Evaluation of legislation in the Netherlands

Wim Voermans*

Over the last ten years, evaluation of legislation has grown into an important issue in the Netherlands and in other Member States of the European Union. Partly due to worries that arose in the Netherlands as a consequence of excessive regulation and poor legislative quality, there was a growing need, boosted by quality-of-legislation policies, to assess the effectiveness of statutory regulations in terms of the objectives they pursue. In actual fact, the enactment of a statutory regulation often is not the terminus of a policy process – contrary to what politicians like to believe – but only the beginning.

1 LEGISLATION AS A PERPETUAL CYCLE

Only after a regulation has entered into force will it become clear to what extent the objectives that the regulation meant to achieve are actually achieved in practice. In itself, using the instrument of the law to achieve policy objectives does not guarantee success. Moreover, applying the regulation in practice may have side effects that had not been anticipated by the legislator in advance. The judge, for instance, may interpret statutory regulations in ways that had not been intended by the legislator; executive organizations may be facing unforeseen overload; implementation of the regulation may turn out to be much more costly than expected, etc. Such effects may arise at any arbitrary moment in the regulation's life cycle. In the context of Dutch legislative policy, therefore, effective legislation also

* Professor of Constitutional and Administrative Law, Leiden University.
means that the legislator should allow for the social or administrative effects that statutory regulations may have. Consequences produced by regulations, intended or unintended, may cause a statutory regulation to be adjusted or withdrawn, or may induce intervention in the preconditions that affect a regulation's effectiveness in practice.

All this requires ceaseless attentiveness, which turns the legislative process into a cyclical activity. The legislator will have to keep his finger on the pulse and keep collecting information about the regulation's effect in practice to determine whether there are any grounds for reevaluating the regulation or any of its elements. Such continuous evaluation and any ensuing feedback of evaluation results may cause the permanency of a statutory regulation, and in its wake the stability and the legal certainty involved in government intervention through statutory regulations, to suffer. Statutory regulations often benefit from a measure of permanency. To prevent statutory regulations from having to be revised soon after their entering into force, legislative partners in the Netherlands (government and parliament) increasingly tend to agree to evaluate a statutory regulation periodically, generally after a substantial period of five years; this is the so-called **ex post** evaluation. They also increasingly attempt to map probable consequences of a regulation before it enters into force by means of an evaluation in advance, the so-called **ex ante** evaluation. This paper deals with both kinds of legislative evaluation and with their position and role in Dutch legislative policy.

2 LEGISLATIVE EVALUATION

Collecting information about the expected or actual effects of a statutory regulation can be done in many ways. For example, the effects of a regulation can be monitored through the general news outlets. In addition, interested parties in a statutory regulation, such as MPs or ministers, frequently set up an **ad hoc** investigation into any of its aspects. Besides such rather incidental kinds of evaluation, there are also more systematic kinds of evaluation. Figures and data on a statutory regulation and developments in a policy area are often systematically monitored because this has been
agreed or is required by law. Executive or judicial authorities, for example, are obliged to draw up annual reports to show processing or output figures, etc. The most systematic kind of legislative evaluation, however, purposively investigates the effects of a regulation and the significance of those effects in the perspective of the effects the legislator intended the regulation to have. This link between actual policy effectiveness and the legislator’s intentions turns an evaluation into a genuine legislative evaluation. Our definition of a legislative evaluation, therefore, is the following: ‘the purposive collection and analysis of data on the effect of a statutory regulation in practice and their assessment in the light of the legislator’s intentions’. Contrary to other kinds of government effectiveness evaluations, such as policy evaluations, the explicit object of the legislative evaluation is the statutory regulation and the underlying intentions of the legislator. This definition is not to imply that other kinds of evaluations, such as policy evaluations, may not be extremely important to the legislator. Statutory regulations are often part and parcel of an aggregate of policies and policy areas, and policy information about the developments in the field to which the statutory regulation belongs, therefore, is highly relevant and important to the legislator. Information about the effect of a regulation that is not directly assessed with reference to the legislator’s intentions may still be of substantial interest. However, these and other kinds of evaluations will not be discussed in this paper.

3 LEGISLATIVE EVALUATIONS IN ALL SHAPES AND SIZES

There are many ways to evaluate the effects of statutory regulations, and one of these is the purposive legislative evaluation. Purposive legislative evaluations also come in various shapes and sizes. They are usually subdivided into ex ante and ex post evaluations: ex ante evaluations are carried out before a regulation is enacted, and ex post evaluations after a law has come into effect.

---

1 See Ph Eijlander, De wet stellen (‘Laying down the law’), Tilburg University dissertation, Zwolle 1993, p 208
2 This usually means ‘judging the observed content, processes, or effects of a policy using certain criteria.’ For this definition, see J Th A Bressers, A Hoogerwerf, ‘Inleiding tot de beleidsevaluatie,’ in: J Th A Bressers, A Hoogerwerf (eds) Beleidsevaluatie (‘Policy evaluation’), Alphen aan den Rijn 1991, p 21
3 See, among others, A B Ringeling, A Sorber (eds), Macht en onmacht van bestuurlijke evaluaties (‘Power and powerlessness of administrative evaluations’) ’s-Gravenhage 1988
3.1 Ex ante evaluation

Strictly speaking, *ex ante* evaluations are not true legislative evaluations in terms of the definition presented above, since it is impossible to assess in advance the practical effects of a regulation with reference to the legislator’s intentions. Usually, the legislator’s intentions are still incubating, while the *ex ante* evaluation is carried out and any practical experience has not yet been gained. Nevertheless, *ex ante* evaluations are worth mentioning here for the role they can play in the deliberate preparation of statutory regulations. Assessment of the possible pros and cons of an intended statutory regulation will have to be thorough to ensure that a regulation does not suffer from quality defects that may impede its practical implementation. Points of special interest for such an *ex ante* evaluation of intended statutory regulations can first of all be found in various places in the *Aanwijzingen voor de regelgeving* (‘Instructions for legislation’), a collection of guidelines that, as a result of legislative policy initiated in 1992, Dutch legislators must comply with.

1.° INSTRUCTIONS FOR LEGISLATION AND EX ANTE EVALUATION

The Instructions for legislation recommend various types of *ex ante* evaluations for aspects related to the (side) effects and other pros and cons of a regulation. Instruction 9 lays down that, in order to answer the question whether government action in the form of a statutory regulation is desirable, attention must be paid to the effects and disadvantages caused by a regulation to the government, citizens, companies, and institutions. Furthermore, the question must be answered to what extent it is to be expected that a regulation will help to realize the intended purpose and what side-effects it is likely to have. The Instructions themselves present various instruments for such a preliminary investigation. The Instructions in Section 2.1, for example, require clarity as regards necessity, purpose, and implementation and maintenance aspects of the intended regulation, besides consideration of administrative disadvantages on the one hand and disadvantages for citizens, companies, and
institutions on the other (for a specification, see the explanation added to Instruction 13). There are other specific instruments. For example, Instruction 212 indicates how the effects and disadvantages mentioned in the explanatory memorandum of a proposed regulation can be budgeted and hence be assessed in advance. Instructions 215 and 216 list a number of points that must be taken into account when budgeting the financial consequences of a regulation – which, again, is to be expressed in the explanation.

Besides research on Instructions, there are other instruments for gauging the exact effects and side-effects of an intended regulation. A well-known instrument to estimate and/or measure the disadvantages and effects of an intended regulation for companies, institutions, and citizens in advance is the so-called Bedrijfseffectentoets (BET, ‘Company Effects Test’). This is a checklist that was modernized in 1995, in the framework of the project entitled Marktwerking, deregulering en wetgevingskwaliteit (‘Open market system, deregulation, and quality of legislation’): the MDW operation.¹

2° THE BET AND EX ANTE EVALUATION

The instrument of the BET clearly charts the intended and unintended consequences of bills for trade and industry, the open market system, and overall socio-economic development. Its primary purpose is to promote balanced political decision-making processes. The BET consists of two components, the first of which is a questionnaire which, in seven key categories, facilitates systematic investigation into the effects of a bill for trade and industry, the open market system, and socio-economic development. The BET forces one to make clear: 1) which categories of companies a bill affects; 2) how many companies will be confronted with the bill; 3) the nature and the number of the pros and cons of the regulation (structural effects, financial and compliance effects, uncertainty margins of pros and cons, spread of effects

over different companies, administrative costs); 4) how the pros and cons of a bill relate to the resources of the company in question; 5) how things are arranged in a particular policy field in (competing) foreign countries; 6) what the consequences are for the open market system; and 7) what the bill’s socio-economic consequences are in terms of employment, production, etc.

3.° SIMULATION OF REGULATIONS, EXPERIMENTS, AND EXPERIMENTAL PROJECTS

One of the more recent forms of ex ante evaluation consists in doing trial runs with a statutory regulation in a kind of laboratory setting. In such a setting, the actual context in which a statutory regulation will be operating after its implementation is imitated as accurately as possible. Such imitation can take the form of a game simulation or a role play. In the recent past, such experiments have been carried out on the Fertilizer Law. A form of ex ante evaluation that goes a little further is a trial run with a statutory regulation in a field test or an experimental project. In such cases, the statutory regulation is subjected to an experiment in a real implementation situation for some time during its preparatory phase. In such an experimental project, a number of municipalities or a district, for example, experiment for some time with the statutory regulation as it is expected to be formulated after its enactment. This may concern an entire regulation or a component part of the regulation that needs testing. A case in point is the experimental ‘telehearing’ project, which was carried out in the Assen district and concerned prolongation of the retention on remand procedure in the framework of the change of the Code of Criminal Procedure.

5 A special form of regulation simulation is micro-simulation, in which, by means of a mathematical model, the consequences of a regulation for different populations is calculated. In this type of simulation, computer systems can play a useful role. About this, see J.S. Svenson, Kennisgebaseerde micro-simulatie ('Knowledge-based micro-simulation'), dissertation TU Twente, Enschede 1993. For a German example of methods and results of simulation-like test methods in legislation, see C. Bohret, ‘Zuerst testen – dann verabschieden Erfahrungen mit der Prüfung von Gesetzentwürfen’, Zeitschrift für Gesetzgebung, 1992, pp 193-216.

6 See also the study by Mastik et al. 1995. See also D.P. van den Bosch, ‘Simulation of legislations’ RegelMaat 1995, pp 202-204.

7 Kamerstukken ('reports on parliamentary proceedings') II 1995/96, 24 219, nr 8.
3.2 Ex post evaluation

The best-known form of legislative evaluation is the *ex post* evaluation, carried out once a statutory regulation has taken effect. Among *ex post* evaluations, too, various distinctions can be made. On the basis of the evaluation method used, Winter distinguishes two main types of *ex post* evaluations: *systematic legislative evaluations* and *subjective evaluations*. In a systematic evaluation, observing and assessing the effects of the statutory regulation are done by means of scientific research methods. In subjective evaluations, it is not primarily scientific (empirical) methods that are used to investigate and assess the effects, but other observation methods. A well-known specimen in the latter category is the short-term legislative evaluation in which an opinion, perception, or piece of advice is asked of an expert or an authoritative politician with respect to the effects of a law as observed by him or her. In their turn, systematic evaluations can be subdivided into the *descriptive-assessing* type and the *explanatory-assessing* type, the difference between the two being, by and large, that the former evaluations only take stock of the effects of a statutory regulation in the light of the legislator’s intentions, and that the latter also attempt to specify causes and/or other explanations for the effects observed.

The distinction between these types is important even if only because evaluations can often make a contribution to improving the quality of legislation. Especially systematic legislative evaluations often yield information, points of view, or explanations that may lead to adjustments which, on balance, contribute to progress being made on the ladder of legislative quality. Other studies into the influence of legislative evaluation, carried out in the Netherlands, have also shown that systematic legislative evaluations, especially if implemented by bodies outside the circle of those immediately involved in the regulation, can often make a positive contribution to the quality of legislation. It should cause no surprise, therefore, that Dutch legislative policy, which is founded on the memorandum *Zicht op wetgeving* ('View of legislation'), greatly values regular and systematic legislative evaluations. This, incidentally, in no way disquali-

---

9 See Winter, *a w* 1996, p 326
10 See *Kamerstukken II 1990/91*, 22 008, nrs 1-2, pp 39-40
fies other forms of legislative evaluation, which can also make a quality contribution in other circumstances or may be indicated on other grounds.

4 THE RELATION BETWEEN LEGISLATIVE EVALUATION AND LEGISLATIVE QUALITY

In the Netherlands, a good deal of research has been conducted into the relation between legislative evaluation and the quality of legislation. For example, in his dissertation entitled *Evaluation in het wetgevingsforum* ('Evaluation in the legislative forum', 1996), Winter developed the model of the legislative forum with a special eye to measuring the effects of legislative evaluation. This model is interesting for legislators for more reasons than legislative evaluation alone. This model of the legislative forum takes in everyone involved in the development and realization of legislation, and the central idea behind it is that the quality of the arguments determines the quality of the debate in the forum\(^\text{11}\), and that, in turn, the quality of the debate in the forum determines the quality of the legislation. By better, i.e., more empirically founded, information, the quality of legislation can be improved. A precondition for this assumption is that it is also assumed that more rational arguments and considerations lead to better decisions, insights, etc. However – and this is also recognized in a growing number of administrative publications\(^\text{12}\) –, the actual legislative process is not always as simple as that. Debate in the legislative forum is not entirely dictated by the laws of rational exchange of arguments and a search for higher quality of information and argumentation. The discussion in the legislative forum is increasingly target-searching rather than target-determining in nature.\(^\text{13}\) In our view, the debate in the legislative forum mostly does not obey the laws of rational consideration and policy-making. The issues and the finality of such a debate – perhaps even more than those

\(^{11}\) In this context, this means that the more empirical the foundation of the argument, the better its quality

\(^{12}\) See the criticism of rational policy making methods by, among others, I Th M Snellen, *Bovend en geboeard* ('Captivating and captivated'), inaugural lecture Tilburg University, Tilburg 1987, but also Hoogerwerf himself relativizes the value of rational policy making and 'objective' information as a basis for the effectiveness and legitimacy of policy, see A Hoogerwerf, *Het ontwerpen van beleid als wetenschapstoepassing* ('Designing policy as an application of science'), in A Hoogerwerf (ed.), *Het ontwerpen van beleid* ('Designing policy'), Alphen aan den Rijn 1992, pp 17 & f

\(^{13}\) See Ph Eijlander et al (eds), *Wetgeven en de maat van de tijd* ('Legislating and the measure of time'), Zwolle 1994, pp 10-11
of administrative policy-making – are strongly determined by other rationalities, such as the political, socio-economic, and judicial ones.\textsuperscript{14}

\textbf{5 MOTIVES FOR LEGISLATIVE EVALUATION}

Evaluation of a statutory regulation can be advisable for various reasons. A first, and possibly the most important motive, is that the legislator wishes to know which effects a statutory regulation has in practice. If there turn out to be any bottlenecks in practice, the regulation may then be adjusted, which will help to improve the quality of the regulation or its implementation and enforcement. Another motive is often prompted by the political dimension of the legislative process, which also plays a role in the decision whether to evaluate a statutory regulation or not. If an evaluation has been indicated or stipulated in a legislative proposal, this may often accelerate political decision-making, as any lacking consensus about the proposal is counterbalanced by the promise of an evaluation.\textsuperscript{15} In this way, an evaluation that has been indicated or stipulated in a statutory regulation may act as a lubricant in the process leading up to a law’s enactment.\textsuperscript{16} Following naturally from this function, legislative evaluation can also be used strategically, by parliamentary minorities in particular, to reintroduce sensitive issues periodically on the political agenda. The practice of legislative evaluation research demonstrates that legislative evaluation research is likely to be less effective if the decision-making context is more discordant.\textsuperscript{17} Nevertheless, the power of legislative evaluation as a strategic political instrument should not be underestimated.

Besides motives and functions, legislative evaluations may also have a legitimizing function: a legislative evaluation may help to engender public support for a regulation as it provides an opportunity to give vent to objections or criticism etc. Legislative evaluation may contribute to the communicative potential of statutory regulations, as discussed previously in this book. Legis-

\begin{itemize}
\item \textsuperscript{14} Cf Wim Voermans (review), H Winter, ‘Evaluaties in het wetgevingsforum’, Rechtsgeleerd Magazijn Themis 1998, volume 159, pp 26-29
\item \textsuperscript{15} See also J M Polak, ‘Over de herkomst en resultaten van opdrachten voor wetsevaluaties’, in J H T H Andriessen \textit{et al}, \textit{Wetsevaluaties tussen wetenschap en beleid} (‘Legislative evaluations between science and policy’)
\item \textsuperscript{16} See Eijlander, op cit., 1993, p 208
\item \textsuperscript{17} H B Winter, M Scheltema, M Herweijer, \textit{Evaluatie van wetgeving terugblik en perspectief} (‘Legislative evaluation retrospective and perspective’), Deventer 1990, p 192
\end{itemize}
Evaluative evaluation research can also have a warning function. By including an evaluation stipulation in a statutory regulation, for instance, parliament can signal that it has only accepted the bill *nolens volens*. In a more positive sense, the legislator can also seize the evaluation to indicate that the effects the statutory regulation will in practice have his full his care and attention.

6 EVALUATIONS: WHEN, HOW, AND BY MEANS OF WHICH CRITERIA?

Evaluations are costly and time-consuming. This is why it is not always opportune to announce and implement extensive evaluations of each and every statutory regulation. Moreover, extensive, systematic evaluations do not always generate results that are effective: many of the effects that are investigated and the explanations that are found for them will not lead to adjustment or reconsideration of legislation. In general, evaluations rarely lead to fundamental adjustment of established legislation, though research results do frequently lead to solutions for problems in actual implementation practice. Nor should we forget that evaluations, especially *ex post* evaluations, also involve risks. Promising an evaluation, for example, may signify that a problem that should really have been dealt with when the regulation was being prepared is actually shelved. Evaluations can also be seized to reintroduce debates on statutory regulations. The stability of legislation does not always benefit from periodic implementation of evaluations. Premature evaluations, that is, following immediately upon the enforcement of the statutory regulation, are often inefficient because implementation practice has not yet taken shape, little experience

---

18 The Dutch Audit Office, for instance, concluded that the usefulness of evaluation facilities is actually doubted by legislative departments themselves. There are other ways of obtaining information about the effects of statutory regulations: contacts with branches in society and executive and enforcement agencies, consulting case law or appeals lodged as a consequence of a statutory regulation. See Algemene Rekenkamer, *Wetgeving organisatie, proces en product* ("Legislation organization, process and product"), Kamerstukken II 1993/94, 23 710, nrs 1-2, p 20

19 Ringeling holds that people’s expectation that evaluation will always lead to sweeping changes or improvements in policy is an overestimation of its significance, if not a rather mechanistic view of evaluation. This does not mean that evaluations in general have little or no influence on policy, but that the results of evaluation studies are only one kind of input in the legislative process, not the only input and certainly not the most authoritative. See A Ringeling, ‘Wetsevaluatie’ ("Legislative evaluation"), *RegelMaat* 1995, p 49-56

20 See Winter et al, op cit 1995, 222-223

21 See also H B Winter, *Het forummodel en de toekomst van evaluatie van wetgeving* ("The forum model and the future of legislative evaluation"), 1997, p 137-138
with the regulation has been gained, and the debate about its content is still very fresh. If the legislator decides that an evaluation is imperative, he will have to proceed selectively.\textsuperscript{22} If a new regulation carries great social weight, for instance, and the effects of the regulation are hard to map in advance, there will usually be a direct and necessary ground for making a periodic evaluation mandatory by way of an evaluation stipulation in a statutory regulation. Also in cases of modular legislation (i.e., in subsequent phases or tranches), systematic evaluation is important. Implementation experiences gained in previous phases can then be used to generate learning effects for subsequent phases.

In many other cases, an extensive systematic evaluation must be considered as a subsidiary instrument: there is only scope for such an extensive systematic evaluation if the possibilities to assess the possible practical effects of a statutory regulation by way of preliminary inquiry are inadequate for a reliable preview, or if there are no other simple ways to use existing sources of information to collect information about the law’s effect. In the long term, selective use of systematic legislative evaluation prevents this mechanism from becoming a meaningless ritual due to overexposure.\textsuperscript{23}

Evaluation of legislation, however, does remain very important. Continuous information about the effect of statutory regulations is even gaining importance. In order to obtain sufficient evaluation data, it is important for the legislator to arrange effectively and efficiently which information is to reach whom in which way. Effective ways of collecting information include legal commitments for executive organizations to present figures, reports, or other information to the minister responsible for implementing the regulation. By stipulating that third parties should also be acquainted with such information, several actors involved in the legislative process can keep up to date with the practical effects of a statutory regulation. Especially if tasks are delegated to independent administrative bodies that do not come within the compass of ministerial responsibility, it is important to adequately arrange the information flows in the regulation system, both from the evaluative point of view and from the perspective of possible public

\textsuperscript{22} See also Winter, op cit 1996, p 327 ff

\textsuperscript{23} See also Manette Lokin, Evaluatie van wetgeving. van praktijk naar beleid (‘Legislative evaluation from practice to policy’), RegelMaat 1997, p.131 ff
control.
Particularly if statutory regulations have a provisional or experimental character, evaluation is the appropriate way of monitoring whether the regulation will acquire a measure of stability.

7 EVALUATION CRITERIA

In the Netherlands, legislative evaluation may have several foundations. They may arise from a legal obligation to carry out a legislative evaluation. They may also result from a governmental or ministerial undertaking laid down either in a regulation's explanatory memorandum or elsewhere in the legislative process. If a legislative evaluation is being contemplated, whether in a statutory regulation or elsewhere, it is imperative to make the framework of the evaluation unequivocally clear, especially the criteria that will be used to assess the regulation. This prevents the evaluation research from going astray or the results from being irrelevant in retrospect. To make sure that a legislative evaluation is a meaningful enterprise that can nourish a debate on experiences with a statutory regulation on the basis of empirically substantiated data and arguments, several matters must be observed in Dutch legislative policy.
First of all, those who commission the evaluation need to be well set-up. This means that the evaluative parameters need to be precisely defined and that the commissioning authority needs to specify accurately what kind of information the evaluation is supposed to provide: is it supposed to be a broad systematic study that compares empirical data with the legislator's objectives, or is it to be quick advice on bottlenecks occurring in practice during the implementation of the statutory regulation? In the former case, a systematic legislative evaluation is in order; in the latter case, a more consultancy-like approach may do, to be carried out by an expert or consultant.
The commissioning authority also needs to keep a close eye on the quality of the evaluation study that is being carried out. High-quality evaluation studies guarantee that the significance and value of future legislative evaluation will not wear away. The most important guarantees of quality
in this respect include quality control of the research itself and an adequate infrastructure for monitoring and process control during the evaluation study. Quality control of the research itself means that the commissioning authority should make sure that the study has a clear problem definition, that the evaluation criteria have been critically examined, that the proper research method is used to guarantee the scientific quality of the study, that the results of the evaluation study have been tested, etc. The Dutch researcher Winter has demonstrated that it is not uncommon for legislative evaluation studies to have a flawed quality control system. For instance, the symmetry requirement, which stipulates that a study should not present any conclusions or recommendations that do not ensue from the analytical findings, is frequently violated. Commissioning authorities need to develop an evaluation policy that specifies criteria and norms for evaluation studies to meet. Such a policy is commonly lacking. Arrangements concerning the infrastructure can also help to boost the quality of legislative evaluation. Naturally, the commissioning authority should make solid agreements about the expenses, duration, and design of the study. If a commissioning authority is itself the main executor of the study, through its research department, for example, it is also important to make solid arrangements with those involved. For a variety of reasons, evaluation studies have a tendency to overstep time limits, which may involve major drawbacks as the usefulness of the study’s information is often dependent on the moment it is made available. Time management implies that the commissioning authority should play an active role in collecting the data that are required for the study. Loss of time is often caused by situations in which parties bide their time. Taking charge of the study-in-progress includes the establishment of a supervisory committee. Such a supervisory committee can keep a close watch on the quality of the study’s content and can function as the commissioning authority’s counterpart. After the evaluation data have become available, the commissioning authority must ensure that the research results land on

24 See Winter, op cit 1996, p 330 ff
25 Winter recommends involving the Interdepartmental Commission for the Harmonization of Legislation See Winter loc cit 1997, p 139
the appropriate desks rather than end up in its own bottom drawer. This may require an active effort from the commissioning authority to make sure the research data are widely disseminated or distributed on a more limited and confidential scale.
ANNEX
FOREWORD

General

This brochure contains the Dutch Business Effects Test (BET) Checklist: a list of seven points requiring attention when the impact of draft legislation on businesses is assessed. The Checklist and the accompanying Notes are intended as an aid for those conducting the BET. This Checklist forms part of the Questionnaire for the testing of draft legislation, as used by the inter-departmental Proposed Legislation Working Group (Government Gazette 1995, No. 96). The Questionnaire includes questions on whether legislation is implementable and enforceable, and on its effects on the environment. The full Questionnaire is presented in Appendix 6. A brochure has also been produced on the other aspects.

The BET is an instrument designed to clearly identify the intended and unintended consequences of draft legislation for businesses, the functioning of markets and social and economic development. Its primary purpose is to facilitate balanced political decision-making. A description of effects on businesses forms a compulsory part of the Notes accompanying draft legislation with potential business effects.
Formal integration of the BET

The BET forms part of the ‘Instructions for Legislation’ (Gouvernment Gazette 1992, No. 230). These instructions represent an important aid in the realisation of effective legislation.

The Dutch government also approved the Market Function, Deregulation and Quality of Legislation (MDQ) project on 4 November 1994. The aims of this operation are improved legislation, a more dynamic economy and more effective administration. An important part of the project was the installation of a Ministerial Commission for Market Function, Deregulation and Quality of Legislation, chaired by the Prime Minister (Gouvernement Gazette 1995, No. 15). This Commission not only reviews existing legislation, but also considers draft legislation separately. As a result, the BET falls under the Commission’s responsibility, together with the tests for implementability and enforceability of the Ministry of Justice, and the environmental impact test of the Ministry of Housing, Physical Planning and the Environment.

The inter-departmental Proposed Legislation Working Group was formed as part of the MDQ project. Its mandate is to list proposed legislation at central government level and, where relevant, to determine the extent to which the department with prime responsibility for the legislation in question should provide an insight into the potential (side) effects.

BUSINESS EFFECTS

Business effects form part of the (side) effects of legislation and regulations.

The term ‘business effects’ refers to costs and benefits for businesses or business categories, consequences for the functioning of markets and social and economic effects. Costs and benefits can include financial effects (taxation, duties, compensation for damages etc.) and compliance effects (administrative costs, capital costs, loss of earnings, savings etc.). Among other things, the functioning of markets relates to the possibilities for new businesses to penetrate the market.
Social and economic effects can involve the consequences for production, employment and investment. Information on the approach taken by other countries in the field to which the draft legislation relates is important in the determination of the social and economic effects. The foreign test is therefore a separate point for consideration in the BET Checklist.

CHECKLIST

The Ministry of Economic Affairs drew up the BET Checklist primarily in order to give the BET form and content. On the basis of this Checklist, the Proposed Legislation Working Group determines the extent to which the various legislative proposals should be subjected to the BET, in consultation with the department holding primary responsibility for the draft legislation in question. The significance and nature of the draft legislation are important in this respect. The Checklist also helps to ensure that, as far as possible, the same issues are treated in similar ways in draft legislation. This is not only a question of standardisation, but also one of providing the government and Parliament with an insight into the potential (side) effects of draft legislation on a more systematic basis than in the past. The Checklist is accompanied by detailed explanatory Notes. These explain the significance of each point, which aspects are important, the meaning of the terms used and means of obtaining information. The Notes also contain various tips, examples and guidelines.

Structure of the brochure

The brochure starts with a general information section on the BET. Among other things, this explains which legislation should be assessed, when and how this should be done, how to deal with European Community (EC) legislation and which services the Ministry of Economic Affairs can offer. The general section is followed by the BET Checklist itself. Finally, the brochure contains individual explanations of each of the seven points in Checklist.
FURTHER INFORMATION

The Business Effects Test Secretariat of the Ministry of Economic Affairs can always offer assistance and further information on the implementation of the BET.

This Secretariat forms part of the Joint Support Centre for Proposed Legislation. The support centre was formed at the initiative of the Ministries of Justice, of Housing, Physical Planning and the Environment, and of Economic Affairs. Comments, additions, corrections and tips which could improve or clarify a later edition of this brochure are welcomed.

G. J. Wijers

Minister of Economic Affairs
Contents

1. General information on the business effects test
   What is the business effects test?
   Reasons for the business effects test
   When is testing required?
   Which legislation should be tested?
   How should testing be performed?
   Division of roles
   Service provision by the Ministry of Economic Affairs

2. Business Effects Test Checklist

3. Notes to the Business Effects Test Checklist*
   Categories of businesses (Point 1)
   Number of businesses (Point 2)
   Costs and benefits (Point 3)
   Capacity to absorb costs (Point 4)
   Foreign test (Point 5)
   Competition (Point 6)
   Social and economic effects (Point 7)

Appendix 1: Guidelines and examples for determination of costs
Appendix 2: Sources of assistance
Appendix 3: Relevant passages on the MDQ Ministerial Commission and from the Instructions for Legislation
Appendix 4: Addresses and sources of information
Appendix 5: List of contacts
Appendix 6: Questionnaire on draft legislation
Appendix 7: Index of key terms

* Note: Given the length of technical details and since they are in some aspects not directly applicable to other scenarios, items 3 and appendices are not included, except for appendix 6 – Questionnaire on draft legislation
1. GENERAL INFORMATION
on the business effects test

What is the business effects test?

The business effects test (BET) is an instrument designed to clearly identify the intended and, more importantly, the unintended effects of draft legislation on businesses, the functioning of markets and on social and economic development.

The description of these intended and unintended consequences is a compulsory part of the Notes accompany draft legislation with potential effects on businesses.

Example

Consequences for businesses can include:

- Financial rights or commitments in relation to the government
- Necessary investment (in plant, equipment etc.)
- Higher or lower administrative costs
- Changes in the scale of production and employment
- Restriction of, or an increase in competition.

In order to promote transparency, you are advised to provide the description of these consequences in a separate paragraph.

Reasons for the business effects test

The primary aim of legislation and regulation is to generate positive social effects. However, in many cases legislation also has (side) effects, the scale and nature of which are not clear in advance. These (side) effects can lie in the area of compliance costs for businesses, for example, or in consequences for competition, economic dynamism, employment, the environment or safety. Legislation can therefore unintentionally undermine the main aims of the policy. An insight into all relevant (side) effects is essential for a balanced assessment of, and decision-making on draft legislation (whether the legislation...
is implementable, enforceable, and has consequences for businesses and the environment). After all, only then is it possible to form a view on the proportionality of the legislation, or its cost-benefit ratio. All Notes to draft legislation therefore include an outline of the nature and scale of the intended and unintended effects. The BET represents an aid to the preparation of such an outline.

The BET is consequently in line with the Cabinet's plans to reallocate responsibilities. According to the Coalition Accord, such a reallocation can lead to a new balance between the need for protection and the need for economic dynamics.

To this end, the government introduced the Market Function, Deregulation and Quality of Legislation (MDQ) operation. The aims are to reduce the burden of administrative costs and regulation for business to the minimum necessary, to reinforce the functioning of markets and to improve the quality of legislation and regulation.

In order to realise these goals, the Cabinet must not only reassess existing legislation in terms of aspects such as necessity, whether the means justify the ends and enforceability, but also wants to realise more stringent testing of proposed legislation. After all, there will be little benefit in improving existing legislation if government departments at the same time are producing new legislation with disproportionate side effects.

When is testing required?

It is extremely important that the BET is performed at the earliest possible stage. It is precisely in the phases where a choice between instruments and between alternative forms of regulation is still possible that the BET will generate the most valuable results. This applies not only for legislation, but also for policy papers or special regulations laying down a (future) legal framework.

This need not lead to delays in the legislative process. After all, you will receive requests for information on the consequences for businesses anyway, in the course of interdepartmental talks, from the Cabinet, from the Council of State or from Parliament. It will be easier to provide the required information and eliminate any resistance among the businesses concerned,
or in political circles, if you take these questions into account from the start. This can avoid considerable delays.

**Which legislation should be assessed?**

The Instructions for Legislation, of which the BET forms a part, relate to all forms of legislation and regulation which are realised under Ministerial responsibility. This not only includes Acts of Parliament, but also General Administrative Orders (AMvBs), and Ministerial Decrees and Orders. The (side) effects, including those for businesses, should therefore be considered in the preparatory stages of all these forms of legislation and regulation (see Instructions 9 and 13 in Appendix 3 of this brochure).

The inter-departmental Proposed Legislation Working Group, which works under the flag of the MDQ operation, draws up a list of all planned central government legislation and regulations with (side) effects for businesses, the environment and for implementability and enforceability. The working group will also state which (side) effects of the draft legislation must in any event be described by the department initiating the legislation. This results in the 'Legislative Review'. Obviously, the BET only plays a role in draft legislation with potential consequences for businesses. It need not, therefore, be performed for every piece of draft legislation.

**Example**

Draft legislation to which the BET has been or will be applied:

- Regulating ecotax for small-scale consumers
- The new Competition Act.

Draft legislation for which no BET is required:

- Privatisation of the General Civil Service Pension Fund (ABP)
- The Delta Act for Major Rivers (legislation on emergency fortification of dikes).
The formal procedure for the legislative tests by the Ministry of Justice does not apply for Ministerial Orders and Decrees, as these are not debated by the Cabinet. Nevertheless, a description of the business effects is required in the Notes for these forms of regulation (see Instruction 212). It is therefore important that the departments most closely involved also consult each other on Ministerial regulations. Again, the BET Checklist can be used for this purpose. If the business effects have already been discussed in the Notes to the underlying regulation or Act, a reference to these Notes will usually suffice.

A great deal of draft legislation is based on EC legislation. At least 30% of Dutch legislation and regulation now derives directly or indirectly from Brussels. This is why business effects should be considered both in the preparation of EC legislation and in its implementation. However, testing need not be carried out if the underlying EC Directive, in terms of both norms and application, leaves no policy scope for implementation in national legislation.

Finally, it should be noted that if draft legislation with consequences for businesses is altered substantially during the formulation process (for example as a result of advice from the Council of State or comments from the Second Chamber of Parliament), re-testing may be necessary.

How should testing be performed?

It is certainly not necessary to cover every point on the BET Checklist in detail, with quantifications, for every piece of draft legislation. In most cases, a brief BET will suffice. The primary issues in this case are indications of the scale of the main business effects (to be expected). A detailed quantitative analysis of the social and economic effects is not required here. Generally speaking, the more extensive the expected effects on businesses and on social and economic developments, the more stringent the testing requirements will be. In this case, we refer to a ‘detailed’ BET. It may then be necessary to employ an external agency to collect the data you need for the BET. The Checklist then serves as a useful aid to the realisation of a satisfactory research assignment.
and the knowledge and experience available at the Ministry of Economic Affairs in the field of identifying business effects.

2. BET CHECKLIST

The (side) effects of draft legislation are assessed on the basis of the questionnaire used by the Proposed Legislation working group (see Appendix 6). The BET Checklist, which forms part of this questionnaire, contains the following seven points for consideration in the testing of draft legislation for its impact on businesses:

1. For which categories of business could the draft legislation produce business effects?

2. How many businesses are actually involved?

3. What is the most likely nature and scale of the costs and benefits of the draft legislation for the businesses concerned?

The Notes should cover:

a) Whether the effects are structural or occur once only.
b) The split between financial and compliance effects.
c) The evidence for the costs and benefits, and the uncertainty margins.
d) The balance in the distribution of the effects among (categories of) businesses.
e) The consequences for the scale of administrative costs.

4. How do the costs and benefits of the draft legislation compare with the resources of the businesses in question?

5. What is the position regarding legislation in the relevant policy field in the countries that can be regarded as the most important competitors of the Dutch businesses in question? (Foreign test)
DIVISION OF ROLES

Government departments themselves hold primary responsibility for the quality of their draft legislation. The same applies for the explanation and testing of the (side) effects associated with the legislation in question. The Ministry of Justice holds primary responsibility for the general legislative test.

On the basis of the Legislative Review, this Ministry will present legislation with potential effects for businesses to the Ministry of Economic Affairs. The Ministry of Justice, the Ministry of Economic Affairs, the Ministry of Housing, Physical Planning and the Environment and, if necessary, other departments will assess the informative value of the sections of the Notes to the draft legislation which are relevant to them. The key issue here is whether the Cabinet and Parliament can in principle make a balanced assessment of interests on the basis of the information provided in the Notes. Obviously, each department also has its own responsibility to assess the cost-benefit ratio of draft legislation. In many cases, this assessment will lead to an advisory report to the Ministers concerned, for the purpose of the Cabinet discussions on the proposed legislation.

SERVICE PROVISION BY THE MINISTRY OF ECONOMIC AFFAIRS

It is not always easy to provide a clear insight into the (side) effects of draft legislation. The Ministry of Housing, Physical Planning and the Environment, the Ministry of Justice and the Ministry of Economic Affairs therefore decided to provide joint information and assistance for the description of the (side) effects of draft legislation. The Joint Support Centre for Proposed Legislation has secretariats for the BET and for the environmental impact test. The Legislation Directorate (Legislative Quality Policy sector) at the Ministry of Justice provides support. In exceptional cases, the Support Point can provide financial assistance for external research. You can also contact the BET liaison officer in your own department (see Appendix 5). Moreover, you can make use of the BET databank.
6. What are the consequences of the draft legislation for market operations?

7. What are the social and economic effects of the draft legislation (on employment, production etc.)?

3. NOTES TO THE BET CHECKLIST

Purpose of the Checklist

The Checklist was drawn up in order to make the description of the business effects of draft legislation, or the implementation of the BET, concrete. Again, we recommend that the Checklist is not applied to legislation that is virtually finalised, but at the earliest possible stage of the legislative process. The Checklist can prove its worth precisely at the stage when alternatives for the legislation are being considered.

Which questions?

One of the tasks of the interdepartmental Proposed Legislation working group is to provide a concrete statement in the Legislative Review of the extent to which the BET (including the foreign test) should be performed. The points for attention in the list are, in outline:

- A description of the nature and scale of the costs and benefits for businesses (Questions 1 to 3);
- Relating these costs and benefits to the capacity of the businesses concerned (Question 4);
- A description of the situation in the relevant field of legislation in other countries (Question 5);
- A statement of the consequences for the functioning of markets (Question 6);
- A description of the social and economic effects (Question 7).
Depending on the nature, significance and scope of the draft legislation, the working group will determine, in consultation with the department holding primary responsibility, which information is desirable or essential in the Notes in order to provide the required insight.

Quantification

Generally speaking, it is desirable to quantify the effects of draft legislation on businesses as far as possible (see Instruction 212). The degree of quantification required varies from one point to another. For example, the reply to Point 6 will almost always be made in qualitative terms, while this is impossible for Point 2.

The required degree of quantification also depends on the nature, significance and scope of the draft legislation and the availability of data. The possibilities for quantifying the effects on businesses will be considered on a case by case basis by the officials handling the dossiers in the department concerned, in consultation with the Joint Support Centre for Proposed Legislation.

Structure

The points for attention are explained in more detail, in sequence, in the remainder of these Notes.

The clarification of each point is structured as follows:

- The significance of the point
- Definition of the terms used
- Method of reply
- Possible sources of information.