What is regulatory pressure?
An exploratory study of the international literature

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Preface

The following research report was made by order of the WODC by the University of Tilburg and the University of Groningen. The study was carried out as part of the programme Bruikbare rechtsorde (in translation: Practical legal system) of the Dutch Ministry of Justice. The goal of this programme is to stimulate and facilitate departmental activities that lead to the reduction of regulatory pressure. For this purpose Practical legal system offers alternatives means of regulation and carries out projects for the application of these alternative models. Also, research is done relating to the subject of regulatory pressure.

If you have any questions concerning the programme, please contact Prof.mr. F.J. van Ommeren (070 370 74 45, programme director) or drs. E.S.M. Meijsing (070 370 76 23, programme secretary).

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Summary

'Regeldruk' (regulatory pressure) is an ill-defined but widely used concept. It appears in different places with different meanings, yet there is no general agreement about its correct definition or what it actually is. Against this background the aim of this exploratory study was therefore to map out the ways in which the concept of 'regulatory pressure' is used in the international literature, thus improving our understanding of the concept and its applicability in practice. This study was guided by four basic research question:

- *What distinct concepts and definitions of regulatory pressure are used in the literature? Do these overlap, do they complement one another, or are they in fact conflicting?*
- *What theoretical principles are important when it comes to interpreting the concept of regulatory pressure?*
- *To what extent are other terms and concepts similar or related to 'regulatory pressure' used in the international literature, and what can we learn from these in the study of legislation?*
- *What practical lessons does this study provide for the legislator*

The first stage of this study consisted of a broad survey of the available literature (a so-called 'quick-scan'). After that as much relevant literature as possible was collected together using a variety of electronic search systems. We also obtained specific recommendations from a number of international experts. Finally all the literature that had been collected together was edited, categorised and stored in a special databank on the Internet for the purposes of this study, which was made accessible only to the researchers. Within the context of this study it was not possible to examine all the international literature with the same degree of intensity. A further selection was therefore made, which eventually led to the selection of countries which play a central role in the separate chapters of this study. As much variety as possible was sought in this selection, both in terms of the location of the countries examined and the kind of attention regulatory pressure has received in those countries. It was decided to include monographs on:

- *The Netherlands*
- *Germany*
- *Great Britain*
- *The United States*
- *The European Union*

A small-scale meeting of experts was held at the end of the study (see Appendix II). During this meeting the preliminary results of our study were presented. A draft report was drawn up, and the final shape of the report was subsequently determined in consultation with the guidance committee.

The international literature on regulatory pressure was examined through three different lenses. In the first place we certainly did not limit our study exclusively to the Dutch literature. We also examined scientific publications and reports from Germany, Great Britain, the United States and the European Union.

In the second place the study was not discipline-oriented but problem-oriented. No single academic discipline is central; the study targeted all the literature that could possibly provide answers to the research questions irrespective of the discipline concerned. As a result, this exploratory study incorporates a wide variety of insights obtained from a range of sources, including jurisprudence, (legal) economics, political science and sociology.

In the third place we did not confine our study to the literature which is primarily concerned with a quantitative approach to rules and regulations, but also examined publications which deal with various kinds of 'perceived' regulatory pressure.

The Netherlands

The debate about regulatory pressure in our country is closely tied to three successive rounds of deregulation in the Netherlands. During the first of these in the early nineteen eighties, it was argued above all on macro-economic grounds that the number of laws and regulations should be drastically reduced, with the aim of removing economic obstacles for the business community.

Following the accession of Hirsch Ballin as Minister of Justice at the end of the eighties, the problems of regulatory accretion and increasing regulatory pressure came to be seen in a different perspective. Under his policy there was a growing realisation that it was necessary to look for alternatives to - and within - legislation (such as self-regulation), and that such alternatives should be embedded in a broader policy for legislative quality.

The third (and so far the last) deregulation operation concerns the 'Practical legal system" programme instigated by minister Donner. The philosophy behind this operation seems to be that citizens should have more opportunities to make their own choices and be take on greater responsibility in society. The way regulations are implemented and enforced has also become an important touchstone for the quality of legislation. Although it is still too early for an evaluation of this project, we can already say on the basis of the literature that many of the alternative instruments presented in the course of the third deregulation round are not as new as they look at first sight.

Germany

It is apparent that the theme of regulatory pressure (by different names) is very much alive in Germany. Compared to the literature in our country, the German literature draws a sharper distinction between the diverging factors relating to regulatory pressure. Roughly speaking there is a three-way subdivision into: factors related to the legislative process itself;

the implementation of legislation by implementation bodies, supervisors and enforcers; and finally the attitude/experience of the target groups ('normadressaten'). It is also striking that there is virtually no-one in the academic debate who seriously challenges the constitutional framework within which the primacy of the legislator and the principal of legality are firmly anchored. There is a somewhat more thoughtful approach when it comes to the workings of the democratic process. We hear from various sides that the functioning of parliament, in combination with the federal structure, encourages over-regulation. With respect to driving back regulatory pressure, there is a strong emphasis in the literature on instruments and techniques such as 'Gesetzesfolgenabschätzung' (ex ante evaluation), 'Befristung' (withdrawal of obsolete regulations), and building restrictions on application into the legislation (as in the case of temporary regulations).

Great Britain

The British literature on regulatory pressure examined in this study is primarily concerned with endorsing or criticising the (deregulation) policy and associated legislation of the British government. In both the policy and the literature there is a strong emphasis on the costs and benefits of regulation. During the conservative government there was a strong focus on cutting back the quantity of regulations, whereas during the Labour government the quality of legislation also played an important role. Above all the literature is critical of the deployment of Regulatory Impact Assessments (RIAs) as an instrument for reducing regulatory pressure. On the one hand some important shortcomings of this method are emphasised. On the other, attention is drawn to the fact that we need to adjust the way we think about legislation and the way it comes into being ('smart regulation').

The United States

In much of the American literature on regulatory pressure that was examined, the contrast between the supporters and opponents of an economic approach to regulation is central. In this debate political contrasts also play an important role, such as those expressed in the polemic between scholars associated with the AEI-Brookings Joint Center for Regulatory Studies and those associated with the Center for Progressive Reform. The American legal economics literature on the use of cost-benefit analyses in relation to regulation is extensive. However this has not led to a scientific consensus about the correct methods and techniques for such analysis. Often the literature draws attention to important shortcomings of the economic approach to regulation. One proposed alternative is to draw a clearer distinction between large and small businesses when determining the costs and benefits of new legislation, and to explicitly consider the possibility that even though individual laws may not produce any additional regulatory pressure, the sum total of all these laws may in fact do so (this is referred to as the 'system burden'). Parallel to the literature about regulation as such, there is growing attention in the American sociology of law to the phenomenon of 'perceived' regulatory pressure in the context of the general theme of 'legal consciousness'.

The European Union

The debate on 'regelverdichting' (regulatory accretion) and regulatory pressure at the European level is dominated by recommendations and policy documents. At the same time there is a growing interest in certain Community legislation themes, such as the importance of the subsidiarity principle in limiting the scope of legislation, regulatory impact assessment, co-regulation and self-regulation. Another striking feature of the European treatment of regulatory pressure is the way much of the thinking tends to be expressed in adversarial terms. When European regulation is successful the member states take the credit, but when there is negative criticism 'Europe' is often seen as the guilty party. Subsequently no-one is interested in who came up with the original idea in the first place (was it the Commission or one of the member states?) or the underlying causes of regulatory accretion. At the European level, the use of regulatory impact assessments (RIAs) also appears to be on the increase. Although the literature emphasises that RIAs cannot replace political decision-making on European legislative proposals, thorough testing based on policy analysis is nevertheless considered to be very important in combating an unnecessary and unintended increase in regulatory pressure.

Five 'shortcomings' in the literature on regulatory pressure

This exploratory study shows that the literature is coloured by a strongly 'instrumental' perspective. It is striking, for example, that in virtually all the countries investigated the legislator is allocated a central role in combating regulatory pressure. There is also an ongoing search for new instruments to measure or reduce regulatory pressure. In line with this we observe the following five important 'shortcomings' in the international literature:

- *Historical shortcoming*

Much of the literature on regulatory pressure that was examined has an a-historical character. In spite of the fact that there have been several deregulation operations in most of the countries we looked at, very little time is spent examining past events. This means important questions about the background and causes of regulatory production and regulatory growth often remain unanswered.

- *Conceptual shortcoming*

Nor is there any sign in the literature of any advanced development in the concept of 'regulatory pressure'. What is regulatory pressure exactly? How many distinctive forms of regulatory pressure are there? How do these inter-relate? And what other concepts can be connected to regulatory pressure?

- *Political shortcoming*

The impression is often given in the literature that tackling regulatory pressure is simply a matter of taking certain technical and 'policy-neutral' measures. A proper analysis of regulatory pressure however requires not only that we consider the number of regulations but also the political agenda behind those regulations.

- *Empirical shortcoming*

It appears from the literature that there is very little empirical information available about regulatory pressure. To the extent that empirical research is referred to, it is primarily quantitative research aimed at counting the number of regulations or mapping out the administrative burden arising from them. We hear calls for regulatory pressure to be 'measured' much more often than we do for it to be 'analysed' or 'explained'.

- *Contextual shortcoming*

This is the sum total of all the above-mentioned shortcomings. Many measures against regulatory pressure are proposed from a vacuum, as it were. Most contributions are written from the perspective of a particular law, but not from the perspective of those who have to implement the law or comply with it. This means there is generally more emphasis on the similarities (everyone is subject to the same law) than on the differences between these groups.

Conclusions
The four research questions formulated above may be answered as follows.
In the countries we examined no absolutely clear, comparable (and equally comprehensive) concept of regulatory pressure exists. In other words there is no equivalent concept to 'regulatory pressure' or 'regeldruk' as it is used in the Dutch literature; generally speaking it is subdivided into a number of component subjects such as: bureaucratisation, Verrechtlichung, regulatory creep, the administrative burden etc. Both in the Netherlands and in other countries, there is a great deal of material dealing with particular (de-) regulation instruments. So far there is virtually no sign of concepts being eliminated, but neither is there any discernible competition between different concepts or schools of thought.

We may draw a distinction between the 'narrow' and the 'broad' approach to regulatory pressure. From the first – narrow – perspective we have to conclude that scarcely any theoretical principles are to be found in the literature which address regulatory pressure explicitly. One consequence of this is that generally speaking, the conceptual development of regulatory pressure is still in its infancy. The most important exception in this regard is

the (legal) economics literature. The 'broad' approach to regulatory pressure is not so much aimed at the phenomenon of regulatory pressure as such, but more at related subjects of varying importance to the study of regulatory pressure. From this – broad – perspective a number of interesting theoretical lessons may be drawn from the international literature examined, and these could be further adapted to the study of regulatory pressure in any follow-up study on this subject.

One concept of considerable relevance to the study of regulatory pressure is that of 'legal consciousness'. The (primarily American) literature in this field shows us how different kinds of background and personal circumstance are important to the way laws and regulations are experienced in society. This approach can also contribute to our understanding of the way regulatory pressure is perceived. For the study of legislation, we can learn something from this 'legal consciousness' literature in at least two different ways. Much of the existing literature deals with the subject of regulatory pressure, but not with those affected by it. For example, we see a large number of factors and circumstances mapped out which could contribute to regulatory pressure (answering the question 'regulatory pressure caused by what?') but there is still remarkably little interest in the nature and backgrounds of those who actually experience regulatory pressure (regulatory pressure on whom?). One of the first important lessons to be drawn from this American research is therefore that the extent to which citizens and businesses experience regulatory pressure, and how they experience it, is affected by (among other things) their socio-economic background. The second lesson is that the extent to which citizens experience regulatory pressure, and how they experience it, is also affected by their own moral standards and expectations with regard to the law.

Lessons for the legislator

The four most important lessons for the legislator to be drawn from this study may be summarised as follows:

- 'Regulatory pressure' is a problematical concept and therefore – in its present, unmodified form – unsuitable as a criterion for evaluation.
- The subjective aspects of regulatory pressure deserve to be taken seriously.
- The potential for (scientific) learning and policy improvement can be considerably enhanced by making the methodologies for measuring and limiting regulatory pressure (more readily) falsifiable.
- For future international, comparative research, the broad concept of 'regulatory pressure' should be subdivided into a number of smaller, component subjects.

Chapter 1. Study background and research structure

1.1 Reasons for the study

One of the spearhead policies in the Dutch government's 'Practical legal system' (Bruikbare Rechtsorde) memorandum was to drive down regulatory pressure above all for citizens and businesses[1]. Naturally a modern, complex and internationally oriented society like ours cannot do without rules. The policy document points out however that:

> *"Citizens too sometimes experience over-regulation. The programme set out below describes how to arrive at legislation that gives citizens genuine space and is not experienced as being unreasonably restrictive on their actions. To achieve this we must investigate the extent to which legislative structures, up to now based primarily on behavioural prescriptions, can be changed or replaced by legislation whose first objective is to provide a clear and durable structure for mutual transactions between citizens while facilitating their activities by reducing uncertainty."*[2]

The document also points out that successive cabinets over the last 25 to 30 years have attempted to promote deregulation and self-regulation, but this has not so far led to any reduction of 'regulatory pressure'. Surprisingly enough the central concept of regulatory pressure is not subsequently defined. At the same time the document makes clear that the idea of regulatory pressure has several dimensions. Regulatory pressure is linked to the growth in the number of recorded regulations for example, but also to the (administrative) burden for citizens, companies and implementation organisations, and the willingness to comply with, and the feasibility and enforceability of, laws and other regulations governed by public law. In 'Practical legal system' a selection of causes is named for the increasing regulatory pressure, varying from the emergence of new policy areas (environment, biotechnology) and the growing influence of Europe (implementation of EC directives for example) to a one-sided emphasis on the realisation of principles of legality and legal equality.

The Scientific Research and Documentation Centre (WODC) of the Ministry of Justice asked the Centre for Legislative Studies of the University of Tilburg, and the Sociology of Law department of the Groningen State University, to carry out an exploratory study of the phenomenon of regulatory pressure in the international literature.

This report is an account of the results of that study. In the present chapter we begin by considering some of the different meanings of 'regulatory pressure' in the public discussion. We then give a definition of the problem for this study, and state the research questions to be answered. This is followed by a more detailed account of the approach and methodology adopted in the study. Finally the three fundamental perspectives (or 'lenses')

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1 *For a discussion of this paper see: R.A.J. van Gestel, Wie is er tegen een bruikbare rechtsorde?, NJB 2004, p. 1784-1791.*

2 *Nota Bruikbare rechtsorde, TK 2003-2004, 29 278, no. 9, page 2.*

of the study are described.

1.2 Different senses of regulatory pressure

In the political debate, in media discussions and in the views presented in the literature, the concept of 'regulatory pressure' occurs very frequently. The concept has many different meanings however. The following summary gives us a general impression of these varying meanings.[3]

Regulatory pressure as a sign of the current relationship between government and society
- the government wants to regulate and control everything in detail
- the government does not sufficiently trust the business community

Regulatory pressure may also be used as a collective concept for too much government interference, in the broadest sense of those words.

> *"Everything is pinned down in advance by rules, even though we are all mature adults quite capable of taking on responsibility for ourselves. You may call us to account for this, but a lot of regulations treat us like children, telling us to 'be careful of this' and 'watch out for that.'" (page 64)*

> *"Business people must be able to do business. They should not be obstructed by unnecessary laws and regulations." (page 6)*

Regulatory pressure and bureaucracy
- there are too many civil servants
- civil servants live in a world of paper
- civil servants work too slowly
- government services work at cross-purposes

In other places criticism of regulatory pressure is mainly directed at the bureaucracy. Civil servants for example are said to make too many rules, work too slowly, or have too little contact with reality.

> *"'Rule-makers breed rules.' Regulatory pressure will accelerate as the number of civil servants making rules and checking compliance increases. The number of new rules and the number of rule-makers increase together."*[4]

> *"The permanent staff of legislative departments have to justify the department's existence by*

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[3] *Unless stated otherwise the quotations in this paragraph are from interviews with business people, civil servants and politicians reported in: 'Te druk met regels (Verkenningsnota Commissie Stevens)', The Hague, June 2005.*

[4] *'Bureaucratisering en overregulering' (Recommendation from the Economic Affairs Council). TK 2004-2005, 30 123, no. 2, page 4.*

[5] *'Regels moeten dienend zijn' (interview with Prof. L. Stevens), NRC Handelsblad, 8 September 2005.*

constantly producing new legislation."[5]
"The various public bodies are too fragmented. Each government department is only concerned about its own particular rule shop."(page 32)

Regulatory pressure and the national legislator
In many discussions regulatory pressure is primarily used in the sense that the legislator ('The Hague') creates too many and too detailed rules and regulations.
- there are too many laws
- the legislation is too detailed
- the legislation is not clear
- the legislation is conflicting
- the legislation is often too slow

"In the Netherlands we are currently in a wild-west situation when it comes to legislation. The laws and regulations have become a mass of excessive detail." (page. 40)

"In terms of regulatory pressure, the Netherlands is starting to resemble a former East European country. We always used to think of Eastern Europe as being the prime example of bureaucracy and state interference, but now we have created a comparable jungle of rules and regulations for ourselves."[6]

"Let's start with the attitude that it is not necessary to regulate everything in detail. Of course you can have a safety net, but apart from that leave everything free. In the past, anyone who wanted to start a business could pick up a certificate of no objection from the municipal authority. Nowadays you first have to fill out an application form for a Natural Persons Certificate of Good Conduct (VOG NP) from the Ministry of Justice. The form consists of 25 yes/no questions and a few open questions." (page. 22)

Regulatory pressure and local government
- it takes too long to apply for a permit
- each municipal authority has its own set of rules
- there are too many differences from one local government to another

Sometimes the criticism of excessive regulatory pressure is aimed specifically at local government. Municipalities want to regulate too many things for themselves, and there are too many differences from one municipality to another.

"First the ministries lay down the law, then they leave its implementation to the municipalities. The municipalities react as if they have to rediscover the wheel. For businesses, the room for manoeuvre that may have been present in the national legislation is completely taken away by local officials because of their overriding need for certainty and their lack of knowledge."(page 47)

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6 *'Het pad van de ondernemer is geplaveid met regels,' NRC Handelsblad, 8 September 2005.*

"In the Netherlands each municipality decides for itself the times when lorries are allowed to stock up the supermarkets. Usually a few hours in the morning and a few hours in the evening. They also have their own rules about the length of lorries entering the city. This varies from eight to fourteen metres. TNO has calculated that it would save our sector 107 million Euros per year if the time-frame rules and the lorry restrictions were abolished. The Hague has gone too far in delegating authority for this kind of regulation, and municipal authorities are only too happy to exercise that authority. Each the king of his own castle." (page. 54)

Regulatory pressure and the European legislator
- Brussels meddles too much
- Brussels ignores national practice
- regulations from Brussels lead to more national regulations
- regulations from Brussels are incomprehensible and/or unnecessary

Regulatory pressure is also used as an argument against excessive and unnecessary interference from 'Brussels'.

"Trying to be 'top dog' by translating European regulations to the Dutch situation in advance is neither necessary nor advisable. It leads to a lot of extra regulatory pressure, most of which is found in retrospect to have been quite unnecessary.'(page 16)

Regulatory pressure and enforcement bodies
- enforcers lack expertise
- enforcers are too strict
- enforcers ignore deserving exceptions
- different enforcers want different things

Apart from criticism of legislation, criticism is also frequently directed at various enforcement bodies. Inspectors for example are said to impose too many and unnecessary fines, and to be impossible to talk to.

"Whereas in the past permits were based on general conditions and things like 'good housekeeping,' we now have to deal with inspectors who understand very little about what they are inspecting.' If the piece of paper they are carrying says something has to be red and it turns out to be pink, they mark it down as a violation. There is no more room for interpretation."(page 33)

"If it is unlucky, a catering establishment may be visited by as many as three different inspectors from the Food and Consumer Goods Authority (VWA). One for tobacco, one for alcohol, and one for food safety. A visit from one of these inspectors can sometimes be more like an interrogation."(page 46)

Regulatory pressure and information costs
- the administrative burden

- businesses are constantly having to provide information
- it costs (companies) too much money to keep up with all the new regulations
- regulations keep changing, it costs money to stay informed

Often criticism of regulatory pressure entails criticism of the costs of filling out all sorts of forms, or fulfilling other requirements to provide information.

> *"If information is requested from a company, the government should first ask itself what that information is needed for. And make inquiries to check that the information has not already been provided. Should it inform the company of the purpose of the information? Should internal information be translated into government terminology first?" (page 57)*

> *"Business information no longer has to be submitted on paper. See that every entrepreneur is given a digital locker on the Internet. To which he can deliver information. We also receive our annual report from the accountant in the form of a small PDF file. It is not at all difficult to send such a digital file on to the Chamber of Commerce for filing. And yet the annual report still has to be sent in multiple copies printed on paper." (page 52)*

Regulatory pressure and compliance costs
- the administrative burden
- unnecessary rules lead to extra costs
- we are so busy with rules that our work (and sales) are neglected

The criticism of excessive regulatory pressure is also frequently a result of the fact that companies and institutions feel they are spending too much money complying with all sorts of regulations.

> *"In the 2005 Tax Plan, it was proposed that the use of company cars should be taxed through the salary administration. This means it is up to the employer to see to the administration for these leased cars. This yields an extra 110 million Euro for the cabinet, which it will use to pay for the lowering of corporate income tax. But no-one talks about the immediate impact on the business community, which is equivalent to several times that amount."(page 23)*

"The greater part of compliance costs arising from the Consumer Goods Act are related to labelling requirements. For every single item, the supermarkets have to state the method of preparation, use-by date, ingredients etc. Much of this information is of no use to anybody. If a customer buys a capsicum for 39 cents and sees that there is also a pack of six capsicums for 1 Euro and 79 cents, does he really want to know the price per 100 grams? We do not think so, but Brussels prescribes a so-called 'price per standard unit" (PPS).(page 53)

"Unnecessary regulations cost our members – more than one hundred and fifty theatres and concert halls – millions of Euros annually."[7]

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[7] *Cited in: NRC, 8 September 2005.*

1.3 Problem definition and research questions

Regulatory pressure is a vaguely defined but widely used concept. It appears in different places with different meanings, yet there is virtually no agreement about its correct definition or what it actually is. Against this background the aim of this exploratory study was therefore to map out the ways in which the concept of 'regulatory pressure' is used in the international literature, thus improving our understanding of the concept and its applicability in practice.

The central problem definition for this study is as follows:

How is regulatory pressure (and similar concepts) described in the various disciplines, and what is known about the causes and (side) effects thereof?

On the basis of the WODC start memorandum, we subdivided this problem into the following set of research questions:

- What distinct concepts and definitions of regulatory pressure are found in the literature? Do these overlap, do they complement one another, or are they mutually conflicting?
- What theoretical principles are needed to interpret the concept of regulatory pressure?
- To what extent are other concepts used to describe the phenomenon of 'regulatory pressure', and what can we learn from this in the study of legislation?
- What practical lessons does this study provide for the legislator?

Other studies in progress

More or less concurrently with the present study, a number of other studies are being carried out into (particular aspects of) regulatory pressure. The University of Twente for example was instructed to carry out a study into the relationship between open standards and regulatory pressure.[8] That study defines regulatory pressure in terms of the costs of compliance incurred by those targeted. Erasmus University in Rotterdam recently conducted a study of the effect on regulatory pressure of creating a support base for regulation by involving relevant players in the way it is drafted (this often leads to very detailed regulation). The same study strongly emphasises the role of the lawyers responsible for drafting the legislation in the negotiations with branch organisations and special interest groups, whereby it is assumed that 'negotiated legislation' leads almost by definition to an increase in the number of regulations since the parties concerned will put their own interests first, and this inevitably leads to the creation of exceptions to the rule.[9] The Public Administration Council (Raad voor het openbaar bestuur) was also asked to

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[8] *B.R. Dorbeck-Jung, M.J. Oude Vrielink-van Heffen & G.H. Reussing, 'Open normen en regeldruk – Een onderzoek naar de kosten en oorzaken van irritaties bij open normen in de kwaliteitszorg,' Enschede, December 2005.*

[9] *W.S.R. Stoter and N.J.H. Huls, 'Wie draagvlak zoekt, die regeldruk ontmoet,' Rotterdam 2006.*

advise on the relationship between regulatory pressure and the principle of equality. This is because it is thought that the detailed working out of regulations and the way exceptions are dealt with is often based on that principle.[10] Furthermore, recent studies have been carried out by the Groningen State University[11] and the T.M.C. Asser Institute,[12] which are primarily aimed at mapping out the (quantitative) influence of the European legislation on our national regulations. The Economic Affairs Council (REA) recently issued a recommendation to the government concerning the relationship between bureaucratisation and over-regulation.[13] The Council recommended that legislation for which the costs are higher than the benefits should be abolished. They also made three further recommendations: the prime minister should be made responsible for deregulation, every proposal for new legislation should be accompanied by more than proportionate elimination of existing regulations, and every new law must have a defined horizon whereby the period of application is limited. Finally, the exploratory memorandum of the Stevens Committee[14], the 'Zero-test of the administrative burden for citizens'[15], and the 'Trapped by rules' memorandum by a working group of the ministries for Justice, Finance, Economic Affairs and Interior and Kingdom Relations are also worthy of mention.[16]

Where desirable and possible, the above-mentioned studies were taken into account in the design of the present study.

1.4 Research structure

To answer the research questions, it was decided to do the research in five stages:

Stage 1: Quick-scan of the literature
The first stage of the research for this study consisted of an initial survey of the literature (a so-called 'quick-scan'). This made it clear as to what literature is already available and what literature still needs to be actively sought. This initial survey also allowed us to design three so-called 'research lenses' which could be used to structure the rest of the study. The chosen 'lenses' are described in the following subsection.

Stage 2: Data collection

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10 *Raad voor het openbaar bestuur, 'Verschil moet er zijn: Bestuur tussen discriminatie en differentiatie' The Hague 2006.*

11 *P.O. de Jong and M. Herweijer, 'Alle regels tellen. De ontwikkeling van het aantal wetten, AMVB's en ministeriele regelingen in Nederland' The Hague 2005.*

12 *For a report on this study see M.A.P. Bovens and K. Yesilkagit, 'De invloed van Europese richtlijnen op de Nederlandse wetgeving,' NJB 2005/10, p. 520-529.*

13 *'Bureaucratisering en overregulering,' (Recommendation of the Economic Affairs Council), TK 2004-2005, 30 123, no. 2.*

14 *'Te druk met regels,' (Verkenningsnota Commissie Stevens), The Hague, June 2005.*

15 *P.M.H.H.M. Bex and others, 'Nulmeting AL Burgers' Ministry of Justice (Sira Consulting), Nieuwegein 2005.*

16 *'In regels gevangen? Een verkenning van mogelijke oorzaken van regeldruk' The Hague, February 2006.*

Relevant literature for this study was then collected and documented by various means:

- Research documentalist and research assistant

On the basis of a series of specific questions from the researchers, an experienced documentalist from the University of Tilburg working in collaboration with a research assistant collected as much relevant literature as possible using a variety of electronic search tools.

- Recommendations from international network

To unlock the international literature on regulatory pressure and comparable concepts in a relatively short space of time and at minimal cost, we collected specific recommendations from a number of experts. These were asked to put us on the track of relevant literature in their countries, or to refer us to other colleagues with expertise in the field of regulatory pressure. Grateful use was made of the advice received from the following persons:

- Robert A. Kagan, Professor of Law and Political Science, University of California, Berkeley.
- Bronwen Morgan, Professor of Socio-Legal Studies, University of Bristol.
- Colin Scott, Professor of EU Regulation and Governance, University College Dublin.
- Lorne Sossin, Professor of Constitutional and Administrative Law, University of Toronto.
- Robin Creyke, Professor of Administrative Law, Australian National University, Canberra.

- Databank

Finally all the literature collected was edited, classified and stored by the research assistant in a special electronic databank on the Internet designed for this purpose, which was only accessible to the researchers.

Stage 3: Selection

It was not possible within the framework of this study to examine all the international literature with equal intensity. For this reason a further selection of countries was made from the sources collected, and these countries play a central role in the various monographs included in this study. As much variety as possible was sought in this selection, in terms of both the location of the countries and the kind of attention given to regulatory pressure. It was decided to write monographs on:

- The Netherlands
- Germany
- Great Britain
- The United States
- The European Union

There is also considerable interest in regulatory pressure in such countries as Belgium, Canada and Australia. However, since we discovered that there is a lot of overlap with the Dutch, British and American literature, it was decided not to write separate monographs on these countries.

Stage 4: Specific analysis
The literature thus selected was then subjected to a specific analysis. The three research lenses previously developed on the basis of the quick-scan played a major role in this analysis. The differences in the quality of the literature concerned were also considered. The following topics were examined during the study of the international literature:

- Different definitions and concepts of regulatory pressure and comparable phenomena.
- Factors contributing to the creation or increase of regulatory pressure.
- (Side) effects of regulatory pressure on those targeted, supervisors, enforcers and the legislator.
- Theoretical assumptions in the analysis of regulatory pressure.
- Practical lessons for the legislator.

Stage 5: Expert meeting and compilation of report
A small-scale meeting of experts was organised at the end of the research phase (see Appendix). During this meeting the preliminary results of our study of the literature were presented to several experts. This led to clarification and correction of our findings in a number of places. A draft report was drawn up and discussed with the guidance committee. The final report was then completed.

1.5 Three lenses for an exploratory study of the literature

On the basis of the first 'quick-scan' of the existing literature, we observed that there were three 'blank' areas in many of the existing studies of regulatory pressure: 1) there is scarcely any systematic attention to experiences abroad; 2) often a strictly mono-disciplinary perspective is adopted which can lead to a narrow point of view; and 3) generally speaking no distinction is drawn between objectified and perceived regulatory pressure.[17] On this basis we developed three research perspectives - or 'lenses' – through which we studied the

[17] *By 'objectified' regulatory pressure we mean the increased effect of regulations measured in terms of clearly measurable and widely accepted criteria such as: the quantity of regulations, the number of cross-references between regulations, the limitation of the freedom of choice and action due to greater detail, and the growth in the number of information obligations arising from regulations. This objectified regulatory pressure also has an element of subjectivity since the choice of a particular approach is determined by specific personal preferences and assumptions. From that point of view it would be better to call it 'objectified subjective regulatory pressure.'*

international literature on regulatory pressure.

Lens I: Regulatory pressure from an international perspective

The Netherlands is not an island, and over-regulation is by no means a purely national problem. Perhaps European legislation has an even worse reputation in this regard than Dutch legislation. In many member states there is a (widespread) belief that the European Union is suffering from 'legislitis.'

Yet when it comes to the nature and scope of the body of European legislation, the facts are not always taken seriously – at least not in the media. The European Commission has even set up a special Internet page entitled: 'Get your facts straight'.[18] The page contains innumerable – often amusing – examples of misunderstandings about European legislation.[19] The Commission sets the record straight, for example, in relation to reports in the British press that ambulances are no longer allowed to be white. [20]Aside from the facts, it is of course an interesting question as to how this negative image of European rule-making came into being. In this regard the perceptions of citizens - and communication - are obviously of great importance.

There have been many deregulation initiatives in the past at the European level as well. The results are often unclear however. The discussion was often conducted from one particular angle, such as cutting back the administrative burden for the business community (as in operations SLIM and BEST), or a reassessment of the relationships between the powers of the Union and the member states when it comes to creating new legislation (as in the protocol accompanying the Treaty of Amsterdam concerning application of the subsidiarity and proportionality principle).[21] Here again, there is little transparency with regard to what has actually been delivered by such initiatives.

In the international context, the OESO has conducted numerous 'impact studies' over the years concerning the results of deregulation initiatives in a large number of countries.[22]

Many of these countries, just like the Netherlands, have policy programmes and/or institutions engaged in collecting information about the practical necessity for reducing and simplifying legislation. The 'kenniscel wetsmatiging' (centre of expertise for legislative mitigation) of the Flemish government is just one example in this regard.[23]

There are also many ideas about regulatory growth and regulatory pressure from scientific

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18 *http://europa.eu.int/comm/dgs/press_communication/facts/index_en.htm.*

19 *See also R.A.J. van Gestel, 'Beter en minder wetgeven in Europa,' RegelMaat 2005/3, special edition on the theme of the quality of European legislation.*

20 *The report 'Ambulances must turn yellow for Europe' is from the Daily Mail of 6 March 2002.*

21 *Treaty of Amsterdam, Pb C 340 of 10 November 1997. See http://europa.eu.int/eurlex/ lex/nl/treaties/dat/11997D/htm/ 11997D.html#0105010010*

22 *See the list of reports by country at http://www.oecd.org/countrylist/0,2578,en_2649_- 37421_ 1794487_1_1_1_37421,00.html.*

23 *http://www.wetsmatiging.be/home/index.cfm.*

circles, in disciplines varying from public policymaking to the rapidly expanding world of 'law and economics'. This literature has mapped out many advantages and disadvantages of concrete regulations and open standards, and has also led to criteria such as the use of 'economies of scale' in the regulation of frequently occurring cases. This literature has been applied in various fields in recent years, such as regulations on accounting practice, and for the environment.
Up to the present time there is no clear (total) picture in the Netherlands of potentially interesting insights with regard to the conceptualisation of the phenomenon of regulatory pressure in other countries.

For this reason we also decided to explicitly examine the foreign literature and the experience of deregulation operations in other countries in the present study of regulatory pressure (and related concepts).

What can we learn from the experience outside the Netherlands, and in what ways is our understanding of ways to reduce regulatory pressure lagging behind that of other countries?

Lens II: Regulatory pressure from a multi-disciplinary perspective
Where we refer to 'narrow-mindedness' we mean that the object of investigation (regulatory pressure) is being looked at from a single scientific perspective or rationale.[24] In a (legal) economics approach for example, there is a strong emphasis on costs and benefits in assessing whether or not there is any question of over-regulation, whereas from a purely legal perspective the 'cost price' of regulations can never be a decisive factor because this criterion has nothing to do with justice. For the rest, from a strictly internal legal perspective there is in fact very little to be said about the question of when 'over-regulation' is occurring. After all, from a strictly legal point of view the quantity and (to a lesser degree) type of regulation is usually an accepted fact.

The influence of European legislation on national legislation can also be seen from very different perspectives, as is clear from the discussion between Bovens/Yesilkagit and Van Schendelen. Bovens/Yesilkagit investigate the quantitative influence of European directives on the current laws of the Netherlands from a public administration point of view, whereas Van Schendelen as a political scientist attacks them on the grounds that a percentage as such tells us very little about whether or not there are too many - or too few - European regulations. To arrive at such a judgement, we need to examine the objective and the weight of the various Community standards much more carefully.

One approach that has received surprisingly little attention so far is the social science perspective. From the rationale of social science, one condition for the achievement of government objectives is that there must be appropriate theories of policy and action, based on knowledge gained from experience and empirical research into the behaviour of

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[24] *Compare I.Th.M. Snellen, 'Boeiend en geboeid: ambivalenties en ambities in de bestuurskunde' (Tilburg lecture), Alphen aan den Rijn 1987.*

citizens, businesses and bureaucratic organisations. In this domain it is important to look for such things as compliance indicators: what are our reasons for (not) complying with certain regulations? Research of this kind can produce relevant information as to which regulations are regarded by the citizen as sensible or correct, and which are regarded as unnecessary.
A common feature of all these rationales is that they try to displace one another. Arguments seen as rational from the political point of view – introducing a statutory regulation because of its symbolic function for example - are often regarded as irrational when viewed from a different realm. Snellen remarks however that the various policy rationales may well have meaning for one another as limiting conditions, so that it is important for scholars to bear the trade-offs in mind. If, for example, we want to find out why regulations are sometimes made on the basis of a political rationale, when it is doubtful (from a social science viewpoint) that these regulations will be complied with, then we should look for the underlying processes driving the production of regulations.

For this reason our study of the literature on regulatory pressure (and comparable concepts) has a clearly multi-disciplinary character.

We have not set out to make an in-depth study based on a single, central perspective, but rather to map out the points of view arising from previous research that are important from a multi-disciplinary perspective.

Lens III: Regulatory pressure from an objective and subjective perspective
An international and multi-disciplinary approach is indispensable if we also want to understand what is appropriately referred to in the study carried out by ECORYS-NEI, Regeldruk voor OCW-instellingen (Regulatory pressure for Education, Culture and Science institutions) as 'perceived regulatory pressure'.

This involves such things as the extent to which those targeted by a regulation feel that they are (unnecessarily) hindered by that regulation.

Here it is important not to assume a causal relationship between (for example) the change-over from a detailed legal standard to a more open standard on the one hand, and a reduction of regulatory pressure on the other. To assume such a causal relationship would fail to take into account possible cost variations due to the fact that statutory open standards are often realised in practice by further rules or agreements drawn up by branch organisations (self-regulation) . Regulatory pressure caused by non-statutory rules would then fall outside the scope of this study. For those targeted however, it will not always be clear or even relevant as to whether the standard in question has official legal status or not.

A different issue is the fact that willingness to comply may be affected by the extent to which rules of conduct tie in with the habits and customs inside so-called 'semi-autonomous social fields'. In other words: how does legislation relate to the informal rules of conduct and

customs that apply within a particular sector or branch? Is there a connection between legislation and self-regulation, or are these actually in conflict? We were able to ascertain for example that in practice, abandoning the existing set of permits for taxi companies and deregulating prices with the intention of encouraging price competition may run up against all sorts of firm but informal rules inside the sector (at Schiphol the taxi drivers prefer to wait patiently in line to avoid problems with their colleagues). A similar phenomenon was also observed after the introduction of strict European anticartel legislation in the Dutch construction industry.[25] Briefly stated, the legislator who wants to have a real influence in the social workplace must heed the views and standards that apply inside local semiautonomous social fields.[26] These may form an obstacle to the implementation of statutory regulations, and they may also affect the extent to which the regulations are perceived as 'burdensome'.

In reverse order, if statutory norms are more in tune with the experience of citizens and companies, they have a greater chance of being internalised by them. This is the basic assumption in existing theories of communicative legislation, whereby the legislator prefers open standards and norms primarily in order to bring about a change of mentality that will eventually lead to a change of behaviour. The underlying idea is that this can best be brought about by establishing aspirational standards in the law, which will then be further interpreted in practice by processes of consultation and persuasion between governments and legal colleagues. Whether this will eventually lead to a quantitative increase or decrease in the regulations is not so important here; what really matters is whether the final result will be supported by the legal community.[27] The bigger the support base for the regulations, the more reason we have to assume that (in any case) the subjective elements of regulatory pressure will be felt less strongly.

In this study we therefore devote explicit attention to both perceived regulatory pressure and objective regulatory pressure (counting the regulations).

1.6 The content of this report

In chapter 2 of this report the most important developments in the Dutch scientific and policy literature on regulatory pressure will be discussed. After that we focus on the international literature, with monographs on Germany (chapter 3), Great Britain (chapter 4), the United States (chapter 5) and the European Union (chapter 6). Finally in chapter 7 we present the most important conclusions from the study of the literature, and translate these conclusions into a number of lessons for the legislator.

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[25] *M. Hertogh, 'Van naleving naar beleving van recht: bouwwereld en bouwfraude vanuit een rechtssociologisch perspectief,' in: T. Barkhuysen et al. (ed.), 'Recht Realiseren: Bijdragen rond het thema adequate naleving van regels,' Leiden 2005, p. 51-68.*

[26] *J. Griffiths, 'Rechtssociologische theorie en de kwaliteit van wetgeving,' in: P.W. Brouwer et al (ed.), 'Drie dimensies van recht: rechtstheorie, rechtsgeleerdheid en rechtspraktijk,' The Hague 1999.*

[27] *For a more extensive treatment see B. van Klink and W. Witteveen (ed.), 'De overtuigende wetgever,' Deventer 2000.*

Chapter 2. Regulatory pressure in the Netherlands

2.1 Regulatory pressure not a new problem

Complaints about 'regulatory pressure', a 'flood of regulations' and 'over-regulation' have always been with us. As early as the 15th century the famous Florentine architect Leon Baptista Alberti lamented that:

> *"No more than ten commandments announced by Mozes were enough to keep the entire Jewish race in fear of God for hundreds of years practising virtue, justice and patriotism. All the Romans needed were twelve short tables to expand their republic and protect the entire empire. We have sixty shelves crammed with laws, and we are producing new regulations every day."*[28]

This quotation brings into perspective the belief – which some people may share – that the debate which has flared up around regulatory pressure (subsequent to the memorandum from the Ministry of Justice on 'Practical legal system' among other things) is quite new. But neither should we conclude from this quotation that the scientific debate about the consequences of juridification and regulatory accretion is simply going around in circles. Since the beginning of the Christian era there has in fact been a great change in the nature and scope of regulatory production, and the way we think about it. In Roman law and intergential law, for example, there was a constant tension between the codification of law in law books intended to realise important themes of legal unity throughout the entire empire (ius gentium), and the arguments for legal pluralism, common law and group law, intended to develop rules that are closer to the citizen.[29]

In our present society, group law and personal legal circles no longer play such a prominent role.[30] National and supra-national law on the other hand (EU legislation, international treaties) have risen to great heights. Furthermore, until the French revolution there were numerous socio-economic rules based (among other things) on the continuing existence of the various guilds.[31] After the French revolution these rules were formalised into state laws at a rapid rate.[32]

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28 *Found and translated from the German by P. Noll, 'Der Mensch und die Gesetze,' from: P. Noll, 'Gedanken über Unruhe und Ordnung,' Zürich 1985, p. 166.*

29 *F.H. van der Burg, 'Regelgeving en bestuur,' Zwolle1993, p. 19.*

30 *This is not to say that group law no longer plays any role at all. Just consider the disciplinary rules of associations, for example.*

31 *Most guilds were abolished in 1791 with the aim of promoting free trade. See S. Schama, 'Kroniek van de Franse revolutie,' Olympus 1989, p. 522.*

32 *The guilds are regarded as the private predecessors of the present-day company organisation governed by public law. See J.Ph. De Monté 'Verloren, een herleving van de gilden in moderne vorm, in: A.G.G. de Groot et al (ed.), Recht als instrument van behoud en verandering, opstellen aangeboden aan Prof.mr. J.J.M. van der Ven, Deventer 1972.*

More generally speaking, we see an exponential growth in the number of tasks allocated to the state in the Netherlands and also in the rest of Europe since the Second World War. This growth is not just the result of autonomous social, economic, technological and demographic changes. The emergence of basic social security rights and their codification in our own Constitution of 1983 is also a reaction to the fact that in the welfare state, the citizen could expect more active involvement by the government in a growing number of areas. The process of transferring every form of care provision to state control (welfare, health care, care for the environment etc.) was also fed by the strongly growing belief in the 'maakbaarheid' (susceptibility to change for the better through government influence) of our society from the ninetenn sixties onward.

2.2 From codification to modification

Big changes took place in the last quarter of the twentieth century in the way we think about legislation as a vehicle for social change and a tool for 'social engineering'.

The famous essay by Koopmans published in 1970 is an important reference point in Dutch thinking about legislation. In the jubilee book of that year celebrating the hundredth anniversary of the Netherlands Lawyers' Association he observed a general transformation in the nature of legislative activity. Until about a century ago, according to Koopmans, the job of the legislator was primarily a matter of:

> *"recording rules he had "vorgefunden" somewhere else: customary law, morals, rules of respectability, generally accepted ethical principles, or whatever."*[33]

Throughout the last three quarters of the century however the legislator would increasingly use the law to give shape to changes that had already taken place in society.[34] The primary objective is no longer codification but modification. This was the conclusion of Koopmans' analysis, who was for the rest aware that he had interpreted a complex reality in very abstract terms.[35]

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[33] *T. Koopmans, 'De rol van de wetgever,' in: 'Honderd jaar rechtsleven,' Jubileumboek Nederlandse Juristen Vereniging, Zwolle 1970, p. 1.*

[34] *See also C.J.M. Schuyt, 'Ongeregeldheden: naar een theorie van wetgeving in de verzorgingsstaat,' Alphen aan den Rijn 1982, p. 16-17.*

[35] *Idem, p. 3. Van der Vlies and others put the distinction between codification and modification into perspective. She correctly points to the fact that in the previous century society itself was already showing signs of change, so it is also possible that even then society may have influenced the legislator. She also thinks it possible that the legislator was in fact 'modifying' when he thought he was 'codifying,' since customary law was not clear or unified. Furthermore, with codification, the boundary between legal rules as followed in practice and legal rules as they ought to be followed would be a thin one because of the different conceptions of law. See I.C. van der Vlies, 'Handboek wetgeving,' Zwolle 1987, p. 7-9.*

In the Netherlands the Koopmans publication seems to signal the start of a critical re-appraisal of the meaning of legislation as an instrument of policy in the 'interventionist state'. Geelhoed places the discussion of the role of legislation in the broader context of changes in the nature of government action. In his view, the emphasis in legislative action during the nineteenth century was primarily on structuring and classification: the binding of the government to constitutional/legal standards and the creation of normative preconditions within which citizens are able to engage in the mutual pursuit of their objectives. With the emergence of the welfare state however, the law (partly due to pressure from interest groups) would be increasingly used as a vehicle for the emancipation of socially disadvantaged groups in the population and to guarantee the basic security and social and cultural well-being of the citizen: the intervention function. From the sixties onwards, Geelhoed also sees the legislator increasingly acting as an arbitrator where conflicting or diverging interests arise between, for example, employers and employees in relation to working conditions and social security.[36]

All in all, the controlling function of legislation became increasingly dominant. In Weberian terms we could say that the 'Zweckrationalität' (purposiveness) of legislation sometimes threatened to displace the 'Wertrationalität' (safeguarding function).[37] With this in mind, in the course of a much discussed speech given in 1976, the former Minister of Justice C.H.F. Polak warned of the risks to the rule of law in the Dutch state caused by the growing problems of creating law by means of legislation. He stated (among other things) that:

> *"laws are becoming complex and contradictory, the sets of permits are stacking up, law enforcement is becoming weaker and more arbitrary, and fixed regulations are lacking for many of the comprehensive tasks under government responsibility."*[38]

This speech led to a number of rescue plans, whereby the (controlling) legislation was seen as both 'perpetrator' and 'victim'. In retrospect, the deregulation operation in the early nineteen eighties was an important trail-blazer for the current thinking about alternatives to legislation, such as the introduction of various kinds of public-private co-operation, the use of voluntary agreements, and the deployment of certification systems to safeguard public interests.

2.3 The first deregulation round: 'dis-regulation'

The deregulation operation in the early nineteen eighties led by L.A. Geelhoed was one of six major operations intended to reduce the administrative burden and improve administrative

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36 *Vgl. L.A. Geelhoed, 'Democratie en economische orde in de verzorgingsstaat,' in: P. VerLoren van Themaat (ed.), 'Bedrijven in moeilijkheden,' Zwolle 1982.*

37 *U. Rosenthal, 'Wetgeving in beweging: dominante beelden,' in I.C. van der Vlies et al, 'Wetgeving in beweging, Verslag van de landelijke Bestuurskundedag,' Zwolle 1991, p. 20.*

38 *C.H.F. Polak, 'Hulp voor de wetgever,' NJB 1976, p. 911.*

efficiency through: reorganisation of government departments, decentralisation and privatisation of government tasks, slimming down of government machinery, and a re-appraisal of government expenditure and governmental responsibilities.[39]

Under the influence of (among other things) an economic recession, deregulation in our country was at first very much pre-occupied with 'dis-regulation', that is to say the reduction and simplification of rules and regulations. For primarily macro-economic reasons and partly inspired by the ideas of American Monetarist economists such as M. Friedman, a drastic reduction in the number of laws and regulations was argued for.[40] The main aim was to remove economic obstacles for the business community, but there was also a secondary objective, namely that of reducing the administrative burden for government.[41]

During this period the term 'legislation' acquired very negative connotations. Words like 'Normenflut' and 'Erlaßschwemme' were used to characterise the threat of regulation to the functioning of society.[42] The welfare state was thought to have become too cumbersome and complicated due to excessive democratic decision-making and bureaucratisation. Some even described the excessive load in terms of a sick patient suffering from elephantiasis or 'legislitis'.[43] Looking back, one striking feature of this deregulation operation was the fact that there was no real discussion of the fundamental question: when are regulations unnecessarily obstructive, which ones, and for whom exactly?

We may nevertheless conclude that by the mid eighties, it was widely agreed that serious 'regulatory accretion' was taking place. Not only was it thought that there was an excessive increase in the number of regulations, but also that the interweaving of regulations (cross-references), the regulatory intensity (the controlling nature due to the effect of limiting the freedom of action and decision-making by citizens) and the regulatory specificity (detail and refinement) had grown too strongly.[44]

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39 *F.K.M. van Nispen en D.P. Noordhoek (ed.), 'De grote operaties,' Deventer 1986.*

40 *Friedman asserted in a controversial article that economic and political freedom are strongly interlinked. If the government share of the national income of Western industrial countries threatened to exceed the limit of 60%, the freedom of citizens and the democratic legal order would be endangered. Compare. M. Friedman, 'The line we dare not cross; the fragility of freedom at 60%,' Encounter 1976, p. 8-14. For a criticism from the legal point of view, see: J.J. Vis, 'Rechtsstaat en verzorgingsstaat,' Deventer 1978.*

41 *See sub-report 31 of the re-appraisal work group, 'Wettelijke voorschriften in verband met de economische ontwikkeling,' TK 1981-1982, 16 625, no. 39. Compare also J.M. Polak, 'Een tussenbericht over de deregulering, WPNR 5662, p. 515, P.J. Slot, 'Regelen en ontregelen,' Deventer 1983 and A. Mulder, 'Deregulering,' in: J.A.M. van Angeren et al (ed.), 'Kracht van wet,' Zwolle 1984, p. 301 ff. The latter work refers to a double track: reduction of the burden in the market sector and the managability of (the burdens from and for) government action itself.*

42 *F.H. van der Burg, 'Regelgeving en bestuur,' Zwolle1993, p. 88.*

43 *C.A.J.M. Kortmann, 'Elefantiasis, beschouwingen over een zieke staat,' Deventer 1981 and P. de Haan, Th.G. Drupsteen and R. Fernhout, 'Bestuursrecht in de sociale rechtsstaat,' part 1, third edition, Deventer 1986, p. 184.*

44 *A.F.A. Korsten and W. Derksen, 'Uitvoering van overheidsbeleid,' Leiden/Antwerp, 1986.*

2.4 Criticism following the first deregulation round

After an originally somewhat one-sided emphasis on reducing regulations and the 'retreat of the regulator', it was soon generally recognised that much legislation simply had to be better co-ordinated and many standards made simpler, more identifiable and more resilient.[45]

As to whether the first deregulation round may be regarded in retrospect as a success, the opinions are fairly unanimous. Geelhoed feels it is regrettable that the rationale of government action was not the top priority in the discussion. In his view this led to the symptoms of regulatory accretion being combated rather than the underlying causes. As long as deregulation is obliged to be 'neutral' in terms of policy, there will not be much point in a second deregulation round. According to Geelhoed, anyone upholding policy neutrality is encouraging job opportunities for the legislature in a way that can best be compared to: 'pruning blackberry bushes with a pair of nail scissors'.[46]

De Ru also criticised the de-regulation policy pursued by the first Lubbers cabinet. In particular, he believes that urgently required improvements in the quality of legislation were not realised. Furthermore, the retreat of the legislator was not sufficiently utilised to provide opportunities for citizens and businesses and their development. All in all deregulation remained too much a matter of an inward-looking, juridical and technocratic testing of intended legislation, so that existing legislation was spared any criticism, and the financial and economic consequences of legislation were not examined in sufficient detail. According to De Ru, not enough distance was maintained between politics and the deregulation test for new legislative proposals. Nor were the limiting international and European influences on the national deregulation policy taken sufficiently into account.[47]

In the early nineties Kortmann calls for renewed political attention to the dangers of over-regulation. In his view, if citizens do not stick to the set rules in an over-complicated and incomprehensible complex of regulations, this does not really matter so much.[48] It is a more serious matter when the government itself can no longer find its way through the current legislation: 'If it wants to act in accordance with the law, which more than anyone else it should, then it must be able to administer proper justice within a reasonable period of time.'[49] Here Kortmann is in fact drawing attention to an important issue of legitimacy lurking behind the problems of over-regulation: the government gradually loses authority

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45 *See for example W. Derksen, Th. G. Drupsteen and W.J. Witteveen (ed.), 'De terugtred van regelgevers,' Zwolle 1989.*

46 *L.A. Geelhoed in Ph. Eijlander et al (ed.), 'Overheid en zelfregulering,' op. cit., p. 39.*

47 *H.J. de Ru, 'Deregulering,' in: C.A. de Kam en J. de Haan (ed.), 'Terugtredende overheid: Realiteit of Retoriek?,' Schoonhoven 1991, p. 76-97.*

48 *The question is whether this line of thinking is not too simplistic. After all, we certainly cannot exclude the possibility that a large-scale failure to comply with regulations might also lead to a devaluation of regulations which are in fact of high quality. We will return to this point for separate consideration later in this study.*

49 *C.A.J.M. Kortmann, Ontregeling, in: 'Zorgen om de wetgeving,' NJB special, 4 November 1993, p. 1376-1377.*

when it asks the citizen to comply with regulations which it can no longer keep track of, or correctly interpret, for itself.

At a time when even the judicial policy plan 'Recht in beweging'[50] (Law in motion) states that in spite of the deregulation policy pursued in the past, laws are still too often adopted which are unable to stand up to criticism in terms of their clarity, effectiveness and above all enforceability, the theme of deregulation would seem to be off the agenda for the time being.[51]

2.5 The second round: from deregulation to self-regulation

Particularly after the accession of Hirsch Ballin as Minister of Justice, the problems of regulatory accretion and increasing regulatory pressure are seen in a different perspective. Under his governance the realisation grew that it was necessary to look for alternatives to and within legislation, and these alternatives should be embedded in a broader policy of legislative quality. The term 'self-regulation' gradually came into fashion.

As early as 1983 J.M. Polak expressed his amazement at the lack of attention to self-regulation in the deregulation debate. However, he then pointed to the risks of self-regulation by asserting:

> *"Precisely now when not only deregulation but also privatisation is in the spotlight, we may reasonably expect an investigation into the question of whether the deregulation of government regulations leads to the same regulations re-emerging in private-law form (the articles of incorporation and regulations of associations and foundations, general terms and conditions, etc.)."*[52]

Up to the mid eighties, only a few studies (monographs) had appeared about self-regulation in particular areas of law such the right of recovery and consumer law.[53] The report by the Legislative Issues Committee 'Orde in de regelgeving' (Structure in regulations) of 1985 for example makes no mention whatsoever of the opportunities and risks associated with self-

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50 *'Recht in beweging, een beleidsplan voor Justitie in de komende jaren, TK 1990-1991, 21 829, no. 2, p. 10.*

51 *This is in fact the conclusion drawn by the vice-president of the Council of State, Scholten, in his introduction to the annual report of the Council for 1993 (p. 10).*

52 *J.M. Polak, 'Een tussenbericht over de deregulering,' WPNR 5662, p. 516.*

53 *Compare for example: E.H. Hondius, Journal of Consumer Policy 1984, p. 137-156. See also International Chamber of Commerce, 'Een vergelijkende studie inzake overheidsregulering en zelfregulering als middel tot bescherming van de consument,' The Hague 1984. The first dissertation in the Netherlands about self-regulation is also in the field of consumer law. See M. van Driel, 'Zelfregulering: Hoog opspelen of thuisblijven,' Deventer 1989. In privacy law/registration of persons, self-regulation also received recognition relatively early – from about the mid seventies on. See B.R. Ziegler-Jung, 'Elementen van reflexief recht in de WPR?,' in: N.J.H. Huls and H.D. Stout (ed.), 'Reflecties op reflexief recht,' Zwolle 1992.*

regulation.[54] One of the few who does look into this matter is W.J. Slagter. He points out that the boundaries between regulation, deregulation and self-regulation may vary according to subject-matter, time and place. If the density of regulations is too great in relation to particular subjects then deregulation may naturally follow; but if there is nevertheless a continuing need for sector-differentiated regulation, self-regulation is a possible solution. In times of low economic activity or international tension there may well be a greater need for government regulation, and in some countries there will be more opportunity for deregulation and self-regulation than in others.[55]

Hirsch Ballin subsequently disputes this. He warns that self-regulation should not be seen as a second choice to deregulation. He argues that as a result of the shift in the political discussion toward improving the quality of legislation since the reports of the Geelhoed committee, the limitation of regulatory pressure should no longer be the only criterion in the assessment of legislative proposals. At the same time he emphasises that the goal of self-regulation is not achieved if it is only the level of regulation that changes, leaving the regulations themselves just as detailed and burdensome as they were before.[56]

Self-regulation becomes an issue

Recognition of the potential role for self-regulation in legislative policy is really only seriously examined for the first time in the WRR report 'Rechtshandhaving' (Enforcing the law) of 1988.[57]

To improve the enforcement of quality regulation the Council advises strengthening the role of the formal legislator with respect to the material content of the intended legislation. The legislator should no longer have to determine the means by which the diverging interests are protected, but rather the level of protection they ought to receive in social transactions. The WRR thereby argues for a method of legally conditioned self-regulation. The legislator would then lay down the framework for private-law self-regulation and law enforcement by the interested parties. This framework could vary according to the nature of the interests to be protected, the economic equality of parties, the organisational level and the desired level of protection. The normal court, arbitrator or pseudo-legal body should always have the last word, according to the WRR.[58]

The Committee set up in 1987 for the testing of legislation projects with a view to the continuation and intensification of a sober and detached legislative policy also propagated a

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54 *Commissie Wetgevingsvraagstukken, 'Orde in de regelgeving,' 's-Gravenhage 1985. Cabinet standpoint subsequent to the report: TK 1986-1987, 20 038, nos. 1-2.*

55 *Compare W.J. Slagter, 'Zelfregulering als basis voor privaatrechtelijk tuchtrecht,' in: H.J. Snijders et al (ed.), 'Overheidsrechter gepasseerd, conflictbeslechting buiten de overheidsrechter om,' Arnhem 1988.*

56 *E.M.H. Hirsch Ballin, Introduction to the symposium 'Van overheidsregulering naar zelfregulering,' Govt. Gazette 1988, 250, also published in NJB, 7 January 1989, p. 35.*

57 *WRR report, 'Rechtshandhaving,' The Hague 1988.*

58 *WRR, 'Rechtshandhaving' 1988, p. 48-49 and p. 61.*

philosophy of self-regulation which was supposed to work inside the general legislative policy.[59] Only at the end of the Lubbers-Kok cabinet does self-regulation really become an important theme in the justice policy.[60] In the previously mentioned memorandum 'Law in motion', it is considered to be very important for the development of law in the nineties that the law should be more complementary to the self-regulating capacity of the community. Openness, network formation and activation of social participation during the creation, enforcement and application of law; these are key words and concepts in the policy plan.[61] An exception is made with respect to the environment. According to the government, there is a good reason for extending legislation and law enforcement in this field within civil law, administrative law and criminal law frameworks, because here we cannot expect self-regulation to be effective due to the potential conflicts of interest.[62] In retrospect this is a remarkable point of view considering that environmental policy is precisely the field in which many forms of self-regulation, such as voluntary environmental agreements, codes of conduct and internal company environmental protection systems, have come to fruition.[63]

Views of legislation

Self-regulation becomes firmly anchored in the general legislative policy with the publication of 'Zicht op wetgeving' (Views of legislation). This memorandum looks at ways to improve the general legislative policy by improving the quality of state and administrative law.[64] The memorandum acknowledges that legislation is still too often used as an instrument for achieving government objectives, because it is not understood that the opportunities for the government to bring about changes of behaviour in society by means of legislation are limited. More than ever before, this memorandum sees not just the demanding and calculating citizen as the cause of regulatory accretion and over-regulation, but also the government culture itself. In parliament and inside the departments, performance is evaluated too much on the basis of the quantity of policy memoranda and regulations produced, and not enough on the basis of the achievement of underlying objectives.[65]

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59 *TK 1988-1989, 20 800 VI, no. 13, p. 17.*

60 *Regeringsverklaring, Handelingen II 1989-90, p. 319.*

61 *'Recht in beweging' op. cit., p. 3, 20, 21 and 37. Apart from self-regulation the plan also talks about reinforcing 'zelfredzaamheid' (the ability to manage for oneself) and settling conflicts outside the government courts (p. 19 for example). On the other hand this 'zelfredzaamheid' also seems to be presented as an example of the increasing blurring of moral standards. Compare for example the reference to Hulsman as representative of the abolitionist movement in criminal law (p. 5-6). Criticism in terms of the sociology of law of the inconsistent cultural criticism in the memorandum is given by P. van Seters, 'Beweegt het recht?,' NJB 1991, p. 1222-1227.*

62 *Idem p. 16.*

63 *See among others R.A.J. van Gestel, 'Zelfregulering, milieuzorg en bedrijven,' The Hague 2000.*

64 *'Zicht op wetgeving,' a policy plan for further development and implementation of the general legislative policy, aimed at improving the constitutional and administrative quality of government policy, TK, 1990-1991, 22 008, nos. 1-2.*

65 *'Zicht op wetgeving,' op. cit., p. 16-18.*

Since legislation is more than a matter of technical skill and methodology, 'Zicht op Wetgeving' formulates six quality criteria:

- legitimacy and the realisation of legal principles;
- effectiveness and suitability;
- subsidiarity and proportionality;
- ease of implementation and enforceability;
- mutual harmonisation;
- simplicity, clarity and accessibility.[66]

Self-regulation is discussed particularly in connection with subsidiarity and proportionality. In this context it is emphasised that government control has practical and fundamental limits, because sectors of society can only be penetrated by control signals from outside with difficulty and to a limited extent.[67] We should therefore try to support, institutionalise and (if necessary) influence existing self-regulating mechanisms in society.[68] Thinking in terms of alternatives is a central theme of 'Zicht op Wetgeving'. The idea is defended that government bodies do not always have to weigh up the interests involved, a process which lies at the heart of legislation, entirely by themselves.[69] Not all regulations – including implementation – have to originate from the government: 'It is sometimes sufficient for the legislator to provide no more than a framework, offering quality control in retrospect.'[70] This is in fact an early variation on J.P.H. Donner's idea of adjusting our thinking about legality by placing less emphasis on detailed, specific standardisation of administrative powers, and more emphasis on retrospective accountability.

Criticism of 'Zicht op Wetgeving'

The ideas developed under Hirsch Ballin about self-regulation also met with some opposition.[71] J.M. Polak for example criticised the lack of a retrospective examination and evaluation of the developments that had already taken place in the field of legislation subsequent to the deregulation operation. He points to the 'Aanwijzingen inzake

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66 *See again 'Recht in beweging' op. cit., p.21-22. The Review committee had already used these principles in an assessment framework , see the Annual Report 1989-1990, TK II 1990- 91, 21 800 VI, no. 24, p. 4 ff.*

67 *Here the memorandum refers to the work of the German philosopher of law Gunter Teubner in particular, who raised a commotion at the end of the nineteen eighties with his publications about 'Recht als autopoietisches system.'*

68 *'Zicht op wetgeving,' op. cit., p. 26-18.*

69 *Idem p. 14. According to Hirsch Ballin self-regulation can also be seen in the context of delegation issues. This does not mean however that the discussion should be narrowed down to the allocation of regulations between layers of government or the question of where details are regulated. After all, it is certainly not always necessary to regulate details, and allocation of responsibilities to administrative bodies is too restricted a point of view since the interests of the parties can often be weighed up just as easily outside government by citizens and social institutions. Compare E.M.H. Hirsch Ballin, in: I. Kolhoop, (ed.), 'Delegatie van wetgevende bevoegdheid,' Alphen aan den Rijn 1992, p. 104-105. Compare 'Zicht op wetgeving,' op. cit., p. 14.*

70 *'Zicht op wetgeving' op. cit., p. 14-15 and 26-27.*

71 *Some people are even irritated by 'Zicht op wetgeving' due to its (alleged) linguistic shortcomings and poorly constructed arguments. See for example T. Holterman, 'Gebrekkig zicht op wetgeving,' NJB 16 1991, p. 814-815.*

terughoudendheid met regelgeving' (Directions on restraint in regulation) of 1984, and the 'Aanwijzingen inzake toetsing van ontwerpen van wet en van algemene maatregel van bestuur' (Directions on the assessment of draft legislation) of1985. According to Polak these together with the 'Aanwijzingen betreffende de wetgevingstechniek' (Directions on legislative methods) of 1984, already contain the quality criteria later set out in the government memorandum. Even the question of why we should not be able to make do with self-regulation instead of legislation was already on the list of questions in the 'Directions' of 1985, according to Polak. Now that self-regulation has received the seal of approval from quality requirements, he finds it disappointing that no overview has been provided of the experiences of the past.[72] He does have a possible explanation for this however; we cannot exclude the possibility that the reason for this omission lies in the lack of concrete results in the legislative policy pursued up to that time.

Kortmann in turn found that the most serious drawback of the memorandum was the absence of more specific solutions to legislative problems. In his view, classic deregulation – fewer rules and less intervention in the social realm – was too much ignored in favour of the theme of legislative quality.[73] Van Kreveld on the other hand actually defends the abstract character of the memorandum.[74] In his view it attempts to provide points of reference and some general indications as to how the quality of legislation can be improved. We should not expect a detailed blueprint since the memorandum deals with general legislative policy, and is therefore necessarily of a general nature.

In response to 'Zicht op Wetgeving' Van Maarseveen denounced the lack of attention to bureaucratic routines leading to the continued existence of legislative problems.[75] His assertion illustrated by examples (that the self-interest of legislating and implementing organisations and the civil servants employed by them plays an important role in the preservation of opaque and complex administrative law) is an interesting one. According to Van Maarseveen this is not a matter of bad faith. It is rather because the primary and immanent objective of government organisations, just like private companies, is to maintain themselves, to survive, to continue to exist; 'such continuation is only possible on condition that the marketable production continues to expand.'[76] Here we see an argument that was also used recently in a report by the Economic Affairs Council (REA) on 'Bureaucratisering en overregulering' (Bureaucratisation and over-regulation). Among other things the REA report states that:

> *"The development of legislation has a powerful internal dynamic. Empirical research demonstrates that rules lead to new rules and that the number of new rules increases with the number of rule-*

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72 *J.M. Polak, 'Een tussenbericht over de deregulering,' WPNR 1991, p. 269.*

73 *J.M. Polak, 'Een tussenbericht over de deregulering,' WPNR 1991, p. 86.*

74 *J.H. van Kreveld, 'Nota Zicht op wetgeving: geen blauwdruk, maar kader en oriëntatiepunten voor verbetering van wetgevingskwaliteit,' Regelmaat 1991/3, p. 91-92.*

75 *C.H.F. Polak, 'Hulp voor de wetgever,' NJB 1991, p. 811.*

76 *Idem p. 812.*

makers, especially as the affinity of the rule-makers with the content of the rules tends to grow. Furthermore, the abolition of rules represents a threat because it breaks the status quo in the field: existing positions of power, rights and privileges, and the distribution of capital and income, which are no longer protected in the way they used to be."[77]

2.6 Reducing regulatory pressure: round three

It is a pity that (partly due to the criticism of the high level of abstraction in the 'Zicht op wetgeving' memorandum) the general recommendation of the Review committee announced as early as 1991 concerning the use of alternatives to and within legislation never saw the light of day.[78] This was supposed to examine the possibilities and limitations of this concept in legislative policy by (for example) indicating the areas in which, and the conditions under which, self-regulation can be deployed. Drawing on practical experience, an attempt would be made to develop an assessment framework for the possible application of various forms of legitimately structured self-regulation.

For the rest, the task of drawing up such a recommendation would not have been a sinecure. There is always the (renewed) risk of drifting back into generalities when attempting to develop a uniform framework for a (theoretically) unlimited number of subjects and cases in diverging policy domains. The added value of such an endeavour could well be limited in practice, and it could therefore easily be criticised along similar lines to 'Zicht op wetgeving'. The question is however whether this is the only explanation for that particular recommendation. In the course of the nineties we seem to be returning to the days when the reduction and simplification of regulations was paramount. This is first seen in the arguments for using open standards. Later we see a growing interest in the introduction of market stimulants.

Arguments for open standards

Once again it is the Committee for the Assessment of Legislative Projects which opens the debate about the value and the need for working with global standards in legislation. In the annual report over 1992-1993 the Committee states:

"Under certain circumstances these regulations may turn out to be less 'just' in a specific situation, but they have the advantage of greater continuity and transparency. Above all, they will be much easier to enforce."[79]

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77 *TK 2004-2005, 30 123, no. 2, p. 1.*

78 *See the announcement of a general recommendation on self-regulation in the annual reports of the Review Committee for the years 1990-1991, 1991-1992 and 1992-1993, respectively: TK 1991-92, 22 300 VI, no. 12, TK 1992-93, 22 800 VI, no. 8 and TK 1993-1994, 23 400 VI, no. 5.*

79 *Annual Report of the Committee for the Assessment of Legislative Projects over the year 1992-1993, TK 1993-94, 23 400 VI, no. 5, p. 3. As long as ten years ago, A.M. Donner put forward a similar argument in: W.F. de Gaay Fortman, 'Problemen van wetgeving,' Deventer Kluwer 1982, p. 1- 16*

No further reasons are given however as to why global standards should be more transparent and easier to enforce than standards which are specifically targeted. The assertion is therefore not based on empirical research. The Committee for the Assessment of Legislative Projects nevertheless received support later on.[80]

One avowed supporter of working with more global standards is H.J. de Ru. According to him, the age-old adage that the 'lex specialis' has priority over the 'lex generalis' could even be reversed. The use of an (existing) general law should often be given preference over more specific and therefore (often) more detailed legislation. In his view, open standards would have a deregulatory effect almost by definition, and would allow those affected by them to take greater responsibility and regulate themselves; such standards would also make it easier to respond to changing social circumstances, scientific developments and technological innovation.

De Ru acknowledges that working with open standards from private, administrative and criminal law can lead to higher (procedural) costs for private parties in relation to the settlement of disputes. For the government it may also place a greater burden on the judicial system. On the other hand he also says that on the grounds of the profit principle, an increase in private enforcement costs is defensible up to a certain point, and that (the cost of) a possibly greater demand on the courts should be weighed up against the savings in relation to policymaking and enforcement of detailed regulation.

In the foreword to the De Ru study however, Hirsch Ballin warns against excessive optimism. As well as having practical reservations about the far-reaching proposals of De Ru, such as the possibility that Community obligations may limit the freedom to work with open standards, he also defends the viewpoint that the legislator should continue to provide administrators and citizens with sufficient legal certainty.

The De Ru study raises the age-old debate about the relationship between regulations and exceptions. On the one hand there are the traditional thinkers who defend the view that the legislator should try to adopt specifically targeted standards which exclude as many exceptions to the rule as possible, and which are therefore able to give strong guidance in decisions about actual cases.[81] On the other hand there are those who think that by trying to achieve 'the perfect standard', too much confidence is placed in the primacy of the legislator. Targeted standards could equally well have the effect of generating conflict and

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[80] *H.J. de Ru, 'De algemene wet gaat voor de bijzondere wet,' SDU, The Hague 1993. De Ru prefers the term 'open standard' to 'global standard.' The latter term could be taken to suggest that the standards are somewhat vague. 'Open' standards on the other hand is clear with reference to the rights and obligations arising from them. Characteristic of such standards is the fact that implementation and enforcement are left more to the judiciary, while they also give more freedom in the development of law through legal precedents.*

[81] *Compare for example J.M. Barendrecht, 'Recht als model van rechtvaardigheid,' Zwolle 1992.*

causing legal uncertainty, especially if those targeted lose sight of the purpose of the law because they feel that compliance with the regulations is forcing them into a straitjacket.[82]

The debate about open standards has recently returned to the political agenda. The WRR in particular, in the report 'De toekomst van de nationale rechtsstaat' (The future of the national state under rule of law), shows itself (once again) to be an enthusiastic supporter of working with open standards in order to create greater freedom for implementation bodies, citizens and businesses in their interpretation.[83] We also see the discussion re-emerge in the implementation programme for 'Bruikbare rechtsorde' (Practical legal system'). We mention here only the proposals to use 'zorgplichten' (duties of care) and prescribed goals more often in all kinds of law, so that the responsibility for social problems can be brought closer (returned) to the citizen.[84]

Critics of this viewpoint reply by saying that the need for more or fewer open standards is not really the issue. The discussion should rather focus on the circumstances in which more or less freedom of choice and action should be given to the (groups) targeted by the standards.[85] We should also be alert to the possible external effects of working with open standards, such as an increase in the number of appeals to the courts.

Legislation and market mechanisms

In the government policy statement of the first Kok cabinet, there was again a strong emphasis on reducing the burden for the business community. The subject of deregulation was therefore placed on the political agenda again in the context of the 'Market mechanisms, deregulation and legislative quality' (MDW) operation. The main objectives of this operation are clear from the MDW action plan, namely: 1. driving back regulation and the administrative burden for companies to what is strictly necessary; 2. encouraging market mechanisms by only enforcing regulations that restrict competition if it is strictly in the public interest; and 3. improving the quality of legislation, especially with respect to enforceability, alternatives to regulations, and proportionality.[86]

During the MDW operation the directing function lay much more with the Ministry of Economic Affairs, although the formal leadership was in the hands of the prime minister. An official committee served as the gateway to ministerial decision-making on specific projects and subject matter.[87] After discussion in the Council of Ministers, project work groups of

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82 *See H.C.F. Schoordijk, 'Antwoord aan Barendrecht,' RM Themis 1995, p. 144-149.*

83 *WRR, 'De toekomst van de nationale rechtsstaat,' The Hague 2002, p. 243-244 and elsewhere.*

84 *See for example the report of the Zijlstra Commission, 'Ruimte voor zorgplichten,' The Hague 2004.*

85 *Compare among others J.E.M. Polak, 'Bestuursrechtelijke kanttekeningen bij de toekomst van de nationale rechtsstaat,' NTB 2003/6, p. 168-172.*

86 *TK 1994-1995, 24036, no. 1, p. 2-3.*

87 *Govt. gazette 1995, 15. The Commission for Assessment of Legislative Projects was disbanded at the start of the MDW operation. In the last annual report, TK 1993-1994, 23400 VI, no. 49, the Commission for the rest acknowledges that it had not been able to encourage real deregulation to a sufficient degree.*

varying composition were set up for each subject to formulate proposals and publish reports; these work groups could also include representatives from local authorities, scholars and experts from the business community if necessary. An interdepartmental work group was also formed, which periodically drew up an overview of current legislation plans including any substantial (side) effects for the business community, the environment, implementation, enforceability and the burden for the judicial authorities.[88] This in fact signalled the start of the 'implementation, enforcement and business effect assessment' which still exists today.

The economic effects were immediately apparent in the first phase of the MDW operation, from the proposals to extend the scope of the Trading Hours Act, the strengthening of market mechanisms in the taxi sector, deregulation of the Environmental Management Decree, flexibilisation of the Driving Hours Decree and the Working Conditions Act, and the relaxing of the monopoly of the legal profession.[89] Many MDW projects also had a strongly ideological element, and led to extensive debate in parliament and the community (on the extension of shopping hours and the alleged consequences for self-employed persons for example, or the resistance from religious groups to the infringement of the peace and quiet on Sundays).

Criticism of the MDW operation

At this moment it is difficult to gain a clear picture of the weaknesses of the MDW operation. It only ended in 2003, and it is still too early to make a sound judgement. This has not stopped some policymakers from calling the MDW operation a success however. It is said that the majority of the 70 projects were completed and resulted in a reduction of about 470 million Euros to the administrative burden, by replacing permit obligations with sets of general rules, and opening up new markets for example. How this sum was calculated is not entirely clear. Nevertheless, Van den Bosch says that it was different to previous deregulation operations because: a) there was more political commitment, since the operation had already been announced in the coalition agreement for the first coalition government of social democrats and liberals under prime minister Kok; b) there was a relatively high degree of political urgency because the economy had been in stagnation for several years; and c) there was clear political direction now that a ministerial commission decided on all start memoranda for new projects, cabinet standpoints and progress reports.[90]

We think it is fair to say in retrospect that throughout the MDW operation, legislative quality seems to be translated in a rather one-sided way in terms of the cost to businesses and

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88 *Govt. gazette 1995, 96.*

89 *A further four legislative themes were selected, namely the quality of EC regulations, private payments for collective facilities, limiting planning and information obligations, and certification as an alternative to government regulation.*

90 *D. van den Bosch, 'Een bruikbare rechtsorde voor het onderwijs,' in: Ph. Eijlander, D.P. van den Bosch and W.G.G.M. van Holsteijn, 'Bruikbare rechtsorde, hoger onderwijs als proeftuin,' Symposiumbundel Nederlandse Vereniging voor Onderwijsrecht, The Hague 2005, p. 57.*

driving down the administrative burden.[91] (Too) little attention is paid to the possible benefits of legislation to citizens, companies and social organisations, who are in many cases the ones asking for new regulations. Furthermore, the issue of legislative quality seems to be pushed somewhat into the background in comparison to previous cabinets. There were still some thematic projects, particularly at the start of the MDW operation, aimed at strengthening the quality of EC regulations for example, or the (im)possibility of using certification as an alternative to government regulation, but interest in such projects seemed to wane as the operation proceeded.

It is also notable that within the MDW set-up, there was little interest in the extent to which parliament itself may possibly contribute to the creation of regulatory pressure by arguing for new legislation, even though Minister Sorgdrager for example forcefully raised this argument. Finally, it seems as though there is often an implicit assumption in the MDW operation that fewer regulations leads to a better operation of market mechanisms, whereas a whole range of rules of play and 'market superintendents' (supervisors) are in fact needed to ensure that the market functions as it should.[92]

A possible general criticism is that in spite of the large number of MDW projects that were carried out between 1994 and 2003[93], no external evaluation was ever carried out. It is true that overviews of (good) results were presented with some regularity, but this did not lead to any independent investigation. It has since become clear however that deregulation and liberalisation efforts in the MDW operation did produce exclusively positive results. In the recently published nation-wide task-analysis 'Overheid en markt' (Government and Market) under the auspices of the current project 'Andere overheid' (Different Government), several lessons are drawn from the MDW operation. These lessons vary from: 'be careful when privatising monopolies, take the resistance of vested interests (more) into account', to: 'create realistic expectations, and arrange your room for manoeuvre in advance for reducing regulatory pressure in Brussels.[94]

Perhaps the most important lesson from the report of the 'Gemengde commissie Marktordening' (Mixed Committee for Market Structuring) however is that: 'Successful change takes time'.

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91 *In the memorandum 'Naar minder administratieve lasten,' in which an overview is given of regulations from different departments that create substantial costs for businesses as a result of administrative and procedural obligations, it is emphasised that the calculations are not of an 'advanced' nature. See TK 1994-1995, 24036, no. 5, p. 5-6.*

92 *See E.E.C. van Damme, 'Marktwerking en herregulering,' in: R.A.J. van Gestel, and Ph. Eijlander et al (ed.), 'Markt en wet,' Deventer 1996, p. 19 ff.*

93 *For an overview of all MDW projects see http://appz.ez.nl/mdw/zoek.asp.*

94 *Gemengde commissie Marktordening, 'Rijksbrede takenanalyse Overheid en markt: Van goede intenties naar goede interventies,' The Hague, June 2005, p. 6 ff.*

2.7 The Practical legal system project

The (for the time being) last deregulation operation – although the responsible policymakers will undoubtedly say that it was concerned with much more than simply reducing and simplifying regulations - relates to the 'Practical legal system' programme instigated by Minister Donner. The philosophy behind this operation seems to be that the citizen should be able to make more of his own choices and take on more responsibility in society.

Somewhat surprisingly the Practical legal system memorandum opens with the observation that previous deregulation operations have done a lot of good, but have not led to fewer regulations. The memo gives the following analysis of the causes of growing regulatory pressure:

- In our present society the idea of citizens running risks that are not covered by regulations and supervision is becoming less and less acceptable.
- International and European law compel the harmonisation of regulations in all areas, as well as insisting on equal treatment of cross-border economic and social problems (the way illegal waste transportation is dealt with for example).
- The desire to deal with comparable situations on an equal basis and to follow the diversity of life in (multicultural) society.
- Judgements delivered by the courts compelling correction or supplementation of the existing regulations.

To combat growing regulatory pressure – the core concept in the Practical legal system memo, which is for the rest not defined – the cabinet suggests an approach along three different lines:

The approach based on principle
The point of departure for the legislator should not be the interests of the government, but the idea that the legitimate interests of citizens must be promoted and protected. The memorandum further states that the legislator should abandon the standpoint that government administration can be made fairer and more effective by trying to achieve a meticulous equality of treatment whereby all cases and exceptions are covered by regulations. The legislator should be able to invoke abstract standards more frequently, which would be applied by implementers in permanent, open communication with the field. Legal standards should be formulated in such a way that it is possible to do justice to changes of social circumstances in their implementation,. Supervision and enforcement should be tailored to this requirement. According to the cabinet, social organisations have an important role to play here. Legislation can be made more suitable for self-regulation in certain areas. Existing institutions should be utilised for this purpose, and new concepts developed. Examples of the former are the utilisation of collective bargaining agreements between employers and employees, voluntary agreements and certification. Examples of

the latter are the enforcement of 'zorgplichten' (duties of care) as carriers for certain spheres of activity, and the replacement of supervision by monitoring of the self-regulating system.

Better use of existing arrangements
According to the memorandum, existing regulatory and other schemes that influence behaviour could also be improved by testing them against the criteria of necessity, proportionality of the means deployed, effectiveness, efficiency, ease of implementation and enforceability. This may result in some regulations being abolished because the market in question is emancipated, permits replaced by general regulations, directions about means replaced by directions about goals, prohibitions replaced by less stringent measures for exerting influence, procedures streamlined, arrangements for similar objects harmonised or better co-ordinated, and schemes at different administrative levels brought to the same level.

Enforcement and sanctioning
Finally, the use of criminal law to sanction government legislation could be reduced in favour of administrative law or liability laws, and more use could also be made of self-regulating systems or alternative ways of settling disputes.[95]

Policy-neutral deregulation?
The most striking thing about the Practical legal system memorandum is that the core concept used in the document, namely 'regulatory pressure' is not sufficiently explained. It does suggest however that regulatory pressure can be caused by a wide range of things. In our opinion this also implies that 'the solutions' must also be sought at different levels.[96] In this regard it is notable that at first sight, the memorandum does not have very much new to say about previous deregulation operations. Policy-neutrality once again appears to be foremost. In any case the policy ambitions of various departments are in principle not discussed. The same applies mutatis mutandis to the proposed level of protection for guaranteeing all kinds of public interest. This does not appear to be discussed either. To take a random example, in the start memorandum on the reduction of regulatory pressure in the field of animal welfare, it is commented that:

> *"In both the political discussion and the discussion in the community, this subject is high on the agenda. The communis opinio about the welfare of pets is that this issue cannot simply be left to the market parties concerned such as breeders, handlers and owners: it is generally considered desirable for the government to intervene in this area. The way and the extent to which they should do so is open to debate; among other things the project concerned serves as an evaluation of the current state of regulation and government intervention."*[97]

One crucial question, which unfortunately remains unanswered in the above passage, is

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95 *TK 2003-2004, 29 279, no. 9, p. 12.*

96 *The word 'solutions' is deliberately placed in inverted commas here, since the extent to which we have to learn to live with regulatory pressure in an increasingly complex society is open to debate.*

97 *The start memorandum can be found at www.justitie.nl/themas/bruikbarerechtsorde.*

however: to what extent is it acceptable when shifting greater responsibility to parties inside the sector itself (businesses, but also social organisations) that this should also lead to a lower level of protection? In other words, should we expect the alternatives to government regulation proposed in this area to produce the same yield in terms of animal welfare?

Of course fewer rules and less supervision do not necessarily lead to an erosion of the public interest, but the preliminary question which does deserve an answer is to what extent this and other projects should be policy-neutral in their execution. In other words, are we concerned first and foremost about the deployment of different instruments through such things as the replacement of regulations about means by regulations about objectives or maintenance responsibilities, more frequent use of administrative fines, recognition of self-care systems, the scrapping of planning obligations and the introduction of insurance obligations, or is it also permissible to discuss the actual content of policy in the areas concerned?

As already mentioned Geelhoed in particular, who played a leading role in the shaping of ideas during the first deregulation operation, was strongly opposed to the idea that a substantial reduction and simplification of complex sets of regulations could be carried out in a policy-neutral fashion. Without discussing underlying policy objectives, he considers deregulation to be a somewhat pointless undertaking.

Old wine in new bottles?
Although it is still too early for an evaluation of the Practical legal system project, we nevertheless have to conclude that many of the alternative instruments referred to are far from new. The discussion about the usefulness and necessity of replacing detailed regulations relating to means by more open standards has been running for decades, and the same applies to the question of whether the (remaining) criminal-law enforcement of administrative-law legislation should not be replaced by administrative law, private law and disciplinary alternatives.

What is relatively new however is that the current deregulation battle is being fought on so many fronts simultaneously. Almost all departments have operations in which their own regulations are being analysed and re-evaluated. For the rest, the emphasis is different from department to department. The Ministry of Economic Affairs for example is interested in reducing the number of conflicting regulations, the Ministry of Finance is concerned with reducing the administrative burden resulting from over-regulation, and the Ministry of Education, Culture and Science wants to return responsibility for the quality of higher education to the institutions by incorporating duties of care in the law.

There is also criticism of the operation however. Barendrecht points to the fact that many of the alternatives proposed in the Practical legal system project are already very well-known, and up to the present they have still not led to a substantial reduction of regulatory pressure. He argues in favour of experimentation to see where real innovation can be achieved. Van

Gestel mainly attacks the lack of analysis, historical awareness and empirical underpinning of the memorandum. Van der Heijden drew attention to the fact that a number of projects would not so much lead to less or better regulations, but primarily to a displacement of regulatory pressure from the public to the private domain. The Economic Affairs Council concluded in turn that the present proposals do not go (nearly) far enough. Among other things Van der Heijden proposed that a time-limit be incorporated into every legislative proposal so that (parts of) laws that have become superfluous do not continue to exist unnecessarily, but this is not a new suggestion either.

2.8 Lessons for the future

When we try to draw up the balance of some thirty years of scientific debate about deregulation, several things come to our attention.

To start with it seems as though the debate about regulatory pressure benefits from an economic recession, because it is then that the need to scrap legislation obstructing the ability to compete is felt most acutely. Deregulation initiatives always have to struggle against vested interests and conservative forces who want to keep existing legislation. To achieve breakthroughs in this struggle, it seems to help when there is political sense of urgency about the fact that 'something has to be done'. We saw this in the early nineteen eighties and at the start of the MDW operation.

A second observation when drawing up the balance of the literature relates to the policy-neutrality already referred to several times above. If reduction and simplification of legislation is in fact restricted to a matter of form and the instruments used, while the underlying policy remains unaffected, then the chance of achieving any real breakthrough will remain small. The observation by the REA that rules often lead to new rules also applies to private rules, for example. We saw such an example in the policy concerning voluntary agreements. Apart from the fact that a call for harmonisation was soon heard on that occasion[98], it turned out that supporting legislation was also needed to ensure the effectiveness of, and compliance with, voluntary agreements.

The question then arises as to whether voluntary agreements have led to fewer regulations or any reduction in regulatory pressure. It is of course possible that voluntary agreements are more easily internalised by the parties and therefore perceived as less obstructive or burdensome, but this is something we know relatively little about. Perhaps this is also a possible subject for research by the scientific community. This community keeps a critical eye on the deregulation policy it is true, but does not seem to have an agenda of its own in which themes connected with regulatory pressure are investigated in depth from a multi-disciplinary point of view.
Emphasising the importance of self-regulation and market mechanisms as an alternative to

[98] *This has since resulted in 'Aanwijzingen voor de convenanten op rijksniveau.'*

government regulation in the literature and in policy does not tell us very much if it is not made clear what this means in actual practice, or how to anticipate possible side-effects. Often it is not a choice between government regulation and self-regulation. The problem seems to be rather a matter of finding the right mix. A voluntary certification regulation, for example, will probably not have the desired effect if there are 'free riders' active in a particular branch who the government is unable to catch. Something similar applies to working with systems of negotiable rights or obligations to insure. Such forms of regulation, which work through the mechanism of the market, consistently assume rationally acting and utility-maximising players, whereas the experience in practice shows us that market behaviour does not always follow these lines by any means. Often, the 'rational complier' with regulations does not exist.[99]

Another possible lesson is that there should be more attention to the processes behind the apparently autonomous growth of the stock of regulations. To what extent does the development toward 'negotiated' legislation, whereby interest groups are intensely involved in the preparation of legislation, possibly lead to an even greater growth of regulation that was previously the case? What can we say about the influence of parliament? Is it really the case, as the vice president of the Council of State seems to suggest[100], that opportunism in the practice of politics – including the reaction to events in the media – has led to numerous unnecessary regulations?

Greater attention also seems appropriate with regard to the consequences of the possible shifts and displacement of regulatory pressure as a result of various attempts to re-evaluate existing sets of legislation. Does working with public standards, for example, lead to a corresponding increase in the number of appeals to the courts, or is this effect negligible? Do citizens and businesses really want more freedom of action and choice in the compliance with regulations, or does this only apply to certain groups or certain subjects?

Finally, it is striking that the Dutch literature shows only a limited interest in the experience of other countries with regard to cutting back superfluous regulation. If this trend is ever reversed, it would be advisable to look not only at the quantitative aspects, but also the quality aspects. With regard to the latter for example, it is fair to say that the perception side of regulatory pressure in the debate of recent years has not (until a short time ago) received very much coverage. In the past the question of whether, and if so where, there are too many regulations has been seen primarily from the perspective of the government. It would be interesting to examine the experience of those targeted in relation to this point. Exactly what regulations are perceived as obstructive, by whom, and why? Is this primarily a matter of subjective experience, or is there more to it than that?

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99 *See H. Elffers, 'De rationele regelovertreder', The Hague 2005.*

100 *Council of State, Annual Report 2003, The Hague 2004, p. 18.*

Chapter 3. Regulatory pressure in Germany

3.1 Confusion of concepts

The theme of regulatory pressure – under various names – has been an object of ongoing concern in (legal) scientific, political, administrative and economic circles in Germany since the early nineteen sixties. Since that time words like 'Regelungsdichte', 'Verrechtlichung', 'Gezetsesflut', 'Normenflut', 'Deregulierung' and 'Bürokratieabbau' have appeared with great frequency in professional journals, policy documents and the media. The vice president of the Bundesverwaltungsgericht pointed out that a concept such as deregulation is not a legal concept in the German context but rather a catch word; it means more than simply the reduction of the responsibilities of government with respect to the operation of the market however:

> *"Als Ober- und Sammelbegriff bezeichnet es das Ziel, generell die Rechtsnormen und Verwaltungsvorschriften zu reduzieren, damit die Tätigkeit der Verwaltung zu vereinfachen und zu beschleunigen, die Überschaubarkeit sowie die Transparenz der Rechtswege zu fördern und die Rechtsprechung effektiver zu gestalten."*[101]

From this point of view the concept of 'deregulation' or 'reducing regulatory pressure' is a comprehensive one. It is therefore not surprising that in the German literature, it is often remarked from various sides that in practice, labels such as 'Deregulierung', 'Rechtsberreinigung' and 'Bürokratieabbau' are too easily applied to a wide range of (undesirable) matters, which means that they can be used for a wide variety of political objectives.[102] Jann correctly comments in this regard that if the government is serious about driving down regulatory pressure, it is necessary to distinguish the widely diverging causes of regulatory pressure since there is no single, miracle cure for all the problems with which it is associated. He distinguishes different levels of 'Bürokratieabbau' for example:

- 'zuviel Staat', das ist die **Aufgabeebene**,
- 'unnötige, überflüssige' Gesetze und Vorschriften, das ist die **politische Regulierungsebene**,
- 'komplizierte, unverständliche, wiedersprüchliche, teure' Vorschriften, das ist die **administrative Regulierungsebene**,
- 'mangelhafte, langsame, unfreundliche, unqualifizierte' Umsetzung dieser Normen durch bürokratische Verfahren, das ist die **Implementations- oder Organisationsebene**, und die gibt es zum einen innerhalb öffentlicher Verwaltungen, das ist die **intra-organisatorische Ebene**,
- und/oder zwischen öffentlichen Organisationen und Ebenen, das ist die **interorganisatorische Ebene**.

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[101] *I. Franke, 'Deregulation – Der Rechtsstaat ist die Form', Report, Congres Deutscher Juristinnenbund 1999, p. 4.*

[102] *H. Schulze-Fielitz, 'Theorie und Praxis parlamentarischer Gesetzgebung', Berlin 1988, p. 1 and 24.*

A closely related point to this, emphasised in the German literature, is that regulatory pressure should not be regarded as an isolated (legal) problem. In practice it is phenomena such as 'regulatory creep' and the 'accumulation of standards' which are important, phenomena which unintentionally affect one another. Regulatory creep refers to the fact that statutory norms often have their own dynamic, caused by the translation and working out of laws in implementation regulations, interpretations in practice, guidelines etc. Here we often see the occurrence of 'cascade effects' and 'gold plating.'[103] Initially straightforward rules in a particular law then start to have unintended side effects because they become entangled with new sets of standards alien to the original sector concerned. Accumulation of standards is a consequence of the fact that rules laid down from different policy points of view may converge at a single point. In other words sets of regulations, not unnecessarily burdensome when considered independently from one another, may actually become so when they converge on a particular target group.[104]

3.2 Objective and subjective regulatory pressure

A similar argument to that of Jann is also found in the dissertation by Holtschneider. His central proposition is that neither legislative failure nor legislative success can be determined in a (purely) objective manner. In the case of over-regulation, the expectations with respect to regulations do not run parallel to their effects. Such expectations are also related to the interest group one belongs to. After all, someone in favour of maintaining the status quo will always judge a legislative proposal intended to realise certain policy objectives more critically than someone who would actually like to see changes in the existing situation. In other words their respective points of departure are quite different. In Holtschneider's view, the question of whether 'Rechtsversagen' occurs as a result of the diverging expectations and effects of regulations is one that must be addressed at several levels. This means the following aspects have to be considered:

- **Verfahrensfehler**: problems arising on the side of the regulating parties, such as inadequate harmonisation between different sets of standards, unclear objectives, concepts etc.
- **Vollzugs- und Interpretationsdefizite**: this refers to implementation problems caused by incorrect application and/or interpretation of legislation, such as inadequate implementation and enforcement.

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[103] *The expression 'gold plating' originates from the literature on the implementation of European directives. There it refers to the accretion of proposed modifications in adjacent domains during the conversion process, whereas the directive does not actually require this to happen. For this reason 'gold plating' often results in the implementation period being exceeded.*

[104] *W. Jann, K. Wegrich and S. Veit, 'Verfahren und Instrumente erfolgreicher (De)Regulierung,' Universität Potsdam, 10 Januar 2005, p. 23. One salient point here is that the examples of conflicting regulations, caused by the fact that rules are created for one and the same problem on the basis of different rationales, tie in seamlessly with the Dutch discussion. Compare for example the German discussion about regulations for butcher's shops, whereby from a hygiene point of view smooth floor tiles should be used, whereas the working conditions regulations are actually opposed to this idea because of the danger of losing one's footing.*

- **Adressatenresistenz**: this relates to the fact that those targeted may look for ways of side-stepping or negating a regulation by (for example) exploiting gaps in the law, not (actively) providing the necessary information, relocating their operations abroad, or mobilising opposing forces to reverse or modify a particular regulation.[105]

Holtschneider too argues that in the German deregulation debate, the causes of diverse problems tend to be lumped together, whereas what really needs to be done is to methodically unravel the exact problem behind the alleged over-regulation and to establish the causes of that problem. In his view however, this calls for (time-consuming) empirical research. At the same time it is necessary to determine at all the above-mentioned levels just what the parties concerned (legislators, implementation bodies, citizens, interest groups) really consider to be the problem, what the expectations are (or were) with respect to an (existing or new) regulation, what interests are at stake in a particular field, how these are structured, and what their effect is on the creation and implementation of regulations. According to Holtschneider, one reason why insufficient time is devoted to analysing the problem of over-regulation is that the political and scientific agenda is drawn up on the basis of differing rationales and at differing speeds. Politicians think too much in terms of 'Wahlperioden', and the introduction of new laws is too often regarded as a sign of decisiveness and success.

3.3 State of affairs in the German deregulation debate

The start of the deregulation debate

It is apparent from the literature that at the start of the deregulation debate in Germany, science and politics worked hand in hand in the search for analytical techniques and solutions.[106] In the seventies there was a major emphasis on the search for 'rationale Entscheidungsmethoden' when mapping out the nature and scale of the problem of 'Yberregelung'[107], such as cost-benefit analyses.[108]

The German situation is distinctive in that there was apparently a brief reversal in the conduct of the deregulation debate in the eighties, which until then had (largely) been couched in technical legal terms. From this point on in the literature, the reduction of regulatory pressure is also increasingly presented as a means of combating the 'Politikverdrossenheit' (dissatisfaction/unease with regard to politics) and 'Systementfremdung' (legal alienation) of the population.[109] Deregulation is therefore presented as something which is necessary to

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105 *R. Holtschneider, 'Normenflut und Rechtsversagen,' Baden-Baden 1991, p. 227-228.*

106 *For a summary of this first deregulation wave see R. Mayntz, 'Gesetzgebung und Bürokratisierung, Wissenschafliche Auswertung der Anhörung zu Ursachen der Bürokratisierung in der öffentlichen Verwaltung, Bundesministerium des Innern,' Köln, November 1980.*

107 *We see this search for a more analytical approach repeatedly in such works as: P. Noll, 'Gesetzgebungslehre,' München 1973, on p. 191 for example. Compare also: R. Mayntz en J. Feick, 'Gesetzesflut und Burokratieabbau: das Problem der Yberregelung im Spiegel der öffentlichen Meinung,' Die Verwaltung 1982, p. 281-299.*

108 *E. Bohne, 'Kriterien und institutionelle Voraussetzungen des Bürokratieabbaus,' FÖV Discussion Papers 22, Speyer 2005, p. 2.*

provide the confident, articulate citizen the freedom of choice and action he needs to reinstate his 'Privatautonomie'.[110] Public and private forms of regulation are thereby increasingly seen in juxtaposition as 'Selbstregulierung' and 'Fremdregulierung', including in the juridical literature.[111] Strangely enough the concrete approach to the problem of 'Verrechtlichung' still tends to be couched in technical legal terms.

When Helmut Kohl fired the starting shot for a first major deregulation operation in his first government policy statement of 1982, he placed the theme in the broader context of the need for 'Staatsmodernisierung' and 'Rechtsbereinigung'. He observed that: 'Wir wollen den Staat auf seine ursprünglichen und wirklichen Aufgaben zurückführen, zugleich aber dafür sorgen, daß er dies zuverlässig erfüllen kann.' Just as in the Netherlands in the eighties, an independent deregulation commission was set up (the 'Unabhängige Kommission für Rechts- und Verwaltungsvereinfachung des Bundes').[112] For ten years this commission produced (above all) a lot of paper, in the form of interim reports, recommendations and draft proposals for the reduction and simplification of regulations.[113] In terms of concrete results, the yield is limited. Between 1986 and 1990 for example, only 12 Bundesgesetze and 30 Verordnungen were abolished, and a few simplifications introduced in the law of (administrative) procedure. There is no question of any structural decline in the production of legislation or major changes in the way new laws are prepared and implemented.

On the way to becoming a 'Schlanker Staat'?

The Waffenschmidt-Kommission was succeeded by the 'Sachverständigenrat Schlanker Staat'. This commission consisted of 17 representatives from policy-making, scientific and business community circles, as well as local politics, professional and business organisations, etc. The commission published its final report in 1997. The most important recommendations relating primarily to the reduction of legislative pressure were as follows:

- Erstellung eines Testkatalogs für gesetzgeberische Vorhaben zur Eindämmung der Gesetzesflut sowie die Einrichtung einer Normprüfstelle beim Bundeskanzleramt sowie auf europäischer Ebene. Gleiches gilt auch für Verwaltungsvorschriften und Standards, die nur mit Verfallsdatum erlassen werden sollten (compare the later discussion of 'horizon legislation');
- Intensivierung des Erfahrungsaustausches zwischen Bund, Ländern und Kommunen, Stärkung des Subsidiaritätsprinzips;
- Reduzierung der Staatsaufgaben auf die Kernbereiche durch permanente

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109 *See M. Lammer, in: W. Mantl (Hg.), 'Effizienz der Gesetzesproduktion, Internationaler vergleich,' Wien 1995, p. 97-98.*

110 *Compare J. Isensee, 'Mehr Recht durch weniger Gesetze?, Zeitschrift für Rechtspolitik 1985, p. 143.*

111 *See among others M. Schmidt-Preuß and U. Di Fabio, 'Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtlehrer,' Berlin/New York 1997.*

112 *Better known as the Waffenschmidt-Kommission.*

113 *Michael Bürsch, 'Schlanker Staat - der Worte sind genug gewechselt: zur Modernisierung der Bundesverwaltung,' Bonn, 1998.*

Aufgabenkritik sowie die Nutzung des Umzugs nach Berlin[114];
- Konsequente Fortsetzung der Privatisierungspolitik;
- Harmonisierung des deutschen Umweltrechtes mit seinen 3.542 Paragraphen durch ein Umweltgesetzbuch (a plan which has since been mothballed following a wide-ranging political discussion about draft legal codes);
- Beschleunigung von Planungs- und Genehmigungsverfahren.[115]

The Sachverständigenrat was later criticised mainly on the grounds that it (allegedly) focused too much of its attention on the privatisation of governmental tasks, and too little on the effective structuring and distribution of governmental tasks between the European Union, Bond and Länder. It was also said that all too often the reassessment of public tasks and the limiting of regulatory pressure was regarded as an internal matter for the respective ministries, whereas we have no right to expect that these ministries, like Baron von Münchhausen, will actually be able to drag themselves out of the swamp by their own hair.[116]

On 1 July 1997 the Sachverständigenrat Schlanker Staat counted 2059 Bundesgesetze, 3004 Rechtsverordnungen (delegated regulations), and an overall total of about 80,000 regulations.[117] In spite of the fact that these numbers were used by reform-minded parties as an argument for declaring the failure of the federal legislator, there were also dissenting voices to be heard. The observation of Fliedner is interesting in this regard; he says there is no question of an exponential growth in the stock of legislation in Germany.[118] He points out that ever since WWII there have been regular ups and downs in the growth of legislation, all of them perfectly understandable, such as the reconstruction legislation shortly after the war, the social reforms during the social democrat-liberal coalition in the mid seventies and during the period of German reunification in the early nineties. Fliedner also says that the increase in the number of laws is relatively insignificant when there is no clear measure of comparison. In recent years, according to Fliedner, the number of new (major) legislation projects (codification projects) has clearly declined, whereas there has been a drastic increase in the number of (smaller) legal changes to existing sets of regulations. How should we weigh these two things up with respect to one another? Fliedner points out that the way the statistics turn out is at least partly a matter of legislative technicalities. A collective law may have the effect of modifying a whole range of laws, but in the existing German statistics it is given the same weight as a minor amendment. Surely a single mega-law like the Social Gesetzbuch, containing more than a thousand articles, should weigh heavier than certain

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114 *This 'Nützung' refers to the taking advantage of the relocation of the seat of government to Berlin to cut back the number of civil servants in the various ministries. The number is said to have dropped from 25,017 in 1993 to 19,000 in 2001.*

115 *Sachverständigenrat "Schlanker Staat", Abschlußbericht, Bonn 1997, Band 2, p. 203.*

116 *Budhäus, D. and S. Finger, 'Stand und Perspektiven der Verwaltungsreformen in Deutschland,' Die Verwaltung, Heft 3, 1999, p. 313-344.*

117 *Sachverständigenrat "Schlanker Staat", Abschlußbericht, Bonn 1997, Band 1, p. 8.*

118 *It is true that (just as in the Netherlands) more new laws are being created than are disappearing. For this reason the total stock of regulations continues to increase in terms of absolute numbers.*

technical adjustments to the Bundes Immissionsschutzgesetz?[119]

Finally, Fliedner observes that the widely discussed 'Rechts-bereinigungsgesetze' (below) are primarily aimed at the withdrawal of obsolete regulations. Yet these are by definition no longer a major burden for implementation bodies, citizens and businesses. Fliedner therefore argues for a more qualitative approach, whereby the essential and political desirability of laws is detached as far as possible from the professional quality of the legislation, since it is only possible to provide objective, general assessment criteria for the latter.[120]

Ultimately it is the voter who should decide on the political necessity and the quality of laws adopted during a cabinet period.

Moderner Staat-Moderne Verwaltung

In December 1999 the 'Programma Moderner Staat-Moderne Verwaltung' was initiated.[121] In the first instance there were four central cornerstones to this programme, involving 15 main projects and 23 sub-projects. The four original cornerstones were:[122]

- Increasing the effect and acceptance of the law (through a stronger focus on ex ante evaluation and the identification and cutting back of legal obstacles in the realm of public services).
- The Confederation as partner (co-operation between administrative levels and with private organisations).[123]
- Performance management, cost effectiveness and transparent administration (by

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119 *O. Fliedner, 'Gute Gesetzgebung: Welche Möglichkeiten gibt es, bessere Gesetze zu machen?', FES-Analyse Verwaltungspolitik, Friedrich-Ebert-Stiftung, Bonn, December 2001, p. 4-5.*

120 *Fliedner op. cit., p. 7-8, summarises this as follows: "Aufgabe der gesetzgebungsfachlichen Standards ist es, zu gewährleisten, dass die mit einem neuen Gesetz gewollten politischen Ziele und Inhalte sowohl für den Staat als auch für die Betroffenen effizient und ökonomisch in die Wirklichkeit umgesetzt werden. Bei ihnen geht es z.B. um die Frage, ob die gewählten Formulierungen für die Anwender und Betroffenen verständlich sind, ob das Gesetz einen klaren Aufbau hat, ob die Gesetze der Logik eingehalten wurden und ob die getroffenen Regelung nicht zu anderen Regelungen im Widerspruch stehen. Ferner ist die Praktikabilität und Vollzugstauglichkeit der Vorschriften von Bedeutung sowie der Umstand, dass kein unnötiger Aufwand für die Anwender und Betroffenen entsteht. Zu den gesetzgebungsfachlichen Standards gehört u.a. auch, dass der Sachverhalt, für den eine Problemlösung erfolgen soll, ausreichend aufgeklärt wurde." According to Fliedner all questions concerning the necessity, acceptance/willingness to comply with and the justness of laws lie beyond the scope of the civil servant.*

121 *For a comprehensive treatment of this programme see: http://www.staat-modern.de/.*

122 *In recent years the programme has had a three cornerstone structure with 'Modernes Verwaltungsmanagement,' 'Bürokratieabbau' and 'E-Governement.'*

123 *One typical German explanation for the difficulties in reducing regulatory pressure relates to the Federal structure, whereby the governments of the länder not only have to be involved in the preparation of federal legislation, but also often have approval rights or the right to object. This means that structural changes often have to be made to legislative proposals at quite a late stage in their development, and these infringe upon the methodology and quality of the original design. See among other places the interesting lecture given by the German Minister of Justitie Brigitte Zypries on 24 June 2004, 'Das Wesentliche verständlich regeln: Weze zu einer besseren Gesetzgebung.' Also to be found at: www.bmj.de.*

introducing standard cost calculations, benchmarking and IT solutions in the public service).
- Motivating government personnel (education and courses).

In retrospect, the most important results from the first stage of this project seem to be directed primarily at savings in the sphere of government personnel.[124] As regards efforts aimed at reducing regulatory pressure, the emphasis in this period is on developing the above-mentioned Gesetzesfolgenabschätzung. From 11 December 1984 onward the Federal Republic had a so-called 'Prüfverfahren' consisting of ten questions which were to taken into consideration during the preparation of new legislative proposals at the federal level.[125] These questions were:

- Muss überhaupt etwas geschehen?
- Welche Alternativen gibt es?
- Muss der Bund handeln?
- Muss ein Gesetz gemacht werden?
- Muss jetzt gehandelt werden?
- Ist der Regelungsumfang erforderlich?
- Kann die Geltungsdauer beschränkt werden?
- Ist die Regelung bürgernah und verständlich?
- Ist die Regelung praktikabel?
- Stehen Kosten und Nutzen in einem angemessenen Verhältnis?[126]

These questions have since been elaborated upon and incorporated into the Gemeinsamen Geschäftsordnung der Bundesministerien, which came into effect on 1 September 2000.[127] The most important aim of the GGO is to see that thorough reasons are given as to why legislation is necessary at all in a particular case and to consider whether self-regulation would not suffice, while also placing demands on the mapping out of the costs and consequences of new legislation for implementation and enforcement.

Although these 'directions for legislation' in the Federal Republic seem to be generally regarded as an achievement, there is also a communis opinio in the literature that these questions/this guideline for the preparation of new legislation is too often seen as a formality. In 1998 for example the Bundesrechnungshof observed:

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124 *'Moderner Staat – Moderne Verwaltung': Bilanz 2002, www.staat-modern.de/Modernes- Verwaltungsmanagement/-,10103/Publikationen.htm.*

125 *On this topic see (among others): O. Gericke, 'Möglichkeiten und Grenzen eines Abbaus der Verrecht-lichung - Eine kritische Analyse von Gesetzgebung und Gesetzgebungsanalyse,' Aachen 2003.*

126 *Cabinet decision of 11 December 1984, GMBl 1990, p. 1-4.*

127 *See www.bva.bund.de.*

"Die stichprobenweise Prüfung von Gesetzesvorlagen unterschiedlicher Bundesministerien hat ergeben, dass jene in der Begründung und im Vorblatt zu Gesetzesentwürfen oft nur vermerken, dass entweder keine Kosten verursacht würden oder die voraussichtlichen Kosten nicht quantifizierbar seien. Angaben zum wirtschaftlichen Nutzen und eine Abwägung mit den voraussichtlichen Kosten fehlen überwiegend. Diese Mängel sind mit auf die unzulänglichen Regelungen der Gemeinsamen Geschäftsordnung der Bundesministerien zurückzuführen. Auch die "Blauen Prüffragen", anhand derer die Ressorts hausinterne Prüfungen zur Notwendigkeit, Wirksamkeit, Verständlichkeit und zu den finanziellen Wirkungen von Gesetzgebungsmaßnahmen durchführen sollen, entfalteten bisher keine erkennbaren Verbesserungen."[128]

According to some there is a lack of political will to take all these directions for legislation seriously, whereas others say this is partly due to the fact that there are no legally binding rules, and no independent organisation transcending the departments to supervise the way in which the answers to these fundamental questions of legislative practice are dealt with.[129] Nevertheless, inspired in part by the European interest in Regulatory Impact Assessments, there still seems to be a general preference in Germany for continuing to extend and improve the ex ante evaluation of legislation. They are considering a 'quality chamber' or 'Beratungsdienst' for the German Bundestag, upgrading the assessment of regulation by government, and the compulsory introduction of ex post evaluations for certain new laws.[130]

The federal government also recently decided to mothball and/or scrap a number of laws (see below). Specifically, on 4 May 2005 for example it was announced that 340 laws and bye-laws are to be abolished because they are no longer thought to have any practical effect.[131] The bill for a new Rechtsbereinigungsgesetz is thereby one of the central plans of the federal government in relation to Bürokratieabbau, aimed at a systematic analysis of the existing stock of legislation to identify superfluous regulations.

3.4 Dissatisfaction with existing deregulation practice

Technocratisation of legislative policy

There is also fundamental criticism of the way the problem of regulatory accretion is being tackled in Germany. According to some, far too many solutions are being sought in new

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[128] *Bundesrechnungshof, 'Finanzielle Auswirkungen von Gesetzesvorhaben', Report 1998, no. 11. Found at: www.bundesrechnungshof.de/ergebnis2000/bem11.html.*

[129] *H.P. Schneider, 'Meliora Legalia – Wege zu besserer Gesetzgebung', Zeitschrift für Gesetzgebung 2004, p. 105-121.*

[130] *T. von Danwitz, 'Wege zu besserer Gesetzgebung in Europa', IPR-Rechtspolitisches Forum 2005, no. 31, p. 5-6. For a comprehensive discussion of a wide range of improvement proposals see also: Peter Blum, 'Wege zur besseren Gesetzgebung – sachverständige Beratung, Begründung, Folgeabschätzung und Wirkungskontrolle', Gutachten I zum 65. DJT, Berlin 2004.*

[131] *See the press report on 'Rechtsbereinigung' of 2 November 2005 (www.bmj.de). For an overview of the situation by department, compare: (Second interim report) 'Bereinigung des Bundesrechts, Initiatieve Bürokratieabbau', Bundesministerium der Justiz 2005.*

institutions and instruments which involve structural problems such as a legislative culture in which there is too much emphasis on Einzelfallgerechtigkeit, the opportunism resulting from the parliamentary response to the lobbying activities of interest groups and the sudden attention from the media leading to promises of new regulations and, more generally, a strengthening of the symbolic function of laws at the expense of a proper concern for their operation and effects.[132] Bohne names three conditions which must be fulfilled to ensure that deregulation is no longer primarily a matter of symbolic politics, namely:

- Deregulation and de-bureaucratisation must be seen as 'Daueraufgaben', something which cannot be made to depend on 'political and economic cycles'.
- Successful deregulation requires durable institutionalisation to ensure that lessons are learned from the (empirical) experience of the past, whereby the current state of professional and scientific knowledge should serve as the point of departure for the way problems are tackled.
- To avoid 'Reformsymbolik' administrators and scholars should not chase after every new phenomenon that is presented in the name of 'Bürokratieabbau'. Much more attention should be devoted to studying the effects and side effects of reform proposals. What works (or not), and (above all) why?[133]

The literature also points to the paradoxical situation whereby agreement is often reached at an abstract level to the effect that there are too many superfluous regulations in a specific area (subsidy schemes for example), and yet when an attempt is made to scrap specific regulations in the area concerned, a pressure group always appears which mobilises all its forces to prevent it from happening. W. Jann commented in this regard that: 'Gesetze und Vorschriften in aller Regel nicht erlassen oder novelliert werden, weil wild gewordene, hyper-aktive Beamte in den Ministerien außer Kontrolle geraten sind, sondern weil externe Akteure Druck machen, die Interesse an dieser Regulierung haben.' He thereby points to the existence of wide range of thematic policy networks to which not only private parties belong (companies, non-government organisations etc.) , but also policy officials, politicians, local authorities etc.[134]

Bürgernähe

Since over-regulation is not objectively measurable, but always a matter of the perceived interests of the various parties, our Eastern neighbours often talk about 'Gef\hlter Bürokratie'.[135] According to some, this phenomenon also explains the need to connect with

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132 *In his speech for the 65th Deutscher Juristentag in 2004 President Thierse of the German Bundestag even referred to 'Hysterisierung der öffentlichen Kommunikation,' which according to him is a serious obstacle to the creation of good legislation. See S. Keller, 'Reform der Föderalismus und Wege zu besserer Gesetzgebung,' Zeitschrift für Gesetzgebung 2004, p. 398.*

133 *Bohne op. cit., p. 4.*

134 *See W. Jann, 'Burokratieabbau, Rede voor de commissie Binnenlandse Zaken van de Duitse Bondsdag,' 28 June 2004, p. 3. See : www.brandenburg.de/media/lbm1.a.1168.de/jann.pdf.*

135 *See H. Hill, 'Burokratieabbau und Verwaltungsmodernisierung,' DÖV 2004, 721-729.*

the perceptions of those directly or indirectly targeted by regulations when searching for criteria for the reduction of regulatory pressure.[136] Bohne hereby points out that a reduction of regulatory pressure from the point of view of the private parties targeted will not necessarily lead to a corresponding reduction of the burden for government. He distinguishes three criteria from the point of view of businesses and citizens for the reduction of regulatory pressure, namely: 1) greater freedom of choice and action; 2) cutting costs; and 3) time savings. Bohne mentions the example of a project manager deployed by government to deal with permits etc. in relation to the surrounding environment. For the citizen this may lead to a far better utilisation of the room for manoeuvre and therefore to savings in terms of time and money, whereas from the government's point of view the opposite is probably true.

No 'one-size-fits-all' solutions

German deregulation politics sometimes tends toward 'total' solutions, which on closer examination do not deserve that predicate . In a study ordered by the Bertelsmann Stiftung for example, Wegrich, Shergold, Van Stolk and Jann comment that virtually all political parties since the election campaign in 2005 have made proposals to limit the operation of laws over time so that they do not continue to exist indefinitely ('Befristung' or 'sunset legislation'). Surprisingly the authors say that they were right to do so, which is surprising considering the previous experience with inserting horizon clauses into legislation and the fact that there is no empirical evidence that this technique leads a reduction of regulatory pressure.[137] Among other things they conclude:

> *"Ein 'Verfallsdatum" in Vorschriften führt daher zwar formal zu einer Beweislastumkehr, wird effektiv aber vor allem die Mobilisierungskräfte von 'Anti-Terminierungskoalitionen" aktivieren. Die für Bürokratieabbau eintretenden Querschnittakteure haben demgegenüber weniger 'natürliche" Koalitionspartner mit vergleichbaren Mobilisierungspotenzial, die bei der durch ein 'Verfallsdatum' geschaffenen Gelegenheit aktiviert werden können."*[138]

There had been earlier objections to the more or less automatic application of horizon clauses. The German Minister of Justice Zypries previously pointed out that a legislation technique of this kind may actually lead to unnecessary bureaucracy, because there will often be a need for extension legislation. Furthermore, 'sunsetting' may conflict with directly applicable European law. Whatever the truth of these assertions, we may expect that in the next few years Germany will focus (even) more attention on limiting the period of validity of laws, possibly linked to an (ex post) evaluation.

One well-known name in the field of legislative research, Hans Peter Schneider, made several interesting proposals in the Zeitschrift für Gesetzgebung on this theme. He argued

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136 *For example: W. Leisner, 'Krise des Gesetzes: Die Auflösung des Normenstaates,' Berlin 2001, p. 126 ff.*

137 *K. Wegrich, M. Shergold, C. van Stolk and W. Jann, 'Wirksamheit vorn Sunset Legislation und Evaluationsklauseln, Ein Gutachten im Auftrag der Bertelsmann Stiftung,' Oktober 2005, p. iv-v.*

138 *Idem, p. iii.*

for an independent Gesetzgebundsrat consisting of representatives from government, parliament, the scientific community and the business community. This Council would: 1) draw up an annual 'state of the legislation' document; 2) independently supervise and monitor important legislative projects from the moment they start; and 3) make a selection of laws whose operation would be mapped out by means of empirical research. It would also be necessary think more carefully about, and experiment more, with limiting the operation of laws in terms of time, place and the groups targeted by them. In this way experience could be gained of new laws by testing their effect in actual practice before declaring them to be lasting, for example.[139] Schneider's ideas tie in neatly with other proposals such as bringing the debate on the need and utility of legislation (as opposed to using alternatives) forward in time by using green and white papers and modern consultation techniques (citizen panels for example). The advantage of this would be that it is made clear at an early stage which specific solutions will (not) be supported by a political majority, after which the later discussion of the technical quality of the legislation can proceed more calmly.

3.5 Conclusion

We may conclude that the theme of regulatory pressure (under different names) is very much alive in Germany. We may take it as a compliment perhaps, that the Germans look at the Netherlands and especially Great Britain as examples of countries that have been successful in the sphere of deregulation. Unfortunately however, they seem to be looking primarily at procedures and institutions such as ACTAL, without having a clear picture of the yield produced by the successive operations designed to reduce and simplify legislation.[140]

Generally speaking we can say that the German deregulation debate is still conducted along fairly technocratic lines. There is no question of a discussion about what regulatory pressure actually is, such as the one currently taking place in the Netherlands. As already mentioned however, the German literature draws a sharper distinction between the various factors that may influence regulatory pressure than does ours. Roughly speaking this involves a three-way subdivision into: those factors which are related to the legislative process itself such as the choice of particular types of standard; the putting into operation of legislation by implementation bodies, supervisors and enforcers; and finally, the attitude/experience of those actually targeted.

It is only disappointing that this distinction in the literature has not (yet) led to a conceptualisation.

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[139] *See H. Schneider, 'Meliora Legalia,' ZG 2004, p. 105-121.*

[140] *Compare from many examples: T. Grether, 'Weniger Bürokratie in Deutschland wagen,' Berlin 2005.*

The latter remark may also be applied to the perception side of regulatory pressure. From the scientific disciplines, some attention is in fact devoted to the problems of 'rechtsvervreemding' (alienation of/from the law), but there still seems to be no question of a genuine doctrine/specific area of investigation. With respect to policy, for the time being the debate about regulatory accretion is still conducted primarily in terms of protocols, instruments and procedures. Academics, administrators and politicians are still very interested in ex ante evaluation of legislation, without it being clear where the enthusiasm for Gesetzesfolgenabschätzung exactly comes from. In any case previous experience in Germany does not give us very much reason to believe that greater attention to demands for subsidiarity, ease of implementation and enforceability during the preparation of legislation (with a tendency to strive for Einzelfallgerechtigkeit and ongoing refinement of regulations) will lead to a structural turnaround in the legislative culture.

It is also striking that there is virtually no-one in the academic debate who seriously challenges the constitutional framework within which the primacy of the legislator and the principal of legality are firmly anchored. There is a more subtle approach to the workings of the democratic process however. We hear reports from various sides that the functioning of parliament, in combination with the federal structure, encourages over-regulation. The German parliament is said not to devote enough attention to assessing the quality of legislation, and to be unable to counterbalance the power of government departments during preparation of legislation.

Chapter 4. Regulatory pressure in Great Britain[141]

The British debate about regulatory pressure has been running for some twenty years now. It started in 1985 with the publication of the memorandum 'Lifting the Burden'[142], in which the British Conservative government announced a package of measures aimed primarily at driving back the administrative burden for the business community. There are two important chapters in both the political and the scientific debate about regulatory pressure. The central concepts of both are 'deregulation' and 'better regulation'.[143]

4.1 Deregulation under the Conservative government

In the mid nineteen eighties, subsequent to the policy document 'Lifting the Burden', the British conservative government introduced a large number of specific measures.[144] Such as the Compliance Cost Assessment (CCA), which ensures that the administrative burdens (compliance cost) of the regulations associated with new legislation must be taken explicitly into account. This policy also led to the establishment of several special commissions and policy departments, which were frequently renamed and shifted from one ministry to the other as the theme of deregulation acquired greater political importance. In 1986 for example the Enterprise and Deregulation Unit was set up in the Department of Employment to supervise various departmental anti red-tape projects. In 1987 the department was renamed the 'Deregulation Unit' and moved to the Department of Trade and Industry. In 1989 the Cabinet Committee on Regulation was also formed. In 1994 various memoranda and other policy documents were published[145], based on the 'think small first' principle. In other words new legislation was supposed to take special account of the position of small and medium-sized businesses. As a sign of the major political significance the British government attached to the theme, the Deregulation Unit was relocated in 1995 to the Cabinet Office. An advisory board was also set up with representatives from the business community, and seven Business Taskforces created for a number of specific sectors .

With regard to legislation the most important development in this period is the introduction of the Deregulation and Contracting Out Act (1994).[146] This Act gives the cabinet far-

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141 *In the writing of this chapter, grateful use was made of the ideas and suggestions of Prof. Bronwen Morgan (Socio-Legal Studies, University of Bristol) and Prof. Colin Scott (EU Regulation and Governance, University College Dublin).*

142 *DTI, 'Lifting the Burden,' Cmnd 9571, 1985.*

143 *For a recent overview see R. Baldwin, 'Is better regulation smarter regulation?' Public Law 2005, p. 485-511.*

144 *DTI, 'Building Business Not Barriers,' Cmnd 9794, 1986; 'Releasing Enterprise,' Cmnd 512 1988.*

145 *DTI, 'Deregulation: Cutting Red Tape,' DTI, London, 1994; 'Thinking About Regulation; Guide to Good Regulation,' DTI, London, 1994; 'Getting a Good Deal in Europe,' DTI, London, 1994.*

146 *Compare D. Miers, 'The deregulation procedure: an expanding role.' Public Law 1999, p. 477-503; M. Ryle, 'The Deregulation and Contracting Out Bill 1994 - A Blueprint for reform of the Legislative Process?' Statute Law Review 1994, p. 170.*

reaching powers to amend or repeal legislative proposals which cause too great a regulatory burden. The central provision of this Act (Section 1(1)) reads as follows:

> *"If, with respect to any provision made by an enactment, a Minister of the Crown is of the opinion (a) that the effect of the provision is such as to impose, or authorize or require the imposition of, a burden affecting any person in the carrying out of any trade, business or profession or otherwise, and (b) that, by amending or repealing the enactment concerned and, where appropriate, by making such other provision as is referred to in subsection 4(a) below, it would be possible, without removing any necessary protection, to remove or reduce the burden or, as the case may be, the authorisation or requirement by virtue of which the burden may be imposed, he may, subject to the following provision of this section and sections 2 to 4 below, amend or repeal that enactment."*

The term 'burden' is defined in article 1(5) of the Deregulation and Contracting Out Act as follows:

> *"a restriction, requirement or condition (including one requiring the payment of fees), together with any sanction (whether criminal or otherwise) for failure to observe the restriction or to comply with the requirement or condition; and any procedural provisions (including provisions for appeal) relevant to that section."*

4.2 Deregulation under the Labour government

After the parliamentary elections of 1997, Labour became the new party of government under the leadership of Tony Blair. With the arrival of 'New Labour' the deregulation policy of the former conservative government was given a new lease of life. The new government announced a change of course, from deregulation to better regulation. Introducing the Better Regulation programme in 1997, David Clark stated that:

> *"Deregulation implies regulation is not needed. In fact good regulation can benefit us all; it is only bad regulation that is a burden."*[147]

To back up this line of thinking, in 1997 the Better Regulation Task Force (BRTF) (allied to the Cabinet Office) was established. This is an independent advisory committee of representatives primarily from the business community. The committee was given the explicit assignment of targeting 'small businesses and ordinary people' and this led to the publication of the 'Five Principles of Better Regulation.'[148] In the meantime, Compliance Cost Assessment (CCA) was replaced by a more comprehensive Regulatory Impact Assessment procedure. In 1999 the Better Regulation Unit became the Regulatory Impact Unit (Cabinet Office). To underline the political importance of the policy, prime minister Blair was

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147 *Baldwin op. cit., p. 486.*

148 *BRTF, Principles of Good Regulation, Cabinet Office, London, 2003. These principles are: proportionality, accountability, consistency, transparency, and targeting.*

appointed chairman of the Panel for Regulatory Accountability in 2004, whose aim was to cut back the 'burden of red tape'. An inquiry was also announced into unnecessary regulation and 'regulatory creep' (unintentional growth of regulations). At the end of 2004 Blair also announced that 'regulatory reform' would be one of the central themes of the British chairmanship of the EU (in the second half of 2005).[149]

The most important statutory measure in this period was the creation of the Regulatory Reform Act (2001), as successor to the Deregulation and Contracting Out Act (1994). The new law differed in at least two important ways from its predecessor:[150]

- In the first place it is not aimed exclusively at easing the burden, but also actually makes it possible to create a greater burden in other areas. Under certain circumstances more new regulations may be imposed, as long as this leads to a reduction of the burden in other areas.
- The new Act is not only intended to ease the burden for the business community for example, but to do so in principle for everyone, including government organisations (provided they are not the only ones to benefit). The policy is intended to be for 'the benefit of business, charities, the voluntary sector, individuals and legal persons and the wider public sector.'

In early 2006 the (temporary) Better Regulation Task Force (BRTF) was renamed the (permanent) Better Regulation Commission.[151] The last BRTF annual report lists all the publications of this body, and reviews the most important political and policy results achieved. The chairman summarised their work follows: *"Perhaps our most important achievement has been to put the spotlight on the costs of regulation – costs to the private, public and voluntary sectors and to each and every one of us as citizens. It is said that there are two unavoidable things in life – death and taxes. Regulation looks like being the third."*[152]

Under the motto 'What gets measured gets done', the BRTF places great emphasis on measuring the costs of regulation. It is roughly estimated that the 'total cost of regulation' is about 10 to 12% of the British Gross National Product, or about 100 billion British pounds, which is equivalent to the annual revenue from income tax. According to the BRTF their most important results may be summarised as follows:

- 'Better regulation' is now a top priority of the British government;
- Ministries now have better departments to supervise deregulation and the quality of legislation;
- The 'Five Principles' developed by the BRTF (see above) have been broadly accepted,

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149 *See recently for example BRTF, Regulation – Less is More. Reducing Burdens, Improving Outcomes, March 2005.*

150 *Compare D. Miers, Regulatory reform orders: a new weapon in the armoury of law reform, Public Money & Management 2001, p. 29-34.*

151 *http://www.brc.gov.uk/*

152 *BRTF Annual Report 2004/5, p. 2.*

including by non-governmental organisations;
- A Better Regulation Executive has been set up inside the Cabinet Office;
- The British government made 'better regulation' one of its top priorities during the British chairmanship of the EU.

Among other things, the British literature contains a critical discussion of the following three themes: a) the effects of the Regulatory Impact Assessments; b) the overwhelmingly quantitative interpretation of the concept of the term 'burden'; and c) the various ways in which the existing deregulation policy could be improved.

4.3 Regulatory Impact Assessment (RIA)

Regulatory Impact Assessment (RIA) is one of the most important instruments of the British deregulation policy. Prime minister Blair announced in 1998 that from now on, not a single policy measure would leave the room without first having survived an RIA test. The test can be summarised as follows:

> *(RIA) " ... involves an assessment of the impact of policy options and covers the purposes, risks, benefits and cost of the proposal, also examining: how compliance will be obtained; expected impacts on small business; the views of the affected parties; the criteria to be used for monitoring and evaluating the regulatory activity at issue."*[153]

Since its introduction, almost 900 RIAs have been carried out in total, an average of 160 per year. In spite of these numbers, Baldwin among other points out that in many cases there is some doubt as to whether they produced the desired data. He refers in particular to the problems associated with:

> *"the availability of good data, the assumptions to be made on values underpinning the RIA; the inconsistency of RIAs with statutory social objectives; the timing of the RIA; and administrative resistance to the RIA process."*[154]

An investigation by the National Audit Service of 43 test cases shows that the policy objectives were clearly formulated in only half of the cases investigated, and that an alternative to the proposed policy measure was considered in no more than seven.[155] In many cases it is difficult to quantify the expected costs and benefits. Furthermore, in many reports nothing is said at all about the effects of enforcement. These conclusions are in agreement with a previous study carried out by the British Chambers of Commerce.[156]

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153 *Baldwin op. cit., p. 490.*

154 *Baldwin op. cit., p. 490.*

155 *National Audit Office, 'Evaluation of regulatory impact assessments compendium report 2003-4,' HC 358, March 4, 2004.*

156 *T. Ambler et al, 'Are Regulators Raising Their Game: UK Regulatory Impact Assessments in 2002/3,' British Chambers of Commerce, London, 2004.*

4.4 Criticism of the quantitative interpretation of regulatory pressure

There is a distinction drawn between two categories of regulatory pressure (burden) in the British literature, namely 'administrative burdens' and 'regulatory burdens'.[157] The first concerns:

> *"the requirements involved in interactions between individual firms or other actors and government, or on minimising form-filling and tax administration costs."*

The second concerns the 'general compliance cost'. In practice the two categories are closely related. The British literature also includes a critical discussion of how to interpret the statutory definition of a 'burden'.[158] It seems that in practice, a burden should be expressed above all in terms of specific costs and benefits – which can be expressed in figures – even if these are not easily available in specific instances. Alongside the various calculations of the cost savings for the departments concerned, often the trade unions and other interest groups also produce their own figures. The risk of passing costs on is also pointed out. New legislation that produces a minor saving on administrative burdens for the business community could also possibly result in a big cost increase for the government bodies concerned. Miers discusses the case of the Sunday Observance Act 1780. Since Christmas and New Year's Eve both fell on a Sunday in the year 1995, it was proposed that this Act should be amended to allow dancing on Sunday night. The supporters of the amendment pointed out that this would considerably reduce the administrative burdens for the parties affected. Critics on the other hand said that it would actually lead to a greater burden in other areas, such as extra costs for police officers and other public servants, as well as extra noise nuisance for people living nearby.[159]

4.5 From 'better regulation' to 'smart regulation'[160]

According to Cunningham & Grabosky many regulation problems cannot be solved through the deployment of a single instrument.[161] They argue instead for 'smart regulation'; this is an optimal combination of different types of regulation in both the public and private sectors, adjusted to suit the specific circumstances of the case concerned. This kind of regulation is based on the following principles:

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157 *Baldwin op. cit., p. 494.*

158 *Compare Miers op. cit., 1999, p. 482 ff.*

159 *The Deregulation (Sunday Dancing) Order 1995: the Proposal (Commons: 1994-95, H.C. 817, paragraphs 4-35; Lords: 1994-95, H.L. 102, paragraphs 54-59).*

160 *Compare R. Baldwin, 'Better Regulation: Is It Better for Business?' Federation of Small Businesses, London 2004.*

161 *N. Cunningham & P. Grabowsky, 'Smart Regulation,' Oxford 1988.*

- preference should be given to policy mixes incorporating a broader range of instruments and institutions;
- preference should be given to less interventionist measures;
- a dynamic pyramid of instruments should be ascended to the extent that is necessary to achieve policy goals;
- participants best positioned to act as surrogate regulators should be empowered;
- opportunities for win-win outcomes should be maximised.

According to Baldwin, most of the measures adopted by the British government do not fulfil these principles; 'better regulation' is not necessarily 'smart regulation'. In the first place much of the British policy is based on the use of Regulatory Impact Assessments (RIAs). It turns out however that in practice, these do not always result in alternative forms of regulation being conceived or applied. An RIA is furthermore always concerned with one particular law, whereas 'smart regulation' is primarily concerned with the combination of different types of legislation and regulations. He therefore proposes that in future, RIAs should no longer be targeted on single new laws whereby all the existing legislation is taken as given, but that there should first be a thorough examination of how the new law ties in with the existing complex of legislation. He also suggests that the British legislator should abandon the 'single shot design' whereby new laws have to be right first time, with no looking back once they have been passed. Legislation should not be a one-off affair, it should rather be subjected to ongoing evaluation. Such an approach ('from design to review') also allows us to take changing facts and circumstances better into account when attempting to estimate the size of the burden.

4.6 Conclusion

The British literature on regulatory pressure examined in this study is primarily concerned with endorsing or criticising the (deregulation) policy and related legislation of the British government. In both the policy and the literature there is a strong emphasis on the costs and benefits of regulation. During the conservative government there is a strong emphasis on cutting back the number of regulations, whereas throughout the period of the Labour government, the quality of legislation also plays a major role. The literature is above all critical of the use of Regulatory Impact Assessments (RIAs) as an instrument for reducing the size of the regulatory and administrative burden. On the one hand, some important shortcomings of this method are pointed out. On the other, our attention is drawn to the fact that the way we think about legislation, and the way legislation comes into being, will have to change ('smart regulation').

Chapter 5. Regulatory pressure in the United States[162]

Since the early seventies in United States there has been a lot of interest in different forms of deregulation and 'regulatory reform'. The initial reason for this was the rapid growth of federal legislation and regulations in the fields of public health, public safety and the environment. According to one author, the country was suffering from a serious form of 'hyperlexis' in this period: 'the pathological condition caused by an overactive lawmaking gland.'[163] The central aim of American reform measures continues to be: 'achieving a proper balance between cost, both in terms of dollars and of government intrusiveness, and benefits.'[164] These are in fact the central themes in much of the American literature about regulation. There is also some reflection, particularly in the sociology of law literature, on the subject of 'legal consciousness'.

5.1 The American deregulation policy in brief

Deregulation was an important part of the electoral platform of President Reagan in 1980. It focused on measures to combat 'regulatory excess' and 'over-regulation'. Immediately after his election in 1981 Reagan issued 'Executive Order 12291', generally regarded as an important milestone in the development of 'regulatory reform'. For the first time all government bodies were obliged to do a cost-benefit analysis for every new law and regulation, which would then be submitted to the Office of Management and Budget for approval. President Clinton retracted this measure in the early nineties, only to replace it with a very similar measure.

The subject was still the centre of attention in the mid nineties. Kagan talks about a 'legal proliferation' in this period. He describes it as follows:

> *"In contemporary democracies, positive law, the law on the books, proliferates extremely rapidly – so rapidly that it confounds our attempts to find out, in any systematic way, what is actually going on. Like Lewis Caroll's Red Queen, we seem to run faster and faster only to keep from falling further behind."*[165]

According to Kagan, current legislation is different to the legislation in previous years for at least four reasons. It is at present: a) more ambitious; b) more complex; c) more international; d) there is now what Kagan calls 'vertical distribution'. Supra-national

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[162] *In the preparation of this section, grateful use was made of the ideas and suggestions of Prof. Robert A. Kagan (Political Science and Law, University of California).*

[163] *B. Manning, Hyperlexis: 'Our National Disease', Northwestern University Law Review 71:767, 1977.*

[164] *R. Garcia, 'Federal Regulatory Reform: An Overview', CRS Issue Brief for Congress, The Library of Congress, 2001.*

[165] *R. Kagan, 'What Socio-Legal Scholars Should Do When There is Too Much Law to Study', Journal of Law and Society 1995/ 1, p. 140.*

legislation has grown enormously, and the relationship between this and 'local' laws and regulations is a complex one. In his view these factors are further encouraged by greater international economic competition, extremely rapid technological developments, growing environmental problems and greater geographical mobility.

In this period the Republicans won a majority in the House of Representatives under the leadership of Newt Gingrich. Their campaign was run under the banner of the so-called 'Contract with America' and regulatory pressure also played an important role in programme.[166] The 'contract' was based on three principles: more direct accountability on the part of politics with respect to citizens; a greater role for personal responsibility and liability; a drastic lightening of the tax burden and regulatory pressure in general ('regulatory and tax relief'). To achieve the latter, a large number of far-reaching measures were announced, aimed particularly at introducing cost-benefit analyses and risk analyses on a large scale for new legislation and regulations.

Since the eighties a large number of laws have also been introduced in the American Congress aimed at deregulation and easing the regulatory pressure for the business community. These included (to name just a few) the 'Paperwork Reduction Act' (1980), the 'Regulatory Flexibility Act' (1980), the 'Small Business Regulatory Enforcement Fairness Act' (1996), and the 'Truth in Regulating Act' (2000). These names are pretty much self-explanatory.

Since the end of the nineties, the (political) interest in deregulation and regulatory pressure has gradually diminished.

5.2 The administrative burden and regulatory pressure

The American discussion of regulatory pressure is primarily concerned with the administrative burden and the costs and benefits of regulation. It is furthermore concerned with the aggregate of all the costs of regulation ('regulatory costs') for the entire business community. The much-used cost-benefit analyses (see below) also apply to these total costs, and not to the costs and benefits for a single company for example. Kagan & Axelrad[167] are an exception in this regard. They consider the aggregate approach to be far too general, preferring to draw attention to the costs of regulation for individual businesses. In this sense they distinguish four types of cost incurred by businesses in relation to compliance with and enforcement of regulations:

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[166] *Compare R.L. Glicksman & S.B. Chapman, 'Regulatory Reform and (Breach of) Contract with America: Improving Environmental Policy or Destroying Environmental Protection,' Kansas Journal of Law and Public Policy, 9:11, 1996, p. 9-27.*

[167] *R. Kagan & L. Axelrad, 'Regulatory Encounters: Multinational Corporations and Adversarial Legalism,' Berkeley 2000.*

- *direct regulatory compliance costs:*
  the costs arising directly from legal obligations.
- *legal services costs:*
  the costs for legal advice and lawyers in possible law suits.
- *accountability costs:*
  the cost of analysing and reporting effects, and of showing that they are complying with the regulations.
- *opportunity costs:*
  the cost of lost opportunities caused by delays in business operations as a result of regulations.

According to Ruhl & Salzman the emphasis in most of the American literature is on two forms of regulatory burden: the 'information burden' and the 'effort burden'.

> *"The conventional view is that compliance is simply a matter of (1) investing the appropriate level of resources toward gathering the information needed to perform the tasks required to comply (information burden) and (2) performing those tasks (effort burden)."*[168]

As already mentioned, the relevant American literature tends to be dominated by criticism of the instruments used to cut back on the amount of legislation and the regulatory burden. There is also an emphasis in various places on the fact that simply cutting back on the number of rules is too simple a solution for such a complex problem. "In short, deregulation in one area often requires new regulation and oversight someplace else."[169] A telling comparison is made with the (imaginary) conversation between Mozart and Emperor Joseph II, when the composer asks the Emperor what he thinks of the opera that has just been performed.

> *The Emperor: "Well, my dear fellow, there are, in fact, only so many notes the ear can hear in the course of an evening. Your work is ingenious. It's quality work, but there are simply too many notes. That's all. Just cut a few out and it will be perfect."*
> *Mozart: "Which few did you have in mind, Majesty?"*

We will now consider the following subjects in greater detail: a) the criticism of mandatory cost-benefit analyses; b) the suggestion that greater attention should be paid to the consequences of the regulatory burden at system level; and c) the literature in the field of 'legal consciousness'.

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[168] *J.B. Ruhl & J. Salzman, 'Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State,' Georgetown Law Journal 2003, p. 763.*

[169] *Compare S. Rose-Ackerman, 'Defending the State: A Sceptical Look at 'Regulatory Reform' in the Eighties,' University of Colorado Law Review 61:517, 1990, p. 517.*

5.3 Supporters and opponents of the 'cost-benefit' state

The American Office of Management and Budget (OMB) is legally obligated to produce an annual cost-benefit analysis of all (federal) legislation:

> *"an estimate of the total annual costs and benefits (including quantifiable and nonquantifiable effects) of Federal rules and paperwork..."*[170]

These and other cost-benefit analyses of legislation play a major part in both the political and the scientific debate. Sunstein even refers to the emergence of a 'cost-benefit state' in the United States.[171] A substantial body of literature has already been written on this subject, particularly in the field of (legal) economics. Many of the contributions here originate from the AEI-Brookings Joint Center for Regulatory Studies[172] in Washington DC, led by R.W. Hahn.[173] Hahn and Hird[174] distinguish five different (economic) techniques for measuring the costs of legislation:

- Econometric studies: these typically measure market outputs directly, or use production and cost functions to assess the impact of regulatory change.
- Expenditure evaluations: these typically rely on surveys of businesses to determine compliance costs.
- Engineering approaches: these estimate the direct cost of installing equipment in order to comply with a regulation.
- Productivity studies: these estimate the difference between observed changes in productivity over time and the changes that would have occurred in the absence of a regulation.
- General equilibrium models: these are used to examine how a perfectly competitive market responds to a new policy, e.g. through a change in the levels of output or employment as a result of a new regulation.

In spite of the considerable interest in such cost-benefit analyses, no broadly accepted approach has yet been developed. Chittenden and his colleagues conclude on the basis of

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170 *Section 624, Treasury and General Government Appropriations Act 2001.*

171 *C. Sunstein, 'The Cost-Benefit State: The Future of Regulatory Protection,' Chicago: American Bar Association, 2002.*

172 *www.aei-brookings.org*

173 *See for example: R.W. Hahn & R.E. Litan, 'Counting Regulatory Benefits and Costs: Lessons for the U.S. and Europe,' Journal of International Economic Law 8, no. 2, June 2005, p. 473-508; R.W. Hahn, 'The Economic Analysis of Regulation: A Response to the Critics,' The University of Chicago Law Review 71, no. 3, Summer 2004, p. 1021-1054; R.W. Hahn & R. Malik, 'Is Regulation Good for You?,' Harvard Journal of Law and Public Policy 27, no. 3, October 2004, p. 893-916; R.W. Hahn & E.M. Layburn, 'Tracking the Value of Regulation,' Regulation 26, no. 3, Fall 2003, p 16-21; R.W. Hahn & C. R. Sunstein, 'A New Executive Order for Improving Federal Regulation: Deeper and Wider Cost-benefit analysis,' University of Pennsylvania Law Review 150, May 2002, p. 1489-1552.*

174 *R.W. Hahn & J.A. Hird, 'The Costs and Benefits of Regulation: Review and Synthesis,' Yale Journal on Regulation 1991/8, p. 223-278.*

a comprehensive study of the American literature in this field as follows:

> *"There is a large degree of uncertainty among academics and agencies about questions concerning costs and benefits of regulations... As a result there is a great deal of uncertainty surrounding the validity of the results."*[175]

The use of these and other forms of economic analysis to analyse legislation is criticised in other places. Some of these critics (most from jurisprudence circles) have joined forces in the Center for Progressive Reform.[176] In one contribution appropriately entitled 'Pricing the Priceless' they point to several problems with such analyses (when used to evaluate environmental policy for example):

> *"Cost-benefit analysis is a deeply flawed method that repeatedly leads to biased and misleading results. Far from providing a panacea, cost-benefit analysis offers no clear advantages in making regulatory policy decisions and often produces inferior results, in terms of both environmental protection and overall social welfare, compared to other approaches."*[177]

Another criticism is relates to the excessive standardisation of cost-benefit analyses ('one size fits all').

> *"A cost-benefit requirement that is rationally related to the achievement of efficient regulation in the context of one regulatory program may be counterproductive in another context."*[178]

We also hear doubts expressed from many different quarters as to whether it is possible for this type of analysis to take all the relevant costs and benefits into account. In spite of assertions about 'hard' objective figures, there is in practice an important subjective side to many of the figures. And in relation to environmental legislation, there are calls for explicit attention to the non-economic objectives and benefits of such legislation as well. Cost-benefit analyses are furthermore limited to individual laws. A proper balance may be possible between the costs and the benefits associated with one specific law, but most companies are in fact confronted by a combination of laws. Taken in combination, these laws may produce far greater costs than anticipated. Finally, Thornton, Cunningham & Kagan emphasise the importance of looking at how individual companies experience the costs and benefits of legislation.[179] Large companies are probably better equipped than

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175 *F. Chittenden, S. Kauser & P. Poutziouris, 'Regulatory Burdens of Small Business: A Literature Review' (DTI Small Business Service research series) 2002, p. 59.*

176 *www.progressiveregulation.org*

177 *L. Heinzerling & F. Ackerman, 'Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection' (Georgetown Environmental Law and Policy Institute; Georgetown University Law Center) 2002, p. 1.*

178 *Glicksman & Chapman op. cit., p. 27.*

179 *D. Thornton, N.A. Cunningham & R.A. Kagan, 'General Deterrence and Corporate Environmental Behavior, Law & Policy' (special issue Regulation and Business Behaviour), 2005/2, p. 262-288.*

small ones to cope with numerous regulations because of economies of scale.

In response to this criticism, Hahn recently wrote a book called In Defense of the Economic Analysis of Regulation.[180]

5.4 The regulatory burden at system level

According to Ruhl & Salzman the existing literature, which as we said before is primarily concerned with 'information' and 'effort' burdens, is too limited. In order to truly understand the social effects of legislation, they say that we should also carefully examine the 'system burden' that is created. Ruhl & Salzman observe that although many people assert that there are too many regulations, the circumstances behind such assertions have hardly ever been examined in a systematic way:

> *"As easy as it is to find quips in the literature decrying the accumulation of "too many rules," one searches in vain for principled analysis of the problem and its solutions."*[181]

They therefore call for greater attention to the phenomenon of "regulatory accretion"; "an increase by natural growth or by gradual external addition." When individual regulations which work perfectly efficiently by themselves are added together, they may in fact result in a regulatory system which is very inefficient. In other words the whole is greater than the sum of the parts; "doubling the number of rules may more than double the effort needed to ensure compliance". Such effects at system level may mean that individual regulations are scarcely complied with, if at all:

> *"regulatory accretion, even of rules that are perfectly efficient, clear, and institutionally valid, increases non-compliance by changing the very quality of the operation of the regulatory system."*

Their analysis is supported by (among other things) the results of a small-scale survey among environmental lawyers. When asked to give the most important reason for 'involuntary compliance' among companies, most of the respondents pointed to the enormous number of regulations as the most important factor. The costs of compliance with regulations may be widely discussed in the literature, but for the respondents in this survey this was the factor pointed to least.

According to Rull & Salzman the 'system burden' of regulations also has major consequences for the legitimacy of the law. In the first place, as a result of these system effects it is not clear to individual companies how their actions can contribute to an easing of the regulatory burden. After a while this may cause many companies to ask themselves

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[180] *R.W. Hahn, 'In Defense of the Economic Analysis of Regulation,' Washington DC, 2005.*

[181] *Ruhl & Salzman, op. cit., p. 762.*

whether it still makes sense to abide by the rules and procedures:

> *"Eventually, when the good apples feel that, regardless of effort, they are "hitting their heads against the wall" and "throwing good money away" because they cannot improve compliance performance, they may begin to wonder what the point is of being good apples."*[182]

System effects also imply that it is increasingly difficult to achieve the desired effects by means of legislation and regulations. This too puts the legitimacy of the regulations under pressure.

Ruhl & Salzman point out that as a result of these system effects, the solution to an excessive regulatory burden does not lie in reducing the number of regulations by itself. They describe the situation in terms of the following paradox:

> *"As the number of administrative rules increases, the government's ability to foster compliance and increase payoff becomes more limited. The solution, however, is not to tinker with the number of rules. The solution is to change the structure of the regulatory system within which the rules operate."*[182]

In other words they look for a solution in the system itself. Solutions should not be sought at the level of individual regulations, regulation-makers and persons holding legal rights, but at the level of the system. They make a number of concrete suggestions on how to do this, which they refer to under the collective label of 'regulatory re-invention':

> *"Ultimately, regulatory policy must reflect an understanding that regulation operates as a system, that regulated parties operate as systems, and that the systems interact."*[183]

5.5 Legal consciousness: the perception of law and regulations

The regulatory burden and the costs and benefits of legislation are the most common themes in the American regulation literature. Parallel to these however, but without any apparent connection, there is also an ongoing development of the theme of 'legal consciousness' in the sociology of law literature. This includes, following a very general definition, research
into:

> *"all the ideas about the nature, function and operation of law held by anyone in society at a given time."*[185]

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[182] *Ruhl & Salzman, op. cit., p. 826.*

[183] *Ruhl & Salzman, op. cit., p. 850.*

[184] *Ruhl & Salzman, op. cit., p. 840.*

[185] *D. Trubek, 'Where the action is: critical legal studies and empiricism,' Stanford Law Review 1984/36, p. 575.*

This literature addresses such questions as: To what extent are statutory provisions actually known about, not only in legal codes and by specialised lawyers but also in daily practice among the people for whom the laws are intended? This type of research goes in two directions: a) research into 'aptitude, competence or awareness of law'; and b) research into 'perceptions or images of law'. American research into 'legal consciousness' began in the nineteen seventies. After a period of relative quiet, it has once again become a subject of great interest not only in the US but also in Europe.[186]

American research in the seventies often involved the use of large-scale surveys among the population. In the so-called KOL survey (Knowledge and Opinion about Law) it is primarily public knowledge and public opinion about law which is the central concern.[187] Here the public attitude to law is seen as a measurable entity, which can be compared to the official policy objectives for example. According to some researchers their work can also be used to predict criminal behaviour. 'Strong legal consciousness' is seen as indicating a high degree of compliance, whereas 'weak legal consciousness' is in fact an indicator of criminality. Generally speaking, it appears from this type of research that many people are poorly informed about the regulations that are applicable to them, and that there is wide variation in their opinions about the law.

More recent research into 'legal consciousness' is mostly based on long-term observation and in-depth interviews. Unlike the KOL survey, here the legal system is no longer seen as something influencing society from the outside (law and society) but as an important part of that society itself. 'To understand law is to understand the processes of interaction associated with the idea of 'law'.' The emphasis in this new interpretation of legal consciousness is therefore mostly on: 'images of laws and legal institutions that people carry around in their heads and occasionally act upon.'

Three examples

In her book Getting Justice and Getting Even, Sally Engle Merry looks at: Legal Consciousness among Working-Class Americans, including such things as the images and expectations people have when it comes to the administration of justice and the way the courts respond.[188] Whereas the (American) courts like to refer many relatively simple cases on to an arbitrator, the persons concerned certainly do not always feel the same way, generally preferring a 'real' court to examine their cases.

In her article 'Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment' Laura Beth Nielsen examines what the public

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186 *For a recent overview (and a comprehensive bibliography) see S. Silbey, 'After Legal Consciousness,' Annual Review of Law and Social Science 1, 2005, p. 323-368. M. Hertogh,' A 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich.' Journal of Law and Society 4, 2004, p. 457-481.*

187 *See for example: A. Podgorecki et al, 'Knowledge and Opinion about Law,' London 1973.*

188 *S.E. Merry, 'Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans,' Chicago 1990.*

thinks about public insults and possible regulations in this area.[189] Observation and interviews in three neighbourhoods in California show that there are widely diverging opinions on this matter between men and women and between different ethnic groups. Most respondents are against statutory regulation of such insults, but the 'discourses' in which they present their arguments tend to vary greatly.

The most elaborate – and most influential – theoretical treatment of 'legal consciousness' is the work of Ewick and Silbey.[190] For their book The Common Place of Law: Stories from Everyday Life they interviewed more than 400 inhabitants of New Jersey about the role of law in their daily lives. On the basis of this material they distinguish three idealised types (Figure 5.1). Some people are before the law; they look up to the law and are convinced of its value. Others are best described as with the law; these people see the law as a game and use it as it suits them. Finally there is a group which is against the law; these do not believe in the legitimacy of the law and use every possible method to resist it. For a proper understanding of their approach it should be emphasised that Ewick and Silbey are not describing three distinct groups of people, but rather three different types of narrative about the law. A particular person may therefore possibly be described as 'before the law' in a certain area (with respect to criminal law for example), but as 'against the law' in some other area (tax law for example).

Figure 5.1 Three forms of 'legal consciousness' [191]

	BEFORE THE LAW	**WITH THE LAW**	**AGAINST THE LAW**
Normativity	Impartiality, objectivity	Legitimate partiality, selfinterest	Power, 'might makes right'
Constraint	Organizational structure	Contingency, closure	Institutional visibility
Capacity	Rules, formal organization	Individual resources, experiences, skill	Social structures (roles, rules, hierarchy)
Time/Space	Separate sphere from everyday	Simultaneous with everyday	Colonizing time/space of everyday life
Archetype	Bureaucracy	Game	Making do

[189] *L.B. Nielsen, 'Situating legal consciousness: experiences and attitudes of ordinary citizens about law and street harassment,' Law and Society Review, 2000/ 34, p. 1055-1089.*

[190] *P. Ewick & S. Silbey, 'The Common Place of Law: Stories from Everyday Life,' Chicago 1998.*

[191] *Ewick & Silbey, op. cit., p. 224.*

5.6 Conclusion

In much of the American literature on regulatory pressure (the 'regulatory burden') that was examined, the contrast between the supporters and opponents of an economic approach to regulation is a central theme. In that debate the political contrasts also play an important role, as is evident from the polemic between researchers of the AEI-Brookings Joint Center for Regulatory Studies and those of the Center for Progressive Reform. There is extensive treatment of the application of cost-benefit analyses to regulation in the American legal economics literature. This has not led to a scientific consensus about the right methods and techniques for such analysis however. Often the literature draws our attention to important shortcomings in this economic approach to regulation. One proposed alternative is to draw a clearer distinction between large and small companies when calculating the costs and benefits of new legislation, and also to explicitly examine the possibility that even when an individual law does not appear to create any extra regulatory burden, the combined effect of several different laws may well do so (the 'system burden'). Parallel to the literature about regulations, there is a growing interest in the theme of 'legal consciousness' in the American sociology of law literature .

Chapter 6. Regulatory pressure in the European Union

6.1 Introduction

The phenomenon of regulatory pressure certainly plays an important role at the European level, although it is referred to more in policy documents and reports by groups of experts etc.[192] than it is in the academic literature on European law.[193] Recently for example the European Commission created an Internet site which can be consulted by companies and other interested parties in relation to Community regulations that lead to unnecessary bureaucracy and unnecessary administrative burdens.[194] European Commission president Barosso said:

> *"We are keen to hear which rules need to be simplified because they stand in the way of sustainable growth, deter business investment or hinder job creation. This Commission has already come a long way to improve the regulatory environment. We have strengthened the consultation procedures, new legal proposals have to be subject to a rigid impact assessment and we are screening existing proposals and laws for its effectiveness."*[195]

This quotation from Barosso calls to mind the Dutch debate about deregulation sparked off by (among others) the Economic Affairs Council (REA). However, at the European level the concept of deregulation is never about de-bureaucratisation or reducing regulatory pressure. The term 'deregulation' is mainly reserved for the liberalisation of markets (energy, Postal Services, telecom companies etc). Whatever we may like to call it, the socio-economic approach seems to be fairly dominant at present, both at the national and the Community level. One central concern is the alleged negative effect of regulation on the business climate and economic growth. Much less is said however about the fact that legislation can also lead to a reduction in decision-making costs for the business community, and less uncertainty (in the market). The same applies mutatis mutandis to other possible positive effects of the harmonisation of national legislation, such as monitoring to ensure a 'level playing field' for business.[196]

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192 *Compare the 'Rapport Public du Conseil d'Etat français. Considérations générales sur le droit communautaire', 1992, Etudes & Documents no. 44, the Molitor report (COM(95)288, 21 June 1995, the Mandelkern report, Better regulation, Brussels 2001, the report of the Anglo-German Deregulation Group, 'Deregulation Now,' 1995; the UNICE regulatory report 1995, and the Koopmans report about the quality of European legislation, 'Kwaliteit van EG-wetgeving,' Ministry of Justice 1995.*

193 *The mutual proximity of the literature and policy in such articles as: Andrea Mészáros, 'New challenges in the EU lawmaking,' European Integration Studies, Miskolc, Volume 3. Number 1, 2004, pp. 19-24.*

194 *http://europa.eu.int/yourvoice/consultations.*

195 *European Commission press report of 8 June 2005, IP 05/693.*

196 *The one-sided interest in the limiting effect of the 'Dienstenrichtlijn' (Services directive) on national competitiveness is illustrative in this regard, even though this directive is actually intended to remove obstacles restricting the ability of companies to compete.*

What makes the discussion of regulatory pressure in the European context even more complicated is the fact that there is no clear demarcation with respect to the quantity and complexity of regulations at the European level and the influence of the national legislator. After all, there is no such thing as the European legislator. European legislation is always a matter of co-actorship since national parliaments and governments also take part in the creation of European regulations, through their national contributions in the Council of Ministers for example.[197] The Community legislative agenda is also partly fed by initiatives from the member states (these play an important role as part of the 'third cornerstone' in particular). And during the translation of European legislation to national law by member state legislators, a review of adjacent national regulation is often included. This practice, which is for the rest contrary to the 'Aanwijzingen voor de regelgeving' (Directions for regulation)[198], not only means that the period for implementation is sometimes unnecessarily exceeded, but also that it is difficult (for that reason alone) to distinguish what the European influence on the national growth of regulatory pressure actually is. For these and other reasons the figures about the (quantitative) contribution of European regulation production to the total stock of Dutch regulations vary.

We are nevertheless able to discern a number of recurring themes in the European debate on regulatory pressure. The most important of these are:

- the role of the subsidiarity principle in preventing superfluous regulations;
- the positioning of reduction and simplification of regulations and de-bureaucratisation inside the Community legislative quality policy;
- the above-mentioned emergence of regulatory impact assessments;
- the growing interest in various forms of co-regulation and self-regulation.[199]

Issues concerning the nature and intensity of the implementation and enforcement of European regulations are also of course important in relation to the increase or decrease of regulatory pressure at national level. This approach is beyond the scope of the present chapter however, and will therefore not be considered further here.[200]

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197 *E.M.H. Hirsch Ballin and L.A.J. Senden, 'Co-actorship in the Development of European Lawmaking,' TMC Asser press, The Hague 2005.*

198 *Compare Awr 337, which reads: "Bij implementatie worden in de implementatieregeling geen andere regels opgenomen dan voor de implementatie noodzakelijk zijn."*

199 *For a summary of initiatives in relation to co-regulation and self-regulation see the EECS Pamphlet series, 'The current state of co-regulation and self-regulation in the single market,' Brussel 2005.*

200 *For the sake of simplicity we refer the reader here to just two works on this topic, namely: B. Steunenberg and W. Voermans in collaboration with B. Berglund, A. Dimitrova, M. Kaeding, E. Mastenbroek, A. Meuwese and M. Romeijn: 'De omzetting van Europese richtlijnen: instrumenten, technieken en processen in zes lidstaten vergeleken,' WODC, The Hague 2005 and: A. van den Brink, 'Regelgeving in Nederland ter implementatie van EU-recht,' Deventer: Kluwer 2004.*

6.2 Subsidiarity: an old theme

In the European context the subsidiarity principle was discussed with increasing frequency from the early nineties on. This was partly due to the concerns of many member states about the expanding powers of the EU. The subsidiarity principle is traditionally brought to bear in this context, since its original purpose was to ensure that the EU should not assume any of the powers which rightly belong to the member states. After the Treaty of Maastricht a second dimension was added to the principle, namely that decisions inside the EU should be taken as close as possible to citizen.

Over-regulation and subsidiarity

Complaints about European over-regulation are certainly not new either. As early as 1996 the European Parliament (subsequent to the publication of the Molito report) issued a resolution proposing that all future legislative proposals at the Community level should be assessed in accordance with a number of criteria, such as: a) is intervention necessary or can the problem be left to self-regulation or some other managerial mechanism? b) what other possible courses of action are available, and at what level (EC or member state) should intervention take place? Is issuing European legislation the only option, and if so, should such intervention take the form of an EC regulation ('verordening') or is a directive ('richtlijn') sufficient? c) what are the costs and benefits of a new regulation?[201] A protocol was subsequently added to the Treaty of Amsterdam concerning application of the subsidiarity principle and the proportionality principle.[202] This implies that for each European legislative decision an assessment must be carried out to see whether legislation at the European level is necessary. Three criteria would be decisive in this, namely:

- the issue in question must have trans-national aspects which cannot be satisfactorily regulated by an action of the member states;
- action by the member states on their own, or a failure of the Community to act, would be contrary to provisions of the Treaty (such as the need to combat unfair competition, or avoid concealed restrictions to trade, or strengthen social cohesion) or would substantially damage the interests of the member states in some other way;
- action at the Community level would produce clear benefits in comparison to national action due to the scale or consequences thereof.

Subsidiarity without blocking powers?

In practice the subsidiarity test produced very few results. There are two main reasons for this. First of all the (legal) status of the subsidiarity principle is not clear. It is true that the EU may only intervene if the action of separate member states is not sufficient to realise a particular policy objective, but the central concepts of Article 5 subsection 2 of the EC treaty

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[201] *Resolution based on the report of the group of independent experts concerning simplification of legal and administrative regulations of the Community, COM(1995), 288.*

[202] *Treaty of Amsterdam, Pb C 340 of 10 November 1997. See http://europa.eu.int/eurlex/ lex/nl/treaties/dat/11997D/htm/ 11997D.html#0105010010.*

are so vague and open to interpretation that they cannot raise any real barriers to the creation of superfluous European regulations.[203] In practice, the test to see whether or not the principle is complied with is primarily a procedural one. It loses itself in such issues as the authority of the institutions to intervene in a particular case, and arguments for legislative action in terms of effectiveness and proportionality. As long as it is clear that the subsidiarity principle has not been ignored, there is usually not much to worry about. The European Court of Justice will not assess the content of proposals for a new EC regulation or directive, for example, to see whether they are contrary to the spirit of the principle. If it did take such a step, the court would be straying too far into the realm of politics.[204]

Secondly, it is important that the subsidiarity test be carried out by the European institutions themselves in the present constellation, and not (or at least only indirectly) by the member states.[205] In a certain sense we could say here that the legislator is 'biased'. We may fairly assume, after all, that the institutions themselves will be less likely than the member states to find that a European initiative to regulate a particular area is superfluous, or that it would be better not to deal with the material concerned at the Community level. It is precisely in relation to this point that the Treaty establishing a Constitution for Europe (European Constitution) would apparently have strengthened the position of the member states. According to Article 1-11 third subsection of the European Constitution, the institutions of the Union after all apply the subsidiarity principle in accordance with a protocol concerning the principles of subsidiarity and proportionality appended to the treaty. The Article continues: 'The national parliaments ensure that the principle is honoured in accordance with the procedure laid down in that protocol.'

The subsidiarity protocol to the European Constitution

The question is whether or not the new protocol to the European Constitution would give national parliaments effective blocking powers to combat progressive undermining of the primacy of the member state legislator(s) by the EU.

The arrangement in itself is a relatively simple one. The basic idea is that the European Commission should send legislative proposals and amended proposals to the national parliaments at the same time as they send them to the Council of Ministers and the European Parliament, complete with explanatory notes on subsidiarity (necessity) and proportionality.[206] Subsequently, within six weeks of these being sent, each parliament – or in the case of a two-chamber system, each chamber – can send a recommendation to the

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[203] *Art. 5 EC treaty determines that the Community may only intervene if and to the extent that: "the objectives of the action under consideration cannot adequately be realised by the member states and therefore, considering the scope or the consequences of the action under consideration, would be better realised by the Community."*

[204] *See the previous work on this by V.J.J.M. Bekkers, H.T.P.M. van den Hurk and G. Leenknegt, 'Subsidiariteit en Europese integratie,' Zwolle 1995, p. 174-175.*

[205] *Through national representation in the Council of Ministers for example.*

[206] *See also in this regard the 'Protocol betreffende de rol van de nationale parlementen in de Europese Unie PbC 310/204' of 16 December 2004.*

chairmen of the European Parliament, the Council of Ministers and the Commission, stating why the legislative proposal is not in keeping with the subsidiarity principle. The European institutions to whom the recommendation is addressed must then, according to the protocol, 'take this recommendation into account'. So it is also possible that the advice will not be followed, provided adequate reasons are given for not doing so.

According to Article 7 of the Protocol however, the Commission will have to reconsider its proposal if said recommendations represent at least one third of the votes of the national parliaments – the threshold in the EU of 25 member states is therefore normally obtained with 17 votes since each parliament has two votes.[207] If the Commission decides to uphold the proposal in spite of the 'yellow card' from the member states, then the member states may lodge an appeal with the European Court of Justice in accordance with Article 8 of the Protocol. This court may finally issue the 'red card' and determine that the legislative act may not proceed.

Although on paper the subsidiarity protocol seems to suggest a clear strengthening of the position of the national parliaments, there is still some doubt as to whether it will prove to be so in practice. It appears namely from the recommendation on the parliamentary handling of European legislative proposals of the Mixed Commission for the Application of Subsidiarity that there are still quite a few snags.[208] One interesting question for example is whether national parliaments may resort to the European Court of Justice without the mediation of their governments. The European Convention has not laid down any measures on this question, since it is regarded as a matter for the member states. It clearly makes quite a difference however whether the government is only a middleman in procedures relating to breaches of the subsidiarity principle or whether it has a moment when it can make an independent assessment of its own in relation to the decision to submit an appeal![209] Taking this line of thought a step further, it is also an interesting question as to what is supposed to happen if the two Chambers of the States General are not in agreement about the acceptability of a European legislative proposal. In such an event, what could be done to prevent a situation arising where the Netherlands speaks to the European legislator with two different voices? If we gave the government an important 'mediating or even arbitrating' role on this point, this too could easily infringe the protocol's aim of strengthening of the influence of the national parliaments.

Another threshold for the actual ability to exercise blocking power during the creation of European legislation under the European Constitution is the time allowed for national

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[207] *For legislative acts on the grounds of Art. III-264 this is one quarter of the votes (i.e. at least 13 votes against the legislative act as drafted).*

[208] *The recommendation can be found via: http://www.europapoort.nl/. See the theme page: 'Gemengde Commissie Toepassing Subsidiariteit.'*

[209] *A motion submitted in both the first and second chambers arguing that national parliaments should have independent access to the European Ministry of Justice when it comes to assessing European legislative proposals for agreement with the subsidiarity principle. See EK 2003-2004, 28 473, no. 158f and TK 2003-2004, 28 473, no. 12.*

parliaments to co-ordinate their actions. According to Article 6 of the protocol, this time is very short. It will often be a far from simple matter to get at least 17 national parliaments to reach agreement in the six weeks allowed from the moment of sending (not receipt) of a Community legislative proposal.[210] We may reasonably anticipate, after all, that a certain amount of diplomatic negotiation will be needed to bring one third of the member states in line, all the more so considering that among the EU members, there will almost always be some who support the legislative action concerned and will want to make their political influence felt.

Finally the question arises whether the European Court of Justice under the regime of the European Constitution will be more reluctant when it comes to testing against the subsidiarity principle.[211] In a certain sense the European subsidiarity test will continue to be comparable to the necessity test which we also have in our national Directions for legislation. Direction 6 states that it will only be decided to adopt a new regulation if the necessity thereof has been firmly established. It is no coincidence that this and other Directions do not include any assessment criteria for the courts.[212] Direction 6 after all assumes the pre-eminence of politics and policy. The Dutch courts therefore adopt a reluctant attitude in this regard. It is not easy to see why in the future anything different should apply to the European Court of Justice when it comes to assessing the necessity of European legislation.

The future of the subsidiarity test

Following the outcomes of the French and Dutch referenda on the European Constitution, the future of the subsidiarity protocol has also become uncertain. The next steps to be taken will only become clear after the IGC (Intergovernmental Conference) of June 2006. This did not stop the national parliaments carrying out an experiment on the feasibility of implementing the subsidiarity protocol in March and April of 2005.. The participating parliaments subsequently discussed and evaluated their experiences in the COSAC (the conference of members of the European Parliament and members of the committees for European Affairs from the national parliaments). In spite of the fact that the subsidiarity test was still found to have a number of flaws, it soon became clear that there was a general commitment to its continuation, irrespective of the future of the European Constitution. The basis for this is now being sought in the above-mentioned subsidiarity protocol to the Treaty of Amsterdam. In connection with COSAC, a 'wish list' of new Community legislative proposals was drawn up based on the annual work programme of the European

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210 *For this and other possible traps and pitfalls in the subsidiarity protocol see the expert assessment by Profs. C.A.J.M. Kortmann and L.A. Geelhoed appended to the recommendation of the Mixed Parliamentary Committee.*

211 *See p. 32 of the recommendation by Geelhoed referred to in the previous footnote, where he lists a series of statements which demonstrate this reluctance.*

212 *Compare the explanatory notes to the decree establishing the (first) Directions for legislation, Dutch Government Gazette 1992, 230. These state that: "The Directions have no independent binding power. Third parties may not derive any rights from the Directions in themselves. In any appeal procedure, the content of a Direction could at best only be significant as a supplementary argument."*

Commission, to be subjected to a subsidiarity test in 2006.
In the Dutch parliament the subsidiarity test was carried out by the subsidiarity-test temporary committee consisting of members of the first and second chambers. At the end of 2005 this committee drew up a list of eleven proposals selected from the work programme of the Commission to be checked for subsidiarity.[213] In other words it looks as though the subsidiarity test will be maintained irrespective of the future of the European Constitution.

6.3 Quality of legislation and reducing the number of regulations

Focus on legislative technique
There have been clear parallels between the growing attention to the subsidiarity principle and the agenda for a European legislative quality policy since the Intergovernmental Conference in Edinburgh in 1992. One of the outcomes of that conference was the agreed necessity felt by heads of government for making the existing EU legislation simpler and more accessible. One way of achieving this would be to develop a guiding principle for the drawing up of Community regulations and an editorial assessment of new Commission proposals in particular.[214]

At first it looked as though this heightened attention to legislative quality would remain a primarily technical operation. The legal service of the Council of Ministers was asked, for example, to suggest ways of improving the editorial quality of European legislation. However it soon became apparent that this was not producing sufficient results. This is not so surprising, considering that in the initial stages there seemed to be a somewhat naive conception of the European legislative process. Sometimes for example, technical legislative solutions were proposed to tackle problems of a fundamental nature such as vague language in Community legislation (due at least in part to the compromises of much harmonisation legislation) which are not directly comparable to legislative problems in a national context. Tjeenk Willink pointed out in this connection that the object and function of European and national legislation often differ. Whereas the efforts of the national legislator are consistently aimed at solving collectively experienced problems in a uniform way, the efforts of the Community legislator are far more concerned with marking out the space for different national solutions.[215]

Actions to simplify and reduce regulations
Several deregulation initiatives followed, including the so-called Molito report, on the basis of which the European Parliament issued a resolution in 1996 proposing that all future legislative proposals at the Community level should forthwith be assessed in accordance

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213 *See the document 'Subsidiariteit en proportionaliteit' at: www.europadecentraal.nl.*

214 *See § 1.28 of the European Council of Edinburgh, Bulletin of the European Communities 1992/12.*

215 *H.D. Tjeenk-Willink, 'Toetsing van wetsvoorstellen aan EU-regelgeving,' in G.J.M. Corstens, W.J.M. Davids & M.I. Veldt-Foglia, 'Europeanisering van Nederlands recht,' Deventer 2004, p. 78.*

with a number of criteria, such as: a) is intervention necessary or can the solution to the problem be left to self-regulation or some other form of 'soft' law?[216] b) what actions are possible, and at what level (EC or member states) should intervention take place? Is issuing European legislation the only option, and if so, should such intervention take the form of an EC regulation or is a directive sufficient? c) what are the costs and benefits of a new regulation?[217] The Molito report was followed by various recommendations, all concerning the reduction of burdensome regulations for the business community, none of which appear to have had any effect.[218]

The theme of legislative quality has been placed higher on the political agenda particularly by the white paper on Governance and the action plan of the Commission for the simplification and improvement of regulations, and interest seems to have deepened since. The white paper discusses the mutually connected subjects of reducing the obstructive complexities of the European legislative process, improving and institutionalising legislative consultation (ex ante evaluation), strengthening consultation with citizens and businesses about intended sets of regulations, and the importance of focusing more on alternatives to (and within) legislation such as co-regulation and self-regulation.[219]

The action plan announced a package of measures to be taken by the Commission, the Council, the European Parliament and the member states. The most important of these were: the introduction of a procedure for ex ante impact assessment of intended regulations whereby the economic, environmental and social effects would be mapped out[220]; ex post evaluation of existing EC regulations; and the introduction of minimum standards for consultation with interested parties aimed at increasing the transparency of European legislative proposals and setting time limits.[221]

Same moves being repeated?

In the action plan for simplification and reduction of regulations, the European Commission seems to have decided to throw off the stigma of compulsive regulation and regulation proliferation, as Voermans had also observed earlier.[222] In the action plan, the ambition is expressed to reduce some 80,000 pages of Community legislation by about 25%. Unlike Voermans, we do not infer from the announcement from the Commission in 2005 entitled 'Betere regelgeving met het oog op economische groei en meer banen in de

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216 *L. Senden, 'Soft Law in European Community Law,' Oxford: Hart Publishing 2004.*

217 *Resolution on the report of the group of independent experts concerning simplification of statutory and administrative regulations of the Community, COM(1995), 288.*

218 *See for example: 'Simpler Legislation in the Internal Market,' COM(96)204 def.*

219 *COM(2001)428 def.*

220 *COM (2002) 276 def.*

221 *COM (2002)277 def.*

222 *W. Voermans and D. van Berkel, 'Beter wetgeven in Europa: het nieuwe Interinstitutioneel Akkoord Beter wetgeven 2003,' RegelMaat 2005/3, p. 90.*

Europese Unie' (Better regulation with a view to economic growth and more jobs in the European Union) that great progress had been made up to that point![223] What is striking here, as is also remarked on the card sent by the State Secretary for European Affairs to the Dutch Second Chamber about that communication, is that the announcement is in fact a 're-launch' of the action plan from 2002. No more than a few new elements have been added. The card summarises the content of the announcement as follows:

- simplification of existing legislation: the Commission will set about doing this more systematically, using input from stakeholders and action plans per sector;
- impact assessments: the Commission will investigate economic aspects in greater depth and improve the quality control of impact assessments;
- screening of old Commission proposals still under consideration by the European Parliament or Council: the Commission will re-assess these in relation to competitiveness, and withdraw them if necessary;
- strengthening of national action: the Commission recommends that member states who are not yet doing so should develop impact assessments and a simplification programme, and wants this to be a part of the national Lisbon action plans; progress is to be monitored using indicators.[224] Separate work groups and networks are to be set up for this purpose, including a 'group of high-level national regulatory experts' to advise the Commission about better regulation (European and national);
- exercising greater influence on national regulation through intensified use of the procedure from directive 98/34/EC and the infringement procedures.[225]

In the annex to this announcement the Commission indicates the desirability of investigating and devoting greater attention to the evaluation and calculation of the administrative burden inside the European legislative process. In 2005 the Commission, working in co-operation with the member states, will test and complete a methodology for calculating the administrative burden in existing and new European legislation. Its final shape will be determined through pilot schemes which will help to ascertain the ease of implementation of such a European methodology. It is notable here that the EU methodology will be partly based on the Dutch methodology for calculating the administrative burden.[226]

Preliminary conclusion

Many of the legislative problems identified in the literature at the European level have not

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[223] *COM(2005)97 def.*

[224] *The Lisbon programme looks to strengthen economic growth and create more job opportunities inside the European Union. See COM(2005) 330 def.*

[225] *Directive 98/34/EC obliges the member states to give notification of every design for new technical regulations related to products and services of the information community in areas that are not yet harmonised. The intention is to avoid introducing new obstacles to the internal market in these sectors. It is also the intention that the scope of this directive should be extended to include other sectors.*

[226] *TK 2004-2005, 22,112, no. 370, p. 11.*

yet been solved. These are, to name just a few: lack of cohesion between sector directives, and the same with respect to regulations on related topics (in the environmental field for example, directives concerning the integrated approach to the environmentally harmful consequences of large industrial plants versus sector legislation relating to air quality, waste products, external safety etc.); the vague distinction between EC directives and EC regulations[227]; the frequent use of open standards and loosely defined concepts without explanatory notes; the inadequate hierarchy of codes and standards and the unclear status of resolutions, announcements, instructions, circulars etc.[228]; the lack of properly updated official codification of the texts of European legislation; the above-mentioned inconsistent treatment of the subsidiarity principle, problems of implementation and enforcability[229]; technical legal shortcomings such as lack of transitional law; excessive readiness to apply directives retrospectively, and in some cases an implementation period which is far too short.[230]

The main causes of these problems are also largely known. These relate in part to the lack of a collective legislative tradition, or are a consequence of complex decision-making procedures and political negotiation processes.[231]

We also see double standards in legislative policy. State Secretary Nicolaï points out that member states themselves often insist on detailed regulations, because they want their own exceptions to the rule to be included in (for example) a particular EC directive or regulation.[232] Heads of government congratulate themselves when the measures turn out

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227 *This is manifested in (among other things) the fact that: 1) the choice of a directive or regulation sometimes has little to do with the material content or the desired degree of harmonisation, and more to do with political opportunity; 2) direct application is increasingly being granted by the courts to the provisions of EU directives; and 3) the fact that directly applicable provisions from directives in a triangular relationship can also create obligations for private parties. On this last point see for example S. Belhaj and B. Hessel, 'De rol van de decentrale overheden bij met EG-richtlijnen strijdige nationale wetgeving: enkele beschouwingen over driehoeksverhoudingen, rechtstreekse werking, richtlijnconforme interpretatie en het arrest Wells,' RegelMaat, 2005/1, p. 23–34.*

228 *Illustrative in relation to the hierarchy of standards is the contribution of R. Barents, 'Een grondwet voor Europa (IV): Besluiten en besluitvorming,' NTER 2004/12, p. 352-359.*

229 *W. Voermans, Ph. Eijlander, R. van Gestel, I. de Leeuw, A. de Moor-van Vugt and S. Prechal, 'Kwaliteit, uitvoerbaarheid en handhaafbaarheid. Een onderzoek naar de kwaliteit van EG-regels en de gevolgen daarvan voor de uitvoering en handhaving binnen Nederland,' Study ordered by the Dutch Ministry of Justice, The Hague 2000.*

230 *See for example W. Voermans, 'Nieuwe wetgevingsprocedures en regelingsinstrumenten voor de EU,' RegelMaat 2001/6, p. 204-215. Werkgroep Koopmans, 'De kwaliteit van EG-regelgeving, Rapport aan de Minister van Justitie,' The Hague 1995, p. 7 ff. On the problems of language and translation, and the application of directives to legislative technique, see for example (op. cit.) R. Wägenbaur, 'European Union legislation,' in: U. Karpen (ed.), 'Legislation in European Countries,' Baden-Baden 1996, p. 15 ff.*

231 *Among others on this subject: B.J. Drijber, 'Nederland en de Europese regelgeving gezien door een insider op afstand: de PermanenteVertegenwoordiging,' RegelMaat 2001/1, m.n., p. 29-30.*

232 *There is some mention of 'droit diplomatique.' See C.W.A. Timmermans, 'How to improve the quality of Community legislation: the viewpoint of the European Commission,' in A.E. Kellerman et al, 'Improving the quality of legislation in Europe,' The Hague 1998, p. 41.*

unexpectedly to be a success, but are equally quick to blame Europe when the measure in question fails,[233] even if this is the result of faulty implementation or insufficient effort from the member states in relation to supervision and enforcement. Another important reason for the existence of legislative problems is the lack (until a short time ago) of structured attention to ex ante evaluation of legislation.[234]

6.4 Impact assessments

The existence of impact assessments is not completely new at the European level either.[235] Since 2002 however the Commission has switched to a more integrated approach to ex ante evaluation, whereby for example economic aspects (including employment), environmental and gender effects are all taken into account. In the first announcement about impact assessment the Commission itself said:

> *"The new impact assessment method integrates all sector assessments of the direct and indirect consequences of a proposed measure in an all-inclusive instrument, and thereby abandons the present situation of several partial and sector assessments."*[236]

Reading further in the announcement however, we see that the impact assessment focuses primarily on the cost-effectiveness of policy intentions and proposals for legislation. But whereas in 2003 and 2004 it was a matter of gaining experience with impact assessments by means of a pilot project, the situation from 2005 onwards was that all legislative initiatives and other important policy plans from the work programme of the Commission were to be subject to an impact assessment.[237]

Directives for execution of RIAs

In June 2005 the Commission drew up new detailed directives for the execution of impact assessments, intended for officials of the Commission.[238] In these it is stated however that the severity of the ex ante evaluation to be carried out may vary, depending on the nature of

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233 *Compare the European Governance White Paper (Witboek Europese Governance), COM(2001) 428 of 25 July 2001, p. 7. There are some in Great Britain who also adopt this standpoint. See for example the British European Parliament member Baroness Sarah Ludford in the Financial Times of 24 April 2003, 'EU is an easy scapegoat for national failings.'*

234 *A.E. Kellerman et al, Improving the quality of legislation in Europe, Kluwer Law International, The Hague/Boston/London 1998, p. XXXII and XXXIII.*

235 *On the emergence of impact assessments at European level and the driving forces at work see among others R. Löfstedt, 'The swing of the regulatory pendulum in Europe: from precautionary principle to (regulatory) impact analysis,' Journal of Risk and Uncertainty 2004, p. 237-260. Compare also C. Radaelli, 'What does regulatory impact assessment mean in Europe?,' AEI-Brookings Joint Center for Regulatory Studies, January 2005.*

236 *COM(2002)276 def., p. 2.*

237 *For a comprehensive treatment see A.C.M. Meuwese, 'Impact assessment door de Europese Commissie,' RegelMaat 2005/3, p. 109-114.*

238 *SEC(2005)791 def.*

the subject matter and whether it relates to the development of new legislation or the review of existing legislation. This is the 'principle of proportional analysis'.

The two most important cornerstones of the new directives are: 1) that the right level of Community action should be defined in accordance with the principles of proportionality and subsidiarity, whereby the option of making no (new) regulations is always included (by falling back on self-regulation or co-regulation for example), 2) seeing to consistency and balance in the three-cornerstone policy aimed at 'sustainable development', namely economic development, social cohesion and environmental protection. Compared to earlier guidelines for the execution of regulatory impact assessments however, the centre of gravity now seems to have shifted emphatically in the direction of quantifying (economic) costs and benefits. Nor is there any sign of a clear testing methodology.

The directives for executing impact assessments of 2003 and 2005 both emphasise that the testing methodology is characterised by the use of so-called multi-criteria analyses. What this means exactly remains strikingly vague, especially considering the subsequent conclusion, namely that:

> *"The set of evaluation criteria will vary with the policy area(s) concerned and the nature of the proposed objectives. There are, however, some generic evaluation criteria that apply to all proposals of the Commission, namely: effectiveness, efficiency and consistency."*[239]

We could of course think of many possible methods to measure the effectiveness and efficiency of legislation, whereby for European regulations there is the complicating factor that such matters as the achievement of the set goals and cost effectiveness are closely linked to the way the regulations are translated, applied and enforced by the member states. If furthermore the evaluation criteria may vary depending on the subject matter, the question naturally arises as to what extent the results of the various types of impact assessment are comparable to (and consistent with) one another. Here we should also bear in mind that there seems to be a lot of freedom in the choice of research techniques (standard questionnaires perhaps, or interviews with key figures – and who makes the final choice where there is consultation between different parties?). Recently however, steps have in fact been taken to clarify in particular the method by which the administrative burdens caused by European legislation are mapped out.[240] There seems to be a growing realisation that 'to measure is to know' only applies if it is clear what the measuring technique actually involves.

Steps in the RIA process

In spite of the methodological vagueness with regard to executing RIAs, the most important steps to be taken in impact assessment are virtually always the same. These are, in succession: Mapping out the policy problem as clearly as possible (including the

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[239] *For the directives of 2005, see p. 43 of the Impact Assessment Guidelines referred to in previous footnote.*

[240] *See SEC (2005)1329 and SEC(2005)518.*

appropriate financial figures). Mapping out the policy objectives. Listing the various theoretical policy options which could be used to tackle the problem (including the zero option - what are the consequences of doing nothing?). Next comes the impact analysis in the narrow sense, namely what are the positive and negative effects of the various options on the economy, the social environment and the natural environment? Then the options and their respective effects are compared in a way that makes it clear to the ultimate political decision-makers what the 'trade-offs' are between the various options. And finally, careful consideration is given to the question of the extent to which, and way in which, the future effects of the most obvious choices can best be monitored and evaluated.

Political influence
With respect to the foregoing, the Commission has consistently emphasised that impact assessments are only a tool in the legislative process, and that they cannot replace political decision-making. The reason for this caution is now obvious as Commission proposals themselves become more vulnerable to systematic impact assessment. After all, there is now a much stricter requirement for legislative institutions (Commission, Council, European Parliament) to produce sound arguments for deviating from the outcomes of an ex ante evaluation.[241]

It is in any case clear that the Commission is taking the matter seriously. On 27 September 2005 Commission member Günter Verheugen presented a plan in which it was announced that 68 of 183 current legislative proposals that had previously been subjected to an RIA would be withdrawn. The withdrawn directives and regulations relate to such themes as: promoting sales in the internal market, labelling of household goods, a weekend ban on trucks, and packaging sizes for coffee. These proposals were considered not to fulfil the Lisbon objectives on strengthening the economy. On 25 October 2005 the same Verheugen announced that the coming year at least a further 22 EU laws would be withdrawn, re-written or drastically simplified.[242]

After the referenda on the European Constitution in France and the Netherlands, the European Commission decided to go a step further in its deregulation plans. They also realised it would be a good idea to involve the member states in this endeavour. This led to the establishment on 2 March 2006 by the Commission of a group of national experts, to advise on such matters as suitable indicators for measuring the (progress of) reduction and simplification of regulation, and to map out best practices for cutting back bureaucracy and regulatory pressure.[243] This group of experts will also be deployed to raise awareness of European initiatives in the member states.

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[241] *Perhaps this is also the reason why the European Parliament and the Council of Ministers started experimenting with their own impact assessments.*

[242] *For the complete list see: http://europa.eu.int/comm/enterprise/regulation/better_ regulation/docs/annex_simpli_en.pdf.*

[243] *See the press report from the Commission of 2 March 2006, IP/06/254.*

6.5 Self-regulation and co-regulation

With the European initiatives to reduce and simplify regulations and cut back bureaucracy, there also seems to be a greater interest in recent years in encouraging various forms of self-regulation and co-regulation.[244] A considerable change has taken place since the above-mentioned Molitor report of 1996, in which alternatives to legislation were only briefly touched on. For example self-regulation and co-regulation are the two main themes of the inter-institutional 'Better Legislation' agreement entered into at the end of 2003 between the European Parliament, the Council and the Commission.[245] In the explanatory notes to this document, the application of these alternative methods of regulation is linked explicitly to the subsidiarity principle and the proportionality principle. Their usefulness is particularly emphasised in cases where the EC treaty does not explicitly prescribe a particular legal instrument. The last point speaks for itself since it would be contrary to the Community attribution principle if powers could be assigned to organisations or institutions not in any sense anchored to the basic treaties.[246] It is already evident that the issue of competence is a thorny one from the following passage in the agreement:

> *"The Commission sees to it that the application of co-regulation and self-regulation mechanisms is always in agreement with Community law, and that the criteria of transparency (publication of the agreements in particular) and representativeness are always observed with respect to the parties concerned. The application of such mechanisms must also always have an added value for the public interest. Such mechanisms may not be applied if fundamental rights or important policy decisions are involved, or in situations whereby the regulations should be applied uniformly in all the member states. Their aim must be to achieve quick and flexible regulation which does not affect the principles of free competition or the unity of the internal market."*[247]

The strength of this core passage lies in the fact that it addresses many important issues, all of which should certainly be taken into account when applying alternatives to, and within, legislation. Spontaneous self-regulation should always be approached with a healthy scepticism by the government, considering that standards set in a particular market by an interested party are often (also) aimed at protecting certain economic advantages for that party with respect to competitors and/or interested third parties.[248] It is therefore not surprising that the European Commission is asked to keep a finger on the pulse in this

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244 *See for example E. Best, 'Alternative regulations or complementary methods? Evolving options in European Governance,' Eipascope 2003/1, p. 1-11.*

245 *PbEU 31 December 2003, C321/01.*

246 *Compare also the speech of W. Voermans, 'Toedeling van bevoegdheid,' The Hague 2004, p. 16, where he indicates that the acceptance of powers for European institutions on the grounds of customary law, even more than in the Netherlands, would run counter to the closed system of 'compétences d' attribution' of Article 5 subsection 1 of the EC Treaty.*

247 *See consideration 17 of the Inter-institutional agreement.*

248 *See A. Ogus, 'Self-Regulation,' in: Boudewijn Bouckaert and Gerrit De Geest (eds.) 'Encyclopedia of Law and Economics,' 1999. http://encyclo.findlaw.com. and W.J. Slagter, 'Zelfregulering als basis voor privaatrechtelijk tuchtrecht,' in: H.J. Snijders et al (red.) 'De overheidsrechter gepasseerd,' Amsterdam 1998, p. 92-93.*

regard. Guarding against unauthorised trade barriers and cartel agreements is after all one of her core tasks.

The weakness of the above passage however is that it scarcely includes any practical ideas at all about how to deal with various forms of co-regulation and self-regulation in legislative policy. Guaranteeing the transparency of self-regulation agreements is of course important[249], but this tells us very little about who will bear witness to such openness, and what form of publication is then the most appropriate. This is all the more worrying, considering that the Inter-institutional agreement comments that in principle, the European institutions should not be expected to adopt a position with respect to (pure) self-regulation.[250] If that is the case, who is then responsible for the publication of voluntary agreements and codes of conduct, for example? The same applies mutatis mutandis to the issue of representativeness during participation by interested parties; who actually decides, and on what grounds?[251] Does this also imply that there should be no involvement on the part of the European Commission when it comes to self-regulation in the narrow sense, for example?

Concern about self-regulation initiatives is also apparent from statements from the European Parliament about what was said on this matter in the white paper on 'Governance'. Briefly stated, some members of the European Parliament are worried that the emergence of a wide range of self-regulation initiatives and regulatory agencies threatens to erode the role of the European Parliament in the process of setting standards. NGOs often take the position that the interests of weaker parties are not as well protected by private standards, and that there is always the danger of 'free rider' behaviour. They point out furthermore that few EU-wide interest groups are willing or able to represent a particular social interest adequately.[252] Here we could also add the risk that growing interest in self-regulation at the European level (as witnessed by the so-called 'New approach' directives which refer to 'private standardisation norms') may lead to a significant shift of regulatory pressure from the public to the private domain.

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[249] *Compare in the Netherlands the requirements in this regard arising from the 'Aanwijzingen voor de convenanten' (Directions for voluntary agreements), Regulation of the Prime Minister, 21 January 2003. See: http://www.justitie.nl/themas/wetgeving/instrumenten/aanwijzingen/.*

[250] *See consideration 22 of the agreement.*

[251] *The circle of parties involved in self-regulation will almost always be more limited than it is in legislation. Also, the relationship between interest group organisations and their members is often structured differently to the relationship between political parties and voters. For this reason alone, it would be going too far to impose similar requirements of democratic representativeness on various forms of self-regulation.*

[252] *See on this, and also for a summary of self-regulation initiatives: http://www.eur ac tiv.com/Article?tcmuri=tcm:29-117444-16&type=LinksDossier.*

6.6 Conclusion

When we come to draw up the balance, we notice first of all that there is still not really any (or very little) scientific discourse specifically dealing with European legislative issues from a more theoretical point of view.[253] This is all the more strange considering that cutting back bureaucracy and regulatory pressure at the European level is such a 'hot issue'. The absence as yet of a European legislative doctrine and research culture probably helps to explain, at least in part, why the debate about regulatory accretion and regulatory pressure at the European level is dominated by recommendations and policy documents. Fortunately however there is a growing scientific interest in some Community legislation themes, such as the significance of the subsidiarity principle in limiting the scope of legislation, alternatives to and within regulations, regulatory impact assessments, etc.

With respect to the subsidiarity principle, which for a long time was no more than a paper tiger, we see for example attempts to refine the procedures of protocols to give member states a bigger say when it comes to stopping European legislative projects that could lead to regulatory accretion.[254] Here it has to be said that the tide is against supporters of European expansion and growing policy ambitions. If the tide should turn, the literature tells us it is an open question whether the subsidiarity protocol to the European Constitution (for example) could really present an effective barrier to a growing Community enthusiasm for regulation.

Another striking feature of the European literature on regulatory pressure is that up to now, much of the thinking is expressed in terms of opposites. When European regulation is successful the member states take the credit, but when there is criticism 'Europe' is seen as the guilty party. Subsequently no-one is interested in who came up with the original idea (was it the Commission or one of the member states themselves) or what actually led to the regulatory accretion. Could it be the policy ambitions of European officials at the various DGs for example, or could it be the fact that each member state wants its own exceptions to the rule to be included? It is also apparent from the literature that there are sometimes tall stories circulating about the Community 'urge to regulate' which are not based in fact.[255]

One development whereby the facts are certainly important is the emergence of the above-mentioned regulatory impact assessments. In a certain sense we could say that these represent an attempt to arrive at 'evidence based lawmaking' in legislative policy. Although the literature (rightly) emphasises that RIAs cannot replace political decision-making with

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253 *T. Bruha and H. Kindermann, 'Rechtsetzung in der Europäische Gemeinschaft,' Zeitschrift für Gesetzgebung (1986) Heft 4, p. 293.*

254 *J.J. van Dijk, 'Juist zonder Europese Grondwet een subsidiariteitstoets,' RegelMaat 2006, p. 3-12.*

255 *For a summary of striking examples of alleged European over-enthusiasm for regulation not based in fact see: http://europa.eu.int/comm/dgs/communication/facts/ index_en.htm.*

respect to European legislative proposals[256], a thorough, policy-based, analytical assessment is nevertheless very important in the process of combating any unnecessary and unintentional increase in regulatory pressure. Here it is important that the assessment methods and research techniques should be properly explained, and that they should prove reliable.[257]

Furthermore, if the criteria are overly tailored to the particular project being assessed, it will be more difficult to compare the outcomes from different assessments. Nor in the longer term will we be able to avoid the awkward question of who is going to carry out all these RIAs. Will this continue to be a matter for the officials working for the Commission, or is there in fact also a need – particularly where politically sensitive legislative structures are involved – for a somewhat more independent and detached assessment process?

Finally, we also see at the European level a growing interest in various forms of co-regulation and self-regulation. This interest seems to be spreading unchecked over the different policy areas, whereby private standards are not shunned even in areas where fundamental rights are at issue, such as the freedom of the press. We mention here only the codes in the fields of advertising and the media, whereby a private branch organisation known as European Advertising Standards Alliance is extremely active.[258] Here there is some criticism in the literature to the effect that greater attention should be given to possible undesirable side-effects.[259] As to the (cost-)effectiveness of such alternatives, scarcely any research has been done as yet at the European level. It is also important in the EU context that such things should be taken into account as: the danger of unbalanced representation of certain interests in the drawing up and imposition of private standards, the risk of monopoly formation because of big players imposing rules on their competitors which do not contribute to the public interest but are meant instead to drive smaller players out of the market; the sometimes extremely limited options for enforcement of private standards and rules; and problems with 'free riders' who do not feel they have to obey the rules.

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256 *See on this the fascinating contribution of S. Veit, 'Entpolitisierung staatlicher Regelungsprozesse durch Gesetzesfolgenabschäzungen?,' Preadvies Junge Staats- und Verwaltungswissenschaft, FoJuS Diskussionspapiere 2005/3, Potsdam 2005. Also to be found via http://users. ox.ac.uk/~polf0035/.*

257 *See also N. Lee and C. Kirkpatrick, 'Evidence-based policy-making in Europe: an evaluation of European Commission integrated impact assessments, Impact Assessment and Project Appraisal,' March 2006, p. 23-33.*

258 *http://www.easa-alliance.org/.*

259 *See op. cit. J. Black, 'Constitutionalising self-regulation,' Modern Law Review 1996, p. 24-55.*

Chapter 7. Conclusions and lessons for the legislator

7.1 Regulatory pressure through different lenses

We have analysed the international literature on regulatory pressure using three different lenses to obtain: an international perspective; a multidisciplinary perspective; a perspective that examines both the objective and the subjective sides of regulatory pressure.

Regulatory pressure from an international perspective
In the first place, we certainly did not limit ourselves exclusively to the Dutch literature in this study. We also examined scientific publications and reports from Germany, Great Britain, the United States and the European Union. One of the first things that became apparent is that on the whole, there are more similarities than differences. Naturally certain parts of the literature are specific to a particular country, but in a general sense it is the mutual parallels that are most noticeable. We see for example that discussions of regulatory pressure are often linked to a much broader treatment of deregulation and the reduction of government interference. We also find that in most places, this discussion is also closely related to the economic developments in the country in question. In the international literature examined in this study, reducing regulatory pressure (or deregulation) is often mentioned as a way in which the government can stimulate the economy.

In other words interest in regulatory pressure is certainly not unique to the Netherlands. This means that we in the Netherlands can benefit from the approaches and solutions already tried or adopted in other countries. But it also means that the way regulatory pressure is analysed and tackled here may also be relevant to the international debate. For the rest, although it is true to say that there are many brief references to developments in other countries in the literature, such references are seldom accompanied by a systematic analysis of the similarities and differences between the countries concerned. It is also surprising that the degree of internationalisation in the scientific study of regulatory pressure is still relatively low. We get the impression that the scientific disciplines are not in the vanguard when it comes to disseminating ideas in relation to the conceptualisation of regulatory pressure, or (above all) the methods and techniques used to measure, analyse and manage regulatory pressure.

More influential when it comes to propagating analytical instruments such as regulatory impact assessments are organisations such as the OESO, which produces country reports and also does a lot of comparative research. Although the underlying causes of regulatory pressure seem to be international, most studies are limited to the country of origin.[260] Much of the research is very fragmented and there hardly seems to be any exchange of research

[260] *There are also positive exceptions to the rule however. See for example the multi-disciplinary and comparative legal study by W. Jann, K. Wegrich, S. Veit, 'Verfahren und Instrumente erfolgreicher (De)Regulierung,' Pilotstudie, Universität Potsdam, January 2005.*

data between researchers from different countries on a regular basis. Here, in our view, lies a challenge for international associations for scientific study such as the European Association of Legislation.

Regulatory pressure from a multi-disciplinary perspective

This study was not discipline-oriented but problem-oriented. In other words no particular scientific discipline was allocated a central role; the study targeted any literature which might provide answers to the research questions (irrespective of the discipline from which it originated). This exploratory study therefore includes insights obtained from the sciences of jurisprudence, (legal) economics, political science and sociology, among others. Of all these disciplines the (legal) economics literature is the most abundant, whereas the sociology literature was far less developed in relation to the subject of the present study. We had anticipated that there would also be some relevant literature available in the field of (social) psychology. For the purposes of the present study however, which was specifically aimed at the phenomenon of 'regulatory pressure', no such literature was yet available. Perhaps in a follow-up study not so much focused on regulatory pressure as on a number of underlying phenomena (see section 7.4), the literature from this discipline may have a significant role to play (as may the literature from other disciplines which could not be examined further in the context of this exploratory study).

The above remark about the lack of integration in the international research on regulatory pressure may be repeated here in relation to the various scientific disciplines. Most of the studies we encountered were predominantly mono-disciplinary in character. It seems that there is still no question (in most places) of a real exchange of research data between the different scientific communities. This may help in part to explain why the methodological literature on the subject of our study is not very well developed (with the exception of the economics literature on the correct usage of cost-benefit analyses).

*Regulatory pressure from an objective **and** subjective perspective*

Finally, this study not only examined the 'objective' approaches to regulatory pressure but also the 'subjective' ones. In other words we did not only look at work which is dominated by a quantitative approach to the numbers of regulations, but also tried to include studies which deal with various forms of perceived regulatory pressure. It was found nevertheless that the most dominant approach to regulatory pressure in the international literature is a quantitative one. In virtually all the studies and policy programmes examined, the primary emphasis is on quantifying the number of regulations and the costs and benefits of those regulations. There is also growing criticism of this approach in a number of places. The German literature criticises among other things the so-called 'Rechtsbereinigungsgesetze'; in the British literature there many objections to the way Regulatory Impact Assessments (RIAs) function because it appears that many of the important costs and benefits of regulation are virtually impossible to quantify; the American criticism of the large-scale deployment of cost-benefit analysis shows strong similarities to the British. It was only in

the literature about the European Union that such reservations were found to play a lesser role.

This criticism goes hand in hand with calls for a greater focus, by various means, on the subjective aspects of regulatory pressure. The German literature for example points to the relationship between the experience of regulatory pressure and the expectations of those affected, and the importance of the legitimacy of law is also emphasised. Words like 'Systementfremdung', 'Gefülhter Bürokratie' and 'Burgernähe' are used. The American literature similarly discusses the possibility that an increase in regulations may also lead to 'system burdens' which may in turn threaten the legitimacy of the law.

Summing up, we may cautiously conclude there appears to be a new development slowly unfolding in the international literature with respect to the way regulatory pressure is looked at. Essentially we find that although various 'objective' (or quantitative) approaches to regulatory pressure still have the upper hand, there is also a growing interest in more 'subjective' (or qualitative) interpretations. There are more people arguing, especially in Great Britain but also at EU level, for 'smart regulation' strategies. Robert Baldwin points out however that working with different 'mixtures of policy instruments' may present new problems when it comes to mapping out the effects of different types of standard, and understanding the causal relationships between the way standards are set and the increase or decrease in regulatory pressure. Instrument mixes immediately raise the question: what exactly causes what?

7.2 Five shortcomings in the literature on regulatory pressure

On the basis of our analysis of the literature we may draw several general conclusions. First it is notable that, contrary to the initial expectations of the 104 researchers involved, regulatory pressure is not (or is hardly ever) treated as an independent subject for scientific study. As already mentioned, the international literature on regulatory pressure – apart from a few exceptions – is mainly a commentary on the deregulation policy of national governments.

Variations on the theme of regulatory pressure
There are several variations on the theme of reducing and simplifying government regulations in the literature. Every time regulatory pressure is dealt with under a different conceptual banner, such as 'regulatory reform', 'deregulation', 'Bürokratieabbau' or 'better regulation', there is a slight change of tone and emphasis. At one point the accent may be on improving legislative quality by opposing regulation refinement that leads to obscure and impenetrable regulations, and at another it may be far more on driving down the administrative burden for government and/or business. And in yet other places, the emphasis seems to be not so much on reducing the number of regulations as such, but more on encouraging a shift from government regulation to some form of market

mechanism, co-regulation or (possibly under legal conditions) self-regulation.

Interestingly we see such variations on the theme of regulatory pressure in virtually all the countries examined. In Great Britain for example, Baldwin and Cave argue for alternatives to state regulation. The same argument recurs in the report of the Better Regulation Task Force.[261] In Germany similar ideas emerge in the discussion of 'Regulierte Selbstregulierung'.[262] Variations on the latter theme recur in the American literature on 'Responsive regulation'. Furthermore, the arguments for more self-regulation in the literature do not seem to be primarily aimed at reducing government management ambitions, but more on increasing the level of acceptance and willingness to comply with regulations which are supposed to serve (among other things) the public interest. Not less, but 'better' and 'smarter' regulation is the general motto. There seems to be an exception to this rule in the European deregulation debate, where on the conveyor belt of the subsidiarity principle, a long discussion has been taking place about the nature and scope of the distribution of powers between EU institutions and member states. The claim that there are too many (unnecessary) Community rules does not always translate directly here into an argument for reducing regulations or government intervention as such, but also relates to the issue of more or less 'meddling in national affairs'.

Limitations of this study

Some caution is advisable in drawing general conclusions from this study. After all, each system has its own unique characteristics. In the German literature, there is more of an attempt than elsewhere to draw an analytical distinction between problems of over-regulation related to political influence on the nature and scope of standards, the chosen legislative technique, the method of implementation, and such things as the 'resistance' of those targeted when it comes to the acceptance of regulations. The German literature also draws a distinction between political and administrative deregulation. The latter concerns reducing regulatory pressure without calling policy objectives into question. The former concerns reducing the number of regulations and the administrative burden, whereby there is also the possibility of lowering the level of protection, for example, or perhaps taking it out of the hands of the legislator.[263]

In comparison to the Netherlands and Germany, there is more interest in the US and Great Britain in mapping out in detail the (tangible and intangible) costs and benefits of legislation. There is also plenty of criticism of this approach however. Rull and Salzman for example believe that the phenomenon of regulatory pressure is looked at in a shallow, purely economic fashion, without taking background information sufficiently into account. According to these authors the detailed mapping out of the cost and benefits of individual

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[261] *See http://www.brc.gov.uk/downloads/pdf/stateregulation.pdf.*

[262] *See for example D. Grimm et al, 'Regulierte Selbstregulierung als Steuerungskonzept des Gewährleistungsstaates, Ergebnisse des Symposiums aus Anlaß des 60,' Geburtstages von Wolfgang Hoffmann-Riem Duncker & Humblot, Berlin, 2001.*

[263] *W. Jann, K. Wegricht, S. Veit, 'Verfahren und Instrumente erfolgreichter (De)Regulierung, Pilotstudie, Universität Potsdam,' Januar 2005, p. 1.*

laws leads to a far too insulated view of reality, overlooking the fact that regulations are actually a part of various social subsystems which interact with one another. In practice citizens and businesses have to deal with the cumulative effect (on costs) of regulations that are mutually connected, and may converge at certain points on one and the same target. In such circumstances it is extremely difficult to distinguish the costs and hindrances associated with a particular regulation.

A third cautionary note has to do with the ever-present limitations of an international comparative study when it comes to the choice of countries. The form of government alone makes it difficult to compare some aspects of regulatory pressure in the different countries. The US and Germany for example have a federal form of government in which deregulation has an extra dimension, namely that of the federal state with respect to the confederation. This in itself is enough to make the debate about reducing and simplifying regulations in such countries more discursive than it is in the Netherlands and Great Britain. In both Germany and the US there are various deregulation projects at the federal state level, whereby the emphasis sometimes lies in different places. Some German states have their own deregulation policy for example, and in Texas there is a heavy emphasis on the use of sunset clauses (horizon conditions) in legislation[264], so that legislation originating from agencies automatically expires after a period of time unless an evaluation shows that extension is necessary. At the federal level and in other federal states, sunset clauses are much less popular however. It is not surprising therefore that the research into factors that reduce regulatory pressure is sometimes a little vague.

It has to be said however, that the European context is also an unusual one in many ways. Both with respect to Germany and the Netherlands and in relation to the US and Great Britain, the regulatory pressure caused by Community regulation is strongly divergent. Not only do EU member states such as Germany, the Netherlands and Great Britain have a say of their own when it comes to the nature and scope of the European body of regulations, but also the function of Community legislation, as the literature points out, is always different to that of member state legislation. At the European level, normally speaking it is harmonisation of national legislation that is sought. Often the EU legislator does not specify in the positive sense what the member states should do exactly, rather the boundaries are laid down with respect to things they may not do, such as frustrating the aims of the internal market. For this reason, quality criteria for legislation as developed in the Dutch literature cannot easily be transplanted from the national to the European level. As mentioned above, in the Community context the concept of subsidiarity is mainly associated with the distribution of powers between Union and member states, whereas subsidiarity as applied to the Dutch policy memorandum 'Views of legislation' (Zicht op wetgeving) is mainly concerned with the possibility of (lighter) instruments (other) than legislation to tackle a particular policy problem.

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[264] *For an overview of the deregulation policy in Baden Württemberg see for example: http://www.innenministerium.baden-wuerttemberg.de/de/Deregulierung/79991.html. Compare for an overview of how 'horizon legislation' was used in Texas, see the website of the sunset advisory commission: http://www.sunset.state.tx.us/.*

An instrumental perspective

The literature on legislative issues often adopts a so-called 'instrumental' perspective.[265] In this perspective a statutory regulation is seen as a tool which can be used by policy-makers. One of the arguments in favour of this approach (although not always declared as such) is that with respect to the effectiveness of statutory measures, there is a direct connection between a regulation and the consequences intended by the legislator. This line of thinking is characterised by the following characteristics: 1) law and justice are seen as neutral instruments deployed to achieve a particular policy objective; 2) legislation is subservient to political values; and 3) legislation is pre-eminently an instrument used to manage society from a central point.[266]

We can also see important elements of this instrumental perspective in the international literature on regulatory pressure. It is striking for example that in virtually all the countries examined, the legislator is allocated a central role in combating regulatory pressure. We also see an ongoing search for instruments with which to measure regulatory pressure. Such as regulatory impact assessments, implementation and enforceability tests, cost-benefit analyses etc. The assumption behind the search for instruments is that scientifically mapping out the impact of statutory regulations is the first step toward solving the problem. Scientific research is seen here above all as a vehicle for social change. This is not to say that there is no interesting research already taking place into the nature and scope of regulation production in the various countries; however, this research often seems to be rather one-dimensional. Many 'better regulation' publications start out by assuming there are too many regulations without taking the time to examine the underlying causes in depth, or to work out the assessment criteria on which that assumption is based.[267]

Five shortcomings

Continuing on this theme of the 'instrumental perspective', we observe the following five important 'shortcomings' in the international literature on regulatory pressure: 1) an historical shortcoming; 2) a conceptual shortcoming; 3) a political shortcoming; 4) en empirical shortcoming; and 5) a contextual shortcoming.

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265 *Compare J. Griffiths, 'De sociale werking van wetgeving,' in: J. Griffiths & H. Weyers (red.), De sociale werking van recht (4e druk). Nijmegen: Ars Aequi Libri 2005, pages 467-505.*

266 *C.J.M. Schuyt, 'Sturing en het recht,' in Schuyt, C.J.M. (1985), 'Sturing en recht,' in: M.A.P. Bovens and W.J. Witteveen, 'Het schip van staat, beschouwingen over recht, staat en sturing,' Zwolle: Tjeenk Willink, p. 113-124.*

267 *Recently for example, Hirsch Ballin argued in his defence that the wrong questions were often asked in relation to European legislative policy. According to him the principal question should be: "not how many rules we need, but how much uniformity is required in order to make the EU's legal system function properly." E.M.H. Hirsch Ballin, Reflections on co-actorship in the development of European law-making, in: E.M.H. Hirsch Ballin and L. Senden, Co-actorship in the development of European law-making: The quality of European legislation and its implementation and application in the national legal orders, T.M.C. Asser Press, The Hague 2005, p. 7.*

- *Historical shortcoming*

Much of the literature studied about regulatory pressure has an a-historical character. Even though there have already been several deregulation operations in most countries, the literature spends very little time looking back on what has gone before. Important questions about regulation production and regulatory growth therefore remain unanswered, such as: 1) What is the problem exactly? 2) Why is it a problem? and 3) How can the problem be solved? Questions 1 and 2 often seem to be passed over, and the discussion immediately moved on to question 3 and the issue of 'regulatory reform'. This would seem to be a missed opportunity, considering that any attempt to answer the 'what' question will also involve analysing the current 'state of the art' in deregulation policy. What has been done in the past to tackle over-regulation, and what results has this actually produced? This step is important in order to take stock of the point of departure for (new) policy, and to make it clear what the new policy must add to what has gone before. A thorough analysis of the historical context may avoid the same 'solutions' being proposed repeatedly, without it being clear how these solutions can really offer an answer to question 3.

A good example of lack of historical awareness is the proposal made by the Economic Affairs Council (REA) in the Netherlands to furnish every new legislative proposal with a 'horizon clause' (see above).[268] Here previous experience of similar measures in the Netherlands and abroad was not taken sufficiently into consideration. Proposals were nevertheless brought forward in the eighties (and research also carried out) to attach time limits to new laws more often.[269] Such proposals were inspired by the deregulation policy in the US where 'sunset clauses' had already being experimented with in the seventies, to avoid (among other things) the unnecessary continuation of regulatory agencies that were not doing their job properly. In Germany we see something similar in the shape of the 'Befristung van gesetzen'. It would therefore be reasonable to expect that before (re)introducing this type of measure as a 'new' instrument to combat over-regulation, there would first be a thorough investigation of past experience, both in the Netherlands and abroad, of such measures and their results. Judging from recent German literature for example, it would seem that horizon clauses are not likely to lead to a drastic reduction of regulatory pressure.[270]

- *Conceptual shortcoming*

Nor is there any evidence in the literature studied of any advanced development of the

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[268] *For a critical discussion of this recommendation see Ph. Eijlander and R.A.J. van Gestel, 'Horizonwetgeving: effectief middel in de strijd tegen toenemende regeldruk? Een onderzoek naar de functie van werkingsbeperkingen in wetgeving ter vermindering van regeldruk,' The Hague 2006.*

[269] *See for example Th.W.A. Camps, W.J.M. Kickert and A.F.A. Korsten, 'Horizonwetgeving: een nieuwe coloradokever,' Bestuur 1982/4 p. 10-13 and the literature referred to there.*

[270] *K. Wegrich, M. Shergold, C. van Stolk and W. Jann, 'Wirksamheit von Sunset Legislation and Evaluationsklauseln, Ein Gutachten im Auftrag der Bertelsmann Stiftung,' Oktober 2005.*

concept of 'regulatory pressure'. What is regulatory pressure exactly? How many different types of regulatory pressure are there? How do these inter-relate? What other concepts can be connected to regulatory pressure? etc. One thing and another is manifest in the fact that, as we said before, there is a far greater interest in the solutions than in the causes of regulatory pressure. This is illustrated in the 'Practical legal system' memorandum, in which 'regulatory pressure' plays a central role and yet a definition of precisely what is meant by the term is nowhere to be found. Furthermore, when the concept of regulatory pressure is in fact given greater attention, there is a tendency to choose as broad a definition as possible (a 'catch all').[271] See for example the definition in the report 'In regels gevangen' (Trapped by rules):

> *"Regulatory pressure may be defined as the investment and the effort which citizens, businesses and institutions must make, and the limitations on freedom they must undergo, in order to comply with the regulations. It therefore involves the space left by the regulations for alternative behaviours (freedom of choice), the recognisability and transparency of the regulations, their consistency with other regulations, the way regulations are implemented and compliance assured, the way the regulations are enforced and infringements punished, and the resulting administrative burden (the information obligations imposed, for the purposes of checking compliance for example)."*

There are a few exceptions however. In the OCW report mentioned earlier for example, a distinction is drawn between the potential, actual and perceived regulatory burden.[272] Dorbeck-Jung and other refer to the last of these as the 'intangible' regulatory burden.[273] Contributions in the international literature on the importance of the 'system burden' and 'regulatory accretion' are also an interesting exception to the rule.[274] Drexhage has convincingly shown in this connection, through a thorough analysis of the above-mentioned REA recommendation, that the correct conclusions are not always drawn from the international literature about regulatory growth in the Dutch debate.[275] There is considerable confusion surrounding the Anglo-Saxon term 'regulation' which means many more and different things to the Dutch term 'wetgeving' (legislation) or the German 'Gesetzgebung'. Regulation in the US and United Kingdom is associated first and foremost with reforms aimed at liberalising the market, privatisation of state industries, and removal of obstacles to trade.[276] 'Regulation' is thereby often used in relation to marketing

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[271] *See for example the definition of 'regeldruk' (regulatory pressure) in the publication by a work group of the Ministries of Justice, Finance, Economic and Internal Affairs, and Kingdom of the Netherlands Relations: 'In regels gevangen? Een verkenning van mogelijke oorzaken van regeldruk'. The Hague 2006, p. 4.*

[272] *ECORYS-NEI. Regeldruk OCW-instellingen totaal, Rotterdam, 2004.*

[273] *B.R. Dorbeck-Jung, M.J. Oude Vrielink-van Heffen & G.H. Reussing, 'Open normen en regeldruk – Een onderzoek naar de kosten en oorzaken van irritaties bij open normen in de kwaliteitszorg,' Enschede, December 2005, p. 20.*

[274] *Ruhl & Salzman op. cit., 2003.*

[275] *B. Drexhage, 'En alle schuren raakten vol,' on the first recommendation from the Economic Affairs Council, in L. Heijnis et al (red.), 'Over de streep, Liber Amicorum Hans Bierman,' The Hague 2006, p. 125-134.*

[276] *See for example G. Nicoletti and S. Scarpetta, Regulation, productivity and growth: OECD evidence, Economic Policy, April 2003, p. 445-467.*

authorities, and may refer to the granting of permits, pricing, supervision and (even) the settlement of disputes.[277] Such a multiplicity of meanings can easily lead to a confusion of concepts, and the risk of talking at cross-purposes. The effects of reducing or simplifying the regulations that define the rules of the game for competition in particular markets for (semi-)public services (such as energy, postal services, telecom), markets that are controlled by large professional organisations, cannot after all be translated on a one to one basis into rules of conduct that are directly related to the actions of citizens.

With respect to the regulatory pressure, the most elaborate distinctions found so far were in the German literature where, as mentioned above, a three-way distinction is drawn between the problems at the level of (respectively) those setting the rules, those implementing the rules, and those targeted by the rules and ultimately responsible for compliance. A loss of information may occur at all of these levels: the legislator may phrase policy intentions incorrectly in the regulations; implementation bodies may then misinterpret these regulations and pass these mistaken interpretations on to citizens and businesses; these may in turn interpret the regulations wrongly because they do not fit in with their experience and/or sense of values.

For the rest, the German literature and legislative policy does not consistently use the same set of concepts. It is confusing that terms like 'Deregulierung', 'Bürokratieabbau', 'Verrechtlichung' and 'Rechtsbereinigung' are often used interchangably when it is far from clear whether they are referring to one and the same thing. In particular, the distinction between regulatory accretion (standards) and bureaucracy (implementation) is often blurred.

Perhaps the most important conceptual shortcoming, which is also an empirical shortcoming (see below), concerns perceived or intangible regulatory pressure. Although the experiential side of regulatory pressure is also seen to be relevant in other legal systems, there is by no means a good overview of the various factors that lead to intangible regulatory pressure or 'legislation stress' in the national and international literature.

- *Political shortcoming*

Often the literature also gives the impression that tackling regulatory pressure is merely a question of taking certain technical and 'policy-neutral' measures. In the Netherlands Geelhoed has already drawn attention to this.[278] A proper analysis of regulatory pressure requires not only that we consider the number of regulations, but also the political agenda behind those regulations. The international literature is particularly illustrative on this point. In Germany, the approach to regulatory pressure in the early nineteen eighties was inextricably tied up with the process of 'Staatsmodernisierung' by Helmut Kohl. In the

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[277] *See also L.F.M. Verhey and N. Verheij, 'De macht van de marktmeesters,' in A.A. van Rossum, L.F.M. Verhey and N. Verheij, 'Toezicht: preadviezen voor de Nederlandse Juristen-Vereniging,' Deventer 2005, p. 157 ff.*

[278] *See for example A. Geelhoed in Ph. Eijlander et al (red.), 'Overheid en zelfregulering,' Zwolle 1993, p. 39.*

United States it is also clear that many measures against regulatory pressure have their origins in the economic reform policy of president Ronald Reagan. From that moment on there was a big upsurge of interest in the costs and benefits of legislation. Finally, in England, the first policy measures in this area are closely related to the politics of Margaret Thatcher, and the most recent developments ('from less to better regulation') are linked to the political ambitions of 'New Labour' and Tony Blair.

Another striking feature of the literature is that the level of interest in reducing or simplifying regulations often rises sharply during times of important economic reform in a country. At such times an economic slump may be used as a 'crowbar' to abolish regulations affecting the economic competitiveness of businesses, or which represent a potential obstacle to economic growth in general (social security legislation, working conditions legislation, tax legislation etc.) or the slimming down of governmental tasks.

- *Empirical shortcoming*

The literature shows that generally speaking, there is very little empirical data available about regulatory pressure.[279] In as much as empirical research is referred to at all, this is primarily quantitative research aimed at counting the number of regulations (to measure is to know) or mapping out the administrative burden they create.[280] We hear calls to 'measure' regulatory pressure far more often than calls to 'analyse' or 'explain' it. The European Union is illustrative in this regard, where a debate has been running for some years now about reducing the number of pages of Community legislation text.

In practice however the counting of European regulations quickly leads to an oversimplification of reality.[281] The number of regulations says nothing for example about the direct or indirect hindrance experienced by citizens and businesses in the member states due to the nature and scope of the stock of Community legislation. Here after all it is necessary to examine not only secondary EU law (regulations, directives etc.), but also primary law (basic treaties). Another important question is whether the quantity of European regulations really matters so much when it comes to determining the regulatory pressure on citizens and businesses in the member states. The degree to which citizens are hindered by European regulations will in fact depend, among other things, on: a) those targeted by the regulations; b) the strictness of the regulations (detailed, or with room for choice); c) the way the regulations tie in with the self-regulating capacity of those targeted

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279 *"Empirisch onderzoek laat zien dat regels leiden tot nieuwe regels...," according to the recommendation of the REA (p. 1). Scarcely any research data is provided to back up this statement however. The emphasis, furthermore, is on quantitative analysis of the numbers of regulations.*

280 *Schulz (1998); March, Schulz & Zhou (2000); De Jong & Herweijer (2004); Bovens & Yesilkagit (2004); De Jong & Witteloostuijn (2005).*

281 *See also the discussion between Van Schendelen and Bovens and Yesilkagit under the headings 'Europese regeldruk als mythologie' and 'Ontmythologiseren gaat van au,' NJB 2005, p. 793-794.*

(do the regulations correspond to the level of organisation of the business sector in question, and are they suited to the current state of technology); and d) the extent to which implementation, supervision and compliance are associated with information obligations or some other administrative burden or costs for citizens and businesses.[282]

In Germany, Fliedner for example pointed out that there is no question of an exponential growth in the stock of legislation. In his opinion it is develops more by fits and starts. At the same time Fliedner warns against oversimplified mathematical models because it is very difficult to achieve a proper balance. Withdrawing a large number of superfluous regulations by means of a 'Rechtsbereinigungsgesetz' will not do much, according to Fliedner, to reduce the regulatory pressure experienced by citizens and businesses. More important, according to Fliedner, are the nature of the regulations (do they codify or modify, for example), their form (a single collective law may change many different regulations) and their relative weight (a mega legislation project such as the Social Gesetzbuch should be weighted more heavily than a technical amendment for modification of the Bundesimmissionsschutzgesetz).

In the Netherlands Drexhage has shown that the findings of the REA with regard to the proposition that 'rules breed rules', whereby a sort of multiplier effect is suggested, do not stand up to scrutiny. Drexhage points out that the REA is very selective in its quotations from the research of March, Schultz and Zhou on regulatory growth, and very little account is taken of the fact that learning organisations cannot exist without rules. Regulations may furthermore actually lead to a reduction in decision-making costs because of the expertise contained within them, and the fact that (up to a point) they enable routine procedures.[283] The literature in Great Britain and the US also points to a wide range of transferral effects.

A new piece of legislation intended to lighten the administrative burden for the business community for example may lead to a big rise in implementation costs for government. From the point of view of those targeted, we also have to take 'economies of scale' into account. Large companies and other 'repeat players' are often better able to deal with frequent changes of legislation than small ones and 'one-shotters'.[284] Often the latter do not have the knowledge and financial means needed to adjust adequately to constantly changing circumstances.

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[282] *See P.M.H.H. Bex et al, Nulmeting administratieve lasten bij burgers, WODC 2005. See also the progress report in relation to the Practical legal system memorandum: http://www.justitie.nl/Images/Voortgang%20programma%20Bruikebare%20 rechtsord %E2%80%A6_tcm 74-74450.pdf.*

[283] *Drexhage op. cit., p. 3-4.*

[284] *The distinction between 'repeat players' and 'one-shotters' comes from Marc Galanter, Why the 'haves' come out ahead: speculations of legal change, Law and Society Review 1974/9, p. 165-230.*

[285] *Compare Wegrich et al., 1995. They are critical of new German proposals for 'sunset legislation' in spite of previous experience in Germany with horizon clauses whereby it has never been demonstrated empirically that such legislation leads to a reduction in regulatory pressure.*

All in all we may conclude that figures about the increase or decrease in the number of regulations tell us very little about the social context in which they apply. New measures are often proposed without the effects of the old policy being clear.[285] And many reports, such as that of the OESO[286], refer unhesitatingly to the experience of other countries, but without providing the necessary background information to help us understand the national contexts.

- *Contextual shortcoming*

This is the sum total of all the above-mentioned shortcomings. As a result of the apparent lack of interest in historical backgrounds and empirical data, many of the measures against regulatory pressure described in the literature are proposed as it were from a vacuum. Most contributions are written from the perspective of a particular law, but not from the perspective of those who have to implement the law or comply with it. As a result there is generally a greater emphasis on the similarities than on the differences between these holders of legal rights.[287] In our country, but also abroad, most of the complaints about regulatory pressure come from the business community. Naturally this is an important signal. But it is also possibly somewhat one-sided. After all, it is often the case that businesses and social organisations want to see new regulations created in their own interest.[288]

Entrepreneurs have specific interests and wishes with respect to the legislator. Large companies often have different problems to small ones. Most analyses devote little attention to such contextual factors. The same applies to the issue of why businesses and citizens find (certain) regulations objectionable or unnecessary. It is important to know, for example, whether this is because the regulations intervene in conflicts of interest, or because the people targeted have no confidence in those who make or apply the regulations, or whether they object above all to the form in which the regulations are cast (the nature of the regulation: regulations about means, regulations about purpose, duties of care etc).

Finally, in most places in the literature social complaints about the excessive regulatory burden are not seen in the context of social opinions about the law and legislation in general. This means that in many cases, there is not a clear enough understanding of how (relatively) sensitive or insensitive particular target groups are to new legislation.

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[286] *See OECD, Regulatory policies in OECD Countries: from interventionism to regulatory governance, OECD 2002.*

[287] *This leads among other things to the criticism in the US and England that mandatory cost-benefit analyses are too standardised ('one size fits all'). Compare Glicksman & Chapman, op. cit., 1996.*

[288] *See in this regard the classic study by E. Gerber, The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation, Princeton University Press 1999.*

7.3 Answers to the research questions

In this section we will discuss the results of this study of the international literature in terms of the various research questions set out in chapter 1 (research question 4 is addressed in section 7.4).
The first research question concerns the concept of 'regulatory pressure'.

- *Research question 1*

What concepts and definitions of regulatory pressure are distinguished in the literature? Do these overlap, do they complement one another, or are they in fact conflicting?

The following picture emerges from our analysis of the relevant international literature. To begin with we can say there are no clearly comparable (comprehensive) concepts to regulatory pressure ('regeldruk') in the systems we examined. The concept of regulatory pressure breaks up into a multiplicity of closely related sub-topics such as bureaucratisation, 'Verrechtlichung', regulatory creep, the administrative burden etc. In the Netherlands (and certainly some other countries as well) there is also considerable interest in the study of separate (de)regulation instruments such as alternatives to and within legislation, Rechtsbereinigungsgesetzen, horizon legislation etc.

As yet there is scarcely any question of elimination of concepts, but perhaps more disturbingly, nor is there any question of competition between different concepts or schools of thought in Europe. In our view it is surprising that in general terms, there seems to be a fairly large gulf between the rather abstract theoretical treatment of features of the judicial system which may contribute to an increase or decrease of regulatory pressure on the one hand, and the literature adopting a more instrumental approach to deregulation issues on the other.

As examples of the more theoretical treatment, we mention here only the German literature on 'Recht und Autopoiese' (which did in fact find its way into legislative policy documents such as 'Zicht op wetgeving' (Views of legislation)) and the writings on 'Responsive regulation' found in the Anglo-Saxon literature. This theoretical literature seeks to find explanations for over-regulation, but because of the level of abstraction and the (occasional) lack of empirical data, these do not translate easily in terms of policy.
Teubner for example talks about the self-referential nature of systems, which may stop control signals from the legislator penetrating directly into social sub-systems. However, as to the question of the extent to which, and the way in which, the self-referential nature of systems actually plays a role in daily judicial practice, we still know very little. The concept of a 'system' is furthermore not clearly delineated, so that it is often unclear what the object of study exactly is in the Autopoiesetheorie of Teubner. [289]

[289] *For Teubner the law is a system, but the same applies to the economy and society. The church, a company, and a family are also systems, so that the question arises as to whether or not these 'systems' are quite different in their nature, and whether they operate according to different 'laws'.*

More importantly in our view, a clear analytical framework to study the various problems of over-regulation is lacking. Regulatory pressure is a jigsaw puzzle with many different pieces, and the first thing that has to be done is to put the outside edges in place. To that end we once again apply the (in our view useful) German distinction between 'Verfahrensfehler', 'Implementationsdefizite' and 'Adressatenresistenz'. If we want to understand more about the phenomenon of regulatory pressure, we need a better understanding of the degree to which, and the way in which, the various potential causes of over-regulation interact at these three levels. This has not been done consistently in any of the systems we examined.

As regards a more detailed interpretation of the German three-way distinction, it may be useful for example to start by investigating, or collecting together other studies on: 1) the relationship between the different types of standard over which the legislator himself has a direct influence with respect to information obligations and the administrative burden (more or less open, more or less coercive, private/public); 2) the political influence on legislative preparation (relative importance of expertise versus political rationale); 3) the application of regulations by implementing bodies and enforcement organisations (to what extent does the treatment by these organisations affect the perception and acceptance of regulations)? 4) the influence of interest groups on the creation or disappearance of regulations; and 5) the extent to which the general attitude of citizens and businesses to the law influences the perception of regulations and regulatory pressure (compare studies of the differences in tax ethics between countries).

To do all this we need a conceptual framework in which the pieces of regulatory pressure puzzle can be laid, so that later perhaps, these pieces can be pushed together to provide a single, larger perspective.[290] In our view, the international literature tells us that it is not a good idea to declare a single concept sacrosanct if we want to learn more about the phenomenon of regulatory pressure. As the years of US experience with respect to cost-benefit analysis show, it is very unlikely that all the many different aspects of regulatory pressure will fit one and the same template.

On the other hand we have to beware that a policy of 'let a hundred flowers bloom' in regulatory pressure research does not lead to a situation where research results are hardly ever compared and contrasted because different schools of thought are created who try to push one another aside, as is the case in the US in relation to ex ante evaluation of legislation. For this reason it may be useful to keep the concept of 'regulatory pressure' as an integrating concept. Naturally, in terms of content, the government can do nothing to stop (groups of) scholars choosing their own path.
The second research question concerns the way regulatory pressure is interpreted

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[290] *From the opposite point of view, studying the phenomenon of regulatory pressure rather resembles the old story of the mammoth in the cave, whereby the people in the cave are to work out what kind of object it is by feeling it. Since no-one in the cave can touch more than a small part of the mammoth, and no-one can see it (it is dark in the cave), no-one is able to say that it is a mammoth.*

theoretically.

- *Research question 2*

What theoretical principles are important in interpreting the concept of regulatory pressure?

We can distinguish a 'narrow' interpretation and a 'broad' interpretation of regulatory pressure. The first of these is central to the present study. As a point of departure, the phenomenon of 'regulatory pressure' is interpreted the way it is in the international literature. From this – narrow – perspective, we may conclude that there are scarcely any theoretical principles in the literature which explicitly target regulatory pressure. As already mentioned, on the whole the literature tends to follow government policy. Most contributions are therefore solution-oriented, without any clear analytical or theoretical perspective. One consequence of this is that the conceptual development of regulatory pressure is still in its infancy. The most important exception in this regard is the (legal) economics literature. Here the cost-benefit analysis plays a central role. There are several different types of cost-benefit analysis available, each based on different theoretical and methodological principles. There is no scientific agreement in the literature however as to which type is preferable.

The 'broad' approach to regulatory pressure is not so much aimed at the phenomenon of regulatory pressure itself, as on related subjects of varying degrees of importance to the study of regulatory pressure. Here the focus is on such things as: different forms of regulation, the social effects of legislation, and the changing role of government. From this – broad – perspective a number of interesting theoretical ideas can be distilled from the international literature, which could be further applied to the study of regulatory pressure in a possible follow-up study (see section 7.4). Examples of these promising theoretical ideas are: the 'smart regulation' approach (Cunningham & Grabowsky); the ideas about 'system burdens' (Ruhl & Salzman); application of the social-science system theory of Luhmann and Teubner to the study of regulatory pressure; the concept of 'legal consciousness' (see below). Here in our opinion it is particularly important that the assumptions in the theoretical literature be tested in relation to their empirical feasibility. To what extent (if at all) and (if so) under what circumstances, for example, does the legislator's joining forces with the self-regulating capacity of particular organisations actually lead to greater acceptance and willingness to comply with the regulations among those targeted, and when do those affected possibly regard this as a case of the government shirking its responsibilities?

The third research question is concerned with concepts in the international literature that are possibly similar to regulatory pressure.

- *Research question 3*

To what extent are other concepts similar to the phenomenon of 'regulatory pressure' to be found, and what can we learn from these in the study of legislation?

One concept that may not be associated directly with regulatory pressure, but which is certainly relevant to its analysis, is 'legal consciousness.' The primarily American literature in this field demonstrates clearly, on the basis of empirical research, how certain types of background and circumstance can be important to the way in which laws and regulations are experienced in society. This approach may also contribute to our understanding of the perception of regulatory pressure.

In the study of legislation, we can learn something from the 'legal consciousness' literature in at least two different ways. Much of the existing literature examines regulatory pressure as an 'object', but do not consider those who are 'subject' to regulatory pressure. For example, a large number of factors and circumstances are mapped out which may contribute to regulatory pressure (regulatory pressure caused by what?) but there is still remarkably little interest in the characteristics and backgrounds of those who actually experience it (regulatory pressure on whom?). Furthermore, even when the latter question is considered, the discussion is virtually always couched in general terms; regulatory pressure on 'the entrepreneur, 'the school administrator', or 'the service provider' for example. The literature in the field of 'legal consciousness' shows us however that there are big differences in the way different groups of citizens experience the law. These differences are also of great importance to the perception of regulatory pressure. A distinction can be drawn in terms of: a) socio-economic differences; and b) different values among the individuals subject to regulatory pressure.

One of the first important lessons to be drawn from the (earlier) American research into 'legal consciousness' is that the degree to which, and the manner in which, citizens and businesses experience regulatory pressure is affected by their socio-economic and other backgrounds. In the case of citizens for example it is important to know: their age, level of education, socio-economic class, ethnic and cultural backgrounds etc.[291] For businesses it is important to know such things as: the nature of their activities (whether they are involved in international trading for example), the scale of operations (a multinational or one-man business for example), workforce characteristics, economic situation (is the business a healthy one or almost bankrupt?) etc.

The second lesson from the legal consciousness literature is that the degree to which, and the manner in which, citizens experience regulatory pressure is also affected by their own moral values and expectations with regard to the law. What, for example, does the introduction of a new set of rules mean in practice? Someone who has doubts about the legitimacy of the law, and who is above all interested in resisting it (who is 'against the law')

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[291] *In the first study of the administrative burden for citizens for example, several target groups are distinguished: the elderly, persons entitled to a benefit, the handicapped and chronically ill, and all the rest. See P.M.H.H. Bex, B.H. Duits, A. van Vliet, 'Nulmeting AL Burgers Ministerie van Justitie' (WODC, Sira Consulting) The Hague 2005.*

is more likely to experience such rules as extra regulatory pressure than someone who takes the legitimacy of the law for granted (who is 'before the law'). For someone who sees the law primarily as a way of winning a game ('with the law') the question of whether or not an extra regulatory pressure has been created is more likely to depend on the practicality of the new set of rules.

7.4 Lessons for the legislator

The four most important lessons for the legislator to be derived from this study are set out below. This section addresses the last of the research questions, namely:

- *Research question 4*

What useful lessons does this study provide for the legislator?

The first of these is as follows:

- *'Regulatory pressure' is an analytically problematical concept and therefore – in its present, unmodified form – unsuitable as a criterion for evaluation.*

The following considerations are important here:
On the one hand, it is apparent from the research that regulatory pressure in the international literature is interpreted in many different ways. This reflects the large variety of ways in which the concept of regulatory pressure is used in the public debate, as described at the start of this study. It is also evident that the concept of regulatory pressure is used in many different ways in the legislative policy of the countries studied. It fulfils, apparently, a widely felt political and official need. Looked at in this way, the wide range of uses for the concept of regulatory pressure is very positive: it provides 'something for everyone'.

Our research also demonstrates the opposite side of the coin however. There is no consensus in the literature about the interpretation of 'regulatory pressure'. The correct interpretation of regulatory pressure is not only argued about between different disciplines (jurisprudence and legal economics for example), but also between representatives from one and the same discipline (the different approaches to 'cost-benefit analysis' in legal economics for example). This can easily lead to lack of clarity, inaccuracies and misunderstandings. The study also shows that 'regulatory pressure' is almost always used in a pejorative sense. Although linguistically speaking the term 'regulatory pressure' does not necessarily imply negative associations (the 'pressure' may be low, or entirely absent), it is nevertheless easily seen as something negative, and therefore something to be got rid of as soon as possible. Even though this sense is undoubtedly in agreement with the feelings of

many people, such a strongly moralistic and negative interpretation of the concept also constitutes an obstacle to the objective scientific analysis of regulatory pressure which rightly speaking should also include 'regelgeluk' (regulatory satisfaction') and 'regelnut' (regulatory utility). Against this background, 'regulatory pressure' may therefore also be seen as an emotionally charged and indistinct concept.
In view of the above, we conclude that 'regulatory pressure' is a problematic concept. This means that 'regulatory pressure' – in its current form – is not very useful as a criterion for evaluation of legislative policy or other policy domains. Any evaluation is best served, after all, by clear, sharply delineated criteria/indicators. The usefulness of 'regulatory pressure' can be considerably increased by supplementing the concept in at least two ways: firstly by paying serious attention to the subjective sides of regulatory pressure, and secondly by making the techniques for measuring regulatory pressure (more easily) falsifiable. Both of these points will be worked out in greater detail below.

- *The subjective aspects of regulatory pressure deserve serious attention.*

The following considerations are important here:
On the one hand our study shows that in an increasing number of places, there is a need to complement the existing, objective approach to regulatory pressure by more subjective elements. This second approach is not a matter of counting the numbers of regulations or quantifying regulatory pressure along some other lines, but of analysing the way the regulations are experienced (including the question of when and why, according to those targeted, there are perhaps too many regulations). At the same time it is notable that no detailed, practical way of taking subjective regulatory pressure into proper account has yet been found. This illustrates the unusual difficulty of operationalising such an approach, and at least on first sight certainly, it cannot compete with the simple quantitative approach to regulatory pressure.[292] Briefly stated, it does not (yet) give us enough to work with. Other questions that often arise in this regard are: 'how do you measure the experience of regulatory pressure?' and 'how do you distinguish good regulatory pressure from bad?'[293]

On the other hand the international literature shows that with respect to the interpretation and application of 'objective' regulatory pressure, a good deal of knowledge and experience has been gained, which may possibly also be applied in the further development of a 'subjective' approach. It is also becoming increasingly clear that an approach concentrating purely on the numbers of regulations (or the costs of compliance with those regulations) is inadequate in several important ways.
In view of the above, we conclude that the subjective sides of regulatory pressure deserve

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[292] *Here the study of how to measure the administrative burden may serve as an example, in which it has been found that there are relevant differences between various groups of citizens depending on the degree to which they are confronted by such a burden (this is greater for handicapped persons, for example).*

[293] *It is of course obvious that citizens, businesses and social organisations do not always have to be in agreement with regulations. Often regulations are also intended to compel, or persuade. The issue of whether or not citizens find regulations 'burdensome' is therefore not in itself a conclusive argument for leaving regulations in place or withdrawing them.*

serious attention. The usefulness of the concept of 'regulatory pressure' will be greatly increased if the experience of regulatory pressure comes to play just as great a role as the current quantification of regulatory pressure. Experiential aspects will thereby also have to be translated to existing legislative instruments. Parallel to the existing 'Regulatory Impact Assessment' (RIA) for example, an additional, comparable analysis (using experiments or simulation techniques perhaps) could be used to map out the experience of regulations and regulatory pressure. To some extent this already happens – just think of the application of the so-called 'tafel van 11' (table for 11) in the mapping out of factors influencing compliance, or consultations with citizens and interest groups during the preparation of legislation – but the methodological aspects of 'objectifying subjective regulatory pressure' require a great deal more attention. To give just one example: It is important that we learn more about the reasons for acceptance of regulations so that we can differentiate appropriately in legislative policy. When those affected are in agreement with the content of a regulation for example, but mainly have a problem with the form in which it is cast, this will call for a different set of measures to when there is scarcely any (or no) support base for (parts of) the content of a regulation. And the situation is different again if a particular social group is virtually always bound to be sceptical about any (new) regulation in a certain area, irrespective of form or content (compare the account of legal consciousness above).

For any of these and other instruments to succeed, it is important that we learn from previous experience, both positive and negative. This is the subject of the next lesson for the legislator.

- *The scientific and policymaking learning potential can be considerably improved by making the methods used to measure and limiting the regulatory burden (more readily) falsifiable.*

The following considerations are important here:
On the one hand the international literature and the legislative programmes examined tell us to let a hundred flowers bloom! Many different approaches to regulatory pressure are used alongside one another. Observations are also frequently made, if not always accurately, of other countries. The result is a rapid succession of different instruments to measure or analyse regulatory pressure (schemes, consultations, experimental gardens, RIAs etc). Sometimes techniques are even introduced from other countries that have since fallen into disuse in that country, or which are bound to attract a lot of criticism in our own. This means an effort is being made at least, to gain the maximum possible benefit from all the approaches to regulatory pressure that have been tried in the past.

On the other hand, the research carried out also shows that little is to be learned in this way from previous experience. Since it is not always clear in advance what criteria an instrument should satisfy in order to be considered 'adequate' or 'reliable, there is a risk of instruments being deployed endlessly in spite their serious shortcomings in practice. Without clear criteria, important information about the advantages and disadvantages of these

instruments is not systematically registered, nor is it possible to use that information to improve existing instruments. Consider the following two examples.

The first concerns the popular use of many types of ex ante evaluation of legislation and impact assessment. The methodology of these instruments must be developed further, but it is also important that ex post and ex ante evaluation be linked. It is very important to establish retrospectively, namely by means of ex post research, just where and why the estimation of the impact of a regulation has badly missed its target. It may be possible to use this information to fine-tune prospective evaluation methods.

The second concerns the already mentioned use of horizon legislation, which is propagated as an important weapon against over-regulation in all the systems we looked at, but whereby no clear criteria are ever given as to when the instrument should and should not be deployed. This is remarkable considering there is certainly no lack of evaluation research from which it may be inferred that horizon legislation is certainly no panacea against over-regulation, and in some situations may lead to undesirable side-effects. The use of a horizon clause in a measure designed to liberalise the market, for example, may lead to the market parties being more concerned about the temporary nature of a particular pricing measure than they are about competing to arrive at the most attractive product.[294]

In the light of such arguments, we conclude that the analysis instruments used to measure regulatory pressure should be made (more readily) falsifiable. By making it easier to verify whether or not these instruments are functioning as they should, the opportunities for scientific and policymaking circles to learn more about regulatory pressure will also be improved. If a particular instrument is shown to work well over a period of time, then it is worthwhile extending that instrument further. If on the other hand a particular instrument is shown not to work well over a period of time, then it is important that a decision be taken to adjust that instrument or stop using it altogether. To this end it is important that international comparative research should be carried out. This is the subject of the fourth and last lesson for the legislator to be discussed here.

- *For future international comparative research, the broad concept of 'regulatory pressure' can best be divided into a number of smaller, constituent subjects.*

The following considerations are important here:
On the one hand the focus on 'regulatory pressure' (and similar concepts) in this study has enabled us to map out the international literature. It turns out that the concept is interpreted in several different ways in both the science and the various legislative programmes. It also enables us to see in which countries developments comparable to those in the Netherlands are taking place, and which developments in fact diverge from the scientific and policy discussion in the Netherlands.

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294 *See Ph. Eijlander and R.A.J. van Gestel, 'Horizonwetgeving: effectief middel in de strijd tegen toenemende regeldruk? Een onderzoek naar de functie van werkingsbeperkingen in wetgeving ter vermindering van regeldruk,' The Hague 2006.*

On the other hand it has also become clear from this study that for a clear understanding of 'regulatory pressure', a clear understanding of the underlying factors and circumstances in these countries is also indispensable, and that these circumstances may vary from country to country. Since the scope of this exploratory study was relatively wide-ranging (to include as many different approaches to regulatory pressure as possible), many of these factors and circumstances could only be outlined in passing. This study shows that for purposes of international comparison, it is important to look not only at the similarities in the terminology that is used for 'regulatory pressure' for example, but also to interpret this terminology with explicit reference to the background politics and judicial systems of the countries examined, and also to their local (legal) culture.

These considerations lead us to conclude that this first exploratory study of the international literature about regulatory pressure should be followed up by a further study. Such a follow-up study should not focus so much on the broad, general concept of 'regulatory pressure, but should attempt to concentrate on a number of smaller, more carefully targeted, constituent subjects for investigation in one or more of the countries dealt with in the present study. Appropriate subjects for follow-up studies of this kind might be: an international overview of the experiences with Regulatory Impact Assessments (RIAs); an analysis of the consequences of growing calls for self-regulation in a number of sectors to be specified; an investigation of the way (the costs of) supervision and control are experienced by the various parties concerned.

Appendix I. Review of the existing literature

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Appendix II. Meeting of participating experts 19 May 2006

For the purposes of this study, a meeting of experts took place on 19 May 2006 at the University of Tilburg.

The meeting was attended by:

Prof. P. Popelier (University of Antwerp)
Professor of Legislative Studies

Prof. W.J. Witteveen (University of Tilburg),
Professor of Law, general introduction to all branches / member of Dutch Upper House

Dr. B.R. Dorbeck-Jung (University of Twente)
Senior lecturer Sociology of Law

Prof. L.A.J. Senden (University of Tilburg)
Professor of European Law

Drs. S.A.P.J. van Melis (Ministry of Justice)
Project team 'Bruikbare rechtsorde' (Practical legal system)

Prof. P. Larouche (University of Tilburg)
Professor of Competition Law

Prof. P.J.J. Zoontjens (University of Tilburg)
Professor of Education Law

Dr. B.M. Dijksterhuis (University of Tilburg)
Lecturer Sociology of Law

Mr.dr. J.L.M. Gribnau (University of Tilburg)
Senior lecturer Tax Law

Appendix III. Composition of guidance committee

The guidance committee for the study by order of the WODC bearing the title: 'Wat is regeldruk? Een verkennende internationale literatuurstudie' (What is regulatory pressure? An exploratory study of the international literature) was comprised of:

Prof. I.C. van der Vlies, chairman
Professor of administrative law at the University of Amsterdam (UvA)

Prof. G.J. Veerman
Head of the Legislative Expertise Centre (Kenniscentrum Wetgeving) / professor of legislation and legislative quality at the UM

Mr. H.P. Heida
Director of Constitutional Affairs and Legislation, Ministry of the Interior and Kingdom Relations

Dr. A.C. Hemerijck
Member of the Advisory Council on Government Policy

Mr. Y. Visser
Project leader WODC (Research and Documentation Centre)