

# *Introduction to the Symposium on Effective Law and Regulation*

Maria MOUSMOUTI\*

---

In the last few decades, *effectiveness* has become a topic of concern in the debate around legislation. Politicians want laws that are effective in order to deliver policies and satisfy their electorates; legislators claim that laws are effective as proof that they do their work adequately; and, of course, citizens want laws to be good and effective because this ensures security and transparency in the exercise and enjoyment of their constitutional rights. Despite the rhetoric, however, the fact remains that effectiveness is one of the least understood words in the legal vocabulary. What do we mean by it? And, perhaps more importantly, do we all understand the same thing when we talk about effectiveness? Can we measure it and, if yes, how? At the end of the day, do we know how to achieve effective legislation?

The symposium titled “Effective Law and Regulation” approaches the concept of effectiveness of primary legislation and regulation from distinct perspectives in an attempt to address points of confusion, discipline-specific barriers and set the groundwork towards a unified understanding of its meaning and its position in the policy and law-making cycle. To this purpose, this issue brings together a cohort of academics and practitioners who contribute distinct viewpoints to the fundamental questions raised above. Theory of law, legislative studies, regulation, administrative law, behavioural economics are given space and the opportunity to provide insight to conceptual and practical concerns. The contributions were initially presented in a day conference organised at the Institute of Advanced Legal Studies of the University of London in July 2017.

A first angle examines theoretical questions associated with effectiveness. From the viewpoint of legal theory, differences in perspective lead to distinct definitions of effectiveness as measures to produce “actual results”; as the capacity to change the legislative panorama in the desired direction; as the capacity to obtain the desired changes in society; or as the capacity to reach specific political goals. How does effectiveness help translate the political will into legislation and transform ideals (political discourse) into rules (legal discourse)?

A second angle addresses effectiveness as an aspect of legislative quality and especially as a quality pertinent to lawmaking and drafting. From the viewpoint of legislators and drafters, quality of legislation is a goal and effectiveness holds a central

---

\* Lecturer in Law, Institute of Advanced Legal Studies, University of London.

position in relation to it. But what does effectiveness mean? And how can one know if what is being drafted is a good law? What are the values, principles or milestones one can obey or follow in the effort to draft an effective law? How can effectiveness guide the intellectual effort of lawmakers and drafters when making subjective decisions on specific drafting dilemmas in the process of designing and drafting legislation? And, to take this line of inquiry a step further, is effectiveness, as a principle that guides lawmakers, an operational concept we can work with? If so, what are the specific elements one has to work with in order to design and draft effective legislation?

A third angle approaches effectiveness as a concern that takes distinct shape and form in different areas of law. How does effectiveness play in different legal sub-systems like administrative law, penal law or fundamental rights? Are areas of law concerned and challenged by the concept in a different way?

Last but not least, a fourth angle adds an instrumental approach that looks at traditional concepts associated with effectiveness: compliance, enforcement and implementation. Is effectiveness synonymous with compliance? What is the relation between the two concepts? How can lawmakers predict compliance? Further, from the perspective of implementation, what is the role of control and enforcement? Do “more” enforcement and inspections equal “better” or more “effective” laws? Is effectiveness a question of quantity of controls and severity of punishments, or are there links with more complex behaviour-modification approaches?

These are only few of the questions that this symposium attempts to address in an effort to set the table for meaningful academic debate in a highly interesting and dynamic area that lies at the intersection of science and real life. Do we have answers? Yes. And no. The main innovative value of the six insightful contributions included is that they *contextualise* effectiveness. To use Zamboni’s analogy, in the same way that effective football means different things for English and Italian football fans, effectiveness can be viewed from distinct angles (macro or micro), can mean different things depending on context (it is, after all, a question of degree and translates into different concerns in specific areas of law, as De Benedetto convincingly argues), can be formal or substantive (Rangone), and can raise different questions depending on the standpoint and perspective (proactive or reactive, as Mousmouti notes, or from an implementation point of view according to Blanc). Rather than claim to solve the multiple and intricate open questions around its nature, scope and function, the contributors explore aspects which, when placed in context and perspective, make the impressionistic concept of effectiveness clearer. The broader picture becomes more focused and the complementary, rather than mutually exclusive or polemic, dimensions of its elements acquire clearer shape and form.

Contributors agree that in its abstract dimensions effectiveness is a “neutral”, relative and fluid principle, “empty” in terms of substantive (value laden) content. Its value lies in adding rationality to legislative decision making and its function is to ensure (or measure) the connection between objectives and results rather than indicate which objectives or which results. Hence, effectiveness is meaningful as the *functional link* between ideals, situation and results, as Zamboni claims, outcomes (both in terms of desired effects and public interest concerns), according to De Benedetto, or, according to Mousmouti, between the four elements of every legislative text that determine the

capacity of a law to be effective: objectives, content, context and results. Effectiveness essentially focuses on the *mechanics* of the law. Effectiveness, as a fluid concept, becomes specific only when placed in a specific context. Whether it is a specific area of law, the standpoint of the lawmaker or the drafter, the perspective of the implementer or broader political ideals, only then can effectiveness translate into concrete questions. How to get the answers right? By making sure that the fundamental elements of effectiveness are in place, addressed or taken into account.

Effectiveness-in-context is hence a *decision making criterion* rather than an absolute value. In this capacity it can help select legislative policy (the legislative model used to tackle a certain issue via legislation), as Zamboni claims, can serve as a criterion for pre- and post-legislative scrutiny that focuses on the individualised potential of legislation to be effective, according to Xanthaki, as a criterion on the “*whether*” and the “*how*” of legislation and a tool for a “steering administration” (De Benedetto) or as the main criterion for problem solving during the conceptualisation, design and drafting of drafting legislation (Mousmouti), including the choice of compliance and implementation strategies. Rangone suggests that effectiveness requires a broad understanding of the drivers that induce people to comply and lead laws to attain their desired ends, while Blanc suggests that specific features of institutions and practices make *regulatory delivery effective* independently of the design of rules.

In terms of practical solutions on how to engineer effective laws, several ideas are placed on the table. Zamboni raises the issue of optimal position of non-legal experts in the legislative process as the (ever challenging) interface between the legal and the political. Mousmouti in her “effectiveness test” lays out a number of critical questions that can proactively guide lawmakers to make conscious decisions on effective drafts. Xanthaki advocates a broader scrutiny and adds elements to the test, including regulatory and legislative concepts, communication, expression, presentation and monitoring. Rangone, looking at compliance with the “spirit of the law” (as opposed to compliance with the terms of rules only) as an important element of effectiveness, makes a strong claim that effective rules require a broad understanding of drivers that lead people to comply, including motivations beyond rational calculus, such as internal ones, a sense of procedural fairness, cooperation, social norms, or cognitive biases and heuristics. Moreover, broadening the regulatory toolkit with “new” behavioural tools, like nudging and cognitive empowerment, can contribute to the successful use of rules but also to assess the relative potential of rules compared to other control devices. Blanc, building strongly on evidence, argues against the long-standing assumptions that compliance is primarily fear- and deterrence-driven and suggests that a more comprehensive view of drivers for behaviour modification, and a deliberate mix and match of interventions can result in more effective and efficient “regulatory delivery”.

The relevance of effectiveness from a theoretical, doctrinal, disciplinary, professional and practical point of view is confirmed. Scholars, policy and lawmakers, legislative drafters, enforcers, implementers, interpreters, evaluators all have a unique, and complementary, perspective to add. This symposium sets the background, raises a number of issues but inevitably also points at questions that still need to be explored. Is a general theory of effectiveness useful? Could it provide a common framework for further work? Is the policy or the legislative process the most appropriate context for

effectiveness? And if policy comes into play, how is the intention to achieve effectiveness transformed in the different steps of the policy process? What can an interdisciplinary approach to effectiveness add to its understanding and conceptualisation? What distinct perspectives can different disciplines, like law and economics, sociology of law, political science, highlight? Further questions, answers and debate will, most certainly, add new and unexpected perspectives to this intriguing discussion.