

Chapter 4

The development of new regulations

Predictable and systematic procedures for making regulations improve the transparency of the regulatory system and the quality of decisions. These include forward planning (the periodic listing of forthcoming regulations), administrative procedures for the management of rule-making, and procedures to secure the legal quality of new regulations (including training and guidance for legal drafting, plain language drafting, and oversight by expert bodies).

Ex ante impact assessment of new regulations is one of the most important regulatory tools available to governments. Its aim is to assist policy makers in adopting the most efficient and effective regulatory options (including the “no regulation” option), using evidence-based techniques to justify the best option and identify the trade-offs involved when pursuing different policy objectives. The costs of regulations should not exceed their benefits, and alternatives should also be examined. However the deployment of impact assessment is often resisted or poorly applied, for a variety of reasons, ranging from a political concern that it may substitute for policy making (not true-impact assessment is a tool that helps to ensure a policy which has already been identified and agreed is supported by effective regulations, if they are needed), to the demands that it makes on already hard pressed officials. There is no single remedy to these issues. However experience around the OECD shows that a strong and coherent focal point with adequate resourcing helps to ensure that impact assessment finds an appropriate and timely place in the policy and rule making process, and helps to raise the quality of assessments.

Effective consultation needs to be an integral part of impact assessment. Impact assessment processes have – or should have – a close link with general consultation processes for the development of new regulations. There is also an important potential link with the measurement of administrative burdens (use of the Standard Cost Model technique can contribute to the benefit-cost analysis for an effective impact assessment).

The use of a wide range of mechanisms, not just traditional “command and control” regulation, for meeting policy goals helps to ensure that the most efficient and effective approaches are used. Experience shows that governments must lead strongly on this to overcome inbuilt inertia and risk aversion. The first response to a problem is often still to regulate. The range of alternative approaches is broad, from voluntary agreements, standardisation, conformity assessment, to self regulation in sectors such as corporate governance, financial markets and professional services such as accounting. At the same time care must be taken when deciding to use “soft” approaches such as self regulation, to ensure that regulatory quality is maintained.

An issue that is attracting increasing attention for the development of new regulations is risk management. Regulation is a fundamental tool for managing the risks present in society and the economy, and can help to reduce the incidence of hazardous events and their severity. A few countries have started to explore how rule-making can better reflect the need to assess and manage risks appropriately.

Assessment and recommendations

Ex ante impact assessment of new regulations

Although impact assessment has been established a long time, there is widespread agreement that the current process is in practice unsatisfactory, weak and ineffective. There is also considerable common ground as to what needs fixing. Nearly all of those interviewed by the OECD peer review team¹ expressed dissatisfaction with current impact assessment processes. Issues raised included the fact that impact assessment comes too late in the decision-making process to have any effect on outcomes, inadequate consultation, lack of transparency, failure to take into account benefits as well as costs, and the need to define a clear methodological approach balancing qualitative and quantitative analysis. There is an overemphasis on business costs defined fairly narrowly, and an under emphasis on alternatives to regulation (despite the efforts of the Ministry of Justice), benefits, non business impacts, consultation, and on support and quality control, which is fragmented and ineffective. There is little appreciation of the importance of evidence-based, cost-benefit analysis and other methodologies² for effective impact assessment. An analysis by the Proposed Legislation Desk (the institutional focal point of the process) shows that a considerable number of proposals are not sufficiently clear about the likely effects. Many of these issues had already been raised in the OECD's 1999 report, which drew specific attention to the need for effective quantification, the need to consider alternatives, and the need to consult (Box 4.1). There has been progress on some fronts since then, notably the quantification of administrative burdens for business, but not enough to generate an effective approach.

Box 4.1. Recommendation and comments from the 1999 OECD report: Impact assessment

- Improve the contribution of impact assessment (RIA) to good regulatory decisions by increasing methodological rigour, including adoption of a benefit-cost test; expanding it to incorporate detailed consideration of alternatives; and integrating RIA with consultation processes.

The Dutch RIA programme is in some ways strong. It applies to both primary and subordinate regulation, is targeted toward major regulation, and includes a highly developed and well-resourced system of assistance for ministries from co-ordinating agencies. Changes made since 1994 to the RIA system significantly improved its potential to contribute to regulatory quality. For example, targeting of RIA requirements to only the most significant regulations concentrated limited resources to their highest value in improving the cost-efficiency of regulations.

In particular, provision of significant resources through the help desk function is innovative and worthy of consideration by other OECD countries. Creation of a dedicated budget to fund analysis can help to overcome agency reluctance to divert resources to RIA, as can access to dedicated statistical resources from the help desk. The use of three co-ordinating departments to ensure that various aspects of regulatory quality are properly considered is another promising practice.

Yet the RIA programme has not been very effective in producing reliable data that can increase the cost-efficiency of regulatory decisions. OECD best practices suggest that three key steps are needed to improve its effectiveness: *i*) increase methodological rigour by providing training, written guidance, and

minimum analytical standards including a requirement for benefit-cost tests to line ministries; *ii*) expand RIA to incorporate detailed consideration of alternatives; *iii*) ensure greater public scrutiny through integrating RIA with consultation processes.

First, the *degree of quantification* of regulatory benefits and costs remains low. Training and guidance for policy staff in the ministries would be a useful step, and adoption of standard minimum requirements such as quantitative analysis of direct costs of compliance through tools such as the Canadian Business Impact Test. Adoption of an explicit benefit-cost principle, as is currently being considered, would sharply improve the quality of regulatory decisions. The practical and conceptual difficulties of a formal benefit-cost analysis suggests that a step-by-step approach is needed in the Netherlands, in which the RIA programme is gradually improved, integrating both qualitative and quantitative elements of the analysis, so that over time it better supports application of the benefit-cost principle.

Second, the usefulness of RIA in promoting use of cost-effective policy tools would be significantly enhanced by a formal requirement that *feasible alternatives* be analysed and compared with the regulatory proposal. *MDW* does not appear to have had a significant impact in the rate of adoption of alternative policy instruments. While the performance of the Netherlands is relatively good with respect to use of innovative instruments, the use of environmental covenants, while still growing, does not appear to have accelerated as a result of actions taken under *MDW*. More rigorous assessment of alternatives should help identify a wider range of areas where they are the better choice.

The effectiveness of both of these strategies would be enhanced by *integration of RIA with consultation processes*. Publication of RIA through a procedure that required regulators to respond to comments from affected parties would enable consultation to function more effectively as a means of cost-effective information gathering, and thereby improve the information needed for good RIA. Access to RIA would also improve the quality of consultation by permitting the public to react to more concrete information. Such integration should, however, be carefully designed so that additional delays to the policy process are not introduced.

There is concern to control new regulations more effectively. Many stakeholders expressed an underlying concern at the need to control more effectively the burdens that are likely to arise from the flow of new regulations. Some interviewees made the important point that reforming governments – the Netherlands has carried out recent major recent reforms of its health and education sectors – are bound to generate significant new regulation, the effects of which need to be controlled.

At the same time, there does not appear to be a coherent view of how a strengthened impact assessment system might be structured, and no clear vision seems to have emerged from the work of officials to give shape to a new system. For the past two years, a group of officials has been examining ways of improving the process. Despite some useful elements (examining alternatives, web-based consultation) it seems unlikely that these proposals will give rise to an effective, integrated process with real buy-in across government, as the work is mainly promoted by one ministry (Justice) and no clear plan for a new process has yet emerged.

A new approach needs to be developed. The government needs to develop and promote a clear vision and integrated approach to impact assessment, which sets out what impact assessment is for and how it can contribute to stronger, more effective, evidence based policy-making, ensures that new regulations are fit for purpose, and conveys the message that the government understands the importance of bringing new regulations under control. The significant common ground that appears to exist over what is wrong now needs to be translated into a new strategy emphasising the central place that impact assessment has in the policy making process.

Recommendation 4.1. The Netherlands should develop a new strategy, structures and processes for the *ex ante* impact assessment of new regulations, taking account of the more detailed proposals set out below.

Responsibility for carrying impact assessments should remain with the individual ministries, framed by strong central supervision and quality control. Effective supervision and quality control is crucial to the success of an impact assessment process. The Netherlands rightly emphasise the responsibility of individual ministries. However, the current institutional structures for overseeing impact assessment are weak and have fallen into disuse. For example, the Proposed Legislation Desk appears to be increasingly sidelined (according to interviews with the OECD peer review team), does not have a sufficiently high standing in government, and provides advice rather direction.

Recommendation 4.2. A considerably more authoritative form of the Proposed Legislation Desk at official level should be established, reporting directly to the Ministerial Steering Group on Better Regulation chaired by the Prime Minister. This unit, which could be developed on the basis of the current officials' group that supports the Ministerial Steering Group, would have the functions of issuing and updating the relevant guidelines, providing advice and support for ministries in the development of impact assessments, and monitoring the quality of impact assessments, as well as advising ministers directly on the development of the process and the performance of ministries. Consideration should be given to whether the Steering Group should have a formal gatekeeper role for significant new regulatory proposals before they are submitted to the Cabinet (this could be a formal 'sign off', or referral back to the relevant Ministry for more analysis). ACTAL should be considered for an external oversight role, building on its current responsibilities for providing advice to the Cabinet.

Effective training and guidance need to be in place. Officials will need to be trained in the new approach and especially, in the application of the new methodology. The current guidance lacks a sharp edge, and does not cover Cost-Benefit analysis or any of the methodologies for quantification. The cultural changes required, particularly in terms of ensuring that senior management is on board, are as important as the development of technical expertise and this will also need attention. Recently, training on regulatory management techniques, including *ex ante* impact assessment and regulatory burden management, has been developed by the Finance ministry and ACTAL in conjunction with the Interior and Economic Affairs Ministries. In 2008, training was also given to employers of the legal agency of the House of Representatives, in the context of reducing the administrative burdens of amendments made by the parliament.

Box 4.2. Methodological issues for consideration and incorporation into new guidance and training

This needs to cover how to:

- Identify the underlying problems and (multiple) cause-effect relations.
- Link the policy objective and the mechanism chosen to deliver it in a way that allows identification of benefits and costs.
- Apply cost-benefit analysis (how to use market price data, stated and revealed preference analysis, analyse complex and indirect costs, discount rates plus guidance for how to deal with

situations where quantification is difficult/ impossible).

- Deal with distributional effects, benefit transfers, costs to government, producer/ consumer transfers, effects on different-sized firms changes between consumer/ producer surpluses.
- Deal with uncertainty, including sensitivity analysis, compliance rates.
- Use cost-effectiveness if cost-benefit measurement is too difficult (e.g. same benefit compared with difference means to bring it about).
- Establish a baseline scenario, the importance of a baseline measurement (the do-nothing option and how to calculate based on data, trends and economic analysis).
- Investigate unintended consequences, notably the risk-risk trade-off.*

* The so called risk-risk trade paradox refers to the situation in which efforts to manage one type of risk generates countervailing and potentially more relevant risks.

Recommendation 4.3. Training should be developed further to cover the overall process and to encourage the development of expertise in evidence-based policy making. There should also be specialised training on applying the methodology, drawing on support from economists as necessary (given that many officials are not economists by training). Methodology should be incorporated into authoritative step-by-step guidance for officials, which should also make clear the responsibilities of the various decision makers through the process (ministers, officials, the ministerial Steering Group, the supporting officials' group, officials themselves).

Methodological rigour is essential and most obviously achieved by cost/benefit analysis, but a quality dimension is equally important. The Netherlands, through its development and promotion of the Standard Cost Model for administrative burdens, already has the benefit of a culture that is used to quantitative methods, and quantification is a fundamental pillar for evidence-based policy-making. The methodology should therefore have a strong quantitative element, drawing inspiration from the experiences of other OECD countries that are already applying quantification (such as the US, UK, Australia). It should also incorporate a strong qualitative aspect, supported by multi-criteria analysis, not least to capture future benefits that may be difficult to monetise. It is important that benefits as well as costs are drawn out, as this is about Better Regulation, not deregulation.

Recommendation 4.4. A clear methodology with a quantity/quality balance should be established.

A single integrated, standardised process will help to give impact assessment the focus it needs to be adopted by ministries. Current separate processes need to be integrated into a single process which regroups the different assessments and legal quality tests. This standard process should be adopted across government. The format for presenting the new integrated impact assessment should be standardised, and kept simple and clear, so that it is comprehensible - the rationale for action and key conclusions of the impact assessment should be readily understood by decision makers as well as other stakeholders including the general public. Recourse to annexes for technical details would support the accuracy of the reported analysis. A staged approach to the process is needed, as now, but institutionally

stronger. This would make it clear when, early in the policy development process, impact assessments need to be started, developed and updated, taking account of the need for efforts to be proportional, *i.e.* distinguishing between proposals that merit a full-impact assessment and others which need less attention. The current process generally only covers primary laws and orders in council. Consideration should be given to extending impact assessment to other regulations that are likely to be important for Better Regulation.

Recommendation 4.5. Establish a single integrated process for impact assessment across government, which includes a simple format, the stages of the process with the emphasis on starting early, and a clear and comprehensive definition of the regulations covered.

The EU and local dimensions to the development of regulations need attention. There is no reference to EU regulations in the current guidance and the EU dimension needs to be addressed. There is an equally important link to the local level, which has raised the issue of impacts on local government of centrally adopted regulations.

Recommendation 4.6. Ensure that the EU and local dimensions are effectively covered in the new process.

Consultation, which is not covered at all in the current process, needs to be addressed. Consultation needs to be a formal part of the impact assessment development process and engage all potential stakeholders. Broadly-based consultation (including on the web, building on the Internet pilot for consultation on new regulations that has been launched recently) should start early to give stakeholders the opportunity to comment on proposals before it is too late to influence the outcome, including the possibility of alternatives to regulation. Public consultation on draft impact assessments promotes the sharing of information and expertise, which enriches the draft and encourages ownership.

Recommendation 4.7. Impact assessment reports should be published on ministry websites, as well as the website of the lead supervisory authority, both at an appropriate drafting stage, and when finalised. Those who have contributed to consultation should be advised of the impact assessment's publication, and where important comments have been made, given feedback on how the comments were used (or an explanation of why they were not used). The views of the external oversight body should also be made public. Efforts should be made to ensure that the non-business community (those who may not have such as strong voice such as citizens and consumer advocacy bodies) are engaged with the process.³

Ex post evaluation also needs to be built into the new process. Feedback to the government on the effectiveness of the impact assessment process should be built in from the start, as part of the new strategy. There are several options for securing this, which are not mutually exclusive. They include giving ACTAL a role in ex post evaluation (building on its role of advice to the cabinet on regulatory burdens); annual reports to the parliament; tracking the development of new regulations; and last but not least, encouraging the Netherlands Court of Audit (NCA) to carry out audits of the process. Audits by the NCA equivalents in some other countries, notably the UK, have made an important contribution to evaluating the effectiveness of policies to control the development of new regulations, including impact assessment.

Recommendation 4.8. Consideration should be given to the best way of arranging systematic *ex post* evaluation of the impact assessment process. The Ministry of Justice should be encouraged in its work to track the trends in development of new regulations.

Alternatives to regulations

The Ministry of Justice's efforts to draw attention to consideration of alternatives to regulation need support and further development, including and not least as part of an enhanced impact assessment process. Regulation may not be the only option. Before it is too late, the process should include consideration of alternative approaches to achieving desired regulatory outcomes. The significant efforts that were started over a decade ago in the use of alternatives need to be given a renewed impetus. The Ministry of Justice has issued a number of relevant documents and these now need to be made operational. An effective approach might examine the consequences of several different options, including an alternative to "command and control" regulation, and the "do-nothing" option. Guidance should be developed on the appropriate use of alternatives (such as non-legislative action, exemptions, principles-based rather than rule-based approaches, and outcome standards rather than process standards).

Recommendation 4.9. As already recommended in the 1999 OECD report (Box 4.3), the consideration of alternatives needs to be clearly and firmly anchored into a revitalised impact assessment process.

Box 4.3. Recommendation and comments from the 1999 OECD report: Alternatives

- Further encourage the use of cost-effective alternative policy instruments by developing operational guidance for ministries.

A requirement that analysis of alternatives currently required by the Directives on Legislation be documented and subjected to public scrutiny through the RIA process could stimulate genuine comparisons of the benefits and costs of various approaches. However, policy makers are likely to require assistance in the identification of suitable alternative policy tools. Operational guidance on the characteristics and use of alternative approaches should be developed for use by the line ministries.

Background

General context

The structure of regulations in the Netherlands

Box 4.4. The structure of Dutch regulations

Hierarchy of laws and regulations

Primary laws. These are for the most part initiated by the government and enacted by the parliament.⁴ Primary laws may delegate powers to make secondary regulations to the government (royal decrees or orders in council), or directly to a minister (ministerial regulations).

Example: The *Zorgverzekeringswet* (Health Insurance Act) contains an obligation for every Dutch citizen to take out health insurance, as well as rules on the content, pricing and application for insurance companies offering those insurance.

Royal decrees (orders in council). These are made by the government under powers delegated by a primary law.

Example: The *Zorgverzekeringsbesluit* (Health Insurance Decree) develops several aspects of the obligations contained in the Health Insurance Act that are subject to frequent changes, so that regulation or those aspects by means of an act of the parliament would be too time consuming.

Ministerial regulations. These are made by individual ministers under powers delegated by a primary law. They are mainly used for technical matters and administrative procedures.

Example: The *Zorgverzekeringsregeling* (ministerial regulation on health insurance) contains provisions of a technical nature that may need to be changed faster than would be possible by an order in council.

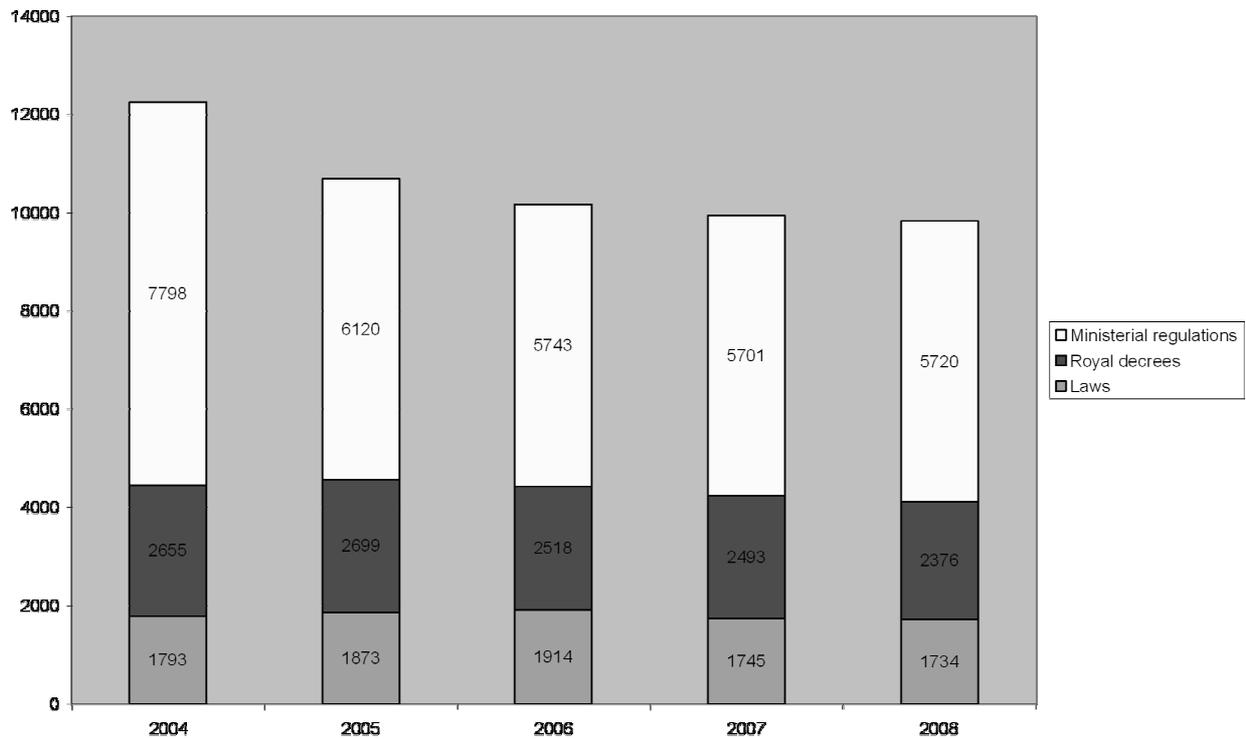
Regulations made by agencies (e.g. financial, telecoms, health and safety). Agencies can make their own regulations under powers granted by primary laws. But these are unusual.

Example: The *Nederlandse Zorgautoriteit* (Dutch Health Authority) is charged with supervising and regulating several aspects of the services offered by health providers. In order to improve public transparency with respect to the performance of health providers, it has issued a *Regeling publicatie wachttijden somatische zorg* (regulation on the publication of waiting periods for somatic treatments). This regulation obliges health providers to offer information about the average waiting periods for their clients.

Regulations made by municipalities and provinces. General acts for municipalities and provinces give their councils powers to enact legislation – by-laws or ordinances – on matters for which they have exclusive competence (“household” matters). Provincial ordinances must not conflict with existing national legislation, and municipal ordinances must not conflict with the ordinances of the provinces to which they are attached. Municipalities and provinces may also make regulations under powers delegated by a primary law.

Trends in the production of new regulations

The Ministry of Justice has recently established a monitoring system for central government regulations in force, starting with a quantitative analysis carried out in 2004 of regulations in force since 1975. Monitoring since then has picked up the total number of laws, royal decrees and ministerial regulations in force at the beginning of each year. There is not, as yet, any separate monitoring of the number of new regulations or amendments to existing regulations each year, although this is planned (it is estimated that there are some 500 new central government regulations each year). Between 2004 and 2008 the number of central government regulations in force declined, levelling off from 2007 onwards. The most significant fall was in the number of ministerial regulations.

Figure 4.1. Trends in the number of central government regulations in force at the start of each year

Source: Dutch government.

Processes for making new regulations

The law making process

Box 4.5. The Dutch law-making process⁵

Proposals for legislation are agreed by cabinet.

They go to the Council of State for scrutiny as to whether they are compatible with other laws and treaties (the Constitution, international treaties such as the European Convention on Human Rights, and European law (or, in the case of a draft order in Council, statutory law). The Council also considers proposed legislation from a wider angle: whether it is a “good” law that will serve the interests of citizens.

The proposal then goes to the monarch for signature (a formality), before it is tabled before the House of Representatives. The advice of the Council of State as well as an explanatory memorandum (purpose and contents) is attached to draft bills.

The bill is subject to scrutiny by the relevant parliamentary standing committee. The committee may arrange a hearing, and make enquiries, or request a briefing by government Advisory bodies such as the Central Planning Office, the Central Bureau of Statistics, or external experts. A report is drawn up and sent to all members of the House, and to the government. The government responds to this report.

The draft bill then goes to plenary for debate. Amendments may be tabled by members of the House during the debate. The bill – amended or otherwise – is then sent to the Senate.

Once passed by the Senate, the bill is returned to the monarch for formal signature, alongside the signature of the responsible minister. The act is then signed by the Minister of Justice, who arranges for it to be published in the Bulletin of Acts and Decrees.

Forward planning

Beyond the very general framework that is set by the Coalition Agreement and subsequent annual policy/legislative plans, there is no centralised system for the forward planning of new regulations. Each ministry has its own planning system. However, a growing need to share information on legislative projects has led the Ministry of Justice to develop – in co-operation with the legal departments of other ministries – a set of standards for planning and control, aimed at interoperability between systems, and in the long term, a shared system. Work will start in 2009 to develop these standards and is planned to be completed before 2011.

Administrative procedures

There is no single administrative procedure regulation as exists in some other OECD countries. Instead, general procedures for rule-making are laid down in the Constitution, and elaborated in internal regulations within the administration and the parliament.⁶ Legal drafters must, however, comply with the “Directives on Legislation” (*Aanwijzingen voor regelgeving*). These are a set of rules, developed by the Ministry of Justice, agreed by the cabinet and issued by the Prime Minister, which cover general quality criteria, rules of procedure and legal and editorial instructions. There are no formal requirements for ministries to consult each other in the development of new regulations. There is, however, an incentive to carry out some consultation in order to avoid delays and blockages, for example when a draft goes to cabinet for approval.

Legal quality

Ministries are responsible for drafting legislation in their policy field. Each ministry has a legal department in which bills are drafted. Since 2001, the Academy for Legislation offers a two-year postdoctoral training “on the job” programme for legal drafters, as well as ongoing training. Postdoctoral training is only offered to selected new legal drafters. Legal drafters who are already employed within government are not required to follow the programme. Since 2001, most legal drafters have followed some form of training with the Academy.

The Ministry of Justice has overall responsibility for legal quality, and a quality framework has been in place since 1991. The definition of legal quality, compared with the definition used in many other countries, is quite broad. The Ministry of Justice considers the likely effectiveness of a proposed regulation in relation to policy goals, including whether alternatives to regulation would be more effective. The ministry also develops and disseminates guidance on legislation and the legislative process, and provides advice and support on the transposition of EU regulations. It offers a central contact point and runs a specialised website.

The ministry is also, more strategically, active in developing and refining policy on the legislative process. Its most recent policy document, “Trust in Legislation” (*Vertrouwen in wetgeving*) was sent to the parliament in November 2008. The document stresses the importance of having a realistic view about what can be achieved with legislation, and the need to consider the costs and burdens of unnecessary or overly complicated regulation. The government should also put trust in, and leave room for other (civil) institutions and control mechanisms when considering the necessity of legislation. In the document several projects are announced with the purpose to improve the quality of the legislation and the legislation process, such as the development of an integrated regulatory impact assessment structure for policy and regulation, the creation of a clearing house for evaluation of regulations and the promotion of the use of ICT in making legislation.

The current quality framework covers six criteria:

- legal compliance (is a proposed regulation lawful, does it obey legal principles *e.g.* as regards the Constitution, European law?);
- effectiveness and efficiency (is a proposed regulation likely to be effective and efficient?);
- subsidiarity and proportionality (is a proposed regulation useful and necessary?);
- feasibility and enforceability (is a proposed regulation practicable and enforceable?);
- co-ordination with other regulations in the same field / at the same level (is a proposed regulation well co-ordinated and in harmony with related regulations?); and
- simplicity, clarity and accessibility (is a proposed regulation simple, clear and transparent?).

The Ministry of Justice scrutinises all draft central government legislation against these criteria (the legislative test) before they are submitted to the cabinet for approval.

Ex ante impact assessment of new regulations

Policy on impact assessment

Ex ante impact analysis (impact assessment) has a long history in the Netherlands. Some form of impact assessment has been required since 1985, via the Directives on Regulation. The early requirements were ineffective, consisting of a very general questionnaire that only sought to identify side effects of proposed regulations (*i.e.* what might be overlooked), rather than a careful weighing of the whole impact. Impact assessment was overhauled in 1994-95 as part of the then new cabinet's policy on regulatory reform. It stressed co-operation between three ministries – Justice, Economic Affairs and Environment – to improve the quality of analysis, and established a central help desk (the Proposed Legislation Desk that still exists today), shared by the three ministries.

A new and mandatory process was agreed in 2002 by the cabinet. It covers not one but several distinct impact assessments:

- *A Business Impact Assessment (BIA)*. This is intended to show the effects of proposed legislation for the business community. It consists of eight questions. The guidance notes the importance of quantification, without going into the detail. The process is directly linked to the business regulatory burden reduction programme. Data generated by the latter is re-used for this impact assessment.
- *An Environmental Impact Assessment (EA)*. This identifies the intended and unintended effects on the environment, for example on energy usage, mobility and waste treatment.
- *A Practicability and Enforcement Assessment (P&E)*. This facilitates identification of the effects of proposed legislation for implementing and enforcement authorities, including ministries, agencies, but also authorities such

as the police, Public Prosecutor's Office and judiciary. Again, the same broad approach and guidance is offered as for BIA. The Table of Eleven checklist is appended (see Chapter 6).

- *Cost-Benefit Analysis (CBA)*. This is mentioned separately from the other impact assessments. It is intended to clarify the financial consequences of new legislation for the "community".

Impact assessments – as well as the other legal checks on proposed legislation (see section above on legal quality) – are only mandatory for central government primary laws, orders in council and amendments to them. Budget laws and laws initiated by the parliament are not covered. The process also does not generally apply to decrees or ministerial regulations, nor does it apply to the regulations issued by agencies, municipalities and provinces. If thought necessary, however, impact assessments may be performed on these forms of regulation.

There is considerable interest in the development of a stronger impact assessment process. The OECD peer review team were told by the Ministry of Justice that a consolidated and strengthened *ex ante* impact assessment process was under development, via a working group of legal drafters, in order to "enhance the consideration of alternatives, accountability and effects", with the aim of having the new approach operational by 2011. The approach will be staged – two pilots are proposed for spring 2009. It is not clear, however, how far the work has in reality progressed, as there are no documents yet available on the plans, and the OECD peer review team was not provided with any information on the outcome of discussions taking place in the legal working group.⁷ The Regulatory Reform Group for its part also expressed keen interest in the development of a stronger impact assessment process, and asked the OECD team for advice on how this could be achieved, and what a strengthened impact assessment process should consist of.

Institutional framework

The initiating ministry is responsible for the overall quality of proposed legislation, and for developing the required impact assessments. It is supported and monitored by the Proposed Legislation Desk which may provide general help (for example, to identify sources of data), and which checks the quality of impact assessments. The Proposed Legislation Desk is operated jointly by the Regulatory Reform Group (Business Impact Assessment), the Ministry of the Environment (Environmental Assessment) and the Ministry of Justice (Practicability and Enforceability Assessment).

A guidance paper produced by the Proposed Legislation Desk⁸ has been prepared for ministries. The guidance includes manuals for the first three impact assessments but not for cost-benefit analysis, as "it will not very often be necessary, and requires specific technical skills". Courses and lectures on impact assessment have been offered to ministries and other institutions involved in the legislative process (including as part of courses at the Academy of Legislation). Recently, training on regulatory management techniques, including *ex ante* impact assessment and regulatory burden management, has been developed by the Ministry of Finance and ACTAL in conjunction with the Ministry of Interior and the Ministry of Economic Affairs. In 2008, training was also given to employers of the legal agency of the House of Representatives, in the context of reducing the administrative burdens of amendments made by the parliament on draft new legislation.⁹

Process and methodology

There are no standard or compulsory analytical methods. The contents of the impact assessments are “form free”. The emphasis remains, as identified in the 1999 OECD report, on capturing side effects rather than a consolidated weighing up of overall impacts.

The process for carrying out impact assessments is expected to follow two stages (the guidance recommends starting as early as possible):

- *Quick scan.* The initiating ministry must perform a quick scan to examine whether the proposed regulation (or amendment to an existing regulation) is desirable or necessary (if a proposal is not expected to have any significant impacts, there is no scope for alternatives, and it is a mandatory EU regulation, the quick scan does not need to be performed). The scan considers whether substantial consequences are likely in respect of the issues covered by the different impact assessments (business, environment etc), and whether a cost-benefit analysis is needed. The Proposed Legislation Desk checks the ministry’s proposals including its choice of impact assessments to be performed.
- *Performance of impact assessments.* External expert support is mandatory in some cases (for example Statistics Netherlands for the business impact). Once the impact assessments have been completed, they are submitted to the Ministry of Justice for the legislative test (see section above on legal quality). At the same time, the Ministry of Justice commissions a review of the completed impact assessments from the relevant ministries (RRG for the BIA, Environment for the EA and itself for the P&E).

The results of all these tests are brought together by the Ministry of Justice into a report which states “approval or disapproval”. If agreement cannot be reached with the responsible ministry, the report of the Ministry of Justice is attached to the proposal that goes to the cabinet.

If proposed legislation affects administrative burdens, it must also be submitted to ACTAL, the independent advisory body on Better Regulation. These burdens are expected to be quantified and ACTAL will base its recommendations on these figures. ACTAL provides written advice to the cabinet on this. In 2003, 2004 and 2005, ACTAL reviewed a total of 730 proposed regulations and gave a formal report in 198 cases (half of these in 2005). According to the latest numbers, ACTAL worked on 198 files in 2008 and published advice in 47 cases.¹⁰ The reports are divided into four categories: ACTAL can approve the proposed regulation with no further comments, approve it conditionally (stating necessary changes), reject it conditionally, or fully reject it. Only in seven cases has the proposed regulation been fully rejected, while full or conditional approval is most common.

The Council for the Judiciary (see Annex A) may also be asked for its advice concerning the likely impact of a regulation for the administration of justice. Its role is set out in an appendix to the guidance paper. An official request for advice must be submitted when the regulation is under development. Its advice will cover the administrative costs for the judicial “chain”, to be included in the overall expected financial costs. It may also be consulted informally. If it provides advice, this must be incorporated into the report of the Ministry of Justice to the cabinet.

Public consultation and communication

Impact assessments are not available to the general public, apart what goes into the Explanatory Memorandum to the parliament, attached to draft bills. There is no formal requirement to consult as part of the process. Consultation is not mentioned in the guidance.

Alternatives to regulation

A main goal of the legislative quality policy of the Ministry of Justice is to develop and encourage the use of alternatives to regulation. Since the 1990s a broad range of white papers and checklists have been established, concerning for example the use of normalisation and certification, covenants, duties of care, general rules as an alternative for permits, tradable permits, contributions to public services.

Risk-based approaches

The Netherlands have been working to develop risk-based approaches in the development of regulations. New legislation is often based on risk analyses and a focus on activities relating to businesses as well as citizens with a higher risk profile. The use of risk-based approaches however, is not yet systematic. To stimulate its development, the RRG and REAL have been encouraging a dialogue to discuss risk-based regulation and the mechanisms that generate burdensome regulations. Part of this discussion has focused on (dis)trust as an issue which encourages unnecessarily burdensome legislation. The RRG and REAL want to find out how to use trust as a steering instrument for “light regulatory” governance, the shape this should take and the regulatory areas or business sectors in which pilots can be started up. It is seeking to bring together various stakeholders; policy makers, academics, politicians and business representatives. There are two different approaches;

- A fundamental track to find out which “factor” is needed to prevent the regulatory mechanism from increasing distrust and regulatory burdens.
- A second track to search for and organise countervailing powers to slow down and reverse the cycle of increasing distrust and regulatory burdens.

The goal of this discussion is to develop an operational mechanism which can be put into force as soon as possible to counter the continuing development of regulatory burden mechanisms. A round table discussion is planned for May 2009. Further analyses and a policy approach are expected in October 2009.

Notes

1. Officials as well as external stakeholders.
2. Such as sensitivity analysis, and multicriterial analysis.
3. Citizen views should not just be confined to the citizen burden reduction programme. In any event there is an important link with the development of new regulations that may add to their burdens.

4. The lower house of the parliament also has the right to initiate legislation.
5. Primary laws and orders in council.
6. For example: *Aanwijzingen voor de regelgeving, Reglement van orde TK en EK, Reglement van orde voor de ministerraad.*
7. It made a request for information.
8. “Assessment of Proposed Legislation – explanatory notes, step-by-step plan, quick scan, manuals”.
9. This followed the “*Blanksma Van den Heuvel and Smeets*” resolution by two spokespersons for Better Regulation.
10. The annual reports from 2006 and 2007 state: In 2006 there was advice on 58 proposals (total $58 + 194 = 252$ files); in 2007 there was advice on 41 cases (total $41 + 160$ files).