LEAVE ALLIANCE

Brexit Monograph 6

Post-Brexit regulation

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(corrected)

Introduction
Prominent elements of the Brexit debate in the run-up to the EU referendum were discussions about the cost of EU regulations and the potential for massive deregulation, with the prospect of a vast "bonfire of regulation" offered by the leave campaign, effectively as a reward for voting to leave the EU.

Underlying this debate, which continues to this day, was an assumption that regulatory costs are a measure of undesirability – on the basis that the higher the cost, the less desirable they are – and that reducing regulatory costs is a policy objective worth pursuing.

In this Monograph, we examine the role of regulation, with specific reference to regulatory costs. We then assess the regulatory costs attributable to the EU and how they arise. From there, we move on to evaluate claims that Brexit might bring significant savings in regulatory costs.

Specific reference is made to the Open Europe study, published in October 2013, in which it was claimed that "the top 100 EU laws cost the UK economy £27.4 billion a year".[1] We also review the further report in 2015 which put the cost at £33.3 billion for this "top 100".[2]

In conclusion, we explore whether deregulation is a practical proposition or, for that matter, even desirable, or whether the focus should be elsewhere.

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[1] Press release here: http://archive.openeurope.org.uk/Page/SingleMarket/en/LIVE#, with the full report here: http://archive.openeurope.org.uk/Content/Documents/Pdfs/131021Top100Regulations.pdf

[2] http://openeurope.org.uk/intelligence/britain-and-the-eu/top-100-eu-rules-cost-britain-33-3bn/ and http://2ihmoy1d3v7630ar9h2rsglp.wpengine.netdna-cdn.com/wp-content/uploads/2015/03/Open_Europe_Top100_costliest_EU_regulations.pdf

The relevance of regulatory costs

In addressing the costs of regulation – irrespective of its origin – it is necessary to question whether costs, *per se*, are a meaningful measure of their utility or otherwise. Arguably, and especially in administrative law affecting businesses, they are an unavoidable cost of doing business, or of achieving a desired policy outcome. The actual cost (given efficient regulation and sensible enforcement) is not necessarily an issue.

Taking one example of business costs, in the hygiene laws applicable to commercial food premises, there are statutory obligations relating to the cleanliness of toilets. These are, currently, EU regulations but, not even the wildest anti-EU zealot would argue that the repeal of the relevant EU law would result in proprietors no longer spending money on toilet cleaning.

In the food sector, many operators go far beyond the minimum regulatory standards, some using high standards as a marketing tool. In practice, therefore, regulation becomes a means of penalising the very few non-conforming businesses. That has the dual function of "levelling the playing field", preventing traders gaining a competitive advantage from non-conformity, and of maintaining consumer confidence.

Another aim of regulation is to prevent or reduce the likelihood of catastrophic failure. Such an objective would apply to aviation safety, where the preservation of life is the primary objective to which all others are subordinate. Cost is not an issue.

Prevention of catastrophic failure is certainly one objective of financial services regulation. The cost of the world financial crisis in 2008-9 was estimated by the IMF to be $11.9 trillion (US) and while some have argued that poor regulation was in part responsible, the current round of regulation is most definitely aimed at preventing a repetition.[3] As such, regulation might be considered as insurance – its "premiums" as an unavoidable cost.

Regulation, in this and other sectors often has the function of defining specific codes of behaviour or procedures, thereby to prevent fraud or other malpractice. Sometimes it is not devoted to improving efficiency, *per se*, but to improve the ability of global supervisory bodies to detect early signs of market failure or fraudulent activity.[4] This is easier to do when common standards are in place.[5]

For instance, we are seeing increasingly rigorous regulation governing aspects of the VAT system. Estimated at 12 percent of total VAT revenue, EU-wide

[3] *The Daily Telegraph*, IMF puts total cost of crisis at £7.1 trillion, http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/5995810/IMF-puts-total-cost-of-crisis-at-7.1-trillion.html

[4] http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/106/10611.htm

[5] House of Lords, European Union Committee, The role of the EU in global supervision and regulation http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/106/10611.htm

fraud may have cost €90-113bn a year in the period 2000-2006 and more than €100bn in 2012, accounting for over €1 trillion in just over a decade.[6,7] The law is shaped by the need to prevent criminal activity in an attempt to stem multi-billion annual losses.[8]

Here, one can reasonably argue for complete revision of the VAT system or its replacement with a different form of tax. But as long as the system is in place, there must be regulation to protect it.

In terms of international trade, regulation is often not so much proscriptive as permissive, facilitating the movement of goods. Conformity with an agreed international standard, where it exists, prohibits importing countries imposing their own arbitrary (or even just higher or different) standards which can (and are often intended) to act as barriers to trade.

A classic example of this is the Globally Harmonised System of Classification and Labelling of Chemicals (GHS), manifest at EU level in the Classification, Labelling and Packaging (CLP) Regulation.[9] The global standardisation of hazardous material markings means that goods bearing the correct markings cannot be excluded by importing countries on the grounds of non-conformity with local codes. Labelling is a normal cost of doing business. Harmonising regulations are entirely beneficial.

Nevertheless, in assessments of regulatory costs, the standard measure is the impact assessment, which compares the notional cost of compliance with the supposed savings or benefits which accrue from that compliance. The impact assessment for the CLP Regulation illustrates the sometimes crude nature of assessments and the tentative nature of the results, based as they are on a number of unverifiable assumptions.

In this event, it was concluded that there would be cost savings of about 2.5 percent of all the costs related of the non-tariff-barriers to external trade. These were expected to translate into lower prices to customers.[10] The regulation, overall was expected to deliver savings, possibly as high as €500 million annually. Any real costs incurred were attributable to the transition from the existing to the new system, effectively amounting to one-off costs.

Here, at least, there is some (albeit limited) value in the impact assessment, but the very concept of measuring the impact of regulation in terms of cost/benefit ratios can mislead analysts into thinking that an economic advantage is

[6] *Finfacts*, European Union continuing to struggle in fight to reduce VAT fraud, Michael Hennigan, 3 September 2013, http://www.finfacts.ie/irishfinancenews/article_1026481.shtml
[7] Eurostat, Tax revenue in the European Union, http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-12-002/EN/KS-SF-12-002-EN.PDF
[8] Council of the EU, 22 July 2013, Council approves measures to tackle VAT fraud, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/138239.pdf
[9] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R1272&from=EN
[10] http://ec.europa.eu/environment/chemicals/labelling/pdf/ghs_ia.pdf

necessarily the main or sole purpose of regulation. But they also allow campaigners to argue that high costs are a valid reason for reducing or eliminating regulation.

The fallacy of this view is evident when one looks at the rise of consumerism and in particular the campaigning activities of Ralph Nader on the safety of automobiles. Despite the expense of safety regulation, it is hardly imaginable that buyers in developed countries would be willing to purchase vehicles that had not been extensively tested. The cost of regulatory compliance is again a cost of doing business.

Turning to the food scares of late 1980 through to the late '90s, from Salmonella in eggs to BSE, producers were often prepared to accept a degree of regulation more rigorous than strictly necessary to ensure public safety, simply to restore consumer confidence. Without the controls, there was no business.

In the meat industry, meat inspection is now heavily regulated by EU law. But a uniform system in Britain was first mooted in 1922 at the behest of the industry after problems with the considerable diversity in the level of inspection actually carried out in different districts, and the lack of uniformity, which imposed "unequal liabilities" on traders. Where no inspection was carried out, "serious embarrassment" to honest traders was caused, "owing to the absence of any check on unscrupulous traders".[11]

The idea of "levelling the playing field" pervades modern regulation, to the extent that modern businesses often welcome regulation. One example cited by the DIY chain B&Q was the EU timber regulation. This was regarded as an example of an environmental policy which is essentially desirable – it supported many member states' own endeavours to address the challenge of driving unsustainable timber from the market.[12]

In the UK, the DIY store B&Q had a long-standing policy of selling only "sustainable" timber to its customers. Whilst embracing an ethical timber policy made sense to the UK business, before the adoption of the EU timber regulations, the business was put at a disadvantage with its European competitors. EU timber regulation therefore created a more level playing field, and ensured that the company was not put at a commercial disadvantage for "doing the right thing".[13]

At a different level, manufacturers find the absence of specific product regulation can render them prey to different contract standards applied by their

[11] Ministry of Health, Circular 282: "Circular letter and memorandum on a system of meat inspection… for adoption by local authorities and their officers". Author's collection.
[12] European Commission, Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010, http://ec.europa.eu/environment/forests/timber_regulation.htm
[13] Balance of Competences, *op cit*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227069/2901084_SingleMarket_acc.pdf

powerful customers. Individual supermarket buyers have been known to demand their own specific standards simply to lock in their suppliers to prevent them from supplying competitors unless they are prepared to set up different production runs for the different standards. Comprehensive statutory codes protect them from this predatory, anti-competitive activity.

Taking a broader view of regulation, therefore, at the very least it can be said that cost is only one of the factors in assessing their utility, and not necessarily the most important.

The Open Europe survey

At the centre of the debate on the cost of regulation has been the think tank Open Europe, with its study of October 2013, asserting that the top "100 EU laws" cost the UK economy £27.4 billion a year.[14] In a further study published in 2015, this became £33.3 billion.[15]

Notwithstanding the limitations of impact assessment calculations, the studies relied on a summation of the estimated costs reported in UK impact assessment studies, ignoring the estimated benefits. The higher figure of £33.3 billion was translated by the Vote Leave campaign into a weekly cost of £600 billion, implying that this amount could be saved if we left the EU.[16]

As to benefits, these were estimated at £58.6 billion a year. However, £46 billion of this stemmed from just three pieces of legislation which, in the view of Open Europe, were "vastly over-stated". The benefit of the EU climate targets (£20.8 billion), for instance, was dependent on a global deal to reduce carbon emissions that was never struck. Open Europe thus estimated that up to 95 percent of benefits had failed to materialise. They later clarified this as applying only to the climate change figure.[17]

However, not only were benefits under-stated, there was an obvious selection bias. The "top 100" was chosen by reference to estimated cost, with only the highest selected. But this was from an *acquis* of over 20,000 legislative acts currently in force. Many of these deliver, as with the CLP Regulation, real benefits and show minimal costs. Necessarily, they were excluded from the survey.

Almost to the level of *reductio ad absurdum*, one might consider the cost of the much-derided "banana directive", not a directive at all but Commission Implementing Regulation (EU) No 1333/2011, repeated at global level as

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[14] Open Europe, o*p cit*: http://archive.openeurope.org.uk/Page/SingleMarket/en/LIVE#

[15] http://openeurope.org.uk/intelligence/britain-and-the-eu/top-100-eu-rules-cost-britain-33-3bn/ and http://2ihmoy1d3v7630ar9h2rsglp.wpengine.netdna-cdn.com/wp-content/uploads/2015/03/Open_Europe_Top100_costliest_EU_regulations.pdf

[16] http://www.bbc.co.uk/news/uk-politics-eu-referendum-36398272

[17] http://openeurope.org.uk/today/blog/clearing-up-confusion-over-open-europes-view-of-the-benefits-and-costs-of-eu-regulation/

Codex Standard STAN 205-1997, AMD. 1-2005.[18] Translated into law as the Quality Standards for Green Bananas (England and Wales) Regulations 2012, there was no full impact assessment because: "the only impact which is foreseen is an impact on the public sector of not more than £5m and no political or media interest is foreseen".[19]

This grossly under-values its effect of opening up international trade. Currently, banana production serves a huge market with a traded value in 2013 of US$9 billion and a retail value of approximately US$25 billion.[20] Much of this is entirely due to the historic development of quality standards, explained by the Executive Secretary of the United Nations Economic Commission Europe (UNECE), Christian Friis Bach, in terms of the cucumber marketing standard:

> The standards not only facilitate trade, they also help producers get a better price for better quality. Traders in the UK can buy cucumbers from Spain or Morocco, or any other country by simply referring to the standard. They will then be able to compare prices, knowing exactly what they will get. There is no need to travel all the way to where the cucumbers are grown to inspect them. The quality is defined by the standard. So, if you order Class I cucumbers, you will get Class I cucumbers. This is trade facilitation at its best. And the producers of Class I cucumbers, wherever they might be, will get the premium for a Class I cucumber.[21]

Thus to focus on the "top 100" most costly regulations is in itself a distortion. The Single Market *acquis* comes as a package. Its costs need to be assessed as a package or not at all. To cherry-pick a limited number of items on the basis of a hierarchy of cost is to misrepresent the situation.

This notwithstanding, even attributing the cost to EU regulation is tendentious. Open Europe itself notes that "it would be wrong to assume that these regulatory costs would magically disappear if the UK were to leave the EU". It then adds: "The UK Government would probably want to keep a good number of these laws in part or in full – anti-discrimination laws, some health and safety rules, food safety standards, and so forth".[22]

Looking at the top five of Open Europe's "top 100", we see listed: the UK Renewable Energy Strategy, with a recurring cost: £4.7bn a year; the CRD IV package, costing £4.6bn a year; the Working Time Directive, estimated at £4.2bn a year; the EU Climate and Energy Package, at £3.4bn a year; and the Temporary Agency Workers Directive with a recurring cost: £2.1bn a year.

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[18] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011R1333&from=EN; http://www.unece.org/fileadmin/DAM/trade/agr/meetings/ge.01/document/Codex%20bananas%20E.pdf

[19] http://www.legislation.gov.uk/uksi/2012/947/pdfs/uksi_20120947_en.pdf

[20] http://www.iisd.org/ssi//banana-market/

[21] http://www.unece.org/info/media/blog/previous-blogs/cucumbers-blame-the-un.html

[22] Open Europe, *op cit*.

The second item is the CRD IV financial regulation package, yet in a 2015 report on the "post-crisis EU financial regulatory framework" a House of Lords Select Committee stated: "…it is likely that the UK would have implemented the vast bulk of the financial sector regulatory framework had it acted unilaterally, not least because it was closely engaged in the development of the international standards from which much EU legislation derives".[23]

This definitely applies to the CRD IV package, which stems almost entirely from the Basel III regulatory framework produced by the Basel Committee on Banking Supervision.[24] What we are seeing is global standard setting, part of the international response to the global financial crisis.[25] No honest assessment of costs could possibly attribute this legislation to the EU.

Similarly, when it comes to the UK Renewable Energy Strategy and the Climate and Energy Package, collectively costed at £8.1 billion, even Open Europe refers to "a global deal" struck on climate change. In fact, the entire package implements the UN Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol.[26]

In this, though, the UK's own 2008 Climate Change Act (CCA) takes in the Kyota commitments and expands upon them, going much further than EU legislation.[27] And, with the UK impact assessment putting estimated annual costs at £14.7-£18.3 billion, their magnitude dwarfs the £8.2 billion attributable to the EU.[28]

As to whether the UK would gain any relief from leaving the EU – even supposing the Government could be prevailed up on to repeal the CCA - one can compare its situation to that of a victim in a horror movie, trapped alive in a coffin. Having broken through the lid in a bid to escape, he finds to his consternation that there is another lid. This "double lid" is, on the one hand, the EU treaty obligations and, on the other, the UNFCCC Kyoto Protocol. Breaking through the EU legislative layer simply reveals the second "lid" of the Kyoto Protocol.

The idea, therefore, that climate change costs can legitimately be attributed to "EU regulation" is extremely suspect. And, without that, Open Europe has already lost nearly £13 billion from its regulatory costs.

Next on the list is Working Time Regulations, based on Directive 2003/88/EC, which is attributed entirely to the EU. This ignores the fact that the core

[23] http://www.publications.parliament.uk/pa/ld201415/ldselect/ldeucom/103/103.pdf
[24] http://www.eba.europa.eu/regulation-and-policy/implementing-basel-iii-europe
[25] http://www.bis.org/publ/bcbs189.htm
[26] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:1994:033:FULL&from=EN and http://ec.europa.eu/clima/policies/forests/docs/kpeng_en.pdf
[27] http://www.legislation.gov.uk/ukpga/2008/27/pdfs/ukpga_20080027_en.pdf
[28] http://webarchive.nationalarchives.gov.uk/20130123162956/http://decc.gov.uk/assets/decc/85_20090310164124_e_@@_climatechangeactia.pdf

requirements are based on International Labour Organisation (ILO) standards.[29] An ILO convention actually set a maximum eight hour day and maximum week of 48 hours in 1919.[30] It is difficult to argue that the UK would have been immune to this movement, and that labour unions would have been quiescent on this issue.

Dipping further into the Open Europe list, one finds the Agency Workers Directives, which is largely EU, but has a slated cost of £2 billion, against the "benefit" of £1.5 billion. Then there are the Building Regulations 2006, which most probably would be the same had we not joined the EU. The European regulations simply update the UK's 1963 Regulations. There are then Motor Vehicles (EC Type Approval) (Amendment) Regulations 2008 which is attributed to the EU, even though the regulation now is originated by UNECE.[31]

Moving still further down the list, we come across the Control of Salmonella in Poultry Order 2007, attributable to Regulations (EC) No 2160/2003 and 1168/2006. The EU law replaced the Poultry Laying Flocks (Testing and Registration etc.) Order 1989 and other legislation brought in piecemeal in response to the 1988 Salmonella and eggs crisis. By so doing, it extended what had been applicable only to UK to the whole of the EU, effectively "levelling the playing field".[32] The cost had been "Europeanised".

Conclusions: the prospects for deregulation

An extraordinary amount of emphasis has been given to the cash-saving potential of Brexit, this supposedly affording the opportunity for a bonfire of regulations on a Churchillian scale. This gave the leave campaign the opportunity to argue that, of the Open Europe "top 100", 66 were attributable to EU Single Market legislation, at an annual cost of £22.6 billion.[33]

Post-referendum, however, Open Europe was being more sanguine about cost savings, acknowledging that none would accrue where international regulation was involved – something it had not previously admitted.[34]

By March of this year, they were estimating that "politically feasible" deregulation would deliver a saving of around £12.8 billion per year, rowing back considerably from their earlier headline figure of £33.3 billion. Even that required tackling "controversial areas", involving changing social employment and workers' rights regulations and a huge shift away from our climate change

[29] http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/working-time/lang--en/index.htm

[30] http://www.fedee.com/labour-relations/history-of-working-time/

[31] https://ec.europa.eu/growth/sectors/automotive/technical-harmonisation/international_en

[32] Personal observations. The author was at the time technical advisor for the United Kingdom Egg Producers Association (UKEPRA).

[33] https://d3n8a8pro7vhmx.cloudfront.net/voteleave/pages/212/attachments/original/1451390475/151226_Cost_of_single_market.pdf?1451390475

[34] http://2ihmoy1d3v7630ar9h2rsglp.wpengine.netdna-cdn.com/wp-content/uploads/2016/04/Open-Europe-A-liberal-free-market-guide-to-Brexit-FINAL.pdf

obligations - with no recognition of the international dimensions and the fact that these are mandated by the Climate Change Act.

They also look to a more deregulated approach to overseeing parts of the financial services sector, concluding that "a more extreme scenario could deliver high gains but would involve even tougher political choices".[35]

Yet, if the climate change legislation is retained (to which Open Europe currently attributes £11.9 billion), and the government avoids what would be a hard-fought battle with labour unions over employment rights, the actual scope for cost savings is minimal. Thus, the organisation concludes:

> … Brexit does potentially present an opportunity in terms of deregulation and competitiveness improvements. However, these are not without challenges. There is less low hanging fruit than some may think and the political opposition to some changes could be significant.[36]

What we can conclude is that the focus on the economic costs of regulation, in the expectation of making large-scale savings, has in the main proved illusory. A better approach might be to consider the time-consuming aggravation of "red tape", seeking to reduce demands on businesses and allowing proprietors to concentrate on revenue-making activities.

Here, what is often neglected is the enforcement element of regulation. In our investigations, we found that poor or over-zealous enforcement was often as significant as the regulation itself.[37] As a general observation, even poor regulation can be tolerable if sensibly enforced and no amount of good law can compensate for poor enforcement, especially if there is a tendency to gold-plate.

For these reasons, we have seen both at EU and national levels a change in emphasis from high profile deregulation policies to a more nuanced strategy of seeking "better regulation" at national and EU levels.[38,39] This, reflecting the continued failure of successive deregulation programmes, seems to be a more productive approach.

Also of considerable concern to British businesses at the European level is the perception that other nations are better at lobbying and influencing new legislation than the UK. One hears complaints of other nations having infiltrated and thus dominating technical committees which decide standards. And while there may be some truth in this – although there is no quantitative

[35] http://openeurope.org.uk/today/blog/clearing-up-confusion-over-open-europes-view-of-the-benefits-and-costs-of-eu-regulation/
[36] http://2ihmoy1d3v7630ar9h2rsglp.wpengine.netdna-cdn.com/wp-content/uploads/2016/04/Open-Europe-A-liberal-free-market-guide-to-Brexit-FINAL.pdf
[37] Booker & North (1994), The Mad Officials: How the bureaucrats are strangling Britain, Constable, London.
[38] https://www.gov.uk/government/news/launch-of-regulatory-delivery
[39] http://ec.europa.eu/priorities/democratic-change/better-regulation_en

evidence – that might be a function of the way trade bodies are organised in this country.

In Germany, for instance, in specific occupations membership of a guild is compulsory under the so-called *Meister* system[40] It also has "Chambers of Industry and Commerce", where membership is compulsory in some sectors.[41]

Britain, by contrast, has a much more informal system, with voluntary membership representing only a small fraction of any trade. Thus, Continental trade groups present as more coherent and effective. Unsurprisingly, when it comes to international representation, the impression is that these bodies tend to perform better in promoting their members' interests than do their British counterparts.

Within the EU system, the problem is the inherently inflexible system of law-making, where the European Commission has the right of initiative. This means that changing a law requires a new law, which only the Commission can propose. A law added to the *acquis*, therefore, is very difficult to remove.

In this context, the more important issue would appear to be not regulation, *per se*, but who makes the regulations, and the degree of control the UK is able to exert over its adoption and, crucially, its ability to secure change. But, where law is increasingly framed at international level, there is particular advantage in being outside the EU and regaining voting rights and independence in global (and regional) standards-making bodies. Through this, we regain the right of initiative and, once more, have a direct hand in shaping the legislative agenda.

Looking then at the bigger picture, although enormous energy has been expended on the notion of deregulation, detailed evaluation shows that there are no easy pickings. Effectively, deregulation is a vast red herring – an unproductive diversion of resources and political capital. There is much that can be explored in making any regulatory system more effective, but the pursuit of wholesale removal is not a useful activity – not even as a propaganda tool.

On reflection, this should not be a surprise. Regulation is the tool and the consequence of policy. Over-emphasis on regulation is akin to mopping up the water from an overflowing bath without first turning off the tap. If policy is well-founded, outcomes will reflect the quality of the inputs. Policy needs to be the target. The rest will follow.

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[40] http://www.wsj.com/articles/SB105345616711027000

[41] https://en.wikipedia.org/wiki/Association_of_German_Chambers_of_Industry_and_Commerce