

The 'one in, one out' principle

A real better lawmaking tool?



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Abstract

The study submits that 'One in, one out' is a tool for less, not better, regulation and legislation, and, as such, it is not a suitable instrument for better law-making.

To achieve effectiveness of legislation, the EU must reform its law-making policy holistically by placing the citizen at the core of its legislative communication. The EP must lead on and defend the citizens' right to better legislation. To put this reform to effect, the JURI Committee must place itself at the centre of deliberations, via a Working Group dedicated to Better Regulation, to assure a constant reflection on better regulation with the support of a network of European academic experts.

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee.

This document was requested by the European Parliament's Committee on Legal Affairs.

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Original: EN

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Manuscript completed in October 2023

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This document is available on the internet at:

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LIST OF ABBREVIATIONS

BR	Better Regulation
EP	European Parliament
EU	European Union
OIOO	One in One Out
OITO	One in Two Out

EXECUTIVE SUMMARY

Background

Since the introduction of the Commission's undertaking to fully implement the OIOO initiative in 2019¹, the commitment of the European Commission to its implementation has been confirmed repeatedly, amongst others in the written answer of Vice-President Šefčovič to a relevant question at the EP in 2020.² OIOO is a version of offsetting that ensures that any new regulation introducing new burdens withdraws equivalent burdens to citizens and enterprises from EU legislation in the same policy area.

The Commission alleges that the "successful and aggressive implementation of such policies has contributed positively to economic growth and job creation by stemming the flow of regulation, red tape and bureaucratic burden, while increasing the chances that non-regulatory methods of achieving policy goals are considered".³

But economic growth and job creation are no indicators of better law-making. They could possibly be introduced in the future as indicators for better regulation, should the prevalent strategic policy aim of the EU become financial in nature. Thankfully, this is not the case with the EU now and hopefully not even in the future. In its response to the Van der Leyen commitment to the implementation of OIOO in 2019, the Council challenged the Commission to ensure that the implementation of OIOO should not be detrimental to the ecological and social objectives of the EU. Thus, within the EU's current regulatory environment with its multitude of supplementing and equally valued policy goals (including the promotion of peace and democracy, the implementation of human rights, social protection, ecological preservation, and of course financial stability, competitiveness, and growth), the OIOO approach can only boast to be a tool for the promotion of one set of the EU's policy goals that tackle the reduction of administrative burdens and red tape.

This is undertaken via the maintenance, or reduction, of regulatory burdens for citizens and enterprises. One route for this maintenance or reduction is the balancing of the relevant legislative provisions. And one sub-type of that route is the balancing or reduction of whole legislative texts (not sporadic provisions with legislative instruments) that introduce burdens to citizens and enterprises. OIOO, as implemented by the Commission, is a strategy that withdraws whole legislative instruments in order to balance burdens, whatever is unilaterally classified as such by the Commission.

Conclusion 1: The OIOO cannot serve as a tool for better regulation in its current form. To be effective, OIOO cannot be limited to an assessment of unnecessary burdens. It must also include the assessment of its possible effects on the current regulatory goals of the EU. This requires the compilation of a list of regulatory goals against which offsetting must be evaluated.

¹ President of the European Commission, Communication from the President to the Commission on the Working Methods of the European Commission, European Commission, Brussels, 2019.

² Question for written answer E-006042/2020 to the Commission, Rule 138, Charlie Weimers (ECR), Eugen Jurzyca (ECR), Derk Jan Eppink (ECR), Bert-Jan Ruissen (ECR), Jorge Buxadé Villalba (ECR), Gunnar Beck (ID), https://www.europarl.europa.eu/doceo/document/E-9-2020-006042_EN.html.

³ See Question for written answer E-006042/2020 to the Commission, Rule 138, Charlie Weimers (ECR), Eugen Jurzyca (ECR), Derk Jan Eppink (ECR), Bert-Jan Ruissen (ECR), Jorge Buxadé Villalba (ECR), Gunnar Beck (ID), https://www.europarl.europa.eu/doceo/document/E-9-2020-006042_EN.html. But contra, R Hahn and A Renda, "Understanding regulatory innovation: the political economy of removing old regulations before adding new ones" (2017) *Comparative Political Economy: Regulation*, <https://www.semanticscholar.org/paper/Understanding-Regulatory-Innovation%3A-The-Political-Hahn-Renda/2912383d672ea1318ee3e09769c2be0038ef41bb>; and also contra UK National Audit Office, "The Business Impact Target: cutting the cost of regulation", 2016, <https://www.nao.org.uk/report/the-business-impact-target-cutting-the-cost-of-regulation/>.

Conclusion 2: OIOO is not a tool for better legislation. It does not tackle legislative quality.

Conclusion 3: OIOO can be a tool for less legislation. Less in the number of legislative instruments in the EU statute book. Not less in the number of actual provisions within the less instruments. Not less in the content of these provisions, whose qualitative assessment is not undertaken via OIOO.

Conclusion 4: For real Better law-making **the Commission must undertake a holistic reform of its legislative strategy**, via the application of the Better Regulation principles on to its own law-making approach. To put this reform to effect, **the JURI Committee must place itself at the centre of deliberations and lead consistently and systematically, via a Working Group dedicated to Better Regulation**, to assure a constant reflection on better regulation with the support of a network of European academic experts. Better regulation is not just an institutional task for the Commission, it is an expression of the rights of EU citizens to accessible legislation and participatory regulation, which (rights) must, and can only, be defended by the European Parliament.

Conclusion 5: This reform can be implemented without grandiloquent legislative or structural changes in the law-making process of the EU. It can be achieved via, amongst other tools, a simple technocratic **modernisation of the legislative drafting style of EU legislation**, reflecting of course a modernisation of legislative philosophy. Using legislation as a modern method of direct communication with its citizens can allow EU legislation to finally become current, fit for purpose, and effective.

Conclusion 6: Better legislation is a right for EU citizens, one that must be promoted and protected by the EP. But, through its forging of a relationship of loyalty and trust between citizens and regulators/law-makers, better EU legislation can also become a real tool for the resilience and sustainability of the EU, both as an ideal and as an organisation.

1. THE OIOO AS A TOOL FOR BETTER REGULATION

KEY FINDINGS

The OIOO can be a tool for better regulation. But not in its current form of solely and exclusively financial measurements. To perform its task fully, OIOO requires a list of regulatory goals both in abstracto (overarching all EU regulation) and in concreto (with reference to the specific regulatory initiative) against which regulatory performance can be measured and assessed.

In 2019, the then newly elected President of the European Commission von der Leyen announced, amongst other reforms, the introduction of the OIOO principle⁴, as a means of reducing red tape⁵. In the 29 April 2021 Communication on “Joining Forces to Make Better Laws” the Commission undertook to “strengthen the burden reduction effort further through a ‘one in, one out’ approach whereby, when introducing new burdens, we systematically and proactively seek to reduce burdens imposed by existing legislation”.⁶ In its 2022 Work Program on 19 October 2021 in Strasbourg, the European Commission committed to implementing a new working method based on the OIOO principle, “whereby when introducing new burdens, [it] systematically and proactively seek to reduce burdens imposed by existing legislation”. The Commission intended to “strengthen the attention of policymakers for the implications and costs of applying legislation, especially for small and medium-sized enterprises (SMEs)”.

The OIOO approach entails the offset of costs of every new legislative initiative generating administrative burdens by the repeal or amendment of one or more existing legislative provisions, normally from the same policy area, with at least equal unnecessary costs.

The OIOO approach has been studied by the EP, through its JURI Committee the main Committee competent for Better Regulation. Taking into account the three expert reports prepared by Sion Jones, Prof. Dr Andrea Renda, and Prof. Dr Giovanni Sartor, the EP issued its resolution of 7 July 2022 on Better regulation: Joining forces to make better laws (2021/2166(INI)), which tackled better regulation and, in point 83, the OIOO approach. The EP narrows down the possible impact of the approach as the offsetting of newly introduced burdens by relieving citizens and businesses of equivalent burdens at EU level in the same policy area, calls for a holistic approach to regulatory goals beyond the narrow OIOO goal, calls for stakeholder and interinstitutional involvement to its design and implementation, and emphasises that it should not “lead to mechanical or mathematical decisions to repeal legislation, lower its standard or result in a chilling effect on legislation, and that its aim should be to modernise and reform EU legislation to face new challenges, including by replacing, merging and improving legislation”, and stresses “that, while additional unnecessary administrative burdens should be avoided when designing, transposing and implementing EU legislation, this approach should not be translated

⁴ In 2019, ten member states representing 86% of the EU28 GDP and 86% of the EU28 population had already implemented or announced OIOO in their own regulatory approaches: A. Renda, “Feasibility study: introducing ‘One-in-one-out’ in the European Commission”, Final Report for the German Ministry for Economic Affairs and Energy, Presented by the Centre for European Policy Studies, 5 December 2019, 6.

⁵ Ursula von der Leyen, Inaugural speech, 10 September 2019, https://europa.eu/rapid/press-release_IP19-5542_en.htm.

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Better regulation: Joining forces to make better laws, COM/2021/219 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0219>.

into deregulation or 'no-regulation', nor should it prevent Member States from maintaining or taking more ambitious measures and adopting higher social, environmental and consumer protection standards in cases where only minimum standards are defined by Union law".⁷

The OIOO approach is presented and promoted as a tool for better regulation. Apart from reducing administrative costs, it draws awareness on the existence and calculation of costs amongst the regulators, invites stocktaking of legislation⁸, and increases the transparency of these costs resulting from legislation.⁹ But for the EU it cannot do so in its current, only partial, and finance focused, form. This is evident by the still positive OIOO balance even if compliance costs by EU Regulations are included.¹⁰ At the moment, better regulation is presented as a tool that requires the measurement of unnecessary costs (including administrative burdens) to EU enterprises and, to a lesser degree, the lives of EU citizens. It requires the balancing of existing burdens against any new burdens introduced. And the idea is that the financial burden of EU regulation both for citizens but mostly for enterprises, does not go beyond what is already in existence at the EU level. This makes sense from a financial perspective only. But the aim of regulation is not, and thankfully cannot be, just financial. Especially for an organization like the EU where emphasis is placed on non-financial values such as world peace, democracy, the rule of law, social protection, well-being, environmental agendas, digital agendas, and more. When assessing whether a regulatory initiative is good or bad, reference must be made against all of the regulatory goals of the regulator, and in the EU this is not limited, and thankfully cannot be restricted, to just financial burdens.

Better regulation cannot for example be a lighter form of administrative burdens when the content of the regulation restricts the freedom of EU citizens. For example, hypothetical regulation abolishing costs of travel within the EU and rendering intra-EU flights free for EU citizens could not be considered good, if it also introduced a prohibition of intra-EU travel for EU citizens. Simplistic and outlandish as this example might be, it does illustrate the risk of assessing a regulatory measure by exclusive use of financial criteria, without additional assessments that also take into account the content and the qualitative assessment of the relevant regulatory effects. This is all the more evident and all the more risky for an organization like the EU, which started as a political organization, moved on to become a promoter of a social agenda, and has now moved into finance focused organization. COVID and the war in Ukraine have notably reminded the EU and its peoples that financial competitiveness and economic growth on their own cannot be the sole areas of regulatory focus.

It would therefore be desirable for the OIOO approach to assess regulatory quality holistically, including of course unnecessary burdens, but not excluding everything else.

And so, the choice here is to either delimit the scope and aspiration of OIOO to simply a tool for better financial regulation, or to amend OIOO by making its scope broader and allowing it to function as a real better regulation tool.

If the aim of OIOO switches to its true capacity as a tool of regulatory financial soundness, then its capacity to serve that purpose can be agreed. If the financial picture of what is being introduced and

⁷ Better regulation: Joining forces to make better laws, European Parliament resolution of 7 July 2022 on Better regulation: Joining forces to make better laws (2021/2166(INI)), P9_TA(2022)0301.

⁸ A. Renda, "Feasibility study: introducing 'One-in-one-out' in the European Commission", Final Report for the German Ministry for Economic Affairs and Energy, Presented by the Centre for European Policy Studies, 5 December 2019, 127.

⁹ One-in, one-out principle, <https://tem.fi/en/one-in-one-out-principle>.

¹⁰ National Regulatory Council of Germany, "The Crisis as a Wake-up Call: Modernise Public Services, Build on the Momentum for Digital Change, Make Legislation Easy to Enforce", Annual Report 2020, 81.

what is being withdrawn were accurate, if the calculations used were truly evidence based¹¹, taking benefits into account¹², and challengeable for verification by stakeholders and the institutions, and of course if the OIOO were not left at the point of introduction of the new regulatory initiative but were monitored regularly and evaluated after a period of time.

This is not yet the case. The OIOO approach is presented as a tool for better regulation in general or without a delimitation on its scope as a tool of financial assessment only, the financial data used in OIOO, especially within the EU, tend to be vague in reflection of the Commission's persistent prior refusal to introduce further concreteness in the financial evaluation of administrative burdens.

As a legal scholar, I doubt that accuracy of financial data can be achieved without a holistic and qualitative appreciation of possible future burdens: after all EU law is still not transparent in its costs.¹³ To illustrate my statement, it would be inaccurate to say that the withdrawal of the requirement to purchase and maintain refrigeration for fruit producers is financially "less" of a burden. Although it sounds this way prima facie, if the withdrawal of the regulatory requirement to have refrigeration led to fruits being kept outside, thus diminishing their shelf life, and forcing producers to sell quickly at much lower prices. This is a simplistic example to show that the reduction of a financial burden cannot be fully appreciated unless the qualitative content of the relevant regulation is also taken into account.

This becomes even trickier if OIOO measures the data just at the point of the introduction of the new regulatory initiative without verification of possibly unforeseen complications at the later stage of implementation.

So it would be fair to state that OIOO can be an effective tool for better regulation. If that specific regulation is of exclusively financial nature, if the criteria used for its assessment are not just quantitative but also qualitative, and if they are introduced, measured and assessed not just at the point of introduction of the new regulation but also at the point of implementation, regularly taking into account any change in the surrounding circumstances.

If OIOO continues to be promoted and viewed as a better regulation tool, then it cannot possibly function without a clear understanding of what good regulation is. Good regulation is assessed on the basis of its success to promote specific regulatory goals. These can be overarching, namely regulatory goals that apply irrespective of what type of regulatory initiative comes into play: for example, world peace, human rights, social protection for EU citizens, resilience and sustainability, the Green Deal goals, the Digital Decade goals, and of course including economic growth and competitiveness.¹⁴ The problem with the EU as an organisation, which admittedly is not unlike most regulators, is that there is no concrete and exhaustive list of regulatory goals, even at an overarching level. It would therefore make sense for the regulators to identify and agree with the institutions on a list of EU regulatory goals

¹¹ G. Sartor, The way forward for better regulation in the EU - better focus, synergies, data and technology, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, PE 736.129, August 2022.

¹² S. Jones, G. Dohler, and L. Pate, "Better regulation in the EU: Improving quality and reducing delays", EP Policy Department for Citizens' Rights and Constitutional Affairs, PE 734.712, June 2022, 4.

¹³ National Regulatory Council of Germany, "The Crisis as a Wake-up Call: Modernise Public Services, Build on the Momentum for Digital Change, Make Legislation Easy to Enforce", Annual Report 2020, 81; also, National Regulatory Council of Germany, "Future-Proof State – Less Bureaucracy, Practical Legislation and Efficient Public Services, Annual Report 2021, 83 ss.

¹⁴ Better regulation: Joining forces to make better laws, European Parliament resolution of 7 July 2022 on Better regulation: Joining forces to make better laws (2021/2166(INI)), P9_TA(2022)0301; also, F. Simonelli and N. Iacob, "Can We Better the European Union Better Regulation Agenda? (2021) European Journal of Risk Regulation, 849, 860; also WWW Briefing, "Better Regulation", January 2022.

as a means of identifying what EU regulatory efforts should be contributing to and, of course, assessing new regulatory initiatives against evidence-based quantitative and qualitative criteria.

Of course, overarching regulatory goals tend to change, or at least their prioritisation does, based on the environment within which regulation must function. Regulatory goals at the EU level should therefore be monitored and reviewed regularly¹⁵ to verify that the list against which they are assessed continues to be current in its content and in its sequence of prioritisation.

On top of overarching regulatory goals, each regulatory effort carries its own concrete regulatory aims. It is important that these are identified, and indeed in a concrete way. It is not enough to identify which policy this regulatory effort is contributing to. It is not enough to generically refer to, for example, the contribution to an area of freedom, security and justice when introducing money laundering measures. Concreteness of goals led to concreteness of criteria against which regulatory measures can be expertly assessed for efficacy. It is only concrete criteria that can provide concrete answers as to the post facto evaluation of the measure as to whether it has achieved its goals, whether it has achieved them partially or not at all, and what needs to be amended for the achievement of full regulatory success.

This is not a regulatory philosophy that is new to the EU regulation policy. The EU has repeatedly expressed the need both for evidence-based regulation through for example quantitative evaluation/monitoring/review clauses, and for strategic foresight through the identification of long-term trends that must be taken into account and must be served in regulatory efforts. It is unfortunate that these tools and this approach applies currently to EU legislation, whereas they are perhaps even more relevant when it comes to EU regulation. If a list of regulatory, aims both overarching and also measure-related, came into existence, then the EU will have created the environment within which OIOO can flourish and achieve its current broad task. But without such a list and without such a holistic appreciation of the effects of regulatory initiatives, not just quantitatively but also qualitatively, OIOO is sentenced to reduce its effect on financial regulatory goals only.

The recent introduction of foresight in the better regulation agenda is a welcome political compromise¹⁶, and can serve as a tool for the identification of longer-term resilient policy goals against which OIOO can be assessed in practice.¹⁷

To sum up the assessment of OIOO as a tool for better regulation. In its current exclusively financial and quantitative/mathematical focus, OIOO is not fit for the purpose of assessing good regulation or improving better regulation.¹⁸ This is because the correlation between its current scope and its current

¹⁵ Better regulation: Joining forces to make better laws, European Parliament resolution of 7 July 2022 on Better regulation: Joining forces to make better laws (2021/2166(INI)), P9_TA(2022)0301, 56. For an analysis of OIOO in the UK and a call for retrospective tallies, K Ollerenshaw, "Burden Reduction: An Evaluation of Statutory Instruments in the UK Government's Regulatory Off-setting and Business Impact Target Initiatives 2010–2019", *Parliamentary Affairs* (2023), 1–23 <https://doi.org/10.1093/pa/gsad013>, 19.¹⁶ Claudio Radaelli, "The state of play with the Better Regulation Strategy of the European Commission", EUI, STG Policy Papers, April 2021, Issue 2021/06, p.3.

¹⁶ Claudio Radaelli, "The state of play with the Better Regulation Strategy of the European Commission", EUI, STG Policy Papers, April 2021, Issue 2021/06, p.3.

¹⁷ A Renda and F Simonelli, "Study supporting the interim evaluation of the innovation principles" (2019), https://www.ceps.eu/wp-content/uploads/2019/11/KI0219819ENN.en_.pdf; also Communication from the Commission to the European Parliament and the Council, 2020 Strategic Foresight Report, Strategic Foresight – Charting the Course Towards a More Resilient Europe, COM(2020)493 final, [https://ec.europa.eu/transparency/documents-register/detail?ref=COM\(2020\)493&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2020)493&lang=en).

¹⁸ The point of departure should be the general interest, in order to protect our societies, safeguard democracy and ensure a solidarity-based system that works: É. Van den Abeele, "One-in, one-out' in the European Union legal system: a deceptive reform?", Working Paper 2020.4, European Trade Union Institute, 42.

aspirations is misaligned.¹⁹ In order to improve the efficacy of OIOO as a tool for better regulation, the EU has a choice between two actions. One option for the EU is to resign to the fact that OIOO in its current form can only be used as a tool for the reduction of unnecessary burdens, thus potentially contributing to the competitiveness of EU enterprises, and consequently adding to possible competitiveness and economic growth. Even with this limited focus, OIOO requires the addition of qualitative assessment and concrete evidence based quantitative assessment in its calculation of new and existing burdens to enterprises, thus presenting the full picture of what unnecessary costs can be attributed to the existing and the new regulation. The second option for the EU is to maintain its aspiration of OIOO as a tool for better regulation in general, but provide a list of regulatory goals against which new regulation initiatives must be assessed. The list must include both overarching goals for the organisation and its peoples and also concrete regulatory goals for the regulatory measure at hand. This is not a procedure that can be unilaterally agreed by the main regulators, the European Commission. It must be an inter-institutional effort, where especially the EP plays a prominent role. This is so because the safeguarding of the values of the EU and its member states and peoples is a task assigned mainly to the EP. It is also important that the list agreed with the consensus of all three main institutions is regularly reviewed and updated in order to ensure that any new regulation is assessed against the current and full list of regulatory goals that the EU aims to achieve.

So far, the findings of this study have been that OIOO is not fit for purpose, at least not the purpose that it is assigned to at the moment. It is worth assessing if it fares better as a tool for less legislation.

¹⁹ Prof. Renda uses the term “mismatch” between the financial focus of Better Regulation against the holistic goals of economic growth, social protection, and ecological preservation in his study requested by the JURI Committee of the EP entitled “The Assessment of current initiatives of the European Commission on better regulation”, Policy Department for Citizens’ Rights and Constitutional Affairs Directorate-General for Internal Policies, PE 734.766, June 2022, p.6.

2. OIOO AS A TOOL FOR LESS LEGISLATION

KEY FINDINGS

If used to offset sporadic articles within EU Acts, OIOO can only shorten existing texts, and replace known and used provisions by the same number of new, not yet applied, and therefore inherently burdensome, ones.

If used to offset whole EU legislative instruments, OIOO can maintain the current legislative volume or even reduce it. Provided that the new texts are shorter and "less" themselves.

Despite the obvious difference between regulation and legislation,²⁰ the later being a tool for the former, the narrative on OIOO uses the terms interchangeably. This sidelines the Commission's own efforts to distinguish between the two, to highlight the possible efficacy of non-legislative regulation, and to promote alternative (non legislative) means of regulation. It is obvious from the analysis so far that OIOO is fertile for application not just on legislation but also on all types of regulation. And, actually, application on regulation might be even more amenable to successful results, as regulation is wider and lends itself to policy-based, rather than text-based, approaches.

It is worth stating here that regulation is also different to law-making. The Commission defines Better Regulation as "..... designing EU policies and laws so that they achieve their objectives at minimum cost. 'Better Regulation' is not about regulating or deregulating. It is a way of working to ensure that political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed by the comprehensive involvement of stakeholders. This is necessary to ensure that the Union's interventions respect the overarching principles of subsidiarity and proportionality i.e. acting only where necessary at EU level and in a way that does not go beyond what is needed to resolve the problem. 'Better Regulation' also provides the means to mainstream sustainable development into the Union's policies."²¹ Better Regulation is both an aim and a process setting out how regulations are prepared, assessed and revised.²² The concept therefore is much wider than law-making, which is the process of regulating via legislator.

²⁰ H Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (2014, Hart Publishers, Oxford); H. Xanthaki, "Quality of legislation: an achievable universal concept or a utopian pursuit?" in M. Travares Almeida (ed.), *Quality of Legislation* (Baden-Baden. Nomos, 2011), 75, 76-78; S T Trautmann "Empirical knowledge in legislation and regulation: a decision-making perspective" [2013] 1 *The Theory and Practice of Legislation* 533, 538-539; M. Mousmouti, "Operationalising quality of legislation through the effectiveness test" (2012) 6 *Legisprudence* 191, 194; W. Voermans, "Concern about the Quality of EU Legislation: What Kind of Problem, by What Kind of Standards?" (2009) 2 *Erasmus Law Review* 59, 223 and 225; and R. Baldwin and M. Cave, *Understanding Regulation: Theory, Strategy and Practice* (Oxford, Oxford University Press, 1999) 85.

²¹ European Commission (2017), *'Better Regulation' Guidelines*, 2017, p. 4, Luxembourg, Publications Office of the EU, <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-better-regulation-commission.pdf>; also Better regulation: Joining forces to make better laws, European Parliament resolution of 7 July 2022 on Better regulation: Joining forces to make better laws (2021/2166(INI)), P9_TA(2022)0301, 5.²² E. Goldberg, "Better Regulation': European Union Style", M-RCBG Associate Working Paper Series No. 98, Mossavar-Rahmani Center for Business & Government, Weil Hall, Harvard Kennedy School, September 2018, www.hks.harvard.edu/mrcbg, 9.

²² E. Goldberg, "Better Regulation': European Union Style", M-RCBG Associate Working Paper Series No. 98, Mossavar-Rahmani Center for Business & Government, Weil Hall, Harvard Kennedy School, September 2018, www.hks.harvard.edu/mrcbg, 9.

Notwithstanding this, and despite the Commission's repeated classification of the OIOO approach as a tool for better regulation, it is clearly and expressly only applied to legislative texts. And, as such, its aspirations can only be restricted to it being a successful tool for better legislation. Better includes less legislation and legislation of quality. Let's evaluate the OIOO against its subcategory.

By reducing unnecessary burdens in legislative texts, the OIOO can be used as a tool for less legislation. But not in its current form.

The Commission describes its function as an offsetting of unnecessary costs. So, OIOO is about offsetting new provisions against old. This is not about less legislation, it is about keeping EU legislation to its current, inflated volume. This is indeed valuable. But it is not effective for less legislation.

The Commission does not specify at what level offsetting happens. Is it at the level of a provision, namely an article within an EU Act? Or is it at the level of whole texts?

If it is the former, then the result of the application of OIOO can only be the shortening of existing texts, without intervening on the length of new ones. This is not a recipe for less legislation at all. It can be the replacement of known and used provisions by the same number of new, not yet applied, and therefore inherently burdensome, ones.

If it is the latter, then offsetting whole legislative instruments against existing ones, then OIOO can indeed maintain the current legislative volume. Or even reduce it. Provided that the new texts are shorter and "less" themselves.

So, once again, the effect of OIOO as a tool for less legislation requires a qualitative assessment of each offsetting rather than a quantitative, purely mathematical one.²³

²³ Better regulation: Joining forces to make better laws, European Parliament resolution of 7 July 2022 on Better regulation: Joining forces to make better laws (2021/2166(INI)), P9_TA(2022)0301, 83; also E. Van den Abeele, "'One in, one out', an incongruous approach to the major European challenges", European Economic, Employment and Social Policy (ETUI) Policy Brief, 2021.13, 6.²⁴ C. Stefanou, "Legislative Drafting as a form of Communication" in L. Mader and M. Travares-Almeida (eds), *Quality of Legislation Principles and Instruments* (Baden-Baden, Nomos, 2011) 308; and also see C. Stefanou, "Drafters, Drafting and the Policy Process" in C. Stefanou and H. Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Aldershot, Ashgate, 2008) 321.

3. THE OIOO AS A TOOL FOR BETTER LEGISLATION

KEY FINDINGS

Good legislation is effective legislation. Effective legislation contributes to the achievement of regulatory efficacy. OIOO is not a tool for effective legislation.

OIOO can contribute to regulatory efficacy and legislative effectiveness, when it achieves the qualitative reduction of legislative provisions, thus reducing the complexity of the body of legislation. If used in this correct manner, OIOO may affect legislative quality but the link is so remote that it cannot be considered as a tool for better legislation.

So, OIOO is not fit for purpose as a tool for better regulation, and it can only contribute to less legislation if it is applied holistically, qualitatively, and with purpose.

But could it serve as a tool for legislation of better quality?

Answering this requires further in depth analysis.

Legislative quality here focuses on the quality of legislation as a product of the drafting process, which according to Stefanou is a part of the legislative process that, in turn, is a part of the policy process.²⁴ In other words, the study focuses on the quality of legislative instruments from a regulatory perspective. Issues of content, such as constitutionality, legality, morality, important as they are, bow down to functional regulatory values. This reflects the regulatory context of the study and focuses its analysis on regulatory perspectives. However, it is also worth noting that a legislative text flawed in content cannot possibly be regulatorily sound: it may function for a short period of time until it is repealed on substantive grounds, thus depriving it from the opportunity to serve its regulatory purpose.

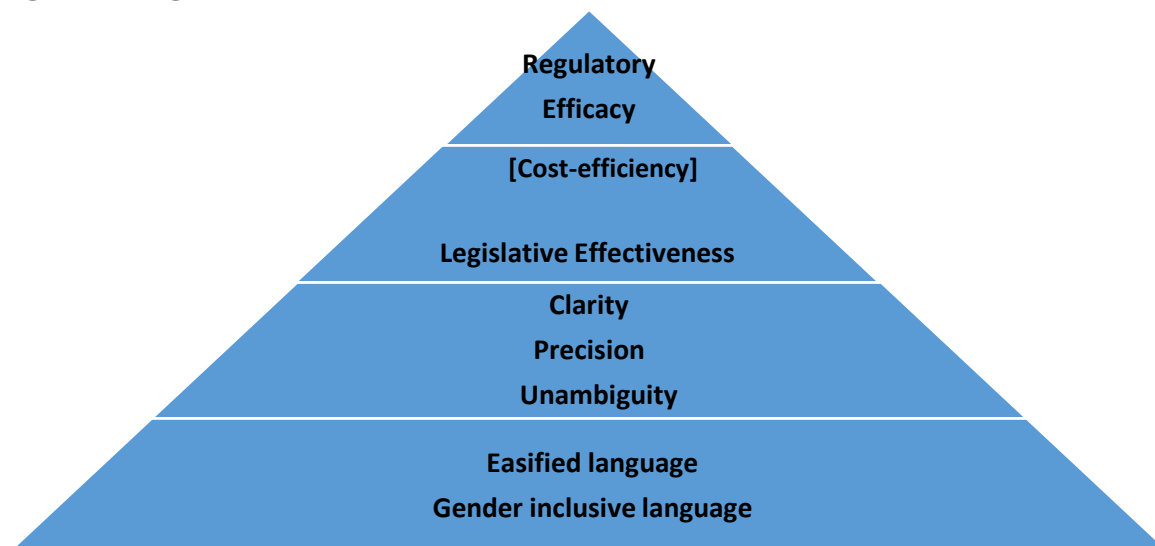
3.1. What is legislation of good quality?

With that disclaimer in place, let us define legislative quality in its regulatory context, as visualised in the diagram²⁵ below.

²⁴ C. Stefanou, "Legislative Drafting as a form of Communication" in L. Mader and M. Travares-Almeida (eds), *Quality of Legislation Principles and Instruments* (Baden-Baden, Nomos, 2011) 308; and also see C. Stefanou, "Drafters, Drafting and the Policy Process" in C. Stefanou and H. Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Aldershot, Ashgate, 2008) 321.

²⁵ The first draft of the diagramme appears in H. Xanthaki, "On transferability of legislative solutions: the functionality test" in C. Stefanou and H. Xanthaki (eds), *Drafting Legislation: A Modern Approach – in Memoriam of Sir William Dale*, above, n.19, 1.

Figure 1: Diagram



At the top of the pursuit of law-makers stands the context of legislation as a tool for regulation. Within the whole of the regulatory effort (as a result of the drafting, legislative, and wider policy processes) lies regulatory efficacy. Efficacy is the extent to which regulators achieve their goal. The term effectiveness is also used within the context of regulation, often even within the EU.²⁶ For the purposes of this analysis, efficacy relates to the actual achievement of the desired regulatory results: this delimits the term to the context of regulation, and distinguishes it from legislative effectiveness that refers to legislation.²⁷

Within the umbrella of regulatory efficacy, the law-maker pursues legislative effectiveness.²⁸ The term is used widely but often without a definition. For example, the EU calls for accountability, effectiveness, and proportionality as a means of achieving better law-making, but the term is not defined at all.²⁹ Mader defines effectiveness as the extent to which the observable attitudes and behaviours of the target population correspond to the attitudes and behaviours prescribed by the legislator.³⁰ Snyder defines effectiveness as “the fact that law matters: it has effects on political, economic and social life outside the law – that it, apart from simply the elaboration of legal doctrine”.³¹ Teubner defines

²⁶ U. Karpen, “Efficacy, Effectiveness, Efficiency: from Judicial to Managerial Rationality” in K Messerschmidt and D Oliver-Lalana, *Rational Lawmaking under Review. Legisprudence According to the German Federal Constitutional Court* (2016, Springer, New York) 304, 306.

²⁷ G Teubner, “Substantive and Reflexive Elements in Modern Law” [1983] *17 Law and Society Review* 239.

²⁸ C. Timmermans, “How Can One Improve the Quality of Community Legislation?” (1997) *34 Common Market Law Review* 1229, 1236–7; Better regulation: Joining forces to make better laws, European Parliament resolution of 7 July 2022 on Better regulation: Joining forces to make better laws (2021/2166(INI)), P9_TA(2022)0301, 22.

²⁹ “European Governance: Better lawmaking”, Communication from the Commission, COM(2002) 275 final, Brussels, 5.6.2002; High Level Group on the Operation of Internal Market, “The Internal Market After 1992: Meeting the Challenge – Report to the EEC Commission by the High Level Group on the Operation of Internal Market”, SEC (92) 2044.

³⁰ L. Mader, “Evaluating the effect: a contribution to the quality of legislation” (2001) *22 Statute Law Review* 119, 126.

³¹ F. Snyder, “The effectiveness of European Community Law: institutions, processes, tools and techniques” (1993) *56 Mod L Rev* 19, 19; also F. Snyder, *New Directions in European Community Law* (London, Weidenfeld and Nicolson, 1990) 3.

effectiveness as term encompassing implementation, enforcement, impact, and compliance.³² Muller and Ulmann define effectiveness as the degree to which the legislative measure has achieved a concrete goal without suffering from side effects.³³ Flückiger defines effectiveness as the achievement of objectives.³⁴ In Jenkins's socio-legal model effectiveness in the legislation can be defined as the extent to which the legislation influences in the desired manner the social phenomenon which it aims to address.³⁵ Voermans defines the principle of effectiveness as a consequence of the rule of law, which imposes a duty on the legislator to consider and respect the implementation and enforcement of legislation to be enacted.³⁶ Mousmouti describes effectiveness as a measure of the causal relations, or under Zamboni the functional link³⁷, between the law and its effects: and so an effective law is one that is respected or implemented, provided that the observable degree of respect can be attributed to the norm.³⁸

For the purposes of drafting in its narrow sense, therefore, effectiveness is the ultimate measure of quality in legislation.³⁹ It simply reflects the extent to which the legislation manages to introduce adequate mechanisms capable of producing the desired regulatory results.⁴⁰ If one subjects effectiveness of legislation to the wider semantic field of efficacy of regulation as its element, effectiveness manages to hold true even with reference to diverse legislative phenomena, such as symbol legislation, or even the role of law as a ritual. If the purpose of legislation is to serve as a symbol, then effectiveness becomes the measure of achieved inspiration of the users of the symbol legislation. If the legislation is to be used as a ritual, effectiveness takes the robe of persuasion of the users who bow down to its appropriate ritual.

In its concrete, rather than abstract conceptual sense, effectiveness requires a legislative text that can (i) foresee the main projected outcomes and use them in the drafting and formulation process; (ii) state clearly its objectives and purpose; (iii) provide for necessary and appropriate means and enforcement measures; (iv) assess and evaluate real-life effectiveness in a consistent and timely manner.⁴¹

³² G. Teubner, "Regulatory law: Chronicle of a Death Foretold" in Lenoble (ed), *Einführung in der Rechtssoziologie* (Darmstadt, Wissenschaftliche Buchgesellschaft, 1987) 54.

³³ G. Muller and F. Uhlmann *Elemente einer Rechtssetzungslehre* Zurich, Asculthess, 2013) 51-52.

³⁴ A. Flückiger, "Effectiveness: a new Constitutional Principle" [2009] 50 *Legislação: cadernos de ciência de legislação*, 183, 190.

³⁵ I. Jenkins, *Social Order and the Limits of the Law: a Theoretical Essay* (Princeton, Princeton University Press, 1981) 180; also see R. Cranston, "Reform through legislation: the dimension of legislative technique" (1978-1979) 73 *NwULRev* 873, 875.

³⁶ W. Voermans, above, 230.

³⁷ M. Zamboni, "Legislative Policy and Effectiveness: A (Small) Contribution from Legal Theory" [2018] 9 *European Journal of Risk Regulation*, 416, 418.

³⁸ M. Mousmouti, above, 200.

³⁹ H. Xanthaki, "On Transferability of Legal Solutions" in C. Stefanou and H. Xanthaki (eds.) *Drafting Legislation, A Modern Approach*, above, n 19, 6.

⁴⁰ See Office of the Leader of the House of Commons, *Post-legislative Scrutiny – The Governments Approach*, March 2008, para 2.4; also see A. Flückiger, "L'obligation jurisprudentielle d'évaluation législative: une application du principe de précaution aux droits fondamentaux" in A. Auer, A. Flückiger and M. Hottelier, *Les droits de l'homme et la constitution: études en l'honneur du Professeur Giorgio Malinverni* (2007, Schulthess, Zurich), 170, 172.

⁴¹ This is Mousmoutis effectiveness test: M. Mousmouti, "Effectiveness as an Aspect of Quality of EU Legislation: Is it Feasible?" [2014] 2 *Theory and Practice of Legislation* 309; also see M. Mousmouti, "Making Legislative Effectiveness an Operational Concept: Unfolding the Effectiveness Test as a Conceptual Tool for Lawmaking" [2018] 9 *European Journal of Risk Regulation* 445.

Cost-efficiency is a parallel concern for drafters. Efficiency is the use of minimum costs for the achievement of optimum benefits of the legislative action⁴². Efficiency refers to the choice of the most financially appropriate solution: as a result, it is a preoccupation for the economists of the multi-disciplinary drafting team. In the context of legislation as a tool of regulation, efficiency is a quality sine qua non of the regulation, and consequently the legislation that has been selected as the tool for the achievement of the regulatory goals.⁴³

Leaving cost-efficiency aside, effectiveness is achieved by means of three tools: clarity, precision, and unambiguity. Clarity, or clearness,⁴⁴ is the quality of being clear and easily perceived or understood.⁴⁵ Precision is defined as exactness of expression or detail.⁴⁶ Unambiguity is certain or exact meaning:⁴⁷ semantic unambiguity requires a single meaning for each word used⁴⁸, whereas syntactic unambiguity requires clear sentence structure and correct placement of phrases or clauses. Clarity, precision, and unambiguity offer predictability to the law. Predictability allows the users of the legislation, including enforcers⁴⁹, to comprehend the required content of the regulation. Predictability of effect is a necessary component of effectiveness and indeed of the rule of law.⁵⁰ Thus, compliance becomes a matter of conscious choice for the user, rather than a matter of the users' subjective interpretation of the exact content of the legislation and, ultimately, the regulation.

At the third level of the hierarchy of goals for the drafter comes easified language and gender inclusive language. Easified language is a successor of plain language as a concept encapsulates a qualifier of language, which is subjective to each reader or user.⁵¹ Plain language requires the drafting of an objectively plain text. Easified language addresses the impossibility of this task by recognizing the relativity of communication: each audience carries individual needs of communication and understanding. Easified language therefore departs from an objectively plain text, and seeks a text that is understandable by the specific circle of users of the particular text.

Gender inclusive language requires the elimination of any notion of gender characteristic or classification from the text. It basically requires expression that does not recognise gender as a characteristic relevant to the communication. Gender inclusivity is a development of gender neutral

⁴² R. Posner, "Cost Benefit Analysis: definition, justification, and comments on conference papers" (2000) 29 *The Journal of Legal Studies* 1153.

⁴³ W Voermans, "To Measure is to Know: The Quantification of Regulation" [2015] 3 *Theory and Practice of Legislation*, 91, 110.

⁴⁴ Lord H. Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents* (London, John Murray, 1902) 61.

⁴⁵ See *Compact Oxford English Dictionary of Current English* (Oxford, Oxford University Press, 2005).

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ J. MacKaye, A.W. Levi and W. Pepperell Montague, *The Logic of Language* (Hannover, Dartmouth College Publications, 1939) chapter 5.

⁴⁹ A. Seidman, R. Seidman and N. Abeyesekere, *Legislative Drafting for Democratic Social Change* (The Hague, Kluwer Law International, 2001) 255.

⁵⁰ Sir S. Laws, CALC Conference 2009, Hong Kong.

⁵¹ R. Sullivan, "Some implications of plain language drafting" (2001) 22 *Statute Law Review* 145, 149.

language, which in itself is a tool for accuracy, as it promotes gender specificity in drafting⁵² and before the courts.⁵³

The brief exposé of the main principles of drafting and their placement in a pyramid of hierarchy presents interesting conclusions. The pursuit of drafters is their contribution towards efficacy of regulation. This is undertaken within the limited role of the drafter in regulation, and is defined as effectiveness. Thus, for drafting in its narrow sense quality in legislation is synonymous to effectiveness. Effectiveness in legislation is achieved via clarity, precision, and unambiguity. Easified language and gender inclusive language are both worthwhile tools for the achievement of clarity, precision, and unambiguity.

3.2. Does OIOO contribute to legislation of good quality?

The definition of good legislation and the brief analysis of its elements block even a debate about the contribution of OIOO to legislation of good quality. Simply because the two concepts are parallel in nature. OIOO is a regulatory tool whose field of application, at least in its current guise in application within the EU, is quantitative. Legislation of good quality is a law-making goal whose field of application is, and can only be, qualitative in nature. It is therefore difficult to see what connection there can be between the two. Ditto, legislation is a tool for regulation and effective legislation contributes to efficacious regulation. But the link between the two is qualitative, it focuses on the desired regulatory results, and thus can only be assessed by qualitative and quantitative criteria as to the achievement of set regulatory objectives. Whether these are introduced and served by offset texts via OIOO is irrelevant.

Of course, legislative effectiveness takes into account the complexity of legislation not just on the basis of one legislative instrument but also of the statute book as a whole. Simplifying the body of legislation within EU regulation is indeed a worthy goal, and can affect the context within which each legislative instrument is read and functions. In that sense, simplification and reduction of the body of EU legislation contributes to the reduction of complexity of the context of EU legislative instruments. But the link between that and better legislation is rather remote, actually too remote to allow the statement that OIOO is a tool for better legislation.

⁵² Commentary, "Avoidance of sexist language in legislation" (1985) 11 *Commonwealth L Bull* 590, 590.

⁵³ W. B. Hill Jr., "A need for the use of nonsexist language in the courts" (1992) 49 *Wash and Lee L Rev* 275.

4. REAL TOOLS FOR BETTER EU LEGISLATION

KEY FINDINGS

Currently, the Better/Smart Regulation agenda ignores legislation as a product. Until recently, this reflected the regulatory focus of the EU on economic growth, competitiveness of EU enterprises and the required removal of unnecessary burdens.

But since 2014 increasingly the regulatory agenda of the EU is balanced with a focus on EU citizens. To achieve sustainability, the EU needs loyalty and trust by its citizens. EU legislation, as a means of direct communication between the EU and its citizens, can restore loyalty and trust to the EU vision and the organisation, thus contributing greatly to its long-term sustainability.

The application of the DECIDE test, and of its four criteria, to a legislative reform initiative points to its feasibility as a joint initiative by the main EU institutions.

Legislative reform requires a holistic change of law-making philosophy, placing EU citizens at the centre of legislation and legislative drafting style.

The paper offers 22 concrete recommendations as tools for real-law-making within the EU.

4.1. Better legislation in the Better/Smart Regulation agenda

4.1.1. The current state of affairs

Within EU institutions the successful passing of an EU legislative text is viewed as a cause for celebration. From a political perspective, it is. After all, every new piece of EU legislation is another step towards integration⁵⁴, another step towards the realisation of the EU vision. From a legislative perspective, however, every new EU legislative text in its current, inherently flawed and incomplete format as *droit diplomatique*, adds to the complexity of EU law and pushes the EU's boat further into the troubled waters of bad legislation. Much more so since the evaluation of legislation within the EU remains at the individual legislative instrument level. Evaluation per policy or holistically does not really happen. Although assessing the EU's legislative policy holistically, and introducing an overarching strategy for EU law-making is present in the post-2014 narrative of the Commission's Better Regulation, institutions and Member States continue to focus on each legislative text as it happens to come along. This needs to change. Individual legislative dossiers must come together to form a collective legislative approach, and to suggest a methodology for better legislation overarching policies and institutions.

The implementation of a sound methodology for a holistic evaluation of EU legislation is certainly within reach. Better Regulation itself can, and must, be used as a tested, evidence-based methodology for a new better EU legislation strategy.

Unfortunately, legislation as a product has been excluded from the Better/Smart Regulation agenda. Of course, technical drafting tools have already been introduced: for example, the 2011 Inter-institutional Style Guide, the 2015 Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation, and the 2019 Joint Handbook for the Presentation and Drafting of Acts subject to the Ordinary Legislative Procedure.

⁵⁴ A. Bradford A., *The Brussels effect: how the European Union rules the world* (2020, Oxford University Press, Oxford); Z. Laïdi, *La norme sans la force - L'énigme de la puissance européenne* (2013, Presses de Sciences Po, Paris).

Admittedly these are useful practitioner tools for the EU's institutional drafters. But their focus exclusively on the formalities of drafting accentuates the perception that legislation is a mere technical, formalistic, dare I say esoteric, task: inevitably relevant solely to institutional technocrats; inevitably detached from both regulation as a whole and its end-users. A critical engagement with the philosophy of legislation, the principles of legislative drafting, and the evolving use of legislation as a regulatory tool communicating with citizens as participants to the regulatory process seems to have ended for the EU sometime back in 2003. And the EU, whilst still leading the world on regulatory reform, has been left behind when it comes to legislative reform, despite the many advances of legislative practices led by drafters in its Member States, for example in Finland, Germany, Greece, Italy, the Netherlands, and Sweden.

Let's prove this statement. Better Regulation is a revolutionary concept, which has already delivered tangible policy results. After all, the OECD now ranks the EU amongst the first in stakeholder engagement, impact assessment policy, and evaluation.⁵⁵ Better Regulation introduces impact assessments for every appropriate new regulatory proposal, improved roadmaps, the introduction of the independent Regulatory Scrutiny Board to replace the Impact Assessment Board, systematic ex post evaluations from the end users' perspective, strengthened role of the High Level Group, and enhanced public consultations. Better Regulation follows Stefanou's identification of the drafting process as a part of the legislative process, which is a part of the policy process: this places legislation in the broader concept of regulation, and establishes a firm connection between legislation and regulation. Better Regulation confirms that EU regulation is a shared responsibility of the institutions and Member States, and confesses that further cooperation is needed between the EU and national co-legislators, in order to achieve effective regulation. And it affirms the need for in-depth consultation and citizen participation as a means of enhancing legitimacy. Focus is placed on the simplification of EU law via the reduction of administrative burdens; evaluation of law effectiveness and efficiency ex ante via fitness checks on key areas (environment etc.), and via strategic general policy evaluations; selection of the "the best possible" legislation through Impact Assessment, improvement of implementation record via post-legislative scrutiny, SOLVIT, and EU Pilot; and achieving clearer and accessible legislation via simple language, codification, recasting, and e-access.

The list seems endless, and the possible benefits rather attractive. However, one wonders how these noble aims are going to be achieved, especially with reference to legislation rather than regulation. Simplification of EU law is indeed a worthy goal. But it cannot be taken to mean simply a reduction of administrative burdens. In fact, the Smart Regulation agenda neglects to address a number of crucial aspects of simplification without which reduction of administrative burdens cannot be achieved. One, simplicity of the chosen policies: if a policy choice is complex, then the reduction of red tape will not suffice to make it accessible to the citizens. Two, simplicity in the selected regulatory means: as legislation is inherently the most complex regulatory tool, reducing administrative burdens via legislation carries inherent complexity. Three, simplicity of drafting style: the EU's complex legislative style tends to diminish the simplification effect, irrespective of the percentage of reduction of administrative burdens; if the users cannot understand the language of the law, how can they benefit from the opportunities created by a policy of reduced red tape? Four, simplicity of enforcement methods. Five, simplicity of the national implementing measures, both in content and in form. And five, simplicity in the methods of pre- and post-legislative scrutiny tools and their accessibility by the users.

⁵⁵ OECD, "OECD Regulatory Policy Outlook 2018" (2018), https://www.oecdilibrary.org/governance/oecdregulatory-policy-outlook-2018_9789264303072-en.

Similarly, ex ante evaluation of effectiveness and efficiency of law is a solid initiative. In theory. But it cannot be achieved simply via fitness checks and general policy evaluations. In the EU's legislative environment, regulatory goals are vague and ambiguous goalposts, which carry a different meaning for the different actors in the regulatory process. Especially since actors include both the EU and the national authorities. Even where efficacy and effectiveness appears clear, there are no set criteria of effectiveness by way of successful regulation that must be used in reference to a specific piece of legislation. The application of the generic elements of the semantic field of the concept of effectiveness in the specific context of a piece of legislation as applied in the specific legal system that serves a specific society in a specific time is not an easy task and should not really be ignored or left to chance. There is a dire need to ensure that the criteria for effectiveness of any piece of legislation are agreed upon by policymakers, law experts, and legislative drafters and that they are clearly expressed in the legislation itself, via perhaps their inclusion in a purpose clause or an objectives article. These can then be carried through to post-legislative scrutiny and then utilized to confirm effectiveness, thus allowing the text to continue its legislative life.

Another pathology of the EU's legislative system concerns possible action in case of ineffectiveness. What happens, if evaluation ex post shows that any set of effectiveness criteria are not met by the legislative instrument within the time in the review clause? Is the legislation bound to die an automatic death via perhaps a sunset clause⁵⁶, will it continue to plague the Official Journal as it stands, at least until an enlightened decision-maker decides to address the problem⁵⁷, or will it lead to an automatic exercise of fine-tuning via perhaps an amending piece of legislation that addresses the issues raised in the evaluation? Similar concerns apply to ex ante evaluation.

Moreover, Better/Smart Regulation fails to identify the way in which, if at all, evaluation will take place at the Member State level. Here, other considerations should also come into play. Will national scrutiny be compulsory or could the Member States be offered discretion on the basis of national sovereignty in the legislative process? Moreover, Smart Regulation fails to address the extent of any national scrutiny process, namely, whether it must relate strictly to the national implementing measures or whether it can refer to the original EU text. This is rather crucial, especially in reference to national legislation, which departs from the policy and law of the EU by means of either a direct or indirect breach or even legitimately by means of an acceptable exercise of discretion as would be the case with the implementation of a Directive. And what if the national scrutiny exercise identifies a flaw in the EU policy? Can that be reported back to the EU and will this result in any action at the EU level?

The improvement of the implementation record is a third worthy point of reference for Better/Smart Regulation. But once again, one has to distinguish between the aim and the proposed methods for its achievement. Can implementation be improved solely via post-legislative scrutiny, availability of SOLVIT, and the EU Pilot on clarification and assistance with the application of EU legislation? What about clear guidance on the definition of complete transposition for new, older, and aspiring Member States? What about clear guidance on the definition of quality in legislation for the purposes of EU drafting and also EU transposition? What about the establishment of national drafting offices with trained specialist drafters vetting (if not drafting) implementation measures on the possible example of the UK model for drafting national primary legislation [Office of Parliamentary Counsel]? What about

⁵⁶ É. Van den Abeele, "One-in, one-out' in the European Union legal system: a deceptive reform?", Working Paper 2020.4, European Trade Union Institute, 43.

⁵⁷ In the EU repeals require the same process as the passing of new laws: E Goldberg, "The Jury Is Still Out on One-In-One-Out", The Regulatory Review, 3 February 2020, <https://www.theregreview.org/2020/02/03/golberg-jury-still-out-one-in-out/>.

extending the scrutiny of implementation beyond substantive transposition to technical quality of transposition?

And finally, who would disagree with the selection of the “the best possible” legislation? But is this really achievable simply via impact assessments, clearer and accessible legislation, simple language, codification, recasting, and e-access? What about opening the debate for a holistic approach to effectiveness in the sense of the use of legislation as a tool for regulation? What about setting a hierarchy of drafting virtues that can serve as guidance for drafters in their inevitable subjective drafting dilemmas? What about training drafters to achieve these goals? What about considering a central drafting office with trained drafters within EU institutions, including the Commission, the Council, and the Parliament? What about training national drafters to contribute to the effort?

The focus on regulatory quality in the EU's better governance campaign was a positive development in its infancy. But now, with its maturity, comes the time to address legislative quality as an intrinsic part of regulatory quality. Legislative quality is effectiveness, namely the production of a legislative text that with the co-operation and synergy of all other actors in the policy process can achieve the regulatory aims. Whilst focusing on regulation, the EU seems to have forgotten about legislation, somehow trying to simply wish away the continuing problems of legislative quality. The same focus away from legislation is present in the 2020 Agenda for Europe.

4.1.2. Why start focusing on legislative quality now?

Better Regulation focuses on the enhancement of the economy of the EU by rendering its enterprises competitive through the removal of unnecessary barriers. This reflects the initial regulatory emphasis to 2020 competitiveness Agenda. But recently the regulatory goalpost has been moved.⁵⁸ The imbalance⁵⁹ between enterprises and citizens in the Smart Regulation, the Better Regulation, and the 2020 Agenda for Europe is beginning to tip over, with clear mention of EU citizens in most Better Regulation documents after 2014.

Since then, the Commission is quoted to introduce Better Regulation as an effort for “opening up policy and law-making and listening more to the people it affects”.⁶⁰ This demonstrates the priority now placed on EU citizens as users and a subsequent move towards law-making rather than pure regulation: “bringing the EU closer to its citizens”⁶¹ and completing Better Regulation “for the benefit of EU citizens”⁶². In the updated objectives of Better Regulation, the Commission includes the reduction of regulatory burdens, but introduces them as a tool that benefits not just businesses but also citizens and public administration. Additional objectives are open and transparent decision-making, EU actions

⁵⁸ C Radaelli, “Whither Better Regulation for the Lisbon Agenda?” [2007] 14 *Journal of European Public Policy* 190, 207.

⁵⁹ A Alemanno, “Better Regulation: Holding the European Commission Accountable?”, IDEAS Working Paper Series from RePEc (2018).

⁶⁰ https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en.

⁶¹ Political Guidelines for the next European Commission, by Candidate for the President of the European Commission Jean-Claude Juncker, Strasbourg, 15 July 2014.

⁶² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Completing the Better Regulation Agenda: Better solutions for better results”, SWD(2017) 675 final, https://ec.europa.eu/info/sites/info/files/completing-the-better-regulation-agenda-better-solutions-for-better-results_en.pdf; also see Communication from the Commission to the European Parliament, the European Council and the Council “Better Regulation: Delivering better results for a stronger Union”, COM/2016/0615 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0615>.

based on evidence⁶³ and impact, and policy and law-making process where citizens and stakeholders can contribute. It is rather notable that citizens are included in each and every one of the four objectives of Better Regulation, and that law-making is clearly included and expressly set apart from policy.⁶⁴ In the 2017 Better Regulation Stock-taking, the necessity of Better Regulation is not competitiveness but “the desire for better European governance”⁶⁵ and “for anchoring sustainable development in the Union’s policymaking”.⁶⁶ Despite early criticisms that the Better Regulation Agenda would plateau,⁶⁷ the Commission took it one step further. In the 2017 Better Regulation update, the Commission confirmed their focus on its 10 political priorities⁶⁸ “for the benefit of the Union’s citizens; to support growth and jobs, to make the internal market work better, to tackle security threats, to protect consumers and workers and to improve public health and the environment”.⁶⁹ In the 2019 Better Regulation restocking exercise⁷⁰ the Commission confessed that the application of Better Regulation can be further improved by, amongst others, improving EU legislation.

These documents show a clear change to the focus of the EU, a balanced focus between enterprises and citizens. This ties perfectly with the ethos of our times. As the world changes and bureaucracies can no longer rely on the former awe of their citizens before regulatory and legislative demands, their relationship with their citizens changes. Brexit, the election of Trump, the rise of extremist ideologies also within Europe are all signs of the prevalence of populism in political debate. In their facing of international crises, citizens have been usurped by populist voices that have played upon their insecurity and hardship to question their faith in law and regulators. As is the case with all regulators, the EU now needs to persuade its citizens on the wisdom and necessity of its vision and its regulatory requests. As stated by Margaritis Schinas, Vice President of the European Commission, “the best weapon against populism and extremes is good policy, the kind that creates trust and offers real solutions to real problems”.⁷¹

And EU legislation can serve as an yet unexploited tool to communicate the necessity and rationale of legislative intervention to the lives of EU citizens, and to persuade them of the wisdom of legislative

⁶³ Thus enhancing accountability: C Radaelli and A Meuwese, “Hard Questions, Hard Solutions: Proceduralisation through Impact Assessment in the EU” [2010] 33 *West European Politics* 136.

⁶⁴ https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en.

⁶⁵ “Commission Work Programme 2015 – A New Start”, COM(2014) 910 final.

⁶⁶ “European Governance – A White Paper”, COM(2001) 428, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52001DC0428>.

⁶⁷ R E Lofstedt, “The 'Plateauing' of the European Better Regulation Agenda: An Analysis of Activities Carried out by the Barroso Commission” [2007] 10 *Journal of Risk Research* 423, 447.

⁶⁸ https://ec.europa.eu/commission/index_en.

⁶⁹ European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Completing the Better Regulation Agenda: Better solutions for better results”, COM/2017/0651 final, 24.10.2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0651>, 1.

⁷⁰ European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Better regulation: taking stock and sustaining our commitment”, COM(2019)178 final, 15.4.2019, 13.

⁷¹ M. Schinas, Speech at the Conference of the Spanish Peoples’ Party on 4 April 2022, <https://www.iefimerida.gr/politiki/shoinasto-kalytero-oplo-enantia-sto-laikismo>.

action.⁷² Achieving this can lead not just to their participation to the EU's regulatory initiatives, thus securing their success via wide implementation. Also, and much more importantly, this can lead to their ascribing to the holistic regulatory goals of the EU and to its general political vision. In turn, this can lead to the restoration of trust⁷³ and loyalty to the EU, and consequently to the long-term sustainability⁷⁴ of the EU vision and the organisation.⁷⁵

But, in order to achieve this goal, legislation must speak to the citizens as end-users. And this requires a radical change in the way in which legislation is drafted, structured and published.

4.2. A methodology for better legislation in the EU

A methodology for legislative reform is easily identifiable in the Better Regulation's DECIDE test. The first element of the DECIDE test invites the identification of the key characteristics and type of the proposed initiative. The proposed new EU legislative strategy could qualify as a "major" initiative for a holistic and principled new strategy for the EU's legislative approach. In Tool 1 of the Better Regulation Agenda, the European Parliament, Council and Commission reassert their recognition that delivering high quality legislation is a joint responsibility for legislation meeting four criteria. Criterion one (an area with the greatest added-value for European citizens and strengthening the competitiveness and sustainability of the Union's economy) is fulfilled: better legislation would indeed be of great benefit to citizens and companies, balancing the EU's financial and social profile. Criterion two (it must deliver the Union's policy objectives in the simplest, most efficient and effective way possible) is also fulfilled: the most efficient and effective intervention after more than 60 years of legislative integration and continuing legislative fragmentation would be to pause the introduction of even more, fragmented legislative texts, and to now focus on identifying a methodologically sound, principled, and Better Regulation compliant structure for the EU's legislative approach. In the words of Mr Juncker, doing less but more efficiently.⁷⁶ Criterion three (it must avoid overregulation and unnecessary administrative burdens for citizens, administrations and businesses and particularly SMEs) is also easily met by the proposed initiative. The fourth criterion (it must be designed to facilitate transposition and practical application) is also met: the whole point of the proposed initiative is to be applied, and its application aims to achieve better legislation suitable for transposition. A joint⁷⁷ initiative for legislative reform with the involvement of all main institutions towards better legislation in application of the Better Regulation Tools is feasible.

⁷² R Rácz "The Better Regulation Agenda of the European Union" [2009] 7 *European Integration Studies* 85, 104.

⁷³ L Berg "Citizens' Trust in the EU as a Political System" in A Bakardjieva Engelbrekt, N Bremberg, A Michalski, L Oxelheim, *Trust in the European Union in Challenging Times* (2019, Palgrave Macmillan, Switzerland), 65, 87.

⁷⁴ CM Radaelli, "The state of play with the Better Regulation Strategy of the European Commission", 2021/6 STG Policy Papers, https://cadmus.eui.eu/bitstream/handle/1814/70901/PB_Radaelli_2021_06.pdf?sequence=1&isAllowed=y, 5.

⁷⁵ K Nicolaidis, "EU 2.0? Towards Sustainable Integration", 2010, Open Democracy, at: https://www.opendemocracy.net/kalypso-nicola%C3%AFdis/_project-europe-2030-towards-sustainable-integration; also K Nicolaidis, "Sustainable Integration: Towards EU 2.0? – The JCMS Annual Review Lecture" [2010] 48 *Journal of Common Market Studies* (Annual Review), 21; K Nicolaidis, "Project Europe 2030: Reflection and Revival", 2010, Open Democracy, <https://www.opendemocracy.net/kalypso-nicola%C3%AFdis/project-europe-2030-reflection-and-revival-part-one>.

⁷⁶ See Scenario 4 of the White Paper "Doing Less More Efficiently: The EU27 focuses on delivering more and faster in selected policy areas, while doing less elsewhere", https://ec.europa.eu/commission/white-paper-future-europe_en.

⁷⁷ Better regulation: Joining forces to make better laws, European Parliament resolution of 7 July 2022 on Better regulation: Joining forces to make better laws (2021/2166(INI)), P9_TA(2022)0301, 34.⁷⁸ Commission Regulation (EEC) No 1677/88 of 15 June 1988 laying down quality standards for cucumbers, *OJ L 150*, 16/06/1988, pp.21-25.

The second element of the DECIDE test is to identify the scope and the objectives of the proposed initiative. In the case of an EU legislative reform, this is to put Better Regulation to effect in the EU's legislative policy. Better Regulation means "designing EU policies and laws so that they achieve their objectives at minimum cost" (G4); the proposal is for effectiveness and cost efficiency in the EU's legislative policy. And the objective behind the proposed legislative reform is to respect subsidiarity and proportionality (G4); to provide the means to mainstream sustainable development into the Union's policies (G5); and to re-establish communication with citizens and regain loyalty, as analysed above.

The third element of the DECIDE test is to confirm that the legislative instrument should act. In application of the subsidiarity principle, the test here aims to ensure that competences are respected. There is little point in debating that the legislative reform of the EU must come from within. Member states cannot possibly achieve this goal, unless they bring about a reform of the constituting treaties.

The fourth and final element of the DECIDE test invites the identification of the better regulation tools to be applied to the proposed new legislative strategy. These would be evaluation, impact assessment, implementation plan, and public consultation. Let's take them in turn.

Proposed BR Tool 1: Evaluation

Evaluation calls for an assessment on the feasibility and effectiveness of the measures proposed against the goals to be achieved. For the proposed new legislative strategy this is a truly difficult assessment. Not because there is difficulty in reaching a conclusion, but because conclusions can be really hard to bear. The question really is whether an EU of 27 member states, or more, can really achieve good legislation.

There is little doubt that this is a mammoth task. Not necessarily because of the multiplicity of complexities in a legislature for so many diverse jurisdictions, legal terminologies, languages, and diverse legal traditions. Not even necessarily because compromise lies at the heart of EU law-making. But mainly because the goal pursued is effectiveness of legislation, and this is set against a cultural, legal, social, financial and political environment. By definition, effective legislation serves the particular requirements of a specific executive within the particular environment of the jurisdiction. And thus, effectiveness requirements differ between diverse environments. The EU has not yet reached a level of homogeneity that can allow a single legislative text to serve the same effectiveness in all its member states to an adequate degree. Despite the levels of standardisation and harmonisation, the peoples and countries of the EU retain their national eccentricities in culture, religion, politics, finances, and law. It is this strength of the EU that prevents it from achieving effectiveness by means of a single legislative text.

This leads to a mismatch between the regulatory goals of the EU and the legislative instruments available to its legislating bodies. Effectiveness could be served if the EU were to legislate solely via Directives, setting common regulatory goals but allowing national implementing measures to introduce diverse mechanisms for their achievement within each member state. Regulations could prove rather ineffective legislative tools, even when their need for transposition is regained. The result of this proposed switch to Directives as the main legislative tool for regulatory effectiveness could nurture good legislation at the EU and national levels. The downside would be that the EU would have to entrust national drafters to achieve effectiveness of the regulatory package by means of national transposing regulatory [not necessarily legislative] measures. This would require a free-hand in transposition, and an equally free-hand, principled (rather than formalistic) scrutiny of national compliance. This may sound simple but it is not: effective principled scrutiny requires an expert level of understanding of legislative drafting by national and EU officers alike.

It is worth noting that the post-2016 Better Regulation documents upgrade the role of national drafters and Parliaments to one of co-legislators, and stress the importance of their contribution to the legislative efforts of the EU. The understanding of effectiveness as a relative value coloured by national

eccentricities and regulatory choices seems to have already created a fertile environment for wider co-legislative choices at the national level. The challenge now seems to be to put the new ethos into effect not only at the EU but also at the national levels. Tuning national co-legislators and the EU in the same concept of regulatory efficacy and legislative effectiveness requires courage, trust, and training especially within the Member States. But it is a worthy goal to the benefit of EU citizens and the EU vision.

Proposed BR Tool 2: Impact Assessment

Having completed the evaluation test, an Impact Assessment is to follow. This is where empirical analysis becomes necessary. One is to measure the impact of bad EU regulation and legislation, in order to justify the necessity and proportionality of the new strategy and its measures.

Measuring the cost of bad legislation is by no means a simple task, and inevitably a degree of guesswork is on call. What makes this task even more complex is the lack of basic data on the users of EU legislation. Without knowing who reads EU legislation and who relies on it to make decisions on their activities, one cannot accurately identify who the subjects on the alleged damage by bad EU laws are. Let me explain this point. At the moment, there has been no survey identifying who reads EU law: is it just the local authorities of the member states, who then use it to transpose them into national law, or could it be that companies and perhaps even citizens themselves resort to EU law to learn about new rights and obligations. Knowing who the audience of legislation is can have serious effect on the measurements of the impact of bad EU law.

If the audience of EU law is mainly national authorities, and legal and natural persons read the national implementing measures, then the possible negative effects of EU legislation may already be eliminated by the intervention of national drafters. Measurement of the negative effect of EU legislation would relate to its contribution or loss arising from the competitiveness of EU industries, the attraction of the EU as a foreign investment area, the transposition of EU measures, and any administrative burdens. With reference to transposition, this negative effect would include losses from the cost of transposition of EU law to member states, the cost of late implementation to the EU and the other member states, and the cost of non-implementation to the EU and other member states. Where these costs are measured, note should be taken of the actual cost, namely the cost that is not remedied by national legislation. This may lead to a decision that a new strategy for EU law is not necessary at all, or that the needs of national authorities as the main users of EU legislation can be addressed by means of a consultation with them and a subsequent possible fine-tuning of the current drafting techniques.

If the audience of EU law includes EU citizens, natural and legal persons, the game changes dramatically. If lay users make use of the principles of direct effect and direct applicability and rely on EU instruments for the purposes of claiming their EU rights before the national courts and the national authorities, the alleged negative effect of EU legislation must be measured by reference to them also. Competitiveness of EU industries would be measured as arising from EU legislation only, without remedies from national implementation measures. The attractiveness of the EU as a foreign investment area would relate to the cost of EU laws on the natural and legal persons in third countries that set out to select which geographical area in the world they intend to invest in. The alleged cost arising from the transposition, late implementation or non-implementation of EU measures would include costs to the EU, member states, companies, and citizens. The negative effect from administrative burdens arising from EU legislation would be measured by reference to the EU, the member states, and EU citizens natural and legal persons. In all probability, acquiring empirical evidence that direct effect and direct applicability is used by EU citizens would result to a confirmation that a strategy for better EU law is not just justified but long overdue.

The survey of users could, if the question is asked, reveal another possible user anomaly. Since direct effect and direct applicability are justly hailed as conferring power to EU citizens to make use of EU legislation directly and without the need for national implementation, it is worthwhile to learn if EU citizens themselves make use of these tools or whether they leave it to their legal counsellors to do so

when the matter reaches national courts. Direct effect and direct applicability are revolutionary tools that bring EU legislation directly to the citizens. If EU citizens do not use them without expert legal advice, it is possible that one of the causes could be the alleged user-unfriendliness of EU legislative texts. Confirmation of user-unfriendliness of EU legislation could explain, to an extent, the current wave of Euroscepticism in quite a few EU member states: directly effective and directly applicable EU legislation could be a tool of communication of the EU directly to EU citizens, a channel to alert citizens of the added value offered by the EU. Failing to utilise this tool adequately could explain the disturbing prevalence of populist voices that ridicule solidly rooted policy options as dictatorial impositions from a self-absorbed EU bureaucracy. For example, the presentation of EU legislation on crooked cucumbers⁷⁸ or even on bendy bananas⁷⁹ not as a measure protecting EU crops and farmers from disease-prone varieties but as a dictation of the extent of curve of vegetable produce favoured by EU bureaucrats. Identifying this as a contributing factor to Euroscepticism would upgrade the proposed new EU strategy for better legislation to a strategy contributing to the regain of trust and popularity of the organisation amongst EU citizens, using EU legislation as a direct channel of communication between the EU and its citizens. This is a view shared by a number of legislative studies academics apart from this author but it requires empirical confirmation to get it off the ground. If it is confirmed, then Brexit can be added to the cost of bad EU legislation, strengthening the voice for a new strategy on better EU law even further. It is worth noting that such an approach to EU legislation would not be out of tune with approaches to legislation at the national level. The UK Good Law survey showed beyond doubt that users of legislation in the UK are lay persons by 70%. As a result, UK laws are now drafted in lay language, the regulatory message strengthened by user-friendly explanatory notes, and legislative texts are available online. Similar movements are evident as part of the Better Regulation national agendas in the Netherlands, Germany, Italy, Switzerland, and elsewhere: it seems that there is a pan-European trend for easily accessible legislation that users can use to learn about their rights and obligations directly.

Proposed BR Tool 3: Public consultation

The pre-Impact Assessment survey can produce exciting results that may offer a new impetus for the Europhile movement. Public consultation would be supplementary to the survey, and could greatly contribute to a deeper exploration of the inevitably raw results of the survey.

A public consultation could, and should, involve hearing from EU staff on the current process of legislating. They are the ones experienced and interested in EU law-making and transposition monitoring. They are the users of processes, and their voice is valuable and learned.

A public consultation would include drafters and policy officers from the member states. They are equally users of the system and process of law-making both at the EU and the national levels. They carry experience of approaches to legislation and legislating for transposition, and could inform on the national implementation hurdles and how these could be overcome.

Technical experts at the EU and national levels may have the learned voice but lay users, legal and natural persons citizens of the EU, may have considerable contributions to make, if they are proven to be the end users of EU legislative texts. Whereas the former may contribute in an open consultation with the identification of weaknesses in the current process and perhaps devices to address the issues, the latter lack the expertise to contribute constructively at this stage. So, involving end users in the consultation exercise would require a different kind of consultation, perhaps in the form of user testing. Having identified the weaknesses and the preferable solutions, end users can be mobilised to select

⁷⁸ Commission Regulation (EEC) No 1677/88 of 15 June 1988 laying down quality standards for cucumbers, *OJ L 150*, 16/06/1988, pp.21-25.

⁷⁹ Commission Regulation (EC) No 2257/94 of 16 September 1994 laying down quality standards for bananas (Text with EEA relevance), *OJ L245*, 20/09/1994, pp.6-10.

their preferred text amongst those offered by the consultation experts, thus confirming that the in abstracto solution offered by the experts is indeed achieving accessibility to the end users when applied in practice.

Proposed BR Tool 4: Implementation plan

Having confirmed the necessity of a new strategy and, via consultation, decided on its bare skeleton of problems and preferred solutions, an implementation plan can now be drawn.

Step 1 would consist of **the identification and profiling of the users of EU legislation**. It is not enough to know who reads EU legislation. It is important to know what it is that users are looking for when reading the text. This will allow EU drafters to determine the main regulatory message sought by users, and adapt their drafting to provide them easily and as a priority.

Step 2 would involve **pitching the language of EU legislative texts accordingly**. Accessibility includes legislative expression that can be understood by the particular audiences of the legislative text in question. User testing can also assist here by ascertaining that the language used in legislative texts is one that conveys the regulatory message to the users rather than the one that sustains the multiple compromises required to see the text through.

Step 3 could involve **revisiting the structure of EU texts and dividing the regulatory messages according to Step 1 conclusions**. As there rarely, if ever, is a single audience in legislation, a layered approach to structure can liberate the drafter in pitching diverse messages in various levels of linguistic and legal sophistication that match those of each audience. Understanding who reads EU legislation and for what purpose can lead to the introduction of a text in parts, each addressing lay users, national authorities, and legally trained users. Their language would be different, and their regulatory messages would be allocated by reference to the answers required by each group. For example, a text offering subsidy to oil producers can be structured in three parts: part 1 addressed to oil producers telling them clearly and simply that they are now entitled to a subsidy and that they must fulfil a number of conditions and complete a precise process to get it; part 2 addressed to national authorities detailing the administrative procedure to be followed; part 3 addressed to lawyers and judges dealing with any consequential amendments, any interpretation and definitions, and any appeals. This rather simplified example is a good example of a revised structure.

Step 4 could involve **a revisit of the publication of EU legislation**. So far, EU legislation is available online free of charge but it is addressed to learned users. Bringing the legislation to lay users would require new techniques, such as hyperlinks to relevant texts, explanatory materials, or variation of colours.

This is all rather radical, so it is anything but simple! But it is not enough. These are suggestions for formalities in drafting techniques that reflect a grander philosophical reform in the EU's legislative strategy. A principled approach to EU legislation would see a promotion of creative drafting to serve effectiveness rather than the current timid formalistic application of models and precedents. Such a liberal approach requires confident drafters, and these are normally professional drafters.

The question is whether, with its current constraints, effectiveness can be achieved at EU level. A feasibility survey would respond to the question. It is not easy for any bureaucracy to reform, and this would be quite a major reform. Can the EU sustain it or is effectiveness only possible at the national level. Effectiveness by definition requires a homogenous setting with similar policy needs and similar policy solutions. EU legislation normally places different policy needs at the EU versus each national level. The EU looks for homogeneity and standardisation in order to achieve further integration. National policy goals are obviously different and may involve competitiveness or social goals. Solutions are by definition different as they aim at different goals. Much more so, since effectiveness at each member state may very well require different approaches. In a Europe of diversity (North versus South, rich versus financial challenged, immigration facing versus immigration deferring etc.), it is difficult to envisage a single legislative solution to achieve EU policy within all 27 member states.

There are two options here. One, **a holistic reform of the EU law-making processes to accommodate the radical reform seemingly necessary for better EU legislation.** The Commission, via the post-2016 seems ready to grapple with the necessary reforms, perhaps as a response to the current financial, political, and social challenges, which, by the way, are not solely Europe based. Two, **a maintenance of current law-making processes but a reform of drafting techniques** to fine-tune EU legislative texts in response to the conclusions of the Better Regulation tools above along with a principled decision to regulate solely or mainly via Directives. These beautiful creatures are flexible enough to accommodate effectiveness at the EU level in the goals and effectiveness at the national level in the options available to Member States in the achievement of the policy goals set. This rather placid solution can produce radical results, if the scrutiny of national implementing measures is no longer formalistic and becomes principled, with a focus to the effectiveness of the proposed national implementing measures.

5. RECOMMENDATIONS FOR REAL BETTER LEGISLATION IN THE EU

Having established the methodology, and subsequent feasibility, of a joint initiative for legislative reform within the EU, let us now come to the crux of proposed reforms. These will be introduced in the sequence of the stages of legislative drafting, introduced by Thornton, namely analysing the proposal (stage 1), understanding the proposal (stage 2), designing the draft (stage 3), composing the draft (stage 4), and validating the draft law (stage 5).

5.1. Stage 1 – Instructing to draft an EU legislative instrument

Stage 1 involves the receipt of drafting instructions for the purposes of starting the drafting process. For the drafters of the EU instrument, Green and White papers constitute the crux of drafting instructions. These documents, in addition to policy documents justifying the necessity, subsidiarity, proportionality, and context of the legislative proposal, also serve EU drafters to understand the parameters of efficacy and effectiveness of the proposed text.

Recommendation 1: Green and White papers, as well as introductory reports, need to identify the concrete policy goals of the legislation. These objectives must be tangible, concrete, and achievable.

Recommendation 2: Concrete and measurable effectiveness criteria for the EU text are necessary for the evaluation of the text *ex ante* and *ex post*.

Recommendation 3: It is commendable that EU drafters persist with the use of sunset clauses in EU legislation, especially in combination with a review clause of the effectiveness of the text. Further, EU drafters can foresee that the EU text will expire unless EU legislators decide to extend its life, subject to an evidence-based post-legislative review on the achievement of the measurable criteria of effectiveness. This would reflect the nested cycles of legislation within law within regulation, and would enhance the link between legislation as a tool for regulation.

5.2. Stage 2 – Analysing the proposal to draft an EU legislative instrument

Stage 2, understanding the proposal, requires preparatory analysis of the policy, regulatory, and legislative environment within which the proposed EU Legislative instrument will function, as a means of ensuring that its introduction will contribute to a smooth completion of the policy, regulatory, and legislative environments. Perhaps the biggest gap here currently is the detachment of EU drafters from transposition drafters and their needs. Although awareness of the need for transposition has been repeated by the EU in recent Better Regulation policy documents, legislative texts themselves have little to show by way of change. And, although there is now increasingly frequent availability of transposition guidelines in separate Commission documents, their content as regulatory, rather than technical drafting documents, is not focused on the transposition drafting task. After all, transposition guidelines documents appear to be missing a set, drafting focused methodology. To introduce that, for the facilitation and coordination of future transposition, focus must be placed on the provision of the questions required by the first part of Stage 2 of the transposition drafting process.

Recommendation 4: EU legislative texts and their accompanying transposition guides, where available, need to provide authentic answers to the seven questions of Xanthaki's test as follows:

- 1) which are the desired regulatory results of the EU. These must be introduced in a list of concrete, achievable, and measurable regulatory results, against which the effectiveness of the EU text is to be assessed. This can link pre-legislative scrutiny to legislation and to post-legislative scrutiny;
- 2) how will the desired regulatory results be measured by the EU? A list of measurable empirical data that will be used by the EU to assess effectiveness on a post-legislative scrutiny exercise can direct national drafters to the collection of that data at the national level, thus enhancing the quality of evidence-based Better Regulation. Moreover, national drafters can replicate the type of data used by the EU with data used for the assessment of effectiveness of the transposition measure at the national level;
- 3) how long is the regulatory deadline, and therefore within which period of time are results expected?
- 4) what is the mischief at the EU level? This type of analysis of EU law and why it does not currently cover the mischief in question is already found in introductory texts of draft EU texts.
- 5) how can the new EU legislation expected to address the mischief at the EU level? Drawing the link between the legislative solution and the current gap in EU legislation can play a dual role. In showcasing the rationale behind the EU text, it can persuade national drafters of the soundness of the EU strategy, thus enticing them to participate in the co-legislative effort, and guiding them to a similar solution at the national level, using the EU text as a model law, where appropriate.
- 6) does the language of each EU provision communicate its message clearly?
- 7) if not, how can national drafters achieve a sound national terminology. Although this seems to be a task for national drafters, often Commission officials who have followed the text through negotiations can shed light into the vagueness of EU terms used in the text. These often come as a result of an impasse in negotiations resulting from diversities and clashes of terminology or concepts in national legal systems. Offering national drafters a menu of possible choices can guide them to the one that is more familiar to them.

Recommendation 5: In view of the frequency of such diversities and even conflicting positions in the national legal orders of 27 Member States, effectiveness of transposition leads the Commission to revisit the way in which such clashes resolve in EU texts. The current position of introducing a vague term that can encompass most national positions and allow the text to proceed further in the EU legislative process may facilitate progression to the next stage of passing but will inevitably come back to haunt effectiveness via incomplete or even erroneous transposition by the co-legislators. One wonders whether it now makes regulatory sense to note the richness of national terms that fall within the scope of the EU's legislative intent, thus exposing this danger area or national sensitivity, alerting national drafters to the issue, and consequently inviting them to either remain with the existing national term and concept or to adhere to the EU's complete legislative intent by introducing the EU generic term with a definition that draws the distinction between the two. The latter will facilitate complete transposition but, perhaps equally importantly, complete implementation of the transposing text.

5.3. Stage 3 – Design

The ideological debate between the effectiveness of elaboration in the national transposition legislation and the practicability of the copy/paste transposition method has tilted with practicability in at least Denmark, France, Germany, Greece, Estonia, Ireland, Italy, Poland, Portugal, Romania, Spain (albeit to a lesser extent), and, albeit perhaps not so importantly any more, the UK. If anything, Member States are moving away from elaboration and are beginning to test non-transposition altogether on

the basis that Accession Acts combined with the supremacy of EU law can allow transposition by reference only without even the need to copy/paste the text of the EU legislation under transposition. This is being debated in Luxembourg, Cyprus (here it is rarely used), the Czech Republic, Germany, Latvia, the Netherlands (where it is actually used in practice), in Slovenia, and in Spain. The French Conseil d'Etat has been resisting continuing attempts to introduce the practice in France. It is therefore evident that, despite considerable opposition from academia, Member States seem reluctant to depart greatly from EU legislative texts. The design and structure of EU legislation ends up being replicated in national transposition legislation, in an increasing majority of Member States.

At the same time, the design and structure of EU legislation remains completely unexplored as a tool for delivering the Better Regulation goals. Inter-institutional Agreements⁸⁰ and documents on the style of EU Legislative instruments simply re-iterate the axiom of chapter/part/section as a reflection of the "logical" division of EU documents. And, thus, the purely text-focused 70-year old traditional structure of EU legislation is the one communicated to EU citizens via the EU and the national transposition legislative texts.

Yet, design can serve as one of the most successful tools for the accessibility of EU legislation. Design can be used to convey the real EU regulatory goal and the benefit that it offers to EU citizens in the short or longer term. This can lead to create or confirm support and loyalty to the EU vision. Design can effectively offer all three user groups answers to their questions directly, thus ensuring that the right message is received by the right group, as the EU legislative text intended. This can identify rights and obligations clearly, thus enhancing correct application of EU legislation. In turn, this can lead to the desired social behavioural change that it sought by the regulators, which, if the regulatory choices were correct at the time of legislating, can produce the desired regulatory results. Design is crucial for the legislative effectiveness of EU legislation, and, consequently, the regulatory effectiveness (what literature calls efficacy) of EU policies.

Recommendation 6: In view of the Commission's continued emphasis on Better Regulation, and the EU institutions continuing dedication to the cause, this may be opportune time for the EU institutions collectively to discuss whether the current design of EU legislative texts is fit for purpose. Taking into account the old age of the design, the innovations already paved in EU regulation, and the reality of replication of the EU design in the national transposition texts, there is little doubt that change is urgently needed. And that it can deliver miracles.

Recommendation 7: In the citizen-focused EU a user-focused design can reflect the great value now expressly placed on EU citizens and their following of the EU as an ideal and as an organisation. The optimal tool to express this in legislative design is the layered approach. In order to apply this to EU legislation, it is necessary to identify the users of EU legislation. Traditionally, EU law was referred to as a *droit diplomatique*. But this is no longer a valid approach. The identity of EU legislation is no longer defined by the compromises made in its passing. In application of sustainable integration, the new identify of EU legislation clearly expressed in Better Regulation already, is defined by effectiveness to the longer term benefit of EU citizens. And this identity is best reflected in a layered text offering prominence to EU citizens as participants to the regulatory agenda of the legislative text.

Before presenting the design of a layered EU Legislative instrument, it is necessary to identify the user groups of EU legislation. There is no doubt that Member States and the national authorities remain a solid user group of EU legislation: they are entrusted with the provision of the administrative

⁸⁰ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123/1.

framework for the application of EU legislation at the national level; they may not necessarily have legal training but they certainly have great sophistication both in the subject matter and in handling EU legislation. They therefore fall in the layered approach's Group 2 users. Moreover, there is also little doubt that lawyers and judges continue to use EU legislation: they are entrusted with the interpretation and application of EU legislation in the national and European courts; they have expert sophistication in EU legislation. Therefore, they fall in the layered approach's Group 3 users. So far, so good. The question is, whether EU legislation is actually used by lay users. In other words, is there a Group 1 type of users in EU legislation? There certainly is a Group 1 user group in national transposition legislation. But, since in an increasing number of Member States EU legislation is simply copied and pasted, or just referenced, in the national transposition measures, Group 1 users end up using the EU text either in its form as an EU text or in its copy/pasted form as a national transposition text. And, although in the past the EU could be forgiven for relying on Member States to bring the text to its national users creatively, there is now enough evidence to pull that safety net under the institutions' feet altogether. There is little doubt therefore that EU legislation now has a group of lay users that read EU legislative texts in order to understand what the new legislation is offering them in the form of rights, or what it is asking them to do in the form of obligations. In fact, one wonders whether the actual usage of EU legislation by lay users should be a factor in the design of EU legislation at all. After all, the objective of Better Regulation to regain direct communication with EU citizens in order to convey the EU regulatory messages accurately, and away from populist interpretations, requires that the text talks to EU citizens directly. Even if they do not read it now, making it more user friendly will entice them to read it, and its regulatory messages, in the future. And so the objectives of Better Regulation surpass even one's position in the debate on whether current usage includes a Group 1 user group. It does, but, even if it doesn't, it should. And the layered structure of EU texts can bring this in for the EU institutions.

Recommendation 8: Having established that EU legislation is addressed to three user groups, the layered division of EU legislation becomes much easier. In fact, it tends to fall clearly in the lap of EU drafters. In application to the layered division presented above, Part 1, addressed to Group 1 lay users, can contain the main regulatory messages, namely, a. why legislate, b. how this benefits citizens and enterprises, and c. what are the awarded rights and imposed obligations. These must be expressed concretely, simply, and accurately.

For example, Regulation (EU) 2017/920 can start with "This Regulation relieves EU citizens from charges when phoning abroad within the EU". The rather unfortunately named round cucumbers and bent bananas EC Commission Regulation No 2257/94 (now repealed) could start with "1. This Regulation prohibits the cultivation of those species of bananas and cucumbers that are prone to disease. 2. The objectives of this Law is: a. to enhance the income of banana and cucumber farmers by 20% over a period of 3 years; and b. to protect crops from disease, thus saving the economy 2,000,000 Euros per year." Finally, Victim's Rights Directive 2012/29/EU could start with: "1. Directive introduces the right of victims of crime in another EU Member State to receive immediate assistance, interpretation of oral legal processes, and translation of legal documents in their own language. 2. The objective of the Directive is to benefit the 15% of European citizens who fall victims of crime elsewhere in the EU by offering them easy and immediate access to services and legal processes in a language that they understand. 3. Directive offers the same rights of access to assistance and legal processes everywhere in the EU, thus enhancing citizen safety and security within the whole of the EU, and ensuring full participation in the legal processes." Placing these crucial regulatory messages in the very beginning of the text, when the attention span of lay users is in its prime time (think advertising) would promote awareness of EU citizens on what the EU is offering them, short or longer term, why legislation is necessary, and what the new provisions are about.

Recommendation 9: One final point for Part 1 could be the inclusion of the effect of the EU text on EU citizens. This would require the identification of the date of entry into force, and an explanation of direct applicability and direct effect in lay terms. For example, "This Regulation is the law in all EU Member States after 31 December 2019, even without further national implementation". Or "This Directive is the law in all Member States after 31 December 2019, and EU citizens can rely on it before the national courts even if their state has not legislated any further". Or "Articles 1, 3, 5, and 10 of this Directive are the law in all EU Member States after 31 December 2019, and EU citizens can rely on these provisions before the national courts even if their state has not legislated any further. Articles 2, 4, and 5 of this Directive are the law in the EU but EU citizens cannot rely on them before their national courts without further legislation in the Member State".

Recommendation 10: Part 2, addressed to Member States and national authorities, can include the detailed list of regulatory messages. The content, and even language, here would not change from the existing EU legislation. Perhaps it would make sense to divide in separate lists the duties of Member States and their powers: Member States must, as opposed to Member States may. This will facilitate complete transposition, by identifying in a clear list the obligations of Member States. This is where national authorities can focus, and these can be replicated in correlation tables like the one currently used by the Commission. Duties could be enhanced by including specific national implementation action, such as the identification of an agency to administer the law, the provision of enforcement mechanisms, and any monitoring requirements. This would promote effective implementation of the EU legislation at the national level and effective monitoring of implementation at the EU level. Of course, as duties are necessary elements for the completion of the regulatory package, duties must come with a clear deadline. This is already provided for as the transposition deadline. But taking it away from the variety of dates at the end of the EU text would both draw Member States' attention to what they are expected to do by that time, and it would alleviate the confusion of lay users on the date of entry into force of the EU legislative text. Powers of Member States, namely transposition options, could be a new element in EU legislation. They are currently found in Transposition Guidance. The advantage of placing them in the text of the legislation would be that the choices of Member States would be limited to the ones included in the legislation. This could dramatically prevent gold-plating, and would enhance a level of harmonisation by steering Member States to manageable groups of trends in legislation and practice.

Recommendation 11: Part 3, addressed to EU and national lawyers and judges, can include everything that is left outside of Parts 1 and 2. Recitals, definitions, legal issues, issues of interpretation, reviews and sunset clauses can be collected in Part 3. This would involve simply transferring these types of provisions from the beginning of the EU texts to the bottom. This is the part of the legislation, where drafters can use expert terminology freely provided that the rule of law is still served.

Applying the layered approach to EU texts seemed a daunting task, in theory. But in practice, it proved to be a minor tweak in the current structure of EU legislative texts. It involves creating a new Article 1 with the three regulatory messages requested by Group 1 lay users: why, how, and what, in concrete terms. Then dividing current content into duties and powers for Member States and authorities. And transferring recitals, definitions, and interpretation from the start of the text, and bundling them to the bottom along with the rest of final provisions. Not a bad price for enhanced effectiveness, in delivery of Better Regulation.

5.4. Stage 4 – Composition of EU legislative instruments

The linguistic tools used by national drafters in the composition of national legislation do not vary dramatically. Clarity, simplicity, plain language are popular drafting goals based on the equally

common principles of the rule of law, constitutionality, and legality. Even drafting styles are breaking the boundaries of the civil/common law divide. EU integration has resulted to a rapprochement between civil and common law drafting styles within the EU. In fact, legislative expression, within or outside transposition, has been adequately explored and amended into a modern style in most Member States. It would be accurate to say that linguistic expression is the Stage of Thornton's drafting process where change is needed the least. This is because, until recently, legislative drafting was viewed as a science of words. In that respect, the plain language movement, which prevailed in legislative theory and practice over the last fifty years, has produced results. But innovations in linguistic expression in the Member States seem to be de facto blocked at the EU level. The frequent replication of the legislative expressions used by the EU text within the transposition texts deprive the latter from the creative composition that decorates other national legislative texts. From the point of view of the EU this practice can be reversed if monitoring of the effectiveness of national transposition measures is transformed.

Recommendation 12: A principled, in depth and in substance monitoring of the capacity of the text to produce the agreed desired regulatory results at the national level contributes greatly to the achievement of the desired regulatory results at the EU level. This is precisely what monitoring the implementation of the EU text by Member States should measure.

Recommendation 13: Of course, the current superficial box-ticking monitoring exercise is an established practice for the EU. It may well be justified by the limited resources in most institutions. However, a shift of focus, and hopefully resources, from a punitive post-legislative review of national transposition legislation with questionable contribution to sustainable integration to a pre-emptive pre-legislative joint co-legislative review of national transposition plans could fertilise the ground for creative composition of transposition texts. In fact, there are calls for joint for a of cooperation between the Commission and national authorities to continue after transposition, thus allowing national authorities to interpret the EU legislative text more accurately, to explain the provisions to EU citizens correctly, and to be up to date with developments arising from judicial interpretations of the legislation.

Recommendation 14: EU legislative expression must be selected also by reference to national terminology. Loading the EU text with terms already existing in the national legal orders of Member States creates ambiguity within the holistic co-legislative regulatory package of EU and transposition legislation. Taking transposition into account when choosing terms in the EU text would go a long way in avoiding such ambiguities, which (as is the case with the Victims' Rights Directive) can gravely affect the effectiveness of EU legislation.

5.5. Stage 5 – Verification of the draft legislative instrument

Stage 5 involves confirmation that the draft EU legislative instrument can contribute to the desired regulatory results. It is a form of internal evaluation ex ante, where the drafting team seeks to ensure the quality of the draft text. Within the EU drafting process, the point of verification is to ensure that the draft Legislative instrument serves the regulatory goals of the initiating institution, also taking into account future transposition. Within the current EU legislative practice, the process already takes place both within the drafting team and within the discussion of the draft by expert groups, working groups, and drafting groups with the participation of Member States. What needs to change here is the philosophy and focus of these verification fora.

Recommendation 15: The verification of the draft within the initiating institution must be focused on its legislative quality, in application of all recommendations above. A draft EU legislative instrument

may well be the start of a possible political victory but, above all, it is legislation. And the prevalent value is legislative quality, not political compromise.

Recommendation 16: Preventative “personalised” transposition Guidance by use of one of the most popular transposition aids, expert meetings, can work wonders for the completion of the drafting task via transposition. This will inevitably take place after the passing of the Legislative instrument, but in a drafting process that includes transposition, the job drags on until the last Member State transposes.

Recommendation 17: In a lighter version of the proposed solution, the Commission can offer the opportunity to national teams to bring forward their transposition drafts, allowing experts to comment and benefit from peer review of the drafts by EU and Member States’ experts. Such a discussion could inform national teams of best practices or common errors, which can supplement transposition Guidance documents.

Recommendation 18: In a heavier, and ideal, version of the proposed solution, the EU can offer channels of communication, such as an appointed member of staff or meetings where necessary, where technical experts can present their drafts and seek advice.

Recommendation 19: Although the resources of EU institutions are not limitless, there is an argument to support the view that moving transposition monitoring from prevention to intervention could balance the work between the two, thus allowing current resources to cope with the new requirement. Perhaps more importantly, the move will finally showcase the departure from the current ethos of rushing through a legislative texts for its completion whatever its quality. It is essential for all those involved in shaping Union legislation to be reminded that their political concerns and desire for results must not be allowed to override the need for clear and precise legislation, as already suggested by the Mandelkern Group. After all, true co-regulation enhances EU legitimacy.

Recommendation 20: In view of the technical nature of such meetings, perhaps the most suitable Chair would be a member of the Better Regulation team, whose expertise in effectiveness can guide discussion to the correlation between EU regulatory goals, national effectiveness goals, and national choices of design and legislative expression in the draft transposition text.

Recommendation 21: To alleviate the constraints of formality that can inhibit substance, the conclusions of such meetings can be advisory only, thus allowing a frank and risk-free exchange of views without concerns on their possible contribution to binding decisions at the end of the meeting.

Recommendation 22: Such meetings can only work if there is a strict Better Regulation methodology, perhaps that of Stage 2, with an ethos of cooperation within the co-legislating drafting team of EU and national drafters. Otherwise, the meetings could be usurped for the purposes of strengthening national positions.

6. BETTER LEGISLATION FOR A RESILIENT AND SUSTAINABLE EU - CONCLUSIONS

The OIOO principle has been hailed as a tool for better law-making within the EU. The Commission purports that its implementation can reduce regulatory burdens for citizens and enterprises via the offsetting of relevant legislative provisions.

Conclusion 1: The OIOO cannot serve as a tool for better regulation in its current form. To be effective, OIOO cannot be limited to an assessment of unnecessary burdens. It must also include the assessment of its possible effects on the current regulatory goals of the EU. This requires the compilation of a list of regulatory goals against which offsetting must be evaluated.

Conclusion 2: OIOO is not a tool for better legislation. It does not tackle legislative quality.

Conclusion 3: OIOO can be a tool for less legislation. Less in the number of legislative instruments in the EU statute book. Not less in the number of actual provisions within the less instruments. Not less in the content of these provisions, whose qualitative assessment is not undertaken via OIOO.

Conclusion 4: For real Better law-making **the Commission must undertake a holistic reform of its legislative strategy**, via the application of the Better Regulation principles on to its own law-making approach. To put this reform to effect, **the JURI Committee must place itself at the centre of deliberations and lead consistently and systematically, via a Working Group dedicated to Better Regulation** to assure a constant reflection on better regulation with the support of a network of European academic experts. Better regulation is not just an institutional task for the Commission, it is an expression of the right of EU citizens to accessible legislation and participatory regulation, which (rights) must be defended by the European Parliament.

Conclusion 5: This legislative reform can be implemented, amongst other tools, by **a reform of the drafting style of EU legislative instruments**, reflecting of course a reformed, citizen-focused legislative approach.

Conclusion 6: The implementation of **22 concrete recommendation** spreading through all 5 of Thornton's stages for legislative drafting can revolutionise the effectiveness of EU Legislative instruments, and, consequently, the efficacy of EU Regulation.

Conclusion 7: Better legislation is a right for EU citizens, one that must be promoted and protected by the EP. But, through its forging of a relationship of loyalty and trust⁸¹ between citizens and regulators/law-makers, better EU legislation can also become a real tool for the resilience and sustainability of the EU, both as an ideal and as an organisation.

⁸¹ Better regulation: Joining forces to make better laws, European Parliament resolution of 7 July 2022 on Better regulation: Joining forces to make better laws (2021/2166(INI)), P9_TA(2022)0301, 84.

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ANNEX: AN EXAMPLE OF THE CITIZEN-CENTERED STYLE FOR DIRECTIVES

OIOO is promoted by the Commission as a tool for legislative scrutiny, for better regulation and better legislation. It cannot possibly deliver, especially in view of the EU parameters analysed in the study. Clear and effective communication of EU regulation and legislation to citizens and businesses, to Member States, and to the institutions themselves can identify regulatory burdens clearly and can be much more effective than an "accounting" approach proposed by the European Commission with one-in one-out approach.

To demonstrate this, please see below Directive 2023/970 on equal pay in a citizen-centered structure and style. No text has been touched, this version is simply a restructured draft of the same provisions and words allocated in three parts, each addressing one of the three main legislative audiences.

Note the directness and completeness of message for EU citizens in Part 1.

Note the clarity of obligations (duties) and transposition options (powers) for Member States in Part 2.

Note how loudly the unbearable regulatory burden from the Directive is set out when the 44 relevant provisions are listed together rather than spread in the text. No need for OIOO, if reduction of regulatory burdens is identified as a problem and addressed within each EU legislative text.

DIRECTIVE (EU) 2023/970 on equal pay for equal work or work of equal value between men and women (Pay transparency and enforcement mechanisms)

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Considering that:

- (1) Equality between men and women is a right for EU citizens protected under:
 - a. Article 2 and Article 3(3) of the Treaty on European Union on the right to equality,
 - b. Articles 8 and 10 of the Treaty on the Functioning of the European Union (TFEU) on the elimination of inequality,
 - c. Article 157(1) TFEU on equal pay for male and female workers for equal work or work of equal value is applied,
 - d. Article 157(3) TFEU on measures of application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value (the 'principle of equal pay'), and
 - e. The established caselaw of the Court of Justice of the European Union on the extension of the principle of equal treatment of men and women beyond sex discrimination, and the application of the principle to discrimination arising from gender reassignment.

- (2) In some Member States, it is currently possible for persons to legally register as having a third, often a neutral, gender. This Directive does not affect relevant national rules giving effect to such recognition as regards matters of employment and pay.
- (3) The 2020 evaluation of the relevant provisions of Directive 2006/54/EC found that the application of the principle of equal pay is hindered by a lack of transparency in pay systems, a lack of legal certainty on the concept of work of equal value, and by procedural obstacles faced by victims of discrimination. Workers lack the necessary information to make a successful equal pay claim and, in particular, information about the pay levels for categories of workers who perform the same work or work of equal value. The report found that increased transparency would allow revealing gender bias and discrimination in the pay structures of an undertaking or organisation. It would also enable workers, employers and the social partners to take appropriate action to ensure the application of the right to equal pay for equal work and work of equal value (the 'right to equal pay').
- (4) The effects of the COVID-19 pandemic will further widen gender inequalities and the gender pay gap unless the recovery response is gender sensitive. Those consequences have made it even more pressing to tackle the issue of equal pay for equal work or work of equal value. Strengthening the implementation of the principle of equal pay through further measures is particularly important to ensure that the progress which has been made in addressing disparities in pay is not compromised.
- (5) The Union gender pay gap persists: it stood at 13 % in 2020, with significant variations across Member States, and has decreased only minimally over the last ten years. The gender pay gap is caused by various factors, such as gender stereotypes, the perpetuation of the 'glass ceiling' and the 'sticky floor', horizontal segregation, including the overrepresentation of women in low-paid service jobs, and unequal sharing of care responsibilities. In addition, the gender pay gap is partly caused by direct and indirect gender-based pay discrimination. All those elements constitute structural obstacles that form complex challenges to achieving good quality jobs and equal pay for equal work or work of equal value and have long-term consequences such as a pension gap and the feminisation of poverty.
- (6) The lack of information on the envisaged pay range of a position creates an information asymmetry which limits the bargaining power of applicants for employment. Ensuring transparency should enable prospective workers to make an informed decision about the expected salary without limiting in any way the employer's or worker's bargaining power to negotiate a salary even outside the indicated range. Transparency would also ensure an explicit, non-gender-biased basis for pay setting and would disrupt the undervaluation of pay compared to skills and experience. Transparency would also address intersectional discrimination where non-transparent pay settings allow for discriminatory practices on several discrimination grounds. Applicants for employment should receive information about the initial pay or its range in a manner such as to ensure an informed and transparent negotiation on pay, such as in a published job vacancy notice, prior to the job interview, or otherwise prior to the conclusion of any employment contract. The information should be provided by the employer or in a different manner, for instance by the social partners.
- (7) Since the objectives of this Directive, namely a better and more effective application of the principle of equal pay through the establishment of common minimum requirements which should apply to all undertakings and organisations across the Union, cannot be sufficiently achieved by the Member States but can rather, by reason of their scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive, which limits itself to setting minimum standards, does not go beyond what is necessary in order to achieve those objectives.
- (8) This Directive lays down minimum requirements, thus respecting the Member States' prerogative to introduce and maintain provisions that are more favourable to workers. Rights

acquired under the existing legal framework should continue to apply, unless provisions that are more favourable to workers are introduced by this Directive. The implementation of this Directive cannot be used to reduce existing rights set out in existing Union or national law in this field, nor can it constitute valid grounds for reducing the rights of workers in regard to the principle of equal pay.

HAVE ADOPTED THIS DIRECTIVE:

Part A: To EU citizens

Article 1 – Objective of the Directive: What the EU aims to achieve for you

The objective of this Directive is to reduce the pay gap between men and women within the EU by 10% over a period of three years by strengthening the application of the principle of equal pay for equal work or work of equal value to all EU citizens, irrespective of their sex.

Article 2 – Subject matter: How will the EU achieve the objective

This Directive requires Member States to strengthen pay transparency and reinforce enforcement mechanisms.

Article 3 – Definitions

Definitions are in Annex 1.

Article 4 – Your new rights

If you are an applicant or a worker with an employment contract or employment relationship in the Member State of employment, irrespective of your sex, you have the following rights:

- (a) The right to equal pay for equal work or work of equal value;
- (b) The right to pay transparency prior to employment, including the right to receive from your prospective employer, information about:
 - a. the initial pay or its range, based on objective, gender-neutral criteria, to be attributed for the position concerned; and
 - b. where applicable, the relevant provisions of the collective agreement applied by the employer in relation to the position. Such information shall be provided in a manner such as to ensure an informed and transparent negotiation on pay, such as in a published job vacancy notice, prior to the job interview or otherwise;
- (c) The right not to be asked about your pay history during your current or previous employment relationships;
- (d) The right to expect job vacancy notices and job titles that are gender-neutral and that recruitment processes are led in a non-discriminatory manner;
- (e) The right to transparency of pay setting and pay progression policy via easy accessibility to the criteria used to determine workers' pay, pay levels and pay progression, and via criteria that are objective and gender neutral.
- (f) The right to information, namely:
 - a. the right to request and receive,
 - i. in writing,
 - ii. within a reasonable period of time not exceeding two months from the date of your request, and
 - iii. in a format which is accessible to persons with disabilities and which takes into account their particular needs, information on your individual pay level and the average pay levels, broken down by sex, for categories of workers performing the same work as them or work of equal value to theirs;

- b. the possibility to request and receive the information referred to in i. through your workers' representatives, in accordance with national law or practice or through an equality body;
- c. in the event that the information received is inaccurate or incomplete, you have the right to request, personally or through your workers' representatives, additional and reasonable clarifications and details regarding any of the data provided and receive a substantiated reply;
- (g) The right to be reminded by your employers, on an annual basis, of your right to receive the information referred to in i and of the steps that you must undertake to exercise that right;
- (h) The right to disclose your pay for the purpose of the enforcement of the principle of equal pay; but your employer may require you not to use information other than on your own pay or pay level for any purpose other than to exercise your right to equal pay.
- (i) The right (individual, through your workers' representatives, labour inspectorates and equality bodies) to ask employers for additional clarifications and details regarding any of the data provided, including explanations concerning any gender pay differences. Employers shall respond to such requests within a reasonable time by providing a substantiated reply. Where gender pay differences are not justified on the basis of objective, gender-neutral criteria, employers shall remedy the situation within a reasonable period of time in close cooperation with workers' representatives, the labour inspectorate or the equality body.
- (j) The right for you, your representatives, and the monitoring body to be informed of the joint pay assessment, which must also be available to the labour inspectorate and the equality body upon request.
- (k) In the implementation of the measures arising from the joint pay assessment, the right to remedy of the unjustified differences in pay within a reasonable period of time, in close cooperation, in accordance with your national law or practice, with your representatives. The labour inspectorate and the equality body may be asked to participate in the process. The implementation of the measures shall include an analysis of the existing gender-neutral job evaluation and classification systems or the establishment of such systems, to ensure that any direct or indirect pay discrimination on the grounds of sex is excluded.
- (l) The right to the protection of your personal data:
 - a. To the extent that any information provided pursuant to measures taken under this Directive, and 10 involves the processing of personal data, it shall be provided in accordance with Regulation (EU) 2016/679.
 - b. Any personal data processed pursuant to this Directive shall not be used for any purpose other than for the application of the principle of equal pay.
- (m) The right to full, real, and effective compensation or reparation for any damage as a result of an infringement of any right or obligation relating to the principle of equal pay, in a dissuasive and proportionate manner.
- (n) The right to access to evidence in compensation or reparation proceedings.
- (o) The right to be protected from victimisation and less favourable treatment: you and your workers' representatives shall not be treated less favourably on the ground that you have exercised your rights relating to equal pay or have supported another person in the protection of that person's rights.

Article 5 – The source of your rights: Who legislates

- (1) The Directive introduces your rights, and you can rely on it before your national courts.
- (2) The complete legislation for the protection of your rights is laid down by Member States, which must comply with Article 6 below.

PART B: To the Member States

Article 6 - Duties

By the end of the transposition period you must:

- 1) Take the necessary measures to ensure that employers have pay structures ensuring equal pay for equal work or work of equal value;
- 2) In consultation with equality bodies, take the necessary measures to ensure that analytical tools or methodologies are made available and are easily accessible to support and guide the assessment and comparison of the value of work in accordance with the criteria set out in this Article;
- 3) Put in place measures to prohibit contractual terms that restrict workers from disclosing information about their pay;
- 4) Report on pay gap between female and male workers by ensuring that ensure that employers provide the following information concerning their organisation:
 - a. the gender pay gap;
 - b. the gender pay gap in complementary or variable components;
 - c. the median gender pay gap;
 - d. the median gender pay gap in complementary or variable components;
 - e. the proportion of female and male workers receiving complementary or variable components;
 - f. the proportion of female and male workers in each quartile pay band;
 - g. the gender pay gap between workers by categories of workers broken down by ordinary basic wage or salary and complementary or variable components.
 - h. Employers with 250 workers or more shall, by 7 June 2027 and every year thereafter, provide this information relating to the previous calendar year.
 - i. Employers with 150 to 249 workers shall, by 7 June 2027 and every three years thereafter, provide this information relating to the previous calendar year.
 - j. Employers with 100 to 149 workers shall, by 7 June 2031 and every three years thereafter, provide this information relating to the previous calendar year.
 - k. Employers with fewer than 100 workers may provide this information on a voluntary basis, and must do so if provided by national law.
 - l. The information shall be communicated to the authority in charge of compiling and publishing such data, published by the employer on its website or made publicly available in another manner, and provided by the employer to all their workers and to the workers' representatives of their workers, to the labour inspectorate and the equality body upon request. The information from the previous four years, if available, shall also be provided upon request.
- 5) Take appropriate measures to ensure that employers who are subject to pay reporting conduct, in cooperation with their workers' representatives, a joint pay assessment where all the following conditions are met:
 - a. the pay reporting demonstrates a difference in the average pay level between female and male workers of at least 5 % in any category of workers;
 - b. the employer has not justified such a difference in the average pay level on the basis of objective, gender-neutral criteria;
 - c. the employer has not remedied such an unjustified difference in the average pay level within six months of the date of submission of the pay reporting.
 - d. The joint pay assessment shall be carried out in order to identify, remedy and prevent differences in pay between female and male workers which are not justified on the basis of objective, gender-neutral criteria, and shall include the following:
- 6) an analysis of the proportion of female and male workers in each category of workers;

- 7) information on average female and male workers' pay levels and complementary or variable components for each category of workers;
- 8) any differences in average pay levels between female and male workers in each category of workers;
- 9) the reasons for such differences in average pay levels, on the basis of objective, gender-neutral criteria, if any, as established jointly by the workers' representatives and the employer;
- 10) the proportion of female and male workers who benefited from any improvement in pay following their return from maternity or paternity leave, parental leave or carers' leave, if such improvement occurred in the relevant category of workers during the period in which the leave was taken;
- 11) measures to address differences in pay if they are not justified on the basis of objective, gender-neutral criteria;
- 12) an evaluation of the effectiveness of measures from previous joint pay assessments.
- 13) Provide support, in the form of technical assistance and training, to employers with fewer than 250 workers and to the workers' representatives concerned, to facilitate their compliance with the obligations laid down in this Directive.
- 14) Without prejudice to the autonomy of the social partners and in accordance with national law and practice, take adequate measures to ensure the effective involvement of the social partners, by means of discussing the rights and obligations laid down in this Directive, where applicable upon their request.
- 15) Without prejudice to the autonomy of the social partners and taking into account the diversity of national practices, take adequate measures to promote the role of the social partners and encourage the exercise of the right to collective bargaining on measures to tackle pay discrimination and its adverse impact on the valuation of jobs predominantly carried out by workers of one sex.
- 16) Ensure that, after possible recourse to conciliation, court proceedings for the enforcement of rights and obligations relating to the principle of equal pay are available to all workers who consider themselves wronged by a failure to apply the principle of equal pay. Such proceedings shall be easily accessible to workers and to persons who act on their behalf, even after the end of the employment relationship in which the discrimination is alleged to have occurred.
- 17) Ensure that associations, organisations, equality bodies and workers' representatives or other legal entities which have, in accordance with criteria laid down in national law, a legitimate interest in ensuring equality between men and women, may engage in any administrative procedure or court proceedings regarding an alleged infringement of the rights or obligations relating to the principle of equal pay. They may act on behalf of, or in support of, a worker who is an alleged victim of an infringement of any right or obligation relating to the principle of equal pay, with that person's approval.
- 18) Ensure that, in the case of an infringement of rights or obligations related to the principle of equal pay, competent authorities or national courts may, in accordance with national law, at the request of the claimant and at the expense of the respondent, issue:
 - a. an order to stop the infringement;
 - b. an order to take measures to ensure that the rights or obligations related to the principle of equal pay are applied.
- 19) Where a respondent does not comply with any order issued pursuant to k, ensure that their competent authorities or national courts are able, where appropriate, to issue a recurring penalty payment order, with a view to ensuring compliance.
- 20) Take the appropriate measures, in accordance with their national judicial systems, to ensure that, when workers who consider themselves wronged because the principle of equal pay has not been applied to them establish before a competent authority or national court facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no direct or indirect discrimination in relation to pay.

- 21) In administrative procedures or court proceedings regarding alleged direct or indirect discrimination in relation to pay, where an employer has not implemented the pay transparency obligations set out in this Directive, ensure that it is for the employer to prove that there has been no such discrimination.
 - a. This shall not apply where the employer proves that the infringement of the obligations was manifestly unintentional and of a minor character.
 - b. This shall not apply to criminal proceedings, unless national law provides otherwise.
- 22) Ensure that in proceedings concerning an equal pay claim, competent authorities or national courts are able to order the respondent to disclose any relevant evidence which lies in the respondent's control, in accordance with national law and practice.
- 23) Ensure that competent authorities or national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the equal pay claim.
- 24) Ensure that, when ordering the disclosure of such information, competent authorities or national courts have at their disposal effective measures to protect such information, in accordance with national procedural rules.
- 25) Ensure that national rules applicable to limitation periods for bringing equal pay claims determine when such periods begin to run, the duration thereof and the circumstances under which they may be suspended or interrupted. The limitation periods shall not begin to run before the claimant is aware, or can reasonably be expected to be aware, of an infringement. Member States may decide that limitation periods do not begin to run while the infringement is ongoing or before the end of the employment contract or employment relationship. Such limitation periods shall be no shorter than three years.
 - a. This does not apply to rules on the expiry of claims.
- 26) Ensure that a limitation period is suspended or, depending on national law, interrupted, as soon as a claimant undertakes action by bringing a complaint to the attention of the employer or by instituting proceedings before a court, directly or through the workers' representatives, the labour inspectorate or the equality body.
 - a. This does not apply to rules on the expiry of claims.
- 27) Ensure that, where a respondent is successful in proceedings relating to a pay discrimination claim, national courts can assess, in accordance with national law, whether the unsuccessful claimant had reasonable grounds for bringing the claim and, if so, whether it is appropriate not to require that claimant to pay the costs of the proceedings.
- 28) Lay down the rules on effective, proportionate and dissuasive penalties applicable to infringements of the rights and obligations relating to the principle of equal pay. Member States shall take all measures necessary to ensure that those rules are implemented and shall, without delay, notify the Commission of those rules and of those measures and of any subsequent amendment affecting them.
- 29) Ensure that the penalties referred to in paragraph 1 guarantee a real deterrent effect with regard to infringements of the rights and obligations relating to the principle of equal pay. Those penalties shall include fines, the setting of which shall be based on national law. The penalties shall take into account any relevant aggravating or mitigating factor applicable to the circumstances of the infringement, which may include intersectional discrimination.
- 30) Ensure that specific penalties apply in the case of repeated infringements of the rights and obligations relating to the principle of equal pay.
- 31) Take all measures necessary to ensure that the penalties provided for pursuant to this Article are effectively applied in practice.
- 32) Introduce in the national legal systems such measures as are necessary to protect workers, including workers who are workers' representatives, against dismissal or other adverse treatment by an employer as a reaction to a complaint within the employer's organisation or to any administrative procedure or court proceedings for the purpose of the enforcement of any rights or obligations relating to the principle of equal pay.

- 33) Without prejudice to the competence of labour inspectorates or other bodies that enforce the rights of workers, including the social partners, ensure that the equality bodies shall be competent with regard to matters falling within the scope of this Directive.
- 34) In accordance with national law and practice, take active measures to ensure close cooperation and coordination among the labour inspectorates, the equality bodies and, where applicable, the social partners with regard to the principle of equal pay.
- 35) Provide equality bodies with the adequate resources necessary for effectively carrying out their functions with regard to the respect for the right to equal pay.
- 36) Ensure the consistent and coordinated monitoring of and support for the application of the principle of equal pay and the enforcement of all available remedies.
- 37) Designate a body for the monitoring and support of the implementation of national measures implementing this Directive (monitoring body) and shall make the necessary arrangements for the proper functioning thereof. The monitoring body may be part of an existing body or structure at national level. Member States may designate more than one body for the purpose of awareness-raising and data collection, provided that the monitoring and analysis functions provided for in ee (b), (c), and (e) below are ensured by a central body.
- 38) Ensure that the tasks of the monitoring body include the following:
 - a. raising awareness among public and private undertakings and organisations, the social partners and the public to promote the principle of equal pay and the right to pay transparency, including by addressing intersectional discrimination in relation to equal pay for equal work or work of equal value;
 - b. analysing the causes of the gender pay gap and devising tools to help assess pay inequalities, making use, in particular, of the analytical work and tools of the EIGE;
 - c. collecting data received from employers, and promptly publishing the data, in an easily accessible and user-friendly manner that allows comparison between employers, sectors and regions of the Member State concerned, and ensuring that the data from the previous four years is accessible if available;
 - d. collecting the joint pay assessment reports;
 - e. aggregating data on the number and types of pay discrimination complaints brought before the competent authorities, including equality bodies, and claims brought before the national courts.
- 39) On an annual basis, provide the Commission (Eurostat) with up-to-date national data for the calculation of the gender pay gap in unadjusted form. Those statistics shall be broken down by sex, economic sector, working time (full-time/part-time), economic control (public/private ownership) and age and shall be calculated on an annual basis.
 - a. The data shall be transmitted from 31 January 2028 for reference year 2026.
- 40) Take active measures to ensure that the provisions which they adopt pursuant to this Directive, together with the relevant provisions already in force, are brought by all appropriate means to the attention of the persons concerned throughout their territory.
- 41) Bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 7 June 2026. They shall immediately inform the Commission thereof.
- 42) When informing the Commission, provide it with a summary of the results of an assessment regarding the impact of their transposition measures on workers and employers with fewer than 250 workers and a reference to where such assessment is published.
- 43) When adopting the measures referred to in ii, include a reference to this Directive or attach such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.
- 44) By 7 June 2031, inform the Commission about the implementation of this Directive and its impact in practice.

Article 7 - Powers

- (1) Notwithstanding the right to transparency of pay setting and pay progression policy, Member States may exempt employers with fewer than 50 workers from the obligation related to pay progression.
- (2) When reporting on the pay gap Member States may, as a matter of national law, require employers with fewer than 100 workers to provide information on pay.
- (3) Member States may decide that, where the disclosure of information pursuant to Articles 7, 9 and 10 would lead to the disclosure, either directly or indirectly, of the pay of an identifiable worker, only the workers' representatives, the labour inspectorate or the equality body shall have access to that information. The workers' representatives or the equality body shall advise workers regarding a possible claim under this Directive without disclosing actual pay levels of individual workers performing the same work or work of equal value. For the purposes of monitoring, the information shall be made available without restriction.
- (4) Despite the Directive, Member States may introduce evidential rules which are more favourable to a worker who institutes an administrative procedure or court proceedings regarding an alleged infringement of any of the rights or obligations relating to the principle of equal pay.
- (5) Member States need not apply paragraph 5 (n) to procedures and proceedings in which it is for the competent authority or the national court to investigate the facts of the case.
- (6) Member States shall consider requiring contracting authorities to introduce, as appropriate, penalties and termination conditions ensuring compliance with the principle of equal pay in the performance of public contracts and concessions. Where Member States' authorities act in accordance with Article 38(7), point (a), of Directive 2014/23/EU, Article 57(4), point (a), of Directive 2014/24/EU, or Article 80(1) of Directive 2014/25/EU in conjunction with Article 57(4), point (a), of Directive 2014/24/EU, contracting authorities may exclude or may be required by Member States to exclude any economic operator from participation in a public procurement procedure where they can demonstrate by any appropriate means an infringement of the obligations referred to in paragraph 1 of this Article, related either to a failure to comply with pay transparency obligations or a pay gap of more than 5 % in any category of workers which is not justified by the employer on the basis of objective, gender-neutral criteria. This shall be without prejudice to any other rights or obligations set out in Directive 2014/23/EU, 2014/24/EU or 2014/25/EU.
- (7) On the level of protection, Member States may introduce or maintain provisions that are more favourable to workers than those laid down in this Directive.
- (8) The duties on access to evidence shall not prevent Member States from maintaining or introducing rules which are more favourable to claimants.

PART C – LEGAL AND TECHNICAL PROVISIONS

Article 8 – Interpretation of discrimination

- (1) In this Directive, discrimination includes:
 - (a) harassment and sexual harassment, within the meaning of Article 2(2), point (a), of Directive 2006/54/EC, as well as any less favourable treatment based on a person's rejection of, or submission to, such conduct, when such harassment or treatment relates to or results from the exercise of the rights provided for in this Directive;
 - (b) any instruction to discriminate against persons on grounds of sex;
 - (c) any less favourable treatment related to pregnancy or maternity leave within the meaning of Council Directive 92/85/EEC (24);
 - (d) any less favourable treatment, within the meaning of Directive (EU) 2019/1158 of the European Parliament and of the Council (25), based on sex, including with regard to paternity leave, parental leave or carers' leave;

- (e) intersectional discrimination, which is discrimination based on a combination of sex and any other ground or grounds of discrimination protected under Directive 2000/43/EC or 2000/78/EC.
- (2) Paragraph 1, point (e), shall not entail additional obligations on employers to gather data as referred to in this Directive with regard to protected grounds of discrimination other than sex.

Article 9 – Union-wide guidelines on gender-neutral evaluation and classification systems

Where appropriate, the Commission may update Union-wide guidelines related to gender-neutral job evaluation and classification systems, in consultation with the European Institute for Gender Equality (EIGE).

Article 10 – Level of compensation and reparation

- (1) The compensation or reparation awarded for damage as a result of an infringement of any right or obligation relating to the principle of equal pay shall place the worker who has sustained damage in the position in which that person would have been if he or she had not been discriminated against based on sex or if there had been no infringement of any of the rights or obligations relating to the principle of equal pay. Member States shall ensure that the compensation or reparation includes full recovery of back pay and related bonuses or payments in kind, compensation for lost opportunities, non-material damage, any damage caused by other relevant factors which may include intersectional discrimination, as well as interest on arrears.
- (2) The compensation or reparation shall not be restricted by the fixing of a prior upper limit.

Article 11 - Proof of equal work or work of equal value

- (1) When assessing whether female and male workers are carrying out the same work or work of equal value, the assessment of whether workers are in a comparable situation shall not be limited to situations in which female and male workers work for the same employer, but shall be extended to a single source establishing the pay conditions. A single source shall exist where it stipulates the elements of pay relevant for the comparison of workers.
- (2) The assessment of whether workers are in a comparable situation shall not be limited to workers who are employed at the same time as the worker concerned.
- (3) Where no real comparator can be established, any other evidence may be used to prove alleged pay discrimination, including statistics or a comparison of how a worker would be treated in a comparable situation.

Article 12 - Equal pay in public contracts and concessions

The appropriate measures that Member States take in accordance with Article 30(3) of Directive 2014/23/EU, Article 18(2) of Directive 2014/24/EU and Article 36(2) of Directive 2014/25/EU shall include measures to ensure that, in the performance of public contracts or concessions, economic operators comply with their obligations relating to the principle of equal pay.

Article 13 - Relationship with Directive 2006/54/EC

This Directive shall apply to proceedings concerning any right or obligation relating to the principle of equal pay set out in Article 4 of Directive 2006/54/EC.

Article 14 - Level of protection

The implementation of this Directive shall under no circumstances constitute grounds for reducing the level of protection in the fields covered by this Directive.

Article 15 - Monitoring and awareness raising

By 7 June 2028 and every two years thereafter, Member States shall, in a single submission, provide the Commission with the data on the pay gap, the joint pay assessment reports, and aggregating data on the number and types of pay discrimination complaints brought before the competent authorities, including equality bodies, and claims brought before the national courts.

Article 16 - Collective bargaining and action

This Directive shall not affect in any way the right to negotiate, conclude and enforce collective agreements or to take collective action in accordance with national law or practice

Article 17 - Implementation

Member States may entrust the social partners with the implementation of this Directive in accordance with national law and/or practice with regard to the role of the social partners, provided that Member States take all the necessary steps to ensure that the results sought by this Directive are guaranteed at all times. The implementation tasks entrusted to the social partners may include:

- (a) the development of analytical tools or methodologies as referred to in Article 4(2);
- (b) financial penalties equivalent to fines, provided that they are effective, proportionate and dissuasive.

Article 18 - Reporting and review

By 7 June 2033, the Commission shall submit a report to the European Parliament and to the Council on the implementation of this Directive. The report shall examine, inter alia, the employer thresholds, as well as the 5 % trigger for the joint pay assessment. The Commission shall, if appropriate, propose any legislative amendments that it considers to be necessary on the basis of that report.

Article 19 – Citation

This Directive is DIRECTIVE (EU) 2023/970 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (Text with EEA relevance).

Article 20 - Entry into force and review clause

- (1) This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.
- (2) This Directive shall expire after 10 May 2028, unless it is extended following ex post evaluation.

Article 21 - Addressees

- (1) Part A of this Directive is addressed to EU citizens.
- (2) Part B of the Directive is addressed to the Member States.

- (3) Part C of this Directive is addressed to Member States and EU institutions.
- (4) Nevertheless, the Directive is binding on its entirety.

Done at Strasbourg, 10 May 2023.

For the European Parliament
The President
R. METSOLA

For the Council
The President
J. ROSWALL

ANNEX 1 - DEFINITIONS

In this Directive, the following definitions apply:

- (1) 'indirect discrimination' means the situation in which an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified on the basis of a legitimate aim, and the means of achieving that aim are appropriate and necessary;
- (2) 'labour inspectorate' means the body or bodies responsible, in accordance with national law and/or practice, for control and inspection functions in the labour market, save that, where provided for in national law, the social partners may carry out those functions;
- (3) 'equality body' means the body or bodies designated pursuant to Article 20 of Directive 2006/54/EC;

ANNEX 2 - NOTES

...

The study submits that 'One in, one out' is a tool for less, not better, regulation and legislation, and, as such, it is not a suitable instrument for better law-making.

To achieve effectiveness of legislation, the EU must reform its law-making policy holistically by placing the citizen at the core of its legislative communication. The EP must lead on and defend the citizens' right to better legislation. To put this reform to effect, the JURI Committee must place itself at the centre of deliberations, via a Working Group dedicated to Better Regulation, to assure a constant reflection on better regulation with the support of a network of European academic experts.

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee.

PE 753.421
IP/C/JURI/IC/2023-044

Print ISBN 978-92-848-1085-7 | doi:10.2861/43195 | QA-04-23-875-EN-C
PDF ISBN 978-92-848-1086-4 | doi:10.2861/533172 | QA-04-23-875-EN-N