

On the Smartness of Smart Regulation – A Brief Comment on the Future Reform Agenda

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We live at a time where Smart is better than Better, and Better was not Smart enough. This is not a dull pun. It actually reflects the status in which regulatory reform finds itself nowadays. To many observers, the switch from Better to Smart just reflects the attempt to instil renewed commitment and faith in an agenda, which in some (European) countries has maybe exhausted its thrust. The European Commission also admits candidly that the choice of the new term largely serves as a refreshing slogan. But limiting it to a branding change, with little consideration of its content, would be a mistake in appreciation. And a missed opportunity. We do need “Smart Regulation” – and not only in the Commission. Above all, we need smart *regulators*.

The Commission has acknowledged this and the small squabble on the new label of the strategy does not blind the overall picture. Its Smart Regulation strategy contains underlying substantial elements that convey a quite powerful message that transcends the European executive. This brief commentary focuses on one aspect of the smart approach and offers a few considerations on the way ahead for a generalised new, smart agenda.

It is smart to move beyond red tape

One important part of the new Smart Regulation message is the need to change paradigms. A recent international conference addressed this issue, referring to the reform policy as being “at the crossroads”.¹ The impact that the financial and economic crises have had on the regulatory reform agenda as it has been widely promoted in the recent years compels us

to quickly and fully grasp the value of the changes currently taking place.

The tsunami of the administrative burden reduction, which crossed Europe throughout the last decade, seems now to have passed and its wave has left a languishing Better Regulation agenda behind. There is widespread disillusion with the actual effectiveness of the various cutting red tape programmes, and doubts about their efficiency. So far, business has reported not to have perceived relevant tangible benefits. Critics now denounce that those who espoused the equation “regulatory reform largely equals less red tape” have bet on the wrong horse. The economic and financial crises have highlighted the need to address wider, structural issues, and not just the burdens from direct regulatory information obligations.

Against this backdrop, the Commission stands out for never advocating an unbalanced emphasis on administrative burden and for showing a wise moderation in deploying related tools. Its defence of the merits of an integrated, comprehensive impact assessment system to identifying and gauging both costs and benefits must be underscored once again. It is through policy coherence – and through instruments conceived to facilitate the achievement of such objective – that sustainability and growth can be coupled.

Because it reiterates and builds upon this reasoning, Smart Regulation is to be valued and must be sought. It represents a further step towards de-franchising regulatory reform from its purely de-regulatory origins. The actions envisaged in the Commission’s new strategy fit such an evolution quite neatly – they must now be put into practice, of course. Their relevance may not be perceived as urgently by all countries, and many of these would have preferred catching up quietly with the “old” paradigm. But for those governments that have already travelled a substantial part of the reform road, it is time to go around a bend and pave a new path. It might be uphill (again), but there is no easy tunnel in sight. Since a few years, the Commission belongs to such a group of advanced reformers, and it deserves the credit of tacking quite timely action in that respect.

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¹ Available on the Internet at <http://www.oecd.org/site/0,3407,en_21571361_45507055_1_1_1_1_1,00.html>. See also L. Allio and S. Jacobzone, “Regulatory Policy at the Crossroads. The Role of the OECD in Mapping an Agenda for the Future” (2011), in A. Alemanno, F. den Butter, A. Nijsen and J. Torriti (eds), *Better Business Regulation in a Risk Society* (New York: Springer, forthcoming).

It is smart to learn from the “red tape legacy”

To be clear, the cutting red tape boom was not wrong *per se*. It has very important merits. In order to be smart, governments must therefore learn from the positive lessons and the benefits brought by those experiences. Beyond the concrete measurement and simplification results, the legacy is in fact most valuable. For instance, burden reduction programmes have helped mainstream the idea of evidence-based decision-making, insisting on the notion that “what gets measured, gets done”. In many cases, standardised measurement was not possible and databases were not available before the red tape initiatives. There is criticism of directly extrapolating macro-economic gains from micro-economic measurements, as promised by the Standard Cost Model. But relevant figures have been put on the table and deserve to be considered. Programmes have been increasingly linked, moreover, to administrative processes re-engineering and introducing e-Government across public administrations, laying the foundations for concretely bridging legislative and administrative simplification.

In addition, the programmes have made evident the necessity to grasp and manage the “regulatory cascade”, i.e. ensuring that high quality regulation is adopted and implemented at all levels of government in a coordinated and consistent manner. In a number of countries, pilot projects on coordinated administrative burden measurements have been launched by central and sub-national governments. Finally, the considerable investments deployed by many governments during the various phases of the cutting red tape programmes push to asking about their effectiveness and efficiency. An *ex post* evaluation of the programmes is increasingly justified. This has clear implications on how we address the question about the real impact of regulatory reform initiatives.

It becomes clear therefore that the red tape phase has been an important one in the development and diffusion of regulatory reform, and that moving beyond it means looking wider. Being smart is therefore about producing more encompassing (“integrated”) analyses, but also about closing the two cycles – one on regulations (through regulatory *ex post* reviews) and the other on the regulatory policy (by assessing the performance of programmes and initiatives).

It is smart to understand perception ... even smarter to exploit it

To conclude, let us return to a point raised above. The experience of many countries with the administrative burden reduction programmes reveals a conundrum that may appear discouraging. Despite several factual indications of simplified procedures and the related benefits in reduced economic burdens on businesses, entrepreneurs still claim that very little has actually changed and they expect further savings. It is the “irritating burdens”, they claim, that governments have not got rid of. These burdens may well not be the most costly ones, but they are perceived as such.

This reminds of the sometimes irrational and unpredictable nature of the regulatory realm. The evidence regulators are increasingly called upon to produce when justifying their intervention is intimately linked with the way it is perceived and/or communicated. Scholars and practitioners of risk analysis are quite familiar with such a challenge, and a whole discipline has emerged on how to best craft risk communication and manage risk perception and trust.

President Obama’s Administration is promoting an innovative approach to looking into the impact of regulation. As other contributions in this EJRR Symposium highlight, the US OIRA/OMB is pursuing reform by, *inter alia*, keeping using benefit-cost analysis in a highly disciplined and rigorous way while seeking greater pragmatism. Special emphasis is being put on the insights provided by social, behavioural and psychological sciences when formulating regulatory policy, and on their contributions to enhance the proportionality, effectiveness and acceptability of regulation.

Perception thus matters, and the challenge is to understand when it drives regulatory action, when it should, and when it should not. To be smart regulators is therefore also to be able to disentangle whether and when reform interventions ought to tackle the substance of regulation rather than simply addressing its form. It means also being committed to better address the *benefit* side of the regulatory equation. If we succeed, then there will be no doubt anymore that regulatory reform is not about the quantity of regulation.