Making Legislative Effectiveness an Operational Concept: Unfolding the Effectiveness Test as a Conceptual Tool for Lawmaking

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The importance of effectiveness in lawmaking is acknowledged by scholars and practitioners alike. Yet the concept remains one of the most vague terms in legal vocabulary. The article maintains that effectiveness has concrete content that reflects the systemic coherence and alignment between four fundamental elements of legislation: objectives, content, context and results. From this perspective effective legislation is the result of complex mechanics in the conceptualisation, design and drafting of the law and cannot materialise unless it is a clear concern in the early phases of lawmaking. The article takes a closer look at the fundamental elements of effectiveness and articulates the specific challenges that lawmakers are facing when attempting to design and draft effective rules. The "effectiveness test", a conceptual tools that adds "effectiveness lenses" to the existing lawmaking toolkit, is developed in more depth to a set of critical questions that lawmakers need to address in order to make conscious decisions on effective drafts.

I. Introduction: the challenge of lawmaking

Legislation is a "tool" to steer human behaviour towards political, social and economic change. As a "technique" for social engineering or transformation it induces individuals to adopt or refrain from specific behaviours and determines the reactions of the legal community to them.[1] Rules are born as ideas and then shaped into binding norms through the lawmaking process. The features of this transformation depend on the type of legal system,[2] constitutional frameworks and jurisdictional arrangements, system of government, political and social structure, culture,[3] drafting styles, and the "nature and ethos"[4] of law, among other issues.

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1 H Kelsen, "Law as a Specific Social Technique" (1941) 9 University of Chicago Law Review 75, 79–80.

2 C Stefanou, "Comparative Legislative Drafting. Comparing across Legal Systems" (2016) 18(2) European Journal of Law Reform 123, 124–134.

3 T Drinoszi, "Legislative Process" in U Karpen and H Xanthaki (eds), *Legislation in Europe. A Comprehensive Guide for Scholars and Practitioners* (Hart 2017).

4 H Xanthaki, "Legislative Drafting: The UK Experience" in F Uhlmann and S Hoefler (eds), *Professional Legislative Drafters. Status, Roles, Education* (DIKE 2016) 15–38.

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Lawmaking is a *cyclical* process[5] that does not end with the adoption of a law. Laws are conceived, adopted, implemented and amended in consequential steps that involve design and drafting, deliberation and adoption, implementation, enforcement and amendment. The life of the law is an eternal process of action, reaction and more action that shape its content. The close interconnection between the phases of the life cycle of legislation makes one thing evident: that choices made during the early stages of designing and drafting legislation determine the life of the law thereinafter. It is therefore reasonable to say, without undermining the importance of other factors in shaping the content of the law, that the early stages of lawmaking shape the law in the same way that the early years in a baby's life shape its character and personality.

Lawmaking is a *prospective* enterprise. Lawmakers have to rely on implicit or explicit assumptions about social reality or specific problems, their evolution and the ways in which the law will affect them.[6] Part of the role of the lawmaker is to anticipate the future and identify legislative formulas that are expected to work. How can they do that given their limited predictive capacities? A response to this concern came in the form of evidence-based lawmaking as an objective, interdisciplinary and incrementalist approach that looks for effective and custom-made "solutions" to legal problems.[7] This means that the link and the logical process between the problem to be addressed and the chosen legislative solution needs to be traceable and justifiable, as intuition is not sufficient basis for intervention. In practice, *rational or evidence based lawmaking* emphasises two complementary elements: on the one hand the well-grounded design of legislation and on the other the appraisal of the actual impacts of legislation and its responsiveness to changing circumstances.[8] Law informed by reality – as opposed to intuition – is assumed to produce better laws,[9] even though the link between legislation and logic is often contested[10] and the direct connection between evidence-based lawmaking and evidence-based law is difficult to prove.[11]

However, lawmaking is not a clinical experiment. It takes place in a dynamic, complex and constantly changing environment. It is complex in terms of content, management, organisation, coordination and implementation. Several actors are involved, several processes take place in parallel or consequently usually under extreme time pressure. Pressure also comes in many forms and the need to reach compromises and take into account heterogeneous interests forces lawmakers to engage in a complex balancing exercise that reconciles ideals with reality. This complex and constantly evolving environment makes entirely rational approaches to lawmaking a utopia, yet highlights

[5] P Noll, *Gesetzgebungslehre* (Rowohlt, Reinbeck 1973) 314.

[6] OD Oliver-Lalana, "Due Post-Legislative Process? On the Lawmakers' Constitutional Duties of Monitoring and Revision" in K Messerschimdt and AD Oliver-Lalana (eds), *Rational Lawmaking under Review. Legisprudence According to the German Federal Constitutional Court* (Springer 2016) 259.

[7] S Ranchordas, "Consultation, Citizen Narratives and Evidence-Based Regulation" (2017) 1(2) European Journal of Law Reform Special Issue on Better Regulation at 66–67.

[8] Oliver-Lalana, supra, note 6, at 259.

[9] J Rachlinski, "Evidence-Based Law" (2011) 96 Cornell Law Review 901 at 910.

[10] J Hage, "The (Onto)logical Structure of Law: A Conceptual Toolkit for Legislators" in M Araszkiewicz and K Pleszka (eds), *Logic in the Theory and Practice of Lawmaking* (Legisprudence Library Vol 2, Springer 2016) 3.

[11] Rachlinski, supra, note 9, at 912.

the contemporary nature of lawmaking as a *partially rational* exercise *with a strong social character*.

What can serve as a clear guidance in the complex task of lawmaking? One – but not necessarily the only – answer to this question emanates from the goal-oriented nature of lawmaking.[12] Legislation is "an instrument for purposive, goal-oriented intervention designed to achieve specific goals in concrete situations"[13] and shape behaviour in a way that corresponds to specific goals.[14] Given the impossibility of pure logic or rationality in lawmaking, yet the need to respond to real problems with specific solutions, the effective nature of lawmaking emerges as an important feature in contemporary contexts. Is this the case? What is the position of effectiveness in lawmaking?

II. Effectiveness as a value in lawmaking

The values and principles guiding lawmaking have been a concern for all disciplines dealing with legislation: legal theory, constitutional law, sociology of law, regulation, legislative studies. Unsurprisingly, each discipline prioritises different values: legal theorists refer to efficacy,[15] sociologists refer to effectiveness,[16] law and economics scholars and scholars of regulation are concerned with efficiency.[17] Constitutional law scholars refer to principles of proper lawmaking[18] that encompass proportionality, legal certainty and legality, among several others. And although the usefulness of these principles is undisputed, what guidance do they offer in the practical steps of lawmaking?

There are two main concerns with the usefulness of abstract substantive principles (like proportionality or legal certainty) from a lawmaking perspective. The first is that in their majority they approach the law from the perspective of the judge rather than that of the legislator.[19] The impact of a rule on legal certainty or legality is considered after a norm has been enacted. Yet norm formulation is fundamentally different from norm interpretation. The thinking process behind delivering a judgment or deciding on the constitutionality of a law is different to the proactive thinking required when attempting to "subject human conduct to the governance of rules".[20] Despite the alleged alliance in aim and technique between the judicial and the legislative processes,[21] the questions tormenting the lawmaker and the judge differ in nature, texture and scope. Take for example the proportionality test, a balancing exercise used by courts worldwide to

[12] A Allot, *The Limits of Law* (Butterworths 1980) at 11.

[13] G Teubner, "Substantive and Reflexive Elements in Modern law" (1983) 17(2) Law & Society Review 239.

[14] Allot, supra, note 12, viii at 11, 28, 30.

[15] HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1997) at 103.

[16] Allot, supra, note 12, at 11.

[17] R Baldwin, M Cave and M Lodge (eds), *Understanding Regulation. Theory, Strategy and Practice* (2nd edn, Oxford University Press 2012) at 25–31.

[18] P Popelier, "Legal Certainty and Principles of Proper Law Making" (2000) 2(3) European Journal of Law Reform at 321; U Karpen, "Introduction" in Karpen and Xanthaki, supra, note 3, at 12.

[19] K Tuori, "Legislation Between Politics and Law" in L Wintgens (ed), *Legisprudence* (Hart 2002) 99.

[20] L Fuller, *The Morality of Law* (revised edn, Yale University Press 1964) at 106.

[21] J Landis, "Statutes and the Sources of Law" in *Harvard Legal Essays Written in Honor and Presented to Joseph Henry Beale and Samyel Williston* (Cambridge Mass, Harvard University Press 1934).

examine whether a measure restricting an individual right is proportionate. The judiciary "corrects" the rationality of lawmaking by examining whether a measure serves a legitimate purpose, whether it is rationally connected to the purpose, is the least restrictive of all equally effective means, and is not disproportionate in the strict sense.[22] However, this ad hoc "balancing exercise" looks at lawmaking in the light of the facts of a specific case. Can it also, and to what extent, proactively guide lawmakers to make more proportionate decisions? The trend of constitutional and other courts to act as "regulatory watchdogs"[23] and refer, although to a different extent and often reluctantly,[24] to legislative preparatory documents indicates an effort to place themselves in the prospective position of the lawmaker. Although a number of problems are associated with this evolution,[25] the message to be drawn in relevance to the present study is that the more the legislator anticipates judicial objections, the more discretion the courts can be expected to exercise. The proactive use of judicial tools (especially the proportionality test) in lawmaking is an issue that deserves closer study and attention in the future.

Secondly, standards for good legislation are "topical points of view",[26] hence elusive, relative and vague. Substantive standards like democratic legitimation, functionality, completeness and coherence, understandability and accessibility and legistic or procedural standards might often contradict each other, lack concrete content and be challenging to operationalise.[27] And although their overall relevance in lawmaking is beyond doubt, the concrete guidance they offer merits further scrutiny as in their current form they rely mostly on ad hoc reasoning that differs greatly from the abstract thinking the lawmaker needs to engage in. Without undermining their potential to assist lawmakers, these principles need further elaboration and operationalisation in order to reflect the concerns of the lawmaker in the early stages of lawmaking.

At this point principles of economic or "managerial" rationality,[28] such as efficacy, effectiveness and efficiency emerged to strengthen the rational aspects of lawmaking. These principles interact with substantive ones[29] by adding layers of rationality. Their advantage is their "neutrality" and their potential to furnish objective decision-making criteria in the process of designing and drafting legislation. However, even these

[22] N Petersen, *Proportionality and Judicial Activism. Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge University Press 2017) 2.

[23] P Popelier and A Mazmanyan, "Constitutional Courts and Multilevel Governance in Europe. Editors' Introduction" in P Popelier, A Mazmanyan and W Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013) at 13.

[24] Indicatively see R van Gestel and J de Poorter, "Putting evidence-based law making to the test: judicial review of legislative rationality" (2016) 4(2) The Theory and Practice of Legislation 155; P Popelier and J De Jaegere, "Evidence-based judicial review of legislation in divided states: the Belgian case" (2016) 4(2) *The Theory and Practice of Legislation* 187; the contributions in Messerschimdt and Oliver-Lalana, supra, note 6, for the German experience, and the contributions in Popelier, Mazmanyan and Vandenbruwaene, supra, note 23.

[25] R Ismer and K Meßerschmidt, "Evidence-based judicial review of legislation: some introductory remarks" (2016) 4:2 The Theory and Practice of Legislation 91 at 92.

[26] H Schulze-Fielitz, "Paths Towards Better Legislation, Detours and Dead Ends" in Messerschimdt and Oliver-Lalana, supra, note 6, at 36.

[27] ibid at 35–36.

[28] U Karpen, "Efficacy, Efectiveness, Efficiency: from Judicial to Managerial Rationality" in Messerschimdt and Oliver-Lalana, supra, note 6, at 304.

[29] U Karpen, "Introduction" in Karpen and Xanthaki, supra, note 3, at 12.

principles – the triad of efficacy, effectiveness and efficiency – are not free of challenges, both conceptual and operational. Disciplinary boundaries and limited inter-disciplinary dialogue have not allowed a cross-fertilisation of knowledge on the operation, content and interrelation between them, not to mention their role in lawmaking, resulting in considerable confusion as the concepts are often used interchangeably and with overlapping content.

The concepts of efficacy and effectiveness have been a concern to most disciplines working with the law. Kelsen considered effectiveness a condition of validity of a norm.[30] Others (Hart, Raz) rejected the link to validity[31] but associated efficacy (rather than effectiveness) to the conformity of actual behaviours to the standards or models of behaviour prescribed by the law.[32] Mader linked efficacy to the achievement of the goals of legislative action and effectiveness to the correspondence and the causal links between the attitudes of the target population and the normative model.[33] Fluckinger claims the opposite: he considers measures efficacious if applied and followed, efficient if the cost is proportional and effective if they achieve their objectives.[34] Legal sociologists associate effectiveness (rather than efficacy) with the goals of legal policy and the results produced by a norm.[35] According to Allot, an effective law is a law that can do what it was designed to do and effectiveness is the degree of achievement of its objectives.[36] Efficiency on the other hand, a term with economic origin, has clearer content.

The confusion especially in the definition of efficacy and effectiveness and the relation between them emerges both because the terms are used interchangeably but also because they are associated with sub-concepts that remain equally vague. Do both concepts link the goals of legislation with its results and effects? Is compliance a criterion of efficacy, effectiveness or both? Do goals and results coincide with compliance and observance? What kind of goals? What kind of results? Are the two synonymous? If not, what is the difference between them?

Attempting to synthesise the previous approaches, the three principles can work together if seen to connect different aspects of legislative objectives to different aspects of results and functions of legislation. Efficacy, if accepted as the broadest of the three concepts, focuses on the broader functions of legislation and the extent to which it contributes to broader policy or societal objectives (the question being: *has the law achieved its broader objectives on the legal system or the society eg to promote equal opportunities*?). Effectiveness, on the other hand, focuses on results directly associated with the rule and the mechanics of the solution included there (the question being: *does the law work as planned*? *Does it achieve its direct goals?*) while efficiency looks at

[30] H Kelsen, *Pure Theory of Law* (translated from the 2nd revised and enlarged German edition by Max Knight The Lawbook Exchange 2009) at 11.

[31] Hart, supra, note 15, at 103; J Raz, *The Authority of Law* (2nd edn Oxford University Press 1980) at 87.

[32] H Jones, *The Efficacy of Law* (Rosenthal Lectures Northwestern University Press 1968) at 4.

[33] L Mader, "Evaluating the Effects: A Contribution to the Quality of Legislation" (2001) 22(2) Statute Law Review 119 at 126. See also Karpen, supra, note 28, at 304–308.

[34] A Fluckiger, "Effectiveness: a new Constitutional principle" (2009) 50 Legislação: cadernos de ciência de legislação 183 at 190.

[35] A Sarat, "Legal Effectiveness and Social Studies of Law: on the unfortunate resistance of a research tradition" (1985) IX:1 Legal Studies Forum 23 at 23.

[36] Allot, supra, note 12, viii at 28, 30.

objectives in relation to costs (the question being: *does the law achieve maximum benefits with the least cost?*). Seen in this light, each principle refers to a different function of a legislative text: achievements in the legal or social arena (efficacy), application and observance of the law and achievement of direct results (effectiveness) and the cost-effectiveness of the solution (efficiency). This not only solves the conceptual confusion but highlights the complementary nature of the three principles, and the need for them to coexist in synergy in order to enable a multidimensional understanding of legislative quality.

Xanthaki places these principles in a pyramid of virtues that guide the drafting of legislation (and lawmaking in general I would add).[37] The hierarchy does not reflect importance, but the different scope of each principle. Efficacy is the broadest, to the extent that it reflects regulatory goals; effectiveness is a realistic measure of correspondence between attitudes of the target population and the normative model, and efficiency is an expression of cost in relation to benefit. According to her, out of the three, effectiveness is the primary expression of legislative quality that lawmakers can realistically pursue within their mandate.[38]

Despite the gaps emanating from the limited interdisciplinary dialogue on the topic, one thing becomes clear: that all disciplines dealing with the law, including practitioners, despite their distinct perspectives, are in fact looking for a concept that encapsulates the internal systemic consistency, coherence and purposive nature of legislation and can guide lawmaking. Out of these three principles, effectiveness seems to best respond to the quest for a concept that encapsulates the internal systemic consistency, coherence and purposive nature of legislation.

There are several reasons for this. On the one hand, efficacy (as the connection between the law and regulatory goals) is too broad as it goes beyond the scope of the law in the realm of policy; efficiency is guided by a narrower, "coined" rationality looking at resources in relation to outcomes but downplaying important substantive elements which are not valued by cost related concerns. Despite its advantages in terms of objectivity and inclusivity, the prevalence of cost-related arguments in legislative decision making can over-technify decisions, obscure broader impacts which are not easily quantified, cannot always weigh all effects (and especially social impacts) and, most importantly, can overlook public interest elements which go beyond the economic, but are nonetheless important in lawmaking.[39] Effectiveness on the other hand, as a concept tailored to the measure of the legislative text or rule, contributes a layer of rationality by setting clear benchmarks[40] and connects them to the mechanisms introduced, the results prescribed by the legislator and those achieved in real life. Further, it renunciates a thinking primarily oriented towards numbers to include consideration of social, psychological and

[37] H Xanthaki, "On Transferability of Legislative Solutions" in C Stefanou and H Xanthaki (eds), *Drafting Legislation. A Modern Approach* (Ashgate 2008) 1 at 17; H Xanthaki, Drafting Legislation. Art and Technology of Rules for Regulation (2014) at 7.

[38] H Xanthaki, "Quality of Legislation: an achievable universal concept or a utopia pursuit?" in L Mader and M Tavres de Almeida (eds), *Quality of Legislation. Principles and Instruments* (Nomos 2011) at 80–81.

[39] W Voermans, "To Measure is to Know: The Quantification of Regulation" (2015) 3(1) The Theory and Practice of Legislation 91 at 110–111.

[40] Fluckiger, supra, note 34, at 187, 189.

political effects.[41] Effectiveness, as the capacity of legislation to do the job it is meant to do, looks at the *mechanics* of legislation and its *systemic* capacity to work.

Hence, effectiveness combines a number of features: firstly, it is a *purposive* concept that reflects the orientation of legislation towards specific goals directly linked to the legislative text. Secondly, it is a *systemic* concept that reflects the *mechanics* of legislation and its capacity to function as a "system". Thirdly, it is a primarily internal (rather than external) element of every law to the extent that it is determined to an important extent (but not exclusively) by the substantive choices made by the lawmakers. Every piece of legislation bears the seeds of its effectiveness (or ineffectiveness). Fifth, effectiveness has a *cyclical* nature, evolves together with the rule and connects its life phases through its two dimensions: a *prospective* dimension when the law is formulated and drafted and a *real-life dimension* when a law is implemented. The former expresses the extent to which legislation is conducive to the desired results (can a law achieve the desired results?), which is pertinent to lawmakers, while the latter expresses the extent to which the attitudes, behaviours, results and outcomes correspond to those prescribed by the legislator (has a law achieved the desired results?). The answer to these questions and their interrelation is an indicator of the effectiveness of a rule.

However, even if we agree that effectiveness best reflects the tangible perspectives of the quality of a rule (that fall within the decision-making scope of the lawmaker), this solves neither the question of how it can be operationalised nor how it can serve as guidance to lawmaking. Is effectiveness yet another illusory concept?[42] Does it have concrete content? Can lawmakers consciously work towards effectiveness? How? Which legislative choices promote effectiveness and which ones do not? How can effectiveness move from an abstract and theoretical principle into a concept guiding legislative decision-making? So far effectiveness is treated as an abstract and theoretical concept. My argument is that effectiveness as a purposive, systemic, substantive and cyclical concept has concrete operational content that can respond to the specific lawmaking choices and provide decision-making criteria to lawmakers.

III. The fundamental elements of legislative effectiveness

Looking at the content of effectiveness, existing scholarship and practice do not provide a single analytical formula to the question what makes a law effective. Philosophers acknowledge links to the communication of the "message", supportive action in the courts and society, forestalling avoidance, enforcement and motivating feelings of obligation in the subjects of the law.[43] Legal sociologists acknowledge links to the content of the law, the character of norms, the clarity of purpose, the interaction and fit of the law with other components of the legal system and the social context, the suitability of implementing norms, institutions and processes, language, scrutiny or monitoring of how the law works in practice as well as factors like vagueness or specificity, knowing

[41] Karpen, supra, note 28, at 306.

[42] Fluckiger, supra, note 34, at 187, 189.

[43] Jones, supra, note 32, at 5, 14–21, 76.

who the audience is, clarity of language, knowledge of the law, the use of appropriate sanctions, deterrents and enforcement mechanisms.[44] Overall, emphasis is mostly placed on the deterring function of sanctions, compliance and enforcement goes in little depth on all other issues.

However, looking at the broader picture, effectiveness as a measure of the mechanics of legislation essentially aligns four fundamental elements that are present in every law: the objectives of the law, the "solution" expressed in the content of the law, its results and the overarching structure of the law.[45] Each element has a distinct importance for effectiveness: purpose sets the benchmark for *what* legislation aims to achieve; the substantive content determines *how* the law will achieve the desired results and how this will be communicated to its subjects. The results of legislation indicate *what has been achieved.* Last but not least, the overarching structure of legislation determines *how the law integrates the legal system and interacts with it*.

Seen as a synthesis of these elements, effectiveness is no longer an abstract concept. On the contrary, it becomes specific, concrete and tailored to the specific choices expressed in every legislative text. The following section will examine each element and try to identify the lawmaking challenges associated with them.

1. Purpose of legislation: the benchmark of effectiveness

Legislation is a purposive tool. The lack of purpose would make a law arbitrary and go against fundamental premises of the rule of law.[46] Purpose is also the connecting tissue between policy and legislation and the different phases of the life-cycle of the law: when a rule is conceptualised and drafted, purpose is the "link" between the specific problems addressed, the broader policies of the government and the means chosen to address them; when a law is interpreted, purpose helps diagnose the intention of the legislator to interpret vague provisions. Further, purpose is the obvious starting point in the effort to connect legislation with its results and determine what a law has achieved.

The purpose of a law is important in terms of effectiveness because it states *what* the law aims to achieve. Obvious as this may sound, the more one thinks about it and looks at legislative practice, the less it appears to mean. Is the purpose of a law a clearly identifiable and objective concept? Where is this expressed? So far the purpose of legislation is mostly sought in the process of judicial interpretation and review. Yet, if legislation does not clearly indicate its purpose, how objective is this process? Legislation can serve different purposes and functions ranging from achieving specific goals, generating broader changes on the surrounding legal or societal environment. These goals can be tactical or strategic, explicit, implicit or hidden.[47] What purpose and goals are relevant to effectiveness? And where can they be found?

To come to the next point, goals are traceable to a different extent in legal or non-legal documents connected to legislation or the process of its adoption and enactment.

[44] Allot, supra, note 12, viii at 13.

[45] M Mousmouti, "Operationalising Quality of Legislation through the Effectiveness Test" (2012) 6(2) Legisprudence 201; M Mousmouti, "Effectiveness as an Aspect of Quality of EU Legislation: Is it Feasible?" (2014) 2(3) The Theory and Practice of Legislation 309.

[46] R Ekins, "The Intention of Parliament" (2010) Public Law 715.

[47] M Zamboni, "Goals and Measures of Legislation: Evaluation" in Karpen and Xanthaki, supra, note 3, at 97–99.

Expressions of purpose can be found in the body of legislation (depending on the jurisdiction in the form of purpose provisions, titles or preambles). Alternatively or in parallel the rationale and purpose of a legislative intervention can be explained or stated in explanatory material or extraneous documents such as policy papers, reports on motives, explanatory notes or impact assessments. Where should one look for purpose? And when inconsistently stated, what prevails?

Last but not least, and independently of their placement which is a jurisdiction-specific choice, the degree of abstraction or precision of legislative goals affects the work of the lawmaker, the interpreter and the implementer. Independently of placement, and in order to promote effectiveness, purpose needs to provide a meaningful benchmark for what the law aims to achieve. Is this the case in the way laws are currently made? Legislative practice shows that purpose is a vague and elusive concept. Even when explicitly stated different ways to do so respond to a different extent to the challenges of effectiveness.

Attempting a typology, a first way to express purpose includes narrowly phrased statements that convey pragmatic or procedural information. For example, "the purpose of the Act is to make provision for..." or "to amend the law…" or "to transpose in the national legal order Directive X...". Accurate as these statements might be, they provide limited information with regard to the substantive purpose and objectives of the specific law and resemble a self-fulfilling prophecy. Do these statements provide a meaningful benchmark for effectiveness? Unfortunately not. Their usefulness when attempting to assess effectiveness is relatively limited.

At the other end of the spectrum one can encounter broad statements that allude to policy rather than legal objectives and tend to go beyond the reach of legislation. For example, statements phased as follows: "the present law aims to make the equality of opportunities a reality for everyone"... or "to increase equality of opportunity" or "to eliminate discrimination". Although more informative with regard to the substantive content of the law, these statements introduce goals so ambitious that the legal text can by no means achieve them, while the specific objectives of the text remain to be deduced. Again, these statements set a benchmark that a law on its own could never achieve. Effective as it may be, no law can eliminate discrimination, corruption or other complex and multidimensional social phenomena.

A third way of stating purpose in legislation includes legally-oriented objectives. For example, "an Act to render unlawful certain kinds of discrimination" states how the text intervenes to contribute to the fight against discrimination. Such statements are accurate but again have a self-fulfilling nature. By the fact of enacting a law that renders some acts as unlawful discrimination this purpose is fulfilled. Hence again its broader usefulness as a benchmark of achievement is limited.

Last but not least, another type of expressing purpose in legislation is by combining narrow and broader objectives. For example, an Act "to set a framework for combating discrimination ... in order to ensure the application of the principle of equal treatment" indicates the legal means used as well as the overall objectives to which they contribute. Legal statements are combined with statements of broader (policy) objectives and provide a more meaningful benchmark both for the interpretation and the effectiveness of the law.

Despite its important role when designing, drafting and implementing legislation, expressing the purpose of legislation in a meaningful way poses important challenges. Although practices differ significantly among jurisdictions and legislative texts, and purpose should, at least in principle, be stated in some form either in the text of the law, in preparatory material or in both, this is rarely the case. In practice, purpose is rarely explicit and often needs to be deduced. Although more information is available in material extraneous to the legislative text, more often than not judges or interpreters need to be creative in determining the purpose of the law. Although in theory purpose setting is the starting point of every decision-making process, when it comes to lawmaking, it remains vague and obscure.

Three main challenges are associated with the identification of purpose in legislation: firstly, often purpose is clearly stated neither inside nor outside the text and significant deductive effort is required to identify it, which make the overall objectives of the legislative text ambiguous and vague. Secondly, expression of purpose is often either too narrow or too broad and hence cannot meaningfully guide the implementer and the interpreter. Thirdly, purpose might be expressed inconsistently or even in a contradictory way in different parts of the legislative text or material. To conclude, the examples presented suggest that insufficient attention is paid to the expression of purpose when designing or drafting legislation.

Determining the purpose of legislation in a clear way is an important starting point for an effective law. Implicit purposes require deductive reasoning to determine what a law is there to achieve. Purposes that are too broad or too narrow cannot direct interpretation and implementation to the desired results and the law might be manipulated in different directions. Independently of whether purpose is placed inside or outside the text, which depends to a great extent on the practice followed in different jurisdictions, ways of expressing purpose can differ substantially in the information conveyed. Seen from the perspective of effectiveness, the purpose of legislation is not a formality but needs to set a clear, objectively identifiable, and pertinent benchmark for what a law aims to achieve. Whether this information will be included in the text or in other material does not change the fact that lawmakers need to figure out a clear and meaningful purpose, that is unambiguous and easily identified, reflects the different levels at which legislation is expected to operate (results, outcomes, effects) and sets a *clear and substantive* benchmark for what the law aims to achieve.

2. Substantive content of legislation: the "heart" of effectiveness

The second fundamental element of effectiveness is the content of legislation. Laws usually come as a solution to a problem (they punish, they motivate, they set standards of behaviour to address specific phenomena). The "mechanics" of the legislative solution essentially involve a choice of rules and legislative techniques that will influence the behaviours of the target audiences, enforcement strategies and mechanisms that will induce them to comply, and choices in communicating the message of the law to its audiences expressed through language, structure, form etc. Seen from the perspective of effectiveness, the content of the law determines *how* it will achieve its results.

The choice of rules determines how behaviours will be directed towards the desired goals, what obligations are imposed, how the rules will be enforced and the consequences or motives attached to them. Last but not least, the way in which the "message" of the law is stated determines how the targeted audiences will be reached. These choices obviously have a significant impact on the capacity of legislation to achieve results. If the selected rules (or combination of rules) are inappropriate to address the problem or to the audience or do not serve the objective of the law, their design is ineffective; if enforcement mechanisms are inappropriate or implementation is inadequate, enforcement is ineffective; if the subjects of the law do not know how to comply or encounter difficulties in complying or interpreting rules, drafting is ineffective.[48] Reality can always challenge them, but these are the primary tools the lawmaker has in order to design rules.

From the perspective of the lawmaker the formulation of the content of rules poses three important challenges: that of compliance, enforcement and communication. These topics, common in the discussion around legislation, are so far treated as implementation problems. However, when seen from the perspective of lawmakers they raise questions of distinct texture and content. How and to what extent can the lawmaker choose rules the subjects are more likely to comply with? How can they anticipate which legislative techniques are more likely to bring the expected results? And what criteria can they use apart from intuition or hunches to select rules that have more probability of being respected? Further, how can the most appropriate enforcement styles and mechanisms be selected? Not all laws are the same, not all audiences are the same. What can work best in each case? Last but not least, how can language, as the main communications medium of the message of the law, be used to transmit clear signals and eliminate "noise" or "interference"?[49]

Legislative practice offers several examples of how poor choices in the content of the law affect its overall effectiveness. For example, legislation introducing standards and requirements can miss its target in several ways. It is not uncommon for legislation to introduce standards and requirements which are irrelevant to local circumstances (for example stringent building requirements in a country where this is not justified by a history of earthquakes), are beyond the reach of the majority of the population and do not take into account local incomes, climates and available resources or do not motivate people to comply (tax avoidance being a common example). In this case the "design" of the "solution" introduced by the law seems to invite lack of compliance and ineffectiveness.[50] It is also common to encounter laws with ambitious and unrealistic enforcement mechanisms. A planning law in Uganda required the recruitment of an additional 20,000 civil servants. Such unrealistic enforcement strategy that did not reflect the financial and institutional capacity and reality of the implementing institutions inevitably had a negative impact on the law: it was never implemented.

[48] J Black, "Critical Reflections on Regulation" (2002) 27 Australian Journal of Legal Philosophy 3.

[49] Allot, supra, note 12, viii at 13.

[50] For specific examples see M Mousmouti and G Crispi, "Good Legislation as a Means of Ensuring Voice, Accountability, and the Delivery of Results in Urban Development" (2014) 6 World Bank Legal Review 257.

But even in more sophisticated legislation, challenges in the "mechanics" of the law can be encountered. For example, European equality legislation puts in place a multi-layered regulatory strategy that combines prohibitions of distinct forms of discrimination, positive measures, obligations to impose sanctions, duties to disseminate information, to promote social dialogue, dialogue with civil society, self-regulation and preventive measures, even proactive measures like mainstreaming.[51] The multi-layered enforcement strategy combines an individual complaints-led model, traces of a group-justice model and proactive measures. In this example, challenges relate to the communication of the message of legislation. For one matter, the legal formulations of equality in the Equality Directives do not reflect clear legislative choices. Definitions have not been clear and unambiguous and present a mix of concepts with a determined content and others with an "open" or flexible one. Definitions of direct and indirect discrimination suffered from multiple inconsistencies that have been gradually "corrected" through the interpretative intervention of the Court of Justice and "recast" efforts. The concept and the nature of positive action is not defined, leaving considerable vagueness with regard to its function and nature. A related issue pertained to the definition of the protected grounds of the Equality Directive. Highly controversial grounds, such as race and ethnic origin, religion or belief and sexual orientation are left open while conceptual and drafting choices raise a number of questions. To take one concrete example, the lack of a definition of disability, caused controversy with regard to the cases that could fall under it. In the case *Chacon Navas*,[52] the Court acknowledged that an "autonomous and uniform" European definition of disability would guarantee uniform treatment across Europe. In fact, the Court did no more than reflect on some fundamental lawmaking choices: how can the Directive introduce minimum standards of protection across the EU if the content of basic notions is not clear? Even though the design of the Equality Directives is well articulated, its effectiveness is "weakened" by the fluid and abstract content of central legal formulations. Although this can be justified as a "realistic" approach that reflects the intricacies of European legislation, from a lawmaking perspective, it raises a number of questions with regard to the protection offered, the circumstances under which the law will be interpreted, and the degree to which these choices allow equality legislation to be effective. These limitations should have been the subject of consideration during the lawmaking process.

The examples presented are only meant to make explicit an important lesson from legislative practice, namely, how poor legislative design can come in different forms: an insufficient understanding of the features of the problem addressed through legislation and consequently the choice of inappropriate rules, inconsistency in the rules introduced, complex solutions that do not reflect the existing structures and capacity, solutions that are difficult (or impossible) to implement, or complex or inarticulate choices in legislative communication. The typology is not exhaustive: inevitably it will expand with the number of examples subjected to the test of effectiveness. However, the point made is that there is a direct relation between the choices expressed in the law and the results achieved in reality and these need to be conscious and consistent.

[51] Mousmouti, supra, note 46, at 309–327.

[52] C-13/05 *Chacon Navas v Eurest Colectividades SA* [2006] ECR I-6467.

How can lawmakers anticipate and avoid these failures? Although there is no definitive answer to this question it is important to note that the main issue is to approach lawmaking as a pragmatic and bottom up (rather than top down) process. This implies studying a specific problem and its features, finding information and evidence, researching, analysing and thinking. This process and way of thinking, backed by different types of evidence,[53] has the potential to balance intuitive choices, confirmation bias or naïve beliefs, minimise automatisms and repetitive patterns in legislation and capitalise the knowledge emanating from pre-existing legislation, other jurisdictions, expert or scientific studies, economic or mathematical models and statistics, including using the outcomes of existing tools like impact assessment studies, consultations and tools designed to assess compliance etc. Devoting time to legislative design and a clear legislative strategy, balancing out the advantages and disadvantages of alternative legislative techniques in terms of capacity to deliver results, reflecting on past success and failures, anticipating the thorny issue of compliance through the use of practical tools where available,[54] ensuring that enforcement mechanisms have a logical structure and are feasible in terms of resources, being aware of path dependence,[55] testing the consistency and proportionality of the solution, making informed choices on communication, structure and language and being aware of legislative "patterns" and automatisms that tend to repeat themselves are what the legislator can do.

The substantive content of legislation lies at the heart of effectiveness. This is too broad a subject to be fully developed here. However, the point I want to make evident is that the choice of legislative techniques, enforcement mechanisms and legislative construction determines to a great extent whether a law will achieve results or fail, partially or entirely, and these are conscious or unconscious choices that lawmakers make. The substantive content of legislation is conducive to results when the choice of legislative techniques, enforcement mechanisms and drafting conventions is proportional and responsive to the purpose of legislation and when these choices are consistent, balanced, coherent and expressed in a clear and precise way.

3. Results of legislation: the "measure" of effectiveness

The legal discipline is not particularly at ease with measurable concepts like results, outcomes or effects. Despite this, it is a fact that every law produces specific results and effects, wanted or unwanted. Different types of results appear to be particularly pertinent: outputs or "products" linked to a specific law (eg judgments, permits, claims etc); goals, outcomes, as cumulative results in the field of intervention (eg safer travelling as a result of using seatbelts or respecting tobacco prohibitions); and effects or impacts on human behaviour, positive and negative, independently of what the lawmaker had in mind (eg people using seatbelts or respecting tobacco prohibitions).[56] Unless the anticipated

[53] SJ Kealy and A Forney, "The Reliability of Evidence in Evidence-Based Legislation" (2018) 1 European Journal of Law Reform 40 at 52.

[54] Dutch Ministry of Justice (2004), *The Table of Eleven*: *A Versatile Tool* available at < www.sam.gov.lv/images/modules/items/PDF/item_618_NL_The_table_of_Eleven.pdf > (last accessed 8 September 2018).

[55] O Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2001) 86 Iowa Law Review 601 at 604.

[56] L Friedman, *Impact. How Law Affects Behaviour* (Harvard University Press 2016) at 45, 48.

results are clearly figured out in the process of lawmaking, the enterprise of making effective choices to achieve them remains fluid.

Anticipated results are to be verified once the law is enacted. The "implementation game"[57] proves that the relation between the law on paper and the law in reality is not always linear. The need to know about the results and effects of legislation is not a theoretical concern: instead, it is a requirement of democratic governance, a way to prevent adverse effects on fundamental rights and to consistently appraise the responsiveness of the law to the regulated problems.[58] In some countries, like Switzerland or France,[59] it is a constitutional obligation, while in others, like Germany, it is a quasi-constitutional obligation enacted during judicial review.[60] There is growing awareness that knowing about the results of the law is necessary both to evaluate its performance and to determine the extent to which its objectives have been achieved. From a lawmaking perspective, results are the "moment of truth" for legislation that will prove whether and to what extent the assumptions of the lawmaker were actually proven or verified.

Information on the application and the results of legislation can be generated in different ways: through horizontal processes of post-legislative scrutiny and evaluation or through specific reporting or review requirements in legislation. Specific reporting or evaluation requirements may pertain to individual provisions that are central in delivering what the law is there to do (for example, an obligation to report on how a specific provision is implemented).

Post-legislative scrutiny and evaluation assess the results and effects of legislation but are a "weak" spot in the life cycle of the law. In many jurisdictions, information on how laws work in practice is unavailable, fragmented or unsystematic. What happens after a law is enacted is often a mystery. However, even when such processes are in place, challenges are common. Switzerland, a country with long tradition in legislative evaluation makes a strong case on the difficulties of determining causal relations between legislation, its results and real life impacts.[61]

Reporting or review requirements, including sunset clauses, are becoming more and more popular in jurisdictions around the world. Examples from several jurisdictions show that these range from relatively simple obligations to collect or disclose data or information on a specific issue (for instance the number of male and female employees in an enterprise) to more sophisticated obligations to periodically monitor progress on a specific topic, monitor changes in society through surveys and so forth.

A challenge that often comes with review or reporting requirements is the unfocused or inconsistent way of doing it. The EU Framework Equality Directive reviews implementation every five years. However, the reporting obligation included in the

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[57] E Bardach, *The Implementation Game: What Happens after a Bill becomes a Law* (MIT Press 1977).

[58] A Flückiger, "L'obligation jurisprudentielle d'évaluation législative: une application du principe de précaution aux droits fondamentaux" in A Auer, A Flückiger and M Hottelier, *Les droits de l'homme et la constitution: études en l'honneur du Professeur Giorgio Malinverni* (Schulthess 2007) at 170.

[59] Art 170 of the Swiss Constitution; Art 24 of the French Constitution.

[60] Oliver-Lalana, supra, note 6, at 257–294.

[61] H Schäffer, "Evaluation and Assessment of Legal Effects Procedures: Towards a More Rational and Responsible Lawmaking Process" (2001) 22 Statute Law Review 132.

Directive does not clarify its focus and the reports produced offer a confusing picture that refers indiscriminately to transposition, enforcement, application and, in very limited cases, to broader effects. Independent opinions[62] that looked at the effectiveness of the EU equality Directives' highlighted a number of issues on the ground such as limited awareness of rights, obstacles in accessing justice, the lack of statistical data that were hardly picked up by the reports. This means that the reporting obligation failed to put its finger on the elements that emerged during implementation. The lesson for lawmakers is that the mere existence of generic requirements to monitor and evaluate parts of the law are only half a solution: unless carefully considered, construed and focused on necessary and substantive information, these can result in a "bureaucratic" exercise without a clear direction and without clarifying whether, why and to what extent legislation has been effective. Lawmakers need to carefully consider not only the elements that will need to be monitored, the kind of data or information that will be required, how this will be collected or made available and the mechanisms through which this will be achieved.

Information on the application and the results of legislation is critical for effectiveness. Firstly because it enables learning about the real-life results and effects of legislation, and secondly because it connects the different phases of the life-cycle of legislation and allows the juxtaposition of initial objectives and real-life results. Without information on results, effectiveness cannot be appraised and the errors of legislation cannot be identified and addressed. This information is an important requirement for effectiveness.

4. Overarching structure: the context of effectiveness

Every new piece of legislation, following its enactment, becomes part of the legal system. Every legal system is saturated with legal messages with obvious or hidden interactions between them. Every new Act comes with a new message (or messages) that will compete with those transmitted by other laws for the attention and the allegiance of end-recipients.[63] The way in which these messages are aligned has an impact both on the effectiveness of the message itself, on the capacity of the end-recipient to locate it and understand it and on the capacity of the implementer and the judge to apply and interpret it. From the perspective of the lawmaker, these considerations translate into three lawmaking challenges: firstly, how to ensure that the end-recipient can easily identify the message/s addressed to him/her within the legal system (identify does not mean understand, it means locate); secondly, how to ensure that the end-recipient can differentiate this message from competing ones and thirdly, how to ensure that the end-recipient can grasp whether and to what extent the new message changes, overrides or leaves competing messages unaffected?

Lawmakers have a number of choices when it comes to how new provisions will integrate the legal order. As a new standalone Act? As an amendment to an existing Act? As a consolidation? As an addition to an existing code (where relevant)? These choices

[62] European Union Agency for Fundamental Rights, "Opinion of the European Union Agency for Fundamental Rights on the Situation of Equality in the European Union 10 Years on from Initial Implementation of the Equality Directives" (FRA Opinion – 1/2013) < fra.europa.eu/sites/default/files/fra-2013-opinion-eu-equality-directives_en.pdf > last accessed 8 September 2018.

[63] Allot, supra, note 12.

determine how the new provisions are integrated in the legal system and how they will interact with legislation in force.

For example, in the area of equality legislation, prior to the introduction of the Equality Act 2010, several different Acts co-existed in the UK.[64] Although the existence of separate Acts made the protected grounds (gender, disability, etc) more visible to the affected stakeholders and more useful from the perspective of advocacy, it raised serious problems of inconsistency in the protection offered and the definition of identical or related terms. The unification of all legislation dealing with equality and non-discrimination in a single Act was conceived as a solution to the multiple problems that emerged in the course of four decades of equality legislation. These choices also directly affect the accessibility and coherence of legislation.

In our complex realities, it is common to have sophisticated issues regulated through a multiplicity of provisions in primary and secondary law, even soft law or programming documents, financing mechanisms etc. Complex "patchworks" raise issues of consistency in the protection offered but also in the direction in which behaviours are oriented. It is not rare, and this might not always happen in an obvious way, that legislative measures direct behaviour in opposing directions. For example, when one set of legislative provisions offers incentives to a specific group (eg underrepresented gender) to stay in the labour market while another set of provisions offers motives to the same group to apply for early retirement, these contradictions often result in legislation failing to meet its goals. When different laws send competing messages, the subjects are often confused. Ensuring that the message transmitted by a law is coherent with the pre-existing ones is an important feature of effective legislation and it is, to an important extent, the work of lawmaker to make sure that a new law is aligned with the different instruments of the legal order.

Choices of overarching structure can be the result of several factors: constitutions and legal traditions, automatisms in legislating, influence from external sources (for example in the transposition of Directives or international conventions) but also political need to show action, timing and pressure to legislate. Legislative practice suggests that quite often, the choice of whether to introduce a new Act, to amend an existing one or to consolidate or to bring existing material together in a codification is determined by factors other than the impact of these choices on the effectiveness of the new legislation. However, these choices affect the potential of legislation to be effective in a number of ways: in terms of accessibility, consistency, ease of application and setting in jeopardy the achievement of its overall objectives.

The context of legislation is an important element of effectiveness that needs to be duly considered when legislation is being designed and drafted. It is important the lawmakers consciously examine the advantages and disadvantages of alternative ways to communicate their message and make a clear rather than intuitive choice.

[64] Non-discrimination legislation included the Race Relations Act 1965 amended by Race Relations Act 1968, the Race Relations Act 1976 and the Race Relations Act 2000; Equal Pay Act 1970; Sex Discrimination Act 1975; Disability Discrimination Act 1995; Employment Equality (Religion or Belief) Regulations 2003; Employment Equality (Sexual Orientation) Regulations 2003; Employment Equality (Age) Regulations 2006; Equality Act 2006.

IV. Operationalising effectiveness for lawmakers: unfolding the "effectiveness test"

Empirical evidence on the four elements of effectiveness shows how specific (deliberate or unconscious) choices made during the design and the drafting of legislation affect the potential of legislation to be effective. Even if effort has been put in the formulation of the individual elements, poor alignment between them can lead to poor results.

Effectiveness requires a consistent effort throughout the life cycle of legislation. It meaningfully connects the different phases of the life-cycle of legislation (design, implementation, evaluation) but it needs to be the subject of special attention when legislation is designed and drafted. It cannot materialise, unless it is a clear concern in the early phases of the life cycle of the law. The majority of challenges identified in the previous sections cannot be remedied by ad hoc practices, but only by making effectiveness a guiding principle in the law-making process and culture.

Hence, effective legislation is the result of complex mechanics in the conceptualisation, design, drafting, enforcement, and implementation of the law. This requires processes, institutions and tools that can guide legislative design and drafting in this direction. Existing tools used in lawmaking, like impact assessments and consultations might support but do not clearly target effective lawmaking. Impact assessment makes institutions more intelligent and accountable,[65] enhances the evidence base and promotes transparency,[66] yet it is a policy, rather than lawmaking, tool. However, policy and lawmaking have important differences. Further, impact assessments have a clear orientation towards efficiency rather than effectiveness. Last but not least, impact assessments have expanded to integrate substantive concerns on fundamental rights, competitiveness, gender issues, to name only a few, without a clear prioritisation. What happens if the most cost beneficial option has important adverse effects on fundamental rights or minority issues that cannot be quantified? To conclude, impact assessments are effective in promoting deregulation, technocratic rationality in decision making and participatory policy making,[67] but they are not lawmaking tools. They are useful in setting the policy framework within which the lawmaker will have to work and they are a source of useful information. However, the critical challenges that lawmakers face, highlighted above and dealing with the internal "mechanics", lay out and communication of a legislative solution are not addressed. On the other hand, drafting guidance, manuals or checklists addressing primarily legislative drafters, are useful for promoting homogeneity, but their rigid, overly descriptive, detailed and instructive nature often obscures rather than sheds light on the broader choices at hand.[68]

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[65] C Dunlop and C Radaelli, "The politics and economics of regulatory impact assessment" in C Dunlop and C Radaelli (eds), *Handbook of Regulatory Impact Assessment* (Edward Elgar 2016) 3 at 14.

[66] A Alemanno, "Courts and regulatory impact assessment" in Dunlop and Radaelli, supra, note 65, at 127.

[67] ACM Meuwese, "Regulatory Review of European Commission Impact Assessments. What Kind for Which Better Regulation Scenario?" (2017) 19(1-2) European Journal of Law Reform 16 at 18.

[68] H Xanthaki, "Drafting Manuals and Quality in Legislation: Positive Contribution towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules" (2010) Legisprudence IV 2 at 111, 127; E Millard, "Les limites des guides de legistique: l'exemple du droit français" in A Flükiger and C Guy-Ecabert (eds), *Guider les Parlements et les Gouvernements pour mieux légiférer – Le rôle des guides de legistique* (Schulthess 2008); R Cormacain, "An Empirical Study of the Usefulness of Legislative Drafting Manuals" (2013) 1(2) The Theory and Practice of Legislation 205.

To fill this gap, the effectiveness test is a conceptual tool to make lawmakers, as the "mechanics" of effectiveness, aware of relevant issues, engage them in a thinking process that is expected to assist them in controlling and identifying – early on – potential critical points for their drafts. The effectiveness test complements the existing quality toolkit (impact assessment, consultation, simplification, codification etc) with effectiveness-focused lenses. Its advantage is that it looks at the elements of effectiveness in draft legislative form (and not in the sense of abstract decisions) and tests their alignment and coherence (objectives, content, context, results)[69] with a view to allow an early diagnosis of potential weaknesses in the conceptualisation and design of legislation and prevent regulatory failures. If properly applied, the effectiveness test can allow the identification at an early stage of the ineffectiveness of content and design (whether the rules used are inappropriate to address the problem tackled or are too broad or too narrow in relation to the stated purpose), the ineffectiveness of enforcement (whether the enforcement strategy or mechanism is inappropriate or implementation is inadequate) and drafting ineffectiveness (whether the subjects of the law do not know how to comply with it or encounter difficulties in complying because the rules are not accessible, coherent or clear, or are complicated and imprecise).

The advantage of the effectiveness test is that it is a neutral tool. It does not promote specific legislative choices but looks at the content and the consistency of the features of legislative texts and judges them objectively in relation to the regulatory objectives. It is not a measure of perfection in legislation but instead a tool to assist lawmakers to see the whole picture, anticipate failures and promote –to the extent possible- sound, aligned and consistent choices that have the potential to deliver the desired results. The effectiveness test as a lawmaking tool consists of a set of questions that need to be addressed in a consistent manner:

1. Purpose

The main objective of the first step of the effectiveness test is to explore the purpose in relation to the underlying problem, policy and the objectives of the law and ensure that it provides a meaningful link and benchmark for what the law aims to achieve. The main questions are: What is the purpose of the law? How is the purpose analysed in results, goals and outcomes? Can they be quantified? What is the relation between these and the objectives of the relevant policy/ies? How is purpose expressed? Is it easy to find, clear and unambiguous? Does the purpose set a clear and meaningful benchmark for what the law aims to achieve? What is this benchmark? Does it provide a meaningful direction for the implementer and interpreter (judge)? When looking at purpose retrospectively the purpose and objectives will be juxtaposed with results to ascertain the degree of coincidence or achievement.

2. Content

The main objective of the second step of the effectiveness test is to scrutinise the substantive content of legislation in order to explore: (a) the responsiveness of the

[69] Mousmouti, supra, note 46, at 201.

legislative choices to the situation to be addressed; (b) the potential for compliance and effective enforcement; and (c) the consistency and alignment between the choice of rules, enforcement mechanisms and communication. If applied critically this step can prevent the adoption of rules which are incongruent with reality, can highlight potential barriers to compliance and enforcement and challenges in construction and can help make the content of legislation realistic, proportional, responsive to the reality and conducive to results. The main questions to be addressed in lawmaking are: What are the legislative choices through which the law intervenes? How are there relevant to the problem addressed? Do these reflect the reality on the ground (target audiences, resources, institutions etc)? Are they proportionate and appropriate in relation to the defined objectives? How are they expected to impact the problem as it currently stands? What enforcement mechanisms/strategies are used? Are they realistic? Do they take into account current/existing institutional capacity and resources? What are the main audiences of the law? What are the main messages of the law? How are the main messages of the law communicated to the target audiences? Retrospectively, this step would examine the extent to which the assumptions expressed during lawmaking have been verified throughout the enforcement and implementation of the law, what worked well, what did not work well etc.

3. Results

The third step of the effectiveness test scrutinises a number of issues: firstly, that expected results are clear, that sufficient mechanisms are in place (or introduced in the law) to ensure proper monitoring of implementation and that sufficient information and data will be available for the identification and evaluation of results; and secondly to identify the actual results achieved and the method for relating them to the initial objectives of legislation. During lawmaking, emphasis lies on making sure that sufficient mechanisms (horizontal or specific) are in place to ensure that results will be consistently monitored and measured and that sufficient data will be collected to allow information about results.

The main questions to be addressed (in lawmaking) are: what are the specific results, outcomes, impacts to be achieved? How will the implementation of the law be monitored? How and when will the law be evaluated? How will results be measured? What information is required to monitor implementation and evaluation? What data needs to be collected during implementation? What data and information are required to evaluate the law? Who will collect this data/information and under which processes?

During the evaluation phase, emphasis is on looking at the actual results and juxtaposing them with the initial intentions. The main questions to be addressed are: According to the data collected, were the results achieved? What were the broader impacts of the law? Are there clear causal relationships between the law and its results or effects? Are these associated to the choices related to the content, context or purpose of legislation? What worked well and why? What did not work well and why? Were the assumptions of the law in terms of legislative choices, enforcement etc confirmed?

4. Context

The purpose of the fourth step of the effectiveness test is to look at the law in relation to the broader legal environment with which it interacts. Questions to be addressed during lawmaking are: how will the law integrate the legal order? Why is this the best solution? How does the law interact with other provisions and does it provide a clear solution to issues of consistency? Are the changes introduced easy to identify and understand? What problems can be expected? Retrospectively, the questions to be asked are: How did the law interact with other provisions and laws? Were there overlaps, gaps or inconsistencies? To what extent were these predictable? How can these be solved?

V. Conclusion

Lawmaking is a challenging yet fascinating exercise. Effective lawmaking presents the challenge of having to anticipate – to the extent possible and in as much detail as possible – that the choices and solutions considered have the capacity to work. Although perfection is not a realistic measure for legislation, effectiveness is not a utopia. On the contrary, if seen as the result of a meticulous process of analysis, design and drafting it becomes a manageable and approachable task for contemporary lawmakers.

For this to happen it is important to initially acknowledge the role of effectiveness as a guiding principle in lawmaking. Effectiveness can play this role because it is (contrary to efficacy and efficiency that look at other functions of legislation) tailored to the measure of the legislative text and depicts its capacity to function as a system. Four elements operationalise the content of effectiveness: purpose, content, context and results. By taking a closer look at these elements, in theory and legislative practice, the challenges facing lawmakers become even more concrete and tangible.

The effectiveness test is a practical way of addressing these challenges in a focused way from the perspective of lawmakers. The questions are neither new nor unknown, yet to this date not consistently addressed by existing tools used in the process of policy and lawmaking (impact assessments and drafting manuals). The novelty of the test is the emphasis it places on effectiveness and the interrelation between specific choices made in the conceptual design, the structure, the layout and the drafting of the text as a simple method to proactively assess the logic, the design and the effects of specific pieces of legislation.

Following the cyclical nature of effectiveness, the test can be used throughout the life-cycle of legislation. However, its main added value lies in making the complex mechanics of conceptualisation, design and drafting of the law and the challenges for effectiveness tangible during lawmaking. Effectiveness cannot materialise unless it is a clear concern in the early phases of lawmaking, and this is where the effectiveness test comes to its aid.