

CONCERN ABOUT THE QUALITY OF EU LEGISLATION: WHAT KIND OF PROBLEM, BY WHAT KIND OF STANDARDS?

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Abstract

Over the last decade the interest in the quality of EU legislative instruments has surged due to serious threats to the effectiveness of the legislation. This contribution makes an inventory of the policies and instruments that have been put into place to improve quality of legislation and assesses their character, orientation and effectiveness. Any appraisal of these policies, so the paper argues, is dependent on a perception of the basic functions attributed to EU legislative instruments and the standards derived from it. The paper concludes that the present policies and instruments for Better lawmaking have the ability to promote regulatory quality, but not necessarily overall legislative quality.

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1 Introduction

Debates on the quality of Community – or EU¹ – legislation have, in the wake of similar debates in EU Member States,² become ever more topical in the last decade. Various reasons may account for this rising interest, for instance the increased volume and tempo of EU legislation accompanying the establishment of the single market and the accession of twelve new member states. The growing awareness of detrimental effects (non-compliance, ineffectiveness, market distortions)³ of poor EU legislation have also contributed to a sense of urgency to improve legislation among EU institutions and member states alike.⁴ On top of that, more critical attitudes in member states regarding the EU and EU policies, and problems pertaining to the legitimacy of EU legislation, have spurred the debate, as have the worldwide focus on better regulation and new insights in the effects of regulation on economic growth.

For more than a decade now the EU has been trying to get to grips

¹ ‘EU-legislation’ is the common terminology to indicate all of the legislation enacted under both the EC- and EU-Treaty. Especially texts stemming from the period before 2002 (still) use the term ‘Community legislation’ which basically refers to legislation enacted under the EU’s first pillar (EC Treaty). In our contribution we will use the terms ‘Community Legislation’ and ‘EU Legislation’ almost indiscriminately, for purposes of readability. Most texts on the quality of legislation typically address Community legislation. Once the Reform Treaty of 2007 (Lisbon Treaty) is ratified and entered into force only ‘EU legislation’ survives as the proper indication. After the Irish ‘no’ of 13 June 2008, however, it remains to be seen whether the Lisbon Treaty will survive.

² Better regulation is spreading like bushfire in Europe the past few years. See for a few examples the UK (Better regulation and its Better regulation policy <<http://www.dti.gov.uk/bbf/better-regulation/index.html>>), Germany (the establishment of the National ‘Normenkontrollrat’ to promote Better regulation and cutting red tape <<http://www.normenkontrollrat.bund.de/Webs/NKR/DE/Homepage/home.html>>), Portugal (the Simplex 2007 and 2008-programs <http://www.portugal.gov.pt/portal/PT/Governos/Governos_Constitucionais/GC17/Ministerios/PCM/MEAI/Comunicacao/Programas_e_Dossiers/20060327_MEAI_Prog_Simplex.htm>), Ireland (<<http://www.betterregulation.ie/index.asp>>), the Netherlands and other countries (see also <www.administrative-burdens.com>).

³ See for a treatise on this subject C. Radaelli, ‘Governing European Regulation: The Challenges Ahead’ (Florence: European University Institute 1998) *RSC Policy Paper No 98/3*. <http://www.eui.eu/RSCAS/WP-Texts/RSCPP98_03.html> (last visited 4 January 2008).

⁴ See for instance the *White Paper on European Governance* COM (2001) 428 final, the EU Commission’s *Action Plan on Better lawmaking* COM (2002) 275 final, and (more or less) its follow up, *A strategic review of Better regulation in the European Union* (Common Better regulation Strategy, for short) launched in a Commission communication of 14 November 2006 COM (2006) 689.

with legislative problems. Especially over the last five years the law making institutions of the EU have committed themselves to a series of policies, protocols, instruments and review methods to improve the overall quality of legislation. The mass and intensity of these quality strategies is remarkable. They provide an interesting focal point for research for a variety of reasons. Firstly, they tell us something about the current state of affairs of the overall governance of the EU, a treaty-based union that uses legislative instruments to further its goals. What kind of instruments are used to attain the EU's objectives, why and to what effect? What works and what does not, and what are the side effects? Secondly – more interesting from a scholarly point of view – the quality strategies themselves may tell us something about shifts in the perception of EU legislation and, following from that, the standards it has to meet. This is basically a constitutional matter. If we ask ourselves what 'good' EU legislation is, or what kind of standards EU legislative instruments have to meet, than any answer to that question reflects notions, mostly constitutional, about what we expect from EU legislation, more in particular the functions we attribute to it.⁵ These notions vary widely and the standards accordingly.

If, for instance, we find that the most fundamental function of legislation is to enable institutions to intervene in markets, social or political life (instrumental function),⁶ then the standard to measure the success or

⁵ See L.A.J. Senden, 'The Quality of European Legislation and Its Implementation and Application in the National Legal Order' in E.M.H. Hirsch Ballin and L.A.J. Senden (eds.) *Co-actorship in the Development of European Law-making* (The Hague: T.M.C. Asser Press 2005) 29.

⁶ The instrumental functions of legislation in modern societies are manifold. Summers distinguishes five common techniques to give effect to government policies using the law as an instrument. To further policy or political ends law is commonly used as: a. a *grievance remedial* instrument (recognition of claims to enforceable remedies for grievances, actual or threatened); b. *penal* instrument (prohibition, prosecution and punishment of bad conduct); c. an *administrative-regulatory* instrument (regulation of generally wholesome activities, business or otherwise); d. an instrument for ordering governmental/authoritative *conferral of public benefits* (education, welfare, economic infrastructure, etc.); e. as an instrument for *facilitating and effectuating private arrangements* (facilitation and protection of private voluntary arrangements, economic and otherwise). EU legislation - especially EC legislative instruments – basically perform most of these instrumental functions, be it that the *administrative-regulatory* function (e.g. in agriculture, health and environment legislation) and *facilitating and effectuating private arrangements* (e.g. consumer protection, telecommunication services etc.) functions are somewhat predominant. See R.S. Summers, 'The Technique Element in Law' (1971), 59 *California Law Review* 733 see especially at 736. The functions are inspired on an article by H. Kelsen, 'The Law as a Specific Social Technique; the Essence of Legal Technique' (1941-1942) 9 *The University of Chicago Law Review* 75 at 75.

failure of legislation is an altogether different one than according to notions that frame the principle functions of legislation in terms of establishment of institutions, attribution of power and constraints on governmental action (constitutional function). It does not stop there; legislation in modern states performs a host of other functions.⁷ It expresses and fixes trade-offs between (opposing) interests in political arenas (political function); it provides the basis for popular participation – and so the legitimization – in the framing of legislation (democratic function); it communicates and reaffirms public morals, values and public goods (symbolic function),⁸ and it organizes and structures implementing powers and institutions (bureaucratic function),⁹ to name but a few of the most important functions. I will not deal with all of these functions at length, but it is important to see that quality notions are in fact implicit (most of the time) expressions of perceptions of the proper functions of legislation.

To complicate matters: the functions of EC legislation are not static. They have changed quite substantially over the years. Under the ‘old’ EEC Treaty the EC’s legislative instruments were means to very specific ends: establishing a customs union, achieving a common market, safeguarding economic freedoms.¹⁰ Under the Treaty establishing the EU, the Union’s objectives have changed and, as a result, the way in which legislative instruments are used.¹¹ The way in which the bulk of EU legislative instruments is enacted nowadays, involving the European Parliament as a full legislative partner under the co-decision procedure, has left its mark on the character of EU legislation as well.

⁷ These functions in fact are a summary of the – Llewellyn-based (from his *Jurisprudence* (1962)) – basic functions Twining and Miers attribute to ‘rules’. See W. Twining and D. Miers, *How to Do Things with Rules?* (London: Weidenfeld and Nicolson 1991, 3rd ed.) paragraphs 3.8 through 3.11 at 159.

⁸ This coincides to some extent with what Morgan labels ‘meta-regulation’. B. Morgan, *Social Citizenship in the shadow of Competition; the Bureaucratic Politics of Regulatory Justification* (Aldershot: Ashgate 2003) at 79.

⁹ This in fact is more or less a subsection of the ‘constitutional function’. The constitutional function is commonly believed to be made up of the *constituent*, *institutional* function (establishing institutions), the *attributive function* (attributing power to institutions) and the *regulatory function* (outlining and limiting the scope of the use of power). See for instance C.A.J.M. Kortmann, (in Dutch) *Constitutioneel recht* (Constitutional Law) (Deventer: Kluwer 2008, 6th ed.) at 21.

¹⁰ See the preamble of the EEC Treaty and articles 2 and 3.

¹¹ See for the different objectives article 2 of the Treaty establishing the European Union (TEU). The objectives of the Union can be summarized as follows: promotion of economic and social progress and a high level of employment to achieve balanced and sustainable development, implementation of a common foreign and security policy, establishment of citizenship of the EU, and providing for a area of freedom, security and justice.

These underlying notions as to the functions attributed to legislation are vital to any understanding of the EU's legislative policies. If we fail to take account of them, it will be impossible to understand where the standards for good legislation – on which most of the strategies are built – originate from, nor will it be possible to come up with a balanced appraisal of the effectiveness of these strategies.

It is therefore that in this contribution we will ask ourselves two basic questions:

1. What kind notions of and standards for EU legislation are expressed in recent policies and instruments aiming to improve the quality of EU legislation?
2. Are these policies and instrument effective means to solve legislative problems?

I will not, with this distinctive approach, address the questions primarily from a regulatory governance perspective (why regulate, who are the principle actors, what interest are served, etc.)¹² but rather from a more or less constitutional perspective (what are the basic functions attributed to legislation, what kind of standards for 'good' legislation emanate from that, how are these standards reflected in policies and enshrined in normative documents, and how and to what degree are these standards met, etc.).¹³

2 The quality of legislation: an elusive concept

Over the past decade, the concern for legislative quality and focus on better regulation has become popular in many EU countries for various reasons.¹⁴ There is some evidence that legislation can and does affect competitiveness

¹² See (from the vast lakes of literature on regulatory governance) for instance, A. Ogus, *Regulation: Legal Form and Economic Theory* (Oxford: Oxford University Press 1994); R. Baldwin and M. Cave, *Understanding Regulation* (Oxford: Oxford University Press 1999).

¹³ This latter approach was also adopted by H. Xanthaki, 'The Problem of Quality in EU Legislation; What on Earth is Really Wrong?' (2001) 38 *Common Market Law Review* 651.

¹⁴ The work of the Organization for Economic Cooperation and Development (OECD) has been an important inspiration as well the successes of other EU countries like the United Kingdom, the Netherlands and Belgium in freeing markets and limiting administrative and other burdens as a result of legislation. Or may be it is due to the fact that no one in all seriousness can oppose Better regulation. Who on earth would want to promote 'Worse legislation'? See S. Weatherill, 'The Challenge of Better regulation' in S. Weatherill (ed.) *Better regulation* (Oxford, Oregon and Portland: Hart Publishing 2007) 3.

and economic growth¹⁵ and there are troubling problems regarding the effectiveness of legislation. As a result, better regulation policies have mushroomed throughout Europe and up to the level of the European Union.¹⁶

What many of these policies share, as does EU policy on Better Lawmaking,¹⁷ is the ambition to improve the overall quality of legislation. But what do we mean by legislative ‘quality’? It is a very elusive buzzword indeed. According to a common definition, quality is the extent to which goods or services meet requirements or standards.¹⁸ Hence legislative quality is the degree to which legislative instruments and procedures live up to the legislative standards. But then a new question emerges: what are the relevant or proper standards for EU legislation? A question like this can only be answered in the light of the function EU legislation performs in EU context.

3 Legislation as the source of quality standards

Legislation is primarily a medium through which law is expressed. As such it performs important functions in constitutional states, as we have already seen. In the political systems of welfare states, governed by the rule of law,¹⁹ legislation provides both the basis and the framework for government action (constitutional function). At the same time, law expressed by legislation serves as an instrument to further policies (instrumental function), acts as a trade-off mechanism for interests (political function) and a channel for popular participation in the enactment of law (democratic function), and it offers the basic framework for the operation of a bureaucracy (bureaucratic function).²⁰ Aside from these more or less instrumental functions, legislation has less well known but important non-instrumental expressive and symbolic functions, which structure the legislative debate and provide the authoritative aura for and legitimacy of legislation (symbolic function).²¹

¹⁵ See for instance Organisation for Economic Cooperation and Development, *Cutting Red Tape: Comparing Administrative Burdens across Countries* (Paris: OECD Publishing 2007).

¹⁶ See for instance the overview for simplification initiatives see <www.administrative-burdens.com> (last visited 16 June 2008).

¹⁷ See <http://ec.europa.eu/dgs/legal_service/law_making_en.htm> (last visited 16 June 2008).

¹⁸ See for instance the ISO 9000-definition of quality of the International Organization for Standardization (ISO).

¹⁹ An important – procedural - element of the rule of law is that it requires a mandate in law for governmental action and the obligation to act in accordance with law.

²⁰ See P. Eijlander and W. Voermans, *Wetgevingsleer* (On Legislative Drafting). (The Hague: Boom Juridische uitgevers 2000) at 18.

²¹ The communicative function of law (and legislation, as its expression, for that matter) is, as observed by the Dutch scholar Wibren van der Burg, a complex one.

By and large, the EU's legislative instruments perform the same functions in the context of the EU legal order, but there are some differences compared to the situation in national states. Article 249 of the EC Treaty, for instance, provides that EU institutions can only enact legislation 'in order to carry out their task and in accordance with the provisions of this Treaty'.²² On the face of it, this anchors the use of legislative instruments, like regulations and directives, to the objectives of the EU, notably the promotion of economic and social progress in a single market, the establishment of a common foreign and security policy, EU citizenship, and an area of freedom, security and justice.²³ Although the scope of the objectives has broadened since EEC became EC, even under the EU umbrella, article 249 of the EC Treaty seems to indicate that the rationale for EC legislation is totally different from the one in the member states. Historically this holds true. The EU was not set up as a plenipotentiary state, but as a community with specific, limited powers devised to achieve limited ends. As a consequence, the functions of legislative instruments put in place by this community are predominantly instrumental and bureaucratic, and should be appreciated accordingly, one could argue. This way of reasoning, however, ignores that the changes in the context in which the EU's legislative instruments have been used since the mid-1990s. Barents, for one, believes that the EU can no longer be deemed a mere intergovernmental community, since it has developed into a – originally self proclaimed – autonomous legal order governed by constitutional principles (adherence to democracy, fundamental rights, etc.).²⁴ Article 6 of the Treaty establishing the European Union (TEU) bears witness to this by stating that

The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

This is especially relevant for the use of legislative instruments in the EU. These instruments are no longer a mere means to economic ends that must

Law may create a normative framework, a vocabulary to structure normative discussions, as well as institutions and procedures that promote further discussion. The expressive function of law is at stake when it expresses which fundamental standards, which values are regarded as important. See W. Van der Burg, 'The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues' (2001) 20 *Journal of Law and Philosophy* 1 31. See also B. Z. Tamanaha, *Law as Means to an End; Threat to the Rule of Law*. (New York: Cambridge University Press 2006).

²² A limited power. See also article 5 TEU.

²³ See article 2 TEU.

²⁴ R. Barents, *The Autonomy of Community Law* (The Hague, London, New York: Kluwer Law International 2004) especially at 19.

primarily be appreciated functionally, but instruments that perform vital functions in an autonomous legal order, governed by constitutional principles. EU legislation therefore basically serves the same ends and purposes as national legislation, although there are different accents. But it goes almost without saying that present-day EU legislation has a significant democratic,²⁵ political, constitutional and symbolic function, making it much more comparable to member state legislation than it used to be.

4 Legislative and regulatory quality

In order to be able to perform most of the functions mentioned above, legislation in a constitutional state as well as EU legislation must meet some basic requirements. Subject to the rule of law, as any other institution or agent in a constitutional state or the EU for that matter, the activity of legislating is subject to the law itself. This means that in order to legislate, a constitutional power to legislate is a prerequisite, and that legislative processes as well as legislative discretion are confined by law (preparation and enactment according to the due procedure, not acting contrary to higher ranking laws, and some form of accommodation to existing law). Aside from this ‘principle of legality’ the rule of law also imposes a duty on the legislator to consider – in some way or respect – the implementation and enforcement of legislation to be enacted (‘principle of effectiveness’). The last requirement the rule of law sets upon a legislative act results from the principle of legal certainty, and is what we can call the ‘principle of intelligibility’, the principle that legislative acts need to some extent to be readable and intelligible to its addressees. Most constitutional states are not only governed by the rule of law but are in effect democratic states too. The latter feature results in separate, additional requirements for legislatures connected to the democratic and political function of legislation. Legislative authorities are subject to the ‘duty to give reasons’, the ‘duty to consult or involve interested parties’, be it directly or indirectly, and the ‘duty to inform’ (transparency and accessibility), during the course of legislative processes resulting in primary legislation.²⁶

For some it will be obvious that legislative quality standards can only emanate from constitutional principles (e.g. constitutional lawyers),

²⁵ Especially now the co-decision procedure, involving the European Parliament, is applicable in most of the first pillar legislation and will be the regular legislative procedure under the Lisbon Treaty.

²⁶ ‘Primary’ used here as opposed to ‘subordinate’ or ‘delegated’ legislation, in the form of statutory instruments, government decrees or ministerial regulations that are based on higher ranking regulations and merely detail the norms of the higher ranking laws.

others may take a different view of the matter. The Organization for Economic Co-operation and Development (OECD), for instance, approaches the idea of – what they call - regulatory quality from a rather more economic angle. The overall OECD perception of regulatory activity – often taking the form of legislation – is largely instrumental. The OECD and a large part of the regulatory governance community²⁷ understand legislation primarily as a regulatory instrument, as a means to attain public good, and to provide prerequisites for stable institutions, fair market conditions, citizen's satisfaction, and economic growth and welfare.²⁸ Taken from this perspective legislation performs well if it maximises the net benefits of regulatory measures and citizen's wealth. Legislative quality, according to this view, is not in the first place the extent to which legislation complies with constitutional principles or conveys symbolic notions, but rather more the way legislation rates in terms of enhancing economic performance, or the dynamics of trade offs of interests. Over the last decade much effort has been invested in defining (a wide range of) regulatory quality indicators, in order to make regulatory quality measurable. Performance on indicators like these gives us an idea of the ability of a government to formulate and implement sound policies and regulations that permit and promote private sector development.²⁹

The different functions of legislation translate into different views on legislation. When one adopts an instrumental or political view to legislation the conceptual lens to problems of and the proper standards for legislation will be a different one than from a more constitutional or symbolic perspective. That is why we will distinguish between the concept of 'legislative quality' and the concept 'regulatory quality'. From a constitutional point of view (and the symbolic function which is closely related to it) the only right measure for the quality of legislation is its ability express law.³⁰ The quality of legislation is the extent to which the criteria,

²⁷ Regulatory governance is topical in political science and the literature is developing rapidly. The European Policy Group for political research has an active standing group on regulatory governance. See <<http://regulation.upf.edu/>> (last visited on 19 June 2008). It is quite strange that scholars in constitutional law are not catching on: a state's regulatory capacity is the core business of constitutional law.

²⁸ See OECD, *Regulatory Policies in OECD Countries; from Interventionism to Regulatory Governance*. (Paris: OECD Publishing 2002).

²⁹ See the paper D. Kaufmann, A. Kraay and M. Mastruzzi, Governance Matters VI: Aggregate and Individual Governance Indicators 1996–2006 (2007) *World Bank Policy Research Working Paper No. 4280*. See also Centre for European Studies Bradford University, *Final Report on Indicators of Regulatory Quality*, report for DG Enterprise (European Commission 2004).

³⁰ See also J. Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press 1999) especially Chapter 2 - The Indignity of Legislation. See also

emanating from constitutional principles, are met. Regulatory quality on the other hand is the extent to which legislation, as a means to express public policies, is successful in implementing policies to permit and promote private sector development, fair market conditions, stable institutions, citizens' satisfaction, etc. The different notions are not mutually exclusive; in fact they coincide in some respects. One might, for instance, argue that the regulatory quality of legislation is a part of an overall notion of legislative quality, since it deals with effectiveness and efficiency of legislation. This would not, however, do justice to the very different perspectives on the function of legislation in the two different notions.

However interesting this discussion is, this paper does not take regulatory quality as its principle point of departure, but legislative quality instead. Not that I wish to disqualify the regulatory quality perspective, but in an attempt to add to it by taking a more constitutional point of view, one that has, in my opinion, not been fully explored and expressed in recent Better regulation debates.

5 Quality standards for EU legislation

The legislative requirements mentioned in paragraph 4 are still very general and theoretical, even though they are represented in quality policies of different member states.³¹ If we want to find out what kind notions of and standards for EU legislation are expressed in recent quality policies we need to take a closer look to these policies themselves and the debates and considerations preceding them.

The idea to improve the quality of EU legislation is quite new. In the rush to complete the internal market, not much attention was given to the quality of legislative instruments. It did not sting up until 1990: the legislative volume of the EU had been quite modest up to that moment and legislative problems were dismissed as either 'collateral damage' or

C. M. Radaelli and F. de Francesco, *Regulatory Quality in Europe: Concepts, Measures and Policy Processes* (Manchester: Manchester University Press 2007).

³¹ See for instance the Netherlands. The idea of legislative quality is closely related to the demands of the rule of law and demands of – so called - administrative quality of legislation. See *inter alia*, the legislative policy document 'Outlooks for Legislation' (*Zicht op wetgeving – Dutch Parliamentary Papers (Kamerstukken II) 1990/91*, 22 008, nos 1-2). Quality of legislation in the Netherlands is perceived as the degree to which a regulation complies with the requirements (so-called 'quality pairs') of: a. legality and lawfulness, b. implementation and enforcement, c. effectiveness and efficiency, d. subsidiarity and proportionality, e. harmonization and coordination and f. simplicity, readability and accessibility. These requirements are elaborated in policies and dedicated instruments, like reviews, manuals and (voluminous) drafting directives.

perceptions that did not duly account for the different setting³² of EU legislation. After the Sutherland report sounded the alarm over the quality of EC legislation in 1992,³³ however, the debate was on, not only on the problems but on the proper standards for EU legislation as well. This does - to my mind - not accidentally coincide with the emergence of the new political and constitutional objectives the EU has set itself since the Maastricht Treaty. These new objectives bear on the expectations of EC legislation.

5.1 Sutherland, Koopmans, Piris and Timmermans

Since 1992 most commentators, scholars and policy makers have felt that the proper quality standards for European legislation are to be found in the Treaties and the objectives pursued in a Community context with the existing legislative instruments. At the conference 'Quality of European and national regulations in the internal market', held in Scheveningen in April 1997,³⁴ both the Director-General of the Council Legal Service, J-C Piris, and the deputy Director-General of the European Commission Legal Service, C. Timmermans, indicated what the term quality of European

³² Some authors argue that the EU legal order and national legal orders are in fact incomparable as regards legislation and legislative processes. Legislation at the EU level performs different functions than in the Member States and the setting of EU legislative processes is unique. Timmermans – for instance - notes that the nature of Community Law is a 'droit diplomatique', a product of intergovernmental negotiation that can only be judged on its own merits and is governed by its own standards. C.W.A. Timmermans, 'How to improve the Quality of Community Legislation: the Viewpoint of the European Commission', in A.E. Kellerman and others (eds.) *Improving the Quality of Legislation in Europe* (The Hague, Boston, London: Asser Press 1998) 39. This idea of incomparability seems to have caught on, especially in the Netherlands (see Hirsch Ballin and Senden, above n. 5 at 29).

³³ The Sutherland report ('*The internal market after 1992: meeting the challenge*') of 1992 SEC (1992) 2044 sets out some basic requirements for EC legislation, holding that each Community legislative act should be assessed on the basis of five criteria, namely the need for action, the choice of the most effective course of action, proportionality of the measure, consistency with existing measures, and wider consultation of the circles concerned during the preparatory stages. See for the follow up of the report, inter alia, the European Commission's Communication SEC (1992) 2277 and COM (1993) 361 def.

³⁴ For a summary of the contents of this meeting ('*Kwaliteit van Europese en nationale regelgeving in de interne markt*') see H. Hijmans, 'Over de kwaliteit van Europese regelgeving' (*On the quality of European Legislation*) (1997) 5 *Regelmaat* (Dutch Journal for Legislative Studies) at 192.

regulation must be taken to mean in a Community context in their view.³⁵ Building upon the work of the Sutherland report of 1992 and the Koopmans working group,³⁶ these EU officials came up with an impressive shopping list of quality standards for EU legislation.³⁷ Although shopping lists are not all that interesting per se, what is interesting to see is that the list of EU quality standards corresponds to a very high degree to the general observations set out in paragraph 4. The shopping lists express, to a certain extent, a somewhat constitutional view on EC legislation where one would expect a primarily instrumental view. There are also specific features and differences. The EU quality standards set out by Piris and Timmermans emphasise the demands of subsidiarity and proportionality (concurrent with the requirement of article 5 of the EC Treaty), and the right choice of instrument (and the accompanying procedure). The latter element is a typical consequence of the system of conferral or limited attribution under the EC

³⁵ See J.-C. Piris, 'The Quality of Community Legislation: the Viewpoint of the Council's Legal Service' in A.E. Kellerman and others (eds.) above n. 32 at 25 and Timmermans, above n. 32.

³⁶ In the wake of the alarms raised by the report of the Molitor group (*Report of the Group of Independent Experts on Simplification of Legislation and Administration*, COM (1995) 288 final/2, of 21 June 1995) the Dutch presidency of the EU in 1996 commissioned a working group to try and find more or less universal standards for legislation. The Koopmans-group came up with a set of standards that are derived from (or inspired) by the common legal cultures from the - then - 10 EU Member States. Koopmans Report, '*The quality of EC Legislation. Points for Consideration and Proposals*' (The Hague 1995).

³⁷ According to approximation of these 'legislative chiefs' in 1997 EU legislation must meet with the following demands: 1. Necessity of regulation (alternatives to regulation are to be considered); 2. Proportionality (no more burdening than absolutely necessary); 3. Subsidiarity (in line with the subsidiarity principle laid down in article 5 of the EC Treaty); 4. Choice of the right instrument (directive, regulation, etc.); 5. Control over the volume of legislation, by preventing new regulation, excessive costs, red tape and overregulation; 6. Coherence and harmonization with existing measures; 7. Requirement of due care during preparation, in the sense of prior consultation of interested parties; 8. Implementation and enforcement; 9. Drafting quality, in particular compliance with Community requirements enshrined in manuals and style guides. At the time (1997) these were the Commission's and Council's Drafting manuals, style guides and the requirements following from the Sutherland-report. In 1998 a lot of these drafting requirements were forged and enshrined into the Interinstitutional Agreement of 22 December 1998 on *common guidelines for the quality of drafting of Community legislation* (OJ 1999C73/1) (hereinafter *IIA 1998*) and 10. Accessibility (*inter alia*, in the sense of providing easy access to, consolidation and codification of regulatory texts). Points 1, 2, 4, 6 and 7 were also put forward as requirements for EC legislation in the 1993 Sutherland report. See Commission Communication of 16 December 1993 COM (1993) 361 def.

and EU Treaties.

5.2 EU Quality standards

In the following years these sketchy notions on quality standards from the 1997 conference were elaborated in policy papers and policies, notably in the white paper on European Governance³⁸ and conclusions of the Laeken and Lisbon summits. They underpin the present EU legislative policies. Their echo also resonates in the work of the Mandelkern group,³⁹ the Better lawmaking initiatives and instruments of 2002⁴⁰ and the subsequent Better regulation strategy of 2006.⁴¹ If we were to sum up the net result of these documents, the EU standards for legislative quality would boil down to the following requirements to be met when drafting, enacting and implementing legislative acts.

- i. Legality: the limits of the legislative attribution of the EC Treaty and EU Treaty, sufficient legal basis, not contravening superior or already existing legislation or treaties – including the EC and EU Treaty - with due regard for unwritten legal principles, etc.⁴²
- ii. Due procedure and consultation: proper procedure, coordination (information exchange, cooperation, synchronization, etc.) between the three legislative institutions (Commission, Council and European Parliament),⁴³ (multi)annual programming of legislative activity, wide consultation,⁴⁴ evidence-based and duly motivated decisions,⁴⁵ transparency throughout the legislative process enabling maximum accessibility, etc.⁴⁶
- iii. Subsidiarity and proportionality (including overall effectiveness and efficiency of an act): careful consideration of necessity of Community action⁴⁷ in view of the subsidiarity principle,⁴⁸

³⁸ COM (2001) 428 final.

³⁹ See Mandelkern Group on Better regulation, *Final Report* (2001).

⁴⁰ Communication *Better lawmaking* COM (2002) 275 final, followed by the *Action Plan for simplifying and improving the regulatory environment* COM (2002) 278 final.

⁴¹ COM (2006) 689 final.

⁴² See for instance point 2 *Interinstitutional Agreement on Better Law-Making* of 31 December 2003, *OJ* 2003C321/01 (hereinafter: *IJA 2003*).

⁴³ See points IIA 3 through 11 of the IJA 2003.

⁴⁴ See point 26 IJA 2003.

⁴⁵ See point 15 IJA 2003.

⁴⁶ See points 4 through 9, 10 and 11 of the IJA 2003.

⁴⁷ See points 16 and 17 of the IJA 2003 (elaborated in point 18 through 23).

⁴⁸ See article 5 of the EC Treaty, the of 25 October 1993 on the procedures for implementing the principle of subsidiarity *OJ* C 329/135, points 13, 16 and 18 through 23 of the IJA 2003.

prevention of legislative proliferation, due regard for alternative methods of regulation,⁴⁹ avoiding red tape where possible, instruments and costs proportional to the policy goals and as simple as possible,⁵⁰ consideration of effectiveness of the solution in comparison to alternatives, informed and evidence-based decision-making e.g. on the basis of an integrated impact assessment,⁵¹ screening the legislative stock from time to time, simplification (inter alia by repeal of obsolete acts), codification and consolidation,⁵² etc.

- iv. The right instrument: choosing the right instrument (directive, framework directive, regulation, etc.), the right balance between general principles and detailed provisions, no excessive use of implementing powers, etc.⁵³
- v. Implementation and transposition: attention to the operability and application of an act,⁵⁴ careful consideration of implementation powers for the Commission and the Member States, clear transposition deadlines for directives, consideration of transitory provisions and entry into force, monitoring implementation and evaluation, etc.⁵⁵
- vi. Enforceability: due consideration of the enforcement and assessment of compliance, effective inspection and sanctioning.⁵⁶
- vii. Technical quality (including accessibility and readability): clear, simple and precise language, due attention to internal and external consistency, consideration of the multilingual context of the EU, overall accessibility and readability.⁵⁷

Lists like these always have an element of subjectivity⁵⁸ and this one certainly cannot claim to be exhaustive or the ultimate one. Some may feel that elements of the list should be joined or – on the contrary – should be split. Others will argue that the list is quite technical and administrative in nature and does not take full account of the political, social or economical

⁴⁹ See point 16 IIA 2003.

⁵⁰ See e.g. point 12 IIA 2003.

⁵¹ See points 27, 28 and 29 of the IIA 2003.

⁵² These latter elements are at the heart of the Better regulation Strategy of 2006, COM (2006) 689 final. See also points 35 and 36 of the IIA 2003.

⁵³ See point 13 IIA 2003 and – somewhat remotely – point 2 of the IIA 1998.

⁵⁴ See the Commission's Communication *Better Monitoring of the Application of Community Law* COM(2002)725 final/4.

⁵⁵ See points 24 and 32-34 IIA 2003 and 20 and 21 IIA 1998.

⁵⁶ See the Commission's Communication *Europe of Results – Applying Community Law* COM(2007) 502 final.

⁵⁷ See points 1 through 19 IIA 1998.

⁵⁸ See Senden, above n. 5 at 29.

dimensions of legislation. This may well all hold true, but the purpose of this list of requirements is not to give any definitive answer, but foremost to provide an aid to understanding the discussion on quality of EU legislation and the proposed solutions, as well as to provide a guide through the dense woods of EU policies aiming to improve on it. If we look at it from that perspective, it is interesting to see that most of the quality standards voiced in the debate reflect and emphasize the constitutional, democratic, bureaucratic and instrumental functions of EU legislation. The quality standards expressed do not seem to fit the picture of EU legislative instruments as mere instruments of economic integration, which in fact is somewhat strange because the EU's objectives for the most part are.

6 Legislative problems

Legislative functions and standards derived from it are, as argued above, conceptual lenses to legislative problems. Not all EU legislation is up to the standards mentioned in the previous chapter, that much will be clear. But is this a large problem, if a problem at all? The Dutch Minister of Employment and Social Affairs in 2008, P. Donner, takes the view that the problem of lacking quality of EU legislation is often overrated due to national bias in the perception of quality. EU legislation needs to be judged on its own specific accord and merits, and a more teleological approach of EU legislation is called for, according to Donner.⁵⁹ Senden and Hirsch Ballin too argue that the notion of EU legislative problems to a large extent depends on the eye of the beholder.⁶⁰ Xanthaki, on the other hand, observes that the quality problems of EU legislation are probably not very different or more troubling than those of national legislation.⁶¹ We tend to agree with her, since – as we have argued in paragraph 4 – the functions of EU legislative instruments have changed over the last decade, making EU legislation (and its problems) much more comparable to member state legislation than before.

Even if we allow for the fact that the discussion on the seriousness of legislative problems may vary according to the angle chosen, one cannot deny that EU legislation does on occasion come with quality defects. Such defects – the failure to meet quality requirements – can have serious consequences on different levels (individual, national, EU and international) and ultimately lead to ineffectiveness of EU legislation and the policies enshrined therein. Whatever relativist position one cares to take, a quality defect that cripples or threatens to cripple the effect of EU legislation is by

⁵⁹ See J.P.H. Donner, *De kwaliteit van Europese regels (The Quality of European Legislation)* (2001) *RegelMaat* (Dutch Journal for Legislative Studies) 216.

⁶⁰ See Senden and Hirsch Ballin, above n. 5.

⁶¹ See Xanthaki, above n. 13 at 651-652.

all means a ‘true’ legislative problem.⁶²

If we want to assess the effectiveness of quality enhancing policies and instruments – as I have set out to do – we need to have some basic understanding of the problems they are meant to solve. Problems facing EU legislation have been researched and analysed over the last decade by different expert, high level groups (e.g. Molitor group,⁶³ Koopmans,⁶⁴ Lamfalussy,⁶⁵ Mandelkern⁶⁶) academics and institutions,⁶⁷ although far more less detailed and systematically than one would expect in view of the seriousness of the problems. Briefly summarized the gist of these reports results in four categories of quality defects of EU legislation:

a. Qualitative defects as a result of the dynamics of EU legislative processes. These problems become manifest in various forms, ranging from insufficient consultation to a lack of ex post evaluation. At the heart of the matter lies the problem that EU legislative processes – until recently⁶⁸ – were not cyclic and – thus – not self correcting, but rather one dimensionally oriented at enactment, without due attention to the afterlife of legislation, notably problems of interpretation, application, implementation and

⁶² In a 2001 contribution to *RegelMaat* I suggested to take the *effectiveness test* as a method to decide whether or not a quality problem constitutes a serious legislative problem. The test holds that if a quality problem results in a situation where legislation cannot or no longer attain the objectives laid down by the legislative authority it creates a legislative problem. W. Voermans, ‘Nieuwe wetgevingsprocedures onder en regelingsinstrumenten voor de EU?’ (New legislative procedures and instruments for the EU?) (2001) *RegelMaat* (Dutch Journal for Legislative Studies) 204.

⁶³ See Molitor Group, above n. 36.

⁶⁴ See Koopmans, above n. 36.

⁶⁵ Committee of Wise Men on European Securities Regulation, *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets* (Brussels 2001).

⁶⁶ Mandelkern Group on Better regulation, *Final Report*, above n. 39.

⁶⁷ See *inter alia* Radaelli, above n. 3; Kellerman, above n. 32; V.J.J.M. Bekkers and others, ‘The case of the Netherlands’, in S.A. Pappas (eds.) *National Administrative Procedures for the Preparation and Implementation of Community Decisions* (Maastricht: European Institute of Public Administration 1995) 397; L. Marissing, Vier rapporten inzake de kwaliteit van EG-regelgeving (*Four Reports on the Quality of EC Legislation*) (1996) 4 *SEW* 124; N.E. Bracke, *Voorwaarden voor goede EG-wetgeving* (Requirements for proper Community legislation), PhD-thesis (Amsterdam: University of Amsterdam 1996); W. Voermans and others, *Quality, Implementation and Enforcement; a Study into the Quality of EU Legislation and its impact on the implementation and enforcement within the Netherlands* (The Hague, Tilburg: Ministry of Justice, Tilburg University 2000).

⁶⁸ In a recent Communication the EU Commission advocates increased attention to aspects of implementation throughout the policy cycle COM (2007) 502 final.

compliance.⁶⁹ Because it is so difficult to achieve results and compromises, and the pressure to meet the integration goals is high, EU legislative processes tend to focus on direct, sometimes short term, results. Achieving policy goals was until recently more or less synonym to getting policies decided or legislation enacted. Problems of application, implementation, enforcement and compliance did not head the priority list of the EU's legislative institutions. This has had five consequences.

- i. Firstly, it has resulted in a lack of information on the overall effectiveness of enacted EU legislation in terms of application, implementation and enforcement. The EU legislative institutions simply do not know half of what happens when EU legislation is implemented, applied or enforced in the member states. Moreover, the institutions do not always seem to be very keen to know either; the overall sentiment seems to be that after enactment, implementation is the member states' business.

Information on what is actually happening after enactment, though, is vital for EU legislative institutions' ability to reconsider and adjust their course. The problem is not that there isn't any information on the application of EU legislation, but that in many cases it is not the information needed to assess the effectiveness of directives or regulations, and that they are reported by a more or less partisan organizations, i.e. the member states themselves. Transposition notifications, scoreboards, reports on litigation under EC legislation, the odd infringement procedure, will tell you only so much about what is really happening in the post-enactment stages of legislation. The EU by and large has a 'paper implementation culture' meaning that implementation and application are mainly monitored on the basis of abstract member state progress reports and notifications. Information on the law in action is quite rare.

The lack of (the right) information shows whenever a policy area is systematically evaluated. A 2004 evaluation of the Public Procurement Directives 1992-2003 for instance revealed that less than an estimated third of the public procurements complied with the administrative procedures laid down in the procurement directives.⁷⁰ This compliance deficit does not show from the monitoring data the Commission keeps nor from its annual reports on application. Sometimes even the central authorities of member states are not aware of the 'silent losses' as regards interpretation and application

⁶⁹ See Bekkers and others, above n. 67.

⁷⁰ See Europe Economics, *Evaluation of Public Procurement Directives* (2004) Markt/2004/10/D Final Report. The researchers admit that this percentage of non-compliance can even be worse because they simply did not have all the necessary information.

of EU law.⁷¹ We simply do not know whether, and to what extent, EU legislation is being complied with; judging by what is seeping through, the outlook is not altogether promising.

- ii. Secondly, from the little we know, we can deduct that the compliance rate of EU legislation is probably rather low. In 1998 Radaelli concluded that poor performance in the implementation stage is the Achilles heel of many European rules.⁷² His conclusion still stands. In a communication of September 2007 the EU Commission⁷³ admits as much, but at the same time points out that it is, in fact, the member states which have the primary responsibility for the correct and timely application of EU treaties and legislation. The EU Commission cannot go it alone when it comes to overseeing and controlling the implementation. This divide in responsibilities only seems to add to the problems of implementation. Chinese walls seem to be cemented between the initial legislative stages and the implementation phase. The Commission cannot be held accountable for the implementation performance of the member states and lacks the resources to effectively monitor and check it. Member states themselves will not be all that motivated to review and verify their implementation performance more rigorously than is strictly required. In most cases only reports of on-time acts are required (notifications of transposition or an implementation report, for example). To do more than that is ill advised: overzealous implementation can result in disadvantages for national economic

⁷¹ In our own research project in the year 2000 (Voermans and others, above n. 65 at 28) it turned out that ‘silent losses’ occur quite frequently because national enforcement authorities, inspectors or administrative authorities simply cannot resolve residual legislative problems of their own, nor can they report back. One example is the provision on ‘serious offence’ in Directive 96/26/EC on the admission to the occupation of road haulage operator and road passenger transport operator and mutual recognition of diplomas, certificates and other evidence of formal qualifications intended to facilitate for these operators the right to freedom of establishment in national and international transport operations, amended by Directive 98/76/EC *OJ* 1998 L 277/17. The directive holds that repeated – even minor - offences of drivers against the transport rules leads to the revocation of the license to practice as a road transport operator. This has the unforeseen and quite dramatic consequence that big operators, with a large staff, run a much bigger risk of losing their license than small operators. Obviously this was not the objective of the directive, but what are the administrative authorities to do? They do what they normally do: not apply the provision at all. This was but one example. We stumbled upon many problems like these in the five, randomly picked, dossiers we studied in our research.

⁷² See Radaelli above n. 3 at 6.

⁷³ See *A Europe of results – applying Community Law*, above n. 56.

operators. Add to this that underachievement in the actual implementation of EC legislation is very difficult to bring to court, let alone the Court of Justice, and one can discern a constitutional flaw in the fabric of the EU legal order here. The system of checks and balances pertaining to the responsibility for implementation of EU legislation leaves much to be desired. The establishment of European agencies⁷⁴ and European networks that act as ‘ears and eyes’ as regards implementation, is to be welcomed in this respect, notwithstanding the need for a broader discussion on the institutional setting of European agencies.⁷⁵

- iii. Thirdly, EU legislative processes lack an effective feedback culture. After EU legislation is concluded it sometimes proves difficult for authorities in member states to report back on interpretation, application and implementation problems without incriminating themselves and triggering an infringement procedure. The need for feedback shows in the emergence of different networks of implementation authorities over the years. A well-known network in this respect is the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL), an informal network of the environmental authorities of the member states.⁷⁶
- iv. Fourthly, the efforts of legislative institution are not always well coordinated, which results in inconsistencies and inefficiency.⁷⁷
- v. Finally, the lack of transparency of the legislative processes and the idea that it cannot be influenced combine with the problems of intelligibility of EU legislation.⁷⁸

⁷⁴ According to the Commission’s website a Community agency is a body governed by European public law; it is distinct from the Community Institutions (Council, Parliament, Commission, etc.) and has its own legal personality. It is set up by an act of secondary legislation in order to accomplish a very specific technical, scientific or managerial task, in the framework of the European Union’s “first pillar”. See <http://europa.eu/agencies/index_en.htm> (last visited 8 January 2008).

⁷⁵ See the recent communication of the European Commission *European agencies – The way forward* COM (2008) 135 final.

⁷⁶ The IMPEL network is both active and influential, especially since the European Commission accepted the invitation to preside it. Since 1992 IMPEL has generated almost 50 reports ranging from the Better Legislation initiative to the Reference Book on Environmental Inspections. Informal and semi-informal networks like IMPEL are mushrooming the five years. See P.C. Adriaanse and others, *Implementatie van EU-handhavingsvoorschriften* (Implementation of EU control and sanction provisions) (The Hague: Boom Juridische uitgevers 2008).

⁷⁷ See the *White Paper on European Governance*, above n. 4.

⁷⁸ See the findings of Working Group IX (D’Amato) on Simplification of the European Convention CONV 424/02 (2002). The group held that the Union’s system of lawmaking as we know it is not very clear or comprehensible to its citizens. The

b. A second group of quality problems concerns legislative proliferation (Normenflut) and defects in the use and abuse of EC regulatory instruments in policy-making. The EC legislative file is often believed to be too voluminous.⁷⁹ Although the volume of EU legislation is perhaps not large in itself compared with the stock of the member states, the excess of detail and the resulting administrative burden ('red tape') can, however, impede economic growth. Especially when EU legislation does not live up to the subsidiarity principle this is undesirable. It was the Molitor Working party that, in 1995, triggered an increased awareness of the detrimental effects of EU legislation to economic growth. At this moment the volume of legislation and the burdens it creates have become a prime political concern throughout Europe and at EU level as well.⁸⁰

A problem specific to EU legislation and its volume is the cost involved in the translation of legislation.⁸¹ Even a simple decrease of the number of pages of the legislative file will save a substantial sum of money. Another problem is the use of legislative instruments. The EU harbours a regulatory and legalistic approach to policy making⁸² and policy implementation,⁸³ which means that most policies are implemented by legislative instruments. This drives legislative proliferation. A separate problem is the abuse of legislative instruments, detailing directives to such an extent that they are virtually regulations, with no room left for discretion during transposition.⁸⁴

c. A third group of quality problems consists of technical flaws of

ability to criticise the system is, however, a key factor of democracy. Citizens must be able to understand the system so that they can identify its problems, criticise it, and ultimately control it.

⁷⁹ In 2001 the EU the total number of pages enshrining the 'acquis communautaire' was estimated at 80.000 pages, COM (2001) 645 final.

⁸⁰ See for an interesting 'debunking' – though a bit partisan – comment on the often unsubstantiated claim that economic growth is impeded by large volumes of legislation, the report of the British Trade Union Conference (TUC), *Unravelling the red tape myths* (2003) < http://www.tuc.org.uk/em_research/tuc-6257-fl.cfm#tuc-6257-1 > (last visited 6 January 2008).

⁸¹ The latest figure (2005) for the total annual cost of translations is € 1,123 million, which is 1 per cent of the annual general budget of the European Union. Divided by the population of the EU, this comes to € 2.28 per person per year.

⁸² Policy making is often equated with law-making. See L. Metcalfe, 'Building Capacities for Integration: The Future Role of the Commission' (1996) 2 *Eipascope* 1.

⁸³ See e.g. V.A. Schmidt, 'Procedural Democracy in The EU: the Europeanization of National and Sectoral Policymaking Processes' (2006) 13 *Journal of European Public Policy* 670.

⁸⁴ See the Koopmans Report, above n. 36 at 15.

legislative texts. It concerns problems such as the lack of readability and comprehensibility of legislation due to vague or ambiguous language, the use of unclear formulations and inconsistencies, and unnecessary complexity.⁸⁵ Legislation needs to be as simple, clear and precise as possible to allow the public, interested parties and those responsible for interpretation, enforcement and implementation, to understand and apply the law. Poorly drafted legislation is not merely a nuisance, it can also result in deficient⁸⁶ application, enforcement and compliance problems, and unduly restrictive interpretation.⁸⁷

d. The last group of quality problems relates to the physical accessibility (including availability) of EU legislation and the management of the EC regulatory file.⁸⁸ In this context, it mostly concerns problems relating to the access to EU legislation, promulgation, codification and consolidation of legislation.⁸⁹ The EU legislative file used to be difficult to access, due to the piecemeal way of enacting bits and parcels of legislation on the same subject.

7 From Better Lawmaking to Better Regulation

The survey above demonstrates that EU legislative problems are by no means ‘cosmetic’ nor merely artificial in the eyes of some member state beholders. From what we know about the effects of EU legislation – which is little, due to the lack of a committed evaluation culture – a troubling picture emerges. Lack of legislative quality and the resulting problems seem to threaten European integration on all levels, both economical and political.

⁸⁵ See for instance the wording of the former paragraph 1 of article 19 of Regulation 820/97 EC which read: ‘A compulsory beef-labelling system shall be introduced which shall be obligatory in all Member States from 1 January 2001 onwards. However, this compulsory system shall not exclude the possibility for a Member State to decide to apply the system merely on an optional basis to beef sold in that same Member State.’

⁸⁶ Divergent application in different Member States, for instance, can lead to heterogeneous regimes and thus resist harmonization and level playing fields.

⁸⁷ Point 1.3 of the *Joint Practical Guide* (2003) gives the example of the Case *C-6/89 ARD v. Pro Sieben* 1999 ECR I-7599 where a foggy text, intended to resolve problems in negotiating the provision, ultimately was interpreted by the Court of Justice to the exact opposite of what was intended.

⁸⁸ Admittedly a lot has improved since the arrival of EUR-LEX. <http://eur-lex.europa.eu/en/index.htm> (last visited 23 June 2008).

⁸⁹ The problem of poor accessibility was signalled quite early on by the French Council of State. See the *Rapport Public* of the Conseil d’État (1992), in particular at 49.

It is a problem that cannot be readily discarded.

This explains why the EU has adopted an increasingly activist approach to the matter. Since the Edinburgh European Council, in 1992, the need for Better lawmaking has been recognised and placed on the political agenda.⁹⁰ Although EU policies aiming to improve lawmaking are fairly recent, three distinct periods can be distinguished since the outset in 1992. The first period (1993-2002) was a period of humble beginnings. During this period, Better Lawmaking was approached in a rather technical, depoliticized way. The emphasis was on the improvement of the quality of drafting and on attempts to simplify legislation. The second period (2002-2006) is characterized by a more comprehensive approach to Better Lawmaking, which was perceived as an integral part of good governance and therefore required attention throughout the policy cycle. Elements of effectiveness and efficiency of legislation came to the fore as key aspects of consideration. Systematic use of impact assessment of legislative proposals, transparency and openness of the legislative procedure (including wide consultation) and programmatic simplification were added to the existing core of quality policies. Compared with the first period, the approach of this second period was more outward looking, with a keener interest in the overall external effects of legislation. The third period (2006-present) builds upon Better Lawmaking, but takes it one step further by mainstreaming the so-called Better Regulation strategy into the overall strategy of the Union. Better Regulation ties in with the Lisbon strategy of 2000, which aims to make Europe a competitive player in a globalised marketplace. Better Regulation is therefore much more political and economically oriented. It strives for a sort of ‘smart’⁹¹ use of legislation that minimizes costs and maximizes benefits (increased productivity, employment, etc.).

7.1 1993-2002: Improving and simplifying drafting quality

After the Edinburgh Council, in 1992, the Council of Ministers adopted a resolution on the quality of drafting of Community legislation.⁹² The set-up of this resolution was modest⁹³ and technical, and not binding for all European legislative partners. In 1995 the Commission followed suit, with

⁹⁰ Keleman and Menon feel that these first initiatives to simplify and to improve EC legislation were a sort of ceremonial self-flagellation more or less to cloak the vast amount of regulatory initiatives of the Delors’ Commission. See R.D. Keleman and A. Menon, ‘The Politics of EC Regulation’ in S. Weatherill (ed.) *Better Regulation* (Oxford and Portland, Oregon: Hart Publishing 2007) 183.

⁹¹ See R. Baldwin, ‘Is Better regulation Smarter Regulation?’ (2005) *Public Law* 485.

⁹² Council Resolution of 8 June 1993 on the quality of drafting of Community legislation, *OJ* 1993 C 166, 17 June 1993 1.

⁹³ The resolution consists of a mere ten points.

an in-house legislative policy of its own.⁹⁴ Like that of the Council, the Commission's resolution was principally aimed at improving the technical quality of drafts, although somewhat more elaborately.

Further progress was made upon the conclusion of the Treaty of Amsterdam in 1997. To the final act of the Treaty a declaration (no. 39) was appended, calling upon the institutions to 'establish by common accord guidelines for improving the quality of the drafting of Community legislation.'⁹⁵

This declaration, in turn, was followed by the Interinstitutional Agreement 1998 on common guidelines for the quality of drafting of Community legislation (IIA 1998).⁹⁶ This agreement binds all institutions involved in the enactment of Community legislation. The IIA stresses that the quality of drafting is a joint responsibility of the EU institutions involved in Community legislation.⁹⁷

The Interinstitutional Agreement (IIA 1998) for the most part includes technical requirements and considerations pertaining to the quality of EU legislation (in sum 22 guidelines). They are supplemented by eight implementation measures.

Especially if we consider the fact that a comprehensive comparative analysis of all of the legislative drafting directions in the member states and an in-depth study into the case law of the EC Court of Justice were conducted as an inspiration for the IIA 1998, a harvest of 22 technical guidelines seems rather modest. The IIA 1998 includes hardly any points related to the implementation or enforcement of Community law, but focuses strictly on the technical aspects of drafting. However, compared to the former – very broad – Council resolution of June 1993, it is a step forward in terms of both content and its binding character. The IIA is binding for all three of the legislating European institutions: the Council, the European Parliament and the Commission.

The implementation of the IIA is proving to be a long haul. In 2001, Xanthaki observed that drafting rules, including the IIA, still were applied very poorly. That could, in her view, partly account for bad legislation. We however do not feel that meeting the standards of good drafting from drafting manuals or the IIA 1998 is a purpose in itself. Meeting them will certainly not safeguard against bad legislation. Drafting directives are tools to improve aspects of drafting by a 'dedicated dialogue'. The ultimate goal of the IIA and drafting instruments is to raise awareness for the quality of

⁹⁴ EU Commission, General guidelines for legislative policy, SEC (1995) 2255/7, 18 January 1996.

⁹⁵ *OJ* 1997 C 340 at 139.

⁹⁶ The IIA 1998 was adopted on 22 December 1998, *OJ* 1999 C 73/1.

⁹⁷ See also See EC Commission, *Better lawmaking 1998: a shared responsibility*, COM (1998) 715 final, dated 1 December 1998.

legislative texts, to spark discussions on the quality of Community legislation, to give a voice and place to the aspect of quality in the drafting process, and ultimately to promote a culture of due care for technical quality. It is questionable whether this is catching on. Never in the past ten years has a reference been made to the IIA 1998 in parliamentary questions, rarely in case law,⁹⁸ and only twice in an opinion of the Commission.⁹⁹

It must be noted that the IIA 1998 was never intended to be the final stage, but merely a step towards systematically drawing more attention to the drafting quality of Community legislation. The implementation measures attached to it voice this character of a continuous process. The measures provide, *inter alia*, for a further cooperation between member states and institutions, with a view to better understand the aspects to be considered when drafting, and to foster both the creation of drafting units and the drawing-up of a joint practical guide. This Joint Practical Guide, replete with best practices and illustrations, was published in 2003. It has proved to be a very practical tool indeed.¹⁰⁰

After the report of the Molitor working party (1995) the European Commission decided to subject some sectors of the internal market to a critical review, with the assistance of the member states, the corporate sector and consumers. The so-called SLIM exercise (Simpler Legislation Internal Market) may be regarded as an element in the follow-up to the Molitor report. The European Commission proposed to have four sectors of the internal market examined by four SLIM teams. These SLIM projects were intended to assess the administrative burdens and business effects of community rules in some selected policy areas, but owing to the political sensitivities related to operations of this kind, these deregulation projects

⁹⁸ It proves to be a bit of a hobby horse in the opinions of the – late - Advocate General Geelhoed. Of the 9 references made to the IIA 1998 in European case law, 7 are of his doing. The IIA itself is never the object of litigation, nor an important argument. See for an example Geelhoed's opinion delivered on 26 January 2006 in Case C-161/04 *Republic of Austria v. European Parliament and Council of the European Union*.

⁹⁹ Opinion of the Commission on the European Parliament's amendments to the Council's common position regarding the proposal for a Directive of the European Parliament and of the Council on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (optical radiation). COM (2005) 526 final - COD 1992/0449 and Opinion No 7/2006 on a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) *OJ* 2007 C 8, 12 January 2007 at 1.

¹⁰⁰ The first French draft (*Guide Pratique Commun*) and later the English draft (*Joint Practical Guide*) circulated since the year 2000 within the Commission and the EP. In 2003 it was published in the other languages.

have not produced many tangible results.¹⁰¹ A similar initiative, but specifically aimed at reducing administrative burdens on enterprises, is the Business Environment Simplification Taskforce (BEST), which was more or less in line with the SLIM operation. The task force submitted its final report to the Commission in May 1998. Although there were no direct and tangible results in the field of deregulation of EU legislation, it was successful in the sense that it revealed critical factors of deregulation. It demonstrated the need for planning simplification and a long-range simplification programme, the need for a dedicated legislative simplification procedure, and a political, common and continuous sense of urgency to simplify legislation.¹⁰²

7.2 2002-2006: Better lawmaking

At the Lisbon Council in 2000 the European Union carved out an ambitious strategic goal for the next decade. The EU wanted to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth, with more and better jobs and greater social cohesion. The general feeling since the Lisbon Council is that European legislation, as an important instrument for these targets, needs to be tuned to this overall strategy. In its white paper on European governance of 2001, the Commission conceded that the European Union needs to pay ‘constant attention to improving the quality, effectiveness and simplicity of regulatory acts.’¹⁰³

Later that year the Commission wrote an interim report¹⁰⁴ and issued a Communication on Better Lawmaking, mapping out the strategy for the three key elements of the new philosophy: simplifying and improving the regulatory environment; promoting a culture of dialogue and participation (i.e. furthering transparency, consultation, etc.); and the systemization of impact assessment by the Commission.¹⁰⁵ The Communication was accompanied by an action plan ‘Simplifying and improving the regulatory environment,’ detailing the responsibilities of the legislative institutions and the actions required of them.¹⁰⁶ Many elements have been enshrined in the

¹⁰¹ To quote a former Dutch Junior Minister (Benschop) ‘the SLIM operation as such is useful, but, to date, it has produced insufficient actual results’. This was at the time the common feeling. *Kamerstukken II* (Dutch Parliamentary Papers) 1998/1999 21 501-01, no. 123 at 2.

¹⁰² Commission Staff Working paper (2001) ‘Simpler Legislation for the Internal Market’, preparing for a fifth phase, SEC (2001) at 575.

¹⁰³ *White paper on European Governance*, above n. 4 at 20.

¹⁰⁴ *Interim-report Improving and Simplifying the Regulatory Environment*, COM (2001) 130 final.

¹⁰⁵ *Simplifying and improving the regulatory environment*, COM (2001) 527 final.

¹⁰⁶ COM (2001) 278 final.

Interinstitutional agreement on Better Lawmaking of 2003 (IIA 2003).¹⁰⁷ Better Lawmaking policy has left an impressive number of documents and policies in its wake.¹⁰⁸ We will not deal with them all but only discuss some main features.

i. Simplification of the regulatory environment

Simplification is a big issue under the Better Lawmaking strategy. The legislative stock is costly in the sense that it runs the risk of overburdening citizens and economic actors in the EU (compromising competitiveness, economic growth and sustainable development), and it also consumes considerable funds for translation. Therefore, and as a result of the Action Plan Better Lawmaking, the Commission has stepped up the pace of simplification in its Framework for Action 'Updating and Simplifying the Community Acquis'.¹⁰⁹ This ongoing Action Plan basically adopts a twofold approach. Firstly, it aims at a simplification of the substance of secondary Community legislation by continuous efforts to screen pending proposals, and by screening policy sectors to identify simplification potential (and acting upon it), mainstreaming this type of simplification screening, etc. The second part of the Framework for Action strategy aims at reducing the volume of the acquis by 25 per cent, 30,000 to 35,000 pages, by codification,¹¹⁰ consolidation, and the removal of obsolete legislation.¹¹¹ The evaluation, 'First progress report on the strategy for the simplification of the regulatory environment',¹¹² reports that the simplification part of the Action Plan is in full swing. The Commission screened pending proposals in 2004 and withdrew 68, and foresaw a further 10 withdrawals in 2007. The simplification of existing legislation is also underway. From 2004 onward the Commission has reinforced its efforts to modernise and simplify EU legislation. Of the 100 originally planned proposals in the rolling

¹⁰⁷ Interinstitutional Agreement on better law-making, *OJ* 2003 C 321 at 1.

¹⁰⁸ See for the road that leads from better law making to Better regulation <http://ec.europa.eu/governance/better_regulation/index_en.htm> and <http://ec.europa.eu/dgs/legal_service/law_making_en.htm> (last visited 23 June 2008).

¹⁰⁹ COM (2004) 432 final.

¹¹⁰ At the EU level the process of *codification* is understood as a process whereby different parts of law on a related subject are in some form or other integrated into a single act. Codification involves adopting a new legal instrument, published in the Official Journal (L series), which incorporates and repeals the instruments being consolidated (basic instrument + amending instrument(s)) without altering their substance.

¹¹¹ Consolidation in fact is a sort of re-publication of pre-existing legislative texts.

¹¹² COM (2006) 690 final.

simplification programme 2005-2008,¹¹³ about 50 had been adopted by the end of 2006. The Commission has now even beefed up its rolling simplification programme with new proposals,¹¹⁴ even opening up the possibility of simplification as the outcome of ex-post evaluation of existing legislation. On a more critical note, the Commission report concludes that simplification proposals need to be given higher priority by the co-legislating institutions. The codification and repeal of obsolete legislation should be prioritised as well. More than 20 simplification proposals were pending in the spring of 2008. Procedures to facilitate adoption of simplification proposals should be considered, according to the Commission.

ii. Improvement of the regulatory environment

The improvement of the regulatory environment, another dimension of Better Lawmaking, includes a host of instruments and actions. The most topical ones, most of them enshrined in the IIA 2003, involve:

- a better coordination of the legislative process¹¹⁵ by way of improved information exchange, synchronization of action between the various actors, multi-annual planning, programming en progress reporting, etc.
- improved transparency and accessibility of the legislative process.

Better planning, programming, and mutual exchange of information do not only improve the efficiency of the interaction between the European Council, the European Parliament and the European Commission, but are also relevant to the citizen. Transparency and better accessibility of legislation and legislative processes is an important subject in the 2003 Agreement.¹¹⁶ Not only should European citizens gain greater access to Community rules, they should also be able to gain a better insight into the legislative processes preceding these rules.¹¹⁷

- a balanced choice of legislative instrument and use of alternative methods of regulation. Under the Better Lawmaking strategy,

¹¹³ COM (2005) 535.

¹¹⁴ First progress report on the strategy for the simplification of the regulatory environment, COM (2006) 690.

¹¹⁵ Points 3 through 9 IIA 2003.

¹¹⁶ Points 10 and 11 IIA 2003

¹¹⁷ The Commission (through PreLex) and the European Parliament (through the Legislative Observatory) will in the future ensure that citizens are able to see at a single glance to what stage of the decision-making process a specific proposal for a directive or regulation has proceeded and what documents are relevant.

Community action in the form of legislation is perceived as a last resort instrument. Regard for the principle of subsidiarity requires soul searching as to the necessity and appropriateness of Community action. Only when no alternative methods¹¹⁸ (self-regulation, agreements, co-regulation)¹¹⁹ of solution are open, and only when it is strictly necessary and unavoidable, is Community legislation to be considered. This policy of reluctance has the beneficial side-effect that it could keep the legislative stock in check, albeit potentially at the cost of transparency and effective operation.

- improving the quality of legislation by adhering to the IIA 1998, open and extensive pre-legislative consultation and an integrated impact analysis on the part of the Commission on legislative proposals: an ex ante evaluation of the estimated social, economic and environmental impact of the proposed legislation. This assessment can be communicated to co-legislators like the European Parliament and the Council, and even to the general public, to enable evidence-based rule-making. Due attention to consistency of text is the last measure to improve quality.
- better transposition and application. Even though member states tend to complain that the time limits for the transposition of directives are too tight, the IIA of 2003 agreement calls on the institutions to use time limits in directives that are as short as possible and that generally do not exceed two years. Further, an attempt has been made through a ‘pillory effect’ to urge the member states to transpose legislation at an even faster pace. A Commission scoreboard and annual reports with tables show the member states’ transposition record.

iii Consultation

Consultation is of prime importance for the quality of legislation. This is true not only from the viewpoint of due consideration of the relevant interests (and so the enhancement of input legitimacy) but also from the viewpoint of careful preparation of proposals. As a part of the Better Lawmaking strategy, the Commission established a set of minimum standards, procedures and techniques for external

¹¹⁸ See points 16 through 23 IIA 2003.

¹¹⁹ I.e. the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognized in the field (such as economic operators, the social partners, non-governmental organizations, or associations (see point 17 IA 2003)).

consultations in 2002.¹²⁰ According to these standards attention needs to be paid to providing clear consultation documents, consulting all relevant target groups, leaving sufficient time for participation, publishing results and providing feedback. The standards provide a common framework for the operation of consultation, to ensure that they are carried out in a transparent and coherent way throughout the Commission.

Obradovic and Alonso Vizcaino are critical about the new common framework. They feel this framework signals the end of the era of the open access policy for interest associations wanting to partake in Community decision making.¹²¹ Where the Commission has hitherto held that interest representation should be based on principles of good governance, like representativeness, accountability and transparency, the present consultation standards do not provide sufficient operational basis to meet these principles.¹²²

iv Systematization of impact assessment

In 2003 the Commission introduced a system of integral Impact Assessment (IA), replacing and integrating all existing sector assessments of direct and indirect impacts of proposed measures. When IA was introduced in 2003, it required all items included in the Commission's Legislative and Work Programme (CLWP) to undergo a Preliminary Impact Assessment (PIA). Based on the PIA, the College of Commissioners decided whether an Extended Impact Assessment (ExIA) was necessary. This didn't work all that well and a number of aspects were revised in 2005.

The Commission decided that initiatives set out in its Legislative and Work Programme 2005 – key legislative proposals as well as the most important cross-cutting policy-defining non-legislative proposals – should all be subject to an integral impact assessment.¹²³ The distinction between PIAs and ExIAs was abolished. Roadmaps replaced PIAs, and a full IA is now required for all items in the CLWP.

The methods, too, were refined. By 2005, guidelines on IA

¹²⁰ See the Commission's Communication *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*, COM (2002) 704 final.

¹²¹ D. Obradovic and J.M. Alonso Vizcaino, 'Good Governance Requirements Concerning the Participation of Interest Groups in EU Consultations' (2006) 43 *Common Market Law Review* 1049, especially at 1083-1084.

¹²² *Id.*, at 1084.

¹²³ Communication from the Commission to the Council and the European Parliament, *Better regulation for Growth and Jobs in the European Union*, SEC (2005) 175 COM (2005) 97 final.

had been published, detailing the procedural rules and analytical steps in IA, which were updated in March 2006, to integrate, inter alia, the Inter-Institutional Common Approach to IA, which clarified the roles of the three EU Institutions with regard to IA. One element of this common approach consists of a mutually agreed method for measuring administrative costs (the EU Standard Cost Method).¹²⁴ The Commission also established an Impact Assessment Board in 2006, which primarily has a quality-control and support function.

The IA system was evaluated in 2006 and 2007.¹²⁵ The overall conclusion was that it is still difficult to tell whether IA is a success, as the system is still in an early stage of its evolution.¹²⁶ In terms of quantity, IA is serious business: as of November 2008, already more than 230 impact assessments have been carried out. In terms of quality the evaluation shows that the more IAs are understood and conducted as a genuine, objective and open analytical exercise, the higher their potential to lead to better informed and therefore higher quality proposals.¹²⁷ However, the preconditions are not always in place for such an exercise, due to an inappropriate approach or insufficient tools, expertise, time and resources. The quality of the IAs was found to vary, and the use of IAs by the Council and European Parliament was sometimes found to be hampered by internal factors (working culture, available capacity) within these institutions. IA is successful in terms of a growing cultural change in the Commission services, internal and external openness and transparency of the policy, development process, improved coordination within the Commission, the consultation aspects and more quantification and better quality analysis of proposals. The establishment of the Impact Assessment Board is believed to be a step forward for the quality of IAs.¹²⁸ The bureau concludes that there is room for improvement regarding the scope of application, elements of analysis, timing and approach, quality control and support and guidance. All in all, those are not bad marks for a four-year-old system. The system seems to be here

¹²⁴ Council document 14901/05 of 24 November 2005; Parliament endorsed the Common approach as the last of the three institutions in July 2006.

¹²⁵ Evaluation Partnership Limited, *Evaluation of the Commission's Impact Assessment System* (2007) Final report.

¹²⁶ Meuwese more or less comes to the same conclusion. See A.C.M. Meuwese, *Impact assessment in EU Lawmaking*, PhD-thesis Leiden University (Alphen aan den Rijn: Kluwer Law International 2008).

¹²⁷ See Evaluation Partnership, above n. 125 at 5.

¹²⁸ See Information note from the President to the Commission 'Better regulation and enhanced Impact Assessment' 28 June 2007 SEC (2007) 926 OJ 1795 – point 16.1.

to stay, somewhat enhanced maybe, but largely unchanged.¹²⁹

7.3 Since 2005 – stepping up Better Lawmaking to Better Regulation

In November 2007 the European Commission stepped up the Better Lawmaking programme, launching the Better Regulation strategy.

Better regulation is a broad strategy to improve the regulatory environment in Europe – containing a range of initiatives to consolidate, codify and simplify existing legislation and improve the quality of new legislation by better evaluating its likely economic, social and environmental impacts,

so the communication tells us.¹³⁰ Basically this is the same concept as held in the Better Lawmaking project but with an economic twist. The reason for this change of course is obvious: the failed European Constitution. The process resulted in the perception that EU lawmaking is in need of more legitimacy. This perception combined with the need to redirect the governance strategy from 2001 – which, to a certain extent, relied on the Constitutional arrangements and instruments – seem to be the underlying motives for Better Regulation. On the face of it, though, Better Regulation is just another denomination for Better Lawmaking.

Meuwese maintains that Better Regulation differs from Better Lawmaking in that it is made a political priority and explicitly linked the (output) legitimacy of EU lawmaking. Better Regulation further distinguishes itself by taking into account specific conditions of EU lawmaking, culminating in the formalization of the inter-institutional dimension of regulatory reform.¹³¹ Whatever the case, the distinction is not all that clear-cut. The ‘Better Regulation’ label does, however, tie in better with the name of similar projects in the member states and OECD ‘lingo’.

The Better Regulation strategy that has emerged since 2005 comprises the following highlights:

- an updated simplification programme, aimed at generating tangible economic benefits (particularly by reducing administrative burdens)
- a reinforced scrutiny of impact assessments through the creation of an independent Impact Assessment Board under the authority of the President
- strengthening the enforcement of Community law

¹²⁹ See C. Day, Secretary General of the European Commission, *Enhancing Impact Assessment*, speech of 28 June 2007 <http://ec.europa.eu/governance/impact/docs/key_docs/speech_cd_rev2.pdf>

¹³⁰ Communication from the Commission *A strategic review of Better regulation in the European Union* COM (2006) 689 final.

¹³¹ See Meuwese, above n. 126 at 22.

- more systematic impact assessments of major amendments to Commission proposals
- high priority to pending simplification proposals, to codification and to repeal of obsolete legislation
- development and enforcement of consultation mechanisms, where missing
- improved application of Community law.

The update of simplification, announced in the Better Regulation Strategy, was already underway. In October 2005, following the Commission communication on ‘Better Regulation for Growth and Jobs in the EU’,¹³² the Commission launched a new phase for the simplification of existing EU law by setting out a rolling programme, initially covering the years 2005-2008.¹³³ It lists some 100 initiatives affecting some 220 basic legislative acts. It was updated for the period 2006-2009,¹³⁴ adding another 43 initiatives to the programme. In parallel, on the basis of a detailed programme covering more than 400 legislative acts, the Commission intends to codify the body of European legislation (acquis) by 2008.

A new element in the strategy is the reduction of administrative burden. To this end, an Action plan was published in 2007,¹³⁵ laying down a programme to reduce the administrative burdens, primarily caused by information provisions in legislation, by 25 % in 2012.

Another stone in the hail of Better Regulation priorities is that of the improvement of application of Community law. In September 2007 the Commission issued a Communication outlining its policy in this field.¹³⁶ The Commission plans to deal with poor application of Community legislation in four different ways: by prevention (giving increased attention to implementation throughout the policy cycle); by an efficient and effective response to poor application (with improved information exchange and problem-solving); by the improvement of internal working methods (prioritisation and acceleration in infringements management of the Commission itself); and finally by enhancing dialogue and transparency between the European institutions and improving information for the public.

¹³² COM (2005) 97.

¹³³ Communication of the Commission, *Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment*, COM (2005) 535.

¹³⁴ Communication from the ‘A strategic review of Better regulation in the European Union’, COM (2006) 690 final, COM (2006) 691 final.

¹³⁵ Communication of the Commission, *Action Programme for Reducing Administrative Burdens in the European Union*, COM (2007) 23.

¹³⁶ Communication of the Commission, *A Europe of results – Applying Community Law*, above n. 56.

8 Evaluation

If poor quality of EU legislation is the ailment, one cannot say that there isn't any medicine around. The last decade has shown a remarkable increase in awareness of the problems and insights in consequences of defective legislation, as well as a sense of urgency for 'Better Lawmaking'. But does the medicine cure or prevent the disease, and is it properly dosed?

This is a hard question to answer, not only because Better lawmaking (or Better Regulation) policies are fairly new and have not yet been fully evaluated, but also because any appraisal of these policies depends, as we have seen, on a perception of the basic functions attributed to legislative instruments and the standards derived from it. Debate, academic or otherwise, on the standards for 'good' legislation and its theoretical underpinnings is scarce in the EU. Different visions regarding the quality of EU legislation and the proper standards seem to have piled up in the present quality policies.¹³⁷ The EU's Better Lawmaking initiative (2002-2006) – its standards and policies – seems to reflect and emphasise the constitutional, democratic, bureaucratic and instrumental functions of EU legislation, whereas the Better Regulation initiative (2006-...) seems to favour the instrumental and political functions.¹³⁸ In the current Better Regulation strategy, however, strands of both perceptions, and the standards resulting from it, are still present. This leads to the paradoxical situation in which the Better Regulation strategy aims to improve the interventionist performance of legislation, a lot of the legislative standards reflect the constitutional, democratic and bureaucratic functions of legislation. Although admittedly there is some relation between standards and aim, this can lead to indetermination or even confusion about the objectives of the quality policies, and in the long run and hamper the effect thereof. The demarcation line between Better Lawmaking and Better Regulation was not drawn very precisely in 2006. It would be a good idea to clarify the issue here, if we want to see whether the regulatory policies are yielding result.

Baldwin, for one, has argued that there are no easy routes to regulatory improvement, and we feel he is right.¹³⁹ Not only is Better Lawmaking difficult, its success or failure is notoriously hard to review and

¹³⁷ De Francesco and Radaelli label this 'the proliferation of objectives and goals of the regulatory reform' after the Lisbon Agenda (including competitiveness, the completion of the single markets and the participatory-transparent government). F. De Francesco and C.M. Radaelli, 'Indicators of regulatory quality', in C. Kirkpatrick and D. Parker (eds.) *Regulatory Impact Assessment; Towards Better Regulation?* (Cheltenham UK: Edward Elgar Publishing 2007) 50.

¹³⁸ See A.J. Harcourt and C.M. Radaelli, 'The limits to EU technocratic legislation' (1995) 35 *European Journal of Political Research* 107 at 109.

¹³⁹ See Baldwin, above n. 91 at 511.

assess. First of all there is the problem of the yardstick. What are the right standards for legislation, what is the right scale? From a Better Regulation perspective one may want to take a set of economic scales and try to calculate whether legislation strikes the right balance when it comes to minimizing costs (e.g. not creating any more burdens than is strictly necessary) and maximizing benefits (increasing productivity, employment, etc.). The benefits, however, may prove hard to calculate. Especially if we consider that European legislation also creates trust, security, legal protection and all kinds of other, more or less imponderable, benefits for the internal market, the ‘pricing’ of pros and cons may prove to be extremely difficult. In the update of the project ‘Governance Matters 2007’ the World Bank presents an impressive set of data on the scoring rate of 212 countries and regions on six dimensions of governance between 1996 and 2006.¹⁴⁰ One of these dimensions is ‘regulatory quality’, which breaks up into over 25 indicators for quality.¹⁴¹ Based on these indicators, different groups and organisations were asked questions about the way legislation impedes, permits and promotes economic life in a country or region (Does the exchange rate policy hinder the competitiveness of firms? Is it easy to start a business? etc.). These data are compared with statistics on economic (and other types of) performance, giving an overall score on regulatory quality over a course of ten years. This allows a review on a countries performance over the years or a comparison to other countries. But does it really tell us something about regulatory quality and can it be used to judge the effectiveness of Better regulation policies?¹⁴²

If we examine the data more closely we will see that performance indicators and outcomes do not calculate the effect of legislation to economic life as such, but merely estimate the risks of some regulatory impediments and the effect of laws directly pertaining to the economy, like business, tax and financial law. The quality of traffic regulations or human rights in a country, for instance, is not considered separately in this project. Traffic regulations and human rights, however, do form an inextricable part of a country’s legal system but it is difficult to assess what their particular contribution to the quality of other legislation is, or to the overall legal framework. As of yet they may prove imponderable, which can blur the total assessment of the regulatory quality of other, more measurable domains of law. Regulatory quality assessment may be prone to a measurability myopia with a bias to the quality and effects of legislation that does not directly pertain to or affect economic life.

Even if we were to take a somewhat more general, utilitarian

¹⁴⁰ See <<http://info.worldbank.org/governance/wgi2007/home.htm>> (last visited 18 January 2008).

¹⁴¹ See Kaufmann, Kraay and Mastruzii, above n. 29 at 68 ff.

¹⁴² See also Radaelli and De Francesco, above n. 30 at 48.

approach, it would remain difficult to find a quantitative net result of Better Lawmaking efforts in terms of impact or success of the measures on the overall quality of the legislation. The legislative standards themselves seemingly resist an objective calculation of success: What is the right measure for proportionality, what are the degrees of legality and drafting quality of a directive, what the right benchmarks?

It may even be undesirable to assess legislation and policies to improve them in this way. In his latest book, Tamanaha argues that a one-sided instrumental use and perception of law, one-sided debates on law as a mere means to an end, can threaten the very idea of legality itself.¹⁴³ Mere instrumentalism may in the end undermine important social and symbolic functions pertaining to legislation.

Regulatory quality and legislative quality are, as we have seen, different concepts, expressing and highlighting different functions of legislation. Where regulatory quality is about the extent to which legislation, as an instrument of public policy, permits and promotes 'private sector development', legislative quality is about the ability of legislation to express law. Improving legislative quality may require a different approach than the improvement of regulatory quality. Sometimes these objectives may even run counter or prove incompatible.

Does that mean there is no way of assessing the success of EU Better Lawmaking policies? On the contrary, we believe there is. First, one can take a more procedural point of view to the assessment: Have the relevant procedures been complied with, have the programme targets been met, is the message hitting home and are the actors satisfied with the result? One may also take the level of embeddedness as a success indicator.

Seen through that lens, EU Better Lawmaking and Better Regulation policies seem to be making some progress. Impact assessment seems to be well under way, the simplification programmes are yielding result, consultation is under control and the awareness for the need of Better Lawmaking seems to have caught on. Although the proper application and implementation of some (drafting) rules¹⁴⁴ and instruments¹⁴⁵ and the coordination of Better Lawmaking efforts between the institutions probably still leaves something to be desired, on the whole Better Lawmaking

¹⁴³ See Tamanaha, above n. 21 at 227.

¹⁴⁴ Based upon her assessment of the drafting quality of EC legislation in 2001, Xanthaki argued that lacking quality of EC legislation was not as much the result of the lack of dedicated policy and instruments (criteria, manuals, drafting and such), but rather more the result of poor *application* of these instruments. Xanthaki, above n. 13 at 675.

¹⁴⁵ See Meuwese e.g. observes that the Austrian handbook for Strategic Environmental Assessment is still hardly implemented at all. Meuwese, above n. 126 at 259.

agreements seem to be abided by.

Another perspective on the result has more of a constitutional nature. One may assess Better Lawmaking policies by the level in which they express, enshrine and safeguard the relevant standards for legislative quality. In this respect, too, progress has been made. If we take the IIAs of 1998 and 2003 we can see that, after a modest start in 1992 and again in 2003, essential legislative quality standards (as we read them from the treaties and the common cultures of the member states) have been enshrined in binding documents.

In a somewhat more provocative way Better Lawmaking can also be seen as a source of EU constitutional law. Better Lawmaking policies provide instruments (the interinstitutional agreements, for instance) that lie down binding law on EU Lawmaking, but are not held within the EU treaties themselves (which contain the bulk of the EU's constitutional law). Some of the Better Lawmaking policies even coincide with some of the rules and tools required by the 2000 governance strategy, which the failed European Constitution could not deliver. The proper norm on the use of EC directives under the IIA 2003 and the Consultation strategy is but one of the few examples for that. It is not all that uncommon to take the view of Better lawmaking policies as an expression and source of constitutional law. In her PhD thesis, Anne Meuwese demonstrates that in some respects IA can function as a catalyst of legal principles (launching them in the political debate more prominently), act as a constraint to legislative processes (by the power of its present self-evidence it disciplines the legislative actors), and act as a platform for constitutional discourse and a source for soft constitutional law as well. Especially some of the interinstitutional agreements on Better Lawmaking are constitutional in character, especially where they function as the 'laws of lawmaking'.¹⁴⁶

The ultimate test for Better Lawmaking will, of course, be the political appraisal of the outcome of the policies. Better Regulation and Better Lawmaking policies are essentially political programmes resting on political perceptions as to the overriding values of legislation in a market economy. This does not mean that the political assessment of the success is purely subjective or unstructured. It only means that in the end the effect and success of Better Lawmaking can only be weighed politically. On that note, in March 2007 the European Council acknowledged that 2006 had seen good progress towards improving the regulatory environment and underlined that further efforts on the simplification programmes and reduction of administrative costs were required in order to consolidate and build on achievements so far. With a view to the Strategic Review of Better

¹⁴⁶ See I. Eiselt and P. Slominski, 'Sub-Constitutional Engineering: Negotiation, Content, and Legal Value of Interinstitutional Agreements in the EU' (2006) 12 *European Law Journal* 2 209.

regulation, in the spring of 2008 the Commission was considering an evaluation strategy to the Better Regulation initiatives, possibly including the establishment of a group of independent experts to advise the institutions on their work towards Better Regulation. We feel that on the occasion of the evaluation it is important to pay due attention not only to regulatory quality but to legislative quality as well. And especially to the difference between the two, for the improvement of legislative quality does not automatically entail the improvement of regulatory quality.