Quality of Legislation: strengthening legal certainty and reducing the implementation gap

Enhancing implementation by better legislation

CONference paper¹

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INTRODUCTION

1. A Montenegrin proverb cautions that:

“Winter bites either bites with its teeth or lashes with its tail.”

One often hears calls for laws with teeth but I have yet to hear of the need for laws to have a tail to lash with. Perhaps there are lessons to be learned from the wise people of Montenegro who first spoke these words of wisdom.

2. In the presentation that accompanies this paper I hope to provoke some discussion about how good quality legislation, which promotes legal certainty, can lead to better implementation. To do this I will pose and answer a series of questions about policy making, law drafting and the implementation of public policy through legislation.

3. Public administration reform and European integration have become central concerns for governments and citizens in the Western Balkans. Both policy goals will involve herculean efforts but can bring great rewards. The efforts need to be applied in the legislative, executive and judicial branches of government and at every level of central and local government.

4. Amongst the issues of concern is that of implementation. This paper examines the issues associated with the implementation of public policy decisions. It pays particular attention to the implementation of policies that are brought into effect by legislation.

5. The paper looks at the subject in general and at abstract terms, drawing from the experience of EU and OECD Member States, particularly those that have recently joined the European Union. The paper asks and answers a series of questions about the timing and sequencing of actions to ensure effective implementation of policy decisions and draws from the experiences gained at the level of the Institutions of the European Union and its Member States through the adoption of better regulation policies (i.e., specific and overarching policies designed to improve the quality of policy making, law drafting and enforcement in the European Union).

6. Finally, the paper looks at these issues in the context of Montenegro and suggests some ways in which the challenges posed by implementation of public policies can be met by Montenegro in the context of its domestic policies and in the context of the implementation of policies designed to achieve European Integration.
What is implementation?

7. In political science, implementation refers to the carrying out of public policy. Most policies are carried out by some means of legislation. Primary laws must be passed by the legislature or secondary laws must be made by a Minister or other law-making bodies.

8. This process consists of strategic planning or management, policy formulation, rule-making, rule-administration and rule-adjudication. Factors impacting on implementation include the legislative intent, the administrative capacity of the implementing bureaucracy, interest group activity and opposition, and presidential or executive support.

9. In the case of candidate or potential candidate countries, implementation also refers to the need to adopt and give effect to the European acquis. This involves a complex task of reviewing the acquis in each sector, identifying any domestic law and reconciling it with European norms.

Why is implementation important?

10. There is no doubt that some policies are developed for purely political reasons. A minister has made a promise that action will be taken and a law passed. So an action is taken and a law passed. However, in most cases policies are formulated and legislation enacted so as to solve a problem in society. That problem can only be solved if the policy is implemented and its objectives are achieved. So the implementation of policy is an essential part of the policy cycle.

11. Policies may be designed to improve social welfare, improve educational opportunities, improve economic performance, cure market failures, and protect the environment. Or they may be designed to collect and disburse revenues. A small number of these policies are self-executing. There are incentives built into them so that everyone wins and, therefore, implementation takes care of itself. However, in most cases, implementation is more of a challenge and the policies are not self-executing. The policy objectives need to be enforced and complied with. The enforcement may be as simple as a complaint by a consumer, followed by a warning by an inspector or may involve the full majesty of the law, a prosecution, trial and penalty, such as a fine or even imprisonment.

12. For those who need to comply with the law, legal certainty is required to be able to understand and comply with obligations. Therefore, for successful implementation every effort must be made to create legal certainty.

13. It follows that if policies are to be of any value they need to be implemented. The easier the implementation the more effective will be the policy. So the following questions arise in the context of implementation and how it is achieved:

   1. When issues involving implementation should be considered?

   2. How can implementation be achieved?
3. Who should be responsible for implementation?

4. How can the EU better regulation agenda contribute to better enforcement and compliance?

5. What lessons can be drawn by Montenegro from the answers to these questions?

When issues involving implementation should be considered?

14. Given the importance of implementation, the issue needs to be considered at each stage of the policy cycle. As we have seen from the paper presented by Ms. Ben-Gera, policy includes “a definite course of action selected from among alternatives in the light of given conditions to determine present and future actions.” It is impossible to know if a policy is good or not until it has been implemented. However, what can be done in advance is to try to maximise the chances of the success of a policy by making the best choice in the first place. So the policy, when initially conceived, must be thought of in terms of how this will be implemented and what are the preconditions for success? For example, a ban on smoking in public places in Ireland was successful because a lot of thought was given well in advance to educating the public regarding the benefits of such a ban. In Albania, a similar ban was proposed, announced and abandoned almost as quickly because the difficulties of implementation were not thought through sufficiently at the stage of the conception of the policy.

15. Thus, implementation must be considered on the initiation of the decision to create a policy. The issue of implementation must then be kept in mind at each stage of the policy cycle. The initial question to be asked is: what is the problem? When the EU was considering the policy problem of children getting poisoned by taking medicines that had been left lying around carelessly, it defined the problem in terms of a technical solution – child-proof stoppers for medicine bottles. The problem, however, should have been seen in terms of an information solution, i.e., campaigns of education. Pharmaceutical products with stoppers that are difficult to open are as difficult to open for elderly people as for children so the policy failed as accidents continued because people left the bottles open. A different approach which involved education and information campaigns was much more successful.

16. Implementation needs to be considered when the costs and benefits of alternative approaches are considered. Finally, policies must be reviewed several years after their adoption so as to ensure that the policy as conceived has dealt with the problems which needed to be addressed and that no unintended consequences have occurred as a result of the implementation or non-implementation of the policy solution.

How can implementation be achieved?

17. In the simplest of terms, policies can be implemented if the consultations and discussions that took place before the adoption of the policy proposal and its implementation into law were sufficiently extensive so that people’s behaviour changed (or consensus was built) with the result that the law concerned was self-implementing (or compliance was ensured). This was the case with the Irish smoking ban.
18. For many policies, enforcement requires regular inspections and a determination by enforcement authorities to demonstrate that laws will be enforced. A determination to enforce laws, however, must be accompanied by being realistic about how many resources are available to achieve the levels of inspection needed for effective enforcement. In the UK, a campaign in the media about road deaths educated the public about the dangers of driving too fast and was much more effective than previous efforts to reduce road traffic deaths by raising the level of penalties and increasing police presence on public roads.

19. Limited resources may then necessitate that enforcement authorities must take a risk-based approach to enforcement. In other words, where the failure to enforce certain laws involves increased risk to society these risks must be reduced by increased enforcement. These risks vary from country to country in accordance with political priorities and the particular problems in a given country.

20. There are a number of ways in which governments can monitor the application of laws. They can undertake studies and assessments of the extent to which laws are being implemented. Enforcing authorities can also investigate complaints of citizens and organisations and questions from Members of Parliament. Enforcing authorities can carry out investigations and inspections to ensure that laws are being implemented.

Who should be responsible for implementation?

21. In an ideal world, policies and laws would be self-enforcing. However, experience tells us that some policies and laws require more implementation and enforcement efforts than others. A menu of tools is available for implementation, as well as a range of institutional options.

22. At one level, teachers in schools can educate children about the dangers of poor diet or inappropriate consumption of certain products or engaging in certain activities. For other policies, experts are needed, for example, to take and measure effluents from factories or the level of certain substances in the air at certain work places.

23. The decision, therefore, as to who is responsible for what depends very much on the issue at stake and the resources available. So this brings us back again to the necessity to consider carefully at the conception stage of policies what are the costs and benefits of the different options available to public authorities to secure implementation of policy decisions through the relevant legislation and/or other measures.

24. As regards the implementation of the acquis in the European Union, it is up to the Member States and their institutions to ensure enforcement (either directly or indirectly through regulatory measures, transposing the EU policy objective into the domestic legal order). However, in addition to any implementation and enforcement action taken at national level, the European Commission fulfils the role of "Guardian of the Treaty": according to Article 211, first indent of the EC Treaty, the Commission is to ensure that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied. In performing that function, the Commission may open infringement procedures. Within this context, close co-operation between national authorities and the European Commission contributes to a better implementation.
25. Another example is a European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL), which is a network of the environmental authorities of EU Member States, acceding and candidate countries, and Norway. It provides a framework for policy makers, environmental inspectors and enforcement officers to exchange ideas, and encourages the development of enforcement structures and best practices.

26. Judges have an important role to play, since rights and obligations deriving from Community law are enforced on a daily basis by national courts and tribunals. The European Union Forum of Judges for the Environment contributes to the enforcement of national, European and international environmental law by enhancing knowledge of environmental law by judges.

27. To support the implementation and enforcement of Community environmental legislation, the Community has adopted the Directive on Environmental Liability, the recommendation providing for minimum criteria for environmental inspections and the Directive on the Protection of the Environment through criminal law.

**How can the EU better regulation agenda contribute to better enforcement and compliance?**

28. The EU better regulation agenda seeks to encourage Member States and the Institutions of the European Union to improve the quality of their policy making, law drafting and enforcement by the use of certain tools. Essentially, these tools are consultation and impact assessment. Policy makers are encouraged also to ensure that new laws impose as few administrative burdens on businesses and citizens as possible.

29. Drafters of legislation are encouraged also to carry out the work of drafting in as clear a manner as its subject matter permits. In the drafting of legislation, drafters can play a key role in ensuring that legislation will be properly complied with and enforced by asking whether what is proposed can:

- operate with the requisite levels of accountability, transparency, proportionality and equity
- operate with the right levels of expertise to enforce it (e.g., skilled inspectors who have the expertise). necessary to enforce the legislation).

30. Related to this is the need to manage the stock of legislation in such a way that it is easily accessible. In order for the rule of law, and thus the legislation, to function effectively and efficiently all participants involved in a society, an economy or the government of any country need to be able to find the

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2 Directive 2004/35/EC of the European Parliament and of the Council 21 April 2004 on environmental liability with regard to the prevention and remediying of environmental damage (ELD) establishes a framework based on the ‘polluter pays’ single Quote principle, according to which the polluter pays when environmental damage occurs. This principle is already set out in the Treaty establishing the European Community (Article 174(2) TEC). As the ELD deals with the “pure ecological damage”, it is based on the powers and duties of public authorities (“administrative approach”) as distinct from a civil liability system which is more appropriate for “traditional damage” (damage to property, economic loss, personal injury).
legislation, and once they find it, they should be able to follow it, identify their responsibilities and rights and have easy access to any administrative procedures and documentation necessary for its implementation. There are political, legal and economic reasons to manage the stock of legislation so as to make it accessible, transparent and simple.

31. Laws also need to be consistent with the respective constitutional arrangements of the countries concerned, as well as being consistent with the general principles of law. Policy makers and drafters of legislation must also be aware of the relevant international obligations, notably those prescribed within the European Union, so as to make laws that are ‘future proofed’ and consistent with the European acquis.

What lessons can be drawn by Montenegro from the answers to these questions?

32. Two overarching considerations need to be taken account of by Montenegrin policy-makers: how to align present and future laws with the European acquis and how Montenegro can ensure that the quality of its policy choices, their formulation and transposition into legislative or other measures matches or exceeds the standards set in other European countries?

33. According to the recent SIGMA Assessment of Policy-Making and Co-ordination, in the past two years, Montenegro has taken conscious steps to strengthen its policy system.

   “There is evidence of the efforts made by the General Secretariat of the Government (GSG), the Secretariat for European Integration (SEI), and ministries to improve planning, monitoring, and policy development.”

34. The view was expressed in the 2008 Assessment to the effect that Montenegro should continue to improve its policy system in the step-by-step manner that it has been pursuing. Among other matters, it was suggested that a plan should be developed, including resources and training, to strengthen legal drafting and policy capacity in ministries.

35. This is possibly an area in which SIGMA may be of assistance. Part of such development should be a review of implementation capacities and the development of ideas in relation to how better policy and rule-making can lead to better implementation.

Further reading

www.sigmaweb.org

See in particular:

• Assessments

• SIGMA Paper No.42

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