



# **STILL OUT OF CONTROL?**

## **Measuring eleven years of EU regulation**

**March 2010**

By

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## EXECUTIVE SUMMARY

This is Open Europe's second report analysing the cost of regulation in the UK since 1998, when the British Government began to produce Impact Assessments for regulatory proposals.

Since last year, we have analysed an additional 320 Impact Assessments, putting the total number of IAs studied above 2,300. This arguably represents the most comprehensive study to date of the cost and flow of regulations introduced in the last eleven years.

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

Our research into the cost of regulation is divided into three categories:

- The cumulative cost of regulation, which is the sum total cost of regulation coming into force since 1998
- The annual cost of regulation, which is how much regulations adopted since 1998 cost the economy each year
- The benefit/cost ratio of regulations

### KEY FINDINGS:

Since our last report we have noticed evidence of genuine progress arising from UK and EU initiatives to cut down on and simplify regulations. While this is encouraging, there is still a long way to go. Overall, the cost of regulation keeps going up year on year, and the economic downturn has added pressure for new, hastily formulated laws which risk adding unnecessary burdens on businesses and the public sector.

#### ***Cost of regulation keeps on going up***

- Since 1998, regulation introduced in the UK has cost the economy £176 billion. This is roughly equivalent to the UK's entire budget deficit<sup>1</sup>, or 12.6 percent of GDP.<sup>2</sup> Of this, £124 billion, or 71 percent, had its origin in the EU. This means that EU regulation in the past eleven years has cost every UK household an average of £4,912.<sup>3</sup>
- The *annual cost* of regulation in 2009 stands at £32.8 billion. For this amount, the Government could cut corporation tax by two thirds.<sup>4</sup> Since the UK launched its 'Regulatory Reform Agenda' in 2005, the annual cost of regulation has doubled (up from £16.5 billion).
- 59 percent of the cost arising from regulation in 2009 stemmed from EU legislation. In 2008, the equivalent figure was 65 percent. Over the last eleven

<sup>1</sup> According to the 2009 Pre-Budget report, the UK's estimated budget deficit in the 2009/10 financial year is £177.6 billion.

<sup>2</sup> UK GDP in 2009 is estimated at £1,396,474,000,000 by Eurostat.

<sup>3</sup> Estimates by the Office of National Statistics put the number of UK households at 25.29 million in 2006, see <http://www.statistics.gov.uk/STATBASE/ssdataset.asp?vlnk=7678>

<sup>4</sup> According to the Treasury's latest Public Finances Databank (February 2010), corporation tax receipts amounted to £43.1 billion in the 2008/09 financial year, see [http://www.hm-treasury.gov.uk/psf\\_statistics.htm](http://www.hm-treasury.gov.uk/psf_statistics.htm)

years, on average, the annual proportion of the EU-derived cost is 72 percent. The proportion of EU regulation as a share of the total has tended to go down in recent years.

### ***Domestic regulations are 2.5 times more cost effective than EU laws***

- We estimate the benefit/cost ratio of the regulations we studied at 1.58. In other words, for every £1 of cost introduced by a regulation since 1998, it has delivered £1.58 of benefits. However, the benefit/cost ratio of EU regulations is 1.02, while the ratio of UK regulations is 2.35.
- This means that UK-sourced regulations deliver a benefit almost 2.5 times higher on average than regulations coming from the EU. For every £1 of cost, EU regulations introduced since 1998 have only delivered £1.02 of benefits. Expressed differently, it is 2.5 times more cost effective to regulate nationally than it is to regulate via the EU. This also means that EU regulations come dangerously close to failing an overall cost-benefit analysis.
- This is a clear argument in favour of regulating at the local or national levels as much as possible, and an indication that deregulation efforts should be targeted at the EU level.

### ***EU labour market laws account for 22 percent of the total cost of regulation***

- EU employment legislation introduced since 1998 has cost the UK economy £38.9 billion. This means that 22 percent of the *overall* cost of regulations introduced in that period in the UK can be sourced to EU employment laws alone.

### ***The Government's claims to have cut the cost of regulation do not stack up***

- The UK Government has taken positive steps to increase the transparency and accountability surrounding regulation, and has also improved the quality of its Impact Assessments.
- However, while improvements are being made, the Government's initiatives are not striking deep enough to have a lasting impact on the overall regulatory environment. 30 percent of businesses state that it has become more difficult to comply with regulation in the last 12 months – only three percent believe that it has become easier. In no small part, this is down to the failure to stem the flow of new EU regulations.
- At the same time, the UK Government's claimed savings in regulatory costs do not match the figures we have extrapolated from its own Impact Assessments.

### ***The Conservatives offer hope – but need to turn their attention to EU regulation***

- The Conservatives have proposed a series of fresh regulatory reforms that are innovative and could cut the cost of regulation. However, the Conservatives have chosen to focus their regulatory reform agenda almost exclusively at the domestic level.
- This, in turn, could lead to contradictory or undeliverable policies since a future Conservative government will only have full control over 28 percent of the cost of regulation. The Conservative party needs to make it a priority to set out how they

intend to apply their domestic reform proposals to the EU decision-making process.

***Some progress at the EU level – but cultural change in Brussels is moving slowly***

- The European Commission is pursuing some worthwhile initiatives to cut regulation. However, the prevailing culture in Brussels is still 'more regulation means more Europe'.
- The financial crisis and the recession have created a greater pressure for regulation that threatens to roll back the positive steps that the Commission has taken so far.
- Since 2003, the European Commission has only dropped four proposals following cost-benefit analysis.

***Reform is possible: 30 ways to cut red tape***

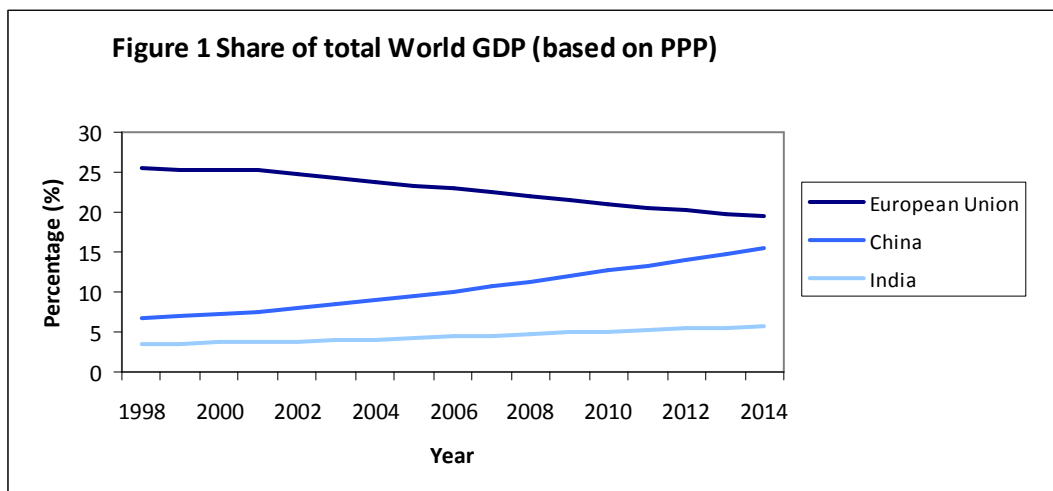
- Fewer and better regulations would give Europe a massive economic boost. This is possible but a radical new approach is needed. We set out 30 ways to achieve this, with particular focus on strengthening the filters at the beginning of the EU's decision-making process.

# INTRODUCTION

*“Putting better regulation solutions into practice across Europe will have an enormous impact, not only saving money but promoting economic growth and allowing business to prosper” – Ian Lucas, Minister for Business and Regulatory Reform<sup>5</sup>*

## Why does regulation matter?

The economic crisis has exacerbated Europe’s already pressing problems of low growth, high unemployment, declining share in world trade and an ageing population. The IMF’s October 2009 World Economic Outlook shows the EU’s share of world GDP<sup>6</sup> declining, with Europe on course to be surpassed by the world’s emerging economies in the coming decades if current trends continue.



Source: IMF World Economic Outlook

In this environment, getting regulation right is more important than ever. Regulation is not an abstract concept, but goes to the heart of productivity in the public and private sectors. Time spent complying with red tape reduces competitiveness and profitability, in turn affecting economic growth and job creation. Regulation also has a real impact on peoples’ everyday lives: a well targeted regulation can boost consumer protection for instance, while an overly burdensome environmental law can push up energy prices, and a misdirected financial regulation can decrease pension returns.

As Europe struggles to lock-in tentative recovery from the deepest recession in recent history, a commitment to fewer and less burdensome regulations could serve to unlock some of Europe’s unharnessed potential, boosting economic growth and employment levels.

<sup>5</sup> Department for Business, Innovation and Skills, “Defining European success with smart regulation”, 11 March 2010, see

<http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=412098&NewsAreaID=2>

<sup>6</sup> Gross domestic product, based on purchasing power parity (PPP).

## What we did and why

Our study has involved studying over 2,300 Government Impact Assessments, and extracting data on the cost and benefits of regulation introduced in the UK from 1998 to 2009.

There are at least three reasons for this study:

- The cost of regulation is generally poorly understood and most governments, including the UK's, have an insufficient grasp of how regulation impacts on the wider economy and how much of their national wealth they spend through the regulations they adopt;
- There are few credible estimates of the annual cost of regulation comparable over time, meaning that policymakers have a hard time assessing whether their efforts to cut regulation are bearing fruit;
- The proportion of the cost of regulation coming from the EU is subject to fierce debate and is too often shrouded in ideological bias rather than based on hard data.

Our report is an attempt to provide hard, quantified evidence in response to all of these three points.

### **Box 1: What is an IA?**

An Impact Assessment (IA) is a document prepared by Government departments and executive agencies<sup>7</sup> assessing the various costs and benefits of a regulation. They are designed to provide ministers and policy-makers with evidence on the economic, social and environmental impact of a regulatory proposal, and assist them in selecting the most cost-effective policy option. IAs often, but not always, quantify costs and benefits in monetary terms.

IAs were introduced in 1998 by Tony Blair's Government as part of a wider programme to reduce the burden of regulation on the UK economy.

For proposals stemming from the EU, IAs in the UK tend to focus on Directives, which generally concern large pieces of legislation, such as the Free Movement Directive, enabling people to freely move across borders in the EU, or Working Time Directive (WTD), restricting working hours. Directives are implemented in the UK through a separate law enacted in Parliament.

Other types of EU legislation, which do not tend to trigger an IA, include EU Regulations<sup>8</sup>, which are directly applicable in EU member states and are immediately enforceable without producing a UK law to implement them, and EU Decisions, which are automatically binding on member states and usually do not produce a new piece of UK legislation.

We estimate there to have been around 2,500 IAs produced since 1998, but cannot know for sure because, until recently, no Government department kept a database of all IAs. Some IAs have simply been impossible to track down.

<sup>7</sup> For example, the Driver and Vehicle and Licensing Agency or the National Measurements Office.

<sup>8</sup> In this report Regulations with a capital 'R' refer to EU Regulations, while regulations with a lower case 'r' are the generic regulations which describe laws impacting on the economy.

Nonetheless, the sheer number of IAs studied arguably makes this the most comprehensive and in-depth study to date of the cost of regulation in the UK in the last eleven years.

### **What our study is not**

Our study, while one of the most comprehensive ever carried out, cannot provide a total picture of the cost of regulation because it is impossible to track down every single IA produced since 1998.<sup>9</sup> Additionally, our study does not capture the costs arising from regulations introduced before 1998, and those EU Regulations for which an IA was not produced.

Moreover, our study does not seek to present the *net* cost of regulation. Since many IAs do not quantify the benefits of a piece of legislation (particularly pre-2004 IAs), a comparable benefit estimate was not feasible to produce.

Instead, we have produced an average benefit/cost ratio figure of the regulations introduced since 1998, only using IAs that contain both quantified costs and benefits (see section 1.3).

Importantly, this report *does not* provide an answer to the question of what proportion of all British *laws* have their origin in EU legislation. Our study measures the *cost* of regulation, and the proportion of this cost stemming from the EU. Neither is it a study into what proportion of EU regulations would still exist in the UK if they had not been adopted at the EU level (see section 1.5).

### **What regulatory costs have we included?**

Our estimates capture administrative costs and policy costs of regulations (see Box 2). They do not include transfer payments, such as taxes, levies or welfare payments. Knock-on effects on the wider economy have not been included either, as these are rarely quantified in IAs. We have also excluded IAs which relate to Government expenditure, such as education and welfare costs, and obviously those IAs which relate to regulations no longer in force.

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<sup>9</sup> Until recently, there has been no central database of IAs, making it impossible to know exactly how many have been produced. Those we have been able to track down have been located on departmental websites, in the House of Lords and Commons library and in the British Library.

**Box 2: Different types of regulatory costs**

**Administrative costs** are those incurred by companies from providing information to a third party, such as the Government or shareholders, or complying with administrative tasks such as record-keeping or invoicing.

**Policy costs** are those incurred through meeting the aims of the regulations, such as installing new computer software to facilitate information sharing.

**Financial costs** are costs arising from a direct transfer of money to the Government or other relevant authority, because of a tax or levy, for example regulations increasing national insurance contributions.

**Wider effects** are those costs not directly imposed by a regulation, but caused by its knock-on effects in the wider economy, for example regulations making it more difficult to sell real estate could lead to stagnation in the housing market. These costs are rarely quantified in IAs.

# 1

## THE COST OF REGULATION

Since last year's report, Open Europe has analysed an additional 320 Impact Assessments (IAs). Our figures are now based on 1,950 Impact Assessments, with an additional 350 analysed, but excluded for various reasons.<sup>10</sup>

We have extracted costs and benefits from all these IAs produced by the Government since 1998 in order to reach an overall cost of regulation to the UK economy.

Our research into the cost of regulation is divided into three categories:

- The cumulative cost of regulation, which is the sum total cost of regulation coming into force since 1998
- The annual cost of regulation, which is how much regulations adopted since 1998 cost the economy each year<sup>11</sup>
- The benefit/cost ratio of regulations

To help conceptualise this, if the UK was to 'pay the bill' for the cost of regulation arising over the last eleven years, it is the cumulative cost that it would have to pay off. This figure includes the recurring costs of the regulation, multiplied by the number of years it has been in force, and the implementation costs of the regulation, counted only once.

The annual cost is the amount being paid each year for regulations that have been introduced between 1998 and 2009. The annual cost of regulations in, say, 2005 includes the recurring cost of each regulation introduced between 1998 and 2005, and the implementation costs of regulations introduced in 2005.

While the cumulative cost will inevitably increase over the period we have looked at, as it is essentially piling the costs in different years on top of each other, the annual cost could be expected to go down or up in any given year – as it measures the flow of regulation.

The benefit/cost ratio is a comparison, indicating whether the benefits of regulation outweigh the costs.

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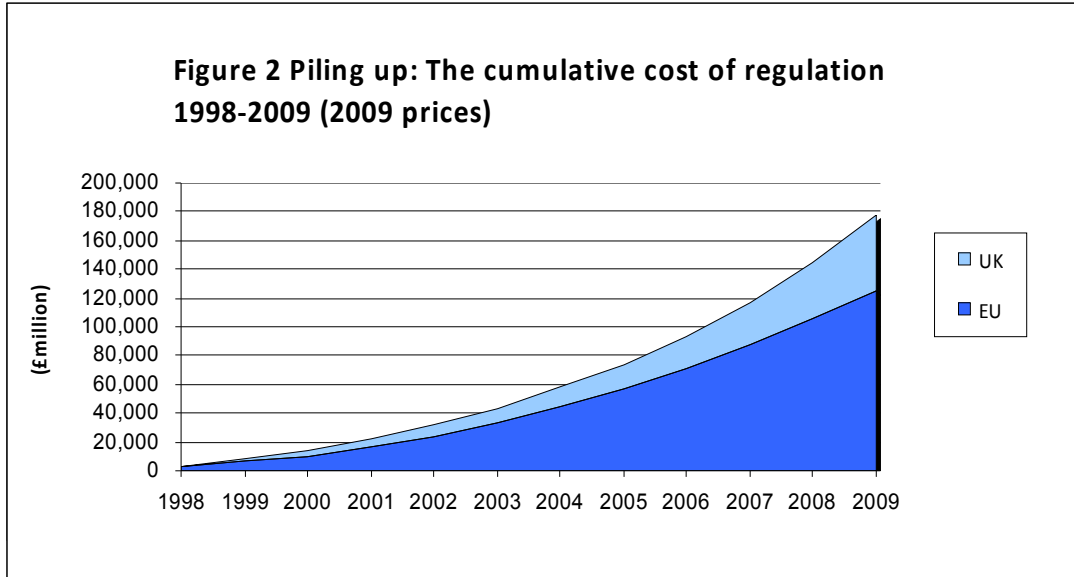
<sup>10</sup> We have excluded partial impact assessments, and those relating to Government expenditure, such as crime and police bills.

<sup>11</sup> For more details on the difference between the cumulative measure of the cost of regulation and the annual measures, please see the methodology section.

## 1.1 THE CUMULATIVE COST OF REGULATION

Based on the IAs analysed, we estimate the cumulative cost of regulations introduced in the UK between 1998 and 2009 at £176 billion. This is roughly equivalent to the UK's entire budget deficit in this financial year.<sup>12</sup>

Of this amount £124 billion, or 71 percent, had its origin in EU legislation.



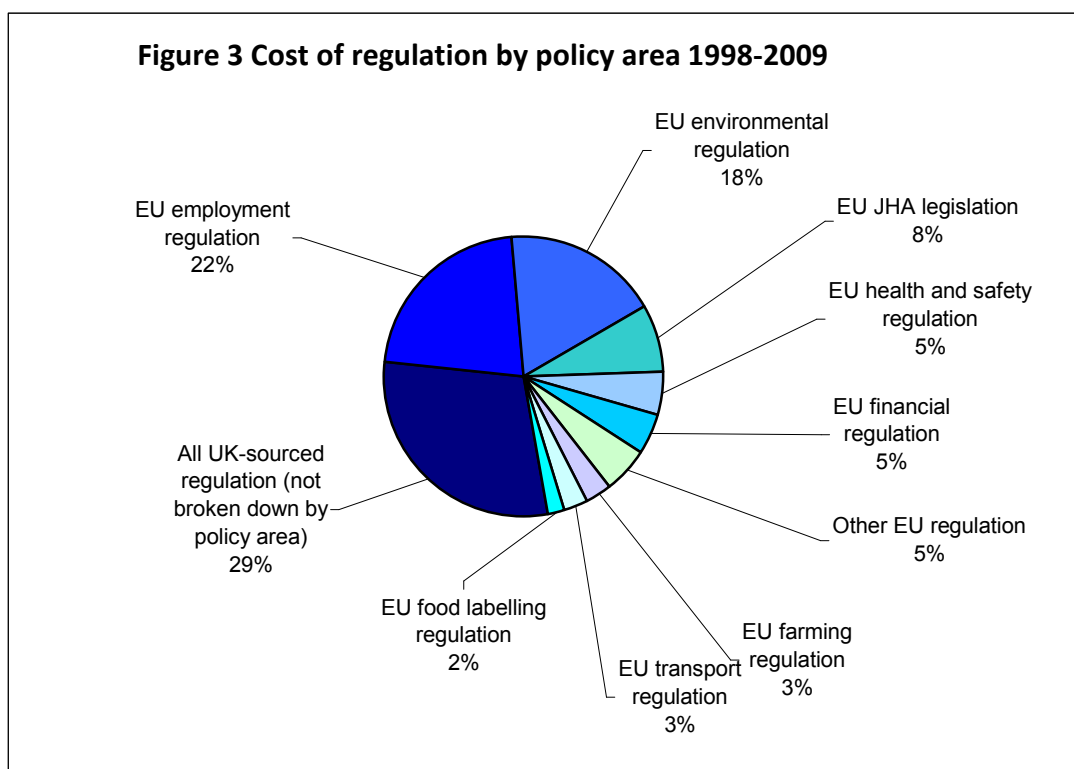
Source: Open Europe's regulation database

A further breakdown of this cost reveals that:

- EU employment legislation introduced since 1998 has cost the UK economy £38.9 billion. This means that 22 percent of the *overall* cost of regulations introduced in that period in the UK can be sourced to EU employment laws alone.
- EU environmental regulation coming into force since 1998 represents 18 percent of the entire cost of regulation over the same period, or £31.7 billion.
- EU health and safety legislation accounts for 5 percent of the total cost of regulation in the last eleven years, and has cost £8.9 billion.
- EU financial regulation coming into force in the same period has cost the UK economy £8.3 billion, or less than 5 percent of the total cost of regulation.
- EU agricultural regulations have cost British farmers over £5 billion and EU food labelling requirements have cost the UK £3.5 billion since 1998.

The graph below illustrates the break down in 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 2009. UK regulation is not broken down in the same way.

<sup>12</sup> According to the 2009 Pre-Budget report, the UK's estimated budget deficit in the 2009/10 financial year is £177.6 billion.



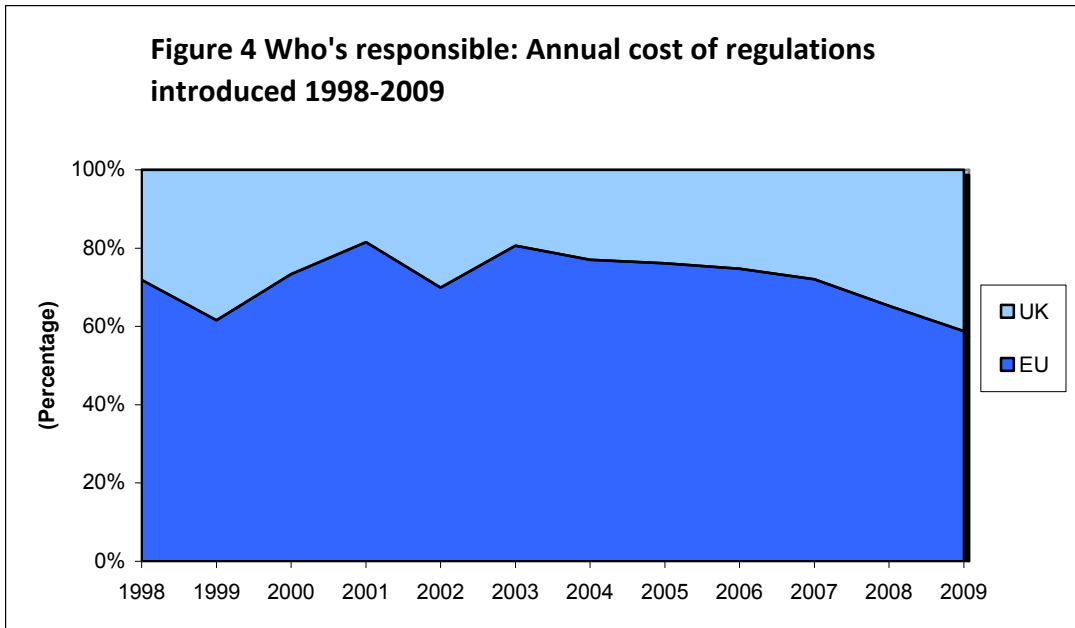
Source: Open Europe's Regulation Database

## 1.2 STILL GOING UP: THE ANNUAL COST OF REGULATION

Measuring the annual flow of regulation is more meaningful than measuring the cumulative cost, as it involves assessing the cost of all new laws in a given year, in addition to the cost arising from the existing laws in that same year. Measuring the flow allows us to track changes in the regulatory environment, and most importantly, enables us to see whether the cost of regulation is going up or down.<sup>13</sup>

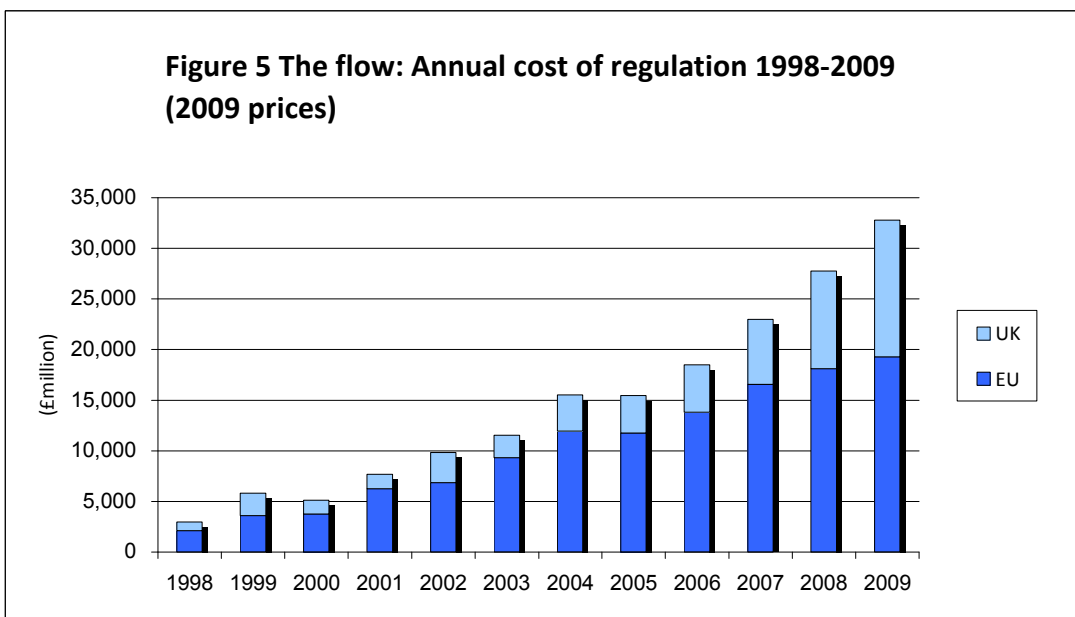
In 2009, the cost arising from regulations introduced since 1998 was £32.8 billion. 59 percent, or £19.3 billion, of this amount is EU-derived. This is an increase of 4 percent on the EU cost in 2008, which then stood at £18.5 billion.

<sup>13</sup> Figures from earlier years, 1998-2000 in particular, should be treated with caution because when IAs were first introduced, they were of relatively poor quality and there were also fewer produced. However, later figures, particularly from 2004 onwards, can be considered more reliable and therefore more suitable for year-on-year comparisons.



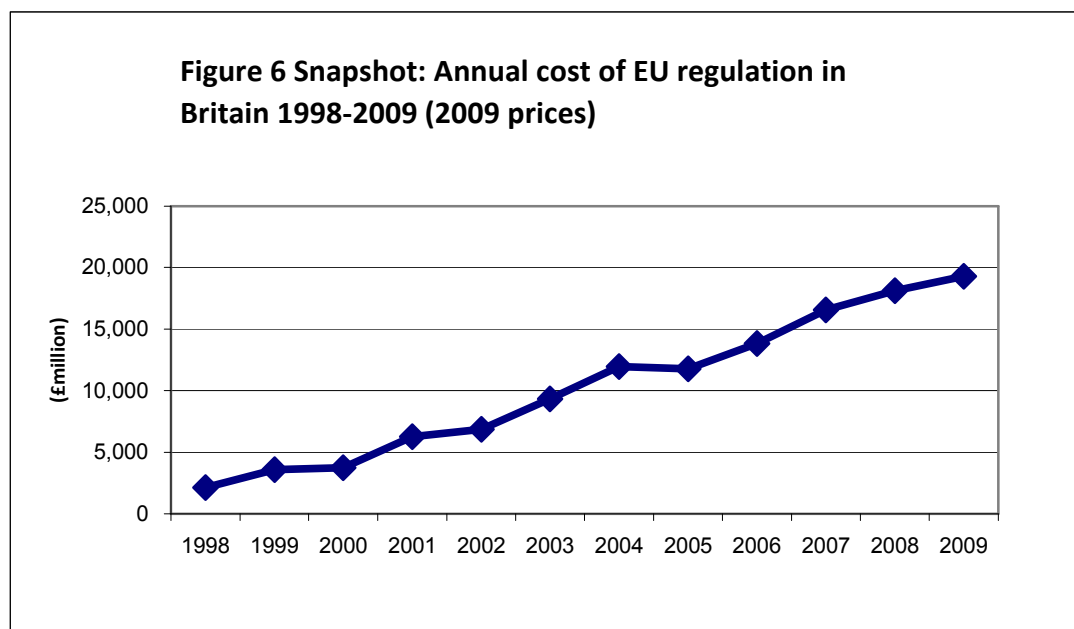
Source: Open Europe's Regulation Database

The EU proportion varies from year to year – from 59 percent in 2009 to 82 percent in 2001 – reflecting that the cost stemming from EU regulation tends to be cyclical, depending primarily on one-off costs arising from Directives, which usually take two to three years to implement from the date they have been agreed.



Source: Open Europe's Regulation Database

Although still going up, the increase in the cost of EU regulation has been slower in the last three years, which may be an indication that the EU's Better Regulation Agenda is starting to pay off (see figure 6). This is an encouraging sign and policymakers in Brussels and Whitehall should be acknowledged for it.



Source: Open Europe's Regulation Database

However, there are several costly EU regulations in the pipeline which could produce a spike in the cost of EU regulation in two or three years' time. Examples of potentially costly measures include the Temporary Agency Workers Directive (TAWD), which is due to be implemented in October 2011<sup>14</sup>; the Alternative Investment Fund Managers Directive (AIFMD), which is still undergoing negotiations at the EU level but is likely to be agreed in the next six months and come into force in the next three years<sup>15</sup>; and possibly the Pregnant Workers Directive currently subject to discussion between the Commission, the Council of Ministers and the Parliament.

### 1.3 THE BENEFIT/COST RATIO OF REGULATIONS

This year we have also produced a benefit/cost ratio of regulations, in order to assess whether the benefits of regulations do in fact outweigh the costs. After all, the whole point of regulation is for it to produce a total benefit, in one form or another, which outweighs the total cost. That is how policymakers justify a regulatory proposal in the first place.

<sup>14</sup> The TAWD has been estimated by the Government to have a £40 million implementation cost and recurring annual costs of £1.9 billion (however this is partially offset by recurring benefits to workers of £1.4 billion if discounting transfer payments), see *Department for Business Innovation and Skills*, "European Parliament and Council Directive on working conditions for temporary agency workers", see <http://www.berr.gov.uk/files/file54288.pdf>

<sup>15</sup> The AIFMD is still under negotiation, and the final shape of the legislation will determine its regulatory costs on business. However, following a survey of hedge fund and private equity managers in September 2009, Open Europe estimated the implementation costs of the Directive to be between £1.2 billion and £1.6 billion and the annual recurring costs to be between £597 million and £853 million. See *Open Europe*, *The EU's AIFM Directive: Likely impact and best way forward*, 21 September 2009, see <http://www.openeurope.org.uk/research/aifmd.pdf>

We estimate the benefit/cost ratio at 1.58 in 2009. This means for every £1 of cost introduced by a regulation since 1998, it delivered £1.58 of benefits.<sup>16</sup> This shows a comparatively smaller benefit than the Government's equivalent figures, which stands at 1.85. However, the Government's figures only take into account the regulations introduced in 2008/09 and are therefore not as comprehensive as ours (see Annex II for a discussion on this). It is nevertheless clear that the benefits of regulations on the whole outweigh the costs – at least according to the Government's IAs.

Broken down, the benefit/cost ratio of UK regulations is 2.35, while the benefit/cost of EU regulations is 1.02.

In other words, UK-sourced regulations deliver a benefit almost 2.5 times higher, on average, than regulations coming from the EU. Even more critically, EU regulations come dangerously close to failing an overall cost-benefit analysis. For every £1 of cost, EU regulations introduced since 1998 last year only delivered £1.02 of benefits.<sup>17</sup>

In combination with our other estimates, this ratio allows us to draw some conclusions:

- It is 2.5 times more cost effective to regulate domestically than via the EU level. The discrepancy is a clear argument in favour of keeping as much regulation as possible nationally or locally. It also reinforces the need to focus any regulatory reform agenda primarily at the EU level.
- As we noted before, the disproportionately high cost for EU regulation is not surprising, given the nature of EU law. Unlike national legislation, once an EU regulation is decided it is very much set in stone, even if it proves overly burdensome or inappropriate in light of evidence and experience. Changing an EU law requires the reopening and successful conclusion of negotiations with all 27 member states and the European Parliament – which is very hard to achieve (and a government may even lose concessions it previously has won). New and existing EU laws can therefore continue to generate heavy policy costs every year and still be left unaddressed.
- In addition, EU regulations – even when coming in the form of Directives – are one-size-fits-all solutions which cannot fully accommodate individual national circumstances. If not adjusted to the existing regulatory framework in a member state, EU laws can add a disproportionate – and unnecessary – burden.
- However, there are also clear benefits stemming from EU regulations and, overall, the benefits of being part of the EU's regulatory regime – and therefore the Single Market – still outweigh the costs on pure economic grounds. Some

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<sup>16</sup> As we noted last year, IAs display substantial inconsistencies in quality between different years and Government departments – particularly as pertains to quantification of benefits, something which many early IAs in particular were lacking. Therefore, we have only included IAs that quantify both costs and benefits in our overall ratio in order to compare like to like. Including *all* IAs produced since 1998 generated an overall benefit/cost ratio of £0.76, with the BCR of UK regulations being 1.18 and the BCR of EU regulations being 0.48. However, since around 75 percent of IAs did not quantify benefits, we chose to reject this ratio.

<sup>17</sup> This ratio comes with some caveats, however. First, it involves estimates produced over eleven years, during which time the methodology of IAs has changed. Secondly, IAs rarely quantify knock-on costs, which can be very high and far-reaching. At the same time, it's generally acknowledged that benefits are harder to quantify than direct costs. It's hard to say what a ratio would look like if these two aspects were properly accounted for.

regulations emanating from Brussels serve to free up markets, improve consumer protection, reduce costs and so forth.

- But there are also a large number of cases where the benefits of a piece of EU regulation are clearly outweighed by the costs. This is particularly true in certain policy areas, such as social policy which has inappropriately become part of the EU's Single Market jurisdiction. These are the areas where deregulatory efforts should be targeted.

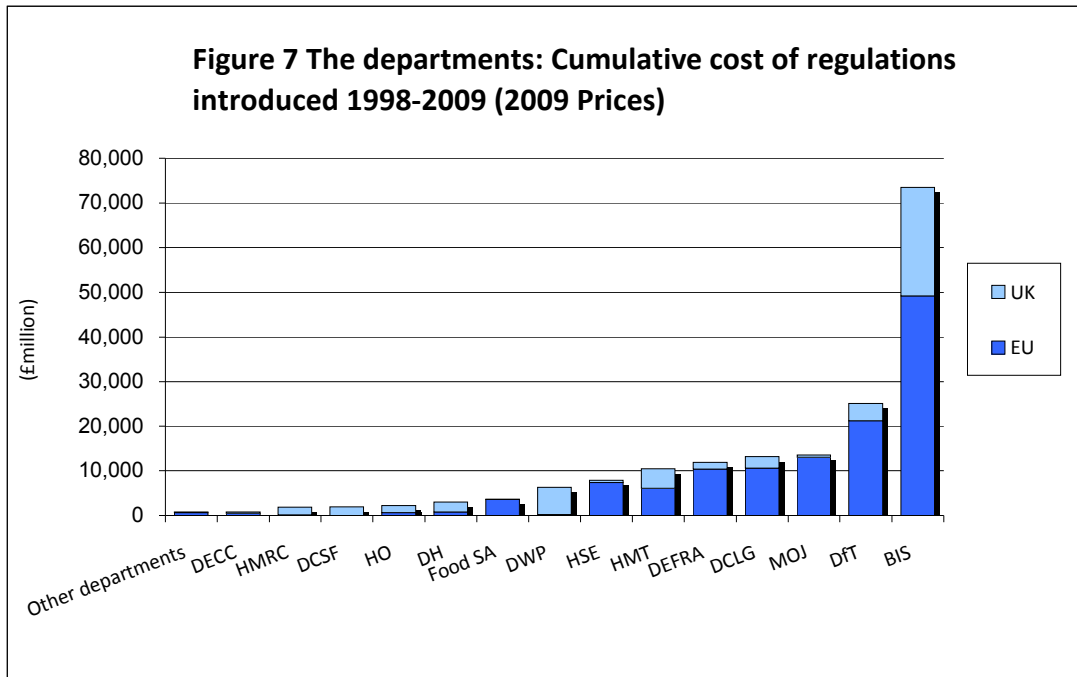
#### 1.4 THE COST OF REGULATION BY DEPARTMENT

In this section, we analyse how the regulatory cost is divided amongst UK Government departments.

**Table 2 Departmental break-down: cumulative cost of regulation 1998-2009 (2009 prices)**

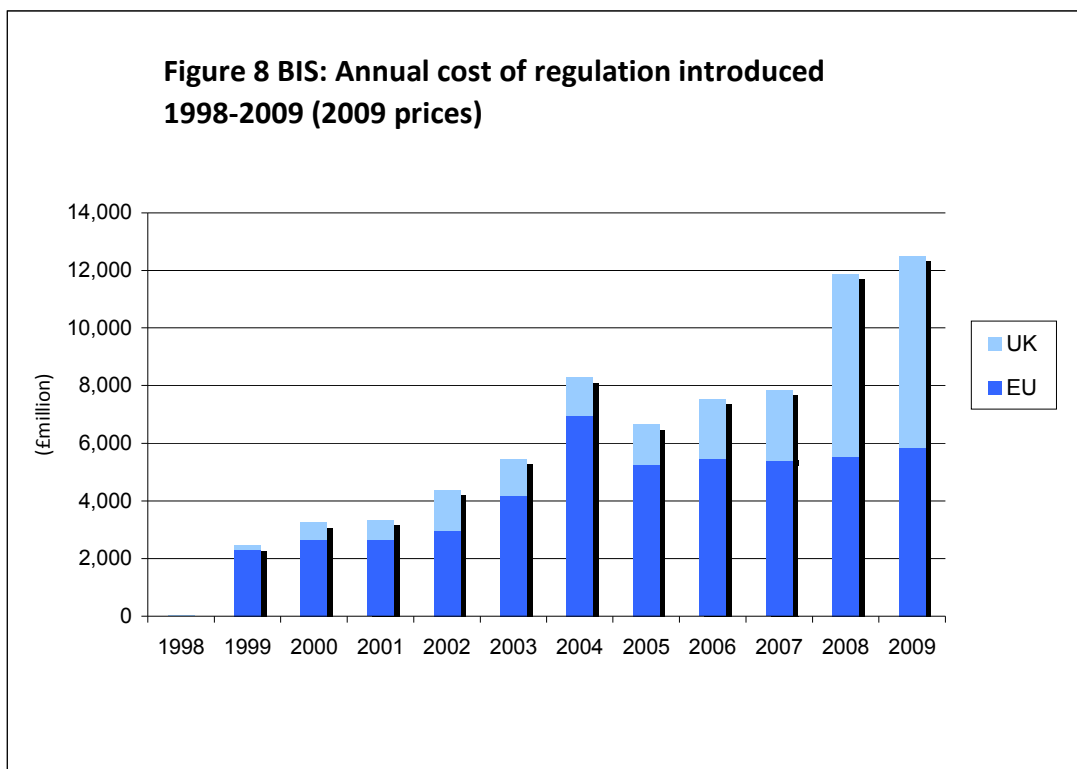
Department	Cumulative cost (£million)	Cost of domestic legislation (£million)	Cost of EU legislation (£million)	EU proportion of cost	Share of overall cost of regulation in the UK
BIS	73,511	24,313	49,198	67%	42%
DfT	25,073	3,885	21,189	85%	14%
MOJ	13,571	539	13,032	96%	8%
DCLG	13,184	2,609	10,575	80%	7%
DEFRA	11,864	1,463	10,401	88%	7%
HMT	10,458	4,386	6,072	58%	6%
HSE	7,856	485	7,372	94%	4%
DWP	6,291	6,095	196	3%	4%
HMRC	1,870	1,738	132	7%	1%
DH	2,988	2,226	762	26%	2%
Food SA	3,637	42	3,595	99%	2%
HO	2,235	1,599	636	28%	1%
DCSF	1,907	1,907	0	0%	1%
DECC	809	333	476	59%	0%
All Other Departments	764	155	609	80%	0%
<b>Total</b>	<b>176,017</b>	<b>51,774</b>	<b>124,243</b>	<b>71%</b>	<b>100%</b>

Source: Open Europe's Regulation Database



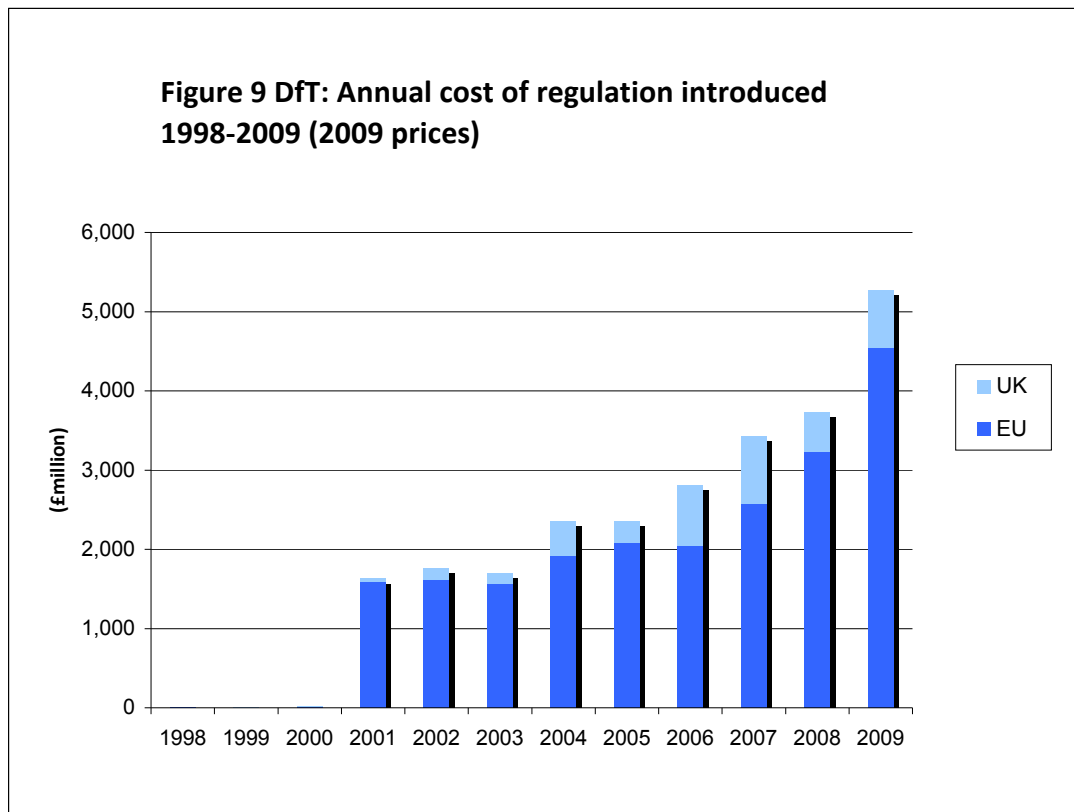
Source: Open Europe's Regulation Database

Among UK Government departments, the Department for Business, Innovation and Skills (BIS) is the main driver of regulation in the UK. It accounts for 42 percent of the cumulative cost of regulation, and has imposed a cost of £73.5 billion since 1998. About two thirds of this amount, £49.2 billion, stems from EU legislation. BIS facilitates regulations relating to many product standards and employment laws.



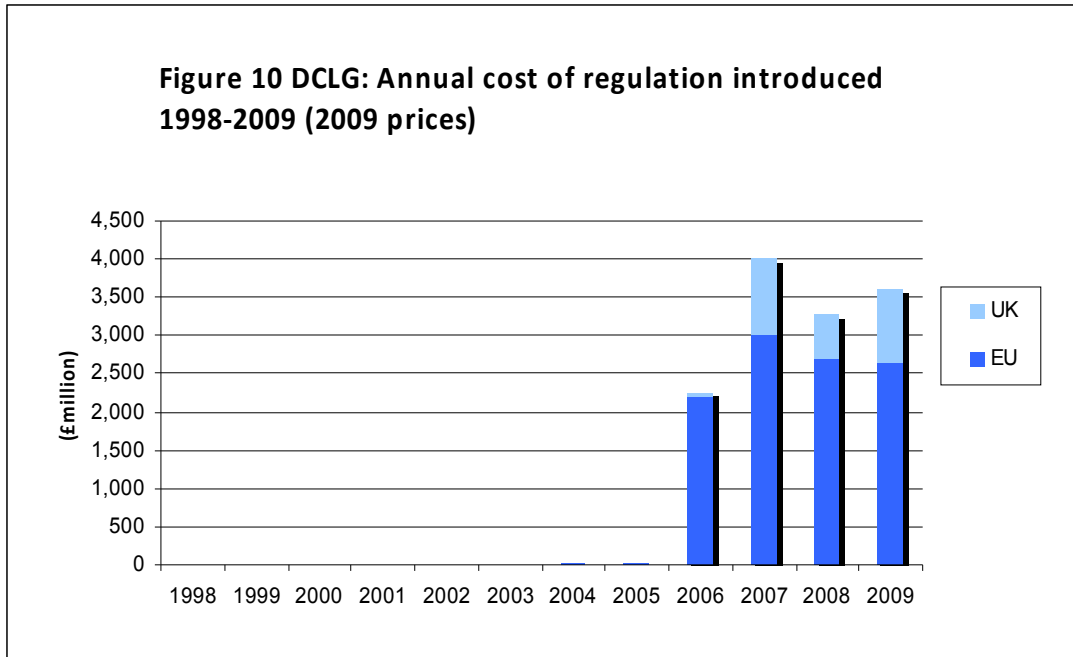
Source: Open Europe's Regulation Database

In second place is the Department for Transport (DfT), which is responsible for 14 percent of the total cost of regulation in the UK – £25 billion. Of this, a huge 85 percent, or £21.2 billion, comes from the EU.



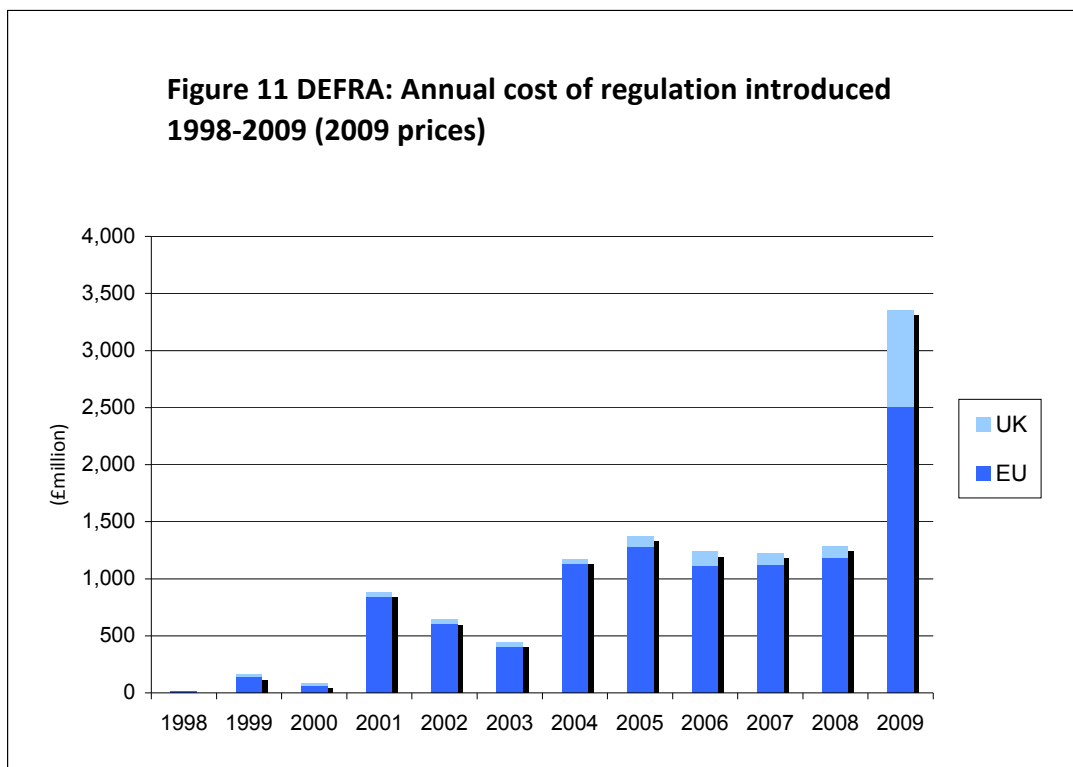
Source: Open Europe's Regulation Database

The Ministry of Justice (MOJ) is the third most expensive Government department. However, this can be considered an anomaly because the high proportion of EU cost is due solely to the EU's Data Protection Directive. After this, the next most expensive department is Communities and Local Government (DCLG), accounting for 7.5 percent – £13.2 billion – of the total cost of regulation, with 80 percent of that coming from the EU.



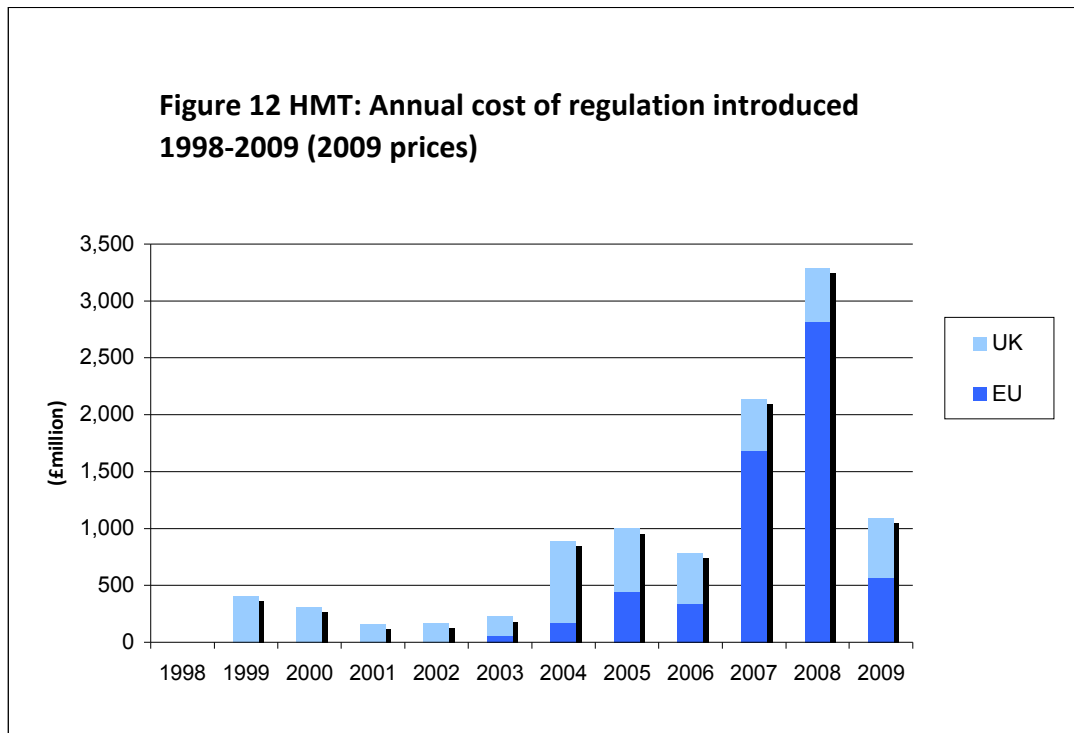
Source: Open Europe's Regulation Database

The Department for the Environment, Food and Rural Affairs (DEFRA) is the next most expensive department, with 6.7 percent – £11.9 billion – of regulation introduced between 1998-2009 coming from the department, and with 88 percent of that cost coming from the EU. The high cost in 2009 is explained by several environmental measures, such as the Fluorinated Greenhouse Gas Regulations 2009.



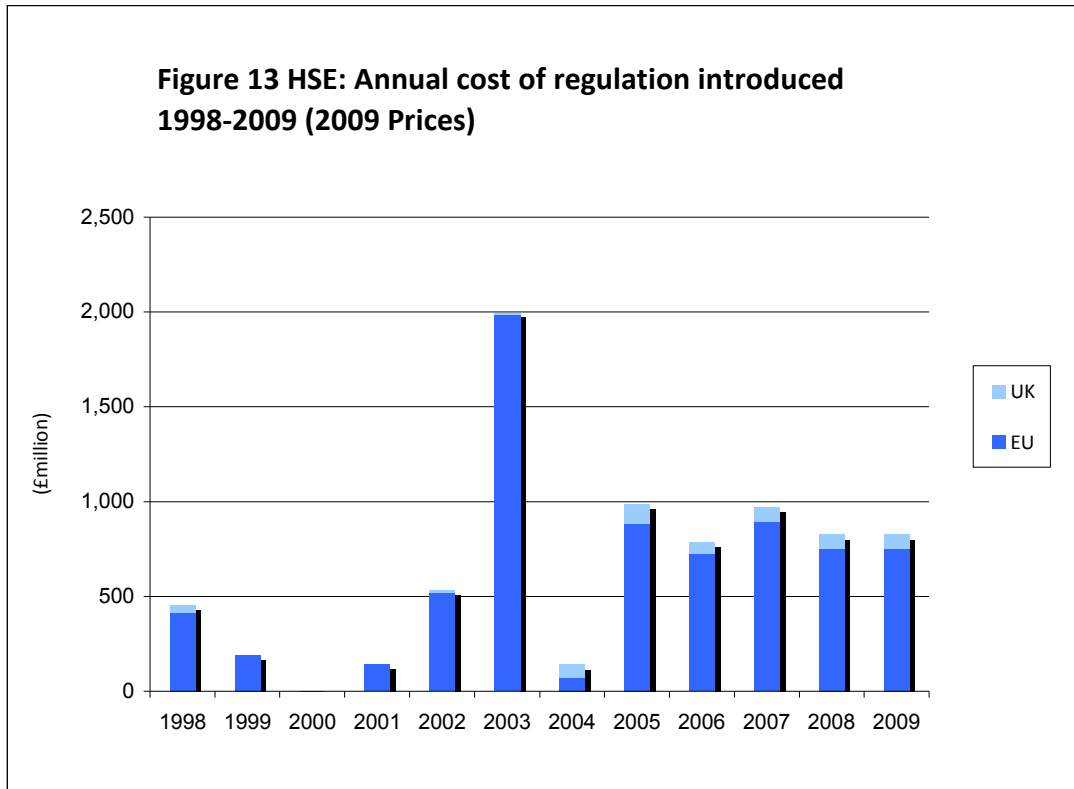
Source: Open Europe's Regulation Database

The Treasury's (HMT) cumulative cost of regulation introduced since 1998 is £10.5 billion, amounting to 6 percent of the total cost. The EU proportion – 58 percent – owes primarily to financial regulations such as the Markets in Financial Instruments Directive. The drop in the cost in 2009 is due to the fact that a series of regulations with high implementation costs were introduced in 2008, meaning that those costs were not felt in 2009.



Source: *Open Europe's Regulation Database*

The final most expensive department is the Health and Safety Executive (HSE). The cost of regulation introduced through the department between 1998 and 2009 is £7.9 billion, with 93.8 percent of that coming from the EU. Regulation from the department as a whole constitutes 4.5 percent of the cost of regulation during the time period we have examined. The peak in 2003 is explained by the introduction of the EU's Control of Asbestos at Work Regulations, the implementation costs for which the IA put at £1.4 billion.



Source: Open Europe's Regulation Database

## 1.5 EVIDENCE OF SYSTEMATIC GOLD-PLATING IS STILL MISSING

'Gold-plating' describes a situation where national governments add extra requirements to EU legislation, which in turn can increase regulatory burdens to business and others. This almost exclusively applies to EU Directives as these allow member states room for interpretation when implementing them into national law.

In this study, we have not measured the extent of gold-plating. A comprehensive study of the true role of gold-plating would require a comparison of a large number of Directives and their implementing laws in the UK. In addition, in order to capture possible over-implementation both in absolute and relative terms, it would require comparisons with the corresponding laws in other member states.

However, as we noted in our report last year, hard, robust evidence suggesting a widespread use of gold-plating of EU laws in the UK is still conspicuous by its absence.<sup>18</sup> We therefore remain unconvinced that it constitutes a primary source of regulatory cost in this country, although there are certainly cases where the practice has occurred and burden has been unnecessarily added in the transposition phase.

Indeed, the ECJ and the Commission continue to take measures against the UK for *under-implementing* EU laws – an additional two ECJ-rulings on the Working Time Directive (WTD) (bringing the total number of times the ECJ has extended the WTD to eight) and the EU's anti-discrimination laws are two examples in the last year where the UK has been accused of under-implementation. There have also been recent cases where the UK Government has done a better job implementing an EU law relative to other member states. Following the prospect of defeat in Parliament,

<sup>18</sup> For a review of the existing body of literature on the subject, see last year's report.

the Government scrapped plans for a central database for communications data<sup>19</sup> and implemented the Data Retention Directive in a significantly less onerous way than for example Germany and Sweden.

Looking ahead, an interesting case study of potential gold-plating is the Temporary Agency Workers Directive. The Institute of Directors (IoD) has argued that the Government is set to gold-plate the Directive, which in turn could have a negative impact on small businesses.<sup>20</sup> According to the IoD, correspondence from the European Commission made clear that the Directive, which sets out a number of additional rules for the employment of agency workers, should apply only to those companies that have formalised pay structures. This, the IoD argues, should exclude 90 percent of temporary staff at small businesses where pay is usually agreed on a one to one basis.

However, it is unclear whether excluding companies without formalised pay structures will stand the test of time in the ECJ. The history of the WTD would suggest otherwise.

It is therefore time for those who claim that gold-plating regulation, rather than the source of regulation, is the main problem to come forward and present some hard evidence.

In any case, national efforts should continue to guard against gold-plating, and recent initiatives by the UK Government to ensure light transposition (including specifying in IAs if the implementing law goes beyond the EU minimum requirement) are welcome. But this should not distract from the fact that addressing the real source of the cost – the regulation itself – must be the number one priority for the UK Government.

## **1.6 WOULD THESE LAWS EXIST IN THE ABSENCE OF THE EU?**

Some argue that the origin of regulation is irrelevant because member states would have introduced much of it anyway, regardless of their EU membership. In response to our report last year, Michael Connarty, the Chairman of the EU Scrutiny Committee in the House of Commons, claimed that “probably 90 percent” of all EU laws currently in force in the UK would have existed, even in the absence of the EU.<sup>21</sup>

There is certainly some truth in the notion that many EU regulations would have been put into place anyway. However, clearly some laws would not have existed. And crucially, while the broad framework of many EU laws may have existed in the UK anyway, a whole range of prescriptive requirements contained within these laws certainly would not have.

For example, the Temporary Agency Workers Directive, which affects the UK disproportionately because of the large number of agency workers compared to the EU average, would almost certainly not exist in its current form if the UK Government had a choice. The Government only dropped its long-standing opposition to the Directive in 2008 in exchange for a guarantee that the UK could maintain its opt-out from the EU’s 48-hour week – a ‘guarantee’ which it did not get.

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<sup>19</sup> See, *Independent*, ‘Ministers cancel ‘Big Brother’ database’, 10 November 2009, see <http://www.independent.co.uk/news/uk/politics/ministers-cancel-big-brother-database-1817708.html>

<sup>20</sup> The IoD has calculated that applying the Directive to all small businesses would cost them an “unnecessary” £1.2bn annually, given that the sector employs about 900,000 temps, cited in *Financial Times*, “Business warns on agency workers directive”, 23 July 2009

<sup>21</sup> Speaking on the *BBC Politics Show*, 1 February 2009.

It is therefore impossible to know the exact proportion, but 90 percent strikes us as an arbitrary and unfeasibly high figure.

And quite apart from the actual proportion, the source of regulation is vitally important both in terms of practically amending or changing it and in terms of political accountability. If we do not know the source of regulation, any attempt to de-regulate or hold policymakers to account will be short-lived.

The UK Government can choose to backtrack on a piece of domestic legislation or amend it, but EU-sourced legislation reduces the room for manoeuvre because of the difficulty of repealing or making substantial changes to it (see above). This is true for sitting and future governments alike. For example, the Conservatives have vowed to scrap the controversial Home Information Packs, but will come up against a law that is currently locked in at the EU-level.

In addition, at the EU level, national governments can be outvoted not just on an original proposal but also on later amendments. The European Court of Justice can use its jurisprudence to interpret Directives in a way that member states had not envisaged when they were first proposed and agreed.

Again, the Working Time Directive is a good example. Since its UK implementation in 1998, the ECJ has ruled eight times on the Directive, pushing up costs for businesses and the public sector. The 2000 SiMAP<sup>22</sup> and the 2003 Jaeger<sup>23</sup> rulings both added additional costs to the UK economy and caused operational difficulties for the National Health Service.<sup>24</sup>

In the SiMAP ruling the ECJ said that time spent resident on call in a hospital or other place of work should count as working time, even if the worker is asleep for some of that on-call time. The then Health Minister John Hutton said "it was certainly not within the intentions of the United Kingdom Government when we signed up for the Directive that time spent asleep would somehow magically count as time spent at work"<sup>25</sup>.

The ECJ is required to arbitrate on issues of EU law but examples such as this show that once member states have agreed to EU legislation they can become hostages to fortune. In addition, as with all policymaking, accountability and transparency are vital. The banking crisis taught us the importance of being able to hold regulators to account. But this is very difficult if we do not know from where the regulation stems or where the regulators sit.

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<sup>22</sup> Case C-303/98, Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998J0303:EN:HTML>

<sup>23</sup> Case C-151/02, Landeshauptstadt Kiel v Norbert Jaeger, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0151:EN:HTML>

<sup>24</sup> For an overview, see *Open Europe*, 'Time's Up! The case against the EU's 48 hour working week', March 2009, p21-9, see <http://www.openeurope.org.uk/research/wtdoptout2.pdf>

<sup>25</sup> *House of Lords EU Select Committee*, 'Ninth report', 30 March 2004, section 3.36, see <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/67/6706.htm>

# 2

## MOVING SLOWLY ALONG: THE UK'S BETTER REGULATION AGENDA

*"The real test for the regulatory reform agenda is the extent to which it delivers genuine and noticeable benefits for businesses" – The National Audit Office<sup>1</sup>*

The UK's 'Regulatory Reform Agenda', launched in 2005, is ambitious and shows that British policymakers are genuine in their efforts to scale down on regulation.

However, the overall cost of regulation keeps on going up in the UK. In 2009, the cost arising from regulations introduced since 1998 was £32.8 billion, compared to £28.7 billion in 2008 – an increase of 14 percent. At the same time, various polls indicate that businesses do not perceive a reduction in the overall cost and burden of regulation.

### 2.1 HIGHLIGHTS FROM THE PAST YEAR

#### i) Increased transparency

The UK Government has in the last year taken additional, positive steps to increase the transparency surrounding regulation. As noted above, in October last year, the UK Government published a total benefit/cost ratio of new regulations introduced in the financial year, enhancing accountability and transparency.<sup>26</sup>

Likewise, the Government's so-called "Forward Programme" will boost openness and help business and others to plan ahead.<sup>27</sup> Published for the first time in 2009, the programme details the planned changes to regulations. Helpfully, the programme also identifies whether the regulation has EU or domestic origins. This sourcing of legislation is something that Open Europe recommended in last year's report – and indeed is something which should be extended to the actual piece of legislation as well.

#### ii) New initiatives

Since last year, the UK Government has announced two initiatives that appear to target the problems arising from the flow and wider costs of regulations. First, the Government will aim to identify reductions of £5 billion over 2010-2015 in the policy

<sup>26</sup> HM Government, "The Total Benefit/Cost Ratio of New Regulations 2008-2009", 21 October 2009, see <http://www.berr.gov.uk/files/file53280.pdf>

<sup>27</sup> HM Government, "The UK's Regulatory Forward Programme", 15 October 2009, see <http://www.berr.gov.uk/files/file53203.pdf>

costs of existing regulations, which will extend the cost reduction programme beyond only the administrative burden. This is the right thinking.<sup>28</sup>

Secondly, the Government has set up what it calls a 'Regulatory Policy Committee' (RPC), an independent scrutiny body headed by Michael Gibbons, a former member of the high-level Stoiber group advising the European Commission on administrative burden reduction. The role of the RPC is to review Impact Assessments and ensure that the Government accurately assesses the costs and benefits of regulation.<sup>29</sup> Unfortunately, the Government has at the same time shelved plans for regulatory budgets, which would have obliged the Government to axe old regulations before it introduced new ones, in a "£1 in, £1 out" scheme.<sup>30</sup>

### iii) Impact Assessments are slowly improving

Since last year's report, we have reviewed an additional 320 Impact Assessments. Overall, the quality of IAs continues to improve, in terms of clarity and structure. However, some of the areas that we highlighted last year still leave room for improvement, including:

- The 'do nothing' option has not been recommended in a single IA we have come across since last year, which shows an unwillingness amongst policymakers to seriously consider alternatives to regulation.
- There is insufficient independent scrutiny of IAs, leading to a huge variety in the quality of IAs – as pointed out by the NAO and others.<sup>31</sup> The Government's decision to establish the RPC to ensure the high quality of IAs should therefore be welcomed.<sup>32</sup>
- Too many IAs are not subject to quantification. Of the 320 additional IAs we looked at in the last year, around 15 percent lacked quantified costs. Some departments were particularly bad, including the Health and Safety Executive and the Department for Culture, Media and Sport, which failed to quantify costs in 85 percent of cases.
- It is still not always clear that the cost of a regulation identified in an IA outweighs the benefits, but they are still being signed off by the relevant minister. For example, the Waste Batteries and Accumulators Regulations 2009, which partially implemented EU Directive 2006/66/EC, was signed off in April 2009, despite the IA showing that the costs clearly outweighed the benefits. Annual

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<sup>28</sup> For the period 2010-2015 the Government will also seek to achieve a further net reduction of £1.5bn in administrative burdens, on top of the £3.4bn that it says will be achieved between 2005 and 2010. *HM Government*, "The UK's Regulatory Forward Programme", 15 October 2009, see <http://www.berr.gov.uk/files/file53203.pdf>

<sup>29</sup> Having been set up in January 2010, the RPC in its first two months considered 73 public consultations issued by Government departments and agencies, of which 41 were regulatory, and issued three opinions on them (As of 2 March 2010). External scrutiny of IAs by an impartial body is indeed a very good idea, but we will have to wait to see whether the initiative bears fruit.

<sup>30</sup> Incidentally, Business Secretary Lord Mandelson said that the plans were shelved because, "There is clearly a need for new regulation in some areas now - such as climate change and financial services in response to the current banking crisis." This is curious because climate change legislation was already considered a no-go zone in the original plans and EU financial legislation accounts for less than 5 percent of the total cost of regulation. Quoted by the *Press Association*, 2 April 2009.

<sup>31</sup> *National Audit Office*, "Delivering High Quality Impact Assessments", 30 January 2009, see [http://www.nao.org.uk/publications/0809/high\\_quality\\_impact\\_assessment.aspx](http://www.nao.org.uk/publications/0809/high_quality_impact_assessment.aspx)

<sup>32</sup> As proposed in *HM Government*, "The UK's Regulatory Forward Programme", 15 October 2009, see <http://www.berr.gov.uk/files/file53203.pdf>

costs were estimated at anywhere from £10.2 million to £17.2 million, while the benefits were estimated to be between £2.1 million to £2.8 million.<sup>33</sup>

- There is still no proper ‘audit-trail’ for regulatory proposals and their corresponding IAs, making it difficult to keep up with new regulations. The Government’s Impact Assessment Library – while welcome – still doesn’t contain all the IAs and is not up to date. Individual departments need to be more disciplined in uploading their assessments as soon as they are ready to be published.
- Additionally, there are occasionally discrepancies between IAs uploaded onto the Impact Assessment Library, and those on the website of the Office of Public Sector Information (OPSI).<sup>34</sup>This lack of consistency in the Impact Assessment Library highlights the need for a more ‘joined-up’ approach to IAs across Government.<sup>35</sup>

## 2.2 WHERE IS THERE STILL ROOM FOR IMPROVEMENT?

### i) IAs still do not impact on EU regulations

An early, well-targeted IA can be a powerful bargaining tool in EU negotiations as they can strengthen the UK’s negotiation position by providing evidence and illustrating the importance of the issue for the economy and voters at home (see below). However, one of the main problems we highlighted in last year’s report was the failure of UK IAs to make a real impact on regulations negotiated and agreed in Brussels – which is in large part due to poor timing and targeting.

Unfortunately, this problem appears to have become even worse in the last year, with several significant EU proposals virtually overlooked in the IA process.

For example, a key EU proposal tabled in April 2009 – known as the AIFM Directive – to regulate the alternative investment industry, such as hedge funds, private equity firms and investment trusts, still awaits a formal IA. This Directive is of particular importance to the City of London and the UK economy.<sup>36</sup> Despite this, however, the Treasury said that it would not produce an IA due to the “foreshortened time scale” of the negotiations – although the Financial Services Authority commissioned one separately.<sup>37</sup> The Treasury’s thinking is peculiar as negotiations are still ongoing. And after all, Open Europe managed to produce an assessment of the impact – including quantified cost figures – of the proposed Directive in less than three months.

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<sup>33</sup> OPSI, “Explanatory Memorandum to The Waste Batteries and Accumulators Regulations 2009”, [http://www.opsi.gov.uk/si/si2009/em/uksiem\\_20090890\\_en.pdf](http://www.opsi.gov.uk/si/si2009/em/uksiem_20090890_en.pdf)

<sup>34</sup> For example, in the case of The Nitrate Pollution Prevention Regulations 2009 there are differences in the cost and benefit estimates for the IA in the two different locations. OPSI’s IA quantifies the expected net benefit range as £-381 million to £-980.8 million. However, the IA uploaded to the Impact Assessment Library quantifies the expected net benefit range as £-132.9 million to £-670.4 million.

<sup>35</sup> Tony Blair commissioned a report by the Cabinet Office’s Performance and Innovation unit to look into what could be done to help remove the barriers which held up the ‘joining up’ between Whitehall departments on issues which cut across traditional remits. See, *Cabinet Office*, “Wiring it up”, Executive Summary, January 2000

<sup>36</sup> For example, around 80 percent of all hedge fund managers are based in the UK, while investment trusts are almost exclusively established there. For more on the AIFM Directive, see *Open Europe*, “The AIFM Directive: Likely impact and best way forward”, 21 September 2009, see <http://www.openeurope.org.uk/research/aifmd.pdf>

<sup>37</sup> In response to an FOI request put down by Open Europe, the Treasury confirmed that, “because of the foreshortened time scale on which the directive is being negotiated, we will not be publishing a formal impact assessment.” See *HM Treasury*, FOI response from, Ref 9/411, 24 July 2009

What is more, it is precisely because of the foreshortened time period – and the risk of a rushed and poorly drafted proposal – that producing an IA is absolutely vital.

A similar example, but in a different industry, is a proposal put forth by the Commission in May 2008, proposing to amend an EU regulation defining the conditions which must be met by fresh, frozen and quick-frozen poultrymeat.<sup>38</sup> The UK Government had raised concerns over extending the requirements to prohibit the sale of fresh or chilled products that previously had been frozen, arguing that the proposal would ban a safe, profitable business practice, antagonise trading partners and cost the UK industry in excess of £160 million.<sup>39</sup>

Despite the UK accounting for 66 percent of the EU's total market in these products, the Government did not produce an IA until after the proposal had been agreed at the EU-level in 2009. Also, the Commission failed to produce a European Impact Assessment. In December 2009, the Commons EU Scrutiny Committee concluded,

“The history of this proposal is not a happy one, in that the Commission's proposal – which clearly has a major impact on the UK – was not accompanied by an Impact Assessment, and then appears to have been steamrolled through the Council.”<sup>40</sup>

There is clearly a big problem when the Government fails to produce targeted and well-timed IAs for proposals with such importance for the UK economy.

## ii) The Government's savings don't add up

The Government continues to claim that it makes savings in the overall administrative burden for businesses through its Administrative Burden Reduction Programme (ABRP), aimed at cutting the cost to companies of complying with the administrative burden of regulations.<sup>41</sup>

However, like last year, there is a mismatch between the UK Government's claimed savings in the administrative burden and the overall increase in the cost of regulation. In other words, the *net* administrative burden is going down according to one set of Government figures<sup>42</sup> (the ABRP estimates), while the total cost of regulation is going up according to another set of Government figures (aggregated costs extracted from IAs). Administrative burdens are only one part of regulatory costs, relating to reporting and information requirements, and represent a small part of the total overall regulatory costs on business and the public sector.

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<sup>38</sup> *European Parliament*, “Proposal for a Council Regulation amending Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets as regards the marketing standards for poultrymeat”, 28 May 2008, see

<http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=en&procnum=CNS/2008/0108>

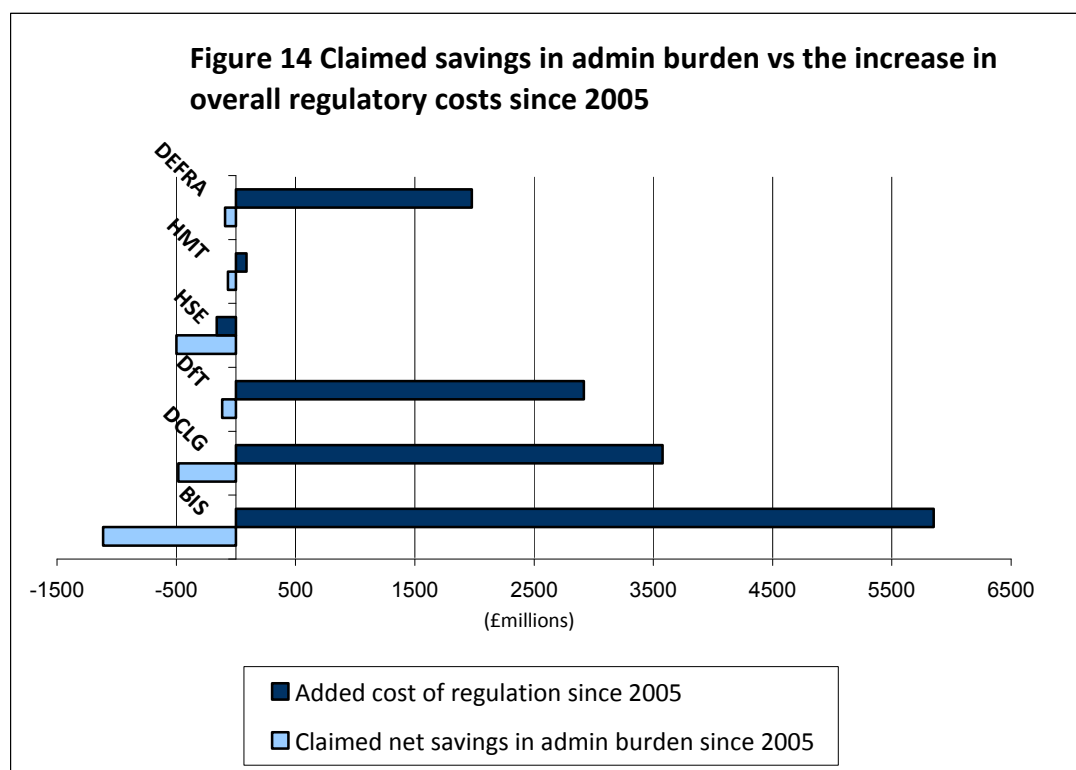
<sup>39</sup> Brief for members of the European Scrutiny Committee, 14 December 2009

<sup>40</sup> *United Kingdom Parliament*, “Marketing standards for poultry meat”, ESC reference 29727, 15 December 2009, see <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmeuleg/5-iv/5iv12.htm>

<sup>41</sup> In its latest estimates, the Government claims to have cut £2.93 billion off the net administrative burden for businesses since 2005. Before the end of 2010, it aims to cut an additional £300-400 million, which will represent a 25 percent reduction against its 2005 baseline figure (which was estimated at £13.1 billion). See *HM Government*, “Summary of Simplification Plans”, <http://www.berr.gov.uk/files/file54013.pdf>

<sup>42</sup> This estimate is a net figure calculated by measuring the gross savings arising from a reduction in the administrative burden and netting these off against the administrative costs of new regulations.

The graph below illustrates the discrepancy between the Government's claimed savings on admin costs, and the rising cost of regulation since 2005. This discrepancy clearly undermines the credibility of the entire ABRP – or at least the Government's assessment of its impact.



Source: Department for Business; Open Europe's Regulation Database

This inconsistency is reinforced by business perceptions of regulation. As the NAO argued last year, "The real test for the Programme is its success in delivering genuine and noticeable benefits for business".<sup>43</sup>

Crucially, according to an NAO survey published in October 2009, business perceptions of regulation remained at the same level in 2009 as in 2008 – despite the Government's claimed savings. Only three percent of business believed that complying with regulation had become easier in the last 12 months, 30 percent stated it had become more difficult, whereas 65 percent stated it had stayed about the same.<sup>44</sup>

As Amyas Morse, head of the NAO, noted,

*"There is always a difference between perception and reality but our testing shows that almost no businesses think that complying with regulation has become easier or less time consuming in the last year. The majority think that*

<sup>43</sup> National Audit Office, "Complying with Regulation: Business Perceptions Survey 2009", October 2009, p. 5, see <http://www.nao.org.uk/idoc.ashx?docId=dc946588-a5aa-476a-b3bd-de7286f48ef3&version=-1>

<sup>44</sup> Similarly, one percent of businesses believed that complying with regulation had become less time consuming in 2009, against 37 percent who said that complying with regulation took longer and 60 percent who said that it had stayed the same. National Audit Office, "Complying with Regulation: Business Perceptions Survey 2009", October 2009, p. 18, see <http://www.nao.org.uk/idoc.ashx?docId=dc946588-a5aa-476a-b3bd-de7286f48ef3&version=-1>

*things have remained the same and over a third think that the burden of regulation has got worse.*<sup>45</sup>

Similarly, a survey of 6,000 members of the Forum for Private Business organisation in June 2009 found that only 5 percent of respondents thought that the current regulatory framework was beneficial to their businesses.<sup>46</sup>

What explains this discrepancy? The NAO echoes two conclusions from last year's Open Europe report. First, businesses still perceive the flow of new regulation to be adding burdens every year, meaning that the cost of complying with new rules outweighs the impact of any reductions in the administrative burden.<sup>47</sup>

Secondly, the ABRP relates to only one aspect of the total cost of regulation – the administrative – and so a reduction in this alone may not be enough to make a tangible difference to business.

### **iii) The flow of EU regulation is not being addressed**

The conclusion must be that while improvements are being made, the Government's initiatives are not striking deep enough to have a significant impact on the overall regulatory environment. New, unnecessarily costly regulations are being introduced every year. Although the domestic regulatory machine certainly should not be let off the hook, our figures clearly show that the flow of regulation is driven primarily by laws emanating in Brussels – although we are encouraged by signs that the EU proportion of the flow is going down.

The unfavourable benefit/cost ratio for EU regulations compared to those that are domestically derived give a clear indication of where the main focus of a regulatory reform agenda should be. The Treasury noted in 2008 that "The flow of regulation is heavily dependent on the flow of legislation originating in the EU."<sup>48</sup>

Moreover, reducing the administrative burden is all very well, but it will not achieve much if the underlying problem is a poorly drafted or overly burdensome regulation (see section 1.5). This is particularly pertinent for EU legislation, due to the difficulties involved in changing it. Getting European laws right the first time around is therefore absolutely imperative – which yet again reinforces the importance of putting strong filters in place to control the flow of EU regulation.

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<sup>45</sup> *National Audit Office*, Press release, 22 October 2009, see

[http://www.nao.org.uk/publications/0809/complying\\_with\\_regulation.aspx](http://www.nao.org.uk/publications/0809/complying_with_regulation.aspx)

<sup>46</sup> *Forum of Private Business*, "The cost of complying with regulation", Referendum 188, July 2009

<sup>47</sup> The NAO survey showed that ninety six percent of businesses believe that 'having to keep up to date with the introduction of new regulation' has become more time consuming or stayed the same over the last 12 months.

<sup>48</sup> *HM Treasury*, "Enterprise: Unlocking the UK's talent", 12 March 2008, p. 65, see [http://www.hm-treasury.gov.uk/bud\\_bud08\\_enterprise.htm](http://www.hm-treasury.gov.uk/bud_bud08_enterprise.htm)

# 3

## WOULD A CONSERVATIVE GOVERNMENT DO BETTER?

The Conservative party has announced a series of regulatory reforms to be implemented if the party wins the next general election in the UK. The party's reform agenda aims to take a "post-bureaucratic approach to regulation" and will focus on cutting the cost of existing regulation, curbing the cost of new regulation, as well as targeting enforcement and the regulators themselves.<sup>49</sup>

### 3.1 WHAT HAPPENED TO THE EU-DIMENSION?

The Conservatives' plans contain a number of initiatives which are innovative and which could have a real impact on the ground.<sup>50</sup> However, the Conservatives have so far chosen to focus their deregulation efforts almost entirely on the domestic level – on paper arguably even more so than the current Government. The lack of EU focus is problematic for several reasons.

Firstly, it puts the deliverability of some of the party's key proposals into question. The evidence clearly shows that EU legislation is the main driver of regulatory cost in the UK, and so the realisation of some of the Conservatives' reform proposals are dependent on the flow of EU regulation and need to be presented and addressed accordingly.

Secondly, as we noted last year, ignoring the impact of EU legislation leads to unrealistic expectations of delivery. This, in turn, could undermine the credibility and legitimacy of the entire reform agenda in the long-term.

Thirdly, it can lead to the Government and business wasting resources on deregulation initiatives – such as scrapping a specific requirement – which are undeliverable because a piece of regulation deemed overly burdensome is locked in at the EU-level anyway.

In addition, the Conservative party has been – rightly – a critic of 'EU overregulation' in the past. In a speech in May 2009, launching the party's European election campaign, David Cameron said: "Our next task is to fight the EU's culture of

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<sup>49</sup> *Conservatives*, "Regulation in the post-bureaucratic age", October 2009, see <http://www.conservatives.com/~media/Files/Policy%20Documents/BetterRegulation.ashx?dl=true>

<sup>50</sup> For example, a sunset clause for quangos, requiring a review of them every seven years; proposals for how to make the regulatory inspection and enforcement process more consistent and better targeted; and proposals for strengthening the ability of the public and Parliament to hold regulators to account.

centralisation and over-regulation. Brussels can be a force for economic dynamism - but too often it acts like an economic millstone.”<sup>51</sup>

Starting off with a series of regulatory reform proposals which barely mention the EU gives the impression that the party is dodging the question – which again has implications for credibility.

### 3.2 WILL ‘ONE-IN – ONE-OUT’ WORK?

The Conservatives’ flagship proposal is a more radical version of the Government’s shelved regulatory budgets. Under the Conservatives’ proposal, before any new law can be passed regulators would have to cut old laws which, together with the new law, produce a net reduction of 5 percent in the overall regulatory burden imposed by the Government department.<sup>52</sup>

Similar to regulatory budgets, this proposal has on paper the potential to curb the flow of regulation, and force policy-makers to prioritise between different initiatives in a similar manner to conventional budgetary policies. By proposing a series of rolling cuts, the plan is actually far more radical than the Government’s existing vision for regulatory budgets, which only proposes to maintain the status quo. Indeed, the Conservative’s plan would be a world first. Provided that the methodological challenges involved in this exercise can be solved<sup>53</sup>, the proposal should in principle be applauded.

However, the Conservatives have made no mention of how to take account of the large number of new and often costly EU regulations introduced each year. The Conservative proposals simply state that,

“This will help to instil the necessary culture change at the heart of Whitehall, Westminster, British representatives in Brussels and regulators too, since deregulatory thinking will become an essential part of creating and piloting any new law, EU Directive or regulation in force in the future.”<sup>54</sup>

Our figures show that only 28 percent of the cost of regulation on average is UK-derived on an annual basis, meaning that a UK Government would only control 28 percent of any ‘one-in – one-out’ scheme or regulatory budget (although changing methodology to take into account only the cost to business could alter these figures).

As a point of comparison, imagine the Conservatives taking office with a series of proposals for how to get the country’s public finances in order, but only having full control of 28 percent of the actual budget. Would such proposals be credible?

This high proportion becomes even more problematic when considering that the proposals envision continuous 5 percent net reductions in the regulatory burden, because so many laws are locked in at the EU-level.

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<sup>51</sup> David Cameron, “European Election Campaign Launch”, May 18 2009, see [http://www.conservatives.com/News/Speeches/2009/05/David\\_Cameron\\_European\\_Election\\_Campaign\\_Launch.aspx](http://www.conservatives.com/News/Speeches/2009/05/David_Cameron_European_Election_Campaign_Launch.aspx)

<sup>52</sup> It’s not exactly clear which regulatory costs the scheme is supposed to take account of, but one can assume that it will include both the administrative burden and the policy costs of regulation.

<sup>53</sup> For a discussion on the methodological challenges involved in regulatory budgets and related initiatives, see *Open Europe*, “Out of Control? Measuring a decade of EU regulation”, 1 February 2009, p. 40

<sup>54</sup> *Conservatives*, “Regulation in the post-bureaucratic age”, October 2009, p. 15, see <http://www.conservatives.com/~media/Files/Policy%20Documents/BetterRegulation.ashx?dl=true>

**Table 3 Departments with highest proportion of EU regulation in 2009**

Department	Proportion of the regulatory cost stemming from EU legislation in 2009
Food SA	99%
HSE	91%
DfT	86%
DEFRA	75%
DCLG	74%

*Source: Open Europe's Regulation Database*

What is worse, for some departments the share of the total cost of regulation coming from the EU can be as high as 86, 91 or even 99 percent, leaving the Government with virtually no room to enact its own legislation should it want to.

Here there are plenty of lessons to be learned from the past. In 2006, for example, new EU rules for food and feed hygiene more than doubled the Food Standards Agency's administrative burden from £91 million to £205 million. This, in turn, gave the Agency a net saving of minus 75 percent overnight (at which it still stands) in the Government's ABRP.<sup>55</sup>

The Conservatives should therefore make it a matter of priority to come up with ideas for how their proposed scheme would tap into the EU decision-making process. We set out some proposals for how this can be achieved in our recommendations section below.

### **3.3 IGNORING THE EU-DIMENSION CAN LEAD TO CONTRADICTIONARY POLICIES**

A similar reasoning applies to the Conservatives' proposal for "reviewing and, if necessary, modernising the 30 worst failures in regulations and red tape each year". Under this proposal, if the Government doesn't take further action, the 30 worst regulations will be scrapped, based on Impact Assessments and feedback from the public and businesses.<sup>56</sup> These are bold and radical proposals which are trying to achieve the right thing: bring more ownership over regulation back to the people who are actually affected by it.

However, some of the nominated regulations – if not a majority – are bound to be rooted in EU legislation. Will a Conservative government promise to seek re-negotiation in Brussels? For example the IA for the Waste Electric and Electronic Equipment (WEEE) Directive estimates the present value of the net cost from 2007-2017 to be between £1.9 and £2.2bn. Would this Directive be enough to prompt a Conservative government to seek a renegotiation at the EU level?

Similarly, the proposal for a 'Star Chamber' cabinet sub-committee to sign off on all new regulatory proposals is a very good idea.<sup>57</sup> But what happens if the Star

<sup>55</sup> *HM Government*, "Summary of Simplification Plans 2009", December 2009, see <http://www.berr.gov.uk/files/file54013.pdf>

<sup>56</sup> The selection would be made by business groups and the public, each nominating the ten "most hated" laws or regulations. The remaining ten would be selected by identifying the regulations which show the biggest discrepancy between cost and benefits in their respective IAs.

<sup>57</sup> According to the Conservatives' plan, all proposals would have to receive the prior approval of the 'Star Chamber' and would also "apply to British negotiations on draft EU directives in Brussels, and will prevent gold plating of the laws which are created later, when an agreed directive is translated into UK

Chamber refuses to approve a draft directive and the UK Government is then outvoted or out-negotiated in Brussels and is forced to accept the directive anyway? Will the Star Chamber require re-negotiation or simply let the regulation slip through?

The Conservatives' focus on the domestic level also leads to contradictory policy proposals. For example, the proposal for Annual Introduction Dates – establishing a single date when all new regulations in one year come in to force – could conflict with the proposal to wait to implement a European Directive until a majority of member states have implemented it first.

To illustrate: the UK Government has committed itself to delay implementation of the Temporary Agency Workers Directive until the latest possible date – October 2011 – to reduce the burden on business, but what if the Conservatives' annual introduction date was in April. Would they commit to introducing an expensive piece of regulation before the latest possible date?

Even the Conservatives' proposal to review and possibly scrap some existing quangos could run into problems with the EU dimension. For example, Regional Development Agencies are responsible for distributing the EU's structural funds.

All of this does not imply that the Conservatives' proposals are in themselves without merit. On the contrary. However, it does mean that the party must seriously begin to consider how to incorporate the EU-dimension into their reform agenda – or they risk facing considerable backlashes from businesses, the public and from their own ranks when some of their key proposals turn out to be undeliverable.

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law by Parliament.” See *Conservatives*, “Regulation in the post-bureaucratic age”, October 2009, p. 15, see <http://www.conservatives.com/~media/Files/Policy%20Documents/BetterRegulation.ashx?dl=true>

# 4

## EU REGULATION: THE STRUGGLE FOR CULTURAL CHANGE

*“Given the role of the EU in regulating and enforcing the rules of the Single Market, much of the responsibility for reducing burdens is at the European level” – UK Government<sup>58</sup>*

*“There are 27 commissioners, which means 27 directorate-generals. And 27 directorate-generals means that everyone needs to prove that they are needed by constantly producing new directives, strategies or projects. In any case, the rule is: More and more, more and more, all the time.” – Former EU Industry Commissioner Günther Verheugen<sup>59</sup>*

The Commission and the member states are pursuing some worthwhile regulatory reforms aimed at cutting and improving regulation. However, the economic downturn has added new pressures for swift EU-action, which in turn has exacerbated the risk of poorly thought through and overly burdensome regulations slipping through the decision-making process.

In its 2009 report, the European Commission’s Impact Assessment Board made this exact point, noting that the financial crisis has compromised the standard to which the impact, including economic, of new proposals is being assessed:

*“Six impact assessments carried out in 2009 were linked to the Commission’s response to the financial crisis and were prepared under extremely tight deadlines. The short preparation times made it difficult to respect entirely the Impact Assessment Guidelines and had an impact on the quality of the impact assessment reports submitted to the Board.”<sup>60</sup>*

On the whole, as we noted last year, the Commission’s Better Regulation Agenda is still characterised by far too much tinkering at the margins.

### 4.1 HIGHLIGHTS FROM THE PAST YEAR

#### i) The Better Regulation Agenda is still alive

Last year we raised the concern that the Better Regulation Agenda would not survive the retirement of EU Industry and Enterprise Commissioner Günter Verheugen, who made better regulation a personal mission during his last five year tenure in the

<sup>58</sup> *HM Government*, “EU compact for jobs and growth”, January 2010, p.26, see <http://www.cabinetoffice.gov.uk/media/329788/compact-jobs-growth.pdf>

<sup>59</sup> *Spiegel*, 9 February 2010, “The EU has no vision of where we are heading”, see <http://www.spiegel.de/international/europe/0,1518,676784,00.html>

<sup>60</sup> *European Commission*, “Impact Assessment Board Report for 2009”, 29 January 2010, p11, (emphasis in original); [http://ec.europa.eu/governance/impact/iab/docs/sec\\_2009\\_1728\\_en.pdf](http://ec.europa.eu/governance/impact/iab/docs/sec_2009_1728_en.pdf)

Commission. However, Commission President Jose Manuel Barroso last year announced that he would take personal control of the EU's Better Regulation Agenda, pledging to make 'smart regulation' a *leitmotif* of his second term.<sup>61</sup>

To what extent the programme will deliver real results under Barroso's watch remains to be seen, but the fact that better regulation remains a priority for the next Commission should nonetheless be welcomed.

Since last year's report, the Commission has published its "Third Strategic Review of Better Regulation in the EU", detailing some welcome progress in the EU's attempts to cut red tape. In particular, the Commission has announced that reviewing and developing a common approach to impact assessments in both the European Parliament and the Council of Ministers should be a "priority".<sup>62</sup>

This commitment should be commended but it has to be followed through with concrete action towards the systematic use of sound evidence in justifying substantial amendments to legislation by either MEPs or national ministers.

## ii) The Small Business Act for Europe

In June 2008 the European Commission published its "Small Business Act for Europe", which commits the Commission to take special consideration of small businesses when proposing legislation.<sup>63</sup>

It has also led to concrete legislative proposals which could serve to help small businesses across the EU, including a Directive allowing members states to offer reduced VAT rates for sectors such as hairdressing and catering; a Directive aimed at combating late payments, allowing companies to claim compensation for debt recovery costs incurred; and a regulation that will make it easier for small firms to get extra government funding.<sup>64</sup>

## iii) The Stoiber Group

The EU's High Level Group (HLG) on Administrative Burdens, also known as the Stoiber group, has published its second report detailing its rolling efforts in simplification of EU legislation. The group was established in 2007 in order to advise the Commission on how best to cut red tape.

In its report, the Stoiber Group said that it had identified 250 suggestions for simplification measures and reducing the admin burden, which could produce up to €40bn in annual savings.<sup>65</sup>

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<sup>61</sup> See, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/400&format=HTML&aged=0&language=EN&guiLanguage=en>

<sup>62</sup> *European Commission*, 'Third strategic review of Better Regulation in the European Union', 28 January 2009, p8;

[http://ec.europa.eu/governance/better\\_regulation/documents/com\\_2009\\_0015\\_en.pdf](http://ec.europa.eu/governance/better_regulation/documents/com_2009_0015_en.pdf)

<sup>63</sup> See *European Commission* website; <http://ec.europa.eu/enterprise/policies/sme/small-business-act/>

<sup>64</sup> For an overview, see *British Chambers of Commerce*, "EU small business act policy brief", November 2009

<sup>65</sup> Two of the measures that present potential for savings, regulations on e-invoicing and exempting micro-enterprises from EU accounting directives, have been formally presented as simplification proposals and now await action from the Council and European Parliament. *European Commission*, "Intermediate Report of the High Level Group of Independent Stakeholders on Administrative Burdens", 17 September 2009, p.4, see [http://ec.europa.eu/enterprise/policies/better-regulation/files/180909\\_hlg\\_ab\\_intermediate\\_report\\_incl\\_annexes\\_en.pdf](http://ec.europa.eu/enterprise/policies/better-regulation/files/180909_hlg_ab_intermediate_report_incl_annexes_en.pdf)

The HLG's expertise and relative independence from the Commission makes it a valuable tool, which is reflected in its results based approach and the tone adopted in its reports. This year's report stated that the HLG would not "cease to underline the message that the reduction of administrative burden is very important to improve the situation of European businesses and to increase the trust in European politics." It also added that, "Concrete actions are needed, not lip service."

To ensure that the current commitment to Better Regulation does not dwindle, the HLG should become a permanent fixture. It should have a 'value for money' clause written into its mandate to ensure that it continues to generate benefits.

#### **iv) The Impact Assessment Board**

The EU's Impact Assessment Board (IAB), set up in November 2006, has a mandate to improve the quality of EIAs and advise the Commission departments which write them how they can be improved. The IAB issues opinions on the quality of draft impact assessments themselves, rather than the legislative proposal they are assessing.

Since it was set up, the IAB has often been a voice of reason. In 2009, the IAB requested that 38 percent (30 from 79) of the Commission's EIAs be resubmitted, as they were not of sufficient quality.<sup>66</sup>

However, on several occasions, IAB opinions on resubmitted EIAs complained that the EIA was still failing to address concerns raised in the first IAB opinion.<sup>67</sup> Worryingly, in 43 percent of cases where a resubmission was required, the IAB was concerned about the quality of subsidiarity and proportionality analysis – showing that EIAs are failing to properly consider that action at the EU level might not be the most appropriate option.<sup>68</sup> This is a serious shortcoming.

However, the IAB's lack of a mandate to block a proposal's progress due to a poor quality impact assessment<sup>69</sup> means that its power is quite limited, as the Commission can simply ignore it. An IAB with the power to veto proposals accompanied by a sub-standard impact assessment would create a much higher threshold over which new regulation would have to pass.

## **4.2 WHERE IS THERE ROOM FOR IMPROVEMENT?**

### **i) EU 'cultural change' is moving too slowly**

Despite some good initiatives under the Better Regulation Agenda, the cultural change that Günter Verheugen called for in Brussels struggles to make progress. In an interview with *Der Spiegel* on his retirement from EU service, Commissioner Verheugen said:

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<sup>66</sup> The IAB can ask for a resubmission on occasions "where there are serious concerns with the fundamental elements" of the original EIA.

<sup>67</sup> For example the IAB opinion on a resubmitted proposal on financing of aviation security notes that the EIA has still failed to justify why action at the EU-level is necessary.

<sup>68</sup> *European Commission*, "Impact Assessment Board Report for 2009", 29 January 2010, p8, see [http://ec.europa.eu/governance/impact/iab/docs/sec\\_2009\\_1728\\_en.pdf](http://ec.europa.eu/governance/impact/iab/docs/sec_2009_1728_en.pdf)

<sup>69</sup> See *European Commission*, "Impact Assessment Board Report for 2009", 29 January 2010, p19, see [http://ec.europa.eu/governance/impact/iab/docs/sec\\_2009\\_1728\\_en.pdf](http://ec.europa.eu/governance/impact/iab/docs/sec_2009_1728_en.pdf)

*“There are 27 commissioners, which means 27 directorate-generals. And 27 directorate-generals means that everyone needs to prove that they are needed by constantly producing new directives, strategies or projects. In any case, the rule is: More and more, more and more, all the time.”<sup>70</sup>*

This is evidenced by a continuing failure to adhere to the subsidiarity principle at the EU level. As Günter Verheugen said in an interview with German business weekly *Wirtschaftswoche*:

*“In practice, member states don’t defend the subsidiarity principle nearly enough. I am frustrated at how quickly subsidiarity is forgotten when the Commission beckons with money. The Commission cannot be the only defender of subsidiarity, it has another perspective and other interests. I worry that most governments don’t worry enough about how the Commission thinks and how it operates. One can’t leave the Commission to its own devices.”<sup>71</sup>*

These conclusions have been echoed elsewhere. In an extensive article, written for *Frankfurter Allgemeine Zeitung*, former German President Roman Herzog, former Dutch EU Commissioner Frits Bolkestein and Director of the German-based Centre for European Politics Lüder Gerken similarly noted the failure to respect subsidiarity at the EU level, arguing:

*“The EU must win back the endorsement of its existence, which it has lost from many citizens and even from many parts of the economy... The loss of this endorsement stems from an almost all encompassing impression that Brussels legislates regardless of the people’s wishes and of long established traditions and cultures, constantly introduces rules and regulates things that could be regulated at least as well at the regional or national level.”<sup>72</sup>*

It is clear that cultural change in Brussels, particularly when it comes to respecting the subsidiarity principle, is still a very slow moving process.

## **ii) The EU lacks a meaningful ‘do nothing’ option**

According to the Commission’s database of Impact Assessments, only four legislative proposals tabled by the Commission since 2003 have been scrapped following the production of an Impact Assessment, compared with some 5,500 proposals for Regulations and Directives that have been adopted in the same time period.<sup>73</sup> Even in these cases, it is unclear if the proposal was scrapped due to a finding of the EIA, or some other reason.

As the House of Lords EU Committee points out, the ‘do nothing’ option in an impact assessment will inevitably lead to a proposal being dropped only rarely, due to the Commission’s practice of publishing the impact assessments and draft legislation at the same time. However, this makes it very difficult to judge the effect of impact assessments on final legislative proposals as early drafts of legislative proposals and

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<sup>70</sup> *Spiegel*, 9 February 2010, “The EU has no vision of where we are heading”, see <http://www.spiegel.de/international/europe/0,1518,676784,00.html>

<sup>71</sup> *Wirtschaftswoche*, 30 January 2010, see <http://www.wiwo.de/politik-weltwirtschaft/kommission-nicht-sich-selbst-ueberlassen-420674/>

<sup>72</sup> *Frankfurter Allgemeine Zeitung*, 15 January 2010, see <http://www.faz.net/s/RubDDBDABB9457A437BAA85A49C26FB23A0/Doc-EC34E29B107D74E889CDBF2E9E184CED0~ATpl~Ecommon~Scontent.html>

<sup>73</sup> See the Commission’s website, see [http://ec.europa.eu/governance/impact/ia\\_carried\\_out/cia\\_2009\\_en.htm](http://ec.europa.eu/governance/impact/ia_carried_out/cia_2009_en.htm), viewed on 9 February 2010

impact assessments are not published.<sup>74</sup> More transparency and a credible 'do nothing' option is desperately needed.

### iii) Still too much tinkering at the margins

The Commission's Better Regulation Agenda is still characterised by too many initiatives that have little real impact on the ground. For example, since 2005, the Commission has announced the withdrawal of 128 of its pending proposals, following an extensive screening process – presenting the initiative as a major deregulation exercise. However, 49 of these were over five years old and unlikely to be adopted anyway, and 22 of them concerned association agreements signed with new member states – which became obsolete when they joined in 2004.

The Commission's "Rolling Simplification Programme" has shown some promise, such as the simplification measures suggested by the Stoiber Group outlined above. However, in the Commission's 2009 Work Programme<sup>75</sup> many of the 'simplification' initiatives merely proposed to remove directives and regulations that, in the Commission's words, had become "obsolete and of no practical relevance". Given that these regulations were already "obsolete", removing them might have been a useful tidying up exercise but it is unlikely to have been of much practical benefit to business.

The Commission also remains heavily focussed on "consolidation", which involves bringing together different related pieces of regulation into one single law. This can be helpful in making the EU's rule book more user friendly. However, does this really amount to deregulation and simplification, if none of the actual requirements – and therefore none of regulatory burden – are dropped?

This was the point made in a report published by the Danish, Dutch and UK governments this year. It noted:

*"To ensure that its simplification measures focus on reducing regulatory burdens in a tangible way, the Commission should establish a simple rule about what can be categorised as a simplification measure, with clear objectives and beneficiaries. We believe it should only be called a simplification if it reduces regulatory burdens... Simplifications such as codification and consolidation – as they do not reduce regulatory burdens – should instead be considered part of the programme to improve the quality of the EU body of law."<sup>76</sup>*

The Commission needs to resolve this ambiguity and be much more aggressive in seeking out ways to repeal, simplify or scrap existing regulation so that it actually delivers real benefits to businesses and the public sector. The emphasis has to be on results, not process.

### iv) Too many EU Impact Assessments still not fit for purpose

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<sup>74</sup> House of Lords European Union Committee, "Impact assessments in the EU: room for improvement?", 9 March 2010, p20, see

<http://www.publications.parliament.uk/pa/ld200910/ldselect/ldeucom/61/61.pdf>

<sup>75</sup> European Commission, 2009 Work Programme, see

[http://ec.europa.eu/atwork/programmes/docs/execution\\_report\\_2009.pdf](http://ec.europa.eu/atwork/programmes/docs/execution_report_2009.pdf)

<sup>76</sup> Danish, Dutch and UK governments, "Smart regulation: A cleaner, fairer and more competitive EU", 11 March 2010, p19, see <http://www.berr.gov.uk/files/file54760.pdf>

Like their UK counterparts, EIAs are based on a vital and simple principle: state intervention must always be justified. However, EIAs continue to fall short and have so far failed to live up to this basic principle in practice. Regrettably, EIAs have only marginally improved compared to last year<sup>77</sup>.

The UK Minister for Better Regulation, Ian Lucas MP, told the House of Lords EU Committee that “There are impact assessments that have been made that have been very helpful to us...but I do not think that all of the impact assessments that have been made at the present time are of sufficiently high quality”.<sup>78</sup> There are a number of ways in which the quality of EIAs could receive an instant boost (see chapter 5).

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<sup>77</sup> For an overview of the criticisms of EIAs see *Open Europe*, “Out of Control? Measuring a decade of EU regulation”, February 2009, p49-51, see <http://www.openeurope.org.uk/research/outofcontrol.pdf>

<sup>78</sup> *House of Lords European Union Committee*, “Impact assessments in the EU: room for improvement?”, 9 March 2010, p13, see <http://www.publications.parliament.uk/pa/ld200910/ldselect/lducom/61/61.pdf>

# 5

## REFORM IS POSSIBLE: 30 WAYS TO CUT REGULATION

The proposals we presented in last year's report for reform in the UK and EU are repeated here, with some new proposals added. Encouragingly, some of our recommendations are currently being considered both by the UK Government and the European Commission, and a handful have been introduced. For a more detailed discussion on these proposals, see our previous report.

### 5.1 UK-LEVEL REFORM

#### i) Using IAs and regulatory budgets as bargaining tools

The UK Government should use Impact Assessments to better effect at the EU level. In particular, IAs should be used as 'bargaining tools' by providing evidence to inform EU negotiations at the earliest possible stage. The Government 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.
- Require proposals where the UK IA and the EIA show different estimates to be subject to further assessment before they can be taken forward in the European Council.

Where the UK Government is faced with a possible defeat over a key proposal – either imminent or long-term – it should 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 idea is no more radical than other member states simply choosing not to implement an EU law – such as the resistance to energy and services legislation in Germany, for example. Likewise, regulatory budgets or a 'one-in, one-out' system could serve to narrow the UK Government's negotiating mandate in Brussels in a similar way.

#### 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 policymaking not only once a proposal leaves the Commission, but also while it is being formulated inside the Commission. As is often pointed out, British negotiators must get involved *before* the proposal is formulated in the Commission – at the point when the idea for a regulation is first being floated anywhere in Europe.

The drafting of the AIFMD, and other financial services proposals over the last year, are prime examples of poor engagement, and lessons in how not to conduct relations at the EU level. In its enquiry into the EU's regulatory response to the financial crisis, the House of Lords EU Committee criticised the Government's failure to engage with negotiations at the EU-level soon enough, accusing them of appearing to "be behind the ball game at times."<sup>79</sup>

### **iii) Ongoing UK impact assessment and consultation throughout the EU decision-making process**

UK IAs 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 institutions can currently be relied upon to produce their own IAs.

### **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. The 'Forward Programme' is a step in the right direction.

In this respect the UK Government could learn something from the Commission – for every proposal, the EU publishes a timeline marking all the important dates in the policy-making process on the online 'Prelex' database.

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.

### **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. 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.

The Chairman of the European Scrutiny Committee has also pointed out that MPs on the Committee are often double-booked for EU debates on the Floor of the House, which happen infrequently. ESC Chairman Michael Connarty told the Commons last year:

*“European debates are a bit like buses—we wait for one for ages, then three come along at the same time. For the first time, we are holding the debates on a Tuesday—they normally happen on a Wednesday to ensure that many*

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<sup>79</sup> *UK Parliament*, European Union Committee – Fourteenth Report, June 2009, see <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldcom/106/10602.htm>

*members of the European Scrutiny Committee have to choose between its Committee meetings and the debates in the Chamber.*<sup>80</sup>

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.

Reform of this system could include:

**Making scrutiny public:** This would facilitate media and public interest in the work of the ESC. 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 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. 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 75 percent of the cost of DEFRA legislation originates in the EU, the committee should have a corresponding number of MPs with EU expertise.

**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 for failures to comply, such as a formal censure or the resignation of the minister in question. Crucially, a mandate based system would also strengthen the UK Government's bargaining position in Brussels.

**Parallel times for sittings of the ESC and EU sessions:** The European Scrutiny Committee must be sat as long as EU institutions are in session.

**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.

The UK's Permanent Representative in Brussels should also be answerable to the ESC to improve scrutiny of the 'EU-end' of legislation.<sup>81</sup>

#### **vi) Source any proposal laid before Parliament**

Ministers should be made to clarify on Bills and Statutory Instruments whether or not the legislation is derived from the EU. This will make the origin of UK regulation more transparent. The Government is already doing so in its Forward Programme, so could extend this to all proposals laid before Parliament.

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<sup>80</sup> *UK Parliament*, Daily Hansard, 20 January 2009, see

<http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090120/debtext/90120-0010.htm>

<sup>81</sup> This proposal was made by UK Labour MP Gisela Stuart, in an Open Europe debate in the House of Commons on 11 May 2009.

## **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 – and 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.

## **5.2 EU-LEVEL REFORM**

### **i) Cultural change: a commitment to less as well as ‘better’ regulation**

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**

European Impact Assessments are still not up to scratch and the European IA Board is still not tough enough. A properly 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.

The existing IA Board has often been critical of EIAs and made valuable suggestions regarding future improvements. However, it does not have the political clout, nor the time and resources required to raise the standard of EIAs to the required level. 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.

### **iii) Radically improve European Impact Assessments**

EIAs still fall way short and could be improved in a number of ways, including:

- **Clearer objectives.** EIAs should be overtly committed to less regulation, and should properly consider the ‘do nothing’ option. According to the Commission’s database of Impact Assessments, only four legislative proposals have been scrapped since 2003, following the production of an Impact Assessment, compared with some 5,500 proposals for Regulations and Directives that have been adopted in the same time period.<sup>82</sup> Even in these cases, it is unclear if the proposal was scrapped due to a finding of the EIA, or some other reason. This suggests that EIAs are not properly considering the option to not proceed with regulation at all.

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<sup>82</sup> See the Commission’s website, [http://ec.europa.eu/governance/impact/ia\\_carried\\_out/cia\\_2009\\_en.htm](http://ec.europa.eu/governance/impact/ia_carried_out/cia_2009_en.htm), viewed on 9 February 2010

- **Quantification of all economic costs and benefits.** Commission guidelines on EIAs now outline a standard model for discounting future costs and benefits, because benefits and costs are worth more in the first year than in later years. The guidelines state that a four percent discount rate should be used.<sup>83</sup> The Council and European Parliament should refuse to consider any proposal without an attached IA with properly quantified costs and benefits.
- **More consultation and transparency.** More progress needs to be made on transparency in the EIA system, and draft EIAs and the IA Board's opinion on them still need to be published, as well as the final product, so that everyone can see who was consulted and whose opinion was taken into account when the Commission was formulating the proposal.
- **Clearer presentation of findings.** Some EIAs now have an executive summary, but not enough progress has been made on this and EIAs still need to have a clear 1 or 2 page summary and table summarising all costs and benefits. Additionally, EIAs are still hard to read for non-specialists.
- **More EIAs and better selection processes.** One positive move on EIAs is the decision by the Commission to extend the requirement to produce EIAs on initiatives, beyond those contained in the annual Legislative and Work Programme, "which are likely to have a significant impact".<sup>84</sup> This is welcome because the IAB's annual 2009 report highlighted the fact that only 27 percent of the EIAs it had examined that year were contained in the Legislative and Work Programme – which is obviously a hurdle for any attempts by national governments to anticipate EU regulation and plan regulatory budgets.<sup>85</sup>

However, there should be better criteria for what a "significant impact" constitutes, for example a threshold with a minimum impact at which proposals are subject to IAs. The decision on whether the proposal falls under the threshold should be taken by the IAB.

- **Greater use of EIAs by the European Parliament and Council.** No progress has been made on this since last year, and both institutions still need to make more use of EIAs when negotiating proposals, and produce an updated EIA for any significant amendments to the proposal.

#### iv) A simple majority for scrapping proposals

One of the main problems with trying to achieve regulatory reform at the 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.

Any meaningful de-regulation agenda must seek to change this – to make it easier to scrap or revise legislation than 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

<sup>83</sup> See Annex 11 of Commission's Impact Assessment guidelines, 15 January 2009

<sup>84</sup> Third Strategic Review, p.6,

[http://ec.europa.eu/governance/better\\_regulation/documents/com\\_2009\\_0015\\_en.pdf](http://ec.europa.eu/governance/better_regulation/documents/com_2009_0015_en.pdf)

<sup>85</sup> See the Impact Assessment Board report for 2009, p.6,

[http://ec.europa.eu/governance/impact/iab/docs/sec\\_2009\\_1728\\_en.pdf](http://ec.europa.eu/governance/impact/iab/docs/sec_2009_1728_en.pdf)

is deemed too costly or best enforced at the national level, and see the legislation abolished if 50 percent or more of member state governments in the Council vote in favour. This should apply to existing as well as all new legislation.<sup>86</sup>

#### **v) A robust, legally defined 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 have to be justified and the 'do nothing' option considered in all cases, particularly in light of our benefit/cost ratio which shows that regulations at the EU level are not as cost effective as domestic regulations. The first step would be to legally define subsidiarity, and give examples of what it does and does not entail.

#### **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. 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. This would make EU grievance procedures 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) A 'guillotine mechanism' for Commission proposals**

Commission proposals should be given an expiry date, and should definitely not roll over to the next Commission if a proposal has not been adopted within a given legislative timeframe. This is described by former German President Roman Herzog as the "discontinuity principle," which is a system currently employed in Germany, and would force the Commission to prioritise its proposals, allowing it to concentrate on the areas where it can add value.<sup>87</sup>

#### **viii) 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.

#### **ix) "€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 should not adopt a "€1 in, €1 out" system for regulations.

#### **x) Sourcing new proposals**

In order to avoid the disproportionate influence of interest groups on EU legislation it should be made more transparent who exactly is responsible for a given legislative

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<sup>86</sup> As proposed, for example, in John Tate & Greg Clark, "Reversing the Drivers of Regulation: The European Union", Policy Unit, Conservative Research Department, 2005, p. 51

<sup>87</sup> *Welt am Sonntag*, "An article on the EU constitution", 14 January 2007, see <http://www.openeurope.org.uk/analysis/herzog.pdf>

proposal, for example by starting a proposal by stating who has asked for that piece of legislation.

#### **xi) Common commencement dates for EU regulation**

As part of the “Think Small First” principle, to minimise the cost of regulations for small and medium sized enterprises, the Commission has adopted the idea for common commencement dates, the end of April and the end of October, for EU regulation wherever feasible – which is a welcome move. This must now be implemented in practice.<sup>88</sup>

#### **xii) Push for less first-reading agreements**

The UK should push within the Council of Ministers to avoid first reading agreements in order to increase the length of time available for national parliaments to scrutinise EU proposals and allow the regulation process to properly run its course.

In a 2009 report, the House of Lords EU Scrutiny Committee found that the increase in first reading agreements between the Council of Ministers and the European Parliament meant the “real negotiation” was happening in informal trilogue meetings which are highly opaque and “make effective scrutiny of codecided legislation by national parliaments very difficult.”<sup>89</sup>

#### **xiii) A value for money clause**

Expand the idea of a benefit/cost ratio so that each Directorate-General and quango (such as the Committee of the Regions) justifies its existence based on the benefits and/or regulatory costs it produces.

#### **xiv) Name and shame commissioners**

EU Commissioners, and their Directorate-Generals, should be ‘named and shamed’ when they fail to adhere to Better Regulation Principles, for example the “Think Small First” principle and/or share best practice in the wider Commission. This could be done by the EU’s Small Business Envoy.<sup>90</sup>

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<sup>88</sup> See the Commission website, viewed 17.02.2010, [http://ec.europa.eu/enterprise/policies/sme/business-environment/common-commencement-dates/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sme/business-environment/common-commencement-dates/index_en.htm)

<sup>89</sup> *House of Lords European Union Committee*, ‘Codecision and national parliamentary scrutiny’, July 2009, p.31, see <http://www.publications.parliament.uk/pa/ld200809/ldselect/lducom/125/125.pdf>

<sup>90</sup> This proposal was made in *HM Government*, “EU Compact for Jobs and Growth”, January 2010, p.27, see <http://www.cabinetoffice.gov.uk/media/329788/compact-jobs-growth.pdf>

## **ANNEX I METHODOLOGY**

For a full methodological note on our regulation database, please see Annex 1 of last year's report.

The 'Other Departments' mentioned in tables and charts refers to those Government departments which produce comparatively few IAs and so are grouped together. This includes the Foreign and Commonwealth Office, Department for Culture, Media and Sport and the Cabinet Office, among others.

In this year's report, we have re-classified many regulations in terms of the 'policy area' they fall under. For example, IAs relating to pollution standards for vehicles are now classed as environmental regulations, where last year they were classed as transport regulations. We believe this is a more accurate way to characterise them, since their intended effect is on the environment.

Since last year's report, we have sourced an additional 320 IAs, mostly dating from 2009. However, a small number of these date from earlier years. In these cases, we have added the costs into the 2009 annual costs, to reflect the fact that they represent additional costs to those quantified in last year's report.

## ANNEX II

### HOW DO OUR FIGURES FIT WITH OTHER ESTIMATES?

#### ***The Government's benefit/cost ratio***

The Department for Business, Innovation and Skills (BIS) has calculated a benefit/cost ratio (BCR) of all new regulations introduced in the 2008/09 financial year. According to BIS the BCR now stands at 1.85, meaning that for every £1 of cost introduced by a regulation, it is expected to deliver £1.85 of benefit.<sup>91</sup>

This differs from our benefit/cost ratio, presented this year as 1.58. The discrepancy is explained by the fact that the Government's BCR does not capture the recurring costs and benefits of regulations introduced in previous years, which are still felt by the economy in 08/09. The Government's BCR also does not distinguish between regulations stemming from the EU, and regulations stemming from the UK.

Additionally, our BCR has only included those IAs with a quantified cost and benefit, to compensate for the fact that many IAs in the early years of our snapshot period failed to calculate the benefits of regulation.

#### ***The BCC's Burdens Barometer***

Each year, the British Chambers of Commerce (the BCC) publishes a 'Burdens Barometer', listing the most costly regulations introduced since 1998, based on costs extracted from IAs.<sup>92</sup>

In 2009, the Burdens Barometer put the cumulative cost of regulations introduced since 1998 at £76.8 billion. Of this amount, 69.4 percent - or £53.3 billion – had its origin in EU legislation. While the EU-UK proportion is strikingly similar to our figures, in monetary terms there is a big discrepancy between the two estimates. This is, quite simply, because the Burdens Barometer is based on 104 IAs, whereas Open Europe's figures are based on around 2,000.

In addition, the Burdens Barometer does not make any adjustment to reflect different years' prices and inflation. This makes the estimates slightly misleading, i.e. costs arising in 2009 are given in 1999 year's prices, as with the WTD for instance.

Likewise, it does not adjust for changes that may have taken place to a piece of legislation following the publication of the original IA. For instance, the Working Time Directive has been extended by the ECJ six times – with the rulings having had a significant impact on the annual cost. The Government's latest IA on the WTD is from a report published in 2004, and contains updated figures on the annual cost.<sup>93</sup> Still, the BCC chooses to extract the figures from an IA published in 1999. In addition, the Burdens Barometer only gives the cumulative cost of regulation. However, the two estimates are not contradictory *per se*.

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<sup>91</sup> HM Government, "The Total Benefit/Cost Ratio of New Regulations 2008/09", 21 October 2009

<sup>92</sup> British Chamber of Commerce, "Burdens Barometer 2009", March 2009, see [http://www.britishchambers.org.uk/6798219243887862847/burdens\\_barometer\\_2009.pdf](http://www.britishchambers.org.uk/6798219243887862847/burdens_barometer_2009.pdf)

<sup>93</sup> For the Government's latest cost estimate of the WTD, see <http://www.berr.gov.uk/files/file11496.pdf>; for the cost of the HAD, see <http://www.berr.gov.uk/files/file16179.pdf>; for the cost of the Bectu ruling, see <http://www.berr.gov.uk/files/file32480.pdf>

In a separate report<sup>94</sup>, the BCC published figures showing that the EU accounted for 20 percent of all regulations in 2007/8, down from about 30 percent the year before. By value, the report claimed, EU legislation was only responsible for about £1.9m of the additional *net* costs to business arising in that year, equivalent to 0.1 percent of the additional net cost over that time period. These figures are not directly comparable to our estimates, since a) they estimate *net* cost and b) they take into account regulations introduced only in 2007/08.

But we disagree with the claim that for “this year, virtually all regulatory activity can be attributed to Whitehall”. 07/08 saw the implementation of several important EU initiatives, such as the controversial Renewable Transport Fuel Obligation order or the Construction and Design Management regulations. In addition, our figures suggest a different picture. According to the IAs we have reviewed in 2007, for instance, the cost of new EU regulations introduced in 2007 was about £3.4 billion, while the benefits stood at £1.5 billion. It is unclear what accounts for this discrepancy.

### **Günther Verheugen’s alleged €600bn figure**

An often repeated figure is that the cost of EU regulation to businesses in the EU stands at a staggering €600 billion – a figure attributed to former EU Industry Commissioner Günther Verheugen. 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, this figure has been widely misunderstood, for three reasons: a) the estimate captures the administrative burden only (i.e. not policy costs or knock-on effects b) it describes the cost of EU regulations and domestic regulations combined (so not only EU regulation) and c) crucially, Verheugen probably never mentioned the figure in the first place. What Verheugen 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 *Financial Times*’ journalist appears to have taken this to mean that €150bn represented 25 percent of the total cost of regulation. However, Verheugen’s office has subsequently confirmed that the €150 billion figure referred to the extra benefits that would be generated (as opposed to saved) through various dynamic effects by a 25 percent cut in the administrative burden of EU and domestic regulations combined.

According to the Commission’s official estimate, the administrative burden in the EU (domestic and EU regulation combined) amount to 3.5 percent of GDP in the EU, which in 2009 would have been about €413 billion.<sup>95</sup>

Based on extrapolations, we estimated in last year’s report that the annual cost arising from regulations introduced since 1998 for the EU-27 stood at around €270 billion in 2008. €161 billion of this, 58 percent of the total, was EU-derived. A substantially lower figure than Verheugen’s alleged €600 billion, but for reasons described above, the two are not comparable.

### **German Ministry of Justice: 84 percent of all laws come from the EU**

<sup>94</sup> *British Chambers of Commerce*, “Worlds Apart: The EU and British Regulatory Systems”, May 2009, see [http://www.britishchambers.org.uk/6798219243077818908/BCC\\_report\\_Worlds\\_Apart.pdf](http://www.britishchambers.org.uk/6798219243077818908/BCC_report_Worlds_Apart.pdf)

<sup>95</sup> *European Commission*, “Action Programme for Reducing Administrative Burdens in the European Union”, COM(2007) 23 final, see [http://ec.europa.eu/enterprise/policies/better-regulation/files/com\\_2007\\_23\\_en.pdf](http://ec.europa.eu/enterprise/policies/better-regulation/files/com_2007_23_en.pdf). Assuming an EU GDP in 2009 of €11.8 trillion.

That 84 percent of all national laws come from the EU is another often repeated claim. Two issues are worth raising in response to this figure.

First, this figure is meant to capture all laws, unlike our estimate which is strictly limited to regulations (excluding most laws relating to health, school and police spending, for instance, in addition to excluding transfer payments). Our figure also relates to the cost of regulation, as opposed the absolute proportion of the number of laws. It is therefore not correct to use this as a comparable measure to ours.

Secondly, the figure is probably an exaggeration. The estimate is drawn from a written parliamentary answer in the German Bundestag in April 2005, given by Undersecretary Alfred Hartenbach at the Ministry of Justice:<sup>96</sup>

- In this answer, Alfred Hartenbach stated that from 1998 until 2004 18,187 EU regulations and 750 directives were adopted in Germany. During the same period the German Parliament passed in total 1,195 laws (as well as 3,055 "Rechtsverordnungen" - which are akin to Primary and Secondary legislation).
- Former President Roman Herzog and Luder Gurken of the Centrum für Europäische Politik used these figures to calculate that 84 percent of all German laws originate in Brussels. The logic of this calculation is as follows:

750 (directives) + 18,187 (regulations) = 18,917 EU legislative acts

1,195 (Gesetze) + 3,055 (Verordnungen) – 750 (directives) = 3,500 German legislative acts

EU legislative acts as a proportion of German legislative acts = 84 percent

The 750 directives were subtracted as they require separate implementing laws in Germany (assuming a directive/implementing law ratio of 1:1).

These figures give an indication of the huge influence the EU has over national legislation, but to claim, based on this answer, that 84 percent of all regulations come from the EU is a stretch.

Germany is a federal system, meaning that the individual Lander have substantial powers to legislate autonomously. The many laws adopted on the Lander-level would have to be included in any *all* laws count, which isn't the case here. In addition, this count says nothing about the nature of the laws, nor their relative importance.

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<sup>96</sup> See, <http://dip21.bundestag.de/dip21/btd/15/054/1505434.pdf>

## ANNEX III DEPARTMENTAL KEY

<b>Acronym</b>	<b>Full name</b>
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
Food SA	Food Standards Agency
HSE	Health and Safety Executive
BIS	Department for Business, Skills and Innovation
MOJ	Ministry of Justice
DECC	Department for Energy and Climate Change
Other Departments	This includes other departments which do not produce a significant regulatory cost on their own, such as the: Foreign and Commonwealth Office; Department for Culture, Media and Sport; and Cabinet Office.