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## **The implementation of international law in the national legal order : a legislative perspective**

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## 11.1 INTRODUCTION

In the previous chapter we explored the scope and substance of identified legislative standards under selected international legal regimes. To complete our assessment of those standards, it is imperative to determine to what extent they contribute to the quality of domestic implementing legislation. Therefore, in the present chapter we turn to existing policies -both international and national- in an attempt to determine to what extent the quest for legislative quality has been translated in international and national efforts on the subject. Subsequently we will explore theories and practices with regard to the quality of implementing legislation. In this way, this chapter aims to present an answer to the question how the notion of legislative quality must be understood and discusses the relevance of legislative standards for the assessment of a law's quality. Together, our findings will enable us to make a comparison -in Chapter 12- between current practice with regard to the inclusion of requirements pertaining to implementing legislation in international legal regimes on the one hand, and the state of the art with regard to policies to enhance legislative quality on the other hand.

The present chapter is divided into several sections. Section 11.2 is dedicated to national practices in the Netherlands and the United Kingdom with regard to quality of domestic implementing legislation in general, and legislative standards in particular. Then our focus shifts towards two international approaches, adopted in the framework of the OECD and the EU respectively (section 11.3). Building on the findings from these national and international practices, the concept of 'quality of legislation' and its most important (and problematic) aspects will be further elaborated in section 11.4.

## 11.2 NATIONAL APPROACHES TO THE QUALITY OF IMPLEMENTING LEGISLATION

### 11.2.1 Introduction

How do national governments approach the concept of legislative quality, or, more specifically, which legislative standards have been identified in order to increase the quality of legislation in general and of implementing legislation in particular? For reasons of space, the analysis contained in this chapter is limited to two domestic legal orders: the Netherlands and

the United Kingdom. Their inclusion is not only the somewhat arbitrary product of the language barrier; also the diverse way in which international law is received in their legal orders and their characterisation as civil law and common law justify the selection these two legal orders. Of course, the findings presented in this chapter cannot be said to reflect *all existing* national approaches to implementing legislation; the Netherlands and the United Kingdom serve as mere examples.

## 11.2.2 The Netherlands

### 11.2.2.1 *General policy on the quality of legislation, including implementing legislation*

The backbone of Dutch policy on legislative quality has been laid down in the Instructions for law-making. They are codified in an internal guidance document that was adopted by the prime-minister. The initial version of the document in its present form entered into force on 1 January 1993, although earlier guidance documents go back to 1951;<sup>1021</sup> over the years, the Instructions for law-making have been revised several times.<sup>1022</sup> They apply to various kinds of legislation that is adopted by the central government<sup>1023</sup> and, if expressly indicated, to 'treaties, binding decisions of the European Union and other decisions of international organisations'.<sup>1024</sup>

The Instructions for law-making consolidate the evolution of Dutch legislative policy, the modern origins of which may be traced back to the early 1990's, when a policy document was formulated 'with a view of the further development and implementation of a general legislative policy, aimed at the improvement of rule of law aspects and administrative aspects of government policy'.<sup>1025</sup> To this end, several measures were proposed, including the formulation of quality standards applicable to legislation.<sup>1026</sup>

These standards require, first of all, that legislative proposals do not infringe on law of higher rank, such as EU law and (under Dutch constitutional law) international law, and on general principles of law such as the principle of legal certainty. In this context, it was noted that to an increasing extent international and EU law had been restricting room for domestic policy making. Therefore, it was expressly added, attention had to be paid to supranational law, with regard to both the development of 'autonomous'

1021 Ph. Eijlander and W. Voermans, 'Nieuwe aanwijzingen voor de regelgeving' *Nederlands Juristenblad* 5 (1993) 169-174, 170.

1022 'Instructions for law-making', issued by the Prime-Minister (18 November 1992) (*Stcrt.* 1992, 230). Available through <http://wetten.overheid.nl> (in Dutch) (accessed 29 March 2018).

1023 Instruction 4.

1024 Instruction 1.

1025 Minister van Justitie, 'Zicht op wetgeving' (5 March 1991) Parliamentary Papers II 1990/91, 22008, no. 2.

1026 *Ibid.*, 22.

national legislation and national implementing legislation.<sup>1027</sup> Second, legislation must, in an efficient manner, contribute to the realisation of the formulated policy objectives. The standards of effectiveness and efficiency require a clear and exhaustive formulation of policy aims underlying the proposed piece of legislation.<sup>1028</sup> Third, the requirements of subsidiarity and proportionality serve to protect the 'balance between government and society'. Subsidiarity demands that, as a rule, responsibilities must be entrusted to municipal and provincial governments and non-governmental actors, unless action by the central government is inevitable. 'Proportionality' refers to the standard that requires a balancing between the costs and benefits of the intervention. Fourth, legislation must be practicable and enforceable. The inclusion of this standard is motivated by the assumption that laws which cannot be applied in practice and enforced will remain ineffective. This, it is noted, is unacceptable from a policy perspective and a rule of law perspective.<sup>1029</sup> Fifth, laws must contribute to the coherence of the whole body of legislation in force for the purpose of transparency and the coordination of policies and exercise of powers. In absence of consistency with other applicable laws, it is argued, the achievement of the formulated policy aims will be impeded.<sup>1030</sup> Sixth, laws must be simple, clear and accessible.<sup>1031</sup> Although it was acknowledged that in practice it may not always be possible to satisfy all of the aforementioned legislative standards, policy makers should seek to observe the quality criteria to the largest extent possible.<sup>1032</sup>

A few years later, in 1994, the Dutch government established a ministerial commission on competition, deregulation and legislative quality in an attempt to 'reinforce economic growth'.<sup>1033</sup> As part of this effort, the government pledged to decrease and simplify laws that unjustifiably impeded civilian and economic life. This approach entailed, *inter alia*, a decrease of the regulatory and administrative burden to a minimum, the repeal of laws that unnecessarily obstruct competition and the enhancement of legislative quality.<sup>1034</sup> In 2000, the Dutch government reaffirmed the importance of the quality standards it had formulated less than a decade before, although it observed an increased emphasis on the criteria of practicability and enforceability.<sup>1035</sup>

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1027 Ibid, 25.

1028 Ibid.

1029 Ibid, 27.

1030 Ibid, 29.

1031 Ibid, 30.

1032 Ibid, 16.

1033 Minister van Justitie, 'Marktwerving, deregulering en wetgevingskwaliteit' Parliamentary Papers II 1994/95, 24036, no. 1, p. 1.

1034 Ibid, 2-3.

1035 Minister van Justitie, 'Wetgevingskwaliteitsbeleid en wetgevingsvisitatie' (6 November 2000) Parliamentary Papers II 2000/01, 27475, no. 2, p. 5-6 and 8-9.

In a policy document that was published in 2008, the government announced a shift of attention towards the decision making process; the formulation of quality criteria was not sufficient, it held, but should be complemented by guidance during the preparatory stages of the policy process.<sup>1036</sup> It thus introduced an 'Integrated framework for the assessment of policy and legislation'.<sup>1037</sup> In brief, this document includes several questions that serve as guidance for policy makers. They emphasise, among other things, the problem analysis, the policy aim, the choice of the appropriate policy instrument, its legality, and the expected consequences for affected persons, companies, the environment etc. Although the Integrated framework for the assessment of policy and legislation is closely related to the quality of legislation, it has a wider scope than quality of *legislation* as it extends to public policy in general, also encompassing policies that do not require the adoption of legislation. Therefore, for the following discussion of the legislative standards adhered to in the Netherlands we will rely primarily on the Instructions for law-making. They can be divided into three categories: instructions dealing with substantive legislative issues, instructions regarding legislative technique and instructions regarding legislative procedure.<sup>1038</sup>

The instructions dealing with substantive legislative issues are part of Chapter 2 of the Instructions. One of the most important provisions is Instruction 6, which provides that the process to develop a legislative proposal shall be set in motion only if the adoption of legislation is strictly necessary. Once this test has been passed, policy makers should acquire all relevant knowledge on the relevant subject and formulate in specific terms the policy aims that are to be achieved. Subsequently, it must be discussed whether the aspired objectives can be realised without government intervention and, if this is not the case, whether existing legislative instruments suffice. If this question must be answered in the negative as well, a new legislative proposal can be justified.<sup>1039</sup> Moreover, the Instructions for law-making stipulate that whenever policy makers consider the various options to obtain the policy objectives, special attention must be paid to the extent to which a new law may contribute to the realisation of those objectives, to the consequences of the considered piece of legislation and to the expected regulatory burden (such as administrative or financial obligations) for affected individuals, companies or other institutions.<sup>1040</sup> With regard to the latter element, a legislative proposal must be designed in a manner that

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1036 Minister van Justitie, 'Integraal wetgevingsbeleid' (6 October 2008) Parliamentary Papers II 2008/09, 31731, no. 1, p. 7.

1037 Ibid, 7-8 and 10.

1038 N.A. Florijn, 'The instructions for legislation in the Netherlands. A critical appraisal' 4 *Legisprudence* 2 (2010) 171-191, 175.

1039 Instruction no. 7.

1040 Instruction no. 9.

reduces the regulatory burden to a minimum.<sup>1041</sup> In respect of foreseen negative consequences, if applicable, they must be proportionate compared to the pursued aims.<sup>1042</sup> Furthermore, a new law may not be introduced until it has been clarified whether it could be applied and enforced in practice.<sup>1043</sup> Another important legislative standard requires the observance of legal norms of higher rank, such as EU law or the Dutch Constitution.<sup>1044</sup>

The instructions regarding legislative technique can be found in Chapters 3, 4 and 5 of the Instructions. For instance, legal text must be formulated as concise as possible; the use of superfluous terms must be avoided.<sup>1045</sup> Moreover, drafters should use common language to ensure comprehensibility.<sup>1046</sup> Other instructions concern the consistent use of terms, not only within a single legal instrument, but across the entire body of Dutch legislation. Examples can be found in Instructions 71 and 88b, which prescribe the way in which laws should refer to the overseas territories of the Netherlands and the institutions of the European Union respectively. Furthermore, the Instructions for law-making stipulate the various elements, both formal and substantive, which should be included in the proposed legal instrument. The formal components include, among other things, the formulation of the preambular section of a law.<sup>1047</sup> The legislative standards with regard to substantive components of a law concern, among other things, directives which require a thorough motivation of the establishment of advisory organs or quasi-governmental organisations or the mutual recognition of goods, if applicable.<sup>1048</sup> Elements of laws that emerge more often include the appointment of supervisory authorities, the attribution of powers for the purpose of enforcement, a legal basis for the imposition of penalties on offenders, provisions on legal remedies against the exercise of governmental authority, provisions for the *ex post* evaluation of a law's effectiveness and transitional provisions.<sup>1049</sup>

The instructions on legislative procedures, codified in Chapter 6 of the Instructions, contain directives with regard to the involvement of actors in the legislative process, including departments of the central government and advisory bodies such as the Council of State. They stipulate, for instance, that legislative drafts must be assessed by the Legal Section of the Ministry of Justice and Security, in particular with regard to the extent they meet the six legislative demands described above.<sup>1050</sup> Furthermore, legislative drafts must be sent to the EC if they impose 'technical regulations'

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1041 Instruction no. 13.

1042 Instruction no. 15.

1043 Instruction no. 11.

1044 Instruction no. 18.

1045 Instruction no. 52.

1046 Instruction no. 54.

1047 Sections 4.1, 4.2 and 4.3.

1048 Instructions no. 123a, 124a and 131c respectively.

1049 Instructions no. 133 and sections 4.9, 4.10, 4.13, 4.14.

1050 Instruction no. 254.

which may constitute an impediment to the free movement of goods across the internal borders of the EU.<sup>1051</sup>

#### 11.2.2.2 *Specific legislative standards applicable to legislation to implement EU instruments*

In addition to the directives applicable to legislative proposals in general, Dutch legislative policy provides for instructions which apply to laws aimed at the implementation of EU instruments in particular. They can be found in Chapter 8 of the Instructions for law-making. The instructions included in this chapter aim to ensure the timely and correct implementation of binding decisions of the EU in the Dutch legal order.<sup>1052</sup> As a point of departure, it is stipulated that the instructions on legislation in general, as discussed above, equally apply to legislative proposals that serve to implement binding decisions of the EU, unless indicated otherwise.<sup>1053</sup> In other words, in principle, the legislative standards codified in the Instructions for law-making do not distinguish between implementing legislation and non-implementing legislation.

For the purpose of timely implementation, implementing legislation may not contain elements that are not strictly required by the EU instrument at hand, in order to avoid delay as a consequence of political debates on added 'national' elements for which there may be no tight deadline.<sup>1054</sup> For the same reason, the Dutch legislature may choose to delegate the power to adopt implementing measures to the council of ministers or even a particular minister, if the provisions that require implementation are highly detailed or leave little room for decision making on the national level.<sup>1055</sup> Such delegation decreases the time needed to accomplish implementation, since the adoption of legislation by the council of ministers or a particular minister tend to be less lengthy procedures.

In addition to Chapter 8 of the Instructions for law-making, the Dutch authorities have drawn up a manual on implementation matters, among them the requirements pertaining to legislation that serves to implement binding decisions adopted in the framework of the EU.<sup>1056</sup> These requirements primarily flow from the case law of the CJEU on questions of imple-

1051 Section 6.1a. The obligation to inform the European Commission and other EU member states in the case of the introduction of 'technical regulations' is derived from Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services (codification) (OJ 2015, L 241).

1052 Instruction no. 328, explanatory note.

1053 Instruction no. 329.

1054 Instruction no. 331.

1055 Instruction no. 334, sub a and b.

1056 Ministerie van Justitie, *Handleiding Wetgeving en Europa. De voorbereiding, totstandkoming en nationale implementatie van Europese regelgeving* (Ministerie van Justitie, Den Haag 2009) <<http://www.kcwj.nl>> (in Dutch) (accessed 29 March 2018).



mentation. This case law has been discussed extensively in Part II and will not be repeated here. Through the manual, policy makers and legislative lawyers are supported to prepare their legislative proposals in full conformity with EU case law on the matter.

### 11.2.2.3 *Specific legislative standards applicable to legislation to implement non-EU international instruments*

Chapter 7 of the Instructions for law-making is dedicated to ‘treaties’, although it encompasses both treaties and decisions of international organisations.<sup>1057</sup> With regard to treaties, Instruction 311, second paragraph, distinguishes between the act of approval (*goedkeuring*), in accordance with the terms used in article 91 of the Dutch Constitution, and the act of implementation (*implementatie* or *uitvoering*). As a rule, the approval of a treaty requires the adoption of a parliamentary act of approval.<sup>1058</sup> Whether implementation also requires the enactment of legislation by the Dutch legislature, depends on the substance of the treaty and on the answer to the question whether existing legislation provides for the delegation of the power to adopt implementing legislation to the government or to a specified minister. If existing domestic legislation is not in conformity with the treaty regime and, as a consequence, the enactment of an amending parliamentary act of implementation is required, Instruction 311, second paragraph, states that, as a rule, the act of approval and the act of implementation must be submitted for parliamentary approval simultaneously. Furthermore, the explanatory memorandum to the act of approval must provide insight into the legal consequences, including the consequences for domestic legislation, of the treaty for which approval is sought.<sup>1059</sup>

There are some additional instructions that apply to decisions of international organisations, such as the requirement that representatives of the state that are engaged in negotiations on a new decision must pay heed to the consequences for domestic legislation.<sup>1060</sup>

However, it is clear that the instructions contained in Chapter 7 of the Instructions for law-making concern procedural issues only, such as the involvement of advisory bodies, relevant policy makers and the overseas territories that are part of the Kingdom of the Netherlands. In other words, Dutch policy on legislative quality does not provide for legislative standards that apply *particularly* to domestic legislation that implements non-EU international instruments.

1057 The terms ‘treaties’ (*verdragen*) and decisions of international organisations (*besluiten van volkenrechtelijke organisaties*) are derived from articles 94 and 95 of the Dutch Constitution.

1058 Act on the approval and publication of treaties (*Rijkswet goedkeuring en bekendmaking verdragen*) art 4.

1059 Instruction no. 313, fourth paragraph.

1060 Instruction no. 310, first paragraph. A similar instruction is included for treaties (Instruction 307, first paragraph).

### 11.2.3 The United Kingdom

#### 11.2.3.1 General policy on the quality of legislation, including implementing legislation

In the United Kingdom, the most prominent actor in the legislative process is the Office of Parliamentary Counsel (OPC), which performs the actual drafting of a bill. The OPC is part of the Cabinet Office, a ministerial department which supports the Prime Minister. Contrary to countries such as France, Germany, Sweden, Switzerland and the Netherlands, the task of drafting legislative text is thus entrusted to a centralised government agency.<sup>1061</sup> The OPC consists of around forty specialised legislative drafters, who work from instructions prepared by departmental lawyers and the bill team, which is composed of several civil servants of the responsible government ministry.<sup>1062</sup> It has often been argued that the OPC's considerations are limited to matters of form, whereas policy and substance fall within the domain of policy officers etc. An example can be found in Dale, who in 1977 published *Legislative drafting: A new approach*.<sup>1063</sup> It contains a comparative analysis of the drafting of laws in France, Germany, Sweden and the United Kingdom and was made at the request of the secretary-general of the Commonwealth.<sup>1064</sup> In the study's preface, Dale points at a difference in approach between the United Kingdom and the 'continent'. Whereas to the continental lawyer the "'drafting" of a law is not a process independent of the formulation of its content', in the reality of the common law world this distinction is upheld.<sup>1065</sup> Nevertheless, it has also been pointed out that form and substance cannot be entirely separated.<sup>1066</sup> As Laws puts it, the Parliamentary Counsel are not just 'wordsmiths' but are also counsel who provide legal advice and, in doing so, may have considerable influence on the process of policy formulation.<sup>1067</sup> In this regard, the size of the jurisdiction may play a role as well; legislative drafters who work in smaller jurisdictions tend to be more involved with substance and policy than their colleagues in larger jurisdictions.<sup>1068</sup>

1061 S. Höffler, M. Nussbaumer and H. Xanthaki, 'Legislative drafting' in: U. Karpen and H. Xanthaki (eds), *Legislation in Europe. A comprehensive guide for scholars and practitioners* (Hart Publishing; Oxford and Portland, Oregon, 2017) 145-163, 153-156.

1062 M. Zander, *The law-making process* (7<sup>th</sup> edn Hart Publishing, Oxford and Portland, Oregon, 2015) 9 and 18.

1063 W. Dale, *Legislative drafting: A new approach. A comparative study of methods in France, Germany, Sweden and the United Kingdom* (Butterworths, London 1977).

1064 *Ibid.* vii.

1065 *Ibid.* viii.

1066 C. Stefanou, 'Drafters, drafting and the policy process' in: H. Xanthaki and C. Stefanou (eds), *Drafting legislation. A modern approach* (Routledge, London 2008) 321-333, 321.

1067 S. Laws, 'Drawing the line' in: H. Xanthaki and C. Stefanou (eds), *Drafting legislation. A modern approach* (Routledge, London 2008) 19-34, 20.

1068 Stefanou, 'Drafters, drafting and the policy process' (n 1066) 325 and 332.

With regard to regulation in a broad sense rather than legislation, which is only one means of government regulation<sup>1069</sup>, the United Kingdom has defined five principles of good regulation: proportionality, accountability, consistency, transparency and targeting. The application of these principles determine whether government intervention can be justified and, if so, which regulatory tool should be selected.<sup>1070</sup> Thus, the principles of good regulation may serve a similar purpose as the 'Integrated framework for the assessment of policy and legislation' in the Netherlands. The principles of good regulation have been codified in the Legislative and Regulatory Reform Act 2006.

Turning from regulatory policy to legislative policy, the United Kingdom has, contrary to the Netherlands, only recently taken up the task to codify its policy with regard to legislative quality. Indeed, in 2010 Xanthaki stated that 'the UK still rejects the introduction of a manual for drafting applicable to its own territory'.<sup>1071</sup> Recent developments suggest a change in attitude towards the use of manuals. An event that deserves to be mentioned here is the publication of the report *Ensuring standards in the quality of legislation* by the Political and Constitutional Reform Committee of the House of Commons.<sup>1072</sup> It was written in reaction to 'repeated criticism in recent years' about the quantity and quality of legislation.<sup>1073</sup> In this report, the Committee recommended the formulation of a 'Code of Legislative Standards' for good quality legislation (a draft of which was annexed to the report), since it considered such code a necessary precondition for the improvement of legislative quality.<sup>1074</sup> The committee emphasised the code's character as a draft and invited the government and Parliament to consider it 'as the basis for discussion and agreement'.<sup>1075</sup> From the absence of *codified* legislative standards until the publication of the draft code, can we draw the conclusion that a government policy with regard to legislative quality, or even legislative quality itself, has been non-existent in the United

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1069 The distinction between regulation and legislation will be further discussed in section 12.2.4.

1070 C. Radaelli and F. De Francesco, *Regulatory quality in Europe: concepts, measures and processes* (Manchester University Press, Manchester 2007) 33.

1071 H. Xanthaki, 'Drafting manuals and quality in legislation. Positive contribution towards certainty in the law or impediment to the necessity for dynamism of rules?' 4 *Legisprudence* 2 (2010) 111-128, 120.

1072 House of Commons (Political and Constitutional Reform Committee), *Ensuring standards in the quality of legislation, vol I, Report, together with formal minutes, oral and written evidence* (1st report of session 2013-2014) (The Stationary Office, London 2013) <<https://publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/85/85.pdf>> (accessed 29 March 2018). A brief discussion of the document can be found in A. Samuels, 'Ensuring standards in the quality of legislation' 34 *Statute law review* 3 (2013) 296-299.

1073 House of Commons, *Ensuring standards in the quality of legislation* (n 1072) 5.

1074 *Ibid.*, 18 and 47.

1075 *Ibid.*, 21.

Kingdom? Certainly not, as drafting manuals are neither a sufficient, nor the only way to achieve legislative quality.<sup>1076</sup>

The codification process has not yet been successfully concluded and it remains uncertain whether it will in the future; in a response on the report's publication, the government stated that '[it] does not believe that a Code of Legislative Standards is necessary or would be effective in ensuring quality legislation'.<sup>1077</sup> Nevertheless, it is interesting to briefly examine the draft Code of Legislative Standards, which encompasses fourteen subjects.<sup>1078</sup> From this examination it becomes clear that the draft code exclusively covers legislative drafts' substantive aspects. Although formal criteria seem to emerge as part of the standard of 'understandability and accessibility' of the draft, a closer look reveals that this element refers to purpose or overview clauses, definitions, formulae and new drafting techniques or innovations. Indeed, it is expressly noted in the report that the document does not contain 'set standards for drafting'.<sup>1079</sup> The legislative standards included in the draft code are formulated as commands or questions. For instance, the legislative draft should make clear how the bill relates to existing legislation, including EU legislation. Also it must be explained what the policy objectives of the bill are, its desired outcome and why legislation was necessary to fulfill the policy objective. With regard to the involvement of stakeholders, the draft code prescribes that a summary of the internal or external consultation must be written, as well as an estimation of the costs of preparing and implementing the law.<sup>1080</sup>

In 2013, the OPC launched the 'Good law initiative', which stresses the importance of necessary, clear, coherent, effective and accessible laws. In the view of the OPC, the quality of laws is determined by four interconnected topics: content, language and style, architecture of the statute book and publication. 'Content' includes the necessity of a law, the level of detail and its consistency with other laws. Under the heading 'language and style' the OPC emphasises the importance of laws that are easy to understand. The 'architecture of the statute book' refers to the structure of statute law and to the delegation of legal provisions to regulations. Finally, the way in which a law is presented to the (online) user of legislation is considered to be part of the 'publication'.<sup>1081</sup>

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1076 This will be further discussed in section 11.3.2.

1077 House of Commons, *Ensuring standards in the quality of legislation* (n 1072) appendix, section 12.

1078 They include: responsibility for the bill; purpose; extent, application and devolution; legislative background; policy background; pre-legislative scrutiny; consultation; emergency legislation; public bodies; large multi-topic bills; is the legislation understandable and accessible?; offences; costs; scrutiny and secondary legislation.

1079 House of Commons, *Ensuring standards in the quality of legislation* (n 1072) annex A.

1080 Ibid.

1081 The Good law initiative's website is: <<https://www.gov.uk/guidance/good-law>> (accessed 29 March 2018).

Only a couple of years later, in August 2015, the OPC issued a *Drafting guidance*. As stated in the introduction to the document, the guidance is an instrument for internal use and does not aspire to be a 'comprehensive guide to legislative drafting or to clarity in legal writing'; members of the OPC are 'asked to have regard to' it.<sup>1082</sup> The Drafting guidance consists of eleven parts, each of which is solely concerned with formal aspects of legislation.<sup>1083</sup> This gives the guidance its character as a highly technical document, which can be explained by the OPC's role in the legislative process, as discussed above. Put differently, the document is limited to the activity of drafting, which can be described as the process whereby the conceptualisation of some new legislation is transformed into an actual legislative text and which encompasses planning, composing, revising and editing.<sup>1084</sup> For instance, for the sake of clarity, members of the OPC are requested to use short sentences, to tell their story in a 'moderate, level tone', to use the active voice instead of the passive voice and to use precise and concrete words.<sup>1085</sup> With regard to language and style, it is recommended to draft legislation in a gender-neutral manner, to use figures for all numbers above 10 and to use the '%' mark as a substitute of 'per cent'.<sup>1086</sup> Part 3 of the guidance is concerned with the structure of the legislative text and suggests the inclusion of headings in order to help people to find what they are looking for. Moreover, it is recommended to avoid the use of 'sandwiches' and unnecessary cross-references in legal clauses.<sup>1087</sup> Furthermore, in respect of definitions, it is stipulated that labels must not cover terms that are not expected by the reader and should not include operative provisions.<sup>1088</sup> The document also contains detailed directives on the way in which legislative drafts should refer to domestic or EU legislation, and how amendments (including repeals) to existing legislation should be formulated.<sup>1089</sup> Other provisions which underline the highly technical character of the Drafting guidance include the preference, with regard to the creation of statutory bodies, for '[name] is established' over 'there is to be [name]' and, with regard to reference to periods of time, of '14 days beginning with' over '14 days beginning on'.<sup>1090</sup> Part 9 is concerned with subordinate (delegated) legislation, including procedures applicable to it. The final provisions of legislative proposal are the subject of Part 10, which *inter alia* prescribes

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1082 Office of Parliamentary Counsel, *Drafting guidance* (2015) I <<https://www.gov.uk/government/publications/drafting-bills-for-parliament>> (accessed 29 March 2018).

1083 The 'parts' of the document concern the following subjects: clarity; language and style; structure; definitions; citation; amendments; bodies corporate; periods of time; subordinate legislation; final provisions; words and phrases.

1084 Höffler, Nussbaumer and Xanthaki, 'Legislative drafting' (n 1061) 152.

1085 Office of Parliamentary Counsel, *Drafting guidance* (n 1082) 1-6.

1086 *Ibid.*, 7-12.

1087 *Ibid.*, 13-21 and 26.

1088 *Ibid.*, 30 and 31.

1089 *Ibid.*, 32-50.

1090 *Ibid.*, 51 and 53.

the running order of the final provisions, including provisions with regard to the entry into force and applications in the jurisdictions of the United Kingdom, transitional provisions and sunset clauses.<sup>1091</sup> Finally, in Part 11, the Drafting guidance clarifies the exact meaning of several terms in order to facilitate their correct use in legislative texts.

Also of interest to us is the *Guide to making legislation*, which was published by the Cabinet Office in April 2017.<sup>1092</sup> The Guide describes the procedures for the drafting and adoption of primary legislation and aims to support bill teams and policy officials.<sup>1093</sup> The document not only sheds light on the 'Good law initiative', but also contains some standards pertaining to the quality of legislation. First of all, the Guide states the need to ensure compliance with the ECHR. The bill team should include an explanation of this particular point in their instructions to the OPC; observance of the ECHR should also be part of the explanatory notes to the legislative proposal.<sup>1094</sup> Furthermore, under section 19 of the Human Rights Act 1998, which incorporates the ECHR in the domestic legal order of the United Kingdom, as we have seen in Part I, the responsible minister should make a statement ('section 19 statement') to both houses of Parliament as to the proposal's compatibility with the ECHR.<sup>1095</sup> While compliance with the ECHR receives a considerable amount of attention in the Guide, the conformity with other international legal obligations of the United Kingdom, including human rights treaties, receives far less attention.<sup>1096</sup> Second, the Guide provides that consideration should be given to the EU law aspects of the proposal to ensure there is no conflict with EU law. A third legislative standard that can be derived from the Guide is the requirement to perform impact assessments for all 'government interventions of a regulatory nature' that cover economic, social, environmental and equality impacts.<sup>1097</sup> This impact assessment should contain an identification of the problem, a statement of policy objectives, possible solutions, the impacts, costs and benefits of each solution, an analysis of enforcement and of the proposal's application in practice and, finally, a plan for evaluation.<sup>1098</sup> Fourth, as part of the pre-legislative scrutiny procedure, which entails the examination of legislative drafts by a parliamentary committee prior to their formal introduction

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1091 Ibid, 65-74.

1092 Cabinet Office, *Guide to making legislation* (2017) <<https://www.gov.uk/government/publications/guide-to-making-legislation>> (accessed 29 March 2018).

1093 Ibid, 5.

1094 Ibid, 72 and 103.

1095 Ibid, 117.

1096 Nevertheless, in the Guide the role of the Joint Committee on Human Rights of Parliament is explained. In this context, it is stated that '[t]he JCHR may also ask about compliance with any international human rights instrument which the UK has ratified; it does not regard itself limited to the ECHR. Cabinet Office, *Guide to making legislation* (n 1092) 120.

1097 Ibid, 125-129.

1098 Ibid, 126.

in Parliament, drafts may also be published as part of public consultation. This has ‘enormous value’ for stakeholders, it is stated, ‘as it provides an extra opportunity for them to comment having seen how the legislation would work in practice’.<sup>1099</sup> In 2016 the Cabinet Office published a short document on ‘consultation principles’ in which it elaborated the contours of the public consultation procedure. The principles stipulate, for instance, that consultation should have a purpose and be informative, targeted and proportional.<sup>1100</sup>

### 11.2.3.2 *Specific legislative standards applicable to legislation to implement EU instruments*

The United Kingdom, as a member of the EU, is under the obligation to adopt the necessary measures for the implementation of the EU’s legislative instruments. Again, a guidance document sets out the policy with regard to those implementing measures: *Transposition guidance: How to implement European directives effectively*, which also encompasses the *Guiding principles for EU legislation*.<sup>1101</sup> As a point of departure, this document stipulates that before starting transposition it must be determined how the aims of the EU law and domestic policies ‘will be brought into harmony so that transposition neither has unintended consequences in the UK nor risks infraction’.<sup>1102</sup> This task must be carried out in a way that implementing legislation delivers what is required by the EU instrument without going beyond its minimum requirements.<sup>1103</sup> However, ‘goldplating’ may be the preferable option in exceptional circumstances if it is ‘justified by a cost-benefit analysis and consultation with stakeholders’.<sup>1104</sup> Similarly, as a general rule, the Transposition guidance states that the date of entry into force of implementing legislation should be on the date prescribed by the EU instrument rather than *before* that date. On the other hand, early implementation is recommended if that provides an advantage to businesses or other stakeholders.<sup>1105</sup>

Moreover, the document recommends the inclusion of a statutory provision containing an obligation to review the implementing law every five years. This is an ‘essential check on whether the original policy objectives

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1099 Ibid, 169.

1100 Cabinet Office, *Consultation principles: guidance* (2016) 1-2 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/492132/20160111\\_Consultation\\_principles\\_final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492132/20160111_Consultation_principles_final.pdf)> (accessed 29 March 2018).

1101 HM Government, *Transposition guidance: How to implement European directives effectively* (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf)> (accessed 29 March 2018).

1102 Ibid, 31.

1103 Ibid.

1104 Ibid, 7-8.

1105 Ibid, 12-13.

(including expected benefits and costs) are being achieved, and whether any changes or improvements could be made'. Also, the findings of the evaluation could be used in future discussions on the EU level.<sup>1106</sup> With regard to the evaluation, it is argued in particular that:

'The principal focus should be on identifying areas where implementation and enforcement could be improved to reduce burdens or increase effectiveness, learning from experience both in the UK and in other Member States. Where other Member States have implemented EU legislation, you should consider aligning implementation in the UK to ensure British businesses are not put at a competitive disadvantage. However, you should also consider whether there is evidence, and potential for an alliance with other EU Member States, that would support taking a request for a wider review of the objectives of the underlying Directive to the European Commission'.<sup>1107</sup>

This means that under the United Kingdom legislative policy it is recommended to engage in a periodical evaluation of the implementing law, irrespective of whether an evaluation of the EU instrument itself is foreseen. This might lead to the situation in which the evaluation of the domestic implementing law reveals some serious flaws in the applicable regime, even though this regime cannot be changed without the adoption of a new legislative proposal to amend the existing EU regime, with all its lengthy discussions on the EU level.

Finally, in respect of consultation of legislative proposals that aim to implement EU instruments, the document adheres to the general rule that consultation with stakeholders must be performed. However, in some cases written consultation may not be proportionate.<sup>1108</sup>

### 11.2.3.3 *Specific legislative standards applicable to legislation to implement non-EU international instruments*

The implementation of non-EU instruments is hardly a specific topic in the United Kingdom's codified legislative policy. However, the fact that a legislative proposal serves to implement international legal obligations may be a reason to be treated as a priority and thus may be considered as an argument for its inclusion in the legislative programme.<sup>1109</sup> Contrary to what has been said above with regard to public consultation of legislation, legislative proposals that implement international commitments may not be suitable for publication in draft if 'there is little flexibility around implementation'.<sup>1110</sup> In this regard, the exception for legislative proposals implementing EU law to the general rule to engage in public consultation equally applies to the proposals that implement non-EU instruments.

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1106 Ibid, 13.

1107 Ibid.

1108 Ibid, 16.

1109 Cabinet Office, *Guide to making legislation* (n 1092) 28.

1110 Ibid, 163.



### 11.2.4 Conclusion

Our discussion of legislative quality policy in the Netherlands and the United Kingdom has revealed that the legislative policies in the Netherlands and the United Kingdom share important elements. For instance, the need for accessible laws through the use of understandable and common language is firmly embedded in the legislative process in both countries. Similarly, with regard to the more substantive elements of legislative proposals, both countries acknowledge the importance of impact assessments, consultation of stakeholders and burden reduction when preparing new legislative proposals. The examination carried out in previous sections also suggests a consensus on quality standards pertaining to the decision making process *even before legislation is chosen as a means of government regulation*. Here legislative quality borders on regulatory quality. As we have seen, in the Netherlands the 'Integrated framework for the assessment of policy and legislation' demands a problem analysis, the formulation of a policy aim, the choice of the appropriate policy instrument and the expected consequences for affected persons, companies, the environment etc. Similar instructions are part of the 'Guide to making legislation' in the United Kingdom, which prescribes the performance of an impact assessment for all 'government interventions of a regulatory nature' that cover economic, social, environmental and equality impacts.<sup>1111</sup> This impact assessment should contain an identification of the problem, a statement of policy objectives, possible solutions, the impacts, costs and benefits of each solution. This similarity also makes clear that legislative quality and regulatory quality often coincide; the performance of impact assessments is considered to be part of both. As a consequence, such assessment should equally be carried for government intervention of a non-legislative nature.

From the foregoing we may also conclude that the legislative policies in the Netherlands and the United Kingdom do not include specific quality standards with regard to legislation aimed at the implementation of non-EU law. Thus, the quality of implementing legislation is evaluated on the basis of general legislative quality requirements.

These common features cannot conceal the fundamentally different ways in which both countries aim to ensure the quality of legislation. They may be explained by differences in legal or legislative culture, of which the centralised organisation of the legislative function in the OPC is merely one element. Another important difference concerns the codification of the legislative quality policy. While the Netherlands have used its main drafting manual, the Instructions for law-making, for several decades, such codification has been rejected in the United Kingdom until recently. As is often the case with matters regarding culture, it is difficult to precisely pinpoint the source of the established differences in the methods of ensuring legislative quality.

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1111 Ibid, 125-129.

### 11.3 INTERNATIONAL APPROACHES TO THE QUALITY OF IMPLEMENTING LEGISLATION

#### 11.3.1 Introduction

As stated above, our discussion of the national approaches to legislative quality in general and implementing legislation in particular, must be complemented with an examination of two international approaches to legislative quality. Again, both approaches differ significantly. Whereas the OECD is primarily concerned with the quality of national legislation, the EU focuses on the quality of EU law, i.e. legislation adopted by the institutions of the EU. Despite this fundamental difference, both policies can be considered the most elaborate international attempts to ensure the quality of legislation and thus deserve attention in this chapter.

#### 11.3.2 Organisation for Economic Cooperation and Development

On the international level, the OECD seeks to enhance domestic regulatory quality under the heading of 'regulatory reform'. Although the OECD uses the terms 'regulation' and 'regulatory', it is clear that it is intended to refer to what has been called 'legislation' elsewhere in the present study, as 'regulation' is defined as 'the diverse set of instruments by which governments set requirements on enterprises and citizens. Regulations include laws, formal and informal orders and subordinate rules issued by all levels of government, and rules issued by non-governmental or self-regulatory bodies to whom government has delegated regulatory powers'.<sup>1112</sup> 'Regulatory quality' encompasses 'performance, cost-effectiveness, or legal quality of regulations and related government formalities'.<sup>1113</sup> Although regulation and legislation often can be used synonymously, both terms have different origins and meanings, as will be further explained in section 11.4.2.<sup>1114</sup>

The organisation's dedication to the subject of legislative quality was codified in the 1995 Recommendation of the Council on improving the quality of government regulation, in which member states were called upon to 'take effective measures to ensure the quality and transparency of government regulations'.<sup>1115</sup> To succeed in its task, the Council proposed

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1112 OECD, 'The OECD Report on regulatory reform. Synthesis' (OECD, Paris 1997) 6 <<http://www.oecd.org/gov/regulatory-policy/2391768.pdf>> (accessed 29 March 2018). For a further clarification of the distinction between legislation and regulation, see W.J.M. Voermans, 'Legislation and regulation' in: U. Karpen and H. Xanthaki (eds), *Legislation in Europe. A comprehensive guide for scholars and practitioners* (Hart Publishing; Oxford and Portland, Oregon, 2017) 17-32.

1113 OECD, 'Synthesis' (n 1112) 6.

1114 Voermans, 'Legislation and regulation' (n 1112) 18.

1115 OECD, 'Recommendation of the Council of the OECD on Improving the Quality of Government Regulation' (9 March 1995) C(95)21/final <<http://www.oecd.org/regreform/>> (accessed 29 March 2018).

a checklist for regulatory decision-making, which includes ten questions that reflect ‘principles of good decision-making’. They include questions such as ‘is the problem correctly defined?’, ‘is government action justified?’ and ‘do the benefits of regulation justify the costs?’.<sup>1116</sup> Other questions are more concerned with the text and structure of the regulation, such as ‘is the regulation clear, consistent, comprehensible and accessible to users?’<sup>1117</sup>

Two years after the adoption of Recommendation C(95)21 the OECD published a report on regulatory reform in which it identified a ‘real risk [...], particularly in a time of profound and rapid change in economic and social conditions, that regulations [...] become an obstacle to achieving the very economic and social well-being for which they are intended’.<sup>1118</sup> A lack of legislative quality was seen as a potential threat to the competitiveness of national economies. In order to remove this threat, seven policy measures were proposed, which included, *inter alia*, the systematic review of the effectiveness and efficiency of existing regulations and the transparent, non-discriminatory and efficient application of regulations. Other measures related to the strengthening of competition policy, the removal of trade and investment barriers, which emphasise the predominantly economic concern with regard to legislative quality.<sup>1119</sup> In 2005 the Council adopted the OECD Guiding principles for regulatory quality and performance, which were an elaboration of the principles adopted in 1997.<sup>1120</sup>

Several years later, in 2012, the Council adopted the Recommendation on regulatory policy and governance, which constituted an update of (and demonstrate considerable overlap with) the ‘guiding principles’ it had adopted in 2005. In its own words, the 2012 Recommendation:

‘provides governments with clear and timely guidance on principles, mechanisms and institutions required to improve the design, enforcement and review of their regulatory framework to the highest standards’.<sup>1121</sup>

The 2012 Recommendation, which is still the leading OECD document, contains twelve principles, the most important of which will be highlighted here. Member states are urged to ‘commit at the highest political level to

1116 OECD, Recommendation C(95)21/final (n 1115) appendix.

1117 Ibid, question no. 8.

1118 OECD, ‘Synthesis’ (n 1112) 5.

1119 Ibid, 27-38. Also M. Mousmouti, ‘Operationalising quality of legislation through the effectiveness test’ 6 *Legisprudence* 2 (2012) 191-205, 196.

1120 OECD, ‘Guiding principles for regulatory quality and performance’ (OECD, Paris 2005) <<http://www.oecd.org/fr/reformereg/34976533.pdf>>. In addition to the 2005 Guiding principles, the ‘Integrated checklist on regulatory reform. A policy instrument for regulatory quality, competition policy and market openness’ (<<http://www.oecd.org/regreform/34989455.pdf>>) was published. This document was the product of the cooperation between OECD and Asian-Pacific Economic Cooperation (APEC).

1121 OECD, ‘Recommendation of the Council on Regulatory Policy and Governance’ (22 March 2012) foreword <<http://www.oecd.org/governance/regulatory-policy/49990817.pdf>> (accessed 29 March 2018).

an explicit whole-of-government policy for regulatory quality'.<sup>1122</sup> Such policy should 'define the process by which a government, when identifying a policy objective, decides whether to use regulation as a policy instrument, and proceeds to draft and adopt a regulation through evidence-based decision-making'.<sup>1123</sup> This policy is not in itself a quality criterion applicable to legislation, but emphasises the need to put in place an institutional framework within governments with a view of increasing legislative quality. Furthermore, governments are requested to promote stakeholder participation in the regulatory process and to ensure that regulations are comprehensible and clear and that parties can easily understand their rights and obligations.<sup>1124</sup> Another important principle concerns the performance of *ex ante* regulatory impact assessments in the early stages of the decision making process. This entails, *inter alia*, the identification of a specific policy aim, the exploration of the various ways of pursuing that aim; subsequently, the selection of the most appropriate instrument and an assessment of the economic, social and environmental impacts.<sup>1125</sup> Once legislation has been adopted, it must be reviewed retrospectively (*ex post*) against 'clearly defined policy goals, including consideration of costs and benefits, to ensure that regulations remain up to date, cost-justified, cost-effective and consistent and delivers the intended policy objectives'.<sup>1126</sup> Finally, the 2012 Recommendation urges member states to ensure the availability of effective remedies in order to review the legality of the adopted legislation.<sup>1127</sup>

In 2014, the OECD published two additional documents on regulatory policy. One of them specifically focuses on inspections in OECD countries and provides 'best practices'. They consist of eleven principles, such as the need for evidence-based, risk-based and proportional enforcement, the need for a clear legal framework for the performance of inspections and enforcement and the importance of professional inspectors.<sup>1128</sup> It thus elaborates on the legislative standard of compliance monitoring and enforcement.

The other 2014 complementary document to the 2012 Recommendation concerns 'the governance of regulators'. It was intended to support member states in developing a policy on the 'role and functions of regulatory agencies'.<sup>1129</sup> Instead of focusing on the quality of laws themselves, this document looks primarily into the adequacy of the national bodies producing

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1122 Ibid, section I, paragraph 1.

1123 Ibid, section I, paragraph 1, and section 1 of the Annex.

1124 Ibid, section I, paragraph 2, and section 2 of the Annex.

1125 Ibid, section I, paragraph 4, and section 4 of the Annex.

1126 Ibid, section I, paragraph 5, and section 5 of the Annex.

1127 Ibid, section I, paragraph 8, and section 5 of the Annex.

1128 OECD, *Regulatory enforcement and inspections* (OECD Best practice principles for regulatory policy, OECD Publishing, Paris 2014) <<http://dx.doi.org/10.1787/9789264208117-en>> (accessed 29 March 2018).

1129 OECD, *The governance of regulators*, OECD Best practice principles for regulatory policy, (OECD Publishing 2014) 3 <<http://dx.doi.org/10.1787/9789264209015-en>> (accessed 29 March 2018).

laws. Although it falls outside the scope of the present study to thoroughly examine such institutional aspects of legislative quality, the document illustrates that the regulatory quality policy developed by the OECD also concerns other aspects than legislative standards.

In sum, the OECD approach to legislative quality goes beyond the mere application of checklists by policy makers or legislative drafters; it also provides for guidelines for the adoption of a legislative policy, the attribution of responsibilities within the government apparatus and the role and functions of regulators. Several legislative standards are firmly embedded in the legislative quality policy propagated by the OECD, among them stakeholder participation, *ex ante* and *ex post* evaluation, comprehensibility and clarity of the anticipated laws and the availability of remedies. These elements of legislative quality apply to legislation in general, comprising both truly national legislation and national implementing legislation; up until now, the efforts of the OECD in this field have not included guidance with regard to implementing legislation in particular.

### 11.3.3 European Union

Another major player in the international quest for legislative quality is the EU. Whereas the OECD efforts aim at the improvement of *national* legislation, the activities instigated by the EU focus on the quality of *supranational* legislation: the legislative instruments adopted in the framework of the EU. The present study's main subject is national implementing legislation. As a consequence, it could be argued that the quality of legislation adopted beyond the national legal order, such as EU regulations and directives, should remain outside the scope of our analysis. On the contrary, it cannot be ignored that the EU's efforts to improve the quality of its legislative instruments have led to elaborate policies that, judged by its measure of detail, could easily compare to the policies developed under the auspices of the OECD. Moreover, from a more substantive viewpoint, the legislative policies propagated by the OECD and the EU reveal several common features, which may be an indication that the quality of national legislation and international legislation should be assessed by the same standards. Finally, discussions of the quality of EU legislation transcend the traditional distinction between civil law and common law, as it must accommodate both.<sup>1130</sup> For these reasons, a discussion of the efforts undertaken by the EU's institutions to improve the quality of EU legislation, should be part of the present study.

The EU's current policies aimed at the quality of legislation are known under the heading 'better law-making' and 'better regulation'. It is an agenda pursued by the EC, the body that is entrusted with the task to ensure

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1130 H. Xanthaki, 'Emerging trends in legislation in Europe' in: U. Karpen and H. Xanthaki (eds), *Legislation in Europe. A comprehensive guide for scholars and practitioners* (Hart Publishing, Oxford and Portland, Oregon, 2017) 275-296, 275.

the application of the measures adopted by the institutions of the EU.<sup>1131</sup> Better law-making, better regulation and related policies have been on the EU agenda since the early 1990's.<sup>1132</sup> Some milestones in its development will be highlighted here. 1992 saw the publication of a report commonly known as the Sutherland report, which signalled a 'growing unease that, in practice, Community legislation may be too heavy-handed'.<sup>1133</sup> This and other reports triggered the adoption of Declaration no. 39 on the quality of drafting of Community legislation. In this statement, which was annexed to the Treaty of Amsterdam, it was agreed that 'the three institutions involved in the procedure for adopting Community legislation [...] should lay down guidelines on the quality of drafting of the said legislation [...]'.<sup>1134</sup> In 1998 this resulted in the adoption of the Interinstitutional agreement adopted by the three main legislative bodies of the EU, which contains several statements on the technical quality of EU legislation.<sup>1135</sup> The agreement provides, *inter alia*, that the legislative acts adopted by the EU should be drafted in a clear, simple and precise manner.<sup>1136</sup> Furthermore, the drafting of acts 'shall take account of the persons to whom they are intended to apply' and terminology used in a given act 'shall be consistent both internally and with acts already in force'.<sup>1137</sup>

Another milestone was the adoption of the Interinstitutional Agreement on Better Law-making in 2003.<sup>1138</sup> In this document the three legislative institutions pledged 'to observe general principles such as democratic legitimacy, subsidiarity and proportionality, and legal certainty and [...] to

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1131 Article 17, first paragraph, TEU.

1132 In the developments ever since, five 'layers' of policies can be discerned, each of which had its own focal point: technical quality, reduction and simplification, burden reduction, enforceability and legitimacy. See W.J.M. Voermans, 'Beating about the bush in 'Better regulation' in: B. Steunenberg, W. Voermans and S. van den Bogaert (eds), *Fit for the future? Reflections from Leiden on the functioning of the EU* (Eleven International Publishing, The Hague 2016) 69-88. Other publications which provide an overview of the EU's efforts with regard to legislative quality include Xanthaki, 'Emerging trends in legislation in Europe' (n 1130); W.J.M. Voermans, 'Concern about the quality of EU legislation. What kind of problem, by what kind of standards?' 2 *Erasmus Law Review* (2009) 59-95 and W. Robinson, 'Manuals for drafting of European Union legislation' 4 *Legisprudence* 2 (2010) 129-155.

1133 High Level Group on the Operation of the Internal Market, presided over by P. Sutherland, 'The internal market after 1992. Meeting the challenge' (report to the EEC Commission) (28 October 1992) <[http://aei.pitt.edu/1025/1/Market\\_post\\_1992\\_Sutherland\\_1.pdf](http://aei.pitt.edu/1025/1/Market_post_1992_Sutherland_1.pdf)> (accessed 29 March 2018).

1134 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, annex, OJ 1997, C 340, 1.

1135 Interinstitutional agreement of 22 December 1998 of the European Parliament, the Council of the European Union and the Commission of the European Communities on common guidelines for the quality of drafting of Community legislation (OJ 1999, C 73).

1136 *Ibid*, section 1.

1137 *Ibid*, sections 3 and 6.

1138 Interinstitutional agreement of 16 December 2003 of the European Parliament, the Council of the European Union and the Commission of the European Communities on better law-making (OJ 2003, C321).

promote simplicity, clarity and consistency in the drafting of laws and the utmost transparency of the legislative process'.<sup>1139</sup> Compared to the 1998 Interinstitutional Agreement, the 2003 agreement had a broader scope, since it also entailed other aspects of legislative quality than the mere technical or formal. It emphasised the need for greater transparency, improvement of the consultation process and for impact assessments and the observance of the principles of necessity, subsidiarity and proportionality.<sup>1140</sup> It also called for the simplification and reduction of the existing body of legislation.<sup>1141</sup>

The following years saw the transition from 'better law-making' to 'better regulation', which was announced by the EC in 2005.<sup>1142</sup> The EC asserted that the approach to regulation was to be developed 'to ensure that the defence of public interests is achieved in a way that supports and does not hinder the development of economic activity'.<sup>1143</sup> With 'better regulation', legislative quality acquired a more economic perspective. As part of better regulation, the EC stressed the need for impact assessments, consultation of stakeholders, the reduction of administrative burden and the simplification of legislation.<sup>1144</sup>

In 2010 the EC further developed its legislative quality policies under the heading of 'smart regulation', which must be seen against the background of the economic and financial crisis unfolding in those years.<sup>1145</sup> In this document the EC stated that stakeholder consultation and impact assessments were 'now essential parts of the policy making process'. However, the EC also concluded that 'better regulation must become smart regulation'.<sup>1146</sup> Many elements of this strategy can already be found in earlier policy documents, such as the need for simplification of legislation and the reduction of administrative burden.

An important new impulse to the debate on legislative quality was given during the EC presidency of Jean-Claude Juncker, when a communication was issued on 'Better regulation for better results – an EU agenda' in May 2015. In this document, 'better regulation' is described as a tool to provide a basis for timely and sound policy decisions. The application of the

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1139 Ibid, section 2.

1140 Ibid, sections 10, 16, 25-30.

1141 Ibid, section 35.

1142 EU (European Commission), 'Better regulation for growth and jobs in the European Union', Communication from the Commission to the Council and the European Parliament (16 March 2005) COM (2005) 97. Also EU (European Commission), 'A strategic review of better regulation in the European Union', Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions (14 November 2006) COM (2006) 689.

1143 European Commission, 'Better regulation for growth and jobs in the European Union' (n 1142) 1.

1144 Ibid, 5-8.

1145 EU (European Commission), 'Smart regulation in the European Union', Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions (8 October 2010) COM (2010) 543.

1146 Ibid, 2.

principles of better regulation will, it is stipulated, 'ensure that measures are evidence-based, well designed and deliver tangible and sustainable benefits for citizens, business and society as a whole'.<sup>1147</sup> In order to make these ambitions come true, the EC contended that EU legislation should be:

'[...] fit for purpose, modern, effective, proportionate, operational and as simple as possible. Legislation should do what it is intended to do, it should be easy to implement, provide certainty and predictability and it should avoid any unnecessary burden. Sensible, realistic rules, properly implemented and enforced across the EU'.<sup>1148</sup>

The communication stresses the importance of several criteria applicable to legislation. For instance, the EC emphasises the importance of openness and transparency through the consultation of stakeholders. This enhances the availability of evidence, it is argued, which positively contributes to a law's effectiveness.<sup>1149</sup> Other topics that are addressed by the EC are the limitation of burdens, in particular for small and medium enterprises, the importance of effect monitoring and evaluation, and the need for accessible, comprehensible, consistent and clear laws.<sup>1150</sup> In 2016, the EC published another communication on better regulation under the title 'Better regulation: delivering better results for a stronger Union'.<sup>1151</sup> In this document the EC reaffirmed its commitment to better regulation policies and its elements. In addition, it stressed the need for effective application and redress for citizens.<sup>1152</sup>

While the 2015 and 2016 communications issued by the EC serve to present and explain its youngest priorities in the field of legislative policies, the Better Regulation Guidelines, which were published simultaneously with the 2015 communication, enumerate more systematically the quality criteria applicable to EU legislation.<sup>1153</sup> Together, they must lead to 'better regulation', which is described as 'designing EU policies and laws so that they achieve their objectives at minimum cost'.<sup>1154</sup>

The guidelines are divided in 6 categories, each of which corresponds to one phase in the policy cycle: planning; impact assessment; stakeholder

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1147 EU (European Commission), 'Better regulation for better results- an EU agenda', Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions (19 May 2015) COM (2015) 215, 3.

1148 *Ibid.*, 4.

1149 *Ibid.*

1150 *Ibid.*, 6-9.

1151 EU (European Commission), 'Better regulation: Delivering better results for a stronger Union', Communication from the Commission to the European Parliament, the European Council and the Council (14 September 2016) COM (2016) 615.

1152 *Ibid.*, 9.

1153 EU (European Commission), 'Better regulation guidelines', Commission staff working document (19 May 2015) SWD (2015) 111.

1154 *Ibid.*, 5.



consultation; preparing proposals, implementation and transposition; monitoring; and evaluation and fitness checks.<sup>1155</sup>

The Better Regulation Guidelines<sup>1156</sup> start with the planning for a new policy proposal. In this phase, EC officials are required to, among other things, ensure that the anticipated proposal has received political validation at the appropriate level.<sup>1157</sup> If a policy proposal receives the political support needed for its continuation, the Guidelines require the performance of an impact assessment. This involves the formulation of 'logical reasoning' that explores possible solutions to the problem, which must include an analysis of the expected consequences of those policy options.<sup>1158</sup> This 'inception impact analysis' must be shared with stakeholders, in particular through a 12-week public consultation. Subsequently, EC officials must estimate the economic, social and environmental impacts of the formulated policy options, on the basis of quantitative data, if available. This leads to the drafting of the final impact assessment report, which includes not only a description of the economic, social and environmental impact and the consultation results, but also an analysis of the expected consequences for affected persons or entities, in particular for small and medium enterprises, and for competitiveness.<sup>1159</sup>

During the next stage, the proposal must be codified in a legal text. This text should be well drafted 'in order to ensure it adequately reflects the intention of the legislator and can achieve its regulatory aim'.<sup>1160</sup> To this end, a 'Joint practical guide' has been compiled, the first edition of which dates back to 2000.<sup>1161</sup> It provides for 22 principles which mainly concern the formal aspects of the drafting of EU legislation. It includes the requirement, already mentioned above, that the text must be 'clear, simple and precise'. Furthermore, the text must be concise as possible, the use of long articles and sentences must be avoided and the terminology used must be consistent within the instrument and with other legislation in force. Also, the legislative proposals should follow the same standard structure, where necessary, and references to other legal texts must be kept to a minimum.<sup>1162</sup>

Once the legislative proposal is adopted and has entered into force, the EC must examine whether member states comply with the legislative text

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1155 Ibid, chapters II-VII.

1156 The guidelines are complemented by the Better Regulation Toolbox. The Toolbox provides more detailed information on the instructions already codified in the Guidelines. Therefore, a separate discussion is not necessary for the purpose of this chapter.

1157 European Commission, *Better regulation guidelines* (n 1153) 11.

1158 Ibid, 16.

1159 Ibid, 16-18.

1160 Ibid, 35.

1161 The current edition was published in 2015. EU, *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation* (Publications Office of the European Union, Luxembourg 2015).

1162 Ibid, principles 1, 4, 6, 7, 16.

through implementation and transposition, if needed.<sup>1163</sup> The next phase of the policy cycle is concerned with monitoring. This means that it must be identified whether the regulatory intervention is functioning in practice as expected, which also entails the gathering of data in a systematic way in order to improve future interventions.<sup>1164</sup> Finally, the Better Regulation Guidelines prescribe the activities to be undertaken in the evaluation and fitness check phase. 'Evaluation' is defined as an evidence-based judgment of the extent to which an intervention has been 'effective, efficient and [...] relevant given the needs and its objectives, [...] coherent internally and with other EU policy interventions and achieved 'EU added-value'.<sup>1165</sup> In addition to the evaluation instrument, which focuses on one policy intervention only, 'fitness checks' must be performed. These checks concern a *number of* related interventions for a larger policy area, which enables the EC to address the 'cumulative effects of the applicable framework'.<sup>1166</sup> The guidelines describe in great detail the manner in which both assessments must be carried out.<sup>1167</sup>

The guidelines are codified in a EC staff working document, which suggests its application to legislative proposals drafted by the EC. As a consequence, they may, in principle, not apply to the EU's co-legislating institutions: the Council and the European Parliament.<sup>1168</sup> On the other hand, these institutions have also committed themselves to the better regulation policies, most notably through a new Interinstitutional agreement that was concluded in April 2016.<sup>1169</sup> In this agreement, the institutions recognised their 'joint responsibility in delivering high-quality Union legislation'.<sup>1170</sup> This entails, the agreement reads, *inter alia*, the entrenchment of public and stakeholder consultation, ex-post evaluation of existing legislation, impact assessments of new initiatives, simplification and regulatory burden reduction in the EU's legislative products and processes.<sup>1171</sup>

1163 European Commission, *Better regulation guidelines* (n 1153) 41.

1164 *Ibid*, 42-43.

1165 *Ibid*, 49.

1166 *Ibid*, 50.

1167 Chapter VI.

1168 TFEU art 289.

1169 Interinstitutional agreement of 13 April 2016 between the European Parliament, the Council of the European Union and the European Commission on better law-making (OJ 2016, L 123).

1170 *Ibid*, second preambular section.

1171 Chapters III and VIII. Also sixth and eighth preambular sections. In the provisions on common objectives and commitment (Chapter I), it is stipulated that 'the three institutions [...] agree to observe general principles of Union law, such as democratic legitimacy, subsidiarity and proportionality, and legal certainty. They further agree to promote simplicity, clarity and consistency in the drafting of Union legislation and to promote the utmost transparency of the legislative process [and] that Union legislation should be comprehensible and clear, allow citizens, administrations and businesses to easily understand their rights and obligations, include appropriate reporting, monitoring and evaluation requirements, avoid overregulation and administrative burdens, and be practical to implement'.

In sum, the ‘better law-making’ and ‘better regulation’ policies that have emerged in the framework of the EU contain many aspects which have attracted a varying degree of attention over the years. We can observe a significant overlap between the legislative standards formulated under the guidance of the OECD and the EU respectively. They apply to the EU’s supranational legislation, however, and thus ignore the quality of *national* implementing legislation.

#### 11.3.4 Conclusion

How can we assess this overview? From a distance, it could be described as an extensive enumeration of various standards which aim to enhance the quality of legislation adopted in the framework of the EU. This is certainly true, but not the whole story. Although the EU’s efforts to increase legislative quality is concerned first and foremost with the quality of EU legislation instead of national legislation, it is difficult to ignore the similarities with the legislative standards formulated under the responsibility of the OECD. This may suggest a high degree of consensus on the value of those standards for legislative practice. For instance, both organisations stress the importance of the performance of impact assessments, evaluations and clear and accessible legal texts. They thus go beyond the mere application of checklists by legislative drafters. Moreover, both policies do not contain legislative standards for *implementing* legislation in particular. However, we can also observe differences between the approach adopted by the OECD and the EU. They can be partly explained by the specific features of the EU. For instance, the application of the principles of subsidiarity and proportionality to the exercise of authority by the institutions of the EU, including the adoption of legislation, are characteristic for the division of competences between the EU and its member states.<sup>1172</sup>

### 11.4 THE QUALITY OF IMPLEMENTING LEGISLATION: COMMON GROUND?

#### 11.4.1 Introduction

In the previous section we discussed two national and two international policies which aim to enhance legislative quality. But what constitutes ‘quality of legislation’? This question is both essential and difficult to answer. It is essential, since it forces us to clarify what we are seeking; we can only succeed in analysing attitudes towards the quality of implementing legislation if we can provide a sufficiently clear description of what is part of it, and what is not. At the same time, in the absence of a universally accepted definition of

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1172 TEU art 5, third and fourth paragraphs. Also Protocol (no 2) on the Application of the Principles of Subsidiarity and Proportionality, OJ 2008, C 115, 201; Interinstitutional agreement of 13 April 2016 (n 1169), third preambular section.

the term, the delineation of 'quality of legislation' is a difficult task, since it may be viewed as 'an elusive and vague concept for many authors mainly due to the numerous perspectives through which the quality of a piece of legislation or the legislative process may be evaluated'.<sup>1173</sup> According to Mousmouti, legislative quality is a relative concept, as its meaning differs depending on various factors, among them historical, political and social contexts, the viewpoint of different actors and on different legal traditions.<sup>1174</sup> Wintgens states that a concrete definition of legislative quality does not exist.<sup>1175</sup> A possible explanation for this state of affairs lies in the perspectives that have been adopted in order to address the quality of legislation. To come to grips with this diversity, we need to understand the difference between regulation and legislation, and, as a corollary, between regulatory quality and legislative quality. Subsequently we discuss several standards which can be considered part and parcel of the notion of legislative quality.

#### 11.4.2 Regulatory quality and legislative quality: a matter of perspective

'Regulation' refers to the exercise of public authority with the aim of bringing about change in the behaviour of societal actors. These actors encompass individuals and organisations (including companies). There are several ways for this behavioural change to be accomplished, for instance through financial incentives or through the imposition of penalties. 'Legislation' is a specific form in which the proposed regulation may be cast. If policy makers choose to discourage the consumption of sugary beverages for public health reasons, they may consider the imposition of an additional tax on these products (regulation). In a community committed to the rule of law, it must be laid down in law and often this will be written law: legislation.<sup>1176</sup> The question may arise whether less direct interventions in society could be considered legislation. If a government chooses to establish a public body which is attributed by law with the task of providing advice to the government, can this be considered 'regulation'? Since this law only modifies the *internal* organisation of the government, it could be argued that this legislation does not amount to regulation. The point here is that legislation and regulation often, but not always, coincide.

Traditionally, the topic of regulation has been the domain of economists.<sup>1177</sup> They have been interested in efficiency (the flow of goods to the

1173 T. Drinóczi, 'Concept of quality in legislation revisited. Matter of perspective and a general overview' 36 *Statute Law Review* 3 (2015) 211-227, 212. Also Voermans, who describes legislative quality as an 'elusive buzzword'. Voermans, 'Concern about the quality of EU legislation' (n 1132) 64.

1174 Mousmouti, 'Operationalising quality of legislation' (n 1119) 192.

1175 Wintgens, 'Rationality in legislation' (n 67) 7.

1176 As stated earlier, the term 'legislation' should be understood in a broad manner, including both primary and secondary legislation.

1177 R. Baldwin, M. Cave and M. Lodge, 'Introduction: regulation- the field and the developing agenda' in: Idem (eds), *The Oxford Handbook of Regulation* (OUP, Oxford 2010) 3-16, 4.

place where they are valued the highest) and market failures (resulting from market power, the imposition of externalities on third parties, the need for public goods and information asymmetry) which prevent the achievement of efficiency, as a justification for government intervention.<sup>1178</sup> Furthermore, this economic view on regulation has concerned the drafting of cost-effective rules and the removal of inefficient outcomes of existing laws.<sup>1179</sup> It has led to, *inter alia*, the development of regulatory impact studies, an instrument to measure the effects of a particular intervention.<sup>1180</sup> Scholars and other contributors to the field of regulation have also raised the topic of 'better regulation': ways to improve regulatory interventions and, inevitably, debates on the meaning of 'good' regulation.<sup>1181</sup>

Nowadays, regulation theory has evolved into a multi-disciplinary field of research.<sup>1182</sup> It can be said to have merged partly with the field of jurisprudence, which includes elements of, *inter alia*, juridical sciences, economics, social and political sciences, and philology. Whatever the perspective adopted by a scholar, it is important to emphasise that it is basically a different perception of the *same* phenomenon: legislation. The same can be said of our quest for quality, which has been aspired under both the heading of regulatory quality and of legislative quality; several characteristics of 'good regulation' have found their way into discussions on 'good legislation' as well. A case in point may be the reduction of administrative burden. Whereas regulatory quality may demand the reduction of administrative burden imposed on societal actors, legislative quality may require that a legislative proposal is shaped in a way as to minimise its administrative burden.

But even with regard to legislative quality there seems to be no consensus on its meaning and scope. This may be the result of the different functions attributed to legislation. In the words of Voermans, '[l]egislation comes with different meanings in different contexts at different times'.<sup>1183</sup> In democracies governed by the rule of law, six functions can be attributed to legislation. First, legislation may serve as the basis and framework for the exercise of public authority (constitutional function). Second, the legal certainty function of legislation becomes visible whenever a law enshrines rights and obligations, which also imposes a limitation on government interference. Third, the instrumental function refers to the ability of legislation to attain certain policy objectives. Fourth, legislation may also

1178 C. Veljanovski, 'Economic approaches to regulation' in: R. Baldwin, M. Cave and M. Lodge (eds), *The Oxford Handbook of Regulation* (OUP, Oxford 2010) 17-35, 19-22.

1179 Ibid, 27.

1180 C. Radaelli and F. de Francesco, 'Regulatory impact assessment' in: R. Baldwin, M. Cave and M. Lodge (eds), *The Oxford Handbook of Regulation* (OUP, Oxford 2010) 279-298, 279.

1181 For an overview of the discussion, see R. Baldwin, 'Better regulation: the search and the struggle' in: R. Baldwin, M. Cave and M. Lodge (eds), *The Oxford Handbook of Regulation* (OUP, Oxford 2010) 259-278.

1182 Baldwin, Cave and Lodge, 'Introduction' (n 1177) 4.

1183 Voermans, 'Legislation and regulation' (n 1112) 18.

facilitate the political process and reflect the outcome of the balancing of political actors' interests (political function). Fifth, the adoption of a law expresses popular support for it and serves to legitimise the exercise of public authority, which is called the democratic function of legislation. Sixth, the enactment of legislation may possess a symbolic function as well, as it reflects and reaffirms public morals and values.<sup>1184</sup> Of course, a piece of legislation will often perform several of the aforementioned functions simultaneously.

According to Voermans, the functions of legislation translate into different 'views' on legislation, including views with regard to quality.<sup>1185</sup> This means that the diversity of views on the meaning of the concept of legislative quality may be explained by the diversity of legal contexts; the notion of legislative quality is inseparable from its institutional environment. As an example, Voermans refers to the EU's better law-making initiative pursued in the years between 2002 and 2006. While this legislative policy seemed to emphasise the constitutional (including the bureaucratic function), democratic and instrumental functions of legislation adopted in the framework of the EU, the Better regulation activities of the years 2006-2014 seemed to address the instrumental and political functions.<sup>1186</sup> In other words, the institutional environments in which laws are developed may differ with regard to the function(s) attributed to legislation on a more structural level. This may depend on the legal tradition of a particular state or international organisation and even may evolve over time.

Although the stance adopted by Voermans may explain the existence of diverging views on the precise meaning of legislative quality, it may also be unsatisfactory if it prevents us from seeking common ground in the debate on legislative quality. This would be problematic for any attempt to formulate the elements of legislative quality which aspires to transcend individual state jurisdictions, such as the attempts codified in the international legal regimes we have explored in the previous part. Therefore, in the present section we aim to find common ground in the quality debate and, to a certain extent, reconcile the different views expressed by national governments, international organisations and scholars. In doing so, we will propose a definition that can serve as a basis for the assessment of internationally codified legislative standards, to be performed in Chapter 12.

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1184 Ibid, 23-24. Voermans mentions a seventh function of legislation: the bureaucratic function. This function becomes apparent when a piece of legislation lays down the framework for action by a bureaucracy. As he correctly argues, this function must be seen as part of the constitutional function.

1185 Ibid, 25.

1186 Ibid, 30. Elsewhere, Xanthaki observes a 'transposition from legislation as an autonomous product to legislation as a regulatory tool'. Xanthaki, 'Emerging trends in legislation in Europe' (n 1130) 279.

### 11.4.3 Defining the quality of implementing legislation

How should 'quality of legislation' be defined? A functional approach to this question will provide the following answer: legislative quality can be defined as the extent to which a legislative act succeeds in achieving its aims. As Xanthaki puts it, 'good legislation is legislation that manages to achieve the desired regulatory results'.<sup>1187</sup> She explains:

'Since governments use legislation as a tool of successful governing, namely as a tool for putting into effect policies the desired regulatory results, the qualitative measure of successful legislation coincides with the prevalent measure of policy success, which is the extent of production of the desired results'.<sup>1188</sup>

In the view of Xanthaki, the ultimate goal for regulation is efficacy.<sup>1189</sup> Efficacy is described as the ability to produce a desired or intended result; efficacy is synonymous with regulatory quality.<sup>1190</sup> Regulation, in her view, is a broader concept than legislation; legislation is only one of the means of regulation used by governments.<sup>1191</sup> Similarly, legislative drafters are merely one of the many actors in the regulatory process; others include *inter alia* policy makers and enforcement authorities.<sup>1192</sup> Against this backdrop, 'efficacy' must be considered inadequate as a means to assess the quality of legislation. In Xanthaki's words:

'[t]he achievement of a policy objective or purpose is not the sole task of the drafter. [...] If one accepts the multiplicity of actors in the policy process [...], efficacy cannot be a goal set for the drafter alone. As a result, despite acknowledging efficacy as the highest virtue in the policy process, efficacy cannot be viewed as the connecting function of drafters'.<sup>1193</sup>

Instead, in her view, the crucial test for legislative quality lies in the standard of effectiveness: legislative quality equals effectiveness.<sup>1194</sup> The latter term is described by Mader as 'the extent to which the observable

1187 Xanthaki, 'Emerging trends in legislation in Europe' (n 1130) 284. Also Xanthaki, 'Drafting manuals and quality in legislation' (n 1071) 114.

1188 Xanthaki, 'Emerging trends in legislation in Europe' (n 1130) 284.

1189 Xanthaki, 'Drafting manuals and quality in legislation' (n 1071) 114.

1190 Xanthaki, 'Emerging trends in legislation in Europe' (n 1130) 285. Also H. Xanthaki, 'On transferability of legislative solutions: the functionality test' in: H. Xanthaki and C. Stefanou (eds), *Drafting legislation. A modern approach* (Routledge, London 2008) 12-24, 14. Elsewhere, she defines 'efficacy' as 'the extent to which regulators achieve their goal'. Xanthaki, 'Drafting manuals and quality in legislation' (n 1071) 114.

1191 This coincides with our view on the difference between regulation and legislation, as described in the previous section.

1192 Xanthaki, 'On transferability of legislative solutions' (n 1190) 14.

1193 Ibid.

1194 H. Xanthaki, 'Quality of legislation: an achievable universal concept or a utopian pursuit?' <[http://sas-space.sas.ac.uk/4854/1/Nomos\\_book\\_Quality\\_of\\_legislation\\_a\\_utopian\\_pursuit.pdf](http://sas-space.sas.ac.uk/4854/1/Nomos_book_Quality_of_legislation_a_utopian_pursuit.pdf)> (accessed 29 March 2018) (Author's original manuscript. Also published in: M. Travares Almeida (ed), *Quality of Legislation* (Nomos, Baden-Baden 2011) 75-85) 81. Also Xanthaki, 'Drafting manuals and quality in legislation' (n 1071) 115.

attitudes of the target population [...] correspond to [...] the attitudes and behaviours prescribed by the legislator'.<sup>1195</sup> Efficacy and effectiveness are closely related, but must be clearly distinguished. Xanthaki argues that '[w]ithin the umbrella of *efficacy*, the drafter pursues *effectiveness* in legislation' (emphasis added).<sup>1196</sup> Elsewhere, she elaborates on the difference between efficacy and effectiveness in the following manner:

'[E]ffectiveness seems to reflect the relationship between the effects produced by legislation and the purpose of the statute passed. It is different from efficacy in that it relates to the effect of the statute and not to the effect of the policy which the statute sets out to achieve. In other words, effectiveness can be described as the drafter's efficacy'.<sup>1197</sup>

In addition to this understanding of legislative quality, several authors consider other elements than effectiveness relevant as well. They adhere to a broader concept of legislative quality than the functional approach. For instance, in the view of Drinóczi, the 'quality of legislation' constitutes the law's ability to achieve 'short-, medium- and long-term social and economic goals in a planned way by an open and evidence-based preparation and adoption process of constitutional, efficient and implementable laws'.<sup>1198</sup> The definition of legislative quality preferred by Vanterpool comprises two elements: quality in the substance of the law and quality in the form of the law. Whereas the former requires that legislation is 'appropriate, adequate and precise in solving the problem it is intended to solve', the latter demands a 'language and structure that is readily understandable to those who are affected by it and those who must administer it'.<sup>1199</sup> Mousmouti distinguishes between quality of process, content, form and impact of the laws on the one hand (which she refers to as a 'rational process of applying legal principles in order to make democratic decisions'); she contends, on the other hand, that quality 'essentially refers to real world outcomes of legislation and the degree of achievement of its goals' (which she labels 'effectiveness'). Effectiveness, in her view, is the 'real' and 'ultimate' measure of legislative quality.<sup>1200</sup> Finally, Timmermans argues that quality of the legislative instruments adopted in the framework of the EU consists of several elements that can be placed under three headings: quality of drafting and presentation of texts, conformity with general principles, particularly of good and proper legislation, and requirements as to the effectiveness of rule-making. The three categories encompass more detailed standards, among them the easy accessibility of legislative texts, the obser-

1195 L. Mader, 'Evaluating the effects. A contribution to the quality of legislation' 22 *Statute Law Review* 2 (2001) 119-131, 126.

1196 Xanthaki, 'Drafting manuals and quality in legislation' (n 1071) 114.

1197 Xanthaki, 'On transferability of legislative solutions' (n 1190) 14.

1198 Drinóczi, 'Concept of quality in legislation revisited' (n 1173) 216.

1199 V. Vanterpool, 'A critical look at achieving quality in legislation' 9 *European Journal of law Reform* 2 (2007) 167-204, 170.

1200 Mousmouti, 'Operationalising quality of legislation' (n 1119) 197, 201 and 202.



vance of the principle of legal certainty and the requirement that rules must be capable of being enforced.<sup>1201</sup>

In view of the above, it may indeed be concluded that there is no generally accepted definition of 'legislative quality'. On a more positive note, however, authors seem to embrace the more essential (in the view of Xanthaki, for example) element of effectiveness. Thus, although there may be disagreement on the peripheral elements, there seems to be general consensus on its essence: effectiveness. Also Mousmouti, after stating that 'quality' is a vague and elusive term, agrees that 'effectiveness appears to be unanimously accepted as an essential expression of quality'.<sup>1202</sup> Given this state of affairs, it seems feasible to adhere to the approach of legislative quality which places 'quality of legislation' on the same footing with 'effectiveness of legislation'.

However, effectiveness itself is a multifaceted concept. Here, the various functions of legislation, already touched upon in section 11.4.2, come into play. It is submitted that effectiveness of legislation is narrowly entwined with the function of a specific piece of legislation. Thus, it is not limited to the instrumental function, or the ability of legislation to attain certain policy objectives. Also legislation which has merely a symbolic function can be considered effective if it succeeds in fulfilling its symbolic aim, for instance by expressing moral values. In the same vein, if a certain legislative proposal's aim is to adequately reflect political consensus (political function of legislation), the proposal can be considered effective if it is supported by the relevant political actors. Therefore, in the remainder of the present study legislative quality will be understood as the law's ability, taking into account its function or functions, to achieve the formulated aims. While the notion of 'effectiveness' is thus at the center of this definition ('achieve the formulated aims'), it must be stressed that effectiveness itself is a broader concept than merely effectiveness in an instrumental sense, i.e. the achievement of *policy* aims. In other words, in this definition effectiveness is a dynamic concept, which acquires its substance in a particular case only after the law at hand is analysed in the light of its function or functions. This state of affairs may be perfectly captured in Vanterpool's statement that '[o]verall, the pursuit of quality in legislation therefore advocates a certain balance arising from the foundation that legislation achieves its highest quality when it *has attained its true function*' (emphasis added).<sup>1203</sup>

Now we have clarified our understanding of the term 'legislative quality', the question may arise whether this definition could also be applied to *implementing* legislation without further adjustment. In other words, does implementing legislation possess specific features, distinct from 'non-implementing' legislation, which could justify or even force us

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1201 Ch. Timmermans, 'How can one improve the quality of community legislation?' 34 *Common Market Law Review* (1997) 1229-1257, 1237 and 1254.

1202 Mousmouti, 'Operationalising quality of legislation' (n 1119) 205.

1203 Vanterpool, 'A critical look at achieving quality in legislation' (n 1199) 170.

to resort to a different concept of legislative quality? This question must be answered in the negative. It is true that, most notably, implementing legislation serves to attain aims that have been formulated on a different level and with different actors than legislation of a purely national origin. It follows that domestic implementing legislation must adequately reflect international agreement, i.e. comply with the applicable international instrument, whereas non-implementing legislation must reflect national agreement, i.e. the aims that are pursued by relevant national actors. As we have seen above, however, this factor is of no relevance from the perspective of legislative quality. Therefore, when assessing the quality of implementing legislation, there seems to be no reason to adhere to a different concept of legislative quality than the one we have explored above. Nevertheless, in one respect the definition requires amendment in order to clarify the level on which the aims have been formulated. This leads us to the following definition of the 'quality of implementing legislation':

'the national law's ability, taking into account its function or functions, to achieve the aim or aims embedded in the international legal instrument'.

In this definition, 'law' is synonymous to 'legislation' and must be interpreted in the widest possible sense; it is not limited to acts passed by a state's representative legislative body, but may also include secondary legislation.<sup>1204</sup> Again, it must be noted that the phrase 'taking into account its function or functions' in the definition serves to emphasise that the notion of effectiveness (achievement of aims) is a broader concept than the achievement of *policy* aims. In the end, a law's effectiveness cannot be considered distinct from a law's function.

#### 11.4.4 Legislative quality and legislative standards

In Part II we discussed legislative standards that have been identified on the international level. Subsequently we have explored the concepts of 'quality of legislation' and 'quality of implementing legislation' in the previous section. The next question that deserves our attention is how the relation between legislative standards and legislative quality must be understood. As has become clear in the previous section, the notion of legislative quality and legislative standards are closely entwined; legislative standards are often, in contrast to our basic definition proposed in the previous section, considered to be part of the definition of legislative quality. As Mousmouti puts it, '[q]uality is a broad term, which applies in a variety of contexts and is usually judged by reference to specific predetermined standards'.<sup>1205</sup> A similar stance is adopted by Voermans, who maintains that 'legislative

<sup>1204</sup> In this respect, this chapter adheres to the same concept of legislation as Karpen, 'Introduction' (n 13) 2.

<sup>1205</sup> Mousmouti, 'Operationalising quality of legislation' (n 1119) 192.

quality is the degree to which legislative instruments and procedures live up to the legislative standards'.<sup>1206</sup> Radaelli and De Francesco simply state: '[q]uality is defined by principles'.<sup>1207</sup>

How can this reliance on legislative standards for the determination of a law's quality be justified? On the one hand, the concept of legislative quality remains rather ambiguous, perhaps too ambiguous to be effectively applied in practice. This situation is made more complex by the qualification, as proposed above, of effectiveness as a multifaceted concept; a law's effectiveness cannot be assessed except through the lense of the law's function. Against this backdrop, it could be argued that legislative standards are merely specific features that are believed to enhance a law's effectiveness. In this view, reliance on legislative standards offers us the instruments required to make an assessment of a law's quality in practice and to improve it whenever necessary.

On the other hand, the narrow focus on legislative standards may result in a distorted view of a law's quality. Xanthaki adopts a critical stance towards the acceptance or adherence to legislative standards as synonymous to legislative quality. Instead, she proposes a phronetic perspective:

[W]ithin the realm of legislative drafting as phronesis, rules and conventions only serve as a selection of tools which can be chosen by the subjective learned drafter in order to produce good laws. Since the rules and conventions of phronetic legislative drafting cannot possibly be applied with the rigidity and teleogenesis or inexorableness of rules of epistemic disciplines, promoting them to elements sine qua non of the concept of quality in legislation is an unfortunate logical faux pas. [...] In phronetic legislative drafting repetition of application of the same rule can produce, by definition, variable results'.<sup>1208</sup>

Thus, the environment in which legislation is drafted is subject to continuous change. In this dynamic context, the repeated application of legislative standards (or 'rules and conventions', in the terminology used by Xanthaki) leads to varying results. As a result, their observance cannot be considered to suffice for the production of 'good laws' in every situation they are applied, which 'deprives them from credibility as elements of quality'.<sup>1209</sup>

Xanthaki's criticism is, however, not irreconcilable with the viewpoint, described above, that legislative standards are merely specific elements which make a positive contribution to a law's quality. Again, the real test for a law's quality lies in its ability, taking into account its function or functions, to achieve the formulated aims; the observance of one or more legislative standards can be no more than *an indication* that a particular piece of legislation will indeed pass the quality test. This assessment can, as Xanthaki convincingly argues, only be made on a case by case basis, taking into account that particular law's context. Therefore, in our view

1206 Voermans, 'Concern about the quality of EU legislation' (n 1132) 64.

1207 Radaelli and De Francesco, *Regulatory quality in Europe* (n 1070) 32.

1208 Xanthaki, 'Quality of legislation' (n 1194) 76.

1209 Ibid.

the relation between legislative quality and legislative standards is one that is characterised by hierarchy: the observance of legislative standards positively contribute to a law's ability to achieve the formulated aims and thus to its quality.

Observance of legislative standards is, however, not a task that can be fulfilled in a binary manner; it is not a matter of *whether* a legislative standard is respected, but *to what extent*. This is important, since the observance of one legislative standard may produce tension with another. For instance, a law's formulation in conformity with other national (constitutional) and international provisions may result in a decrease of the law's effectiveness. Hence, the observance of legislative standards is a matter of degree. It follows that legislative quality is a matter of degree as well. As a consequence (and this may be both troublesome and reassuring), there is no such thing as a perfect law.<sup>1210</sup>

Moreover, similar to what has been pointed out with regard to a law's quality, the application of legislative standards depends on the law's function. Thus, in order to decide which standards should be applied and to what extent, it is crucial to understand the law's function. For example, the need for clear and accurate language may be less compelling in case of a legislative proposal which has a largely symbolic function, compared to a law with a mainly constitutional function. While the consultation of stakeholders seems to be highly relevant for a piece of legislation with an instrumental function, this may be much less so for legislative proposals with a largely bureaucratic function. This line of reasoning leads us to the conclusion that the various legislative standards which have been included in policy documents and academic scholarship, may tell us more about the propagator's stance adopted towards the functions of legislation. This may vary not only between different legislative proposals within a single jurisdiction, but also between multiple jurisdictions or legal cultures. Perhaps more importantly, it explains the broad spectre of available legislative standards.

Various authors have made attempts to (exhaustively) enumerate the standards they consider of paramount importance for the evaluation of legislative quality. For the purpose of the present study it is not necessary to separately analyse these attempts in depth. Nevertheless, in order to gain an impression of the proposed lists of legislative standards it is useful to discuss two approaches to legislative standards in more detail.

As we have seen in section 11.4.3, Xanthaki places the notion of 'quality of legislation' on the same footing as 'effectiveness of legislation'; both terms are synonyms. Subsequently, she argues that effectiveness can be obtained

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1210 N.A. Florijn, 'Quality of legislation: a law and development project' in: J. Arnscheidt, B. van Rooij and J.M. Otto (eds), *Lawmaking for development. Exploration into the theory and practice of international legislative projects* (Leiden University Press, Leiden 2008) 75-89, 77. Also U. Karpen, 'Comparative law: perspectives of legislation' 6 *Legisprudence* 2 (2012) 149-189, 157.

in two ways: either through efficiency (which refers to the 'use of minimum costs for the achievement of optimum benefits of the legislative action') or, second, by clarity, precision and unambiguity.<sup>1211</sup> The legislative standard of clarity refers to the quality of being clear and easily perceived and the standard of precision must be understood as exactness of expression. Unambiguity is, in the meaning attributed to it by Xanthaki, 'certainty'. Together, through the use of plain language and gender neutral language, they ensure that the law's content can be understood by the legal subjects to which it is addressed.<sup>1212</sup> The aforementioned standards, Xanthaki contends, are the 'main principles of legislative drafting' that should be at the core of any drafting manual.<sup>1213</sup> More importantly, they possess relative universality: they are entrenched in legislative practice across Europe, in both countries with a common law or a civil law tradition.<sup>1214</sup>

Drinóczi proposes an alternative list. In her view, quality of legislation may be achieved if the legislature observes the following standards, which she labels 'principles': legality, effectiveness, intelligibility, transparency, accessibility, 'due' legislative process, rational policy making and enforceability. In order to honor these principles to the largest possible extent, she adds, states should safeguard the quality of the legislative process, since 'legislation cannot be seen as isolated from the legislative activities of the state'.<sup>1215</sup>

A quick comparison of the lists proposed by Xanthaki's and Drinóczi's respectively, set out above, reveals two different approaches. Whereas Xanthaki's list seems to be confined to standards with regard to the formal aspects of legislation, arguably Drinóczi's list has a wider scope, as it also encompasses standards with regard to the substance of a law, such as the law's enforceability. Admittedly, it may not be entirely fair to present the views of both authors as contradictory, as they contain similarities as well. Nevertheless, the comparison indicates that attempts to formulate standards in the quest for legislative quality, has produced various results which encompass procedural, formal and substantive aspects of legislative quality.

Finally, it must be emphasised that no legislative standards which are specifically aimed at the quality of *implementing* legislation have been advanced in the scholarly debate on legislative quality; arguably, legislative standards are believed apply to both legislation of truly domestic origin or to EU legislative instruments.

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1211 Xanthaki, 'Drafting manuals and quality in legislation' (n 1071) 115. Vanterpool suggests an almost identical list which comprises 'clarity, unambiguousness, simplicity and precision'. Vanterpool, 'A critical look at achieving quality in legislation' (n 1199) 186-195.

1212 Xanthaki, 'Drafting manuals and quality in legislation' (n 1071) 115-117.

1213 Ibid, 117.

1214 Ibid, 120.

1215 Drinóczi, 'Concept of quality in legislation revisited' (n 1173) 216.

#### 11.4.5 Conclusion

In this section we defended the thesis that legislative quality must be understood as the law's ability, taking into account its function or functions, to achieve the formulated aim or aims. In particular, it was argued that a law's effectiveness (achievement of aims) can only be assessed with the specific function of the anticipated law in mind. This may vary not only between different legislative proposals within a single jurisdiction, but also between multiple jurisdictions or legal cultures. If we apply this view to the context of implementing legislation, it is justified to advance the following definition of 'quality of implementing legislation': the national law's ability, taking into account its function or functions, to achieve the aim or aims embedded in the international legal instrument. In order to enhance legislative quality, authors have resorted to legislative standards. They must be viewed as hierarchical subordinate to the notion of effectiveness; the observance of legislative standards positively contribute to a law's effectiveness and thus to its quality. In other words, they constitute the means to an end: quality. Similar to the notion of effectiveness itself, the application of legislative standards to a specific legislative proposal is dependent on the law's function or functions. This explains why in a particular case the one standard should have prevalence over the other.

#### 11.5 CONCLUSION

In this chapter we have explored the concept of legislative quality. As part of this endeavour, we have first explored two international (OECD and EU) and two national policies (the United Kingdom and the Netherlands) with regard to legislative quality. This analysis has revealed a certain degree of diversity in the approaches towards the questions how legislative quality must be understood and how it should be achieved. This diversity may be explained by the specific features of legal orders and their development over the course of time. For instance, the legislative quality policy in the Netherlands has taken the shape of the codified Instructions for law-making, whereas in the United Kingdom legislative quality has been pursued by specialised lawyers working for the OPC.

In an attempt to seek common ground in the various approaches, we have distinguished between several perspectives on two levels: first, the distinction between regulation and legislation and, as a corollary, between regulatory quality and legislative quality. We have also seen how both perspectives have been prominent in different stages of legislative policies in the past. Second, we have also submitted that the meaning attributed to the notion 'legislative quality' depends on the function of a particular piece of legislation, which equally applies to implementing legislation: constitutional, legal certainty, instrumental, political, democratic and symbolic. This has led us to the following definition of 'quality of implementing legisla-

tion': the national law's ability, taking into account its function or functions, to achieve the aim or aims embedded in the international legal instrument. The various standards that have been suggested in literature and which serve to operationalise the notion of legislative quality can be divided into three categories: standards with regard to legislative procedure, standards with regard to legislative substance and standards with regard to legislative form. This is where we can observe common ground; most legislative standards emerge under all of the legislative quality policies, such as the need for *ex ante* and *ex post* impact assessments, the need for legislation that is enforceable and the need for clear and accessible legal texts.

Under the four policies that we have discussed, legislative standards tend to apply to legislation in general; there is no reason to assume that *other* legislative standards come into play when states adopt legislation in order to fulfil their obligations under international law.

