

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

Inspections and enforcement, which are the responsibility of the different governments according to the allocation of competences, do not appear to raise any major issues. The review was not able to go into depth on this issue, but the system appears to be well established, with the development of co-operation between inspection bodies and the use of risk analysis.

The appeal structure, by contrast, is a largely Belgium wide system, is equally well-developed, but raised a few issues. The first concerns duplication of procedures (litigants pursuing administrative appeals simultaneously with judicial review). This may need attention. The information gathered by ombudsmen (who have been associated with the work of ASA) could be more effectively used, and their work suggests that access to information on regulatory procedures is not as easy as it should be.

Recommendation 6.1. (all governments): Consider whether there are issues related to duplication of procedures, and more effective use of the information gathered by ombudsmen, that require attention.

Background

Compliance and enforcement

General context

Inspections and enforcement follow the lines of Belgium’s division of competences between governments. For areas of federal competence, inspections are under the responsibility of units of relevant ministries (such as the Directorate-General Enforcement and Mediation of the FPS Economy), or administrative agencies (AFSCA). The same structure applies to regions and communities with respect to their competences. Compliance and enforcement measures differ from one field to another (such as social and economic areas) and also within a single area.

There is increasing use of a system of administrative penalties, in addition to classical penal sanctions (for example, in the field of social security). In addition to administrative penalties, some regulations provide for “alternative procedures”. For example, the 1991 law on retail sales, consumer information and protection provides for a warning procedure.

Although it was beyond the scope of this review to go into detail, the OECD peer review team heard that risk analysis is quite well established in inspection methodologies. Co-operation on exchange of information between inspection bodies is also being developed. It was suggested to the OECD peer review team that harmonisation of fiscal and social security legislation was important in this context.

Box 6.1. Examples of enforcement bodies

The Directorate-General Enforcement and Mediation

The DGEM is in charge of ensuring compliance with economic regulations, which covers around 50 laws and some 300 executory orders. It is also a competent supervisory authority in the field of counterfeiting and piracy besides the Customs and the Federal Police, and is competent in the field of foodstuff labelling (where it has concluded a protocol with the Federal Agency for the Safety of the Food Chain). At the criminal law level, the officials of the DGEM work under the supervision of the Public Prosecutor’s Office but remain within the hierarchy of the SPF for the economy. Market surveillance combines information, prevention, rule safeguarding and alternative resolution of disputes. The policy is to emphasise information, prevention and conciliation rather than repression. This

includes encouraging initiatives that favour recourse to commercial mediation. The methodology for market surveillance is based on risk analysis.

The Federal Agency for the Safety of the Food Chain

The Federal Agency for the Safety of the Food Chain, which was established in 2000, is in charge of compliance in the food sector. The policy is based on close monitoring of compliance rates, use of prevention and information to improve compliance, and risk evaluation. A scientific committee has been formed to support risk evaluation. The frequency of inspection depends on the “potential risk” factor (based on the information of the checklists), and high- risk sectors are more frequently visited by inspectors. The agency has frequent meetings with sector organisations (formal and informal consultation) to prepare regulations and to discuss compliance and enforcement measures. Consumers and operator have a different contact point where they can ask for information or where they file complaints (for consumers concerning the quality of food, for enterprises on the functioning of the agency); information campaigns are set up with sector organisations, newsletters, and press releases. The agency recently created a new service to strengthen its advisory role. This service will, among other things, identify where regulations are still too complex and go around the country to explain procedures and rules to enterprises, farmers, etc.

There is a significant enforcement role at the local level of government. The mandatory missions of provinces and municipalities include responsibilities for implementing and/or enforcing regulations and policies defined by a higher authority. While there are differences across regions, provinces and municipalities play an important role in the implementation of regulations in urban planning (under regional legislation) and the environment (under federal or regional legislation) across Belgium. Provinces are responsible for delivering authorisations for opening a business which present risks or inconveniences to others. Municipalities are responsible for delivering a number of permits and authorisations, for the town development plan and issue planning regulations. The operation of specified establishments is subject to delivery of environmental licences, generally delivered by municipality colleges. The examination of applications is partly done by municipality, and partly by the regional administration. Municipal councils have enforcement powers (with the possibility of issuing fines, suspending a permit or authorisation, closing an establishment).

Appeals

General context

In contrast with inspections and enforcement, large parts of the appeal system are Belgium wide. Appeals against administrative decisions by citizens or businesses may first be heard by administrative tribunals. Judicial review through the court system may be pursued simultaneously. Both the administrative and judicial system are under federal competence. The OECD peer review team were told that it would be helpful to have a policy for greater use of ICT and data sharing, not only within Belgium, but across Benelux.

Administrative review

Administrative tribunals

There are around 30 administrative tribunals in Belgium, which have been established to hear cases against administrative decisions in specific social, judicial and economic areas. The oldest is the permanent deputation of the provincial council, which rules on election-related appeals. A number of these specialised tribunals have been established in response to the slowness of procedures in ordinary courts. Labour tribunals have extensive competences in labour and social security to control decisions taken by regulatory authorities. Similarly specialised tribunals have been established in the field of welfare, housing and foreigners' rights.

The Council of Foreigners Disputes, which was established in 2006 to decide on asylum applications rejected by the General Commissioner for Refugees and Stateless Persons, has become the largest source of cases heard by the Council of State. Other efforts to improve the efficiency of tribunals relate to the transition to electronic files. A project has been launched, but partly failed, which has delayed full computerisation of the judicial system.

Council of State

The Council of State has the power to suspend and to annul administrative acts (individual and statutory) that are contrary to the law. The administrative legal section of the Council hears cases against decisions of the federal government, regional and community governments as well as decisions of provincial and municipal executives and public bodies. A litigant has to make his claim within 60 days of the publication of the regulation in the official journal, or if it is a decision which affects only a limited number of people, within 60 days of notification. The Council of State is also the supreme jurisdiction for decisions by administrative jurisdictions. In this case, the appeal can rely only on violation of law, and the Council cannot rule on the facts (it is not competent on the substance).

Judicial review

While the law has granted significant powers to administrative bodies and the Council of State in appeals against administrative decisions, judicial courts are competent when the appeal involves subjective rights (*droits subjectifs*). For example, judicial courts are competent for actions for damages against the state for having failed to implement European legislation. Appeals for annulment to the Council of State takes place independently from the procedure with the judicial court, except that an annulment decided by the Council of State has an *erga omnes* effect which is not the case for control done by judicial courts. Judicial courts do not have the capacity to assess the opportunity of an administrative decision. However, tribunal presidents consider that it is within their competence to enjoin the administration to act, or to refrain from acting, when it has illicitly struck a blow at subjective rights. In a few cases judicial tribunals have the possibility to annul directly certain administrative decisions with an *erga omnes* effect.

In addition, the courts control the acts of the administration in a decentralised way as the constitution states that “courts and tribunals will apply general, provincial and local orders and rulings in as much as they are in conformity with the law”. This includes checking conformity of administrative rulings with the constitution and international

instruments, including European legislation. Since the Constitutional Court does not have any power to control the conformity of secondary regulations with the constitution, this power is held by the judiciary which uses it extensively, particularly in the tax area.

In practice many litigants pursue both procedures, *i.e.* judicial and administrative appeals. The OECD peer review team were told that it would be helpful to find a way of avoiding this duplication (for example, that a judicial review procedure should not be allowed if an administrative action were underway). There have been cases of uncertainty as regards the competence of judicial and administrative tribunals. Conflicts of attribution are settled by the *Court of Cassation*. With respect to regulatory authorities, general principles apply (appeal to the Council of State for an annulment *erga omnes*, to judicial tribunals for subjective rights). There are however specific cases. In the field of competition law, the Council of Competition is an administrative jurisdiction whose decision can be appealed against to the Appeal Court of Brussels. Decisions of sectoral regulators can be appealed to the Appeal Court of Brussels, but there are plans to have the Council of Competition become the appeal body.

Prevention of disputes

Mediation and arbitration services

A number of extrajudicial systems have been established to provide consumers access to easy, cheap and efficient means of dispute resolution. This includes mediation as well as arbitration services, whose procedure leads to a binding decision on both parties.

There are ombudsmen at all levels of government (federal level, regions and communities). The federal ombudsman was established in 1997. It is independent, appointed by the House of Representatives, with the classical role of an ombudsman. It is a collegial body with a staff of around 40 people. The ombudsman examines complaints lodged by “users” relating to administrative authorities (following a first action). It can also launch investigations upon request of the parliament. For example, in February 2008, the House of Representatives requested an investigation on the operation of closed centres managed by the Foreigners’ Office and the operation of open centres managed by *Fedasil*, the Federal Agency for the Reception of Asylum Seekers. The Ombudsman sends an annual report with recommendations to the parliament (to modify relevant legislation, regulation or administrative practice). It was suggested to the OECD peer review team that more attention could be given to these recommendations. In addition the ombudsmen’s work shows that there is a need for easier means of access to information on regulation and regulatory procedures.

Ruling for tax issues

The law of 24 December 2002 established a system of prior decision, called “ruling”, which gives tax payers and potential investors the possibility of asking for a decision on a specific project or situation. The procedure was established to create a new contact point between tax payers and the tax administration, in order to increase legal security but also to prevent disputes in the tax area. The SPF for Finance issues an anticipated decision on a request relating to the implementation of tax regulations within its field of competence. The decision commits the SPF, but not third parties or the courts.

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.



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