

Chapter 7

The interface between member states and the European Union

An increasing proportion of national regulations in EU member states originate at EU level. Whilst EU regulations¹ have direct application in member states and do not have to be transposed into national regulations, EC directives need to be transposed, raising the issue of how to ensure that the regulations implementing EC law are fully coherent with the underlying policy objectives, do not create new barriers to the smooth functioning of the EU Single Market, 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.

Assessment and recommendations

Consciousness of the importance of EU-origin regulations in shaping the national regulatory environment is high, and the Netherlands are active participants in the development of EU-level Better Regulation strategies. For a relatively small country, the Netherlands have been commendably active in raising consciousness of Better Regulation principles at EU level, so that problems are tackled at source, including most recently the importance of effective EU management to keep down burdens on citizens.²

Well-structured processes are in place for the negotiation and transposition of EU regulations. As in most other EU countries, the Netherlands have developed and established a clear procedural framework for dealing with EU regulations. A particularly strong feature is the process for establishing an implementation plan when an EU regulation is adopted, in which the local levels of government are invited to participate, and the subsequent monitoring of transposition via a centrally co-ordinated database (run by the Ministry of Justice) which systematically tracks and disseminates progress in meeting deadlines for implementation. Transparency as regards the correlation between EU and national regulations is covered under the framework. The processes for ensuring consistency between EU and national regulations (which extend to taking account of the rulings of the European courts) are also noteworthy.

The framework is more effective in securing a sound procedural performance than in addressing issues of substance arising from EU regulations. The EU was a recurring theme

across the interviews with the OECD peer review team, with concerns expressed by a number of stakeholders inside and outside government at the difficulties of managing the process of rule-making at this level and implementation into the national context. These included a concern about staying up to date with EU developments, with information sometimes being available too late to affect the outcome, and about failures to pay sufficient attention to likely national impacts of EU regulations both at the negotiation and transposition phase of the process. For example the packaging directive was gold plated in transposition. Although the local levels have a formal seat at the committee tables to discuss these matters, the team also heard that more targeted efforts should be made to involve these levels where needed. The most fundamental critique of the current approach was the failure to assess impacts adequately. There is currently no requirement for impact assessment at the negotiation phase, and it is not clear how much is actually done at the transposition phase. The Ministry of Foreign Affairs and the Ministry of Justice lead the various processes, which may leave the framework short of input from other key Better Regulation ministries (Interior, Finance and Economic Affairs).

Recommendation 7.1. The government should carry out a review of current processes for the negotiation and transposition of EU regulations, in order to map strengths and weaknesses, to deepen the involvement of the Interior, Finance and Economic Affairs ministries, and to strengthen procedures and guidance aimed at addressing substantive issues. Impact assessment of EU regulations both at the negotiation and transposition phase should be made a formal requirement and an integral part of the new impact assessment process as proposed in Chapter 4.

Background

General context

The baseline measurement of administrative burdens on business showed that some 40% of burdens can be traced back to EU-origin regulation (partly or fully), including a number of significant policy areas (such as VAT, company law and rules on accounting and reporting, working environment, public procurement and food safety). Measurements for burdens on citizens suggest that 23% of these burdens in terms of time, and 15% in terms of costs, have their origin at EU level.

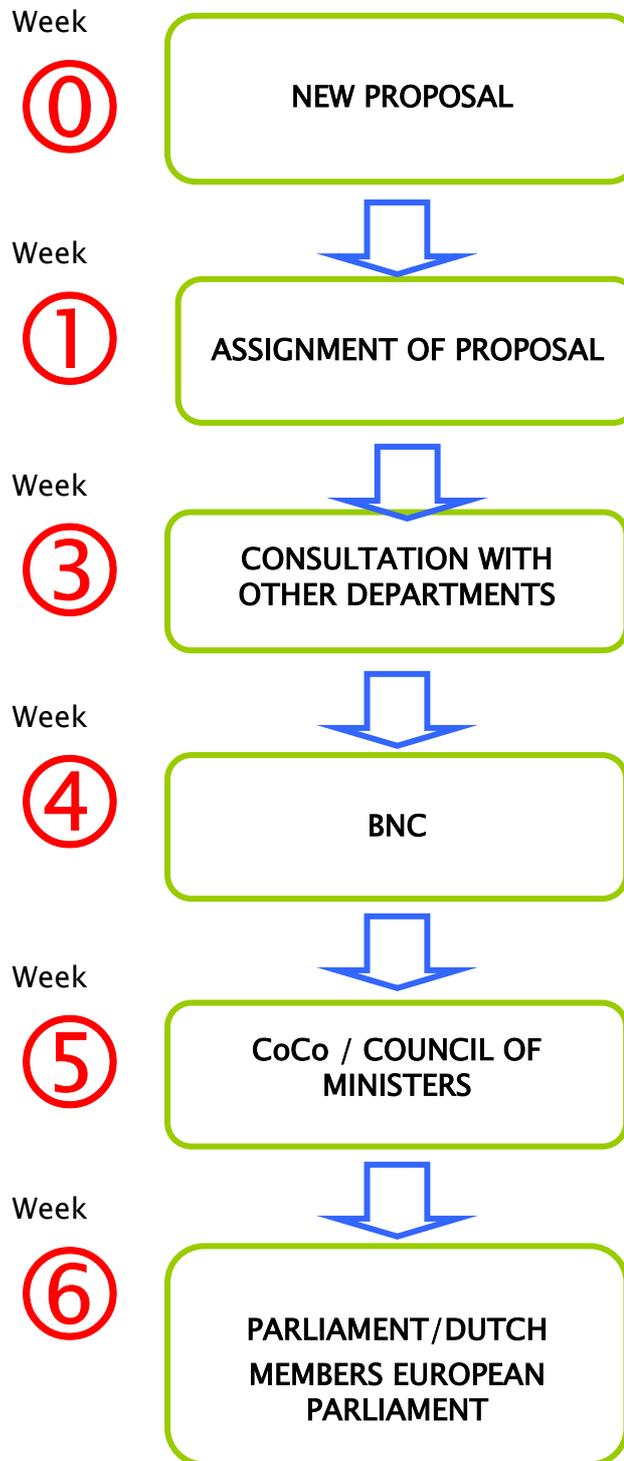
Negotiating EU regulations

Institutional framework and processes

All European Commission regulatory and policy proposals³ are discussed (as soon as the texts are available) within the Working Group for the Assessment of New Commission Proposals (BNC – *Beoordeling Nieuwe Commissievoorstellen*). Each ministry has a representative on this committee, which is chaired by a senior official of the Ministry of Foreign Affairs. The committee determines the lead ministry for negotiation and subsequent transposition of the proposal, and which other ministries should be involved.

The committee also starts the process of developing a Dutch position, focusing on proportionality and subsidiarity. Regulatory implications for the subnational levels of government or regulatory agencies are also taken into consideration at this stage. The Association of Netherlands Municipalities (VNG) and the Association of Provinces (IPO) are members. They do not always attend but take a particular interest in environmental

Figure 7.1. Structure of EU decision-making



issues.⁴ If there is an agency angle, the parent ministry is also involved, if it is not already. A co-ordinated initial Dutch position is prepared by specialists from the ministries involved. A special form (“BNC-fiche”) is used to assess each proposal of the European Commission and to develop a national position.

Completed draft fiches are passed on to the Co-ordinating Committee (CoCo) for discussion and confirmation, and then to the cabinet. Once adopted, they are sent to the parliament and to the Dutch Members of the European Parliament. CoCo is chaired by the State Secretary for European Affairs, who has a seat in the cabinet, and meets weekly. CoCo conclusions are confirmed or discussed in the subsequent cabinet meeting.

Since 2007 the RRG has invested heavily in the Dutch inter-ministerial framework in order to focus attention on the regulatory burdens of new EU-origin regulations. This is reflected in the revised Dutch guidelines for preparing the national position on new EU proposals. As a result, substantial regulatory burdens arising from EU proposals are being addressed much earlier and more systematically in the decision-making process.

The role of the parliament

Influential dialogue with the government, rather than a formal power to confirm the government’s negotiating position, is the cornerstone of the parliament’s engagement on EU legislation.⁵ The European Affairs Committee of the House of Representatives is sent draft EU proposals by the government, together with an explanatory “BNC-fiche” (a form of explanatory memorandum where each European Commission’s proposal is assessed and the national position is developed) which includes an assessment of the proposal’s financial and other implications for the Netherlands. This information is also sent to the other committees. Any of the committees can put the proposal on their agenda for discussion. The European Affairs Committee generally considers horizontal issues (such as the EU’s constitutional future), leaving sectoral issues to the relevant specialist committee. Generally speaking, a committee does not adopt resolutions or prepare a formal mandate setting out a position for the government to take in European Council negotiations. Instead, it engages in discussion with the responsible minister before each European Council meeting, in the expectation that the latter will incorporate its views. The government is motivated to pay attention, since the minister must report back to the parliament after each European Council meeting (this is the so-called “*principle of confidence*”).

It is noteworthy that the parliament also has direct links with Brussels and other national parliaments. It has its own Permanent Representative in Brussels. It carries out a “subsidiarity check”, the results of which are communicated directly to the European Commission. The House of Representatives also consults directly with other national parliaments.⁶

Ex ante impact assessment (negotiation phase)

There is no formal or systematic requirement for impact assessments to be carried out on EU regulatory proposals.⁷ For EU proposals with expected substantial repercussions on the national situation (among others in financial and regulatory terms), special national impact assessments are conducted in order to help develop the national position. The impact of EU regulations on the national market is taken into account in the BNC-fiche underpinning the negotiating position, and where available, the European Commission’s impact assessment is attached to the fiche. Certain environmental proposals are the subject of a separate procedure.

Transposing EU regulations

Institutional framework and processes

Transposition rests on two principles: responsibility of the lead policy ministry, backed up by a centralised monitoring structure to track progress.

Responsibility for the transposition of EU regulations (as in most other EU countries) lies with the relevant policy ministry, reflecting the view that “Europe” should be integrated into national policy and law making. The responsibility includes the correct and timely implementation of EU regulations at subnational level or by a regulatory agency. It also covers the removal of discrepancies resulting from existing national regulations.

Transposition is co-ordinated and monitored by ICER (*Interdepartementale commissie Europees recht* – Interdepartmental Commission for European Law) and a subcommission of ICER, ICER-I, under the aegis of the Ministry of Justice.⁸ All ministries participate in these commissions. As soon as an EU regulation has been adopted, the lead ministry formulates an implementation plan, which is put to ICER-I. The plan, which includes a timeframe for the various steps and actions, may be amended to take account of comments from other ministries.

Dutch policy seeks to avoid mixing up the implementation of EU regulations with the pursuit of national policies. The general rule has been that legislation to implement EU regulations should not be used or extended to cover national policy issues, in order to avoid implementation delays. This cannot, however, always be prevented. The rule also does not preclude separate proposals for legislation related to national policy needs.

Guidance and support

Guidance material is produced by ICER. Reports, guidelines and other sources of information are published on the websites of the Centre of Expertise for European Law (*Expertise centrum Europees recht*- ECER), and of the Knowledge Centre for Legislation (*Kenniscentrum wetgeving*).⁹ Also available are the so-called “Answers to the most frequently asked questions about the implementation of EU regulations (*Praktijkvragen over de implementatie van EG-besluiten*)”, which is currently being updated.

Legal provisions and the role of the parliament

There is no special legislative tool for transposition of EU regulations. National legislative procedures are generally simplified with respect to legislation that (solely) serves to implement EU regulations. Article 1.7 of the General Administrative Law (*Algemene wet bestuursrecht*) stipulates that legal obligations to consult stakeholders are not applicable with respect to EU-related implementation. Consultation may nevertheless take place if it is considered necessary and useful, in particular when significant discretion is left as to how member states may transpose an EU regulation.

Ex ante impact assessment (transposition phase)

Implementation proposals are subject to simplified impact assessment procedures on the assumption that there is little room for debate at that stage. The impact on business, promoted by the RRG, is the most important feature of this check.

Monitoring transposition

Implementation plans adopted by ICER-I are immediately entered into an electronic database, the I-Timer. This database covers deadlines for implementation, as well as normative dates for the steps that need to be taken in the legislative process. The database thus reveals whether implementation deadlines have been met (or expired). Every quarter a report on the state of implementation results is sent to the parliament's European Affairs Committee by the State Secretary for European Affairs. This sets out which regulations have been implemented and which are pending. If the implementation deadline is or will likely be exceeded the reasons are given. Although there is no national database of transposition rates, at the end of each year an overview of implementation rates compared with previous years is given. This shows that implementation performance is steadily improving in terms of both numbers and average delay period.

Speed of transposition

The speed of transposition varies considerably depending on the issue (as does the implementation period given in the EU regulation) and on the legal instrument used for implementation. It was explained that there are rules of thumb, however, about the period it generally takes to implement an EU regulation depending on whether this requires a law (18 months), decree (6 months) or ministerial regulation (3 months). The Netherlands records a very good comparative performance on transposition, according to the EU's Internal Market Scoreboard, which ranks it third among the EU 15 countries. A recent review by the NCA, however, came to a less positive conclusion.

Box 7.1. Netherlands performance in the transposition of EU Directives

The EU Internal Market Scoreboard

The Netherlands performs very well, ranking third among the EU-15 countries. It shows a transposition deficit of 0.8%. This is considerably lower than a few years ago (the deficit was 2-3% until 2000).

The level of transposition is particularly low in the fields of Justice, Freedom and Security. There are also low levels of transposition in Energy and Transport.

NL	Nov-97	May-98	Nov-98	May-99	Nov-99	May-00	Nov-00	May-01	Nov-01	May-02
Transposition deficit as % in terms of Internal Market Directives	3.5	2.2	2.1	2.4	2.8	3	2.5	2	1.3	1.3
	Nov-02	May-03	Jul-04	Jul-05	Dec-05	Jul-06	Nov-06	Jul-07	Nov-07	Jul-08
	1.3	2	2.8	1.6	1.2	1.5	1	1.6	0.7	0.8

The conclusions of the Netherlands Court of Audit¹

The NCA carried out an audit of Dutch transposition performance in 2008.² The audit confirms that there are deficits in transposition. In 2001 and 2006, the Netherlands had to transpose 539 directives into national law. 51 per cent were transposed late. In 2007, almost half the directives were transposed beyond the time limit. The proportion of directives transposed beyond the deadline rose to over three-quarters when implementation required the involvement of more than one Ministry.³

However, there was also a decline in the number of days between the deadline set for transposition, and the date on which the directives were finally transposed. From 2002 to 2005, the average length of the delay fell from 383 to 142 days. However, the average length of the delay rose again in 2006, to 162 days.⁴

Contrary to the conclusions from the EU data used, the NCA does not make out a clear trend of transposition performance. According to their result, between 2001 and 2007, half of the directives are transposed too late, ranging

from 45-60%.⁵ Other data, for instance those regarding the transposition of social policy directives, also suggest a lower level of transposition speed than one that could be deduced from the EU data. Here the Netherlands transposes only about two fifths of the social policy directives in time.⁶

Notes

1. The Ministries of Justice and Foreign Affairs have commented on the findings of the NCA in a letter to the parliament dated 15-10-2008. In this letter they state that the data used by the NCA show a clear improvement over the given time period when corrected for a distorting factor that the NCA had not taken into account.
2. www.rekenkamer.nl/9282000/d/p447_european_legislation.pdf.
3. Netherlands Court of Auditors 2008: 61. Where more than one ministry is involved in the transposition, the average length of the delay is 40 weeks. The average length of delay where just one ministry is responsible for transposition is 34 weeks.
4. For all these data cf. Netherlands Court of Audit 2008: 8.
5. Mastenbroek 2003: 384. She also finds corresponding lower transposition levels for the NL than the EU data suggest even seeing a structural transposition deficit as regards the NL.
6. Haverland/ Romeijn 2006: 12.

Correlation with national regulations

Legislation to implement EU regulations has to state the correlation between the provisions in the national and the EU regulation. To this end, a correlation table should be included in the BNC-fiche that accompanies the proposal, although this does not always happen, in which case the fiche states *verbatim* the relationship between the national and EU regulation.

Double-banking¹⁰

Consistency of national legislation with EU regulations is an element of the legal quality framework promulgated by the Ministry of Justice. Legal quality checks of proposed national legislation by the Ministry of Justice and the Council of State (see Chapter 4) pay close attention to possible inconsistencies between national and European law. In addition, another sub-commission of ICER, ICER-H¹¹ monitors the jurisprudence of the European courts for any decision that may show the need for amendment of national legislation or practices.

Gold plating¹²

Part of the business impact assessment for new EU-origin regulations is expected to consider the issue of gold plating. In 2006 an inventory was completed of 105 complaints about gold plating, of which 16 were considered to have some foundation. Most of these are currently being addressed.

Interface with Better Regulation at EU level

The Netherlands have been active for some years in working with the European Commission and other member states to promote Better Regulation. Particular efforts have gone into promoting policies to reduce administrative burdens, both for business and for citizens, and the Netherlands have made a number of specific recommendations for tangible burden reduction linked to specific reduction targets to the European Commission, emphasising the need for a three-pronged approach for business burdens: give the policy more strategic prominence in the context of the Lisbon agenda for growth and competitiveness; prevent new EU burdens; and tackle burdens in existing EU regulations.

As regards the citizen agenda, there have been significant recent efforts by the Ministry of Interior to raise awareness with the European Commission and other member states over the EU origin of many citizen-related burdens, and it has established an informal European network on the issues.

Notes

1. Not to be confused with the generic use of the term “regulation” for this project.
2. The World Bank’s 2007 report had this to say about the Dutch work at EU level: “Dutch leadership on BR in the EU can be deepened. Significant effort has gone into getting Brussels to understand the benefits of simpler regulation. High-level political prioritisation during the 2004 Dutch Presidency. Increased focus on admin burdens in the review of EU regulations. Secondment of Dutch staff to the Commission. Informal networks such as Directors of Better Regulation and SCM network. Dissemination efforts also in the OECD and World Bank. Netherlands played a lead role in the adoption by the EU of 25% reduction target. Continuing efforts are important. More active lobbying early in the process, working with the Foreign Affairs ministry on the negotiating position.”
3. Including important proposals from member states regarding title VI of the EU Treaty.
4. VNG also has 44 lobbyists in Brussels.
5. In some countries such as the United Kingdom, the parliament’s engagement includes a formal process of agreeing the government’s negotiation position for Council.
6. For example through interparliamentary conferences such as COSAC (Conference of Community and European Affairs Committees of Parliaments of the European Union), or through websites like IPEX (Inter-parliamentary EU Information Exchange Commission).
7. There is no reference to EU regulations in the current impact assessment guidance.
8. “I” stands for Implementation.
9. www.minbuza.ecer.nl. www.kc-wetgeving.nl.
10. Avoiding situations where EU legislation covers the same ground as national legislation.
11. For *Hof* – meaning court.
12. Over implementation of an EC directive through the imposition of national requirements going beyond the requirements of the directive. Directives allow member states to choose how to meet the objectives set out in the directive, adapting their approach to their own institutional and administrative cultures. It is often at this stage that additional details and refinements, not directly prescribed by the directive, are introduced. These can go well beyond the requirements of the directive, resulting in extra costs and burdens.