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## Beating about the Bush in 'Better Regulation'

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# FIT FOR THE FUTURE?

*REFLECTIONS FROM LEIDEN ON THE FUNCTIONING OF  
THE EU*

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## 5 BEATING ABOUT THE BUSH IN ‘BETTER REGULATION’

*Wim Voermans*

(...) The economics of regulation (...) is not a settled body of facts but an approach. It uses the economist’s toolkit to develop political economy theories of regulation, and assist regulators with the technical details of framing effective regulation. It is however in its formative phases. There remain many puzzles and paradoxes to be explained such as the tremendous growth in regulation in parallel with greater role by markets and economics (...) <sup>1</sup>

### 5.1 RALLYING FOR BETTER REGULATION DURING THE DUTCH PRESIDENCY

Whenever the Dutch are at the helm of the EU, we seem to feel the urge to discuss the improvement of the quality of EU legislation. In 1997 already, the Netherlands insisted on Declaration No. 39 on the quality of the drafting of Community legislation during the intergovernmental conference leading up to the Treaty of Amsterdam in 1997 (calling on the institutions to improve the quality of drafting). In 2004, we lobbied for the reduction of the regulatory administrative burden, an impact assessment and simplification of EU legislation. Indeed, it may come as no surprise that the quality of EU legislation once again features prominently on the agenda in 2016. As its number one objective for the 2016 presidency, the Dutch chair will, as a letter to the Dutch Parliament announces, devote itself to:

A Union that focuses on the essentials and that adds value to what Member States themselves can and must do. (...) The government will aim in all the Council configurations to lastingly improve the quality of legislation, make it simpler and more workable and, where possible and necessary, reduce the administrative burden and costs. This agenda of better legislation is not merely a deregulation exercise; besides a reduction in legislation, it aims above all at higher-quality legislation. This is important for citizens, companies and

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<sup>1</sup> C. Veljanovski, ‘Economic Approaches to Regulation’, in R. Baldwin, M. Cave & M. Lodge (Eds.), *The Oxford Handbook of Regulation*, Oxford University Press, Oxford, 2010, pp. 34-35.

municipalities and other public authorities, and will promote sustainable economic growth and competitiveness.<sup>2</sup>

With its insistence on still further improving the quality of EU legislation by ‘making it simpler and more workable’ and – as a result – reduce the administrative burden for businesses, citizens, and governments, the Dutch agenda has not only been consistent over the years, it also ties in very well with the Timmermans agenda on better regulation, which has made better regulation one of the top priorities of the Juncker Commission. In May 2015 already, the Commission stated in response to the concerns of citizens and businesses – especially small and medium-sized enterprises (SMEs) who worry that Brussels and its institutions don’t always deliver rules they can understand or apply – that:

We want to restore their confidence in the EU’s ability to deliver high quality legislation. Better regulation is not about “more” or “less” EU rules, or undermining our high social and environmental standards, our health or our fundamental rights. Better regulation is about making sure we deliver on the ambitious policy goals we have set ourselves in the most efficient way. We must rigorously assess the impact of legislation in the making, including substantial amendments introduced during the legislative process, so that political decisions are well-informed and evidence-based. And while the natural tendency of politicians is to focus on new initiatives, we must devote at least as much attention to reviewing existing laws and identifying what can be improved or simplified. We must be honest about what works and what doesn’t. The decisions taken by EU institutions interest us all, so we are putting forward measures which will open up the EU’s decision-making process, allowing for more transparency and scrutiny, and providing more opportunities for people to give their views.<sup>3</sup>

### 5.1.1 *The Importance of EU Legislation for EU Integration*

This insistence on better regulation is not the (mere) result of the fact that its principle author (Timmermans) is Dutch, and therefore might share Dutch preoccupations. EU legislation is of the utmost importance for European integration: the EU is in fact cemented by law expressed in legislation. Legislation and regulation play a pivotal role in the European

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2 Letter of 28 January 2015 from the Minister of Foreign Affairs to the House of Representatives (Tweede Kamer der Staten-Generaal) on substantive preparations for the 2016 Dutch Presidency of the Council of the European Union. *Parliamentary Papers (Kamerstukken II)* 2014/15, 34 139, no. 1.

3 From the press release *Better Regulation Agenda: Enhancing transparency and scrutiny for better EU law-making* of 19 May 2015 Strasbourg, available at: <[http://europa.eu/rapid/press-release\\_IP-15-4988\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4988_en.htm)> (last accessed on 7 December 2015).

Union because of the distinct characteristics of its institutions and the particular dynamics of the economic and political cooperation between the Member States. Dudley and Wegrich, for instance, note that EU is commonly and duly labelled a 'Regulatory State' – though not formally being a state – due to the fact that its capacity to influence developments in the Member States is limited to regulatory measures.<sup>4</sup> Where 'regular states' predominantly govern by means of redistribution of resources levied from society and channelled through political processes and the delivery of services, the EU is restricted in this respect. According to Dudley and Wegrich there is a threefold cap on EU governance when compared to 'regular' modern states. First of all, the direct delivery of public services is not done by EU institutions themselves; secondly, the EU lacks the financial capacities to rely on spending programmes to a large extent; and thirdly, the EU has to rely on its Member States for implementation and enforcement in its capacity as a regulatory state. Each Member State is responsible for policy implementation, such as adopting implementing measures and their correct application.<sup>5</sup>

Legislation and regulation (in modern societies the two concepts mostly coincide)<sup>6</sup> in the EU are not merely important because they cement the cooperation between the Member States, they are also vital for the delivery of the EU's promise, which is to promote peace, its values and the well being of its peoples (Art. 3 of the Treaty on European Union – TEU). These three main aims of the Union, in their turn, largely rest upon established respect for the rule of law, sustainable economic growth, and price stability, from which will flow – according to the theory underlying Art. 3 TEU – freedom, security, justice (and hence peace) as well as solidarity. Regulation is essential to attaining these goals: markets do not automatically produce benign outcomes. To prevent and remedy market failures, which impede market growth, governments have to intervene. Regulation in the form of legal rules nowadays is not only a necessary condition for trustworthy transactions within markets, but also a means to intervene in these markets, and to *steer* the economy at large. Regulation no longer acts merely as a prerequisite but as an independent *instrument for*

4 S.E. Dudley & K. Wegrich, 'Achieving Regulatory Policy Objectives: An Overview and Comparison of U.S. and EU Procedures', *George Washington University working paper*, p. 26, available at: <[http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley%20Wegrich\\_US-EU\\_RegOverview\\_20150506\\_Rev.pdf](http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley%20Wegrich_US-EU_RegOverview_20150506_Rev.pdf)> (last accessed on 7 December 2015).

5 *Id.*, p. 26.

6 There is a difference between the concepts of legislation and regulation. By 'legislation' we mean the authoritative, and constitutionally controlled form in which law is cast, and the procedure leading up to the enactment of it (the decision). By 'regulation' we mean a public intervention in a market or in society, a form of intervention that consists in setting and enforcing rules of behaviour for organizations and individuals. Regulation is an instrument of governance (not governance itself). Legislation and regulation coincide in many instances. A lot of regulation is cast in the form of legislation. Through this, regulation acquires the power of law, legitimacy and other effects. But not all regulation needs to be cast in the form of legislation (policy rules are an example of this), and not all legislation is regulation (e.g. legislation establishing an advisory body for the government). See B. Morgan and K. Yeung, *An Introduction on Law and Regulation*, Cambridge University Press 2007, p. 4-7.

*government and administration.*<sup>7</sup> This is occurring to the extent that many Western industrialized societies have developed into, what Majone refers to as, a 'regulatory state' (the term is not privy to the EU), because of the importance the interventions by regulatory measures play in economic, political, and social life.<sup>8</sup>

In view of the vital role of legislation and regulation, it may come as no surprise then that the EU has put great emphasis on improving the quality of EU legislation and regulation over the last two decades. Much depends on the quality of legislation in the EU, not only the functioning of the markets but, in sum, the overall performance and legitimacy of the EU as well. This contribution will take stock of the different attempts, programmes, and policies put in place to improve the quality and therewith the performance of EU legislation and regulation. We will try to answer two basic questions related to the current initiatives and policies. First of all, are they well targeted and dosed (in view of the problem at hand)? And secondly, are they working or are they mostly/partly rhetoric and political speech?

## 5.2 IMPROVING EU LEGISLATION

### 5.2.1 *What Do We Mean by the Quality of EU Legislation?*

The quality of European legislation has been receiving serious scrutiny for about three decades now. We will not dwell on all of the causes here, but two major ones need to be mentioned and addressed. The first one goes back to the nineteen eighties when, in the rush to establish the internal market, large volumes of enacted EU legislation were pumped out in a very short time, resulting in substantive and legal flaws with ensuing implementing problems as a result. A second cause is related to this: the architectural needs of the internal market and the tendency to solve everything with law and legislation amounted to (relatively) large volumes of the EU legislation. These large volumes of – at time poorly coordinated and implemented – EU legislation brought with it adverse effects on the very markets and domains it wanted to regulate, predominantly in the form of proportionality issues and administrative burdens. It basically boiled down to an overestimation of the power of regulation as the all-encompassing solution for the functioning of the internal market. This is part of a broader problem. Legislation in the EU is more than the mere engineering instrument of choice to construct a well-functioning internal market. EU Legislation serves

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7 This is actually quite remarkable because rules and regulations are a kind of (authoritative) 'mould' into which we pour agreements. But rules and regulations are often identified with the agreements, or in steering jargon, the 'interventions' themselves. This identification goes so far that in modern social scientific literature 'regulation' is usually seen as any public intervention in markets and societies. See, e.g. R. Baldwin, M. Cave & M. Lodge (Eds.), *The Oxford Handbook of Regulation*, Oxford University Press, Oxford, 2010, p. 6 *et seq.*; Morgan & Yeung, 2007.

8 G. Majone, *Regulating Europe*. Routledge, London 1996.

other goals and performs broader functions. It is important to keep this in mind if we want to make assessments or appraisals about whether or not regulation, on the one hand, or legislation, on the other, has succeeded or met its purpose, or whether it meets the relevant requirements (is of *good quality*, in other words). The differences between the concept of legislation and that of regulation are important if we want to discuss distinctively the effects or requirements and demands set on these phenomena. If we truly want to understand the nature of *legislation*, more than mere market effects need to be considered. Legislation as the single most important container of law in our sort of society – mostly constitutional democracies – performs various important *functions*.<sup>9</sup>

### 5.2.2 Functions

In constitutional democracies governed by the rule of law, for instance, legislation provides both the basis and the framework for government action (constitutional function).<sup>10</sup> It also safeguards against government action by enshrining rights and obligations that can be invoked in legal procedures and provide legal certainty at the same time (legal certainty function). At the same time legislation, and the law expressed by it, serves as an instrument to further government policies (instrumental function);<sup>11</sup> fix 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); offers the basic framework for the operation of a bureaucracy (bureaucratic function);<sup>12</sup> and it

9 See W. Voermans, 'Concern About the Quality of EU Legislation: What Kind of Problem, by What Kind of Standards?', *Erasmus Law Review*, Vol. 2, 2009.

10 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.

11 The instrumental functions of legislation in modern societies are manifold. Summers distinguishes five common techniques used 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 functions (e.g. consumer protection, telecommunication services etc.) are somewhat predominant. See R.S. Summers, 'The Technique Element in Law', *California Law Review*, Vol. 59, 1971, pp. 733, 736. The functions are inspired by an article by H. Kelsen, 'The Law as a Specific Social Technique; The Essence of Legal Technique', *The University of Chicago Law Review*, Vol. 9, 1941, p. 75.

12 This in fact is more or less a subsection of the 'constitutional function'. It is commonly believed that the constitutional function is made up of the constituent, institutional function (establishing institutions), the attributive function (attributing power to institutions) and the regulatory function (outlining and limiting

communicates and reaffirms public morals, values, and public goods (symbolic function) that structure the legislative debate and provide the authoritative aura for and overall legitimacy of legislation.<sup>13</sup>

### 5.2.3 Views

The different *functions* of legislation translate into different *views* on legislation. When one adopts an instrumental or political view of legislation, the conceptual lens to problems of and the proper standards for legislation will be different from a more constitutional or symbolic perspective. It is therefore worthwhile to distinguish between the concept of 'legislative quality' and the concept of '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 to express law.<sup>14</sup> The quality of legislation is the extent to which the criteria,<sup>15</sup> emanating from constitutional principles, are met. Regulatory quality, in contrast, 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, citizen satisfaction, etc. The different notions, however, are not mutually exclusive; in fact they coincide in some respects. One might, for instance, argue that the regulatory quality of legislation is 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.

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the scope of the use of power). See for instance C.A.J.M. Kortmann, *Constitutioneel Recht (Constitutional Law)*, Rev. ed. by P.P.T. Bovend'Eert *et al.*, 7th ed., Kluwer, Deventer, 2012, p. 21.

- 13 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. 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', *Journal of Law and Philosophy*, Vol. 20, 2001, p. 31. See also B.Z. Tamanaha, *Law as Means to an End: Threat to the Rule of Law*, Cambridge University Press, Cambridge, 2006.
- 14 See e.g. J. Waldron, *The Dignity of Legislation*, Cambridge University Press, Cambridge, 1999, especially Chapter 2 – 'The Indignity of Legislation'. See also C.M. Radaelli & F. de Francesco, *Regulatory Quality in Europe: Concepts, Measures and Policy Processes*, Manchester University Press, Manchester, 2007.
- 15 See D. Kaufmann, A. Kraay & M. Mastruzzi, 'Governance Matters VI: Aggregate and Individual Governance Indicators 1996-2006', *World Bank Policy Research Working Paper* No. 4280, July 2007. Available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=999979](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999979)> (last accessed on 1 February 2016).

### 5.3 IMPROVING IT: THE LEGISLATIVE AND REGULATORY POLICIES OF THE EU

In its attempts to improve the quality of its legislation, the EU did not ponder the different functions of perspectives on EU legislation for too long. Confronted with the problem of possibly defective performance of EU legislation due to legal defects and problems resulting from proportionality issues and the volume it just began working in small steps. The piecemeal way of policymaking we know so well in the EU leads the way in the attempts to improve the quality of EU legislation as well. After the first tentative steps in the nineteen nineties, only during the last decade have serious efforts been made to produce a comprehensive 'better regulation' policy in the EU – the end result of different layers of development.

#### 5.3.1 *Policies in Layers*

During the first stage, an attempt has been made – from 1992 onwards – to improve the *technical quality* of EU regulations (**Layer 1**). This involves, among other things, improvements concerning the editorial quality, but also the balance and enforceability of regulations. The Netherlands has – as was mentioned earlier – played an important role in getting these issues on the agenda and addressing them.<sup>16</sup> Following the report by the Molitor group (a circle of experts from within the business sector), attempts have been made to *reduce and simplify* the existing amount of EU legislation (**Layer 2**) ever since the turn of the century.<sup>17</sup> This has been done through projects to screen the stock of EU legis-

16 Following a limited and modest analysis in the Sunderland Report 1992 and the 'Edinburgh' Resolution (*On the Quality of drafting Community Legislation*) OJ 1993 C 166/1, p. 1 of the Council, the Commission took the first steps towards establishing some kind of policy (five assessment criteria to be applied from then on) in Commission Communication COM (1993) 361 def. The Koopmans Report, written in the run-up to 'Amsterdam', exposed the issues concerning the quality of EU regulations – in particular the technical issues (Koopmans Group, *The Quality of EC Legislation*, The Hague 1995). This eventually led, via Declaration 37 of the Treaty of Amsterdam, to the Inter-institutional Agreement 1998 *On common guidelines for the quality of drafting of Community legislation*, OJ 1999 C 73/1 – 22 December 1998. This was a strategy that, after 2003, led to the establishment of an Inter-institutional Agreement on better law-making (OJ 2003 C 321), in which the Council, European Parliament and Commission committed themselves to a joint effort to improve EU regulations.

17 This started with projects like SLIM groups (Simpler Legislation for the Internal Market) followed by BEST groups (Business Environment Simplification Task Force) during the last part of 1990s, and was incorporated in EU policy on legislation via the Commission's Better Law-Making Plan that was implemented from 2002 onwards on the basis of analyses and conclusions from the Mandelkern Report (2001). The new policies were outlined in the Commission's Communication & Action Plan *Simplifying and improving the regulatory environment* COM (2001) 527 final & COM (2002) 278 final. This document formed the basis for multiannual programmes to simplify and update EU legislation, such as the Commission's rolling programme for simplification, launched in 2005, which by 2012 resulted in the identification of more than 640 initiatives for simplification, codification or recasting. This was followed by the Administrative Burden Reduction Programme and its follow-up in EU countries 'ABRPlus', which reduced administrative burdens on business

lation (including pending proposals) to check whether they are still in line with present political priorities and better law making requirements, but also scrutinizing legislation on a more technical level to find out whether or not EU-legislation is out-dated or redundant, and use these insights to cut back the volume of legislation (by way of codification and consolidation for example).<sup>18</sup> At the third stage in the policy to improve EU legislation, an attempt was made (in particular with regard to businesses) to *limit the burden of regulation* (mainly administrative) and to maximize the effects of regulations, particularly in the field of improvements in competitiveness and job creation (*Layer 3*).<sup>19</sup> As a result of this policy, in the past decade analyses of the burden have been carried out on future regulations (including proposals) and future regulations are assessed with regard to their benefit and necessity (subsidiarity) and their possible effects (impact assessment). Attention was also paid to producing a standard methodology for assessing the effects, positive and negative, of regulations (the so-called Standard Cost Model), as well as a standard procedure for performing impact assessments. To cap it off the so-called Impact Assessment Board was established within the Commission (which in 2015/2016 will become the Regulatory Scrutiny Board operating independently from the Commission).<sup>20</sup> The fourth stage of the policy on the quality of regulations focuses on the *enforceability* of EU regulations and strategy (*Layer 4*). Following an analysis of the application and implementation of European regulations and the many vulnerabilities this exposed, as of 2007 an attempt has been made to improve the implementation and enforcement of EU regulations by the authorities in

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stemming from EU legislation by an estimated 25% by 2012. This strategy included several simplification projects which started before 2011 and continue to this day as part of the EU policy for better legislation.

18 See also Inter-institutional Agreement 20 December 1994 on an accelerated working method for official codification of legislative texts, OJ 1996 C 102/02 (little used unfortunately).

19 Done through Commission Communications on better regulation, *Better regulation for growth and jobs* EU SEC (2005) 175, *A Strategic Review of Better Regulation in the EU*, COM (2006) 689 and also continued in current policy. Impact assessment became a standard part of the EU legislative procedure in the Inter-institutional Agreement Better Regulation 2003. This included a clear assessment method (the so-called Standard Cost Model – SCM), a planning cycle (roadmaps and a work plan), a procedure and the Impact Assessment Board. In addition, more emphasis was placed on systematic ‘screening’ of the amount of regulations and the evaluation of EU regulations.

20 The most recent development in this respect is the attempt at a new inter-institutional agreement on better regulation (December 2015), which aims for EU law that is comprehensible and clear; allows parties to easily understand their rights and obligations; includes appropriate reporting, monitoring and evaluation requirements; avoids overregulation and administrative burdens; and is practical to implement (See 1b of the proposed inter-institutional agreement on better regulation). The new inter-institutional agreement, which will replace the one on better law-making of 2003, brings new elements such as provisions on better legislative programming; ex-post evaluation; delegated and implementing legislation; improved transparency and coordination; improved implementation; application (conditions); and simplification. See the provisional text of the proposed inter-institutional agreement on better regulation of 16 December 2015, available at: <[http://ec.europa.eu/smart-regulation/better-regulation/documents/20151215\\_iaa\\_on\\_better\\_law\\_making\\_en.pdf](http://ec.europa.eu/smart-regulation/better-regulation/documents/20151215_iaa_on_better_law_making_en.pdf)> (last accessed on 22 January 2016).

the Member States and the EU authorities (the Commission, but also through the efforts of European agencies). The Commission refers to this as 'smart' regulation.<sup>21</sup>

A final element of the EU strategy for better regulation concerns attempts to improve the *legitimacy* of the European regulations (*Layer 5*). For example, consultation with EU citizens has become a spearhead of the policy on better regulation,<sup>22</sup> but there are now also opportunities for citizens' initiatives and national parliaments can make themselves heard more easily than in the past (for example using yellow and orange cards). These innovations, brought on by the Lisbon Treaty and envisaged to tackle the persistent problem of the 'democratic deficit' of Union decision-making, have been reasonably successful. Contrary to what one might expect of this complex procedure with the short time it has had to operate, the yellow card procedure seems to fulfil a need and has been – judging from the use made of it – more or less a success.<sup>23</sup>

#### 5.4 IS THE MEDICINE WORKING?

##### 5.4.1 Why Is 'Better Regulation' Hardly Ever Evaluated?

Are the regulatory quality policies and programmes the EU has deployed over the last 30 years effective? Counter to what one might expect, this question is only very rarely raised.<sup>24</sup> Although the most recent 'better regulation' programmes of the EU insist on perpetual and systemic evaluation of EU policies, the 'better regulation' programmes themselves have never as such been subjected to such evaluation. Maybe this is because it would be so very hard to do. The character of the regulatory policies is not very evaluation-friendly. The 'better regulation' programmes are full of procedures, routines, techniques, and awareness-raising elements. Superficial evaluations merely listing the frequency of use and the amount of dossiers that have undergone the prescribed treatment will say little about

21 See the Commission Communication, *A Europe of results – Applying Community law*, (COM (2007) 502). Following on from this, in 2010 the Commission issued the communication on 'smart regulation' (COM (2010) 543).

22 See EU Commission Communication, *Towards a reinforced culture of consultation and dialogue – See for example the proposal General principles and minimum standards for consultation of interested parties by the Commission*, COM/2002/704 def, available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52002DC0704&from=EN>>

23 See B. Steunenberg, 'Tussen "Gele Kaart" en Omzettingswetgeving – De Veranderde Rol van het Nederlandse Parlement in Europa', *RegelMaat*, Vol. 6, 2014, pp. 340-353.

24 E.g. Claudio Radaelli, 'Desperately Seeking Regulatory Impact Assessment. Diary of a Reflexive Researcher', *Evaluation*, Vol. 15, 2009, pp. 31-48; and recently Andrea Renda, 'Too good to be true? A quick assessment of the European Commission's new Better Regulation Package', *CEPS-report* (Centre for European Policy Studies) No. 108, Brussels, May 2015, available at: <[www.ceps.eu/system/files/SR108AR\\_BetterRegulation.pdf](http://www.ceps.eu/system/files/SR108AR_BetterRegulation.pdf)> (last accessed 17, December 2015).

the effectiveness of the policies as regards (improving) the quality of legislation and regulation. Does EU regulation/legislation do a better job, perform better, due to the 'better regulation' policies put in place? This is a particularly difficult question to answer.

#### 5.4.2 *Complexities of Evaluating EU 'Better Regulation'*

What is the effect of the policies, what is the overall yield? Aside from some page-counting exercises<sup>25</sup> undertaken in 2010,<sup>26</sup> and lists of dossiers that have undergone impact assessment (and the opinions they have received), no rigorous evaluations on the *net effects* of quality policies for citizens and markets have been made. The effectiveness of the policies has not been proved as of yet. On the contrary, one might have serious doubts as regards the effectiveness of the policies after the impetus of better regulation between 2004 and 2009. On the face of it, one might argue that the 'better regulation' mores seem to have relaxed over the last five to eight years. The series of crises that vexed the EU between 2007 and 2014 produced different priorities, giving way to the old reflex: solutions came in the form of (even more) EU legislation.

It would not be fair to conclude from this that the EU regulatory policies are mostly hot air and political rhetoric. New procedures and institutions – think of the Impact Assessment Board within the EU Commission – to improve the quality of EU legislation *have* been put into place. The way EU legislation/regulation is being prepared differs quite substantially from the way it was prepared before 2005. There is a noticeable new awareness for effects and side effects (especially administrative burdens) of EU regulation; a common adherence of the institutions to the need of evidence-based rule making (including impact assessment); broad recognition of the need to consult widely and open up the legislative process as much as possible; and a shared sense of urgency to cope with (excessive) volumes

25 Between 2002 and 2008 the EU made the reduction of the legislative volume part of a broader strategy to improve the regulatory environment, the Better Regulation Strategy. One of the aims was to cut back the number of pages of the *acquis* (the total number of EU legislation) from roughly 100,000 pages to 80,000 pages – this policy worked. To use pages as the standard may seem strange to the foreign eye but makes some sense if one considers the cost of translation – all legislation needs to be translated in one of the many official languages of the Union. The translation costs of the EU are a staggering one billion euro per year. At present, regulatory monitors are in place. From them we know that the volume of EU legislation has been increasing since 2012. At present there are 40,163 EU legal acts in force; that account for about 83,000 pages of text. These include 11,547 EU regulations, 1,842 EU directives, 18,545 decisions, and 5,456 international treaties. See <<http://en.euabc.com/word/2152?print=1>> (accessed 15 December 2015). The total doesn't say very much, though it is interesting to look at the development of EU regulations. The numbers in the EU are decreasing as well. See G.J. Brandsma, 'Europese regelzucht bestaat gewoon niet' (*de Volkskrant* (online)). Available at: <[www.volkskrant.nl/vk/nl/3184/opinie/article/detail/3304381/2012/08/22/Europese-regelzucht-bestaat-gewoon-niet.dhtml](http://www.volkskrant.nl/vk/nl/3184/opinie/article/detail/3304381/2012/08/22/Europese-regelzucht-bestaat-gewoon-niet.dhtml)>.

26 See also W. Voermans *et al.*, 'Codification and Consolidation in Europe as a Means to Untie Red Tape', *Statute Law Review*, Vol. 29, 2008, pp. 65-81.

of legislation and the quality of regulation to boot. But the mere existence of medicine can never in itself provide the proof that the disease has been cured.

Any proof – as we said earlier – will have to come from a systematic evaluation of the regulatory quality policies as such over the course of the years.<sup>27</sup> That will indeed prove to be a difficult exercise. First of all, this is because there is little political capital in such an evaluation – who will be the political sponsor? What is in it for the institutions of the Member States? Little stands to be gained from a rigorous 'better regulation' evaluation. Secondly: appraisal of these policies will always be dependent on what the legislation/regulation is actually about. It will be subject to perceptions about the basic functions of legislative instruments and the standards derived from it, and to political views as well.<sup>28</sup> Any evaluation of an EU 'better regulation' policy will be confronted with a moving target as its objects of study. Different views as regards what good quality of EU legislation or regulation is about – and thus the proper standards and criteria to meet – seem to have piled up in the present quality policies.<sup>29</sup> The layers within the policies complicate evaluation. The EU's better law-making initiative (2002-2006) regarding standards and policies, for instance, seems predominantly to reflect and emphasize the constitutional, democratic, bureaucratic, and instrumental functions of EU legislation, whereas the 'better regulation' initiative and the present REFIT programme (2006-2015)<sup>30</sup> seem to favour the instrumental and political functions.<sup>31</sup> However, strands of both perceptions – and the standards resulting from it – are still present in the current 'better regulation' strategy. This leads to the paradoxical situation in which the 'better regulation' strategy aims to improve the interventionist performance of legislation while a lot of the legislative standards reflect the constitutional, democratic, and bureaucratic functions of legislation.

27 The EU has – as a part of the refit and better regulation package – an evaluation strategy in place according to which the Commission applies the 'Evaluate First' principle to make sure any policy decisions take into account the lessons from past EU action. Thus, for instance, lessons learned from evaluation should be available and feed into inter-institutional agreement work from the very beginning. See <[http://ec.europa.eu/smart-regulation/evaluation/index\\_en.htm](http://ec.europa.eu/smart-regulation/evaluation/index_en.htm)> (last accessed on 15 December 2015). This applies to all policies, not merely the better regulation strategy.

28 See Voermans 2009.

29 De Francesco and Radaelli label this 'the proliferation of objectives and goals of the regulatory reform' after the Lisbon Agenda (which includes competitiveness, the completion of the single markets, and the participatory-transparent government). Fabrizio De Francesco and Claudio M. Radaelli, 'Indicators of Regulatory Quality', in C. Kirkpatrick and D. Parker (Eds.), *Regulatory Impact Assessment: Towards Better Regulation?* Edward Elgar Publishing, Cheltenham UK, 2007, p. 50.

30 See Commission Communication, *Regulatory Fitness and Performance (REFIT): Results and Next Steps*, COM(2013) 685 final. The REFIT (Regulatory Fitness and Performance) programme, launched in 2012, aims to identify opportunities to cut red tape, remove regulatory burdens, and simplify and improve the design and quality of the legislation so that the policy objectives are achieved most efficiently and effectively, at lowest cost and with a minimum of administrative burden, while fully respecting the principles of subsidiarity and proportionality set out in EU Treaties.

31 See A.J. Harcourt & C.M. Radaelli, 'The Limits to EU Technocratic Legislation', *European Journal of Political Research*, Vol. 23, 1999, p. 109.

### 5.4.3 *Yardsticks?*

Even if we get the perspectives disentangled and clear, how then to appraise the policies as such? What then are the proper yardsticks? 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.). It may, however, prove hard to calculate the benefits. Assessing the 'value' of pros and cons may prove to be extremely difficult, especially when 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. There is a risk of the fallacy of numbers.

In its Worldwide Governance Indicators (WGI) project, the World Bank reports aggregate and individual governance indicators for 215 economies for the period 1996-2014. The report consists of an impressive set of data on the scoring rate of 122 countries and regions on six dimensions of governance between 1996 and 2014.<sup>32</sup> One of these dimensions is 'regulatory quality',<sup>33</sup> which is subdivided into many more quality indicators. Based on these indicators, various groups and organizations were asked questions about the way legislation impedes, permits and promotes economic life in a country or region (e.g. does the exchange rate policy hinder the competitiveness of firms? Is it easy to start a business? etc.) These data are compared with statistical data on economic and other aspects of performance, giving an overall score on regulatory quality over the course of ten years. This produces a review on a country's performance over the years or a comparison with other countries. But is it really saying anything about regulatory quality and can it be used to judge the effectiveness of 'better regulation' policies?<sup>34</sup>

If we examine the data more closely we see that performance indicators and outcomes do not calculate the effect of legislation on economic life as such but merely estimate the risks of some regulatory impediments and the effect of laws directly pertaining to the economy such as business, tax, and financial law. The quality of traffic regulations or human rights in a country, for instance, is not separately considered in this project. Traffic

32 A concept which reflects perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development.

33 See D. Kaufmann, A. Kraay & M. Mastruzzi, *The Worldwide Governance Indicators: A Summary of Methodology, Data and Analytical Issues* (2010). World Bank Policy Research Working Paper No. 5430. Available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1682130](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682130)> (last accessed on 12 December 2015).

D. Kaufmann, A. Kraay & M. Mastruzzi, *Governance Matters VI: Aggregate and Individual Governance Indicators 1996-2006* (2007) World Bank Policy Research Working Paper No. 4280 Available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=999979](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999979)>, (last accessed on 21 September 2015). See also Centre for European Studies Bradford University, 'Final Report on Indicators of Regulatory Quality' (report for DG Enterprise, European Commission, 2004).

34 See also De Francesco & Radaelli 2007, p. 48-49.

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, or to the overall legal framework, is. As of yet they may prove imponderable, which can blur the total assessment as regards the regulatory quality of other more measurable domains of law. Regulatory quality assessment may be prone to a measurability myopia combined with a negligent bias towards 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 approach, finding a quantitative net result of better law-making efforts in terms of impact or success of the measures on the overall quality of the legislation remains difficult. 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 legitimacy, and drafting quality of a directive? What then are the right benchmarks?

It may even be undesirable to assess legislation and policies to improve them in this way. Tamanaha, for instance, has argued 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.<sup>35</sup> Mere instrumentalism may in the end undermine the important social and symbolic functions of 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 then require a different approach than the one for improving regulatory quality. Sometimes these objectives may even run counter to each other or prove incompatible. So is there no measure for assessing the success of EU Better law-making and regulation policies? On the contrary, we believe there is.

#### 5.4.4 *Taking the Broad View*

If we want to know if regulatory policies are working, we need to adopt a broad view when we evaluate them. First of all, any appraisal will need to take on board the different functions of EU legislation and regulation, and be aware of the quantification trap, that is: the tendency to narrow debates over regulation down to mere quantifiable, economic aspects.<sup>36</sup> Regulation in a liberal democracy serves more goals than mere market control or performance. A big focus on market effects and costs of regulation can result in too little attention

<sup>35</sup> Tamanaha 2006, p. 227.

<sup>36</sup> W. Voermans, 'To Measure is to Know: the Quantification of Regulation', *The Theory and Practice of Legislation*, Vol. 3, 2015, pp. 91-111.

for the public interest element in regulation. Regulation also serves to correct market failure, to protect vulnerable (minority) interests, to ward off risks, etc. There are important regulatory rationales beyond the economic ones.<sup>37</sup> Over-emphasizing the economic aspects of regulation may lead to a situation in which we know the price of everything and the value of nothing, as Ackerman and Heinzerling put it.<sup>38</sup> Secondly, any evaluation will have to be problem oriented. That means that it needs to address the question of what kind of problem the policy put in place is meant to solve. This seems straightforward and simple enough, but in fact it isn't. Legislative problems are not empirically identifiable failures in regulatory performance, but are rather the echoes of complaints of citizens, business, and organizations. It is no coincidence that, in his kick-off speech for the newest initiatives under the REFIT programme in 2015, Timmermans states:

We are listening to the concerns of citizens and businesses – especially SMEs – who worry that Brussels and its institutions don't always deliver rules they can understand or apply. We want to restore their confidence in the EU's ability to deliver high-quality legislation.

Evaluation of quality policies should rate how the overall performance of EU legislation (including elements of all of the functions it performs) is or is not effective in addressing complaints and concerns about EU legislation. As it stands, we feel, there are roughly six groups of complaints to be discerned.

#### 5.4.5 *Addressing Complaints and Concerns about EU Legislation as the Yardstick for Success*

Firstly, there are what we can call *constitutional complaints*. They are mostly about authority. Who is allowed to do what, and under which conditions? One complaint concerning the EU and many EU regulations is that they concern matters that the EU should not really be dealing with, for which there is no authority, or for which there should be no authority. The principles of subsidiarity and proportionality come into play here. These sorts of complaints work in the other direction too. Some feel the EU has too little authority to be able to act and keep on top of problems. A second group of complaints – *political complaints* – is closely connected to the first category, but they are actually quite different. Political complaints deal mainly with the question of who is in charge of what

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37 M. Feintuck, 'Regulatory Rationales Beyond the Economic: In Search of the Public Interest', in R. Baldwin, M. Cave & M. Lodge (Eds.), *The Oxford Handbook of Regulation*, Oxford University Press, Oxford, 2010, pp. 39-63.

38 F. Ackerman & L. Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing*, The New Press, New York, 2004.

in the EU, and in particular on whose behalf the EU is acting or should be acting. And what kind of EU do we really want? Many of the worries concerning the perceived mania of the EU for meddling and overregulating are not so much statements of facts, but political signals about the policy and direction of the Union. What kind of Union do we want: a laissez-faire one creating the best conditions for economic growth or one based on solidarity and welfare for all? A third group consists of democratic complaints. They regard concerns about the democratic input of citizens and the electorate in legislation. The EU (intrinsically) suffers from various forms of democratic deficit that also rubs off on EU regulations. For a variety of reasons, it is difficult to involve citizens in the same way as can be done with national legislation. Serious efforts are being made – as we have seen – to invest in better dialogue, greater transparency, and improved consultation. The fourth group comprises burden and impact complaints (basically intervention complaints). These stem from the interventions carried out by the EU through its regulations. As a result of rules and restrictions and everything related to this, the market operating range of (mainly) businesses is limited which has consequences for business operations and profit prospects. A separate section of this category of complaints comprises the burden in the form of the actual costs that arise from EU regulations. The other side of the coin is that interventions are not effective enough in the area of environmental protection, promoting sustainability or employment opportunities. Part of the cause of this ineffectiveness can be found in the nature and design of the regulations. We often refer to these kinds of intervention complaints as the 'burden of rules', or in other words the costs businesses pay for administration and compliance as a result of regulations. Research carried out by Esmeralda Vergeer<sup>39</sup> shows that there is a peculiar discrepancy between the burden for businesses from regulations as perceived by the government, and the actual burden that businesses experience as a result of government regulations. The burden often stems from the lack of proportionality, i.e. the costs in relation to the practicability of the regulations and the perceived benefits. These are costs that burden reduction policies mostly neither define, measure nor target. A fifth group of complaints have to do with operating legislation in practice, especially problems of implementation. Sometimes EU legislation cannot be (fully) implemented in Member States due to their setup, capacity issues, unfitness, or due to insufficient coordination, feedback, supervision, non-compliance, lack of enforcement, etc. The trouble with these types of complaints and problems is that they are concealed to a certain extent. Those who do not implement the regulations correctly generally have little to gain from reporting this fact (and that is actually how the responsibilities are set up in de EU).<sup>40</sup> The last group of complaints can be labelled as technical complaints. This

39 E. Vergeer, *Regeldruk en Deregulering Door de Ogen van de Overheid en Ondernemers*, (translated: regulatory burden and deregulation through the eyes of government and business) PhD research, to be defended on the basis of the manuscript from the research report in 2016 at Leiden University.

40 See Art. 291 TFEU.

category of complaints concerns the clarity of texts and – connected to this – their interpretation. The Union currently has twenty-four official languages and therefore the adoption of uniform versions of directives and regulations is a huge task. Besides this, the often-technical subject matter of EU regulations and the way in which they are painstakingly established makes them hard to fathom.

## 5.5 EU BETTER REGULATION POLICY: FIT FOR THE FUTURE?

The EU Better Regulation Programme has been ‘ripening’ for a number of years. More than ten years after the Inter-institutional Agreement on Better Law-Making of 31 December 2003, the question of simplifying and improving the quality of EU legislation has given way to continuous across-the-board evaluation of the Community acquis and to the demand for a reduction of ‘burdens’ and ‘costs’; these are the concerns that have gradually but insistently moved to the top of the agenda. Better law-making, better regulation and smart regulation policies have resulted in an elaborate and integrated system of road maps, improved public participation, and consultation (with increased transparency) regulatory impact analysis (with an oversight body – the IAB), rolling simplification programmes (including an improved consolidation and codification methodology), deregulation initiatives, ex post evaluation, etc. One of the latest efforts in a series of policies to harness the volume and effects of EU regulation is the new REFIT exercise (Regulatory Fitness and Performance Programme) which aims to make EU law lighter, simpler, and less costly.<sup>41</sup> A new inter-institutional agreement on better regulation, fixing the acquis of the last decade of regulatory policies and integrating the new initiatives, is in the making.<sup>42</sup> The gist of the combined plans (REFIT and inter-institutional agreement) is to make EU law simpler and to reduce regulatory costs, so it can do what it ought to do: contribute to a clear, stable, and predictable regulatory framework supporting growth and jobs. Although one could see the refurbished REFIT initiative as a new call to arms in an already long series, a call to arms from which we do not know whether it is truly effective, we feel the initiative deserves appreciation, if only because of its clear mission,<sup>43</sup> its realism,<sup>44</sup> and its

41 EU Commission Communication ‘Better regulation for better results – An EU agenda’, COM(2015) 215 final, 19 May 2015.

42 See footnote 20 and the provisional text of the proposed inter-institutional agreement on better regulation of 16 December 2015, available at: <[http://ec.europa.eu/smart-regulation/better\\_regulation/documents/20151215\\_iaa\\_on\\_better\\_law\\_making\\_en.pdf](http://ec.europa.eu/smart-regulation/better_regulation/documents/20151215_iaa_on_better_law_making_en.pdf)> (last accessed on 22 January 2016)

43 ‘Better regulation is about making sure we deliver on the ambitious policy goals we have set ourselves in the most efficient way.’ See the press release *Better Regulation Agenda: Enhancing transparency and scrutiny for better EU law-making* of 19 May 2015, available at: <[http://europa.eu/rapid/press-release\\_IP-15-4988\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4988_en.htm)> (last accessed on 1 February 2016).

44 ‘Better regulation is not about more or less regulation, or undermining our strict social and environmental standards, our health or our fundamental rights.’ See the press release *Better Regulation Agenda: Enhancing*

comprehensiveness. In that vein, the establishment of the REFIT Platform and the forthcoming establishment of the Regulatory Scrutiny Board also deserve support, as does the call for so-called 'evidence-based' (improving the factual information that forms the basis for the regulations) legislation and increasing transparency in the process (particularly in the case of trilateral negotiations).

Nevertheless, we believe, the approach of the new REFIT initiative, as well as the new ensuing proposed inter-institutional agreement on better regulation, fall short in some areas as well. First of all, the initiative is in itself not really evidence based. It does not rest on the insights of system evaluation of the EU 'better regulation' programmes and policies as such – it is in a respect somewhat inward looking (quite procedural and inter-institutional). We feel rigorous evaluation of the 'better regulation' policies themselves is in order – taking a broad view as regards their effectiveness in the delivery of better EU legislation/regulation for markets, businesses, and citizens. If evaluation really comes 'first' – as the Commission evaluation policy dictates –<sup>45</sup> then there is no real reason to leave the better regulation policies out. A second flaw of the initiative is that it takes *insufficient account of the different perspectives and contexts of complaints about and problems with regulations* and so the response to these might be inadequate. For example, the current Better Regulation Initiative of the Commission does not really address the constitutional and political dimensions of complaints about legislation: solutions are predominantly sought in institutional and technical quarters. However, better regulation is not a question of quick fixes or miracle cures. It requires a continual shifting of gears in thinking and discussion on the benefits and necessity of regulations, an open attitude towards alternative solutions and a degree of empathy with the sections in society and economic activities for which the regulations are intended. Not addressing this properly soon leads to possible forms of tunnel vision and ineffectiveness in strategy. Recent research by Vergeer based on the situation in the Netherlands,<sup>46</sup> for instance, shows that when the perspectives and context of policy objectives aimed at lowering regulatory burden and the actual (experienced) regulatory burden in the business sector are not in line with each other, then the effects of that policy will be insignificant. Setting up an external approach (REFIT Platform and the Regulatory Scrutiny Board) and systematic and independent evaluations are certainly encouraging developments, but these are not adequate as such to address all the concerns and prevent myopia.

We also feel that the initiative does not put enough effort into arriving at a truly *reflective legislative process* in which the monitoring and evaluation of how EU regulations

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*transparency and scrutiny for better EU law-making* of 19 May 2015, available at <[http://europa.eu/rapid/press-release\\_IP-15-4988\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4988_en.htm)> (last accessed on 1 February 2016).

45 The so-called 'Evaluate First' principle of the Commission. See <[http://ec.europa.eu/smart-regulation/evaluation/index\\_en.htm](http://ec.europa.eu/smart-regulation/evaluation/index_en.htm)> (last accessed on 17 December 2015).

46 Vergeer 2016.

are applied lead to improvements in implementation practice and – in a learning loop – feed back into the EU legislative process itself. The recently established REFIT Platform,<sup>47</sup> in which an attempt is made to keep a check on the effect of regulations following their adoption by means of dialogue and an exchange of information, is certainly a step in the right direction. The current setup, however, has significant shortcomings:

- a. It seems to work on an *ad-hoc basis* (via requests from the Commission or on the basis of other signals) and is not itself able to carry out systematic studies, or to have these carried out and/or request assessments.
- b. The way in which the input from the platform is incorporated in the chain of decision-making is *too non-committal*: the work of the REFIT Platform is not anchored in the standard decision-making processes. Past initiatives to improve regulations in the 1990s (e.g. Smart Groups and Best Projects) also suffered as a result.
- c. The world of the so-called *comitology* (implementing rules drawn up by the European Commission – and assisted in this task by committees of experts from Member States), which accounts for the lion's share of EU regulations, is not adequately incorporated in a cyclical approach to the process of reflection. As a result, increased transparency, dialogue with other institutions (e.g. EU Parliament or Member State parliaments), or any other forms of concrete and substantial ex post evaluation, are not yet within sight. The fact that the Council is to have a bigger role in monitoring suitability and assessing existing legislation is no guarantee as yet for a good result. At present, comitology is still too much like a playing field providing security for the interests of Member States.

Another serious shortcoming of the initiative is that it leaves the relatively autonomously operating world of comitology (accounting for more than 80% of EU regulatory output)<sup>48</sup> untouched. We feel comitology is not sufficiently incorporated. For some of the more substantial proposals for regulations to be enacted in comitology, *impact assessment* as it is presently suggested, will probably not be of any real significance because of the related interests. First, impact assessment of implementing regulations (or EU secondary regulation) will prove difficult or futile, because the basic regulation will most of the time itself have been subjected to an impact assessment (and, hence, the exemption to the rule can readily be claimed, arguing that the impact assessment has already been carried out). Second, since the volume of implementing rules (currently referred to as implementing directives and implementing regulations ex Article 291 TFEU) is so enormous that a representative sample of the impact assessment of everything is not technically possible from a cost and capacity perspective. But these are the implementing rules, established by committees that

47 Commission Decision COM(2015) 3261 final of 19 May 2015 establishing the REFIT Platform.

48 W. Voermans, M. Kaeding & J. Hartmann, 'The Quest for Legitimacy in EU Secondary Legislation', *The Theory and Practice of Legislation*, Vol. 2, 2014. Available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2394073](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2394073)>.

are not democratically legitimized together with the Commission, that give European legislation such a bad name. The volume is enormous, they are technical and extremely detailed, and seldom the product of an open political discussion. Citizens have hardly any opportunities to participate or provide input via their representatives. It is in this area that complaints are concentrated around an undemocratic, technical Europe which is unduly influenced by corporate lobbyists. The Better Regulation Policy could benefit from a broad sectorial, and above all, independent evaluation of the implementing rules. Countries such as the United Kingdom and France (though not only these two) have institutional provisions to keep a grip on implementing rules. The EU could benefit from this. It would have more effect than setting up an ad-hoc and independent panel, at the request of Parliament, the Commission or the Council, to check whether an amended proposal is practically feasible (which in itself is not a bad idea). Some form of permanent monitoring of EU legislation, successful or otherwise, is certainly necessary. The announcement that this will be incorporated in a new inter-institutional agreement is certainly a step in the right direction. Chapter V of the new proposal for the Inter-institutional agreement on better regulation of 16 December 2015 sets horizons for this to fall at the end of 2016 and the end of 2017 (more specifically for a register).

We also feel that more effort should be made to ensure that assessment methods for regulations are more objective. Besides more objective methods to identify the costs of a regulation (the standard cost model developed in the Netherlands), there should also be jointly developed calculation methods which provide an overview of the other costs, and also the benefits, of regulations. The United States has worked with such a system since 2010 with relative success.<sup>49</sup> A true addition to the present initiative would be to make it somehow possible for citizens, organizations or businesses to provide some form of counter-evidence about the factual information upon which proposed regulations or adopted regulations are based, and to have this assessed by an independent body. This doesn't have to be a court, but being given an opportunity to provide actual counter-evidence, before or after the political arena has been entered to do business based on the evidence, can be beneficial.

Only then we can arrive at the ultimate goal that the Commission put to paper so eloquently in 2015:

The body of EU law is not only necessary, it is our great strength – it makes the EU qualitatively different from any other model of collective governance in the world. That is why it is so important that every single measure in the EU's rulebook is fit for purpose, modern, effective, proportionate, operational and as simple as possible. Legislation should do what it is intended to do, it

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49 See Dudley and Wegrich 2015.

should be easy to implement, provide certainty and predictability and it should avoid any unnecessary burden. Sensible, realistic rules, properly implemented and enforced across the EU. Rules that do their job to meet our common objectives – no more, no less.<sup>50</sup>

We couldn't agree more.

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50 European Commission, 'Better regulation for better results – An EU agenda', COM(2015) 215 final, 19 May 2015, pp. 3-4.