

Chapter 3

Transparency through consultation and communication

Transparency is one of the central pillars of effective regulation, supporting accountability, sustaining confidence in the legal environment, making regulations more secure and accessible, less influenced by special interests, and therefore more open to competition, trade and investment. It involves a range of actions including standardised procedures for making and changing regulations, consultation with stakeholders, effective communication and publication of regulations and plain language drafting, codification, controls on administrative discretion, and effective appeals processes. It can involve a mix of formal and informal processes. Techniques such as common commencement dates can make it easier for business to digest regulatory requirements. The contribution of e-Government to improve transparency, consultation and communication is of growing importance.

This chapter focuses on two main elements of transparency: public consultation and communication on regulations (other aspects are considered elsewhere in the text – for example appeals are considered in Chapter 6).¹

Assessment and recommendations

Public consultation on regulations

There is a need for rapid improvement of public consultation as an integral part of effective regulatory management. The Netherlands appears to be at a cross-roads between longstanding traditions of very structured consultation (via the search for a consensus through established groups and committees, and the commissioning of expert advice), and the development of new approaches which reach out to stakeholders very differently, not least via the Internet. There is an increasingly urgent need to take stock and to improve and update the approach to consultation. This does not imply wholesale abandonment of the traditional approaches, but there is a need to boost transparency and ensure that effective and timely consultation is integral to the development of government policies and in particular to the impact assessment process for new regulations. The business and citizen burden reduction programmes have shown the way with new approaches to capture more effectively the real concerns of stakeholders. The pilot project for Internet-based consultation on new regulations across ministries looks very promising.

Recommendation 3.1. The plans to introduce Internet-based consultation should be pursued, with special attention to accessibility by the general public. Public consultation should be woven into the impact assessment process for new regulations. A code of good practice to be followed by ministries and others with significant responsibilities for new regulations might also be considered.

Public communication on regulations

The introduction of Common Commencement Dates (CCD) is a very positive step forward. This will put the Netherlands ahead of many other OECD countries. CCDs are fundamentally helpful to business. The presentation to the business community with a set of new regulations “in one shot” may need some management to ensure that it does not (perversely) contribute to poor perceptions of the government’s control over the flow of new regulations.

Background

Public consultation on regulations

Traditional approaches to public consultation²

The traditional Dutch approach to consultation is based on the corporatist philosophy, resting on two principles, the search for consensus, and the search for expert advice to improve regulatory quality. There is a particularly strong attachment to consensus building in the development of new policies and regulations. The corporatist idea is to introduce checks and balances into the decision making, to increase the legitimacy of regulation, to identify “acceptable” policies and thereby increase the level of compliance. Another perceived advantage is that it ensures affected parties are well informed in advance of proposed new regulation, and can minimise adjustment costs through forward planning. The principles have given rise to two formal and distinct consultation structures:

- *A wide range of formal advisory bodies*, to provide the advisory function. These bodies have been created *ad hoc* by individual legislation to work closely with ministries on policy issues of strategic importance. They are explicitly recognised as “permanent advisory bodies for matters of legislation and administration of the state” by the Constitution. The most important is the Council of State.³
- *A separate network of advisory bodies*, created under the Industrial Organisation Act 1950, to represent the consultation function. The tripartite principle is the underlying factor determining representation. The main body is the Social and Economic Council (SER), made up of 15 members representing employers, 15 for employees, and 15 independent experts appointed by the government. These bodies also have significant regulatory power covering their members in areas such as registration, wages, and training.

The system, however, came under considerable criticism in the 1990s, as unsuited to modern realities. The Dutch government responded with a range of reforms, notably a drastic reduction in the number of advisory boards, and removal of the legal requirement for the government to consult advisory bodies (Law on Advisory Bodies of 1996). Alongside these reforms, ministries started turning to other, more flexible and open consultation approaches, on their own initiative, including notice and comment.

Box 3.1. Comments from the 1999 OECD report: Consultation

The report noted the following criticisms levied at the system:

- They have severely dampened policy responsiveness. On average, seven years was required to introduce new legislation, a considerable fraction of which was traditionally spent in consultation.
- The separation of “advice and consultation” has been compromised in practice. Advisory bodies have too often functioned as defenders of narrow self-interests, rather than as providers of expertise.
- As the *Commissie Geelhoed* found, extensive consultation based on the search for consensus promotes regulatory complexity, as additional details are added in an attempt to balance competing interests.
- By “locking in” consensus solutions at an early stage, the advisory and tripartite bodies have been accused of limiting the role and freedom to act of the government and the parliament.
- The corporatist and cartel-like structures established under the Industrial Organisation Act are increasingly inconsistent with EU single market policies, particularly competition principles.
- Changes in Dutch society, including a decline in union membership and the rise in other forms of social organisation, meant that the representativeness and hence the legitimacy of the tripartite structures was diminished. The Dutch government stated in 1993 that “*The desired social base cannot always be obtained by consulting advisory bodies*”.⁴

The Dutch government (has) responded with significant reforms:

The number of advisory boards was drastically reduced, from 491 in 1976 to 161 in 1991 and 108 in 1993. A yet more radical reform in 1997 abolished all 108 remaining bodies and replaced them with a single advisory body for each Ministry. This reform aims to clearly separate advice and consultation, and to refocus these bodies to major policy issues away from details. The oversight ministries are concerned that too many consultative groups have been re-established following the abolition, but they believe that the change has, nonetheless, improved the situation. Old habits die hard, however, and, without limits on their numbers, there is a continuing danger of proliferation of “new” advisory bodies.

Another fundamental change taken in 1997 is removal of the legal requirement for the government to consult advisory bodies. This follows a more limited change implemented in 1994 (via the General Administrative Law Act) abolishing the consultative requirement in cases where legislation is limited to implementing binding EU legislation. Both of these changes affect the peak consultative bodies (the SER and Council of State). A time limit of three months was also imposed for the provision of advice to reduce the contribution of consultation to the length of the Dutch legislation-making process.

The OECD report also noted that, alongside these reforms, ministries started turning to other, more flexible and open consultation approaches, on their own initiative. It noted evidence of the increasing use of informal consultation to do the real work of consensus-building, with traditional methods becoming more of a formality to confirm the outcome. Notice and comment⁵ had also started to be used, albeit infrequently.

The OECD report concluded:

“Together, these reforms represent a major overhaul of virtually all aspects of consultation. By giving the administration greater flexibility on who to consult and when, these reforms have sought to enhance the value-added of consultation in producing hard data and expert opinion, and to streamline the process and reduce delays. Increased use of open “notice and comment” processes aims to increase participation by a greater range of interests. The reforms are consistent with an international trend toward more transparent and accessible regulatory processes.

Recent developments

The traditional approaches have increasingly been paralleled by novel forms of consultation arising from the deployment of some Better Regulation policies, notably the policies to reduce administrative burdens on business and on citizens. This has “opened” up the system to new methods and engaged relevant stakeholders more directly and *ad hoc* than before:

- The business regulatory burden reduction programme has deployed a range of approaches to solicit the views of the business community, including an interactive website⁶ and the “adoption” by ministers of companies in order to meet them regularly for a better understanding of their concerns.
- The citizen programme has also deployed a range of processes to capture citizen concerns, including seminars and workshops, and citizens panels.

By contrast, consultation on other Better Regulation policies and for the development of specific regulations has not evolved as strongly. Consultation is not an issue that is covered formally in the current impact assessment process for the development of new regulations.

A general recent initiative by the Ministry of Justice is a two-year experiment with Internet consultation on new regulations across all ministries, due to start in summer 2009. An evaluation report on which the government will make a decision for full introduction will be sent to the parliament in 2010. The experiment draws from the experiences of other countries (United Kingdom, European Union). Each ministry will select at least 10 % of new regulations to be covered by the new approach, one of the criteria being the impact of the regulation on administrative burdens. Ministers must post a specific proposal (with specific information about expected effects, and questions to be answered) on the Internet for at least four weeks (maximum 12 weeks), on which anyone is invited to give a reaction. A consolidated feedback report on the results must be posted on the Internet at the end of the process, and the outcome of the consultation is expected to be reflected in the draft regulation. Some ministries (Justice, Finance) have already carried out Internet consultations on new regulations such as the regulations on simplifying company law and the law on financial governance.

Public communication on regulations

Accessibility of regulations

Specific requirements for the publication of new regulations are laid down in the Publication Act (*Bekendmakingswet*). All new legislation is placed on the Internet⁷ after enactment by the parliament. Beyond this, ministries may make their own arrangements to provide greater accessibility to their regulations. Announcements of new regulations have to be published in the “*Staatscourant*”.

There are specific provisions to facilitate access to regulations by the business community. New and upcoming regulations (those that have been approved by the cabinet) with effects on business (ministries must explain this in “plain Dutch”) are published on the central business portal. The website provides links to more extensive descriptions of the changes in policy and the related regulations. The system covers primary laws, orders in council and ministerial regulations. Visitors to the website can choose between the Internet, e-mail, chat and the telephone for receiving information, which is sector specific. As part of the implementation of the EU Services Directive, there are plans to develop the portal into a

single point of contact,⁸ and to link central government information with that of local levels of government.

Common Commencement Dates (CCDs) are currently being set up.⁹ Starting from 1 January 2009, two CCDs per year will be introduced, with a minimum implementation period of three months for all acts and orders in council directly relevant for businesses and organisations. Information will continue to be provided on relevant websites, and with timely and clear information on the development of draft regulations and their immediate effect on companies and institutions. These principles will be included in the Instructions for Legislation. The cabinet will examine in 2009 whether the CCD concept can be expanded to other types of legislation.¹⁰

Notes

1. Procedures for rule-making (Chapter 5); codification (Chapter 6); appeals (Chapter 7).
2. For more, see the 1999 OECD report.
3. They include some representative bodies such as consumer and banking associations.
4. Government of the Netherlands, *Legislation in Perspective*, p. 29, (English version).
5. Pre-publication of regulatory proposals and an invitation to comment from all members of the public.
6. *www.antwoordvoorbedrijven.nl*. The website is set up to answer questions from entrepreneurs, not only on topics relating to regulatory burdens, but also on bottlenecks experienced in their daily management of issues related to doing business. Entrepreneurs can e mail their questions, they can call the back office, but also have the opportunity to chat with the people of the back office. Through chatting they can receive immediate answers to their questions while sitting behind their computer. Also linked to the website is a suggestion box where entrepreneurs & businesses can ask questions about unclear or incompatible legislation, red tape/regulatory burden etc. Experts from the ministries have to explain the legislation and, if needed, find solutions. These suggestions can also be done via e-mail, chatting and telephone. The objective of the suggestion box is to explain legislation and give insight in to the legal requirements for a particular business, to find solutions and to improve communication between government and businesses.
7. *www.overheid.nl*.
8. *Dienstenrichtlijn*.
9. The purpose of CCDs is to help business plan for new regulation and to increase awareness of the introduction of new or changed requirements. By reducing to two dates each year, for example, on which new regulation may be started, it is hoped that increased awareness by businesses of new or changed obligations will result in improved compliance levels.

10. Ministerial regulations and policy regulations of implementing bodies and autonomous administrative authorities, because these regulations may have significant consequences for business processes and internal organisations. National legislation that has direct relevance to citizens and professionals and to national legislation that has direct relevance to local and regional authorities. Local and regional regulations, consultation with the Association of Netherlands Municipalities.