

Introduction to a Government-based Perspective on Proactive Law

Dag Wiese Schartum

1	Introduction	36
2	Proactive Law	36
3	Proactivity and Predictability	39
4	Proactive Government	40
5	The Problem with Predictability	41
6	Interpreting Legal Rules in a Proactive Context	42
7	Coping with Predictability and Proactivity	43
8	Proactive Analysis of Business Models	46
9	Proactive Customers and Transparency	48
10	Striking the Right Balance	51
	Literature	51

1 Introduction

In this article, I investigate the concept of proactive law. The discussion uses important principles and experiences from the government sector as the starting point. Proactive law is discussed in the context of information access and predictability. Another link to the government sector concerns approaches to the automation of legal decision-making in individual cases and the need to identify, analyse and resolve a range of potential legal problems as part of the development of ICT-based decision-systems. Even though this article first and foremost focuses on questions linked to private business, I also attempt to develop a more general understanding of proactive law.

In section 2, I make a general and initial analysis of the concept of proactive law, concluding with a comprehensive definition that is linked to both risks and opportunities. In section 3, I compare and contrast proactivity and predictability. Predictability is an aspect of several principles in the legal system, for instance with regard to the rule of law and legal protection. Predictability is, for example, one of the arguments in favour of the establishment of comprehensive statutory law. However, although statutory law may contribute to predictability, the drafting of statutes is obviously not sufficient in itself to foresee the future of one's own legal situation, take precautions and be prepared. Notwithstanding this, in section 4, I propose that many important government activities lean towards predictability, preparing the ground for a proactive law approach by both business and citizens.

The fact that I stress the significance of predictability for a proactive legal approach does not imply a full correspondence between the two (cf. section 5). In sections 6 and 7, I address different approaches to the process of studying and interpreting statutory law. In doing so, I emphasise a "chance-driven" approach as one of two approaches of particular relevance in a proactive law context. I go further in section 8 and show how extensive analysis of business activities can be carried out, for instance on the basis of a chance-driven approach. Even business can make use of analysis techniques similar to those employed by the government sector. In section 9, I return to questions concerning predictability, related to activities carried out by a proactive business.

2 Proactive Law

Proactive law refers to a legal approach where a major objective is to avoid being surprised by the legal implications of incidents and situations. In discussing proactive law, I consider situations where proactivity 1) implies the use of legal instruments and/or 2) is motivated by legal concerns. Thus, my notion of proactive law even covers situations where no legal instruments are introduced, but where legal concerns determine measures of a non-judicial nature. For example, *logical* analysis of legislation may be regarded as legal proactivity if the analysis is the result of legal consideration.

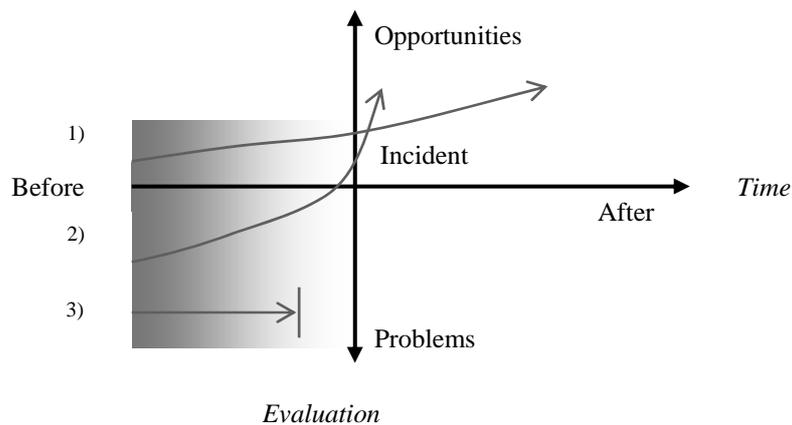


Figure 1: Major aspects of proactivity

My comprehension of proactive law is again based on a twofold perception. That is, proactivity involves both avoiding *problems* and revealing and realising *opportunities*. Furthermore, one might talk about a “preventive” and an “offensive” side to proactivity. As I see it, proactivity addresses two main concerns. While proactive preventive law is concerned with avoiding disasters of various forms and extents, a proactive offensive law responds to future opportunities to successfully attain business goals.¹ Having said that, it is important to emphasise that many developments and situations are neither clearly negative nor positive when considered in advance. Thus, proactivity implies awareness of future legal challenges. Thus, detailed underlying legal problems have to be identified and considered and a range of circumstances evaluated before a conclusion may be drawn. Proactive law deals with a range of situations, from those that must clearly be avoided to those that should obviously be sought.

A proactive approach to law will, in my terms, always imply that one tries to reduce or eliminate problems, and/or exploit opportunities. I have illustrated this in figure 1 with three different examples. In example 1) an opportunity is identified before a decisive point in time (“incident”) and is developed and realised throughout the period. Example 2) illustrates what should probably be regarded as the ultimate in proactivity. Here, a legal problem is identified in advance and transformed into a realised opportunity. The final example 3) illustrates the identification of a problem, which is subsequently eliminated before the critical point is reached (“incident”). Examples 1) and 2) represent offensive proactive approaches, while example 3) may be classified as defensive. The shading in the figure illustrates that proactivity requires effort and action well in advance: the darker the shading, the better the time for action.

Government regulation often constitutes a binding framework for the proactive considerations of businesses, e.g. where statutory law imposes a

¹ Preventive and offensive approaches need not of course be proactive. A *reactive* offensive approach is, for instance, a case where active steps are taken to solve current legal problems, that with a proactive approach, might have been avoided.

proactive approach (see figure 2). This, for instance, is the case where legislation establishes a duty to carry out information security procedures. Another example is the duty to establish internal control procedures, i.e. the duty of businesses to consider the lawfulness of their actions, to introduce appropriate measures and document them. In addition to the proactivity caused by government demands, business goals may obviously also cause proactivity.



Figure 2: Causes of a legal proactive approach

One important business motivation for a legal proactive approach is the avoidance or reduction of the negative effects of regulation, i.e. first and foremost Acts of Parliament and associated regulations. Another motive, on the other hand, may be to maximise the positive effects of legislation.

Proactivity is about addressing and – as far as possible – eliminating uncertainty, both in the sense of avoiding risks and realising opportunities. One important type of risk is that of violating government regulations. Actual opportunities may result from changes that emerge due to changed government regulations, e.g. changes regarding prohibitions and obligations. Thus, proactive businesses should identify and actively consider every relevant

- a) *existing* government regulation, and
- b) ongoing process of *amendment* to existing regulations and *drafting* of new regulations.

Alternative b) above asserts that a proactive business should not await the implementation of formal decisions, but be prepared to become involved at an early stage in the decision-making process. The purpose of acting in this way can be twofold: i) to influence the substantive content of the emerging decision, and ii) to consider the possible consequences of planned amendments and successfully implement changes to meet the future situations. I will however limit the discussion to questions regarding the first situation, i.e. proactive law related to *existing* government regulations.

Success regarding a proactive approach to government regulation relies, to a large extent, on the degree of access to such regulations and relevant

government-held information that interprets and explains legislation. In statutory law, the principle of *publicatio legis*, i.e. that laws should be generally accessible, results in all Acts of Parliament and the regulations pursuant to them being made accessible. In Norway, every identified piece of legislation is available, free of charge, on the Internet from the Lawdata Foundation and through other channels.

However, even the most intelligible statute will contain sub-problems that must be addressed in order to survey the legal contents embodied in the text. Thus, access to the results of legal analysis, made for example by government agencies, may often be of great value in addition to access to the formal legislation itself. For instance, businesses' right to access detailed interpretations and explanations regarding business-relevant legislation from government agencies could obviously constitute an important basis of proactivity. Such thorough analysis is performed as part of the implementation of ICT-based decision-systems in government agencies, or documented in the form of "manuals" and other internal use instructions regarding the application of the law. In a Norwegian context, and I believe in access legislation in many other countries, this type of documentation is not found at the core of access-rights to government-held information. Thus, access to such additional information may require strong arguments in favour, meaning that it is possible, but not certain, that businesses have access to this form of legal insight.

3 Proactivity and Predictability

The legal systems of the Nordic countries are, *inter alia*, characterised by an emphasis on statutory law, i.e. with parliamentary legislation and regulations based on Parliament's delegation of power being the dominating regulatory technique. There are of course several reasons and explanations for such a statutory approach, but this is, to a large extent, founded on the need for *predictability* in law.

Predictability can be split into several sub-elements. However, my point is that the degree of predictability is, to a large extent, the product of intelligibility. In this context, intelligibility may, *inter alia*, be understood to encompass questions of semantics, completeness, syntax, and overall structure. The more intelligible a statutory text is to business, the lower the interpretation and prediction effort needed to take it on. In a perfect world, legislation should make it possible for everyone (business and citizens), while investing as little effort as possible, to foresee what the actual or possible effects of an item of legal regulation will be.

I regard the degree of predictability as a major element, with a decisive influence over businesses' ability to act proactively. Predictability can be seen to imply a certain "division of labour" between government and business, the sum of the effort invested determining the ability to adopt a proactive legal approach. In figure 3, I have sketched two different situations that illustrate the effect of government success/lack of success with regard to predictability (including the intelligibility factor) within a particular area of legislation.

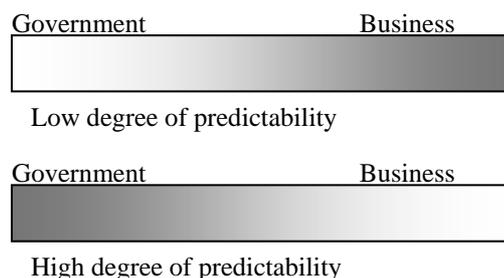


Figure 3: Government's and businesses' effort to create predictability

The simple point I want to illustrate is that legislation with a high degree of predictability results in little proactive effort by business. One important (but insufficient) precondition for successful proactivity within the law is thus intelligible regulations that create predictability. The less government contributes, the greater the effort required by business to interpret, predict and act proactively.

The degree of predictability in legislation is obviously reliant on the legislative technique applied. The more fixed the interpretation of statutes is, the greater the predictability. A high degree of predictability is attained if every element of statutory provisions can only be interpreted in one way, i.e. if legislation is unambiguous. The general point is that absence of vague and discretionary concepts generally prepares the ground for predictability and hence proactivity, with little effort required on the part of business. Maximum predictability implies a “legal dictate”, in the sense that such situations are not open to diverging views regarding what should be regarded as a correct and reasonable interpretation of the legislation. Such cases allow full proactivity in a narrow sense; businesses may explore their detailed legal situations beforehand and act accordingly.

However, most businesses do not always have a vested interest in 100% predictability, as this significantly narrows or even removes their room for manoeuvre in their relationship with government. Thus, from a business perspective, “appropriate” rather than maximum predictability describes the ideal situation for the realisation of legal proactivity. An “appropriate” level of predictability (or, rather, uncertainty) for businesses can generally be described as uncertainty that leaves room for argument in favour of reduced duties and increased rights.

4 Proactive Government

Up to this point, I have described a proactive approach to law as a business objective. However, in my view, proactivity is a basic concern and aim for actors at several levels in society. It may therefore be appropriate to expand the perspective by inviting the reader to consider even government agencies to be

actors for whom it is fruitful, even necessary, to choose and/or give priority to proactivity.

In many cases, we take for granted that government authorities have the ambition to reveal dangers and negative trends in society. A similar assertion probably holds true with respect to opportunities. One generally expects government agencies to identify and foresee opportunities that should be protected or even enforced. Thus, even though people may disagree with regard to the nature and degree of government involvement, many would probably agree that a *proactive policy* by government constitutes an important ideal.

In the Norwegian debate about legislation, one element concerns the difficulty of drafting legislation that can respond to societal and technological developments. The arguments concern both the establishment of new legislation and the amendment of existing legislation. The problem is i) to identify developments that require a legislative response, ii) draft an adequate response, and iii) implement the response in an effective manner.

When policy choices are made, it is generally expected of our legal system that statutory regulations be intelligible and accessible, making it possible for each and every citizen to predict their legal situation, and – possibly – make necessary arrangements. Moreover, government is expected to provide general information regarding legal rights and obligations, and government agencies are expected to have a general legal obligation to provide concrete guidance to citizens in matters that fall under their area of responsibility. In addition, it is a longstanding practise that government agencies produce “handbooks” or internal use instructions regarding how the law should be applied. In section 6, I will discuss an even more extensive and intensive legal analysis of legislation, in connection with the development of ICT-based decision-systems. The point here is to remind the reader that a large part of the machinery of government is geared towards generating detailed legal solutions. The primary aim is obviously to create effective government, but, at the same time, it prepares the ground for proactive businesses and citizens. Thus, with an important modification explained in the next section, proactive actors are in accord with effective government.

5 The Problem with Predictability

To the extent that governments express clear policy goals through legislation, they have an obvious vested interest in making such regulation as effective as possible. The ability to create a predictable legal situation is an important success criterion for effective legislation. I argue that the legal predictability created by government should often be seen as positive, because it makes it easier for businesses to map and analyse their own legal situation and desired future options.

Governments’ objective of creating predictability may encourage the drafting of detailed, coherent and explicit clarification of the legal norms. Compared to more “fragmented” normative methods (e.g. case law), it may be claimed that such a statutory approach better supports the democratic process and improves legal knowledge in society, with a higher degree of compliance being one of the

possible consequences. On the other hand, large and integrated statutory systems result not only in predictability, but also in slowness and inflexibility.

According to the rule of law principle, government is bound by its legislation and statutes may only be amended in compliance with certain procedural rules. This implies that amendments are more time-consuming than they would be without such formal requirements. The more detailed the legislation, the greater the number of legal questions associated with these procedures. This challenge increases if Acts of Parliament and other regulations are elements in an integrated body of legislation. The introduction of direct links between tax law, social security law and other laws may, for example, create interrelationships that render it impossible to change one statutory element without affecting “neighbouring” legislation. Thus, the integration of several complex bodies of legislation may produce interdependencies that create even greater inflexibility than if each piece of legislation had stood alone. Provided that integrated bodies of legislation are thoroughly prepared and intelligible, such integration may be positive for predictability. However, the lack of legislative responsiveness must be regarded as a problem for a proactive law approach.

This reminds us that a proactive law approach is not only about businesses’ ability to follow rules and make the best use of existing regulations. Proactivity may also encompass how to avoid being bound by rules that fail to provide a fruitful and appropriate response to businesses’ needs. I am certainly not thinking about the possible desire to break the law, but rather the possibility that businesses “emigrate” from one legal framework to another, for instance through reorganisation, relocation etc. Detailed legal rules with a high degree of predictability may, in other words, only be regarded as acceptable as long as the richness of detail does not seriously reduce the responsiveness of the legislation in question. However, provided a reasonable capability for amendment exists, a proactive law approach may be supported by the fact that legal regulations are detailed.

6 Interpreting Legal Rules in a Proactive Context

When Parliament adopts legislation, it is left to citizens, businesses and bureaucrats to interpret the statutes and determine how they should be applied. A common approach for business and citizens is to wait until a situation appears where the law applies and then solve each problem on a case-by-case basis. Businesses taking a proactive law perspective may not limit themselves to such a case-by-case method, but may have to address a much broader range of potential legal questions well in advance of situations which trigger the legal rules in question. A fundamental problem is thus deciding how to map and solve such a range of potential legal problems.

In this section, I will outline two related possible courses of action. One of the approaches is inspired by automated decision-making in government agencies. Such decision-making imposes a proactive approach on the system developers. Automated decision-making systems have to contain a representation of “all” (most) solutions to legal questions that fall within the domain of the system.

Thus, every possible type of fact and procedure has to be predefined and described in data models, flow charts, pseudo programming code etc.

Such a comprehensive approach to the interpretation of statutory texts may be viewed as representing an important change in legal reasoning. Traditionally, legal practitioners primarily work in a “case-driven” way, i.e. they identify and resolve legal problems that emerge in specific cases (from courts, their own legal practise or elsewhere). Other problems may be regarded as theoretical and may never be identified and resolved. Obviously, the number of questions a case-based approximation of problems reveals is reliant on the extent and intensity of investigation. However, a reasonable assumption is that the more complex statutory law is, the greater the number of unsolved problems of legal interpretation. Proactivity implies that there should be a low number of unsolved potential interpretation problems. To attain such a high degree of certainty, it may be necessary to shift from a case-driven to a “chance-driven” approach.

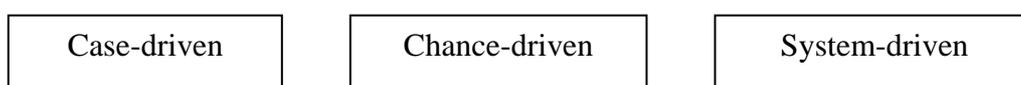


Figure 4: Different approaches to the interpretation of legislation

“Chance-driven” refers to a situation where it is not only specific cases that decide the legal questions to be resolved. The legal problem solving even comprises circumstances linked to potential legal problems or opportunities, e.g. legal issues that, if not dealt with, may have distinct significance for business.

As indicated above, the development and maintenance of computerised decision-systems requires an even more comprehensive approach than the “chance-driven” approach: i.e. they must be based on a “system-driven” and “complete” legal approach. My first point is that the documentation from government agencies’ “wall-to-wall” mapping and resolution of legal problems may well be of great value to businesses applying a “chance-driven” approach within the same area of law.

Of probably greater importance than the possibility of utilising government’s existing results of legal analysis, is the possibility that businesses may make use of techniques first and foremost designed to develop decision-making systems. One choice may be to apply standard methods of data modelling etc. Here, I will limit myself to presenting the highlights of a simpler approach, one designed to make broad analyses of statutory texts (see section 7). In section 8, I illustrate the use of this method with a concrete example.

7 Coping with Predictability and Proactivity

Most lawyers lack the methods required to make extensive or complete surveys of the potential legal problems linked to a particular piece of legislation, cf. the chance-driven and system-driven approaches (above). I will limit myself to presenting a number of basic methods that I consider useful for businesses

applying a chance-based approach to proactivity.² In my view, one important task is to establish general categories that can be beneficial in the identification and analysis of possible legal effects of legislation. Once potential problems are well mapped and described, lawyers should be in a position to resolve them by means of traditional legal methods.

One common characteristic of the following suggestions is that they follow a procedural way of thinking, i.e. I assume that it is often both possible and fruitful to ask what kind of operations should be executed and in what sequence. Here, I will present a number of basic observations on three procedural levels.

At the first level, I propose that legislation may often be regarded as a sequence of three stages before a decision is reached: the resolution of issues related to i) formal conditions of decisions, ii) substantial conditions of decisions, and iii) substantial content of decisions:



Figure 5: Procedural steps in a normal decision-making

“Formal conditions of decisions” designate conditions that must be met in order to start a decision-making process and reach a decision. Typically, this will encompass requirements regarding documentation, signatures, deadlines etc. Without the ability to meet such formal requirements, the decision-making body will never reach a final decision. In other words, it is not allowed/possible to establish the substantial content of decisions before the formal conditions are met.

“Substantial conditions of decisions” are concerned with identifying and resolving questions relating to the characteristics of those cases that fall under the legislation in question. Forms of business organisation (limited company, individual enterprise etc) are one example of a condition used in legislation to determine rights or duties. Other conditions may be whether or not business is “established” in the country in question, or the duty to pay tax may be linked to certain types of procurement etc. The simple point is that such rules trigger further legal consideration. If the party to a case meets the substantial conditions prescribed by law, further assessment of legal content will be made and a decision reached.

The third group of questions relates to determining the actual content of a decision. For example, it is determined that a business meets all the formal and substantial conditions required for it to be eligible for a particular form of industrial government support. The last type of question concerns the legal rules that constitute the basis of the final assessment, i.e. a binding decision. In some

² The following is based on Schartum 2005.

cases, the answer is straight forward, because the legal right or duty is simple and only elementary considerations have to be taken (e.g. poll tax). However, in many cases it is not trivial to move from the settlement of formal and substantial conditions to reaching a final decision. Tax legislation is typically an area of law where questions relating to substantial content of decisions may be very complex.

Within each of the three types of legal questions discussed above, it may often be appropriate to distinguish between i) “static” elements and ii) “dynamic” elements. This constitutes the second of the three levels. Static elements are those that first and foremost represent the facts of the case, while dynamic elements establish how these facts will be used in the course of the decision-making process. In other words, some elements tell us what kind of facts about the “real world” are needed to solve the legal problem at hand, while other elements tell us what kind of operations should be carried out with these facts. If, for instance, I need to map substantial conditions of decisions, the issue may be described by 1) a question regarding the factual basis of the decision, and 2) the type of considerations the facts will be part of. Facts may for example be fed into a process where cumulative conditions are tested.

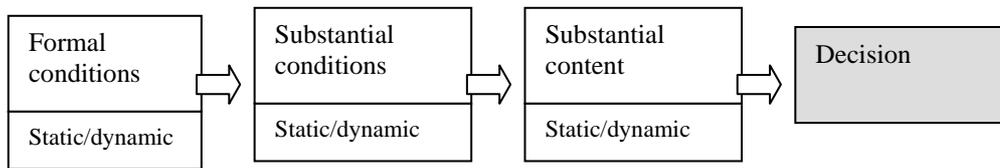


Figure 6: Static and dynamic elements embedded in the stages of decision-making

The third level takes questions regarding static and dynamic elements one step further. The dynamic elements may be divided into the two subcategories of logical and arithmetical operations, i.e. operations that are either based on operators such as (if, and, or, else etc) or mathematical operators (+, -, /, x). The static elements, i.e. the facts determining the case, may be seen as either variable or fixed. Variable elements vary from case to case, according to the characteristics of each case, e.g. form of business organisation, number of employees, profit margin etc. A fixed element is not directly linked to the specifics of each case, e.g. a basic amount used to calculate a benefit.

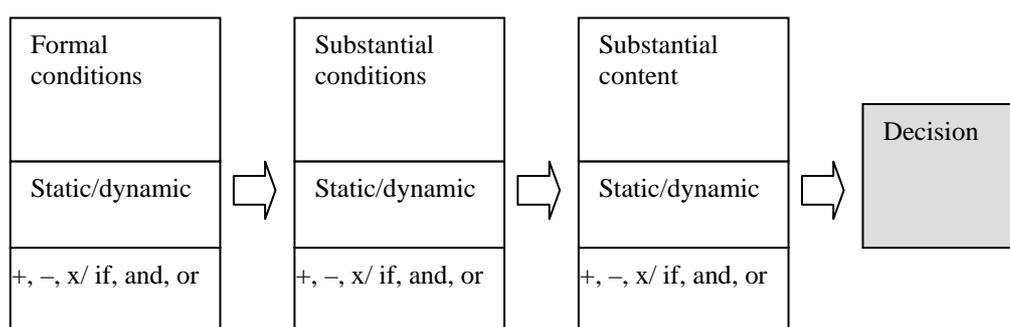


Figure 7: Arithmetic and logic elements embedded in the stages of decision-making

Here, I will go no further into the use of such categorisation. The point here is simply that the ability to categorise legal problems on the three levels I have described above prepares the ground for a semi-formal description and analysis of legal problems. Such description and analysis may be useful for legal proactivity. This can involve comprehensive work, and it is of course unrealistic to expect that businesses carry out such analysis other than in connection with their most crucial legal issues and opportunities. However, such analysis is not only of current interest with regard to government regulations. Among the pressing issues faced by businesses are those related to contractual questions, for instance standard contracts offered to the general public. In the next section, I return to a small example to illustrate how a specific business area may be analysed.

8 Proactive Analysis of Business Models

Several government agencies and private businesses have decades of experience from automated decision-making. Today, new Internet-based government and business models present a challenge that must be addressed in a satisfactory manner as a matter of urgency. The challenge concerns both proactivity and predictability. More specifically, the ability to identify, predefine and resolve the various detailed legal issues linked to new business models, particularly the interaction between citizens/customers and Internet services.

Let us for instance imagine a car rental Internet service. Legally speaking, renting a car represents a fairly simple contract. Car rental over the Internet will most likely be offered on the basis of standard contracts, i.e. on highly standardised contractual terms, offered to a potentially unlimited number of contracting parties. However, although relatively simple, there will always be a rather large number of “hard cases”, which seldom occur, but which should be identified, analysed and resolved in advance, i.e. before contracts are offered (and not when a case occurs). As part of a proactive business approach, I thus claim that there is a need to carry out systematic analysis of the contractual situation before establishing the car rental service. To achieve this, a chance-driven approach can be applied (cf. section 6 above), implying comprehensive analysis of those elements that have a significant positive or negative potential.

Alternatively, the analysis could comprise every legal element concerning car rental contracts that can be identified (system-driven).

Here, I do not go into details regarding how such analysis should be carried out, but limit the discussion to a small example that shows how the three simple procedural stages, outlined in section 7, could be employed to analyse the legal issues related to car rental.

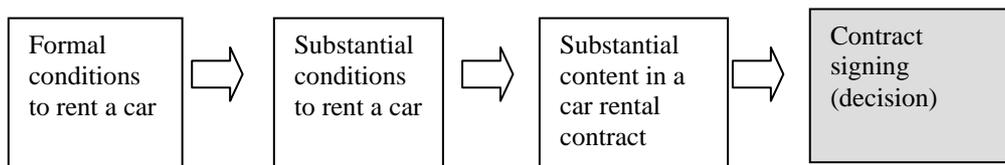


Figure 8: Possible stages of decision-making related to car rental

“Formal conditions of decisions” designate the formal conditions that must be met in order to enter into a contract with a customer. In order to rent a car, formal requirements may comprise the presentation of a valid driving license for the type of vehicle in question, the presentation of an international driving licence, the presentation of valid identification of customer/payer, signature on contract, etc. At this stage, problem identification, analysis and resolution should not only cover “normal” situations. What if the driving licence is issued in a country that is not a party of the Vienna Convention on Road Traffic of 1968? What if a foreign driving licence is issued temporarily? What if a driver with foreign licence is resident in Norway, etc.?

As these examples demonstrate, there may be numerous formal legal conditions linked to a simple contract. Of course, this is not to say that a business always has to address all of them. On the other hand, a proactive business would probably have conducted a broad survey of the potential formal legal questions linked to their contracts and decided which of the issues they should actively deal with up front. Obviously, a car rental company should be aware of most, if not all, the mistakes on their part that could lead to liability, e.g. renting a car to a person with an invalid driving licence.

“Substantial conditions of decisions” in a car rental context include, for example, identifying and resolving questions concerning the attributes of persons who are acceptable as renters of a car. For instance, the person who presents a driving licence must be sober and not under the influence of any drug, the driver must be physically capable of driving the vehicle in question etc. In our example, substantial conditions could also relate to lawful use of the vehicle, for instance with regard to overloading, driving in water etc. Again, more in-depth analysis may be required, for instance regarding the car rental company’s obligation to check and notify the authorities in cases where there is suspicion of drug use. Applying the chance-driven approach, the selection of problems subjected to thorough analysis would in this case be determined by the business’ legal liabilities.

The third group of questions relates to the actual content of the car rental contract, i.e. in the situation where all necessary formal and substantial

conditions have been met. In our example, these elements are first and foremost related to price, payment of deposit, insurance, and any incident and situation that may have a bearing on the settlement of accounts (time, distance, type of payment, damage etc). A chance-driven approach would focus primarily on the most significant events, such as damage (to person or car), loss of car etc. I will not go further with this exercise of illustrating how a car rental business may proceed in order to identify, analyse and resolve problems related to standard contracts, and I refrain from giving examples of how the other aspects described in section 7 may be used.

The main point here is to underline the value and necessity of a systematic approach to identifying and tackling future legal issues, for instance related to a new type of contract offered from a web-site. Which method to apply is obviously not a question with a standard answer, and my sketch is no more than a simple example. There is, however, another important aspect that the car rental example may help me communicate, and this takes me back to a number of basic questions regarding proactivity and predictability. These are addressed in the next section.

9 Proactive Customers and Transparency

Proactivity should be regarded as an objective to which many parties at various levels and in several sectors of society are committed. I have argued that proactivity could be seen as an important objective for government, and this article is based on the premise that a proactive legal approach will often be fruitful, even necessary, for successful businesses. Individuals, in their role as customer or citizen, are of course no exception. They have similar needs to businesses for a proactive approach: their aim being to avoid risks and make the best possible use of their opportunities.

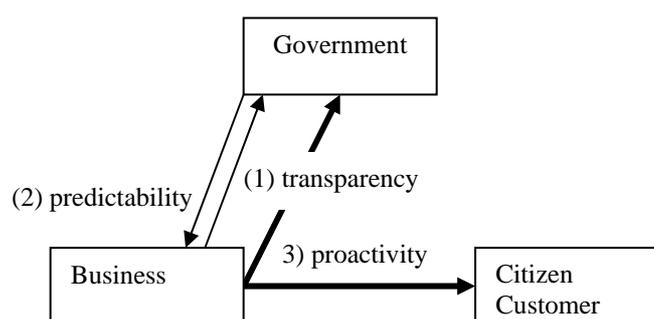


Figure 9: Links between transparency, predictability and proactivity

One of my main points in this article is the significance of predictability. In fact, predictability should, to a large extent, be seen as a precondition for proactivity, and proactivity may be regarded as the ultimate goal for predictability. Furthermore, transparency is a precondition for predictability, meaning that information that makes legal situations predictable is of limited value unless it is

accessible. Viewed generally, we can see a link between transparency, predictability and proactivity (see figure 9). What I want to illustrate here is the coherence, i.e. that the degree of transparency (1) decides the degree of predictability (2), and predictability enables business to be proactive (3) both in relation to government and customers (as well as other businesses). If we accept proactivity as an objective even for individuals' relationships with government and businesses, the arrows in figure 9 could just as well have the "citizen/customer" box as their starting point. If this were the case, a transparency arrow would be directed to the "business box" and the degree of transparency would determine the level of predictability. This would have a decisive influence on customers' ability to act proactively in their dealings with business (and government).

If proactivity is accepted as a general objective even for ordinary customers and citizens, particularly in matters of a legal nature, then this may influence the degree of transparency and predictability on the business side. I will illustrate this point by returning to the car rental example and use a real Internet service as my basis for discussion. The service in question is linked to an airport and customers are introduced to the service via a fairly conventional booking form:

QUESTIONS?

- [How to Use This Page](#)
- [Show me the car types.](#)
- [I have more questions...](#)

IMPORTANT LINKS

- [Credit Card Safety](#)
- [24 hr Customer Care](#)
- [View/Cancel Reservation](#)

Search for Cars in Bergen, NO
Flesland Airport (BGO)

When do you need a car ?

Pickup Date: October 7 Pickup Time: 9AM

Drop-off Date: October 8 Drop-off Time: 9AM

What kind of car ?

Car Types: Economy [Show me the car types.](#)

What company do you prefer ?

Valued National Companies:

Alamo Thrifty Hertz

All Companies:

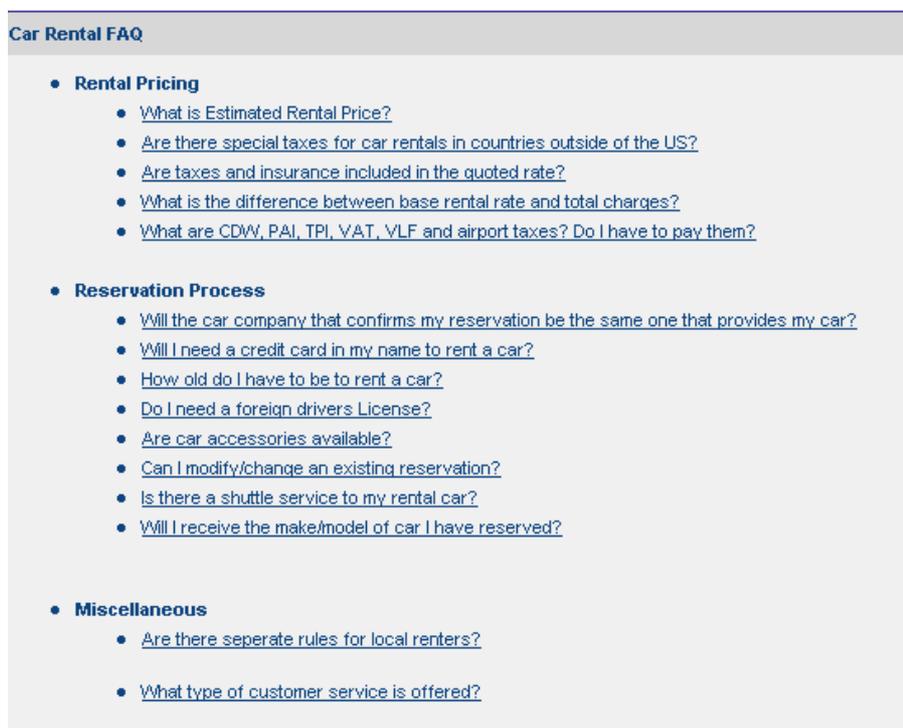
All Available **Search Available Cars**

The first question linked to this Internet based car rental service concerns the degree of contractual transparency as the basis for predictability and proactivity. Below, I have copied the information which is always available to people using this service. It would be an exaggeration to claim that this information makes the conditions for, and contents of, a car rental contract clear to the customers.

Rental Information

- These rates are for renters arriving by airplane who are 25 years of age or older and have a major credit card in their name to secure this rental. Changes in rental or return location, car type, date or times may change this rate.
- Daily rates are quoted for a reservation period of 24 hours. You may be charged an hourly rate for each hour over the 24 hour limit, or you may be charged for an extra day.
- PLEASE NOTE: Due to our reservation volume, the cars listed above may not necessarily be available for rental until you submit the reservation for processing.

However, in the navigation bar on the left side of the booking form, access is given to a series of frequently asked questions (FAQ), which provide more information on specific points relating to the contractual relationship between the car rental business and their customers.



Car Rental FAQ

- **Rental Pricing**
 - [What is Estimated Rental Price?](#)
 - [Are there special taxes for car rentals in countries outside of the US?](#)
 - [Are taxes and insurance included in the quoted rate?](#)
 - [What is the difference between base rental rate and total charges?](#)
 - [What are CDW, PAI, TPI, VAT, VLF and airport taxes? Do I have to pay them?](#)
- **Reservation Process**
 - [Will the car company that confirms my reservation be the same one that provides my car?](#)
 - [Will I need a credit card in my name to rent a car?](#)
 - [How old do I have to be to rent a car?](#)
 - [Do I need a foreign drivers License?](#)
 - [Are car accessories available?](#)
 - [Can I modify/change an existing reservation?](#)
 - [Is there a shuttle service to my rental car?](#)
 - [Will I receive the make/model of car I have reserved?](#)
- **Miscellaneous**
 - [Are there separate rules for local renters?](#)
 - [What type of customer service is offered?](#)

Here, I will not bother the reader with further details from the information in question. From the titles it is possible to identify questions both relating to “formal conditions” and “substantial contents”, cf. section 7. Based on my previous illustration of potential issues in each of the three categories,³ it should however be clear that there are many more questions that could be answered than those classified as “frequent” (FAQ) in this example.

If this particular car rental business has carried out a process of identification, analysis and resolution of legal issues linked to their business area, the question arises as to whether or not the results of this problem-mapping should be used to produce full predictability for customers. In other words, to what extent could a proactive business make use of the results of their legal proactivity to supply customers with information that would make it possible even for customers to be proactive? Obviously, some items of information may be competition-sensitive and thus legitimate to exempt from general access. However, regarding points which have legal consequences to their contractual relationship, it would, in my view, generally be hard to accept the thought of secrecy vis-à-vis customers.

³ I.e. “formal conditions” “substantial conditions” and “substantial contents”.

10 Striking the Right Balance

In my view, a proactive law approach does not present an easy solution to the problem of how best to attain business goals. The primary reason is that, within many fields, proactivity implies significant effort by business in order to clarify complex legal matters in advance of the course of events. At the same time, it is obvious that a significant amount of proactive legal analysis should often be carried out. The problem is, however, striking the right balance between a reactive and a proactive approach. It is possible that risk assessment or more formal risk analysis will help to decide this balance, but, on the other hand, even high quality risk assessments cost time, money and effort.

Several parts of this article have emphasised the significance of predictability for the effort required to adopt a proactive approach. The greater the level of predictability produced on the side of the “regulator” (i.e. both legislation and contracts), the easier it is to understand and adopt the legal rules in question. In my view, this is a strong argument in favour of government giving high priority to producing predictable legislation. Business should, in a similar way, give high priority to creating predictable standard contracts.

Literature

- Barton, Thomas D. and Cooper, James M. *Preventive law and creative problem solving: Multi-dimensional lawyering* “www.preventivelawyer.org/content/pdfs/Multi_dimensional_Lawyer.pdf”.
- Dauer, Edward A. (1998) *Developing Preventive Law: From Lawyering to Quality* “www.abanet.org/log/lpm/bodies/newsarticle11142_body.htm”.
- Schartum, Dag Wiese *Dirt in the Machinery of Government? Legal Challenges Connected to Computerized Case Processing in Public Administration*. International Journal of Law and Information Technology 1995;2:327-354.
- Schartum, Dag Wiese, *Utvikling av beslutningssystemer - Fra lovttekst til programkode*. Oslo: Avdeling for forvaltningsinformatikk 2005. 109 s. Forvaltningsinformatisk notatserie; 1/2005 [“Development of decision-systems – From text of law to programming code”, only in Norwegian].