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Renegotiation by the United Kingdom of its constitutional relationship with the European Union - Issues related to Competitiveness and Better Law-Making

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DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

Renegotiation by the United Kingdom of its constitutional relationship with the European Union - Issues related to Competitiveness and Better Law-Making

STUDY

Abstract

The competitiveness element of the renegotiations with the UK is one of the less controversial parts. The aim is to enable the EU to hold its own in an increasingly competitive world, to increase productivity and to promote employment. That should be attractive to business, to citizens and the Member States. Striking the balance between a regulatory framework which is favourable to business and one which protects other societal interests may be more problematic. All should agree though that a good regulatory framework is vital.

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EXECUTIVE SUMMARY

The competitiveness goals of the United Kingdom in its search for a new settlement with the EU are probably the least controversial part of the renegotiation.

Essentially the United Kingdom is seeking things which are already provided for in the Treaties, although, as regards in particular the internal market, they have not all yet been fully realised in practice.

The competitiveness goals can be seen as the logical extension of the United Kingdom's efforts to reform its own regulatory environment to EU regulation which has a substantial impact on business and citizens in the United Kingdom.

The European Commission's efforts in the field of regulatory reform are based on similar principles to those underlying the United Kingdom's efforts and have been recognised as being broadly equivalent in their effectiveness. There is, however, a difference of emphasis with the United Kingdom focusing very much on a favourable environment for business while the EU is bound by the Treaty to work also towards full employment, social progress and a high level of environmental protection.

It is likely that this aspect of the renegotiation is addressed not just to the European Commission but also particularly to the other EU institutions, to the other Member States and to others in Brussels.

The measures offered by the EU are more political than legal and as formulated are fully compatible with the Treaties.

One goal that is shared by others is to bring together all the disparate texts on the EU's regulatory process into a single coherent and comprehensive text.

1. THE UNITED KINGDOM AND EUROPE

The British relationship to Europe has long been complex. The perhaps apocryphal headline in the London *Times* "Fog in the Channel, Continent isolated" is thought to encapsulate a certain British attitude so well that it is often simply referred to as "fog in the Channel".[1] But perhaps a degree of Anglocentric insularity has been possible because some British could regard other English-speaking countries as their key partners rather than their European neighbours since, apart from the language, they share bonds such as strong historical links leading to similar world views and similar legal or constitutional systems.

It is well known that when Winston Churchill in his 1946 Zurich speech envisaged the creation of a United States of Europe, it was for the other countries of Europe, not the United Kingdom.[2] When the first European Communities were established in the 1950s the United Kingdom at first stood back and observed from across the water. This historical sense of the United Kingdom being different and distinct from "the Continent" is summed up by Winston Churchill's objection in 1953 to the United Kingdom being "merged in a Federal European system", and his assertion that "we are with them but not of them".[3]

It may be noted that David Cameron, in his 2013 Bloomberg speech, evoked "the character of an island nation - independent, forthright, passionate in defence of our sovereignty" and added "We can no more change this British sensibility than we can drain the English Channel".[4]

In 1960 the United Kingdom was a founder member of the European Free Trade Association, which only promoted free trade between its members and did not envisage close union or entail supranational institutions. In 1961 the United Kingdom, under the leadership of a Conservative Prime Minister, Harold Macmillan, applied to join the European Communities but its application was unsuccessful.

In 1973 the United Kingdom, again under the leadership of a Conservative Prime Minister, Edward Heath, succeeded in joining the European Communities. The two other countries that joined at the same time, Denmark and Ireland, both held referendums before joining. Norway had also conducted successful accession negotiations but in a referendum a majority of its population opposed membership and it did not join.

In 1974 a Labour government led by Prime Minister Harold Wilson took office having made a commitment in its manifesto to hold a referendum on whether to remain in the European Communities. That referendum, the first nationwide referendum in the United Kingdom, was held in 1975 with 67% of voters in favour of remaining.[5]

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[1] Over 38 million hits in Google.
[2] See: https://www.coe.int/t/dgal/dit/ilcd/Archives/selection/Churchill/ZurichSpeech_en.asp
[3] HC Deb 11 May 1953 vol 515 c891. Cited in Matthew Goodwin and Caitlin Milazzo, *Britain, the European Union and the Referendum: What Drives Euroscepticism?*, December 2015: https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/20151209EuroscepticismGoodwinMilazzo.pdf
[4] Speech by Prime Minister David Cameron on the future of the European Union given at Bloomberg on 23 January 2013.
https://www.gov.uk/government/speeches/eu-speech-at-bloomberg
[5] http://www.parliament.uk/get-involved/elections/referendums-held-in-the-uk/

In the 1983 general election the Labour Party made a manifesto commitment to begin negotiations to withdraw from the European Communities but it lost the election.

In 1993 Parliamentary approval was needed for the Maastricht Treaty on the Single European Act. Some Conservative MPs campaigned for a referendum on the Treaty. Their campaign was unsuccessful but the Conservative Prime Minister, John Major, was forced to call a vote of confidence in his government. Other Member States such as Denmark and France did hold referendums.

It was in 1993 that the United Kingdom Independence Party was formed to campaign for withdrawal from the EU. Initially it met with little success but its support has grown steadily over the years. While it has not won many seats in the United Kingdom it has consistently achieved better results in the European elections and in 2014 won the largest share of the vote in the United Kingdom, as the following table shows.

Table. UKIP election results[6]

European election	UK general election
1999: 7%	2001: 1.5%
2004: 16%	2005: 2.3%
2009: 16.1%	2010: 3.1%
2014: 26.8%	2015: 12.4%

For the 1997 General Election the Referendum Party was formed to run on the platform of holding a referendum on aspects of the United Kingdom's relationship with the EU and briefly had one MP.

A strongly critical attitude to the EU has come to occupy an established place in parts of British society leading commentators to seek to analyse the demographics and motivations for Euroscepticism in the United Kingdom[7] and to assess such factors as the role of the media.[8] It has significantly affected the political debate and, apart from specifically Eurosceptic parties, has fostered the growth of a sizeable Eurosceptic element in the Conservative Party, leading to internal divisions and heated debate.

In the 2005 general election the Labour, Conservative and Liberal Democrat parties all made manifesto commitments to hold a referendum on whether to ratify the EU Constitutional Treaty. In the event, when the treaty was rejected by referendums in both

See also: http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/referendums

[6] Sources:
http://www.bbc.com/news/uk-politics-21614073
House of Commons briefing paper of 28.7.2015:
http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7186
European Parliament official election results website:
http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00021/Previous-elections

[7] Matthew Goodwin and Caitlin Milazzo, *Britain, the European Union and the Referendum: What Drives Euroscepticism?*, December 2015: https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/20151209EuroscepticismGoodwinMilazzo.pdf

[8] "Media coverage of the European Union is key to understanding eurosceptic attitudes within the UK", Benjamin Hawkins, LSE EUROPP: http://blogs.lse.ac.uk/europpblog/2012/10/01/uk-media-euroscepticism/

France and the Netherlands, the Labour Government led by Tony Blair decided that it was no longer necessary to hold a referendum on it in the United Kingdom.

In 2007 a new treaty, known as the Lisbon Treaty, was proposed to amend the existing European Treaties without establishing a constitution. David Cameron, as leader of the Conservative opposition, undertook to hold a referendum on the new treaty if he became Prime Minister. The Labour government, however, under the leadership of Tony Blair until June 2007 and then under Gordon Brown, maintained that the Lisbon Treaty was a different document from the Constitutional Treaty and that, therefore, a referendum was not needed. In 2008 the United Kingdom ratified the Lisbon Treaty without a referendum.

In 2009 David Cameron admitted that since the Lisbon Treaty had been ratified by all the EU Member States he could not hold a referendum in the United Kingdom but promised that if he was elected, no future substantial transfer of powers would take place without the approval of the British people. In the 2010 general election no party won an absolute majority and the largest party, the Conservatives, formed a coalition government with the Liberal Democrats with David Cameron becoming Prime Minister.

In 2011 100,000 signatories submitted a petition calling for a referendum on the United Kingdom's membership of the EU and over 80 Conservative MPs rebelled against the coalition government to call for such a referendum in a parliamentary vote.

A review of the balance of competences was launched by the Government in 2012 as an "audit of what the EU does and how it affects the UK".[9] The Government stated that:

"The need to minimise unnecessary burdens on business, particular SMEs, was a constant theme in many of the Balance of Competences reports".[10] The review was conducted over two years and when the final reports were published at the end of 2014 the Foreign Secretary, Phillip Hammond, said that they:

> "underline the need for the EU to focus on those areas where it genuinely adds value, alongside pursuing an ambitious reform agenda for the benefit of all 28 Member States. … These reports provide further evidence of the need for a change in Britain's relationship with the EU".[11]

In 2013 David Cameron declared in Parliament that if the Conservatives won the next election they would seek to renegotiate the United Kingdom's relationship with the EU and then give the British people the "simple choice" by 2017 between remaining in the EU or leaving it, saying:

> "It is time for the British people to have their say. It is time to settle this European question in British politics. I say to the British people: this will be your decision".

In its manifesto for the 2015 general election the Conservative Party promised:

> "We will:
>
> give you a say over whether we should stay in or leave the EU, with an in-out referendum by the end of 2017

[9] https://www.gov.uk/guidance/review-of-the-balance-of-competences

[10] See point 2.56 of the Report on subsidiarity: https://www.gov.uk/government/consultations/subsidiarity-and-proportionality-review-of-the-balance-of-competences

[11] https://www.gov.uk/government/news/final-reports-in-review-of-eu-balance-of-competences-published
An article in the Financial Times, on the other hand, was headlined "Tory audit turns into eurosceptic nightmare – Findings fail to back the return of powers from Brussels", 8 November 2013, p. 3.

commit to keeping the pound and staying out of the Eurozone

reform the workings of the EU, which is too big, too bossy and too bureaucratic

reclaim power from Brussels on your behalf and safeguard British interests in the Single Market

back businesses to create jobs in Britain by completing ambitious trade deals and reducing red tape".[12]

While manifesto commitments are not legally binding in the United Kingdom, they give a party a mandate for its policies and reneging on such commitments carries a heavy price.[13] Indeed one reason for the Liberal Democrats sharp fall in popularity between 2010 and 2015 was that as part of the coalition government it had been obliged to go back on its manifesto commitment to ensure that university tuition fees would not rise.

In the general election of May 2015 the Conservatives won a Parliamentary majority and formed the new government on their own. Its policy was set out in the Queen's speech and included the promise to honour its manifesto commitment:

> "My government will renegotiate the United Kingdom's relationship with the European Union and pursue reform of the European Union for the benefit of all member states.
>
> Alongside this, early legislation will be introduced to provide for an in-out referendum on membership of the European Union before the end of 2017".[14]

The referendum will be governed by the Political Parties, Elections and Referendums Act 2000 (PPERA).[15] It will be overseen by the Electoral Commission, which must approve the wording of the question, count the votes and announce the result.

It is important to note that while the referendum is on the United Kingdom's membership of the EU in general, not on the outcome of the renegotiations for a new settlement for the United Kingdom in the EU, David Cameron made it clear that his recommendation to the British people on how they should vote in the referendum would depend on how satisfactory he finds the outcome of those renegotiations.

The United Kingdom's list of goals is set out in a short letter from David Cameron to Donald Tusk of 1 November 2015. It is divided into four headings: Economic governance, Competitiveness, Sovereignty and Immigration.

This study is concerned only with the goals relating to competitiveness. Since those goals relate to the EU's regulatory environment it is appropriate to look first at what the United Kingdom has done to improve its own regulatory environment.

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[12] At page 72: https://www.conservatives.com/manifesto

[13] See V. Bogdanador, "General election: Do party manifestos still matter?", Financial Times, 15.4.2015: http://www.ft.com/cms/s/0/7418b410-e2c2-11e4-bf4b-00144feab7de.html#axzz3yjBKHJuk

[14] Delivered on 27 May 2015: https://www.gov.uk/government/speeches/queens-speech-2015

[15] http://www.legislation.gov.uk/ukpga/2000/41/contents

2. WHAT HAS THE UNITED KINGDOM DONE TO IMPROVE ITS REGULATORY ENVIRONMENT? [16]

Modern concerns about the regulatory environment in the United Kingdom can be traced back to efforts from 1985 to remove some of the burden of regulation on business by means of a deregulation programme initiated by a Conservative Government under Margaret Thatcher.[17] Her position as expressed later was that:

> “every regulation represents a restriction of liberty, every regulation has a cost. That is why, like marriage (in the Prayer Book’s words), regulation should not ‘be enterprised, nor taken in hand, unadvisedly, lightly, or wantonly’.”[18]

The deregulation programme included a requirement for government departments to assess the compliance costs of new regulation overseen by an Enterprise Unit in the Cabinet Office, which in 1987 moved to the Department of Trade and Industry as the Deregulation Unit.

In 1994 the Deregulation and Contracting Out Act was adopted providing a mechanism for removing regulatory burdens and recognising the particular problems of small businesses.

In 1997 the emphasis shifted from removing regulation to ensuring that regulation was of good quality. The Deregulation Unit moved back to the Cabinet Office with broader responsibilities and was renamed the Better Regulation Unit before becoming the Regulatory Impact Unit. That unit was assisted by the Better Regulation Task Force with members drawn from business, civil society and trade unions. The Better Regulation Task Force estimated the total cost of regulation to the UK economy at 10 – 12% of GDP, or GBP100 billion.[19]

The Better Regulation Task Force encouraged options other than regulation and laid down five principles to assess whether any regulation is fit for purpose.

> Proportionality: Regulators should intervene only when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised.
>
> Accountability: Regulators should be able to justify decisions and be subject to public scrutiny.
>
> Consistency: Government rules and standards must be joined up and implemented fairly.
>
> Transparency: Regulators should be open, and keep regulations simple and user-friendly.

---

[16] I acknowledge the helpful critical overview of the background to the UK’s efforts in this field in *How to run a country - the burden of regulation,* Richard Harries and Katy Sawyer, published by Reform (an independent, non-party think tank), December 2014: http://www.reform.uk/wp-content/uploads/2014/12/The_burden_of_regulation_WEB.pdf

[17] See the White Papers by the Department of Trade and Industry Lifting the Burden (Cmnd 9571, 1985), Building Businesses Not Barriers (Cmnd 9794, 1986) and Releasing Enterprise (Cm 512, 1988).

[18] Margaret Thatcher, *Statecraft: Strategies for a Changing World* (2013), quoted in *How to run a country - the burden of regulation,* Richard Harries and Katy Sawyer, published by Reform, December 2014: http://www.reform.uk/wp-content/uploads/2014/12/The_burden_of_regulation_WEB.pdf

[19] See "Better regulation – from design to delivery (annual report) 2005", p.2.

Targeting: Regulation should be focused on the problem and minimise side effects.[20] Regulatory Impact Assessments were required for all new regulations.

In 1999 a Panel for Regulatory Accountability was created including representatives from business in order to reinforce the status of the Regulatory Impact Unit. It was initially chaired by the Minster for the Cabinet Office but later by the Prime Minister.

A Regulatory Reform Act was adopted in 2001 providing for a mechanism of Regulatory Reform Orders which can be used to reform existing legislation in order to remove or reduce the regulatory burdens.

In 2005 two reports were produced, one by the Better Regulation Task Force[21] and the other by a leading businessman who was asked by the Government to carry out a review of regulatory inspection and enforcement.[22] Those reports led to a number of initiatives.

The Better Regulation Task Force was replaced by the Better Regulation Commission, a standing, public body independent of any government department, which was to "advise the Government on action to reduce unnecessary regulatory and administrative burdens, and ensure that regulation and its enforcement are proportionate, accountable, consistent, transparent and targeted".

The Regulatory Impact Unit was replaced by the Better Regulation Executive with the task to "deliver better regulation and reduce unnecessary bureaucracy in both the public and private sectors."

The Government adopted a Better Regulation Action Plan to implement a more coherent approach to regulatory inspection and enforcement and an Administrative Burdens Reduction Programme to cut unnecessary bureaucracy and remove out-of-date regulations with the aim of reducing the administrative burdens imposed on business and third sector organisations by a net 25% by May 2010.[23]

In 2006 the United Kingdom adopted the Legislative and Regulatory Reform Act laying down statutory principles of good regulation based on the work of the Better Regulation Task Force and requiring regulatory bodies to have regard to the principles and a code of practice.[24]

The Better Regulation Executive (BRE) moved from the Cabinet Office in 2007 to the Department for Business, Enterprise and Regulatory Reform (BERR) and is now part of the Department for Business. Its task is to improve the design of new regulations and how they are communicated, simplify and modernise existing regulations, and change attitudes and

[20] http://webarchive.nationalarchives.gov.uk/20100407162704/http:/archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principlesleaflet.pdf

[21] Better Regulation Task Force (2005), *Regulation: Less is More – Reducing Burdens, Improving Outcomes*.

[22] The Hampton Report, *Reducing administrative burdens: effective inspection and enforcement*: http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/budget/budget_05/other_documents/bud_bud05_hampton.cfm

[23] See Simplification Plans 2005-2010 Final Report: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31630/10-1083-simplification-plans-2005-2010-final-report.pdf

[24] Section 21 established the following principles:
"regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent" and "regulatory activities should be targeted only at cases in which action is needed".

approaches to regulation to become more risk-based.[25] It has a staff of 50 with a network of regulatory policy experts in each ministry.

In 2008 a Regulatory Enforcement and Sanctions Act was adopted to ensure consistent enforcement of regulation and more coordination between authorities and to lay down principles to be followed by regulators.

In 2010 the incoming coalition government of Conservatives and Liberal Democrats stressed that "business is the driver of economic growth and innovation and that we need to take urgent action to boost enterprise, support green growth and build a new and more responsible economic model". As part of its business agenda it committed itself in particular to "cut red tape", "end the culture of 'tick-box' regulation", and "give the public the opportunity to challenge the worst regulations".[26] An overview of that agenda is given in a Policy Paper on business regulation.[27]

One key element is the involvement of business and the public in efforts to identify problem areas with existing regulation or its enforcement.

The Red Tape Challenge, launched in 2011, asks businesses and the public which regulations they think could be removed or improved, with a presumption that regulations should go unless there is strong justification for them. If regulations are retained, efforts are made to reduce burdens in their implementation.

The Focus on Enforcement (FoE) scheme was launched in 2012.[28] It consists of a series of sector-based reviews on whether national and local regulatory enforcement is placing the least amount of necessary burden on businesses. In February 2015 the Governemnt announced that better enforcement was saving business over GBP 40 million each year.[29]

Business Focus on Enforcement was launched in 2014 to give trade associations and business groups the dominant role in identifying enforcement issues and the opportunity to present their findings directly to ministers and regulators.

Red Tape Challenge and Business/Focus on Enforcement together led to the removal of 2,400 regulations.[30]

The Policy Paper on business regulation makes a firm commitment to use alternatives to legislation wherever possible.

"We see conventional regulation as a last resort. We will use regulation when:

- we cannot achieve our goals by self-regulation or other methods
- analysis of the costs and benefits shows regulation is preferable to self-regulation or other methods".

Instead of creating new regulations, the Policy Paper on business regulation advocates using existing regulation, if necessary with simplifications or clarification or improved

[25] See for example its annual review for 2009: http://webarchive.nationalarchives.gov.uk/20101201150033/http://berr.gov.uk/assets/biscore/better-regulation/docs/10-578-striking-the-right-balance-bre-annual-review-2009.pdf

[26] See "The Coalition: our programme for government": https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf

[27] Policy paper: 2010 to 2015 government policy: business regulation, updated on 8 May 2015: https://www.gov.uk/government/publications/2010-to-2015-government-policy-business-regulation

[28] See: http://discuss.bis.gov.uk/focusonenforcement/

[29] https://www.gov.uk/government/news/business-friendly-enforcement-saves-firms-over-40-million

[30] https://cutting-red-tape.cabinetoffice.gov.uk

enforcement with better remedies, or information and education. If new measures are needed, it favours self-regulation, co-regulation, or use of economic instruments, such as taxes and subsidies, quotas and permits, or auctions.

Any policymaker who wants to bring in a new regulation has to carry out an impact assessment into the potential effects of the regulation and possible alternatives. Those Impact assessments are first checked by the Regulatory Policy Committee, an independent body. They are then reviewed by the Reducing Regulation Committee, a cabinet sub-committee of ministers, which decides whether the case for a new regulation has been made and either approves or rejects the proposal.

To stem the growth of new regulation affecting business the government applied a "One-In, One-Out" rule from January 2011 to December 2012. Over that period, government departments in fact exceeded the target, removing around GBP 963 million more in business burdens than they introduced according to figures validated by the Regulatory Policy Committee.

Encouraged by that success the government then introduced a "One-In, Two-Out" rule. When policymakers do need to introduce a new regulation that leads to compliance costs for business, they have to remove or modify an existing regulation with double the cost. The One-In, Two-Out rule applies to UK regulation that has an impact on business and voluntary organisations but not to tax rules.

Twice a year the Government publishes lists of new business regulations that will come into force in the next 6 months and existing regulations that will end in the next 6 months together with an account of how departments are performing against their targets.

The Policy Paper on business regulation gave a commitment to systematically consider including review and sunset clauses in all new regulations.

To help businesses plan ahead, the government sets two dates during the year when new business legislation comes into force, known as common commencement dates (CCD).

To minimise the burden that new regulations impose on small businesses, especially on companies with fewer than 10 employees (micro-businesses) on 1 April 2011 the government introduced a 3-year freeze on new UK regulation for businesses with fewer than 10 employees.

The Better Regulation Delivery Office (BRDO) was established in 2012 as a distinct unit in the Department for Business, Innovation & Skills with the mission to :

- Help simplify the regulatory system;
- Drive improvements in regulatory delivery that support growth;
- Provide a forum for business engagement at the heart of the regulatory system;
- Provide advice on regulatory delivery within central government.[31]

[31] https://www.gov.uk/government/organisations/better-regulation-delivery-office/about

It runs a Better Business for All project which brings together businesses and regulators to improve local regulation.[32]

The coalition government was also concerned to reduce the cost of EU regulation on UK business. It quoted from a report produced for the European Commission:

> "It has been estimated that between one-third and one-half of the total administrative burden on businesses in Europe derives from EU regulation".[33]

In June 2013, it set up the EU Business Taskforce composed of business leaders to look at reforms to EU rules, regulations and practices that would make the most impact on British businesses. The taskforce sought contributions from businesses across the EU. It submitted its report *Cut EU Red Tape*[34] in October 2013. The report recommended 30 reforms to individual EU rules to remove competitiveness barriers and proposed the COMPETE principles to ensure all new EU regulation is pro-innovation and pro-growth. Those principles are:

- competitiveness test,
- one-in, one-out,
- measure impacts,
- proportionate rules,
- exemptions and lighter regimes,
- target for burden reduction,
- evaluate and enforce.

The government welcomed the taskforce's report and agreed to take forward its recommendations.

The update report, *Cut EU Red Tape: 1 year on*,[35] showed that 10 of the 30 recommendations had been realized and progress made on a number of others. In December 2014, the EU Competitiveness Council supported a range of the COMPETE principles, a step that was endorsed by the subsequent European Council.[36]

The Policy Paper on business regulation emphasized that the UK Government was working closely with the EU to reduce the cost of regulation, and in particular encouraging the European Commission to concentrate on the areas that businesses find most burdensome and that matter most for growth. The UK Government aims to influence EU legislation by committing itself to getting involved early in the policy making process as set out in the

[32] https://www.gov.uk/government/publications/business-regulation-better-business-for-all

[33] Europe Can do Better; Report on best practice in Member States to implement EU legislation in the least burdensome way; High Level Group of Independent Stakeholder on Administrative Burdens (The 'Stoiber Report'), November 2011

Quoted in: Gold-Plating Review - The Operation of the Transposition Principles in the Government's Guiding Principles for EU Legislation, March 2013: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/137696/bis-13-683-gold-plating-review-the-operation-of-the-transposition-principles-in-the-governments-guiding-principles-for-eu-legislation.pdf

[34] Published on 15.10.2013: https://www.gov.uk/government/publications/cut-eu-red-tape-report-from-the-business-taskforce

[35] Published on 6.11.2014: https://www.gov.uk/government/publications/cut-eu-red-tape-business-taskforce-report-one-year-on

[36] Conclusions of the European Council of 18.12.2014 at point I.1(d): http://data.consilium.europa.eu/doc/document/ST-237-2014-INIT/en/pdf

government's *Guiding Principles for EU legislation*.[37]

The Coalition Programme for Government committed to end 'gold-plating' of EU rules and that commitment was put into effect in the *Guiding Principles for EU Legislation*.[38]

Ahead of the 2015 General Election the Conservative Party Manifesto made a commitment to cut GBP10 billion of red tape over five years. After the formation of the Conservative government that commitment formed a key part of the *Productivity Plan, Fixing the foundations: creating a more prosperous nation*.[39]

The Small Business, Enterprise and Employment Act 2015 (SBEE)[40] enshrined the fundamental principles of the One-In, Two-Out system in law in the form of the Business Impact Target (BIT), requiring the Government to:

- Publish a deregulatory target for the duration of each Parliamentary term;
- Obtain independent verification of the economic impact of new regulation; and
- Report regularly on progress against the target.

In light of the evidence from business about the impact that regulators can have when enforcing regulation, the Government is proposing to extend the scope of the Business Impact Target to include the activities of statutory regulators that have an impact on business.[41]

In March 2016 the Government announced new measures to cut a further GBP10 billion of red tape including stepping up to a One In, Three Out rule.[42]

All work on regulation is subject to close scrutiny by Parliament. The legal drafting of all delegated legislation is scrutinised by the Joint Committee on Statutory Instruments, a Committee of both Houses of Parliament. Work towards Better Regulation is subject to scrutiny by the Regulatory Reform Committee of the House of Commons and its counterpart in the House of Lords, the Delegated Powers and Regulatory Reform Committee.

Other features of the United Kingdom system which differ from most other countries of Continental Europe (but which are often replicated in the common law world) are:

- The Law Commission, an independent, apolitical body which keeps the law under review and recommends reform to ensure that the law is fair, modern, simple, and effective; it runs a rolling programme focusing on different areas identified following public consultation with a view to submitting proposals to Government for it to take

[37] Published on 23.4.2013, BIS/13/774: https://www.gov.uk/government/publications/guiding-principles-for-eu-legislation
[38] See also the *Transposition guidance: how to implement EU Directives into UK law effectively*, published on 23.4.2013:
https://www.gov.uk/government/publications/implementing-eu-directives-into-uk-law
[39] Published on 10.7.2015:
https://www.gov.uk/government/publications/fixing-the-foundations-creating-a-more-prosperous-nation
www.gov.uk/government/uploads/system/uploads/attachment_data/file/443898/Productivity_Plan_web.pdf
[40] www.legislation.gov.uk/ukpga/2015/26/part/2/crossheading/business-impact-target/enacted
[41] See the Enterprise Bill: http://services.parliament.uk/bills/2015-16/enterprise.html
[42] https://www.gov.uk/government/news/government-going-further-to-cut-red-tape-by-10-billion

forward; it differs from the Better Regulation bodies by having a purely technical rather than business-oriented approach;[43]

- The Interpretation Act 1978 which gives guidance as to the interpretation of legislation;[44]
- The Office of Parliamentary Counsel, a corps of specialist legislative drafters who draft all United Kingdom primary legislation.[45]

Since 2013 the Office of Parliamentary Counsel has been running the Good Law Initiative which aims to make British legislation more accessible and understandable to users.[46] The initiative covers the content of legislation, the language used, the architecture of legislation and its publication.[47] As regards publication, the National Archives, which runs the United Kingdom's legislation website, is closely and actively involved.[48]

This brief overview of the steps taken by the United Kingdom over more than 30 years suggests that when it is seeking changes to improve the competitiveness of the EU's regulatory environment that may be seen as a logical application in the EU system of principles and approaches that it has already applied in its domestic system.

It has a multi-pronged approach in which there is a focus on cutting red tape to help business but also general efforts to create a sound regulatory framework for the benefit of all, technical efforts to make new rules accessible and understandable to all users and purely technical reform and modernisation of existing law in areas identified as presenting problems.

[43] http://www.lawcom.gov.uk
[44] http://www.legislation.gov.uk/ukpga/1978/30
[45] https://www.gov.uk/government/organisations/office-of-the-parliamentary-counsel
[46] https://www.gov.uk/government/collections/good-law
[47] https://www.gov.uk/guidance/good-law#content-language-architecture-and-publication
[48] https://www.nationalarchives.gov.uk
The legislation website is: http://www.legislation.gov.uk

3. WHAT HAS THE EU DONE TO IMPROVE ITS REGULATORY ENVIRONMENT?

In the early days the European pioneers were focused on their construction project, for which regulations and directives were the building blocks and little thought was given to any burdens they might entail. In 2014 the High Level Group on Administrative Burdens observed that it is:

> "important that [EU] rules be designed in the least burdensome way possible for businesses and citizens. In the past, this was unfortunately not always the case. Instead the political objective of the legislation was predominant whilst any resulting bureaucratic burdens were rarely taken into consideration".[49]

It was not until the late 1980s and the 1990s that concerns began to be voiced about the clarity and accessibility of European legislation.

In 1989 the European Parliament adopted a Resolution on the simplification, clarification and codification of Community law which stated:

> "in a Community governed by the rule of law general provisions imposing obligations or prohibitions on or giving rights to public authorities and private individuals must be clear, simple and accessible,
>
> … the Community decision-making process is, on the contrary, sometimes confused and uncoordinated".[50]

In particular the Sutherland Report in 1992 proposed a raft of improvements covering such matters as analysing the impact of legislation before and after adoption, improved consultation and transparency, choice of acts and codification and the establishment of a legislative coordination unit.[51]

Also in 1992 the French Conseil d'état noted the growing influence of Community legislation on French law and expressed disquiet at the volume of Community rules and how difficult they were to understand.[52] It recommended in particular an accelerated procedure for codifying European legislation and the creation of an Advisory Legal Committee common to the Council and Commission to check the quality and coherence of proposed legislation.

During the 1992 UK Presidency, the European Council adopted the Birmingham declaration with the pithy demand: 'We want Community legislation to be clearer and simpler'.[53] At its meeting in Edinburgh in December that year, it called for the quality of Community legislation to be improved by better drafting and for it to 'be made more readily accessible in a concise and intelligible form'[54] with the joint focus on writing understandable language

[49] See Cutting Red Tape in Europe, Final Report of the High Level Group, foreword by Edmund Stoiber, p. 6. Available from: http://ec.europa.eu/smart-regulation/refit/admin_burden/high_level_group_en.htm
[50] Doc. A2-152/89, OJ C158, 26.6.1989, p. 386.
[51] http://aei.pitt.edu/1025/
[52] Rapport public 1992, Le droit communautaire (Etudes et documents n. 44).
[53] Presidency Conclusions, 16.10.1992, DN: DOC/92/6, point A.3.
54 Presidency Conclusions, 13.12.1992, DN: DOC/92/8.

and producing simpler texts by replacing acts which had been amended by new updated acts. The following year the Council adopted a Resolution on legislative drafting quality.[55]

In 1994 the European Parliament adopted a Resolution on Transparency of Community legislation[56] and later that year the European Parliament, the Council and the Commission adopted an Interinstitutional Agreement on codification.[57]

In 1995 the Koopmans Committee established by the Netherlands Government recommended the adoption of guidelines for legislation and the creation of a committee of independent experts to assess draft European legislation.[58]

In 1996, following the report of the Molitor Committee, the Commission set out its plans for simpler legislation for the internal market (SLIM).[59]

The Amsterdam European Council of June 1997 called for "simplification of existing and new legal and administrative regulations in order to improve the quality of Community legislation and reduce its administrative burden on European business" which led the Commission to establish the Business Environment Simplification Taskforce (BEST).[60]

The Amsterdam Intergovernmental Conference of 1997 adopted a Declaration calling for action to improve drafting quality and to accelerate the codification of EU legislation.[61] That led to the adoption the following year of an Interinstitutional Agreement on drafting quality.[62]

In 2000, the European Council in Lisbon "set itself a new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world".[63] In the same year, the Ministers of Public Administration of all the EU Member States established a high-level advisory group, the Mandelkern Group, to examine regulatory quality in Europe. In its Final Report presented to the European Council in 2001 it called for an action plan of over 30 measures to improve regulatory quality, including such matters as whether rules are necessary, simplification, impact assessments and consultations and access to regulations.[64]

2001 also saw the publication of the report of the Committee of Wise Men on the regulation of European Securities Markets which recommended a multi-level approach to regulation.[65]

The Commission launched its governance initiative in July 2001, stating that the EU "must pay constant attention to improving the quality, effectiveness and simplicity of regulatory

55 OJ C 166, 17.6.1993, p. 1.
[56] A3-0266/94, OJ C205, 27.7.1994, p. 514.
[57] Interinstitutional Agreement of 20 December 1994 on an accelerated working method for official codification of legislative texts (OJ C102, 4.4.1996, p.2).
[58] Koopmans Report, *The quality of EC Legislation. Points for Consideration and Proposals,* The Hague 1995.
[59] COM(96)204.
[60] Commission Communication on Promoting Entrepreneurship and Competitiveness COM(98)550
[61] Declaration No 39 on the quality of the drafting of Community legislation (OJ C 340, 10.11.1997, p. 139).
62 OJ C 73, 17.3.1999, p. 1.
[63] Point 5 of the Council Conclusions: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00100-r1.en0.htm
[64] http://ec.europa.eu/governance/better_regulation/documents/mandelkern_report.pdf
[65] The Lamfalussy Report, see COM(2001)130, p.4.

acts".[66] Later that year it called for a new strategy and a new culture of simplification of regulation.[67] It also launched a codification programme with the ambitious but unrealistic target of reducing the size of the acquis by some 40%.[68]

In June 2002 it adopted a package of measures as part of the governance initiative designed to lead to better lawmaking, including an Action Plan on simplifying and improving the regulatory environment.[69]

Responding to an invitation from the European Council in Seville in June 2002, the European Parliament, the Council and the Commission adopted another Interinstitutional Agreement in December 2003 affirming their common commitment to improving the quality of lawmaking.[70] It covered: better preparation of legislation, greater transparency, improved accessibility of EU legislation, keeping the regulatory burden as light as possible, and improved follow-up to legislation adopted. It became a cornerstone of the Commission's Better Regulation programme.[71]

The Member States continued to call for further steps to be taken to improve the quality of EU regulatory policy. In 2004 the four countries holding the rotating presidency of the European Council in 2004 and 2005 launched a Joint Initiative on Regulatory Reform which was taken up by other Member States.[72]

In 2005 the Commission launched a programme for the simplification of the regulatory environment.[73]

In 2006, the Davidson Review commissioned by the United Kingdom to examine the impact of EU regulation on the United Kingdom stated:

> "it is widely acknowledged that the EU legislative process and practice (e.g. last-minute amendments by the Council or Parliament, without risk-assessment) still leads to poorly worded or ambiguous legislation. Management of such legislation is a challenging task for national governments and regulators".[74]

In November 2006, the Commission proposed a joint strategy with the Member States to reduce the administrative burden on business stemming from EU legislation by 25% by 2012.[75] That strategy was launched in January 2007 as the Action Programme for Reducing Administrative Burdens. It was endorsed by the European Council and ran until the end of

[66] White Paper on Governance (COM (2001) 428), at point 3.2.
[67] See COM (2001) 130, p. 3 and COM (2001) 726), p. 2.
[68] COM(2001)645, see point 2. According to point 1.3, it was to lead to a reduction in the acquis of 30 00 to 35 000 pages of the Official Journal but when the programme was completed in 2009 it had in fact led to a reduction of just 1 300 pages (see COM (2009) 17 final, point 5).
[69] COM (2002) 275, 276, 277 and 278.
[70] OJ C 321, 31.12.2003, p. 1.
[71] http://ec.europa.eu/governance/better_regulation/index_en.htm
[72] Initiative of the Irish, Dutch, Luxembourg and United Kingdom Presidencies of the EU: http://www.finance.gov.ie/viewdoc.asp?DocID=1804&CatID=1&StartDate=1+January+2004&m.
[73] COM (2005)535 and the follow ups COM (2006)690, COM (2008) 33, COM (2009)17. More recently the emphasis has been on reducing burdens on business, see COM (2011)803
[74] Davidson Review on implementation of EU legislation, HMSO 2006 (see point 5.2.6.): http://www.berr.gov.uk/files/file44583.pdf
[75] A strategic review of better regulation in the European Union, COM(2006) 689.

2012.[76] Its aim was to "measure costs imposed by information obligations on business and to eliminate unnecessary administrative burdens in order to improve the efficiency of legislation without jeopardising its purpose".[77] It covered both EU legislation and national legislation implementing and transposing EU law and was initially applied to 42 EU acts in areas identified as being burdensome for business, with another 30 being added later.[78]

The Commission also established the High Level Group on Administrative Burdens of eminent experts in the field of better regulation chaired by Edmund Stoiber to advise it on the implementation of the Action Programme for Reducing Administrative Burdens. It presented numerous opinions and reports with suggestions on how to reduce administrative burdens and on best practice in the Member States on implementing EU legislation with a total administrative burden reduction potential of over EUR 41 billion a year.[79]

In 2010 the Commission launched the Smart Regulation project embracing the whole cycle of regulation including implementation and post-adoption scrutiny.[80] Smart Regulation represents a further widening of the focus to include: impact assessment, consultation, expertise, administrative costs, choice of regulatory instruments, transposition and application of EU law, subsidiarity and proportionality, simplification and sectoral simplification, codification and recasting, accessibility and presentation of EU law, and inter-institutional coordination.[81]

The Smart Regulation agenda itself forms part of the Europe 2020 strategy which seeks a way out of economic crisis by setting goals in the areas of employment, innovation, education, poverty reduction and climate/energy which are to be achieved by initiatives to deliver smart, sustainable and inclusive growth.[82]

In 2012 the Commission adopted a Communication on EU Regulatory Fitness (REFIT) which forms the basis for the EU's current work on regulatory reform.[83] The Commission sets out the rationale of the REFIT programme as follows:

> "The current economic situation demands that EU legislation be even more effective and efficient in achieving its public policy objectives: demonstrating clear added value, delivering full benefits at minimum cost and respecting the principles of subsidiarity and proportionality. The final result must be a simple, clear, stable and predictable regulatory framework for businesses, workers and citizens".[84]

The Commission explains its policy as follows:

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[76] COM(2007) 23. In 2012 the Commission reported that it has exceeded its target: see COM(2012) 746, point 1, and: http://ec.europa.eu/smart-regulation/refit/admin_burden/index_en.htm
[77] See the Final report on the action programme, SWD(2012) 423, point 1.
[78] COM(2009) 16 'Reducing Administrative Burdens in the European Union'. Annex to the 3rd Strategic Review on 'Better Regulation' in the European Union.
For the results of the Action Programme see SWD(2012)422.
[79] See Cutting Red Tape in Europe, Final Report of the High Level Group, p. 5. Available from: http://ec.europa.eu/smart-regulation/refit/admin_burden/high_level_group_en.htm
[80] COM (2010) 543.
[81] See: http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm
[82] COM (2010) 2020 and the follow ups COM(2012) 42 'Simplification Agenda for the MFF 2014-2020'.
COM(2011) 803 'Minimising regulatory burden for SMEs'.
[83] See the Commission communication on EU Regulatory Fitness (COM(2012)746).
[84] (COM(2012)746), point 2.

> "The Commission … is determined to meet policy goals at minimum cost, achieving the benefits that only EU legislation can bring and eliminating all unnecessary regulatory burden. It will continue to strengthen its regulatory tools and to apply them systematically across its regulatory activities. The Commission will also step up its implementation and enforcement in close cooperation with the other European institutions and the Member States. It will combine various initiatives now underway into a Regulatory Fitness and Performance Programme (REFIT) aimed at eliminating unnecessary regulatory costs (i.e. burden) and ensuring that the body of EU legislation remains fit for purpose".[85]

Key elements of REFIT are the following:

- Other programmes on regulation are merged into REFIT which becomes the Commission's overarching regulatory policy.
- Mapping is used to identify the target areas for simplification.
- "Fitness checks" assess whether the regulatory framework for a policy sector is "fit for purpose". They are comprehensive policy evaluations to identify excessive regulatory burdens, any overlaps, gaps, inconsistencies or obsolete measures and the cumulative impact of legislation and serve as a basis for drawing policy conclusions on the future of the sector.
- REFIT evaluations are part of multiannual evaluation plans to ensure transparency. Evaluation has been strengthened and no proposals for legislation may be examined without prior evaluation.
- Impact assessments are further improved. Road maps are published to show what impact assessments are to be carried out. Further guidance has been issued on impacts in specific areas. All impact assessment are subject to independent scrutiny by the Impact Assessment Board, which in 2015 was replaced by the Regulatory Scrutiny Board.
- Transparency is ensured by improved consultation of citizens and stakeholders by means of longer consultation periods and a multilingual website for consultations and feedback called Your Voice in Europe.[86]
- There is increased focus on implementation with measures to support the Member States in their implementation and a follow-on to the Administrative Burden Reduction Programme called ABR Plus which covers the measures taken by Member States in implementation of EU legislation.
- Efforts continue to make EU legislation clearer and more accessible by means of simplification, codification, recasting and repeals, improved drafting and better electronic access.

In 2014 the incoming President of the Commission, Jean-Claude Juncker created a new post of First Vice-President, responsible for Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights, as well as transparency. He appointed Frans Timmermans to the post and gave him tasks including:

> "Coordinating the work on better regulation within the Commission, ensuring the compliance of EU proposals with the principles of subsidiarity and proportionality, and working with the European Parliament and the Council to remove unnecessary 'red tape' at both European and national level. This includes steering the Commission's work on the 'Regulatory Fitness and Performance Programme' (REFIT)

[85] (COM(2012)746), point 1.

> of EU legislation and ensuring the quality of impact assessments underpinning our activities. ...
>
> Ensuring that the special partnership with the European Parliament, as laid down in the Framework Agreement of 2010, is pursued with full commitment, and coordinating, on behalf of the Commission, the Interinstitutional work on policy programming and better law-making".[87]

Vice-President Timmermans was charged "to take stock of experience and report to the College within twelve months on how our approach to better regulation could be strengthened". As a result, in May 2015 the Commission adopted a Better Regulation Package consisting of a Communication, a proposal for an Interinstitutional Agreement, as well as Guidelines and a Toolbox for its staff.[88]

The Communication on Better Regulation for better results – An EU agenda states:

> The European Commission is determined to change both what the European Union (EU) does, and how it does it. The EU, its institutions, and its body of law, are there to serve citizens and businesses who must see this in their daily lives and operations. We must restore their confidence in our ability to deliver.
>
> The Juncker Commission represents a new start. ...
>
> Better regulation is a tool to provide a basis for timely and sound policy decisions – but it can never replace political decisions.
>
> Today we outline further measures to deliver better rules for better results. We will further open up policy-making and listen and interact better with those who implement and benefit from EU legislation. We will take a fresh look across all policy areas to see where existing measures need to be improved. ...
>
> The body of EU law is not only necessary, it is our great strength - it makes the EU qualitatively different from any other model of collective governance in the world. That is why it is so important that every single measure in the EU's rulebook is fit for purpose, modern, effective, proportionate, operational and as simple as possible. Legislation should do what it is intended to do, it should be easy to implement, provide certainty and predictability and it should avoid any unnecessary burden. Sensible, realistic rules, properly implemented and enforced across the EU. Rules that do their job to meet our common objectives - no more, no less. ...
>
> Over the last decade, the EU has introduced a comprehensive set of better regulation tools and procedures to ensure this. These important changes are already delivering results but this Commission has decided to go further.
>
> Our commitment to better regulation must apply across the board building on the progress already made with impact assessment and the Regulatory Fitness Programme (REFIT). We should not impose policies but prepare them inclusively, based on full transparency and engagement, listening to the views of those affected by legislation so that it is easy to implement. We are open to external feedback and external scrutiny to ensure we get it right. EU policies should also be reviewed

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[86] http://ec.europa.eu/yourvoice/index_en.htm

[87] See http://ec.europa.eu/commission/2014-2019/timmermans_en> accessed 3 September 2015
See in particular his 'Mission Letter' of 1 November 2014: http://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/timmermans_en.pdf accessed 3 September 2015.

[88] Communication on "Better Regulation for better results – An EU agenda" (COM(2015)215), Proposal for an Interinstitutional Agreement on Better Regulation (COM(2015)216),
Better Regulation Guidelines: http://ec.europa.eu/smart-regulation/guidelines/ug_chap1_en.htm
Better Regulation Toolbox:http://ec.europa.eu/smart-regulation/guidelines/toc_tool_en.htm

> regularly: we should be transparent and accountable about whether we are meeting our policy objectives, about what has worked well and what needs to change.
>
> Better regulation is not a bureaucratic exercise. Citizens, businesses and other stakeholders judge the EU on the impacts of its actions: not just new initiatives, but, even more importantly, the rules already in force. The Commission commits to taking political responsibility for applying better regulation principles and processes in its work and calls on the other EU institutions and the Member States to do likewise.[89]

The Commission promises to improve openness and transparency by "Consulting more, listening better" and "Explaining better what we do, and why". It encourages feedback on legislation by means of a "Lighten the Load – Have Your Say" feature on the Commission's website. It commits itself to "Doing It Better" by means of better tools including new better regulation guidelines for its own departments.[90]

The Commission established the REFIT platform consisting of high-level experts from business, civil society, social partners, the Economic and Social Committee, the Committee of Regions and Member States and chaired by the Commission First Vice-President Frans Timmermans. It provides advice to support the simplification of EU law and the reduction of regulatory burden without calling in question the policy objectives of EU law.[91]

In July 2015 the Commission set up the Regulatory Scrutiny Board to scrutinise the Commission's impact assessment and evaluation work. It replaced the Impact Assessment Board. The Regulatory Scrutiny Board is independent of the Commission's policy-making departments and consists of high-level, full time members, half of them from outside the Commission. It examines and issues opinions on all the Commission's draft impact assessments and of major evaluations and fitness checks of existing legislation. In principle, a positive opinion is needed from the Board for an initiative accompanied by an impact assessment to be tabled for adoption by the Commission. All impact assessments and the opinions of the Board are published.[92]

The second communication in the Commission's Better Regulation Package of May 2015 contained a "Proposal for an Interinstitutional Agreement on Better Regulation".[93] On the basis of that proposal the three institutions in March 2016 adopted a new Interinstitutional Agreement on Better Law-Making, which updates and replaces the 2003 Interinstitutional Agreement on Better Law-Making.[94]

In the 2016 Interinstitutional Agreement the three institutions recall their joint responsibility to deliver high-quality legislation and consequently agree to:

- pursue "better lawmaking" by:

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[89] COM(2015)215, point 1.
[90] Commission Staff Working Document SWD(2015)111.
[91] http://ec.europa.eu/smart-regulation/refit/refit-platform/index_en.htm
[92] http://ec.europa.eu/smart-regulation/impact/iab/iab_en.htm
[93] COM(2015)216.
[94] The provisional text is available from:
http://ec.europa.eu/smart-regulation/better_regulation/documents/20151215_iia_on_better_law_making_en.pdf
The 2016 IIA also replaces the:Interinstitutional Common Approach to Impact Assessment (November 2005): Available from: http://ec.europa.eu/smart-regulation/impact/ia_in_other/ia_in_other_en.htm;
Common Understanding on Delegated Acts of 15 April 2011: http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208640%202011%20INIT.

  - observing general principles such as democratic legitimacy, subsidiarity and proportionality and legal certainty;
  - promoting clear and simple drafting and utmost transparency of the legislative process;
  - avoiding overregulation and administrative burdens,
  - including reporting and evaluation requirements,
  - making legislation practical to implement;[95]
- measures to improve the EU's legislative programming and planning;[96]
- measures to ensure use of "Better Lawmaking tools", namely impact assessments, consultation and feedback, and ex-post evaluation of existing legislation;[97]
- improved explanation of the choice of each legislative instrument;[98]
- better use of delegated and implementing acts;[99]
- improved transparency and coordination of the legislative process;[100]
- structured co-operation to assess application and effectiveness of EU law;[101]
- simplifying EU legislation and avoiding overregulation and administrative burdens by:
  - recasting and codification,
  - promoting the most efficient regulatory instruments, such as harmonisation and mutual recognition,
  - cooperating and exchanging views,
  - steps to quantify administrative burdens and their reduction.[102]

Also in 2015 the Commission adopted measures to advance the Single Market.[103]

It can be seen then that the EU's work on regulatory policy, like that of the United Kingdom, is characterised by a succession of programmes, initiatives and strategies involving numerous bodies and groups. Key themes are transparency, consultation and an evidence-based approach. It is not surprising that there are similarities in their approach since they are both active participants in the work of the OECD on regulatory policy (see Chapter 4). While their work on Better Regulation is comparable, despite some differences in emphasis, the EU does not have a body carrying out technical law reform work like the UK Law Commission, nor a programme comparable to the Good Law Initiative.

[95] Section I.
[96] Section II.
[97] Section III.
[98] Section IV.
[99] Section V.
[100] Section VI.
[101] Section VII.
[102] Section VIII.
[103] In particular COM(2015)192 on a Digital Single Market Strategy and COM(2015)550 on Upgrading the Single Market.

4. THE BETTER REGULATION WORK OF THE OECD

The OECD is a leading forum for developing ideas and policies on governance and better regulation. Amongst other things it carries out or commissions studies, issues guidance and recommendations and promotes the exchange of best practices. Member States of the EU, including in particular the Netherlands and the United Kingdom, play an important role in contributing to its work, in feeding in their own ideas and experience, and in taking lessons from it back to the national and EU context. It plays an important role by analysing and reporting objectively on the state of regulatory policy in its members.

The OECD 2012 Recommendation of the Council on Regulatory Policy and Governance sets out detailed guidelines and principles for effective implementation of regulatory policy[104] and serves, in the OECD's words, as "a comprehensive and aspirational international standard on how to promote regulatory quality".[105] Among its key recommendations were:

- high-level commitment to a whole-of-government policy for regulatory quality;
- adherence to principles of open government, including transparency and participation in the regulatory process;
- oversight of regulatory policy procedures and goals;
- integration of Regulatory Impact Assessment (RIA) into the early stages of the policy process;
- consideration of alternatives to regulation;
- systematic reviews of the stock of regulation;
- regular reports on the performance of regulatory policy and reform programmes.

In the framework of the EU15 project run from 2008 onwards in partnership with the European Commission,[106] the OECD produced reports on the regulatory policy work of the EU15 Member States. Its report on the United Kingdom was broadly positive as the following extract shows:

> The vigour and breadth of the United Kingdom's Better Regulation policies are impressive, which makes it well placed to address complex regulatory challenges such as climate change and the regulatory management issues flowing from the financial crisis.
>
> An effective balance, rare in Europe, has been achieved between policies to address both the stock and the flow of regulations. Progress has been especially significant as regards ex ante impact assessment and enforcement which is increasingly risk based. The United Kingdom is also very active in promoting the development of EU level Better Regulation.
>
> Policy is business-oriented and initiatives for citizens and frontline public sector workers could usefully be reinforced. Transparency is generally strong, and the United Kingdom has a well-established culture of open consultations, supported by a code of good practice. The gap between principles of good consultation and processes as experienced by stakeholders in practice needs continuing attention.

[104] OECD (2012), Recommendation of the Council on Regulatory Policy and Governance, OECD Publishing, Paris: http://dx.doi.org/10.1787/9789264209022-en

[105] OECD (2015), OECD Regulatory Policy Outlook 2015, OECD Publishing, Paris, at p. 5.
DOI: http://dx.doi.org/10.1787/9789264238770-en

[106] http://www.oecd.org/gov/regulatory-policy/better-regulation-in-europe-the-eu-15-project.htm

> The development of a more integrated and strategic vision for the longer term would be helpful, not least to confirm priorities and target remaining challenges.[107]

In 2015 the OECD published the *Regulatory Policy Outlook,* an evidence-based analysis of the progress made by the OECD countries and the European Commission to improve the way they regulate.[108] It reviews the use of three critical tools of regulatory policy (Regulatory Impact Assessment, stakeholder engagement and *ex post* evaluation) and proposes options to use them in a more strategic manner to inform the development and delivery of regulations.

Both the European Commission and the United Kingdom are ranked highly for their regulatory policies.

As regards the Commission, areas suggested for improvement are systematic early consultations, consultation for implementing and delegated acts and systematic ex post evaluations but the report notes that the Better Regulation Package of 2015 addresses some of those issues.[109]

For the United Kingdom it is suggested that the regulatory policy agenda could be broadened in scope, rather than focusing so heavily on business.[110]

[107] Better Regulation in Europe: United Kingdom, OECD 2010, See the Executive summary: http://www.oecd.org/gov/regulatory-policy/betterregulationineuropeunitedkingdom.htm

[108] OECD (2015), *OECD Regulatory Policy Outlook 2015*, OECD Publishing, Paris. DOI: http://dx.doi.org/10.1787/9789264238770-en

[109] At p. 158.

[110] At p. 208.

5. RENEGOTIATION

5.1. The new settlement sought by the United Kingdom

The United Kingdom's goals in its negotiations with the EU are set out in a short letter from David Cameron to Donald Tusk on 10 November 2015.[111]

This study is concerned only with the goals relating to competitiveness which are:

> "for all we have achieved in stemming the flow of new regulations, the burden from existing regulation is still too high. So the United Kingdom would like to see a target to cut the total burden on business.
>
> The EU should also do more to fulfil its commitment to the free flow of capital, goods and services. The United Kingdom believes we should bring together all the different proposals, promises and agreements on the Single Market, on trade, and on cutting regulation into a clear long-term commitment to boost the competitiveness and productivity of the European Union and to drive growth and jobs for all".

That letter is very brief and in order to understand the goals it is necessary to see them in context. Part of that context is the work on regulatory reform carried out in the United Kingdom over more than 30 years as outlined in Chapter 2. Another part is the messages made public in the lead up to the renegotiations. Of particular relevance is the speech David Cameron gave at Bloomberg on 23 January 2013[112] when he explained why he wished to seek reform now, even though the EU is facing other, very serious problems. He said:

> "there are 3 major challenges confronting us today.
> First, the problems in the Eurozone are driving fundamental change in Europe.
> Second, there is a crisis of European competitiveness, as other nations across the world soar ahead. And third, there is a gap between the EU and its citizens which has grown dramatically in recent years. And which represents a lack of democratic accountability and consent that is - yes - felt particularly acutely in Britain.
> If we don't address these challenges, the danger is that Europe will fail and the British people will drift towards the exit".

He explained the competitiveness problem as follows:

> "while there are some countries within the EU which are doing pretty well. Taken as a whole, Europe's share of world output is projected to fall by almost a third in the next 2 decades. This is the competitiveness challenge - and much of our weakness in meeting it is self-inflicted.
> Complex rules restricting our labour markets are not some naturally occurring phenomenon. Just as excessive regulation is not some external plague that's been visited on our businesses.
> These problems have been around too long. And the progress in dealing with them, far too slow.
> As Chancellor Merkel has said - if Europe today accounts for just over 7 per cent of the world's population, produces around 25 per cent of global GDP and has to finance 50 per cent of global social spending, then it's obvious that it will have to work very hard to maintain its prosperity and way of life".

[111] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf
[112] https://www.gov.uk/government/speeches/eu-speech-at-bloomberg

He set out his "vision for a new European Union, fit for the 21st Century" built on 5 principles. Speaking of competitiveness he said:

> "At the core of the European Union must be, as it is now, the single market. Britain is at the heart of that Single Market, and must remain so.
>
> But when the Single Market remains incomplete in services, energy and digital - the very sectors that are the engines of a modern economy - it is only half the success it could be.
>
> It is nonsense that people shopping online in some parts of Europe are unable to access the best deals because of where they live. I want completing the single market to be our driving mission.
>
> I want us to be at the forefront of transformative trade deals with the US, Japan and India as part of the drive towards global free trade. And I want us to be pushing to exempt Europe's smallest entrepreneurial companies from more EU Directives.
>
> These should be the tasks that get European officials up in the morning - and keep them working late into the night. And so we urgently need to address the sclerotic, ineffective decision making that is holding us back.
>
> That means creating a leaner, less bureaucratic Union, relentlessly focused on helping its member countries to compete.
>
> In a global race, can we really justify the huge number of expensive peripheral European institutions?
>
> Can we justify a Commission that gets ever larger?
>
> Can we carry on with an organisation that has a multi-billion pound budget but not enough focus on controlling spending and shutting down programmes that haven't worked?
>
> And I would ask: when the competitiveness of the Single Market is so important, why is there an environment council, a transport council, an education council but not a single market council?"

5.2. What the EU is offering

The EU's response to the United Kingdom's list of goals is set out in the Conclusions of the European Council of 18 and 19 February 2016.[113]

Point (2) of those Conclusions states:

> "the following set of arrangements … constitute an appropriate response to the concerns of the United Kingdom: …".

Point I(3) states:

> "Regarding the Decision in Annex 1, the Heads of State or Government have declared that:

[113] EUCO 01/16: http://www.consilium.europa.eu/en/meetings/european-council/2016/02/18-19/

(i) this Decision gives legal guarantee that the matters of concern to the United Kingdom as expressed in the letter of 10 November 2015 have been addressed;

(ii) the content of the Decision is fully compatible with the Treaties;

(iii) this Decision is legally binding, and may be amended or repealed only by common accord of the Heads of State or Government of the Member States of the European Union".

As far as concerns competitiveness the relevant parts of the arrangements are as follows:

In the Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union (in Annex I to the Conclusions), Section B on Competitiveness states:

"The establishment of an internal market in which the free movement of goods, persons, services and capital is ensured is an essential objective of the Union. To secure this objective and to generate growth and jobs, the EU must enhance competitiveness, along the lines set out in the Declaration of the European Council on competitiveness.

To this end, the relevant EU institutions and the Member States will make all efforts to fully implement and strengthen the internal market, as well as to adapt it to keep pace with the changing environment. At the same time, the relevant EU institutions and the Member States will take concrete steps towards better regulation, which is a key driver to deliver the above-mentioned objectives. This means lowering administrative burdens and compliance costs on economic operators, especially small and medium enterprises, and repealing unnecessary legislation as foreseen in the Declaration of the Commission on a subsidiarity implementation mechanism and a burden reduction implementation mechanism, while continuing to ensure high standards of consumer, employee, health and environmental protection. The European Union will also pursue an active and ambitious trade policy.

Progress on all these elements of a coherent policy for competitiveness will be closely monitored and reviewed as appropriate".

The European Council Declaration on Competitiveness (in Annex III to the Conclusions) states:

"Europe must become more competitive if we are to generate growth and jobs. Although this goal has been at the heart of EU activities in recent years, the European Council is convinced more can be done in order to exploit fully the potential of all strands of the internal market, promote a climate of entrepreneurship and job creation, invest and equip our economies for the future, facilitate international trade, and make the Union a more attractive partner.

The European Council highlights the enormous value of the internal market as an area without frontiers within which goods, persons, services and capital move unhindered. This constitutes one of the Union's greatest achievements. In these times of economic and social challenges, we need to breathe new life into the internal market and adapt it to keep pace with our changing environment. Europe

> must boost its international competiveness across the board in services and products and in key areas such as energy and the digital single market.
>
> The European Council urges all EU institutions and Member States to strive for better regulation and to repeal unnecessary legislation in order to enhance EU competitiveness while having due regard to the need to maintain high standards of consumer, employee, health and environmental protection. This is a key driver to deliver economic growth, foster competitiveness and job creation.
>
> To contribute to this objective, the European Parliament, the Council and the Commission have agreed the Interinstitutional Agreement on Better Law Making. Effective cooperation in this framework is necessary in order to simplify Union legislation and to avoid overregulation and administrative burdens for citizens, administrations and businesses, including small and medium sized enterprises, while ensuring that the objectives of the legislation are met.
>
> The focus must be on:
>
> • a strong commitment to regulatory simplification and burden reduction, including through withdrawal or repeal of legislation where appropriate, and a better use of impact assessment and ex-post evaluation throughout the legislative cycle, at the EU and national levels. This work should build on the progress already made with the Regulatory Fitness Programme (REFIT);
>
> • doing more to reduce the overall burden of EU regulation, especially on SMEs and micro- enterprises;
>
> • establishing where feasible burden reduction targets in key sectors, with commitments by EU institutions and Member States.
>
> The European Council welcomes the Commission's commitment to review every year the success of the Union's efforts to simplify legislation, avoid over-regulation and reduce burdens on business. This annual overview done in support of the Commission's REFIT program will include an Annual Burden Survey and also look at the stock of existing EU law”.

The Declaration of the European Commission on a subsidiarity implementation mechanism and a burden reduction implementation mechanism (in Annex IV to the Conclusions) states:

> “The Commission will establish a mechanism to review the body of existing EU legislation for its compliance with the principle of subsidiarity and proportionality, building on existing processes and with a view to ensuring the full implementation of this principle.
>
> The Commission will draw up priorities for this review taking into account the views of the European Parliament, the Council and the national parliaments.
>
> The Commission will propose a programme of work by the end of 2016 and subsequently report on an annual basis to the European Parliament and the Council.
>
> The Commission is fully committed to and will continue its efforts to make EU law simpler and to reduce regulatory burden for EU business operators without compromising policy objectives by applying the 2015 Better Regulation Agenda, including in particular the Commission's Regulatory Fitness and Performance

Programme (REFIT). Cutting red tape for entrepreneurship, in particular small and medium size enterprises, remains an overarching goal for all of us in delivering growth and jobs.

The Commission, within the REFIT platform, will work with Member States and stakeholders, towards establishing specific targets at EU and national levels for reducing burden on business, particularly in the most onerous areas for companies, in particular small and medium size enterprises. Once established, the Commission will monitor progress against these targets and report to the European Council annually".

6. ANALYSIS

6.1. Terminology

Great care is need regarding the terminology used in this area.

If "Europe" is an emotive issue in the United Kingdom, "red tape" is an emotive term. While "bureaucracy" has a neutral meaning (although it is often used with negative connotations) "red tape" is invariably pejorative signifying an excess of bureaucracy. The words immediately conjure up a negative image. Charles Dickens wrote:

> "Britannia, that unfortunate female, is always before me, like a trussed fowl: skewered through and through with office-pens, and bound hand and foot with red tape".[114]

Concern about red tape followed the British around the world and even led to the coinage of a new term "red tapism", which is still in use today in India and Sri Lanka. In 1855 the Ceylon Times wrote:

> "Commonsense blushes at the maintenance of this absurd system of red tape. Red tapism in Downing Street sits idly, dangling in its kid-gloved fingers dispatches on which depended the most vital interests of a valuable Colony".[115]

In 1855 Downing Street was regarded as the root of the problem but the present occupant of Downing Street wants to be the solution to the problem:

> "... every bureaucrat in government has got to understand that we cannot afford to keep loading costs onto businesses ... and if I have to pull these people into my office to argue this out myself and get them off the backs of business then I will do it."[116]

In section 2 of this study we saw that regulatory reform in the United Kingdom in the 1980s was originally referred to as "deregulation" before becoming "better regulation" in 1997. In itself "deregulation" can be understood as removing excessive regulation but the word can be regarded as suggesting removing so much regulation that societal interests such as social policy or environmental protection are no longer safeguarded.

We can see the way similar word games are played in the EU.

In 2009 the European Commission, at the suggestion of the High Level Group on Administrative Burdens, held a competition for the "Best Idea for Red Tape Reduction". It "aimed at identifying innovative suggestions for reducing unnecessary bureaucracy stemming from European law" and was of course popular, attracting over 500 entries.[117] As

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[114] *David Copperfield* (1850), Chapter 43.
[115] Ceylon Times of 26 October 1855, quoted in "The Administration of Sir Henry Ward, Governor of Ceylon 1855-60", S.V.Balasingham, The Ceylon Historical Journal, Vol. 11.
[116] Speech by David Cameron MP to the Conservative Party Spring Conference, 2011
Quoted in *How to run a country - the burden of regulation*, Richard Harries and Katy Sawyer, published by Reform, December 2014.
http://www.reform.uk/wp-content/uploads/2014/12/The_burden_of_regulation_WEB.pdf
[117] See Press Release IP/09/523 of 1 April 2009: http://europa.eu/rapid/press-release_IP-09-523_en.htm

the OECD has pointed out, businesses and citizens support cuts to red tape that affects them but at the same time call for government to act to remedy problems.[118]

The High Level Group on Administrative Burdens explained why it had tackled red tape:

> more and more detailed rules which affect the daily life of citizens have tarnished the image of the EU in the public opinion and resulted in the EU being regarded as a "bureaucratic monster". Europe-wide opinion polls regularly indicate that a quarter of respondents perceive the EU as first and foremost a bureaucracy. Indeed, the President of the European Commission, José Manuel Barroso, pointed out in his State of the Union Speech 2013 that 74 percent of Europeans subscribe to the view that the EU is producing too much red tape.[119]

But it also set out to show that it was not just seeking to deregulate and that it recognised the value of regulation:

> The importance of European law-making for our daily life, especially in the areas of health, consumer and environment protection, but also in respect of company law, labour law and the finance sector will increase further. In our complex and complicated world, people want more safety according to the precautionary principle – provided by the state. The instrument to achieve this is the creation of new rules. This is why it is so important that these rules be designed in the least burdensome way possible for businesses and citizens.[120]

However, that was not enough for some members of the group, four of whom published a dissenting opinion criticising its work as "deregulation".[121] That view was shared by some civil society organisations.[122] So an assessment of what constitutes "deregulation" and whether it is to be welcomed depends on a person's viewpoint.

It might also be noted that Better Lawmaking or Better Regulation are not neutral terms. Of course no-one can object to things being made "better". But "better" does not always or necessarily mean "good", it may just mean less bad. The new London Routemaster buses carry a sign saying that they are "Better for the environment" but all that means is that their diesel engines produce "around half the carbon dioxide and a quarter of the particulate matter and nitrogen oxides of conventional diesel buses".[123] That may explain

[118] See OECD (2015), OECD Regulatory Policy Outlook 2015, OECD Publishing, Paris, at p. 46. DOI: http://dx.doi.org/10.1787/9789264238770-en

[119] High Level Group, Final Report, foreword by Edmund Stoiber, p. 6. Available from: http://ec.europa.eu/smart-regulation/refit/admin_burden/high_level_group_en.htm

[120] High Level Group, Final Report, foreword by Edmund Stoiber, p. 6.

[121] See the comment by the TUC General Secretary Frances O'Grady:
"Deregulation led to the financial crisis and those who believe it is the ideological answer to every problem are guilty of dangerous magical thinking.
It's no wonder that Stoiber failed to get the support of the whole group when his proposals will put workers and consumers at risk by scrapping employment rights, health and safety duties and environmental protection. Even the main trade association for Europe's small firms has rejected the proposals as senseless."
https://www.tuc.org.uk/workplace-issues/basic-rights-work/employment-rights/workers-would-be-put-risk-stoiber-proposals

[122] See, for example, "The crusade against 'red tape': How the European Commission and big business push for deregulation", published by Corporate Europe Observatory, Friends of the Earth Europe, October 2014: http://corporateeurope.org/sites/default/files/attachments/red_tape_crusade.pdf

[123] See the heading "Better for the Environment" at: https://tfl.gov.uk/modes/buses/new-routemaster

why the United Kingdom Parliamentary Counsel, who are careful with their words, have chosen the name "Good Law" for their project.[124]

Apart from emotive or "charged" terminology care must be taken with the relevant technical terms. In particular it should be noted that "administrative burdens" are only part of the "administrative costs" related to the regulatory environment, as is illustrated from the following passage from the Commission document on Measuring administrative costs and reducing administrative burdens in the EU:

> Administrative costs mean the costs incurred by enterprises, the voluntary sector, public authorities and citizens in meeting legal obligations to provide information on their activities (or production), either to public authorities or to private parties. They are different from compliance costs which stem from the generic requirements of the legislation, such as costs induced by the development of new products, or processes that meet new social and environmental standards. Consequently, administrative cost reduction measures are limited to streamlining information requirements and do not affect the basic design of the underlying legislation. This suggests that simplification measures to reduce administrative costs are developed more easily than measures aimed at changing the nature or the scope of the underlying legislation. Given their nature and in light of experiences in Member States which have developed administrative cost reduction programmes, these reduction measures should be relatively straightforward to decide and implement. Such measures are therefore fundamentally different from deregulation initiatives.
>
> Administrative requirements can be further broken down into information obligations (IOs). This can best be explained as follows: a piece of legislation may contain requirements for submitting information (i.e. submitting a certificate of conformity to a public authority, on a regular basis). Each specific requirement in the legislation is defined as an IO.
>
> ***An important distinction must be made between information that would be collected by businesses even in the absence of the legislation and information that would not be collected without the legal provisions. The former are called administrative costs; the latter administrative burdens. The Commission's Better regulation strategy is aimed at measuring administrative costs and reducing administrative burdens.***[125]

The emphasis in that passage is in the original document and it highlights the key fact that while the Commission is measuring all costs resulting from information requirements for business resulting from legislation, it is seeking to reduce only those costs that would not be incurred if there were no legislation.

6.2. Comment on the United Kingdom's goals

In the part of its list of goals relating to competitiveness, the United Kingdom is not seeking any special treatment or derogation. It is seeking the application of the European Treaties. Article 3(3) of the TEU provides:

[124] https://www.gov.uk/guidance/good-law
[125] COM(2006)691, at point 1.2, emphasis in the original document.

> "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment …".

David Cameron is at pains to stress in his letter of November 2015 that improved competitiveness will "drive growth and jobs for all" and to refer to "all we have achieved" and what "we should" do. Similarly in his Bloomberg speech he repeatedly referred to "us" and spoke of "creating a leaner, less bureaucratic Union, relentlessly focused on helping its member countries to compete", all very inclusive terminology. That message that these measures are for the common good is made more explicit by others in key Government positions, such as the Chancellor, George Osborne:

> "In recent years, while fire-fighting the Eurozone crisis, the EU has not done enough to make itself competitive and a source of jobs and growth.
>
> This is what many of the key UK proposals for EU reform are about. We want the EU to rekindle its commitment to economic prosperity. This will benefit all member states. …
>
> All Europeans need the reassurance that the EU is committed to reform. They need assurance that it is committed to democratic accountability and to boosting jobs and growth".[126]

The United Kingdom is seeking a target to cut the total burden on business from regulation.

In setting out the first goal David Cameron concedes that the EU has reduced the volume of new regulations. He does so more or less implicitly, perhaps to avoid weakening his negotiating position, although some might suggest that it would have helped him in his dealings with his European partners if he had first openly praised the achievements already made. This is a reminder that the list of goals is addressed not just to the United Kingdom's European partners but also to the domestic audience which may be more impressed by a firm stance.

He asserts that the burden on business from the acquis is excessive. He suggests that the total burden should be reduced by means of a target.

That would appear to imply that the existing burdens in the acquis should be quantified and a specific numerical target set for reducing those burdens. That would mirror the approach in the United Kingdom where the government regularly publishes targets for reducing red tape and reports on the extent to which those targets are met.

In setting out the second goal David Cameron seems to be seeking a single express and permanent commitment to take full account of competitiveness and productivity in the EU's regulatory process. He wants all the various mechanisms already in existence brought together.

[126] "Four Steps towards a Stronger Europe", *Newsweek*, Davos issue, 22 February 2016.

In pushing for completion of the internal market in services the United Kingdom is sometimes regarded as acting in its own self-interest because it is particularly active in the service sector and would therefore be a major beneficiary. As one academic has put it:

> "Compared to trade in goods, there are still substantial barriers to trade in services across EU member states. One piece of evidence is that the forces which resulted in lower markups for manufactured goods from the single market reforms seem to be absent in the services sector. So British consumers would have much to gain from future integration of services within Europe. Another piece of evidence is that product regulations in the importing country are negatively related to the volume of trade in services, but not to trade in goods. Britain is a net exporter of services to the EU, and a future reduction in barriers to trade in services would provide export opportunities for British firms. Conservative estimates from the Centre for Economic Performance show the expected gains would be between 1 and 3 per cent of British GDP".[127]

But it is certainly not exclusively in the interests of the United Kingdom to liberalise the market in services. One study suggests that the failure to liberalise the EU market in services is one of the reasons why the EU's growth in productivity lags behind that of the USA.[128] The same study suggests that other major EU economies would stand to benefit as much as the United Kingdom:

> "Services make up the great majority of economic activity in most developed economies. In France and the UK, they constitute nearly 80 per cent of economic activity. Even in Germany, which has a large manufacturing sector, services make up 72 per cent". [129]

The Commission itself has estimated that "more ambitious implementation of the Services Directive would add 1.8 % of EU GDP".[130]

6.3. Comment on the EU offer

European Council conclusions have political and declaratory value only.[131]

The European Council does not exercise legislative functions (Art. 15 TEU) but its Decision may serve to "define the general political directions and priorities" of the EU. The heads of State and Government declared that the decision is legally binding (Point I (3) of the Conclusions). However the Decision is expressed using the future tense "will" rather than "shall" which is used in all EU binding acts[132] and it uses expressions such as "will make all efforts", "will take concrete steps" and "will also pursue an active and ambitious trade policy" which suggest at most "obligations d'effort". It does provide that progress on all

[127] "The 'leave' campaigns are ignoring the last 40 years of economic data", Swati Dhingra, LSE EUROPP, 8 February 2016: http://bit.ly/1QRCWxe
[128] "How to build European services markets", John Springford, Centre for European Reform, September 2012, at p. 4.
http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2012/js_markets_sept12-6206.pdf
[129] Ibid., at page 5.
[130] See COM(2015)550, at point 1.2, and http://ec.europa.eu/economy_finance/publications/economic_paper/2012/pdf/ecp_456_en.pdf
[131] See the Report of the House of Commons European Scrutiny Committee on The Conclusions of the European Council and the Council of Ministers, Tenth Report of Session 2007–08, HC 86, at p.3.
[132] See the Joint Practical Guide for Drafting EU legislation, at point 2.3.2:
http://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf

those steps will be "closely monitored and reviewed" but that is immediately qualified by the weak "as appropriate".

The Declaration on Competitiveness "urges all EU institutions and Member States to strive for better regulation and to repeal unnecessary legislation in order to enhance EU competitiveness while having due regard to the need to maintain high standards of consumer, employee, health and environmental protection". That is clearly not mandatory but an exhortation. It refers to measures that are already in place, the IIA on Better Lawmaking and the REFIT Programme.

It does not mention, despite the obvious connection, the Single Market Strategy presented by the Commission in October 2015.[133]

The Declaration of the European Commission on a subsidiarity implementation mechanism and a burden reduction implementation mechanism states:

> "The Commission will establish a mechanism to review the body of existing EU legislation for its compliance with the principle of subsidiarity and proportionality, building on existing processes and with a view to ensuring the full implementation of this principle".

The subsidiarity implementation mechanism is a new creation and the Commission's commitment to review the existing acquis appears to be a new commitment. On the face of it that is a major undertaking since the aquis is estimated to be around 150,000 pages of the Official Journal. It should, however, be noted that, quite apart from the substantive obligation to comply with the principle of subsidiarity in the TEU and Protocol No 2, there has long existed a formal requirement when adopting new legislation to check for compliance with that principle and to confirm it expressly in the recitals (see the Joint Practical Guide for the Drafting of EU legislation, at point 10.15 ff)[134]. So while it will take some time to review the whole of the acquis, it is probably unlikely that very many existing acts are now found to fail the test. The key questions are precisely what mechanisms will be established by the Commission and whether the Commission will apply different criteria from those it applied in the past.

As part of its balance of competences review the United Kingdom specifically examined how the principles of subsidiarity and proportionality are applied in the EU. Its report examined the background to those principles and how they have evolved in the EU, referring to a shift from ex-post judicial enforcement of subsidiarity, more towards ex-ante political enforcement of subsidiarity. [135] It considered the need to review existing EU legislation for compliance with subsidiarity and suggested that that would indeed by useful quoting an academic as saying:

[133] COM(2015)550, Upgrading the Single Market: more opportunities for people and business; SWD(2015)202, A Single Market Strategy for Europe - Analysis and Evidence
[134] http://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf
It is also an element that must be expressly addressed in the Commission's impact assessment and in the Explanatory Memorandum that accompanies all Commission proposals for legislation
[135] See point 1.16 quoting M.Dougan and T.Horsley: https://www.gov.uk/government/consultations/subsidiarity-and-proportionality-review-of-the-balance-of-competences

"[T]he assessment of whether particular actions respect the principle of subsidiarity may evolve over time, with the decision that previously established actions should be scaled back or discontinued, or new actions introduced. Subsidiarity assessment is thus quite dynamic and not a mechanical process whereby one 'right' answer is necessarily able to be read off".[136]

6.4. Have the United Kingdom's goals been achieved?

6.4.1. General

The United Kingdom's goals on competitiveness have not attracted much attention. They have been largely ignored in the media in favour of the headline grabbers like migration.

They do indeed seem uncontroversial.

Establishment of the internal market and a highly competitive social market economy are fixed as aims in Article 3 of the TEU.

As has been shown in Chapters 2 and 3 of this study both the United Kingdom and the EU have for decades worked hard to improve their regulatory systems. Many of the steps they have taken and the programmes they have introduced are very similar. That is hardly surprising in view of their membership and active involvement in the OECD. Both the United Kingdom and the European Commission have been leading players in better regulation work (as well as other EU Member States) and they have shared best practices and implemented the OECD recommendations which they have helped to shape.

If we look at all the points in the OECD's 2012 Recommendation both the United Kingdom and the European Commission tick practically all the boxes. That is recognised by the OECD itself in its 2015 Regulatory Policy Outlook.

The structures and approaches to regulatory reform in the EU and in the United Kingdom respective systems are influenced by their specific organisational structures. Differences may also exist in the focus of their regulatory reform programmes in that the United Kingdom is very concerned by the needs of business while the EU is, under the Treaties, committed to aims such as "full employment and social progress, and a high level of protection and improvement of the quality of the environment" (Article 3(3) TEU).

Some of the United Kingdom's concerns are addressed now by the 2016 Interinstitutional Agreement on Better Law-Making. Since the discussions on that Agreement were conducted between May and December 2015 they may be regarded as part of the renegotiation, even though that was not given prominence in the media at the time. The United Kingdom certainly took that view as is clear from a statement to the House of Commons Europe Committee by Ms Soubry, Minister for Small Business, Industry and Enterprise, who said, referring to both the Better Regulation Communication and the Agreement:

> We welcome those better regulation reforms, which demonstrate the Commission's positive attitude and intention to make rapid advances. The communication is evidence that our efforts to embed the EU's focus on competitiveness, jobs and

[136] See point 3.23 quoting J.Hunt: https://www.gov.uk/government/consultations/subsidiarity-and-proportionality-review-of-the-balance-of-competences

growth are bearing fruit. We continue to work with like-minded member states to achieve further progress on EU better regulation from all three EU institutions. That is genuinely a shared responsibility for minimising the burden of EU legislation.

The Government's negotiating mandate adopted a two-pronged strategy for meeting ambitions for the IIA: to maintain interinstitutional balance at least where it was set by the Lisbon treaty and the previous IIA and to prevent encroachment on the Council's powers and prerogatives; and to pursue a broad better regulation agenda, including through proposals for measures on better regulation and better impact assessment processes. The Government were also clear that where proposals on better regulation could not be achieved through the IIA negotiations, the door was to be left open to pursue them through other means.

The Government's better regulation objectives were a priority during negotiations and they have been successfully achieved in a number of key areas, which is a real boost for small businesses, which are the motor of our economy. First, the Commission makes a firm commitment that impact assessments will include "potential short and long-term costs", the impact on the competitiveness of a proposal, and subsidiarity and proportionality tests. It makes a specific commitment that its impact assessments will, in future, have "particular regard for Small and Medium Enterprises" through "think small first" principles. Secondly, the European Parliament and the Council confirmed that they will carry out impact assessments in relation to their substantial amendments to the Commission's proposal, which is something that the United Kingdom has consistently called for.

Thirdly, and most important, the Commission commits for the first time to assessing the feasibility of establishing an EU burden reduction target—a significant achievement that was added to the text of the proposal as a result of the UK's lobbying.[137]

6.4.2. Administrative burden reduction target

The United Kingdom's goals included "a target to cut the total burden on business".

If it was hoping for something directly equivalent to the system in the United Kingdom where the total burden from regulation is measured and targets are set for reducing that total it has been unsuccessful.

Already back in 2012 the Commission had stated its view in its Communication on EU regulatory fitness (REFIT):

> "The Commission does not believe that setting global targets and/or quantitative formulae for managing the stock of legislation will produce the desired results".[138]

The issue is referred to by the OECD in its 2015 Regulatory Policy Outlook:

> "Another tension lies between the trend in adopting quantitative (blanket) targets to secure action and the aspiration towards quality of the better regulation agenda that

[137] Debate on 8.2.2016: http://www.publications.parliament.uk/pa/cm201516/cmgeneral/euro/160208/c/160208s01.htm

[138] REFIT COM(2012) 746, page 3.

> requires a focused and qualitative approach. For example, quantitative targets on reducing the costs to particular groups may lead to the neglect of collecting evidence on the impacts on other groups, and overall welfare effects. Another example is provided by the administrative burden reduction efforts in many countries. These efforts have had a strong focus on reducing regulatory cost on business and some have evolved into programmes to reduce compliance costs. It is however not clear if these initiatives are taking full account of the competitive environment in which businesses operate. There is a risk that these efforts reinforce business rents as opposed to enhancing market and welfare”.[139]

In the REFIT Communication the Commission contended that managing the stock of legislation:

> “requires a more tailored approach with an assessment of actual benefits and costs — identifying whether they are directly related to EU legislation or to the implementation choices made by the Member States. Such an approach would make it possible to more accurately target cost reduction and regulatory improvements and would be better suited to the specificities of EU policy making”.[140]

It does not say what the specificities are but they may well include the Treaty commitment to such interests as social progress and a high level of environmental protection. Another factor may be the difficulty of dismantling EU schemes that have been in operation for some time and have wide ramifications extending into the Member States. One of the features of the EU is the extent to which it relies on the Member States to apply and implement its rules. That makes it more difficult for the Commission to have a complete overview of all the effects of its rules than it is for a Member State.

Nowadays of course we are aware of the weakness of quantitative targets or limits as we have learned of the possibilities of “gaming” the system whether by programming motor car engines to behave in a particular way when they are being tested or, for example, codifying numerous unimportant legal acts that have been the subject of only minor amendments as a means of boosting output figures in a codification exercise.

Burden reduction is also addressed in the 2016 IIA on Better Law Making in section VIII on simplification:

> “The Commission undertakes to present annually an overview, including an annual burden survey, as a contribution to its regulatory fitness programme (REFIT), of the results of the Union's efforts to simplify legislation and avoid overregulation and reduce administrative burdens.
>
> Based on the institutions' impact assessment and evaluation work and input from Member States and stakeholders, and while taking into account the costs and benefits of EU regulation, the Commission will, wherever possible, quantify the regulatory burden reduction or savings potential of individual proposals or legislative acts.
>
> The Commission will also assess the feasibility of establishing, in its regulatory fitness programme, objectives for the reduction of burdens in specific sectors”.

[139] OECD (2015), OECD Regulatory Policy Outlook 2015, OECD Publishing, Paris.
DOI: http://dx.doi.org/10.1787/9789264238770-en

[140] REFIT COM(2012) 746, page 3.

The language is still imprecise ("wherever possible" and "assess the feasibility") but it is a step in the direction wanted by the United Kingdom, as the UK Minister for Small Business, Industry and Enterprise stated (see point 6.4.1).

6.4.3. Commitment to the free flow of capital, goods and services

The United Kingdom called for the EU to do more to fulfil its commitment to the free flow of capital, goods and services.

In response the European Council included in both its Decision and its Declaration on Competitiveness references to the importance of the internal market and the efforts that all the institutions and the Member States should make to fully implement and strengthen it. In fact, though, here too the Commission had already taken action in the course of 2015 to promote the internal market. Although no reference was made to it in the EU's response, as pointed out in Chapter 5, the Commission had already taken the important step of adopting the Single Market Strategy in October 2015.[141] That Strategy states:

"the Single Market needs to be revived and modernised in a way that improves the functioning of the markets for products and services and guarantees appropriate protection for people".[142]

The Strategy includes measures to:

- modernise the standards system;
- strengthen the single market for goods;
- reduce barriers in key sectors such as business services, construction and retail;
- prevent discrimination against consumers based on nationality or place of residence;
- strengthen preventive enforcement by reforming the notification procedure;
- enable the balanced development of the collaborative economy.

It had already adopted a Digital Single Market Strategy consisting of three pillars:

- better online access to digital goods and services to make the EU's digital world a seamless and level marketplace;
- designing rules which match the pace of technology and support infrastructure development to enable digital networks and services to prosper;
- ensuring that Europe's economy, industry and employment take full advantage of what digitalisation offers to make digital a driver for growth.[143]

6.4.4. Bringing together all the proposals, promises and agreements on the internal market, trade and cutting regulation

The United Kingdom seeks a clear, long-term commitment to boosting the EU's competitiveness and productivity to replace the raft of existing disparate measures. One

[141] COM(2015)550 and SWD(2015)202.
[142] Point 1.2.
[143] COM(2015)192.

might wonder whether this is a reaction to the removal of the reference to free competition in the internal market from the text of the Constitutional Treaty.[144]

The response from the European Council is a Declaration on Competitiveness which stresses the importance of Europe becoming more competitive and of the value of the internal market before urging:

> "all EU institutions and Member States to strive for better regulation and to repeal unnecessary legislation in order to enhance EU competitiveness while having due regard to the need to maintain high standards of consumer, employee, health and environmental protection".

The Declaration also refers to the 2016 IIA on Better Law Making. That IIA would indeed have been an appropriate place to take account of the concerns of the United Kingdom in this regard. Such IIAs may be binding under Article 295 TFEU and although the text is silent in this regard and uses the future tense it is said to enter into force, terminology which is normally reserved for binding acts.

The IIA does refer to competitiveness but only in the preamble and as part of a long catalogue of quality standards for legislation:

"The three institutions recognise their joint responsibility in delivering high quality legislation, ensuring that Union legislation … is designed with a view to … strengthening the competitiveness and sustainability of the Union economy".

It does not refer to the internal market (or the single market) or to trade. As such it falls short of what the United Kingdom is seeking.

It does, however, refer in section VIII to simplification of EU legislation by means of recasting and codification (which continue to be the subject of their separate and outdated IIAs), avoiding overregulation and efforts under REFIT.

What is clearly missing from the EU offer is any response to the UK goal to:

> "bring together all the different proposals, promises and agreements on the Single Market, on trade, and on cutting regulation into a clear long-term commitment to boost the competitiveness and productivity of the European Union and to drive growth and jobs for all"

In fact the Declaration on Competitiveness is merely another patch added to confused and confusing patchwork of texts on the matter. It is high time for the institutions to adopt a comprehensive and coherent set of rules on regulation in the EU. This will be considered in Chapter 7.

[144] See Article I-3(2): "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted" (OJ C 310, 16.12.2004, p. 1).

6.4.5. Monitoring

For all the measures promised, the follow up, monitoring and review are of great importance. The European Council Decision, which is expressly stated to be legal binding, states:

"Progress on all these elements of a coherent policy for competitiveness will be closely monitored and reviewed as appropriate" (Point B).

The Commission in its Declaration undertakes to report annually:

- to the European Parliament and the Council on its review of the whole acquis for compliance with the subsidiarity principle;
- to the European Council on progress towards the specific burden reduction targets at EU and national levels.

Whatever the justifications for the different procedures it is obviously unfortunate, and a weakening of the oversight, for such closely related matters to be treated differently. No one body has oversight over the whole process and there will inevitably be a lack of coordination.

See also Chapter 7.5.

6.4.6. Final remarks

It is likely that the United Kingdom is with its competitiveness goals not so much addressing the European Commission – that would be "preaching to the converted" as we have seen – but perhaps seeking to give a signal to the other institutions, to others in Brussels and to the other Member States that they should not expect the flow of regulation from Brussels to return to levels seen in the past. The Commission has already markedly reduced the flow and the United Kingdom wants to make sure that the valve will not be reopened to its full extent again.

The EU's specific response has offered the United Kingdom political reassurances on the elements it wanted, some merely reaffirming commitments that are already in the Treaties. Will they be enough for the UK government to "sell" the package to its voters?

For now that the renegotiation process is over, the challenge facing the UK government has fundamentally changed. Having argued that EU regulation is a serious problem, it now has to convince the electorate that reforms in the EU over the last two decades, not only those resulting from the renegotiations, have given the EU a regulatory framework that does not overburden business. Since the European Council of February 2016 it has started to address that task, as illustrated by a recent report in a London newspaper:

> "… Chancellor George Osborne nailed the myth that the EU makes all the rules.
>
> Osborne said that regulation begins at home, and added: 'It is British-imposed red tape'. It comes from continuous pressure from commentators and the public to reduce risk and uncertainty, particularly in the aftermath of some scandal or accident. 'We look to the EU as an excuse for our own red tape'.

> The fault lies not in Brussels but in ourselves and our desire for gold-plating. He continued for good measure: 'If we leave the EU, we will have more rules under all these new trade agreements'".[145]

EU law is of course dynamic. It has evolved considerably since the early days, when emphasis was on construction, on building Europe up. Now emphasis must be on helping the EU and its Member States to compete in the modern very competitive world, which is changing so rapidly that regulators have difficulty in keeping up. Particularly in the light of the speed of technological progress a light touch is needed.[146]

The EU used to boast of setting the gold standard for regulation.[147] Can it still afford to do that? It is all right if all the others follow because they want access to the EU market but what if there are other markets like China and India which are less demanding? And will EU business be able to compete against business in other countries subject to lower standards but enjoying market access as part of WTO or other trade agreements?

The European Council expressly states in its Conclusions that the package that it is offering:

> "will become effective on the date the Government of the United Kingdom informs the Secretary-General of the Council that the United Kingdom has decided to remain a member of the European Union".

That means that if the people of the United Kingdom vote "No" in the June referendum the whole package will not apply. While that is quite logical in respect of the special arrangements for non-euro countries it is less logical for the measures regarding competitiveness, which are expressed to be for the good of the whole EU. In particular is it possible that some other Member States might wish to retain the Declaration on Competitiveness or the Commission commitment to review the acquis for compliance with subsidiarity.[148]

A final point merits closer study. In many respects the concerns of the United Kingdom can be linked to aspects of its general culture, or "character" as referred to in the extract from David Cameron's Bloomberg speech quoted in Chapter 1, such as:

- a readiness to criticise any authority if it is felt to overstep the mark;[149]
- the adversarial nature of both its political system and its legal system.

[145] See City Comment in the *London Evening Standard* of 8.3.2016, p. 42: http://www.standard.co.uk/business/anthony-hilton-bcc-chief-john-longworth-let-his-emotions-on-brexit-get-the-better-of-him-a3198516.html

[146] See, for example, Diego Zuluaga, "Regulatory approaches to the sharing economy", 1.3.016: https://thewonk.eu/reports/regulatory-approaches-to-the-sharing-economy r1240.html

[147] "Through the EEA and increasingly through the European neighbourhood policy the rules and standards of the single market stretch beyond the borders of the EU. Frequently the world looks to Europe and adopts the standards that are set here. This works to the advantage of those already geared up to meet these standards, and should contribute to improving the living and working conditions worldwide" (COM (2007) 60).

[148] In its balance of competences report on subsidiarity the United Kingdom mentions the interest in this matter of the Netherlands and Denmark.

[149] All students of English law learn that the system of identity cards for British citizens introduced during the Second World War was still in existence in the 1950s but had to be speedily abolished following the strong criticism in the *cause célèbre* of *Willcock v Muckle* [1951] 2 All ER 367.

It would be interesting for the EU institutions to explore the cultural aspects of this issue in more detail. It seems clear that there are differences in the ways the Member States approach such things as law, legislation and regulation, and how they understand such basic concepts as the rule of law and legal certainty. What degree of regulation is acceptable to them, and what standards must that regulation meet? How do they approach the way regulation is drafted and how do they make regulation clear? Answers to those questions would feed into a review of the rules regarding the drafting of EU legislation and other aspects of the EU regulatory process considered in Chapter 7.

Such a study should ideally cover all the Member States to compare their structures and processes. It could be the occasion for a sharing of best practices and perhaps a degree of voluntary convergence of some approaches both at EU and at national level.

That would contribute to ensuring that EU regulations and directives are fully effective and produce the same effects in each legal system.

7. COMPREHENSIVE AND COHERENT RULES ON EU REGULATION

7.1. What are the current rules on EU regulation?

The EU's approach to regulation has developed piecemeal over the last 60 years, often in response to calls from the Member States (in particular at the Amsterdam Intergovernmental Conference 1997[150] and at European Councils) or to traumatic events such as public rejection of EU treaties in referendums held in Member States. Other triggers have been reports by expert committees set up by Member States or by the EU institutions[151] and reports by the OECD.[152]

Regulation in the EU is currently governed by a bewilderingly complex patchwork of rules, principles, agreements, guidance and mere convention. The rules and guidance are scattered. There is no clear structure and indeed little coherence. And still, much is left to convention, tacit agreement or more or less consistent practices of the EU institutions. Of necessity, the follow up is patchy.

The rules are spread between the basic Treaties,[153] the Rules of Procedure of the European Parliament[154] and the Rules of Procedure of the Council[155] and some EU legal acts.[156]

Principles have been laid down by the Court of Justice of the EU in its case-law stretching back as far as the 1950s on matters as fundamental as the status of the different language versions of EU legislation[157] and the requirement for all legislation to be duly published.[158]

The number of Interinstitutional Agreements (IIAs) and Joint Declarations on aspects of regulation has reached double figures.[159]

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[150] Declaration No 39 annexed to the Amsterdam Treaty OJ C 340, 10.11.1997, p. 139.

[151] In particular Sutherland (1992), <http://aei.pitt.edu/1025/> accessed 3 September 2015, the French Conseil d'état (1992), Rapport public 1992, Le droit communautaire (Etudes et documents n. 44), Koopmans (1995), *De kwaliteit van EG-regelgeving – Aandachtspunkten en voorstellen* Mandelkern (2001), <http://ec.europa.eu/governance/better_regulation/documents/mandelkern_report.pdf> accessed 3 September 2015, Stoiber (2014), <http://ec.europa.eu/smart-regulation/refit/admin_burden/docs/08-10web_ce-brocuttingredtape_en.pdf> accessed 3 September 2015.

[152] In particular: Recommendation of the Council of the OECD on Improving the Quality of Government Regulation (C(95)21); 1997 OECD Report to Ministers, which set up a comprehensive plan for action on Regulatory Reform; 2005 APEC-OECD Integrated Checklist on Regulatory Reform; 2005 OECD Guiding Principles for Regulatory Quality and Performance; 2012 Recommendation of the Council of the OECD on Regulatory Policy and Governance. Accessible from: <http://www.oecd.org/gov/regulatory-policy/recommendations-guidelines.htm> accessed 3 September 2015.

[153] In particular Articles 5, 10, 11 and 12 TEU and Articles 288 to 299 TFEU.

[154] OJ L 44, 15.2.2005, p. 1.

[155] Decision 2009/937/EU OJ L325, 11.12.2009, p. 35.

[156] In particular: Regulation No 1 of 1958 on the language regime, OJ 17, 6.10.1958, p. 385;
Regulation (EEC, Euratom) No 1182/71 on dates and time limits, OJ L124, 8.6.1071, p. 1;
Decision 2009/496/EC, Euratom on the Publications Office of the European Union, OJ L168, 30.6.2009, p. 41;
Regulation (EC) No 1049/2001 on public access to documents, OJ L145, 31.5.2001, p. 43;
Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13); and Regulation (EU) No 216/2013 on the electronic publication of the Official Journal, OJ L69, 13.3.2013, p. 1.

[157] See Case 29/69 *Stauder v City of Ulm* [1969] ECR 419, para 3; and Case 283/81 *CILFIT* [1982] ECR 3415, paras 18 ff.

[158] See Case C-370/96 *Covita AVE* v *Greek State* [1998] ECR I-7711, paras 26 and 27 (timely publication); Case C-161/06 *Skoma-Lux* [2007] ECR I-10841, paras 33, 34, 38, 48 and 49 (no valid publication of a language version); and Case C-345/06 *Gottfried Heinrich* [2009] ECR I-1659, para 63 (non-publication of 'secret' provisions).

The EU institutions have issued numerous guidelines and manuals on regulation and legislative drafting, some of which are publicly available but others are not.[160]

Diverse aspects of regulation at EU level have been the subject of a dizzy succession of Commission initiatives. The main programmes have included: simpler legislation for the internal market (SLIM),[161] Business Environment Simplification Taskforce (BEST),[162] Governance, Better Regulation and simplification of the regulatory environment,[163] a codification programme,[164], the Action Programme for Reducing Administrative Burdens,[165] Smart Regulation[166], Europe 2020[167], and regulatory fitness (REFIT),[168] and most recently the 2015 Better Regulation Package (or Agenda).[169]
But apart from those main programmes a plethora of ancillary measures have been set out in Commission communications or staff working documents.[170]

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[159] IIA of 20 December 1994 on an accelerated working method for official codification of legislative texts, OJ C102, 4.4.1996, p. 2;
IIA of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, OJ C73, 17.3.1999, p. 1;
IIA of 28 November 2001 on a more structured use of the recasting technique for legal acts, OJ C77, 28.3.2002, p. 1;
IIA of 16 December 2003 on better law-making, OJ C321, 31.12.2003, p. 1, replaced from March 2016 by the 2016 IIA on Better Law-Making;
Interinstitutional 'Common Approach to Impact Assessment' (November 2005): Available from: <http://ec.europa.eu/smart-regulation/impact/ia_in_other/ia_in_other_en.htm>, replaced from March 2016 by the 2016 IIA on Better Law-Making;
Joint Declaration of the European Parliament, the Council and the Commission of 13 June 2007 on Practical Arrangements for the Codecision Procedure (Article 251 of the EC Treaty) (OJ C 145, 30.6.2007, p. 5).
Framework Agreement on relations between the European Parliament and the European Commission of 20.10.2010, OJ L304, 20.11.2010, p. 47, replacing the Framework Agreements on relations between the European Parliament and the Commission of 2000 and 2005 ([2001] OJ C 121/122 and [2006] OJ C117E/125);
Common Understanding on Delegated Acts of 15 April 2011, replaced from March 2016 by the 2016 IIA on Better Law-Making: http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208640%202011%20INIT;
Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents, OJ C369, 17.12.2011, p. 14;
Joint Political Declaration of 27 October 2011 of the European Parliament, the Council and the Commission on explanatory documents, OJ C369, 17.12.2011, p. 15)

[160] For general guidance on EU regulation, the Commission has made publicly available its:
Better Regulation Guidelines, SWD (2015)111, May 2015: http://ec.europa.eu/smart-regulation/guidelines/toc_guide_en.htm;
Better Regulation Toolbox, May 2015: http://ec.europa.eu/smart-regulation/guidelines/toc_tool_en.htm
For legislative drafting, the most important publicly available guides are the *Joint Practical Guide for persons involved in the drafting of EU legislation* (JPG) <http://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf> accessed 3 September 2015) and the *Interinstitutional Style Guide* <http://publications.europa.eu/code/en/en-000100.htm> accessed 3 September 2015).
The most recent interinstitutional guide on drafting, the Joint Handbook for the Presentation and Drafting of Acts subject to the Ordinary Legislative Procedure of 2016, is not publicly available at present.
The institutions are also now offering online drafting guidance, such as LegisWrite and the Drafters' Assistance Package (DAP) developed by the Commission and tailored back-up for drafters such as the European Parliament's Drafting Support Tool (DST).

[161] COM(96)204.

[162] Set up by the Commission in September 1997 at the invitation of the Amsterdam European Council of June 1997 to consider "simplification of existing and new legal and administrative regulations in order to improve the quality of Community legislation and reduce its administrative burden on European business".

[163] White Paper on Governance (COM (2001) 428), together with the follow up communications on simplification of regulation (COM (2001) 130 and COM (2001) 726) and the action plan on simplifying and improving the regulatory environment (COM (2002) 275, 276, 277 and 278), COM (2005)535 and the follow ups COM (2006)690, COM (2008) 33, COM (2009)17.

[164] COM(2001)645.

[165] COM(2007) 23. See also COM (2011)803. In 2012 the Commission reported that it had exceeded its target: see COM(2012) 746, point 1, and: http://ec.europa.eu/smart-regulation/refit/admin_burden/index_en.htm

[166] COM (2010) 543, at point 2.4.

[167] COM (2010) 2020 and the follow ups COM(2012) 42 'Simplification Agenda for the MFF 2014-2020' and COM(2011) 803 'Minimising regulatory burden for SMEs'.

[168] See the Commission communication on EU Regulatory Fitness (COM(2012)746).

[169] In particular (COM(2015)215) and (COM(2015)216).

[170] See the extensive but still incomplete list made available by the Commission: <http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm>

7.2. Are the current rules on EU regulation fit for purpose?

Creating a framework to govern regulation for an evolving union of 28 Member States with very different interests, structures and cultures is always going to be a challenge. Are the present rules up to that challenge?

The quality of EU legislation has certainly been criticised by politicians, judicial figures, and academic commentators.[171] The EU institutions have defended their rules. As long ago as 1997, before many of the present rules had been adopted, the Deputy Director General of the Commission Legal Service stated:

> In my view sufficient guidelines and instructions exist to ensure an adequate quality control, at least with regard to drafting itself and presentation of texts ('légistique'), but also as far as the tests of subsidiarity and proportionality are concerned.

He acknowledged that more work was needed on control of effectiveness, and in particular on impact assessment but said "apart from that, existing guidelines seem to be adequate and sufficiently complete. The problem may be rather how to see them properly applied and respected".[172]

Some have suggested, however, that the rules may be part of the problem. Bergeal has written from a French perspective:

> it must be noted that the successive directives of the authorities for improving the quality of legislative and regulatory rules have not had a very noticeable effect, whether in national law or in European law. In fact it appears that the number of different guides and charters on quality increases in ... proportion to the proliferation of texts which – always for very good reason – comply with practically none of the expertly formulated recommendations.[173]

It should be plain that the very proliferation and fragmentation of the rules governing the regulatory process is especially dangerous in the EU context which involves three independent institutions staffed by officials from 28 countries with quite different national cultures and speaking 24 different languages. Responsibility for preparing EU regulation, and in particular for drafting legislation, is not entrusted to a small corps of specialists but is part of the portfolio of tasks of thousands of staff of the EU institutions and civil servants from the Member States. Of necessity those staff members, lacking specialist knowledge,

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[171] For a fuller overview of such criticism of the quality of EU legislation see my account in: W. Robinson, 'Making EU legislation clearer' (2014) 16(3) European Journal of Law Reform 610, 620 and W.Robinson, 'Time for Coherent Rules on EU Regulation', The Theory and Practice of Legislation, Volume 3, Issue 3, 2015, 257.
Specific analyses of the quality of EU legislation are to be found in:
A. Kellermann and others (eds), *Improving the Quality of Legislation in Europe*, Kluwer Law International, The Hague 1998)
H. Xanthaki, 'The problem of quality in EU legislation: What on earth is really wrong?' (2001) 38 Common Market Law Review 651
W. Voermans, 'Concern about the quality of EU legislation: What kind of problem, by what kind of standards?' (2009) 2(1) Erasmus Law Review 59, 74 – 79;
H. Xanthaki, 'European Union Legislative Quality after the Lisbon Treaty: The Challenges of Smart Regulation, (2013) Statute Law Review 35(1), 66.
[172] See C.W.A. Timmermans, 'How to improve the Quality of Community Legislation: the Viewpoint of the European Commission', in A. Kellermann and others (eds), *Improving the Quality of Legislation in Europe*, Kluwer Law International, The Hague 1998) 39, 52.
See also the contributions to that same work by Advocate General F.G. Jacobs of the CJEU (p. 13), J.-C. Piris, Director General of the Council Legal Service (p. 25), and G. Garzon Clariana, Jurisconsult of the European Parliament (p. 60).
[173] C. Bergeal, *Rédiger un texte normative* (7th edn, Berger-Levrault, Paris 2012) 11 (my translation).

rely heavily on following rules and guidance. But few of those staff can have a satisfactory overview of all the rules, guidance, conventions, principles and practices.

A particular feature of EU legislation will always be that the EU depends on the Member States' authorities and legal systems to ensure its implementation and effectiveness. Both the EU institutions and the Member States have focused on the importance of that task and the problems inherent in it.[174]

Quite apart from the question whether the EU rules and guidance are effective, their very proliferation and incoherence represent a serious obstacle to those outside the EU institutions who seek to understand the EU's regulatory process and its legislation. That is why one of the United Kingdom's goals is to bring the rules on Better Regulation and the Single Market together.

The body of EU legislation known as the "acquis" is now said to fill some 160 000 A4 pages of the Official Journal.[175] That is daunting in itself but bearing in mind the warning by the Court of Justice of the EU that to understand an EU provision it is necessary to compare all the 24 language versions,[176] users are confronted by a total acquis of some 3.8 million pages. Some 3 million users access EU legislation on EUR-Lex each month[177] and many must be left bemused by its volume, complexity, alien terminology and convoluted procedural rules.

The recently adopted IIA on Better Law-Making leaves in place much of the confused and confusing patchwork governing the regulatory process in the EU, based in large part still on Commission communications, programmes and guidance. That patchwork is not fit for purpose.

The Commission itself may not appreciate how serious the problem is. It is less troubled by the large number of rules and guides because it has most of them filed in its databases and internal websites and has specialised departments for each of the various areas covered by them. Within each of those departments it can expect staff to have the necessary legal and technical competence – and access to the collective memory - to keep an overview of the part of the patchwork that concerns them.

The Commission may see nothing wrong in the fact that it - rather than the legislative authority - issues so many of the rules and guides. But in a Union "founded on representative democracy" EU citizens are entitled to expect that all the ground rules on regulation should be laid down by the legislative authority comprising the European Parliament, where citizens are directly represented, and the Council in which the Member States' governments are "democratically accountable either to their national Parliaments,

[174] See in particular COM(2002)725 on Better Monitoring of the Application of Community Law; the 2003 IIA which called for the "proper and prompt transposition of Community law into national law" (point 2); COM(2007)502 on A Europe of Results – Applying Community Law; COM(2010)543 on Smart Regulation; and COM(2015)215 on Better Regulation for Better Results which calls for EU rules to be "properly implemented and enforced across the EU" (point 1).
See also B. Steunenberg and W. Voermans, *The Transposition of EU Directives* (Leiden University, 2006); and the UK Government's *Transposition Guidance: How to implement European Directives effectively*, April 2013: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf>.
[175] M. Bratanić and M. Lončar, 'The Myth of Terminology Harmonisation on National and EU Level', in S. Šarčević (ed.), *Language and Culture in EU Law (*Ashgate, Farnham, 2015) 207.
[176] See Case 283/81 *CILFIT* [1982] ECR 3415.
[177] Source Publications Office 2014.

or to their citizens".[178] That would also be in accordance with the fundamental EU principles of the rule of law and openness and transparency.

The Commission takes a proprietorial view of the EU regulatory process and EU legislation, partly for historical reasons. The first President of the Commission regarded the Commission as the colegislator: 'The legislative power in the Community is held by the Council and Commission jointly'.[179]

Still today the Commission plays a key role in the adoption of EU legislation since a proposal from the Commission is required to initiate the ordinary legislative procedure (Article 294 TFEU), unanimity in the Council is required to amend the Commission's proposal (Article 293(1) TFEU) and the Commission may alter or withdraw its proposal at any time before adoption of an act (Article 293(2) TFEU).[180]

After the adoption of an EU act the Commission is to "ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them" and to "oversee the application of Union law under the control of the Court of Justice" (Article 17 TEU). As part of those tasks, the Commission explains how EU legislation is to be understood to the Member States, the business sectors concerned and the general public. It monitors the Member States' implementation of EU law and where necessary opens infringement proceedings against them which may lead to proceedings before the Court of Justice. And it offers its expert views on the interpretation of EU law in every case before the Court of Justice.

It may seem natural and convenient to the Commission to rely for many aspects of EU legislation on its own communications (COM documents) and other documents (in particular Staff Working Documents or SWDs and SECs) but, quite apart from the fundamental objection that the legislative authority should lay down all the basic rules itself, the practice is open to many objections of a more practical nature.

Those documents are not all easily accessible. They are not published in the Official Journal. Some of them are available in EUR-Lex but searching for them in the databases is not easy since they have their own numbering systems and the titles are not standardised. While communications (COM documents) are generally available in all the official languages of the EU, not all SWP and SEC documents are.

The legal status of those documents is not clearly specified. Indeed according to one Commission publication they "have no legal effect".[181]

The documents do not have a standard structure in the same way as legal acts. There is rarely the same clear definition of substantive scope and period of application as in legal acts. As a result there may be overlaps or lacunae and it is not possible to say when such a document starts to apply and ceases to apply. Nor can the reader always ascertain whether

[178] See Article 10 TEU.
[179] See W. Hallstein, *Die Europaeische Gemeinschaft* (1st edition, Econ Verlag, Duesseldorf, 1973) 34.
[180] Some limits on the Commission's power to withdrawal its proposal have been laid down by the CJEU in Case C-409/13 *Council* v *Commission* [2015] ECR I- 0000 (judgment of 14.2.2015).
[181] According to the glossary issued by the Commission on the European Judicial Network in civil and commercial matters:
'A Communication is a policy document with no mandatory authority. The Commission takes the initiative of publishing a Communication when it wishes to set out its own thinking on a topical issue. A Communication has no legal effect' (emphasis in the original).
<http://ec.europa.eu/civiljustice/glossary/glossary_en.htm#Communication>.

a new document builds on an existing one or supersedes it. Were the previous measures so successful that they should be extended or were they so ineffective that a new approach must be tried? It is hard to tell because the documents are uniformly couched in such overwhelmingly upbeat and positive terms.

7.3. Need for coherent rules on EU regulation

The 2016 IIA should be the first step in updating and replacing the EU rules on regulation by a coherent set of rules and guidance fit for the 21st century. So much in the EU has changed in the last decades with new Member States, new Treaties and new types of act. But more generally the approach to regulation globally has changed (evidence based, consultation, transparency) and the internet has revolutionised the way we all work, communicate and access information. It would be advisable to study further the approach to regulation and the standards it is expected to meet in all the Member States as part of this updating process (as mentioned in point 6.4.6).

To take account of those changes a series of new IIAs should be adopted to replace all the old texts and cover all aspects of EU regulation, including in particular the preparation, drafting, publication and interpretation of legislation.

The European Parliament Legal Affairs Committee has itself suggested such an approach, stating that the large number of Commission programmes on legislation "do not provide sufficient clarity and transparency as regards the aims of the measures, particularly for citizens, and should therefore be better combined".[182]

Establishing such a coherent set of rules would facilitate a uniform approach to high-quality regulation across the three EU institutions as recommended by the OECD.[183]

The underlying concept should be for the basic principles of EU regulation to be laid down by the legislative authority in agreement with the Commission, applied uniformly by the staff of the three institutions, and published in such a way that they are easily accessible to all those concerned by EU regulation and to EU citizens generally. A coordinated set of IIAs is an appropriate means for achieving that.

Establishing such a coherent and comprehensive set of ground rules for EU regulation will show that the EU's legislative authority is taking ownership of EU regulation and will cut the ground from the often repeated argument that too much is done by the "unelected bureaucrats" of Brussels.

It will also help improve the consistency of the technical work carried out by the three institutions involved in the EU legislative process, which each have their own constituencies, aims and priorities and their own quite different cultures.

In the EU legislative process the text of the Commission's proposal is the vehicle for all the policy changes and is shaped by many subtle compromises. The more advanced the stage, the harder it is to change anything of substance even if all the parties are aware that technically the text is far from perfect. That makes it important for the three institutions to

[182] Report on REFIT, A8-0208/2015 of 24.6.2015, recital E.

[183] See in particular the Recommendation of the Council on Regulatory Policy and Governance of 2012, which calls on Members to:
"Commit at the highest political level to an explicit whole-of-government policy for regulatory quality", (Annex, point 1): www.oecd.org/gov/regulatory-policy/49990817.pdf

agree in advance all the ground rules on technical matters that are to apply to the staff in each of them, and to make those ground rules widely and readily available. The need for compromises on the substance will always be there but at least there should be a common approach to all technical matters.[184]

In drawing up that set of IIAs a uniform approach should be taken to each aspect of the EU's regulatory process. All the basic principles of EU regulation should be set out in IIAs, which may be stated to be binding under Article 295 TFEU. Detailed rules and non-binding guidance may then be set out either in annexes to the IIA, or else in joint guidelines or ancillary texts agreed by the legislative authority and the Commission. As much as possible should be expressly set out in the IIA and the associated texts, with less being left implicit or at the discretion of the Commission. Putting detailed material in annexes will make it easier to keep it updated.

All the present IIAs and declarations should be expressly repealed. The Commission should withdraw any of its rules and guidance that are superseded by the IIAs and interinstitutional rules and guidance.

Clearly texts already adopted by the Commission may serve as a basis for much of this work but they should be reviewed and adopted by the three institutions as joint rules. This is a process that has to some extent already happened with the legislative drafting rules, where, back in 2000, the Commission's own Manual on Legislative Drafting served as inspiration for many parts of the text of the Joint Practical Guide adopted by the three institutions.[185]

There should be consultation of all concerned bodies at EU level, such as the Court of Justice of the EU, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, the Publications Office of the EU, and at the level of the Member States, such as the national parliaments and national administrations with expertise in regulation, as well as those affected by EU regulation, the academic world and EU citizens at large.

7.4. What should the new rules cover?

Following the publication of the Commission proposal for an Interinstitutional Agreement on Better Regulation (COM(2015)216) I wrote papers describing it as a missed opportunity and setting out a suggested outline for a comprehensive agreement on EU regulation.[186] As the three institutions have now reached agreement on the text of the Interinstitutional Agreement on Better Law Making, my specific suggestion for a single all embracing agreement can no longer be implemented but the underlying idea of creating a unified framework for EU regulation is still valid. I shall here summarise what the new rules might cover while referring the reader who seeks more details to those papers.

[184] Compare the approach of the Hansard Society in R. Fox and M. Korris, *Making Better Law* (Hansard Society, 2010) 16:
... "whilst policy is subject to the partisan political battle, the process by which legislation is considered can make a considerable difference in improving the quality of the final statute that emerges, regardless of political differences. The policy product is important but how the legislative process affects that product is our primary interest, for there are ways in which it is possible to influence the legislative process, particularly in technically complex policy areas, in order to improve it before political dynamics and the imperatives of partisan battle come into play".
Available from: <http://www.hansardsociety.org.uk/publications/modern-publications/#law-making>.
[185] http://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf
[186] http://ials.sas.ac.uk/news/IALS_Think_Tank_Robinson_Report.htm
http://ials.sas.ac.uk/news/docs/OutlineOfAgreementOnEURegulation.0.2.pdf

7.4.1. Lawmaking

Clearly there is no appetite to revisit the 2016 IIA yet but when it does come to be reviewed consideration might be given to the following material that could usefully be incorporated or taken into account in it:

- general principles of regulation, including alternatives to regulation, principles for the choice of type of act, accessibility, and a commitment to use plain language;[187]
- preparatory work, including reference to Citizens' Initiatives and consultation;[188]
- legislative procedure, including the content of the Commission proposal, trilogues, legal-linguistic finalisation and signature.
- implementation and application, including transposition and and evaluation after adoption.

7.4.2. IIA on legislative drafting

An updated and comprehensive IIA on Legislative Drafting should be adopted to replace the 1998 IIA. [189] It should:

(i) Set out a clear and strong commitment to drafting quality;
(ii) Establish basic principles for drafting EU acts;
(iii) Incorporate a complete rethink of the way that an EU act is presented to make it accessible to modern readers, in particular on the internet;
(iv) Set out comprehensive rules relating to parts of an act and points of legislative technique.

The guidelines set out in the 1998 IIA need to be thoroughly revised. The text of those guidelines has already been changed, in some cases significantly (for example, Guideline 1 has been changed from "Community legislative acts shall be drafted clearly, simply and precisely" to "Legal acts of the Union shall be drafted clearly, simply and precisely").[190]
The institutions should consult the Member States and legislative drafting experts before drawing up a new, more comprehensive set of guidelines (the Netherlands drafting guidelines, which were the inspiration for the EU guidelines, have grown from just sixteen in the 1990s to several hundred today). Many more drafting guidelines should be added, not least to reflect new standards for drafting set out the 2016 IIA on Better Lawmaking and COM(2015)215. The opportunity should be taken to correct drafting mistakes and remove redundant material.

At the same time the practical measures called for in the 1998 IIA to ensure that the guidelines were actually implemented should be reviewed and updated (for example the Joint Practical Guide was duly drawn up by the March 2000 deadline but needs to be expanded and kept updated and the promised regular reports on implementation of the 1998 IIA have never appeared).

(i) Commitment to drafting quality

The institutions should adopt a basic commitment to drafting quality which should be binding and guide the work of all those contributing to the drafting of EU acts. It should replace the present Guideline 1 and should cover clarity and intelligibility, precision and consistency. It might read, for example:

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[187] On plain language see 2012 OECD Recommendation, Annex point 2.6 and the Declaration on Parliamentary Openness, point 32: http://www.openingparliament.org/declaration.
[188] Referring to Article 11(4) TEU and Article 11(3) TEU respectively.
[189] Interinstitutional Agreement on common guidelines for the quality of drafting Community legislation (OJ C 73, 17.3.1999, p. 1).
[190] See the revised text of the Joint Practical Guide for persons involved in the drafting of European Union legislation: http://eur-lex.europa.eu/content/techleg/KB0213228ENN.pdf

> "EU legislation must be clear and understandable, consistent and precise".

It could also incorporate the requirement of foreseeability or predictability often referred to by the Court of Justice of the EU.[191]

(ii) Basic principles for drafting EU acts

The basic principles should incorporate Guidelines 1 to 6 in the 1998 IIA but those guidelines should be thoroughly revised and expanded. They must of course be closely linked to the principles for interpreting EU legislation as established by the Court of Justice of the EU.

The basic principles should obviously take account of requirements that have been identified in COM(2015)215 but were not included in the 1998 IIA such as:

> "it is so important that every single measure in the EU's rulebook is fit for purpose, modern, effective, proportionate, operational and as simple as possible. Legislation should do what it is intended to do, it should be easy to implement, provide certainty and predictability and it should avoid any unnecessary burden. Sensible, realistic rules, properly implemented and enforced across the EU. Rules that do their job to meet our common objectives - no more, no less" (point 1);

and

> "legislation should be comprehensible and clear, allow parties to easily understand their rights and obligations include appropriate reporting, monitoring and evaluation requirements, avoid disproportionate costs, and be practical to implement" and "Commit to better legal drafting so that EU laws are correct, comprehensible, clear, and consistent - so that everyone understands their rights and obligations easily and with certainty" (point 3.3).

The institutions should agree on the type of language that should be used in EU acts and explain the impacts on legislative drafting of their policy on clear writing[192] and gender neutrality.[193]

(iii) Rethink of the way that an EU act is presented

The institutions should take account of modern realities and make their acts accessible to modern users. EU legislation is no longer just a matter for lawyers and technical specialists. It is easily accessible to all on the internet and is consulted by millions of users each month. The approach to drafting should be adapted accordingly.

All EU acts need a short and informative title. If the full title is too long a short title should be given.

Preambles are a source of confusion. The function of the enacting formula is hard to grasp because it is in two parts which are separated by all the citations and recitals.

The citations are not clearly understood because they perform two different functions, neither of which is clear from their wording (most citations begin with the opaque formula "having regard to ...").

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[191] See, for one example among many, Case C-201/08 *Plantanol* [2009] ECR I-8343, paragraph 46.
[192] See the Commission's Clear Writing Campaign: http://ec.europa.eu/translation/writing/clear_writing/how_to_write_clearly_en.pdf
[193] See the Guidelines on Gender-Neutral Language in the European Parliament: http://www.europarl.europa.eu/RegData/publications/2009/0001/P6_PUB(2009)0001_EN.pdf

The recitals are becoming ever longer and harder to navigate. They should be given a structure and grouped in sections each of which should have a heading such as: Introduction, Reasons for the provisions, Acts which are repealed or amended, Formal matters, Date of application.

It is time to consider whether placing the lengthy recitals before the articles is too confusing for many readers.

A comprehensive list of all the standard articles in EU acts should be drawn up building on Guideline 15 in the 1998 IIA and the Joint Handbook for the Drafting and Presentation of Acts subject to the Ordinary Legislative Procedure.

(iv) Comprehensive rules relating to parts of an act and points of legislative technique
Guidance should be given (probably in an annex) on all the recurring types of provisions in the enacting terms and on points of legislative technique. Examples of matters not covered by the guidelines in the 1998 IIA or the present guidance in the Joint Practical Guide include:

- implementing and delegated acts (formulas are attached to the 2016 IIA);
- transitional measures;
- reporting obligations and monitoring and evaluation;
- start of validity, including the need to respect principles of legal certainty and legitimate expectations and avoid retroactivity, and the "common commencement dates" referred to in the Better Regulation Guidelines (SWD (2015)111);
- transposition (see the 2016 IIA, section VII);
- the end of validity of an act (see the 2016 IIA, section III).

7.4.3. IIA on publication of EU legislation

An IIA on Publication of EU legislation should set out the basic rules on publication of EU legislation and information about EU law to provide all users with transparency about the publication process and the responsibilities of the Publications Office of the European Union.

Since the Publications Office is an interinstitutional office serving all the institutions of the European Union (under Decision 2009/496/EC, Euratom) it should be the primary source of objective information from the EU about EU law, under the authority of the legislative authority. The websites of the Commission, invaluable though they are, should be clearly distinguished as representing the views just of the Commission.

The IIA on Publication should set out rules covering (and making a clear distinction between):

- formal publication in the Official Journal and on EUR-Lex of the official texts of the Treaties and of the Official Journal;[194]
- provision of information about EU law, such as databases, summaries and consolidated texts of amended acts.

It is time to rethink the whole approach to publication of EU legislation to move it into the 21st century. Millions of ordinary EU citizens access EUR-Lex each month. Small businesses now want to consult the EU rules for themselves rather than using the intermediary of an expensive lawyer. The approach to publishing EU law and legislation must be updated

[194] See Council Regulation (EU) No 216/2013 (OJ L 69, 13.3.2013, p. 1).

accordingly to make it readily accessible to and intelligible to users without specific legal expertise.

In addition to the formal Official Journal publication of legal acts there should be an internet version of all major legislative acts assisting the user with more explanation and clearer internet-based presentation making full use of hyperlinks.[195] It would also be helpful to users if a Word version of acts was made available in addition to the PDF and HTML versions currently offered.

Amending acts should be accompanied at the time of adoption by a consolidated text showing what the text will be once the amendments are incorporated. That would assist the legislative authority and make the content comprehensible to all readers. Similarly codified or recast acts should be accompanied by a text showing what is old and what is new.

EUR-Lex should give more prominence to better explanatory material on the nature of the different types of texts published in the Official Journal and the bodies competent to adopt them and on the structure of an EU act.[196]

EUR-Lex should include databases of definitions given in EU legislation and of terms that have been interpreted by the Court of Justice of the EU. Such databases would significantly assist drafters and promote consistency of terminology across EU legislation as well as making EU law more accessible and less alien to users.

A more coherent approach should be taken to explanatory materials such as summaries, including Citizens summaries, and explanatory memoranda. The explanatory memorandum is at present a useful guide to the content of the Commission’s proposal but it does not take account of amendments to the text in the course of the legislative procedure. It could be updated at the end of the legislative procedure so that it accurately reflects the content of the legislative act.

The IIA on Publication should also include rules on such important matters as correction of EU acts[197] and on the treatment of confidential texts.[198]

7.4.4. IIA on technical aspects of law reform

Law reform is vitally important since 30-40% of EU acts adopted each year are amending acts. The Communication on codification (COM(2001)645) stated that about 10% of EU acts had never been amended, which suggests that some 90% of acts have been amended.

An IIA on technical aspects of law reform, as distinct from deregulation or reduction of administrative burdens, should be drawn up. It should include in particular provisions on:

(i) consolidation,
(ii) codification,
(iii) recasting, and
(iv) repeals.

[195] For example hyperlinks within the text of an act to the explanatory memorandum point corresponding to each provision and for defined terms, references to other acts, and for annexes
[196] The latter could be based on what is currently given in the Publications Office’s Interinstitutional Style Guide: http://publications.europa.eu/code/en/en-000100.htm
[197] See EP Rules of Procedure, Rule 216.

(i) Consolidation
Consolidated texts of the enacting terms of all EU acts that have been amended are produced by the Publications Office. They are not authentic but are a key tool for making EU legislation that has been amended more accessible. They form the basis for work on codification and recasting. Consolidation therefore needs to be made as reliable, fast and user-friendly as possible.

Points for consideration include whether consolidation should be extended to recitals and whether the legislative authority should oversee the reliability of consolidated texts.

(ii) Codification
The 1994 IIA on official codification should be scrapped as being no longer fit for purpose. The very term "official codification" has long been superseded by "codification". In fact, though, it should now be plain that the technique of codification in the EU sense is of little use, since it does not allow any new changes to be made to an old act. Few old acts were drawn up in accordance with modern standards. There cannot be many cases where it is worth the trouble of readopting without change a series of provisions from an old act and all its amendments. The burden on the three institutions of the codification process far outweighs the marginal benefit for users of access to a single new text since users already have access to the Publications Office's consolidated text of the articles as amended.

(iii) Recasting
In fact appropriate use of the recast technique should make codification redundant since if, each time that an act is to be amended, due consideration is given to whether the amendment should be made by means of a recast (see point 3.3 of COM(2015)215), legislation should always remain adequately accessible. The relevant provisions from the 2001 IIA on recasts[199] should be carefully reviewed and updated before being incorporated in the IIA on technical aspects of law reform. In particular more thought should be given to cases where the Commission proposes changes limited to just certain parts and the legislative authority wishes to reopen discussions on other parts. In addition provision should be made for users of legislation to be given information on precisely which parts of a recast act are unchanged and which parts are new (perhaps by giving users access to the marked up versions used by the institutions in the adoption process).

(iv) Repeal and simplification of the acquis
The IIA on technical aspects of law reform should set out a basic commitment to repealing obsolete acts and simplifying the acquis.

The legislative authority should establish ground rules for repeals and simplification and agree with Commission any programme for screening the acquis for acts to be repealed.
The IIA should state formally what are the consequences of "declarations of obsolescence".[200]

7.4.5. IIA on interpretation

Many common-law countries have an Interpretation Act giving guidance on the interpretation of certain words and phrases and on such matters as amendment, repeal and dates of application.[201]

[198] See EP Rules of Procedure, Annex VIII
[199] OJ C 77, 28.3.2002, p. 1.
[200] See SEC(2003) 1085, point 2.3 and footnote 22.
[201] See for example the Irish Interpretation Act 2005:

The law of the EU has evolved considerably since the early days when it was first developed by a small group of Member States with similar civil-law systems. The approach to regulation and the style of drafting legislation have developed into a form of hybrid. Since EU legislation has to be interpreted and applied uniformly in 28 Member states with sometimes very different legal systems and legal traditions it would be helpful if the EU legislative authority were to lay down in an IIA guidance on the interpretation of EU legislation. That guidance should of course take full account of the principles developed by the Court of Justice (which are also linked to the basic principles for drafting EU legislation).[202] Matters that might be covered by such guidance include:

- the status of the various language versions;
- the status of components of EU acts such as titles, recitals, headings to articles, annexes;
- the status of statements in minutes or declarations relating to acts;
- the use of definitions and the role of definitions in other EU acts;
- references to other acts (static and dynamic references);
- basic concepts such as penalties and sanctions, entry into force and application, transposition and implementation, repeal and withdrawal, and so forth;
- effect on legal acts of rulings of the Court of Justice;
- publication and consequences of failure to publish;
- consequences of repeal of an act (for example on other acts based on the repealed act).

7.5. Follow up

Whatever the content of the new IIAs it is vital that they be properly implemented and that there be effective follow up. As the House of Commons European Scrutiny Committee concluded after considering the Commission's Better Regulation Package of 2015:

> The statements of intent and commitments contained in these documents are welcome, but only go so far. They need to be put into practice rigorously. The fact that this new package is so substantially based on existing programmes and agreements indicates that this has not been the case in the past. We consider that this package needs to be accompanied by a change in attitude by all the EU institutions concerned.[203]

How is such a change of attitude to be brought about?
The incorporation of the commitments set out above in agreements formally adopted by the three institutions would be a good start.

There must, however, also be a robust monitoring, reporting and review system, something that has been signally lacking from previous agreements and programmes. The 1998 IIA provided that each of the Legal Services of the three institutions was to draw up periodically reports on the implementation of the IIA (implementing measure (h)). In fact though the Council issued just one report[204] and the Commission never produced a report

<http://www.irishstatutebook.ie/eli/2005/act/23/enacted/en/html> accessed 3 September 2015), and the UK Interpretation Act 1978:
<http://www.legislation.gov.uk/ukpga/1978/30/> contents accessed 3 September 2015).

[202] The only EU legal act at present giving guidance on interpretation is a 1971 Regulation on how time-limits are to be calculated, Council Regulation No 1182/71 (OJ L124, 8.6.1971, p. 1).

[203] Conclusions of 21 July 2015, point 1.2: <http://www.publications.parliament.uk/pa/cm201516/cmselect/cmeuleg/342-i/34204.htm> accessed 3 September 2015.

[204] Report 5882/01 JUR 37 of 12 March 2001.

specifically on the implementation of the 1998 IIA (although it did include brief references to drafting matters in one or two of its annual reports on Better Lawmaking).[205]

Monitoring of the 2003 IIA was entrusted to the High-Level Technical Group for Interinstitutional Cooperation, which is composed of representatives of the three institutions,[206] although in fact the measures it provides for are covered in the same annual reports on 'Better Lawmaking'. The value of such a procedure is undermined by the same weakness as Voermans refers to regarding monitoring the effectiveness of EU legislation; just as Member States are reluctant to report lack of effectiveness of EU legislation for fear of exposing themselves to proceedings for breach of EU obligations,[207] the EU institutions may tend to downplay problems or failures of their own regulatory policies for fear of incriminating themselves.

The Commission's proposal for an IIA had stated:

> "The three institutions will monitor the implementation of this Agreement regularly, including through annual discussions in the Conference of Presidents and the General Affairs Council".[208]

The 2016 IIA stipulates that:

> "The three institutions will monitor the implementation of this Agreement jointly and regularly, at the political level through annual discussions, as well as at the technical level in the Interinstitutional Coordination Group".[209]

That formulation, while not establishing any mechanism specific to the regulatory framework, did draw a distinction between technical matters and political discussion. In a recent article I suggested that the EU now needs a new standing body on technical aspects of EU regulation, composed of representatives of all the EU institutions and of other concerned parties. It should be charged with overseeing all technical aspects of EU regulation, the EU legislative process and the publication and dissemination of EU legislation. It should also have oversight over the various programmes, initiatives, websites and bodies in the field of EU regulation.[210]

In the past there have been repeated calls for some joint structures to bring about effective improvements to different aspects of EU regulation. One suggestion was for the drafting of EU legislation to be entrusted to an EU Legislative Drafting Office independent of the present institutions.[211] Another was for the creation of an independent body to vet EU legislation either at the stage of the Commission's proposal or just before it becomes law, on the model of the French *Conseil d'état* or similar bodies in some Member States.[212]

Those calls were, however, resisted by the institutions which were unwilling to see their

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[205] Available on the Commission's Better Regulation site under the heading "Key Documents" – "Annual reports on Better Lawmaking": <http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm> accessed 3 September 2015.
[206] See point 37.
[207] W. Voermans, 'Concern about the quality of EU legislation: What kind of problem, by what kind of standards?' (2009) 2(1) Erasmus Law Review 59, 77.
[208] See COM(2015)216, point 36.
[209] Section IX.
[210] W.Robinson, 'Time for Coherent Rules on EU Regulation', The Theory and Practice of Legislation, Volume 3, Issue 3, 2015, 257.
[211] See, for example, R. Bellis, "Implementation of EU legislation", a study for the UK Foreign and Commonwealth Office, 2003.
[212] See, for example, *French Conseil d'État* Rapport public 1992, Etudes et documents No 44, p. 31, and the Koopmans Report (1995), De kwaliteit van EG-regelgeving – Aandachtspunkten en voorstellen, points 6.2.1 f.

independence compromised or the EU legislative process complicated still further.[213]

If it is still not possible to set up a standing body specifically to oversee EU regulation, consideration should be given to how the institutions' existing arrangements should be improved. For their part the European Parliament and the Commission have already agreed:

> on the need to reinforce the existing interinstitutional contact mechanism, at political and at technical level, in relation to better lawmaking, so as to ensure effective interinstitutional cooperation between Parliament, the Commission and the Council.[214]

One step would be to set up a specific reporting procedure for all aspects of regulation in the EU. The Commission should draw up an annual report to be completed by a set date (such as the end of February). It should be sent to the national parliaments as well as the European Parliament and Council. The report should be drawn up according to a prescribed format ensuring that each aspect of the regulatory framework gets due coverage. It should be accompanied by detailed statistics according to a standard model.

The other institutions and the Publications Office should also submit reports on their related activities by the same deadline.

The three institutions should coordinate the annual reporting exercise and make sure that it does not degenerate into a box-ticking exercise but is the occasion for a real appraisal of regulation in the EU and a broad debate amongst all parties concerned, and the Member States, which could be encouraged to carry out a similar exercise at national level at the same time.[215] The process should lead to a regular updating of the rules. While the basic principles remain the same, detailed aspects are continually evolving.

The EU has committed itself to becoming more open and more democratic. But its regulatory function still bears the imprint of the early technocratic approach with the Commission continuing to call the shots rather than the legislative authority. Moreover, the three institutions still tend to maintain their own, sometimes divergent, traditions.

In a speech to the European Parliament Committee on Constitutional Affairs in early 2014 António Vitorino urged a more coherent approach to interinstitutional processes:

> Finally I would add only one brief reference to the question of inter-institutional agreements. In broader terms I would make a plea for a basic tripartite framework agreement to replace the current model that appear to me to be fragmented unbalanced.
> In this respect I acknowledge the distinction between political programming and procedural engagements and the very different scope of them. Nevertheless I believe that the need for enhanced dialogue and shared planning would be

[213] See J.-C. Piris, 'The Quality of Community Legislation: The Viewpoint of the Council Legal Service', in A. Kellermann and others (eds), *Improving the Quality of Legislation in Europe*, Kluwer Law International, The Hague, 1998) 25, 37, and C.W.A. Timmermans, 'How to improve the Quality of Community Legislation: the Viewpoint of the European Commission', ibid., 39, 54-55.

[214] Framework Agreement on relations between the European Parliament and the European Commission [2010] OJ L304/47).

[215] See also the recommendation by the Mandelkern Group: "As of 2003, the Commission should produce an annual report to the European Parliament and to the spring European Council on developments in better European regulation by the EU and each Member State, bringing together existing reports in overlapping areas (e.g. Better Lawmaking, better regulation elements of the Cardiff report)", Mandelkern report, Action Plan, General, first paragraph: <http://ec.europa.eu/smart-regulation/better_regulation/documents/mandelkern_report.pdf> accessed 3 September 2015.

> preferable to the set of partial agreements that might be contradictory and do not contribute to the clarity of the political purposes of the Union as a whole.
> And clarity of purposes is what we are desperately in need so that 2014 can be the starting point of reconciliation of the vast majority of our citizens with the European ideal![216]

The EU faces a continuing challenge to bring together its 28 Member States and their populations, with their very different traditions, cultures, structures and legal systems. It needs to win and maintain their trust and acceptance. One way in which it can achieve that is by making sure that its rules are of the highest possible standard, accessible and understandable and adopted by a transparent process. A coherent series of new IIAs covering all aspects of EU regulation would be a big step in the right direction, although a cultural shift in the three EU institutions to ensure effective and wholehearted implementation of the IIA would also be needed.

It may well be that little can be done to lessen the complications and compromises resulting from the EU's complex political processes but establishing a coherent and comprehensive framework for all technical work on regulation and then tightening up the oversight in this way would make a major contribution to the quality of regulation in the EU.

[216] As reported in "European Commission and Parliament: What Relations?", *Tribune*, 29 January 2014, <http://www.institutdelors.eu/media/eceprelations-vitorino-ne-jdi-jan14.pdf?pdf=ok> accessed 25 October 2015.

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