GUIDE

Characteristics of good regulation

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REGULATORY MANAGEMENT UNIT

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GUIDE

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EXECUTIVE SUMMARY

Good regulation is (1) necessary and effective, (2) appropriate and balanced, (3) implementable and maintainable, (4) lawful, (5) consistent, (6) simple, clear and accessible, (7) well-founded and well-discussed and (8) relevant and up-to-date.

This guide provides an explanation of the characteristics of good regulation that the Flemish government adopted on 7 November 2003. Making it clear what we mean by good regulation gives rise to a good reference point for improving the quality of our regulation. However, the publication and use of these characteristics is, in itself, far from sufficient to improve the quality of regulation. Amendments are also needed in existing structures, processes, tools and guidelines. The task of the Regulatory Management Unit is to develop proposals and measures to achieve this. These must ensure that the characteristics of good regulation can also be put into practical effect.

The characteristics of good regulation are relevant to legislation in all its forms (orders, decrees, etc) and aspects (rights, duties, procedures, administrative formalities, etc), in every phases (preparation, implementation, follow-up) and at every level (Flemish, local, federal, European, etc). Hence this guide provides a general explanation of use to a wide audience in a variety of circumstances and areas of policy. Later a more specific brochure will be produced for each area of policy, making explicit the content and significance of the characteristics of good regulation by means of examples from the area of policy in question.

FOREWORD

This is the guide to Characteristics of Good Regulation. It has been produced by the Regulatory Management Unit and provides an explanation of the characteristics of good regulation that the Flemish government adopted on 7 November 2003.

The characteristics of good regulation are the quality criteria for legislation that the Unit uses in the establishment of Flemish regulatory policy.

Characteristics of good regulation are the quality criteria for legislation

However, good regulation is everyone's business. Everyone is affected by legislation and experiences the disadvantages of 'bad' regulation. But everyone also has a greater or lesser opportunity to do something about it.

Ministers, members of parliament and members of Minister's political offices and the civil servants bear great responsibility in this area, but other people can also consider things and offer ideas on how particular rules of law can be improved: members of the judiciary who plug loopholes and experience problems of application, officials responsible for implementing the rules or checking on compliance, advisory and consultative bodies, academics, the press, civil society and - last but not least - the many ordinary citizens, companies and organisations that are faced with the law in practice.

Good regulation is everyone's business

The characteristics of good regulation described below may be used as a reference point in this process, since they are relevant to all its forms (orders, decrees, etc) and aspects (rights, duties, procedures, administrative formalities, etc), in every phases (preparation, implementation, follow-up) and at every level (Flemish, local, federal, European, etc).

In any event, it is desirable for Flemish officials in all areas of policy to become familiar with these characteristics of good regulation. Hence the Unit will be disseminating them widely and promoting them actively. To this end a specific brochure is being produced for each area of policy, making explicit the content and significance of the characteristics of good regulation by means of examples from the area of policy in question.

It is desirable for Flemish officials in all areas of policy to become familiar with these characteristics of good regulation

If you have any questions or observations about this guide, you can refer to the Regulatory Management Unit.

WHY THIS GUIDE?

Good legislation is of great social importance. Important Flemish achievements in the fields of, for example, public health, safety, the living environment and socio-economic wellbeing are the result of legislation. For the future legislation will also remain an essential tool for creating a high-quality society for everyone.

Good legislation is of great social importance

At the same time there is great concern about the quality of our regulation. This is a result of the expansion of the scope of regulation, the complexity of administrative formalities and procedures, the large number of levels of government that produce legislation and the cost of the ever increasing requirements imposed by that legislation.

Many of these costs are undoubtedly reasonable given the benefits of regulation. But frequently the costs – in terms of reduced economic growth and job creation or in barriers to innovation and structural change – seem higher than necessary. Furthermore, more legislation often means more inconsistencies and more amendments. Along with the problematic accessibility of the legislation, this results in some areas in an 'impenetrable jungle' of rules and poor implementation and compliance. This also affects the credibility of government and widens the gap between the public and politicians.

Frequently the costs seem higher than necessary

When legislation is badly designed or much too complex, the cost of knowing, implementing, complying with and maintaining the legislation can thereby become unnecessarily high, without there being any certainty that the social objectives contemplated by the legislation will be achieved. Everyone experiences the obstacles this gives rise to, mainly the public and companies, but also the judiciary and the government itself.

Estimates indicate that the cost savings from better, simpler regulation and a lower administrative burden can be very considerable. This helps to explain why good regulation is more and more becoming part of competition between countries and regions. In an age in which the globalisation of the economy and economic and monetary union have deprived governments of many of their tools[1], the quality of regulation is coming ever more explicitly to the fore as a means of ensuring the attractiveness of countries and regions for investments and locations for operations.

The cost savings from better, simpler regulation and a lower administrative burden can be very considerable

Better regulation and the production of better regulations are consequently a necessity from a variety of viewpoints. But what are 'better regulation' and 'production of better regulations'? What do we mean by good regulation? The Regulatory Management Unit intends this guide to provide answers to these questions since making it clear what we understand by good regulation results in a useful reference point for improving the quality of our regulation. It sets the standards for constructing a system of built-in quality control of the government 'regulation factory'.

Characteristics of good regulation provide a useful reference point for improving the quality of regulation

ASSUMPTIONS

The principles of proper regulation have already been extensively described in a variety of places. They have in part been translated into practice in manuals such as the Flemish government's circular on "legislative techniques"[2] and the Council of State circular on legislative techniques[3]. These mainly involve a detailed description of legalistic rules that the text of a statute must comply with. This is useful and benefits the quality of legislation.

However, the approach of this guide is different.

First its emphasis is not on formulating detailed guidelines for someone who drafts actual regulations, but on a general description of important characteristics of good regulation that is of use to a wide audience in a variety of circumstances and areas of policy.

Second, the legalistic quality of the text of a statute is obviously important, but at the same time it is merely one aspect among many. Characteristics of good regulation are not limited to legalistic rules and techniques. They also involve things like necessity, effectiveness, efficiency, legal certainty and social justice. Hence the text of a statute must not simply be viewed through legalistic-judicial spectacles.

The legalistic quality of the text of a statute is merely one aspect among many

Third, attention to the quality of regulation must not be limited to the text of the statute per se. In reality, attention to the quality of regulation must already be there before there is even a single letter on paper. Consequently, the characteristics of good regulation also relate to the question of when and how regulation should be used and how this can best be brought about.

Attention to the quality of regulation must already be there before there is even a single letter on paper

Taking these assumptions we will now briefly set out these characteristics of good regulation and then explain them in greater detail.

EXPLANATION OF THE CHARACTERISTICS OF GOOD REGULATION

1. Necessary and effective

Good regulation is regulation that is necessary and effective for the achievement of the intended goal. Government intervention is necessary and effective and regulation is its best tool.

Regulation aims to attain social ends. But those ends can often be achieved as well – or even better – by some other means than regulation. Good regulation is thus regulation that is agreed to be the best option.

A good analysis of the problem is very important

This assumes, in the first place, a good analysis of the problem for which a solution is sought: Exactly what is the problem? Who causes it? Why does it occur? A good definition of the problem will in itself supply all possible solutions and rule out others that are clearly unsuitable. Thus it may be possible to establish that some problems are attributable not to some shortcoming of regulation but to deficient implementation or maintenance of existing rules. In such a situation, new regulation merely serves to exacerbate the existing implementation problems and does not solve the problem.

Not all problems can be resolved by government intervention. One important objective of the analysis of the problem is to detect precisely the relevant factors over which the government has control and, where appropriate, to show where government action is of little effect. It also means that the precise objective and target groups at which the intervention is aimed are stated more clearly.

Government intervention is not necessarily the best way of solving problems

But even where government action is expected to be effective, it is not necessarily the best way to solve social problems. The government should not needlessly interfere radically with society but should leave room for the self-regulatory abilities of the public, businesses and social organisations. Hence the government should not in principle intervene if it appears that the objectives can be brought about spontaneously by the people concerned themselves, or should limit itself to supporting those social processes by ensuring the existence of the institutional and material preconditions and by watching for undesirable and inadequate results. Obviously, a balance must be struck case by case.

Alternatives to regulation are sometimes cheaper and more effective

When government intervention is desirable, it is then necessary to choose the most suitable form for it. This may be new regulation, or else more effective implementation of policy using existing regulations or tools, the application of some sort of policy tool other than regulation or a mixture of these. There are often several alternatives available (see box 1). Experience shows that well-considered use of the alternatives can increase the effectiveness of government interventions and reduce their cost. The choice of the most suitable form of government intervention must also be done on a case-by-case basis, taking account of the characteristics of the actual situation.

The scale factor must also be included in these considerations. This is far wider than the question of whether Flanders has the power to regulate. It also involves the question of whether the problem can or should be better addressed at a higher or lower level, since, in a number of cases, the Flemish level will be less appropriate. First, solutions may be needed at a higher level, for example because of the negative effects on the international competitive position of unilateral action, or of inadequate effectiveness in cross-border problems. Second, local government bodies can sometimes achieve the set goals themselves, and action at Flemish level is neither needed nor desired. However, in certain cases the freedom of choice will be restricted because they are decided at a higher level (e.g. government programme, policy plan, international commitment, implementation of European directive, case law). This is an argument for restraint in commitments on the structure of new regulation in, for example, government programmes, policy plans and international undertakings, where necessity and alternatives have not been investigated.

BOX 1 ALTERNATIVES TO REGULATION

We are often all too quick to resort to legislation in order to address social problems. Nonetheless, alternative tools may be more suitable than legal prescriptions, rules and procedures. The alternatives may stand on their own or be supported by regulation:

- *Do nothing:* legislation is avoided or is made superfluous by relying on the free market (e.g. insurance), falling back on existing competition rules and principles of liability, adaptation or better use of existing tools and regulations, etc.
- *Self-regulation:* legislation is avoided or made superfluous because the intended target group takes action or establishes rules – possibly in consultation with the government. Examples of this include codes of good practice, codes of and commitments to behaviour, quality and other control systems within a sector, settlements of disputes within a sporting association, collective labour agreements, etc.
- *Social-communication tools:* actions and changes in behaviour are not imposed end enforced by law, but are brought about by changing players' knowledge and appreciation of alternative behaviour. Examples include information and awareness-raising campaigns, advice, education and training, exemplary behaviour by the government, demonstration projects, product labels, quality labels, benchmarking (performance comparisons), audits, checklists, reporting rules, helpdesks, consultancy and other contributions to forming public opinion (e.g. publications, conferences, etc).
- *Economic tools:* actions and changes in behaviour are obtained by changing the cost and/or benefits of alternative behaviour. Examples include duties and taxes (intended to change market prices and tax undesirable behaviour), subsidies (financial rewards for desirable behaviour), negotiable rights and certificates (proprietary instruments issued by the government that can be bought and sold in a market), liability rules, returnable deposit systems, warranty principles, tax incentives, etc.
- *Private law tools:* actions and changes in behaviour are not decided on unilaterally by the government but are determined by contractual means in consultation with those concerned. Examples of these include contractual arrangements between government agencies (administrative conventions) or between government agencies and companies or social players (policy conventions), administrative agreements with private individuals, etc.
- *Institutional tools:* detailed regulation and procedures are avoided by granting specific powers to regulatory bodies (cf. regulatory bodies for electricity and gas, telecommunications, drinking water, etc), standards institutes, regulations on recognition of status (e.g. for laboratories, experts, etc), certification and accreditation (inspection by an expert or independent body showing that a product, service, organisation or person meets predetermined requirements), etc.
- *Collective action:* action and changes in behaviour are obtained by creating new alternative forms of behaviour that the market cannot generate at all, or only inadequately. Examples include creating new facilities and infrastructure, government investments, government purchases, etc.
- *Alternative forms of physical regulation:* action and changes in behaviour are not imposed and enforced by detailed rules of behaviour , installation requirements, establishment quotas, proximity rules, product standards, quotas, licenses etc, but by alternatives such as target requirements (which lay down the results or targets that must be achieved instead of the way in which they are arrived at), administrative requirements (which lay down a systematic approach in order to audit production and other business processes and minimise risks, cf. HACCP, environmental care systems, etc), forms of manufacturer's liability (e.g. duties of acceptance and end-of-life collection of used equipment), etc.

2. Appropriate and balanced

Good regulation contribution to the welfare and wellbeing of society. It achieves its intended goal at the lowest possible social cost and minimises unwanted side-effects.

Regulation creates rights and duties. These protect interests and achieve policy objectives. But this often goes hand-in-hand with an infringement or restriction of other interests and policy objectives. Good regulation ensures that the disadvantages are not disproportionate to the goal sought or the result achieved.

The cost of regulation must be reasonable given the benefits

In other words, good regulation must lead to greater social welfare and wellbeing, not less. This means that the benefits of regulation justify the cost. To that end, the costs and benefits must be mapped out and balanced against one another, but at the same time it must be recognised that a completely formal cost-benefit analysis is not always possible, desirable or necessary. In that case, reasonable estimation and consideration of the expected effects of the intended regulation may be sufficient. An important basic premise in this is that good regulation does not have any negative effect on the ability to achieve sustainable development. This means that – where relevant – the possible social, economic and environmental effects on both the present and future generations are mapped out. However, it is necessary to look at what form and depth of such a regulatory impact analysis (RIA) is desirable and feasible on a case-by-case basis (see Box 2).

Good regulation avoids unnecessary costs and expenditure

Good regulation also avoids unnecessary costs and expenditure. It achieves its intended goal at the lowest possible social cost. This embraces a number of approaches and points for attention. First, in order to avoid unnecessary expense for the public and businesses in the achievement of the intended objectives, it is important that the implementation be flexible. It also means that good regulation leaves the target group as much freedom as possible to choose for itself the manner in which the imposed standards or objectives will be achieved. If, however, detailed requirements for resources or behaviour are employed, it is best to allow alternatives of equal merit to be used. Second, in order to avoid unnecessary for society as a whole, the distribution of effort between and within target groups can be extremely important. The cost is minimised if the greatest effort is demanded of the target groups among whom it is cheapest. One must also, for example, avoid establishing monopolies. Third, in order to avoid unnecessary expense in the long term, good regulation should support and stimulate desirable technological and social innovations. This, once again, includes attention to flexibility of implementation, and appropriate timescale for implementing the regulations, certainty, predictability and an interest in the long-term effects of the regulations. Finally[4], in order to avoid unnecessary administrative expense, the administrative formalities and the cost of procedures (in time and money) should be limited to what is necessary for sound government policy and should be organised in the most efficient and customer-friendly way.

It may be desirable to compensate disadvantaged interests and groups

Finally, good regulation requires not only that the aim be well balanced and achieved at minimum cost, but also that individual interests do not suffer disproportionate harm, since the cost and benefits of the regulations may be unevenly distributed. This can have undesirable effects on, for example, the distribution of incomes, employment in a region or the competitive position of a branch of business. This does not necessarily mean that the regulations are undesirable in themselves, but may provide grounds for examining alternative modes of application (e.g. transitional periods, recycling tax revenue, etc) or, if necessary, working out additional measures or compensation for the most severely affected groups or regions (e.g. income support, social counselling, etc). Once again, the latter do not necessarily have to be included in the intended regulation itself. Compensation may also be provided via actions and regulations in other areas of policy. In a number of cases, this may actually be more desirable because of the clarity, uniformity and consistency of policy and regulation.

BOX 2 REGULATORY IMPACT ANALYSIS (RIA): AN ASSORTMENT OF FORMS AND METHODS

The ideal is for all intended regulation in all its forms (executive orders, decrees, etc) and aspects (rights, duties, burdens, procedures, forms, sanctions, etc) to be tested, along with all possible alternatives, for its cost, benefits and all other positive and negative effects (now and in the future) on society, the economy, business, employment, prices, purchasing power, the distribution of incomes, the environment, mobility, the welfare state, the position of disadvantaged groups and minorities, the government budget, etc. This testing must be quantified and preferably costed.

Obviously, this ideal is not always attainable for lack of information, people, resources, expertise and time. Hence not all regulation can be subjected to the same kind of evaluation to the same extent. A pragmatic and realistic strategy is needed, in which the cost of evaluation is reasonable in relation to the expected scope of the effects of the regulation[5]. In this sense, an RIA of 'important regulations' may fall within the scope of the ideal described above. This means that the core of such an RIA is to some extent made up by balancing costs and benefits using methods that look at a wide ranging set of both positive and negative and direct and indirect effects and that quantify and include costings wherever possible. With 'less important regulation', a scaled-down form of impact analysis may be sufficient. Here one might consider a checklist of points for attention in the intended regulation. A whole spectrum of possible techniques and approaches already exist. These include multi-criterion analysis, formal cost-benefit analysis, cost-effectiveness analysis, socio¬economic impact analysis, reporting of effects (effects on business, SMEs, the environment, children, etc), appropriateness analysis, risk analysis, budgetary impact analysis, qualitative methods, etc. Each of these methods has its advantages and disadvantages. Hence flexibility in the choice of the methodology to be used is desirable, and in any event the most suitable technique should be used.

However, ensuring the necessary consistency demands a degree of standardisation. This can be via manuals containing guidelines on the content of RIAs, or else criteria and procedures are required in order to determine what type of RIA applies to a particular sort of regulation.

3. Implementable and maintainable

Good regulation entails guarantees that it will be given practical effect. It must be implementable and enforceable.

Right from the design of the regulations, attention must be paid to their subsequent implementation and maintenance

Implementation and maintenance of laws is essential, both for their operation and the achievement of the goals set for them, as well as for the credibility of government.

The search for solutions to problems of implementation and maintenance within the implementation and maintenance cycle itself is good per se but not sufficient since the cause of the problems frequently lies elsewhere, in the design of regulation. Right from the choice of tools and the formulation of regulations, attention must therefore be paid to the implementability and maintainability of the rules (see Box 3).

Rules must be implementable and maintainable

An item needing initial consideration is whether the rules are actually implementable and enforceable. Problems may arise for technical reasons (e.g. the lack of adequate detection apparatus able to take measurements with sufficient accuracy), vague wording, contradictory provisions, inadequate sanctions or the absence of social support.

If rules are indeed implementable and enforceable, it is then necessary to ensure that they can be implemented and maintained in a timely and correct manner by the administrative and judicial machinery. That is a question of cost and available resources, but also of the available tools and the practical organisation of such implementation and maintenance. This may, for example, mean that more detailed regulations have to be enacted (e.g. implementation decrees), departments and authorised officials need to be designated, expenditure included in the budget, training organised, etc.
It is important to assess this properly in advance and to ensure a satisfactory division of tasks and organisation between the competent bodies so as to avoid delays and problems during implementation.

We need not necessarily consider (only) criminal sanctions

On the maintenance and sanctions side, we need not necessarily consider (only) criminal proceedings, fines and imprisonment.
Other possibilities include administrative penalties, amendment, suspension or withdrawal of licenses and authorisations, giving warnings and making recommendations, forms of self-policing, accreditation and certification, facilities for benchmarking and social audit (e.g. provision of information to consumers about the performance of products and companies), etc. Here it is important that the chosen maintenance tool and the penalty are proportionate to the nature and consequences of the potential contravention.

BOX 3 MEASUREMENT OF IMPLEMENTABILITY AND MAINTAINABILITY

Measuring the implementability and maintainability of proposed regulations is a tool for mapping out the expected effects so that the quality of the legislation can be improved. Effects of implementability and maintainability means the consequences that not only the implementing organisations but also the public and companies will experience implementing and complying with the new regulations. In the Netherlands, this testing of effects is done by means of the following questions:

1. *What target group (s) are faced by the effects of the draft regulations and to what extent?*
2. *What organisations will implement and maintain the draft regulations; what is their opinion on implementability and maintainability and the cost thereof?*
3. *What are the consequences of the draft regulations on the commitment to and need for maintenance? Pay attention to:*
   a. the expected extent of spontaneous compliance, which is determined by the target group's knowledge of the rules, the cost/benefits of contravention or compliance, the degree of acceptance of the rules by the target group, the tendency of the target group to abide by standards and the extent of informal or social audit;
   b. aspects that involve the scope and possibility of control, including the chance of informal reporting, the chance of an audit and the chance of detection (the chance of a contravention being established by an audit);
   c. aspects that involve the scope and possibility of sanctions, including the chance of sanctions and their severity and nature.
4. *What are the consequences for the burden on the judicial system? Pay attention to:*
   a. the structural or one-off nature of the effects;
   b. the expected number of police reports (criminal law), decisions, objections and appeals against which an appeal will lie (administrative law) and summonses and applications (civil law); possible effects on funded legal aid;
   c. elements of the draft regulations that affect complexity of the proceedings;
   d. the substantiation of the effects.

4. Lawful

Good regulation respects the requirements and limits imposed on legislation and meets democratic concerns.

Regulations must fit in with the existing legal framework and general legal principles. These characteristics may be perceived as limit conditions or minimum requirements laid down from a legal and democratic point of view.

Regulation must satisfy minimal legal and formal requirements

What is of primary importance is that the regulations should have basis in law and take into account the applicable international and European law, as well as the procedural requirements laid down for the enactment of the regulations in question (see Box 5).

General principles of law must also be respected. This involves things like legal certainty, equality before the law, individual administration of justice and the allocation of powers.

Legal certainty also involves robustness and predictability

Legal certainty is aimed at clarity for the public and organisations about their legal position. It involves both the clarity and accessibility of the text of the law (see 6.6) and the robustness and predictability of legal rules. From this there follow a number of practical guidelines on the content of regulation. Thus a regulation must not be changed at the drop of a hat. Legislation must also be published in good time, and the period for which it is not possible to be clear about one's own legal position in advance and hence a decision of an administrative body (e.g. a licence) is needed must be kept as short as possible. Furthermore, the public and organisations must be able to foresee to a reasonable extent what the consequences of their acts will be. This is why regulation may be given retrospective effect only of the factual and legal circumstances justify it. The principle of legal certainty also plays a part in transitional provisions: for example, a transitional provision must be determined within a reasonable period so that the target groups can actually adapt to the new provisions. More generally, any temporary measure may be regarded as a transitional provision, which must always be well thought out. The choice between retrospective, immediate, discretionary and deferred effect must be the result of a balancing of interests.

Regulation may not give rise to any impermissible inequality

The principle of equality means that the target groups of a regulation must not be selected in an arbitrary manner: comparable cases must be treated the same and non-comparable cases differently. Neither may the effect of the regulation give rise to any impermissible inequality or discrimination. A difference in treatment may perfectly well be established where there is objective and reasonable justification for the criterion for differentiation. This justification must be judged in the light of the object and consequence of the regulations.

The principle of individual administration of justice relates to the principle of equality. It means that the undesirable consequences that arise from the practical application of the rule in an individual case can be overcome. One possible technique is provisions that specify to what extent and subject to what conditions it is possible to depart from a general rule and whether such a rule can be added to. However, such provisions may not result in administrations being given the freedom to work as they will. It must then also be possible to examine the criteria that the government uses in such circumstances.

The principle of allocation and delegation of powers means, among other things, that an executive order is restricted to whatever is essential for the regulations envisaged. Anything that is not essential may be delegated to the implementing authority. On the other hand, the delegation may not be too wide either. An executive order must specify the basic principles and conditions within which the implementing authority may act with sufficient precision.

Finally, good regulation does justice to democratic concerns. The kernel of democratic consists formally in respect for the principle of legality – the formal must provide a basis for this or provide for its essence – and substantively in an intrinsic balancing of interests and justification of accountability (see below). More practical matters requiring attention include participation and appeals. In legal proceedings it is desirable from the prescriptive point of view to have opportunities for persons having an interest to participate: it must be possible for anyone with a legal interest to be involved in the decision. Opportunities must also be provided for lodging an appeal against the decisions made with a non-partisan body, in other words a body other than the one that made the original decision.

Good regulation does justice to democratic concerns such as participation and appeals

5. Consistent

Good regulation is consistent.
On its own or alongside other regulations, it exhibits no overlaps or contradictions and forms part of a coherent whole.

The mutual attuning of rules and regulations is necessary for uniformity of regulation. This makes regulations clearer and simpler and often makes it possible to reduce their scope significantly.
The important thing is not just whether a law is internally consistent, but also – and above all – whether it is well attuned to the existing regulations so that duplicated rules, incompatibilities and contradictions are avoided. Hence there must, for example, be consistency between the definitions in an executive order and those in the implementation decree, and between administrative orders themselves.
The introduction of new regulations can also require existing regulations to be amended or repealed. Consequently, the introduction of new regulations must be proceeded by an inventory and evaluation of the existing regulations.
It is also necessary to have consistency with existing regulation or draft regulations on other areas of policy and other levels of authority, since the public, companies and organisations have to comply with the entirety of the legislation applicable to them. In that respect, it is not sufficient for Flemish regulation to be consistent within a particular area of policy. Overlaps, contradictions and unnecessary differences from other Flemish regulations or with federal or local regulations must also be avoided. This demands consultation and reconciliation with the other levels in order to arrive at a coherent whole. More generally, coordination and codification of regulations are more important means of promoting mutual consistency (see Box 4).

The important thing is not just whether a law is internally consistent, but also whether it is well attuned to the existing regulations

Consultancy with other levels of authority is needed for a regulation to form a coherent whole

BOX 4 CONSOLIDATION, COORDINATION AND CODIFICATION

Consolidation, coordination and codification are tools for technical-legal simplification.

Consolidation involves the merging and incorporation of the amendments that have been made to legislation over the course of the years by separate amending provisions, so that there is once again a single authentic text of the law available (e.g. 'coordinated' order on town and country planning).

Coordination comprises merging various separate but substantively similar regulations into a single whole, in which sections and provisions are regrouped, without material substantive changes being made (e.g. coordination of all implementation decrees on the Soil Decontamination Order as one regulation - Vlarebo).

Codification is more radical. It involves merging and restructuring legislation into a logical whole, frequently from a vision of the optimum future structure, and in which substantive changes are almost unavoidable. It is possible to distinguish between two versions of this. The first is bundling regulations into a limited number of codes or codexes (e.g. one Environment Order, one Mobility Order, one Energy Order, etc). The second is the use of 'horizontal orders' that standardise the rules on a particular aspect that have hitherto been separately governed in much or all legislation[6]. This can be done within one area of policy (e.g. one Environmental Maintenance Order that replaces the divergent maintenance provisions in environmental orders and decrees) or across areas of policy (e.g. harmonisation rules on the right of pre-emption or the use of voluntary agreements, a Complaints Order[7], an order on administrative procedures[8], etc).
These tools make it possible to open up the regulations better and to simplify and reduce their scope considerably. More particularly, they address the following deficiencies of regulation: obsolete rules, duplicated inconsistent rules, insufficient standardisation of the terminology in procedural rules and substantive, inadequately structured or accessible (and locatable) regulations, substantive hiatuses in the regulation, etc.

6. Simple, clear and accessible

Good regulation is easy to understand, explicit and readily accessible to everyone to whom it may be of importance.

From a variety of points of view, simplicity, clarity and accessibility are of great importance for target groups, government agencies and judges. This applies to every aspect of the law, including the associated administrative formalities. Clear wording simplifies appreciation of the content of the legislation and is easier to maintain, so that its effectiveness is greater. Differences and discussions about interpretation are also minimised, which avoids uncertainty and saves time, and cuts the cost of information and legal proceedings. Finally, there is also an important social aspect. Comprehensible, accessible regulation is a condition of the public knowing their rights and hence actually being able to make use of them.

Rules must be comprehensible and unambiguous

Thus rules must be comprehensible. That implies simple use of language, with familiar terms instead of unnecessary technical legal jargon (see Box 5). Other points requiring attention include a transparent organisation and structure, avoidance of a profusion of references and abbreviations, careful choice of words, a uniform terminology, and stylistic aspects such as succinctness, clarity and conciseness, replacement of the entire section when amendments are made to part of it, etc. However specific legal terms and rules for the organisation and structure of a law also have a value. That illustrates that the target groups of a law are not always homogeneous and that laws have a variety of functions that cannot always be reconciled with one another. Thus it can be very important to produce more accessible brochures and publications tailored to each individual target group, in addition to the text of the regulation itself.

Rules must also be unambiguous and precise so as to avoid misunderstandings and problems of interpretation. Obscurity can result from vague or ambiguous wording, and from frequent amendments. That latter is particularly true if only the amendments to a regulation are published.

Regulations must be made public properly

Finally, regulations must be accessible. They must be easy for anyone for whom they are of importance to find and become conversant with. A minimum requirement for this is that regulations must be made public properly. This is done by publishing them in the Moniteur Belge, including them in the Flemish codex and by other means. An important role in this is reserved for information and communication technology. However, in many cases that is not enough to actually inform everyone with an interest of the content of the regulation. Additional publicity tailored to the target group is then desirable (e.g. brochures, explanations, etc).

BOX 5 EXISTING GUARANTEES OF THE LEGALISTIC AND LINGUISTIC QUALITY OF REGULATION

In Flanders there are already a number of guarantees of the legal and linguistic quality of regulation.

- Within each department there is a departmental legal section that can provide assistance to the minister's political office when drawing up regulations.
- Circular VR 2000/4 on legislative techniques is the guideline that the Flemish government uses when putting new regulations in place. It includes a detailed description of linguistic and legislative guidelines with which the text of a law must comply. It also includes models and procedural rules that must be followed in orders and decrees from preparation to publication in the Moniteur Belge.
- The Legal Services Unit of the Chancellery Section gives legal advice on all preliminary drafts of executive orders and draft decrees. That advice relates, in particular to formal legal consistency and the application of the rules on content included in circular VR2000/4. In addition the section is available where problems and questions of a legislative nature arise.
- Every text presented for advice on legislative technique is automatically also subjected to a linguistic examination by the Linguistic Advice Unit of the Chancellery Section. This advice relates to the readability and linguistic purity of the drafts. The Section also deals with linguistic issues connected with regulation.
- There are similar legal and linguistic units working for the Flemish Parliament. These provide legal and linguistic advice on proposed executive orders, resolutions and the like, as well as on draft executive orders if defects of language or legislative technique have been established.
- In principle, the Legislation Department of the Council of State gives an opinion on all initial drafts of executive orders and drafts of regulatory decrees. In the opinion, the drafts are tested for a number of formal requirements, legal principles (authority, legal basis, etc) and legislative criteria. These are included in the Council of State's circular Legislative Technique.
- Finally, the secretary to the Flemish government, who is part of the Chancellery Section, stands watch over the procedure by which the regulation comes about. She tests that regulations to be put on the agenda satisfy the formal requirements included in the Flemish government's standing orders, and carries out a check on regulations requiring signature. She also has an automated tool for checking whether the publication process is proceeding correctly and without delays and oversees the completeness of the archives.

7. Well-founded and well discussed

Good regulation is carefully prepared.
It is based on all the useful, scientific and empirical information that is reasonably available. There is wide-ranging official, social and political discussion on its objectives, options, content and effects.

Attention to the quality of regulations must not be limited to one particular evaluation parameter. It must be there at every stage in the process of putting the regulation in place. This implies careful preparation and includes the underpinnings, consultation and justification.

Scientific and empirical information reinforces the rational basis of decisions

Good regulation is based on all the useful scientific and empirical information that is reasonably available on such things as the necessity for, alternatives to and effects of intended legislation. This information reinforces the rational and analytic basis of decisions. This underpinning aims, in particular, at having a true insight into the factual circumstances to which the regulation will apply and into the consequences that it will have. This makes it possible to estimate its effectiveness and appropriateness and to ensure that draft legislation does not have any undesirable side effects (see Box 6). One important for attention is that information should be collected in a balanced way. Ideally, all points of view and effects relevant to the subject should be mapped out, including effects on business, the population at large, the government, the environment, etc. This is best done systematically, which can avoid some interests being given insufficient prominence compared with others or the available information not being comparable because different basic data, hypotheses and reference periods have been used. The desirability of such underpinnings does sometimes come up against a lack of resources, time or expertise. Hence attention must also be paid to sound collection and opening up of data, the performance of scientific research and organising training course in order to be able to interpret and process scientific information.

Good regulation is not only underpinned but also discussed with those having an interest

Such underpinning is necessary but insufficient since the choices to be made in regulation are not purely scientific or technical but to a large extent social. Consequently, the acquisition of data does not aim to replace political decision making, but to make possible a better informed, better structured and better balanced social debate. Hence good regulation is not merely underpinned but also discussed.

For the time being, consulting those with an interest contributes to transparency in putting regulations in place and the openness of the democratic decision-making process. It ensures that everyone with a relevant interest in the decision has a say. Furthermore, it promotes the establishment of a social consensus thereby generating a basis of support for implementation and improving compliance. Consultation is also essential for the quality of the regulations themselves. It makes it possible to exploit whatever knowledge and information those involved may have, since target groups can be an important source of information for alternatives. They can also help to estimate effectiveness, appropriateness and implementability and to keep an eye on aspects such as simplicity, accessibility and consistency between different regulations. Finally, consultation can lead to a better understanding and partnership between government and target groups, which gives different forms of self-regulation by the target groups a greater chance and gives rise to a forum in which other problems can be raised.

Consultation can be done in a variety of ways, ranging from once in the process to more or less continuous in every phase of decision making, and for informal consultation to targeted enquiries among target groups, low threshold opportunities to make suggestions, public enquiries, focus groups, test panels, hearings, reference to consultative and advisory committees (who often also use one of the above forms in preparing their advice), etc. The best option will depend both on the characteristics of the subject and the target group, as well as on the circumstances (experience, time available, legal rules, etc) and on the stage in the design process of the regulation. Usually, a combination is advisable.
What is more important than form is that the consultation be done properly. An essential condition is that the discussion be taken seriously and consequently that consultation takes place at an early stage in designing the regulations, simple participation procedures be used, and that sufficient time be allowed. Furthermore, consultation must be balanced, so that less well organised target groups and interests also have their say. This assumes a transparent consultation process and good dissemination – during or prior to the consultation - of accessible and relevant information in which complex and technical matters are made plain.

What is more important than form is that the consultation be done properly

Furthermore, the effectiveness of consultations benefits from targeted questions and good planning and coordination. This can avoid irrelevant observations, duplicated procedures, bottlenecks, overloads and 'consultation fatigue' among target groups. Finally, in order to keep target groups motivated, it is necessary to ensure that the comments received are actually considered.

This may best be done by, in one way or another, producing a reasoned report on the comments received and reasons why they have or have not been taken into account. This can be done on an individual basis or globalised by target group or by category of observation, via the memorandum of explanation, the note to the Flemish government, separate reports, agreements with the target group, etc. Quite apart from consultation, good justification is a characteristic of good regulation. It means that there is an argument for the outcome of the decision making and that it is made public.

Good justification is a characteristic of good regulation

BOX 6 RIA AS A TOOL IN UNDERPINNING, CONSULTATION AND JUSTIFICATION

Regulatory impact analysis (RIA) plays an important role in underpinning regulation and in the associated consultation on and justification processes.

The role of RIA in providing the underpinnings is evident since the technique is intended to provide systematic collection and structuring of information about the alternatives available and their advantages, disadvantages and effects, so that understanding of the problem and its possible solutions increases, making better founded decisions possible.

However, RIA also has an important role in consultative processes. Not only does it offer a framework and structure for having regular consultation of those involved when drawing up an effects report. Effects reports also increase the effectiveness of all kinds of existing participation procedures because the implications of intended regulation become much clearer. RIA maps out the effects of alternative solutions. Hence the impact of the regulation becomes more explicit so that public interest increases and improves the quality of consultation. Seen in that light, in practice RIA's biggest contribution to the quality of regulation probably comes, not from the exact calculations and figures in the analyses, but from the heightened understanding and social involvement obtained during the design process.

RIA also offers added value in justifying regulation, since a good RIA is public – whether or not it is part of a memorandum of explanation - and in fact runs the gamut of the characteristics of the content and process of good regulation:

- Description: statement of the aim and content of the draft regulations;
- Alternatives: state why the chosen option is better than possible alternatives (does the problem justify government intervention, if so, is regulation the most efficient and effective manner of government intervention?, why is the chosen form of regulation the most desirable?);

- Cost and benefits: identification and quantification of the cost and benefits of the regulations, with qualitative analysis if (complete) quantification is not possible; (do the intended regulations lead to a reasonable relationship between benefits and cost?);
- Distribution of cost and benefits: mapping out the cost and benefits for different economic and demographic groups (How are the benefits distributed? Who bears the cost?);
- Other effects: pinning the effects down to particular areas requiring attention (e.g. international competitive position, effects on SMEs, consequences for the burden on administration, environmental effects, coordination with existing regulations, etc);
- Implementation and maintenance: description of the measures taken and to be taken in order to guarantee proper implementation and maintenance (how will the implementation be done and compliance with the regulations monitored and maintained?);
- Consultation: summary of the consultations that have taken place internally and externally with the intent of analysing the problem, development of the regulation and analysing cost and benefits (in what way are the target groups consulted and what is their opinion about the intended regulation and its effects?).

8. Relevant and up-to-date

Good regulation ensures that its intended goals continue to be achieved effectively and appropriately.

Regulations are enacted at a particular moment but it is generally intended to exercise an influence over a longer period. However, after some time, the factual or policy conditions may have changed in such a way that the regulations loose their social significance. It may also be that their application is having increasingly harmful effects, as a result of which social support for them is also dwindling. Hence regulations must be revisited regularly so that the need for them and their effectiveness, appropriateness and consistency continue to be guaranteed. With existing regulation that previously subject to no or few quality requirements for regulation, an evaluation may be useful.

Regulation must be re-examined regularly

This is best done in a planned and systematic way, for example, using annual action plans and progress reports so that priorities can be set. What is more, that way each evaluation does not merely stand on its own so that unexpected connections and cumulative effects can be exposed more readily.

But considerations of later evaluation can also be built into the regulation itself. This can promote carrying over the results of evaluations since they then always have a place reserved for them on the political agenda. They can be included in the regulation in a number of different forms, which have to be considered on a case-by-case basis: an automatic revision clause or "horizon" section ("sun setting") which establishes an expiry date for laws or some of their provisions (an evaluation must then determine whether the regulation should be extended), a 'statute evaluation clause' (which requires an evaluation of the regulation within a particular time or at a particular frequency), a 'report clause' (which requires periodic reporting on particular aspects of the regulation), or a power of evaluation awarded to a particular body (e.g. evaluation commission, advisory board, etc).

Considerations of later evaluation can also be built into the regulation itself

Another type of provision that can be built into the regulations is attention to feeding back information about the practical implementation of the law. This applies to both the content of the regulation itself and to the associated administrative forms and processes since indicators and ideas for improving regulations or lightening the administrative burden are there for the having in various points in society – among the public and companies (frequently collected by organisations in civil society), among officials responsible for implementing the rules or checking compliance, among advisory and consultative bodies, from the Council of State and the courts and the Flemish Ombudsman Service, and among parliamentarians, academics, etc. In Flanders the incorporation of feedback mechanisms that receive and give effect to these signals is regulated at general level by the Complaints Order (see Box 7).

It is necessary to latch on to indicators for the improvement of regulation

If later evaluation of regulations is to be done properly, decent documentation of the objectives, rationale and underpinnings of the rules is needed. This demands an adequately detailed memorandum of explanation or note to the Flemish Government and proper archiving thereof.

BOX 7 THE FLEMISH COMPLAINTS ORDER: ALSO A TOOL FOR REGULATORY MANAGEMENT

The Flemish Complaints Order[9] requires all departments and institutions of the Flemish administration, including ministerial political offices, to set up an arrangement for complaints. The premise is that every member of staff must be able to act as a contact for members of the public in formulating their complaints. The necessary procedures and arrangements must be established for that member of staff to be able to pass that complaint on quickly to a specific person responsible for dealing with or coordinating complaints. The latter person must take action to deal with complaints quickly and properly (in particular sending out confirmations of receipt, including the complaint in a register of complaints, investigating it and giving notice of the findings).

A complaint is "a manifest utterance (whether oral, written or electronic) by which a dissatisfied member of the public complains to the government about an action or service performed (or not performed) by the government. The objects of complaints may include (...) the practical application of an existing regulation; the complaints procedure does not apply to (...) general complaints about regulation and policy." In this the following observations are important:

- In a number of cases it will not be possible to establish a clear borderline between complaints about the practical application of an existing regulation and complaints about regulation in general. In this event, the term "complain" must, according to the order, be interpreted widely and every possible step must be taken to respond to the member of the public's request in a proper manner.
- A complaint is a source of information, an indicator to be used positively. Taking the basic philosophy of the order, all grievances, suggestions and comments by a member of the public must be included in the register of complaints, even if it appears immediately or subsequently that they fall outside the scope of the Complaints Order. Hence, inadmissible general complaints about regulation must also be registered. However, they do not have to be dealt with within the framework of the Complaints Order.
- The data in the complaints register, which accordingly includes general complaints about regulation, form part of the mandatory report on the pattern of complaints with which every Flemish authority must provide the Flemish Ombudsman Service or the minister holding functional authority every year. This report must also be included in that administrative institution's annual report. The Flemish Ombudsman Service publishes these reports alongside its own annual report.

In other words the Complaints Order and complaints registers are valuable feedback mechanisms for the regulatory policy of the Flemish administration, since the complaints and observations about regulation thereby collected constitute an extremely useful input for checking the progress of regulatory policy and for the areas of policy and the Regulatory Management Unit in drawing up the annual regulatory management action plans.

STATUS AND USE

This guide explains the characteristics of good regulation. These may be used as a yardstick for assessing and improving the quality of legislation.

However, publication and use of these characteristics are in themselves far from sufficient to improve the quality of regulation.

To start off with, the characteristics of good regulation may come into conflict with one another. For instance, the consequences of democratic requirements such as participation may stand in the way of setting the shortest possible deadlines for procedures – a part of legal certainty - and vice versa; the availability of alternatives (appropriateness) may be limited by European rules (lawfulness), etc. Hence a balance must be struck case by case.

Furthermore and most importantly, they must form part of a wider system of regulatory management. Hence the adoption and dissemination of the characteristics of good regulation must be followed by the measures needed for those characteristics to find acceptance in practice, be further refined in practical situations, be weighed against one another and be allowed to put down roots in decision making.

The characteristics of good regulation must form part of a wider system of regulatory management

The task of the Regulatory Management Unit is to develop proposals for the structures, processes, tools and manuals needed for this purpose. As an intermediate stage, a specific brochure is being produced for each area of policy, in which the content and significance of the characteristics of good regulation are made explicit by means of examples from the area of policy in question.

A specific brochure is being produced for each area of policy

It should also be noted that what is seen as quality of legislation – or lack thereof – is determined by social, political and administrative opinions at any given moment. The characteristics of good regulation are a product of their time. It is then also important to stress that the quality of the legislation in all its aspects of and the interpretation given it must not be seen as a static and immutable fact.

The characteristics of good regulation are a product of their time and must be reviewed regularly.

The Unit intends, on the basis of experience in the use of this guide and altered social perceptions, to re-examine the characteristics of good regulation periodically. Hence all your comments and suggestions are welcome.

If you have any questions about this guide, or reactions to it, please contact the Regulatory Management Unit at the following address: Regulatory Management Unit, Flemish Governement Boudewijnlaan 30-Bus 34 1000 Brussels, wetsmatiging@.vlaanderen.be or 02-553.17.11

NOTES

1 Cf. the European and GATT rules on direct and indirect state subsidies, the Maastricht norms, the 'Europeanization' of instruments of monetary policy, etc

2 Circular VR 2000/4 of 8 September 2000. Available onwww.vlaanderen.be/wetsmatiging.

3 Legislative techniques, version 3 of 1 March 1999. Available onwww.vlaanderen.be/wetsmatiging.

4 Besides the different cost categories, the avoidance of unnecessary expense for the government itself deserves mention. This will be dealt with further in the discussion of the implementability and maintainability of legislation.

5 Here we may note that the one-off cost of an RIA should compared with its benefits in the form of better regulation, which will make itself felt over the lifetime of the rules.

6 The difference between the two versions can be linked with the distinction that lawyers make between substantive and formal law. The first version involves streamlining the substantive law or the substantive rules of behaviour for the public, organisations and administrative bodies. The second version involves the formal law - the procedure to be followed, the powers of the institutions in question, the resolution of disputes, the penalties, etc – that are simultaneously harmonised for a variety of substantive rules.

7 The Flemish Complaints Order of 1 June 2001, applicable since 1 January 2002, also provides an interesting illustration of the possibilities of codification, as well as of the way in which the opportunities that such codification offers are insufficiently exploited. The initial premise of the order was that the public do not benefit from many different complains procedures, but do from a single, clear general procedure. The Complaints Order caters for this by laying down that existing sector complaints regulations are relevant only where they contain provisions stricter than those of the Complaints Order. However, in practice, it is not always easy to determine when a regulation is "stricter", i.e. when it offers more protection to the member of the public/complainant. Furthermore, some other complaints regulations are structured completely differently. As a result, the interpretation and application of regulations is not clearer and simpler, but more complex. Another observation is that new complaints procedures continued to be produced. One example is the recent order on government communication. Often these regulations appear to differ little or not at all in conceptual terms from the Complaints Order. They are merely arranged somewhat differently at a technical level. A reference to the Complaints Order would mostly have been sufficient.

8 This means an order in which everything relating to procedures in a wide sense is grouped together. This does not mean to say that only a single general procedure (for example, for public enquiries, licenses, collection proceedings, tax proceedings, the possibility of appeals, etc) is kept, but that use is made of special procedures only where really necessary.

9 The Complaints Order itself is quite short and sets out the broad outlines and basic conditions. Making it usable in practice required that it be made more explicit. This has been done by the circular VR2002/20 of the Flemish Government of 1 February 2002 ("Guidance on the organisation of complaint management in implementation of the order of 1 June 2001 concerning the attribution of a right of complaint in relation to administrative institutions"). This circular was not published in the Moniteur Belge.

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