The Red Cell

Brexit's Red Tape Challenge

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He that will not apply new remedies must expect new evils;
for time is the greatest innovator.

Francis Bacon

Key Points

Principles

- Some regulatory burdens are inevitable to guarantee domestic consumer safety, and secure mutual confidence in international trade. It is however commonly acknowledged that administrative costs significantly exceed what is necessary to achieve this.
- Considerable opportunities exist with Brexit to remove red tape. This applies particularly within the UK market, but also includes UK rules covering future exports into the EU.
- Whitehall and the Brussels system are both responsible for adding red tape. Combined, they compound the problem exponentially.
- "Brussels" includes the impact of the Luxembourg Courts, all of whose decisions should fall within the scope of post-Brexit review (especially precedent set without any UK participation in any role).
- The default attack on red tape should be maximalist: to remove regulation, except where it is required to secure trade; to strip, unless it is democratically desired; to lighten all that remains, according to a strict interpretation of clear objectives.

Retrospectives

- All government departments should run, publish, and embrace, fresh and ranging red tape audits. Attempts to do so in the past have been suppressed.
- The reviews should be ambitious, and identify management and control failures in previous anti-red tape policy.
- Departments should come clean about the scale of red tape they previously assessed was "out of scope" to audits because it came from the EU.
- Repeal needs to be driven by those outside of government most affected by existing regulatory excesses, and pursued with a central role for Parliament.
- It is likely that boldly redrafting or ditching a small number of prioritised legislation will have quick and considerable effect which could help maintain momentum.

Future Institutional

- Parliament needs in future to reorientate and deepen its oversight, towards civil servants negotiating in global standards setting bodies.
- Cultural reform is needed in Whitehall, requiring changes to training.
- Fast Stream civil servants should as part of their early career spend time in placements in SMEs.
- Appointments to standards authorities should be deliberately opened up to allow increased representation from industry rather than scientists, or from scientists who are known to take a less normative view of the need for widespread deregulation: this might begin with the introduction of deliberate 'Devil's Advocate' slots to question existing assumptions.
- A designated Minister of State, and realistically a Cabinet Minister, needs to exclusively focus on just managing the red tape sieve, in a new post that will have to last at least two parliaments (and may usefully endure beyond that as a safeguard role).
- Work needs to commence now. This can begin by planning to cut manning levels so that staff recruited purely for Brexit Transition do not become permanent posts.
- Standards agencies will need to retreat from the Precautionary Principle, at least in terms of what is sold in the UK market.

Future Mechanisms

- 'Taking back control' is here, as in other areas, merely the necessary precursor and prerequisite to wider economic success. Change is needed.
- Attempts to create mechanisms to reduce domestic red tape have been attempted and have failed. Reformers need to grasp the range of cultural and political reasons behind inherent system failures.
- Regulatory Impact Assessments (RIAs) need in future to be inherently more robust, questioning, and generated from outside the drafting circle. 'Guestimates' should be admitted as such.
- Trade negotiators will need to ally with NAFTA diplomacy to support the gradual move in EU trade thinking towards equivalence of standards rather than absolute uniformity, which is the enemy of diversity and consumer choice.
- Emphasis on retained regulation should shift towards the process of certification of exports to the required local standard. Rather than certifying all domestic production, this will prioritise securing the credentials of the export certifiers and quality controllers themselves.
- Core to deregulation is the education of the UK public so they can make an informed choice, based on understanding and choosing to accept or not minuscule risk.
- Decisions on standards setting should be based on credible, substantive science. This may also require some consideration on better indemnifying decision-makers, relating to reasonable and reasoned judgement calls.
- A number of vested interests will be in play that will need to be exposed and overcome. This will be particularly the case of those with a financial interest in authorising standards and safety certification and training, industries which can be very lucrative (but not for those requiring it).

- The Compensation legal profession will also need to be revisited as part of a grand strategy to redress commercial and professional abuse.

Brexit's Ten Tapeworm Tests

Is the regulation/law demonstrably needed to fulfil a specific purpose?

Will straight transcription of an international original suffice?

Does the legal advice offered by Whitehall lawyers match the political reality for non-compliance?

Is the cost-benefit analysis genuinely credible?

Does the Precautionary Principle stack up, in terms of marginal mitigation in exchange for known costs?

Has due credence been given to cost warnings by affected parties, especially SMEs?

What happens to the scales if one discounts input by minority vested interests who gain from regulatory burdens?

Has second order impact been considered?

Is there an exceptional reason why a sunset or time-check clause has not been included?

Which other items of regulation can be removed at the same time as adding this one?

Introduction

Red tape has been a risk of any bureaucratic system of government since the dawn of time. Arguably its first evidence is the fact that the Hammurabi law code of the eighteenth century BC saw a portion of the pillar setting out the text subsequently erased. These days, deregulation is not quite so simple.

Red tape is often associated with EU membership. This is hardly surprising; the EU system for generating laws is a complex one, involving many tiers, and numerous opportunities for texts to be amended one way or another.

Attempts have been made in the past to mitigate the risks that have arisen from the EU generating reams of red tape. One of the most notable was under Lord Freeman in the closing days of the Major Government, which while it delivered relatively little in practical terms was a rare recognition of the problem, and an appointment at Cabinet rank that in itself admitted to the scale and opportunities involved.[1] Other attempts included measures to create 'colour cards' for national parliaments to hold up European Commission proposals. But overall these have been very limited in their effectiveness.

With Brexit though, the system of law-making in very many areas that carry regulatory risks will change. This also generates prospects for a significant revision of existing elements of EU-passed law, where additional burdens have been added that are not required for exporters, and especially for those traders concerned predominantly or entirely with the UK's own single, internal market.

If we accept that opportunity, we also must recognise a corresponding need to prep, and to prompt, Whitehall and Parliament to make best use of those opportunities on offer. This paper offers some general proposals, looking not just at the issues around over-administration that hampers the UK's businesses and managers, but also the associated element that accompanies it - best practice for democratic oversight.

PART ONE: PROCESSES

Need

What is gold-plating? Gold-plating is when implementation goes beyond the minimum necessary to comply with a Directive, by:
- *extending the scope, adding in some way to the substantive requirement, or substituting wider UK legal terms for those used in the Directive; or*
- *not taking full advantage of any derogations which keep requirements to a minimum (e.g. for certain scales of operation, or specific activities); or*

[1] Roger Freeman's remit ran more widely than just EU red tape, but was heavily focused on that source. (One of the authors of this paper was in attendance at a private meeting between the Chancellor of the Duchy of Lancaster and the Westminster Group of Eight MPs in 1996 discussing options and direction.)

• retaining pre-existing UK standards where they are higher than those required by the Directive; or
• providing sanctions, enforcement mechanisms and matters such as burden of proof which are not aligned with the principles of good regulation; or
• implementing early, before the date given in the Directive.

Box 1: HMG Definition of Gold Plating[2]

The existence of red tape arising from EU membership is not disputed. What are questioned is its scale, the damage it does, and thus by extension the risks and opportunities arising from Brexit.

It may help if we distinguish from the outset the different sources and therefore types of regulatory burden. Some arise from generating globally-accepted standards. A much larger portion arises from translating those global standards into identical standards at EU level. Additional red tape also emerges from transcribing international and in particular EU standards into domestic law. Additionally, there is red tape generated entirely domestically. Of these, the greatest burdens arise from redrafting at EU level, and then by Whitehall seeking to make the UK compliant so that it doesn't face millions of Euros' worth of fines from the Commission for failure (as a consequence of which threat, it over compensates).

The background to this is covered in a flow chart later: the key point here is Brexit does generate a genuine opportunity to revisit two major routes for regulatory burdens which exceed what is considered necessary for a country to conduct international trade.

It may be on review that some regulatory burdens are cherished for social reasons. That is a perfectly acceptable conclusion to come to, after debate and dispassionate analysis and number crunching. The problem has always been that there has been too little of either with legislation introduced through the Brussels model. Brexit allows an opportunity to think afresh about every EU law and standard. Many will be found to add burdens, even individually relatively slight ones that add up to billions taken in the round. Reviewing the morass of legislation, taking documents individually, analysing from first principles, and conducting fresh and balanced cost-benefit appraisals of current drafts versus possible slimlined versions (or even scrapping entire laws altogether) is a Herculean effort and one that deserves full democratic buy-in.

It is precisely the need for such democratic engagement and a fresh reappraisal of the old official statistics (which were often questionable) that has discouraged Eurosceptics from specifically naming legislation that *should* be repealed, though plenty of work has gone into identifying legislation that *could* be repealed (see Open Europe's output, for example). To assist in that process, in Annex A we provide a list of areas that were identified during the Brexit Referendum as likely candidates for amending or repeal, since a number of communities had already been criticising them – over some years, complaints doomed to be without effect so long as we were in the EU.

Leaving the EU does not of itself dictate the depth of Government interventionism in the future. It means neither a 'Blue Brexit' nor a 'Red Brexit'. The fact of Brexit merely allows democracy to

[2] *Transposition Guidance: How to Implement European Directives Effectively*, April 2013

pursue more options and opportunities, and to have a greater public ownership of the decision-making behind it. This is rather useful given the extent to which the divorce between the voter and the politician even now remains unhealed from the Expenses Scandal. It is in this context that we welcome the reports of the creation of a new 'Red Tape Institute' as a think tank to help conduct such a Herculean task.

Scale

> *The first need is to free ourselves of that worst form of contemporary obscurantism which tries to persuade us that what we have done in the recent past was all either wise or unavoidable. We shall not grow wiser before we learn that much we have done was very foolish.*
>
> Friedrich Hayek[3]

The existence of a real cost to EU membership is beyond challenge. The Commission itself acknowledges it. The problem arises because, in the first instance, focus on EU membership costs traditionally has been drawn to the straightforward sums associated with the gross and net budget calculations; and in the second, the Commission is reticent to explore precisely how much those costs truly are. If it did, it would be facing questions as to why it isn't doing more to address the issue, and why those costs were allowed to happen in the first place.

In 2007, that is to say a decade of regulation ago, Simon Wolfson and John Redwood made the following observation;

> *The EU […] is in regulatory overdrive. There are now 170,000 pages of live legislation on the EU's books […] The amount of current EU legislation would stretch for 31.7 miles in printed form, taking someone more than four hours to run its length. Commissioner Verheugen reckons the cost at 5.5 per cent of EU GDP, a huge €600bn (£400bn) of cost on business. It means that EU based businesses have to race against China, India and the USA sandbagged by forty-five stones (285 kg) of law code*.[4]

Commissioner Verheugen's estimate, though very broad brush, is a plausible one. In the first instance, as he was the Commissioner most exposed to it (he was in charge of Enterprise and Industry), he was uniquely placed to assess it.[5]

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[3] The final of the Twelve Points listed on the back cover of the first edition of *The Road to Serfdom.*

[4] *Freeing Britain to Compete: Equipping Britain for Globalisation*, Economic Competitiveness Policy Group, Wolfson and Redwood, 2007, page 53.

[5] The estimate was considered valid enough for Dutch think-tank CPB, which enjoys good contacts with the Commission, to base its estimates of productivity gains of around 1.4% of EU GDP, or €150 billion, on the Commission's stated objective of cutting a quarter of its regulatory burdens. Reviewing the reporting of the Commission as it pursued this task is a difficult exercise that merges absurdity, exaggeration, invention, and some occasional inspiration: for example, by including legislation relating to the defunct GDR as part of the counting towards meeting the deregulation target. The quest to achieve deep reform (notwithstanding some obvious good intentions in certain quarters) was probably doomed from the outset given the dismal precedent of Commission reactions to the Subsidiarity Test. In the first three years to which it operated, only one of the

To this it is also worth adding a comment by another Commissioner. Erkki Liikanen in an in-house brochure went on record as saying, "It is not acceptable that it costs three times as much and takes seven times as long to start a new business in the European Union as in the US."[6] The inference (though the assessment is an average across EU states) is obviously that the EU was a more burdensome environment. Challenged on this, Commissioner Liikanen expanded by agreeing that, "It is clear that the differences between the time necessary and cost involved in establishing a new enterprise in the Community and those that arise for an equivalent operation in the United States are not acceptable."[7]

We know from a Freedom of Information request what the reference papers are that Whitehall itself has been citing to grapple with the scale.[8] A Civitas report from 2004 estimates that 80 per cent of red tape is EU sourced, costing £18.99 billion. A 2009 British Chamber of Commerce analysis suggested a share of 69.4 per cent, but without stating an end figure. Open Europe in 2010 assessed it to run at 71 per cent, and valued at £19.3 billion.

Intriguingly, the only internal figure deployed is one produced by the Department for Business, Innovation & Skills (BIS), running at 31 per cent for a range of £8.6-9.4 billion. It is not entirely clear how this figure was reached, though it appears to have been a simple count of EU rules generated over a single twelve month timespan applied across a total estimate of how much red tape Whitehall estimated existed. This is particularly limited given the caveats the subsequent Whitehall internal review noted, that the loss of two Social Chapter opt outs for the UK alone meant additional potential business burdens of £22.5bn a year.

Even if this lower estimate is correct and two thirds of red tape is domestically generated without the help of the EU, this would not of course excuse Whitehall from addressing an even greater proportion of regulatory burdens which would already be within its direct remit to tackle. Notably, the short response to the parliamentary question that revealed this estimate, added, "This Department has not estimated the overall cost of either all EU regulation or domestic regulation on British businesses, because to do so would involve disproportionate expenditure."

We have a further reference tool in the form of the documentation arising from the 2006 audit of regulatory burdens. Here, we will focus on the analysis from the Department of Trade and Industry.[9] Section 3.6 in particular broke down administrative costs by origin, generating three categories. Cat A included obligations exclusively the result of EU and (NB) other international obligations; Cat B was

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proposals remitted to national parliaments (relating to zoos) was not part of a "ragbag of out-of-date and irrelevant measures of no interest to anyone", for instance a reference to a UN General Assembly meeting that had happened ten years' before, or references to EU countries from before they had joined the EU (Prof Tim Jeppesen, University of Odense). These failed bids at reform within the EU fall outside the remit of this paper, but certainly merit study for the many lessons that could be learned. That would require a candid book by an insider who grappled with the process – but they would then have their EU pension rights taken away.

[6] *Cordis Focus*, 4 October 1999 (from the author's collection)

[7] European Parliamentary Question E-0251/00. The response (successfully) emphasised the role of the Commission in seeking to identify best practice in member states, while (less successfully) sought to excuse the actual impact of EU legislation on SMEs.

[8] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220969/foi_eumembership_literaturereview.pdf

[9] *Administrative Burdens Measurement Exercise, Final Report*.

where those bodies were the source of the rules, but the wording was down to international member states; and Cat C covered obligations that were exclusively down to rules formulated at a national level. Cat A was also, very helpfully, broken down into rules made by the EU and rules made elsewhere. A further table then broke down the top 11 regulations and assessed where the administrative costs originated from – in other words, where the EU and then Whitehall had added gold plating.[10]

The analysis made a number of observations;

- Looking at the Information Obligations and Date Requirements (IOs/DRs) that constitute much of what turns out to be red tape, 90% of DTI requirements by volume was categorised as domestic, but only half by impact;
- Cat A (overseas regulations) constitute 3% by number but 36% of admin volume generated;
- Cat B constitutes 6% by number but 15% by admin volume generated
- 75% of Cat A costs is down to the EU;
- 99% of Cat B costs is down to the EU;
- Combined, this means 83%, £5,433m, of administrative costs covered by DTI rules are down to the EU;
- The top 11 costliest departmental regulations comes to £10.6bn – four fifths of the total for the department;
- 45% of this is down to just Whitehall, adding admin costs not required by the EU - the rest is mostly down to the EU.

The bad news from this is that the UK's civil service is demonstrably not fit for purpose in passing simple laws without adding unnecessary burdens. The good news, conversely, is that sanitising a small number of regulations will have a disproportionate effect on those affected by legislation put out by each government department. This implies there may be some quick gains from Brexit if attention is focused on sectoral priority areas, and this may in turn stimulate further engagement and outreach with the process of reform.

The current scope of EU engagement in the legislative process also in itself endorses the assessment of scale. The European Court has ruled that the power to harmonise national legislation is very wide indeed. Its case law makes clear that regulatory divergence between member states affecting intra-EU trade will almost invariably justify harmonisation.[11] This is not a recent discovery of course. We might cast our minds back to Lord Denning's observations from 1990:

> *Our sovereignty has been taken away by the European Court of Justice […] Our courts must no longer enforce our national laws. They must enforce Community law [...] No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave*

[10] The Companies Act 1985 was estimated as accounting for half the administrative costs. This has since been superseded by the Companies Act 2006, commonly described as the longest piece of legislation enacted into UK law.

[11] Take two examples relating to healthcare, considered one of the more sensitive areas of the Single Market: *R (Swedish Match AB) v Secretary of State for Health* [2004], ECR I-11893, para 33; and *Germany v Parliament and Council* [2006], ECR I-11573.

bringing down our sea walls and flowing inland over our fields and houses – to the dismay of all.[12]

That will now change, and the UK had better be ready to administer it. Even in a scenario where the UK remains administratively closely tied to the Single Market after Brexit or mirrors it (perhaps for a short transition period), the overwhelming bulk of EU-sourced legislation in existence will no longer be necessary for the UK to trade with the EU.

One might reflect on the amount of acquis EEA states have to follow in order to operate. Norwegian studies placed the scale of the acquis as low as 9% of the whole burden of EU law, and that is including the legislation that relates to Schengen of which the UK is not a part.[13] Even if the figure is significantly higher, and a figure of 20% would be pessimistic, that suggests that four fifths of current EU rules are simply unnecessary in terms of regulating a complex trade deal with the EU.

Take into consideration the prospect of a simpler deal being reached that encompasses a small amount of the negotiating Chapters associated with such treaties, and the focus on trade barriers and obstacles to exports that arise from a mere Free Trade deal rather than a blueprint for common Government, then there is clearly a huge amount of scope for repealing rules that are onerous without adding commensurate, dubious, or indeed any value. If we do stick to a pessimistic figure, Verheugen's rough estimate suggests £30 billion of red tape savings are there to be made by the UK – and importantly, much red tape reduction can already be undertaken unilaterally.

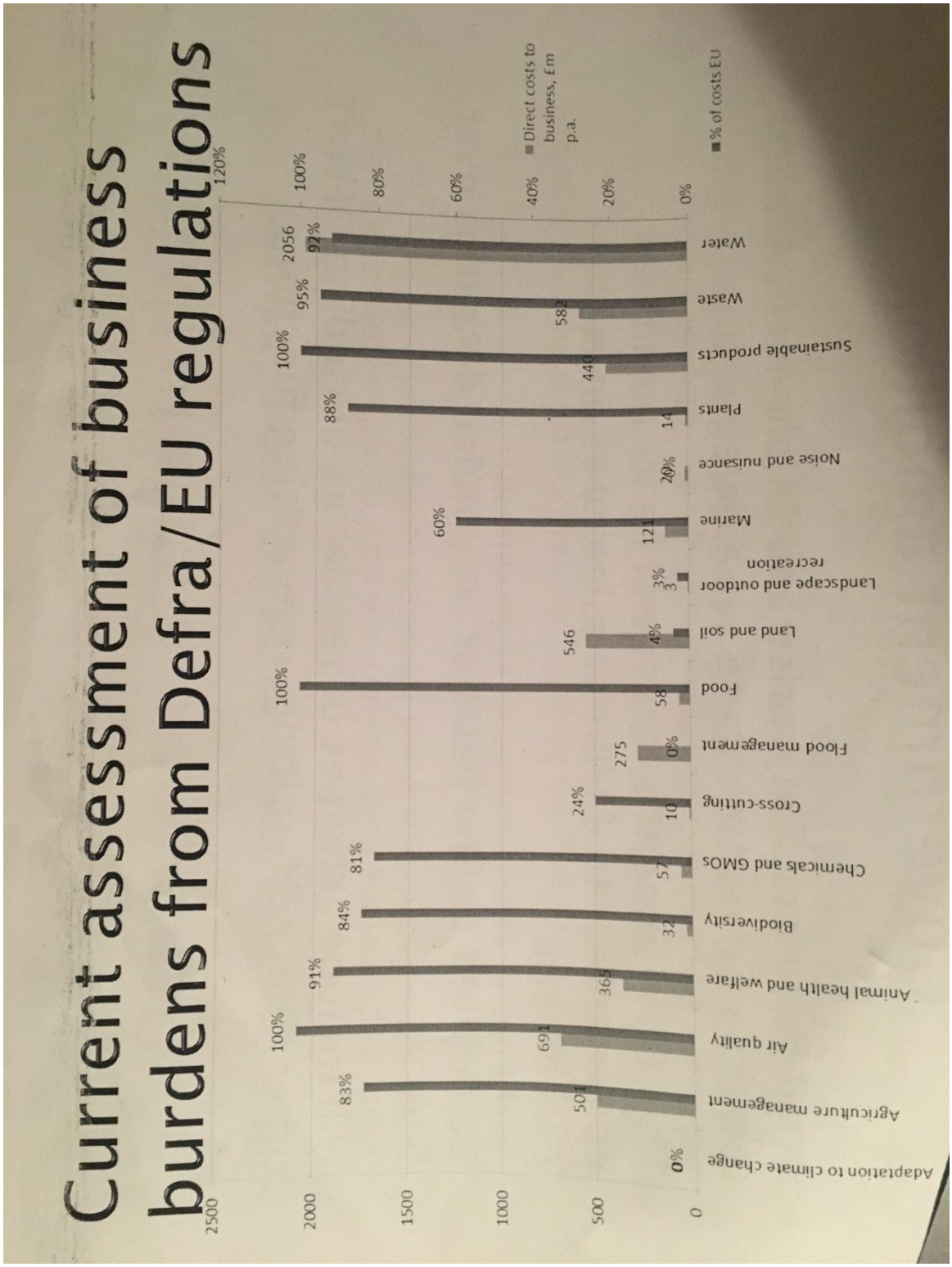
Of course the figures remain speculative. The problem is that the UK Government and its counterparts have shied away from admitting EU regulatory costs exist, for obvious political reasons. As that motivation no longer exists, a comprehensive study now needs to be made.

It is possible that Whitehall, or at least parts of it, already has an inkling as to what is in play. Both the Blair and the Brown Governments conducted audits of red tape. These inevitably appear to have focused on what was domestically generated (rather than what was achievable in deregulatory terms without membership of the EU), and the implication is also that ambition was stymied by the politics of Socialist interventionism underpinning Labour governments.

However, a document which this author once found on a photocopying machine in Westminster, relating to the Better Regulation Agenda, suggests that some reports do exist within some departments relating specifically to what is achievable in EU terms. These should now be released to Parliament by ministers.

The following document shows how the Department that is probably most affected by EU rules views those burdens.[14] It shows what DEFRA assessed was "out of scope" to the audit because the red tape came from the EU. The scale of opportunity is very significant. Note that this relates to just one department.

[12] "The European Court of Justice: Judges or Policy Makers?" Bruges Group, 1990.
[13] See the Red Cell paper "The EEA is Not the Way", which explains why the original figure may have doubled as EEA rules have increased over the subsequent decade. That still makes for a huge proportion of EU rules that can be scrapped without affecting UK exports.
[14] Source: author's collection.



Some historical context may further help explain this, because these sums are the result of aggregated obligations accruing over time. Let's take one case to underline the point. According to the requirements set out by the Intervention Board (IB) in the 1990s, based on the Milk Supplementary Levy Requirements themselves arising from Regulation 1546/88, the IB required the following paperwork to be maintained by all milk producers on a calendar month basis:

- Herd records (number and breed of cows and calved heifers in dairy herd with details of numbers in milk and numbers run dry);
- Daily production records (including quantities of milk produced per day);
- Details of and records relating to quantities of milk processed, types of processing, and quantities and types of milk products produced on the farm;
- Details of and records relating to quantities of whole milk used in the production of milk products;
- Details of and records relating to quantities and types of milk products used on the farm for stock feeding;
- Details of and records relating to quantities and types of milk products for domestic consumption showing that consumed on the holding and that consumed off the holding;
- Details of and records relating to quantities and types of milk products sold direct to the consumer;
- Details of and records relating to quantities and types of milk products sold wholesale and name and address of purchaser;
- Details of and records relating to quantities and types of milk products purchased, exchanged or otherwise received and details of records relating to disposal of these items;
- Details of stocks of milk and milk products;
- Details recorded as a result of participation in the National Milk Recording Scheme or other recording scheme;
- Details of reference quantities held;
- Copies of any returns made to the Milk Marketing Boards or other purchasers.

Records had to be kept for a minimum of three years, starting from the end of the year in which they were drawn up.

This relates to just one set of regulations. Regardless of the extent to which these were subsequently mitigated (if at all), the lesson to be drawn is that the management of farming rules pursued after Brexit, at least as concerns the management of such subsidies as continue, must be pursued in a logical and simple a manner as the avoidance of fraud permits.

Box 2: An Insider's View of the Red Tape Relationship

The author of this paper in 2016 interviewed a former UK official who had also worked inside the EU, who was willing to share insight into where the UK had been going wrong over regulation. The following key points emerged (we have anonymised the specifics);

- The FCO in particular, along with HMT, has a tendency of overreacting in order to avoid Article 169 Letters (and being fined by the Commission for non-compliance). This applies even where no other state is complying and thus there is no prospect of a fine: "Everyone else is playing boules while we are playing cricket."

- The FCO approach differs because it believes lawyers are there to give instructions rather than advice, while other countries just ignore their input where it is inconvenient. The UK attitude staggers other countries – one EU official once admitted "We would never be so hard" in applying the rules (and was kicked on the shins by a colleague).

- In another case, after lengthy negotiations about a regulation, the comment from continental counterparts was that the process was mad: the UK had "argued against it for nine months and then you are the only ones who enforce."

- In one particular case, intergovernmental negotiations had dragged on and one element remained. Other delegates agreed to finesse the remaining element and just ignore its application. The UK delegate noted that "eventually the lawyers will pick this up" – which is what happened internally in the UK much later. The unusual advice by the delegate to his successor was that "Nobody cares" and the UK lawyers' concerns should be ignored.

- A case study in misunderstanding the Commission: the UK and another government were united in their opposition to the Commission which challenged methodology used by both, but which it had previously said it was happy with. The FCO/UKREP believed a meeting would resolve matters, despite being advised otherwise. Sure enough, the Commission official on arrival informed them their objections were being ignored. The non-UK official folded as he was leaned on by his government and threatened with the sack. An expensive lawyer was brought in to review the case. The Commission official was subsequently found to be incompetent. Rather than being fired, the individual was given early retirement with a very big pension.

- The UK gold plates far more than is needed for compliance. If three rules are obligatory it adds another two, adding extra costs - then finds one of the optional ones triggers disallowance.

- The UK is its own worst enemy with gold plating. Often for no apparent reason it comes direct from the minister. Sometimes it is civil servants who do not have the gumption to stand up when they see a problem coming. An example was over an IT system. The ministerial plan for the system was predicted to fail and it was foreseen an interim system was needed. But the implementation people did not dare speak up/stand up.

- Devolution and the EU systems don't mix. It can cope with single points of contact in federal systems, but not the UK's jostling administrative system. This generates automatic non-compliance. Devolved agencies are too suspicious of Whitehall and jealous of their own powerbase to accept any offer of help/funding to correct such matters, even when it might be genuinely offered with no strings attached.

PART TWO: A SLIPPERY BEAST

> *"Governments which are not of revolutionary origin […] are inept at making revolutions. When they try, they are not taken seriously, being a little like firemen who set fire to something or professors who kick up a shindig."*
>
> François Charles-Roux[15]

Red Tape has been known about for decades. The association of Brussels with its generation has been around for almost as long. What attempts have been made to grapple with it; and why have they failed?

The Whale Tankers Case Study

Fortunately (but only for the analyst), parts of the basis of a business study readily exists. Mike Fisher was Managing Director of a company that manufactured vacuum tankers, a relatively large SME employing around 130 people. He is also the son of the founder of the IEA, and until recently one of its Trustees, meaning he perhaps had a clearer perspective on government's role in getting in the way of business.

In the 1990s, Fisher penned several articles for *Economic Affairs*: the date of authorship alone confirms that red tape problems relating to EU membership are no recent development.[16] It also, unhappily, demonstrates the repeated failure of Government to adequately address them.

His examples included the following;

- Fire safety thresholds meaning inspectors were obliged to look at some buildings but not others;
- The need to maintain a Fire Log, a physical book listing fire alarm tests which are supposed to have happened - rather than the tests themselves and a public notice warning when tests happen during the week being sufficient;
- Fire exit signs needed in a building with only two doors and no visitors;
- The need to add a fire escape sign over a huge window;
- A car park that required 18 months of planning permission, despite the buildings themselves being approved. Officials encouraged the company to make cosmetic changes to get the approval through, which in turn bounced;
- A safety report involving the HSE that took four years three months to submit;
- During a downturn, staff were individually warned off in June that there may be future job losses. Updates went out collectively in the fortnightly newsletter. Redundancies were held

[15] Cited by William L. Shirer, *The Collapse of the Third Republic,* Simon & Schuster, New York, 1969.
[16] Mr Fisher kindly sent this author copies of them in 1999 on hearing of his involvement in a "Death by Regulation" project, demonstrating (a) the prospect of most of the key lessons already existing in Whitehall files that need simply to be dusted off (b) the value of academics and researchers maintaining good and eclectic personal archives.

off til after Christmas. Two employees then claimed unfair dismissal because they had not been individually consulted again. [17] The Department for Employment booklet and the minister himself indicated by letter there wasn't any such requirement. The legal case was still pursued.

Fisher went on to join the Major Government's Deregulation Task Force. Yet he ended up resigning from this role in frustration. The trigger was a set of fire safety rules that were forced onto the UK under QMV, despite the cost analysis suggesting the bill to business (for negligible return) was going to be up to £1 billion. The story behind them is informative.

The drafts of two key directives had been on the Brussels table since 1989. In 1992, the Home Office set out its plans for how it intended to implement them. Michael Heseltine, the then-President of the Board of Trade, to his credit observed "the proposals appear to go far beyond the requirements of the Directives and are out of proportion to the risks they are meant to address."[18]

The Efficiency Scrutiny Team looked at the text and at what had gone wrong with drafting it. It concurred that the draft went well beyond what was needed in legislative but also in practical terms: the first draft would have cost £1.5 bn.

A second look cut the bill down to £1.25bn and was, absolutely contrary to the explicit evidence submitted, officially expressed to be a price worth paying. But there was no consensus supporting the draft, and certainly not from business submissions to the consultation. The Deregulation Unit for some reason was actively endorsing excessive regulation despite clear evidence to the contrary. Only a further draft managed to salvage a reduced bill to businesses of a 'mere' £1 billion, adding regulations to a country that already had a fire safety record that was the best in Europe. The further caveat to those figures however remained throughout that they were, at best, official guesswork.

The decision to go ahead was, it would seem, based on a political judgment. Evidence collated indicated that the new statutory rules added new burdens while duplicating the benefits of existing safeguards, and indeed did nothing about those areas where fire safety could still be improved (domestic residences). The cost of the regulations on businesses, and by extension on tax take, could instead have been spent on subsiding smoke alarms for homes, had one been driven by a genuine desire to save lives.

No wonder Mr Fisher resigned. The whole process is unfortunately redolent of John Hoskyn's recollections of trying to push Margaret Thatcher's economic reforms through parts of a lethargic, dispirited or reticent Whitehall.[19] Unfortunately, one senses with subsequent attempts to cut red tape that the problem about a sense of 'managing decline' in officialdom was only ever part addressed, and that it needs a fix of attitudes both amongst civil servants but also in particular amongst a number of current and future ministers.

[17] Based on Directive 75/129/EEC, via the Employment Act 1975.
[18] Letter to Bryan Cassidy MEP dated 16 September 1992. The following information comes from a Cabinet Office presentation made in 1996.
[19] *Just in Time*, Aurum Press, 2000 (also the prompt for the introductory quite from Bacon). This work deserves wider attention across Whitehall and Westminster - particularly by innovators frustrated within their departments.

What was the end impact from those particular attempts on red tape?

A *Telegraph* editorial of the time cuttingly observed that small businessmen were particularly now feeling the pinch because of the tendency not only to introduce the laws despite questionable benefits, but to adopt a draconian policing bureaucracy to them:

> "True, some of the more rococo regulations have been binned, such as gun barrel proof laws, and the Long Pull Order, preventing barmen from serving more than a pint measure in pubs. But ministers and businessmen are rapidly discovering that their task resembles that of a player of the video game Space Invaders: once the easy, early targets have been vanquished, a flood of much nastier, more fast-moving devices now takes their place. The Government now faces such assaults as the Bus and Coach Construction Directive, harmonising the number of doors on these vehicles; but even those directives that it has succeeded in watering down into mere "advice and guidance" bring further burdens. This is because insurers insist that businesses adhere to the spirit of Euro-regulations, lest anything short of that might expose them to massive legal liabilities that might derive from the existence of *nominally* higher standards on the continent.
>
> "That is the nub of the matter. As we have observed so often, this nation is being sucked at an increasing pace into a European-style legal and administrative system which is at variance with or traditions. Attitudes towards enforcement are quite different: one eminent British food retailer, on a recent visit to a French supplier, observed that the brie was stored, unrefrigerated, on the traditional wooden boards in defiance of all health inspectors. He asked what the inspector thought: "He eats cheese, too," came the reply."[20]

Pointedly, it continued,

> "Once again, the Government is confronted with the uncomfortable reality that many European nations have long endured a vast array of regulations, inefficiently and unevenly enforced; by contrast, Britain, hitherto, has enjoyed few, but well policed laws. It remains a central delusion of "Majorism" (if such a corpus of thought can be said to exist) that such fundamental problems could be averted by opt-outs and a proliferation of worthy task forces – even in so inoffensive a field as excessive regulation."[21]

The 'WB' Case

In 1999, the author of this paper was involved in a campaigning organisation part of whose remit involved opposing excessive Brussels legislation. The following example provides a further case study, this time from the early Blair years, explaining the vantage point from another company that

[20] DT, 6 December 1996. To put this in a modern UK context, a starting point for deregulation and the shift in the balance of consumer risk could be over artisan cheeses made from unpasteurised milk, and institutional engagement with the Specialist Cheese-maker's Association (SCA) over post-Brexit regulations (and revisiting lessons learned from MAFF's mishandling of the *Lanark Blue* and *Duckett's* cases).

[21] This is, of course, from 20 years ago and one might assume a measure of convergence has happened since. But notably, the UK remains consistently at the top end of the league table for EU compliance.

was facing excessive legislative burdens as at 1999.[22] Clearly some time has lapsed; but then additional EU treaties have been signed since, competences expanded, and legislation added.

Box 3: The Case of a Recruitment Consultancy

Being a Recruitment Consultancy and employing Temporary Staff to work under the control of our clients, we were particularly affected by the swift introduction and required implementation of the Working Time Regulations with just 6 weeks notice. This is of course a mixture of Euro Legislation with some 'icing' on the top created by our current Government.

Being a good employer it is recognised that staff should have paid holiday if they have qualified and be protected from being forced to work more than 48 hours. However, it would appear that Euro and UK Governments seem to work on the principle that all employers are bad and all employees are perfect when producing endless employment legislation and we've a lot more to come!!

The implications of just the above two items has been the burden of the initial attendance at seminars to understand the new laws (even though some of them are terribly grey) the training of staff and the communication to our clients and temporary staff. We then had to issue new Terms of Business to clients and new Terms of Engagement to Temporary Workers. Upgrades of our payroll software took place in 7 weeks and of course there have been glitches due to the fast implementation. New forms had to be produced with regard to the 48 hour working week and signatures obtained for opting in/out.

The record keeping both computerised and paperwise has added to the pile we already have and our Accounts Controller has to check each timesheet received each week to ensure that anyone working over 48 hours has signed to opt out, in addition to the other checks for accuracy. Our permanent staff also have to complete a weekly schedule of hours worked.

Basically we appear to be walking through treacle in trying to maintain the same staffing at base, continually investing in technology to ease our processing in order to remain cost effective and profitable. Governments can easily increase their staffing and pass on the costs to their customers (us the Tax Payers) businesses cannot, especially in today's competitive world. Increasing employment legislation increases labour costs, and companies continue to merge to survive and this increases unemployment. The large corporations who are Europhiles because of their investments in Europe can very easily uproot their HQ and production overseas to countries with low labour costs.

Basically the majority of politicians do not have any practical business experience, even if they have been trained theoretically. Perhaps Work Experience Schemes could be set up for ALL politicians and I am sure all businesses would be absolutely delighted to give placements. The business world could then loos forward to more realistic legislation (fairness for all).

The alternative to the work experience option for educating MPs with the facts on the ground is of course for political parties – and in particular, Labour – to select more candidates with such experience in the first place, and then to appoint them to key ministries. One is similarly reminded that Churchill was advised to reform the civil service in the 1930s by requiring staff to spend an apprenticeship in the private sector first. **At the very least, placements of a couple of years in business environments should be made commonplace for fast streamers.[23]**

[22] Author's files.

[23] There will be obvious objections levied on the grounds of professional integrity relating to contract bids and the like. The solution would be for them to work in SMEs.

The Small Farmer Case

If the above example reveals a sense of divide between those drafting laws and those on the receiving end, the following one expands upon a set of important concerns in another sector. Larger companies by dint of their size are better able to absorb costs that smaller competitors cannot. One of the charges levied against the EU system of governance is that its corporatist approach is highly favourable to big business backers, since it drives smaller and otherwise more agile and more competitive competitors out of business. Red tape can be seen as a price worth paying by complicit monopolies.

Here is another item of correspondence from 1999, this time from a small farmer.[24]

Box 4: The BC Case

It seems to be open season on all small businesses. I feel like a sitting duck wondering from what direction the next salvo is coming from.

I am a member of the NFU who have a monopoly in dealing with the Government in agricultural matters. They used to be interested and supportive of the small farmer but not any longer I fear. Since the early 80's the NFU seems to have been highjacked by the CLA, certainly from that time all the legislation they have supported has been distinctly bias[ed] to big business but all the safeguards they said would be in place to protect the interests of the small farmer have not materialised. Their policies have become even more transparent in their current negotiations with the Government on the CAP review and their headlong rush into the Euro. The opinion, if not their declared policy, in NFU circles is that the bottom tier of the industry can be abandoned as a price worth paying. This leaves me wondering how the hell I can tackle all the grossly unfair levies, taxes and regulations being thrown my way without any representation on their implementation. For instance, Groundwater Regulations, I am faced with a levy just to wash out my sprayer at a cost of 17.28p per gallon, a farmer 10x my size pays 1.6p. There is already talk of the levy going up ten fold so I shall be paying 172.8p per gallon and the big farmer 16p.

There are a number of other case studies that could be pursued. Examples include rather mixed official attitudes to the egg industry over salmonella; over decision-making relating to small cheese makers using unpasteurised milk (and which led to a successful court case against a quango deemed by the judge to be a "pugnatious litigant"); or the catastrophic and well-recorded effect on the small abattoirs sector that carried completely self-defeating consequences by increasing travel time for cattle to be killed, especially for those sited in isolated or insular communities (see below).[25] However, we now move on to some of the mechanisms that have been underpinning the maintenance of failure.

[24] Author's archives.

[25] An abattoir operator in South Wales reportedly saw his veterinary inspection charges increase from £300 to £17,000 p.a. (Minutes of meeting of specialist food groups, 31 March 1999, author's collection). A point made during the meeting that is worth revisiting is how membership of standards monitoring bodies is determined, and the extent to which it may still depend on personal connections and known adherence to normative assumptions about the need to overregulate to deliver safe products.

The Beef Exports Example

In 1999, the Meat and Livestock Commission reviewed the problems facing the industry, hit by the BSE scandal.[26] The Pratt Report provides a useful aggregated summary of the obstacles facing the beef industry at the time, since these standard costs were now being increased by the extra checks that were now in place.

Examples of the difficulties faced by UK farmers that were exacerbated by the 'UK way of doing red tape' included the following;

- The new Meat Hygiene Service (MHS) was required under UK law to break even, meaning inspection rates went up by around £2 per hour;
- The new rules required more direct supervision and checking by veterinarians, at increased inspection costs (exacerbated by shortages of staff, meaning higher inducement rates, and thus even higher costs);
- Inspectorates based on hourly rates, but inspectors in practice charging for whole afternoons regardless;
- Other countries basing their rates on headage, with lower costs because including throughput charges means economies of rules of scale apply;
- Conflicting scientific evidence on safety means the standardisation of tests adds the same burdens to everyone; without them, it adds burdens just to those that are looking for burdens;
- Standards and rules are important for consumer confidence. However, transparency, credibility and uniformity however are the key elements (and consumer confidence is no excuse for over-regulation).[27]

Again, the key lesson does seem to be that those seeking to police standards need to take a pragmatic and practical approach from the outset, and consider what is "reasonable".

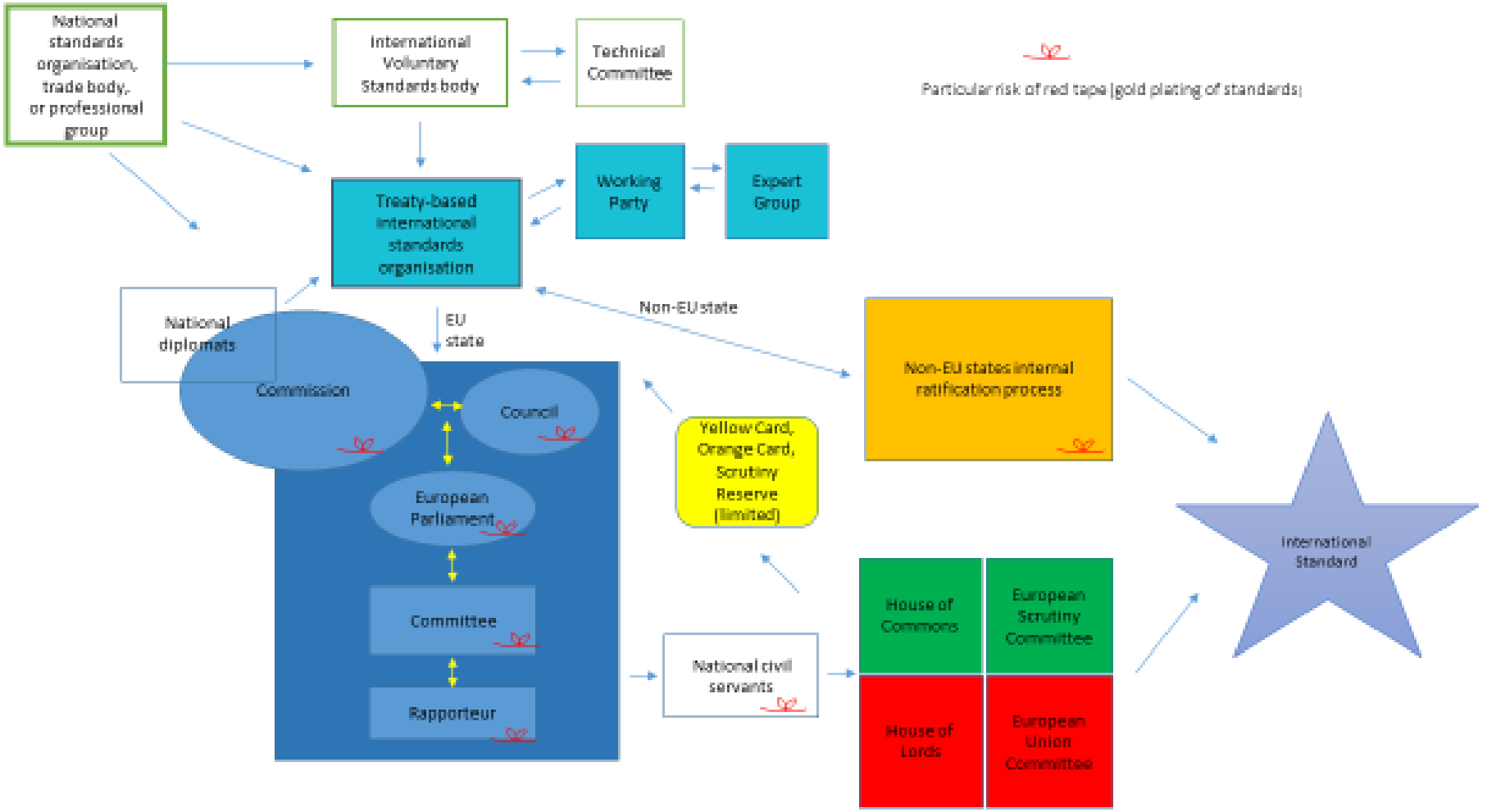
UK Monitoring of EU Legislation

In its paper *The Life of Laws*, The Red Cell has previously explored the processes by which international standards are set.[28] The process is tiered, ranging from voluntary professional standards, and then on to formalised state-sanctioned standards as agreed multilaterally through an international treaty organisation. It is in implementing those standards that the threat of red tape really begins to aggregate (see flow chart below, taken from the paper).

[26] *The Impact of Further Changes to Meat Inspection Charges and Other Enforcement Costs*, Meat and Livestock Commission, 1999

[27] The paper also claimed that BSE existed in Germany, but regulatory burdens (and export bans) were being ducked by the condition being given a different name. The contemporary post-Brexit lesson here is one of applying robust reciprocity in trade bans when this sort of activity is found out (q.v. also the horse meat scandal).

[28] http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/life_of_laws.pdf


National standards organisation, trade body, or professional group
International Voluntary Standards body
Technical Committee
Particular risk of red tape (gold plating of standards)
Working Party
Expert Group
Treaty-based international standards organisation
National diplomats
EU state
Non-EU state
Commission
Council
European Parliament
Committee
Rapporteur
Yellow Card, Orange Card, Scrutiny Reserve (limited)
Non-EU states internal ratification process
National civil servants
House of Commons
European Scrutiny Committee
House of Lords
European Union Committee
International Standard

There is a clear and thorny differential that emerges between countries that are in the EU, and thus subject to its mechanisms for generating uniform interpretation of international obligations, and countries that are not. States that form part of the EU are subject to a process of communal law-making to generate a common draft. This involves several extra layers of drafting review and input where additional legislative burdens may be added. These are in addition to those generated when the end EU text is subsequently transcribed again by national civil servants, to be then formally passed by the relevant national parliament.[29]

Thus we can define two types of regulatory burden. The paper distinguishes these by using the terms *gold plating* and *silver plating*. The former happens when drafts are amended within the EU; the latter, when national civil servants are involved.

Parliaments that are not part of a common legislative system, ie are not part of a federated or incorporated state or are members of a legislative customs union, cut out the middle men and transcribe the original draft as they see fit. This reduces considerably, but does not remove, the risk of red tape.

This tiering is not a new development. In the time of the John Major Government, this author was present in a meeting between the "Westminster Group of Eight" Eurorebels and the then-Chancellor of the Duchy of Lancaster, convened precisely to discuss the issue of overregulation.[30] The Cabinet Minister had been tasked specifically with tackling Brussels red tape; and there were plenty of examples that were deployed to inform him of how the UK system was failing in transposing EU rules.

Fast forward ten years, and there were still enough large problems for the NAO to publish *Lost in Translation? Responding to the Challenges of European Law*. The NAO's conclusions were not simply about red tape, but explored other management failures (and some successes) in play, from a triple set of hurdles. These were achieving accuracy in understanding and interpreting Community law; the timeliness (or otherwise) of transposition and implementation, with a deadline that meant automatically being punished for non-compliance; and communication (or a lack of) with key players who were either most expert in the consequences, or most affected, and usually both.

The NAO found that the UK was good at getting laws in within the EU deadlines, but occasionally at a cost – and one felt, incidentally, by the private sector rather than the department though the report neglected to remind the reader of this basic reality. Departments needed to:

Achieve timely, accurate transposition

1 Provide clear, accessible guidance and advice
2 Collate comprehensive data on transposition progress, implementation and infringements
3 Monitor progress at senior levels
4 Adopt programme and project management early, particularly by:
- *Using a transposition project plan*

[29] Directives carry direct effect, but are a minority of EU laws.
[30] This would have been around late 1996.

- *Early identification and management of key risks to transposition*

5 Have sufficient resources in place for high profile, complex legislation

Manage uncertainty

1 Follow Cabinet Office guidance by:

- *Involving lawyers early*
- *Preparing a comprehensive Regulatory Impact Assessment*
- *Being clear about the proposals in your consultation*

2 Work with others to aid interpretation:

- *Member States*
- *Devolved administrations*

3 Give explicit consideration as to whether copy-out or elaboration is the best transposition policy

Improve communication with key players

1 Follow the Cabinet Office code of practice on consultation
2 Use a variety of consultation methods
3 Learn from consultation exercises and disseminate good practice
4 Issue guidance on implementation in a timely fashion
5 Make use of technical expertise in Competent Authorities
6 Work with devolved administrations and take account of their timetables in transposition plans

Some of its conclusions largely remain relevant today. 'Improving communication' after all is just common sense. 'Managing uncertainty' is self-evidently about having a clear idea of what you are trying to achieve, and getting to grips with side effects. The need for timeliness is no longer an issue with Brexit taking the issue in reverse, other than to note that red tape that remains on the books continues to act as barnacles on the hull of the economy until they are finally removed.

We might usefully apply reverse logic to the rest of the report, allowing certain proposals to emerge;

- Those most affected by the changes need to be most fully engaged in the de-gold plating process, from the outset, especially in order to prevent new unexpected burdens from arising;
- Red tape needs to be stripped even from those areas where the UK may be supplying qualitative checks just on exports into the Single Market, either directly or be signing off third party inspectors, but this needs to be done in such a way that exports remain legally compliant;
- Certain areas where gold plating has been added have been done by combining domestic standards introduced on ethical or political grounds (for example, pig welfare standards); these examples should be priority cases for debate in Parliament, to determine the level of support for retaining certain costs because of a genuine conscious desire for them;

- There will be experience within Whitehall from limited successes in tackling red tape in the past. Expertise and records from the Ministerial Challenge Panel on Regulation, the Regulation Minister [sic], the designated Departmental Board member who champions regulation [sic], and in particular the Cabinet Office's Regulatory Impact Unit – none of which are in the public domain – need to be sieved for lessons learned by a robustly critical Whitehall team;
- In terms of ministerial responsibility, regulation has dropped into the remit of a PUS, occupied with fifteen other duties. This very junior duty (it was at least at Minister of State level in 2016, though with 9 other job distractions) should profitably be turned into a single-issue role at least at Minister of State level either within the Cabinet Office or under the Leader of the House, but is probably is best served at Cabinet Level in a post lasting for two parliaments;
- Both archived and re-calculated Regulatory Impact Assessments (RIAs) are a potentially important spur for pushing red tape strimming, but only if undertaken in a consistent and credible manner across departments.
- The box ticking culture that came to be associated with RIAs needs to be understood by reformers from the outset. Legislation had to be signed off by a minister stating that "I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs." However, the logic of what constituted a 'benefit' stopped being expressed in financial terms.

This latter point is an important one. Adding a flawed RIA is worse than not having one at all – and the RIAs after a while clearly became speculative. In one case, the estimated economic benefit for a law ran across a range that varied in the order of 2000%. Instead, adding a notional economic gain gave the pretence of supplying a full audit and a proper cost-benefit analysis, even if the justification for the programme was actually political rather than based on economic return. The modern reviewer should reflect on the annexes for the RIU's summary of what needed to go into the RIA, as they constitute an important lesson in how analytical failure and political collusion can emerge in Whitehall from what was, conceptually, an extremely good idea.

It is also briefly worth noting that in 2003, the FCO had commissioned its own report into Brussels-sourced red tape. The conclusions and emphasis within the Bellis Report fell short of overlapping with the NAO's, which cuttingly commented, "The report found no evidence of over-implementation and in fact found cases where the UK approach has led to underimplementation."[31] Blame for red tape is placed in part on the Commission shifting from general to specific requirements, elements being bundled into the Recitals at the last minute, lack of expertise at key points in the EU drafting process, an absence of scrutiny or capacity of legal improvement once a draft gets to Council level, and a range of specifics that focus on how scope for divergent interpretations can arise within the EU drafting system, since the heavy focus of the study is in the legislative upstream. Some

[31] *Implementation of EU Legislation, An Independent Study for the Foreign and Commonwealth Office*, by Robin Bellis. He was a retired civil servant who had been an adviser in EU legal work – perhaps not in fact making him the best choice for the "fresh perspective" Jack Straw claims in the foreword. It can be found at http://webarchive.nationalarchives.gov.uk/20041229103759/http://www.fco.gov.uk/Files/kfile/EUBellis.pdf. The NAO's observation is on p26 of its own report.

awareness of these old complaints will still be useful for any BIS staff posted in the future to Brussels to keep tabs on EU trade developments.

More relevant to our report however are the suggestions that;

- Whitehall teams responsible for taking legislation through Parliament may on occasion be inexperienced, particularly in legal matters;
- The professionalism of lawyers across departments was very mixed;
- Negotiations in Brussels (which, of course, are still ongoing prior to Brexit) often involved a junior officer with no legal training or experience;
- The French system by comparison includes early back reference to the capital, where a *fiche d'impact juridique* (legal impact analysis) is produced, identifying problems and coordinating policy at an earlier stage;
- Napoleonic Code countries prefer to state the principles and the framework - add this to Eurosceptic arguments relating to Napoleonic Law being permissive and Common Law being prohibitory in the way each does business, plus the difference between whether one should determine a legal meaning based on what a "reasonable man" would think or what was in the minds of the legislators. Combined, these warn us in Brexit Britain that many in Government, and very many in the legal profession, now need to relearn fundamental Common Law principles in order to avoid knee jerk gold plating.[32]

It is also worth noting that the author claims that "more than sixty per cent of national legislation is of EU origin [in 2003] and this is increasing" (it is further noted that the Conseil d'État at the time estimated it was nearer seventy five percent).[33]

As we have raised them, we might here briefly recall a lesson otherwise learned about RIAs. Open Europe in 2010 estimated that the benefit-cost ratio of EU regulations in the UK was 1.02 – so, for every £1 of costs that EU regulations impose, they delivered £1.02 of benefits. The comparable benefit-cost ratio for domestic regulations was 2.35 – that is £2.35 of benefits for every £1 of costs.[34] Even if we take these figures at face value – and the number crunching wizardry underpinning the cost-benefit analysis of HS2 suggests we most certainly should not – this suggests that projects currently supported by UK taxpayer money and funnelled through the EU need a total review in vfm terms. It should also remind us of the absolute wider necessity to review how RIAs are calculated, and to prompt planners to include a significant margin of doubt not only in terms of return but also delivery cost.

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[32] The review includes a helpful comparison of the Napoleonic Code *Cascade Approach*, whereby ministers are signed off on general law and authorised to carry out the implementing small print, whereas Parliament maintains a degree of oversight throughout (however currently nominal: but the monitoring of Statutory Instruments is the core of the matter at point). On the difference in how to make interpretations, see the *Dim Dip* Case, 60/86 Commission v UK.

[33] The passing reference to the *La Pergola* Law in Italy also has a measure of Brexit relevance. La Pergola was an Italian minister who passed a law lasting for a year, allowing ministers to fast track legislation that had failed to get agreed by Parliament in time. The power is described as analogous to Section 2(2) of the European Communities Act 1972, is of interest to those arguing about democratic obligations during a hasty transition, and serves to rebut some Remain contentions associated with the *European Union (Withdrawal) Bill 2017-2019*.

[34] *Still Out of Control? Measuring Eleven Years of EU Regulation*. Open Europe, 2010

Later Improvements?

Track record on transposing EU laws into UK legislation since then has remained persistently poor. There is no excuse for this being the case in recent times. In 2010, HMG issued a document instructing civil servants how to do it.[35] It yet again acknowledged the existing problems of over-regulating and surpassing the baseline requirements of the original EU text.

In 2013, the IoD conducted an important analysis of red tape burdens arising from EU employment rules.[36] It drew particular attention to a report by the Department for Business, Innovation & Skills (BIS) that had latterly been published.[37] BIS asserted that there had been no gold plating since July 2011 in the 88 measures enforced. It said that during this period departures from a straight carrying across, or "copy-out", of texts presented by Brussels were only used to provide legal certainty or to benefit business; that early implementation of directives had only taken place to reduce business burdens earlier, and that a ministerial review clause is included in all legislation implementing EU laws unless the law is deregulatory. But as the IoD observed, "These claims though do not bear close scrutiny";

> *The BIS document does not identify the 88 measures examined. However, one of the most significant pieces of employment legislation in recent years was introduced in the period covered by the report, and fails on all of the above points. The Agency Worker Regulations, which came into force on 1st October 2011, gold-plate the definition of "pay" by including elements that were not needed, such as bonuses; they expand rather than copy out key clauses in the Directive, such as the definition of "basic working and employment conditions"; they came into force 2 months earlier than required; and they do not contain a ministerial review clause. The Regulations compare unfavourably with the equivalent Irish legislation on a number of points, not least the definition of "pay".* […] *Although the Agency Worker Regulations were drawn up under the previous Labour Government, they did not come into force until some 18 months after the present Government came to power. During that period the Government could have reviewed what the Labour Government had drawn up and could have scaled back what was proposed. But it chose not to.*

The IoD's report is utterly damning. It goes on to provide a number of other examples where Whitehall had gone beyond what the agreed EU text has required of it: one example is cited in the box below. It is quite clear that there is something deeper going on here than just "Commission-proofing" UK law so the EU does not take us to court. Rather, there is a deeper dynamic – a form of addiction to the opportunity to draft in a more burdensome way than the requirements demand.

This trend needs to be recognised, and fixed, if we are to make the most of Brexit opportunities. At the very least, red tape needs to be "owned" and the people responsible held accountable by Parliament. This means giving ministers the means and the incentive to spot the legal fat.

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[35] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf

[36] *The Midas Touch: Gold-plating of EU Employment Directives in UK Law*, Philip Sack, IoD, 2013.

[37] *Gold-Plating Review – The Operation of the Transposition Principles in the Government's Guiding Principles for EU Legislation*, March 2013

Box 5: IoD Observations on Whitehall's Gold Plating of the Working Time Directive

1. Record-keeping: Directive simply requires "up to date records" of all workers who have signed the opt out; the Working Time Regulations require records which show whether this and other limits are being complied with, and to keep them for 2 years. This could be simplified.

2. Additional paid leave of up to a further 8 days (28 in total) is not required by the Directive (which only requires 20 days).

3. Payment in lieu and carrying over unused leave: the Working Time Regulations restrict employers' ability to pay in lieu of unused additional (Reg 13A) leave, in a way that the Directive does not require. Different rules for the first 20 days of leave (Reg 13 leave) and the additional 8 days of leave (Reg 13A leave) create complexity.

4. Opt out from 48 hour week: The Working Time Regulations allow workers to withdraw from the opt-out on 7 days' notice; Directive is silent on this.

5. Autonomous workers: Directive allows an exemption from 48 hour week for workers whose working time can be determined by themselves; the Regulations replicate this provision but it is too unclear for employers to use; a possible solution would be to exempt anyone earning more than a specified amount. Dutch law adopts a simple definition which classifies any worker earning more than three times the national minimum wage, as an autonomous worker. The Netherlands and Spain define junior doctors as autonomous workers.

6. Some options in the Directive are restricted in the Regulations by requiring the agreement of trade unions or workers

7. Inclusion of training time and additional periods under a relevant agreement is not required by the Directive and adds complexity.

8. Many apparently simple directive requirements are transposed in a very complex and wordy fashion (for example pro-rated annual leave in first year or on termination of employment)

The specific proposals that were set out by the Government in 2010 are good ones (see box below). The fundamental problem lies in the lessons having taken four decades to be learned, having only been partially implemented, being too often merely paid lip service to in compliance tests, and having had no prospect of full and retrospective fixes while the UK remained an EU member.

It is worth here briefly noting a problem with compliance testing that has long been recognised. To quote a Whitehall insider who spotted the problem already in the 1990s,

> "Compliance Cost Assessments (CCAs) are blunt instruments giving only a guide to the actual cost. They are estimates at best. They are never revisited after the event so nobody actually knows about their accuracy. I liken CCAs somewhat to 'indicators' in chemistry – the colour of the litmus gives an indication which must then be judged by its hue. Litmus though is proved. CCAs never have been."[38]

[38] Author's personal files.

At the heart of the problem is the reality that the EU legislative system is incompatible with the Northern European civil service preference for hermetically sealing all laws rather than applying an element of latitude, adaptability and interpretation based on the prospect of actual challenge. Worse, the more the Commission chases up southern states' failure to transpose laws, the greater the self-induced pressure on Whitehall to widen the scope (and burdens) of an EU text, to mitigate (to the maximum) the risk of also being put in the dock by the Commission for some minor transgression, and face a massive fine or a demand to retrieve huge grants that have already been disbursed.

Nevertheless, the guidance is an important summary and deserves to be revisited. If properly applied today, with respect to post-Brexit deals covering international standards agreements, it provides civil servants with a ready starting reference point. But that "If" is a laconic one.

Box 6: HMG Guiding Principles in Transposing EU Law, 2010

When transposing EU law, the Government will:

a. *ensure that (save in exceptional circumstances) the UK does not go beyond the minimum requirements of the measure which is being transposed;*
b. wherever possible, seek to implement EU policy and legal obligations through the use of alternatives to regulation;
c. endeavour to ensure that UK businesses are not put at a competitive disadvantage compared with their European counterparts;
d. always use copy out for transposition where it is available, except where doing so would adversely affect UK interests e.g. by putting UK businesses at a competitive disadvantage compared with their European counterparts. If departments do not use copy out, they will need to explain to the RRC the reasons for their choice;
e. ensure the necessary implementing measures come into force on (rather than before) the transposition deadline specified in a directive, unless there are compelling reasons for earlier implementation; and
f. include a statutory duty for Ministerial review every five years.

Attitudinal changes will need to be widespread. The UK is currently an EU member and will soon not be. That generates considerable opportunities to reduce regulatory burdens, but also requires a massive shift in terms of accepting direct responsibility for producing red tape-free drafts directly to Parliament, and also MPs themselves getting more properly to grips with oversight responsibilities in accordance with their more direct links to negotiators much higher the standards-drafting food chain.

In practical terms, this means that feed in will no longer happen to any UK delegates (elected or otherwise) at EU institutions. There will be limited impact on the nature of UK outreach with Commission officials, since their role demands impartiality – any UK nationals staying on in role after Brexit will in any event be keen to demonstrate continuing impartiality, while under increased

scrutiny and quite possibly pressure.[39] But there will be a shift in the way both Parliament and Government (both officials and ministers) need to manage their relationships in order to minimise red tape risks.

That should begin with setting a new ethos. Legislation should be as simple, cost-effective and minimalist as international standards require. Everything bolted on to that should be because of a conscious public call for standards operating in the UK to be higher, based on solid scientific evidence and public support predicated on the accountability of MPs to their constituents rather than a bag of pre-printed postcards from a lobby group.

Legal Transition

In the run up to Brexit, international trading standards will continue to be processed through the EU system and transcribed into Community counterpart legislation. EU legislation will also be drafted and enacted covering areas that, properly speaking, do not encompass the Single Market, but do add potential costs and liabilities to the UK economy.

That means that the mitigation of red tape risk is an element that needs to be considered over the transition period itself.

In general terms, the UK Government has declared its intent, through the Repeal Bill, to carry across existing legislation that is already in force. This is an entirely pragmatic approach. Doing so removes the first order risk of legal uncertainty on what laws and standards are *intended* to be in force post Brexit. This also ensures that even in areas where negotiation of trade access prove problematic, the UK will remain compliant with EU trading norms over at least a transitional period, minimising risk of customs problems.[40] This does even so raise some natural questions.

One lies in transitional reappraisal. Whitehall has a tendency to overregulate in transposing EU rules for two reasons. The first lies in the opportunity provided when implanting them to use them as what we might style 'mules', stacking on provisions not otherwise required by the source EU terms, but where the department has identified a related item that it thinks needs modification. The second reason is the threat of the Commission challenging the manner of implementation as transcribed into UK law. This latter has been particularly exacerbated in recent years with the Commission gaining the power to impose significant and incremental fines. The incentive within Whitehall's legal services has often been to swallow the additional cost from extra red tape in order to minimise the risk of legal pursuit, even if the advice from the negotiators themselves is that counterparts will not be enforcing the rules anywhere near as robustly (meaning the UK would be at the back of the queue in any legal challenges).

[39] We predict that those choosing and allowed to stay on will be moved from certain briefs; will face glass ceilings; and be subject to hostile lobbying by national governments and indeed quasi-unionised staff from particular countries seeking 'fair share' of posts.

[40] Of course it raises all manner of other transitional questions relating to Technical Barriers to Trade (TBTs): the Whitehall reader is invited to reflect on the 200 pages of our *Brexit Risk Register*. The point however is that the objective of continuity and gradual 'evolutionary' transition has been identified as the route for divergence.

Both of these approaches should now be safeguarded against. 'Muling' should be explicitly signposted within accompanying explanatory notes whenever it is done (which should be rarely), in order to allow the issue to be addressed on its separate merits. But also, departments need to pursue a policy of 'lean transposition'.

Legislation that is not related to the Single Market needs to be considered on stopwatch merits. Items that do not carry an implementation deadline set within the Brexit time schedule (into which the response time for Commission review and subsequent CJEU appeal are factored in) should not be automatically considered to be items that require legislating. This is obviously dependent on the nature of the law. Or to put it another way: if a law coming from the EU will not hinder UK-EU trade if it is dropped; if it adds costs to the UK; and if challenging non-implementation takes the resolution of the court case beyond Brexit; then the Government should kick the proposal into the long grass and let it wither with the fact of Brexit.[41]

This then is a policy combining lean transposition and barebones selection. Only items relevant to continued export access to the Single Market would continue to pass through the UK's legislative system; and only then in such minimalist form as to do the task at the accepted global international standards. What is needed is delivering continued access by UK manufacturers and suppliers at currently recognised international levels of standards and legal cover - nothing more and nothing less.

Part of this process may well include the option of sunset clauses. Sheer scale of EU-sourced legislation realistically precludes running a blanket sunset clause. We shall turn to that prospect shortly. But the much smaller scale of legislation currently passing through Parliament as part of the 'rearguard' of UKREP activity over the coming months does lend itself to that option.

Removal of Red Tape: A Gradual Process

Brexit is an opportunity. It can be exploited. It can also be squandered. How, then, to ensure that the EU legislation that the Repeal Bill has 'normalised' is not simply left in storerooms at face value, unappraised?[42]

It is possible to identify several principles and mechanisms that need to be applied.

The first, understandably, is one of **prioritisation**. Open Europe estimated that the scale of EU legislation is such that if stacked up in paper form, it would be as high as Nelson's Column. A top-to-bottom review of that pile by Government, even if broken down across departments, would take

[41] This clearly depends on the terms of the agreement on the nature of continuing CJEU influence on the future UK-EU bilateral. But SIs covering trade minutiae would continue to be implemented over transition; so the CJEU's remit even if temporarily extended would not cover the type of items under discussion.

[42] Computerisation may prove in the end to either have helped or hindered on this. At least with the old hard copies of the Official Journals they visibly took up a lot of space, as anyone paying a trip to the House of Common's European Vote Office in the 1990s will recall. The mere summary of EU laws – volume I of the *Directory of Community Legislation in Force* – was the size of a telephone directory. It stopped being published when it got too big for its bindings.

considerable time even before one gets into cross-checking initial appraisals against *de minimis* standards also required by global trade deals.

Happily, a lot of the work has already been done. As legislation was pursued, business groups and professional associations lobbied first the EU and then Whitehall in order to avoid or minimise damage and costs to their particular sectors. Those bodies retain corporate memory, in terms of staff and archives, of the issues they campaigned most energetically against. That is a tremendous set of assets that departments should now tap. The initial priorities for stripping unnecessary costs should be based on what the private sector itself suggests should be top of the pile.

That pile itself then needs to be prioritised based on **wider engagement on narrow proposals**. The main prize of taking back control is that it allows for a reinjection of democracy through Parliamentary engagement, as well as greater direct consultation by, and accountability for, those communities most affected by laws.

It may be that a given piece of legislation, which a sector says has £10 million of red tape costs added to it on top of what is needed to export into the EU, fulfils a separate social purpose that has wider public consent. In that case even if the mood is to retain the provisions (or to reduce the red tape slightly), the nature of the debate will have changed so that there will now be a sense of public ownership of the issue and perhaps one that generates wider understanding of the sectoral problems more generally. At this stage however, we anticipate the nature of the red tape being successfully put forward to be items that are least contentious and generating clearer gains.

An important requirement even at this stage however will be the need to be **alert to vested interests**. In some cases, lobbies exist that favour keeping regulation on the grounds that they constitute a non-tariff barrier, hindering free trade competition. Others can see rules as a mechanism for generating extra direct employment, since someone has to verify rules are being followed – the most egregious example of this perhaps involves sectors of Health and Safety compliance. As a consequence, submissions relating to the removal or retention of red tape need to be viewed with a fair perspective of the vested interests of the provider. That particularly applies to individuals or entities that have previously directly benefited from accessing EU funds.

Not everyone will be in a position to readily feed into such a review, especially at an early stage. **Technology** may assist. Ministers may usefully consider whether there is scope for a wiki approach to the early elements of this process, allowing input into 'top ten' listings of issues that need to be addressed across a sector by those who may be amongst the most affected but less well sited, historically or institutionally, to lobby (particularly the case for small sectors and many small businesses). There is a risk associated with this, however: in the first instance previous attempts to deploy wiki technology in policy development have been met with spoilers[43]; and it also depends on uptake, requiring some advertising costs. An alternative option might then be to provide wiki options within and across sectors (for example, sub-contracting out to professional or trade bodies to ask their members): this mitigates risk at the cost of reducing access. The optimal solution may simply be to provide general access for feed in without supplying any editorial rights.

[43] Unless David Miliband really was interested in owl magnets, which was amongst a range of surreal (and entertaining) responses to his attempt to use wiki crowd source input into a DEFRA draft policy document in 2006.

Whitehall itself should be able to directly provide vital input. **Staff and archives** will dovetail with input from the concerned sectors. Many unnecessary corners can be cut by running a comprehensive research drive to pick up those areas where the UK Government *itself* identified problematic legislation, but where part or all of it slipped through at comitology level or later. To achieve this, departments should begin by reviewing all cases where the UK voted against EU proposals, but where thanks to QMV the proposal still entered the corpus of EU law. This is a small number of cases however; by and large, the 'consensus' model of EU policy making does not tend to push governments into a corner without giving them something in return, even if the offer is relatively nugatory (such as a partial exemption) or a time-limited face-saver (a prorogation).

A failed QMV vote is likely to have been triggered in the most egregious of cases but will not tell the full red tape story by a long chalk. For that reason, departments will also need to review those cases where the UK was opposed to a proposal, but where the end result was somewhat imperfectly mitigated, sufficiently to allow the UK not to attempt to block. Departments also on top of that need to identify areas where they might otherwise have voted against to register formal dissatisfaction, but in the clear absence of a blocking minority they decided instead to quietly take the deal on the chin. Further, they need to review cases where it was considered retrospectively that the delegate should have voted a different way.

Checking lost QMV votes is the easy part: the remainder require a major sift, though that will be extremely rewarding in identifying legislation that entered UK law despite the UK Government not actually wanting it.

To generate that list, however, requires a major survey of departmental archives, particularly but not exclusively those of UKREP. It may require an 'interview group' to track down serving and even retired officials to encourage them to 'get old issues off their chests'. The suspicion is that many will have seen legislation pass that they feel should not have proceeded in a given form, and some may be prepared to chip in to the process even from retirement as a final vindication of their past efforts to get good laws drafted and bad ones stopped.

Members of Parliament will clearly have a role as a part of the review process for legislation, but it may be more productive to engage with them earlier. Their assistance could be useful in encouraging wider participation in the consultation element, helping to reduce the risk of geographical or social bias (though while acknowledging the possibility of increasing political bias, since MPs will individually favour certain interest groups over others based on their political background: hopefully across all parties this will even out).

A core element of the process though is that it is formed on the basis of **gradualism**. Removing red tape will not be a revolutionary process; though after a number of years with an ambitious programme the consequences may well prove to be revolutionary, at least in terms of comparative red tape burdens faced by competitors and the impact that is generated on FDI and on domestic investment preferences, even if their development is evolutionary. Coupled with gradualism, the twin determinant will be that change is driven by political debate and buy-in.

We might anticipate the direction of the change being divided into three areas of development and oversight. We can envisage matters of technical reform falling under the remit of a parliamentary scrutiny committee. More substantive issues clearly merit being reviewed on the floor of the House.

Matters that are directional, or carry sectoral implications, should be incorporated in a manifesto. Gradualism should be neither so slow as too stall, nor so fast as to engender any sense of foreclosure of democratic engagement in controversial decisions. Nor again should they assert, without Parliamentary support, new norms that cannot themselves subsequently be revisited, except insofar as existing international treaties already constrain decision making.

Finally, there is the question of including a **sunset clause**. Tempting as it is to add a self-destruct deadline to all existing EU legislation, the risk is that the sheer bulk of SIs and other items precludes reviewing them all in time. A safeguard would be to allow for some form of inbuilt delay trigger, extending review time for legislation merely by publishing at intervals a list of items that were still on the review list. There are still several risks. One is that any item (since there are so many of them) might accidentally fall through the cracks. Another is that the review process might be deliberately allowed to drag on by an uninspired Government and a future Parliament might get bored and simply 'defuse' the timers. A further risk is that the approach of deadlines may add extra burdens to the general review with various entities and bodies flapping and jostling as particular groups of expiry dates approached.

Consequently it makes more sense to deploy a slightly different approach. Sunset clauses should be used as an optional extra for any new item of EU-sourced regulation already coming through the pipeline, and they should be of sufficient time lapse (say, five years, and extendable) so as to provide enough review time. They should be used where a provision's implementation cannot be delayed until after Brexit, but where the value of the items as a facilitator for the future trade arrangement is already identified as questionable.

For existing legislation, rather than generating a sunset clause, a more manageable approach may be a Review Clause. That means that every item of existing EU-sourced legislation at some point requires review by a select committee, which in turn recommends whether it be proposed for repeal. The mechanism for managing that might be a regular day set aside for that review as part of normal committee activity. The items need to be advertised widely and well in advance. But this process should be secondary to the focused work that pushes to the top of the list what is identified as potential red tape. We review some of the guidelines that would need to operate in this process later on.

Case Law

Red tape is not a matter of legislation alone: it can be generated as a consequence of the courts, whose rulings can carry major cost implications.

For that reason, any serious review of red tape needs to consider the rulings of the Luxembourg Court. Even if the European Court of Human Rights is not presently on the political agenda, how the CJEU interprets it generates a secondary impact that does need to be taken into consideration. Furthermore, just as law drafters in Whitehall have had to consider how the Commission would interpret how they passed on EU law, so too have they had to keep an eye on the legal precedent – regardless of how the UK Government actually itself saw or intended the original draft to mean.

That applies not only for precedent set involving a UK plaintiff, or the UK Government as the subject of the case. It does not even limit itself to those cases where the UK has supported one side. It certainly does not mean just those cases where the British judge was in the room. Case law is set in every CJEU session that makes a ruling.

Equally, the mountain of cases does not lend itself to a scything reaction, but it does need to be reviewed over time and with expert guidance from those who have been most affected by the findings. The rights generated and the precedents set will need review in conjunction with the review of the law it has amended, tempered, guided - or distorted, distracted, and thwarted. The logical focus will be to begin with reviewing those cases where the UK was involved on either side, and which its lawyers lost. Then, it should be extended to cover those cases where the UK was minded to fight, but where the case was dropped (probably on the basis that it realised it would lose).

The easiest mechanism to identify these may be in auditing legal advice held within Whitehall (if appropriately filed and logged) recommending swift changes to UK law to remain compliant.

With the repatriation of judicial powers to the domestic judiciary, it should become easier for the UK courts to interpret laws as they are genuinely intended. Laws will be drafted more transparently, debated by a single body of lawmakers (ie those just in the UK Parliament), and not subjected to secondary transposition.

In turn that allows Parliament opportunities to consider more properly some of the more pernicious side effects of abstract legalism. Top of the list is our compensation culture; but we can also have a rational, frank and open debate about mechanisms to limit vexatious litigation by ambulance chasers; to begin the debate on the fundamentals underpinning human rights; the borderline between rights and responsibilities; and the mechanisms best used to safeguard complex or state-sensitive rights, such as the conflict between privacy and security.

In many of these cases regulatory costs follow, as employers are forced to defend themselves against increasing threats of litigation based on well-meaning but increasingly-abused principles.

PART THREE: FUTURE OVERSIGHT

Practicalities of Oversight

Whatever the precise form of the UK's future connectivity with the EU, the deal will include processes through which trading arrangements will be monitored and elements potentially adjusted to maintain a measure of either recognition or alignment. In turn, that means that those providing democratic oversight of that activity will also need to be set up to provide competent overwatch of those mechanisms. This will be increasingly true the closer the level of alignment is required by the trade association model (itself a strong reason for following the FTA route).

Overwatch needs to happen in a way that is;

- Timely, able to respond to identified issues with sufficient leeway to affect a draft;
- Commensurate, so that committee work is not automatically clogged up by non-controversial issues;
- As close to the original source of drafting as possible, ie providing input if required to any international standard before it becomes part of an international agreement;
- Informed;
- Alert to both red tape costs arising from an original draft as well as regulatory burdens added elsewhere by Whitehall.

In practical terms, we might in this regard focus on two particular aspects: IT, and liaison.

Parliamentary oversight of EU output is far less dependent on physical connectivity today; indeed, 'hard copy outreach' largely gave way to IT linkage in the early-post millennial period. Gone are the days where each item of EU material would need to be pored over in print form after a visit to the European Vote Office, tucked away in a basement at one end of the Parliamentary estate. Key material is now put online at source. The problem has become less about physical bulk and access but one of sifting volume and alertness.

Parliamentary monitors of EU legislation – whether MPs in Select Committees, Parliamentary clerks, House of Commons Library staff, or staff from individual MPs' offices – thus today face a task of administrative management. But we might also here metaphorically separate two categories of watcher, distinguishing as it were the farmer (who reaps vast ready fields) from the hunter (who has to find his prey). The small number of those who are 'in the system' have to manage scale, and will continue to have to sift and sieve and prioritise amidst a mass of documents that automatically arrive in their in-tray. Meanwhile, those who are not directly engaged in the process of vetting legislation also face the problem of having to track concerns and controversies down.

Previously, Official Journals of a particular type could be selected and sent as a matter of course in big packets to anyone who filled out a form requesting them.[44] The problem was that the copy often arrived with only a few days to spare before the deadline for any official objection to be raised, even assuming the massive bundle was read immediately. Though the work was effectively delivered on a plate, the dish was served cold. With the shift to IT, the problem then conversely became one of

[44] The L Series contains laws; the C series contains case rulings flags up opportunities for funding; and S contains invitations to tender.

finding the time to proactively logon and sift material unprompted. As a pointer to the scale of the task, the publications office of the EU (OPOCE) employs 655 people. Both Parliament and Whitehall will need people with the designated task of monitoring output.[45]

A different problem arises with other aspects of IT linkage. The UK will, quite possibly, agree to maintain some degree of connectivity in specific IT systems. Examples might include Naples II, FADO, ECRIS, SIS II, Eurojust, or EURODAC, to cite a few databases and associated formal mechanisms for sharing them. Alternatively the methodology may be less interconnected in IT terms, such as operates with the European network of contact points for persons responsible for genocide, crimes against humanity and war crimes. In either case, the obvious issue arises is one of legal oversight, and specifically where jurisdictionally that lies.

Our assumption is that the end decision will include primacy of national law in the location where a specific database physically sits (which will often be on the continent, and therefore subject to the arch primacy of EU law); however, data sets supplied by a foreign party or government would see their inputted material guaranteed by caveats established under their own national law.

The modalities underpinning that will be a matter for treaty negotiators to address. As part of this, they will need to ensure that rules are not unnecessarily proscriptive; are not a risk to civil liberties; do not generate exploitable data weaknesses; generate buy-in from both sides so it is not the UK that is the only party offering data or opportunities; and use a system that actually works by interconnecting effectively and securely. The agreement covering such IT systems also needs to ensure that democratic and not just judicial oversight is included. The risk is not just that a database turns out to be leaky; but that supplying the data in some areas creates or maintains burdens for those supplying it for minimal practical gain. Each IT mechanism should be considered on first principles.

The other mechanism for plugging in to EU circuitry includes the use of posted liaison staff. This is true not just of a possible outreach office dealing with the Commission or European Parliament, but also some of the quangos. Both the nature and extent of those links have been covered in a separate Red Cell paper.[46] That research also sets out precisely what any bilateral agreement would need to include in the terms of the deal: primarily, it is about sorting out the nature of the budget, the legal basis for cooperation; the opportunity for expansion; and the methodology to be used.

One of the advantages of a posted liaison officer, however, is that a select committee can ask questions. Another is that it provides eyes-on contact, and the ability to pick up on issues at an early stage – to channel Hawkins, as it were while they are yet unformed stellar gas and before they start to put out light and heat. In some areas, red tape risk may be pre-emptive: it might involve spotting a proposal that the UK was interested in at an intergovernmental level before any blueprints are agreed, and inputting into the proposals at a time that reduces UK costs at a later date (for example, by picking a computer system that talked with the UK's existing ones).

[45] One of the authors of this report was for a while one of only a couple of Parliamentary Researchers known to be monitoring all EU output in the late 1990s, which at least provided for a near-monopoly of Eurosceptic briefing material for journalists. A reversion to merely a similar level of accountability with the replacement sausage factory needs to be avoided.

[46] http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/the_tangled_web_-_eu_agencies_after_brexit.pdf

Scrutiny of International Negotiators

What will ultimately turn out to be far more important will be generating better oversight into the global source of global regulations; and then tracking how those rules are then translated into domestic law. This particularly applies to UN bodies such as UNECE, but also to WTO activity, and also to a range of other standalone entities.

As our earlier flow chart showed, the EU is frequently not the true font of standards or indeed of the red tape that adorns them; it is a middle man. By parliamentarians having a clearer and more direct insight into the work and output of the source itself, that reduces risk. The solution obviously needs to inject accountability without encouraging either lethargy on the part of our delegates, nor the insertion of excessive caveats and limitations that make counterparts think the UK delegate is not a reliable interlocutor, or a credible committee or policy lead.

It is worth noting a particular peculiarity of the current EU legislative system is that the Commission acknowledges the centrality of these 'higher formations', and yet does not have a policy to address the implementation risks. An FoI request by this author in 2016 sought to determine from the Legal Service of the Commission what guidelines had been issued in relation to the requirement for EU legislation to be compliant with international minimum standards set elsewhere.[47] This was to determine both what the policy was and which Directorates General (DGs) were most guilty of breaching it. It turns out, however, that there was nothing held within the obvious lead department: the question was assessed to be most relevant to DG TRADE but they had nothing; and asking around, the respondent discovered that DG GROW, DG AGRI and DG TAXUD had no such guidelines either.

This is an astonishing admission, because it reveals that the European Commission has no policy on preventing gold plating on the implementation of international trade agreements, or certainly at least nothing that involves the key factories of EU laws that are then transposed into domestic law.

The solution is likely to be threefold. Relevant select committees should assume a more direct oversight role over the senior Whitehall managers; diplomats should be invited to brief committee members in private on areas likely to prove of particular interest or controversy; and a new mechanism might be considered, encouraging trade diplomats to supply occasional rolling briefings on areas of some traction. This latter might be printed on special paper to distinguish their function as reducing red tape and to act as a permanent reminder; "violet pages" might be the equivalent of DipTels, generating simple listings of areas where small print deals were advancing in committees, as well as short briefs prompting MPs well in advance to reflect and take soundings on areas that might create business problems or political controversy down the line - such as chlorinated chicken.[48]

Direct oversight and management would remain the preserve and responsibility of the minister, who is the accountable figure and the one issuing direction.

[47] Ref GestDem 2016/2751

[48] Violet being chosen as unfortunately red (for 'red tape') might be confused with colour coding for highly classified documents.

Sanctions

Parliament might usefully reflect in advance on what role it might play as decision-making on the levying of sanctions also shifts.

Government will assume an increased unilateral role in how it faces imbalances in trade, taking on a part largely played by the Commission. This is obviously in addition to managing strategic diplomatic sanctions, including embargoes, targeted against a state for political reasons.

It is perhaps excessive to expect MPs to have a role in monitoring assessments on dumping, and whether a given state is avoiding its trading obligations and engaged in technical protectionism. There is, perhaps, a greater role in consultation over the extent to which countervailing duties should be levied.

At all stages, WTO rules would need to be maintained. There are questions however relating to whether the UK opts to unilaterally cut tariffs (especially if there were no competing UK industry); or whether a countervailing duty might be targeted in a particular way. We intend to explore those choices in a future paper, and simply here note it is a matter of policy providing considerable opportunity for democratic debate in which both parliament and manifesto development will play key parts.

There are also the question of divergent opinions (explored in CJEU case law) on what constitutes dumping where the WTO case law is currently ambivalent. These are best handled as big picture issues rather than on a case-by-case basis. It makes most sense then in this instance for the Commission's own oversight model to be mirrored; Government should issue an annual report to Parliament setting out what it has done in terms of anti-dumping and anti-subsidy measures, and there could be an annual debate (on a take note motion) set aside in the parliamentary diary for this.

Policy Development

There are other aspects of trade oversight in which Parliament could play a more hands-on part, beyond its existing role in approving trade deals.

The trigger level requires some consideration. If Government decides to reduce a tariff, should Parliament have a say? What if five are covered? Five small sectors like umbrellas and beach balls, or one major one like beef? What then if those tariffs are in sectors where the UK does not produce anything? The nature of borderlines being what they are, at the very least Parliament should be informed in a timely manner, and then have the opportunity to lay down an Urgent Question, which summons the minister at short notice to give an account of his policy (subject to the MP being able to convince the Speaker this issue is an important one).

That noted, clearly Parliament will have a critical role in ratification of the various free trade deals that Whitehall is now working on. Ministers might productively include for each of these a section of the explanatory memorandum that specifically addresses red tape risk and mitigation, both in terms of transition (where an EU trade agreement already exists, which is being transitioned) and also subsequent mitigation and redress. Part of that might be a commitment to include a 'Scandinavian

caveat' to a particular treaty that is likely to generate legislation. Denmark and Sweden (and to a lesser and less formalised extent certain other member states) include EU scrutiny caveats in their negotiations, with ministers indicating they are inclined to sign off a deal but require the permission of Parliament to do so. Other negotiators simply operate on the principle that their government has a majority and will get the deal passed.

Some argue that this weakens the hand of those caveating states since their counterparts are less likely to offer concessions. This interpretation is, unsurprisingly, most often stated by former diplomats whose work is being critiqued; it is equally as likely that the risk of a veto discourages EU counterparts from pushing too steep a set of terms for that country to accept, whereas a minister operating on his own might have signed up anyway.

Whatever the reality, outside of the EU, UK negotiators need to operate with the prospect – however unlikely – of non-ratification behind them, if for no other reason than a signature does not force the UK Government to commit itself to a bad deal packed with stifling red tape costs that a negotiating team unwisely thought in the abstract was a price worth paying.

How to Get Brussels 'Eyes-On'

Institutionally, the nature of UK participation in the organs of the EU will change dramatically post-Brexit.

Perhaps the most strikingly symbolic will be the absence of any UK MEPs. The obvious reasons underpinning this hardly need dwelling on. That does mean, however, that a monitoring mechanism for legislation that could have impact on UK exporters will disappear. In reality, that will only be a concern as relates to proposals in fields not covered by existing international standards, and to a lesser extent areas where international standards are under development and where the EU collective position is in the process of being defined.

If issues today are only being picked up by the time they reach the European Parliament, then there is a serious monitoring problem. The real function of outreach mechanisms post-Brexit that feed into the European Parliament will involve lobbying. But UK lobbies already exist, both in the private sector and on behalf of branches of government – local government and UK quangos devote considerable effort to this process even with MEPs in place, while a considerable body of UK lobby machinery exists operating in behalf of private interests. What may well change is the formatting of some of this outreach, with particular focus on much narrower bands of activity in Brussels where there is a surviving UK regulatory interest within international regulatory 'nul zones' where mutually recognised standards are presently awaiting acceptance. This may be accompanied by a realignment of lobby format as intermediaries shift in some circumstances away from joint effort with counterparts remaining within the EU; there can be expected to develop in some areas a divergence in interests as the UK is able to pursue a more deregulatory approach that simply cannot be mirrored (however much they might wish) in quite the same way by others in the same current EU lobby.

Just as UK MEPs will no longer be around, the same will also apply with respect to UK participation in the other representative elements of the regulatory food chain. Even on current terms, the value of

the Committee of the Regions is little more than a talking shop, whose opinions are readily discounted by the Commission (unless they coincide with their strategic objectives, in which case they are eagerly taken up as justification). Assuming the UK adopts a basic FTA settlement with the EU, the CotR's relevance to the UK will be completely eviscerated after Brexit. The Economic and Social Committee is slightly different. While widely held to be just as much a talking shop, on rare occasions it can be observed to operate as a red tape indicator, flagging up occasions where the Commission might usefully look again at the value of a particular legislative approach.[49] Consequently, mechanisms applied to feed into the European Parliament might also consider monitoring the in-tray of specific subject matter experts within the ESC who are sympathetic to light-touch regulation in general, to help spot cases where burdens might arise from a Commission draft.

The UK Parliament's input into COSAC will end. COSAC is the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union. It brings together the scrutiny committees of the national parliaments, and as such is a useful construct, or rather could be. It meets only twice a year, for two days. A measure of the weakness of this formulation is perhaps most evidenced by the vaunted nuclear button its membership supposedly holds. The Yellow Card and Orange Card systems set out in the Lisbon Treaty allow for national parliaments to unite against legislation they consider to be damaging. Neither is described as a red card for an obvious reason: there is no veto right. The yellow card is where 10 parliaments challenge a proposal on subsidiarity grounds – the Commission can ignore it. The orange card requires 15 parliaments to get together, and even then requires a blocking minority of governments to row in behind it – it's never been used. Both would require an incredible amount of coordination to happen, which the irregular COSAC cannot supply. They would also, incidentally, of course require parliaments to be voting against the policy of their governments.

Yet the COSAC institution may provide a useful hinge for something that could be productive post-Brexit, and that is feed into national parliaments on areas of common interest. That rather depends on how its secretariat and rotating Troika view matters. Significantly, countries such as Georgia, Norway and (since 2014) Switzerland do enjoy a form of access rights to meetings and are able to send delegates. Link this process in with action through the Inter-Parliamentary Union, and some useful routes for engagement on broad issues might take place here which could be useful in confidence building. Maintaining confidence in UK standards and standards monitoring in turn is important in discouraging increased regulatory burdens, particularly in exported foodstuffs.

This is not to overlook the significance of bilateral cooperation. A small amount of additional funding might perhaps usefully be set aside for the first couple of years after Brexit to encourage direct engagement by UK MPs and their counterparts in EU member state parliaments. That might include, exceptionally, a short period of FCO funding for All Party Parliamentary Groups (APPGs) covering not just EU countries, but also those where particular priority is given on reaching a swift FTA post-Brexit, and that might usefully be spent now.

Such activity should not preclude more direct avenues of communication with EU institutions themselves. The UK Parliament has an outreach office in Brussels that taps directly into the activities of the European Parliament, and generates confidential (and historically, entertaining) reports for

[49] A specific example is given in the Red Cell paper, *Life of Laws* (which was a surprise to the author after tracking its meritless output for two decades).

the European Scrutiny Committee. That process was firmly established at the time of the Convention in the Future of Europe but has proved to be valuable as a parliamentary counterpart to what the FCO has supplied in DipTels to Whitehall. Maintaining an information-gathering outpost would retain an asset for MPs. Perhaps some reflection on the nature of its links with the post-UKREP UK diplomatic delegation might be revisited if there are any difficulties over office space and the like.

Clearly, in parallel, the UK will no longer have a seat amongst the permanent representations in the Council. That will obviously be a practical hindrance with regard to corridor diplomacy, since people will bump into each other on fewer corridors. Then again, there will be less of a need to engage in quite so many conversations, since so much of what the EU does is superfluous to the basics of trade. Here it is useful to point to two developments over the past few years. The first is the increase in IT, coupled with the increase (in relative terms) of transparency. Compared with twenty years ago, it is vastly easier to identify what areas are emerging on the legislative radar at an earlier stage in the process, even where the reviewer is not a participant at delegation meetings, because the meetings pointing to direction are put online. Fighting post-Brexit red tape risk would have been a different order of difficulty before the EU spent hundreds of millions of pounds developing IT to provide wider access, and before years of pressure from MEPs and national campaigners pushed those generating legislation to put early drafts (even if not quite first drafts) into the public sphere. Monitoring law making can now take place at points in the flow where problems can more readily be identified or predicted, and lobbying occur without having to unglue complex deals and compromises already made.

The second development relates to the continued development of structures used in deconfliction. Canadian-EU relations pre-CETA are governed by ACEC, the much less ambitious Agreement on Commercial and Economic Cooperation. This 1976 treaty was really the first stepping stone made by the EEC in developing future FTAs, though it fell considerably short. It was essentially an enabling document (and as such is incidentally worth noting as evidence of how even WTO or 'MFN' treaty terms allow for a plethora of other bilateral agreements to be separately bolted on). It does not contain any institutional mechanism for conflict discussion let alone resolution.

Contrast that 35 years on with the text of the EU-South Korea FTA. It sets out provisions for Working Groups to for instance agree (by consensus, ie not unilaterally by the EU) such issues as Geographical Indications (eg agreeing that "Champagne" needs to come from Champagne region) or Registered Designs (a branch of copyright law). In a range of other areas, the agreement covers particular elements that both parties commit to, and where general principles of joint arbitration would apply. A Trade Committee provides oversight for areas of contention, underpinned by general principles of transparency across what the FTA covers. There are additionally six specialist sub committees, and seven specialist Working Groups generated from the outset. A Domestic Advisory Group is established that engages with civil society on Sustainable Development issues. A Panel of Experts is convened to cover technical questions, a third of whom are third country nationals. There is also an Arbitration Panel for particular cases, which (under article 14.15) can seek specialist advice as it sees fit and receive input from the parties privy to the case. This is all set within and subject to the wider WTO framework.

The point is that the FTA contains a lot of elements whose core function in many cases involves addressing Non-Tariff Barriers. A lot of NTBs are what we might style our red tape issues, and may

even in turn generate extra red tape to get around them. The future trade deal with the EU itself, even if it is “only” an FTA, is going to generate a number of mechanisms that have the potential to safeguard against unnecessary regulations, or at least to mitigate them

The question then arises as to how best to support that process. Government will directly be locked in, as a signatory to the treaty. Democratically, MPs will need to put in more of an effort to either feed in to these processes, or hold participants to account.

PART FOUR: FUNCTIONALITY

Avoiding 'Fax Red Tape'

The term 'fax democracy' has entered political diction. It is used of the terms of association applied to EEA members who are also members of EFTA rather than EU members, the EEA being an element that groups the latter with three of the four former. The concept is predicated upon the idea that EU decisions are reached in Brussels, then simply relayed to Oslo (or Reykjavik, or Valduz) for unquerying implementation.

Opinions vary on the relative merits of the EEA over other forms of trade deal with the EU. Norwegian Eurosceptics, who are probably best placed to make a judgement call, prefer the latter to the former. Regardless of one's views, the 'fax democracy' meme is a falsehood. The reason why is a useful indicator of mechanisms that can exist to minimise red tape difficulties in models falling outside of EU membership.[50]

It fundamentally boils down to three issues.

In the first place, EEA states have direct input into the legislative process before laws enter the EU system, because they represent themselves in international standards making bodies. Since the Commission asserts primacy in these international bodies, the reality is that EU member states are subject to fax democracy at this stage in proceedings.

Secondly, once internationally-agreed standards have been set and implementation is being discussed at EU/EEA level, EEA states have both direct and indirect input into the legislative chain.

Thirdly, any EEA Government and Parliament has a right of veto over the end product. In practice this has been very rarely used, as it suspends the application of Single Market rules to that country in that area - though not, it is also generally overlooked, the opportunity for products meeting global standards to be traded, thus allowing the member state to export without the red tape it had objected to. It may also be noted that the propensity to avoid this route has overwhelmingly been a political decision undertaken by governments seeking to join the EU. The actual process of suspension incidentally is not as abrupt as tends to be made out.

The 'Norwegian model' includes provisions for a Council covering political oversight; a Joint Committee for general oversight; a Joint Parliamentary Committee; participation within the comitology system in areas covered by the EEA Treaty; equal state information rights;

Access to comitology is a key and underappreciated element, as the Commission bases its output based on the specialist advice fed in by technical experts. In practice this focuses on currently 29 committees (an updated list can be found maintained in Protocol 37 of the Agreement).

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[50] http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/a_warning_from_norway.pdf, and see also a counterpart Red Cell paper of the Icelandic view out shortly. This latter is extremely helpful in demonstrating the surveillance shortfalls that exist within the EEA even if the fax democracy concept can be avoided (the underlying problem is that it needs a determined government and civil service to call the Commission's bluff).

In short though, Norway is not forced to accept EU rules on which they have had no input. At international organisations it holds what amount to veto rights over many of the proposals that then trickle down to the EU. Within the EU it is able to inform and influence. It then has a choice on whether to accept the final version of international standards as applied just to manufacturers based within the EEA. The prospect of that veto realistically being applied is what dissuades gold plating being applied to Norway. Norway gains a double veto on gold plating that other EU states have to fight via QMV to use. The problem for Norwegians has been with its ministers.

Turkey's situation is more like a fax democracy. The terms of its deal mean that in areas covered by the Customs Union with the EU, it has to adopt EU rules. It covers all industrial goods but excludes agriculture (except processed agricultural products), services or public procurement. However, it is free to avoid red tape in areas not covered by the trade terms.

Turkey also has direct representation and a veto at source in the international trade negotiations; and of course its trades bodies play a direct part in setting voluntary standards in professional settings, just as other national representatives do where they have not voluntarily pooled into a trans-European group. Unlike Norway, it does not have quite such a ranging consultative process or institutional framework (see insert below).

Ankara Agreement

Article 55

1. Wherever new legislation is drawn up by the Commission of the European Communities in an area of direct relevance to the operation of the Customs Union and the Commission of the European Communities consults experts from Member States of the Community, it shall also informally consult Turkish experts.

2. When transmitting its proposal to the Council of the European Union, the Commission of the European Communities shall send copies thereof to Turkey.

3. During the phase preceding the decision of the Council of the European Union, the Parties shall, at the request of either of them, consult each other again within the Customs Union Joint Committee.

4. The Parties shall cooperate in good faith during the information and consultation phase with a view to facilitating, at the end of the process, the decision most appropriate for the proper functioning of the Customs Union.

Article 56

1. Where it adopts legislation in an area of direct relevance to the functioning of the Customs Union as defined in Article 54 (2), the Community shall immediately inform Turkey thereof within the Customs Union Joint Committee to allow Turkey to adopt corresponding legislation which will ensure the proper functioning of the Customs Union.

2. Where there is a problem for Turkey in adopting the corresponding legislation, the Customs Union Joint Committee shall make every effort to find a mutually acceptable solution maintaining the proper functioning of the Customs Union.

The quid pro quo is gained from simple economics. Turkey gains access to a large market across certain key sectors in which it is particularly competitive due to low labour costs, and the deal is sweetened by several hundred million Euros in pre-accession and other aid every year.

That policy comes with a significant risk to the Turkish economy over time if a measure of its global competitiveness is lost at the cost of temporary gain through one market. An economy such as the UK's that combines current productivity issues with developed nation level wages cannot simply seek to succeed on the basis of a Near Eastern private sector pay rate underwritten by transfers from the EU central budget. The key point from this arrangement is that a Customs Union without institutional safeguards is a poor mechanism for avoiding regulatory burdens. Options by contrast do exist for including checks within FTAs as the South Korean FTA shows.

Working Parties

Comitology constitutes a fundamental, submerged and largely under-acknowledged part of the EU system of governance. How the UK feeds into or at least tracks that will be an important feature of efforts at red tape mitigation, insofar as the end result has an impact on UK exports (which is a key qualifier in scale and relevance).

In technical terms, comitology is the process by which, before generating drafts, the Commission is obliged to consult a panel of experts on which someone from each country affected is represented (EU countries and in some cases EEA ones). The response comes in the form of an opinion, whose weight varies depending on the committee. Certain areas don't require committee feed in, but these tend to be more administrative items such as in some grant awards.

There are two mechanisms in play. The *Examination Procedure* involves a QMV vote by the committee and binds the Commission one way or the other. The *Advisory Procedure* as the name suggests provides input into the Commission's draft, but recommendations can be ignored. Additionally, there is an *Appeal Committee* mechanism that can be triggered to review the draft at an early stage if a member of a panel flags up major concerns which they feel have been ignored.

If the UK is not going to be a member of the EU or the EEA, it will obviously not be sending experts to these panels. That of itself is not necessarily a negative, as the question arises to what extent an expert is operating in the national interest or on the basis of personal views, rather than as a technical consultant making recommendations purely on practical analysis (it would, we suggest, vary considerably amongst delegates through academic status, personality, ambition, and policy).

There is, however, a double element of interest here. The first relates to access. All proposed Commission actions discussed in the committees are disclosed both to MEPs and the Council. The UK Government could prudently identify a mechanism by which they tap into this transparency at an early stage – no doubt the EFTA office in Brussels already applies a practical system that could be mirrored. Secondly, MEPs and the Council also enjoy the Right of Scrutiny: this allows them to challenge the legal competence of the Commission to pursue a draft based on its actual treaty powers. A similar safeguard mechanism could be established to monitor at an early stage items that are likely to generate problems with the text of the future EU-UK bilateral.

Experts

The credibility and impartiality of high ranking experts from international organisations came under challenge during the referendum campaign, as a direct consequence of the UK Government inviting third parties to intervene in the domestic debate on its behalf, while discouraging nuance and balance. In the eyes of a significant segment of the population, the neutrality of third party advice is seen as tainted. This should not be surprising since its providers are as personally engaged by the heat in the Brexit debate as everyone else is.

A particular controversy lies in the funding issue. The EU budget includes a rolling commitment of hundreds of millions of Euros to academics, campaign groups, and lobbies who are then invited to provide their opinion on EU issues. Conversely, like any subject matter, the EU attracts specialists and commentators who are most interested in it, and often who are most congenial to its processes. That applies both to those operating within the Brussels lobbying circuitry as to the situation across academia where Jean Monnet funding is in play.

In a sense, though on a very different scale, this is no different from the French Government funding the Institut français, and seeing lots of people who like France and French culture going to its events.

We neither here approve nor disparage the individual bias of academics that academia itself transmits, but identify it as a fact that requires more honesty and recognition.

With the considerable reduction or the ending of 'EU' money being redirected back into the UK, it is likely that the nature of lobbying and of academic interest in the EU will transform over time. In the interim, there is a question that does need to be asked of individuals providing expert advice: is the source biased from the outset? The worst person to go to advice in 1991 when emerging from post-Soviet days would have been a former apparatchik of the Communist state.[51]

But we might also legitimately ask: is there any residual vested interest in play? Does the individual still aspire to operate on the EU payroll, and thus have an interest in displaying residual pro-Commission credentials and maintaining contractual opportunities? Is the reluctance to consider stripping red tape down to a personal reluctance to move away from familiar EU norms? Is there even an element of personal anti-Brexit 'sod the lot of them' Götterdämmerung that might apply?

This is not to suggest that all external advice being considered by the Government and indeed the private sector will be tainted, far from it: but it is a risk to mitigate against when taking advice about stripping red tape over the years of transition.

[51] With some notable exceptions who gained the key administrative insight but never really bought in. (The comparison should not be read into too deeply: the point is about buying into any system, human reticence in undoing years of commitment, as well as the absence of vision and the will to seize opportunities.)

Ethics

EU policy-making includes generating safeguards on issues of high ethical importance. In some cases, such as the use of emerging technologies, there are also significant regulatory consequences that follow. The problem here is where decisions are made on ethical grounds in the absence of strong data, and where (as in GM crops) the weight of public opinion may vary from country to country.

With the removal from UK play of the EU's ad hoc Ethical Committee, and the end of the direct impact of the European Group on Ethics in Science and New Technologies (EGE), this generates a top end opportunity in strategic thinking.

Much of the work is currently being duplicated at national level by counterpart committees. These include for example the General Advisory Committee on Science, the Animals in Science Committee, the Science Advisory Council, the Council for Science and Technology, and the Government Office for Science, not to mention a variety of other specialist groups such as the National DNA Database Ethics Group.

This role seems to be particularly suited for the wisdom of the House of Lords, and in particular for the bishops there.[52] These latter are, after all, professional specialists in morality; and being Anglicans tend not to be particularly dogmatic in their views.

As route for restoring even a small element of morality and spiritual identity within the political sphere, the broader long term consequences of generating a defined morality role for the Lords Spiritual may prove to be extremely valuable.

MPs Adding Value

Members of Parliament also have potential roles to play in assisting Ministers plug diplomatic gaps. A number of MPs have personal ties with key figures in other parliaments and governments.

Clearly there are potential issues that need safeguarding against relating to propriety and business interests. But the potential is already acknowledged by Government in the manner through which it selects trade emissaries, from the backbenches and from the Lords. The UK currently has 21 trade envoys, with roles designated over 50 parts of the world where they have particular expertise. There are also special envoys on thematic issues, and sometimes these too are selected from outside the diplomatic corps (for example, Sir Eric Pickles covering Post-Holocaust Issues).

The point is that each of these individuals may have particular contacts and insight that might productively be tapped in support of trade negotiations between the UK and particular countries, or covering particular themes. This may help in removing NTBs and red tape. They may also have an appropriate network to help explain and support the ratification process abroad. Any assistance they may be able to provide to counteract any narrow protectionist lobbying may also prove useful.

[52] Of the Commission President's moral advisers in the EGE by contrast, only one is a clergyman (who also happens to be an ethics professor).

PART FIVE: OTHER BODIES

Euroquangos

The Red Cell has separately conducted a review of the EU non-governmental institutions.[53] In summary, it concluded that there were three approaches that should be developed;

i. Leaving the agency: retaining contact with the body from outside, and merely monitoring its activities;

ii. Strategic association; liaison activity with an embedded link office, governed by a Memorandum of Understanding/enabling treaty, to provide legal force for contractual activity (such as paying rent for the office and IT) and joint activity undertaken;

iii. Retention of membership, perceived in the report to be useful in a minority of cases (the end list to be the result of debate and negotiation, predicated on actual cooperative need).

Suggested reference points underpinning this concept were also set out. As these have a direct bearing on good governance, they are worth re-citing here;

Box 7: The Seven Principles of Euroquango Review

1. Association should default to the most minimalist level, unless a practical need for closer administrative cooperation is proven. What can be achieved by a phone call or monitoring a web site should be left at informal intergovernmental level.

2. Euroquangos constitute an enduring element of political risk, owing to the strategic objectives of the EU; and they are a long term distraction and complication for counterpart bodies that form part of the jigsaw of global entities. These latter should constitute the true focus for developing engagement.

3. Future associations should not encourage a monopoly on links held by one government department; nor generate a clique of civil servants orientated purely towards EU bloc bilateralism.

4. Priority should be given to generating liaison that pre-empts future technical barriers to trade, best confirmed by larger agreement at wider international level.

5. Funding of programmes should, taken collectively, be revenue neutral.

6. Cooperation should not include automatic obligations for the UK to legislate, which must be the preserve of Parliament, also developing better mechanisms for monitoring negotiations undertaken in international standards-setting fora such as UNECE.

[53] http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/the_tangled_web_-_eu_agencies_after_brexit.pdf

7. While UK quangos may initially take over from Euroquangos as a default, change must not end there. An opportunity exists for significant reforms of the national system of quangos, with powers returning to more direct democratic supervision through ministers within departments, greater Parliamentary oversight, devolution to regional government level and beyond, and more direct legislative responsibility and accountability.

From a red tape perspective, the critical theme running across several of these elements is simply this: that with the extraction of the UK from the environment where Euroquangos operate, comes an opportunity for the powers that are then restored to national counterparts, or to Whitehall, or to the devolved governments, to be massively rethought. Part of that entails injecting accountability to elected officials, providing a much greater level of direct oversight into decision-making than presently exists. That oversight may well be at Westminster, or perhaps at Belfast, Cardiff, Edinburgh. Collapsing the former systems into government departments clearly also means ministers assuming a direct role. But some authority might be pushed down further, to council and community level. The opening sessions that follow that transfer will be a rare opportunity to challenge and reject inherited assumptions

Nor should that be the end of it. Just as Brexit creates shifts with those quangos, it also provides opportunities to rethink more widely how the whole UK quango system operates, and to review both transparency and in particular accountability for poor decision-making - starting with pay levels, punishment for failure, and the inflated honours system associated with the senior managers fleetingly traversing this narrow element of public service.

Judicial Reforms

If the CJEU is to be transferring its powers into the hands of the domestic judiciary, this similarly generates an obligation for us to reflect if any changes should not accompany them, at the very least in order to ensure that good governance (in which we include avoiding red tape) is secured.

The Brexit debate included as a core element the question of “taking back control”. At its most fundamental, it was about Parliament reclaiming its centrality from the Commission, as buttressed by the Luxembourg judges.

Consequently, a core result of Brexit must be that the judiciary must not inherit any misplaced sense that its duty is to act as a legitimate mechanism of appeal to overturn Acts of Parliament, undertaken for social or political reasons. That certainly is the motivation of certain legal professionals, and most definitely is the intent of a number of plaintiffs who have had recourse to the CJEU over the years (without even considering the motivations of some supporters of recent Brexit-related cases).

The reality is that the UK’s Supreme Court will have the power to judicially overturn EU case law. The terms of the negotiated end deal will have to recognise this fact, while negotiators must reject any attempt to create a split, Manichean, authority shared equally with the Luxembourg Court (or, for that matter, the Strasbourg one – though that is a matter for a different paper).

Another key point here is not so much about the power of the judiciocracy - important though that is – but rather about the legal hierarchy.

Common Law long ago developed a doctrine of 'implied repeal', meaning giving effect to a later statute over a former. After we joined the EEC, this was dropped wherever it impinged upon the 1972 European Communities Act. The question now also arises over how the lower courts behave when there is ECJ case law, but Parliament has already voted to introduce a different type of regulation. The potential for ambiguity currently remains with the 'Phase one' draft Brexit agreement between HMG and the Commission.

The chain of legal authority that reaches abroad needs to be broken, and replaced at most with foreign courts acting as an historic point of reference. Even this must be tempered by a preference to the use of domestic case law (at least in any area that does not expressly cover pure cross-border trade), and excluding case law developed after Brexit. The logic to this is that the counterpart influence of Common Law traditions within the rulings of the Luxembourg Court will be even more slender than they are now.[54]

Given very recent attempts to push judicial activism, the Government most definitely should avoid handing over to judiciary any final role in any future interpretation of the UK-EU relationship. Regardless of one's views of particular cases, the democratic precedent that could have emerged verged on the extremely dangerous.

Further, Government might usefully take the opportunity to reconsider the fundamentals of legal aid. It might usefully reflect on limits and thresholds set for judicial reviews and major investigatory commissions.

Financial Administration

Red tape is not necessarily something to be suffered by those being legislated against: it can also clog the arteries of governance and administration itself. Whitehall, including its associated army of quangos and semi-affiliates, will have to conduct a health check on its own systems to ensure that it is not being over burdensome on the way it itself does business, in everything from Health and Safety to the paperwork for bids.

Here we might usefully cite the example given to this author in 1997.[55] Manchester University put in a bid for a SOCRATES grant of £350,000. It received an award of £15,000, or less than 5% of the value of the application. The announcement was made in the summer vacation, when it was virtually impossible for students to take up the grants since they were due to start in September. The source pointed out that a similar situation had arisen in relation to a grant in which they had also been involved and which had received the same result: the individual was thus in a position to reveal that the cost of preparing and submitting the grant to EU officials exceeded the amount of grant

[54] The Luxembourg judiciary comprises an overwhelming majority of judges from Napoleonic Code traditions. Even today, precedent is being set on a daily basis without a UK judge, plaintiff, or defendant in the room.
[55] Personal correspondence, 7 July 1997.

received, resulting in a loss to the university. This was without taking into consideration the "onerous" restrictions then associated with the funds.

PART SIX: LOCALISM

Local Government

One of the more peculiar lobbying developments in the last decade has been via the expansion of UK levels of sub-government. Spearheaded by the first Mayor of London, quasi-embassies were set up to provide direct lobbying for local and regional government. This was despite the duplication this directly generated with national representation, and despite the alternative model of hiring third party lobbyists (though the latter are very expensive). It is also operating in addition to membership of collective institutions that represent the interests of particular types of region, or municipalities in general and regardless of nationality.

There are only three reasons to generate these. The first is as prestige items, of particular interest to the Scottish Government whose ruling party has aspirations for independence and therefore an interest in setting up quasi-embassies. The second is as a base for putting in applications to get EU grants, which of course will be a moot point in the future. The other reason is if it intends to lobby in a way that is different from the way the UK Delegation will engage.[56]

There may indeed be certain areas where generating a particular regional accent in a debate might add a level of credibility, such as over whisky tariffs; but that is what the Scotland Office is for. The only legitimate reason that might be considered is if regional ministers were sending intermediaries to lobby for different end results than national representatives; this says a great deal about joined-up government and value-for-money for taxpayers.

Disorder facilitates bad legislation. There may be a logic and an argument for some form of connectivity that circumvents central government. If so, a hotchpotch of legates from regions, counties and cities is not the solution: a return to the use of the Local Government Association is.

Devolution

Brexit creates opportunities for powers currently residing at Brussels to be passed down. While firmly applauding that approach, good governance also requires that the process be thought through.

The core consideration relates to maintaining the UK's own Single Market. The reason the UK Government is arguing that powers should, at least temporarily, be kept in a holding pattern at Westminster before being devolved goes back to the devolution settlement of 1999. That arrangement was predicated upon a rather fundamental assumption: that the UK would always remain a member of the EU. That meant powers such as fisheries and agriculture could be devolved down to Edinburgh, but within a wider context: the integrity of the UK single market in these areas was underscored by its membership of the EU Single Market, with all its constraints.

[56] It is quite remarkable to read, in its 2015 annual report, the Greater Birmingham and West Midlands Office proudly noting, “As part of our wider networking activities in Brussels we re-engaged with the UK Permanent Representation to the EU and actively participated in the meetings organised with the other British regional and city offices.”

In a post-Brexit world, that framework has been stripped away and the UK needs to come up with its own rules and standards in these areas. That is naturally a task for Westminster to resolve centrally, albeit with input from the devolved regions. The reason for this should be obvious: if these powers were devolved to Edinburgh or Cardiff straight away, it's quite possible these jurisdictions would establish entirely different regulatory frameworks that were not merely generating new regulatory burdens and Technical Barriers to Trade, but possibly even in the case of the SNP Government deliberately designed to rupture the coherence of the UK marketplace and undermine the prospect of reaching FTAs (for which it might be assumed, perhaps erroneously, that Westminster would be the one getting the blame).

The principle must be one of central government and Parliament ensuring that the initial transition of *acquis* into UK law retains legal certainty. International and local obligations need to be carried across before legislation is audited. Powers should be clearly defined before handed on to regional and local government in order to avoid breach of those commitments, meaning damage to commerce, and potentially even law suits.

Devolution should also involve a process of *trans-devolution*: power going through and beyond the regional governments down to councils and communities where possible. The obvious starting point for that is in managing fishing policy.

That done, there will be many opportunities for analysis of what red tape should be stripped. Democratic ownership of the decision-making process implies that where practical it should happen at the point of devolution rather than before, however much it might be appealing to tackle certain cases straight away. In some instances, uniformity of conformity may mean a common set of principles needs to be established, particularly when compatibility of future IT systems will be needed. Clearly, an ongoing process of consultation with regional governments will be needed in certain fields, as well perhaps as a period of briefing-up legislators who will subsequently need to make a choice about options available on stripping red tape.

PART SEVEN: WIDER PRACTISE

Red Tape Training

Whitehall unfortunately needs to confront an unwelcome reality: it is psychologically disposed to generate red tape rather than to combat it. The very trade of generating rules carries an inherent risk of embellishing them.

There are several approaches that might be made in response. One is to train civil servants to be aware of the risk, so that they may better identify and challenge it in their own output and in others'.

This might usefully be developed as a through-career process. Those considering careers in the civil service might be pointed towards preparatory reading material prior to testing for recruitment, to include recommended background works that underline the concepts in play. Written tests and interviews for potential civil service staff might include demonstrating a grasp of this as one of the areas for review, for example by including a test draft that needs simplification, or a text cross referenced against another one that includes certain sentences that should be struck out.

In terms of career development, regulatory best practice should feature as part of the regular requirements included in e-learning packages. Educational elements should provide concrete examples where bad drafting has been demonstrated to generate difficulties and burdens. The subject matter should also be a tested item included in any coursework required for promotion.

The Civil Service Learning process contains a number of streams. These are;

- Policy and Working in Government
- Analytical
- Commercial
- Finance
- Project Delivery (several sections feeding into Project Delivery and Personal effectiveness)
- Customer Service
- Digital
- Programmes including Leadership and management
- Leadership and management – Managing people
- Leadership and management – Leadership development
- Other curriculum - Working Essentials (eg Numeracy, Literacy)
- Mandatory

Realistically, generating a red tape-averse culture needs two elements. One should sit as a conceptual element within the Mandatory curriculum, alongside Health and Safety, Diversity and Inclusion, and Responsible for Information.[57] It might be packaged up with a couple of other items as

[57] The temptation would be to associate it with Introduction to Policy within the Policy and Working in government stream; but introducing the concept of value for money across the entire public sector would be a

an Introduction to Good Governance element. Separately however, there need to be practical elements specifically bolted on to training elsewhere. Indeed, working out where to place the training is more of a matter of finding exceptions to where it is relevant. But clearly from the Consolidated Curriculum Map, wherever it is currently taught is completely hidden by other dominant subjects and it nowhere features as a stand alone topic in its own right (assuming – and this may be a dangerous assumption – it currently to any meaningful degree even features at all)[58].

This is not to add as it were an additional red tape burden for Whitehall to spend millions in teaching itself about red tape: this is about adapting existing coursework so that the concept is embedded in the drafter's psyche. The process will perhaps be more difficult with the physical closure of the quasi-academic National School of Government at Sunningdale, removing certain old hands and replacing them with a system of "trainers"; on the other hand, the introduction of a more adaptable Civil Service College model may make the transition in coursework easier. That is rather dependent on a serious audit of what is actually being taught in the modules: *prima facie*, it looks like a robust rearrangement is needed, both in content and priority subject matter.

Fine Tuning Existing Internal Safeguards

Internal Whitehall mechanisms do exist to attempt to obstruct red tape. The problem is, at least as can best be interpreted from the outside, they do not appear to have operated with any real degree of efficiency.

The ready existence of certain frameworks does at least allow the Cabinet Office in any review to reconsider what is hampering their effectiveness. These may turn out to be down to limitations on data; bias on what are considered valued sources; manpower or time considerations; or even an in-built reluctance simply to challenge counterparts.

In 2013, the Cabinet Office produced a significant document that sought to tackle the issue more substantively. Many of the points it made are now redundant. However, some of its proposals could be usefully adapted to suit the new Brexit reality. This might, once adjusted and qualified with wider lessons learned, include the following;

- Wherever possible, civil servants should seek to implement EU policy and legal obligations through the use of alternatives to regulation;
- Reviewers should go back to the original text and use copy-out for transposition where it is available, except where doing so would – demonstrably and unequivocally – adversely affect UK interests;
- They should include a statutory duty for ministerial review every five years for all new regulations that come in during the Brexit period;
- They should also include a statutory duty for ministerial review of <u>all</u> existing EU regulation;

bigger gain. That would particularly be the case when seeking to dismiss (or even just stop promoting) staff who are patently bad at it.

[58] In the two days of the 'open day' Civil Service Live 2017, none of the 300 or so presentations addressed the subject.

- Officials should provide Ministers not only with a "full and frank assessment of the nature and scope of the legal risks" (as now), but also whenever so doing include comment on the likelihood of political realities trumping them;[59]
- The One-In, Two-Out (OITO) principle will quite likely be overtaken by this regulatory review. But the withdrawal of moribund EU rules should not be taken as an excuse for a surge in new rules; and OITO should be reinstated at a target date;
- There should be a declared acknowledgement that rules governing UK exports to the EU and rules covering domestic production intended for the UK internal market will diverge over time. We can anticipate sectorally that parts of the UK market will tend over time to align or remain aligned with either global or EU standards, where a particular market is heavily associated with exports;
- Whitehall will need to monitor compliance failure in other states, particularly through CJEU case law, in order to offer best guidance to UK exporters or to bring an early challenge to any problematic interpretations before the WTO (in which it may incidentally find covert support from the aggrieved losing party, which cannot lodge WTO appeal owing to EU membership rules);
- Legislative Guidance must now be issued in a very timely manner;
- The period of Parliamentary Scrutiny time needs to be hugely expanded, simply to allow time for MPs to identify areas that need to be debated on the Floor of the House. (More committees also need to be set up to undertake this work, whose volume already surpasses reasonable expectation of more than marginal reflection; and reflection might productively happen on increasing access and transparency for documents under consideration);
- Transposition Tables (used to show which bits of a law are copied from the original EU document, 'Copy Out') should also be deployed in auditing existing legislation.

Practical Safeguards

The administration of the red tape sieve needs to be considered. This can usefully be begun by running a broad-ranging internal diagnostic on processes civil servants themselves may identify as parts of their work flows that fail to catch red tape. Wiki technology might be put to productive use internally, to capture first hand experience and specific case examples.

An example of what could emerge might be the generation of a paper looking at how modelling over-engagement generates administrative burdens – and indeed, where it does not. It might review the extent to which signing up to a closer level of administrative cooperation with EU counterparts has historically generated a common administrative structure. Consequently, rather than fulfilling the original objective – say, the sharing of data on request in a timely manner – it has in fact led to the establishment of a costly agency to provide oversight for an approach that might be better run multilaterally. Such *Lessons Learned* analysis should then be used to inform future training.

[59] The author is reminded of an anecdote provided by a former official. The UK's legal advisers insisted on gold plating a proposal despite the fact that counterparts from other EU countries in the talks had told him none of them intended to fully implement the legislation.

Jointery should not in the future be entered into in an unconsidered manner. Upon leaving EU institutions and institutional agreements, future bilaterals should be reviewed from first principles of what the intended effect is, what the physical cost is of adopting an particular approach, what literal costs emerge, and what mitigation might arise by pursuing a less institutionalised approach. That should include a consideration of what legislative obligations arise from that new arrangement, and what level of ambiguities might be generated that encourage the production of red tape. Where future EU or other bilateralism does occur, the fact of cooperation itself should not be seen as the gain: the consequences set against the cost must be.

A *Lego approach* is best used. Agreements should include a Future Developments Clause, allowing for obstacles such as trade barriers (often forms of red tape) to be addressed in bolt-on agreements, subject to domestic approval. Such a Docking Bay clause must not be abused though, and be subject to transparent reporting to legislators at the time of consideration; incorporating one during Brexit negotiations may be a significant option where both the value of and level of political support for close bilateralism is uncertain, and as applied to a narrow field. Conversely, as a matter of course, bilaterals need to contain a termination clause to ensure both that processes do not become arduous or arbitrary, or that any sense of democratic permission once given can never be rescinded - a surefire way to undermine confidence in any individual agreement.

In each instance where the UK Government may be inclined to sign up to a significant EU bilateral, ministers should provide Parliament with a clear, unambiguous, and costed audit of the pros and cons of each proposal under consideration. This should include defined threshold safeguards over any obligations that arose from the treaty, showing how red tape risk is to be mitigated, and by whom so that those individuals are known to be accountable.

Finally there is the question of the Referendum Lock. As things currently stand, it appears that this mechanism is to fall. It may yet serve a purpose, even if the relationship it was originally set up to provide oversight to is set to change. Were it to stand safeguard collectively over the remaining bilateral treaties between the EU and the UK, perhaps with a statement redefining what is intended by the trigger mechanism (for instance, to include any “significant” financial or legislative obligations), then it may still have a value.

Awareness

Transitioning systems allow users some preparatory time. In some areas, which are not regulatory but have a regulatory effect, the exact lead in time is unknown.

An example here is the need to review mechanisms for the declaring of interests, both by those within the wider system of arm’s length bodies, but also those brought in as consultants. That category incidentally should also include those who are consulted externally, particularly academics.

Transparency in each case will help ensure that accidental or innate bias risk is reduced, where individuals have financial or inherent psychological leanings towards particular solutions out of a range of legislative or administrative options. A lobbyist whose firm is on the books of a particular company is likely to be biased towards supporting the interests of that source of funding than other interests under consideration. A more subtle risk also exists for those who are brought in whose

background lies in a particular industry over another one, or a big corporation rather than a small business, or a faculty that has supplied staff to the European Commission and gained kudos and funding from preferential access.

This is not to say that experts should be discounted if they have a particular track record; merely to ensure that due balance is accorded to all advice, in order to encourage the consideration of the maximum range of opinions. Just because an EU academic, a lobbyist for big pharma and a retired scientist from the industry agree on the need to mirror EU red tape rules in a particular field doesn't mean to say that the interests of the consumer, market, or other producers should be ignored in drafting those rules.

The increase in the role of Whitehall and Parliament is going to see some changes in how lobbying works. Big exporters will continue to be represented at Brussels; but they and everyone else with commercial interests will also switch a significant portion of their output into London, and to a lesser extent the devolved administrations. "Bringing back control" means a shift in power, meaning some change in emphasis over the people lobbyists will need to lobby.

Parliament might productively reflect on current provisions governing transparency in lobbying, both by the targets and agents of that process, though without trespassing too far into areas that intrude into what are reasonable grounds for privacy or which generate excessive red tape. The original proposals on UK lobbying transparency that badly defined what lobbying was (and risked encapsulating any act of speaking to an MP) is precisely the level of burden that should be avoided.

A surge in UK lobbying will happen. It is not entirely clear London is quite awake to that, or of the need to revisit how even the current monitoring of, for example, how former civil servants get industry or lobbying jobs once they leave their post.

Fraud and Waste

The Red Cell covers the issue oversight of Brexit-legacy public funds in another paper, in some depth.[60]

A key point to note here is that it is not just regulatory burdens that we need to be concerned about, but illegal and improper financial leakage. It is not just red tape but also issues of general competence and probity that need to be considered by those monitoring good governance.

The paper focuses on three main points, based on the grim track record of those who have worked inside the EU institutions, identified fraud and waste, and tried to stop it. Instead, the system has hounded them.

Our first observation here is that we assess that this is inevitable. There is no such thing as an "EU taxpayer", so there is no true sense of ownership, making fraud and waste more likely.

Secondly, it is institutionally horizontal. It is not just happening in one organisation, but is remarkably wide-ranging across very different EU bodies. The corollary to these two elements is

[60] http://www.theredcell.co.uk/uploads/9/6/4/0/96409902/unfinished_business.pdf

subsequently that the UK should keep a wide berth from any common EU budget, and if it does end up unwisely paying into any common funds, should get as close as possible to a net cost-neutral package.

The third point is that the UK has a duty of care to EU Whistleblowers who have done UK taxpayers a service and who have been left out high and dry.

After Brexit, consideration will need to be given to managing anyone posted to EU bodies in a liaison role. This means thinking in advance of liabilities, reporting chains, codes of conduct, and employee rights. Employment contracts should ensure that UK nationals in such posts have a clear commitment to report wrongdoing to HMG; and be protected when in the event of unreasonable obstruction they report such malfeasance to other legitimate authorities and indeed go public subsequently. In particular, that means the UK having a robust line so that it itself pursues complaints, makes issues public, and breaks the misappled Brussels chokechain of the *devoir de réserve*, which is where EU senior managers can pull pensions and fine individuals for 'bringing the EU into disrepute', a process that can involve making the disrepute of the institution itself public.

Political Opportunity

It is to some extent inevitable that Brexit will carry across red tape. The process was ever one of opportunity, rather than guaranteed delivery, and this is predicated upon the ambition and skill of those involved. It may even be a process only exploited to its full generationally. It is certainly something that is dependent upon the political drive of the government of the day.

The Brexit process is one of four key phases: *Recognition*; *Definition; Transition*; and *Exploitation*. At the moment, though some commentators are still entangled in the first phase, the more constructive thinkers are engaged in the second and as more details emerge from the front line of negotiations, intellectual engagement will facilitate fine tuning of the preparatory work that takes us to phase 3. However, only with the final phase will the widest opportunities be available to reduce red tape.

That is likely to be after the next General Election; its themes may well emerge as a consequence only within the manifestos themselves. A prudent Brexit planner within a political party should already have begun drafting proposals.

What that means though is that Brexit red tape opportunities will vary considerable.

We might envisage seeing the current Labour leadership propose a **Red Brexit** widely encompassing the principles (and costs) of the Social Chapter. It would endorse the principle of Labour mobility, though without squaring the circle on cases where unions already object to undercutting UK labour by deploying foreign workers. It would support the Human Rights Act and be wary of reviewing any at all of the administrative costs that have fallen out of case law. It would be increasingly protectionist in trade terms. It would also, particularly because of the latter, trigger a civil war within a Labour Party in government; Blairites bought into the Single Market programme in a way that the closure of another furnace due to foreign competition would cast a massive and internally damaging spotlight on. But a Red Brexit as things stand risk adding to rather than reducing regulatory burdens.

We can predict similar problems with a **Green Brexit**, which we define as Uncosted Environmentalism. Priority would fall on environmentalism as a social good, regardless of its impact on competitiveness and the economy. Concepts would be pursued at the speed of the passage of legislation, rather than the ability of technology to generate cost-effective solutions. Measures collectively followed to reduce cross-border pollution, while well meaning, would operate under the principle of a level playing field, but one only applying globally to those forced onto the pitch. Meanwhile, legislators would make the most of new opportunities to pursue punishment taxes and tariffs. Innovation would be at risk as the Precautionary Principle took precedence in areas of conflicting scientific evidence, as examples over GM crops and neonicotinoids hint.

One might contrast that again with potential gains where other models seek to exploit opportunities for deregulation. A **Blue Brexit** would aim to focus on increase competitiveness, particularly seeking to develop free trade opportunities to cut barriers and obstacles in its pursuit of global markets. The party fight here would be over unilateralism or multilateralism. An important but typically overlooked benefit exists in this chase: in engaging to reduce non-tariff barriers to trade in foreign markets, the corresponding effect is to open up awareness and debate on obstacles existing within the UK's own economy, where regulatory burdens constrain our own producers, suppliers and consumers. Ultimately it may be our very pursuit of FTAs that drives us internally to be more competitive and successful than our continental neighbours, as the UK electorate becomes unusually informed on half-forgotten principles underpinning commercial success. It is of course through developing a growing economy, by volume and by lighter touch regulation, that the taxes are raised to pay for such items as health care and education.

There is a considerable degree of overlap in this model with the ambitions set out in **Yellow Brexit**. Here we might add an increased emphasis on personal freedom, which in turn generates significant opportunities and also risk in regulation. A caveat here though is a default tendency to seek to operate closer to the EU orbit in administrative terms, which carries an enduring and paradoxical element of regulatory risk for the party historically least inclined to accept it.

Fundamentally though, the key about those four (plus) models of how regulation should develop after Brexit boils down to this: it becomes a matter of greater choice. Decisions will be taken by the people casting their vote in favour of a particular vision, debated in public, and the decision-makers then held to account over how it is delivered and what the results are. Deregulation will happen democratically.

CONCLUSION

Brexit creates opportunities for the UK. Even if the UK ends up shadowing EU regulations in some areas for a transitional period, the EEA experience reveals that a big majority of EU rules will no longer be necessary and can be scrapped. Where divergence then happens, the process can be tailored to encourage due Parliamentary oversight, and proactive consultation by those sectors whose focus has in the past been limited solely to mitigating red tape damage.

A number of vested interests will also be in play that will need to be exposed and overcome. This will be particularly the case with some of those with a financial interest in signing off standards, safety certification and training, which can be very lucrative (but not for those requiring it). The Compensation legal profession will also need to be revisited as part of a grand strategy to redress commercial and professional self-interest and abuse.

What should be beyond all doubt is that the EU does produce a lot of red tape for UK businesses - regardless of whether they export to the EU, export largely elsewhere, or trade predominantly or wholly within the UK. With the overwhelming majority of UK businesses, EU regulation is irrelevant and EU red tape a pointless cost. UK gold plating has been adding insult to injury. Making UK businesses more 'trade aerodynamic' has considerable potential for economic growth, but does not negate the need in parallel for business leaders and trades unions to consider the other root causes behind the nation's productivity gap with its competitors.[61]

Changing the regulatory process by removing the centrality of the EU institutions will inject new authority into Parliament. It should encourage constitutional experts to reconsider how oversight of delegated legislation happens. Problems have long been identified, but new opportunities exist with a simplified circuit board to finally modify the wiring.[62] Part of the solution demands attitudinal changes within government, at all levels.

There will be areas where the model pursued by the EU will differ from that which works in the best interests of the UK. There is a long-growing obsession within EU corridors with the Precautionary Principle, where in essence the burden of proof has shifted even where evidence might be slight, contaminated, or politically-motivated. The first challenge over the coming years will be to balance genuine consumer interests with the irretrievable damage to sectors that arises from getting policy wrong – especially where leading global competitors in cutting edge technologies are unburdened. The second challenge will be to shift the emphasis underwriting permissive trade access. Here, the fact of Brexit may turn out to be highly significant in encouraging those parts of the Commission who favour the principle of mutual recognition (which underscores CETA and especially TTIP) against those still rooted in exact regulatory uniformity.

Such a shift will be extremely important in breaking down TBTs. In the meantime, we can envisage the UK gradually developing a dual approach to regulatory convergence/divergence. The UK market

[61] Some of which on analysis will turn out also to be related to EU membership, such as the increased labour market discouraging firms to invest in training their workers, and also masking critical failings in the UK education system. A coherent government policy is required that addresses all of these issues, including largely non-EU ones such as corporate failure to invest in R&D, as interrelated.

[62] See for instance this note, from 2005:
https://publications.parliament.uk/pa/cm200405/cmselect/cmmodern/465/465we31.htm

would be increasingly open to suppliers who met mutually-recognised standards that were policed at source. Where there is significant divergence in an area of consumer interest, such as over chlorinated chicken (which is, let us not forget, certified safe in the US and which will have been eaten by millions of UK nationals when they last visited the US), goods would still be sold and the customer might be informed of the nature of the product with a sticker, leaving it down to the consumer to make an informed choice based on personal tastes and the cost at the till. Meanwhile, UK poultry farmers would be free to stick their own label on extolling the virtues of through-life 'farm quality' production.

Post-war Government has an inherent addiction to law making, and civil servants exist to make rules. The consequence is inevitably a risk of adding too much. But forget chlorine: in such matters, sunlight is the best disinfectant.

Annex A: A Quick Guide to Regulatory Impact Assessment (A Cabinet Office document dated 2003)

What is in an RIA?

The RIA should be proportionate to the likely impact of the proposal. If the proposal is likely to affect only a few firms or many firms but only to a small degree and/or if the benefits are likely to be small, then the RIA should be quite short. Where the impact will be substantial, however, more data and depth of analysis will be required.

The initial RIA provides a rough and ready assessment based on what is known. This helps to expose gaps in knowledge and aids the collection of fuller, more accurate information, for example through external consultation. This is then developed into a partial RIA containing more detailed policy options and refined estimates of the costs and benefits, and further developed [sic] into a full RIA after consultation.

The full RIA should identify the:
• objectives;
• risks that the proposal is addressing and quantify them;
• options and alternatives to legislation;
• business sectors affected;
• equity and fairness issues, if any;
• benefits and costs for each option considered in the partial RIA and compare them. Don't forget to consider "other" costs and benefits – ie not just those to firms, charities and the voluntary sector but also to consumers/individuals, the public sector, the environment and to the economy at large. Also specify any potential risks associated with each option;
• distributional impacts, if any, eg transfers of income or redistribution of opportunities;
• sectors which will bear the costs and benefits of each option; and
• unintended consequences and indirect costs, if any, outlining how they will be addressed.

The full RIA should also include the:
• Competition Assessment;
• Small Firms' Impact Test and any comments from the Small Business Service;
• enforcement arrangements for securing compliance with each of the proposed options and your plans for guidance;
• monitoring and evaluating/reviewing processes for the policy, eg set an appropriate point at which to look back at what the actual costs and benefits were;
• consultation exercise results, summarise responses received from different sectors or types of business/body (where these vary) and set out how/whether you have changed the assumptions, costings, and recommendations following consultation;
• existing requirements and explain how the proposed options would fit with these;
• recommended preferred option giving reasons based on the elements of the RIA, in particular the analysis of the benefit and costs; and
• signature of the responsible Minister, it then becomes a final RIA.

Annex B: Examples of Plating

The following examples provide some starting points for discussion over what precise legislation could be placed nearer the top of the file for gold plate review. A number are drawn from the Government's Business taskforce looking at cutting red tape.

Space precludes a deep dive on these regulations, some of which are rooted in wider international standards (and on which, see the Red Cell paper *The Life of Laws*) and where the gold plating occurs on several levels. Some items indeed have been subject to review at EU level, and it is even less clear whether this has helped or hindered with gold plating.

Inclusion in the following list is not to call for the repeal of the legislation, but to compare what is currently in law with what the *actual* requirements are for the UK to be seen as compliant with international export standards. In some cases that may allow for rules that diverge considerably from what is required within the EU; in others, to backtrack on rules that have been over-rigorously applied within just the UK. In some other specific examples, the case study demonstrates the effect of legislative wording that needs to be guarded against in the future.

Subject: VAT returns (Directive 2006/112/EEC)

Issue: EU rules state the UK can only lower VAT below 15% on a handful of products and can charge 0% on an even smaller number of goods.

In a recent case, the European Commission referred the Dutch Government to the European Court of Justice (ECJ) for allowing exemptions on boat moorings that had not been approved at EU level.

The Government accepts that VAT rules for cross-border trade 'can be complex and confusing' and that 'UK businesses also experience delays in the processing of cross-border VAT refunds in some EU Member States'.

The annual cost of completing VAT declarations in the EU is estimated to be €40 billion (BIS, February 2014). [63]

Outside the EU's common system of VAT, the UK could exempt exports to the EU from VAT entirely, eliminating the burden on exporters of having to apply for a refund, as well as reducing the complexity of the existing system in the UK.

Subject: Health and safety assessments (Directive 1999/391/EEC)

Issue: As the Government has noted: 'The Health and Safety at Work Framework Directive requires all businesses to keep written records of risk assessments carried out in their workplace, regardless of risk.' The Government notes that this burden applies to 220,000 UK small businesses, and costs businesses across the EU an estimated €2.7 billion (BIS, February 2014).[64]

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

[64] Ibid.

The European Court has ruled that it is illegal to exempt small businesses, even those with fewer than ten employees, from this onerous requirement (Commission v Germany [2002] ECR I-1305).

Subject: The Working Time Directive (Directive 2003/88/EC)

Issue: This Directive has given the European Court control over working hours

Subject: The Waste Framework Directive (Directive 2008/98/EC)

Issue: As the Government has admitted: 'EU rules on the disposal of business waste place a significant burden on SMEs. Even low-risk SMEs such as gardeners, that transport only a small amount of their own waste, need to register as waste carriers. The time and administrative cost spent on doing this is disproportionate for SMEs'.

The Government predicted that as many as 460,000 additional SMEs would have to register by 2014 (BIS, February 2014).

Subject: The Ecodesign Regulation (Regulation 2013/666/EU)

Issue: This implements EU rules which reduce the maximum allowed input power for vacuum cleaners from 1600 Watts in September 2014 to 900 Watts in September 2017.

A similar rule (Regulation 2014/66/EU) lowered the amount of power that ovens are allowed to use. It is possible that these standards will be extended to kettles and toasters.[65]

Subject: REACH (Regulation 2006/1907/EC)

Issue: This regulation makes provision for the Registration, Evaluation, Authorisation and Restriction of Chemicals.

The Government has admitted that: 'The cost of registering chemicals under REACH is excessive. SMEs across the EU are hit disproportionately hard. REACH is forcing some smaller businesses to consider manufacturing outside Europe or stop manufacturing altogether. Current REACH guidance is unwieldy and complex. It forces small companies to buy in expertise to help them comply, which can cost €180 per hour. In 2018, the threshold for registration will reduce from 100 tonnes to one tonne per annum. Most SMEs will then be covered by the regime. They will have little option but to pay fees, often prohibitively high, to join "registration" consortia to gain access to information on chemicals and register for REACH. Costs can be as high as €100,000. We have been given evidence of small firms being advised by their trade association not to grow so that they remain under the threshold. Such arrangements can result in small companies having to obtain information from larger competitors – an open invitation to disreputable larger companies to abuse their position to keep smaller competitors out of the market.'[66]

Subject: The Clinical Trials Directive (2001/20/EC)

Issue: This Directive entered into operation in June 2005 and was intended to harmonise regulation of clinical trials.

[65] *Financial Times*, 26 February 2016

[66] BIS red tape review, op cit.

Academic studies concluded within eighteen months that it 'resulted in a doubling of the cost of running non-commercial cancer clinical trials in the UK and a delay to the start of trials' and 'both increased the cost and caused delay to non-commercial cancer clinical trials run by major public sector Clinical Trials Units in the UK' (European Journal of Cancer, 2007).[67]
Between 2007 and 2011, applications for clinical trials fell by 25%. The cost of insuring commercial trials increased by 800% and the cost of administering non-commercial trials increased by 98% (European Commission, 2012).[68]

The process has been ongoing to repeal it by a regulation nearly seven times its length.[69]

Subject: The Cookies Directive (Directive 2009/136/EC)

Issue: Of concern to any businesses with an online presence, this Directive in principle required users to give consent to internet 'cookies'.

A survey by KMPG in April 2012 found that 95% of businesses were not compliant, risking fines of up to £500,000 (KPMG, 10 April 2012).[70]

The Directive puts tech companies at a disadvantage compared to American competitors.

Subject: Consumer Rights Directive (Directive 2011/83/EU)

Issue: Under this directive, online retailers must ensure that their purchase buttons say '"Order with obligation to pay" or a corresponding unambiguous formulation' (instead of simply saying 'buy'), in order to make sure that customers aren't 'confused'.

Those who sell to consumers have been forced to double the amount of time that an order can be cancelled and the amount of time that customers can requests refunds.

Subject: The Weights and Measures Directive (Council Directive 1980/181/EEC)

Issue: While the use of imperial measures as a 'supplementary indicator' is permitted, metric units 'shall predominate' and must be given in the same or a larger font than imperial measurements.

A number of traders have been prosecuted for breaking this EU law (Thoburn v Sunderland DC [2002] EWHC 195 (Admin)).

This makes it illegal for supermarkets to sell pints of beer without indicating the equivalent of a pint in metric units.

[67] http://www.ncbi.nlm.nih.gov/pubmed/17118647
[68] http://ec.europa.eu/health/files/clinicaltrials/2012_07/proposal/2012_07_proposal_en.pdf
[69] http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1440149325812&uri=CELEX:32014R0536
[70] https://web.archive.org/web/20120413012859/http:/www.kpmg.com/UK/en/IssuesAndInsights/ArticlesPublications/NewsReleases/Pages/Long-way-to-go-for-UK-institutions-with-majority-yet-to-comply-with-EU-Cookie-Law.aspx

Subject: European Food Information to Consumers Regulation (Regulation 2011/1169/EU)

Issue: This requires food products to present information on allergens. This has, among other things, obliged fishmongers to attach warnings on their smoked salmon packaging stating that their products 'may contain fish'.

Subject: Nutrition and Health Claims Regulation (Regulation 2006/1924/EC)

Issue: Under this regulation, the European Food Safety Authority declared that it was illegal to say that drinking water stops dehydration (EFSA, 2011).[71]

Subject: Olive Oil Legislation (Regulation 2012/29/EU)

Issue: 'In order to guarantee the authenticity of the olive oils sold', this regulation provides that olive oils 'shall be presented to the final consumer in packaging of a maximum capacity of 5 litres'.

As a result, it is unlawful to sell to consumers olive oil in six litre containers.

Subject: The 'Bendy Bananas' Directive (Regulation 2011/1133/EU)[72]

Issue: This provides that bananas sold 'must be… free from… abnormal curvature of the fingers'. It also prevents bananas being presented to the consumer in hands of two or three fingers (Council Regulation 2007/1234/EC).

The case study contains a complexity rooted on wider trading standards, how they are reached, what the originally valid motives are, and how they become issues of mockery over their policing. In this instance, standards reached on defining quality under the UN's *codex alimentarius* have been gilded into how they are policed.

This is all the more valid a focus for review given how similar defining constraints have been deployed for other food items across 21 brackets of food products, whose range varies from hops to leeks.

The whole issue of how rules and principles underpinning common organisation of agricultural markets (CMOs), and indeed the extent to which in many products such uniformity is even necessary as opposed to existing in order to generate a new TBT and an associated mechanism justifying subsidy, deserves a detailed paper in its own right. It would reveal how standardisation has been deployed as an excuse for market subsidy and protectionism.

[71] http://www.efsa.europa.eu/sites/default/files/scientific_output/files/main_documents/1982.pdf

[72] As changed over time. The original was Council Regulation (EEC) No 404/93 of 13 February 1993.

Subject: The Plant Protection Products Regulation (Regulation 2009/1107/EC)

Issue: The Government has admitted that this 'EU regulation denies business access to innovative crop protection products. This hinders EU businesses in their efforts to improve crop yields and quality. As a result, EU farming businesses are disadvantaged on world markets'.[73]

Subject: The GM Food and Feed Regulation (Regulation 2003/1829/EC)

Issue: Under this regulation, genetically modified (GM) organisms could not be marketed in the UK without the approval of the European Commission.

In 2007, BASF conducted field trials of a strain of GM potatoes, known as 'Fortuna', which were resistant to blight. After approval to market the 'Fortuna' series of potatoes was continually refused by the EU, BASF announced that continued investment in the strain would be halted due to 'uncertainty in the regulatory environment', subsequently moving its operations to the United States (RSC, 7 February 2013).[74]

Subject: Habitats Directive (Council Directive 1992/43/EEC)

Issue: The Government has acknowledged that 'EU rules such as the Habitats Directive and wider EU environmental permit requirements' are regulations which stop housebuilders 'building the homes that Britain needs' (HM Government, December 2015).[75]

The Home Builders Federation has said that the implementation of the Habitats Directive 'brought house building activity to a virtual halt in large parts of some 11 local authorities in Berkshire, Surrey and NE Hampshire' ten years ago, 'leading to significant job losses in the home building industry and threatening the existence of many SME companies in the region'.[76]

Subject: EU public procurement legislation (Directives 2014/24/EU, link and 2014/25/EU)

Issue: This means the EU sets rules on how Britain procures things like hospital and school buildings. These have little directly to do with international trade.

As the UK Government has admitted, 'the rules are onerous, especially for SMEs. This leads to a regulatory "cliff edge" that inhibits SMEs from bidding for work above the threshold' (BIS, February 2014).[77]

A study for the European Commission found that procurement costs amounted to 30% of the value of a small contract and that procurement exercises cost £45,000 on average and delay contractual awards by 193 days (PwC/Ecorys/London Economics, 2011).[78]

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[73] Red tape review, op cit.

[74] http://www.rsc.org/chemistryworld/2013/02/basf-gm-potato-amflora

[75] https://www.gov.uk/government/news/cutting-red-tape-review-will-give-construction-industry-the-foundations-to-get-britain-building

[76] http://www.hbf.co.uk/?eID=dam_frontend_push&docID=24955&filename=Cutting_Red_Tape__final__27_Jan_16.pdf

[77] Red tape review, op cit.

[78] http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cost-effectiveness_en.pdf

Subject: Other examples of red tape in the construction industry

Issue: CE marks became mandatory on nearly all construction products in July 2013. This has significantly increased the amount of red tape that construction companies have to abide by (Regulation (EU) No 305/2011).

These firms are also required to have a written Factory Production Control system, increasing bureaucracy.

The EU has also introduced new laws on timber which oblige organisations to obtain information such as: country of harvest, tree species, supplier, quantities, the customer to whom the timber is sold and compliance with the relevant forestry information. This is extremely cumbersome and was identified at the outset as likely to push up prices (Department for Environment, Food and Rural Affairs, 2 April 2014).[79]

Subject: The Resale Rights Directive (Directive 2001/84/EC)

Issue: This directive creates a right under EU law for artists to receive royalties on their works when these are resold (droit de suite). This has proven to be ruinously expensive. Jussi Pylkkänen, President of Christie's Europe, called the 'extension of the artists' resale right to deceased European artists' in 2012 'a matter of real concern. It will affect the modern art market, which is a key aspect of Christie's activities in London' (Art News, November 2012).

Subject: Mortgage Credit Directive (Directive 2014/17/EU)

Issue: According to the *Financial Times*, the requirement in the Directive on lenders to display more than one interest rate left borrowers liable to be 'completely confused'.

The Directive was also criticised as 'redundant' in the UK, where consumer protection was already strong.[80]

Subject: Charter of Fundamental Rights

Issue: Business representatives at the time indicated the damage that the Charter could do to UK business interests. The 'opt-out' was received enthusiastically by the Confederation of British Industry as one of the reasons why it 'welcome[d]' the Lisbon Treaty (CBI, 22 September 2008, link).

Business for New Europe stated that 'proposals … like giving the Charter of Fundamental Rights full legal force' were not in the UK's interests (*Financial Times*, 21 June 2007). Its Chairman, Roland Rudd, later a prominent Remain campaign leader, stated that the Charter was 'superfluous and unwarranted' and 'a key concern for business', which 'should not be included in the text of a new treaty' (*Daily Telegraph*, 12 June 2007; *Financial Times*, 18 May 2007).

[79] https://www.gov.uk/guidance/eu-timber-regulation-guidance-for-business-and-industry
[80] *Financial Times*, 5 March 2015

Subject: EU energy policies

Issue: End-user gas prices are now nearly twice as high in the UK than in the US (Business for Britain audit, June 2015).[81] Between 2005 and 2011 EU manufacturing saw the highest increase in energy costs relative to the US, China and Japan (European Commission, 2014).[82]

The Oxford Institute for Energy Studies has warned that 'the cost of Europe's clean energy policies has also risen, and will rise further, as a result of the Commission's proposals' (OIES, April 2014).[83]

The European Commission has itself admitted 'European Energy Intensive Industries... must decide whether to invest in Europe or abroad, in countries with much more promising market dynamics' (European Commission).[84] It has also said that medium sized companies in the EU pay about 20% more for their electricity than companies in China and about 65% more than companies in India (European Commission, 2014).[85]

According to the former European Commission President Jose Barroso, between 2005 and 2012 the gas price for European industry increased by 35 per cent and the electricity price increased by 38 per cent. In the US, by contrast, gas prices fell by 66 per cent and electricity prices fell by 4 per cent (European Commission, May 2013).[86]

It has been estimated that EU energy regulations will cost the UK economy between £86.6 billion and £93.2 billion (net). EU policies currently account for up to 9 per cent of the cost of energy for Energy Intensive Industries. By 2030 this could rise to just under 16 per cent (Business for Britain, August 2014).[87]

Subject: EU emissions policies

Issue: When the EU introduced expensive environmental policies, big businesses responded by moving their factories to non-EU countries (noticeably the chemical industry). Antonio Tajani, the former European industry commissioner, warned 'We face a systemic industrial massacre'.[88]

The EU's Emissions Trading Scheme has been condemned by Friends of the Earth as being 'an abject failure' (Friends of the Earth, October 2010).[89] This fits into a pattern of other environmental errors, including the EU's floods directive.

[81] http://forbritain.org/cogchapter16.pdf#page=22
[82] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014SC0020
[83] https://www.oxfordenergy.org/wpcms/wp-content/uploads/2014/04/Costs-Competitiveness-and-Climate-Policy.pdf
[84] http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52014DC0021
[85] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014SC0020
[86] http://ec.europa.eu/europe2020/pdf/energy3_en.pdf#page=3
[87] http://businessforbritain.org/BFBEnergyPaper.pdf
[88] *Telegraph*, 8 September 2013
[89] https://www.foeeurope.org/sites/default/files/publications/FoEE_ETS_failing_to_deliver_1010.pdf

Subject: Emerging risks

Issue: Some potential burdens look as if they will actually be added during the course of the Brexit transition itself. These will need to be avoided.

An example is over Free online services, endangered by new ePrivacy rules. The European Parliament's Civil Liberties Committee has recommended that all users will have to opt into allowing service providers to access their personal data, replacing the existing system of opt outs.

Many businesses offer free online services because they can monetise the data they hold through advertising. If that information is not widely available, the business model which has driven much of the growth of the internet over the past 20 years will no longer be viable.

The proposals are also unlikely to address the privacy concerns which are the inspiration behind the proposal, as users will have to choose their cookie settings in the browser when they initially set up their device rather than the existing situation where they can set cookie settings for each website visited.

The new regulations would also overly restrict web audience measurement, making it difficult to calculate royalties due to artists or market sites on the basis of usage.[90]

Subject: Water Framework Directive (2000/60/EC)[91]

Issue: The aim of this Directive is to achieve good ecological and chemical status in all inland and coastal waters by 2015. However, "good status" is not clearly defined in the Directive.

Subject: Animal By-Products Regulation (1774/2002/EC)

Issue: Certain rules applied to "wild" animals but "wild" was not defined. In addition, a derogation applied to "remote" areas but "remote" was left to each Member State to define. On which parts of animals were covered, the word "hoof" was used and a question was asked about where the hoof stopped and the leg began. Debates over definition also occurred relating to the term "former food stuffs", what counts as "raw" and the definition of "catering" waste.

Subject: Ozone Depleting Substances Regulation (2037/2000/EC)

Issue: The Departments of Trade and Industry and Environment, Transport and the Regions found the scope of this Regulation unclear about whether Chlorofluorocarbons (CFCs) in foams in fridges had to be recovered.

While trying to clarify this with the Commission, the then Departments took the interim view that foam in fridges would not have to be recovered and decided that it could not advise industry on whether or not to invest in new disposal machinery until the Commission provided

[90] Source: ECR press release.

[91] This and the following examples are directly taken from the NAO report from 2005, *Lost in Translation?* While dated, the analysis shows the range of problems that generate red tape in play.

clarification.

Seven months before the Regulation came into force, the Commission informed the Department that insulating foam was included and had to be recovered. The result was a lack of preparedness by industry for the new rules.

Fridges had to be stored by local authorities as an interim measure at a cost of around £46 million.

Subject: Nitrates Directive (1991/676/EEC)

Issue: The Ministry of Agriculture, Fisheries and Food and the Department of the Environment concluded in 1995, based on legal advice, that the test to see whether nitrate levels were above a set limit should apply only to waters abstracted to produce drinking water. However, in 2000 the European Court of Justice deemed that this interpretation was incorrect and that the test should apply to all water sources.

The ruling meant that the Department had to go through a second designation of nitrate vulnerable zones involving another round of mapping and consultation. This second designation resulted in 55 per cent of England being identified as nitrate vulnerable, compared to the eight per cent originally considered to be vulnerable.

Subject: Pig Welfare Directives (2001/88/EC and 2001/93/EC)

Issue: When transposing the Directives, the Department took the opportunity to update the "Code of Recommendations for the Welfare of Livestock: Pigs"; this code is a national initiative and is not a requirement of the Directives.

This led to accusations by some stakeholders of "gold-plating,"as they felt the code went further than the Directive required.

Subject: Animal By-Products Regulation (1774/2002/EC)

Issue: The Regulation made significant changes to the way in which animal by-products could be disposed of, including a ban on burying dead animals on farms and new disposal routes for waste foodstuffs containing meat. The complexity of the changes meant that they affected around 17 different sectors including the farming community, slaughterhouses, incinerators, pet food plants and retail outlets.

Not all were fully consulted during the implementation planning. This was reflected in the Regulatory Impact Assessment (RIA), especially for small businesses, and more rural communities.

The NAO review of this process suggested that prior consultation was weak because it used language like "we think that" and "it may be that" rather than stating to what extent these opinions had been informed by consultees. Meanwhile, the Departmental Better Regulation Unit made no comments on the quality of this RIA, despite being sent the draft.

About the Author

Dr Lee Rotherham has been an adviser to John Major's whipless rebels, Eurosceptic MEPs, three Shadow Foreign Secretaries, the Conservative delegate to the Convention on the Future of Europe, a delegate to the Council of Europe, and government ministers. He was Head of Opposition Research for the No Campaign in the AV Referendum, and Director of Special Projects at Vote Leave, the designated pro-withdrawal campaign during the 2016 referendum. He has twice been a Conservative candidate in General Elections, in 2001 in St Helens South (the "butler campaign"), and in 2005 in Rotherham standing against the then-Europe Minister. Outside of Westminster he has worked in publishing, teaching, heritage, and in Defence. He has been very extensively published in academia and across think tanks. His publications as author or coauthor include *The EU in a Nutshell*; *Ten Years On - Britain Without the European Union*; *Change or Go*; *Plan B for Europe*; *Controversies from Brussels and Closer to Home*; *Manning the Pumps*; *Hard Bargains or Weak Compromises*; *The Hard Sell*; *Bloc Tory*; *Common Ground*; *A Spotter's Guide to Sound Government Policies*; and the award-winning *Bumper Book of Government Waste* and *Brown's Wasted Billions*. His historical works include *A Fate Worse Than Debt – A History of Britain's National Debt from Boadicea to Cameron*; *The Sassenach's Escape Manual*; and tour guides to Roman Britain, colonial North America, the Hundred Years War, and the Apocalypse. Lee is a reservist in the British army, and has served on three overseas deployments

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