

Chapter 6

Compliance, enforcement, appeals

Whilst adoption and communication of a law sets the framework for achieving a policy objective, effective implementation, compliance and enforcement are essential for actually meeting the objective. An *ex ante* assessment of compliance and enforcement prospects is increasingly a part of the regulatory process in OECD countries. Within the EU's institutional context these processes include the correct transposition of EU rules into national legislation (this aspect will be considered in Chapter 7).

The issue of proportionality in enforcement, linked to risk assessment, is attracting growing attention. The aim is to ensure that resources for enforcement should be proportionately higher for those activities, actions or entities where the risks of regulatory failure are more damaging to society and the economy (and conversely, proportionately lower in situations assessed as lower risk).

Rule-makers must apply and enforce regulations systematically and fairly, and regulated citizens and businesses need access to administrative and judicial review procedures for raising issues related to the rules that bind them, as well as timely decisions on their appeals. Tools that may be deployed include administrative procedures acts, the use of independent and standardised appeals processes,¹ and the adoption of rules to promote responsiveness, such as “silence is consent”.² Access to review procedures ensures that rule-makers are held accountable.

Review by the judiciary of administrative decisions can also be an important instrument of quality control. For example scrutiny by the judiciary may capture whether subordinate rules are consistent with the primary laws, and may help to assess whether rules are proportional to their objective.

Assessment and recommendations

The Netherlands has engaged in pioneer work to ensure that compliance and enforcement are considered at the start of the rule-making process. This was already picked up in the OECD's 1999 report but deserves to be repeated, in the context of today's interest across the OECD in tackling policy related to the enforcement of regulations as well as their development. Efforts by the Ministry of Justice to raise awareness go back over two decades, via the Directives on Legislation (which it drafts), the legal quality criteria which it applies, and the Practicability and Enforcement Impact Assessment which it also applies. The Netherlands is also responsible for the development of the so called “*Table of Eleven*” determinants of compliance, which have widely influenced other countries' efforts in this field.

There has also been steady development toward a new risk-based approach and structures for enforcement. A well-articulated policy which engages the local as well as national levels has been refined through successive cabinets, starting in 2001. Local levels are formally engaged through the central government agreement with municipalities, including pilots for new approaches with a sample of pioneer municipalities.

Recommendation 6.1. The government should consider how it can share experiences and ideas on more effective enforcement with other countries, both to learn from them and to disseminate its own successes.

The establishment of the co-ordinating Inspection Council to promote the new approach has been a successful move and there is close co-operation with the work of the RRG. Is the Ministry of Justice fully engaged? The council came across to the OECD peer review team as motivated and enthusiastic in its role. There is a close link with the regulatory burden reduction programme for business (reflected in the fact that a reduction of state supervision forms part of the current action plan for the reduction of administrative burdens on business) and close involvement by the RRG in this work. The involvement of the Ministry of Justice, which has played a longstanding upstream role in drawing attention to compliance and enforcement when regulations are developed, is not so clear. Yet the reform programme implies the need to address regulations as they are developed, as much as how they are implemented once adopted.

Recommendation 6.2. The Ministry of Justice needs to be fully engaged in developing the programme, especially as the current Framework Vision seeks to promote a fundamental reform of attitudes to underlying rules and policy.

The current Framework Vision is ambitious as well as quite precise in its goals: careful evaluation of progress is essential if credibility and momentum are to be sustained. The results to date set out in the 2008 report to the parliament appear to be impressive. The report documents for example the establishment of joint risk analyses between inspectorates, co-operation between inspectorates and municipalities, facilities for digital co-operation, and the reassignment of tasks. What has been the real effect of these reforms on the ground? Are these the right targets?

Recommendation 6.3. Steps should be taken to ensure that regular and independent evaluations are carried of the results emerging from the Framework Vision.

The research report of the Ministry of Justice on the state of compliance is a useful initiative to back up further reform. The results should be directly relevant to the further development of the Framework Vision.

Background

Compliance and enforcement

An early start to embed compliance and enforcement in regulatory policy

The Netherlands was a pioneer among OECD countries in seeking to address issues of compliance and enforcement as part of the process of making regulations. The Directives on Legislation, which go back to 1972, and the Ministry of Justice framework for securing

legal quality before a proposal can be submitted to cabinet for approval (see Chapter 4) require regulators to ensure, before adopting a regulation, that they will be able to “adequately” enforce it. The directives require rule makers to consider explicitly whether enforcement under administrative, civil or criminal law would be most appropriate. Explanatory notes specify general legislative drafting principles for improving enforceability, including minimising scope for different interpretations, minimising exceptions, directing rules at “situations which are visible or which can be objectively established” and ensuring practicability for both enforcers and the regulated. One of the six criteria which make up the legal quality framework explicitly addresses feasibility and enforceability. To further underline that compliance and enforcement needs early attention in the rule-making process, a “Practicability and Enforcement Assessment” (P&E) is part of the current Dutch impact assessment process. This facilitates identification of the effects of proposed legislation for implementing and enforcement authorities, including ministries, agencies, but also authorities such as the police, Public Prosecutor’s Office and judiciary.

Table of Eleven

A further important and longstanding dimension is the Inspectorate of Law, now called the Expert Centre on the Administration of Justice and Law Enforcement, within the Ministry of Justice, which acts as consultant to ministries on issues of enforcement in relation to regulatory proposals. The Expert Centre regards enforceability assessment as essentially probabilistic, recognising that there is significant uncertainty. It aims to identify the two or three key “risk factors” for compliance/enforcement in relation to each regulatory proposal to enable policy makers to address these issues in advance. The review is made as consistent as possible through adoption of standard checklists and other instruments. A key tool is the “Table of Eleven” determinants of compliance.³

Box 6.1. The Table of Eleven

This was developed jointly by the Ministry of Justice and Erasmus University and derives from academic literature in the areas of social psychology, sociology and criminology, supplemented by the Ministry’s practical experiences and viewpoints on law enforcement. The table is in three parts:

- *Spontaneous compliance dimensions.* These are factors that affect the incidence of voluntary compliance - that is, compliance which would occur in the absence of enforcement. They include the level of knowledge and understanding of the rules, the benefits and costs of complying, the level of acceptance of the “reasonableness” of the regulations, general attitudes to compliance by the target group and “informal control”, and the possibility of non-compliance being sanctioned by non- government actors.
- *Control dimensions.* This group of factors determines the probability of detection of non-complying behaviour. The probability of detection is directly related to the level of compliance. The factors considered are the probability of third parties revealing non-compliance, the probability of inspection by government officials, the probability of inspection actually uncovering non-compliance and the ability of inspection authorities to target inspections effectively.
- *Sanctions dimensions.* The third group of factors determines the expected value of sanctions for non-compliance, that is, the probability of a sanction being imposed where non-compliance is detected and the severity and type of likely sanctions.

Development of a risk-based approach to enforcement

Reforms have been ongoing for a number of years, as part of the process of modernising central government, under parliamentary pressure for change, and because of pressures generated by civil service reforms and staff cuts. Inspectorates and other enforcement agencies in the Netherlands now commonly use a risk-based approach to enforcement, carrying out risk analysis based on estimations or measurement of non-compliance and the maximum credible effect of non-compliance, tailored to the sector in question. Risks are prioritised in discussion with parent ministries.

First reform steps: The 2001 and 2005 Framework Visions on Inspection and Supervision

The fireworks disaster in 2000 in Enschede drew sharp attention to the issue of inspection and enforcement in the Netherlands. This led in 2001 to the first Framework Vision on Inspection and Supervision. The first vision was broadened and developed in 2005 into a second Framework Vision. The second vision was taken forward through various initiatives which continued until the end of 2007.

Current policy: The ambition for 2010 and the Inspection Simplification Programme

The current cabinet has endorsed the continuation of a Framework Vision, setting out its vision for 2010 in a letter to the parliament. It also follows up on another parliamentary motion.⁴ The objective is to continue the modernisation of central government inspection so that it promotes trust, takes firm action where required, provides better services, operates in close co-operation with other inspectorates at central and local government level, and interacts effectively with government policy and lawmaking. The government wants to reduce the number of government bodies involved, and apply advanced methods with a smaller organisation. The vision in terms of how companies, institutions and professionals are to experience inspections by 2010 is described thus

Box 6.2. Inspections: The Ambition

“Inspectors act on the assumption that we want to adhere to the rules. Business operations involving major hazards are monitored more intensively than they used to be and processes which carry less risk are monitored less frequently. Methods of inspection have also changed. The inspectorates make maximum use of our quality systems and our data. If these are satisfactory the inspectorate will focus mainly on checking the system. National inspectorates and municipalities etc. all collaborate well, which means we are approached by fewer inspectorates and no longer have to answer the same questions twice. The inspectors are skilled and are receptive to our operational processes. They communicate clearly about their tasks and the results. Rules have become less complex and are fewer in number. Observing them entails no disproportionate effort. Inspectors communicate clearly which rules apply to us, their nature and how we should incorporate them. If the rules are deliberately ignored, inspectors act quickly and firmly”.

Source: Letter from the Dutch Minister of the Interior and Kingdom Relations to the parliament, January 2008.

This ambition rests on four pillars. The first two elements are the continuation and intensification of existing initiatives and mainly concern the central government inspectorates. The remaining two promote a more fundamental reform with their focus on

the underlying rules, policy, and societal concepts that underpin the role of the inspectorates:

- *Modernisation and quality (streamlining structures, collaboration and modern risk-based approaches)*. Inspection and supervision will be reorganised into domains and/or chains, recognisable for the stakeholder, with a single front office for each domain, and relevant inspectorates collaborating in the back office. Cross-government analyses drawn up by the inspectorates will provide insight into the main risks in the defined domains. ICT will be deployed to facilitate exchange of information between inspectorates. Promotion of a cultural shift under which inspectors will trust that stakeholders are willing to comply, act proportionately, communicate clearly, and offer advice, with peer assessment to make this stick. Inspectors will make as much use as possible of control systems such as quality assurance systems for companies (certification and accreditation) which minimise burdens. The work is to be based on “lenient where possible, strict where required”. The Netherlands notes that the international dimension limits modernisation, EU approaches not always being well adapted to a more flexible system because of an emphasis on regulatory harmonisation and the need to develop a level playing field within the EU. Inspectorates (and parent ministries) are therefore encouraged to play a proactive role internationally in support of more flexible methods.
- *Transferred tasks and clustered expertise (more efficient reorganisation of tasks)*. Where necessary tasks will be transferred between central government inspectorates (and hence ministries). Grouping will be carried out where possible according to sector (e.g. SMEs, child services), for joint inspections (including “joint regulations” for integrated enforcement) as well establishment of lead inspectorates with authority to act on behalf of others. This is already happening with the Labour Inspectorate, Housing, Spatial Planning and the Environment Inspectorate. Tasks will be allocated according to “operational scale”, with a related reassignment of tasks between inspectorates. Central government inspectorates may operate on behalf of other layers of government. Some routine tasks may be privatised.
- *Regulations and policy (more flexible regulatory approach)*. This is the Inspection Reform Programme. It consists of a review of existing regulations to determine whether alternative instruments could be used. Where possible, regulations will be linked to target standards (checklists, performance indicators) rather than specific provisions (in short, giving inspectors more flexibility).
- *Government accountability (promoting a new understanding of the limits of government responsibility in risk management)*. The focus is on managing public and political concepts of the role of inspectorates, given often conflicting views on risk and the public interest. “Society will need to accept that government cannot be responsible for protection against all risks. Adequate attention must be paid to this policy.”

The Inspection Reform Programme

To give effect to the Framework Visions, an Inspection Reform Programme (which used to be known as the Inspection Simplification Programme) has been set up by each ministry across its area of responsibility.

Box 6.3. Main results to date of the Inspection Simplification Programme

- Burden measurements have been concluded in 16 domains and are ongoing in 3 others;
- A maximum of two standard government inspections each year for SMEs is now in place in four domains, is scheduled for two domains, and was already in place in seven others;
- Front offices have been set up in ten domains, are in preparation in eight others;
- Approach and attitude: incorporation of a fresh approach and attitude in six domains; attunement between existing inspectorate training programmes;
- Co-operation between inspectorates: joint annual plans achieved in nine domains and in preparation in nine others; risk analyses drawn up in four domains, scheduled in ten others;
- Co-operation with other regulators: 50 municipalities, 8 provinces and 4 water authorities involved in current or scheduled pilots in 17 domains;
- Transfer of tasks: in six domains various monitoring tasks have been reassigned between central government inspectorates; transfer of tasks is under scrutiny in nine domains; privatisation of inspection tasks in the agricultural and horticultural sectors;
- ICT: eight facilities for digital co-operation have been developed and tested, partly in co-operation with municipalities; and
- Boundary framework for information exchange: legal requirements have been considered and translated into practical guidelines; covenants between inspectorates are being prepared.

Source: Letter from the Dutch Minister of the Interior and Kingdom Relations to the parliament, January 2008

Institutional framework

The strategy engages four lead ministries: the Ministry of Interior (general responsibility for inspection and supervision, as well as a co-ordination role for local levels of government), the Ministry of Economic Affairs and the Ministry of Finance (regulatory burden reduction programme for business) and the Ministry of Justice (legal quality and law enforcement, as well as general legal hurdles that need attention such as the privacy laws from extending the use of ICT such as data exchange).

The practical roll out of the programme is overseen by the Inspection Council, made up of the heads of the 14 state inspectorates.⁵ The council is a vehicle for collaboration and for the further professionalisation of inspection activities in accordance with the Framework Visions, and for specific programmes concerning state inspection.⁶ Advisory members represent the Ministry of Interior and the Ministry of Justice. The council's bureau has a budget of EUR 2.5 million for 2009, funded by the inspectorates. For building and implementing joint ICT applications, the programme was granted a EUR 24.5 million budget by the Central Government Reform Programme, topped up by inspectorates by the same amount. The council, assisted by a small bureau, co-ordinates much of the Inspection Simplification Programme (apart from policy-related issues such as the review of regulations, which is done by the parent ministries). The secretaries of state of the four lead

ministries jointly monitor the programme. The Ministry of Interior and Kingdom Relations monitors the programme. The Prime Minister's Steering Group for Better Regulation intervenes as necessary. There are regular progress reports to the parliament, including the Inspection Council's annual report.

Responsibility for enforcement on the ground is shared by national inspectorates and municipalities.

There are fourteen national inspectorates (*inspecties*). They have their own executive and budget. These inspectorates are set up according to a limited number of templates as regards budget and legal arrangements, although their tasks and responsibilities vary. Parent ministries are ultimately accountable for their work and decisions.⁷

Local government dimension

The Central Government Agreement with the Municipalities (see Chapter 8) connects them with the general policy for enforcement reform and the development of a more risk-based approach. The central inspectorates have co-ordinated with local government to map the situation and have found that some of the most important issues arise at the local level. To make progress, an adapted version of the SCM methodology has been used, including irritants. Specific areas are examined to establish what matters most for the recipient of enforcement activity.⁸ Pilot programmes have been established with some municipalities and provinces.

Research project on compliance

The research institute of the Ministry of Justice is currently examining the general level of compliance in a project called "The state of compliance". The project is expected to be completed in 2009 and is considering:

- *The state of compliance.* In what respect is compliance measured or estimated? What perspectives, methods and techniques are used? What kind of information is available and what sectors and target policy groups does it cover?
- *What kind of information results from current compliance?* To what extent do target groups comply with the law? What's the cause and character of non-compliance? What kind of differences and similarities can be found in non-compliance within certain target groups or policy areas?

Appeals

The General Administrative Act contains procedures for appeal against administrative decisions, including those relating to regulatory enforcement. Administrative appeals are heard by the administrative branch of the courts, and in appeal by specific administrative courts.⁹ Appeals are always preceded by an objection procedure (*bezwaar*) with the body that took the initial decision. It is usual for these cases to be heard by a single-judge division, but the district court can decide to appoint three judges to a case which is complex or which involves fundamental issues. In cases involving civil servants and social security issues, appeal is a matter for a special tribunal, the Central Appeals Tribunal, and in most other cases for the Administrative Jurisdiction Division of the Council of State.¹⁰

Notes

1. Administrative review by the regulatory enforcement body, administrative review by an independent body, judicial review, ombudsman.
2. Some of these aspects are covered elsewhere in the report.
3. www.justitie.nl/onderwerpen/opsporing%5Fen%5Fhandhaving/rechtshandhaving/producten%5Finstrumenten%5Fmethodes/T11.
4. Submitted by Brigitte van der Burg MP.
5. General Inspection Service for Agriculture, Nature and Food Quality, Labour Inspectorate, Health Care Inspectorate, Inspectorate for Public Order and Safety, Inspectorate of Transport, Public Works and Water Management, Education Inspectorate, State Inspectorate for Cultural Heritage, Food and Consumer Product Safety Authority, Inspectorate of Housing, Spatial Planning and the Environment. There are other types of agency under this category, such as the State Archive Agency.
6. A parliamentary motion submitted by Charlie Aptroot MP proposing a merger of inspectorates led to its establishment as well as to the Inspection Simplification Programme.
7. The agricultural sector was measured for example- what did farmers think? It found that they didn't mind lots of inspections, provided that they were short and didn't coincide with farming's busiest periods. Entrepreneurs in other sectors do mind lots of inspections, particularly if the same questions are asked more than once. Irritants in regard to inspectors are lack of knowledge, mistrusting attitude and lack of feedback.
8. General Inspection Service for Agriculture, Nature and Food Quality, Labour Inspectorate, Health Care Inspectorate, Inspectorate for Public Order and Safety, Inspectorate of Transport, Public Works and Water Management, Education Inspectorate, State Inspectorate for Cultural Heritage, Food and Consumer Product Safety Authority, Inspectorate of Housing, Spatial Planning and the Environment. There are other types of agency under this category, such as the State Archive Agency.
9. The Council of State (for cases relating to the environment, spatial planning, immigration), the Centrale Raad van Beroep (for cases relating to the Civil Service Act – *Ambtenarenwet*) and the College *van Beroep voor het Bedrijfsleven* (for cases relating to agriculture and other economic sectors).
10. Generally speaking, appeals against judgements of courts of first instance in administrative matters can be lodged with the Council of State.) For specific categories other courts of appeal are competent: the *Centrale Raad van Beroep* (for cases relating to the Civil Service Act – *Ambtenarenwet*) and the *College van Beroep voor het Bedrijfsleven* (for cases relating to agriculture and other economic sectors).

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.

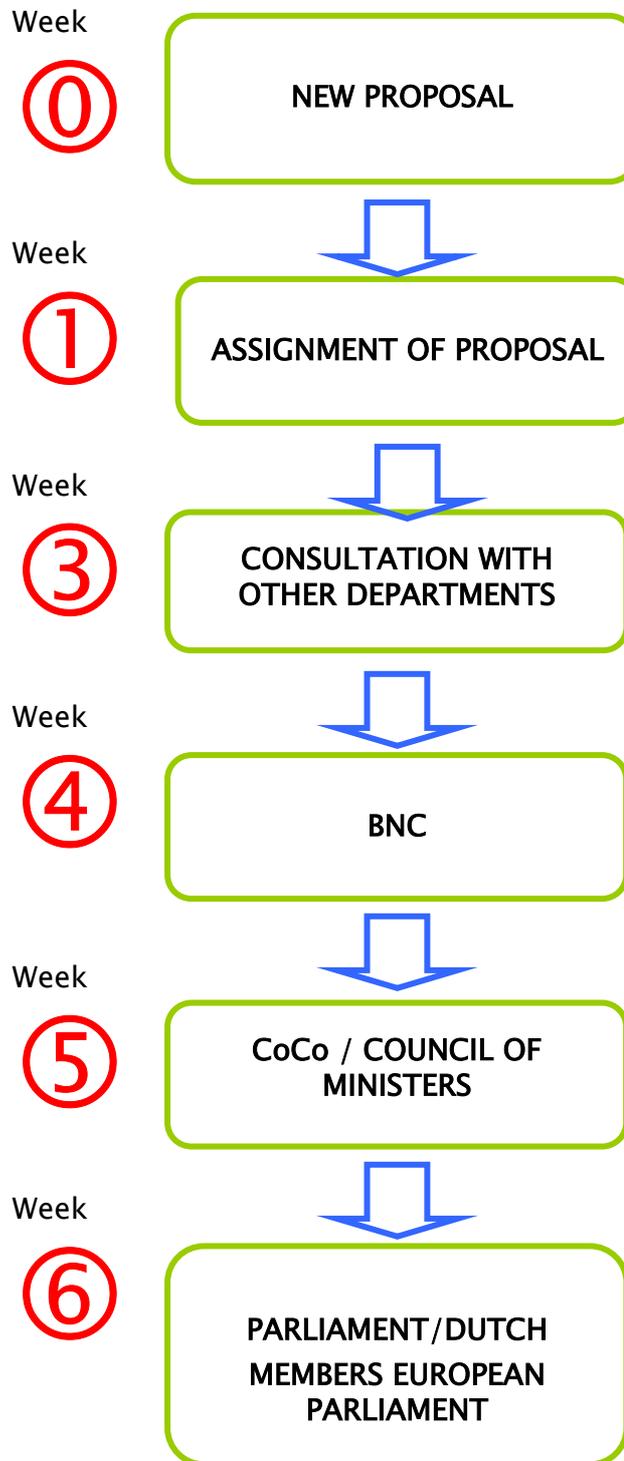
Negotiating EU regulations

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.