

Out of control?

Measuring a decade of EU regulation



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CONTENTS

Chapter	Page
Foreword	1
Executive Summary	3
Introduction	7
1 Ten years of impact assessments: What we did and why we did it	8
2 Out of control: The cost of regulation	16
3 Misdirected: The UK's Regulatory Reform Agenda	32
4 Tinkering at the margins: The EU's Better Regulation Agenda	43
5 Stemming the flow: proposals for reform	54
Annex I: Methodology	65
Annex II: Departmental key	69

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FOREWORD

“Regulatory costs are the least controlled and least accountable amongst government costs. Many governments have no idea how much of their national wealth they are spending through regulation”

- OECD

The health of the economy is the single most important consideration facing the UK today. Lifting ourselves out of recession will require some very sober and robust reassessments of our economic policies – and a long, hard look at the business environment we have created for our employers and entrepreneurs.

Small businesses, in particular, need all the help they can get. There has never been a more important time to confront the torrent of regulations shackling their ability to operate effectively.

Over the past ten years, the Government has paid lip service to the idea of ‘regulatory reform’, changing the name of the Department for Trade and Industry to the tongue-twisting Department for Business, Enterprise and Regulatory Reform, for instance.

But despite the rhetoric, this new report from Open Europe shows that the annual cost of regulation has skyrocketed.

Undertaking one of the most comprehensive and far-reaching studies, analysing over 2,000 of the Government’s own ‘impact assessments’, Open Europe finds that the cumulative cost of regulations introduced in the UK between 1998 and 2008 is £148.2 billion.

Not only that, but the annual cost of regulation has increased from £16.5 billion to £28.7 billion since the Government introduced its so-called ‘Regulatory Reform Agenda’ in 2005.

Importantly, Open Europe also shows that while the EU accounts for around 50 percent of the *number* of UK regulations, the EU share of the *cost* of those regulations is far higher. Of the cumulative cost of regulation, £106.6 billion, or just under 72 percent, had its origin in the EU.

And it gets worse. The study shows that if current trends continue and if the cost of new regulations adopted each year is not brought under control, EU regulations will cost the UK £356 billion by 2018 – that is £14,300 per household in Britain.

According to Open Europe’s study, EU labour market laws alone already account for over 20 percent of the total cost of regulation in the UK, and there are currently several extremely costly new proposals in the Brussels pipelines.

The Government has already lost in negotiations over stricter rules for agency workers – rules that will cost the British economy thousands of jobs and billions of pounds. And now, the UK’s opt-out from EU working time rules is under threat.

Should the Government lose again, it will be a huge blow to our economy at a time when flexibility and breathing space for businesses is absolutely vital.

All this tells a very clear story. It indicates that any meaningful de-regulation agenda must – as a matter of urgency – tackle both domestic and European legislation.

Following interviews with policymakers from across Europe, including Brussels, and some of the key actors involved in regulatory reform in the UK, Open Europe argues that while there has been some progress in deregulation efforts, the fundamental problem has not been addressed – the relentless government intervention.

A fresh strategy is needed to bring the flow of regulation under control. Because of the high proportion of the cost coming from the EU, a twin approach is vital. Now more than ever – at a time when the British economy is searching for a recovery strategy – we need strong, pro-active leadership which stands up for business and against over-interference from both Whitehall and Brussels.

No amount of good intentions will stem the flow of regulation. Two courageous steps are required if we are to make progress.

Firstly, the mindset of government must change. Policymakers must accept the radical idea that the law should only be used to regulate our endeavours where there is an overwhelming case for state intervention.

Secondly, Ministers must be far stronger in resisting new regulation from the EU. They must use all the power at their disposal to stem the tide of regulation coming from the EU, regardless of the unpopularity it may cause us in Brussels. In the long run, the whole of Europe will thank us for taking a stand.



Simon Wolfson,
Chief Executive, Next plc

Executive Summary

It is ten years since the UK Government introduced a system of regulatory Impact Assessments in an effort to get a grip on the flow of new regulations.

Using information derived from over 2,000 of these Impact Assessments, Open Europe has carried out one of the most comprehensive studies ever undertaken of the cost and flow of regulations introduced in the past decade.

The purpose was twofold: on the one hand, to measure the cost of regulation to the economy over the last ten years, and on the other, to measure the proportion of that cost coming from EU legislation.

The research makes two main types of cost estimates:

- a) The cumulative cost of regulations between 1998 and 2008
- b) The annual cost of regulations between 1998 and 2008

Key findings:

Both the number and cost of regulations are going up all the time

- Over the past decade, the number of laws produced in both Whitehall and Brussels has skyrocketed. The number of legal acts in force in the EU has gone from 10,800 in 1998, to over 26,500 in 2008.
- However, while the number of regulations adopted each year is a useful indicator of trends, a far more meaningful assessment of the burden of regulation is the relative cost of those regulations to the economy.
- Since the UK launched its 'Regulatory Reform Agenda' in 2005, the annual cost of regulation has gone from £16.5 billion in 2005 to £28.7 billion in 2008 – an enormous increase of 74%.

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- Meanwhile, the estimated *cumulative* cost of regulations introduced in the UK between 1998 and 2008 is £148.2 billion. This is the equivalent of 10% of GDP.¹
- For the same amount, the UK Government could abolish income tax for one year² or cut the national debt by 24%.³

EU legislation is responsible for 72% of the cost of regulations in the UK

- Of the cumulative cost of regulations introduced over the past decade, £106.6 billion, or 71.9%, had its origin in the EU. Similarly, the EU proportion of the *average annual* cost of regulations is 71.6%.

... of the cumulative cost of regulations introduced over the past decade, £106.6 billion, or 71.9%, had its origin in the EU ...

- Overall, the cost of EU legislation has gone up steadily year-on-year over the past decade. In 2008 alone, EU legislation dating from 1998 cost the UK economy £18.5 billion – up from £12.2 billion in 2005.
- Taking the cumulative cost estimates, EU legislation since 1998 has cost the UK 23% more than the UK's total gross contributions to the EU budget over the period 1998-2008.⁴

1 Calculated assuming that UK GDP in 2008 was £1,461,301,000,000, see Eurostat http://epp.eurostat.ec.europa.eu/portal/page?_pageid=0,1136173,0_45570701&_dad=portal&_schema=PORTAL

2 According to the Treasury's Latest Public Finances Databank (December 2008), income tax amounted to £151.9 billion in 07/08, see http://www.hm-treasury.gov.uk/psf_statistics.htm

3 According to ONS figures, March 2008, UK national debt was £614,400,000,000, see <http://www.statistics.gov.uk/cci/nugget.asp?ID=277>

4 According to the Treasury, the UK's gross contributions to the EU budget 1998-2008 were £86.34 billion, see http://www.hm-treasury.gov.uk/int_eu_statefraud.htm

At the current rate EU legislation will cost the UK £356 billion by 2018

- If the current flow of regulation continues, by 2018, the cost of EU legislation introduced since 1998 will have risen to more than £356 billion.⁵ This is around £14,300 per British household.⁶ For the same amount, the UK Government could pay off almost 60% of the national debt⁷, or abolish income tax for 2 years and still leave the Treasury with a surplus.⁸

EU labour market laws alone account for 21% of the total cost of UK regulations

- Labour market legislation introduced over the past ten years has cost the UK economy £45 billion. 69% of this – £31 billion – came from the EU. This means that 21% of the overall cost of new regulations introduced in the UK between 1998 and 2008 can be sourced to the EU's labour market laws alone. For this amount, the UK Government could cut corporation tax by two-thirds.⁹
- Meanwhile, EU health and safety legislation coming into force in the last decade has cost the UK £5.7 billion.
- EU agricultural regulations have cost British farmers over £2 billion, and the EU food labelling requirements have cost the UK £1.7 billion over the last ten years.

BERR is the UK's 'regulation factory', with 73% of its annual cost of regulation coming from the EU

- Among UK Government departments, BERR (formerly the DTI) is the main facilitator of regulation in the UK. If the UK has a 'regulation factory', this is it. In 2008 alone, the department accounted for regulatory costs to the economy of £12.8 billion – 45% of the total cost of regulation in that year. This was roughly £4

billion more than in 2007 – or a 45% increase.

- Over the past ten years, 72.7% of the average annual cost of the regulation imposed by BERR stemmed from Brussels. In 2008, the cost from EU regulation administered through BERR was £5.9 billion. This is enough to cut the rate of corporation tax by an average of 13%.¹⁰
- In 2008, a staggering £9 billion of the cost of regulations coming from BERR arose from labour market regulations, of which £3.6 billion came from the EU. In turn, £2.1 billion of this was due to one single regulation – the EU's infamous 1999 Working Time Directive.

EU regulation accounts for more than 90% of the total cost of regulations from some Whitehall departments

- Meanwhile, EU regulations account for 98.8% of the cumulative cost of regulations coming from the FSA, 96.5% of those coming from the Ministry of Justice, 94.2% of regulations from DEFRA, and 94.3% from the HSE.

EU regulations cost the EU €1.4 trillion

- The cumulative cost of regulation introduced between 1998 and 2008 for all 27 EU member states is €1.4 trillion. Of this, 66%, or €928 billion, is EU-sourced.
- If current trends continue, by 2018, the cost of EU regulation introduced since 1998 will have risen to more than €3.017 trillion. This is over €15,000 per household in the EU.
- Since the Commission launched its 'Better Regulation Agenda' in 2005, the annual cost of EU legislation across the bloc has gone from €108 billion to over €161 billion – an increase of 50%.

⁵ The figure is the Present Value of the cost, calculated using the discount rate of 3.5 per cent specified in the Treasury Green Book, see <http://greenbook.treasury.gov.uk/chapter05.htm#discounting>

⁶ Based on ONS's estimate of the number of UK households at 24.9 million in 2006, see <http://www.statistics.gov.uk/cci/nugget.asp?id=1866>

⁷ According to ONS figures, March 2008, UK national debt was £614,400,000,000, see <http://www.statistics.gov.uk/cci/nugget.asp?ID=277>

⁸ According to the Treasury's Latest Public Finances Databank (December 2008), income tax amounted to £151.9 billion in 07/08, see http://www.hm-treasury.gov.uk/psf_statistics.htm

⁹ According to the Treasury's Latest Public Finances Databank (December 2008), corporation tax receipts were £46.4 billion in 07/08, see http://www.hm-treasury.gov.uk/psf_statistics.htm

¹⁰ According to the Treasury's Latest Public Finances Databank (December 2008), corporation tax receipts were £46.4 billion in 07/08, see http://www.hm-treasury.gov.uk/psf_statistics.htm

- In 2008 alone the cost of regulation for the EU-27 was €269.5 billion. This is up from €229.6 billion in 2007 and €183.4 billion in 2006.
- The cumulative cost to Germany of regulation introduced since 1998 is a staggering €280 billion. Of this amount, €184 billion (66%) is sourced to EU legislation – which is the equivalent of over 7% of the country's GDP.¹¹
- In France the cost was €211 billion, of which almost €144 billion – 68% – came from the EU.

The Government's claims to have cut the cost of regulation do not stack up – the Government must focus much more of its efforts on the EU level

- There is a clear mismatch between our findings and the Government's claims to have cut down the administrative cost and burden of regulations in the last few years.¹² In December 2008, for example, the Government said that the administrative burden had been cut by £1.9 billion compared to the 2005 baseline measure.¹³
- It seems unlikely that the *net* administrative cost of regulations could be falling, while the overall cost of regulation – as captured by our figures – is increasing so markedly. Especially given that both sets of findings are based on the Government's own figures.
- The UK's reform agenda is ambitious. However, because of the large proportion of regulation stemming from the EU, the UK is losing control of it. For example, the new idea for departmental regulatory budgets is a good one, but since the regulatory costs stemming from some departments are so heavily driven by EU legislation, it is difficult to imagine how ministers will be able to control the budgets in practice. With EU regulations accounting for around 72% of the annual average cost of UK regulations, the Government effectively has control of less than 30% of the annual cost of regulation.

UK ministers sometimes sign off on EU proposals despite the Impact Assessment showing the costs outweighing the benefits

- In 2007 the Minister of Transport Stephen Ladyman, for instance, approved an Impact Assessment which showed that the estimated costs of an EU Directive were £400 million a year while the benefits were £18.5 million a year. This encapsulates the UK Government's weak approach to negotiations on EU legislation.

The EU's attempts to cut regulation are paralysed by too much tinkering at the margins

- Over the years the Commission's commitment to 'better regulation' has resulted in very few tangible benefits. Despite noble efforts by a handful of reform-minded Commissioners such as Gunther Verheugen, regulatory reform in the EU is still paralysed by far too much tinkering at the margins. Meanwhile, the flow of regulations coming from the EU is quietly skyrocketing.
- The Commission's system of impact assessments results in sporadic, and poorly formulated assessments which are of negligible use in the policy-making process. We have found only three cases where a Commission proposal has been dropped as a result of an impact assessment – compared to the 10,800 acts that have been adopted in the EU since the introduction of EIAs in 2003.
- The Commission's Impact Assessment Board lacks the autonomy and the teeth to stem the flow of new regulations, while the European Parliament has proven more of a driver of over-interference than an independent watchdog.

¹¹ Based on Eurostat's projections in 2008 of German GDP of €2,513,199,000,000.

¹² HM Government, "Delivering simplification plans: a summary", 11 December 2007, p. 7

¹³ HM Government/Better Regulation Executive, "Making your life simpler: simplification plans – a summary", December 2008, p. 25

Reform is possible – but a radical new approach is needed

- There have been some genuine attempts at reform, but the UK's current agenda is simply failing to curb the increasing flow of new regulations impacting on business and the wider economy. Without a more radical attempt to stem the flow, the cost of regulations will continue to rise year on year.
- The fact that a very high proportion of the total cost of regulation is coming from regulations negotiated not at Whitehall and Westminster but in Brussels and Strasbourg, shows that any reform agenda which does not focus primarily on curbing the flow of EU regulations will continue to fail.

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- Reform requires a whole new approach from both the UK Government and the EU Commission.
- Most importantly, policymakers need to fundamentally change their mentality and understand that state interference – at UK or EU level – can only be justified with conclusive evidence that the benefits of any such interference outweigh properly quantified costs.
- Specifically, the UK Government must turn both its Impact Assessments and its regulatory budgets into bargaining tools at the EU level. For example, the UK's opt-out from the EU's Working Time Directive – under negotiation at the time of writing – is a clear case of where the Government should produce a robust IA, and take it to Brussels, arguing that it simply cannot accept proposals for which there is little support at home, and for which the estimated costs are so high. A similar strategy could have been pursued with the

Agency Workers Directive. Such warnings, when based on robust evidence, will strengthen the UK's negotiation position enormously.

- The Government should introduce EU-Commission style audit trails to help businesses keep up. There also needs to be real-time scrutiny of EU proposals at Westminster, with a bolstered new committee system which takes proper account of the fact that 72% of the cost of legislation is now EU-derived.

... the UK Government must turn both its Impact Assessments and its regulatory budgets into bargaining tools at the EU level ...

- The UK Government is in a strong position to draw up a new approach which leads to a radical reduction in new legislation. The Government should use its influence over EU budget negotiations to lever in concrete new measures to stop regulation – including a proposal to allow national parliaments to veto unnecessary laws.
- The UK Government must push hard for a new commitment among its EU partners to the idea of *less* regulation. The EU should introduce an independent and powerful European Impact Assessment Board capable of stopping proposals which have not been properly quantified; a simple majority in the Council for scrapping proposals, and '€1 in, €1 out' regulatory budgets in the Commission.

... the UK Government must push hard for a new commitment among its EU partners to the idea of less regulation ...

Introduction

The cost of regulation is something which has eluded politicians, journalists, and the public for far too long. The media is full of stories about the “burdens of regulation” and the need to cut “red tape.”

But how much regulation actually costs – how much of a burden to the economy it really is – remains unknown. It would be impossible to ever get a definitive answer, because estimates of ‘costs’ can be fluid and arbitrary.

However, it is possible to use what estimates do exist, for individual pieces of legislation, to build a picture of what kind of numbers we are dealing with. Only by doing this, can we have a sober debate about how much of an impact regulation does, or should, make.

It is unacceptable that policymakers do not know the true impact of the legislation they pass, and also that regulation is not more widely debated in the media. This is in sharp contrast to the wide public attention that fiscal policy attracts, with daily and lively debate about tax rates.

In 1998, Tony Blair’s Government recognised a need to get a better grip on regulation and its effect on business, and introduced the system of regulatory Impact Assessments (IAs).

After ten years, it is time to take stock. To what extent have IAs, and other government initiatives to cut red tape, been a success?

Deeply connected to this issue is a second question – what proportion of UK legislation comes from the EU? This is the subject of an ongoing and fierce debate which has long been shrouded in ideology.

With estimates ranging from as low as 9 percent to as high as 80 percent, the debate is conspicuously devoid of any concrete facts.

Actually sifting through the mountains of legislation produced by the Government over the last ten years is the only way to find any meaningful answers.

Knowing the source of regulation is extremely important. Accountability is rightly one of the UK Government’s “five principles” of good regulation. But if we want to achieve accountability in regulation, we need to know where the decisions are being made – Whitehall or Brussels?

This study is an attempt to set the record straight on these important issues. It has been no small undertaking, involving analysis of more than 2,000 Impact Assessments, as well as interviews and consultation with policymakers from across Europe, including some of the key actors involved in regulatory reform in the UK.

1

Ten years of impact assessments: what we did and why we did it

In 1998 the UK Government began producing Impact Assessments (IAs) for legislative proposals, as part of a wider effort to reduce the burden of regulation to the UK economy. The idea of the Impact Assessment was to evaluate proposals in terms of the potential costs and benefits of a piece of legislation, thereby seeking to ensure that the benefits outweighed the costs.

Over the past decade, the Government has produced IAs for “Any proposal that imposes or reduces costs on businesses or the third sector”, as well as any proposal “affecting costs in the public sector... unless the costs fall beneath a pre-agreed threshold (generally £5m).”¹⁴

What is an Impact Assessment?

Impact Assessments (IAs) are prepared by the UK Government to assist politicians and civil servants in deciding if the benefits of a regulation outweigh the costs.

Apart from the benefits and costs, the IA also assesses the risks involved in the proposal. The impact on businesses is usually the focus, but the public sector, charities and the voluntary sector can also be a part of the assessment.

IAs are meant to consider the different options available, both regulatory and non-regulatory. Ideally, an IA should assist policy makers in thinking through the consequences of proposals, improving the quality of advice to Ministers and encouraging informed public debate.¹⁵ However, this is not always the case in practice, and the real impact of IAs on actual policy outcomes is subject to debate. (See Chapter 3)

One IA does not equate to one regulation. Some IAs seek to assess the impact of more than one piece of legislation. In addition, not all IAs contain quantified costs and benefits. Some simply state that the costs (and/or benefits) are not possible to quantify. This was particularly the case when IAs were first introduced.

Separately, the European Commission also produces its own Impact Assessments for some EU proposals. In this report we will refer to them as European Impact Assessments (EIAs). However these were not included in our calculations. (For a critique of EIAs, see Chapter 4.)

1.1 The challenge: Locating and accessing Impact Assessments

It is impossible to know exactly how many IAs have been produced so far, because, amazingly, up until very recently, not one Government department has kept a central database of IAs.¹⁶

Using a combination of sources at the British Library, the libraries of the House of Lords and the House of Commons, BERR’s annual Employment Relations Research compendiums, and other resources, including departmental websites and the website of the Office of Public Sector Information (OPSI), Open Europe tracked down more than 2,000 IAs dating

from 1998.¹⁷ Using information from the various lists and actual IAs available, we estimate that around 2,500 IAs have been produced since they were first introduced in 1998.

Locating and accessing the IAs was an extremely cumbersome process. The problems we encountered in finding the IAs say something about the problems with regulation more widely – problems we will return to later.

Every six months the Government publishes a Command Paper ostensibly listing all IAs produced over the preceding six month period.¹⁸ Open Europe used these to identify the existence of IAs. Lists of IAs are also available in the Libraries of the House of Lords and the House of Commons, and also on the websites of the Government departments.

The task was complicated by the fact that the lists of IAs available in three different locations did not correspond with one

¹⁴ BERR, “Impact Assessment Guidance”, p. 2 <http://www.berr.gov.uk/files/file44544.pdf>

¹⁵ BERR’s website, <http://www.berr.gov.uk/consultations/ria/index.html>, viewed on 16 December 2008

¹⁶ In April 2008, the Better Regulation Executive within BERR launched an Impact Assessment Library, but, as of September 2008, only around 50 IAs were listed.

¹⁷ It should be noted that some were only partial IAs, and have therefore not been included in our study, while others do not literally quantify costs and benefits, and were therefore of limited use for our study. Furthermore, some IAs only contain partial quantifications, such as “cost per business”, which requires further calculations. Many of these IAs have not been included in our estimates.

another. The list in the House of Lords Library, for instance, revealed IAs that neither the Command Papers nor the departmental websites listed.

Actually accessing the IAs in order to read and study them proved just as problematic. Government departments generally deposit IAs in the Libraries of the House of Lords and the House of Commons, but, according to Library staff, in practice this has not always happened. According to the departments, some IAs have simply “gone missing”.

Another problem was the unwillingness of some departments to disclose IAs. Open Europe encountered difficulties with some civil servants, who were slow to respond to requests, and generally reluctant to make IAs available.

1.2 What our study is

A ten-year snapshot – the flow of regulation between 1998 and 2008

Using IAs containing quantified information, we extracted the costs of a given piece of legislation. We then added up all these figures and produced an estimate of the cost arising from regulation introduced in the UK since 1998.

The study is therefore a ten-year snapshot of the *flow* of regulation between 1998 and 2008, and also of the *trends* of the cost.

Our calculations include only those regulations that are still in force today.

Because of the absence of information about regulations passed *before* 1998, the cost should not be seen as the total cost of regulation – but only the cost of new regulations introduced since 1998.

It is fair to assume that there are significant costs to business and others stemming from regulations adopted before 1998, but these are not captured by our measurement.

The cost of regulation to the economy as a whole

IAs are supposed to cover the costs of regulations to the economy as a whole, although most relate to the private sector only.

Where the information was available, we sought to include the costs to the public sector and the third sector (such as charities), as far as possible. However, because of the nature of the information available in the IAs, the lion’s share of our estimated cost relates to business.

By comparison, the British Chambers of Commerce’s annual Burdens Barometer¹⁹, for example, focuses only on the cost to business.

Our measurement includes primarily the policy costs and administrative burdens involved in complying with regulations. In a few cases, direct financial costs are also included, such as fees paid directly to the Government.

In other words, our measurement exercise differs from the one undertaken by the UK Government in 2005, in which only the so-called administrative burden of regulations was measured.

18 For a list of Command Papers see, <http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/Regulatory%20Reporting/page44948.html>, viewed on 17 January 2009. From March 2008, the listing of IAs in the Command Papers was replaced by the Impact Assessment Library, see <http://www.ialibrary.berr.gov.uk>, viewed on 17 January 2009

19 *British Chambers of Commerce, “Burdens Barometer 2008”, March 2008*

The different types of regulation costs

Administrative burden: The costs to a company of providing information to the Government or a third party (such as consumers or shareholders), including keeping records, carrying out inspections, completing returns and reports, cooperating with audits and inspections, applications for subsidies and grants, applications for permission, exemption or authorisation, framing complaints and appeals, or entry in a register.²⁰

Policy cost: The costs inherent in meeting the aims of a regulation, including direct cash costs such as installing a pollution filter or a factory chimney as prescribed by legislation; or an indirect cost such as changes in working practices as prescribed by health and safety rules.

Financial cost: The cost that is the result of a direct obligation to transfer a sum of money to the Government or the competent authority in order for the company to comply with the regulation – such as paying a tax or licence fee.

Knock-on effects: the wider or indirect cost of regulation to the economy. For example, a new regulation in the transport sector increases the cost for the businesses directly affected, but also raises costs for other companies that depend on transport – which includes most wholesale and retail businesses. These costs are almost never quantified in Impact Assessments.

An absolute minimum cost – what our study does not include

In order to calculate an appropriate cost to the economy, as opposed to business only, we have excluded from our study costs from IAs which involve taxes, minimum wage or welfare benefits – so-called ‘transfer payments’.²¹

There is a case for treating such payments as a cost to the economy, as they can divert economic activity and

impose deadweight costs. However, since there is no consensus on the precise impact of these types of knock-on effects, we have excluded them from our costs.

Likewise, our calculations do not include the significant *indirect* costs of regulations – simply because IAs almost never take these into account. Instead, they deal with the straightforward, direct costs of complying.

For example, EU Directive 2002/15/EC, which restricts the hours of workers in the transport industry, does not only raise costs for the transport sector. By raising the cost of transport, it also makes businesses which are dependent on transport less profitable, leading to a loss of business for these companies and their suppliers, and so on. However the IA produced to assess the Directive does not address these wider, knock-on costs of regulation in any way.²²

We have also excluded IAs which relate to Government expenditure, such as crime and police bills or health and social care bills, or institutional reform, such as changes to the court system.

UK Government guidelines state that IAs should be prepared for all three types of EU legislation: EU Directives, Regulations, and Decisions.²³

However, in practice, IAs are not normally produced for EU Regulations, capturing instead mainly EU Directives. Regulations often (but by no means always) deal with relatively ‘minor’ issues, such as tariff levels, whereas EU Directives tend to be the ‘bigger’ pieces of legislation, even though there are less of them.

Still, there are EU Regulations that impose a cost on the economy, but for which an IA is lacking. This means that there may be other costs from EU Regulations, which are simply not quantified in IAs, and therefore cannot be included in our study.

20 Discussion on costs is drawn from *HM Government*, “Delivering Simplification Plans – a summary”, p 10, 18, December 2007; and *SCM Network*, “International Standard Cost Model Manual”, p. 8-9, December 2005

21 The Treasury Green Book offers the following definition: “Transfer payments may change the distribution of income or wealth, but do not give rise to direct economic costs,” see footnote 3 in <http://greenbook.treasury.gov.uk/chapter05.htm>

22 “EU Directive 2002/15/EC on the organisation of the working time of persons performing mobile and road transport activities”. The IA only quantifies the additional staff costs, equipment costs and administrative costs. The DfT produced an IA for the transposition of the Directive into UK law in March 2005, available at <http://www.dft.gov.uk/consultations/archive/2004/rtfguid/regulatoryimpactassessment.pdf>.

23 BERR website, <http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44278.html> viewed on 15 January 2009

Three types of EU legislation:

There are three main types of EU legislation: Regulations, Directives and Decisions.

Regulations are directly applicable in EU member states and become immediately enforceable in law without further implementation by the member states. In practice, however, EU Regulations are sometimes subject to additional implementing measures. In the UK, Regulations are rarely subject to proper Impact Assessments.

In this report, Regulations with a capital 'R' refer to EU Regulations, in order to distinguish them from the generic term 'regulations', which is widely used to denote laws and rules impacting on the economy.

Directives are not directly applicable, in that they require member states to achieve a particular result without dictating the means of achieving that result. They are binding on member states, and usually need further measures in order to be transposed into national law. Directives have no effect in national law until they are transposed. In the UK, they can be implemented by either primary (Acts) or secondary (Statutory Instruments (SIs)) legislation. In practice, in the UK the majority of Directives are implemented by SIs.

Decisions are used for any purpose other than approximating the laws and regulations of the member states. They are binding, but very few EU decisions generate new UK laws.

Lastly, as noted above, some IAs were impossible to get hold of.

This means that while this is one of the most comprehensive and in-depth independent studies of IAs ever completed, it necessarily results in figures which must be regarded as underestimates, since they do not – and could not – account for every single IA ever produced, nor for every single regulation introduced since 1998.

What about the benefits of regulation?

We do not deny the potential benefits of regulations. Indeed, effective and well focused regulation, from both Brussels and Whitehall, can play a positive role in correcting market failures, increasing competition and promoting fairness.

Our calculations do not allow for the potential benefits of regulations simply because so many IAs produced by the Government do not quantify the benefits of a given piece of legislation. Just like the knock-on costs of regulations, the benefits – such as the improved functioning of a market – can be very difficult to quantify. With only partial information available, a comparable benefit estimate cannot be produced.

An unprecedented study

To date, there have been very few studies systematically working through the estimated costs for each individual legislative proposal, let alone ones collecting such data over a ten year period.

Our study is unprecedented in terms of the scale and range of impact assessments included in the calculations. It is also a rare attempt to quantify the cost and proportion of legislation coming from the EU on a law-by-law basis.

... our study is unprecedented in terms of the scale and range of impact assessments included in the calculations ...

Simply the time involved in locating, accessing and analysing such a vast number of IAs has no doubt been a deterrent for many who have sought answers about regulatory costs.

1.3 Why have we done this?

No one knows the cost of regulation

As the OECD has pointed out, "Regulatory costs are the least controlled and least accountable amongst government costs. Many governments have no idea how much of their national wealth they are spending through regulation."²⁴

Because of the lack of information, there are currently many different estimates of the cost of regulation. Some, for example, only attempt to quantify the administrative burden of regulation – such as that relating to information and reporting requirements for business – as opposed to the total compliance costs (see above for definitions of the different types of regulatory costs).

The arbitrary nature of existing estimates of the cost of regulation was summed up by the UK's Better Regulation Task Force (BRTF)²⁵ when it noted in 2005 that: "Information from the United States and the Netherlands suggests that the total cost of regulation is 10% -12% of GDP. It is unlikely to be much different in the UK, so regulation here is probably costing us around £100 billion per year."²⁶

In 2005/2006 the UK Government measured the *administrative* burden to business in the UK, estimating the cost at almost £20 billion, using 2005 as their 'snapshot' year.²⁷

A similar exercise by the European Commission in 2006 put the (administrative burden) cost of regulation to business across the EU at circa 3.5 percent of combined GDP, or €350 billion.²⁸

In 2004, the soon to be EU Commissioner Peter Mandelson was reported to have said that the cost of EU regulations alone amounted to 4 percent of GDP,²⁹ while a study by Ian Milne in the same year estimated "the direct net cost" of EU regulation at £20 billion a year.³⁰

Perhaps the most useful assessment so far of the cost of regulation is the 'Burdens Barometer', produced every year by the British Chambers of Commerce (BCC). Using IAs, the BCC publishes the top most expensive regulations since 1998 to find a cumulative cost of regulation. While the sample size of the Burdens Barometer is arguably too small for definitive conclusions to be drawn, this represents a valuable platform for further research.

In 2008, it estimated the cumulative cost of the top 83 most expensive regulations at £65.99 billion, with 71.1 percent of this cost stemming from EU legislation.³¹

Indeed the proportion of regulations originating in Brussels is another question which has remained unanswered for too long, and which is also subject to fierce debate.

24 Quoted in *HM Government*, "Regulatory Budgets: A consultation document", August 2008, footnote 9

25 The Better Regulation Task Force was an independent advisory group to the Government between 1997 and 2005, consisting of representatives from businesses, citizen and consumer groups, unions, the public sector and charities. Its members were appointed by the Cabinet Office and it advised the Government on regulatory reform.

26 *Better Regulation Task Force*, "Less is More: Reducing Burdens, Improving Outcomes", March 2005, p. 12

27 The estimated cost across the departments was £13.7 billion. In addition, the Financial Services Authority and HMRC conducted separate, parallel exercises to measure the administrative burden imposed by the rules and legislation they are responsible for. The burden was calculated to be approximately £855 million and £5 billion respectively, see the *SCM Network website*, <http://www.administrative-burdens.com/default.asp?page=83>, viewed on 17 January 2009.

28 It is worth noting here that this figure has been widely misunderstood, as it has been described as the total cost of EU regulation. In fact, this estimate captures the *administrative burden* stemming from EU regulations and domestic regulations combined. Furthermore, on 10 October 2006, the *Financial Times* wrote "The bureaucratic cost to business of complying with European legislation could be up to €600bn a year – almost twice the original estimates – the European Union's Enterprise Commissioner admitted on Monday." However, what Gunter Verheugen – the Commissioner in question – actually said in the interview about reducing regulation, was that "I've said that in my view it must be possible to get a 25 percent reduction, and that means a productivity gain of €150bn." The journalist took this to mean that €150bn represented 25% of the total cost of regulation. However, Verheugen's office has subsequently confirmed that the €150bn figure referred to the extra benefits that would be *generated* (as opposed to saved) by a 25% cut in the administrative burden of EU and domestic regulations combined.

29 *Times*, "Mandelson promises to cut EU red tape", 8 November 2004, see <http://business.timesonline.co.uk/tol/business/economics/article388895.ece>

30 Milne, Ian "A cost too far? An analysis of the net economic costs & benefits for the UK of EU membership", *Civitas*, July 2004, p. xiv

31 *British Chambers of Commerce*, "Burdens Barometer 2008", March 2008

No one knows the proportion of UK regulations coming from the EU

“The German Ministry of Justice has compared the legal acts adopted by the Federal Republic of Germany between 1998 and 2004 with those adopted by the European Union in the same period. Results: 84 percent came from Brussels”

Roman Herzog, former President of Germany³²

“About half of all new regulations that impact upon businesses in the UK originate in the EU”

UK Prime Minister Gordon Brown³³

“Anti-European politicians tell more myths and fantasy about Europe than you can find in Harry Potter or the Da Vinci Code. My favourites include... that the vast majority of our legislation comes from Europe... According to the House of Commons the amount of legislation in the UK which originates from Europe amounts to around 9 per cent of UK laws passed.”

Denis MacShane, Labour MP and former Europe Minister³⁴

Most people realise that the UK is a member of the European Union, and therefore that some of the laws applicable in the UK are negotiated and passed not at Westminster and Whitehall, but in Brussels and Strasbourg.

But nobody really knows *how many* of our laws originate in the EU. For years, politicians, journalists and the general public have debated and discussed

... the UK Government says it wants to “tackle the flow of new regulations” in the UK, but this cannot be done effectively if we do not know exactly where those regulations are coming from ...

the merits and drawbacks of EU regulations without ever really knowing how much of an impact they actually have.

As Conservative MP Mark Harper said in Parliament in October 2008:

“For more than a decade now, members of this House and the other place have been asking the Government what proportion of our law has been initiated by the European Union. No definitive number has ever been agreed.”³⁵

This is a problem when thinking about regulation in particular. The UK Government says it wants to “tackle the flow of new regulations” in the UK³⁶, but this cannot be done effectively if we do not know exactly where those regulations are coming from. If we do not know where they are coming from, then we do not know who is responsible for them, and therefore cannot properly target our efforts to reduce or improve them.

It is also a question of transparency and accountability. Citizens and especially MPs and journalists should have a better understanding of the origins and impact of regulations and legislation in general.

Even before we factor in the well-known complexity of EU lawmaking, regulation is a mode of governance that often comes under criticism for being opaque and subject to lax control and scrutiny both within the Government and more widely.³⁷

Accountability is rightly one of the UK Government’s “five principles” of good regulation.³⁸ But if we want to achieve accountability in regulation, we need to know who the regulator actually is. That means finding out where and how our laws are made.

32 *Welt am Sonntag*, “An article on the EU Constitution”, 14 January 2007, for a translated version see <http://www.openeurope.org.uk/analysis/herzog.pdf>

33 *HM Treasury/DTI*, “Towards and Enterprising Europe – a paper by the French, German and UK governments”, 26 January 2006

34 Speech, 19 March 2005, see http://www.epolitix.com/mpwebsites/mpspeeches/mpspeechdetails/newsarticle/political-and-economic-protectionism-the-spectre-haunting-europe//mpsite/10654/?no_cache=1

35 *Hansard*, 8 Oct 2008: Column 295

36 *HM Treasury*, “Enterprise: Unlocking the UK’s talent, 12 March 2008, p. 64

In the spirit of this, in October 2008 Mark Harper attempted – unsuccessfully – to pass a Bill in Parliament which would have required a Minister to certify on a Government Bill or a Statutory Instrument whether or not it was a result of a decision of the EU.

He explained:

“Our democratic system is based on the principles of transparency and accountability. I do not believe that any right hon. or hon. Member of this House would disagree that members of the public should know the origin of the laws that govern them... There is little clarity—indeed, much confusion—over the extent of the European Union’s influence on the legislation brought before this House and the other place.”³⁹

In the midst of all this confusion, many wildly different estimates have been made about the proportion of UK regulation originating in the EU, fuelling a fierce and often deeply ideological debate which has never resulted in any meaningful or concrete conclusions.

The Labour MP and former Minister for Europe, Denis MacShane, for instance, suggests that only 9 or 10 percent of UK legislation has its origin in the EU.⁴⁰

Meanwhile, at the other extreme, former German President Roman Herzog has claimed that the proportion of national legislation originating in Brussels is 84 percent.⁴¹

A World Bank study of the Dutch Administrative Burden Reduction Programme stated that 40 percent of regulations in the Netherlands stem from the EU.⁴² A Swedish study of business regulations put the equivalent proportion in Sweden at 44 percent.⁴³ Several similar assessments estimate 50 percent.

Gordon Brown himself has said that “About half of all new regulations that impact upon businesses in the UK originate in the EU.”⁴⁴ In 2006, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Lord Triesman, echoed this assessment, saying: “Many EU regulations have a purely technical or temporary effect. We estimate that around 50 percent of UK legislation with a significant economic impact has its origins in EU legislation.”⁴⁵

However, all of these estimates contain flaws.

First, Denis MacShane’s claim is invalid in several respects. His assertion is based on a House of Commons research paper, which noted that between 1998 and 2004 only 9 percent of UK SIs implemented EU legislation.⁴⁶ However, as the same paper states, this figure “gives an idea of the number of Directives as a percentage of all SIs but not Regulations, as these are directly applicable and only a few are implemented by SI.”⁴⁷

In other words, most of the 700 new Regulations the EU adopted in 2008 are not included in this figure, since they do not require new and separate laws (SIs) in the UK.⁴⁸ They still have legal effect, but are not “counted” in the UK’s statutory book.

37 *HM Government*, “Regulatory Budgets: A consultation document”, August 2008, p. 17

38 BRE website, <http://www.berr.gov.uk/whatwedo/bre>, viewed on 7 January 2009

39 See Mark Harper’s Private Members Bill, “European Union (Transparency)”, *Hansard*, 8 Oct 2008: Column 295
40 *Hansard*, 8 Oct 2008: Column 298 and speech, 19 March 2005

41 Herzog refers to a reply by Parliamentary Undersecretary of the German Parliament, Alfred Hartenbach, given on 29 April 2005, see *German Parliamentary Journal* 15/5434, 6 May, 2005, p. 15; *Welt am Sonntag*, “An article on the EU Constitution – it cannot go on like this”, 14 January 2007; see <http://www.openeurope.org.uk/analysis/herzog.pdf>

42 *World Bank Group*, “Review of the Dutch Administrative Burden Reduction Programme”, February 2007, p. 6

43 *Board of Swedish Industry and Commerce*, “Red tape for business in Sweden”, August 2006, p. 7

44 HM Treasury/DTI, “Towards and Enterprising Europe – a paper by the French, German and UK governments”, 26 January 2006

45 Reply to written answer W10 [HL2785], 9 January 2006, see *Hansard* text, http://www.publications.parliament.uk/pa/ld199697/ldhansrd/pdvn/lds06/text/60109w03.htm#column_WA10

46 *Financial Times*, “Reports debunk red tape complaints”, 22 March 2005; See *House of Commons Library*, “EU Legislation”, SN/IA/2888, 3 August 2008

47 *House of Commons Library*, “EU Legislation”, SN/IA/2888, 3 August 2008, p. 12

48 However, in some cases Regulations give rise to SIs. An example is “The Nutrition and Health Claims (England) 2007 Regulations”. In this case the regulations stipulate how an EU Regulation will be enforced in the UK, see *House of Commons Library*, “EU Legislation”, SN/IA/2888, 3 August 2008, p. 2-3,12.

Furthermore, in some cases, several SIs can be used to implement one Directive. For example, the Directive on exhaust systems of motor vehicles required 26 SIs to implement.⁴⁹ At the other end of the spectrum, the SI for the Motor Vehicles Regulations in 2007 implemented four different Directives.⁵⁰ Therefore, MacShane's assumption of "one Directive, one SI" is highly dubious.

In addition, MacShane is essentially comparing apples and oranges. As our estimates below show, Directives are usually far-reaching measures with a big impact on the economy. SIs, in contrast, can cover a variety of issues, including public administration – for example a road closure or changing arrangements for parish elections.⁵¹

Our compilation of over 2,000 IAs shows that SIs based on EU legislation on average have three times the economic impact of SIs based purely on domestic legislation. Again, this makes a one-for-one comparison misleading.

In other words, discussing the proportion of legislation without any sense of the relative weight of each regulation is not good enough. Indeed as our calculations show, it is not the number of regulations coming from the EU that matters – which is what MacShane is referring to – so much as the *cost burden* of those regulations.

Estimates based on measuring the administrative burden to business, such as the Swedish study, are more relevant. However, they apply only to *part* of the overall cost for business of complying with regulation, namely the administrative burden.

Even estimations such as the World Bank study and Gordon Brown's assessment, which seek to quantify the proportion of the wider compliance cost to business, still fall short. Such estimations fail to capture significant costs of regulation to the public sector, third sector and taxpayers.

For instance, new EU rules for fixed term contracts in 2002 were estimated to cost the UK public sector between £98 million and £223 million every year.⁵² Likewise, stricter definitions for on call time for doctors, contained in the EU's Working Time Directive, are costing the NHS "hundreds of millions of pounds per annum" according to the Government.⁵³ These costs need also to be included in any proper assessment of the proportion of EU laws impacting on the economy.

... it is not the number of regulations coming from the EU that matters so much as the cost burden of those regulations ...

49 The Council Directive "on the approximation of the laws of the Member States relating to the permissible sound level and the exhaust system of motor vehicles", see *House of Commons Library*, "EU Legislation", SN/IA/2888, 3 August 2008

50 "The Motor Vehicles (EC Type Approval) (Amendment No.2) Regulations 2007", implements four separate EU directives, see http://www.opsi.gov.uk/si/si2007/em/uksiem_20073135_en.pdf, viewed on 16 January 2008.

51 For example, change to parish elections in South Mimms. Order 2008 S.I. 2008/175.

52 "Final Regulatory Impact Assessment, Age Discrimination – Summary", published in *Department for Trade and Industry*, "2006 Compendium of Regulatory Impact Assessments", Employment Relations, April 2004, p. 65

53 Quoted in *Hansard* 21 April 2004 : Column 315

2

Out of control: the cost of regulation

After ten years of Impact Assessments, it is time to take stock. To what extent have IAs, and other Government initiatives to cut red tape, been a success?

This chapter reveals how, according to information derived from the Government's own assessments, the burden of regulation has increased substantially over the past decade, with the cost of regulation in the UK increasing every year. It also shows the extent to which this trend is driven by EU legislation.

2.1 Regulation: Increasing all the time

Over the past decade, the number of laws produced in Whitehall and Brussels has skyrocketed.

In 2008, the UK Government adopted 2,265 laws, 1,120 of which were labelled regulations. This translates into eight new laws per working day.⁵⁴ In 1998, the UK Government adopted 595 regulations. (See figure 1)

Meanwhile, EUR-Lex, the EU's legal database, contains more than 300,000 documents, which includes various preparatory acts and case law as well as Regulations and Directives.⁵⁵ There are currently 26,559 legal acts in force on the EU's statute book.⁵⁶ 17,579, or 66 percent, have been introduced in the last ten years.

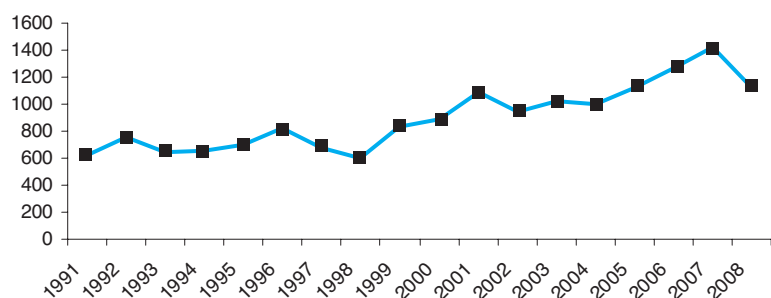
Since 2005, the EU's law book – the *acquis communautaire* – has grown by an average of 1,887 acts a year. This is the equivalent of 10 new acts for each day the European Parliament meets.⁵⁷

In 2008, almost 2,000 EU legal acts were adopted, compared to 845 acts in 1997.⁵⁸

The graphs below illustrate the number of EU Directives and Regulations adopted in the EU each year. The numbers are limited to acts that are still in force, meaning that this effectively represents the "net" growth of EU legislation.

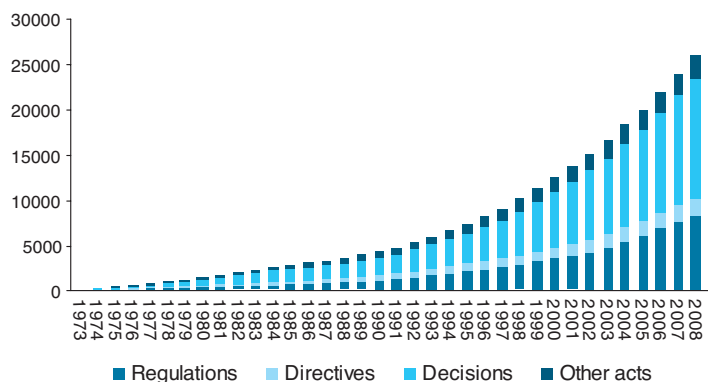
In 2008, 718 Regulations and 113 Directives were adopted. The graphs illustrate that far from "grinding to a halt" since enlargement of the EU, as some

Figure 1 Number of regulations adopted each year in the UK



Source: UK Law Statute Database

Figure 2 The growth of EU legislation: cumulative count of acts in force



Source: EUR-Lex

⁵⁴ UK Statute Law Database, "all legislation" and "regulations search", 14 January 2009

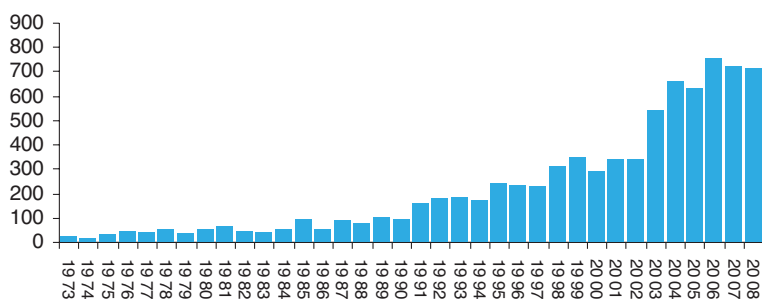
⁵⁵ OECD, "Economic Survey of the European Union 2007", 20 September 2007, p 109

⁵⁶ As of 14 January 2008.

⁵⁷ In 2008, the European Parliament met 4 days a week over a 46 week period. See the website of the UK Office of the European Parliament, <http://www.europarl.org.uk/guide/GFAQmain.htm>, viewed on 17 January 2009

⁵⁸ EUR-Lex database search was restricted to Directives, Regulations, Decisions and other acts "in force". The search took place on 14 January 2009.

Figure 3 EU Regulations adopted annually



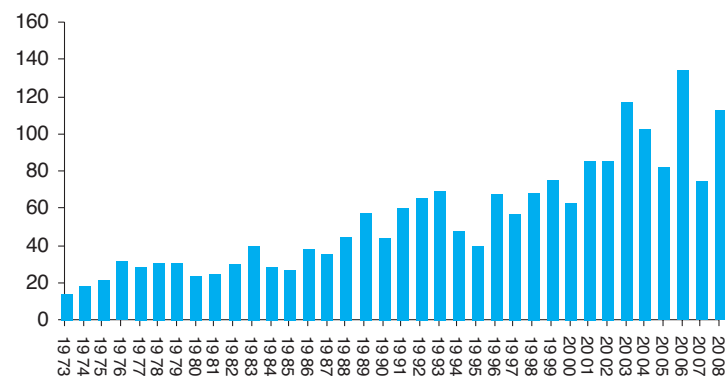
Source: EUR-Lex

Cumulative vs annual cost of regulation

We have divided our estimates of the cost of regulation into two categories: the cumulative cost of regulation and the annual cost of regulation.

For both of these categories we measured the cost that has arisen from new regulations introduced in the UK between 1998 and 2008 – so a cost imposed by a regulation in 1997, for example, is not included.

Figure 4 EU Directives adopted annually



Source: EUR-Lex

The **cumulative figures** represent the total cost of regulations coming into force since 1998. To conceptualise this, if we were to talk about ‘paying the bill’ for all regulations introduced between 1998 and 2008, this is the sum of money we would need to put on the table.

This amount includes the *recurring costs* of the regulation multiplied by the number of years the regulation has been in force. It also includes all the *implementation costs* of the regulations – counted only once, of course.

people have claimed, the EU is in fact producing more Regulations and Directives than ever.

2.2 The cost of regulation in the UK

While the *number* of regulations adopted each year is a useful indicator of trends, a far more meaningful assessment of the burden of regulation is the relative cost of those regulations to the economy. As we described previously, a single piece of legislation may have huge implications, whereas another may be of negligible effect.

The **annual cost** is the cost to the UK economy in *each year* of new regulations that have been adopted during our snapshot period of 1998 to 2008. For example, the annual cost of regulations in 2003 includes the *recurring costs* for each piece of regulation passed between 1998 and 2003, plus the *implementation costs* of regulations passed in 2003. These estimates quantify the “flow” of regulation.

Measuring the *flow* of regulation is more meaningful than adding up the cumulative cost, since it can tell us whether the burden of regulation is becoming lighter or heavier from year to year.

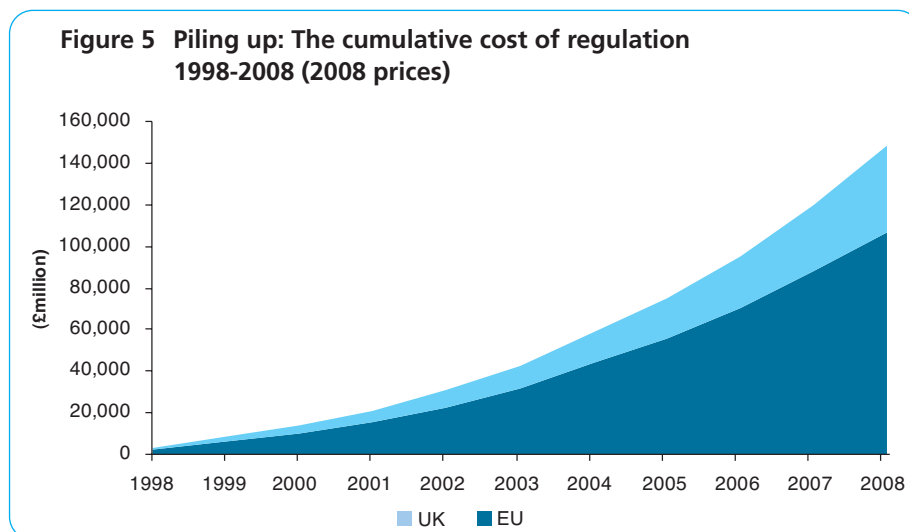
The cumulative cost will inevitably increase over the period as it is essentially piling the costs in different years on top of each other. The annual cost, on the other hand, could be expected to go down in any given year – particularly if the Government’s attempts over the previous year to reduce the regulatory burden had been at all successful.

2.3 Cumulative cost

72% of the cost of regulation in the UK comes from the EU

We estimate the cumulative cost of regulations introduced in the UK between 1998 and 2008 at £148.2 billion. Of this, £106.6 billion, or 71.9 percent, had their origin in the EU.

EU laws introduced in the UK since 1998 have therefore cost the UK economy almost £107 billion.



Source: Open Europe’s Regulation Database

For comparison:

- This is the equivalent of 7.3 percent of GDP.⁵⁹
- For the same amount, the UK Government could cut the national debt by 17 percent.⁶⁰

... Labour market legislation alone introduced over the past ten years has cost the UK economy £45 billion. 69 percent of this – £31 billion – came from the EU ...

- EU legislation since 1998 has cost the UK 23 percent more than the UK’s total gross contributions to the EU budget from 1998-2008.⁶¹

Furthermore, breaking down the EU-sourced cost according to policy area reveals that:

- Labour market legislation alone introduced over the past ten years has cost the UK economy £45 billion. 69 percent of this – £31 billion – came from the EU. This means that 21 percent of the overall cost of new regulations introduced between 1998 and 2008 in the UK can be sourced to the EU’s labour market laws alone. For this amount, the UK Government could cut corporation tax by two-thirds.⁶²

- EU health and safety legislation coming into force in the last decade has cost the UK £5.7 billion.

- The EU’s agricultural regulations have cost British farmers over £2 billion over the same time period.

- The EU’s food labelling requirements have cost the UK £1.7 billion over the last ten years.
- EU environmental regulation has cost the UK £13.8 billion over the last ten years.

59 Calculated assuming that UK GDP in 2008 was £1,461,301,000,000, see Eurostat, http://epp.eurostat.ec.europa.eu/portal/page?_pageid=0,1136173,0_45570701&_dad=portal&_schema=PORTAL

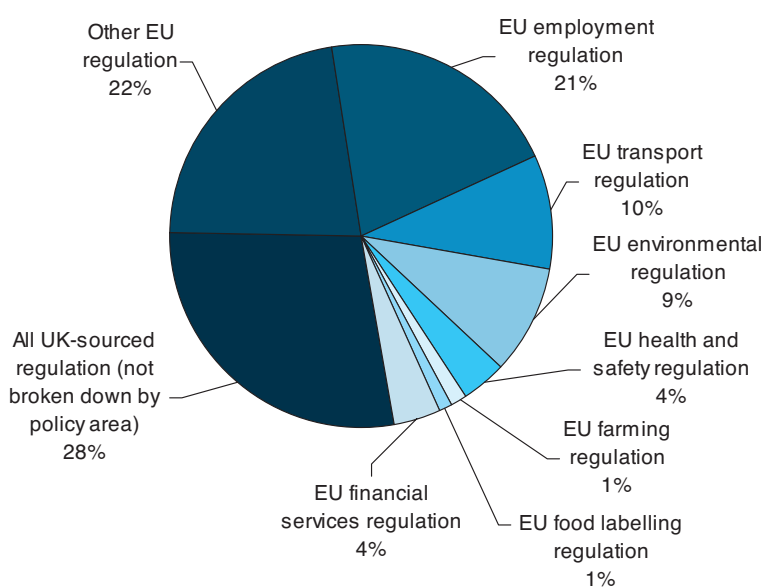
60 According to ONS figures, March 2008, UK national debt was £614,400,000,000, see <http://www.statistics.gov.uk/cci/nugget.asp?ID=277>

61 UK gross contributions to EU budget 1998-2008 were £86.34 billion, see http://www.hm-treasury.gov.uk/int_eu_statefraud.htm

62 Corporation tax receipts were £46.4 billion in 07/08, see the Treasury’s Latest Public Finances Databank, http://www.hm-treasury.gov.uk/psf_statistics.htm

The graph below breaks down the cost of EU regulation by various policy areas in terms of their *share of the cumulative cost* of regulation introduced in the UK between 1998 and 2008. UK-sourced cost is not broken down by policy area.

Figure 6 Cost of regulation by policy area 1998-2008



Source: Open Europe's Regulation Database

By 2018 EU legislation will have cost the UK £356 billion

If current trends continue, and EU-sourced regulations are introduced at the same rate as over the last decade, by 2018 the cost of EU legislation introduced since 1998 will have risen to more than £356 billion.⁶³

- This is almost £14,300 per household in the UK.⁶⁴
- For the same amount, the UK Government could pay off almost 60 percent of the national debt.⁶⁵

The departments: who adds burden?

Among UK Government departments, BERR (formerly the DTI) is the main facilitator of regulation in the UK. It accounts for 43.6 percent of the cumulative cost of regulation.

The Department has imposed a burden of £64.6 billion since 1998. About two-thirds of this amount, £43.9 billion, is sourced to EU legislation.

In second place is the Department for Transport, which is responsible for almost 14 percent of the total cost – £20.7 billion. Of this, 85.8 percent comes from the EU.

Perhaps unexpectedly, the Ministry of Justice is third, accounting for almost £12 billion or 8 percent of the total cumulative cost of regulation. This is down to one main reason: the Data Protection Bill, which implements the EU's Data Protection Directive (Directive 95/46/EC). This explains why the proportion of legislation coming from the EU in this department is so high, at 97 percent. The IA puts the annual recurring cost of the Directive at £742 million.⁶⁶

The Treasury is in fourth place with £9.8 billion, amounting to 6.6 percent of the total cost. The EU proportion – 62 percent– owes primarily to financial regulations coming into force during the period (see overleaf).

The Department for Communities and Local Government (DCLG) is in fifth place (6.3 percent – £9.4 billion), with 83 percent of regulations coming from the EU. This high figure is explained by the

63 The figure is the Present Value of the cost, calculated using the discount rate of 3.5 per cent specified in the Treasury Green Book. See <http://greenbook.treasury.gov.uk/chapter05.htm#discounting>

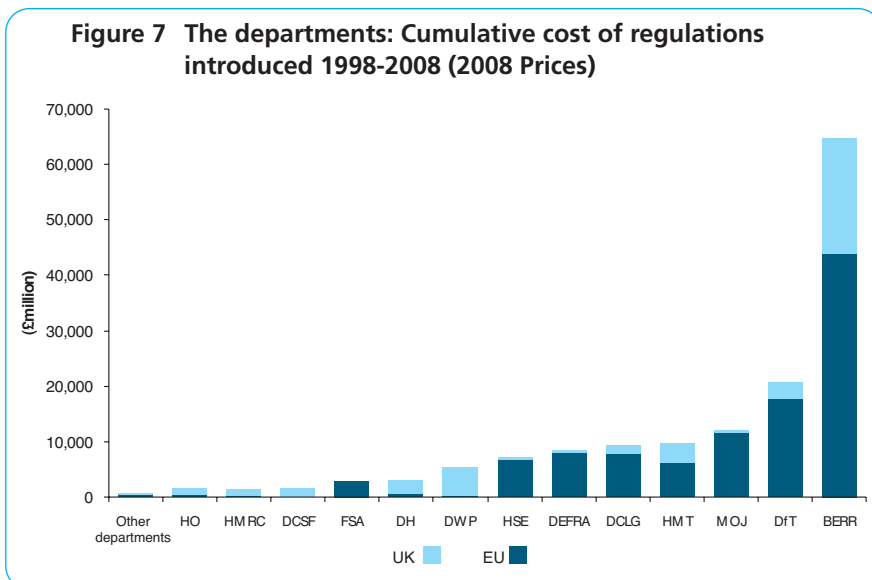
64 Based on ONS's estimate of the number of UK households at 24.9 million in 2006, see <http://www.statistics.gov.uk/cci/nugget.asp?id=1866>

65 According to ONS figures, March 2008, UK national debt was £614,400,000,000, see <http://www.statistics.gov.uk/cci/nugget.asp?id=277>

66 The IA for the Data Protection Directive was originally produced by the Department for Constitutional Affairs, but is now the responsibility of the Ministry of Justice. For the IA, see <http://www.dca.gov.uk/ccpd/dpara.htm>, viewed on 11 January 2009. In our cumulative and annual cost tables we have updated the recurring costs of the directive to reflect 2008 price levels.

Energy Performance of Buildings Directive, which, at least partially, gave rise to the Home Information Packs.⁶⁷

DEFRA follows close behind in sixth place (5.7 percent – £8.4 billion). DEFRA is dominated by EU legislation, which makes up 94 percent of the cost, as is the Health and Safety Executive (94.3 percent).



Source: Open Europe's Regulation Database

Table 1 Departmental break-down: cumulative cost of regulation 1998-2008 (2008 prices)

Department	Cumulative cost (£million)	Cost of domestic legislation (£million)	Cost of EU legislation (£million)	EU proportion of cost	Share of overall cost of regulation in the UK
BERR	64,606.1	20,664.9	43,941.2	68.0%	43.6%
DfT	20,665.0	2,926.3	17,738.7	85.8%	13.9%
MOJ	11,985.4	417.1	11,568.3	96.5%	8.1%
HMT	9,838.2	3,740.1	6,098.1	62.0%	6.6%
DCLG	9,391.8	1,594.8	7,797.0	83.0%	6.3%
DEFRA	8,445.4	490.6	7,954.8	94.2%	5.7%
HSE	7,017.2	398.4	6,618.8	94.3%	4.7%
DWP	5,312.6	5,146.6	166.1	3.1%	3.6%
DH	3,012.9	2,351.5	661.4	22.0%	2.0%
FSA	2,965.6	36.2	2,929.5	98.8%	2.0%
DCSF	1,556.0	1,556.0	0.0	0.0%	1.0%
HO	1,505.3	1,009.0	496.3	33.0%	1.0%
HMRC	1,278.6	1,154.2	124.4	9.7%	0.9%
Other	636.6	134.0	502.6	78.9%	0.4%
Total/average	148,216.7	41,619.6	106,597.1	59.2%	100.0%

Source: Open Europe's Regulation Database

⁶⁷ The Energy Performance of Buildings Directive (EPBD) was originally the responsibility of the Office of the Deputy Prime Minister (ODPM), but on 5 May 2006 the responsibilities of the ODPM was transferred to the DCLG. For the IA on the Directive, see <http://www.communities.gov.uk/documents/planningandbuilding/pdf/143723.pdf>, viewed on 11 January 2009. For the IA on HIPS, see <http://www.communities.gov.uk/documents/housing/pdf/156618.pdf>, viewed on 11 January 2009.

2.4 The annual cost of regulation in the UK

As noted above, measuring the *flow* of regulation is more meaningful than measuring the cumulative cost, in terms of trying to measure whether efforts to improve the regulatory environment are actually working or not.

When IAs were first introduced in 1998, the Cabinet Office ambitiously estimated that the new system would allow for annual savings of £100 million to the UK economy.⁶⁸ In 2005 when the Government re-launched its regulatory reform initiative (see Chapter 3), Gordon Brown said that the Government would approach regulation with “not just a light touch but a limited touch.”⁶⁹

However, our figures show that since 2005, the annual cost of regulation has gone from £16.5 billion in 2005 to £28.7 billion in 2008 – an enormous increase of 74 percent.

The figures from earlier years, 1998-2000 in particular, should be treated with caution because when the system was first introduced the IAs were of relatively poor quality – lacking consistency and often failing to quantify figures. There were also fewer IAs produced. However, later figures, particularly from 2004 onwards, can be considered more reliable and therefore more suitable for year-on-year comparisons.

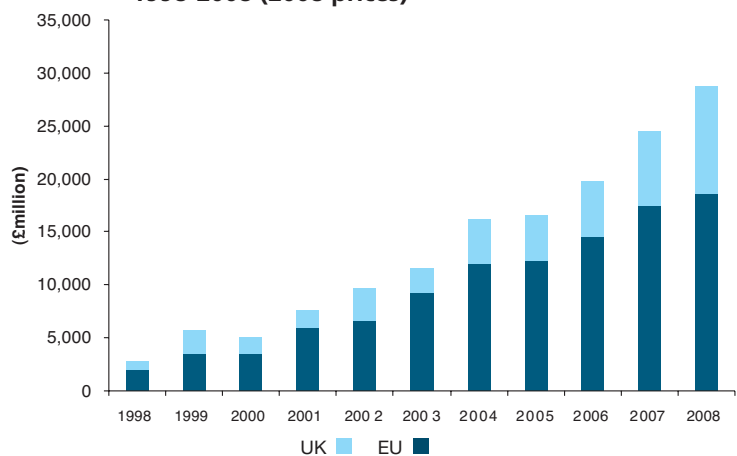
Annual cost of EU legislation

As with the cumulative figures, most of the annual cost of regulations in the UK stems from the EU, with the proportion ranging from 59.9 percent in 1999 to 79.5 percent in 2003. The average annual proportion is 71.6 percent.

It usually takes three years to implement an EU Directive, suggesting that the variation in proportion could be part of a natural “transposition cycle”. The graph clearly illustrates the source of regulation over the last decade in terms of economic impact.

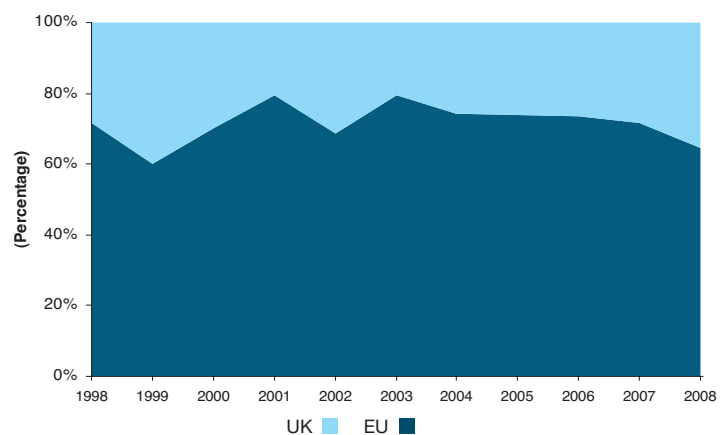
The proportion of the absolute number of EU-sourced regulations introduced between 1998 and 2008 is a slightly different story. The average annual proportion of the absolute number of regulations coming from the EU is 50.4 percent, with a range of 63.2 percent in

Figure 8 The flow: Annual cost of regulation 1998-2008 (2008 prices)



Source: Open Europe's Regulation Database

Figure 9 Who's responsible? Annual cost of regulations introduced 1998-2008



Source: Open Europe's Regulation Database

68 Cited in Renda, Andrea, “Impact Assessments in the EU: the state of the art and the art of the state”, *Centre for European Policy Studies*, 2006, p.28

69 Press release from *HM Treasury*, “Chancellor launches Better Regulation Action Plan”, 24 May 2005

1998, to 38.3 percent in 2002. In this measure, we have only included regulations which, according to the corresponding IA, have any economic impact on business, the public sector or the third sector. We have therefore avoided the fallacy of comparing regulations of economic significance to those with a minor or merely administrative function – a fallacy we discussed in Chapter 1. However, for the reasons we also discussed in Chapter 1, this measurement should not be assigned too much significance.

Overall, the cost of EU legislation has gone up steadily year-on-year over the past decade. In 2008 alone, EU legislation dating from 1998 cost the UK economy £18.5 billion – up from £12.2 billion in 2005.

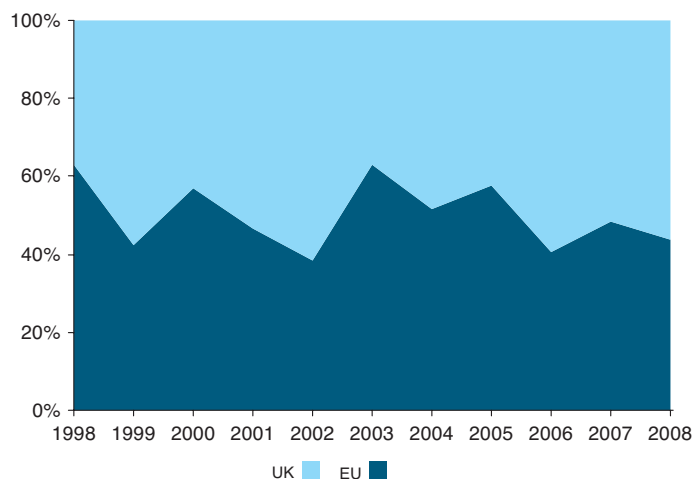
Annual cost by selected departments

Looking at the regulatory trends for individual departments reveals a somewhat patchier record. We can identify some 'peak years' alongside an overall trend of rising regulatory costs across the board. The annual breakdown also clearly shows how the flow is affected by a few very costly regulations, leading to spikes in certain years.

(i) BERR

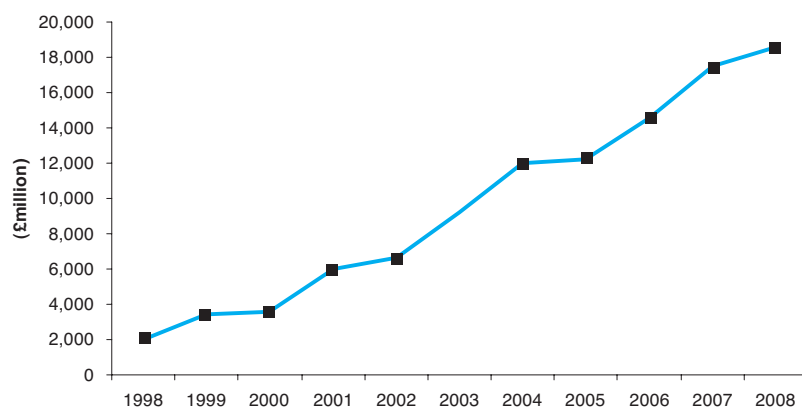
- BERR is the biggest producer of regulation in the UK, both in terms of numbers and costs. If the UK has a "regulation factory", this is it.
- In 2008 alone, the department accounted for regulatory costs to the economy of £12.8 billion – 45 percent of the total cost of regulation in

Figure 10 Who's responsible? Absolute number of regulations introduced 1998-2008



Source: Open Europe's Regulation Database

Figure 11 Snapshot: Annual cost of EU regulation in Britain 1998-2008 (2008 prices)



Source: Open Europe's Regulation Database

that year. This was roughly £4 billion more than in 2007 – or a 45 percent increase.

- As with the cumulative costs, BERR also accounts for a large share of the annual costs of EU legislation. Over the past ten years, 72.7 percent of the average annual cost of the regulation imposed by BERR stemmed from Brussels. In 2008, the proportion was much lower at 46 percent – due to the costly Working Time

Amendment Regulations 2007, which was a purely domestic initiative.

- In 2008, a staggering £9 billion of the cost of regulations from BERR arose from labour market regulations alone, of which £3.6 billion came from the EU. In turn, £2.1 billion of this was due to one single regulation – the EU’s infamous 1999 Working Time Directive.
- In 2008, the cost from EU regulation administered through BERR was £5.9 billion. To provide some context for this figure, this is enough to cut the rate of corporate tax by an average of 13% for one year.⁷⁰

(ii) DfT

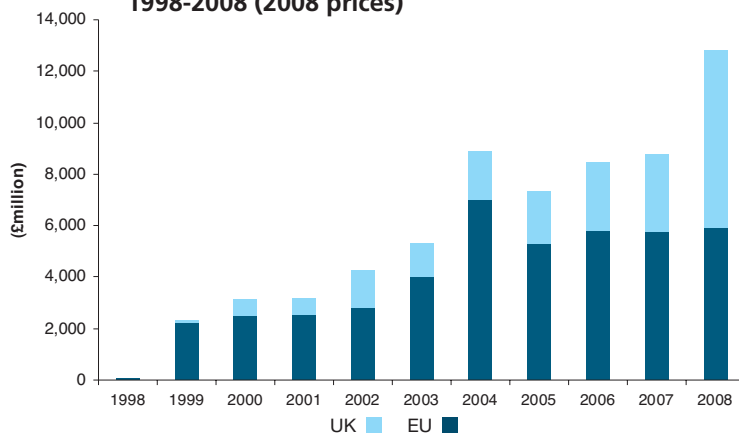
- In 2008, the Department for Transport (DfT) produced regulations costing the economy £3.7 billion. Over 85 percent of this cost was due to legislation from the EU. In 2007, the cost was £4 billion.
- The EU proportion in the last ten years ranges from 77 percent in 2006 to 97 percent in 2001. In other words, transport policy in the UK is now heavily influenced by EU laws.

- Particularly burdensome regulations include the EU-derived Renewable Transport Fuel Obligations Order 2007, with a massive implementation cost of £252 million, and an equally massive recurring cost of £381 million.⁷¹ This also explains the spike in 2007.
- The Vehicle Drivers’ (Certificates of Professional Competence) Regulations 2007 and the Non-Road Mobile Machinery (Emission of Gaseous

and Particulate Pollutants) Regulations 2004 – both from the EU – are two other examples of laws imposing substantial costs.

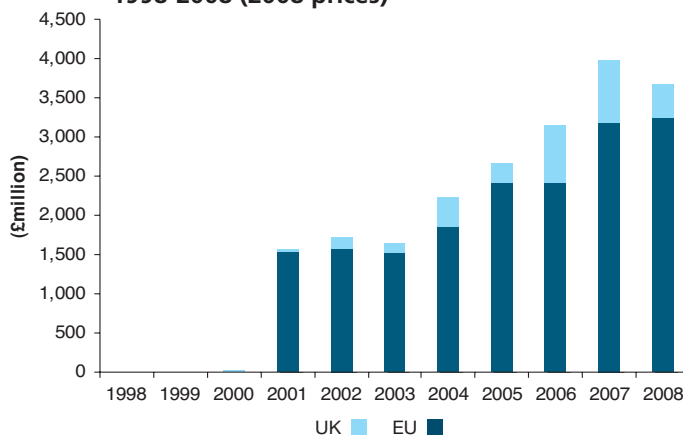
- Incidentally, the DfT was perhaps the least forthcoming Department in providing IAs for Open Europe to scrutinise. This problem was exacerbated by the Department’s confusing (and far from exhaustive) record of IAs on its website. Moreover, over 40 percent of the IAs we did obtain lacked quantified costs.

Figure 12 BERR: Annual cost of regulation introduced 1998-2008 (2008 prices)



Source: Open Europe’s Regulation Database

Figure 13 DfT: Annual cost of regulation introduced 1998-2008 (2008 prices)



Source: Open Europe’s Regulation Database

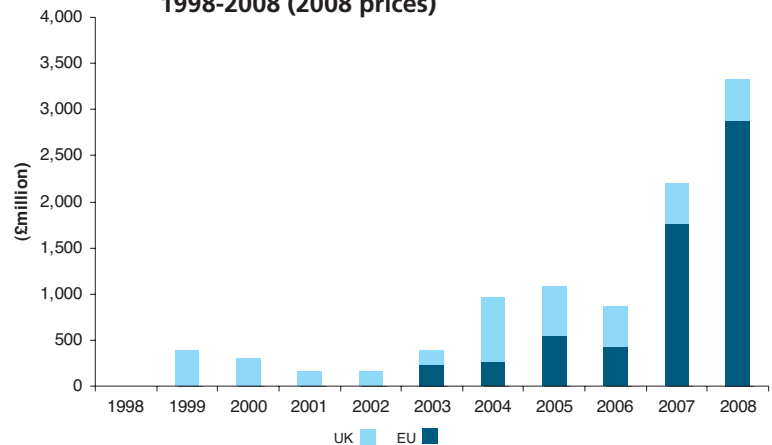
71 For the IA, see the OPSI website, http://www.opsi.gov.uk/si/si2007/em/ukciem_20073072_en.pdf, viewed on 17 January 2009

72 For more details on these Directives, see Open Europe, “Selling the city short?”, November 2006

(iii) HMT

- The cost imposed by the Treasury has skyrocketed in the last two years, from £864 million in 2006 to £3.3 billion in 2008.
- In addition, the EU proportion has gone up considerably, to 86 percent in 2008. This rise is driven by a slew of financial regulations coming in to force in 2007 and 2008, including the EU’s Capital Requirements Directive and the 2007 Markets in Financial Instruments Directive.⁷² The average annual proportion is 58.6 percent.

Figure 14 HMT: Annual cost of regulation introduced 1998-2008 (2008 prices)

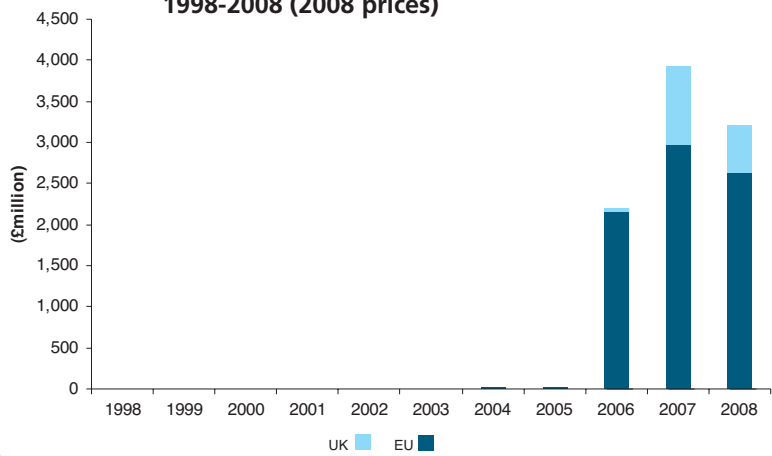


Source: Open Europe’s Regulation Database

(iv) DCLG

- The Department for Communities and Local Government was created in May 2006, taking over the responsibilities of the Office of the Deputy Prime Minister (ODPM), whose regulatory costs we have not included in the table.⁷³ This explains the sudden appearance of costs in 2006.
- The cost of regulation generated by the DCLG was £3.2 billion in 2008, with just over £2.6 billion, 82.2 percent, coming from the EU.

Figure 15 DCLG: Annual cost of regulation introduced 1998-2008 (2008 prices)



Source: Open Europe’s Regulation Database

- It is of course surprising that the share of EU-sourced costs is so high for the Department responsible for *local* government. Intuitively, this seems inconsistent with the EU’s much-vaunted ‘subsidiarity’ principle, which states that decisions should be made at the lowest possible level.
- As previously mentioned, this high proportion is due to the EU’s energy efficiency legislation for buildings, which have fallen under the responsibility of the DCLG. These regulations gave rise to the controversial HIPs. We have split the costs of HIPs between the EU and the UK to reflect how the two

were “twin drivers” of the regulation. The high implementation cost of this law is also the explanation behind the spike in 2007.

(v) DEFRA

- The Department for Environment, Food and Rural Affairs (DEFRA) is another department producing a massive amount of regulations each year. Last year it was responsible for regulatory costs worth £1.3 billion – with over 90 percent coming from the EU. The cost imposed by the department has stayed fairly static over the last

⁷³ The regulatory costs imposed by the ODPM are small and counted towards the “other departments” category in the summary table.

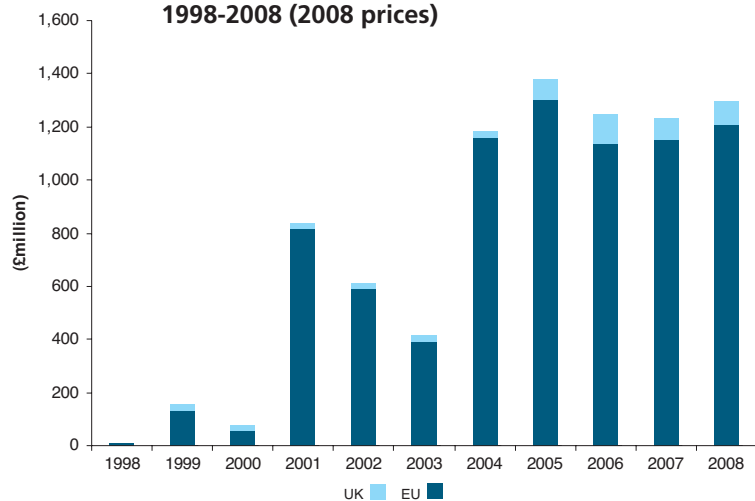
five years, actually dropping in 2008 compared to 2005 levels.

- DEFRA's output is almost entirely dominated by legislation originating in Brussels. The proportion ranges from 91 percent in 2006 to 98 percent in 2004, with an average of almost 92 percent.
- The regulations facilitated by DEFRA relate primarily to agricultural and environmental policy. All regulations produced by the Environment Agency are included under DEFRA. In terms of cost, some of the more burdensome regulations include the EU's Water Supply Regulations, the Genetically Modified Organisms Regulations 2004 and the Controls on Nonylphenol and Nonylphenol Ethoxylate Regulations 2004.

(vi) HSE

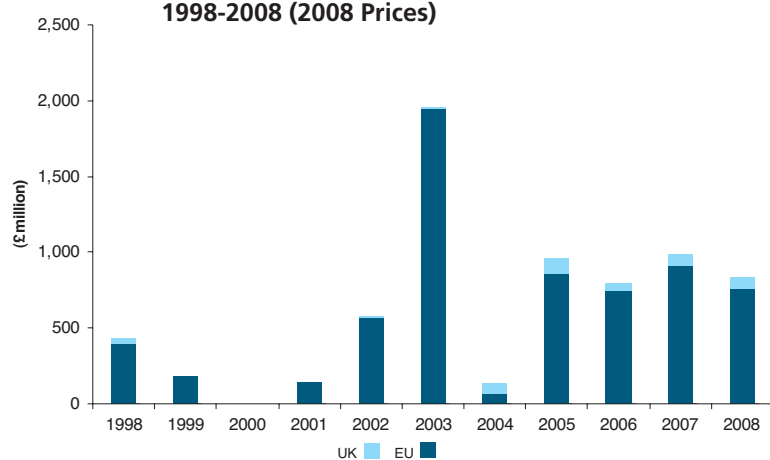
- The Health and Safety Executive (HSE) experienced a spike in 2003, when the EU's Control of Asbestos at Work Regulations 2002 came in to force.⁷⁴ According to the IA, the implementation cost of the regulation was a huge £1.4 billion.⁷⁵
- The cost burden from HSE in 2003 was almost £2 billion – with almost all of it coming from the EU. In 2008, the cost was just over £839 million.
- In 2008, over 91 percent of the cost was attributed to EU legislation, roughly in line with the ten-year average.
- HSE contains several detailed regulations from the EU which relate to the workplace, and which impose huge costs on businesses. Apart from the

Figure 16 DEFRA: Annual cost of regulation introduced 1998-2008 (2008 prices)



Source: Open Europe's Regulation Database

Figure 17 HSE: Annual cost of regulation introduced 1998-2008 (2008 Prices)



Source: Open Europe's Regulation Database

Asbestos rules, the Control of Vibration at Work and the Control of Noise at Work stand out. Both have a recurring cost of around £330 million.⁷⁶

2.4 The cost of regulation in Europe

Having estimated the regulatory burden in the UK for regulations introduced between 1998 and 2008, we were able to produce estimates for the other 26 member states, as well as an EU-wide figure.

⁷⁴ The regulation actually came in to force in December 2002, but in summaries, we have counted all regulations coming in to force in November or December of a given year to the following year.

⁷⁵ For the IA, see the HSE's website, <http://www.hse.gov.uk/ria/chemical/ria-176.pdf>, viewed on 17 January 2009

⁷⁶ For the IA on Noise at Work, see http://www.opsi.gov.uk/si/em2005/uksiem_20051643_en.pdf; for the IA on Vibration at Work, see <http://www.hse.gov.uk/vibration/ria05.pdf>, both viewed on 12 January 2009

The cumulative cost of regulation in the EU 1998-2008

Using the method described in Annex I we estimate that the cumulative cost of regulation introduced between 1998 and 2008 for all 27 member states is €1.4 trillion. Of this, 66 percent, or €928 billion, is EU-sourced. As expected, the proportion is lower than in the UK.

EU legislation introduced in the last decade alone has therefore cost Europe €928 billion. This is equivalent to 7 percent of EU-wide GDP.⁷⁷

If current trends continue, by 2018, the cost of EU

regulation introduced since 1998 will have risen to more than €3.017 trillion. This is over €15,000 per household in the EU.

The table below breaks down the cumulative costs and proportions in each member state. As some member states are assigned the same weighting factors, the proportion of EU-sourced costs are also the same for several countries. (See Annex I)

The cost to Germany of regulation introduced since 1998 is a staggering €280 billion. Of this amount, €184 billion is sourced to EU legislation – which is the equivalent of over 7 percent of the country's GDP.⁷⁸

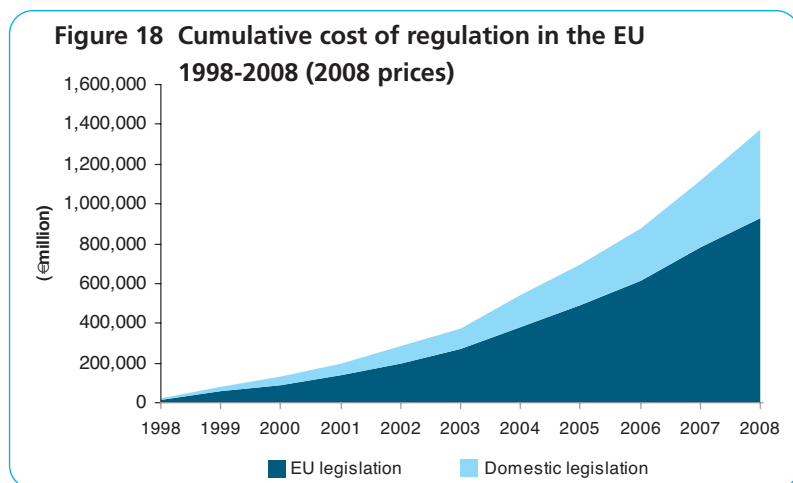
In France the cost was €211 billion, of which almost €144 billion – 68.1 percent – came from the EU.

The annual cost of regulation in the EU-27

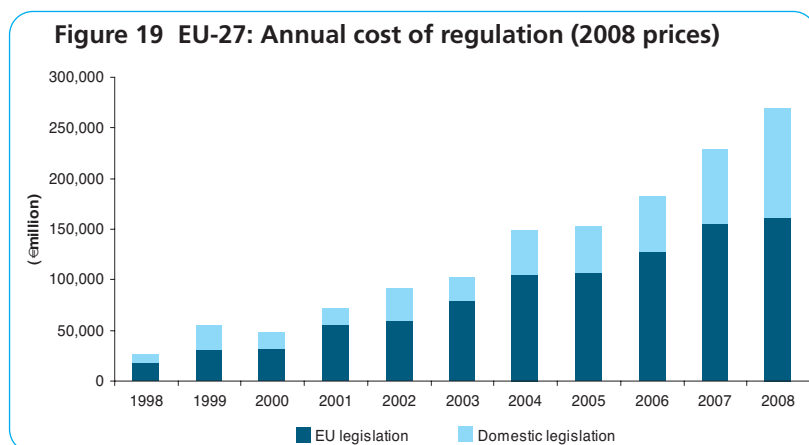
In 2008 alone the cost of regulation for the EU-27 was €269.5 billion. This is up from €229.6 billion in 2007 and €183.4 billion in 2006.

The EU proportion of the regulatory cost was almost 60 percent in 2008, which is lower than the average over the ten year period (67.9 percent).

Since the Commission launched its 'Better Regulation Agenda' in 2005, the annual cost of EU legislation across the bloc has gone from €108 billion to over €161 billion – an increase of 50 percent. The amount spent through EU regulation in 2008 is slightly higher than the Commission's proposed fiscal stimulus package of 1.5 percent GDP in the wake of the 2008 financial crisis.⁷⁹



Source: Open Europe's Regulation Database



Source: Open Europe's Regulation Database

77 Based on EU-wide GDP in 2008 of €12874.944 billion, see Eurostat http://epp.eurostat.ec.europa.eu/portal/page?_pageid=0,1136173,0_45570701&_dad=portal&_schema=PORTAL

78 Based on German GDP in 2008 of €2,513,199,000,000 (Eurostat's projections)

79 Deutsche Welle, "Merkel Agrees to EU's Multi-Billion-Euro Bailout Despite Doubts", 12 December 2008

Table 2 EU-27: Cumulative cost of regulation introduced 1998-2008 (2008 prices)

Country	Cumulative cost (€million)	Cost of EU legislation (€million)	Cost of domestic legislation (€million)	EU proportion of cost	Share of total EU wide cost
Austria	30,969	20,833	10,136	67.3%	2.3%
Belgium	36,831	25,604	11,227	69.5%	2.7%
Bulgaria	4,265	2,487	1,778	58.3%	0.3%
Cyprus	2,125	1,239	886	58.3%	0.2%
Czech Republic	18,118	11,319	6,799	62.5%	1.3%
Denmark	24,051	17,297	6,754	71.9%	1.8%
Estonia	1,933	1,208	725	62.5%	0.1%
Finland	19,412	13,961	5,451	71.9%	1.4%
France	211,010	143,688	67,322	68.1%	15.4%
Germany	279,712	184,436	95,276	65.9%	20.4%
Greece	30,701	17,903	12,797	58.3%	2.2%
Hungary	14,005	8,167	5,838	58.3%	1.0%
Ireland	19,036	13,691	5,345	71.9%	1.4%
Italy	161,748	116,329	45,419	71.9%	11.8%
Latvia	2,663	1,664	999	62.5%	0.2%
Lithuania	3,863	2,414	1,450	62.5%	0.3%
Luxembourg	4,078	2,743	1,335	67.3%	0.3%
Malta	580	417	163	71.9%	0.04%
Netherlands	69,150	43,201	25,950	62.5%	5.0%
Poland	47,716	27,826	19,890	58.3%	3.5%
Portugal	17,075	12,280	4,795	71.9%	1.2%
Romania	17,887	10,431	7,456	58.3%	1.3%
Slovakia	6,709	4,825	1,884	71.9%	0.5%
Slovenia	4,721	2,753	1,968	58.3%	0.3%
Spain	118,311	80,565	37,747	68.1%	8.6%
Sweden	34,035	24,478	9,557	71.9%	2.5%
UK	190,021	136,663	53,358	71.9%	13.9%
Total/Average	1,370,726	928,421	442,304	65.7%	100.0%

Sources: Open Europe's Regulation Database; World Bank's Doing Business rankings; DG Enterprise; Kox 2005; Eurostat

Table 3 EU-27: Annual cost of regulation (for regulations introduced since 1998) (2008 prices)

Country	Annual cost (€million)	Cost of EU legislation (€million)	Cost of domestic legislation (€million)	EU proportion of cost	Share of total EU wide cost
Germany	55,339.5	32,076.9	23,262.6	58.0%	20.5%
France	41,427.3	24,990.1	16,437.2	60.3%	15.4%
UK	36,796.2	23,768.2	13,028.0	64.6%	13.7%
Italy	31,321.3	20,231.7	11,089.5	64.6%	11.6%
Spain	23,227.9	14,011.7	9,216.2	60.3%	8.6%
Netherlands	13,849.3	7,513.4	6,335.9	54.3%	5.1%
Poland	9,695.7	4,839.4	4,856.3	49.9%	3.6%
Belgium	7,194.2	4,453.0	2,741.2	61.9%	2.7%
Sweden	6,590.6	4,257.1	2,333.5	64.6%	2.4%
Greece	6,238.3	3,113.7	3,124.6	49.9%	2.3%
Austria	6,098.1	3,623.3	2,474.9	59.4%	2.3%
Denmark	4,657.3	3,008.3	1,648.9	64.6%	1.7%
Finland	3,759.0	2,428.1	1,330.9	64.6%	1.4%
Ireland	3,686.2	2,381.1	1,305.1	64.6%	1.4%
Romania	3,634.6	1,814.1	1,820.5	49.9%	1.3%
Czech Republic	3,628.7	1,968.6	1,660.1	54.3%	1.3%
Portugal	3,306.4	2,135.7	1,170.7	64.6%	1.2%
Hungary	2,845.8	1,420.4	1,425.4	49.9%	1.1%
Slovakia	1,299.1	839.1	459.9	64.6%	0.5%
Slovenia	959.3	478.8	480.5	49.9%	0.4%
Bulgaria	866.6	432.6	434.1	49.9%	0.3%
Luxembourg	803.0	477.1	325.9	59.4%	0.3%
Lithuania	773.7	419.8	354.0	54.3%	0.3%
Latvia	533.4	289.4	244.0	54.3%	0.2%
Cyprus	431.8	215.5	216.3	49.9%	0.2%
Estonia	387.2	210.0	177.1	54.3%	0.1%
Malta	112.2	72.5	39.7	64.6%	0.0%
Total/average	269,462.7	161,469.8	107,992.9	57.8%	100.0%

2.6 What about 'gold-plating'?

Sourcing legislation is further complicated by possible "gold-plating". The term describes a scenario where member states' governments add to the requirements of EU legislation – almost exclusively Directives. This may be a result of extending the scope of legislation; failing to take full advantage of derogations; providing means of sanction or enforcement above the minimum need; or by implementing the legislation at an earlier date than that stipulated in the Directive.⁸⁰

The debate in the UK surrounding gold-plating, much like the one on the proportion of EU legislation, has too often reflected shades of opinion rather than facts. The often repeated charge is that the UK Government has a tendency to gold-plate more than other EU countries – a bad habit which imposes additional cost on businesses and hurts British competitiveness.

In 2007 the then Trade Commissioner Peter Mandelson said,

"Before you accuse Brussels of excessive regulatory zeal, remember that a greater part of the burden on business comes from national measures which go beyond what is required by European legislation."⁸¹

However, for a charge so often made, quantified evidence is conspicuously absent. A few studies have sought to identify the extent to which gold-plating is a problem in the UK, but none are comprehensive enough to give a proper indication about the extent of the practice.

It has not been possible to determine the proportion of our estimated EU-sourced cost driven by gold-

plating – and indeed our research did not set out to do this. To estimate the level of gold-plating involved would be a massive undertaking on its own, and would require further in-depth research comparing a large number of Directives and their implementing laws in the UK. In addition, it would require comparisons with the corresponding laws in other member states, in order to capture possible over-implementation both in absolute and relative terms.

The most comprehensive study on the topic so far, the Davidson Review on the implementation of EU legislation, for the Government, claimed in 2006 that "inappropriate over-implementation may not be as big a problem in the UK – in absolute terms and relative to other EU countries – as is alleged by some commentators."⁸²

Meanwhile, a 2004 BCC study found that the British Government uses more words than France and Germany when transposing Directives into national law, suggesting that this could be a symptom of gold-plating in the UK.⁸³ A 2006 study from the National Audit Office studying transposition of Directives within DEFRA concluded that such elaboration usually provided for clarification, reduced legal uncertainty and could in fact serve to reduce costs for business.⁸⁴

A paper from the Federation of Small Businesses in 2006 looked at eight "particularly burdensome" Directives, concluding that Whitehall had extended the scope of the Directives in "a number of cases".⁸⁵

The Institute of Directors is reported to have looked at the issue and found only one serious instance of gold-plating – the Intrastat system of import and export reporting. This is currently in the process of being reformed.⁸⁶

80 *HM Treasury*, "Davidson review: Implementation of EU legislation: final report", November 2006, p. 17

81 KPMG lecture, London 4 June 2007, see http://ec.europa.eu/commission_barroso/ashton/speeches_articles/sppm154_en.htm

82 *HM Treasury*, "Davidson review: Implementation of EU legislation: final report", November 2006, p. 4

83 Ambler et al, "How much regulation is gold plate? A study of UK elaboration of EU directives", *British Chambers of Commerce*, 2004.

84 *National Audit Office*, "Lost in Translation? Responding to the challenges of European Law", 26 May 2006, p.6

85 Schaefer, Sarah & Young, Edward, "Burdened by Brussels or the UK? Improving the Implementation of EU Directives", *Foreign Policy Centre & the Federation of Small Businesses*, September 2006, p. 8

86 *House of Commons Regulatory Reform Committee*, "Getting Results: the Better Regulation Executive and the Impact of the Regulatory Reform Agenda", Fifth Report of Session 2007-08, 17 July 2008, p. 36

Without offering any conclusive evidence ourselves, having studied thousands of IAs and a wealth of other sources on the subject of regulation, we suspect that while gold-plating is real, it is not a main driver of the costs of regulation. Some of the cost we attribute to EU regulation no doubt owes to ill-conceived implementation by the UK Government. But in most cases we suspect that the regulatory costs imposed by the UK Government can be traced back to the original EU law.

... without offering any conclusive evidence ourselves, we suspect that while gold-plating is real, it is not a main driver of the costs of regulation ...

There are several reasons for this inclination.

First of all, over-implementation should not be confused with actual implementation. The UK, like most northern European countries, has a fairly strong track record of implementing Directives on time – although in the case of the UK, that is not without exceptions.⁸⁷ Unfortunately, some other member states, for one reason or another, choose not to implement some directives properly far more often, which can create disadvantages for British business. This is a well known problem which hampers a properly functioning single market, and suggests that stronger mechanisms are needed to ensure that member states which sign up to a Directive are also ready to comply with it.

Furthermore, judging from the thousands of IAs we have studied, the UK Government seems to have often taken full advantage of derogations and maximum time frames to implement Directives.

We doubt, for instance, that the UK Government systematically gold-plates in the area of employment law – particularly relative to other member states. There may be some instances where the practice occurs.⁸⁸ However, most comparative business environment rankings of EU countries place the UK at the top in the category for labour market flexibility.⁸⁹ It seems unlikely that the UK would be in this position if it was extensively ‘gold-plating’ EU labour market regulations, especially given the fact that EU employment law alone is responsible for more than 20 percent of the overall total cost of regulation in the UK, and 69 percent of employment regulations.

As Jane Whewell, Director of European Strategy and Labour Market Flexibility at the then DTI (a job title which in itself says a lot about the UK’s approach), told a House of Lords committee, regarding the perception of gold-plating:

“I think there is a tension particularly inherent in EC law where it tends to be drafted in a very broad brush manner, there is a lack of detail and we are caught in the middle. It is perfectly possible for us to copy out the directive and say ‘that is the law’, and say to industry ‘now get on with it’. I do not think they would be terribly happy because just as much as they are saying please do not gold plate, and we try very hard,

87 In July 2008, the UK was subject to 57 infringement procedures from the Commission for not implementing Directives properly. This compares to 127 for Italy; 108 for Spain; 94 for France; 88 for Greece; 87 for Germany; 43 for Sweden and 23 for Denmark, see the Commission’s Internal Market Scorecard, July 2008, p. 19, http://ec.europa.eu/internal_market/score/docs/score17/score17_en.pdf.

88 A 2007 report on European employment law from the House of Lords stated: “We recognise that the perception remains strong that the UK ‘gold plates’ EC directives relating to employment. However, we have seen no conclusive evidence to support this view and indeed the final report of the Davidson review suggests that the perception is exaggerated. We recommend no further action on this matter.” However, the report also cited Alan Tyrell from the Federation of Small Businesses, claiming that the Part-Time Workers Directive is an example of where the UK Government gold-plated. He said: “[The Directive] provided that part-time workers should be treated not less favourably than other workers employed by the same employer under the same contract. The UK Government transposed that in regulation from ‘under the same contract’ into ‘any contract’”. See *House of Lords European Union Committee*, Twenty-Second Report, “Modernising European Union labour law: has the UK anything to gain?” 27 June 2007, paragraph 196.

89 See the discussion in annex 1 on the differences between member states in existing market laws, on the World Bank’s “Doing Business” website, <http://www.doingbusiness.org/economyrankings/> viewed on 15 January 2009

they also ask us for the maximum flexibility under the directive. They ask us, above all, for clarity. Clarity is not a predominant feature of a lot of European law, so we do our best to make the law as clear as possible for business. Sometimes people feel that this is gold plating. One could debate that for a very long time but we do our best and there is a programme now looking at large parts of UK legislation, both domestic implementation of European law and UK law, about can we simplify it? Can we make it easier? How can we help business."⁹⁰

Indeed, there have been accusations that the UK actually *under-implements* EC employment law. In 2006, the Commission won a case in the European Court of Justice against the UK Government, concerning under-implementation of rest entitlement provisions in the Working Time Directive.⁹¹

In addition, since March 2008 authors of IAs are now required to specify on the summary page whether the law goes beyond the minimum EU requirement.⁹² There are instances where the IA does state that the implementing law goes beyond the minimum EU requirements, but that is very rarely the case.⁹³

Further research on the subject of 'gold-plating' is certainly needed. As shown in this report, the proportion of EU-sourced regulatory cost in the UK is substantial. It is impossible to know for sure whether gold-plating is a significant problem – either in relative or absolute terms – in the absence of comprehensive, robust and quantified evidence.

Incidentally, as more member states begin to make use of IAs, a comparative study of the transposition of Directives in different countries could produce some meaningful results.⁹⁴

90 *House of Lords European Union Committee*, Twenty-Second Report, "Modernising European Union labour law: has the UK anything to gain?" 27 June 2007, paragraph 197

91 In September 2006, the ECJ ruled that DTI guidance on rest entitlement was incompatible with the Working Time Directive, see *Case C-484/04: Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*. The Commission stated that the "guidelines endorse and encourage a practice of non-compliance", see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0484:EN:HTML>.

92 An example of an IA template, can be found at: <http://www.berr.gov.uk/files/file44545.doc>

93 An example of an IA which states that the UK regulation does go beyond minimum EU requirements is the "Cancellation of Contracts Made in a Consumer's Home or Place of Work e.t.c. Regulations 2008", see <http://www.ialibrary.berr.gov.uk/ImpactAssessment/?IAID=4aaed40d098b4b239579981729197166>

94 For instance, The European Network for Better Regulation has compiled a database of IAs from several different member states, which could serve as basis for such a study, see <http://www.enbr.org/diadem.php>

3

Misdirected: The UK's 'Regulatory Reform Agenda'

"The new model we propose is quite different. In a risk based approach there is no inspection without justification, no form filling without justification, and no information requirements without justification. Not just a light touch but a limited touch."

Gordon Brown, 2005⁹⁵

"Deregulation is like wrestling with a greasy pig: it slips out of your hands as often as not."

John Major, 1997⁹⁶

"The flux of new regulation is more troubling for a business than the stock of old regulation as businesses will already have coping strategies for old regulation."

Institute of Chartered Accountants, 2008⁹⁷

The UK's approach to regulatory reform is ambitious.

Following on from the introduction of Impact Assessments in 1998, in 2005, the Labour Government launched the so-called 'Regulatory Reform Agenda', which drew inspiration from two key reports: the Hampton Review of regulatory inspection and enforcement,⁹⁸ and the Better Regulation Taskforce report, "Less is more: Reducing Burdens, Improving Outcomes".⁹⁹

The four key objectives of the UK's Regulatory Reform Agenda are to:

- a) Reduce the existing administrative burden for business
- b) Change attitudes and approaches to regulation to become more risk based
- c) Improve the design of new regulations and how they are communicated

- d) Work across Europe to improve the quality of European regulation.

Launching the agenda, Gordon Brown said:

*"The new model we propose is quite different. In a risk based approach there is no inspection without justification, no form filling without justification, and no information requirements without justification. Not just a light touch but a limited touch. Instead of routine regulation attempting to cover all, we adopt a risk based approach which targets only the necessary few."*¹⁰⁰

The Agenda has contributed to some improvement in the regulatory culture in the UK.¹⁰¹

However, the tangible results remain negligible. As John Major once observed, "Deregulation is like wrestling with a greasy pig: it slips out of your hands as often as not."¹⁰²

2.1 A failure to stem the flow of regulation

Our findings about the increasing cost of regulation – from £5.1 billion in 2000, to £16.5 billion in 2005, to £28.7 billion in 2008 – show that the Regulatory Reform Agenda has slipped out of the hands of the UK Government in one crucially important respect: the flow of new regulations has not been brought under control.

... the core problem is not being addressed – businesses, public sector workers and others continue to be subject to incessant Government interference ...

95 Press release from *HM Treasury*, "Chancellor launches Better Regulation Action Plan", 24 May 2005

96 *The Scotsman*, "Cook hits back over jobs fears", 5 February 1997

97 *House of Commons Regulatory Reform Committee*, "Getting Results: the Better Regulation Executive and the Impact of the Regulatory Reform Agenda", Fifth Report of Session 2007-08, 17 July 2008, p. 35

98 See http://www.hm-treasury.gov.uk/prebud_pbr04_hampton.htm

99 See <http://archive.cabinetoffice.gov.uk/brc/publications/lessismoreentry-2.html>

100 Press release from *HM Treasury*, "Chancellor launches Better Regulation Action Plan", 24 May 2005

101 The Government should be credited for having set a 'net target' in reducing administrative burden and for having identified 'business as usual' costs – those costs that businesses would face even if the regulatory requirement itself is scrapped. In theory, this is right thinking.

102 *The Scotsman*, "Cook hits back over jobs fears", February 5, 1997

In effect, this means that the core problem is not being addressed – businesses, public sector workers and others continue to be subject to incessant Government interference.

This also seems to be the perception on the ground. A survey of 2,000 businesses published by the NAO in October 2008, for instance, showed that only one percent of businesses thought that complying with regulations had become less time-consuming during the past year, 40 percent said it had become more time consuming and 57 percent said that it had stayed the same.¹⁰³

Other surveys show similar results – with a survey of 500 members of the Institute of Directors in 2007, for example, revealing that 46 percent felt that regulation over the previous year was more demanding than it was before, 48 percent had noticed no change, and only 1 percent felt they had noticed an improvement in the regulatory environment.¹⁰⁴

Such survey results are problematic as the Government claims to have cut down the cost and burden of regulation in the last few years.¹⁰⁵

In December 2008, the Government said that the administrative burden had been cut by £1.9 billion compared to the 2005 baseline measure.¹⁰⁶ It also listed 28 measures, each of which, it claimed, had led to a net reduction in administrative burdens for business of £10 million or more.¹⁰⁷

Also in 2008, Gordon Brown announced that “Our progress to date is already helping British businesses to support jobs and maintain the strength of the economy,” and Peter Mandelson added that the Government was “on track to meet [the] target of achieving approximately £3.4 billion of net annual savings for business by 2010.”¹⁰⁸

So why doesn't business perception correspond to the Government's claims?

Part of the problem is the Government's overwhelming focus on *administrative* burdens only – the information and reporting requirements which businesses face. The wider costs of complying with regulations – such as policy costs and direct financial costs – are not addressed by the Government's Administrative Burden Reduction Programme (ABRP) for instance.

Surveys suggest that businesses find other types of regulatory costs just as resource-consuming as administrative burdens, such as having to keep up to date with changes in regulations.¹⁰⁹ By focusing so much attention on the administrative burden only, the Government risks overlooking these other important aspects of regulation. Sir David Arculus, former head of the BRTF, has pointed out that the administrative burden accounts for only about one-third of the total cost of complying with regulations.¹¹⁰

However, the mismatch between businesses' perception (and the hard data) and the Government's claims may be better explained by the sheer volume of new regulations impacting on businesses every year – effectively cancelling out what small simplification or reduction measures the Government has achieved with existing regulations.

It is one step forward and a great many more steps back – conjuring images of the Greek mythical character of Sisyphus, who was condemned to an eternity rolling a huge rock uphill, only to see it fall right back to the bottom.¹¹¹

As noted by the Institute of Chartered Accountants: “The flux of new regulation is more troubling for a business than the stock of old regulation as

103 *National Audit Office*, “The Administrative Burdens Reduction Programme, 2008”, 8 October 2008, p. 46

104 *Institute of Directors*, “Better Regulations – getting worse?”, December 2007

105 *HM Government*, “Delivering simplification plans: a summary”, 11 December 2007, p. 7

106 *HM Government/Better Regulation Executive*, “Making your life simpler: simplification plans – a summary”, December 2008, p. 25

107 *Ibid*, p.20-23

108 *Ibid*, p.6-7

109 See survey results in *National Audit Office*, “The Administrative Burdens Reduction Programme, 2008”, 8 October 2008, p. 43

110 Speech to the Lunar Society, Birmingham, 18 November 2008

111 Metaphor taken from Renda, Andrea, “Impact Assessments in the EU: the state of the art and the art of the state”, *Centre for European Policy Studies*, 2006, p.4

businesses will already have coping strategies for old regulation.”¹¹²

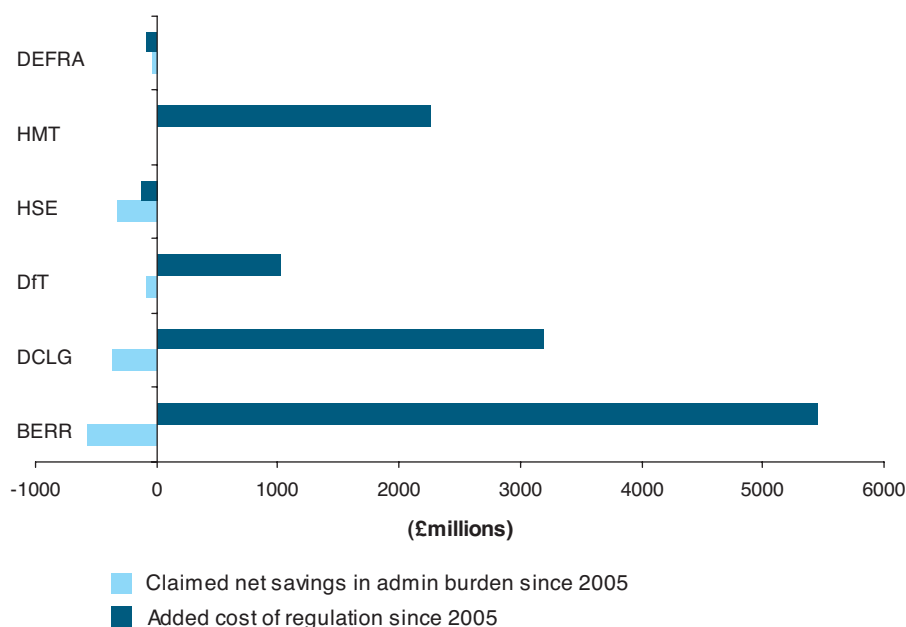
The graph below compares our estimates of the cost with the Government’s administrative burden reduction claims. Given that it is essentially comparing two sets of Government figures, the discrepancy is surprisingly wide.¹¹³

As the Belgian administrative simplification agency, KAFKA, pointed out to us: it is difficult to imagine how the administrative burden can be reduced – in the UK and in other countries with similar targets – while new regulations are being adopted at a growing rate. In other words, they questioned how the administrative burden can be going down, while the total cost of complying with regulation is going up.¹¹⁴

... they questioned how the administrative burden can be going down, while the total cost of complying with regulation is going up ...

All of this suggests that while simplifying existing regulations is important, the key to achieving long-term and meaningful results from a regulatory reform agenda is to concentrate above all on *controlling the flow* of regulation. Our estimates of ballooning costs show that the Government is failing in this key aim, and that it must re-focus its strategy.¹¹⁵

Figure 20 Claimed savings in admin burden vs the increase in overall regulatory cost since 2005



Sources: *The Better Regulation Executive; Open Europe’s Regulation Database*

112 House of Commons Regulatory Reform Committee, “Getting Results: the Better Regulation Executive and the Impact of the Regulatory Reform Agenda”, Fifth Report of Session 2007-08, 17 July 2008, p. 35

113 However, the graph should not be assigned too much significance as savings in administrative burdens are not isolated, nor have they been netted off from our cost estimates.

114 Meeting with representatives from *Agence a la Simplification Administrative*, Brussels 13 November 2008

115 The NAO also noted the discrepancy, concluding that “The rate of new regulations will... need to reduce significantly in the next three years or departments will need to identify additional gross savings if they are to achieve the target”, see *National Audit Office, “The Administrative Burdens Reduction Programme, 2008”*, 8 October 2008, p. 13

The Administrative Burden Reduction Programme: more hype than substance?

The flagship of the Government's reform agenda is the so-called Administrative Burden Reductions Programme (ABRP).

The key objective of the ABRP is to reduce the administrative burdens of complying with existing regulation in Britain by 25 percent by 2010 compared to the baseline in 2005.¹¹⁶ The Government has estimated that such a reduction could amount to savings for business of £3.5 billion.¹¹⁷ Each department is required to publish annual reports outlining the actions it is taking to achieve this target.¹¹⁸

The programme has resulted in some benefits for business. For example, as part of the ABRP, BERR launched an information campaign to help business comply with employment regulations, including providing for enhanced web sources and template compliance forms.¹¹⁹

A survey by the research organisation ORC International suggested that the campaign had delivered benefits for business, although ORC also noted that the savings made in this area against the 2005 baseline "could be due to a combination of factors."¹²⁰

However, the ABRP has received substantial criticism. Professor Claudio Radaelli has described it as "badly conceived", while Professors Francis Chittenden and Tim Ambler have described it as "more hype than substance."¹²¹

Importantly, in October 2008 the NAO assessed the ABRP and concluded that,

"It has not been possible to find evidence of the impact on the productivity of the economy. The uncertainty over the impact for businesses and the lack of information on the full cost of the programme meant that it is not yet possible to determine the value for money achieved by the Programme."¹²²

The NAO has raised issues over the methodology of the ABRP, noting, "The imprecision inherent in the original measurement methodology means that the estimates of administrative burdens are indicative in nature due to the small sample sizes used", adding that reductions were still not calculated on a consistent basis among the departments, and that saving claims should be "treated with caution".¹²³

In addition, the NAO noted how civil servants could be quite creative with the numbers when estimating cost reductions. £800 million of the cuts claimed by the departments in December 2007, for example, actually owed to measures that were taken before the start of the programme in 2005.¹²⁴

In any case, as the Belgian Government agency for administrative simplification, KAFKA, pointed out, it may be of little significance if a form is reduced from three pages to one, when businesses perceive the form itself (and the information requirement behind it) as the problem.¹²⁵ In other words, the problem is the regulation itself. And as our estimates show, the regulations keep on coming.

116 *HM Treasury*, "Enterprise: Unlocking the UK's talent, 12 March 2008, p. 63

117 *HM Government*, "Delivering simplification plans: a summary, 11 December 2007, p. 7

118 *Ibid.* p. 9

119 *HM Government/Better Regulation Executive*, "Making your life simpler: simplification plans – a summary", December 2008, p. 20. For an example, see http://www.businesslink.gov.uk/Employing_People_files/working_time_flow_chart_august_2008.pdf, viewed on 18 January 2009

120 *ORC International*, "Employment Law Admin Burdens Survey 2008", submitted to BERR, December 2008, p. 10

121 *House of Commons Regulatory Reform Committee*, "Getting Results: the Better Regulation Executive and the Impact of the Regulatory Reform Agenda", Fifth Report of Session 2007-08, 17 July 2008, p. 29

122 *National Audit Office*, "The Administrative Burdens Reduction Programme, 2008", 8 October 2008, p. 5

123 *Ibid.* p. 6, 14

124 *Ibid.* p. 12

125 Meeting with representatives from *Agence a la Simplification Administrative*, Brussels 13 November 2008

2.2 Impact Assessments: Are they fit for purpose?

The UK Government has made IAs the key tool in its strategy for improving the quality of new regulation. However, despite a series of refinements and improvements¹²⁶, our calculations about the ever-increasing flow of regulations would suggest that the IA system in the UK has failed to help reduce the overall burden of regulation – although it may have brought about other benefits, particularly in terms of transparency.¹²⁷

As concluded by the NAO, the original objective of IAs – to challenge the need for regulation and provide consideration of alternatives – has not been achieved.¹²⁸

There is no need to repeat at length the excellent work carried out on the subject by Professors Tim Ambler, Francis Chittenden and Deming Xiao.¹²⁹ However, having studied thousands of IAs, we share their criticisms, including:

- The ‘do nothing’ option in the IA is virtually never the recommended option, adding ammunition to the charge that IAs are failing to stem the regulatory flow.
- Independent scrutiny of IAs is lacking, as the same department that draws up the legislative proposal is also responsible for carrying out the IA. This, as Ambler et al. describes, “contributes to facilitation rather than challenge” of new regulations,¹³⁰ including possible under-estimations of the costs. Again, this is intimately connected with the failure of the Government to stem the flow of new regulations.

- Although improvement has taken place, not all IAs are subject to quantification.¹³¹ Of the 2,000 IAs we looked through, around 30 percent lacked quantified costs. Some departments were particularly bad. For the IAs produced by the FSA, for instance, 68 percent did not quantify the costs. For the DfT, over 40 percent of the IAs lacked quantification.
- There is still no proper ‘audit-trail’ of regulatory proposals and their corresponding IAs, making efforts to track the status of a legislative proposal extremely difficult. The Government’s newly created central database for IAs, the Impact Assessment Library, is a step in the right direction, but is still of limited use. As of September 2008, for instance, only around 50 IAs had been published on the website, despite many more proposals being in the pipeline. In addition, the database does not include partial IAs, or the original legislative proposal itself.

Ministers are required to “sign off” an IA to confirm that he or she is “satisfied that the benefits justify the costs”.¹³² However, several IAs we encountered were not particularly clear as to whether the benefits did in fact outweigh the costs – but they were still signed off by the Minister.

In a particularly bad example of this, the IA on the Motor Fuel (Composition and Content) (Amendment) Regulations 2007, implementing a 2003 EU Directive¹³³, estimated both the economic and social benefits of the proposal at £0 a year, while “environmental” benefits were estimated at £18.5 million a year. The costs, meanwhile, were estimated at over £400 million a year.¹³⁴

126 For example, in March 2008 the Government introduced a new IA template to allow for comparisons of cost and benefits over longer and different periods of time, and introduced a consistent methodology for discounting future regulatory costs to their present value. Also since 2008, the Government produces an annual publication of the benefit-cost ratio of all UK regulation.

127 Renda, Andrea, “Impact Assessments in the EU: the state of the art and the art of the state”, *Centre for European Policy Studies*, 2006, p. 39

128 *National Audit Office*, “Evaluation of Regulatory Impact Assessments 2006-07”, 11 July, 2007

129 See particularly, Ambler et al. “The British Regulatory System”, *British Chambers of Commerce*, March 2008, p. 4

130 Ambler et al. “The Burden of Regulation: Who is watching out for us?”, *British Chambers of Commerce*, April 2007, p. 14

131 Ambler et al. “The British Regulatory System”, *British Chambers of Commerce*, March 2008, p. 19

132 BERR website, <http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44232.html>, viewed on 19 January 2009

133 Articles 3(2)(d) and 4(1)(d) of Directive 98/70/EC on the quality of petrol and diesel fuels as amended by Directive 2003/17/EC.

134 Final Regulatory Impact Assessment, “Early Availability of Sulphur Free Fuels” (European Directive 2003/17/EC), see http://www.opsi.gov.uk/si/si2007/em/ukciem_20071608_en.pdf, p. 18

Despite the enormous discrepancy in the balance sheet, Stephen Ladyman, then Minister of Transport, signed off the proposal “on the grounds that this is expected to be the least cost means of complying with our EU obligations”.¹³⁵

There is clearly an enormous problem if IAs are being signed off on proposals where the cost so clearly outweighs the benefits. This further illustrates the need for the UK Government to focus its attention more clearly on Brussels, if the IA system is to function effectively.

Arguably the most serious shortcoming of IAs, is their failure to impact on regulations that are being agreed in the EU. This is in no small part due to timing and targeting.

There are no strict rules about what stage in the policymaking process IAs must be produced. However, Government guidelines state that:

“In the earliest stages of policy development, it is particularly important that policy-makers should use Impact Assessment to help them understand and define the policy challenge and to analyse the case for Government intervention.”¹³⁶

... arguably the most serious shortcoming of IAs, is their failure to impact on regulations that are being agreed in the EU ...

But in practice, IAs are often produced mid-way through the policymaking process, and sometimes far too late to actually have an impact on the resulting piece of legislation – particularly where EU legislation is concerned. For example, in some cases, the Government’s consultation with businesses is launched only one month prior to the due date for a decision in Brussels – and sometimes even after the proposal has already been approved.¹³⁷

Moreover, our research has found that when IAs are prepared on the basis of an original proposal, they are not always updated to allow for new developments in the policymaking process that may significantly alter the original proposal, and therefore have cost impacts. Again, this is particularly true for EU proposals.

For example, the Temporary Agency Workers Directive, finally agreed on 19 November 2008, was never subject to an updated IA to accommodate changing circumstances, despite the fact that five years of negotiations took place following the UK’s original 2003 IA, which estimated the cost to business from the new law at a staggering £637 million a year.

This is a big problem, particularly as the Government guidelines on IAs state:

“Impact Assessment is a *continuous process*¹³⁸ to help the policy-maker fully think through and understand the consequences of possible and actual Government interventions: from the early stages of identifying a policy challenge, through the development of policy options, public consultation and final decision-making, and on to the review of implementation. When review leads to the identification of new policy challenges (perhaps arising from unintended consequences of the intervention itself), the process begins again...”¹³⁹

These problems clearly limit the power of IAs to play a significant role in the consultation, formulation and negotiation of EU policies.¹⁴⁰ In our recommendations, we suggest that the UK Government start using IAs as a “bargaining tool” to a much larger extent, which in turn requires IAs to be produced earlier, with more rigorous consultation, in addition to being much better targeted. (See Chapter 5)

135 *Ibid.*

136 BERR, “Impact Assessment Guidance”, see <http://www.berr.gov.uk/files/file44544.pdf>, p.2

137 See “Progress dates for EU Directives” in Ambler et al. “The British Regulatory System”, *British Chambers of Commerce*, March 2008, p. 25

138 Italics in original.

139 “Impact Assessment Guidance: What is an Impact Assessment”, available at <http://www.docstoc.com/docs/2289851/Impact-Assessment-Guidance-What-is-an-Impact-Assessment-1-Impact>

140 See Ambler et al. “The British Regulatory System”, *British Chambers of Commerce*, March 2008, p. 24

Case study: *The Temporary Agency Workers Directive*

In 2002 the Commission tabled a proposal for stricter rules on temporary agency work.¹⁴¹ The proposal stated that, within six weeks of employment, agency workers must be granted the same rights as permanent members of staff doing a 'comparable' job in the same company – in terms of pay, working time, rest periods, holidays and holiday pay, maternity leave, paternity leave and action taken to combat discrimination. The law was to apply to all agency workers across the EU.

The UK Government produced two IAs after the first proposal was tabled, one in April 2002 and a second one in January 2003. The later IA put the cost of the proposal to British business at £637 million a year.¹⁴²

The UK, backed by some other member states such as Ireland and Germany, managed to block the proposal, and continued to do so as the Commission re-tabled several revised proposals between 2002 and 2007. Different versions were discussed in the Council of Ministers on five separate occasions. Throughout, the UK maintained that restricting temporary agency work would hurt the country's flexible labour market while also leading to job losses. In 2007, John Hutton, Britain's then Business Secretary, said that adopting the Directive would consign "literally thousands of people to benefit dependency".¹⁴³

At a Council meeting in December 2007, the Portuguese Government – which held the EU's rotating Presidency at the time – tabled yet another revised proposal. This time the Directive was part of a package deal that also included revisions to the Working Time Directive, which several member states were keen to amend due to the high costs it had imposed on public sectors across Europe.¹⁴⁴

At this point there was speculation that the UK no longer had enough support from other member

states to block the Agency Workers Directive. In December 2007, the Financial Times reported that Gordon Brown had "personally intervened to defend Britain's flexible labour market" by appealing to other EU leaders not to pass the proposal. The issue was postponed once more.¹⁴⁵

However, at a meeting of EU Employment Ministers in June 2008¹⁴⁶, the UK Government accepted the Directive, in return for retaining its opt-out from the provisions in the Working Time Directive which limit working hours to an average of no more than 48 hours a week.¹⁴⁷ The Agency Workers Directive was adopted by the Council and the European Parliament on 19 November 2008.¹⁴⁸

To our knowledge, no updated IA on the Agency Workers Directive has been published since 2003, to account for the changes that had taken place since the original proposal was first tabled. In addition to the fact that the original proposal itself had changed, there was also the fact that the 2003 IA was based on the assumption that there were 600,000 temporary agency workers in the UK. In 2008, that number had more than doubled, with estimates closer to 1.3 million.¹⁴⁹ This change would presumably increase the cost of the regulation as more businesses would be affected. The £637 million figure from 2003 was therefore out of date and should have been subject to revision.

Now that the Temporary Agency Workers Directive has been passed, the Government has said there will be "a detailed consultation in 2009 with interested parties on the options for UK implementation of the Directive" and that the Government will "have particular regard to avoiding unnecessary administrative burdens for business."¹⁵⁰ Limiting the administrative burden should be a priority, but it does not address the fundamental problem: the Directive itself.

141 *European Commission*, "Proposal for a Directive of the European Parliament and of the Council on Working Conditions for Temporary Agency Workers", COM(2002)149, 20 March 2002, see http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0149en01.pdf

142 "Full Regulatory Impact Assessment: Proposal for a Directive of the European Parliament and of the Council on Working Conditions for Temporary Agency Workers", January 2003. Published in *Department for Trade and Industry*, "2003 Compendium of Regulatory Impact Assessments", Employment Relations Research Series NO 28, April 2004, p. 6

143 *International Herald Tribune*, "EU ministers stymied over worker protection measures", 5 December 2005

2.3 A failure to focus on EU regulations

“The flow of regulation is heavily dependent on the flow of legislation originating in the EU”

HM Treasury¹⁵¹

“We must bear down harder and more effectively on the Regulation Factory, which is Brussels”

Sir David Arculus, former Chairman of the Better Regulation Task Force¹⁵²

We have established that on average 72 percent of the annual cost arising from regulation in the UK has its origin in EU legislation. That means that any attempt to bring the flow of regulation under control must focus overwhelmingly on the EU level. As acknowledged by the Treasury: “The flow of regulation is heavily dependent on the flow of legislation originating in the EU.”¹⁵³

And yet, as illustrated by the limited role of IAs in EU negotiations, the UK Government has chosen to focus its deregulation approach almost purely on the domestic level. In its December 2007 report, “Delivering simplification plans”, the Government

... any attempt to bring the flow of regulation under control must focus overwhelmingly on the EU level ...

dedicates only four paragraphs out of a total of 45 pages to its regulatory priorities in the EU.¹⁵⁴ The same report in 2008 dedicated only 3 out of 63 pages.¹⁵⁵ Likewise, in the chapter on regulation in the Treasury’s March 2008 report on enterprise, only one out of 14 pages specifically addresses EU measures.¹⁵⁶

This is bad news for a number of reasons:

First, on a very practical level, it means that some of the Government’s regulatory reform proposals are unachievable – or at least very hard to achieve –

... ignoring the impact of EU regulations creates a false sense of ownership of domestic regulatory reform ...

since their realisation depends almost entirely on the flow of EU regulation. The plan for regulatory budgets is a case in point. (See below)

Secondly, ignoring the impact of EU regulations creates a false sense of ownership of domestic regulatory reform and, equally worrying, leads to unrealistic expectations of delivery. In the long run this could undermine the credibility of the entire Regulatory Reform Agenda. Indeed, credibility and legitimacy have been described as the “Achilles heel” of deregulation initiatives.¹⁵⁷

144 Following two highly controversial rulings on the Working Time Directive by the European Court of Justice - the Simap and Jaeger cases, in 2000 and 2003 respectively - all time spent on call by doctors and others had to be classified as working time, even where the employee is not actively engaged in his or her duties. The rulings imposed huge costs on member states’ public sectors, particularly the health sectors.

145 *Financial Times*, “Brown set for EU showdown on temps”, 4 December 2007

146 Council of the European Union, Press Release, 2876th Council meeting of Employment, Social Policy, Health and Consumer Affairs, Luxembourg, 9-10 June 2008, see <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/08/166&format=HTML&aged=0&lg=en&guiLanguage=en>

147 The UK Government’s concession at the Council meeting followed an agreement between the Trade Union Congress and the Confederation of British Employers that was meant to preempt the introduction of the Agency Workers Directive. A “Joint statement” said that the TUC and the CBI had agreed that agency workers should be entitled to equal treatment, such as equal pay, after 12 weeks in a given job”. See press release from BERR on 20 May 2008, available at <http://nds.coi.gov.uk/environment/fullDetail.asp?ReleaseID=368001&NewsAreaID=2&NavigatedFromDepartment=True>

148 Directive 2008/104/EC, see Official Journal of the European Union, 5 December 2008, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:327:0009:0014:EN:PDF>

149 *International Confederation of Private Employment Agencies*, “Economic Report 2007”, 2007, p. 20

150 BERR’s website, <http://www.berr.gov.uk/whatwedo/employment/employment-agencies/consultation-2002/page30034.html>, viewed on 16 January 2009

151 *HM Treasury*, “Enterprise: Unlocking the UK’s talent, 12 March 2008, p. 65

152 Speech at the Lunar Society Annual Dinner, November 2008

153 *HM Treasury*, “Enterprise: Unlocking the UK’s talent, 12 March 2008, p. 65

154 *HM Government*, “Delivering simplification plans: a summary, 11 December 2007

155 *HM Government/Better Regulation Executive*, “Making your life simpler: simplification plans – a summary”, December 2008

156 *HM Treasury*, “Enterprise: Unlocking the UK’s talent, 12 March 2008

Thirdly, it can lead to both businesses and the Government squandering resources. Efforts to change a piece of regulation cemented at the EU level are wasted efforts, since EU regulations can only be changed through lengthy re-negotiations in Brussels with 26 other countries. (See Chapter 5) Again, this can lead to businesses and citizens losing faith in deregulation initiatives.

This lack of focus on the EU level goes through virtually every aspect of the Government's Regulatory Reform Agenda.

2.4 £1 in, £1 out: will regulatory budgets stem the flow?

The UK Government has announced that, starting in 2009, it will set "regulatory budgets" for each Whitehall Department.¹⁵⁸ These budgets will oblige the Government to axe old regulations before they introduce new ones, in a "£1 in, £1 out" arrangement. The budget will likely cover three years and, the theory goes, will prevent the overall regulatory cost to the UK from rising over that time period.

The budgets will be based on information about the potential costs of legislation from IAs. The Government's consultation paper on regulatory budgets proposed that the system takes "account of direct and indirect costs as well as benefits, including possible unintended effects, and across all sectors of the economy."¹⁵⁹ However, the "regulatory costs of tackling climate change" would be excluded, with the caveat that a clear definition was needed of what would constitute climate change regulation.¹⁶⁰

The Government has also proposed that regulatory budgets be set on gross cost estimates of regulation, without netting off estimated benefits.

This is no small undertaking; in fact, implementing the budgets in the UK would be a world first. In theory, the budgets should enhance prioritisation within departments and lead policy makers to choose the most cost-effective option, including looking more closely at alternatives to regulation. This would bring regulation closer to fiscal spending, where prioritisation – and public scrutiny based on that prioritisation – is an absolutely essential part of policy-making.¹⁶¹

The BRTF concluded in 2005 that the regulatory budgets would be difficult to implement in practice due the absence of an agreed methodology and difficulties with measuring the cost and effects of regulation. It also expressed concern over the added bureaucratic cost of managing and auditing the budgets.¹⁶²

However, since the BRTF made its recommendations, the IA system has been subject to some significant improvements. Regulatory budgets will be built around a new, enhanced template for IAs and the annual publication of the benefit-cost ratio of all UK regulation, introduced from 2008. These improvements partially address the issues raised by the BRTF.

That said, there remain some serious issues about how the budgets would work in practice – which the consultation document also acknowledges.¹⁶³ For example, measuring the full impact across the economy of any new proposal – including indirect costs such as changes in market behaviour – is a huge methodological challenge. As mentioned previously, IAs rarely address such costs at the moment.

How the budgets will play out practically will depend to a large extent on which version of the

157 Radaelli, Claudio M, "Wither better regulation for the Lisbon agenda", *Journal of European Public Policy*, 14:2 March 2007, p. 200-201

158 *Financial Times*, "Plan to cap red tape costs for 3 years", 6 August 2008

159 HM Government, "Regulatory Budgets: A consultation document", August 2008, p. 37

160 *Ibid.* p. 18

161 *Ibid.*

162 *Better Regulation Task Force*, "Less is More: Reducing Burdens, Improving Outcomes", March 2005, p. 46

163 HM Government, "Regulatory Budgets: A consultation document", August 2008, p. 18

budgets outlined in the consultation paper the Government finally opts for. But the UK is no doubt in a better position to implement the budgets now than it was three years ago.

Regulatory budgets will fail unless used as a lever in EU negotiations

However, the most important remaining question about the regulatory budgets is how they will take account of EU regulations – especially given our new evidence of the very high proportion of regulation coming from the EU. As we have seen, in some Government departments, the share of the total cost coming from EU regulations is as high as 99 percent.

Regulatory budgets may well help the Government to backtrack on a UK-sourced regulation it found it did not have the budget to implement, but this is not so straightforward when dealing with regulations that are agreed among 27 member states at EU level.

While the Government has taken positive steps to address the concerns with methodology and transparency for the implantation of regulatory budgets, it has neglected to address the dilemma posed by the overwhelming share of the regulatory flow stemming from the EU.

The consultation paper states that:

“The Government believes that, as far as possible, EU originating legislation should be treated consistently with other forms of regulation and be implemented in a proportionate and effective manner, although there may need to be some procedural differences to take account of EU processes.”¹⁶⁴

But the paper pays scant attention to the practical problems this creates. Indeed, only one page out of

a total of 39 (not including the technical annex) addresses how EU regulations should be accommodated within the budgets. It also underestimates the EU proportion of the cost of regulation – estimating it to be around 50 percent.

The document states that “Generally, there is good advance warning when the European Commission is considering new legislative proposals... this predictability should facilitate the inclusion of legislation originating from the EU into regulatory budgets,” while admitting that “some allowance needs to be made for the fact that timetables, especially during the negotiation phase, may slip and that the final stages can move extremely quickly.”¹⁶⁵

However the consultation paper is silent on a number of key issues:

Firstly, proposals moving through the EU’s lengthy decision making process can be very unpredictable – particularly in terms of cost and impact. This is precisely why IAs should be updated during the course of negotiations, as the final proposal can often look very different to the Commission’s original version.

The final versions of the EU Services Directive and the Takeover Directives, for example, bore little resemblance to the Commission’s original submission when they finally emerged from the EU decision making process, with significant implications for the costs and benefits.¹⁶⁶

Secondly, not all significant proposals are included in the Commission’s long-term legislative work programme, which can make them hard to spot and assess at an early enough stage for the budgets to be effective.

¹⁶⁴ However, the consultation paper states that, “Some legislation is agreed in line with the European Commission’s responsibilities as a competition authority, including limiting cartels and state aid policing. In this area it uses Commission decisions as a legal instrument of enforcement. The Government believes that this particular form of regulation should be excluded from regulatory budgets (in line with its thinking on domestic competition law).” In addition, it states that, “The Government does not consider that changes to the interpretation of regulation coming from court cases, including infractions, should be part of a regulatory budgets system. Where the result of a court case requires a change to the law itself, the additional costs of such changes are then of course included.” See *HM Government*, “Regulatory Budgets: A consultation document”, August 2008, p. 27

¹⁶⁵ *HM Government*, “Regulatory Budgets: A consultation document”, August 2008, p. 27

¹⁶⁶ *OECD*, “Economic Survey of the European Union 2007”, 20 September 2007, p 109

Thirdly, and perhaps most importantly, the point of the budgets is to ensure regulatory prioritisation within departments. If, on average, 72 percent of the annual regulatory cost originates in the EU – depending on the department in question – then how much of a real “prioritisation” can actually take place? This is particularly true for departments such as the DfT, FSA, HSE and DEFRA whose regulatory output is almost completely dominated by EU laws.

Table 4 How would regulatory budgets work?

Department	Proportion of the regulatory cost stemming from EU legislation in 2008
FSA	99%
DEFRA	93%
HSE	91%
DfT	88%
DCLG	82%

Source: *Open Europe's Regulation Database*

Such high proportions mean that the budgetary targets risk slipping easily out of the hands of the Departments – to return to John Major’s analogy. The Food Standards Agency experienced this in 2006 with the ABRP, when new EU rules for food and feed hygiene more than doubled the agency’s estimated burden from £91 million to £205 million, putting it way off track to achieve the targets. Currently its net savings are minus 75 percent.¹⁶⁷

If EU regulation accounts for around 90 percent of a department’s budget, as with HSE, DfT, FSA and DEFRA, for example, that effectively means that 90 percent of that budget is outside of the Government’s control. This leaves the Government very little leeway to enact purely domestic legislation should it need to, because

its quota – its regulatory budget – will be mostly taken up by EU regulations.

This was precisely the concern raised by the BRTF back in 2005. It noted that:

“Legislation already in the EU pipeline means that the amount of European regulation that the UK needs to implement will grow during the next few years. Against this background, a strict budget would leave virtually no space for the government to enact its domestic regulations, however urgent the need.”¹⁶⁸

The conclusion is that regulatory budgets are not a bad idea *per se* – on the contrary. But the extent of the proportion of regulations originating in Brussels means that the budgets are unlikely to significantly improve prioritisation or stem the regulatory flow. This is because, quite simply, the budgets will only apply to, on average, less than 30 percent of the annual cost of regulation, effectively meaning that the Government has control of less than 30 percent of the cost of regulation.

However, that said, the budgets could make a difference – but only if the UK Government begins to use them as leverage in EU negotiations. We set out how in Chapter 5.

... the Government has control of less than 30 percent of the cost of regulation ...

167 *HM Government/Better Regulation Executive*, “Making your life simpler – Simplification plans”, December 2008, p. 25

168 *Better Regulation Task Force*, “Less is More: Reducing Burdens, Improving Outcomes”, March 2005, p. 46. A solution to this would be to build in a contingency for emergency legislation, but with a strong mechanism in place to ensure that such a provision is not abused. But that also brings us back to the point of prioritisation. The very idea behind the budgets is to give priority to important regulations over less pertinent ones.

4

Tinkering at the margins: The EU's 'Better Regulation Agenda'

"Onslaught begins on EU regulation"

Headline, *Financial Times*, 26 November 1996

4.1 Rhetoric versus reality

The European Commission is currently committed to a 'Better Regulation Agenda', which has been ongoing since 2005.

However, EU initiatives to cut red tape and calls to roll back EU regulation are not new. In March 1985, Margaret Thatcher attempted to install a watchdog group in the Commission with the mandate to stop burdensome proposals from seeing the light of day. In the mid-1990s, the then Conservative Minister for Deregulation, Roger Freeman, said: "The mood has changed in Europe. There is growing recognition that the burden of regulation, particularly on small and medium-sized companies, is a serious disadvantage."¹⁶⁹

Successive Commission Presidents have announced their intention to tackle unnecessary red tape. Jaques Santer, President from 1994-1999, presented a new work programme "Doing less but doing it better" and stressed the need for cutting down on regulation.¹⁷⁰ At the Lisbon Council in March 2000 it was agreed that the Commission would lead a drive to improve and simplify existing EU legislation in line with the goal to make the EU the most competitive economy in the world by 2010.

The Prodi Commission echoed calls for 'better regulation' in its 2002 action plan, "Simplifying and Improving the Regulatory Environment", which included new proposals on how to improve the quality of new legislation through Impact Assessments at the EU level.¹⁷¹

However, despite the plethora of initiatives and announcements, the much-vaunted "turning point" was never reached, and the burden of EU regulations continued to increase throughout the nineties and in to the new millennium. Between 1995 and 2004 almost 11,000 new legal acts were added to the *acquis communautaire*.¹⁷²

In December 2004, Dutch Finance Minister Gerrit Zalm – one of the drivers of the Dutch Better Regulation agenda – said:

"In the past it was a great reluctance at the Commission to take this up. They saw this as a great attack on the Commission, as a very negative attitude. The Commission has had better regulation initiatives in the past, but they were lawyers' initiatives...they counted success in terms of number of pages. We are looking at the cost."¹⁷³

The Barroso Commission picked up the mantle in 2005 and announced yet another ambition to streamline EU regulations. Jose Barroso himself said he wished to achieve what Santer failed to do, saying: "I think we need to deliver on what Jacques Santer said 10 years ago".¹⁷⁴

In March 2005, the Commission's objectives were set out in a communication entitled 'Better regulation for growth and jobs in the European Union', with a clear link established to the goals of the Lisbon agenda.¹⁷⁵

Enterprise Commissioner Gunter Verheugen, in particular, appeared to be stepping up to accept the challenge. He said that "cutting red tape" would be his "personal trademark".¹⁷⁶

¹⁶⁹ *Financial Times*, "Onslaught begins on EU regulation", 26 November 1996

¹⁷⁰ General Report on the Activities of the European Union 1995, see <http://europa.eu/generalreport/en/1995/summary1.htm>

¹⁷¹ *European Commission*, "Action plan 'Simplifying and improving the regulatory environment'" COM(2002)278, 5 June 2002

¹⁷² EUR-Lex database, search was restricted to Directives, Regulations, Decisions and other acts in force. The search took place on 14 January 2009.

¹⁷³ *Financial Times*, 9 December 2004

¹⁷⁴ *Financial Times*, 30 June 2004

¹⁷⁵ *European Commission*, "Better regulation for growth and jobs in the European Union" COM/2005/0097, 18 March 2005

¹⁷⁶ *Financial Times*, 26 November 2004

Following some turf battles within the Commission, Verheugen launched a three pronged agenda, largely based on the Dutch and British experiences:

1) *Set targets and establish the Better Regulation Agenda politically*

In 2006, the Commission announced a reduction target of 25 percent of the administrative burden to businesses across the EU, to be achieved by 2012. Such a reduction of the burden, the Commission estimated, could yield benefits of up to 1.5 percent – or some €150 billion – in the level of total EU GDP.¹⁷⁷

The baseline assessment was based on an extrapolation of Dutch data (Kox 2005), suggesting that administrative costs may amount to circa 3.5 percent of GDP in the EU.¹⁷⁸ Furthermore, based on Dutch and Danish baseline measurements, the Commission suggested that 28-43 percent of the administrative burden emanated from EU Regulations, 13-15 percent from Directives and 44-57 percent from domestic regulations. It called on member states to set targets of “comparable ambition” to that of the Commission.¹⁷⁹

By introducing the reduction target, Verheugen sought to lock in the Better Regulation Agenda both politically and economically.

2) *Simplification*

With the reduction target as a driving force, the Commission initiated a programme aimed at simplifying existing legislation. The entire *acquis communautaire* was scanned – remarkably enough for the first time in the 50 years of its existence.

This exercise was meant to identify where amendments to a piece of law adopted at different times could be brought into one single law – known

as ‘codification’. This, it was argued, would reduce the absolute volume of EU legislation and make the *acquis* more “user-friendly”.¹⁸⁰ In addition, the Commission vowed to revise some laws, and identified 13 priority areas, of which company law and VAT were seen as top priorities.

The Commission also made efforts to identify “low hanging fruits” – usually information and reporting requirements which could be taken out fairly effortlessly and be counted against the reduction target.

For the first time, it was argued, simplification of legislation was taking place on a rolling basis. Along these lines, the Commission appointed a “high-level” group charged with the responsibility of identifying ways to simplify regulations in the priority areas.¹⁸¹ The group, led by former Bavarian President Edmund Stoiber, has subsequently proposed ways to simplify the administrative burden for EU Directives and Regulations relating to company law, VAT and public procurement.¹⁸²

In addition, the Commission has pursued some other initiatives, such as a US-inspired Small Business Act, which includes proposals for giving SMEs a special legal status and providing for reduced VAT-rates.¹⁸³

3) *Assess future legislation*

Following on from the Prodi Commission, the Barroso Commission continued with efforts to improve the use of EIAs, including the creation of an Impact Assessment Board (IAB) and making EIAs mandatory for every proposal that went to the College of Commissioners. The idea was to develop a “knowledge-based approach” to EU decision-making.

177 European Commission, “Measuring administrative costs and reducing administrative burdens in the EU”, MEMO/06/425, 14 November 2006

178 Compare to Open Europe’s extrapolation of UK results, see Kox, Henk, “Intra-EU differences in regulation-caused administrative burden for companies”, CPB Netherlands Bureau for Economic Policy Analysis, December 2005

179 European Commission, “Measuring administrative costs and reducing administrative burdens in the EU”, MEMO/06/425, 14 November 2006

180 European Commission, “Better Regulation – simply explained”, 2006, p. 12

181 European Commission, “Launch of High Level Expert Group on Administrative Burdens chaired by Mr Stoiber”, MEMO/07/471, 19 November 2007

182 “Stoiber Group” website, viewed on 8 January 2009, http://ec.europa.eu/enterprise/admin-burdens-reduction/highlevelgroup_en.htm

183 European Commission, “Think small first: a ‘small business act’ for Europe”, COM(2008) 394, 19 June 2008

4.2 A ray of light? Gunther Verheugen and the struggle for cultural change

*“There is a view that the more regulations you have, the more rules you have, the more Europe you have, I don’t share that view.”*¹⁸⁴

Gunther Verheugen, Commissioner for Enterprise and Industry

Some improvements have taken place as a result of the Commission’s ‘Better Regulation Agenda’.¹⁸⁵

Although there are clear problems with the administrative burden measurement, it marked a break with the past in that ‘better regulation’ is now tied to a specific, quantifiable target.

Similar to the UK’s ABRP, by virtue of being quantifiable and open for all to see, these targets do increase transparency and leave more room for scrutiny of regulators - although still falling well short of what we would consider satisfactory levels of scrutiny.

Commissioner Verheugen, in particular, has broken with the past by emphasising the need to change entrenched attitudes within the Commission’s Directorates-General, by criticising the idea of European integration as a process driven by Commission legislation. In 2006 he accused some Commission officials of failing to adapt to “a new political culture”, and said: “There is a view that the more regulations you have, the more rules you have, the more Europe you have, I don’t share that view.”¹⁸⁶

He vowed to dismantle “the public perception of the EU as the ‘Nessie from Brussels’, a bureaucratic monster whose tentacles leave no village

untouched.”¹⁸⁷ If the gap between citizens and the EU was to be reduced, he argued, perceptions of over-regulation among business and the public needed to be taken seriously.

He attempted, for example, to reduce the burden of the enormous REACH Directive by moving it from the responsibility of DG Environment to DG Enterprise.¹⁸⁸

Likewise, Internal Market Commissioner Charlie McCreevy has attempted to inject common sense into the Commission, saying in 2007,

“As regulators we must not transform entrepreneurs’ dreams into nightmares. Economic growth is not measured by the number of administrative forms to be filled out. What counts are new ideas and people who are willing to take risks.”¹⁸⁹

4.3 But is the overall situation improving?

In the end, however, the EU’s Better Regulation Agenda must be judged by its concrete impact on the regulatory environment. Our figures would suggest that the battle to change the regulatory culture within the EU institutions is simply not being won – the overall burden of regulation is increasing all the time.

Despite some progress, the fundamental problem of continuous regulatory interference has not been addressed forcefully enough.

Too much tinkering at the margins

The problem is that regulatory reform in the EU is still paralysed by far too much tinkering at the margins.

184 *Financial Times*, “Uphill battle against Brussels bureaucracy”, 10 October 2006

185 For more details see: *OECD*, “Economic Survey of the European Union 2007”, 20 September 2007

186 *Financial Times*, “Uphill battle against Brussels bureaucracy”, 10 October 2006

187 Speech to the European Parliament, “The new simplification initiative”, 25 October 2005

188 Lofstedt, Ragnar, “The Plateau-ing of the European Better Regulation Agenda: An Analysis of Activities Carried Out by the Barroso Commission”, *AEI-Brookings Joint Center for Regulatory Studies*, July 2006. p. 3

189 Speech given to the public event on “Better Regulation/Simplification of Company Law” with the Portuguese Ministry of Justice, 13 September 2007

190 *European Commission*, “Regulation of the European Parliament and of the Council on the provision of food information to consumers”, COM(2008) 40, 30 January 2001

191 *UEAPME*, “Updated UEAPME position on the Proposal for a Regulation of the European Parliament and of the Council on the provision of food information to consumers COM(2008) 40 final”, 5 August, 2008, p. 1

Case Study: Simplification or complication for small business?

In January 2008, the Commission proposed new legislation to merge two existing directives (2000/13/EC and 90/496/EEC). The idea was to bring together different sets of rules on food labelling – in line with the administrative burden reduction targets.¹⁹⁰

However, the proposal also included additional labelling requirements, for the purpose of giving consumers more information about possible health and obesity risks.

The European Association of Craft, Small and Medium-Sized Enterprises (UEAPME) strongly objected to the proposal, submitting that it was “a complication, not a simplification for small business”.¹⁹¹

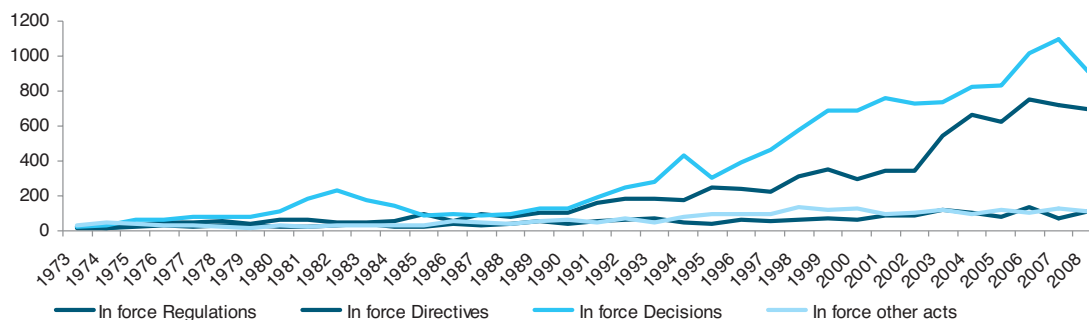
UEAPME specifically highlighted new requirements for labelling of non pre-packed food and requirements for a 3mm minimum font size for labels, as well as detailed nutritional information for pre-packaged foods. The organization argued that both provisions, would create a “competitive disadvantage for SMEs”. UEAPME observed:

“Almost 90 percent of food businesses in Europe have less than ten employees. Most of these businesses are specialist craft enterprises serving

mainly the local population... Small food businesses produce a wealth of variety giving customers choice and satisfaction. That variety depends on seasonality, customer expectations and skills available on the day. By contrast many larger producers are supplying standardised product. A standard item has one analysis and one label. Small craft producers, retailers and caterers may never make the same product twice as they are producing to individual customers’ requirements. That means that it is quite impossible to declare nutritional information accurately or, in many cases, allergen inclusion.”

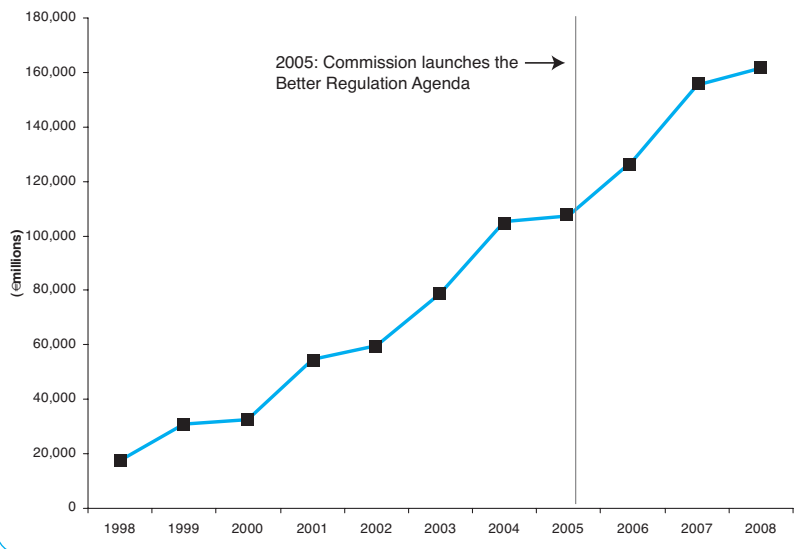
UEAPME has estimated the cost to SMEs of changing food labels at €6 billion a year. Even the Commission’s own Impact Assessment Board criticised the Commission for not better analysing the impact of the proposal on SMEs.¹⁹² In the Commission’s Impact Assessment exemptions and transition periods for SMEs were not adequately quantified, so it is not possible for the Commission to have thoroughly assessed the costs and benefits of the proposal for SMEs. In addition, as the Better Regulation Executive and National Consumer Council in the UK noted, food labels are often too complex and difficult for consumers to understand, much less to act on, therefore adding little value while still raising costs for both business and consumers.¹⁹³

Figure 21 Annual adoption rate of legislation in the EU



Source: EUR-Lex

Figure 22 EU 27: Annual cost of EU legislation 1998-2008 (2008 prices)



Source: Open Europe's Regulation Database

First, perhaps most critically, while EIAs have been subject to improvements and led to increased transparency, we have found little evidence that they have had much real impact on final proposals, much less any effect on the flux of new regulation. (See below)

According to the EU's Impact Assessment database, the Commission has scrapped only three of its legislative proposals since 2003. This is compared with the 4,656 proposals for Regulations and Directives that have been adopted since then. Even in these cases it is unclear to what extent this was due to the IA itself or some other reason.¹⁹⁴

... the problem is that regulatory reform in the EU is still paralysed by far too much tinkering at the margins ...

Moreover, the problem is that measures that are presented as 'deregulation' too often appear to be of limited value for businesses. For instance, as Professor Jacques Pelkmans at the College of Europe has pointed out, counting deregulation in the number of pages axed from the *acquis communautaire* is hardly a meaningful exercise.¹⁹⁵

The Commission claims to have removed 5,000 pages from the *acquis* since the Better Regulation Agenda was launched – calling it a "radical simplification".¹⁹⁶ But this does not tell us anything about the content of the removed pages, nor if the content had an actual impact on businesses in the first place. As Alexander Italianer,

Deputy Director-General of the European Commission's Secretariat General, told a conference in Brussels, "One sentence in one regulation can do more harm than 100 pages".¹⁹⁷

... the Commission has scrapped only three of its legislative proposals since 2003 ...

Similarly, Professor Pelkmans rightly argues that removing obsolete directives is unlikely to make any difference on the ground. In the Commission's 2008 progress report on the better regulation initiative, removing such acts was identified as one of the achievements. The report stated,

"The Commission is also identifying and repealing obsolete acts that no longer have real effect, but which are still in force. This work,

¹⁹⁴ See the Commission's website, http://ec.europa.eu/governance/impact/practice_en.htm, viewed on 13 January 2009

¹⁹⁵ Jacques Pelkmans made these observations during a conference hosted by the Centre for European Policy Studies, "European Network for Better Regulation, Final Conference", Brussels, 11 December 2008

¹⁹⁶ European Commission, "Radical simplification of EU law: 5000 pages of Official Journal removed", MEMO/08/62, 30 January, 2008

¹⁹⁷ Alexander Italianer made this comment during a conference hosted by the Centre for European Policy Studies, "European Network for Better Regulation, Final Conference", Brussels, 11 December 2008

which covers about 2 500 legal acts, could be speeded up if fast-track procedures for repealing obsolete legislation could be agreed by the European Parliament and the Council.”¹⁹⁸

No further details are given. But if these acts are obsolete or “no longer have real effect”, removing them cannot be seen as ‘deregulation’, since they had no actual impact in the first place!

Likewise the Commission’s efforts to scrap pending proposals have so far had negligible impact. For instance, when the Commission undertook this exercise for the first time in September 2005, it announced it had withdrawn 68 bills.¹⁹⁹ However, 27 of these were more than five years old and looked unlikely to be adopted anyway, and 22 of them concerned the association agreements signed with the then ten new member states – bills which all became defunct when the states joined in 2004.²⁰⁰ Removing pending proposals could potentially prove effective in stemming the flow of regulation, but the responsibility for making sure that *meaningful* pending proposals were axed would probably need to fall to some independent body.

Finally, what exactly does codification mean in real life? Consolidating different Directives into one place can be meaningful if it leads to factual improvements either in terms of simplification or quality. But do businesses really care if regulations come from one or several Directives, if the actual impact remains more or less the same? Codification is not an appropriate generic term for deregulation and at times often appears to be more of a lawyers’ pastime. In fact, codification and ‘recasting’ can even lead to additional costs if civil servants insert new objectives – as was the case with changes to the food labelling requirements.

The European Parliament – help or hindrance?

The European Parliament now plays a key role in the shaping of EU legislation. In 44 policy areas²⁰¹, once a proposal has left the Commission, it goes to the Council and the EP, in a process known as ‘co-decision’. MEPs are therefore in a position to impact on the regulatory costs of proposed legislation.

Unfortunately, the European Parliament has often proved to be a problem even for the modest objective of ‘better’ regulation.

As EU Commissioner Gunther Verheugen has observed:

“I was running into a lot of difficulties here but contrary to the conventional wisdom the strongest were not in the Commission. The strongest problems were in the European Parliament... There is a very strong view in the European Parliament that better regulation is something that is directed against the priorities or the prerogatives of the Parliament. It’s very difficult to convince all of the parliamentary groups, some of them fully understand but it’s very difficult to get the full support here because if you have a rule you want to change there is certainly always one person who is a hundred percent convinced that this is a rule that we exactly need.”²⁰²

When the EU’s Better Regulation Agenda was launched, it was criticised by MEPs from across the political spectrum.

... the European Parliament has often proved to be a problem even for the modest objective of ‘better’ regulation ...

198 *European Commission*, “A 2nd strategic review of Better Regulation in the European Union”, COM(2008)32, 30 January 2008, p. 3

199 *European Commission*, “Better regulation: Commission intends to withdraw one third of screened proposals”, IP/05/1189, 27 September 2005

200 *Open Europe*, “Less Regulation: 4 ways to cut the burden of EU red tape”, November 2005, p. 12

201 *European Parliament*, “Conciliation and Codification – a guide to how the Parliament co-Legislates”, July 2007, p. 4

202 Speaking at the *BertelsmanStiftung Better Regulation 2008 conference*, Brussels, 10-11 September 2008

Monica Frassoni, co-President of the Greens/EFA Group in the Parliament, for example, said that “The President of the Commission should not be so influenced by Council deadlock, tabloid sensationalism or scare-mongering from industry and their political mouth-pieces in the EPP”, and warned against “undue haste in ditching draft EU laws”.²⁰³

And there are no shortages of examples of where the EP has added new burdens to regulations affecting both business and the public sector.

The most recent example is the UK’s opt-out from the 48-hour working week contained within the Working Time Directive. The EP voted to end the opt-out within three years – a move which Open Europe estimated could cost the UK economy between £47.74 billion and £66.45 billion by 2020.²⁰⁴

Another well-known example is the Services Directive, where the Parliament’s amendments significantly narrowed the scope of the Directive, effectively eliminating many of the benefits while doing little to address the costs.²⁰⁵

But there is hope. The Consumer Credit Directive is an example of where the EP has proved able to improve a proposal to make it less burdensome.

The Commission’s original proposal was subject to so many amendments from the Parliament that the Commission resubmitted an amended proposal in 2005.²⁰⁶ The Parliament’s rapporteur for the Directive, Kurt Lechner, wrote a report calling for an Impact Assessment to be carried out on the amended proposal. The refusal of the Commission

to do so prompted the Parliament’s Committee on Internal Market and Consumer Protection to commission its own study.²⁰⁷ The Parliament’s report resulted in 236 amendments and an eventual compromise with member states which saw the original Directive significantly improved in terms of its cost potential.²⁰⁸

A committed and well-functioning parliamentary body is absolutely vital for deregulation to take place. However the EP is still much too erratic to fulfill this role.

4.4 European Impact Assessments: More problem than punch

Since 2003, the European Commission has been publishing²⁰⁹ impact assessments for EU legislative proposals, following recommendations by the Mandelkern Report on better regulation.²¹⁰

In November 2006, the EU established an Impact Assessment Board within the Commission with a mandate to improve the quality of EIAs and advise Commission departments on them.

So far, EIAs have had very limited impact on the final outcome of policies.²¹¹ Because of their lack of consistency and varying quality, EIAs were not used in our calculations of the impact of EU regulations.

EIAs are also produced for far fewer proposals than in the UK. In the five years since their introduction in 2003, there have been only 413 EIAs.²¹² This is out of a total of 4,032 Regulations, 624 Directives and 5452 Decisions adopted since then.

203 *Euractiv*, “Is less regulation ‘better regulation’?”, 26 September 2005

204 *Open Europe*, “The potential end of the UK’s opt-out from the EU Working Time Directive”, 16 December 2008, see, <http://www.openeurope.org.uk/research/wtdoptout.pdf>

205 *Open Europe*, “The services directive: Can Europe deliver?”, 13 February 2006, p. 12; also see, *European Parliament Legislative Observatory*, <http://www.europarl.europa.eu/oeil/resume.jsp?id=240902&eventId=928969&backToCaller=NO&language=en>

206 *Euractiv*, 16 April 2008. See, <http://www.euractiv.com/en/financial-services/consumer-credit/article-146529>

207 *European Peoples’ Party-European Democrats* press release, “EPP-ED MEPs call on Council and Commission to live up to their commitments on better regulation”, 25 April 2007; see the report here <http://www.kurt-lechner.de/images/download/CCD-FinalReport.pdf>

208 *Reuters*, “EU lawmakers dilute draft rules on consumer credit”, 11 December 2007; *Euractiv*, 16 April 2008, see, <http://www.euractiv.com/en/financial-services/consumer-credit/article-146529>

209 EIAs are normally carried by Commission officials, but like UK IAs, are sometimes outsourced.

210 *Mandelkern Group on Better Regulation*, Final Report, 13 November 2001, see http://ec.europa.eu/governance/better_regulation/documents/mandelkern_report.pdf

211 For a critique of EIAs, see *The Evaluation Partnership Limited*, “Evaluation of the Commission’s Impact Assessment System Final Report”, April 2007, p. 8

212 For the number of EIAs between 2003 and 2007, see Andrea Renda, “Advancing the EU better regulation agenda: selected challenges for Europe”, *Centre for European Studies*, (draft at 07 September 2008), p. 7; Commission website consulted for number of IAs in 2008, see http://ec.europa.eu/governance/impact/practice_en.htm

Where are EIAs going wrong?

There are several studies pointing to serious flaws with EIAs. The problems can be summarised as follows:

- **EIAs almost never lead to proposals being dropped:** As noted above, since the introduction of EIAs in 2003, we have identified only three cases where an EIA has actually led to a proposal being aborted.²¹³
- **The Commission's Impact Assessment Board lacks autonomy and teeth:** One of the main problems with the EU's IA system is that the IAB is lacking the mandate to take action. For each EIA produced, the IAB gives an "opinion". The IAB has often been quite critical of the EIA system. In its 2007 report, for instance, the IAB identified several problems. Most importantly, it stated:

"In a number of cases, there was a bias in the definition of options towards the preferred option, often leading to an analysis of options that was too much focussed on the preferred option while other options should have been explored in greater detail."²¹⁴

However, even where the Board finds that the EIA is presenting the Commission proposal in a biased manner, its opinion is not binding in any way, making its real impact negligible.

In addition, IAB members – Commission officials – are appointed personally by the President of the Commission, stripping the Board of the vital independence it would need to seriously pick up the fight against the steady stream of new regulations.²¹⁵

- **EIAs have a bias towards the preferred option:** As the IAB has concluded, EIAs often draw biased

conclusions in favour of the option the Commission has proposed.

- **EIAs are never updated during negotiations to reflect changes in the proposal:** EIAs are almost never updated to reflect amendments made during the often lengthy negotiations in the European Parliament and the Council, making EIAs of limited use once they've left the Commission.
- **'Subsidiarity' is only considered in 50 percent of cases:** In a 2007 study the OECD found that less than 50 percent of EIAs considered a proposal's compatibility with the EU's much-vaunted 'subsidiarity' principle – the idea that the EU does not take action unless it is more effective than action taken at national, regional or local level.²¹⁶ This means that in more than half of cases, EIAs are failing to properly evaluate genuine policy alternatives, including, crucially, the 'do nothing' option.
- **Poor quantification of costs and benefits:** Costs and benefits have, until recently, rarely been quantified in EIAs, and are still shaky in many cases. Consistent methods for comparing costs and benefits over time are also lacking.²¹⁷
- **Consultation and transparency are often absent:** According to its own guidelines, when the Commission carries out the IA, it is supposed to consult business and give them enough time to give feed-back on the proposal that is being assessed. However, this does not always happen. To make matters worse, draft EIAs are not publicly available.²¹⁸ In July 2008, Business Europe noted that:

213 These are: "Proposals aiming to modernise and reinforce the organisational framework for inland waterway transport in Europe" in 2008; "Directive on the cross-border transfer of registered office" and "Proportionality between Capital and Control in Listed Companies" in 2007.

214 Impact Assessment Board, Report for the year 2007, SEC(2008) 120, 30 January 2007

215 For a discussion in this issues, see Craig Robertson, "Impact Assessment in the European Union", *eipascope*, 2/2008 (European Institute of Public Administration), 2008, p19

216 OECD, "OECD Economic Survey: European Union", 2007, p. 107

217 A 2007 evaluation found that "while only about 40% of IAs monetised some costs of the proposal in 2003, almost 80% of IAs monetised some costs of the proposal in 2007", see Caroline Cecot, Robert Hahn, Andrea Renda, and Lorna Schrefler, "An Evaluation of the Quality of Impact Assessment in the European Union with Lessons for the U.S. and the EU", *AEI-Brookings Joint Center for Regulatory Studies*, December 2007, p. 8

218 For the Commission's guidelines, see *European Commission*, COM(2002)704, 11 December 2002

“In our experience [the Commission’s minimum standards for consultation] are not always respected: documents are unclear, relevant stakeholders are ignored or their views misrepresented, there is insufficient publicity or time afforded to the process, and feedback is not provided.”²¹⁹

- **Many costly regulations are not subject to EIAs:** The Commission’s IA guidelines are ambiguous about which proposals should undergo an EIA at all. The Commission’s draft 2008 IA guidelines state that “usually” any item contained in its Work Programme ought to be subject to an EIA.²²⁰ This is arbitrary as many costly proposals are not included in the Work Programme. During the course of our research, we have identified several such examples.
- **Many intangible proposals are subject to EIAs:** On the other hand because of the arbitrary selection process, many EIAs simply add no value to policy-making. For example, the EIA on the Commission’s 2005 proposal on “EU strategy for Arica” included the policy objective ‘peace and security’.²²¹

It was estimated that completing the EIA and Communication for this proposal took the equivalent of seven man-months.²²² This is a terrible waste of the Commission’s resources.

- **EIAs are difficult to read:** According to the Commission’s own guidelines, “any non-specialist should be able to follow the argumentation and understand the positive and negative impacts of each of the options considered in the IA.”²²³ In reality, EIAs are extremely difficult to read, poorly structured, and often exceed the recommended length. It is actually laughable to suggest that non-specialists and members of the general public should be able to understand them.

4.5 Conclusions: Can the EU’s Better Regulation Agenda deliver?

Deregulation efforts have a tendency to self-combust if not continuously nurtured. This is true everywhere and particularly in the EU. What Verheugen and some other reform-minded EU politicians have managed to achieve is first and foremost to plant a seed.

However, in light of the explosive growth of legislation shown by our research, the EU must adopt a much more radical approach if any meaningful results are to be achieved.

... deregulation efforts have a tendency to self-combust if not continuously nurtured ...

In its review of the Dutch regulatory reform programme, the World Bank identifies four features which contributed to making the Dutch programme a relative success:

- Announcing a specific 25 percent target attracted attention and made it easier to communicate reform.
- Locating the “coordinating” unit in the Ministry of Finance made reforms feasible because of the link to the budget and because of the personal commitment of Minister Gerrit Zalm.
- The establishment of ACTAL, an agency independent from the Government charged with evaluating the administrative burden of each proposal, made the evaluation independent of any one ministry and also built momentum for reforms.

219 *BusinessEurope*, “Better Regulation Impact Assessment Guidelines”, 14 July 2008

220 *European Commission*, “Impact Assessment Guidelines [Draft version]”, (27.05.08), p. 4

221 *European Commission*, SEC(2005)1255, Oct 2005

222 *The Evaluation Partnership*, “Evaluation of the Commission’s Impact Assessment System Final Report”, April 2007, Annexes to the Report, p. 97

223 *European Commission*, SEC(2005)791, 15 June 2005

- The commitment across all major political parties in parliament to reduce business costs, helped by the reporting requirements of ACTAL to the parliament and the role of the parliamentarians more generally.²²⁴

If this is an indication of what determines the success or failure of deregulation initiatives, then the prospects for the EU are presently bleak.

As mentioned above, the EU's administrative burden reduction targets have their merits, but also create several pitfalls. Critically, the EU has no "coordinating" unit which enjoys the legitimacy of a country's finance ministry.

What's more, Commissioner Verheugen's experience has proved that ambition for reform at the very top is not enough to bring about fundamental change – because the existing bureaucratic culture of the Commission is entrenched among tens of thousands of EU civil servants.

As Verheugen himself said in 2006:

"Too much is decided by civil servants... the whole development in the last ten years has brought the civil servants such power that in the meantime the most important political task of the 25 commissioners is controlling this apparatus. There is a permanent power struggle between commissioners and high ranking bureaucrats. Some of them think: the commissioner is gone after five years and so is just a house keeper."²²⁵

... Commissioner Verheugen's experience has proved that ambition for reform at the very top is not enough to bring about fundamental change ...

... There is a permanent power struggle between commissioners and high ranking bureaucrats. Some of them think: the commissioner is gone after five years and so is just a house keeper ...

Verheugen also said that he had:

"strongly criticised internally some general directorates who evidently did not want to take the head of the commission's aim to reduce bureaucracy seriously, because it did not fit in with their own ideas... Unfortunately it sometimes happens in the communication with member states or parliament that civil servants put their own personal perspective across as the view of the commission."

The personal commitment of Verheugen should not be underestimated. But he will be gone by the end of 2009 as a new Commission is due to take over, and whether or not the agenda has enough momentum to out-live Verheugen is far from clear. The small but vital steps he has taken therefore risk being reversed.

... Reform needs to strike deep into the processes and institutions that determine EU law-making in order to have a lasting impact ...

Because a new set of Commissioners is appointed every five years, reform-minded Commissioners cannot have lasting impact on their own. Reform needs to strike deep into the processes and institutions that determine EU law-making in order to have a lasting impact.

There is no independent body in the EU that scrutinises proposals before they are tabled and which have the mandate to pull the emergency break whenever unjustified interference is taking place.

The European Parliament could in theory shoulder the role as independent scrutiniser, but to date, the EP has been more of a driver of over-interference than an independent watchdog. Meanwhile the Commission's Impact Assessment Board currently lacks the teeth to sufficiently raise the standard of evidence-based policy-making within the Commission.

... 'Better regulation' as a term is meaningless, because it can mean all things to all people ...

Most importantly, there is still ambiguity over the central objective of the EU's Better Regulation Agenda. 'Better regulation' as a term is meaningless, because it can mean all things to all people.

Commission EIAs, the first filter that EU laws face, exemplify this confusion. There needs to be a clear message from bottom to top that regulation should be pursued only when it has been shown to be absolutely necessary and that the benefits outweigh the costs to businesses and individuals. The emphasis must be put on result, not process.

Indeed, there is no consensus in the EU over what exactly constitutes deregulation or good lawmaking, making Commission-led reforms very difficult. As Professor Claudio Radaelli puts it:

"The EU is at the moment a political system in which there are different ideas about the nature of law-making. There are also different pressures at work, with some working in the direction of quantity (thus pushing for slogans such as 'less is more'. 'reductions of burdens', and 'one regulation in, one out') and others pushing for quality [maintaining that] good regulation is not synonymous with less regulation."²²⁶

As the economic downturn risks producing new pressures for regulation, the need to build momentum for a new, reformed and more committed deregulation drive is all the more urgent.

The next chapter will look at what can be done in practice to help curb the flow and cost of regulation.

5

Stemming the flow: Proposals for reform

Our findings on the cost and flow of regulations, and analysis of the UK and EU regulatory reform agendas, illustrate the need for a radically different approach to tackling the problem of burdensome red tape.

Our findings highlight two key conclusions:

- 1) The UK's current Regulatory Reform Agenda is failing to curb the unrelenting and increasing flow of new regulations impacting on business and the wider economy, and without reform, the cost of regulations will continue to increase year on year.
- 2) Secondly, the fact that a very high proportion of that cost is coming from regulations negotiated not at Whitehall and Westminster but in Brussels and Strasbourg, shows that any reform agenda which does not focus primarily on curbing the flow of EU regulations will continue to fail.

Any regulatory reform must therefore focus overwhelmingly on the EU, which is the source of the most burdensome regulation affecting the UK.

This involves both reform *within* the EU institutions, as well as a new approach to EU regulations from national governments.

Indeed reform that delivers results will require real commitment and drive from national governments. After all, it is the member states and their citizens that stand to gain most from effective and less burdensome regulation through greater competitiveness, productivity and employment.

... as is often the way in the EU, it will fall to the larger member states to push for reform ...

As is often the way in the EU, it will fall to the larger member states to push for reform. The UK is well placed to take a leading role.

5.1 UK level reform

The Government recently announced that it was committed to "intensive engagement with the EU institutions...to promote the better regulation agenda."²²⁷ But despite this claim, the Government is not nearly as engaged as it could be. The following, more radical approach could go some way to helping to stem the flow of regulations.

(i) Using IAs and regulatory budgets as bargaining tools

BERR provides an 'instruction manual' on how to use Impact Assessments in EU negotiations. It instructs civil servants to lobby "other Member States to win support for the UK position". This is the right approach.

However, the evidence we have collected suggests that the UK Government has not used its bargaining power stemming from the Regulatory Reform Agenda nearly enough.

... the UK Government has not used its bargaining power stemming from the Regulatory Reform Agenda nearly enough ...

Negotiation theory holds that in the interaction between domestic and international (EU) politics, governments strengthen their bargaining power if they can convince their negotiation partners that their mandate from voters and business at home is very restricted – and that they are ready to stick to that mandate.²²⁸

This is exactly how the UK Government should approach EU negotiations. The UK Government has two main tools at its disposal – Impact Assessments and regulatory budgets.

Impact Assessments

First, the quantification of costs and benefits of regulation has vastly improved in UK IAs – although the costs are probably still underestimates. The scope for using IAs in EU negotiations has therefore widened.

Sometimes a well-targeted IA has made a difference in negotiations. However, there are suggestions that the Government is under-performing in this area.

It is not a good sign, for example, when the British Transport Minister signs off an IA on new EU rules for which the benefits are estimated at £18.5 million a year, while the costs are estimated at up to £400 million a year. (See Chapter 3)

The UK Government could use its comparative advantage with IAs in several different ways. It could:

- Refuse to negotiate EU proposals for which the Commission has not quantified costs and benefits, but where the UK has, and where the costs are shown to outweigh the benefits.²²⁹
- Require proposals where the UK IA and the EIA show different estimates to be subject to further assessment before it can be taken forward in the European Council. An example of when estimates differ is “Phase 2 of the European Pedestrian Protection directive”, which is currently in the process of being negotiated. The UK IA put the cost estimate substantially higher than the EIA did.²³⁰

Case Study: Pedestrian safety – a tale of two IAs

The Commission’s 2007 proposals to improve pedestrian safety illustrate the discrepancy that often exists between UK and EU IAs. The proposals require car manufacturers to install safety features for new cars to protect pedestrians. The UK IA quantified the cost to the car industry of installing one of the specific features (break assist technology) to new cars at £1.7bn over 30 years, adding roughly £24 to the production cost of each car.²³¹

However, the Commission’s IA stated that it had not provided a cost estimate for this technology because “the basic installation requirements, [are] considered to be relatively small.”²³²

The UK IA highlighted the omission from the Commission’s IA stating, “We are concerned that the [Commission’s] proposal does not include any estimated costs for brake assist systems...as a result of these factors, the UK is concerned that the [Commission’s] feasibility study does not present a true picture of either benefits or costs for the measures proposed.”²³³

This case highlights the common failure of the Commission’s IAs to assess all the relevant evidence. It also highlights the potential benefit of UK IAs in European negotiations. The UK’s evidence, and the Commission’s lack of it, provides a strong argument for the Commission to re-evaluate its proposals.

For the most costly proposals, a more drastic approach should be taken. Where the UK Government is faced with a possible defeat over a

229 For an example of such a proposal, see the IA for European Directive on the Statutory Audit of Annual And Consolidated Accounts (2006/43/EC) on which the Commission did not produce an EIA: http://www.opsi.gov.uk/si/si2007/em/ukciem_20073494_en.pdf

230 Compare the UK IA to the EIA, see <http://www.dft.gov.uk/consultations/closed/protectroadusers/impactassessment.pdf>, respectively http://ec.europa.eu/governance/impact/docs/ia_2007/sec_2007_1244_en.pdf

231 *Department for Transport*, “Impact Assessment of Phase 2 of the European Pedestrian Protection Directive”, 8 February 2008, p. 2

232 *European Commission*, SEC(2007) 1244, 3 October 2007, p. 12

233 *Department for Transport*, “Impact Assessment of Phase 2 of the European Pedestrian Protection Directive”, 8 February 2008, p. 9

key proposal – either imminent or long-term – it should not be afraid to use a robust IA to ‘build up its defence.’ But this must be combined with a clear message: Due to the high costs potentially imposed by the proposed regulation, the UK Government lacks the mandate from voters and business at home to sign up to the proposal. The robust findings in the IA will be there for everyone to see.

To illustrate:

An end to the opt-out from the 48-hour maximum working week, entailed in the Working Time Directive, is currently subject to negotiations between the European Parliament and the Council.

In January 2009 – in the middle of a recession – the Government said that ending the opt-out could “cost the UK billions both in costs to industry and lost earnings. As a result, it could also only have a negative impact on overall employment levels.”²³⁴

Open Europe had previously estimated that ending the opt-out could cost the UK economy between £47.74 billion and £66.45 billion by 2020.²³⁵ Another estimate puts the cost at £9 billion per year. These are astronomical figures, given this is just one element of a single Directive.

However, despite these costs and the fact that the opt-out is, at the time of writing, in a late stage in the EU’s negotiation process, the UK Government has still not produced an IA – at least not officially.

In fact, extraordinarily, a BERR official told Open Europe that an IA had never been produced because “no one expected the opt-out to come up for negotiation.”²³⁶ This is not a sign of “the intensive engagement” with the EU on which the Government prides itself.²³⁷

To make matters worse, as late as May 2008, the Government claimed it had secured the opt-out following ‘a package deal’ in which the UK accepted stricter rules for temporary agency workers, in return for keeping the exemption from the working time rules.

The new threat posed to the opt-out from the European Parliament vote just months later shows that the Government’s use of backroom deals and political agreements in Brussels is not a suitable negotiation strategy for EU laws which have very serious implications for the UK economy. The failure to produce an IA for the proposal to end the UK’s opt-out from the 48-hour week because “no-one expected it to come up for negotiation”, seems naïve in the extreme.

In addition, none of the major parties in the UK Parliament are in favour of scrapping the opt-out, so it is clear where the democratic mandate is.

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234 The Parliamentary Under-Secretary of State, Department for Business, Enterprise and Regulatory Reform & Cabinet Office (Baroness Vadera) quoted in *Hansard* 12 Jan 2009 : Column WA130

235 *Open Europe*, “The potential end of the UK’s opt-out from the EU Working Time Directive”, 16 December 2008, see, <http://www.openeurope.org.uk/research/wtdoptout.pdf>

236 Telephone conversation with a BERR representative on 15 December 2008.

237 *HM Government/Better Regulation Executive*, “Making your life simpler: simplification plans – a summary”, December 2008, p. 45

This is a clear case of where the Government should produce a robust IA, and take it to Brussels, arguing that it simply cannot accept proposals for which there is little support at home, and for which the estimated costs are so high. A similar strategy could have been pursued with the Agency Workers Directive.

Such warnings, when based on robust evidence, will strengthen the UK's negotiation position enormously. The idea is no more radical than other member states simply choosing not to implement EU law – such as the resistance to energy and services legislation in Germany, for example.

Regulatory budgets

A similar principle should apply to regulatory budgets.

As we have already seen, if UK regulatory budgets are to reflect realities on the ground they will need to effectively incorporate regulations coming from the EU, which account for the majority of the cost. Rather than merely factoring in the cost of EU regulations to the domestic regulatory budget, budgets should also be used at an early stage in the EU negotiation process.

EU legislation should have to meet the same stringent criteria as domestic legislation. The UK Government should give its negotiators the authority to reject proposals that do not meet its priorities and threaten to break its own regulatory budget.

Without this function UK regulatory budgets will only ever have a very limited impact on reducing the flow of regulation. As with IAs, ministers must make clear that they simply do not have the mandate to sign up to a proposal that will break their departmental budget.

(ii) A more assertive approach at an earlier stage in negotiations

The UK Government's guidelines on using an Impact Assessment in EU negotiations recommend that UK policy-makers should be involved in EU-level policy-making not only once a proposal leaves the Commission but also while it is being formulated inside the Commission. They state that:

“If requested to do so by the Commission, you should consider sharing UK data on the likely impact of a proposal. In cases where you think that the Commission is not sufficiently aware of the impact of a potential proposal on the UK, you should consider taking the initiative to lobby the Commission directly to consider UK data.”²³⁸

The Commission's so-called Roadmaps, which outline Commission proposals for the coming 12 to 18 months and their likely impacts, ought to act as an early warning system to the Government of what proposals are in the pipeline. This would allow the Government to provide the Commission with evidence of the impact of the proposal. Even at this stage, policy-makers should indicate that a costly proposal simply will not be accepted in the light of hard evidence. The earlier this dialogue is opened the better.

(iii) On-going UK impact assessment and consultation throughout the EU decision-making process

UK IA and consultation need to be used throughout the EU negotiation process, to account for changes that take place at different stages – including changes made by the Parliament or the Council, especially given that neither of these can currently be relied upon to produce their own IAs. It is not acceptable, for instance, that the Temporary Agency Workers Directive was never subject to an updated IA, despite the original IA estimating the cost to the UK at £637 million.

²³⁸ Department for Business, Enterprise and Regulatory Reform, “Using an Impact Assessment in EU Negotiations”, available at, <http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44278.html>

(iv) *EU-Commission style audit trails*

One of the simplest reforms the UK Government could pursue is to publish proper 'audit trails' for each new legislative proposal. This would inject instant transparency and help businesses, MPs and others track what is going on with a proposal throughout the often lengthy decision-making process.

... one of the simplest reforms the UK Government could pursue is to publish proper 'audit trails' for each new legislative proposal ...

In this respect the UK Government could learn something from the Commission – for every proposal, the EU publishes online a so-called 'Pre-lex' "timeline," marking all the important dates in the policy-making process (i.e. Council discussion, EP discussion, conciliation, etc)

Separately, the Commission also keeps a database of the proposal, the EIA and the opinion from the Impact Assessment Board all in one place, making cross-referencing easier.

As the process of gathering the figures for this study made painfully clear to us – locating UK Government IAs and the legislative proposals they correspond to is an unacceptably cumbersome process.

The UK Government should establish something similar but also expand on this initiative. Currently, BERR's Impact Assessment Library contains only the IA itself, and as previously noted, is not up to date with new proposals.

(v) *Real-time scrutiny in Westminster*

One of the main problems with the UK's approach to regulation is the fact that scrutiny of EU proposals by Members of Parliament remains woefully inadequate. There is much room for improvement, which, combined with the other proposals in this section, could help to make an impact on reducing the flow of regulation from Brussels.

There have been several studies about the inadequacies of the Westminster system, and proposals for reform – which we will not spell out again here in detail.²³⁹

In summary, currently only 16 MPs on the House of Commons European Scrutiny Committee (ESC) are responsible for sifting through hundreds of EU proposals a year – not to assess their merits, but with a view to singling out the important ones for further scrutiny in the House by a European Committee, and occasionally (around three times a year) for debate in the whole House. For some other EU documents, which the ESC deems to be of legal and political importance, the ESC produces a written report on the issues raised by the document, but with no Parliamentary debate recommended.

Around half of EU proposals do not even receive a substantive written report, with the ESC identifying them as lacking the legal or political importance required. What's more, the vast majority of EU documents that go to the ESC are not referred for public debate by Members of Parliament. Of the roughly 1,000 documents submitted to the Committee each year, only around 45 are referred for debate in European Committee or on the Floor of the House – less than 5 percent.²⁴⁰ Even those that do make it to European Committee are not properly scrutinised – they can be passed without any subsequent substantive debate on the Floor of the House, and often without wider knowledge of the European Committee's amendments or concerns.²⁴¹

²³⁹ See for example, *Open Europe*, "Getting a grip: reforming EU scrutiny at Westminster", 7 April 2006; May, Theresa, "Restoring Parliamentary Authority: EU Laws and British Scrutiny and Theresa May", *Politeia*, 2007

²⁴⁰ House of Commons, *The European Scrutiny System in the House of Commons*, June 2005, p.10

²⁴¹ May, Theresa, "Restoring Parliamentary Authority: EU Laws and British Scrutiny and Theresa May", *Politeia*, 2007

With more than 70 percent of the cost of regulations coming from the EU, it is absurd that only a handful of MPs are responsible for studying the enormous amount of EU proposals generated every year – especially when the vast majority of these are not fully debated. It is unacceptable that European issues are debated so rarely on the Floor of the House, and, as a paper by Theresa May MP has pointed out, that the Minister for Europe is currently only called to account during Questions to the Foreign Secretary.²⁴²

This reflects a clear failure to understand the impact the EU is having on the economy – and a worrying signal that the Government is not taking EU regulation anywhere near seriously enough.

One of the biggest problems with the system is that it operates on the principle of a Scrutiny Reserve, which in theory stops Ministers from signing up to a proposal in Brussels before Parliament has had time to scrutinise it. However, this is not defined in statute and ministers have the power to override it – a power they have used quite often.²⁴³

Other problems concern the working of the ESC itself. For example, it often simply doesn't get enough time to scrutinise proposals sufficiently. Sometimes, by the time the ESC receives proposals in detail, they are already too well developed for the Committee's recommendations to actually have any influence.

Another problem is that the Committee makes its decisions on what to do with EU documents in secret. The Government recently whipped its MPs to vote against the ESC deliberating in public – narrowly winning the vote.²⁴⁴

Reform of this system could include:

- **Making scrutiny public:** This would facilitate media and public interest in the work of the ESC and the debates it recommends – both helping

to ensure the quality of debate and generally raising awareness about what the EU is doing. If the ESC was able to take a public stand of opposition against the Government on the merits of a proposal, this would increase pressure on the Government and help to give more systematic prominence to controversial EU proposals.

- **Departmental Committees focussing more on EU legislation:** Every Departmental Committee should become far more focussed on EU legislation, given the proportion of laws that originate in Brussels.

According to a House of Commons Factsheet on European legislation, currently, "Departmental select committees are also free to examine their department's European policy responsibilities in the same way as any other departmental policies."²⁴⁵ However, there is no obligation on them to do so. In practice, it is too often seen as the job of the ESC to sift proposals and alert other committees to the important ones.

One way of addressing this shortcoming is to establish more sub-committees within the Departmental Committees dedicated to particular policy areas, e.g. a sub-committee for EU proposals in the Transport Committee, or the Treasury Select Committee. The Government should pass proposals to these committees at an as early stage as possible – and not as in the present arrangement where EU proposals are passed only to the ESC.

This means shaking up the system with some redistribution of resources – slimming down or abolishing some committees, while at the same time delegating EU issues to a large number (70 percent) of committee members. This should be reflective of the proportion of EU legislation typically affecting a particular policy area. For instance, given that 99 percent of the cost of FSA legislation originates in the EU, the committee

242 May, Theresa, "Restoring Parliamentary Authority: EU Laws and British Scrutiny and Theresa May", *Politeia*, 2007

243 *Open Europe*, "Getting a grip: reforming EU scrutiny at Westminster", 7 April 2006

244 *Hansard*, 12 Nov 2008 : Column 864, see

<http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081112/debtext/81112-0018.htm#08111228000007>

245 *House of Commons Information Office*, "EU Legislation and Scrutiny Procedures", September 2008, p. 11

should be made up almost entirely of MPs with EU expertise. DEFRA should have 93 percent EU experts, the DfT 88 percent and so on.

- **A Danish-style mandate system:** One proposal for reform would be to make the system more like the Danish or Swedish models, where Ministers set out their negotiation positions to the Committee ahead of European Council meetings, and gain its approval. This kind of system would need to be backed by clear sanctions, such as a formal censure or the resignation of the minister in question. This would raise the stakes at Council meetings, giving Ministers a clear negotiating tool in Brussels.
- **Parallel times for sittings of the ESC and EU sessions:** As Theresa May's paper says – "In domestic policy, it would be unthinkable that the Government should pass law without consulting Parliament; so it should be in European legislation. The European Scrutiny Committee must therefore sit as long as EU institutions are in session."²⁴⁶
- **More teeth for the ESC:** The ESC could be given more resources and more members – and the ability to actually deliver opinions on legislation, instead of just sifting them. This could be achieved by splitting the Committee into areas of policy expertise.

(vi) Source any proposal laid before the Parliament

Ministers should be made to clarify on Bills and SIs whether or not the legislation is derived from the EU. This will make the origin of UK regulation more transparent and serve to improve the debate about the role of the EU in initiating UK legislation, among MPs as well as the general public.

(vii) The nuclear option: refusing to agree an EU budget deal without reform

The UK is in a powerful position to push for reform at EU level – particularly where regulation is concerned, as we have seen. In order to set the wheels in motion, the UK Government should draw up clear proposals for a radical shake-up of the EU's 'Better Regulation Agenda', calling for new commitments to less regulation, and to the idea that state interference can only be justified with conclusive evidence that the benefits of any such interference outweigh costs that have been clearly quantified. It could also propose some of the ideas we explore below.

The UK Government should take a tough line and present this ideal to its EU partners, using its veto over negotiations on the Financial Framework – the EU's multi-annual budget – to help focus minds. The UK is in a better position than most to hold budget negotiations hostage, since it is one of the biggest net contributors to the EU.

... The UK Government should take a tough line and present this ideal to its EU partners, using its veto over negotiations on the Financial Framework ...

5.1 EU-level reform

(i) Cultural change: a commitment to less as well as 'better' regulation

As we have seen, the Commission's current commitment to 'better' regulation is confusing and too vague to be meaningful as an objective. It is also indicative of a reluctance to properly take on the challenge of deregulation.

... most importantly, EU policy-makers must realise that regulation should be a last resort rather than a first option ...

Our results show that the primary objective of the Commission must be to reduce the flow of regulation – which in practice means a new, clear commitment to “less regulation”.

However, our results also show that it is the cost of regulation that imposes the biggest burden, not the number of regulations per se. This means that a new commitment to less regulation must imply less cost.

As well as stemming the flow, meaningful deregulation also means simplifying and scrapping the most costly existing regulations rather than just “codifying” or consolidating them to make them clearer.

Most importantly, EU policy-makers must realise that regulation should be a last resort rather than a first option.

(ii) An independent and powerful European Impact Assessment Board

As we have seen, European Impact Assessments leave a lot to be desired. However, no amount of improvements will make a difference if there is no independent watchdog in place to ensure that the cost-benefit analysis has a real impact on the final decision. This is one of the key lessons from the UK’s experience with IAs. The UK produces some of the most sophisticated IAs in the world, and yet regulation is still skyrocketing.

An independent IA Board should be established with the power to veto legislative proposals if its accompanying EIA does not meet the required standards. In other words, the Board should be

given the mandate to play ‘ping-pong’ with the Commission over regulatory proposals. If the EIA process is to be taken seriously by businesses and member state governments, there must be an enforceable minimum standard.

The existing IA Board within the Commission has often been critical of EIAs and made valuable suggestions regarding future improvements. However, the fact that the quality of many final EIAs continues to fall short, and that study after study continues to point out similar issues, suggests that the current IA Board does not have the political clout, nor the time and resources required to raise the standard of EIAs to any meaningful level.

Furthermore, there is also a case to be made for expanding the remit of the IA Board so that it becomes responsible for actually drawing up the EIAs – instead of just advising on their methodology and approach. Currently, as in the UK, EIAs are produced by civil servants working within the department that has come up with the legislative proposal. This could explain the bias of EIAs in favour of the Commission’s preferred proposal, as explored in Chapter 4.

Bolstering a newly independent IA Board to give it more control over EIAs could vastly improve the system. The additional costs of running an improved IA Board could be recouped by simultaneously abolishing the EU’s Economic and Social Committee and the Committee of the Regions – both of which have negligible roles in the EU’s decision making process.

There is also a case for expanding an independent IA Board’s remit to all the EU institutions rather than just the Commission in an advisory capacity for Parliament and Council amendments. In turn, the Board could then be charged with updating EIAs as the proposals change during the course of negotiation.

(iii) A simple majority for scrapping proposals

One of the main problems with trying to achieve regulatory reform at EU level is that changing existing EU law involves opening up the whole negotiation process from the beginning, just as if a new law was being created. This means an initial proposal from the Commission, multiple negotiations in the European Parliament and the Council, and so on.

As the OECD notes, "Because reaching political agreement is difficult, substantive legislation often remains untouched for a long time once put in place."²⁴⁷

Once an EU regulation is decided, it is effectively set in stone – even if it proves overly burdensome once in force. Any meaningful de-regulation agenda must seek to change this – to make it easier to scrap or revise legislation than it is to make it in the first place.

In practice, member state governments should be able to present a case for EU legislation to be scrapped if it is deemed too costly or best enforced at the national level. If 50 percent or more of member state Governments in the Council vote in favour of scrapping a particular piece of legislation, then it should be abolished. This should apply to existing as well as all new legislation.²⁴⁸ This would allow member states more power to filter out bad regulations if the Commission and Parliament have failed to do so.

(iv) A robust subsidiarity test

All Commission proposals should undergo a thorough subsidiarity test to evaluate whether the policy could be better enforced at the national or local level. The need for EU legislation should be justified and the 'do nothing' option considered in all cases. The IAB should possess the authority to veto proposals that do not do so. The first step would be to legally define subsidiarity, and give examples of what it does and does not entail.

v) Allowing one quarter of national Parliaments to kill off a proposal

If a quarter of national Parliaments object to an EU proposal, then the proposal should be scrapped. National Parliaments must be given enough time to actually receive and scrutinise the proposal, to vote on it, and to register their dissatisfaction and find allies in other countries. Recess periods should be accounted for – so an 18 week window should be allowed.

(vi) A reversed infringement procedure

The EU could also introduce a reversed infringement procedure, whereby national Governments or Parliaments could block any proposal that does not respect a newly toughened up legal definition of the subsidiarity principle.

... If a quarter of national Parliaments object to an EU proposal, then the proposal should be scrapped ...

Should a proposal get through, Governments or Parliaments should be able to take the Commission to the European Court of Justice for failing to respect subsidiarity as legally defined. Currently, the Commission can take member states to court for failure to transpose Directives. EU grievance procedures should become more of a two-way street, forcing the Commission to be far more rigorous in its consideration of the 'subsidiarity test' when drawing up new proposals.

(vii) Improved EIAs

There are many ways in which EIAs could be improved. However, as said, these will count for very little unless the IAB – or some other independent scrutiniser – is given the mandate to ensure that EIAs are properly used. In combination with such a body, EIAs could help to stem the flow of regulation if the following improvements take place:

- **Clearer objectives.** EIAs should be specifically focussed on an overall objective of less regulation.
- **Quantification of all economic costs and benefits.** This should include a standard template for discounting future costs of regulations, and clear presentation of these future costs. The Council and European Parliament should refuse to consider any proposal that does not have a quantified IA attached.
- **More consultation and transparency.** Draft EIAs and the IA Board's opinion on them should be published so that everyone can see who was consulted and whose opinion was taken into account when the Commission formulated the proposal.
- **Clearer presentation of findings.** EIAs should have a clear 1 or 2 page summary, with a table summarising all the costs and benefits. The template which the UK Government introduced for IAs in March 2008 shows that it is possible to summarise the findings of an impact assessment on 1 or 2 pages.
- **More EIAs and better selection processes.** There must be clearer criteria about what kinds of proposals should be subject to assessment – with a view to making them compulsory for a much greater number of proposals. There should be a threshold for which proposals are subject to IAs, e.g. proposals with a minimum impact of €30 million across the EU. The IA Board should be responsible for assessing whether the proposal falls under the threshold, and then decide the extent of the IA required.²⁴⁹
- **Greater use of EIAs by the European Parliament and Council.** The European Parliament and the Council are not currently making use of EIAs when negotiating proposals. Both institutions

should produce an IA for any significant amendments to legislation. Alternatively, a newly independent IAB as described above could be made responsible for updating EIAs throughout the negotiation process.

(viii) A 'guillotine mechanism' for Commission proposals

Commission proposals should be given an expiry date. If a proposal has not been adopted within a given legislative timeframe, the proposal should be scrapped and started again in a new legislative session.

This is described by former German President Roman Herzog as the "discontinuity principle," and is a system currently employed in Germany.²⁵⁰ The EU institutions would no longer have to deal with legislative proposals that have been in the pipeline for a number of years, and it would also force the Commission to prioritise its proposals, allowing it to concentrate on the areas where it can add value.

(iv) Sunset clauses for EU legislation

An often repeated idea is the 'sunset' clause – whereby legislation is reviewed after a given time period. Sunset clauses should be compulsory at the EU level so that EU regulations can be reviewed in the light of experience and evidence.

(v) "€1 in, €1 out" – EU regulatory budgets

If the EIA system were improved, with an independent board to scrutinise it, there is no reason why EU Commission departments (DGs) should not adopt a "€1 in, €1 out" system for regulations. For reasons described in Chapter 3, and given the very high proportion of regulatory costs coming from the EU, it would make more sense for the UK to push for regulatory budgets at EU level first, and then to subsequently introduce them in the UK.

249 As proposed in Andrea Renda, "Advancing the EU better regulation agenda: selected challenges for Europe", Centre for European Studies, (draft at 07 September 2008), p. 43

250 *Welt am Sonntag*, "An article on the EU constitution", 14 January 2007

(vi) Sourcing new proposals

In order to avoid the disproportionate influence of interest groups in EU legislation it should be made more transparent who exactly is responsible for a given legislative proposal. As Commissioner Gunter Verheugen has suggested:

“I think we should also do more to create transparency at the beginning of the process. I would like to know if there is new proposal on the table coming from my colleagues who has asked for that. Start your document with a paragraph saying who has asked for that piece of legislation.”²⁵¹

(vii) Common commencement dates for EU regulation

The EU should introduce Common Commencement Dates for regulations – like those in place in the UK. These are fixed dates occurring twice a year, when new regulations come into force, helping businesses to cope and keep track of changes in legislation.

ANNEX I: Methodology

Below we set out our methodology in some detail.²⁵²

Sources for obtaining Impact Assessments

The sources used to obtain Impact Assessments included:

- Departmental websites listing the most recent IAs;
- Command papers produced by BERR every six months which, in theory, are meant to be a comprehensive guide to all IAs. In reality, we found a number of discrepancies between the information provided in them and other sources;
- The House of Lords library, where departments usually place copies of IAs after they have been produced;
- We also contacted departments directly, attempting to procure hard copies of these impact assessments with varying degrees of success;
- The OPSI website which contains Explanatory Notes of laws and regulations. Sometimes these Explanatory Notes have the corresponding IA attached;
- In a few cases, we also used other sources in order to verify costs and undertake further research on proposals.

Extracting cost estimates from IAs

As a rule, we extracted costs from the 'recommended option' provided in the IA, except in the cases where we knew that a different option than the one recommended had been pursued. When range estimates were provided in the IA, we extracted the middle estimation. Extracting the middle estimation made our database more manageable, and avoided the risk of producing too wide an overall range estimate.

When a cost was provided over a range of time, we divided the estimate by the number of years given to reach an annual estimate. When an IA assessed a regulation that no longer is in force, the cost estimations were only included for the years the regulation had legal effect. A few IAs also assessed proposals that never were adopted – these were excluded from the calculations.

Treatment of recurring costs

Recurring costs were counted from the year of implementation, to reflect how business and affected groups have to begin preparing for new regulation, even before it is implemented. However, when the regulation was implemented in either November or December, the cost was included in the next year. In some instances, the IA specifically states that recurring costs will not begin until 2 or 3 years after implementation. In other instances, the recurring costs were incurred during a limited number of years. These qualifications have been taken into consideration in calculations.

Treatment of transfer payments

In theory, transfer payments do not represent an economic cost or an economic benefit – they are simply a transfer from one group in society to another. Hence, we have not included them in our aggregated results.

The relevant government guidelines (in particular, BERR's IA Toolkit²⁵³ and the Treasury Green Book²⁵⁴) are not particularly clear about how to treat transfer payments in IAs. A footnote to the Treasury Green Book states: "Transfer payments may change the distribution of income or wealth, but do not give rise to direct economic costs."²⁵⁵

Similarly, BERR's IA toolkit states the following about distributional effects, including transfer payments:

²⁵² The section on methodology is partially drawn from Europe Economics' methodological note for Open Europe, "Advice on IA Analysis to Assist Open Europe with its Project 'Ten Years of RIAs'", November 2008

²⁵³ See <http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44199.html> viewed on 26 January 2009

²⁵⁴ See http://www.hm-treasury.gov.uk/data_greenbook_index.htm viewed on 26 January 2009

²⁵⁵ *Ibid*, p. 21 footnote 2

“Even if there are no overall economic effects, distributional effects might be important ... In describing such distributional effects, it will be important to list both gainers and losers, to avoid giving the impression that there is an overall positive or negative effect.”²⁵⁶

In practice, transfer payments are not treated consistently in IAs, and it is not always clear whether estimates of total costs and benefits already exclude transfer payments. This required us to make adjustments on a case-by-case basis as we aggregated results.

Two examples can serve to illustrate.

The HMRC IA produced in March 2005 on a package of partial exemption measures for VAT identifies “economic benefits” of £25-30 million. This represents the additional tax revenue which would be raised, and states that compliance costs would be minimal.

The results presented in this IA are misleading in terms of the impact of the policy on the UK economy. In particular, the tax revenue represents a transfer payment from businesses to the Exchequer, and not a net effect for the economy as a whole. This cost was therefore excluded from our aggregated results.

The second example relates to the IA published by the DWP on the Statutory Maternity Pay (Compensation of Employers) Amendment Regulations 2002.²⁵⁷ The IA identifies benefits of £45 million to mothers and £5 million to small employers, alongside costs of £40 million to the Exchequer and £5 million to larger employers.

The summary table appears to exclude the cost to the Exchequer of funding the additional £5 million of payments to small employers mentioned in paragraph 10 of the IA. Once this cost is taken into account, it can be seen that the estimated costs and

benefits of the policy are equal in magnitude.

All of the costs and benefits quantified in this IA are transfer payments, whether between employers and mothers, or between the Exchequer and employers. Hence, apart from implementation costs, which the IA states are minimal but does not quantify, the net cost of this policy to the UK economy would be zero, and has not been included in our aggregated results. Notably, we have treated minimum wage as a “transfer payment”. Wage costs of minimum wage regulations have therefore been excluded, although we have included relevant administrative costs.

Notwithstanding the above, there is a strong case for treating transfer payments as a cost to the economy, as they can divert economic activity and impose deadweight costs. Statutory maternity pay can lead to distortions of the labour market, for instance. Nonetheless, since there is no consensus on the precise impact of these types of knock-on effects, we have excluded them from our costs.

Treatment of taxes

See the above discussion on transfer payments. Taxes have been excluded since they consist of no direct good or service but involve transfer of wealth from one section of society to another. However, where a regulation to alter tax policy has produced an administration cost, this has been included - for example a new IT system to facilitate the new tax.

Treatment of costs with multiple origins

Some IAs address costs that have their origin in both EU regulation and UK-sourced regulation – for example Home Information Packs.²⁵⁸ For regulatory costs with unclear origin, we have simply split the incurred cost in half. There are also a limited number of IAs which assess regulations that have their origin in international agreements, such as maritime laws. The costs arising from such agreements have been counted towards the UK-sourced costs.

²⁵⁶ See <http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44248.html> viewed on 26 January 2009

²⁵⁷ See http://www.dwp.gov.uk/publications/dwp/2002/smp_amd_reg.pdf viewed on 26 January 2009

²⁵⁸ For the IA on HIPs, see <http://www.communities.gov.uk/documents/housing/pdf/156618.pdf>, viewed on 26 January 2009

Treatment of Government expenditure

We have excluded costs representing Government expenditure such as crime and police bills or health and social care bills, or institutional reform, such as changes to the court system. This is simply on the grounds that Government spending and the costs of regulation are two different things.

Treatment of IAs from non-departmental public bodies

Generally, Government departments produce IAs. However, according to BERR's command papers, some non-departmental public bodies also produce IAs, most importantly the Health and Safety Executive and the Food Standards Agency. These two agencies have therefore been included in our analysis. The other non-departmental bodies, which produce only a limited number of IAs, have been counted towards their corresponding department. For example, regulatory costs imposed by the Maritime and Coastguard Agency are included under the Department for Transport.

Discounting and inflation

To reflect the fact that IAs in different years are likely to present estimated costs and benefits in terms of different years' prices, estimates have been adjusted for inflation so that all figures are presented in 2008's prices. Where an IA does not state which year's prices have been used, it has been assumed that costs and benefits are expressed in terms of prices in the year that the IA was published. To present the costs in 2008's prices, the annual inflation level dating back to 1998 has been reached using the Treasury's GDP Deflator Series.²⁵⁹ This uses 2007-2008 as a base year and then calculates the annual percentage change from that year.

The Present Value (PV) of the costs of regulation in 2018 were calculated using the discount rate of 3.5 percent recommended in the Treasury's Green Book.

Extrapolating UK figures to obtain EU-wide estimate

We considered EU-sourced regulation and domestically-sourced regulation separately when we extrapolated the figures to obtain an EU-wide estimate.

The cost of EU-sourced legislation was weighted against GDP, assuming that the extent of the impact of regulations depends on the size of the economy (GDP). Domestically-sourced legislation was weighted using scale factors.

There are two main reasons for calculating EU and domestic costs using different methods.

First, using the scale factors for EU-sourced costs would imply that the UK occupies a top position in Europe in terms of implementing Directives in a cost-effective way. This assumption would be necessary since the World Bank's Doing Business rankings show that the UK has one of the lightest regulatory burdens in Europe.²⁶⁰ Given the raging debate about 'gold-plating' in Britain, as described in Chapter 2, we are not willing to make that assumption quite yet. We therefore opted for the simpler methodology of weighted GDP.

Secondly, the proportion of regulatory costs that stem from EU legislation cannot be the same in all 27 member states, as it is well known that the existing regulatory environment varies considerably between member states. The EU's Working Time Directive, for instance, imposes a higher cost on the UK than it does on Belgium and France, due to varying levels of rigidity in existing working time rules in the respective countries. We therefore need to assume that the relative cost of regulation is higher in some member states, with the proportion of EU-sourced cost correspondingly lower.

The central issue when extrapolating our results to obtain an EU wide estimate was the choice of scale factors, which were necessary to assign each EU member state a relative share of the overall cost. In

²⁵⁹ See http://www.hm-treasury.gov.uk/data_gdp_index.htm, viewed on 20 January 2009

²⁶⁰ See the World Bank's "Doing Business" website, <http://www.doingbusiness.org/economyrankings/> viewed on 15 January 2009

order to decide on the best approach, we considered the following:

- Scale factors from the World Bank’s Doing Business rankings;²⁶¹
- The Commission’s published scale factors for extrapolating administrative burdens;²⁶²
- Henk Kox’s 2005 study on administrative burdens in the EU.²⁶³ Kox’s work was the basis for the Commission’s measurement exercise of the EU-wide administrative burden in 2006.²⁶⁴

In the end we used the Commission’s published scale factors, having found that Kox’s scale factors produce implausibly large discrepancies upon extrapolation. The drawback of the Commission’s approach is that some countries end up in the same ‘bracket’, despite significant differences in their regulatory regimes, i.e. Italy and the UK.

The scale factors used by the EU Commission are based on Kox’s 2005 study, which in turn builds on work by Djankov et al.²⁶⁵ Djankov’s study looked at the costs associated with the event of setting up a standard firm. This appears to be a narrow measure.

However, we found a strong correlation between “start-up” costs for business and other factors in the World Bank’s Doing Business rankings, suggesting that the “start-up” factors can serve as appropriate measures if we wish to capture also some of the wider compliance cost of regulation for the economy. See correlation values in the table below.

We also found that our method of separating domestic and EU-sourced costs generated fairly similar estimates to the simpler method of using the total cost against GDP. In the graph below, we compare the two methods.

It is worth bearing in mind that this exercise comes with a number of caveats. First,

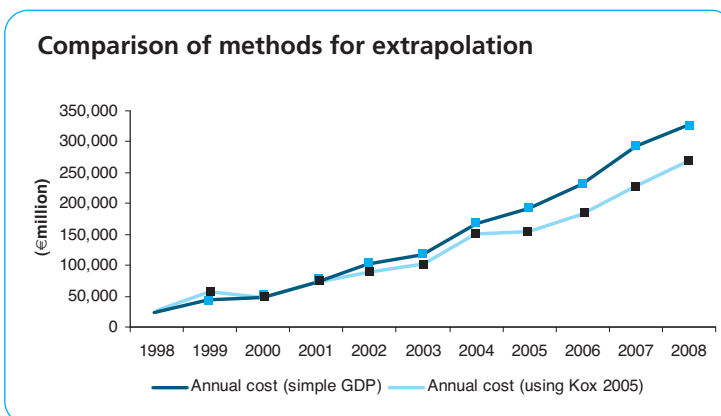
Directives are not implemented uniformly across the EU. Our method of using GDP is therefore not necessarily capturing the full picture, as it does not

	Correlation Value
Rigidity of Hours Index	+0.66
Disclosure Index	-0.58
Time for export (days)	+0.51
Time for import (days)	+0.50
Cost (% of debt)	-0.40
Recovery rate (cents on the dollar)	-0.52

take into account over-implementation or under-implementation. Secondly, it disregards that some EU regulations can have a disproportionate impact on member states that account for a large share of the sector that is being regulated, i.e. EU financial services regulations in the UK.

Thirdly, national legislative programmes over the period 1998 to 2008 may differ substantially in different member states, although we have captured such variations to a certain extent by considering scale factors going back to 2004.

Incidentally, the Commission’s administrative burden measurement exercise in 2006 suffered from similar flaws, as it essentially extrapolated EU-wide results from Kox’s study.



261 *Ibid.*

262 DG Enterprise and Industry, “The new Lisbon Strategy - An estimation of the economic impact of reaching five Lisbon Targets”, Industrial Policy and Economic Reforms Papers No. 1, January 2006, see http://ec.europa.eu/governance/impact/docs/country_distrib_en.pdf

263 Kox, Henk, “Intra-EU differences in regulation-caused administrative burden for companies”, CPB Netherlands Bureau for Economic Policy Analysis, December 2005.

264 European Commission, “Measuring administrative costs and reducing administrative burdens in the EU”, MEMO/06/425, 14 November 2006

265 Djankov, Simieon et al., “The regulation of entry”, *Quarterly Journal of Economics*, vol. 117 (1) 2002, p. 1-37

ANNEX II: Departmental key

Acronym	Full name
DfT	Department for Transport
HO	Home Office
DCLG	Department for Communities and Local Government
HMRC	Her Majesty's Revenue and Customs
HMT	Her Majesty's Treasury
DH	Department of Health
DWP	Department for Work and Pensions
DCSF	Department for Children, Schools and Families
DEFRA	Department for Environment, Food and Rural Affairs
FSA	Food Standards Agency
HSE	Health and Safety Executive
BERR	Department for Business, Enterprise and Regulatory Reform
MOJ	Ministry of Justice

About Open Europe

Open Europe is an independent, non-party political think tank which contributes bold new thinking to the debate about the direction of the European Union.

'Ever closer union', espoused by Jean Monnet and propelled forwards by successive generations of political and bureaucratic elites, has failed. The EU's over-loaded institutions - held in low regard by Europe's citizens - are ill-equipped to adapt to the pressing challenges of weak economic growth, rising global competition, insecurity and a looming demographic crisis.

Open Europe believes that the EU must now embrace radical reform based on economic liberalisation, a looser and more flexible structure, and greater transparency and accountability if it is to overcome these challenges, and succeed in the twenty first century.

The best way forward for the EU is an urgent programme of radical change driven by a consensus between member states. In pursuit of this consensus, Open Europe seeks to involve like-minded individuals, political parties and organisations across Europe in our thinking and activities, and to disseminate our ideas throughout the EU and the rest of the world.

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