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Henri de Waele / Ellen Mastenbroek  
(eds.)

## Perspectives on Better Regulation in the EU

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Rheinische  
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Universität Bonn

Center for European  
Integration Studies

Genscherallee 3  
D-53113 Bonn  
Germany

Tel.: +49-228-73-1810  
Fax: +49-228-73-1818  
<http://www.zei.de>

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**Radboud University**



1614  
1602

Dr. Barbara Beijen is Assistant Professor of Administrative Law, Radboud University Nijmegen.

Prof. Dr. Pieter Kuypers is Lawyer-Partner at AKD Brussels; Professor of National and European Public Procurement Law, Radboud University Nijmegen.

Prof. Dr. Ellen Mastebroek is Professor of European Public Policy, Radboud University Nijmegen; Director of EUROPAL, research network for the Europeanisation of Policy and Law.

Dr. Stijn van Voorst is Assistant Professor of Public Administration, Radboud University Nijmegen.

Prof. Dr. Henri de Waele is Professor of International and European Law, Radboud University Nijmegen and University of Antwerp; Co-Director of EUROPAL, research network for the Europeanisation of Policy and Law; Senior Fellow of the Centre of European Integration Studies, University of Bonn.

Prof. Dr. Helen Xanthaki is Director of PGLaws, University of London; Professorial Teaching Fellow and Honorary Professor, University College London; Senior Associate Research Fellow, Sir William Dale Centre for Legislative Studies, Institute for Advanced Legal Studies; President of the International Association for Legislation.

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## **Perspectives on Better Regulation in the EU – Between Microscopes and Telescopes**

For most people concerned with ensuring good governance, “Better Regulation” (BR) sounds like a nigh irresistible proposition. This is especially so when combined with a governmental pledge to be “big on big things, small on small things”.<sup>1</sup> Under different names, the core ideas behind BR have in fact been on the European agenda for several decades already. Initially, the recipes were formulated with relative ease, undergoing repeated refinements and adjustments over the years.<sup>2</sup> As always, however, the proof of the pudding remains entirely in the eating: what have been the achievements of the BR program? Still today, alas, it does not seem appropriate to unfold a “mission accomplished!” banner.

Definitions of the term “Better Regulation” have varied. The eponymous EU program is generally considered to boil down to a set of activities and instruments aiming to systematically appraise supranational policies and improve their workings. It comprises various processes, actors, tools and compacts, including legislative

- 1 J. C. Juncker, “The Juncker Commission: The Right Team to Deliver Change”, Brussels, 10 September 2014. Online at: [http://europa.eu/rapid/press-release\\_SPEECH-14-585\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-585_en.htm).
- 2 See e.g. H. Xanthaki, “The Problem of Quality in EU Legislation: What on Earth is Really Wrong?”, (2001) 38 *Common Market Law Review*, pp. 651-676.

*Internet resources, last date of access: May 16, 2019.*

quality evaluations, consultations, and impact assessments.<sup>3</sup> The self-proclaimed “last chance” Commission of Jean-Claude Juncker that took office in 2014 launched a single set of methodological templates for BR activities. It moreover decided to reconfigure the existing oversight body, rebranding it the Regulatory Scrutiny Board (RSB). Also, an inter-institutional agreement was concluded between the Commission, Parliament and Council in 2016 that saw them all sign up to the carrying out of evidence-based analyses of amendments proposed in the Union’s law-making process.<sup>4</sup> One particular new initiative focused on “regulatory fitness and performance” (REFIT) checks, mapping opportunities for simplification and reduction of unnecessary costs.<sup>5</sup> A mid-term review was published in 2017, followed by a report of the Court of Auditors. In the meanwhile, numerous scholars conducted their own inquiries into the subject-matter.<sup>6</sup> With the completion of the Juncker Commission’s term of office now close at hand, the time seems ripe to draw up some final eulogies or obituaries.

In such studies, a crucial benchmark may be believed to lie in the (experienced quality of the) output. Allegedly however, with the choice for mechanisms such as impact assessment and ex-post consultation, which invite a wider feedback and participation, high public expectations were raised as well with regard to input and throughput legitimacy.<sup>7</sup> Under REFIT, a specific ambition has been the identification of proposals in need of withdrawal, as an essential part of the promise to “cut red tape”. Correspondingly, no less than

3 C. Radaelli, “Halfway through the Better Regulation Strategy of the Juncker Commission: What Does the Evidence Say?”, (2018) 56 *Journal of Common Market Studies*, p. 85.

4 O.J. [2016] L 123/1.

5 European Commission, “Regulatory Fitness and Performance Programme – Scoreboard Summary”, 24 October 2017, p. 4.

6 See e.g. S. Garben and I. Govaere (eds.), “The EU Better Regulation Agenda – A Critical Assessment” (Oxford: Hart/Bloomsbury 2018).

7 A. Alemanno, “Better Regulation: Holding Martin Selmayr Accountable”, available on SSRN. See: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3251856](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3251856).

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73 proposals were retracted in 2015 alone. Yet, due to the lack of preceding evidence-based analyses of their merits, this move caused an unexpectedly broad upset – amounting to a “false start” in the eyes of many commentators. The conceptual fuzziness of the REFIT agenda, simultaneously pursuing a set of highly diverse goals, also cast persistent doubts with regard to its scientific foundations.<sup>8</sup>

In quantitative terms, the operation has nevertheless borne some fruit. For instance, the number of Commission outputs at the end of 2018, compared to those in 2014, can be seen to accord with the “doing less more efficiently” paradigm.<sup>9</sup> Commentators have equally lauded the novel emphasis on consultation, the effective reform of the RSB, and the introduction of ex post evaluations into the policy cycle. All the same, the question is left open whether the efforts resulted in an enduring, measurable increase in quality of the EU rules. In similar vein, the Commission has been said to disingenuously deploy causal plots, doomsday scenarios and narrative dramatization in its impact assessments, in order to garner consensus and support for the proposals it wishes to maintain.<sup>10</sup>

The current volume originates in an academic gathering where attempts were made to comprehensively take stock of the BR program, challenge vested assumptions, and advance the existing knowledge base. The four main chapters in this booklet contain a digest of two thematic and two sectoral seminar contributions, employing innovative telescopic techniques alongside microscopic ones. First, Helen Xanthaki outlines an original argument for determining the success of the BR program on the basis of its own principles and intentions. She identifies several shortcomings in this regard, and calls for greater compliance with the formulated

8 Radaelli (n. 2), p. 90.

9 S. Blockmans et al., *What Comes After the Last Chance Commission?* (Brussels: CEPS 2019), p. 15. The Commission did develop an obfuscating tendency to bundle proposals and label them as a single package. See: <https://www.politico.eu/article/commission-juncker-less-regulation-promise-falls-short/>.

10 C. Radaelli, C. Dunlop, O. Fritsch, “Narrating Impact Assessment in the European Union” (2013) 12 *European Political Science*, p. 500.

guidelines and tools. To her mind, the alternative only risks to alienate EU citizens further. Next, Stijn van Voorst and Ellen Mastenbroek present the outcomes of their research on ex-post legislative evaluation, exposing that the Commission tends to concentrate on evaluating directives and complex legislation. Moreover, it appears that evaluations by external evaluators are of higher quality than internal evaluations. Overall, they do believe that the Commission has upped its game over the years, and performs relatively well on this front. Hereafter, in a sectoral assessment of the environmental domain, Barbara Beijen zooms in on developments with regard to the many directives in the field concerned. In an earlier study, she found that several such instruments were poorly aligned with each other, that problem definitions were often ill-defined, that their scope was very extensive, and often heavily reliant on soft law. According to her, despite the grand ambitions that have been formulated, the improvements in recent years only seem marginal. Finally, Pieter Kuypers delivers his assessment of the BR agenda in the domain of public procurement. One of the goals here has been to make the rules more accessible. Kuypers notes, however, that the volume of legislation over the last decade has doubled, and became increasingly detailed instead. He proposes a reversion to simpler wording, as well as an outright decrease in legislation, also with an eye to avoiding gold-plating – the maligned practice of Member States going wholly or partially beyond EU requirements in their domestic implementation.

At the end of the seminar, it was argued that contemporary researchers have just begun to scratch the surface of BR policies and outputs, and obviously, the selected contributions provide plenty of food for further thought themselves. The concluding roundtable morphed into a flagging of cross-cutting issues that are yet to be addressed satisfactorily. For starters, one may wonder whether it is ultimately most advisable to resort to quantitative or rather to qualitative parameters when gauging the success of any regulatory improvement scheme. The ever-increasing complexity of modern society suggests



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an ever-fading feasibility of numerical reductions, with every new opening demanding the imposition of new constraints. Contrary to an established wisdom, “less” could thus never truly mean “more” here (notwithstanding that, preferably, the individual rules within an inevitable large quantity are themselves kept as compact as possible – as convincingly argued elsewhere in this volume).

Second, there was the well-received opinion from multiple panelists that Better Regulation boils down to a necessarily continuous PR exercise. In other words, because of its structural appeal in the eyes of the public-at-large, no government can reasonably go without it; small wonder then that the EU keeps bringing it up. One might add that if the underlying idea had been properly internalized, there would indeed no longer be any need to trumpet it so loud and often.

A third daring thesis pertained to the correct level of realization, whereby a BR program pushed predominantly “from the top” was considered bound to remain limited in effect. After all, its success will always stay critically dependent on a proper execution “further down the line”. Specifically in a polity that spans over two dozen countries with peculiar national idiosyncrasies and constitutional power divisions, this would appear to call for a principal realism and humility amongst the supranational nomenclature.

At the panel’s closing, it was advocated that the popular creed of “doing less more efficiently” might well constitute a dual impossibility: instead, one ought to focus either on becoming more efficient, or on trying to do less. Arguably, the aforementioned slogan invokes a classic dilemma, whereas it is simply utopian for an atypical organization like the EU to accomplish both at the same time.

On the whole, similar to the underlying seminar, this booklet offers but a snapshot of the current state of play, politically and academically. It hopes to enable readers to broaden their insights in a succinct fashion, inspecting the multifarious dimensions of the *problématique* from up close and afar. The timing of the publication coincides with the latest BR review of the Commission, completed in

the first half of 2019, so that the findings can be neatly juxtaposed. Despite the lofty intentions and the tentative achievements so far, it must be clear to the key stakeholders that there is still ample work left to be done. Whatever the future holds for EU governance, on the shoulders of Europe's governing class continues to rest, as one author in this volume puts it, a "mammoth task".

*Helen Xanthaki*

## **Using Better Regulation as a Methodology for Achieving Better EU Legislation – A First Approach**

### ***The problem***

The European Union (EU), driven in particular by the cabinet of Frans Timmermans, is at the forefront of regulatory innovation. EU regulation is widely viewed as a desirable model for innovative responses to the popular need for structured, methodologically sound, flexible, and easily applicable regulatory response to challenges of competitiveness. Effectiveness, of regulation and legislation, is at the forefront of the regulatory philosophy of the EU.

However, despite the popularity of the EU's regulatory approach, EU legislation, which is a main regulatory tool, remains sub-standard. One can attribute this legislative ineffectiveness to a number of objective factors. First, and the most frequently quoted within EU circles, is the inevitable futility of attempting to accommodate within a single text a multitude of national legal systems, legal and spoken languages, and legislative styles; and to host them all under a harmonized umbrella of ever changing aspirations of integration. There is little doubt that the hurdles presented in such an effort are, to an extent, insurmountable. Second, and well established in bibliography, is the lack of an agreed definition of effectiveness, even within the EU institutions that seek to achieve it. Effectiveness has been defined with reference to regulatory concepts but not yet with reference to the legislative product. It is difficult to imagine successful reach of an undefined goal. Third, and also well established in bibliography, is the relative exclusion of legislation from the

“Better Regulation Agenda”. In the EU’s past, numerous initiatives have been introduced to perfect EU legislation: from the Sutherland criteria to Inter-institutional Agreements, to “Better Regulation”. They all explore regulation, and post legislative scrutiny, but not legislation as a process and a product. One wonders whether this is due to the perception that legislation is somehow out of reach for regulators (a perception that would be supported by the complexity of legislative processes in the EU and the predominance of political compromise in the EU legislative procedure) or whether this is due to the perception that legislation is out of reach of Better Regulation.

This paper hypothesizes that “Better Regulation” can and must be used to better EU legislation by providing a tested, evidence-based methodology that can draw a new strategy for the EU’s legislative policy for better EU legislation.

### ***The question and its methodological validity***

Indeed, such a methodology can derive from the Commission’s “Better Regulation Guidelines” (SWD [2017]) as supplemented by the 2017 “Better Regulation Toolbox”.<sup>1</sup> But, before moving onto the application of “Better Regulation” methodology on the EU legislative strategy, one has to establish that this would be a methodologically valid approach.

The first question arising here is whether legislation is covered by the field of application of the “Better Regulation Agenda”. The toolbox clarifies that its tools “cover the relevant aspects of all new initiatives and existing policy interventions”; and the guidelines “(...) apply to DGs and services involved in the preparation, implementation, application or evaluation of EU interventions and associated stakeholder consultations”<sup>2</sup>. One could argue that legislation as a product is not conducive to the application of “Better Regulation”.

1 See: [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en).

2 Ibid., Tool 1.1.

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But legislation as a strategy or policy certainly is. In other words, the “Better Regulation Agenda” seems to be rather robustly and expressly capable of applying to a new legislative strategy initiative and to all existing legislative policy interventions. And so, the “Better Regulation Agenda” and tools apply legitimately to a strategy on EU legislation. For the purposes of this argument, it is quite irrelevant to decide whether the subject of this proposed abstract overarching view of EU legislating is really a new strategy or an existing policy, although preference would be with the former as EU policies tend to be prescribed expressly in the constituting documents of the EU.

Having established that a new strategy for better EU legislation (overarching above DGs and institutions) is within the scope of the “Better Regulation Agenda”, and can therefore utilize the “Better Regulation” methods and tools, one must address a second question. Can “Better Regulation” apply to itself? Since legislation is a tool for regulation, can “Better Regulation” self-apply to one of its constituting parts? One cannot see why not. Viewing the pursuit for a strategy for better EU legislation as an initiative places it within the “Better Regulation Agenda”. And focusing on its production by DGs and services renders the application of “Better Regulation” applicable to a legislative strategy too.

### ***Applying BR methodology: passing the DECIDE test (G 11/12)***

Having established the applicability of “Better Regulation” to a new legislative strategy, let us begin the application by placing the new strategy under the DECIDE test. This will ensure that a new EU legislative strategy can be legitimately and effectively pursued by the EU.

The first element of the DECIDE test invites the identification of the key characteristics and type of the proposed initiative. The proposed new EU legislative strategy would qualify as a “major” initiative for a holistic and principled new strategy for the EU’s legislative

approach. This classification guides us to the required process, which is political validation from the lead Commissioner, Vice-President and First Vice-President following an entry created in DECIDE and a roadmap agreed with the Secretariat-General. In other words, this new initiative can be initiated by the Timmermans cabinet, under whose jurisdiction lies “Better Regulation”. It would require political support within the leadership team of the Commission, but one would expect this to be present if one takes into account the widespread support of regulatory innovations so far. The second element of the DECIDE test invites the identification of the scope and the objectives of the proposed initiative. There seems to be no struggle in doing so. The scope of a new legislative strategy would be to achieve better EU legislation: since legislation is a tool for regulation, competitiveness can be nurtured by a new, less complex and more user-friendly legislative net that would invite implementation and effectiveness within the EU, and investment and competitiveness from outside the EU. “Better Regulation” means “designing EU policies and laws so that they achieve their objectives at minimum cost”<sup>3</sup>: a new legislative strategy would support effectiveness and cost efficiency. Moreover, one could argue that better EU legislation favors not only companies and competitiveness but also EU citizens, thus balancing the financial with a social EU profile. Good legislation would enhance the respect of subsidiarity and proportionality; would provide the means to mainstream sustainable development into the Union’s policies; and would contribute to re-establishing direct communication with EU citizens, thus facilitating loyalty to the organization and its ideal of EU integration.<sup>4</sup>

On the point of subsidiarity, is it the EU that should act for a better EU legislative strategy? The answer can only be affirmative. This is about EU law, designed and produced within the EU. It is the EU and the Commission as the main initiator of EU legislation that must take the initiative. There is no doubt that member states must learn to share

3 Better Regulation Guidelines, p. 4.

4 Ibid., p. 4-5.

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the strategy. After all, “Better Regulation” views EU legislation as a shared responsibility. But the steering power must come from the EU since results cannot be adequately achieved at the national level (subsidiarity principle). At this point, it is worth noting that the initiative could be a more holistic one, involving all main EU institutions. In *Tool 1* of the “Better Regulation Agenda”, the European Parliament, Council and Commission reassert their recognition that delivering high quality legislation is a joint responsibility for legislation meeting four criteria. It may be worth considering focusing on such legislation as perhaps a trial, and involving all three main institutions. Of course, one could apply the four conditions to the proposed legislative strategy, thus arguing that, if these are met, the initiative can be a joint one. Let us explore the legality of this option by assessing the strategy against each criterion.

One, this is an area where it has the greatest added value for European citizens and strengthen the competitiveness and sustainability of the Union’s economy. The proposed new legislative strategy fulfils this criterion as the identification of its scope under DECIDE proved that it would be of great benefit to citizens and companies, balancing the EU’s financial and social profile.

Two, it must deliver the Union’s policy objectives in the simplest, most efficient and effective way possible. This is a rather vague condition. But there is a solid argument to be made that the most efficient and effective legislative step after more than 60 years of legislative integration and continuing legislative fragmentation would be to pause the introduction of even more, fragmented legislative texts. And to now focus on identifying a methodologically sound, principled, and “Better Regulation” compliant structure for the EU’s legislative approach.

Three, it must avoid overregulation and unnecessary administrative burdens for citizens, administrations and businesses and particularly SMEs. This a condition easily met by the proposed initiative. The strategy aims to better legislation. Unnecessary regulation and

administrative burdens are constitutive elements of the notion of effective law, where necessity and simplicity are *conditio sine qua non*. The condition serves as a good reminder to include these two elements to the philosophy of the legislative strategy proposed here.

Four, it must be designed to facilitate transposition and practical application. The strategy is indeed designed for practical application, this is its whole point. And it does aim to facilitate transposition, as effectiveness of EU law is a joint responsibility with the member states involving the whole legislative package of EU and national implementing legislation. It seems therefore that there is scope to investigate the feasibility of a joint initiative of the main institutions towards better legislation in application of the Better Regulation Tools.

Finally, DECIDE invites the identification of the “Better Regulation” tools to be applied to the proposed new legislative strategy. These would be evaluation, impact assessment, implementation plan, and public consultation. Let’s take them in turn.

### ***Proposed BR Tool 1: Evaluation***

Evaluation calls for an assessment on the feasibility and effectiveness of the measures proposed against the goals to be achieved. For the proposed new legislative strategy this is a truly difficult assessment. Not because there is difficulty in reaching a conclusion, but because conclusions can be really hard to bear. The question really is whether an EU of 27 member states, or more, can really achieve good legislation. There is little doubt that this is a mammoth task. Not necessarily because of the multiplicity of complexities in a legislature for so many diverse jurisdictions, legal terminologies, languages, and diverse legal traditions. Not even necessarily because compromise lies at the heart of EU law-making. But mainly because the goal pursued is effectiveness of legislation, and this is set against a cultural, legal, social, financial and political environment.



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By definition, effective legislation serves the particular requirements of a specific executive within the particular environment of the jurisdiction. And thus, effectiveness requirements differ between diverse environments. The EU has not yet reached a level of homogeneity that can allow a single legislative text to serve the same effectiveness in all its member states to an adequate degree. Despite the levels of standardization and harmonization, the peoples and countries of the EU retain their national eccentricities in culture, religion, politics, finances, and law. It is this strength of the EU that prevents it from achieving effectiveness by means of a single legislative text.

This leads to a mismatch between the regulatory goals of the EU and the legislative instruments available to its legislating bodies. Effectiveness could be served if the EU were to legislate solely via directives, setting common regulatory goals but allowing national implementing measures to introduce diverse mechanisms for their achievement within each member state. Regulations could prove rather ineffective legislative tools, even when their need for transposition is regained. The result of this proposed switch to directives as the main legislative tool for regulatory effectiveness could nurture good legislation at the EU and national levels. The downside would be that the EU would have to entrust national drafters to achieve effectiveness of the regulatory package by means of national transposing regulatory [not necessarily legislative] measures. This would require a free-er hand in transposition and an equally free-er, principled (rather than formalistic) scrutiny of national compliance. This may sound simple, but it is not: effective principled scrutiny requires an expert level of understanding of legislative drafting by national and EU officers alike.

### ***Proposed BR Tool 2: Impact Assessment***

Having completed the evaluation test, an impact assessment is to follow. This is where empirical analysis becomes necessary. One is to measure the impact of bad EU regulation and legislation, in order to justify the necessity and proportionality of the new strategy and its measures. Measuring the cost of bad legislation is by no means a simple task, and inevitably a degree of guesswork is on call. What makes this task even more complex is the lack of basic data on the users of EU legislation. Without knowing who reads EU legislation and who relies on it to make decisions on their activities, one cannot accurately identify who the subjects on the alleged damage by bad EU laws are. Let me explain this point. At the moment, there has been no survey identifying who reads EU law: is it just the local authorities of the member states, who then use it transpose them into national law, or could it be that companies and perhaps even citizens themselves resort to EU law to learn about new rights and obligations? Knowing who the audience of legislation is can have serious effect on the measurements of the impact of bad EU law.

If the audience of EU law is mainly national authorities, and legal and natural persons read the national implementing measures, then the possible negative effects of EU legislation may already be eliminated by the intervention of national drafters. Measurement of the negative effect of EU legislation would relate to its contribution or loss arising from the competitiveness of EU industries, the attraction of the EU as a foreign investment area, the transposition of EU measures, and any administrative burdens. With reference to transposition, this negative effect would include losses from the cost of transposition of EU law to member states, the cost of late implementation to the EU and the other member states, and the cost of non-implementation to the EU and other member states. Where these costs are measured, note should be taken of the actual cost, namely the cost that is not remedied by national legislation. This may lead to a decision that a new strategy for EU law is not necessary at all, or that the needs of national authorities as the main users of EU legislation can be addressed by

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means of a consultation with them and a subsequent possible fine-tuning of the current drafting techniques.

If the audience of EU law includes EU citizens, natural and legal persons, the game changes dramatically. If lay users make use of the principles of direct effect and direct applicability and rely on EU instruments for the purposes of claiming their EU rights before the national courts and the national authorities, the alleged negative effect of EU legislation must be measured by reference to them also. Competitiveness of EU industries would be measured as arising from EU legislation only, without remedies from national implementation measures. The attractiveness of the EU as a foreign investment area would relate to the cost of EU laws on the natural and legal persons in third countries that set out to select which geographical area in the world they intend to invest in. The alleged cost arising from the transposition, late implementation or non-implementation of EU measures would include costs to the EU, member states, companies, and citizens. The negative effect from administrative burdens arising from EU legislation would be measured by reference to the EU, the member states, and EU citizens natural and legal persons. In all probability, acquiring empirical evidence that direct effect and direct applicability is used by EU citizens would result in a confirmation that a strategy for better EU law is not just justified, but long overdue.

The survey of users could, if the question is asked, reveal another possible user anomaly. Since direct effect and direct applicability are justly hailed as conferring power to EU citizens to make use of EU legislation directly and without the need for national implementation, it is worthwhile to learn if EU citizens themselves make use of these tools or whether they leave it to their legal counsellors to do so when the matter reaches national courts. Direct effect and direct applicability are revolutionary tools that bring EU legislation directly to the citizens. If EU citizens do not use them without expert legal advice, it is possible that one of the causes could be the alleged user-unfriendliness of EU legislative texts. Confirmation of user-unfriendliness of EU legislation could explain, to an extent, the

current wave of Euroscepticism in quite a few EU member states: directly effective and directly applicable EU legislation could be a tool of communication of the EU directly to EU citizens, a channel to alert citizens of the added value offered by the EU. Failing to utilise this tool adequately could explain the disturbing prevalence of populist voices that ridicule solidly rooted policy options as dictatorial impositions from a self-absorbed EU bureaucracy.

For example, the presentation of EU legislation on cucumbers not as a measure protecting EU crops and farmers from disease-prone varieties but as a dictation of the extent of curve favored by EU bureaucrats. Identifying this as a contributing factor to Euroscepticism would upgrade the proposed new EU strategy for better legislation to a strategy contributing to the regain of trust and popularity of the organization amongst EU citizens, using EU legislation as a direct channel of communication between the EU and its citizens. This is a view shared by a number of academics apart from this author, but it requires empirical confirmation to get it off the ground. If it is confirmed, then Brexit can be added to the cost of bad EU legislation, strengthening the voice for a new strategy on better EU law even further. It is worth noting that such an approach to EU legislation would not be out of tune with approaches to legislation at the national level. The UK Good Law survey showed beyond doubt that users of legislation in the UK are lay persons by 70%.<sup>5</sup> As a result, UK laws are now drafted in lay language, the regulatory message strengthened by user-friendly explanatory notes, and legislative texts are available online. Similar movements are evident as part of the “Better Regulation” national agendas in the Netherlands, Germany, Italy, Switzerland, and elsewhere: it seems that there is a pan-European trend for easily accessible legislation that users can use to learn about their rights and obligations directly.

5 See further: <https://www.gov.uk/government/collections/good-law>.

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### ***Proposed BR Tool 3: Public consultation***

The pre-impact assessment survey can produce exciting results that may offer a new impetus for the Europhile movement. Public consultation would be supplementary to the survey, and could greatly contribute to a deeper exploration of the inevitably raw results of the survey. A public consultation could, and should, involve hearing from EU staff on the current process of legislating. They are the ones experienced and interested in EU law-making and transposition monitoring. They are the users of processes, and their voice is valuable and learned. A public consultation would include drafters and policy officers from the member states. They are equally users of the system and process of law-making both at the EU and the national levels. They carry experience of approaches to legislation and legislating for transposition, and could inform on the national implementation hurdles and how these could be overcome.

Technical experts at the EU and national levels may have the learned voice but lay users, legal and natural persons citizens of the EU, may have considerable contributions to make, if they are proven to be the end users of EU legislative texts. Whereas the former may contribute in an open consultation with the identification of weaknesses in the current process and perhaps devices to address the issues, the latter lack the expertise to contribute constructively at this stage. So, involving end users in the consultation exercise would require a different kind of consultation, perhaps in the form of user testing. Having identified the weaknesses and the preferable solutions, end users can be mobilized to select their preferred text amongst those offered by the consultation experts, thus confirming that the in abstract solution offered by the experts is indeed achieving accessibility to the end users when applied in practice.

#### ***Proposed BR Tool 4: Implementation plan***

Having confirmed the necessity of a new strategy and, via consultation, decided on its bare skeleton of problems and preferred solutions, an implementation plan can now be drawn. *Step 1* would consist of the identification and profiling of the users of EU legislation. It is not enough to know who reads EU legislation. It is important to know what it is that users are looking for when reading the text. This will allow EU drafters to determine the main regulatory message sought by users, and adapt their drafting to provide them easily and as a priority.

*Step 2* would involve pitching the language of EU legislative texts accordingly. Accessibility includes legislative expression that can be understood by the particular audiences of the legislative text in question. User testing can also assist here by ascertaining that the language used in legislative texts is one that conveys the regulatory message to the users rather than the one that sustains the multiple compromises required to see the text through.

*Step 3* could involve revisiting the structure of EU texts and dividing the regulatory messages according to step 1 conclusions. As there rarely, if ever, is a single audience in legislation, a layered approach to structure can liberate the drafter in pitching diverse messages in various levels of linguistic and legal sophistication that match those of each audience. Understanding who reads EU legislation and for what purpose can lead to the introduction of a text in parts, each addressing lay users, national authorities, and legally trained users. Their language would be different, and their regulatory messages would be allocated by reference to the answers required by each group. For example, a text offering subsidy to oil producers can be structured in three parts: part 1 addressed to oil producers telling them clearly and simply that they are now entitled to a subsidy and that they must fulfil a number of conditions and complete a precise process to get it; part 2 addressed to national authorities detailing the administrative procedure to be followed; part 3 addressed to lawyers

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and judges dealing with any consequential amendments, any interpretation and definitions, and any appeals. This rather simplified example is a good example of a revised structure.

*Step 4* could involve a revisit of the publication of EU legislation. So far, EU legislation is available online free of charge, but it is addressed to learned users. Bringing the legislation to lay users would require new techniques, such as hyperlinks to relevant texts, explanatory materials, or variation of colors.

This is all rather radical, so it is anything but simple! But it is not enough. These are suggestions for formalities in drafting techniques that reflect a grander philosophical reform in the EU's legislative strategy. A principled approach to EU legislation would see a promotion of creative drafting to serve effectiveness rather than the current timid formalistic application of models and precedents. Such a liberal approach requires confident drafters, and these are normally professional drafters. The question is whether, with its current constraints, effectiveness can be achieved at EU level. A feasibility survey would respond to the question. It is not easy for any bureaucracy to reform, and this would be quite a major reform. Can the EU sustain it or is effectiveness only possible at the national level. Effectiveness by definition requires a homogenous setting with similar policy needs and similar policy solutions. EU legislation normally places different policy needs at the EU versus each national level. The EU looks for homogeneity and standardization in order to achieve further integration. National policy goals are obviously different and may involve competitiveness or social goals. Solutions are by definition different as they aim at different goals. Much more so, since effectiveness at each member state may very well require different approaches. In a Europe of diversity (north versus south, rich versus financial challenged, immigration facing versus immigration deferring, etc.), it is difficult to envisage a single policy goal with a single devise of redress within all 28 member states. There are two options here. One, a holistic reform of the EU law-making processes to accommodate the radical reform seemingly necessary for better EU

legislation. But such a radical reform seems dangerous and perhaps even counterproductive at a time of financial, political, and social challenges, which by the way are not solely Europe-based. Two, and perhaps rather more feasible, a maintenance of current law-making processes, but a reform of drafting techniques to fine-tune EU legislative texts in response to the conclusions of the “Better Regulation” tools discussed above, along with a principled decision to regulate solely or mainly via directives. These beautiful creatures are flexible enough to accommodate effectiveness at the EU level in the goals and effectiveness at the national level in the options available to member states in the achievement of the policy goals set. This rather placid solution can produce radical results if the scrutiny of national implementing measures is no longer formalistic and becomes principled, with a focus to the effectiveness of the proposed national implementing measures.

### ***Conclusions***

The 2017 “Better Regulation” guidelines and toolbox already provide principles, guidelines and tools that apply to all EU measures from policy conception to implementation. But “Better Regulation” has yet to benefit from the self-application of its own principles, guidelines, and tools. Applying “Better Regulation” to the EU’s legislative policy provides a valuable methodology for an evidence-based new strategy for better EU legislation to the benefit of the EU, the member states, and EU citizens. The completion of a skeletal DECIDE test for a proposed new strategy for the EU’s legislative policy detailed a valid step by step methodology for the collection of evidence that can constitute an appropriate basis for effective further action. The author’s hope is that this paper can become an inspiration for a real DECIDE test that can lead to a new principle strategy for better EU legislation. There is confidence in hoping that using EU legislation as a tool for direct regulatory communication with EU citizens can offer effectiveness to EU law, can silence populist Eurosceptic voices, and can contribute to a new era of trust and loyalty to the EU ideal.



*Stijn van Voorst and Ellen Mastenbroek*

## **The EU's System for Ex-post Legislative Evaluation: Fit for Purpose?**

### ***Introduction***

Since the early 2000s, the European Commission has repeatedly formulated the ambition to systematically evaluate all major EU legislation. In 2002-2003 this ambition resulted in the introduction of *impact assessments*: reports assessing the costs and benefits of legislative proposals. From 2007 onwards the Commission also promised to systematically conduct ex-post legislative (EPL) evaluations: reports assessing the functioning of regulations and directives in force. Some EPL evaluations only study the transposition of EU directives to national legislation or their practical implementation; other reports (also) assess the (un)intended effects of EU legislation on society.

Together with impact assessments and public consultations, EPL evaluations form the main components of the Commission's "Better Regulation Agenda"<sup>1</sup>. By assessing the way legislation plays out in a practice, they make the EU's *acquis* more evidence-based. EPL evaluations can be seen as a key instrument to produce high quality legislation, which is to "deliver tangible benefits for European citizens and address the common challenges Europe faces".<sup>2</sup>

More specifically, such evaluations may at least fulfil two important functions related to EU legislation. Firstly, by recommending how the implementation of legislation can be improved and/ or how legislation can

1 European Commission, "Better Regulation Toolbox", SWD (2015) 111.

2 Communication from the Commission to the European Parliament, the European Council and the Council, "Better Regulation: Delivering Better Results for a Stronger Union", COM (2016) 615 final, p. 1.

be amended to increase its effectiveness, EPL evaluations are a potential tool for decision-makers to learn how their policies can be improved.<sup>3</sup>

Secondly, EPL evaluations can be used by actors like the European Parliament (EP) and the Council of Ministers to hold the Commission accountable for its decisions related to legislative implementation.<sup>4</sup> For example, these actors can ask the Commission critical questions based on evaluation results.

This chapter reports of a four-year research project on the European Commission's system of EPL evaluations<sup>5</sup>, which aimed to assess whether the system is fit for purpose. In addressing this question, we focus on three necessary conditions for EPL evaluations to contribute to the twin aims of learning and accountability: systematic initiation, high quality and systematic use. In the following, we describe and explain the variation in these three variables, using insights from a large, self-constructed database of EPL evaluations.

This database consists of 313 evaluation reports from the years 2000-2014. These reports were collected from a wide variety of sources, including the Commission's websites, databases, work programs and annual evaluation

3 T. Fitzpatrick, "Evaluating Legislation: An Alternative Approach for Evaluating EU Internal Market and Services Law", (2012) 18 *Evaluation*, p. 479; S. Smismans, 'Policy Evaluation in the EU: The Challenges of Linking Ex Ante and Ex Post Appraisal', (2015) 6 *European Journal of Risk Regulation*, p. 19; E. Vedung, *Public Policy and Program Evaluation* (New Brunswick: Transaction, 1997), p. 109.

4 T. Fitzpatrick, "Evaluating Legislation: An Alternative Approach for Evaluating EU Internal Market and Services Law", (2012) 18 *Evaluation*, p. 479; S Højlund, "Evaluation in the European Commission – For Accountability or Learning?", (2015) 6 *European Journal of Risk Regulation*, p. 35; European Parliament, *Library Briefing Policy and Legislative Evaluation in the EU* (Brussels: European Union 1990); E. Vedung, *Public Policy and Program Evaluation* (New Brunswick: Transaction, 1997), p. 109.

5 This project has resulted in a Ph.D. dissertation, in which further details about the methodology and the findings of the project can be found: S. van Voorst, *Ex-post Legislative Evaluations in the European Commission: Between Technical Instruments and Political Tools* (Tilburg University, The Netherlands, 2018). The current paper is an adapted version of the English summary of the dissertation.

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overviews, but also our own online searches and EU bookshop.<sup>6</sup> We also created a second dataset of 277 major regulations and directives enacted during 2000-2004, which we used to study the criterion of systematic initiation.<sup>7</sup>

### ***The Initiation of the Commission's EPL Evaluations***

The first condition specified above, systematic initiation, means that all major legislation should be evaluated. Although EPL evaluations may lead to the improvement of specific legislation even if this requirement is not met, in that case they will not enhance legislative quality as a whole.<sup>8</sup> If the Commission conducts EPL evaluations selectively it could also create the impression that it decides what legislation to evaluate based on political motives.<sup>9</sup> Such a reputation could harm the credibility of all its subsequent evaluations. Therefore, the Commission has developed the principle of systematic evaluation as a cornerstone of its Better Regulation policy; it has

“...committed itself to evaluate in a proportionate way all EU spending and non-spending activities intended to have an impact on society or the economy”.<sup>10</sup>

How well does the Commission live up to this maxim of systematic initiation? Our research<sup>11</sup> shows that it has conducted at least one EPL evaluation for about 42% of all major EU legislation from 2000-2004. This means that more than half of the major EU legislation from this time period has never been evaluated. These findings reveal that the Commission only partly meets the requirement of systematic initiation. However, the proportion of legislation that it has evaluated seems to increase over time, since this initiation rate is higher than the 33% found during earlier research

6 S. van Voorst and E. Mastenbroek, “Enforcement Tool or Strategic Instrument? The Initiation of Ex-post Legislative Evaluations by the European Commission”, (2017) 17 *European Union Politics*, p. 648.

7 Ibid., p. 647.

8 OECD, *OECD Regulatory Policy Outlook 2015* (Paris: OECD Press, 2015), p. 120.

9 C.M. Radaelli and A.C.M. Meuwese, “Hard Questions, Hard Solutions: Proceduralisation through Impact Assessment in the EU”, (2010) 33 *West European Politics*, p. 145.

10 European Commission, “Better Regulation Toolbox”, SWD (2015)111, p. 317.

11 van Voorst and Mastenbroek (n. 6), p. 649.

about major legislation from 2000 to 2002.<sup>12</sup> Also, some of the legislation that was evaluated was studied multiple times: fifteen pieces of legislation were evaluated twice, four pieces of legislation were evaluated thrice and two pieces of legislation were evaluated four times.

Our research has shown that four factors significantly affect the variance in the initiation of EPL evaluations by the Commission. First, the *type of legislation* matters: directives are more likely to be evaluated than regulations. Second, the chances that a piece of legislation is evaluated increase with its *complexity*. Both of these explanations suggest that the Commission may prioritize evaluating legislation that grants more freedom to the member states, because for such legislation the risk of non-compliance is higher. In other words, EPL evaluations may partly be initiated by the Commission to make its task of enforcing EU legislation easier.<sup>13</sup>

A third significant explanation for the variance in the initiation of EPL evaluations by the Commission is the *presence of evaluation clauses*: legislation containing a provision that requires it to be evaluated within a given number of years is much more likely to be evaluated than legislation without such a provision. Yet, it must be added that the incorporation of evaluation clauses does not form a guarantee that an EPL evaluation will take place: the Commission has not respected such clauses in 44% of the legislation we studied.<sup>14</sup>

The fourth significant explanation for the variance in the initiation of EPL evaluations lies in *evaluation capacity*: the availability of sufficient means and procedures within an organization to allow it to consistently conduct and use high-quality evaluations.<sup>15</sup> Directorates-General (DGs) are the main organizational components of the Commission and have considerable

12 E. Mastenbroek, S. van Voorst and A. Meuwese, "Closing the Regulatory Cycle? A Metaevaluation of Ex-post Legislative Evaluations by the European Commission", (2016) 23 *Journal of European Public Policy*, p. 1338.

13 van Voorst and Mastenbroek (n. 6), p. 651.

14 van Voorst and Mastenbroek (n. 6), p. 652.

15 S.B. Nielsen, S. Lemire and M. Skov, "Measuring Evaluation Capacity: Results and Implications of a Danish Study", (2011) 32 *American Journal of Evaluation*, p. 325.

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freedom in their evaluation policies,<sup>16</sup> so we decided to assess evaluation capacity at the DG-level. Our research<sup>17</sup> shows that DGs with a specialized unit for ex-post evaluations and/ or specific guidelines for EPL evaluations evaluate a significantly higher proportion of their legislation than other DGs, which confirms that evaluation capacity indeed affects the initiation of EPL evaluations in the Commission.

### ***The Quality of the Commission's EPL Evaluations***

The second condition, high evaluation quality, means that EPL evaluations can only contribute to learning and accountability if they meet certain methodological standards.<sup>18</sup> If EPL evaluations are not valid and reliable, any decisions that take these evaluations into account are based on misleading data. A lack of quality can also create the perception among decision-makers that evaluation findings misrepresent reality, which makes it less likely that such findings will be used for learning in the future<sup>19</sup>.

Our data show that the quality of the Commission's EPL evaluations that assess effectiveness varies considerably.<sup>20</sup> The vast majority (76%) of the reports that were studied used a robust combination of stakeholder input and other forms of data collection. However, the evaluations perform less well regarding other aspects of quality. Whereas almost all reports (89%) have a well-defined scope in the sense of clearly specified research questions, less than 40% of them go beyond this by also describing the intervention logic of the legislation that they evaluate. Between 40% and 70% of the EPL evaluations meet criteria like the presence of a clear operationalization (internal validity), a clear country selection and a clear case selection (external validity) and the presence of substantiated conclusions. By far the worst aspect of the evaluations' quality is their replicability: only 31% of the

16 E. Stern, "Evaluation Policy in the European Union and its Institutions", in: W. Trochim, M. Mark & L. Cooksy, *Evaluation Policy and Evaluation Practice: New Directions for Evaluation*, San Francisco: Jossey-Bass 2009, p. 71.

17 van Voorst and Mastenbroek (n. 6), p. 652-653.

18 OECD, *OECD Regulatory Policy Outlook 2015* (Paris: OECD Press, 2015), p. 121.

19 Mayne & Schwartz, 2005: 1.

20 S. van Voorst and E. Mastenbroek, "The Quality of the European Commission's Ex-post Legislative Evaluations", in van Voorst (n. 5), p. 136.

reports contained or referred to all the material that would be required to repeat the underlying research, like interview guides and lists of respondents.

The key determinant for this variance in evaluation quality is the *type of evaluator*: EPL evaluations conducted by external consultants are of significantly higher quality than evaluations conducted internally by the Commission.<sup>21</sup> This suggests that the technical expertise of external parties is a crucial asset when it comes to properly evaluating EU legislation. The evaluation capacity of the Commission's DGs, the complexity of the evaluated legislation and various political conditions were found to have no effect on the variance in quality.<sup>22</sup> The results do show that evaluations of legislation that had to be approved by the European Parliament (EP) are of higher quality than other evaluations, but more research is needed to find out why that causal relation exists.

### ***The Use of the Commission's EPL Evaluations***

The third condition, systematic use, means that the results of EPL evaluations need to be seriously considered during future decision-making, if they have the role of closing the EU regulatory cycle. If this requirement is not met, the evaluations are essentially a waste of time and money, as without use there is no way in which they can contribute to learning and accountability.<sup>23</sup>

Our research shows that the results of the Commission EPL's evaluations are frequently used in impact assessments (ex-ante evaluations of the costs and benefits of legislative proposals). About 65% of the impact assessments for which a prior EPL evaluation is available make use of that evaluation, although the level of use varies from making a single reference to an in-depth

21 Ibid., p. 138.

22 Ibid.

23 S. Højlund, "Evaluation Use in the Organisational Context – Changing Focus to Improve Theory", (2014) 20 *Evaluation*, p. 1; J. Mayne, "Issues in Enhancing Evaluation Use", in: M. L. Loud and J. Mayne (eds.), *Enhancing Evaluation Use: Insights from Internal Evaluation Units*, London: Sage 2014.

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forms of analysis.<sup>24</sup> The *timeliness* of the EPL evaluations turns out to be a necessary condition for their use in impact assessments.<sup>25</sup>

Besides being a potential source of data for future impact assessments, EPL evaluations can also be used for learning in a more general sense, by pointing out in what direction European legislation should develop. We expected that such use would vary based on the preferences of actors that the Commission depends on (like the European Parliament, the Council and major interest groups), since proposing legislation that these actors would veto would be a waste of time. However, we found no evidence supporting this idea.<sup>26</sup>

Instead, it turns out that the *Commission's own political priorities* are the most important explanation for use. Ever since the Juncker Commission entered into office in 2014, the institution has become more reluctant to propose new legislation, in part as a response to criticism by Eurosceptics. Especially in policy fields that are no priority of the current Commission, it has become difficult to translate the results of EPL evaluations into policy changes. Conversely, in policy fields that are political priorities of the current Commission, there is much opportunity for EPL evaluations to contribute to learning.<sup>27</sup>

We also studied the use of the Commission's EPL evaluations by the European Parliament.<sup>28</sup> In theory, evaluations are a useful source of information for parliamentarians to hold the Commission accountable for its decisions. However, in practice only 22% of the EPL evaluations that we studied turned out to be mentioned in questions which the EP asked to the Commission.<sup>29</sup> The only significant explanation for variation in this regard

24 T. van Golen and S. van Voorst, "Towards a Regulatory Cycle? The Use of Evaluative Information in Impact Assessments and Ex-post evaluations in the European Union" (2016) 7 *European Journal of Risk Regulation*, p. 398.

25 *Ibid.*, p. 400.

26 S. van Voorst and P. Zwaan, "The (Non-) use of Ex-post Legislative Evaluations by the European Commission", (2019) 26 *Journal of European Public Policy*, p. 378-379.

27 *Ibid.*, p. 382.

28 P. Zwaan, S. van Voorst and E. Mastenbroek, "Ex-post Regulatory Evaluations in the European Union: Questioning the Use of Evaluations as Instruments for Accountability", (2016) 82 *International Review of Administrative Sciences*, no.4.

29 *Ibid.*, p. 683-684.

is the *level of conflict between the EP and the Commission*: the chances that an evaluation is used in questions of the EP is significantly higher for evaluations of topics that were controversial during the legislative process than for evaluations of other topics.<sup>30</sup>

To place the results presented above into perspective, it should be noted that most OECD countries do not have systematic procedures for EPL evaluations at all,<sup>31</sup> which means that the Commission outperforms them by default. Furthermore, even the few OECD countries that have systematic procedures for EPL evaluations in place – such as the Netherlands – appear to face problems concerning their initiation, quality and use, which shows that such issues are not unique to the Commission. Therefore, the Commission is clearly ahead of or on par with most national systems for EPL evaluations.

### **General Conclusions**

Some scholars<sup>32</sup> suggest that the European Commission is (partly) driven by its interest to maximize its competences. When applied to EPL evaluations, this theory leads to the expectation that the initiation and quality of such evaluations are lower in those cases where the Commission perceives a higher risk that negative evaluation results could lead to criticism on its competences. However, our results do not confirm this expectation.

Instead, our research supports the view that the Commission is driven by its interest to encourage European integration via the enforcement of EU legislation. This seems the most plausible explanation for the fact that the Commission is more likely to initiate EPL evaluations in cases where the risk of non-compliance by the member states is greater, like directives and

30 Ibid., p. 638.

31 OECD, *OECD Regulatory Policy Outlook 2015* (Paris: OECD Press, 2015), p. 145-211.

32 G. Majone, *Regulating Europe* (London: Routledge, 1996), p. 65; N. Nugent and M. Rhinard, “Is the European Commission Really in Decline?”, (2016) 54 *Journal of Common Market Studies*, p. 1201; M.A. Pollack, “Process, 1970-2008” (Paper presented at Conference on Public Finances in the European Union, Brussels, 3-4 April 2019), p. 9; J. Tallberg, *European Governance and Supranational Institutions: Making States Comply* (Abingdon: Routledge 2003), p. 28.



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relatively complex legislation. However, more research is needed to be able to confirm or reject this interpretation of our results.

The findings presented above also show that various technical factors affect the Commission's EPL evaluations. It is worth noting that several of these variables affect the initiation of the evaluations in the way that we expected, but not their quality. For example, whereas we found that DGs with more evaluation capacity have evaluated a higher proportion of their legislation, we found no similar correlation in relation to quality. In other words, explicit evaluation units and guidelines seem to help DGs to produce more EPL evaluations, but not necessarily better ones. Similarly, evaluation clauses have a positive effect on the initiation of EPL evaluations, but have no effect on quality. In other words, our research presents no evidence that such clauses cause evaluation to become "tick-the-box exercises" that are conducted in a half-hearted way to meet formal obligations.

These results have several practical implications. First, the findings show that evaluation clauses can be a useful tool to encourage the systematic initiation of EPL evaluations in the EU, while there is no need to assume they will have a negative effect on quality. Second, the results reveal that extra investments in evaluation capacity can help the Commission to evaluate more legislation. Third, the results show that the timely availability of EPL evaluations is crucial to allow their results to be used in impact assessments, which shows the importance of strictly enforcing the Commission's "evaluate first" principle.

For future research, three possibilities stand out. First, since the data used for this research process mostly concerns the years 2000-2014, it seems worth assessing if recent changes in the Commission's policies have affected the initiation, quality and use of its EPL evaluations. In particular, the Commission has published new "Better Regulation" guidelines in 2015, which include measures related to EPL evaluations.<sup>33</sup> Also, in 2015 the Regulatory Scrutiny Board was created as a semi-independent body within the Commission, to annually check the quality of a selection of EPL

33 European Commission, "Better Regulation Toolbox", SWD (2015) 111.

evaluations.<sup>34</sup> These developments might have affected the extent to which the Commission's system of EPL evaluations contributes to accountability and learning.

A second possibility for future research is to assess the evaluations' effect on long-term learning. Our research project only studied the use of these reports for short-term learning and accountability. However, various authors<sup>35</sup> believe that evaluations which appear to have no impact in the short run can still affect political agendas in the long run, for example via the diffusion of new ideas. Therefore, it would be worth assessing if the Commission's EPL evaluations can have such effects. A third possibility for future research is to conduct an in-depth analysis of the initiation and quality of a few specific EPL evaluations. Such case studies could help to find the mechanisms behind the correlations that our statistical analyses revealed.

In conclusion, whereas the Commission's current system for EPL evaluations contributes to learning and accountability to some extent, significant further developments regarding the initiation, quality and use of these evaluations appear to be necessary for these benefits to become more systematic. Hopefully, the specific findings and recommendations presented above can contribute to such improvements. In this day and age when EU legislation increasingly affects that day-to-day activities of citizens and companies and is frequently criticized by Eurosceptic actors, it is all the more important to ensure a continuous stream of reliable information about the functioning of such legislation is available. If EPL evaluations can fulfil this role, they may contribute to step-by-step improvements to the effects of legislation, the democratic accountability of the EU's institutions, and the legitimacy of the European project as a whole.

34 Regulatory Scrutiny Board, *Annual Report 2017* (Brussels: European Union, 2018).

35 G.T. Henry and M.M. Mark, "Beyond Use: Understanding Evaluation's Influence on Attitudes and Actions", (2003) 24 *American Journal of Evaluation*, p. 298; J.L. Herbert, "Researching Evaluation Influence: A Review of the Literature", (2014) 38 *Evaluation Review*, p. 390.

*Barbara Beijen*

## **The Quality of Environmental Directives Revisited**

### ***Introduction***

My PhD thesis was published in 2010 and concerned the question what role European environmental directives themselves had in the occurrence of implementation problems in the Member States.<sup>1</sup> Now, a good nine years later, it is time to look back on the conclusions of my research and to see what has changed since then. In the next section, I will first give a short description of my thesis and of the main conclusions. Thereafter, I will pay attention to some of the developments in the field of “Better Regulation” and see if and how they fit with my recommendations.

### ***The quality of environmental directives in 2010***

The infringement procedure of Article 258 of the Treaty on the Functioning of the European Union (TFEU) suggests that Member States are to blame for any flaw in the implementation of a directive into national law. The only relevant question for the European Court of Justice (ECJ) to answer in an infringement procedure is if there was a failure to implement a (provision of a) directive. There is no need to prove if there is any blame on the Member State. Neither can a Member State prevent a condemnation by proving that the implementation gap is not the fault of the Member State, but the consequence of for example a gap in the directive. However, the quality of the directive can certainly influence the occurrence of implementation

1 B.A. Beijen, *De kwaliteit van milieुरichtlijnen*, Den Haag: Boom Juridische uitgevers 2010. For a shorter version in English, see B.A. Beijen, “The Implementation of European Environmental Directives: Are Problems Caused by the Quality of the Directives?”, (2011) 20 *European Energy and Environmental Law Review*, p. 150-163.

problems. If a directive is unclear, or for example in conflict with obligations from another directive, this is not problematic for the directive as such, but the problems will be felt at the national level when trying to implement it into the national framework of legislation.

In my thesis, I focused on the implementation of environmental directives. I did case law research, literature studies, used scoreboards of the European Commission and conducted interviews. I looked more specifically at the implementation of 10 different environmental directives, in different sectors (nature protection, water, waste etc.) to see if there were any common patterns to be found. In addition, I researched the implementation of environmental directives in three Member States, i.e. the Netherlands, Germany and Denmark. The rationale behind this choice was that these three countries seemed to be taking environmental law quite seriously, hence really putting an effort in the proper implementation of European law. As a consequence, failures in the implementation of environmental directives in these Member States are more likely to point in the direction of a flaw in the directive as a cause of the implementation problem. In less 'green' Member States, an implementation problem may also just be the result of a lack of interest in proper implementation. As a side-note: in the last decade this seems to have shifted a bit. These Member States are not as ambitious as they used to be.<sup>2</sup>

In my thesis, I identified a number of recurring aspects in the directives themselves which triggered implementation problems in the Member States. Among these aspects were a lack of coherence between directives, problems with definitions, a lack of clarity about the scope of directives, some specific problems related to the instruments used in the directives and a lack of clarity about the meaning and status of soft law. I will elaborate on these problems a bit further.

2 For the Netherlands, see M.A. Wiering, J.D. Liefferink and B.A. Beijen, "The Internal and External Face of Dutch Environmental Policy: A Case of Fading Environmental Leadership?" (2018) 81 *Environmental Science & Policy*, p. 18-25.

## The Quality of Environmental Directives Revisited

### *Coherence between directives*

There is a large number of environmental directives. At the time of my research there were over 400.<sup>3</sup> Today the number could be a bit lower, because some directives have been repealed or merged, but still it remains a vast amount. Some of these directives have formal links with each other, such as framework directives and daughter directives. This was for example the case in the field of air quality.<sup>4</sup> In the case of formally linked directives, they usually use the same definitions or refer to each other for this. However, most directives are more or less stand-alone instruments. They are adopted one at a time and at the European level there is no real need to fit them into a system or to align them with existing directives. Yet, the Member States are supposed to implement them in their national legal system. Of course these systems vary from country to country, which is the very reason for the use of directives. A lack of coherence will be felt mostly in countries with a (more or less) comprehensive act on the environment, as is the case in the Netherlands. If a certain term is used with different definitions, it will be difficult to use a single definition in the first article of the act, but different definitions have to be used for different chapters of the acts. In for example Denmark, there are many separate sectoral acts on the environment, allowing each act to use its own definition.

### *Definitions*

For clarity with regard to the meaning of directives, it is important that they contain definitions of the most important terms. Although most directives do contain definitions in one of the first articles, this does not mean that there are no problems. The definition of for example “waste” has given rise to a lot of case law and reflections in literature. The meaning of ‘discharge’ also remained unclear for a long time, although it was a key term in the Dangerous Substances Directive.

3 Beijen, op. cit., p. 32.

4 Directive 96/62 (framework directive), 1999/30, 2000/69 and 2002/3 (daughter directives), in 2008 replaced by Directive 2008/50.

The same term may appear in different directives, but with different definitions. This is especially challenging for a Member State wishing to implement the directives in a single act. An example was the term “installation” in the IPPC Directive, but also used in several other directives on heavy industry.<sup>5</sup> The introduction of the Industrial Emissions Directive solved this problem (see below).

An unclear definition as such is not a problem for implementation *stricto sensu*, as the unclear definitions can be literally copied into national law. But then of course, in the application of the national law, the question will still arise how the term should be applied. A final problem relating to the meaning of terms is that not all terms are defined, but that their meaning can be decisive for the application of a directive. An example is the term “significant effect” from the Wild Birds Directive and the Habitats Directive.

### *Scope of directives*

Clarity of the scope of a directive is necessary for the proper implementation into national law. However, this can prove a problem. An example is the EIA Directive, for which several rulings of the ECJ were necessary before the actual scope became clear. Take also the Habitats Directive, dating from 1992, where still new rulings appear clarifying its scope. A recent case concerning the question whether a programmatic approach for granting permits is in line with the Habitats Directive shows that even after more than 25 years, Member States are still struggling with the scope of the obligations.<sup>6</sup>

### *Specific instruments*

Environmental directives are meant to protect the environment, but this can be done in several ways and by prescribing several instruments. Such instruments are amongst others environmental quality standards, emission standards, product standards, designation of areas, plans and programs,

5 Beijen, op. cit., p. 153.

6 Judgment of 7 November 2018 in Joint Cases C-293/17 and 294/17, *Coöperatie Mobilisation for the Environment UA and others*.

## The Quality of Environmental Directives Revisited

procedural requirements, normatively described goals and standards, prohibitions and obligations, rules about enforcement, transitional provisions and annexes. A lack of space prevents me from describing the problems with each category of instruments more thoroughly, but I will point out at least some of them.

Environmental quality standards are useful to prescribe the result that must be achieved by the Member States and leaves it to the Member States how to get there. This is perfectly in line with the instrument of a directive and the principle of subsidiarity. However, the freedom Member States have in achieving the result can also be problematic. Member States are not free to take every measure they want in order to achieve the prescribed result, as those measures will have to comply with the free movement of goods. This blocked for example the prescription of particulate filters for diesel engines.<sup>7</sup> It is also often unclear what the consequences are of exceeding the quality standards. It does not mean that no new permits can be granted or that even existing permits must be withdrawn.<sup>8</sup> For reasons of enforcement, these consequences should be spelled out in the directives themselves.

### *Soft law*

Soft law can take many different forms. An explanatory memorandum from the European Commission is a form of soft law, as are technical documents elaborating norms from a directive, Commission recommendations, and many other kinds of documents. Soft law is, as the name suggests, by nature not binding, but it does often have binding effects in practice. Seen from a positive light, it is safer and easier for the Member States to follow soft law as compared to hard law. It is easier, because they can just follow the interpretation from the document and not have to figure out the exact meaning themselves. It is safer, because sticking to an interpretation given by the European Commission is a way to prevent infringement procedures. However, these documents usually do not have a legal basis, there is (often)

7 Judgment of 27 June 2007 in Case T-182/06, *Netherlands v Commission*, and Judgment of 6 November 2008 in Case C-405/07 P, *Netherlands v Commission*.

8 Judgments of 26 May 2011 in Joint Cases C-165/09-167/09, *Stichting Natuur en Milieu and others*.

no real democratic control and they may give rise to a shift of power towards the Commission. Especially in the light of the tendency of Member States to follow the documents, there is only a small chance that these documents are challenged before the European Court of Justice. The express reference to soft law by the ECJ is limited. In a case against Finland, the ECJ does mention a guidance document, but is not explicit about the value of it.<sup>9</sup> It seems to be just one of the arguments for the Court's reasoning. Advocates General use the guidance documents slightly more often,<sup>10</sup> but of course they are in a different position than Judges. In cases where these documents do play a role (more often preliminary rulings than infringement cases), the ECJ emphasizes that it has the final say in the interpretation of European legislation, but it does use the documents and attaches at least some value to them.<sup>11</sup>

### **Recommendations**

Based on the findings of my earlier research, I formulated some recommendations in order to improve the quality of environmental directives and to prevent implementation problems following from this. These recommendations will be described here in short.

First and most far-reaching, I suggested to introduce an overarching framework directive for the environment, containing the most important definitions, general rules on monitoring, reporting and other kinds of obligations from directives, and consequences of non-compliance with directives. Of course, this was more or less a shot for the moon. It does not fit in the European legal system, where all directives in principle have the same status. It would also be a gigantic operation not only to create this

9 Judgment of 14 June 2007 in Case C-342/05, *Commission v Finland*, par. 29.

10 For example, Opinion of AG Sharpston of 27 February 2014 in Case C-521/12, *Briels*, par. 8-10 and Opinion of AG Léger of 20 January 2011 in Case C-383/09, *Commission v. France*, par. 28.

11 See: <http://www.solar-network.eu> for a thorough study on the meaning and use of European soft law in the Member States.



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directive, but also to amend all existing directives so that they become aligned with it.

Another and more feasible recommendation was to reduce the number of environmental directives. By combining different directives into a single one (or through the use of a framework directive with daughter directives), consistency would at least be better guaranteed than with the use of multiple directives which may be applicable at the same time.

A directive is meant to give the Member States freedom in form and methods<sup>12</sup>. When a need is felt to lay down very detailed rules in a directive, the usage of a regulation instead of a directive should be considered. Although a high level of detail may ensure that the directive is clear, it may still give rise to implementation problems, as it may be difficult to fit the directive into the existing legal system. As a regulation does not have to be transposed, this could be the better solution.

In the Dutch legal system, the explanatory memoranda and the parliamentary documents concerning the adoption of an act are an important source of information for the interpretation of the act. In the European order, these documents are harder to find, and at least in the jurisprudence of the ECJ they hardly play a role. Strengthening the position of these documents and enhancing their accessibility might give the Member States guidance in the implementation process.

As described above, there is a lot of soft law in many forms and appearances, but its status is unclear. More clarity on its status could also be of great help to the Member States: are they supposed to follow soft law documents, or are they expected to be very critical about this and not rely on it too easily? This recommendation is in line with the previous one. Explanatory memoranda could even be considered as a sort of soft law and being a help for the Member States.

Specifically for environmental law, in case directives prescribe environmental quality standards, Member States could be supported by not only prescribing these but also creating a supportive policy at the European

12 See Article 288 TFEU.

level, creating legal instruments helping the Member States to achieve the quality standards. For example, in the field of air quality, more stringent rules on the emission of cars/ trucks/ factories etc. would help the Member States to realize the prescribed quality standards. The consequences of a new proposal are not always clear in advance. It could be helpful to let a small number of Member States make an impact assessment on the basis of a draft directive and use the results in the legislative procedure. This helps to identify problems beforehand, at a moment when it is still possible to make changes to the proposal.

Looking back on these recommendations anno 2019, I still believe they can contribute to enhancing the quality of environmental directive. However, I do not foresee the proposed overarching framework directive anywhere in the near future. As mentioned, it does not fit well in the system of European law, and there are simpler solutions for the same problem. Aligning definitions can also be done by using the same definitions in different directives; and general rules on monitoring, reporting and so on can also be created by drafting a general set of provisions and copying them in different directives.

### ***Developments in environmental legislation***

Since 2010, the quality of legislation has received a lot of attention at the European level, amongst other things in the “Better Regulation” program. The fact that it was the main focus of the First Vice-President in the Juncker Commission (2014-2019) illustrates the importance of this theme. I will now analyze some aspects of the “Better Regulation” program that are aimed at improving the quality of legislation in the environmental field.

#### ***Recasting***

Recasting is a way to make legislation more streamlined, by combining an act and the amendments to the act, or by combining to adjacent directives into a single instrument.<sup>13</sup> This has been done in the field of environmental

13 See: [http://ec.europa.eu/dgs/legal\\_service/recasting\\_en.htm](http://ec.europa.eu/dgs/legal_service/recasting_en.htm).

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law over the last decade, with the Industrial Emissions Directive 2010/75/EU (IED) as the most prominent example. This recast repealed seven different environmental directives, and the directives amending them. Recasting thus fits in very well with my recommendation to reduce the number of directives.

### *Fitness checks*

Another means to improve the quality of legislation is by performing “fitness checks”. The EU define this as follows:

“[C]omprehensive policy evaluations assessing whether the regulatory framework for a policy sector is fit for purpose. Their aim is to identify excessive regulatory burdens, overlaps, gaps, inconsistencies and/or obsolete measures which may have appeared over time, and to help to identify the cumulative impact of legislation. Their findings will serve as a basis for drawing policy conclusions on the future of the relevant regulatory framework.”<sup>14</sup>

Identifying overlaps, gaps and inconsistencies is very important, as my analysis of EU environmental law revealed that this is at least quite regularly a problem. The fitness check of the Water Framework Directive 2000/60/EC (WFD) is being carried out at the time of writing, with a consultation that took place between September 2018 and March 2019.<sup>15</sup>

### *Focus on implementation*

With the Environmental Implementation Review, the Commission created a tool to better monitor the implementation of European environmental law in the Member States.<sup>16</sup> It was introduced in 2016, so experience with it is still limited, but it provides two-yearly country reports on implementation. Especially after some time, these reports could reveal trends and problems in implementation. Such reports can thus contain valuable information, yet for the improvement of the quality of legislation it is more important what is done with this information. Hopefully implementation problems will not

14 See: [http://ec.europa.eu/smart-regulation/evaluation/docs/fitness\\_checks\\_2012\\_en.pdf](http://ec.europa.eu/smart-regulation/evaluation/docs/fitness_checks_2012_en.pdf).

15 See: [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5128184/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5128184/public-consultation_en).

16 See: [http://ec.europa.eu/environment/eir/index\\_en.htm](http://ec.europa.eu/environment/eir/index_en.htm).

only be blamed on the Member States, but will also be used in the evaluation of legislation.

### *Impact assessments*

Impact assessments are a way to analyze the expected effects of legislative proposals.<sup>17</sup> This is a very important instrument to identify possible problems beforehand, at a moment that it is relatively easy to adapt the pending proposals. My original recommendation was to let impact assessments be conducted by a number of Member States and not only at the European level; however, a thorough impact assessment at the European level can still provide valuable information to prevent implementation problems.

### *Make it Work*

“Make it Work” is not an initiative of the European Commission, but of a number of Member States. The project aims to improve European environmental law, particularly by establishing a more coherent and consistent framework of law through developing drafting principles on the use of cross-cutting instruments and procedures in EU environmental directives and regulations.<sup>18</sup> The Make it Work team created drafting principles for environmental reporting<sup>19</sup> and principles on drafting provisions on compliance insurance.<sup>20</sup>

The fact that this network was initiated by the Member States shows that the need was felt to create more uniform rules on certain cross-cutting subjects, which is perfectly in line with my original conclusion that specific problems are caused by instruments such as reporting and inspection. My recommendation was to introduce general rules on these subjects in an

17 See: [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/impact-assessments\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/impact-assessments_en).

18 See: <http://minisites.ieep.eu/work-areas/environmental-governance/better-regulation/make-it-work/home/>.

19 See: <http://minisites.ieep.eu/work-areas/environmental-governance/better-regulation/make-it-work/subjects/2016/08/monitoring-and-reporting>.

20 See: [http://minisites.ieep.eu/assets/1791/MiW\\_drafting\\_principles\\_on\\_compliance\\_assurance\\_July\\_2015.pdf](http://minisites.ieep.eu/assets/1791/MiW_drafting_principles_on_compliance_assurance_July_2015.pdf).

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overarching framework directive. Yet, drafting principles like these are a very good alternative, as they also encourage the European legislator to use standard provisions on such subjects. It is still possible to deviate from the standard, but at least that would require thorough consideration. However, the drafting provisions are only adopted by the Make it Work team. It would be good if the Commission adopted them as well, and for example integrated them in manuals on legislative drafting, possibly in a specific version for environmental legislation.

### ***Conclusion***

This contribution has made clear that the quality of environmental directives is a vivid subject, which has gained a lot of attention over the last decade. In the light of the recommendations of my earlier study, the developments since then, described above, should all be welcomed, as they can contribute to a higher quality of environmental directives and a decrease of implementation problems. However, the quality of legislation is a subject which demands constant attention. Although some of the problems described above are definitely smaller today than they were in 2010 (e.g. due to the recasting of directives), none of them have been solved completely. This means that the recommendations formulated earlier are still relevant points of attention when drafting new directives, or when evaluating and adapting existing ones.



*Pieter Kuypers*

## **Better Regulation in EU Public Procurement Law**

### ***Introduction***

The European Commission recently stated that “Better Regulation matters”.<sup>1</sup> Although this may come across as a rather trite statement, over the last years, the Commission has indeed realized that adopting regulation at EU level – or in other words “regulation from Brussels” – is regularly received with criticism: the principle of subsidiarity is not respected, rules are too complicated, there are too many exceptions, etc.<sup>2</sup> Therefore, the Commission has emphasised the need to reduce the volume of secondary legislation, and as discussed in the introduction to this volume, it has proposed notably fewer new proposals in recent years. Also in the field of EU public procurement law however, one may raise pertinent questions on the quality dimension.

In this contribution, I would like to set out some personal views on the “Better Regulation” program in the realm of EU public procurement law. Below, this contribution starts off by providing some insight into the relevance of this particular field. Hereafter, I will briefly explain the legal framework and key elements. Next, I shall try to assess the most obvious shortcomings of the regulation in this specific domain. In the penultimate section, I mention some solutions and deal with outstanding problems, summing up the key challenges ahead. The final section concludes.

1 Communication from the Commission to the European Parliament, the European Council and the Council, “Better Regulation: Delivering better results for a stronger Union”, COM (2016) 615 final, p. 2.

2 See e.g. W.J.M. Voermans, “Concern about the Quality of EU Legislation: What Kind of Problem, by What Kind of Standards?”, (2009) 2 *Erasmus Law Review*, p. 59.

### ***Public Procurement: What is it all about?***

For the purposes of this contribution, EU public procurement law can be summarised in accordance with the definition in Article 1 Directive 2014/24/EU:

“1. (...) rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.

2. Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.”

The key elements are:

1. The acquisition of works, services and/ or supplies, by
2. contracting authorities (essentially: the public sector and bodies governed by public law) with a pecuniary interest, with
3. an estimated value above the thresholds.

Public procurement law affects a substantial share of world trade, amounting to more than EUR 1.3 trillion per year.<sup>3</sup> In the European Union, the public purchase of goods, services and works has been estimated to be worth of approximately 14%-16% of GDP.<sup>4</sup> In some countries, the share of public procurement in terms of the GDP is even higher. In the Netherlands, for example, the central and sub-central authorities engage in buying at an estimated figure of EUR 73.3 billion per year.

3 See: [http://ec.europa.eu/growth/single-market/public-procurement\\_en](http://ec.europa.eu/growth/single-market/public-procurement_en). Included are public procurement commitments under the World Trade Organization's Agreement on Public Procurement (GPA). Not the entire value of public procurement is therefore included. The WTO has a slightly different estimate, namely EUR 1.7 trillion; see: [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm).

4 The websites <http://ec.europa.eu/trade/policy/accessing-markets/public-procurement> and <http://ec.europa.eu/growth/single-market/public-procurement> mention slightly different figures, but the range is the same. At WTO level, public procurement accounts for 15-20% of global GDP and the economies of many countries around the world fall within this range.



### ***Aims, key principles and legal framework of public procurement***

From the outset, it must be emphasized that the objectives of public procurement are particular to the Member State and case at hand. At the EU level, the following policy objectives are widely accepted:<sup>5</sup>

- To ensure wider uptake of innovative, green, and social procurement;
- To professionalize public buyers;
- To increase access to procurement markets;
- To improve transparency, integrity and data;
- To boost the digital transformation of procurement;
- To promote that authorities are buying together.

In public procurement law, these aims stand next to what may be called its original objective: to establish an internal market for public procurement through harmonization. In order to achieve these aims, there are rules that basically result from the principles of public procurement. In turn, these principles originate in the Treaty on the Functioning of the European Union (TFEU). They are:

#### ***Principle 1: Equal Treatment***

Within the framework of public procurement, all potential interested parties and bidders for public contracts and concessions must be treated equally and without any distinction. Without doubt, this is the most important principle in public procurement. It is codified in Article 18 of Directive 2014/24/EU, and reference is made in the first recital of the Directive. This principle does not mean that different situations or economic operators cannot be treated differently, but from the perspective of the contracting authority all parties in a same position must be treated equally.

#### ***Principle 2: Non-discrimination***

Contracting authorities should not make any difference between the potential bidders on the basis of nationality, gender, etc. Indirect discrimination particularly deserves attention, and over de years, direct discrimination is

5 See: [https://ec.europa.eu/info/policies/public-procurement\\_en#objectives](https://ec.europa.eu/info/policies/public-procurement_en#objectives).

becoming increasingly the exception. This principle can also be found in Article 18 of Directive 2014/24/EU.<sup>6</sup>

### *Principle 3: Transparency*

The principle of transparency provides that the contracting authority should maintain a significant sufficient level of transparency before, during and after the public procurement process. It results from the previous two principles. A contracting authority should not only respect the principle of transparency before the procedure and on the moment of announcement of the contract notice, but also during the procedure and even after the contracting. The principle is codified in Article 18 of Directive 2014/24/EU, and further developed by the Court of Justice. The latter e.g. held in its *Telaustria* judgment:<sup>7</sup>

“That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.”

In later judgments, the Court extended the principle to other phases of the public procurement process. Its importance cannot be underestimated in a situation where the contracting authority is dominant in the public procurement process.

### *Principle 4: Proportionality*

The proportionality principle means that, to achieve the aims of public procurement, the EU will only take the action it needs to, and nothing more. The principle is enshrined in Article 5 TFEU, which states:

“The content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”

A contracting authority must always balance the necessity and proportionality of requirements, conditions, demands, technical

6 For an analysis of the first two principles, see R. Nielsen, “Discrimination and Equality in Public Procurement”; Paper available at: <http://arbetsratt.juridicum.su.se/filer/pdf/klaw46/discrimination.procurement.pdf>.

7 Judgment of 7 December 2000 in Case C-324/98, *Telaustria Verlags GmbH*, par. 64.

## Better Regulation in EU Public Procurement Law

specifications, etc. in public procurement procedures with the aims it intends to realize. Article 18 of Directive 2014/24/EU confirms the application of the proportionality principle in public procurement. Even decisions by the contracting authority, such as in the field of exclusion of economic operators, must be in proportion to the goal that the contracting authority aims to realize. In The Netherlands, the application of the principle of proportionality in public procurement is further regulated in Article 1.10 of the *Aanbestedingswet 2012* and the *Gids Proportionaliteit*. This Proportionality Guide intends in particular to ensure that all requirements imposed by a contracting authority are proportionate to the object and scope of the public contract. Article 1.10 paragraph 3 of the Dutch Public Procurement Act (*Aanbestedingswet 2012*) states that the Proportionality Guide is to be considered as a mandatory guideline. The latter elaborates on the application of the principle of proportionality and how it should be applied in procurement procedures. Accordingly, the application of the Proportionality Guide should strengthen the position of small and medium-sized enterprises during tender procedures. Article 1.10 paragraph 4 of the Dutch Procurement Act stipulates that contracting authorities may only deviate from the detailed provisions on proportionality if this is properly motivated in the tender documents (“*comply or explain*”).

### *Principle 5: Mutual Recognition*

For the establishment of one internal market, the principle of mutual recognition is important. Mutual recognition promotes economic integration and increased trade between the Member States. On top of the previous principles, contracting authorities must guarantee a level playing field among economic operators from different countries. In this respect, contracting authorities must accept that, although conditions might not be identical, certificates, awards, etc. from other member states are all equivalent. Even though at certain points the requirements for a certificate might differ, the contracting authority cannot impose a (national) certificate as condition for award of a contract.

*Principle 6: Effective Competition*

Effective competition will exist if in the period between the notice of the contract and the actual bid several economic operators had effective and equal access to the tender documents, and if the tender documentation enables several economic operators to make a bid. In my view, effective competition is an aim of public procurement, because without competition, it simply does not work: a best price quality ratio can only be reached if effective competition regarding the public contract or concession actually takes place. Effective competition is thus a condition which must be tested in any and all public procurement procedures. These general principles have mostly been recognized in the case law of the European Court of Justice. Later on, they have all been enshrined in EU secondary law. Accordingly, the overall volume of regulation of public procurement has undergone a steep increase over the last 40 years. During this period, the Union (and the Economic Community that preceded it) adopted six generations of directives in the field of public contracts. In 2014, the EU adopted for the very first time a directive on public concessions. This extensive body of secondary law is nowadays related to substance, as well as to enforcement and remedies. Outside the general scope of public procurement regulation, there is separate legislation on defense and security procurement (Directive 2009/ 81/ EC). Yet, these particular procurement rules are very specific, covering only a limited part of the procurement volume and can thus be left aside. Within the framework of this contribution, we may also omit a discussion of the differences between the directives between the first generation of 1971, and the latest generation of 2014. For sure this would be interesting, as the changes in the public procurement directives are numerous. For reasons of space however, the focus lies on the most recent generation of 2014, when the Directives 2014/ 23/ EU (Concession Directive), 2014/ 24/ EU (General Directive) and 2014/ 25/ EU (Special Sector Directive) were adopted. These measures all had to be transposed in national legislation by 18 April 2016.<sup>8</sup>

<sup>8</sup> The Netherlands ran slightly late in transposition and modified the *Aanbestedingswet* 2012 only as per 1 July 2019.

### ***Possibilities of Better Regulation***

Before answering the question “What are the possibilities for Better Regulation in EU law?” with regard to this specific domain, it is first necessary to define what “Better Regulation” in the field of public procurement entails. Let us proceed from the European Commission’s own definition:<sup>9</sup>

“‘Better Regulation’ means designing EU policies and laws so that they achieve their objectives at minimum cost. Better Regulation is not about regulating or deregulating. It is a way of working to ensure that political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed by the comprehensive involvement of stakeholders. This is necessary to ensure that the Union’s interventions respect the overarching principles of subsidiarity and proportionality i.e. acting only where necessary at EU level and in a way that does not go beyond what is needed to resolve the problem. Better Regulation also provides the means to mainstream sustainable development into the Union’s policies.”

Obviously, this is a very general definition of “Better Regulation” at EU level. For public procurement, the definition must be linked to the aims and principles of this field of law. Crucial is that public procurement is ultimately enhanced, in terms of both effectiveness and results. New regulation must therefore be more effective and providing results compared to previous generations. Tentatively, the following key elements may be considered when determining whether new public procurement rules are considered to constitute “Better Regulation”.

#### ***Element 1: Transparency***

The legislative process for secondary EU legislation in the field of public procurement should be transparent, as well as the public procurement procedure itself. In this respect, there is definitely room for improvement. It is clear that too many changes in the latest generation of directives were introduced through amendments in the procedure, and that there has hardly been any reference to the views expressed by the Member States in the legislative process. In the 2014 generation, the European Parliament introduced more than 1000 amendments, sometimes badly prepared. In the

9 See: <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-better-regulation-commission.pdf>.

*Parking Brixen* case,<sup>10</sup> the Court introduced as a clear condition for quasi in-house procurement that no private capital should be involved (presumably to avoid distortions of the market and state aid). However, the attempted codification in Article 12 Directive 2014/24/EU reads:

“1. A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) (...);

(b) (...) and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.”

This exception is entirely new, and was not part of the Commission proposal. Yet, any explanation on its meaning is lacking. This hardly amounts to (the creation of) a transparent new rule in public procurement. In Dutch legislation, it is furthermore a rather odd provision: there are no national legislative provisions that require non-controlling or non-blocking forms of private capital participation.

### *Element 2: Accessibility*

Public procurement rules should be accessible for users and practitioners. Accessibility is at least suboptimal at the present moment: not all judgments of the Court in the field of public procurement law are translated into all EU languages, and the directives are difficult to interpret. Although it is certainly an improvement that a part of the case law of the Court has meanwhile been codified, some provisions, for instance Article 12 of Directive 2014/24/EU, are still not accessible and even deviate in several respects from prior case law. Another example is Article 72 on the modification of contracts during their term. This is a difficult and cascade-like provision, leaving several issues unaddressed, which will certainly give rise to preliminary reference questions.

<sup>10</sup> Judgment of 13 October 2005 in Case C-458/03, *Parking Brixen*, par. 67.

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### *Element 3: Simplicity*

To a certain extent, “Better Regulation” in the field of public procurement law also amounts to (a need for) more simplicity. Rules in public procurement have sometimes become a bit like an Emmenthal cheese, with a clear substantive law part, but also significant holes used by contracting authorities to escape from the demands of effective and transparent procurement. As an example may be mentioned the introduction of life-cycle costing. Article 68 paragraph 1 of Directive 2014/24/EU reads:

“1. Life-cycle costing shall to the extent relevant cover parts or all of the following costs over the life cycle of a product, service or works:  
(a) (...);  
(b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.”

The introduction of life-cycle costing is an improvement, but the provision under (b) makes the use of this award criterion unnecessarily complicated for the average contracting authority.

### *Element 4: Low (Financial) Contracting Burdens*

Public procurement is essentially about contracting. A decreased burden for contracting authorities and economic operators will be beneficial for both. One of the criticisms regarding public procurement legislation pertains to the administrative burden for contracting authorities and economic operators. In most discussions, this is translated into a financial burden for the economic operator. Although in most of these discussions, parties tend to forget that an investment is also needed in private commercial activities, the burden in public procurement might be significantly higher. An alleged burden on both sides certainly has a disadvantage, because the cost of contracting will ultimately be passed on to taxpayers, or calculated in the cost of works, services or supplies. For the public sector, prices will presumably go up: the time and money invested in obtaining the bid will have to be earned back. Contracting authorities will increase their staffing in order to organize properly public procurement. Apart from these arguments, economic

operators might not be prepared to tender, or avoid participating in tenders if the return on investment (including the tendering costs) is not sufficient. This will reduce in the long term competition. Especially in periods of economic growth, certain economic operators (operating in higher market segments) tend to withdraw from the public markets. The chartered accountants in the Netherlands may be mentioned as an example. In the past, the ‘Big Four’ audited the public sector. That however left behind the market of auditing the books of smaller public entities, as result of a combination of increased requirements together with competition aspects.

*Element 5: Availability of Remedies – Effective Review*

Ultimately, in a public procurement procedure, there is one winner.<sup>11</sup> All other economic operators will face a loss: they made an investment without receiving any payback. The question arises how these losing economic operators are protected against unlawful act or even wrongful assessments of their bids. Directives 89/665/EEC and 92/13/EEC (the Remedies Directives) harmonized the national laws in this field. Yet, this harmonization did not mean that remedies cannot be improved.<sup>12</sup> First of all, in practice there is a certain tension between review of procedures and bids by courts or regulatory bodies on the one hand, and a margin of appreciation of the contracting authority on the other. Particularly in the field of quality – when the best price/quality ratio has been selected as award criterion – there must be room for contracting authorities to make an independent assessment that contains, at least to a certain extent, elements of subjectivity. We here encounter a difficult tension, since objectivity and transparency should be the foundations of all evaluations of selections or bids. Secondly, there is a tension between transparency on the one hand and protection of confidential information of economic operators on the other. Effective remedies are only possible if bids are ultimately reviewed by an independent body. Often, the review body will not have the expertise to assess the contents, but at least

11 With the exception of framework contracts; see Recital 61 of Directive 2014/24EU and Article 33 Directive 2014/24/EU.

12 See also in this respect: Report from the European Commission to the European Parliament and Council on the effectiveness of Directive 89/665/EEC and Directive 92/13/EC as amended by Directive 2007/66/EC, COM (2017) 28 final.



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formal aspects and accessible parts of a bid (financing, technical requirements, etc.) can be reviewed.

### *Element 6: Codification*

One of the important arguments for the sixth generation of public procurement directives is the extensive case law on public procurement. The Court of Justice of the EU has handed down many judgements with regard to the five previous generations of directives in the field. For example, with regard to quasi in-house and in-house procurement, these judgments have over the years created a patchwork of rules and particular conditions for relying on the exception for quasi in-house and in-house procurement. Some of these judgements are related to other subjects as well, and difficult to find.<sup>13</sup> More importantly, some of these have been interpreted slightly differently later. For example, the judgments on a significant cross-border interest seem to differ from each other. The latest important judgment in the *Tecnoedi* case underscores that it is still important to examine several judgements at the time.<sup>14</sup> In other words, a positive aspect of the sixth generation, and in this respect a factor leading to Better Regulation, is the increase of legal certainty through codification, as pointed out in the second recital of Directive 2014/24/EU (“There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.”).

### *Element 7: Secondary Aims – Limitation and Coordination*

Over the last 15 years, the emphasis on green procurement and procurement involving environmental aspects has increased. The Court already opened the possibility for contracting authorities to include other aspects than price and quality in the assessment of bids in the *Beentjes* case.<sup>15</sup> It took quite some time before the Court of Justice unequivocally acknowledged in the *Max*

13 See for example the Judgment of 11 January 2005 in Case C-26/03, *Stadt Halle*.

14 Judgment of 6 October 2016 in Case C-318/15, *Tecnoedi Costruzioni*, par. 22.

15 Judgment of 20 September 1988 in Case 31/87, *Gebroeders Beentjes*.

*Havelaar* case<sup>16</sup> that protection of the environment and promotion of sustainable development can be realized through public procurement as well. This emphasis is clearly visible in, for example, recital 91 of Directive 2014/24/EU:

“This Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.”

In my view, this forms an improvement to the extent that there exists always a suspicion that, with the serious differences in ambition between the Member States, green procurement might be abused to protect national interests and jeopardize the entry of economic operators from other Member States. From the “Better Regulation” point of view, a downside is that in the directive, there are too many provisions, which are not clearly linked. For instance, Articles 18, 62, 67 and 68 (award criteria) and 70 (performance conditions) all individually relate to green procurement, yet none of these provisions have been visibly interlinked. Therefore, a clear overall picture with regard to green procurement is missing. A reduced number of rules and more coordinated approach would likely result in “Better Regulation”.

#### ***Element 8: More is Not Better – Reduction of Rules***

It is regrettable that the public procurement directives from generation to generation seem to explode *qua* number of provisions. This leads to a diminished accessibility of the field. In particular, one should question whether public procurement really needs so many detailed rules. In my view, the EU should be more reluctant, and put more on emphasis on the general principles of public procurement instead. I would therefore recommend reducing the number of rules, but clarify the general principles. National legislators could work out the rules in greater detail, possibly adding their own, within their own jurisdictions, yet not losing their way when attempting to navigate the very formal rules at European level. Not only is “more” not automatically “better”, but we also witness an increasing complexity between, on the one hand, the rules in the first and second generation, and

16 Judgment of 10 May 2012 in Case C-368/10, *Commission v Netherlands*.

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the fifth and sixth generation on the other. One could question whether for example Article 26 (choice of procedures) and Article 58 (exclusion grounds) of Directive 2014/ 24/ EU should be so complicated.

### *Element 9: No Gold-plating*

Gold-plating is the well-known pejorative term to characterize the process whereby an EU directive is given an additional remit or level of depth when being transposed into the national laws. Some Member States, e.g. the Netherlands, seem to engage in such gold-plating in public procurement. The pertinent directives have now been transposed into the national laws of most EU member states, and more national legislators have been seizing the opportunity to add their own rules. From the perspective of economic operators, this process should be profoundly regretted. It jeopardizes the functioning of the internal market, as it ultimately leads to different procedures and requirements for contracts with an estimated value above the thresholds. The force of the directives should be that economic operators in the EU can as much as possible participate under harmonized conditions. Being able to more or less expect the same rules creates more efficiency and accessibility of the markets across Member States. Overall, one of the most important objectives must be the creation of one internal market for public spending.

### ***The Challenges Ahead***

Within the Member States, EU regulation is presently used for different purposes. There are those who place an emphasis on public procurement and the economic/ financial result. Accordingly, tenders are awarded for the lowest price. Others emphasize that public procurement should lead to less corruption, and that regulation should only result in a transparent market for public spending. Public procurement rules can however also be used to improve the quality of the public sector and create an environmental and social impact. The EU legislator maintains an own agenda and tries to strike compromises in the discussions between them. The most important challenge will be to reach find a good balance between these competing

aims. The risk here is that ultimately proposals from the Commission will be watered down to “grey”, instead of “better” regulation, lacking clear objectives. Therefore, I would dare to call on the EU legislator to reach out for a more concise approach in the field concerned, and restrict itself with regard to the aims and objectives to be pursued (in contrast to the present six aims). But, I do realize this is a tall order in the contemporary EU context.

The second challenge in my view is the most difficult one: is it possible to abolish rules? This is always a difficult question, since the legislator considers the establishing of rules as its natural power and the best solution to organize public procurement. There are however various rules that create unnecessary difficulties. One could imagine that the principles of subsidiarity and proportionality are sufficient for imposing a duty to find a reasonable balance between the various aims and rules. In practice though, striking this balance is much more complicated. For example, the Dutch Proportionality Guide (in total 69 pages) and the Guidelines on Services and Supplies (in total 51 pages) seem superfluous from that perspective. Leave these matters up to case law, or so I would argue, since application of the principle of proportionality calls for a case-by-case approach rather than general rules. In public procurement, the proportionality principle ensures that all requirements imposed by a contracting authority are proportionate to the object and scope of the public contract. Yet also certain hobbies by member states might be suitable for abolishment. For instance, the concept of “maatschappelijke meerwaarde” (societal added value) in Article 1:4 of the Dutch *Aanbestedingswet* 2012, and an obligation to divide public procurement assignments in lots in Article 1:5 there do not seem to contribute to Better Regulation at all. Not only at the national level can certain rules be abolished though, for EU directives also contain provisions that unnecessarily complicate public procurement. One could mention for example self-cleansing (remedial measures) as a possibility to escape from exclusion in tenders, some of the rules in Article 12 of Directive 2014/ 24/ EU on the quasi in-house and in-house procurement, in particular the rules on participation of private capital, and the exception from the full regime for social and other services in Article 38 of Directive 2014/ 24. Public procurement can easily do without these rules.

### **Conclusions**

Unfortunately, for over six generations, in approximately 40 years of public procurement rules, the trend in the legislation has unfortunately not been one towards “Better Regulation”. Unless one considers more rules and increased complexity as fitting within the “Better Regulation” program, there is instead a tendency towards less transparency and a more extensive set of rules. The process itself must definitely become more transparent, as too many changes in the process have been enacted without public explanations. Ultimately, this will only lead to more case law of the European Court of Justice, and probably further divergences between the Member States – a development that the sixth generation of public procurement consciously tries to avoid. Therefore, “Better Regulation” in public procurement law should align with the foundations of the public procurement rules: the regulation of the acquisition of works, services and/or supplies. This regulation must be accessible, transparent, and display a certain degree of simplicity. “Better Regulation” could certainly help to improve the quality of the public procurement. In particular, rules with many exceptions could be considered for abolition. Overall, it will make public procurement regulation more user-friendly for contracting authorities as well as economic operators. Most probably, the cost of contracting will be reduced at the same time, which is equally beneficial for both. We should not forget that public procurement rules ultimately aim to govern a purchasing process, and that in these commercial or business transactions, fewer rules may well amount to Better Regulation. Moreover, users and practitioners in this field need to be able to assess their rights and obligations quickly. In particular in the public procurement process – where deadlines are short, and parties risk exclusion at considerable commercial disadvantage – such assessments must be easier than in other areas of the law where time is less critical. Therefore, indeed: “Better Regulation” matters and less might be better!



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