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Chapter 11

Conclusions. A Conditional Yes to Ex Ante Evaluation of Legislation

Jonathan Verschuuren and Rob van Gestel

I. Introduction

In the first chapter of this book we set out to develop a critical analysis of various forms of ex ante evaluation of legislation. We defined ex ante evaluation of legislation as:

Future oriented research into the expected effects and side-effects of potential new legislation following a structured and formalised procedure, leading to a written report. Such research includes a study of the possible effects and side-effects of alternatives, including the alternative of not regulating at all.

In various ways, legislatures around the globe try to assess what can be expected when a new piece of legislation is going to take effect. Will the targets be met, will there be any side-effects? If so, what will they be, and how can they be redressed? The aim of this book is to assess the prospects of ex ante evaluation of legislation. What are the benefits of ex ante evaluation and what not? Under which conditions should which form of ex ante evaluation be applied? What should be their role in the legislative process? In order to answer these questions, two paths have been followed: a more or less theoretical path focusing on the context of ex ante evaluation, and an empirical path, focusing on past and present experiences of various forms of ex ante evaluation. This chapter summarizes the results of our venture and tries to stir up the debate on the role that ex ante evaluations or impact assessments should (not) have in improving the quality of legislation and the reduction of regulatory burdens. Special attention is paid to the methodology, or perhaps better the methodologies, of ex ante evaluation and the rationale behind the current popularity of this type of evaluation research in the lawmaking process throughout Europe.

Gaining more insight in the methodological possibilities and constraints of prospective evaluation seems crucial because to a large extent the methodology that is followed, such as cost-benefit analysis, stakeholder consultation or micro simulation, determines what kind of ‘beast’ ex ante evaluation will be in practice.

The importance of raising a debate about the expectations behind the use of regulatory impact assessments in the European Union and its member states lies in the intrinsic tension there will always be between a wish for more evidence-based lawmaking on the one hand and the fact that political judgment can always be used to overrule the outcomes of any kind of evaluation research on the other hand.

II. The Context of Ex Ante Evaluation: Opportunities and Constraints

Starting with the issue of the rationale behind ex ante evaluation one may conclude that over the last decades of the twentieth century, the legislative process has become more and more rationalised. Until fairly recent, there was no such thing as a ‘legislative policy’ in most EU-countries. As far as the scientific study of legislation is concerned, the legislature was, at least from a legal perspective, for a long time the least examined branch of government.¹ With the rise of the interventionist state, legislation became an important tool for policymakers engaged in what Roscoe Pound once coined as ‘social engineering’.² The problems that arose from this instrumentalist use of legislation, including implementation deficits, non-compliance and increasing administrative burdens for business, led to a growing awareness among legislators that behaviour modification is a lot more complicated than the codification of unwritten rules or principles that represent shared values and beliefs in a certain society.

Because of the aforementioned difficulties, the public, politicians, and legal commentators, increasingly require the legislature to underpin proposals for new laws with solid empirical evidence as to the need for legislative intervention, the choice between different types of regulation (self-regulation, co-regulation, economic incentives etcetera), the possible trade-offs between alternative regulatory options, and the expected effects and side-effects in terms of social, economic and environmental effects. Government decisions, including those of the legislature, have to be justifiable on the basis of present information and should be adaptable to changes in insights and in the socio-economic environment. In this situation, ex ante evaluation takes up a prominent position in several influential theories on legislation,

¹ R.W. Bauman & Tsvi Kahana, *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, 2006).

² Roscoe Pound, *Social Control Through Law* (Transaction, New Brunswick, 1997), p. 65.

governance and public management, as was shown in chapter 2 by Popelier and Verlinden. Ex ante evaluation of legislation can provide transparency about the decision-making process that is needed to inform citizens and to create democratic legitimacy, as is required by the New Public Management theory. Stakeholder involvement, as required by the Corporate Governance theory, only works when the citizens involved can assess the impact of decisions, thus providing an important reason of existence to ex ante evaluation. Internal and external controls that can be found in business corporations found their way into government organisations, leading to the rise of various forms of ex ante and ex post evaluations.

Against this background, the 1995 OECD Recommendation on Improving the Quality of Government Regulation became very influential. The OECD considers ex ante evaluation to be an essential element of the lawmaking process, as it can improve the quality of legislation, and contribute to getting simple, efficient, consistent legislation that is necessary to achieve a certain public policy goal. In addition, Popelier and Verlinden show that there also exists a legal obligation to carry out an assessment of the effects of new legislation. Courts may annul legislation when they find that these laws were not created in a transparent and well-informed way. In other words: underpinning new laws with clear data, obtained from ex ante and ex post evaluations, can be seen as a necessity in order to make a new law legally justified and at the same time reliable in terms of effectiveness and efficiency. Populier and Verlinden, however, rightfully warn that ex ante evaluation is not simply a matter of ‘speaking truth to power’ and depoliticising legislative decision-making. Rationality, they claim, is context-bound and therefore the scientific, legal, and socio-economic dimension of lawmaking can come into a conflict that can only be ‘solved’ by way of making political choices. In that sense there really is no contradiction between a political rationality and, for example, an economic or legal rationality. Democratically elected legislators are supposed to serve the public interest. In order to do that political decision-making presupposes the balancing of different types of interests and as a consequence taking an overarching perspective.

The latter does not suggest that, besides the legal rationale for ex ante evaluation of legislation, the economic rationale has not been a powerful motivator for the rise of ex ante evaluation as well. On the contrary, especially in the United States, but since the launch of the Lisbon strategy also on the level of the European Union, more focus has been put on economic growth and the creation of jobs

accompanied by regulatory reform to lift the burdens for business and simplify the existing body of legislation. The ‘better regulation movement’ has certainly emphasized the relationship there is between economic development and regulatory policy. In this context of regulatory reform ex ante evaluation is often considered to be a tool to block unnecessary new legislation and give preference to ‘lighter’ regulatory alternatives in comparison with legislation.

In chapter 3, Larouche describes the rise of ex ante evaluation in the context of the public interest theory of regulation, whereby public authorities intervene to remedy market failures. Impact assessments are meant to study the options to correct undesirable effects of a free market system, such as a communising of costs through a privatisation of profits, which in game-theory is called a ‘double P, double C, game’. Well-known is of course the idea of a ‘tragedy of the commons’ that was developed by Garret Hardin.³ In that story the metaphor of a society of herders sharing a common parcel of land on which they were entitled to let their cows graze was used to show the possible damaging effects of a totally free market encouraging the herders to act in their own self-interest, neglecting the interests of the community as a whole.

Unfortunately, however, public intervention may in practice also be driven by private interests rather than by the public good, leading to an even more harmful intervention in the market. According to Larouche, impact assessments can only prevent this from happening, if they are set up and carried out properly. According to him, this means that the assessment should begin without any *a priori* bias in favour or against regulatory intervention, that it is conducted with an open mind (for instance with regard to the choice of regulatory options to be evaluated, including the option of non-regulation, and that it is carried out at an early stage so that it can still fully influence the decision-making process.

The latter process is essential for the success of ex ante evaluation: the results of the evaluation have to be taken seriously in the subsequent decision-making process, but we would like to add that there are no guarantees that politicians are willing to let themselves be surprised by the outcomes of either ex post or ex ante evaluations. Furthermore, in the complex globalised society of the 21st century, information of the effects of new legislation is, at least in part, often likely to be unavailable because national laws and regulations are increasingly influenced by

³ G. Hardin, ‘The Tragedy of the Commons’ (1968) *Science*, pp. 1243-1248.

supranational decisions. Particularly in the multi-level governance structure of the European Union it is becoming more and more difficult to study national laws as 'stand-alone projects'. It is needless to say that this complicates the question of how to conduct a proper regulatory impact assessment. While some relevant information concerning for example administrative costs for small and medium sized business may be generated in the process of the assessment, other information, such as the benefits from EU-directives for companies that operate on a transnational level may very well remain unavailable or extremely difficult to grasp. Larouche argues that in such cases, the assessment process becomes a discovery process among the various actors involved. Game theory then offers a theoretic environment for such a process. In this view, the ex ante evaluation is only one step in a multi-period game involving the decision-maker and private actors.

As Larouche shows, ex ante evaluation helps the private actors because the decision-making process gets more open and transparent. However, such a vision on the process also explains why ex ante evaluation can and will be politicised and misused every now and then, as both the private actors and public policymakers may consider regulatory impact assessments or stakeholder consultation as a means to an end. The way they perceive the ends does not necessarily correspond with the scientific ideal behind ex ante evaluation (providing objective information to support regulatory decisions) and contribute to the public good.

First of all, policymakers who dislike interference from outsiders, such as an impact assessment board, may argue against regulatory impact assessments by pointing at the fact that they are costly and will slow down the decision-making process. Second, decision-makers and regulators may use the ex ante evaluation to convince potential partners to produce legislation, because they have an *a priori* bias in favour of public intervention through legislation. If that is the case, the impact assessment only studies a pre-determined set of policy options, in a linear fashion (leaving no room to redefine the problem or add new options), without evaluating all possible implications, and it runs in parallel to the drafting of a legislative proposal. Although empirical data are lacking, those that follow specific ex ante assessments will recognise these characteristics. Third, and closely related to the previous argument, is the influence that those who conduct ex ante evaluations may have on

the outcomes. As for example Robert Baldwin has argued,⁴ it is all but unlikely that evaluators will prefer traditional command and control types of regulation because of the fact that the impact of these ‘single shot interventions’ can be estimated more easily than the effects of more responsive types of regulation that consist of mixtures of both hard and soft law, such as co-regulation and legally conditioned self-regulation (see hereafter where we summarize the findings of Meuwese and Senden).

In chapter 4, Bohne indeed shows that ex ante evaluation of legislation runs the risk of becoming discredited as merely a political instrument. First of all, there are often important information deficiencies that make it hard for the legislature to draft effective and efficient legislation. Regulatory information asymmetries do exist. Often, the necessary behavioural and technical information rests with those that are to be regulated. Large corporations, for example, will usually have more accurate information about what are the best available techniques to achieve a high level of environmental protection, taking into account the costs and benefits. The question is, however, to what extent they will see it as being in their best interest to share (all) this information with regulatory agencies. Experience has shown that in the field of environmental law it is not unusual that companies only provide strategic information that benefits their short-term interests thereby disregarding legitimate interests that others might have. Bohne gives striking examples of this mechanism, and reaches the conclusion that ex ante evaluation of legislation should not involve information asymmetries, but is only suited to repair information deficits. These exist when the lawmaker lacks the necessary information, simply because it does not yet exist. Bohne, however, warns that while technical information may be gathered in an ex ante evaluation process, reliable information about human or corporate behaviour is normally much harder to obtain. Regulators usually share all kinds of assumptions about the way the addressees of the rules are going to react to intervention(s) that are aimed at a change of behaviour. Very often, however, they have little or no empirical evidence to underpin these assumptions. Even more important is that those who are primarily responsible for the drafting of legislation are often trained as lawyers and not as social scientists. As a consequence they will often have very little feeling with the use of empirical evidence as input for making regulatory decisions about, for example, the necessity of legislation, the costs and benefits that will accompany the

⁴ R. Baldwin, ‘Is better regulation smarter regulation?’, (2005) *Public Law*, pp. 485-511.

implementation and enforcement, or the consequences for the judiciary in terms of possible conflicts that will arise about the interpretation of a new law.

Because of these reasons, Bohne concludes that the legislature should emphasise ex post evaluations, rather than ex ante evaluations. He feels that ex post evaluations provide harder evidence about real-life effects of legislation than ex ante evaluations. To a certain extent this is probably true. Nevertheless, one has to bear in mind that most ex post evaluations are also meant to provide more insight in the effects and side-effects that have occurred after the enactment of a law or regulation. In other words: did the intended effects the legislature was aiming for indeed occur? That, however, does not yet prove that there is necessarily a causal connection between the societal effects and the regulatory intervention! To be able to establish such as connection one at least needs an experimental research design with a group of addressees that is exposed to a certain regulatory intervention and a control group on which the intervention does not apply. In practice these kinds of randomized trials are pretty rare in the field of legal research. Moreover, one might question if ex post evaluations and ex ante evaluations should be seen as opposites. Would it not be more fruitful to consider them to be complementary? The more explicit and differentiated, for example an ex ante evaluation is, the easier it will probably become to perform a solid ex post evaluation that will provide relevant and reliable feedback afterwards.⁵ The other way around, ex post evaluations of previous legislation often provide important input for the drafting of new laws and regulations.

The preference that Bohne seems to give to ex post evaluations has to do with the danger that ex ante evaluations are more likely to be politicised. He argues that, while ex ante evaluation may improve the quality of legislation when used sincerely, it should not be seen as a handy tool to reduce the number of laws that exist, since information deficiencies about the need for regulatory intervention and the availability of alternative policy options contribute to overregulation only to a small extent. Political and institutional factors, such as the wish of politicians to show strength and decisiveness by pushing a bill through Parliament or the influence that lobby organisations have on legislators, seem to be far greater motivators for an over production of laws and regulations, both at a national and at the EU level. According

⁵ L. Mader, 'Evaluating the Effects: A Contribution to the Quality of Legislation' (2002) 22:2 *Statute Law Review*, pp. 124-125.

to Bohne, overregulation is the real reason why there is an increasing gap between legislative promises and their actual fulfilment.

In chapter 5, Hoppe puts ex ante evaluation of legislation in the public policy context. When looked at from a policy studies perspective, it is clear that there can be no such thing as an independent, completely objective, ex ante evaluation in the legislative process. Hoppe convincingly shows that knowledge is a joint construction of policymakers, experts, public opinion, and the media, each of which strategically uses information to influence and bias the eventual authoritative definition of the problem and its underlying realities. Moreover, ex ante evaluations, such as a cost benefit analysis, usually are far from comprehensive as they do not (fully) cover non-economic costs and benefits. An interesting underlying question is: why is this the case? Is it because of methodological difficulties in estimating and quantifying the indirect benefits of legislation or determining what is the price of immaterial things, like the value of a human life (risk regulation)? Or does it have to do with the fact that policymakers and politicians are perhaps more interested in cutting back on government spending through deregulation than in showing the ‘softer’ benefits of regulatory intervention, such as the value that rules and regulations might have for the stability of financial markets or the trust that people will put in governmental decisions that have a legal basis.

Another reason for Hoppe to be sceptical about ex ante evaluation has to do with the fact that the forecasting of policy effects is still in its infancy, and may, because of severe methodological problems that surround prospective evaluation and, to which we will come back later, never grow old. We just remind the reader of the famous quote of Nobel Prize winner Niels Böhr: “predicting is very difficult, especially about the future”. Still, like Bohne, Hoppe argues that ex ante evaluation of legislation can be a sensible choice in the process of preparing new legislation as long as we accept that the evaluation itself is part of the political process. He proposes two strategies that can be considered. The first strategy is to cut the ties with the political process as much as possible by creating independent professional interdisciplinary bodies in which economists, lawyers and social scientists, all of whom are specially trained to do this kind of research, together carry out the assessments, under a system of independent peer review. One could think of an evaluation committee consisting of experts with different scientific backgrounds, appointed by parliament on the basis of their specific expertise and professional status. The second, and more or less opposite,

strategy is to improve the quality of ex ante evaluation as it is carried out within the (political) process of legislative drafting. This can be done by paying more attention to the checks and balances in the process of lawmaking, for instance by trying to circumvent information asymmetries. An interesting method that is sometimes used is to try to detect and correct overestimation by self-interested stakeholders through the invitation of parties that are not well organized (the 'silent mass') to the consultation process and lowering the threshold for their participation. Also, those that conduct regulatory impact assessments should think of themselves more as professionals who know how to bridge the gap between science and political practice by demarcating and coordinating these different institutional spheres in a creative division of labour. An example of this we find in the compilation of the Impact Assessment Board that has been established by the European Commission in 2006. The members of that board are high-ranking officials from the Commission's departments that have been appointed in the personal capacity and on the basis of their expert knowledge.

Methodological constraints appeared in both chapter 4 and 5. They are the main topic of chapter 6. Van Aeken shows that in practice only a very limited number of methods and techniques are applied to the bulk of ex ante evaluations or impact assessments. Most lawmakers stick to the consultation methods that they are familiar with. They are reluctant to try new and perhaps more promising techniques. An interesting question here is, of course, what could be the reasons for this reluctance. Van Aeken sums up three main culprits for the one-sidedness in the use of methods to perform ex ante evaluations, namely: a lack of political interest in prospective evaluation and/or evaluation research more in general, the time constraints to the drafting of legislation, and the specific competences of the civil servants involved (those are often people with a legal education not trained in doing sophisticated evaluation research). Another, rather trivial, reason might be that stakeholder consultations are a much cheaper method of ex ante evaluation than, for example, experiments with draft legislation in pilot projects or setting up large-scale computer simulations.

Van Aeken sharply criticises this approach: the method should fit the data, not the evaluator. Today's legislation requires in-depth evaluation rather than a quick, superficial or intuitive assessment of the consequences. A simple assessment, for instance by doing some interviews or bringing together a group of experts in a workshop, often misses the effects caused by psychological, societal, cultural,

economic, and other non-legal factors, and their interactions. Van Aeken: “It is, to start with, very hard or even sometimes impossible to determine which events will take place in the future. Next, calculating the effect of these events on the legislative project requires much effort and skills. This is furthermore complicated by the rise of multiple interaction effects between all of the events involved.” The lawmaker can think of a logical causality chain behind his desk, but research has shown that, in practice, this chain is broken by numerous societal, psychological, socio-psychological and other factors. Bill Bogart has compared the claims of this causal model with throwing a bowling ball down an alley.⁶ The impact of the law is in that case measured by how many pins succumb to the force of the ball. When many fall, the impact is considered to be great, but when all or most pins remain standing, the throw was causally insignificant and the bowling agent ineffective.

In reality, the street-level effects of legislation cannot be measured in such a way. Hence, the need for far more sophisticated methods of ex ante evaluation that are able to better take the context in which laws have to function in society into account. For some part the methods and techniques of ex ante evaluation that put less emphasis on causal connections can be listed under the heading of ‘computation’, as they can be employed from behind a desk and a computer. They are such methods as goal attainment scaling, prospective evaluation synthesis, multi criteria analysis, scenario analysis, game theory, risk assessment, micro simulation, modelling, experiments and quasi experiments, etc. etc.

Interestingly, Van Aeken claims that institutionalisation (among other things the presence of an independent evaluation body and a forum for evaluation research) is an effective tool to ensure the systematic use of evaluation research. He seems rather optimistic about the possibilities to overcome the ‘lamentable attitude’ of the political elite and chiefs of administration by this process of institutionalisation. Without denying the importance of institutional factors, we wonder if there is not more to it than just a lack of political interest in the outcomes of ex ante evaluations. Is it not more likely that those in power are sometimes unwilling to take the evaluation results into account? The fact that explanatory memoranda (‘travaux préparatoires’) that accompany legislative drafts sometimes show signs of great

⁶ W.A. Bogart, *Consequences: the Impact of Law and its Complexities* (University of Toronto Press, Toronto, 2002), p. 88.

dedication by leaving unwelcome facts or critical comments that are made during the consultation process aside, should at least cast some doubts in this respect.⁷

III. Practical Experiences with Ex Ante Evaluation of Legislation

There has been ample experience with various forms of ex ante evaluation of legislation in various countries, and at the EU level. At the EU level, however, the experiences are rather recent. Only since 2005, all proposals in the European Commission's Legislative and Work Programme are subjected to an impact assessment. The EU impact assessment is usually characterised as a comprehensive analysis of potential impacts of several policy options, based on accurate, objective and complete information, without prescribing a specific or common methodology. It takes an integrated approach towards environmental, economic and social impacts, and also a subsidiarity and proportionality test have been integrated into the instrument, as well as stakeholder consultation. The aim of an impact assessment is not only to make the legislative process more transparent and enhance the public support for new legislation but also to present to the legislature which trade-offs there are between various regulatory options without the pretensions of providing legislators with a decision criterion.

In chapter 7, Meuwese and Senden critically assess the first experiences of the EU impact assessment system. There definitely are some interesting results. The institution of the Impact Assessment Board in 2006, for instance, has been an impetus for quality control and for a more systematic development of a common methodology. The introduction of impact assessments also lead to opening up the lawmaking process to at least one alternative option. On the whole, however, we must conclude that the experiences are still somewhat disappointing, particularly from the point of view that the impact assessment is supposed to contribute to the better regulation strategy laid down in the inter-institutional agreement on 'Better lawmaking', which demands more attention for alternatives to direct regulation. The alternative that usually is considered but very often rejected, is not to regulate a certain topic at all.

⁷ In the Netherlands there is until today no legal duty to submit consultation documents to parliament together with the legislative draft. This is different, however, in for example Austria where Members of Parliament do receive a copy and where an electronic parliamentary database exists that includes consultation documents. See H. Schäffer, 'Evaluation and Assessment of Legal Effects Procedures: Towards a More Rational and Responsible Lawmaking Process' (2001) 22:2 *Statute Law Review*, p. 135.

Alternative regulatory solutions that take the form of self-regulation or co-regulation are often not evaluated, and a mix of regulatory instruments ('smart regulation') is not at all considered. The impact assessment builds upon a few clear-cut options that have been fixed in an early stage of the process, such as direct regulation, no regulation or self-regulation. A study of mixtures of direct regulation and self-regulation usually stay outside the scope of an assessment and guidance documents on impact assessment tend to treat the use of alternative modes of regulation as fully unproblematic.

Meuwese and Senden partly explain the lack of a systematic approach by pointing to the fact that the Commission does not seem to have a clear vision on when alternatives are allowed and desirable. On the other hand they argue that the 'success' of, for instance DGs and Commissioners or the Commission as a whole is very often still measured in terms of regulatory output. Furthermore, Meuwese and Senden show that even if an impact assessment leads to the conclusion that it is best not to come up with a proposal for new regulation that does not mean that self-regulatory alternatives are actually considered. Sometimes negotiated agreements between public authorities are preferred. Another interesting thought that they come up with to explain the lack of a structured approach towards the consideration of alternative regulatory mechanisms is that specific guidance on when and how, for instance, to use self-regulation would amount to a commitment in sensitive areas such as how the European Commission applies the subsidiarity principle, thereby reducing its own room for manoeuvre.

Last but not least Meuwese and Senden are holding a plea for more guidance on the legal possibilities and constraints regarding self-regulation and co-regulation. The mere indication in the new impact assessment guidelines that there may be legal constraints without clarifying what these actually are, cannot be considered to provide clear and sufficient guidance. The same goes for the way the guidelines encourage to think about regulatory options as either doing nothing, opting for self-regulation *or* relying on legislation. Just like the aforementioned Robert Baldwin, Meuwese and Senden argue that very often it might be wiser to integrate self-regulatory elements into a proposal for new legislation thus making a distinction between alternatives *for* and *in* legislation. According to them, the Commission should invest more in knowledge about the legal and practical conditions under which such a mix of soft and hard law elements is appropriate and pay less attention to regulatory 'hypes' as

the reduction of administrative burdens. This last remark clearly indicates that Meuwese and Senden are convinced that the use of self-regulation and co-regulation in the process of EU-lawmaking should not be regarded as a temporary hype but is there to stay.

The case studies to ex ante evaluation of legislation in Germany and Sweden, presented in chapter 8 by Veit, show that these countries have a history of ex ante evaluation of legislation dating back to the 1970s. In Germany, evaluation of various forms of assessments showed that these were not very successful. The comprehensive regulatory impact assessment, for instance, was not carried out the way it should. Standard questions about, for instance, the necessity of legislation and the availability of alternatives were all too often treated as formalities (tick-box mentality). The availability of an extensive regulatory impact assessment handbook, which provided a comprehensive overview of the methodology of ex ante evaluation did not provide much help since it was considered to be far too complicated to gain attention for impact assessments in the drafting process.

A new phase in the history of ex ante evaluation in Germany was introduced in 2005 when a new Coalition government came to power and made reduction of administrative burdens a top priority. As a consequence, in 2006, an assessment of administrative burdens following the Standard Cost Model was introduced. Although the scope of the assessment was reduced, the resources made available for it, and the political backing of the assessment are much larger than that of the previous forms of ex ante evaluation of legislation. An independent National Regulatory Control Unit, directly reporting to Federal Chancellor, checks all draft laws and general administrative regulations for their compliance with the principles of the standardised measurement of administrative costs before they are submitted to the Federal cabinet. All this explains why the assessment of administrative burdens has been more successful than the introduction of previous forms of ex ante evaluation.

In Sweden, all new or altered regulations, big or small, are subject to a broad regulatory impact assessment. An assessment of the effects of new legislation on small enterprises was integrated in the normal assessment in 2007. In 2008, Sweden followed the German example and established a National Regulatory Control Unit to not only assess the administrative burdens (like in Germany), but also to supervise compliance with the statutory provisions on ex ante evaluation.

A comparison of a large number of ex ante evaluations in Germany and Sweden shows remarkable differences, particularly with regard to the 'real' compliance with the assessment criteria. In Germany, there is a high formal compliance of up to 100%; each legislative proposal has a cover page on which all criteria are 'ticked off'. The real compliance, however, in some categories, is as low as 6%, as is the case in the category 'description of alternatives'. In Sweden, this important criterion has a real compliance rate of 94%: in almost every proposition, alternative policy options are seriously considered.

The reasons for these difference are remarkable. In Sweden, legislation is often prepared by Committees of Inquiry. These committees are organisationally located outside the government and conduct extensive research during a period of, on average, two years, in preparation of new legislation. They always have seen a study into alternative options as one of their tasks. Other factors that contribute to a good performance of ex ante evaluation in Sweden are the high degree of transparency of the legislative process (everybody is watching!), and the fact that in Sweden, other than in Germany, there is no dominance of judicial and juristic expertise in the preparatory phase of the lawmaking process. The latter is caused by both structural factors (the federal set up of the German state and the role of the German federal constitutional court) and social factors (the educational background of staff, which in Germany predominantly is a legal background). Veit concludes that professional socialisation has an enormous power of imprint over the prevalent orientation patterns and attitude in organisations, and thus on the way ex ante evaluation is carried out. However, there is more to it than that. Also the state's architecture is an important reason for differences in the evaluation culture. The fact that Germany is a federal state with a constitutional court explains why the integration of new regulations into the existing legal framework gets more attention during the drafting of new legislation. Sweden, on the other hand is a centralist state, without a central authority responsible for controlling norms in the form of a constitutional court, which explains why there is less focus on the way legislative drafts fit in the overall legal system. Constitution changes can alter these conditions as the membership of the EU by Sweden has shown. This has caused a high demand for professionals with specific legal expertise to supervise the necessary adjustments of national law to EU-specifications.

An interesting empirical study about the prospective value of ex ante evaluation is presented in chapter 9 in which Van Gestel and Vranken have compared ex ante evaluations of the effect of new legislation by the Council of State in the Netherlands with ex post evaluations of the same pieces of legislation in order to find out how accurate the predictions by the Council have been. They call this evaluation method ‘feedback research’. It is a combination of methods of prospective and retrospective evaluation.

An important reason why Van Gestel and Vranken have selected the advisory opinions of the Dutch Council of State as their object of study is that the Netherlands are one of the few countries in Europe that has not yet introduced a system of integrated regulatory impact assessments. The assessment of legislative drafts by the Council of State is what comes closest to an impact assessment, especially now that the Council does not limit itself to an assessment of legal technicalities but also considers the policy-analytical aspects of draft legislation on aspects such as: necessity, efficiency and enforceability. Another thing that makes the Council’s policy-analytical scrutiny of legislative drafts interesting is the fact that State Councillors are combining judicial tasks with providing advice on the quality of legislation. Moreover, most of them have a background in politics or have worked as high-ranking governmental officials, which might encourage a politicisation of the evaluation process.⁸ Finally, compared to most ex ante evaluations in other countries, the Council plays its role at a relatively late moment in the process of legislation, after the Council of Ministers has taken position. This might weaken the role that ex ante evaluation can play. One of the strengths of the Council of State’s assessment, on the other hand, is that it is entitled to receive an explicit reaction on its advisory opinions, which makes it more difficult to quickly and smoothly put aside the advice and impossible to keep silent about it.

Rather exceptional is that Van Gestel and Vranken got access to all relevant confidential internal documents belonging to the Council of State and had the opportunity to discuss their findings with State Councillors, which sometimes gave them more insight in the way the Council proceeds and how, for instance, the guidelines for policy-analytical review are being used. One of the most striking results

⁸ Especially the case of the Compensation of costs in the administrative objection procedure seems to reveal some signs of politisation of the assessment process. In that case the double mandate of State Councillors as judges and advisors on the quality of legislation appears to be a relevant factor in the outcomes of the assessment.

of their case study is that the accuracy of the current review by the Council does not seem to depend very heavily on the methods or checklist applied in the assessment. Roughly the same working methods and exactly the same checklist were applied in the two cases that were studied. However, whereas the Council often did hit the nail on the head in the draft for a new Youth Care Act, it overlooked important weaknesses in the second draft concerning compensation of costs in the administrative objection procedure. Perhaps the Council was in that case convinced by the arguments of the government too easily. In both cases, however, the advisory opinions of the Council had relatively little effect on the final draft that was sent to Parliament. According to Van Gestel and Vranken, the most likely explanation for this is the ‘path dependency’ in the lawmaking process. This makes that, as soon as there is agreement inside the administration about a proposal for a new law, it will normally become extremely hard for ‘outsiders’ such as impact assessment boards or other ex ante evaluators to persuade those who are responsible for the draft to adopt serious changes.

Notwithstanding these outcomes, Van Gestel and Vranken do believe that improvements in the ex ante evaluation by the Council of State are possible. Currently, the Council is usually as brief as possible in commenting. No remarks are made about good practices or possible ways to improve the draft, there is almost no reference to sources and no motivation as to the grounds of the Council’s criticism. It is impossible to find out whether the Council perhaps ignored minor flaws or agreed with choices made in the draft. As a consequence, the assessment process is neither transparent nor systematic. Existing literature on ex ante evaluation of legislation shows that relying heavily on experience, practical wisdom, and intuition, as the Council has been doing until today, is a hazardous approach because legislative flaws, unrealistic assumptions or biased positions can be overlooked quite easily. Moreover, without a systematic assessment with transparency as to the methods, arguments, sources, and evidence which underpin the advisory opinions, an opportunity is missed to challenge those who are responsible for the preparation of the bill to rethink parts of the draft. For them, such an opinion is just an opinion, regardless of the institutional authority of the author.

Van Gestel and Vranken suggest further empirical-legal research as to the possibilities and constraints of feedback research, especially since little has been written about this method of evaluation research, at least not by experts in the field of

legislative studies. For the time being they suggest that probably the biggest potential for feedback research lies in the fact that it might serve to make methods of ex ante evaluations more accurate because it can show in retrospect which observations that were made at various moments in the assessment process (data collection, interpretations of findings from consultations, alternatives modes of regulation and so forth) were right or wrong, and sometimes perhaps even what in particular caused a certain mistake.

In chapter 10, another highly interesting case study is presented in the field of corporate tax reform. Vording and Gribnau show that the reform of corporate tax law in the Netherlands was carried out by a small group of 'insiders', more or less behind closed doors, using a type of language that is not understandable for those outside this group. Independent information is not available. In the end, the decision-making process seems to have been biased towards the interests of large corporations, or/and by the government's wish to avoid any reference to the revenue effects of inward tax planning. The authors convincingly argue that an ex ante evaluation could have helped to overcome these biases. Ex ante evaluation might have helped to develop a realistic idea of feasible goals, given the international developments in the area of multinational enterprises (What can be achieved with a corporate tax rate reduction?). Economists probably would have dominated a formal consideration of feasible goals. As already stated before, the decision-makers were probably not interested in an economic perspective on the tax reform, as they apparently wanted to keep the decision-making process 'under control'. Legislators are perhaps not always willing to let themselves be surprised by reality.

A second role of ex ante evaluation would have been to improve the level of information available in the legislative process. Information that rests with private parties, and that they are not willing to disclose for tactical reasons, could have come to light when the diverging interests among the various stakeholders involved were used to acquire this information by those carrying out the assessment. Nevertheless, Vording and Gribnau rightfully argue that ex ante evaluation is not necessarily a policy-neutral activity. Those who are the information owners in the field of tax law are not always interested in sharing it with others, especially not if they feel the information might be used against them later on in the lawmaking process. The same thing we saw in the field of environmental law where Bohne claimed that corporations are often unwilling to share information about the possibilities for

emission reductions with public authorities because they feel that is not in their best interest. In such circumstances ex ante evaluation is a highly complex undertaking, which starts with problems of data collection. Average consultation procedures are probably insufficient to provide reliable information about the impact of legislation in these circumstances and ex ante evaluators will have to pursue a more active and investigative role, not only in retrieving the relevant data but also in assessing the validity of the information that stakeholders have provided. It goes without saying that this calls for high quality expert knowledge, and for safeguards concerning the confidentiality of information and an independent position. Finally Vording and Gribnau also show that the use of expert committees to prepare legislative drafts, as Veit has described for the Swedish situation, will not always be the answer in tackling information asymmetries, especially not if most of the experts (tax advisers) have their own interest in the outcomes of the process.

IV. Prospects for Ex Ante Evaluation of Legislation

The chapters of this book provide a wealth of new information on ex ante evaluation of legislation. The general conclusion that arises from all of the chapters is that ex ante evaluation of new legislation certainly is a valuable tool to improve the quality of legislation, but that its value must not be overrated because of tremendous methodological and political constraints. Let us go into both aspects of this central conclusion.

It is beyond doubt, that ex ante evaluation of new legislative projects, when carried out properly, has a positive influence on the quality of the decision-making process. It prevents tunnel vision and biases towards a certain option that may not be the optimal option. More in general, it leads to a better-informed and more transparent decision-making process. Having carried out some form of ex ante evaluation can be seen as an indication of the quality of legislation. In fact, courts already begin to refer to (the absence of) regulatory impact assessments as a quality indication of the piece of legislation that they have to judge in a specific case.

The parenthetic clause ‘when carried out properly’ is, however, essential. Ex ante evaluations can easily be misused to push a certain option forward or to push into the direction of using direct regulation as an instrument to deal with a given societal problem. ‘Misuse’ of the process of ex ante evaluations cannot be entirely prevented,

as we must understand that any evaluation that is carried out in the process of decision-making or lawmaking is part of the political process within which the lawmaking takes place. There is nothing wrong with that. It is simply a fact of life in a democratic society. The various actors within the lawmaking process will all try to play their role in the process, including in the ex ante evaluation part of the process. What constitutes ‘use’ or ‘misuse’ probably is hard to say: what is ‘use’ for one actor, can be regarded as ‘misuse’ by the other.

It is essential, though, that all relevant information on relevant policy options reaches the table of the decision-makers, so that political decision-makers at least are well-informed. The main contributing factors to that are:

- Ex ante evaluations should start early in the decision-making process, when all relevant policy options are still open, and they should be transparent.
- There should be room for an in between redefinition of the problem or the introduction of a new policy option.
- They should cover ‘smart regulation’ options, i.e., options in which various instruments of direct and indirect regulation are applied simultaneously.
- They should be carried out, preferably, by an independent institution with staff that is well trained to take a multidisciplinary approach, and that is able to use the wide variety of evaluating methods and techniques that is available. Therefore, staff should not mainly consist of lawyers, but should also consist of social scientist and economists. Attention for methodological issues should be centre stage within this organization, as well as attention for the issue of the relationship between science and political practice.
- All evaluations should be peer reviewed, be it by an Impact assessment board or another independent organisation.
- Ex post evaluations should be used as a basic source of information in an ex ante assessment, and to improve the quality of ex ante evaluations by providing feedback on the accuracy of predictions and comments that were made (introduction of ‘learning loops’).

The above contributing factors are strongly interrelated. Therefore, they should not be aimed for in isolation. Organizing the assessment away from the government, i.e., in an independent institution, for example, is good for the quality of the assessments in the sense that they will be less politically biased. At the same time, however, the

assessment's influence on the decision-making process is likely to be less because of the gap between the evaluation process and the political process. An early start of the assessment process enables a full assessment of all possible options. At the same time, however, the temporal distance between the assessment and the political process may be so big and so many political or practical changes may, meanwhile, have occurred, that the results of the assessment can hardly be used and a whole new assessment has to be carried out. While the factors mentioned above all strongly influence the quality of ex ante evaluations, for ex ante evaluations to be used in the decision-making process, concessions will have to be made. It all boils down to finding the right balance between scientific soundness and practical usefulness, given the specific situation. What is the right balance is different for each country and for each legislative institution.

More research needs to be done in order to further improve ex ante assessments. In several of the chapters of this book, new research questions pop up. For the instrument of ex ante evaluation to be further improved, the following research projects should be carried out:

- First and foremost, research into improving the methodology (or rather: methodologies) of ex ante evaluations is vital. As was shown in this book, there are many methodological pitfalls, all of which have to be further mapped so that they can be avoided. Research has to show the relevance of the various new methods (such as goal attainment scaling, prospective evaluation synthesis, multi criteria analysis, scenario analysis, game theory, risk assessment, micro simulation, modelling, experiments and quasi experiments) for the various types of problems to be evaluated. Which method is best suited for which case? And what conditions have to be met at the side of the evaluators and at the side of the decision-makers/regulators to fully deploy the specific method?
- Further empirical information as to the quality of existing ex ante evaluation instruments needs to become available to show the intensity of the problem of the a priori biases that are presumed to be present, biases towards a specific policy option, and biases towards using direct regulation.
- Ex ante assessments should be monitored and their quality should be assessed when new ex post assessments become available, so that we can learn from

these ex post assessments and are able to constantly improve the mechanism of ex ante evaluation and try to overcome the many difficulties ex ante assessments by nature have. More research is necessary in order to establish the potential link between ex post and ex ante assessments. Under what conditions should ex post evaluations be carried out in order to be of maximum benefit to ex ante evaluations? Can, for instance, the results of ex post evaluations be corrected for changed legal, political, or socio-economic circumstances at the time of the ex ante assessment?

Let us hope that the conditional yes to ex ante evaluation of legislation that is presented in this book, is a stimulus for the further improvement of what may become a valuable instrument in the lawmaking process on all levels of regulation, national and international.