Smart Regulation in the European Union

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Introduction

Just over a year ago, in September 2009, the proposal made by the European Commission's President Barroso to adopt "smart regulation" (SR) as a new approach to European policy-making, was in general welcomed with interest, even if there were some doubts about whether it was not just "repackaging" of the now well known Better Regulation policy. But since then, discussion has been quite lively, first with the joint DK-NL-UK March 2010 Joint Report suggesting avenues for change, followed by the public consultation organized in May-June by the Commission which elicited a wealth of contributions, many of which contain valuable conceptual content. This year I of Smart Regulation culminates with the publication of the European Commission's "Communication on smart regulation[1]" (COM(2010)543) of 8 October 2010) outlining how it intends "to step up a gear", on the basis that *"better regulation must become smart regulation"* .

There is now little doubt that the quality of the regulatory environment is key to the competitiveness of enterprises, especially small enterprises, their growth and economic performance. Moreover, it is important for attracting foreign investment and it contributes to closing the gap between citizens and the European institutions. The fears of early opponents of better regulation as a disguise of deregulatory practices aiming at destroying the *acquis communautaire* have now been largely dispelled. But that does not automatically confer legitimacy on the new approach.

Specifics of the EU level regulatory policy

Within a book devoted to better regulation (BR) across Europe, it makes sense to supplement national chapters with one on the European (community) level:

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[1] See press release at
http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1296&format=HTML&aged=0&language=EN&guiLanguage=en and the text at:

- there is in Brussels and Luxembourg a complex systemic setup, with a dual legislative power (Council and Parliament), and the specific proposal and executive functions of the Commission, to reflect the variety of the constituency which covers nearly 250 million inhabitants; this scene itself is evolving with the Treaty of Lisbon modifying the inter-institutional balance; this system interacts with the law-making institutions in each of the 27 member states;

- the BR policy primarily concerns the making of EU level policy and law, but it is dependent on the national bodies for implementation. For full practical results, it is necessary that both the European and the national authorities apply the same diligence and agree on what constitutes quality regulation. BR/SR must accommodate that multi-level aspect, within the constraint that administrative coordination to simplify law is not a competence delegated to Brussels by any treaty, and the cooperation works under the principles of open method of coordination, which relies primarily on goodwill.

- the national chapters of this book will have illustrated the variety of national approaches. One of the features of the Better regulation promoted by the Commission is that it is the result of arbitration between the various national concepts, as they vie for recognition in Brussels. The Commission always stresses that action at EU level alone is not enough to achieve smart regulation objectives, because in certain key fields such as company law, taxation and social security, most legislation is national in origin and because member states are primarily responsible for ensuring that EU legislation is properly implemented. The Commission plays a role in centralising information and contributing to the emergence of recognised good practice[2], some countries being credited with significant progress on issues such as administrative burden reduction, There is 'no one size fits all' approach to smart regulation, and it is right that each country define priorities on the basis of available human and institutional capacities.

Scope of this paper

This paper will attempt to answer a few questions

- how successful has better regulation been, and have there been, at the European level, real tangible results in terms of a simpler regulatory environment for business and citizens. There is plenty of criticism that the European Commission is still as bureaucratic as before, and that EU law has not moved to any perceptible degree of added clarity. More than half of the total burden of red tape, however, still comes from national legislation, so can the EU be held responsible.

- the new approach: how necessary, how appropriate to the challenges of improving the quality of regulation?

- how realistic are the proposed changes, given the track record of BR initiatives, and what are the chances of SR achieving more than BR?

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[2] Chiefly in the High Level Group of Better Regulation Experts (see
http://ec.europa.eu/governance/better_regulation/ms_action_en.htm#_hlg

1. HOW SUCCESSFUL HAS BETTER REGULATION BEEN?

Before examining the nature and prospects of smart regulation, it is necessary to take stock of what better regulation is or was.

1.1. The early history of better regulation in the EU institutions

The European Commission, though a great producer of norms, did not immediately endorse the principles of regulatory quality as they are now understood. The predominantly legal machinery was however traditionally concerned with "quality of legislation", in a narrower, legal way, in much the same way as its member states, especially those belonging to the area of continental law.

Efforts to improve the regulatory environment were engaged in the early 1980's. Simplification was for instance seen in 1985 as a prerequisite for the completion of the Single Market. The Edinburgh European Council of 1992 made the task of simplifying and improving the regulatory environment one the Community's main priorities.

In 1993, the Maastricht Treaty gave new prominence to the principles of subsidiarity and proportionality and an annual report from the Commission to the European Council on better law-making was introduced to monitor developments (Declaration 39 on the quality of the drafting of Community legislation, annexed to the Final Act of the Amsterdam Treaty, 1997).

In 2000 the Union set itself a new goal for the decade: to prepare the transition to a competitive, dynamic and knowledge-based economy. As part of what became known as the Lisbon strategy, the European Council asked the Commission, the Council and the Member States - each in accordance with their respective powers - " to simplify the regulatory environment, including the performance of public administration. The SLIM programme (Simpler Legislation for the Internal Market), which had been operating since 1997, was extended and proposed a number of sectors for simplification. See SEC(2001)575 for the methodology.

Successive summits in Lisbon (March 2000), Stockholm (March 2001), Gothenburg (June 2001), Laeken (Dec. 2001) and Barcelona (March 2002), gave the Commission a renewed mandate to develop "a strategy for further coordinated action to simplify the regulatory environment". In its White Paper on European Governance (July 2001), the Commission committed itself to action on improving the quality of EU legislation.

The white paper on European governance (COM(2001) 428 final) sought " to reform European governance in order to bring citizens closer to the European institutions", and included a detailed list of initiatives on Better Regulation.

In parallel, the Member States decided to set up a High Level Consultative Group chaired by a senior French civil servant, Mr Dieudonné Mandelkern, which released its final report in November 2001.

The Mandelkern-Report identified six main aspects of a successful better regulation programme:

- Policy implementation options;
- Regulatory impact assessment of new measures;
- Consultation;
- Simplification of existing legislation;
- Access to regulation; and
- Effective structures and a culture of better regulation

As a first follow-up to the Governance White Paper, the Prodi Commission adopted in June 2002 an Action Plan for Better Regulation. The plan identified 16 measures for improvements at various stages of the legislative cycle, from early policy conception to implementation.

From 2003, the Commission has progressively introduced a system where each major policy initiative must include:

- a consultation with stakeholders

- an analysis of the measure's expected impact

- a justification of action at EU level in accordance with the principles of subsidiarity and proportionality

1.2.   Better Regulation in the Commission since Mandelkern

To assure the success of Better Regulation and to strengthen these initiatives, the Commission presented in June 2002, a series of measures in the field of Better Regulation (COM (2002)278 final). A further Communication in 2003 (COM/2003/0071 Final) was aimed at streamlining and simplifying the regulatory environment by reducing the volume of existing European Union legislation and presenting the *acquis communautaire* in a more 'user-friendly' way.

The 2005 reform of Better Regulation. Up till then, the exercise had remained primarily a technical and bureaucratic exercise and actual deliverables were few. The Barroso Commission therefore decided in 2005 to incorporate Better Regulation in the revitalised Lisbon strategy recognizing the wider benefits of this exercise for the EU's economy and society as a whole, and take practical steps (March 2005, Communication on Better regulation, jobs and growth). The focus was on improving European and national regulation in order to better stimulate European competitiveness, without jeopardising the EU's global approach to better regulation. That was also the time when the Commission first mentioned its intention to reduce administrative burdens, the first step being to launch a pilot phase to test methodology and develop a common EU approach.

From then on, the Commission has pursued its Better Regulation strategy through three main lines of action i.e. the simplification rolling programme, the Action Programme for reducing administrative burdens and the impact assessment system.

1.3.   Better Regulation in the other EU institutions

Though the Commission has probably taken the most initiatives, the other EU institutions have been far from inactive.

- With codification, recasting, self-regulation, co-regulation, impact assessments, consultations etc., the European institutions have at their disposal a wide range of tools for improving and simplifying Community legislation. The 2003 Interinstitutional Agreement delineates how they work together to improve the law-making process.

- the European Council takes stock every six months on progress made and encourages/invites the Commission to pursue its action, with specific recommendations. The rotating presidency generally drafted a programme for their six-month term (example Sweden). The latest conclusions are posted on the Council's site, following approval at the 3 December 2009 meeting. Excerpts from Council Conclusions from 2005 to 2009 show this institution's contribution to the progress achieved;

- the European Economic and Social Council[3] and the Committee of the Regions[4] are increasingly involved in current discussions and events related to Better Regulation/ Smart Regulation and are cooperating or working towards cooperation with a number of NGO's and think tanks. They have published interesting "opinions", for instance "The proactive law approach: a further step towards better regulation at EU level" (December 2008).

Assessment: the practical commitment of the other EU institutions remains limited. The regular call by the Commission (the last being in the October Communication) for the European Parliament and Council to do impact assessments on substantive amendments to Commission proposals has not had much influence in spite of the commitment in the 2003 Interinstitutional Agreement.

The Court of Auditors' report has shown that users in both institutions considered impact assessments to be helpful when discussing Commission proposals even if they were rarely used formally in meetings. For EU law to be smarter, Parliamentary committees and Council formations should consider impact assessments as part of their discussions.

2. THE MAIN TOOLS OF BETTER REGULATION IN THE COMMISSION

Historically, the "tools" of BR were developed separately; it is only recently that their integration into one strategy is being actively pursued. This is why they are here presented in order of their appearance, at least for simplification, impact assessment and administrative burden reduction.

2.1. Simplification

Until the beginning of this Commission, simplification was primarily an issue of accessibility or legibility of EU legislation. The move to BR sought to produce benefits for market operators and citizens and thus enhance the competitiveness of the European economy. It is geared to stimulate innovation and reduce administrative burdens stemming from regulatory requirements as well as to move towards more flexible regulatory approaches and to bring about a change in the regulatory culture.

Due to the nature of the EU legislative process, notably the negotiation of necessary compromises within and between the Council and the Parliament, European texts are not always as consistent and coherent as they should be. Such inconsistencies can lead to divergent interpretations amongst Member States and lack of clarity for operators. With time, certain areas of legislation have become real legislative mazes. The area of "Waste" is a "good" example of how legislation has piled up over the last 30 years.

Individually, each of these acts – at time of adoption - was no doubt designed to offer an efficient regulatory framework. But, taken together, these rules no longer represent a consistent, effective and lean regulatory environment.

- In October 2005, following Commission communication 'Better Regulation for Growth and Jobs in the EU', the Commission launched a new phase for the simplification of existing EU law by setting out a **rolling programme,** initially covering the years 2005-2008 (based on the Commission's 2002 Action Plan for simplifying and improving the regulatory environment).

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3   Opinion of the Section for Single Market, Production and Consumption of the EESC, 8 July 2010, INT 489: http://www.eesc.europa.eu/?i=portal.en.int-section

4   Opinion of the Committee of the Regions on the Better Regulation Package 2007/2008, 3-4 December 2009, CdR 199/2009: https://toad.cor.europa.eu/corwipdetail.aspx?folderpath=CONST-IV/023&id=20354

This programme draws extensively on stakeholder input and focuses on sectoral simplification needs. It initially listed some 100 initiatives affecting about 220 basic legislative acts, to be reviewed over the following three years.

- In January 2009 the Commission presented its Third Strategic Review on Better Regulation and updated its simplification rolling programme (cf. "Third progress report on the strategy for simplifying the regulatory environment" - annex 7).

- The Simplification rolling programme currently covers 185 measures of which the Commission has already adopted 132. During 2009, 33 initiatives are foreseen to be adopted. Some of these initiatives are entirely new (22) and cover policy areas such as state aid, accountancy law, enforcement of court judgements in civil and commercial matters and late payments in commercial transactions.

The previous Commission put in place two exercises to improve existing legislation. First, the Simplification Programme has brought substantial benefits to citizens and businesses[5]. [*154*] proposals have been adopted, and the 2010 update of the programme includes 46 new initiatives.

The Commission also reports on a monthly basis on what has been achieved and what is planned as regard these initiatives. See: execution report and forward programming.

In parallel, the Commission is also **codifying** the existing EU legislation *(acquis)*, bringing the basic law and subsequent amendments into one text. This makes laws clearer and reduces the volume of legislation. By the end of 2008, the Commission had codified 227 acts. Of these, 142 acts have already been adopted and published in the EU Official Journal.

By simplifying and codifying legislation, the Commission has claims to have **reduced the *acquis* by almost 10%** since 2005 - about 1 300 legal acts and 7 800 pages of the Official Journal have been removed from the Community statute book.

2.2. Impact Assessment

Impact Assessment is one of the cornerstones of the European Commission's Better Regulation policy aimed at improving and simplifying new and existing legislation. More than the many simplification projects, the introduction in 2002 of IA indicated that the better regulation agenda was being pursued in the Commission. Its purpose is to contribute to the decision-making processes by systematically collecting and analysing information on planned interventions and estimating their likely impact. What is specific about impact assessment as part of the EU BR strategy and how effective has it been?

2.2.1. *Main traits of IA in the Commission*

The Commission impact assessment follows an "integrated" approach. It replaces the previous single-sector type assessments and assesses the potential impacts of new legislation or policy proposals in **economic** (including competitiveness), **social,** and **environmental** fields.

It consists of a **balanced** appraisal of all impacts, and is underpinned by the principle of proportionate analysis, whereby the depth and scope of an impact assessment, and hence the resources allocated to it, are **proportionate** to the expected nature of the proposal and its likely impacts.

RIA is well integrated into the policy-making cycle. As a general rule, all major policy initiatives and legislative proposals on the Commission's **Annual Legislative and Work Programme (CLWP)** are required to undergo an impact assessment. Some other proposals, which do not feature in the CLWP (including implementing measures going through the "comitology" procedure) but which potentially

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[5]   http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0017:FIN:en:PDF

have significant impacts, may also require an impact assessment. The precise scope of application is decided on an annual basis.

Communication around the RIAs is well organised. The development of new policy is announced once a year, and each projected new item of legislation is developed in a "**roadmap**", published online, which gives a broad indication of the main areas to be assessed and the planning of subsequent impact analyses. The impact assessment reports and the opinions of the Impact Assessment Board (IAB) are published once the Commission has adopted the corresponding legislative initiative on the Impact Assessment website.

Methodology. Much attention has been devoted to perfecting and generalising a good working method to develop RIAs. Guidelines giving general guidance to the Commission services set out the procedures and steps for assessment of potential impacts of different policy options.

Improvements were introduced in revised Guidelines in 2009, following a broad public consultation, on the basis of an external evaluation, the experience of the Impact Assessment Board and the practice by Commission services.

 IA is by necessity an "inter-institutional" issue. The three institutions (Parliament, Council and the Commission) must work together to produce EU law; in late 2005, they agreed on the 'Common approach to impact assessment' as an addition to the 2003 Inter-Institutional Agreement on Better Lawmaking. The 'common approach' consists of a set of **'traffic rules'** that the institutions will follow in relation to the preparation and use of impact assessments in the legislative process. The Commission's initial impact assessment on its proposal is supposed to be the basis for any subsequent impact assessment work that the other EU institutions may carry out when they make substantive amendments to the Commission's proposal. This principle has not been consistently been implemented.

Strong central quality control: in order to strengthen quality control of impact assessment, the Commission created an internal quality control function in November 2006. The **Impact Assessment Board** (IAB) comprises high-level officials from Commission departments, who are designated on a personal basis. Since 2006, it has produced over 400 opinions which are available to the public. It is supposed to derive some independence from the fact that it is placed under the direct authority of the President of the Commission.

There is talk about giving this function to a truly independent, external body, and to amalgamate the function with that of adviser to the Commission on administrative burden reduction, but for the moment, the Commission is satisfied with current arrangements, and points out that it is upholding its part in the Interinstitutional approach, contrary to the other institutions, that have never truly engaged in measuring impacts. As noted by the ECA in their September 2010 report, IAs are not updated during the legislative procedure as amendments are proposed. Once the initial Commission proposal is amended, neither the Commission, nor the European Parliament or the Council systematically analyse the impact of those amendments. Therefore, the estimated impacts of the final legislative act are not known.

With the definition of smart regulation under way, the IAB contributed its own analysis to how it viewed improvements, in its report for 2009 (SEC(2009)1728 final, dated 29/01/2010):

> - transparency should be improved by the publication of a list of planned IAs starting in 2010;
>
> - improved follow-up of IAB opinions;
>
> - more standardised format for executive summaries.

The assessment of new legislation will consistently seek to address the widest possible range of impacts, with a newly confirmed emphasis on social impacts. This work will be supported by the new guidelines issued by DGs SANCO and EMPL.

2.2.2. *A critical assessment*

IA is truly a centerpiece within the Commission policy making system. IAs are carried out systematically, and are notorious for their length and technicity. The summary, which has recently started to be published at the same time as the full length report, now makes for easier reading.

Any assessment of the scheme should take on board the report of the European Court of Auditors " Impact assessments in the EU institutions: do they support decision making?" which was published on 28 September 2010. This report identifies a number of weaknesses with regard to the Commission's procedures:

- the Commission did not indicate which initiatives are to undergo an IA in advance and also did not motivate why for certain proposals no IA is carried out. There were problems with quantifying and monetising impacts, due to the availability of data.

- Consultation with stakeholder s was used widely for initial input but not carried out on draft IA reports;

- the IAB was found to contribute to the quality of IAs especially when its review took place early enough in the process (in some cases, quality review took place too late to have an effect on the final draft). In addition, the IAB's mandate is not sufficiently strong when it comes to requesting that DGs undertake IAs."

Overall, the evaluation is very positive, as underlined by the Commission in COM(2010)543. In that Communication, the Commission stresses recent improvements (such as the requirement that in principle a positive opinion from the IAB is needed before a proposal can be put forward for Commission decision,[6] and rejects the suggestion of an external body to control the quality of IA.

2.3. Reduction of administrative burdens[7]

Regulations and laws frequently entail costs for those who must comply. Some costs are linked to legal obligations to provide information either to public or private parties (" **administrative costs")**.

The Commission introduced in 2006 a distinction between **administrative costs** and **administrative burdens**: the latter designate costs specifically linked to information that businesses would not collect and provide in the absence of a legal obligation, and that therefore impinge on the companies' competitiveness.

Under the personal impulse of Vice-President Verheugen, a major programme to cut red tape was implemented from 2007 to 2009, using an adapted version of the Standard Cost Model.[8]

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[6] C(2010) 1100 "The Working Methods of the Commission 2010-2014".

[7] http://ec.europa.eu/governance/better_regulation/admin_costs_en.htm

[8] An operational manual for applying the EU model has been integrated in the Commission's **Impact Assessment Guidelines**.

Nevertheless, the EU approach to better regulation needs to take into account the overall benefits and costs of EU rules. Information requirements are sometimes necessary, for example, in ensuring consumer, health and environmental protection. It is a question of ensuring a **proper balance** where administrative burdens are proportionate to the benefits they bring.

In January 2007, the Commission presented a programme **for measuring administrative costs** arising from legislation in the EU and reducing administrative burdens by 25% by 2012. In March 2007, the European Council endorsed this **Action Programme for Reducing Administrative Burdens** and invited the Commission to launch it with the assistance of the Member States. The European Council also invited Member States to set their own national targets of comparable ambition within their spheres of competence by 2008. The reduction programme is based on an extensive measurement exercise which focuses on a list of legislative and executive acts in 13 priority areas.

In the meantime, the Commission proposed and/or adopted concrete reduction measures for immediate action. In spring 2007, it adopted 10 such fast-track initiatives and more are planned to follow.

In November 2007, the Commission set up a **high level expert group on the reduction of administrative burdens, chaired by Mr Edmund Stoiber, former minister president of Bavaria,** to advise it on the implementation of the Action Programme. The group's mandate was extended and expanded in 2010.

The 15 members of the Group have firsthand experience in Better Regulation and cover the 13 policy areas in which administrative costs are being measured. The group includes the leaders of several bodies charged with fighting red tape at Member State level, representatives from the industry, small and medium sized entreprises (SMEs), trade unions as well as environmental and consumer organisations.

The outcome of the Administrative Burden Reduction Programme were presented in COM(2009)544 [9] (October 2009) which listed around 100 red tape cutting initiatives of the Commission either adopted or under way, in 13 "sectoral reduction plans" offering a total reduction potential in excess of the 25% target, provided all measures become effective. In this communication, the Commission claimed that the Action Programme for Reducing Administrative Burdens[10] was on track to exceed its target of cutting red tape by 25% by 2012. The Commission had tabled proposals which, if adopted, would generate annual savings of EUR 38 billion for European companies out of a total estimated burden of EUR 124 billion – a reduction of 31%. The European Parliament and Council recently approved a proposal concerning value-added tax which will bring about EUR 18.4 billion of these savings and are discussing another proposal to allow over 5 million micro-enterprises to be exempted from EU accounting rules.

Some remaining challenges:

> - enactment of Commission proposals into EU law via the legislative procedure: this requires that the Commission support the proposals in discussions in European Parliament and Council;

> - identification of further reduction possibilities to cover the risk that some important proposal does not make it into EU law.

To keep up the pace in reducing red tape, in order to reach the -25% target by 2012, it is reasonable to expect that all services will account each year for progress in reducing AB and simplifying compliance with EU rules.

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[9]   http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0544:FIN:EN:PDF
[10] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0023:EN:NOT

2.4.   Consultation

For years, the Commission did not appear as a particularly transparent institution, and the blame for the complexity and obscurity of EU law was often imputed to its bureaucratic love of discretion and secrecy. Times have changed, and observers, at least Brussels based one, agree that much progress has been made, and that they are even threatened by consultation overload. On the other side, DGs complain that stakeholders do not trouble to file appropriate feedback.

One of the significant improvements brought about a Commission level by the BR agenda is therefore the systematic approach to consultation. It is a reality that the Commission is in constant touch with external parties when elaborating its policies. These include all those who wish to participate in consultations run by the Commission, such as market operators, NGOs, individual citizens, representatives of regional and local authorities, civil society organisations, academics and technical experts or interested parties in third countries. Consultation itself can be a subject discussed with stakehoders, as in DG SANCO's "Heathy Democracy" exercise in 2007.

The dialogue between the Commission and interested parties takes many forms, and methods for consultation and dialogue are adapted to different policy fields. The Commission consults through consultation papers (Green and White Papers), communications, advisory committees, expert groups, workshops and forums. Online consultation is commonly used. Moreover, the Commission may organise ad hoc meetings and open hearings. Often, a consultation is a combination of different tools and takes place in several phases during the preparation of a policy proposal.

 The initiative to launch a consultation is generally taken by the responsible directorate-general, but the consultation mechanisms must respect a common framework. In 2002 the Commission set out principles and minimum standards for consulting external parties. According to these standards attention needs to be paid to providing clear consultation documents, consulting all relevant target groups, leaving sufficient time for participation, publishing results and providing feedback.

These consultation standards apply in particular at the policy-shaping phase to major proposals before decisions are taken. In particular, they apply to proposals in the impact assessment process which are included in the Commission's Annual Legislative and Work Programme.   Reporting on the Commission's consultation of interested parties is also included in the Better Lawmaking Annual Reports.

The practice of consultation is now well embedded in Commission culture, and is made efficient by the organisation of stakeholders, very numerous to be represented in Brussels. A recent example is the consultation about Smart Regulation, which attracted 79 responses.

2.5.   Other dimensions of Better Regulation

2.5.1.   Implementation of EU law

In principle, the timely and correct implementation of EU law by the Member States ensures that the results intended by EU policy are attained. Late or incorrect implementation can deprive businesses and citizens of their rights. The Commission monitors the transposition of directives by way of the "correlation tables", and verifies respect of EU law more generally (regulations, decisions and EC Treaty rules) in its famous role of "guardian of the Treaties". It examines complaints of breaches of EU law, initiates infringement procedures when necessary and reports on these tasks.

One of the problem arises is that of "gold-plating". When EU directives are transposed, Member States do not always resist the temptation to introduce, in good faith, additional clauses to ensure smooth implementation of easier control: that is what is called "gold plating", one of the main sources of red tape and extra burdens for the business community. Few agree on the exact impact of this

practice, though there have been attempts from the Commission, and certain member states, to estimate it.

While Member States are primarily responsible for transposition of directives, the Commission has put in place a number of measures to help[11]. These include 'preventive action' - paying greater attention to implementation and enforcement in impact assessments when designing new legislation[12]; support to Member States during implementation to anticipate problems and avoid infringement proceedings later on; transposition workshops for new directives such as for regulated professions, insurance, banking, accounting and auditing; and guidelines to help Member States implement new legislation such as for REACH. It is also improving enforcement by prioritising and accelerating infringement proceedings. The Commission produces Annual Reports on the application of EU law which deal with these issues[13].

Monitoring of the transposition process relies on the **correlation tables** provided by the Member States, showing the link between the provisions in directives and national rules. The Commission increasingly includes in its proposals for directives the requirement of the Member States to provide these tables.

The Commission reports regularly on the application of the EU law. In addition to annual reports, the Commission publishes regular information on transposition of directives and progress in notification of national measures implementing them. These data are available on a Commission website on Europa.

Assessment. Although directives allow for compromise and take the national situation better into account, compared to regulations they often open the way for the practice of "gold plating"; so do the options and opt-outs provided in the text of the directive itself. There is nothing illegitimate in the slow progress towards harmonization, with national specifics continuing to enjoy recognition. However, BR policy pursues greater transparency and effectiveness, and substantive political objectives must not generate excessive complexity and unnecessary burdens. That is why the Commission devotes much time and resources to check the transposition and implementation of EU law, and provide member states with a comparative view of how the common texts are being applied..

3.   THE INSPIRATION FOR THE SHIFT TO SMART REGULATION

In this section, we will examine the new approach as it has unfolded in the past year, to try to ascertain how necessary it was, given the evolution of better regulation, and how appropriate it is likely to be to tackle the challenges of improving the quality of regulation.

3.1.   The political context

At the autumn of 2009, several key political milestones opened the opportunity for a re-think of the pre-eminence of Better Regulation as an all encompassing strategic instrument:

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[11]   COM (2007) 502:
       http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0502:FIN:EN:HTML
[12]   See the Impact Assessment Guidelines, pp. 42 – 43:
       http://ec.europa.eu/governance/impact/commission_guidelines/commission_guidelines_en.htm
[13]   http://ec.europa.eu/community_law/infringements/infringements_annual_report_en.htm

- the end of the Barroso Commission, and the need for the president to update his political programme, in this context, there was a specific need to find a "successor" to the Lisbon strategy for growth and jobs;

- a new legislature of the European Parliament,

- the entry into force of the new Lisbon Treaty with changes appearing in the distribution of powers between EU institutions in the law making process.

It is too early to say in any detail how the policy will evolve but change is in the air, to judge by Mr Barroso's political guidelines for his next mandate. Smart regulation, a "successor", more advanced, type of better regulation, would contribute to "sound markets in the EU and at global level". It would "protect the consumer, deliver effectively on public policy objectives without strangling economic operators such as SMEs or unduly restricting their ability to compete". Practical steps would include a major review of existing legislation, to remove "bureaucratic processes and unnecessary centralisation" and extended use of impact assessment.

3.2.   How smart regulation is being defined

3.2.1.   The founding document

In September 2009, President Barroso published his political guidelines for his second mandate. Among other political signals, this document offers a kind of "chart" of smart regulation; it was the first time the concept was put forward in the Commission, and as such must be read carefully. Here are the main points (our summary):

- "we need to continue building the framework of social, environmental and technical regulation that make markets work for people";

- "rules must ensure transparency, fair play and ethical behaviour of economic actors, taking due account of the public interest;".

- "Smart regulation should protect the consumer; deliver effectively on public policy objectives without strangling economic operators such as SMEs or unduly restricting their ability to compete;"

-"The ex ante assessment of the first Commission must be matched with an equivalent effort in ex post evaluation, to guarantee efficient policy implementation, "removing bureaucratic processes and unnecessary centralisation.""

3.2.2.   Keeping in touch with the business community

On 15April 2010, the president of the Commission made a statement commending the work of the High Level Group of independent stakeholders, chaired by Mr. Edmund Stoiber, and announced an expanded mandate for that advisory group. Simplification, monitoring Commission proposals through the legislative process and efficient national implementation of EU law are among the new topics on which Mr Barroso expects the stakeholders to support the continued drive to cut bureaucracy and red tape. The membership of this advisory body, which may be adjusted to fit the new mandate, comprises the heads of three national regulatory watchdogs and a number of stakeholder representatives (business organisations, trade unions, consumers, etc). The Commission has asked the High Level Group of Independent Stakeholders to present a report by November 2011 on best practices of Member States in implementing EU legislation in the least burdensome way.

Though this may not look very significant to external observers, the renewal of this consultative group does carry meaning:

- there is to be a continuity between the Cutting Red Tape agenda of Barroso I and Smart Regulation in Barroso II; the business agenda inherent to BR will not be abandoned;

- the experience of using a high level consultative body to supervise DG activities was judged positive and sufficiently productive to be extended.

3.2.3. Downplaying Better Regulation in "EU2020"

For 10 years, better regulation has been one of the main tools to support the Lisbon strategy for growth and jobs. With EU 2020 strategy [14] designed as a successor to the current Lisbon strategy, what is going to happen to the BR agenda in the next decade?

The landmark communication dated 3 March outlines "a strategy for smart, sustainable and inclusive growth", and member states reached an agreement on that basis enclosed in the 25-26 March conclusions.

These documents do not include any specific reference to the quality of regulation, but take a more economic approach. The improvement of EU law will however continue to be one of the tools to bring about growth and jobs, with a special effort dedicated to the removal of "bottlenecks", some of which are of a regulatory nature.

The Monti report on a new strategy to "relaunch" the single market (May 2010) which relies on improved rules for the integration and functioning of markets, which is "applied BR" and the removal of "bottlenecks". The section on "regulating the internal market, ma non troppo" offers an update on the use of legal acts to harmonize markets, and related challenges (pages 93 to 103).

But how does SR come into the equation for delivering on EU2020 headline targets? A first provisional answer can be found in the operational guidance given by the Commission to Member States on the implementation of the strategy and more specifically on the governance, tools and policy cycle of the strategy. There is to be a new governance cycle for planning and delivering the objectives of the Strategy. A key new element of the governance of the Europe 2020 Strategy is the introduction of a "European Semester" starting in January 2011. But SR is not mentioned. It may be that issues of how the legal corpus is organised and published is not viewed as likely to generate general interest of the European public. Now that the "pro-business" component has been toned down, red tape reduction is less the flavour of the day.

3.3. Other possible ingredients for Smart Regulation

Though its power of proposal it a prime mover in initiating such policy moves, the Commission needs to be sensitive to wider trends in the political context. Member States are vying to influence the course of affairs, and this can be seen both in the international for in individual or collective member state initiatives.

3.3.1. Evolution of common positions in Council and other fora

The future evolution of regulatory quality will naturally be influenced by new guidance or requests received from the European Council and its committees. Two committees regularly address this issue. Here are their most recent pronouncements:

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[14]   http://ec.europa.eu/eu2020/index_en.htm

The Council conclusions adopted at the 3-4 December 2009 Competitiveness Council: Member States call for "new instruments and better use of e-government in the better regulation work", and taking into account compliance costs and perceptions of the effects of regulatory requirements.

At its 16 February 2010 meeting, the Economic and Financial committee (**ECOFIN**) adopted conclusions which commend "smart regulation initiatives" and call for further work in support of the internal market[15].

In the European Parliament, there have not yet been may "tests" of the commitment to regulatory quality, but a recent decision (16 June) on food labelling was hailed as a simplification of food labelling rules, and welcomed by industry as a rare case where administrative burdens had been considered during the discussion.

One trend is to reduce the intervention at EU level, leaving member states free to introduce the extra requirements they may feel are necessary. A recent example is the March Commission position on genetically modified organisms.

3.3.2. *Conceptual contributions from leading MS (UK, NL, DK)*

The Joint Report can be viewed as the reaction of a group of like minded MS, generally considered to the main initiators or guardians of BR, to the announcement of an evolution of the doctrine, and even an attempt to correct possible unwelcome effects of a new concept still in the making.

The three MS view President Barroso's proposal as "a new approach to European policy-making" providing a "chance to rapidly translate the principles of the EU's existing better regulation agenda into tangibly improving the quality of life for European citizens and businesses. And, in these tougher times, smart regulation can be a key vehicle to providing urgent support for economic recovery and growth, while delivering greater fairness and a cleaner environment".

This would require "an integrated, end-user focused and measurable approach", building on experience acquired with current tools. Beyond business growth, SR "can address other urgent issues as climate change, the quality and safety of food and other consumer goods and the creation of new jobs". Regulatory and non-regulatory interventions should be developed and implemented in a smarter way, learning from the best international examples.

The approach needs to be embedded in every intervention in every policy area. Smart regulation should not only be restricted to supporting business growth. It can also, for instance, be an essential means of finding cost-effective ways to reduce carbon emissions and create a low carbon economy. It can help safeguard consumer rights on products and services by focusing regulatory and non-regulatory interventions where the risk is greatest. And, in the area of the financial services market, while it is clear that further single market regulation is

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[15] "In line with the 2007 Single Market Review, which emphasised the need for a better understanding of the functioning of markets based on an evidence-based approach the Council also reiterates its support for the market monitoring and **smart regulation initiatives** to deepen the Single Market in the EU2020 Strategy with a modern evidence-based tool kit. The Better Regulation initiative has contributed to improving the functioning of the single market, by developing impact assessments of policy proposals, and further extending the simplification and reduction of administrative burdens. These economic tools for better inform regulatory or non-regulatory initiatives in the future could be further explored."

needed, smart regulation tools can ensure that new measures are proportionate, targeted and do not impede wealth-creation.

Smart regulation should further help EU institutions effectively work together in the development and design of policy: contributing to the development of joined-up decision-making. It can provide a framework for the Commission, Council, Parliament and Member States to make transparent, evidence-based decisions that encourage and deliver democratic oversight in sensitive areas. This is especially significant given the Parliament's new powers, under the Lisbon Treaty, in the area of justice and home affairs.

Keeping end-users – employees, consumers, businesses and other organisations1 – in mind during policy-making, is the only way to consistently create smart regulation. End-users are key to highlighting where there is a problem and judging whether an intervention will be effective. Getting them involved at every stage of the policy-making process – from choosing how the Commission should intervene, to developing a policy, to the Council and Parliament deliberating upon it and Member States implementing it – means that interventions will be thought through more clearly and better implemented from the beginning. It is the policy makers' responsibility to involve the end-users, just as it is the end-users' and Member States' responsibility to contribute to the process.

3.3.3. Consequences of the Lisbon Treaty

Some attention should also be given to the new inter-institutional framework for better regulation, which is expected to be finalised between the European institutions by September, with many ramifications on impact assessment and other law making procedures.

The framework agreement, the third of its kind, will govern relations between the Parliament and the Commission for the period 2010-2015.

Adopted in February 2010, it is the first inter-institutional agreement adopted under the rules of the EU's new Lisbon Treaty, which confers new powers to the Strasbourg assembly. But the EU Council of Ministers, representing the EU's 27 member states, finds that parts of the agreement are out of line with the spirit of the EU treaties. The Belgian EU Presidency is taking informal contact with the Parliament to address those "legitimate concerns" (mainly on the "full involvement of the Parliament in international negotiations") which they believe affects the EU's institutional balance.

 It may also be time to revise the inter-institutional approach to impact assessment.

3.3.4. The consultation on the content of smart regulation

The Commission launched an online stakeholder consultation[16] to collect input for a Communication on smart regulation to be published this autumn. The consultation will run from 23 April to 25 June 2010.

The consultation document in 21 EU languages comprises some new indications about the smart regulation approach. Example: "Smart regulation is not about more or less legislation – it is about delivering results in the least burdensome way. Smart regulation will be

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[16]   http://ec.europa.eu/governance/better_regulation/smart_regulation/consultation_en.htm

instrumental in achieving the ambitious objectives of Europe 2020, a new strategy for smart, sustainable and inclusive growth." The 8 questions that stakeholders are invited to address give plenty of room for expert suggestions on how to improve existing and new EU law.

The EC has recently published online the [79 contributions](#) received from citizens, organisations and public authorities: a summary report and the Commission's response will be published at some time, but in the meantime, the contributions make for interesting reading.

4.   EVOLUTION OF CONTENT OF THE REGULATORY POLICY

After checking the origins and the objectives of smart regulation, there is room, in a technical article such as this one, for a scrutiny and assessment of what exactly are the innovations introduced in the new policy. For the clarity of the presentation, the

4.1.   A shift towards closer scrutiny of the content of legislation

The move to smart regulation contains a shift in the approach regarding the content of regulation. Long gone are the days where BR could claim "less is more" and simplification programmes always had to contain a significant number of deletions of existing texts. To describe Smart Regulation in a nutshell, you could say that we have now become reconciled to the idea that the legal corpus is nearly impossible to clear, so we will concentrate on the production of smarter rules, based on better research and drafting, and taking better account of conditions in the field.

Up to now, many believed that much of the problem could be ascribed to the <u>medium</u>: regulation, a medium too complex and automatically generating burdens to implement perfectly well conceived policies. Now there is greater recognition that there is also a serious problem with the <u>content</u>: the claimed objectives of policies are not clear or not appropriate, there are conflicting policies existing in parallel, there is an imbalance between advantages and costs, the costs are unnecessarily high due to their poor design, and, in the worst case scenario, the rules are not realistic or not enforceable. Better regulation has to go beyond the visible effects, achieve more than simplification and/or reducing red tape. It must address the substance of the policies; to deliver smart results.

Finally, because it concerns the substance of regulation, smart regulations must incorporate the full range of priority policies. New legislation must contribute to implement all the policies simultaneously promoting a much wider range of decisions in issues such as social policy, taxation, environmental rules, climate change, consumer protection and trade policy, to name but a few.

In practice, this would mean that each new legal act should be coordinated with all other existing and planned legislation, to avoid duplicative or inconsistent rules. "Regulation must promote the interests of citizens, and deliver on the full range of public policy objectives from ensuring financial stability to managing climate change. EU regulations also contribute to business competitiveness by underpinning the single market, eliminating the costly fragmentation of the internal market because of different national rules." (COM(2010)543)

Assessment: in essence, the shift pursues the regulator's dream, perfect consistency between all pieces of legislation and policies, across the diverse constituencies vying for attention and influence. Impact assessment was already an attempt to

4.2.   The 'life-cycle approach"
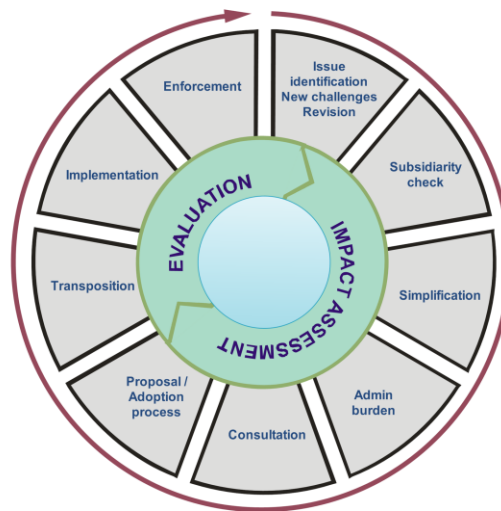
Let us now look at another claim made by the Commission in its SR initiative that SR "closes the regulatory cycle" from the design of policy to its evaluation and revision.

4.2.1.   What the Commission announces

Here are the two relevant extracts from COM(2010)543.

" Smart regulation is about the whole policy cycle - from the design of a piece of legislation, to implementation, enforcement, evaluation and revision. We must build on the strengths of the impact assessment system for new legislation. But we must match this investment with similar efforts to manage the body of existing legislation to ensure that it delivers the intended benefits. This requires a greater awareness by all actors of the fact that getting existing legislation right is as important as the new legislation we put on the table" (p.3).

"The aim of smart regulation is to design and deliver regulation that respects the principles of subsidiarity and proportionality and is of the highest quality possible. This must be done throughout the policy cycle from when a piece of legislation is designed to when it is revised. The Commission's investment in impact assessments is paying off in terms of improved quality of new legislation. Since it is the existing body of legislation, however, that creates most benefits and costs, we must make an equivalent effort to manage it more systematically. Smart regulation policy will therefore attach greater importance than before to evaluating the functioning and effectiveness of existing legislation" (p.3).

True improvements

- amalgamating simplification and reduction of administrative burdens: these two projects were largely separate exercises until February 2010. Simplification had initially been launched under the authority of the Secretariat General, whereas AB was perceived as under DG Enterprise leadership

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- the regrouping of both capacities within the same directorate at SG puts an end to the artificial separation. The new mandate of the Stoiber group has been extended until the end of 2012 to cover simplification issues.

Retrospectively, the Commission admits that simplification had largely been "of the bean-counting" variety and announces its intention of fully integrating them

- integrating evaluation into better regulation: all significant proposals for new or revised legislation are in principle based on an evaluation of what is already in place. This is the second innovation of SR. The Commission intends to draw on a long tradition of evaluating expenditure programmes. It has begun evaluating legislation in certain policy areas including public procurement, professional qualifications and working conditions. This approach must
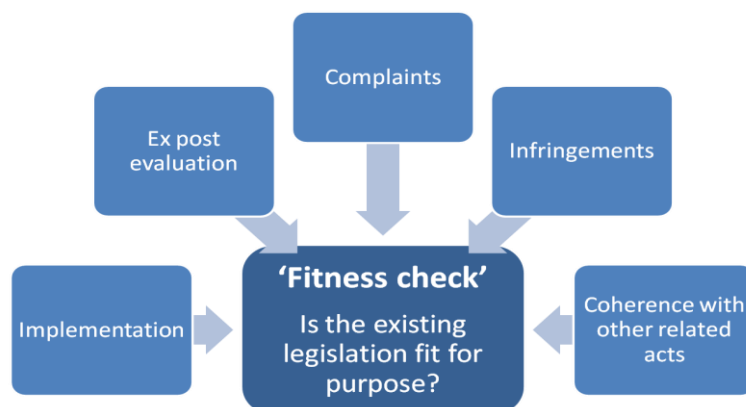
be extended so that evaluations of legislation become an integral part of smart regulation. Evaluating the effectiveness and efficiency of EU legislation will improve the quality of policy-making and help to identify new opportunities to simplify legislation and reduce administrative burdens. The public consultation has shown strong support for this type of evaluation. It has also shown that few Member States do it. Given that national administrations usually have a better understanding of how legislation works in practice, however, the Commission will have to work closely with them in developing this approach.

4.3. The new "fitness check" of EU legislation

In the October Communication, the Commission announces that it would conduct, as part of its smart regulation policy, four pilot "fitness checks" for environment, transport, employment/social policy and industrial policy and extend the approach to other policy areas in 2011.

Rather than collect individual "candidates" for simplification or AB reduction measures on the basis of general criteria, as was practiced up till now, the check would address systematically clusters of EU texts, each cluster representing a policy area, and collect all available information before deciding if the item requires some type of action: simplification, codification, consolidation, repeal or other.

Evaluation of individual initiatives cannot always show the full picture. A more strategic view is often required. Comprehensive evaluations of the common agricultural, fisheries and structural policies have shown the need for such an approach[17]. The Commission will build on this experience and complement evaluation of individual pieces of legislation with more comprehensive policy evaluations. These "fitness checks" will assess if the regulatory framework for a policy area is fit for purpose and, if not, what should be changed. The aim will be to identify excessive burdens overlaps, gaps, inconsistencies and obsolete or ineffective measures.

Both evaluation and "fitness checks" will be closely linked to existing work on implementation, enforcement and infringements. Pooling the information from these activities is intended to help to produce a clear picture of how existing legislation is working and what may need to be changed.

This new approach is made possible by the gradual centralization of the various BR tools in the Secretariat General of the Commission: last year, the ex post evaluation unit was transferred, now it is the simplification and the administrative burdens teams which are being moved. Other types of available information held at Commission level, for instance about the implementation of legislation, would be included in the scrutiny process. This drive will be further supported and intensified by synergies brought about by association of the **ex post evaluation** resources (see Secretariat General webpage) to the BR agenda. Evaluation is now to be listed among the major BR tool. All policies and legislations can be expected to be assessed within the next five years (see below the "fitness check"). New legislation should not be envisaged/planned before the evaluation of the existing policy framework has been completed.

The concentration of resources devoted to Better Regulation in the Secretariat General provides the necessary means to upgrade the Commission's action, by taping the synergies between the different tools of BR. This change also reflects the fact that BR is not only a business agenda, but that it also addresses the concerns of EU citizens and seeks to preserve the European environment.

4.4. Other innovations introduced by smart regulation

To cover the full spectrum of the instruments of better regulation, and introduce the adaptations necessary for the move to smart regulation, COM(2010)543 addresses other traditional components of BR, but the innovations are more limited.

4.4.1. Consultation

COM(2010)543 announces two coming initiatives to "strengthen the voice of citizens and stakeholders":

- Increase the public consultation period to 12 weeks. This will apply from 2012 so that it can be incorporated appropriately into the planning of future initiatives.

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[17]   http://ec.europa.eu/agriculture/healthcheck/index_en.htm
http://ec.europa.eu/agriculture/eval/index_en.htm http://ec.europa.eu/fisheries/reform/index_en.htm
http://ec.europa.eu/regional_policy/sources/docgener/evaluation/expost_reaction_en.htm

- Carry out a review of its consultation policy in 2011, as announced in the follow up to the Euopean Transparency initiative[18]

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4.4.2.   *Access to legislation*

This has been one of the components of BR since the Mandelkern report, one of those that were best promoted during the French presidency of the Union (second semester 2009).

COM(2010)543 contains only a brief paragraph (p.8), under the heading "making legislation clearer and more accessible. The Commission scrutinizes all new legislative proposals to ensure that the rights and obligations they create are set out in simple language to facilitate implementation and enforcement. For existing legislation, the Commission will continue to codify, recast and consolidate legal texts. It will also continue to reduce the volume of legislation by repealing obsolete provisions. Finally, to improve electronic access to the full body of EU legislation, a new EUR-Lex portal is being developed with the other EU institutions. The Commission encourages Member States to consolidate national legislation which transposes EU legislation and to make it electronically available, including via the EUR-Lex portal."

4.4.3.   *Improving the implementation of EU legislation*

EU legislation depends on efficient and simple implementation if it is to achieve its goals. COM(2010)543 does not need to introduce many innovations, though it is easy to see that smart regulation would require even greater attention to implementation. This can according to the Commission be achieved by:

- hightlighting these issues in ex post evaluations of legislation;

- further developing the use of existing tools (see section 2.5.1): implementation plans, correlation tables, with the added incentive that the Commission will monitor and publish information on the performance of Member States.

5.   EX-POST EVALUATION, AN ADDITIONAL TOOL FOR SMART REGULATION

The purpose of this section is to examine how the main innovation of smart regulation, i.e. the introduction of ex-post evaluation as a new tool for BR, can be implemented. What type of evidence or judgment can evaluation provide in the search for regulatory quality? If adaptations to existing evaluation techniques are necessary, what are they? Are these changes realistic, considering the methods and structures in place ?

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[18] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0127:FIN:EN:PDF

5.1.   The Commission definition of ex-post evaluation

Our starting point is the content of the smart regulation initiative of the new Commission, as defined in its 2010 Work Programme in the section (page 10) dealing with the development and use of "instruments of smart regulation" to ensure "a high quality regulatory framework for citizens and businesses": *"A systematic **ex-post evaluation of existing legislation** is essential to ensure that our policies form a coherent framework and deliver effectively on their objectives. Over time, a full ex-post evaluation will become a requisite for the revision of important legislative acts to be included in future Commission's Work Programmes.*

*To keep current regulation fit for purpose, the **Commission will begin reviewing, from this year onwards, the entire body of legislation in selected policy fields through "fitness checks"**. The purpose is **to identify excessive burdens, overlaps, gaps, inconsistencies and/or obsolete measures** which may have appeared over time. **Pilot exercises will start in 2010 in four areas**: environment, transport, employment and social policy, and industrial policy."*

Further explanation on the rationale for making use of evaluation tools and results in the search for the improvement of regulation is provided by a paragraph on the Commission's Better Regulation website:

The European Commission has a mature evaluation system which is well embedded in its departments and has generated a wealth of relevant information. The Commission can build on these achievements for its Better Regulation agenda, which, for example implies that planned interventions are regularly assessed in advance to determine their 'real world impacts'. Ex-post evaluations of legislation can help in providing a better evidence base for new initiatives.

While the Commission has traditionally focused on evaluation of expenditure programmes, it will in future increase its evaluations of legislation and other non-spending activities which have substantial impacts on citizens, businesses and the environment. This will include more "strategic" evaluations, which assess impacts of EU activities across different policy areas. Other added value can be achieved by creating synergies between ex-ante evaluations, as required by the Financial Regulation, and integrated impact assessments.

5.2.   Analysis

The Commission has engaged in an adaptation of the "mature" concepts and methods of evaluation to a new object: legislation, with the explicit purpose of contributing to better regulation. These two types of evaluation are examined below:

- the "classic" evaluation approach: it has been formalised and enhanced in a Commission by a Communication on evaluation (SEC[2007]213) setting out a revised framework and quality standards for all evaluations, on the basis of long experience of public policy evaluation. The Commission annually reports on its evaluation activities. The 2009 report lists more than a hundred studies and provides some summaries of findings, but no critical or methodological insights. A full catalog of all evaluations and impact assessments 2002-2009 is also available online. It lists 1400 reports by policy area.

- the "new" **evaluation of legislation** methodology is currently being developed in a number of Commission DGs. DG MARKT has published a [guide to evaluating legislation](http://ec.europa.eu/dgs/internal_market/docs/evaluation/evaluation_guide.pdf)[19] in December 2008 which defines evaluation as "an **evidence-based assessment** of how well legislation has done (or is doing) what it set out to achieve".

The evolution of evaluation: conscious that there is a possible conceptual hiatus, the guide examines the suitability of evaluation techniques to the assessment of legal acts.

"Usually spending programmes are well defined with regard to their objectives and resources available, have more tangible and measurable actions and results, have easily identifiable beneficiaries and affected parties, and usually assess whether money is being spent wisely. Legislation, however, which often deals with "concepts" or "principles", is more complex in that there are multiple layers of interaction that must be taken into account, but which are interlinked, making them difficult to capture with traditional evaluation models."

The core logic of evaluation of legislation remains however close to programme evaluation: they both seek to assess to what extent the intervention logic reflects reality, by asking a series of questions. "These *evaluation questions* aim to gather the relevant information required to examine how the cause-effect relationships of the legislation have in fact happened". They examine the main cause-effect relationships listed in six different categories: **relevance, effectiveness, efficiency, distributional effects, acceptability and consistency.**

5.3. Discussion: what can be the contribution of evaluation to better regulation?

In the EU context, is there a future for evaluation as a separate, additional, BR tool? Or will the disciplines of evaluation rather bring about an upgrade of BR tools, for instance impact assessment? The question is also being asked whether past evaluation reports can be used as inputs to further streamline legislation, or should new evaluations be ordered to supply the right information to conduct simplification exercises?

The stakes are high: evaluation is a highly polished tool, with methodologies honed by many years of practice. It appears rather complex, suffers from a rather technocratic and complex image. But the wealth of information and judgment accumulated about public policies could be a treasure of relevant information for simplification actions, provided it can be tapped.

To answer the question, two usual deliverables of better regulation tools will be examined: the identification of areas in need of simplification, and a good picture of the impacts of the legislations under scrutiny.

5.3.1. *Identification of legislation in need of simplification*

Better Regulation has always relied on systematic reviews of sectors of legislation to identify areas in need of simplification, and the substance of possible simplification measures. But the formal connection with the "evaluation" methodology is a first, and we do not yet have any examples of successful implementation.

Reviews of legislation targeted by simplification efforts claimed to be systematic and comprehensive, but they generally rapidly zoomed on to legal clauses known to have been

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[19] http://ec.europa.eu/dgs/internal_market/docs/evaluation/evaluation_guide.pdf

criticised by stakeholders. Regulators normally draw from their files a notion of which of the legal acts raise difficulties, or which specific articles are under criticism, even if that information is collected in pragmatic ways. However, those in charge of simplification do not always have access to this privileged information, and a variety of methods have been used to identify the potential:

- the most frequently used is by organising a specific consultation, aimed at listing stakeholder grievances against specific legal obligations; this does not give the guarantee that the survey is comprehensive;

- more recently, the SCM administrative burden approach introduced an element of systematic review which had been lacking. One of the approaches consisted in listing all the information obligations contained in specific legal acts (mapping) before consulting the targeted population (business, citizens) on their perception of the usefulness of the regulation and its practical effects on their lives and activities. In this approach, the difficulty lay in selecting the right legal acts to map and survey. That problem was addressed by some Member States at some cost by mapping the whole corpus of law, and measuring the so-called baseline.

The AB approach, however, does not give a full picture of the consequences of a piece of regulation. Its main deficiency is that it did not take the benefits into consideration, and did not include a cost-benefit analysis. The basic assumption was that all burdens were noxious, or at least suspect, even in the best methodologies which separate the "business as usual" component, which need not be considered as a burden.

To sum up, evaluation provides a method to systematically assess impacts of legislation, and compare with outcomes. It is however not necessarily attuned to the need to identify complexity and its costs.

5.3.2.   Scrutiny of impacts on stakeholders

The evaluation questions are numerous and include various impacts, with the converse benefits. This cost-benefit analysis of regulation is indeed useful for better regulation purposes and breaks with the much criticised emphasis on impacts and costs that we have seen up to now, especially in simplification measures adopted to reduce administrative burdens.

Evaluation seems to be primarily directed at improving the internal logic of policies and legislation, whereas better regulation requires that the internal workings be viewed with a priority given to the impact on stakeholders, and reduction of adverse effects for them, even if the policy/legislation is perfectly consistent and effective.

5.4.   Assessment and conclusions

From this short summary of the "evaluating legislation" methodology, it is apparent that this instrument differs in significant ways from the usual Better Regulation tools. Evaluation can help produce inputs into regulatory quality initiatives such as simplification or AB reduction, but the instrument still need to be adjusted for the new emphasis. But this objective contains a few challenges:

- the logic of evaluation is rather internal than customer oriented; or at least, there is a focus on the end user in better regulation that is not quite to present in evaluation, at least in programme evaluation;

- evaluation has always been primarily concerned with "substantive" results, rather than the specific, perhaps more formal quality objectives which are at the core of the better regulation, and are best summarized in the "principles" of quality regulation;

- there has always been a risk that evaluation was used to legitimize existing policy, [20] whereas BR specific approach was by essence critical of existing legislation;

The grouping of the central evaluation resources, previously in DG Budgets, with the other capacities (impact assessment and burden reduction), is a step in the right direction, but it needs to be followed by an integration of the teams, and the necessary organisational arrangements, including IT support. This regrouping must also encompass the other instruments mentioned in the fitness-checks: infringements, complaints, etc.

It will be necessary to revise the methodologies, both of the impact assessment and of the evaluation procedure. This last one should include specific regulatory quality questions in the evaluation criteria, to be devised by collaborative work between the two fields of expertise.

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[20] There is a whole critical discussion on the role of evaluation, and the risk of being biased towards "legitimizing" existing policies, a risk that can only be obviated by introducing a good measure of consultation of stakeholders. Example: http://www.iuhpe.org/uploaded/Publications/Books_Reports/eval_inpes.pdf

Annex: What is evaluation? An outline for better regulation experts

1. Evaluation of policies and programmes

Evaluation of public policies and programmes is a well established branch of public governance. National governments and international organisations have of long seen in it a useful tool to bring about a process of self improvement, and convincing stakeholders of their bona fide wish to carry out officially announced objectives. The following sites provide good descriptions of internal evaluation processes in international organisations:

- IFAD http://www.ifad.org/evaluation/process_methodology/methodology/framework.htm

for evaluation methodology

- World Bank: there is an independent evaluation group that has devised its own methodology to asses projects : http://web.worldbank.org/external/default/main?theSitePK=1324361&piPK=64252979&pagePK=64253958&menuPK=5039271&contentMDK=20791122

- EIB also publishes their methodology: http://www.eib.org/projects/evaluation/methodology/index.htm

- in the European Commission, the most developed resources concern spending programmes such as the external cooperation programmes, where methodologies, examples and models are available for each type of report: http://ec.europa.eu/europeaid/evaluation/methodology/index_fr.htm

As a consequence of the transfer of the evaluation unit from DG Budget to the secretariat general in 2009, there is an "evaluation" page on the Secretariat General's site: http://ec.europa.eu/governance/better_regulation/evaluation_en.htm

The Commission also regularly reports on its evaluation activities:

http://ec.europa.eu/dgs/secretariat_general/evaluation/docs/final_aer_2009_en.pdf

National governments have in most cases devised their own system.

France has always heavily invested in evaluation of public policies (rather than of expenditure programmes). A very good critical summary of methods and results is given on an informative document by the Documentation Française. http://www.ladocumentationfrancaise.fr/dossiers/evaluation-politiques-publiques/stephane-le-bouler.shtml

Abundant literature is available on evaluation by the Commission, example: http://perso.univ-rennes1.fr/maurice.basle/Publications/2006/01regionalstudies06.pdf

European Evaluation society: http://www.europeanevaluation.org/

2. Evaluation of legislation

DG MARKT has published a guide to evaluating legislation[21] in December 2008. This document has the great merit of bringing all the expertise and dedication of professional evaluators Commission style to adjust excellent evaluation methods to a new subject, legal acts in all their forms and effects.

<u>Definition</u>: the guide provides a definition of evaluation in the case of legislation

"An evaluation is an **evidence-based assessment** of how well legislation has done (or is

doing) what it set out to achieve. It looks at legislation in terms of:

- What has changed - is it what we wanted to change?

- Why it has changed - is it because of the action we took? or due to something else?

- How it has changed - did things get better, worse or stay the same?

- Who was affected - which people/groups were affected by the action we took?"

"An evaluation should look at all aspects of legislation and its process over a given timeframe, ideally covering adoption, implementation and impacts. It should consider not just whether the legislation did what it was expected to do, but also what other effects may have happened as a result. By measuring these changes against the situation at the time of adoption5, the evaluation can then judge just how well legislation has met its targets in the real world. It is important to note that these changes may be negative as well as positive."

Evaluation must be distinguished from other types of reporting documents:

- **implementation / application report:** this is a report on whether and how a legislative instrument has been implemented across the EU, sometimes including key elements of how the legislation has been applied as well as detailed market trends;

- **monitoring report:** this is a regular data collection and review of progress related to specific actions; it focuses on immediate results rather than analysing why certain things are happening;

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[21] http://ec.europa.eu/dgs/internal_market/docs/evaluation/evaluation_guide.pdf

- **audit:** it seeks to check whether correct procedures have been followed; it ascertains the reliability and integrity of information, compliance with policies, adequacy of internal control systems and implementation performance.

Specific issues of evaluating legislation in the Commission

Evaluation was developed to deal primarily with spending programmes. Evaluation of EU legislation requires some adaptations to meet specific issues, inter alia:

- multiple levels and types of legislation i.e. EU, Member State, regional/local government; various types of legal acts with differing degrees of binding nature;

- a number of ways for implementation and transposition to occur (i.e. direct transposition; gold-plating; use of options and/or derogations; delayed, incorrect or patchy transposition, etc.)

A logical sequence of steps

"Every evaluation must have an **evaluation mandate** at the start of the process, which sets out the framework of what, why and how the evaluation is to be carried out16. It covers the complete design of the evaluation, setting out the issues to be examined and where to find the evidence to be analysed. The evaluation mandate governs the process of the evaluation; it is an essential tool for improving how an evaluation is designed and hence ensuring high quality results are produced."

To assess to what extent the intervention logic reflects reality, a series of specific questions that are formulated in such a way as to provoke enquiry are needed. These *evaluation questions* aim to gather the relevant information required to examine how the cause-effect relationships of the legislation have in fact happened. Questions can be distributed in six different categories: **relevance, effectiveness, efficiency, distributional effects, acceptability and consistency.**

- whether the objectives of the EU inputs are still **relevant** to the problem as it is today.
- whether the EU legislation has been **effective** in meeting, or moving towards, the desired outcomes.
- whether the EU legislation has delivered its results **efficiently** in terms of the resources used to obtain the actual effects.
- whether there are **distributional effects** of the legislation across different groups.
- whether the legislation itself (including any additional national measures) and
- effects were **acceptable to the stakeholders** involved.
- whether the actual effects of this legislation are **consistent** with the strategic substantive policy objectives and overall objectives of Commission.
- Whether similar EU added-value could have been achieved without EU intervention.