

Smart Regulation in the European Union

by Charles-Henri Montin, regulatory expert, Paris¹

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¹ The author is an ENA alumnus, senior official from the French ministry of economy currently working in OECD after a three year secondment to the Commission. This article, however, only represents personal views and does not commit any of his past or present employers. The full text with hyperlinks is available at <http://regplus.eu/documents/smartregulation.pdf>

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. This year I of Smart Regulation culminates with the publication of the European Commission's "Communication on smart regulation"² (COM(2010)543) of 8 October 2010 outlining how the Commission 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 businesses, especially small enterprises, and affects their growth and economic performance. Other interest groups favour better regulation because it contributes to more democracy and less red tape in everyday life. Those benefits are now more widely recognized, and as a result the fears of early opponents of better regulation as a disguise for deregulatory practices aiming at destroying the *acquis communautaire* have now been largely dispelled. But that does not automatically confer legitimacy on the new approach. On the other hand, there may be plenty of interest groups disappointed by the shift away from the core better regulation values before they had had time to fully deliver, as was recently expressed by Eurochambres claiming that the appearance of smart regulation showed that the BR agenda was "losing momentum"³.

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 (Union) level, for several reasons:

- there is in Brussels and Luxembourg a complex institutional system producing regulation (a dual legislative power - Council and Parliament - and the specific proposal and executive functions of the Commission) interacting with the national regulators in each of the 27 member states; **producing quality legislation is indeed a challenge in that environment**;
- the BR policy primarily concerns the making of EU level policy and law, but it is dependent on the national bodies for implementation. For better regulation to be effective in Europe, it needs to be applied both at the European and at the national level, with the same diligence. In Europe, **BR/SR is by essence multi-level**; and the necessary cooperation between levels, under the open method of coordination, relies primarily on goodwill and mutual understanding;
- the BR/SR promoted by the Commission can be viewed as the result of arbitration between the various national concepts (see other chapter of this book), as they compete for recognition and influence in Brussels. Hence the use of a European chapter; EU better regulation reflects but also influences the national varieties of better regulation.

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;
- what have been the reasons for the shift to smart regulation? How appropriate was it to renew the approach to 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?

² 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:

http://ec.europa.eu/governance/better_regulation/documents/com_2010_0543_en.pdf

³ Press release (8 October 2010): 'In reaction to the European Commission's Communication on Smart Regulation, **EUROCHAMBRES** today expressed its concerns that the Better Regulation Agenda is losing momentum.'

1. HOW SUCCESSFUL HAS BETTER REGULATION BEEN IN THE EUROPEAN UNION?

To answer this question, it is necessary to first to take stock of what how much better regulation has developed in over the past decade and, in the next section, assess its main achievements.

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 of 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

1.2. Better regulation in the Commission since Mandelkern

To implement the principles of better regulation, the Commission presented in June 2002, a series of measures in a plan of action ([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.

In 2005, there was a shift in content in of better regulation. Until then, the exercise could be characterised as focussing on formal and legal criteria, and actual deliverables were few. The Barroso Commission incorporated BR into the revitalised Lisbon strategy recognizing the wider benefits of this exercise for the EU's economy and society as a whole. Practical steps were defined in the 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, with the launch of a pilot phase to test a 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 significant 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 Inter-institutional Agreement](#) delineates how they work together to improve the law-making process.

- until the end of 2009, the European Council took stock every six months on progress made and encouraged/invited the Commission to pursue its action, with specific recommendations. The rotating presidency generally drafted a better regulation programme for their six-month term (example [Sweden](#)). The [latest conclusions](#) are posted on the Council's site, following approval at the 17 June 2010 meeting. [Excerpts from Council Conclusions](#) from 2005 to 2009 about better regulation show this institution's contribution to the progress achieved;

- the European Economic and Social Council⁴ and the Committee of the Regions⁵ 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).

1.4. Better regulation is still very much a Commission idea

This brief history of BR shows that in spite of many declarations of intent, the search for regulatory quality is still limited to the Commission and the practical commitment of the other EU institutions remains low. 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 Inter-institutional Agreement. The [Court of Auditors'](#) (September 2010) report has shown that users in both

⁴ 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>

⁵ 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>

institutions considered impact assessments to be helpful when discussing Commission proposals even if they were rarely used formally in meetings. The Court has recommended that for EU law to be smarter, Parliamentary committees and Council formations should consider impact assessments as part of their discussions. But this **slow extension of BR** principles to the other can be said to be one of the major **shortcomings** of the BR as practiced till now at the EU level.

2. THE MAIN TOOLS OF BETTER REGULATION IN THE COMMISSION

Historically, the “tools” of BR were developed separately; it was in a second stage that their integration into one strategy was actively pursued. This is why they can be 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).

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 154⁶. During 2010, work proceeded with 46 new initiatives added to cover policy areas such as state aid, accountancy law, enforcement of court judgments in civil and commercial matters and late payments in commercial transactions.

The Commission 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 [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

⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0017:FIN:en:PDF>

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 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. 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.

IA 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 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 agreed to follow for 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 already 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 was to consistently seek to address the widest possible range of impacts, with a newly confirmed emphasis on social impacts. This work is to be supported by the [new guidelines](#) issued by DGs SANCO and EMPL.

2.2.2. *A critical assessment*

All analysts agree that IA is a major feature of 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 stakeholders 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,⁷ and rejects the suggestion of an external body to control the quality of IA.

But the Court does not make a strong case that impact assessments are truly influential in the decision making process. There are on the contrary indications that the political drive underpinning some reforms can somehow get weakened in the difficult process of collecting the evidence required to give the basis for the change in the IA. In the arbitration between conflicting policies backed by different DGs, the initial drive for reform can get bogged down and the result can be unclear legislative proposals.

⁷ C(2010) 1100 "The Working Methods of the Commission 2010-2014".

2.3. Reduction of administrative burdens⁸

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.

Nevertheless, the EU approach to better regulation takes 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.

2.3.1. *The programme for reducing administrative burdens*

Under the personal impulse of Vice-President Verheugen, a major programme to cut red tape by 25% by 2012 was implemented from 2007 to 2009, using an adapted version of the Standard Cost Model.⁹ The [Action Programme for Reducing Administrative Burdens](#) in the European Union was endorsed by the European Council in March 2007. The European Council also invited Member States to set their own national targets of comparable ambition within their spheres of competence. 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 parallel, the Commission proposed reduction measures for immediate (“fast track”) action. In spring 2007, it adopted 10 such fast-track initiatives and more were 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 April 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 enterprises (SMEs), trade unions as well as environmental and consumer organisations.

2.3.2. *The results*

The outcome of the Administrative Burden Reduction Programme were presented in [COM\(2009\)544](#)¹⁰ (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 Burdens¹¹ 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 approved in July 2010 [a directive concerning electronic invoicing](#) for value-added tax which once transposed and

⁸ http://ec.europa.eu/governance/better_regulation/admin_costs_en.htm

⁹ An operational manual for applying the EU model has been integrated in the Commission's [Impact Assessment Guidelines](#).

¹⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0544:FIN:EN:PDF>

¹¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0023:EN:NOT>

implemented 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.

2.3.3. *Assessment*

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.

Though in principle the -25% target by 2012 has already been reached, the concentration of the reduction on one specific measure does not truly correspond to the spirit of the initiative, which should be expected to address many more sources of irritation for companies. The electronic invoicing reform appears more as a spinoff of IT progress than a result of the simplification drive. To be truly successful the cutting red tape program of the Commission needs to register a few more such “hits.” On balance, the true obstacles are no longer within the Commission apparatus, but in the difficulty for member states to accept the necessary harmonisation, which remains the most productive source of simplification opportunities.

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 at 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 mechanisms can themselves be a subject discussed with stakeholders, as in [DG SANCO's “Healthy 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 help¹². These include 'preventive action' - paying greater attention to implementation and enforcement in impact assessments when designing new legislation¹³; 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 issues¹⁴.

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](#).

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.

2.6. Overall assessment of better regulation

There is no doubt that better regulation, which has enjoyed high ranking among the Commission’s strategic initiatives, has been an extremely successful concept. The vice-president, and more recently

¹² COM (2007) 502:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0502:FIN:EN:HTML>

¹³ See the Impact Assessment Guidelines, pp. 42 – 43:

http://ec.europa.eu/governance/impact/commission_guidelines/commission_guidelines_en.htm

¹⁴ http://ec.europa.eu/community_law/infringements/infringements_annual_report_en.htm

the president of the Commission have taken charge personally to try and make a better use of the power of legislation to further the wider objectives of European construction: an efficient internal market, more growth and jobs, a more transparent and accessible legal corpus. But 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 dangerously, the policy had somehow come to be too closely linked to a business agenda, and as such, in several quarters, suspect of discreetly trying to reverse some of the social guarantees written into EU law. The administrative burden reduction programme, in spite of a major investment in time and resources, has not yet yielded any major result. Will smart regulation pick up the challenge and be more successful in winning over the wider public and convince them that Brussels is truly determined to do away with bureaucracy and overbearing regulations, that is what we must try and establish in the next section.

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:

- 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.

The outgoing president, Mr Barroso's, seems to have been sensitive to the need for change, and in this respect, his political guidelines for his next mandate have opened the way for a meaningful and rich debate which is not yet closed, even if the recent Communication COM(2010)543 has shown how this Commission intends to work for the remainder of its mandate.

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.”

Practical steps would include a major review of existing legislation, to remove "bureaucratic processes and unnecessary centralisation" and extended use of impact assessment.

3.2.2. *Keeping in touch with the business community*

On 15 April 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 and contributes to defining practical steps for smart regulation:

- 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](#) ¹⁵ 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

¹⁵ http://ec.europa.eu/eu2020/index_en.htm

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.

One could be slightly disappointed not to find the same pre-eminence given to smart regulation as was accorded to better regulation in the Lisbon strategy. But this can mean that quality regulation need not be viewed as a goal in itself, but as a means of achieving more substantive objectives. It can also mean that the processes started with BR are now sufficiently embodied in good practice that they no longer need to appear as a political imperative.

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:

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 market¹⁶.

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](#).

In summary, the other institutions do not appear to feel the need for practical action of their own, but they are supportive of Commission initiative, including the shift to smart regulation.

¹⁶ "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."

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

Considering that smart regulation can be viewed as right from the start as a departure from a policy strongly promoted by a group of “advanced” member states, it is significant that while the new policy was being developed, this group volunteered their own version of how better regulation should or could evolve in a joint report entitled “*Smart Regulation: A cleaner, fairer and more competitive EU*” published on the internet in March 2010¹⁷.

The [Joint Report](#) can be viewed as the reaction of a group of like minded MS, generally considered to be 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.

Reading the report is recommended as it provides a close variation to Commission views, on exactly the same issue. Casual reading would hardly bring out any difference but experts will be sensitive to different emphasis. It is clear that the three signatories are calling for a different sort of SR:

- continued emphasis on seeking a simpler and less burdensome business environment, even if all the other policies and interest groups are not disregarded as legitimate beneficiaries; in particular, the report offers several suggestions for beefing up the role of the Impact Assessment Board, some of which were later followed by the Commission;
- insistence on adoption of SR tools by the other institutions (Council and European Parliament) as the complexity of EU law is not only ascribed to the Commission.

All in all, this document strengthens the case for continuity between better and smart regulation, drawing on a number of practical achievements in the three signatory countries, and confirming support for some of Mr Barroso’s new orientations.

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](#).

¹⁷ <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/10-520-smart-regulation-report.pdf>

3.3.4. *The consultation on the content of smart regulation*

The Commission launched an online stakeholder consultation¹⁸ 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 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. The [summary report](#)¹⁹ and the Commission's response was published on the same day as COM(2010)543 (8 October). The feedback from the stakeholders does not contain any major conceptual breakthrough, but it confirms the need to pursue better regulation, with a number of adaptations (for instance less emphasis on the business agenda) and contains a number of useful suggestions like a list of areas for the fitness checks.

4. WHAT IS NEW IN SMART REGULATION?

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. The structure of COM(2010)543 does not make it easy to distinguish the innovations, as the document is primarily a re-exposition of the overall regulatory quality strategy. There are however some clear changes and this section will address **both the evolution of the principles, and the technical improvements to the better regulation tools**.

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. All the traditional techniques will continue to be used, and there will be simplifications and deletions, but also a shift in the emphasis, reduction of the *acquis* is not the main drive.

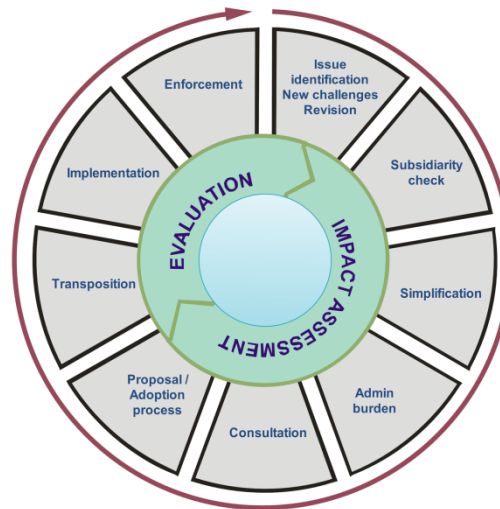
Under SR, the problem has less to do with the medium: regulation is necessary to implement policy, but some of its complexity and inconsistency comes from conflicting or ill-conceived policies. Hence the new focus on the content of policy, to ensure that the claimed objectives of policies are clear and appropriate, that there are no conflicting policies existing in parallel, that there is an balance between advantages and costs and that the objectives of the policy are realistic or enforceable. Quality regulation has to go beyond the visible effects, achieve more than simplification and/or reducing red tape. It relies on the quality of the underlying policies if it is to deliver smart results.

¹⁸ http://ec.europa.eu/governance/better_regulation/smart_regulation/consultation_en.htm

¹⁹ http://ec.europa.eu/governance/better_regulation/smart_regulation/docs/smart_regulation_consult_report_final_en.pdf

Finally, smart regulations must incorporate the full range of priority policies. New legislation must incorporate a comprehensive view of the Commission's policies and promote 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 competing for attention and influence. Impact assessment was already an attempt to subordinate decision making on the adoption of new rules to the consideration of the full range of expected impacts. With SR, the approach is extended to all existing legislation, not only the legal texts under development. Some observers will be sensitive to the ambition that this shows; others will claim it is an unrealistic objective.

4.2. The ‘life-cycle approach’ with the inclusion of ex-post evaluation

4.2.1. Definition

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.

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).

4.2.2. *Practical implications*

The concept of life-cycle is not just a theoretical construction. This major part of the shift to smart regulation has been prepared by bringing together teams that had hitherto been working separately:

- **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. The regrouping of both capacities within the same directorate at SG puts an end to a separation that had not been judicious. The new mandate of the Stoiber group has been extended until the end of 2012 to cover simplification issues.

- **integrating evaluation into better regulation:** the ex post evaluation unit (see [Secretariat General webpage](#)) was moved in 2009 to the SG, in preparation for this change. 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 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. The Commission believes that this approach can be extended so that evaluations of legislation become an integral part of smart regulation.

4.2.3. *Assessment*

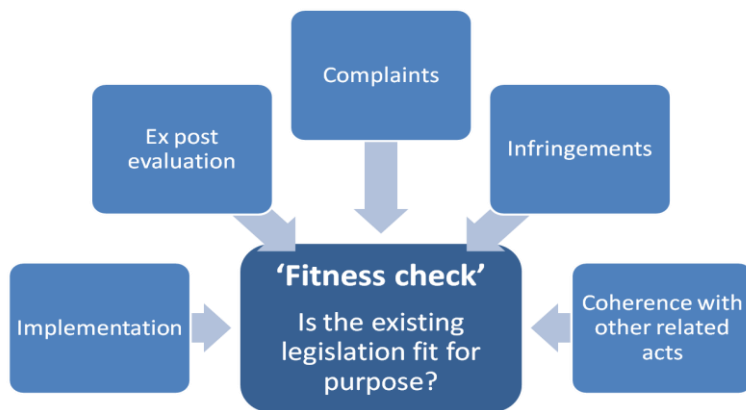
The coordination of simplification and AB reduction activities cannot be considered as innovative, as it has been in effect in several member states for a number of years, and it is generally recognised as the right way of proceeding. The change is more in the nature of correcting an anomaly. Most countries have learnt that the two policies had to be mutually supportive to build efficient regulatory quality capacities.

On the other hand, the integration of ex-post evaluation into regulatory management is really new and will be discussed at length in section 5 below.

4.3. **Applying the new concepts: the "fitness check" of areas of EU legislation**

In Communication (2010)543, the Commission announces that it will 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. Though it is not explicitly stated, the fitness checks are supposed to provide indications as to where the future regulatory quality efforts must be directed. 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 will 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. The fitness checks are also based on the idea that 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 approach²⁰.

²⁰ 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



To support such comprehensive exercises, the Commission intends to make use of all available that it holds concerning the implementation of EU law. “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 changed²¹.” The graph above shows what type of data the Commission intends to make use of in this general verification.

4.3.1. *The approach may be difficult to implement*

Using fitness checks as a means to identify future regulatory quality steps may not be devoid of risks. First it contains a methodological challenge: centralising the information about implementation and enforcement cannot be considered as trivial. Though the data is stored in electronic format, it will not be easy to interconnect the files. Corresponding action may be delayed because of technical issues.

Secondly, the fitness checks mark a shift of regulatory quality towards a greater reliance on examining the content rather than the impact of legislation. They do not rely as much on the perceptions of the stakeholders. It will give more credit to the judgments of the substantive experts as to the efficiency of “their” legislation, and the influence of the better regulation agenda, the simplification drive, may be diluted. However these are for the moment only risks, and the Commission will no doubt be aware of them and doing its utmost to make SR as successful as BR. These points will be developed in section 5 below.

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.
- Carry out a review of its consultation policy in 2011, as announced in the follow up to the European Transparency initiative²²

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).

²¹ COM(2010)543 page 5.

²² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0127:FIN:EN:PDF>

COM(2010)543 contains only a brief paragraph (p.8), under the heading “making legislation clearer and more accessible. The Commission intends to scrutinize 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 would like 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 relies even more on efficient implementation. This can according to the Commission be achieved by:

- highlighting 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.

4.5. How significant is the move to smart regulation?

To summarize the innovations, beyond the technical improvements to the regulatory tools, there are two major trends:

- the broadening of the objective to “make markets work for people” beyond the policy to “simplify the regulatory environment for business”;
- the new emphasis on the content of legislation, which must become “smart”, i.e. deliver effectively on the full range of public policy objectives, rather than reducing the volume of legislation and its financial burden on companies.

These changes correspond to a shift in perspective which corresponds to some of the new political guidelines:

- with the financial crisis, there has been a weakening of the faith in the market, and a corresponding demand for good regulation to compensate for market failure. The deregulation option, always a shadow behind better regulation policies, is no longer an option at least in Europe, and the new emphasis on the benefits of legislation, very marked in the UK BR policy, is most welcome in the Commission, where Vice-President Verheugen’s “business-friendly agenda” had never been unanimously accepted by the Commission DGs;

- the message that regulation can be “smart” if properly devised is good news for all regulators, as signalling a weakening of the offensive against regulation. The experience of RIA in the Commission has received very little official criticism and can be a precedent for further efforts to improve technically the policy making process. This may prove however to be an invitation to complicate the process, with additional bureaucratic constraints, loss of political impetus, and ever more complex regulation.

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

The purpose of this last section is to examine how **the main innovation of smart regulation**, i.e. the introduction of ex-post evaluation as a new tool for quality regulation, can be implemented. What type of evidence or judgment can evaluation provide in the search for regulatory quality? What might be the necessary adaptations to existing evaluation techniques to incorporate better regulation? Are these changes realistic, considering the methods and structures already inherent in the evaluation process?

5.1. The Commission's 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. How must evaluation be adapted to contribute to smart regulation

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 [catalogue 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](#)²³ 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".

²³ http://ec.europa.eu/dgs/internal_market/docs/evaluation/evaluation_guide.pdf

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. What can evaluation contribute to smart 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 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 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 techniques 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, but also benefits to stakeholders and can therefore gather information useful from a regulatory quality point of view. This cost-benefit analysis of regulation is indeed useful for better regulation purposes and breaks with the much criticised emphasis on impacts and costs (excluding consideration of benefits) that characterised better regulation, especially in the formulation of simplification measures adopted to reduce administrative burdens.

However, 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. **Evaluation methods need to adapt to smart regulation objectives**

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 gather inputs for regulatory quality initiatives such as simplification or AB reduction, but the instrument still need to be adjusted for the new emphasis on simplicity. Bringing about these adaptations will not be easy:

- 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 and qualitative 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,²⁴ 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.

²⁴ 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

CONCLUDING REMARKS

This chapter has summarised one year of reflection on smart regulation in the Commission, and tried to assess the innovations that the new approach, expressed in COM(2010)543 may contain.

Better regulation had not yet achieved its full impact: the simplification effort had not yet truly reduced the perceived overgrowth and complexity of European law, in spite of the claim that the number of legal texts had been reduced. In spite of the few major successes (the VAT reform to introduce electronic invoicing for instance) the cutting red tape program which is supposed to run until 2012 needs to deliver significant additional measures in a greater number of areas of legislation, like statistics, accounting, environment, etc. All in all, in no way can it be said that better regulation had already reached the objectives set for it by its initial promoters: EU law still gives an impression of complexity and bureaucracy, the decision making process has not been made that much more transparent;

In this context the innovations introduced by **smart regulation** can be welcome if they do not undermine or slow down the sustained delivery of ongoing better regulation results. The two main changes in SR are 1/ the broadening of the ambition of the strategy to “make markets work for people” which is wider than “simplify the regulatory environment for business”; 2/ the new emphasis on the content of policy and legislation, which must become “smart”, i.e. deliver effectively on the full range of public policy objectives, rather than reducing the volume of legislation and its burden on companies.

This new approach will have to avoid running into some well-known pitfalls. By giving more attention on the content of regulation and requiring more evidence to justify reform, it opens the way for additional bureaucratic prerequisites, running the risk of **focusing more on the process, and not enough on the outcome**. The shift is not exempt from technical challenges, as the evaluation methods will need to be adjusted to accommodate SR goals. By insisting on the technical evaluation of evidence in support of decision making, SR may dilute the political initiative and **further insulate the regulators from the pressure of the stakeholders**. These will be some of the challenges facing smart regulation and also the criteria against which to assess its future achievements.