Interprovinciaal Overleg

HUIS VAN DE NEDERLANDSE PROVINCIES

Dutch provinces for better EU regulation

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Foreword

Legislation should do what it is intended to do; it should be easy to implement, provide certainty and predictability and it should avoid any unnecessary burden. Sensible, realistic rules, properly implemented and enforced across the EU. Rules that do their job to meet our common objectives – no more, no less.[1]

If you are willing to spend half an hour, then you should certainly take the time to read the document produced by the European Commission under the proud chairmanship of its first Vice President Frans Timmermans, in its entirety. This document at least – unlike many of the regulations to which it relates – is clear, accessible and easily readable. A state-of-the-art appeal for better regulation and as such anything but a simple call for discussion of fewer rules.

Naturally, the number of rules remains a point for attention, and the Commission is permanently investing in a means of working in which regular assessment of the need and necessity for existing regulations is given a prominent position. However, this document also reveals that the quality of regulation should not first and foremost (and perhaps not at all) be judged in terms of numbers – a fact which in my opinion could have been put even more explicitly. Even more than is achieved in the current document, attention will have to be focused on what could be described as the philosophy of governance: how do we wish to give shape to the desired social effects? What is the relationship between rules and the underlying instruments and practices? One thing is clear, namely that not only legislator but also far more than has been the case to date, economic and social partners need to be involved.

Regulation calls for a sound analysis of what we wish to achieve and for a clear and realistic vision on the practical reality on which the rules are declared applicable. Rules call not only for a clearly formulated ambition and targets, but also a thorough analysis of the question of what is truly needed to attain those targets. The rules themselves often turn out to be capable of making only a minimal contribution. Montesquieu (one of whose many roles in life was governor of the Bordeaux region) wrote about this question in the still thoroughly readable 'De l'Esprit des Lois.' [2]

Photo: Erik van der Burgt

"Regulation calls for a sound analysis of what we wish to achieve and for a clear and realistic vision on the practical reality on which the rules are declared applicable."

Wim van de Donk
Chairman of the House of the Dutch Provinces in Brussels

Good legislation needs not only a number of clear underlying principles, but also a realistic assessment and sound integration of the rules in the circumstances in which they are to be applied. In that connection, a certain degree of reticence should be employed in respect of generic rules, even in today's Europe: what works in Catalonia may well be less successful in the Free State of Bavaria or Friesland. Since more and more of these rules are being implemented by subnational authorities, the involvement of those authorities is becoming ever more important.

It is therefore a positive development that this new European agenda for better regulation is addressed not only to the Member States but also explicitly to the European regions. For example via their involvement in the European Committee of the Regions, the regions themselves are being more consciously involved than in the past in the preparation and evaluation of European legislation. In the Netherlands the associations of municipalities and provinces, VNG and IPO, together represented in the Dutch delegation to the Committee of the Regions, recently reached agreement with the Dutch government so that far more than in the past they will proactively be involved in the contribution made by the Netherlands to the process of preparing rules, right up to the moment of discussion at the European Council. The executive and staff of the IPO, the executive and staff in our Houses of the Provinces, the executive and staff in the House of the Dutch Provinces in Brussels and our colleagues from the Dutch municipalities are all actively involved in that process, with considerable enthusiasm.

The provinces aim with this publication to make a contribution to the request addressed last year by Frans Timmermans to the Dutch provinces, via the Council of King's Commissioners. That request was to look within their own network into the possibility of arriving at a summary of bottlenecks in the application of EU regulations. We were delighted to fulfil that request, based on our wish as subnational authorities to be involved in the development of an agenda for better regulation in Europe.

Naturally, in making our submissions, we will of course consider the interests specifically applicable to our own provinces and municipalities; certainly as more and more former Central responsibilities are being decentralised to local authorities, we are acquiring an ever greater interest in monitoring the quality of the European legislation applicable to those decentralised tasks. Here, too, a clear vision on the practice of implementation can make a contribution to the preparation of new rules, and can play an important role in the now more permanent evaluation of existing rules. In the spirit of Montesquieu, regional differences remain an important point for attention. After all, in our vision, Europe needs to think carefully about what type of integration truly makes a contribution to wealth and prosperity. In some cases, uniformity can offer a solution, but in other situations, specific honouring a certain degree of variety and regional policy freedom is an equally wise option.[3]

Nonetheless, there is every reason for an enthusiastic response to the initiative for more generic and practically applicable regulations. In a rapidly accelerating global economy, in which Europe is required to fight to maintain its position, it is of key importance that investors and social parties are not hindered in terms of costs and effectiveness by unnecessary differences in definitions, procedures and other complexities, in the application of European rules. The programme for better regulation is effectively above all a contribution to offering our European economy a fair chance to guarantee sufficient wealth and – as a consequence – jobs now and over the coming decades. It is not without reason that the plans from the Juncker Committee, now already approved by the European Parliament and aimed at increasing investments, also focus considerable attention on the importance of better regulation. Investing in effective and successfully applicable regulations is after all also of huge importance for anyone wishing to invest in European business. Perhaps even more important than the amount of money available, is the capacity to take rapid and reliable investment decisions.

We are delighted to be able to make a contribution to the development and implementation of sound European legislation, and hope that this publication will not only serve as a useful inventory of existing bottlenecks, but will also be seen as an investment in a proposal for solving those bottlenecks.

Wim van de Donk
Chairman of the House of the Dutch Provinces in Brussels

1. Better regulation for better results - An EU agenda, Brussels, 19 May 2015 (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (see http://ec.europa.eu/smart-regulation/better_regulation/documents/com_2015_215_en.pdf).
2. For a recent Dutch? translation see: Montesquieu, Over de geest van de wetten, Boom, Amsterdam 2006.
3. See the argument from Jan Zielonka in his 'Is the EU doomed?' (Zielonka, 2014, Polity Press).

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Introduction

This document is an inventory by the Dutch provinces. At the request of European Commissioner Frans Timmermans, this document lists the bottlenecks we experience in day-to-day practice in drawing up and implementing provincial policy, caused by European rules. In an immediate follow-up, we also propose suggested solutions; a task we also consider to be our responsibility.

We are delighted to comply with the request issued by the first vice-president of the European Commission on 19 November 2014 to the Dutch King's Commissioners. After all, simple, effective and efficient regulations encourage understanding and support, protect rights acquired through hard work and promote economic growth. We understand and appreciate the fact that the European Commissioner has asked us to submit possible solutions. As he himself wrote in the *'Better Regulation Agenda': 'At every level, those people who have to work with the rules best understand how they work, and they are in the best position to provide the content needed to make them better. And they wish to be heard.'*

The same applies for the provinces. We see the Better Regulation Agenda as an opportunity. We are not only responsible for implementing regulations; as a subnational government authority we increasingly have a voice in drawing up European regulations. The Impact Assessment Board also proposed by European Commissioner Timmermans offers opportunities in that respect. Because we share government responsibility, we understand that it is not a question of a technical process of tidying up unnecessary rules, but a political process. Right from the start of every process of regulation and legislation, consistent choices must be made in favour of simplicity, effectiveness and efficiency.

There is no shortage of understanding for regulations in general, also not among the provinces. Europe has indeed established an impressive legal framework that must be handled with care. We are also seeing improvements made in this field by the European Commission. A great deal of positive work has already been done but there is still room for improvement. The bottlenecks outlined in this document should be viewed against that background. For that reason, we propose solutions that do justice to the objectives for which the rules were drawn up in the first place.

1

The importance of better EU regulation for the Dutch provinces

European rules have a major influence on provincial policy. Whether relating to environmental legislation (air quality), nature policy, the procurement procedures for regional public transport or promoting the regional economy, the province always has to deal with 'Brussels'. Sometimes the rules describe how the province can (contribute to) implement policy, for example in respect of air quality. Other rules have consequences for subject areas in respect of which, as such, the European Union has no authority. European rules for nature policy (Natura 2000) for example exercise a fundamental influence on provincial spatial planning policy.

It is above all important for the provinces that the rules be proportionate, have the lowest possible costs and less regulatory pressure while offering optimum policy freedom.

The University of Twente has carried out an inventory of the five subjects in European legislation and regulations that cost subnational authorities most money, and which represent the greatest restriction on policy freedom. The rules in question are the tendering rules, the state aid rules, the Bird and Habitat Directives, the Framework Directive on Water and the regulation on the allocation of the European Regional Development Fund (ERDF).
All six are relevant to the provinces. It is difficult to say which of the six delivers the most bottlenecks. An evaluation of the Bird and Habitat Directives, for example is currently underway, which the provinces hope will result in improved rules. We will refer back in detail to a number of examples, later in this document.
Estimating costs is difficult for the provinces. This is for example due to the fact that it is not always clear whether a regulation has a European basis, or whether it is based on national legislation.

The importance of regions for the EU

The importance of the regions is becoming increasingly widely recognised in Europe. The region is the level at which the economy and social-societal networks are embedded; the level at which a labour market operates in conjunction with education and research. In border areas, it is clearly visible how vital these regions are: they often demonstrate growth even in the face of the pressure imposed by poorly harmonised regulations. Provincial executives operate at precisely the right level and have the ideal scale to encourage developments in these regions. This awareness has led to a more established position for the provinces within European decision making procedures at both European and national level.

Over the past ten to fifteen years, the position of provinces, municipalities and water boards in the decision-making process concerning European legislation and regulations has been further strengthened. The guarantees contained in the EU Treaty such as the advisory role of the Committee of the Regions and the obligations upon the Commission to demonstrate that proposals do not go further than necessary, have been supplemented by such instruments as consultation and impact assessments.

Better Regulation Agenda

The Better Regulation Agenda contains even further improvements; this agenda includes plans for improving dialogue with the relevant stakeholding organisations. The proportionality of proposals and the use of the guideline instrument will be considered even more critically. There will be greater focus on the effects for subnational authorities in the so-called impact assessments, and for the evaluation of European legislation and regulations.
The Better Regulation Agenda focuses particular attention on the effects of amendments during the political process, on the eventual rules. Proposals from the European Commission are discussed successively in the European Parliament and the Council, at which point the national parliaments then consider the issues. In each of these phases, changes are introduced. It is therefore essential, in the words of European Commissioner Timmermans in his Agenda, that the European Parliament and the Council also commit to better regulations. Fellow legislators must take account of the fact that the changes they make have direct consequences in practice for those parties who have to deal with them. They too should carry out an impact assessment, whenever they wish to make a substantial change to a proposal. The provinces have high expectations of the new agreements in this area.

Code of conduct between national and subnational authorities

Thanks to the recent major shifts from central to subnational authorities, the provinces more than in the past have been made responsible for implementing European laws and rules. Alongside the responsibility for policy and implementation, authorities have also been transferred; that too supports better regulation. As a consequence, provinces and municipalities have been supplied with more tools for achieving flourishing regions.

It is therefore even more important for the provinces to have a timely insight into the consequences of EU proposals. Central government can take this into account when adopting its own position on the regulations, for submission to the European procedures. It is therefore a good thing that Central government, the provinces and other subnational authorities maintain constant signalling and strategic consultation.

In the Dutch Code of conduct between national and subnational authorities agreements have been reached for involving subnational authorities better and at an earlier stage in EU dossiers. The provinces and other subnational authorities have therefore been given the possibility of consulting directly on determining the Dutch position in the national Working Group for the Assessment of New Commission Proposals (BNC) and other consultation bodies.
At national level, even more attention should be focused on charting out the costs and policy freedom aspects of European legislation and regulations. It is essential that in the case of new proposals, clarity be achieved in advance on the additional tasks to be entrusted to provinces, municipalities and water boards, and the resultant costs.

Investigation by the Ministry of Home Affairs and Kingdom Relations (BKZ) and Foreign Affairs (BZ)

In a recent survey by two Ministries (Domestic Affairs and Kingdom Relations and Foreign Affairs), the Association of Netherlands Municipalities (VNG), the Association of Provinces of the Netherlands (IPO) and the Union of Water Boards (UvW), an investigation was carried out into how they can strengthen cooperation in the arena of European decision making. They have now reached agreement on the fact that in respect of priority dossiers, the subnational authorities can fulfil the equivalent role of a government ministry. Sharing of information will also be improved. Each year, the subnational authorities are expected to identify for them the most important European subjects. On these agreed subjects, as ‘contributing ministry’, they will be able to make their own contribution.

2 Bottlenecks *and* possible solutions

The Association of the Provinces in the Netherlands and the House of the Dutch Provinces in Brussels, the front office with the EU, have called upon the Dutch provinces to identify bottlenecks in European regulations, and the possible solutions, for the purposes of this document. From the submitted suggestions, fully elaborated or simple outlines, a similar common thread was identified by the University of Twente in its own inventory. There are four types of bottlenecks: sectoral regulations, rules not geared to current problems, rules that overshoot their target and audit pressure.

Sectoral regulations

The policy and regulations of the various Directorates General (DGs) of the European Commission sometimes demonstrate overlaps, sometimes are harmonised and sometimes in fact are counterproductive. If provinces wish to spend European subsidies for achieving European policy, the rules imposed by DG Competition and DG Agriculture often make implementation difficult. Environmental legislation and the rules for the internal market are two essential subjects for the Member States, but both subjects suffer from a sectoral approach.

Examples

- Different guidelines employ different terms and definitions. The description of the term hydrocarbon can for example differ from directive to directive. The procedures for participation and legal protection can also differ from directive to directive.
  The directives contain programme obligations that are not harmonised with one another. This has consequences for the Member States who are required to implement the laws, for the authorities required to apply the rules, and for the commercial sector faced with a fragmented system of permits and approval rules.
  At the level of permit issuing, the authorities responsible for implementing EU law have little space for their own considerations. At best they can make use of grounds for deviation and exceptions, but these rights are more limited and are something entirely different. Increased freedom for consideration will for example mean that authorities can more easily avoid unintended environmental effects.

- The reporting obligations from the various EU Directives often overlap. Because the reports are designed differently, the same data have to be submitted in different ways, for different reports. An example of these obligations for any given province:
  – Bird and Habitat Directives: every six years;
  – Derogations from the Bird Directive: every year;
  – Derogations from the Habitat Directive: every two years;
  – Convention on Biological Diversity: every four years;
  – Bern Convention (conservation of wild animals and plants and their natural environment in Europe): incidental, every six years and every ten years;
  – Ramsar (Wetlands Treaty): every three and every six years;
  – Convention on Migratory Species: every three years.

- The question of different definitions for a single term also plays a role. 'Innovation' for DG Competition, for example, is different from the definition employed by DG Regional policy. The provinces 'commute' between these two Directorates General whenever wishing to spend funds from the ERDF. The programme they draw up for that spending must be approved by DG Regional and Urban Policy, but whenever a province wishes to award government aid, DG Competition is required to give permission. It has happened that the permission came so late that the money could no longer be spent; the deadline from DG Regional and Urban Policy had expired.
  The phenomenon of 'visiting Brussels twice' recurs in several areas. Provinces participating in a grant application or supervising parties in drawing up a grant application may for example request a grant from DG Environment or DG Regional and Urban Policy, at which point they then have to report the application for government aid to DG Competition. If the issue involves farming, they may even have to 'travel to Brussels' on three occasions, because they then also have to report to DG Agriculture.

Solutions

The European Commission is attempting to make the rules clearer, above all for industry, but often works on a directive by directive basis. The problems however, are in the interaction between different directives.
Make it Work is an example of a purely practical, integrated approach. On the initiative of the Netherlands (the Ministry of Infrastructure and the Environment), about ten countries are working to improve the rules, rather than constantly coming up with new rules. The countries then call upon the Commission, whenever changes are made to existing regulations, to simultaneously eradicate the incompatibilities with other directives. For example, if the Bird and Habitat Directives are altered, the contradictory rules in other directives (for example the Framework Directive on Water) must at the same time be taken into account.
The Juncker Investment Plan for Europe is another example of how things can work: in the plan, approval for government aid is included in the same procedure as the grant application. In this

plan, the Commission has undertaken to apply a simplified government assessment in the case of requests from Member States for a loan from this fund, on condition the project meets a number of requirements.

Proportionality

The societal tasks facing the provinces and the problems they are required to solve always contain a variety of aspects. In many cases, at least the environment, nature and the economy and involved. For all of these subjects, we have access to European and national rules which we wish to apply, although they are sometimes mutually contradictory. We need a certain degree of freedom to arrive at the ideal mix, that is most practical in a given case.

Examples

In rural policy, one clear example is the area development plan. On the basis of EU rules, the administrative authorities must ensure that the financial resources are correctly spent, and a tender must be issued. However, once entrepreneurs, interest groups and regional authorities have reached agreement on the plan, a selection process of this kind is unnecessary. There is already sufficient support.

Perhaps the clearest example in this field is the regulations concerning air quality. This is an important subject in the Netherlands; the European rules help the provinces to improve air quality. At present, the standard for air pollution that my not be exceeded is the same everywhere. Alongside a busy traffic route with no local residents, the same maximum emission standards apply as in a quiet residential district. This fact has a number of undesirable side effects:

- A great deal of money and energy is invested in achieving the standard alongside busy roads, while those efforts do not always result in health improvements because these areas are home to few people;
- Government introduces measures to spread traffic flows to remain below the standard, as a result of which the pollution is also spread over a wider area. For health, it would in fact be better to combine traffic flows, and to concentrate pollution in those chosen areas.

Solutions

Provinces and other subnational authorities need to be given more possibilities for solving the problems by taking the objectives of the regulations into account, rather than having to strictly comply with the rules.

In a directive such as the Air Quality Directive, the question of health must take priority over environmental hygiene. In reforming the directive, this is the overall aim.

State aid

The aim of those rules is to ensure fair competition between companies from different Member States; fair competition can be hindered if one company receives state aid, while another does not.

Examples

A nature conservation organisation is earmarked as a business and is therefore subject to competition rules, when the province wishes to issue a grant to carry out a project (see case study 3 in annex 1).
The situation starts to become crippling if government aid for a swimming pool 50 km from the national border is not permitted for this reason. The rules also regularly reveal a somewhat outdated vision on cooperation between (subnational) authorities and businesses, often backed by knowledge institutions such as universities.
Research and innovation projects for example are characterised by a certain degree of unpredictability. It is possible that the focus will shift during the course of the project. A project of this kind may well have been started precisely to create the necessary freedom, and to investigate the boundaries, but state aid and public procurement rules are no longer suitable. One example is the relatively new concept of *living labs* (see case study 1 in the annex).
A precondition for the granting of aid by the European Commission is that the procurement rules must be complied with. However, a tendering procedure sometimes takes so long that the period within which the money must be spent (mostly one year) has already expired.
For public-private and public partnerships, subnational authorities may face a variety of different tendering issues. How can a province wishing to implement a project with a selected partner do so without having to undergo the compulsory tendering procedure? And how can a partnership consisting exclusively of public partners award orders to other partners in the partnership?

Solutions

The cooperation between government and public-private parties must have priority. With that in mind, just like research institutions, nature conservancy organisations should be permitted to carry out 15 to 20 percent of their activities on a commercial basis. If they remain below that limit, they will not be viewed as commercial players.
Cooperation between government, industry and other institutions, and cooperation between individual government authorities should not be weighed down with unnecessary administrative burdens.
In the new state aid rules introduced on 1 July 2014, there is more space and freedom for the Member States in respect of state aid. For example, the General Block Exemption Regulation now offers the opportunity to complete less stringent procedures, thereby facilitating the granting of aid. In practice, the European Commission maintains control in the form of stricter monitoring and supervision requirements. The subsidy scheme can still be rejected: the European Commission can exercise supervision and control.

Audit pressure and high execution costs ERDF

The audit pressure and high execution costs within the programme of the European Regional Development Fund (ERDF) mean that innovative entrepreneurs in the Netherland increasingly deliberately opt to not apply for an ERFD subsidy. The benefits are outweighed by the costs, and the risk of corrections to the promised subsidy is perceived as considerable. The balance between the value and the costs of the auditing regime is out of kilter so the direction of auditing shifts from positive to negative: costs are not legal until their legality has been explicitly demonstrated. The aim should be to determine whether the subsidies have been effectively spent. Rather than focusing in minute detail on checking the legality of submitted invoices, the audit should concern itself with what has been achieved with the European subsidy. The audit tower should be reduced to normal proportions. In accordance with the modern risk-based auditing approach, that as far as possible relies on audits already carried out by others, the spiralling tower of audit upon audit should be reduced to a pyramid.

Example 1: reduced legislation

Whenever the European Court of Auditors finds an error percentage that is too high, the European Commission responds by demanding even more checks and reports. The system attempts to prevent problems that have been observed in a single country by introducing new rules that apply to all countries. An example is the provision in the new ERFD regulations that a progress report must have been paid for within 90 days. This provision was included because it was identified in one country that the management authority was too slow in paying on the payments made by Brussels to beneficiaries. The auditing body is required to audit and report on this 90-day time limit. This means that the management authority must develop a system that measures lead times, taking account of the response time of the beneficiaries. Long lead times must be accounted for with supporting arguments. In the Netherlands, this problem is non-existent. Furthermore, it is not possible to make a payment when the money has not yet been transferred from Brussels. In two successive years, the Commission had only paid requests for payment dating from September in January in February of the subsequent year. In the Netherlands, therefore, some regions make an advance payment of ERFD funds, in order to guarantee the timely prepayment to beneficiaries, and to prevent delaying to the innovation process of the subsidy recipients.

The increase in the number of Member States and the pressure of time for arriving at agreements has led to an increased volume of regulations. The Regulation for the structural funds is almost twice as long, and the number of rules in the implementation regulations has trebled as compared with the previous period.

Solutions

To maintain or even add a rule to the regulations, a solid system of assessment of supporting arguments should be introduced. The process of preparing regulations should also be tackled differently: we should avoid including more rules and exceptions.

Example 2: reduced administrative burdens.

Do not bury simplifications by imposing complex conditions. Simplifications that are introduced can be negatively compensated for when Commission services impose too many conditions on their application. A good example is the new proposals for the structural funds. A number of simplifications were proposed and adopted by the Member States, and supported by the Parliament. The Commission services then used the so-called 'delegated' acts to restrict use of the simplification by imposing a whole raft of conditions on application. The objective of policy makers, namely to simplify the procedures, is thereby made unworkable and negated. An example of where this occurred relates to the stipulation that rates and charges that have once been approved within one European project/programme can also be used for other programmes/ funds. The EC subsequently argued that the rates and charges can only be used by the same types of subsidy applicants and for the same types of project. By stipulating in this way that the projects in question must be of the same type, unnecessary discussions are brought about and the process of simplification is sunk before it has even started.

Solutions

Carry out an impact assessment for regulations, which should also apply to further conditions. The result must at least be an improvement in terms of regulatory burdens and pressure. There should also be a concerted effort to limit the use (no, no, no, unless) of the authorities for regulating further 'gold plating' via 'implementing and delegated acts'.

Example 3: reducing audit pressure and audit burdens

SISA (Single Information Single Audit) is employed in the Netherlands among others by central government in accounting for payments to subnational authorities. The method employed is that an investigation must always be undertaken to determine what each next step of the audit ladder needs from previous steps in order to move onwards and thus minimise additional work. These requirements are charted out for 'all audit levels' and all with a view to burdening the beneficiary as little as possible. This is a method that should also be employed within Europe. It results in a framework of requirements that ideally is adopted and signed by all parties (including the European Commission). The most important requirement is that a joint audit framework is established that is 'predictable' for the beneficiary and provides legal certainty. Everyone knows what will be audited and how (predictability) and what the requirements are, and these agreements are reached simultaneously for all layers of the audit ladder. The principles of proportionality should also be more firmly anchored in the policy of the Commission.

Within a Single Audit system of this kind, all burdens can be further reduced in two ways, namely:

- By permitting more efficient audit systems that do not negatively affect the resultant certainty. In a statistical sample, you select a number of euros to be audited and on that basis pass a judgement. The euros in question appear on one invoice, and normally speaking you would then audit the invoice. The EC does permit statistical sampling as a method, but then requires that you not only audit the euros in question and the accompanying invoice, but the entire project. This then involves far more invoices, while the resultant certainty and reliability of the judgement is not improved.
- By attaching more value to the quality of the system (administrative organisation) of the management authority and the certifying authority. In the current situation, even after achieving the highest score for quality of the systems, 60% certainty must still be achieved in the project audits. This means huge amounts of additional work, whereas it should be possible to rely more on the quality of the system and as a result carry out fewer project audits. Here, too, reliability and certainty of the judgement passed by the auditor remain the same. In the current digital world, hunting out the original bank statements and purchase invoices takes beneficiaries and auditors a great deal of time, and can lead to considerable frustration, without the eventual result being any greater.

Solutions

If agreement is reached between the various units in the audit tower on the scope and basis of the audit, more SISA-based methods should be permitted in the guidelines. Differentiate between milder and stricter regimes, depending on the level of the subsidy amounts and the risk profile. Create space in EU regulations for basing audits on auditor's statements rather than on documentary evidence of costs paid for and incurred (invoices).

In audit regulations, the least burdensome and most efficient method should be made compulsory. The provinces have called for space for experimentation within the ERFD funds, for working towards possible solutions on that basis.

3

Transnational and cross-border bottlenecks

Over the past few decades, life has been made far easier for Europeans holidaying in another EU country. The introduction of the euro and the removal of internal borders have eradicated many formalities, so that it now makes no difference whether they stay in their own country or enjoy a holiday 1,500 km away from home.
For citizens working in another country, however, there are still numerous stumbling blocks. The situation can become highly complex due to differences in rules governing employment, social security and taxation. For businesses and knowledge institutions, the recruitment of personnel is no easy task. For Brainport in Eindhoven and the surrounding area, it still remains problematic to employ engineers from Hasselt, while employees dismissed from Philip Morris in Bergen op Zoom cannot, without considerable difficulty, be put to work 'on the opposite bank' in the port of Antwerp. At the end of the day, such hindrances tend to slow down local economic growth. On this subject, refer to annex 2 by the Institute for Transnational and Euregional Cross Border Cooperation and Mobility (ITEM) from the University Maastricht on labour mobility and transnational obstacles.

The need for a 'border eliminating policy' has been recognised for some time. Introducing a national border test was mentioned as a check to determine whether European rules have a restrictive effect on cross-border differences. The Dutch government rejected the introduction of this test, arguing that it was the differences in national legislation in the Member States that caused the discrepancies to grow. European regulations should in fact have the effect of simplifying matters.
It is not expected that in the near future national rules will be harmonised in such a way that all these obstacles are removed. By experimenting with tax rulings and other regional agreements, best practices are being developed that could also be used in other regions. After all, efficient and creative solutions do appear to be possible. When Ford Belgium closed its gates in Genk at the end of 2014, some employees were transferred to the VDL Nedcar factories in Born, in the Netherlands. Another example is the recent system of mutual diploma recognition in the Benelux, which could be adopted throughout the European Union.

Below we list a number of specific bottlenecks and their solutions relating to transnational policy.

Examples

Secondment Directive: Subnational authorities who employ seconded staff must take account of the Secondment Directive that guarantees a good working environment. This refers to employees who travel with their employer, or who are deployed via a temporary employment construction, for a transnational service.
They are entitled to the working conditions applicable in the country where they are employed: for example the break periods, minimum wages and health and safety rules.
In the spring of 2014, a European Enforcement Directive was adopted, the aim of which is to improve, promote and strengthen the practical execution, application and enforcement of the Secondment Directive. The Directive also contains measures to prevent abuse and evasion, alongside guarantees to protect the rights of the seconded employees.
The European Commission would be better served by encouraging cross-border cooperation in adjusted regulations than concentrating on enforcement instruments. This will enable not only authories but also social partners and possibly even judges to acquire a role. After all, they are the bodies responsible for labour law, as a whole. This approach would create greater support and a better understanding of the various enforcement systems within the EU.

Internships: for the European regions it is essential that young people acquire sound qualifications for the labour market. Internships, for example in neighbouring countries, are an excellent means of acquiring the necessary experience. At present, students in secondary vocational education carrying out an internship abroad are unable to receive expenses or travel costs in the event of commuting. An allowance is only possible if they take up accommodation abroad. This is in shrill contrast with the Erasmus programme that enables many students from a whole raft of countries to enjoy a well-subsidised internship lasting between two and 39 weeks. It is particularly desirable that these two sets of regulations be brought into line.

Right to choose unemployment benefit: Cross-border workers who become fully unemployed can only apply for unemployment benefit in the country where they are resident. This was determined by the European Court of Justice, based on the argument that the unemployed have the best likelihood of acquiring new employment in the country where they are resident, and should therefore keep themselves available for the labour market, in that country. Employees should be given the option to apply for an unemployment benefit in their country of work, on condition they were subject to the social security system in that country for a considerable period (five to ten years) as a cross-border worker.

Pensions: Employees who build up pensions in different countries should to be able to obtain a reliable overview of what they can expect upon retirement. This is in reconstruction at the

European level, for example via the Mobility Directive. However, different countries have different ideas on communicating pension information. At the same time, tax rules, which also influence the amount and composition of pensions, are not part of the directive.

Equality on the work floor: For cross-border workers, it is important that they earn the same gross and net amounts as their colleagues. This is not the case for certain professional groups. The salaries of teachers, drivers, pilots and seconded employees are for example not the same. This is because the rules in tax legislation are not aligned for these employees, and in certain cases are even contradictory to the rules for social security. Harmonisation of these rules is particularly desirable.

Levy on university lecturers: Due to the lack of coordination between the fiscal and insurance rules, the phenomenon of 'university lecturer levies' continues to exist in Europe. University lecturers and other teaching staff employed across national boundaries are faced with a levy from their country of residence during their first two years of employment, while they are still required to pay their social security contributions in their country of employment.

Annexes

Annex 1

Three case studies

Europa decentraal

1. Pilot projects or living labs

Businesses and knowledge institutions, including universities, are increasingly joining forces to establish pilot projects or living labs, where the product or service they wish to develop together is tried out in a situation that approximates reality as closely as possible. The initiators also involve the end users, consumers or other businesses and institutions in the pilot. The feedback from all stakeholders sometimes leads to important adjustments to the product or service.
The advantages of a pilot project or living lab are that the users end up with products or services that tie in better with their needs and capabilities, businesses manufacture products that are better matched to demand, and the knowledge institutions can test their ideas in practice.
This approach to working encourages and indeed accelerates innovative developments.
The European Commission recognises these advantages, and has included the phenomenon of the living lab in European funds. As a consequence, in principle they are eligible for subsidies, for example from the European Regional Development Fund (ERDF). However, there are other European rules that hinder the process, as demonstrated by the following example:

A university wishes to launch a pilot project for entrepreneurs from the small and medium enterprise sector (SME). Within the pilot project, a product will be tested and demonstrated. It has reached the final stage before being brought to market. The SMEs will be able to make free use of the facilities of the university.
The university submits an application for an ERDF subsidy, which comes up against a series of bottlenecks:

- Because the university intends to 'pass on' part of the subsidy to the participating SMEs, this is effectively a two-level subsidy. If the rules are strictly interpreted, this means that the subsidy has to be registered for a procedure that can take between three and eighteen months; a very long lead time for a project of this kind;
- The amount of the subsidy can be restricted by the rules on state aid. Because the product is nearly ready for the market, the idea is that the subsidy could result in unfair competition;
- Because the parties are already working together as unique partners in this pilot project, it is in many cases not possible for a public procurement procedure to have taken place for the selection of the cooperation partner. Because in the elaboration of the cooperation there could be indications of government orders subject to a compulsory procurement procedure, the subsidy application may end up being rejected on the basis of tendering objections.

Solutions

To create more leeway for pilot projects, and as a result to encourage innovation, these barriers need to be reduced and if possible eradicated. It would be a sound move, for example, to introduce a new exemption for pilot projects, thereby broadening the possibilities within the rules for state aid. If the possible 'passing on' of the subsidy to the SMEs then complied with the rules, it should be sufficient to issue notice, rather than requiring the long-term registration procedure. A simplified test for state aid that is carried out more rapidly could also work in favour of pilot projects. Within the European Fund for Strategic Investments (EFSI), this less strict test is already applied.

2. Construction of a broadband infrastructure

In the same way as several regions in other Member States, a number of Dutch provinces wish to encourage the construction of a broadband infrastructure in rural areas. Industrial operators are not willing to carry out this process, because it is commercially unattractive. The low population density means investments are high for them, with few clients in return.
The European Union is promoting the construction of (superfast) broadband, and has introduced a series of schemes to which provinces can apply for (additional) subsidy. There is for example a scheme within the European Structural and Investment Funds: *Connecting Europe Facility*. The European Fund for Strategic Investments (EFSI) also has a potential role. Nonetheless, it is often not possible to bring the subsidies and established plans together.

A province submits a subsidy application for the construction of new generation access (NGA), or superfast broadband. In principle, the investment costs for these networks are eligible for the subsidy. Since 1 July 2014, these projects have no longer been required to pass through the long and demanding notification procedure for state aid; it is enough for the province to simply issue an exemption notification.
Nonetheless, even this procedure is not an easy one; the subsidy can only be issued for construction in areas that as yet have both no infrastructure and where no infrastructure is set to be introduced in the next three years. Via a public consultation procedure, the province is required to determine whether these areas are set to remain 'blank spots' on the map. Such procedures are often very difficult, because for reasons of competition, businesses are unwilling to reveal their plans for the next few years.
According to the rules on state aid, the subsidy must be awarded on the basis of a 'public, transparent and non-discriminatory competitive selection procedure'. It is unclear for provinces when the procedure is sufficiently 'open and transparent' for the state aid rules; they have the feeling that too much emphasis is placed on possible falsification of competition in the awarding of subsidies, when the request in fact relates to a subsidy tender to which any number of parties can respond.

Solutions

It is not sufficient to make the state aid procedure for the construction of broadband less demanding. The conditions for obtaining an exemption from the notification procedure are very strict, and not in line with the 'lighter' procedure. A more effective method would be to introduce the lighter test as applicable for the Investment Plan for Europe (EFSI). In a previous instance of broadband construction by provinces, the European Commission issued a so-called comfort letter, making it clear to all parties that a less stringent procedure would be sufficient. Finally, it would be extremely useful for the provinces to be able to estimate in advance the costs they are expected to incur, in order to comply with the rules on state aid and public procurement procedures. By way of illustration: for one broadband project a province was forced to employ an FTE for a whole year, in order to fulfil the requirements of the procedures. In drawing up the new rules, the European Commission should prepare an estimate of the costs for subnational authorities via an *impact assessment*.

3. Area development

There are numerous regional industrial estates throughout the Netherlands that are out of date and sometimes in poor condition. To encourage the regional economy and employment opportunities, provinces sometimes have industrial estates thoroughly redeveloped. For this purpose, the province joins forces with a project developer.
In this form of area development, the province has to deal with a variety of EU rules. If the province wishes to compensate for the effects on the environment of the increased economic activities, something that happens quite regularly, yet another set of rules then applies. As shown in the following case study, the entire situation becomes highly complex:

The province wishes to redevelop and expand an industrial estate to once again make it attractive for businesses from the region as an establishment location. A project developer is interested in purchasing the land. The agreed price is below the market value, but in exchange, the project developer has agreed to prepare the land for construction and ensure access.
When selling the land, the province has to deal with the European public procurement, state aid and competition rules. The state aid rules concerning land sale will be tightened up: aspects from the procurement rules will be included in the land sale rules, according to which the procedure now has to be open and transparent. The provinces are uncertain as to when the procedure is sufficiently open and transparent.
As a result of renewed activities, nitrogen emissions rise. EU regulations oblige government to protect biodiversity and so-called Natura2000 areas, and offer a series of possible subsidies in that connection. To comply with the rules, and to compensate for the emission of nitrogen into the adjacent nature area, the province instructs a nature conservation organisation to raise the water level, and to clean the nearby peatland. For this purpose, the province intends to issue a subsidy to the organisation.
The province applies for a European subsidy for the measures in the nature area. However, in line with recent judgements by the Commission and in accordance with case law, the nature conservation organisation now has to be viewed as a business, and here too the rules on state aid apply.

Solutions

A greater insight is required into the consequences of certain forms of regulations, for subnational authorities. In the event of the sale of land, three types of rules apply, and even those rules seem to be in conflict with one another in terms of implementation; this again results in uncertainty and lack of clarity. An impact assessment could provide the necessary insight. Nonetheless, it is important that the assessment of the consequences be carried out after the rules in question have been amended by the European Parliament and the Council. After all, these institutions often tend to introduce other far-reaching changes.
The rules on state aid should not be applicable to nature conservation organisations, at least as long as their activities are not economic and are exclusively aimed at providing support. In certain sectors, such as research, education and innovation, an exemption of this kind already applies, and could be extended.

Annex 2

Case studies

The Institute for Transnational and Euregional Cross Border Cooperation and Mobility (ITEM) at the University of Maastricht

Labour mobility and transnational obstacles

1. Introduction

European Commissioner Frans Timmermans has called upon the Provinces of Noord-Brabant and Limburg and the Brainport on several occasions to identify specific transnational obstacles. In that light, particular reference should be made to the Agenda for Better regulations for better results (COM(2015) 215 final).
This document is a memorandum in which a number of bottlenecks for transnational activities are outlined. Activities should be broadly interpreted in this context. Take for example employment-related activities but also study activities. It should further be noted that this list of bottlenecks is anything but exhaustive.

2. Purpose

The purpose of this memorandum is to identify a number of transnational bottlenecks that need to be tackled (on the basis of European law). The bottlenecks identified are suitable for presentation to Frans Timmermans. It should be made clear that the bottlenecks presented are just a few examples.

3. Bottlenecks

This paragraph lists a number of bottlenecks that can be described as applying to labour mobility in general. As already mentioned, this memorandum in no way represents an exhaustive list of potential bottlenecks. We have opted to focus on five themes, namely: transnational pensions (par. 4.1), secondment (par. 4.2), students/interns (par. 4.3), diploma recognition (par. 4.4) and better regulations and border effect reporting (par. 4.5). With the exception of the last theme, these five themes follow the same structure: first applicable (European) regulations are outlined in brief, followed by an explanation of the problems, ending with a series of possible proposed solutions. The last theme 'Better regulations and border effect reporting' follows a different structure, given the intended purpose and the broad scope of the theme.

4. Five themes

4.1. Transnational pensions

4.1.1. Transnational pensions

IORP Directive, COM(2001) 214 final, Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision (IORP II), SWD(2014) 102 final (article 12 cross border activities), Mobility Directive 2014/50/EU, article 6 Directive 98/49/EC, Secondment Directive 96/71/EC, Directive from het European Parliament and Council relating to the enforcement of Directive 96/71/EC on the posting of workers in the framework of the provision of services, COM(2012) 131 final, Bilateral treaties for preventing double taxation.

4.1.2. Problem

In the framework of the free movement of workers, workers employed transnationally (both seconded workers and border workers) should not be hindered in establishing adequate pension provisions. One of the possibilities could be an international value transfer. In practice, however, insufficient international value transfers actually take place. This is partly due to the imposition of certain restrictive conditions, but also the absence of any connection between pension systems,

as a result of which accepting a position of employment abroad becomes a difficult choice. Qualification problems between first (state pensions such as the AOW) and second pillar (for example on the basis of the contract of employment or collective labour agreement) can mean that shortfalls arise in pension establishment. Subsequently, it should be noted that the fiscal processing of (the establishment) of pensions does not work in the same way in every country. Pension schemes are not comparable, as a result of which there is no mutual recognition of pension schemes. As a consequence, the same fiscal facilities are not awarded to foreign schemes. The Mobility Directive and the revised Secondment Directive are on the one hand aimed at improving pension retention for mobile workers and on the other hand protecting the position of the seconded worker, whereby specific supplementary company pension schemes are excluded. Neither in the one directive nor in the other is the relation with the problem in terms of fiscal issues established. The absence of fiscal control and supervision acts as an obstacle, and results in shortfalls in pension establishment for cross-border workers.
Because of the fragmented pension entitlements that can be established here and there in different countries, the cross-border worker also has little insight into his total pension establishment and the possible financial and fiscal consequences.

4.1.3. Possible solution(s)

Solutions should be sought in a system of common pension characteristics as a result of which pension schemes from different countries can be compared with one another. Following a determination of comparability, mutual recognition of fiscal rules relating to pension schemes should contribute to the unhindered continuation of pension establishment in a cross-border situation. Wherever continuation of a foreign pension scheme is not eligible, but pension has been established in a fragmented manner in different countries, a pension track and trace system could provide clarity on the established pension. If workers know that they will be able to obtain a clear overview (both financial and fiscal) of their established pension on the basis of such a system, they will be quicker to choose to work over national boundaries. Lack of information will then no longer be an obstacle.

4.2. Secondment

4.2.1. Fiscal issues

4.2.1.1. Applicable (European) regulations

Among others Article 15 Treaty between Netherlands and Belgium, and article 15 Treaty between Netherlands and Germany (new).

4.2.1.2. Problem

1. In the event of international secondment, in other words secondment by a company that makes its employees available to a third party, use is often made of the fiscal so-called 183-day settlement, in customs treaties. This means that the right to levy tax on the salary of the seconded employee remains with the country of residence. This can falsify competition in respect of employees who live and work in the country of employment. Individual states often solve this problem by stipulating that the party insourcing the employee can be viewed as employer in the country of employment as a result of which the country of employment is authorised to levy tax on the salary. However, this does not mean in practice that all problems have been solved. If the levying of tax is awarded to the country of employment, the question then emerges whether the employee in question will receive the same fiscal facilities as an employee living and working in that country.
2. As a consequence of secondment, no equality on the shop floor is achieved with an employee who lives and works in the same country. The underlying thought behind the applicable regulation for secondment is that ties with the country of residence or secondment are strong. On top of this, after 183 days (fiscal secondment rule), the tax and social security obligation then diverges, in the event of a so-called A1 declaration (see also par. 4.2.2).

4.2.1.3. Possible solution(s)

1. Better transnational cooperation should be established between the relevant bodies in respect of international secondment.
   As concerns fiscal issues, it is questionable whether tax-deductible items should be permitted proportionally to the income from employment taxed in the country of employment.
2. It must be investigated to what extent there is inequality on the shop floor. A possible solution could be to bring about a balance in tax and social security obligations.

4.2.2. Social security

4.2.2.1. Applicable (European) regulations

Secondment Directive, Enforcement Directive, Regulation 883/2004 and its application order Regulation 987/2009, decision A2.

4.2.2.2. Problem

1. In respect of the Secondment Directive, there are a number of bottlenecks. The question arises as to what should be taken to mean by ‘provision of services’ and ‘secondment’. Enforcing bodies can be reticent in terms of qualifying a given situation, as a result of which employees do not always receive what they are entitled to on the basis of applicable law. The same applies to compliance with conditions of employment in the Secondment Directive. According to the directive, a number of minimum conditions should be complied with. The Enforcement Directive aims to harmonise the enforcement instruments.

2. A1declations issued by the competent bodies from the seconding country must be respected by the receiving Member State. These statements can only be withdrawn by the bodies from the seconding Member State. As a result of the A1 declarations, social security premiums can be levied in the country of employment. The question is whether the premiums are actually paid to the seconding country. This can result in falsification of competition.

4.2.2.3. Possible solution(s)

1. Better and stricter compliance with the Secondment Directive must be enforced. To ensure correct implementation of the Secondment Directive and the Enforcement Directive, there must be more efficient transnational cooperation.
   Focus should be placed on promoting transnational cooperation instead of harmonising enforcement instruments (Enforcement Directive). This applies both to government bodies and to social partners. As a consequence, the Member States can be brought on board, so that more (bottom-up) support is created.
2. A simplified revision of the A1 declaration by the receiving (employing) country.

4.3. Students/interns

4.3.1. Applicable (European) regulations

General: Article 3, paragraph 2 of the Treaty on European Union (VEU); Articles 165 and 166 of the Treaty on the functioning of the European Union (VWEU); Regulation 1288/2013 (Erasmus+).
For Union citizens and their family members: Articles 21, 45, 49 VWEU, Directive 2004/38 (Union Citizens Directive), Regulation 492/2011 (free movement of workers).
For so-called Third country citizens (non-EU citizens): Directive 2004/114 (Student Directive).

4.3.2. Problem

1. Germany admits third country nationals on the basis of Directive 2004/114 to attend the RWTH in Aachen. However, Aachen is facing a shortage of student accommodation, while just over the border in the Kerkrade/Heerlen area, there is huge house vacancy. The residents' permit issued by Germany on the basis of Directive 2004/114 however offers no entitlement to 'free movement' to the student: in principle they may therefore not become established in the Netherlands.
2. The mobile student is not always entitled to a grant for his studies: 'home member states' are not required to provide exportable student grants (the Elrick case), and 'guest member states' can deny foreign students who study on their territory access to student grants for the first five years of the residence (Förster case). Even if 'Home member states' do provide exportable student grants, conditions can be imposed which sometimes make life very difficult for a student with a very mobile past.

3. Inflexible Erasmus financing for internships: the Erasmus+ programme offers travel and expenses payments for students who follow an internship abroad as part of their educational programme. However, this payment applies only if the student actually moves to another EU country; students in border regions who wish to follow an internship abroad but who do not move abroad are exempted.

4.3.3. Possible solution(s)

1. In this case, a bilateral solution: Germany monitors whether the student actually studies (in accordance with the Student Directive) (monitoring study progress). On the basis of a valid (German) residence permit for study purposes, the Netherlands then issues a special residence permit, so that the students can move into housing in the Netherlands. In the longer term, consideration could be given to a thorough revision of Directive 2004/114 (that goes beyond the current proposal), in which this solution is structurally embedded: following admission (and subject to continuous monitoring) by one Member State, students are entitled to free movement during the course of their studies.
2. A possible solution would be to consider a system of coordination, such as perhaps inclusion of student grants in Regulation 883/2004. Another possibility is to create financing opportunities for students at European level and/or to expand those possibilities (for a starting point, see: Erasmus+, Regulation 1288/2013).
3. A possible solution would be to not make travel and expenses allowances strictly dependent on changed place of residence, but to assume a change in learning and working environment abroad.

4.4. Diploma recognition

4.4.1. Applicable (European) regulations

As concerns *professional* recognition of diplomas (professional practitioners):
Directive 2013/55/EU in revision of Directive 2005/36/EC concerning the recognition of professional qualifications and and Regulation (EU) no. 1024/2012 concerning the administrative cooperation via the Information System of the internal market ('the IMI regulation').
As concerns *academic* recognition of diplomas (individuals not (yet) in professional practice, who primarily wish to have their diploma recognised for study elsewhere): there is no European Directive specifically applicable in this case. Of course, the general rules for the free movement of persons apply. Beyond the EU framework, initiatives have been taken in the framework of the Bologna Process (Lisbon Recognition Convention).
A new Benelux treaty on recognition of diplomas and Anerkennungsgesetz 2015.

4.4.2. Problem

Professional recognition and academic recognition are still too often confused. Excessively high demands are often imposed, that are contrary to free movement. Procedures are often long and

bureaucratic and not always free of charge. One example is employment of paediatric surgeons trained in Germany, in the Netherlands. These experience problems. There is no such training in the Netherlands.

4.4.3. Possible solution(s)

Professional groups and above all the competent bodies for educational institutions should be better informed of the rules, and should develop a framework according to which they assess applications so that the recognition procedure has as few negative effects as possible for the applicant.

4.5. Better regulations and border effect reporting

Recently (19 May 2015), the European Commission published a series of documents for better regulations, in particular the Agenda for Better regulations for better results (COM(2015) 215 final). Following on from that publication, a number of proposals were formulated to improve consultation of the stakeholders, which consultation should be transparent, should reach all relevant stakeholders, and a guarantee should be provided that all necessary data will be collected in order to take carefully considered decisions. In the past, the focus on better regulations was on reducing administrative burdens for businesses, and in particular SMEs. This was indeed one of the key objectives of the REFIT programme. In the new agenda, the consequences of European regulations on local and regional governments, in particular for cross-border regions, were less widely discussed, although the European Commission has emphasised collaboration with the Committee of the Regions and in particular the double test of subsidiary and the proportionality of measures. However, the Committee of the Regions also has only limited authority to monitor European regulations, and to convert European regulations in respect of cross-border regions. As a consequence, at all levels of government, there is a need for improving existing cross-border effects. A precondition is a bottom-up approach and a proactive approach to cross-border regions. ITEM will develop a method for an annual border effect report in respect of cross-border situations in the Benelux and Germany. The idea is that by screening European, national and regional regulations on a yearly basis, a shortlist of dossiers will be created, that will then undergo more detailed assessment ((ex ante and ex post). The results of the report will then be presented each year in the autumn at the ITEM conference, and brought to the attention of European, national and regional policy makers. Firstly, this should help the regions to identify negative effects of regulation at all levels of legislation, and secondly, aims to deliver valuable contributions to national and European law border effect assessment, by delivering specific data and analyses from individuals who have acquired regional expertise through personal experience.

Annex 3

Sources

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Colophon

Interprovinciaal Overleg (IPO)
Huis van de Provincies
Herengracht 23
2511 EG The Hague
Telephone +31(0)70 888 12 12
www.ipo.nl

House of the Dutch Provinces in Brussels
Trierstraat 59-61
B-1040 Brussels
Telephone +32 (0)2 737 99 57
www.nl-prov.eu

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