafter has to assess whether the text can have a short-term or long-term effect, and on which scale (from local level to world level). A number of questions in the quick scan form are similar to the *Kafka Test*. (see Annex 3). The results of the quick scan are attached to the dossier sent to the Council of Ministers in a specific form. This form includes the matrix and a list of questions on the rationale for the proposal, the affected target groups, additional information on the matrix, reasons for not doing an in-depth SDIA, and associated measures to limit negative effects or reinforce positive effects.
- The second step (scoping) is the SDIA itself, which is done when the quick scan has shown the relevance of an in-depth analysis (estimated at less than 2% of texts sent to the Council of Ministers). At this stage law drafters can invite experts such as consultants and academics to participate in the elaboration of the SDIA. The analytical work is preceded by a “scoping” exercise which defines the limits of the analysis (relevant criteria, methodology and selection of experts). The in-depth assessment also includes consideration of measures to limit non-desirable effects and reinforce desirable effects.

Flemish Regulatory Impact Assessment

Impact assessment procedure in Flanders

The Flemish government introduced a Regulatory Impact Analysis (RIA) as a mandatory requirement in the development of regulations on 1 January 2005. The initial requirement covered all new decrees and orders which affect citizens, businesses and non-profit organisations. In 2007, following a first evaluation, the scope was narrowed, through exemptions, in order to carry out “fewer RIAs but better RIAs”. The process includes a compensation rule to control new burdens from the flow of new regulations. Exemptions include self-regulation of the government, regulation with small impact in terms of content, regulation related to budget and taxes and regulations contained in spatial plans. There is no RIA requirement for decrees initiated by a member of the Flemish parliament.

In February 2009, the Flemish Parliament, the government of Flanders, the Flemish Social and Economic Council and the strategic advisory councils signed the “Inter-institutional Agreement” for a joint approach to RIA. This sets out general principles regarding RIA, namely that “the RIA should offer an integrated and balanced picture of the potential social impact of the draft decisions and draft decrees within the current field of

application, invariably in comparison with relevant substantive alternatives. One of the alternatives to examine is taking no legislative initiatives". The agreement emphasises the need to spell out the purposes of the project, identify alternatives, and base the analysis on "accurate, quantitative and as complete as possible" information.

The RIA process is evaluated annually. The most recent DWM evaluation showed the need for a broader approach and stronger political support. DWM recommended that RIA be started at an earlier stage of rule-making (in particular through inclusion of provisional RIAs in the preparation of regulatory agendas), be further developed and updated in the drafting process (after the first substantive agreement), and that its scope be extended to some self-regulation. DWM suggested that each newly appointed minister conclude a formal agreement with relevant administration and regulatory units about the process for preparing regulations, including RIA. DWM's evaluation also concluded on the need to refine quality control criteria (making a distinction between RIA as product, procedure and process) and to provide additional support and guidance (electronic support for preparation, tailor-made training programmes). The government has not yet responded to this evaluation. However, the policy statement issued by the new government following the regional elections of June 2009 mentions RIA as a tool for administrative simplification and regulatory quality, suggesting that it may consider reinforcing the assessment of the impact on administrative burdens.

The Flemish RIA system includes specific impact assessment procedures, including a "local administration check" (to evaluate the impact of new regulations on the governing or financing of local administrations) and an impact assessment on children's rights. There is also an important assessment on the principles of necessity, proportionality and non-discrimination for new regulations and existing regulations in the service sector (not yet compulsory). These assessments are integrated in the main RIA.

Institutional framework, guidance and training

DWM gives RIA advice before the dossier is on the agenda. After the RIA /dossier is put on the agenda, the DWM checks the quality of RIAs produced every week and assigns a score, based on 20 criteria (relating to reason and purpose, consideration of options, assessments of options, implementation, enforcement and evaluation). The results of the scoring are communicated to the Minister of Regulatory Management, who can use the information in the discussion of the dossier in the government (cabinet) meeting.

The DWM also provides training and guidance. It produced guidelines on RIA in 2005 (and updated them in 2006 and 2008). It works as a helpdesk for civil servants. On several occasions, it has organised half-day introductory training sessions and follow-up training sessions on RIA. Since 2006, about 300 civil servants have taken part in introductory sessions and over 80 in follow-up sessions.

Methodology and process

The Flemish RIA includes the consideration of options, consultation as well as specified estimate of administrative costs for all target groups (including citizens). The compensation rule aims to control the burdens arising from the flow of new regulations. RIAs are included in the documents sent to the Flemish parliament. In addition, in March 2008 the Flemish government decided to create a RIA database.

Public consultation and communication

After the first reading by the government, the RIA is published on the Internet together with the draft regulation (as part of the regulatory agenda set for each policy area/ministry).¹² The Inter-institutional Agreement of February 2009 provides for a stronger interaction between impact assessment and public consultation. It specifies that the RIA should feature the result of consultation, and that the SERV (Social and Economic Council of Flanders) and strategic advisory councils should take the RIA into consideration when offering advice on regulatory proposals (with the RIA annexed to the document sent to them for consultation). The agreement also indicates that SERV and strategic advisory councils should, as much as possible, take a pro-active stance based on the regulatory agenda (e.g. identifying alternatives). SERV is also called to apply the RIA methodology in the preparation of consultations.

Role of parliaments

The *Kafka* Test is not attached to draft laws sent to the federal parliament, nor to draft decrees sent to the Walloon Parliament. In Flanders the Inter-institutional Agreement of 2009 aims at strengthening RIA as a support tool for parliament. In this agreement, the government commits to publishing RIAs on its website, reporting to the parliament every six months on the quality of RIAs, and helping parliament with the methodology (e.g. opening its training sessions to staff from the parliament as well as SERV and advisory councils). The agreement also provides for the establishment of a joint technical group to function as a forum for exchanging ideas and best practices. The Flemish RIA is included in the documents attached to draft laws/decrees sent to its parliament.

Alternatives to regulation

Alternatives to regulation exist in the form of conventions or agreements between the state and the industry. For example, in Wallonia, voluntary agreements have been reached in the energy sector (to reduce greenhouse gas emissions and improve energy efficiency). The agreement defines the objectives to be reached, while companies are left to choose the means to reach it. Sectoral implementation reports are published annually. Within the regional competences covenants are often used in the field of environmental conventions between the region and professional bodies.¹³

Consideration of alternatives to regulation is included in some, but not all of the impact assessment mechanisms:

- The SDIA includes the assessment of different options for reaching a policy objective as part of the assessment phase. However, the quick scan (scoping phase) does not include direct mention to search for alternatives (or the zero option).
- The Flemish RIA mentions the search for alternatives (which is re-called in the 2009 Inter-institutional Agreement). At least three options should be considered: the no action option; the chosen option; and an alternative for the chosen option. This requirement is however difficult to implement in practice as very often alternatives considered are not “real” alternatives.
- The *Kafka* Test does not mention alternatives to regulation.

Notes

1. “Programme laws” (otherwise known as “catch-all laws” because they are laws that combine individual laws on various matters which have no obvious link between them). Typical criticisms include: a lack of transparency that breaches the specific nature of the law by mixing sectors; undermining the quality control of parliament; and undermining the work of parliament as a whole. Results include difficulty in allocating across the different legal domains as well as reduced visibility. This contributes to an underlying lack of awareness of the law (extract from the federal government response to the OECD questionnaire).
2. These issues were pointed out by several interviewees to the OECD team. They were also outlined at a workshop organised by *Easi-wal* in February 2008 entitled: “*Inflation normative: mythe ou réalité?*”. The objective of the workshop was to make specific recommendations to contain regulatory inflation. Twenty suggestions were made by participants (members of ministerial cabinets, officials, lawyers, judges, notaries, academics, business and civil society representatives).
3. According to Article 51 of the special law of 16 January 1989, communities and regions are competent for their own budget and administrative control. This implies that the scrutiny is done by the Inspectorate of Finance within the framework of a regulation specific to each entity, by inspectors with accreditation for the relevant ministry. Rules are however similar.
4. Information in the regulatory agenda includes: identification number or title; description of existing rules that would be modified; any statutory deadline; brief summary of the objective; reference to steps in the preparation process of the RIA and the actual legislation; and contact information.
5. See annual report of the Council of State, available at www.raadvst-consetat.be.
6. www.raadvst-consetat.be/?page=technique_legislative&lang=fr.
7. <http://atlas.wallonie.be>.
8. The 2005 Regional Policy Declaration of the Walloon government stipulates: “with a view to eliminating additional paperwork, the principle of declaring administrative burdens – currently in force in the Walloon Region – should be extended to a real impact study regarding administrative simplification to analyse whether new policy measures create unnecessary requirements.” And “An *a priori* evaluation should be carried out on the economic, social and environmental impact of all major public decisions, as is done regarding budgetary impact.” These objectives were translated into the 2005-2009 action plan for administrative simplification, in which the “regulation” part includes the development of impact assessment tools in the area of administrative burdens.
9. The Walloon government introduced a formal requirement to use the *Kafka* Test in May 2007, following a four-month trial period, and modified its circular of 26 August 2004 on the operation of government accordingly. The *Kafka* Test is

mandatory in Wallonia for all draft decrees, orders, circulars presented to the government, and recommended in other cases, when the text creates burdens on citizens and/or the administration. As of February 2009 253 *Kafka* tests had been completed (Commissariat EASI-WAL, 2009).

10. <http://testKafka.wallonie.be>.
11. In Dutch : “*Duurzame ontwikkelingseffectsbeoordelin*”; in French: “*étude d’impact des décisions sur le développement durable*” (EIDDD).
12. See: www.wetsmatiging.be/kwaliteitsvolle-regelgeving/waar-vind-ik-regelgeving/boordtabel-regelgeving-in-opmaak-en-ria-databank.html.
13. Environmental convention of 24 July 2008 concerning the obligation to take back electrical and electronic waste between the Walloon Region and various professional bodies (published in the official journal on 9 October 2008); environmental convention of 27 June 2007 concerning the obligation to take back used oil between the Walloon Region and various representative bodies (published in the official journal on 22 November 2007).



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