

## The Regulatory Quality in the European Union\*

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INDEX: 1. Introduction: the regulatory quality meaning. - 2. Regulatory quality in the European Union. - 3. Regulatory quality meets the *real* people. - 3.1 The European Commission and its application of the default rules. - 4. Conclusions.

### 1. Introduction

The traditional rationale for regulation is to prevent market failures, i.e. internalities, externalities, market power and public goods<sup>1</sup>. The public intervention to remedy market failures has been increasingly under debate and, without going into detail, in certain cases risks to produce government failures: «intervention by public authorities can have adverse effects, potentially worsening market failures or failing to achieve set public policy goals»<sup>2</sup>. The occurrence of market failures and government failures is «the reason why we need a specific policy dedicated to regulatory quality»<sup>3</sup>.

First of all, many authors and international institutions have tried to provide the base meaning of “regulatory quality”<sup>4</sup>, but this is a “hard question”<sup>5</sup> because the

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<sup>1</sup> N. RANGONE, *Regolazione*, in S. CASSESE (a cura di), *Dizionario di diritto pubblico*, Milano, Giuffrè, 2006, pp. 5057-5069.

<sup>2</sup> D. F. SPULBER, *Regulation and Markets*, Cambridge, MA: Mit Press, 1989, p. 37.

<sup>3</sup> C. M. RADAELLI, A. C. M. MEUWESE, *Better Regulation in the European Union. The political economy of impact assessment*, in K. JACOB (ed), *Evaluating Integrated Impact Assessments (EVIA) Handbook*, Springer, 2009, p. 2.

<sup>4</sup> About the position of the European Court of Human Rights (ECtHR) on the quality of legislation, see N. LUPO, G. PICCIRILLI, *European Court of Human Rights and the quality of legislation: shifting to a substantial concept of «law»*, in *Legisprudence*, Vol. 6, No. 2, p. 237. «[...] the current position of the Court on this subject can be summarised as follows: notwithstanding the written or unwritten form of the law, irrespective of its positive or judge-made nature, the actual requirement of lawfulness is the good quality of the internal provision, in terms of its inherent clarity, foreseeability, precision and accessibility». For a functional perspective of quality, see H. XANTHAKI, *Quality of legislation: an achievable universal concept or a utopian pursuit?*, in M. T. ALMEIDA (ed.), *Quality of Legislation*, Nomos, Baden-Baden, 2011, pp. 75-85. «[...] how can one define the concept of quality? [...]. In other words, a good law is simply a law that is capable of achieving the regulatory reform that it was released to effectuate or support. H. XANTHAKI, *Legislative drafting: a new sub-discipline of law is born*, in *IALS Student Law Review*, Vol. 1, Issue 1, 2013, p. 65. What is quality of legislation? My definition of quality is neither technical, nor empirical. My definition of quality in legislation is functional [...]. If legislation is seen as a mere tool for regulation, then a good law simply contributes its best to the achievement of the policy that it serves. As a law on its own cannot produce adequate regulatory results without synergy from the other actors of the policy process, a good law is one that, with synergy, is able of producing the regulatory results required by policy makers.

regulatory quality is an “elusive”<sup>6</sup> principle: «the problem comes in setting quality standards to define what “good” regulation is»<sup>7</sup>. There are multiple definitions of regulatory quality, including several indicators<sup>8</sup>, and currently an individual transversal notion does not exist. This is not a “monolith” concept, as it is intrinsically linked both to stakeholders and to the dimensions of context<sup>9</sup>.

Briefly, the numerous definitions seem to converge on the idea that regulatory quality is an “added value” of any policy, regardless of its content<sup>10</sup>. The quality of a regulation is an “autonomous public interest”, which must not be identified with the different interest sectors of the regulatory activities (environment, production, health, education, welfare and so on) but has its own specificity and, consequently, has to be

<sup>5</sup> A. C. M. MEUWESE, C. M. RADAELLI, *Hard questions, hard solutions: Proceduralisation through impact assessment in the EU*, in *West European Politics*, 33(1), pp. 136-153.

<sup>6</sup> W. VOERMANS, *Concern about the quality of EU legislation: what kind of problem, by what kind of standards?*, in *Erasmus Law Review*, Vol. 2, No. 1, 2009, p. 63; C. M. RADAELLI, F. DE FRANCESCO, *Regulatory, Quality in Europe: Concepts, Measures and Policy Processes*, Manchester University Press, 2007, p. 4. «This term can be elusive and misleading. Policy-makers use it in a normative sense, to indicate specific reforms that have to be undertaken in order to create the capacity, at the level of governments and EU institutions, to deliver high-quality regulations. As social scientists, we do not assign any normative value to this concept. We use ‘better regulation’ to designate a set of principles and tools that discipline the regulatory policy process [...]».

<sup>7</sup> OECD, *Improving the quality of laws and regulations: economic, legal and managerial techniques*, Paris, 1994, p. 11.

<sup>8</sup> C. M. RADAELLI, O. FRITSCH, *Measuring Regulatory Performance. Evaluating Regulatory Management Tools and Programmes*, OECD, Paris, 2012, p. 9 ss.

<sup>9</sup> C. M. RADAELLI, *How context matters: Regulatory quality in the European Union*, Paper prepared for the special issue of *Journal of European Public Policy* on Policy Convergence, 2004, p. 10. «Overall, the notion of ‘good regulation’ means different things to different RIA stakeholders [...]. Accordingly, one can make the assumption that: the expert sees quality as efficiency. The bureaucrat defines quality as a matter of following proper and legitimate procedures in the regulatory process. This actor will use conformity to rules as main criterion. For the politician, quality may well mean responsiveness to pressure groups, or the median voter, or even responsiveness to external pressure created by the EU, the International Monetary Fund, and so on. Let us assume that the politician uses consensus as main criterion and success is evaluated in terms of the outcome of negotiations. The firms perceives quality in terms of minimisation of costs and defines success in terms of profit. The citizens use yet another criterion, the effective protection from risk».

<sup>10</sup> APEC-OECD, *First workshop of the APEC-OECD co-operative initiative on regulatory reform*, 19-20 September 2001, OECD Publishing, Paris, 2001, p. 15. «A “well written” regulation, accountable of its positive and negative impacts on society, is “a value in itself”, whatever its political content. Therefore, in many countries, regulatory quality is becoming an “autonomous” public interest, separate from sectorial interests (e. g.: environment, employment, competition)». The Mandelkern Group on Better Regulation, *Final Report*, 13 November 2001, p. 1. «Improving the quality of regulation is a public good in itself, enhancing the credibility of the governance process and contributing to the welfare of citizens, business and other stakeholders alike [...]». N. RANGONE, *Mercati finanziari e qualità delle regole*, in *Scritti in onore di Francesco Capriglione*, Wolters Kluwer Italia, 2010, p. 173. «La buona qualità delle regole [...] tende a configurarsi come un “interesse pubblico autonomo” rispetto agli interessi alla base delle singole politiche di settore, da perseguire attraverso specifiche tecniche e nel rispetto di criteri organizzativi e procedurali ampiamente condivisi a livello internazionale e comunitario». L. CARBONE, *Qualità della regolazione e competitività: ricette diverse ma ingredienti comuni*, in Seminario su “Tecniche di produzione normativa e «better regulation»” Roma, Università La Sapienza, 26 gennaio 2007, p. 3; A. GRECO, *La semplificazione nell’ordinamento democratico*, in *www.federalismi.it*, n. 13, 2009, p. 2. «Nella considerazione che il diritto deve seguire l’evoluzione della società - se non segnarne le direttive - e in particolare la sua evoluzione economica, ben si comprende che l’anelito ad una better regulation assurga oramai, essa stessa, al rango di interesse pubblico autonomo».

pursued with specific tools and strategies<sup>11</sup>. Starting from this point of view, regulatory quality is considered a type of “meta regulation”<sup>12</sup> or “meta policy” because «of its emphasis on standards and rules which, instead of governing specific sectors or economic actors, steer the process of rule formulation, adoption, enforcement, and evaluation»<sup>13</sup>. The attention to the quality of regulations is growing, because this principle is no longer a mere “cosmetic” factor but is defined as a way to design and formulate norms so as to favour compliance by stakeholders, reducing administrative barriers<sup>14</sup>.

The regulatory quality is a relevant meta-policy; it is characterized by a “neutral” character<sup>15</sup> and its fundamental goal is to establish the environment favourable to stakeholders. Especially during a period of crisis, a great emphasis has been placed by EU institutions on improving the quality of regulation<sup>16</sup>, in particular the European Commission stated that: «the crisis has highlighted the need to address incomplete, ineffective, and underperforming regulatory measures and, in many cases, to do so urgently»<sup>17</sup>.

<sup>11</sup> C. M. RADAELLI, *Better regulation and the lisbon agenda*, Paper delivered to European evaluation society conference “Evaluation in society: critical connections”, London, October 4th-6th 2006, p. 6.

<sup>12</sup> A. C. M. MEUWESE, *Impact Assessment in EU Lawmaking*, Kluwer Law International, 2008, p. 14.

<sup>13</sup> C. M. RADAELLI, *Better regulation for the Lisbon agenda?*, in *Journal of European Public Policy*, 14:2, 2007, p. 191; S. CASSESE, *La qualità delle politiche pubbliche, ovvero del metodo del governare*, in Atti del Convegno su “Rapporto Italiadecide 2012-2013”, Roma, Camera dei deputati, 11 febbraio 2013, p. 2. «La parola “qualità”, a sua volta, può essere intesa in due modi diversi. Quale utilità o efficacia di ciascun indirizzo politico rispetto ai bisogni o all’obiettivo, oppure come utilità o efficacia degli indirizzi politici nel loro complesso, per il modo nel quale vengono scelti, adottati, attuati e verificati, rispetto al modo di governo. Parlare della qualità delle politiche pubbliche nella prima accezione richiede un esame caso per caso, politica per politica (sanità, istruzione, previdenza, ecc.). Esaminare la qualità delle politiche pubbliche nel secondo senso – come farò ora – comporta un’analisi di tipo diverso, che riguarda le procedure con le quali si governa, per accertare se esse soddisfano più generali criteri di buona gestione pubblica».

<sup>14</sup> P. CARETTI, *Introduzione*, in *Osservatorio sulle Fonti*, Torino, Giappichelli Editore, 2007, p. 1 ss. Recently, the Italian Constitutional Court, in the sentence No. 299 of 2012, argued that: «[...] the efficiency and the competitiveness of the economic system are influenced by the quality of the regulations, which condition the actions of the operators on the market. A context of economic rules that cannot be justified – that it is not proportionates and necessities respect to protection of constitutional rights – generates more economic obstacles and further disadvantages for market operators, end users and workers themselves and, finally, it leads to relevant damage to social utility itself».

<sup>15</sup> F. BASSANINI, S. PAPARO, G. TIBERI, *Qualità della regolazione: una risorsa per competere. Metodologie, tecniche e strumenti per la semplificazione burocratica e la qualità della regolazione*, in *Astrid-Rassegna*, n. 11/2005, pp. 12-13.

<sup>16</sup> U. MORERA, N. RANGONE, *Sistema regolatorio e crisi economica*, in *Analisi Giuridica dell’Economia*, n. 2, 2013, pp. 383-394; N. RANGONE, *The myth and reality of good quality regulation tools*, in *Italian Journal of Public Law*, Vol. 4, Issue 1, 2012, p. 96. «The Great Depression in the U.S led to an enormous expansion in the scope of public utility and common carrier regulation, and the “stagflation” (...) of the 1970s set the stage for the deregulation movement. Similarly, Europe turned to better regulation policies in 2000 to remedy its sluggish economy. At present, the European Commission points out that the crisis has highlighted the need to address incomplete, ineffective, and underperforming regulatory measures and, in many cases, they need to do so urgently».

<sup>17</sup> EUROPEAN COMMISSION COM(2010) 543 final, p. 2; OCED, *Regulatory Policy and the Road to Sustainable Growth*, Paris, 2010, p. 5. «Governments face a range of challenges as they emerge from the crisis (...). Effective regulation can provide strong support for meeting these challenges. Ineffective regulation, conversely, will slow recovery, inhibit growth, undermine efforts to address complex issues such as climate change, and reinforce a citizen’s scepticism of government».; OECD, *Reviews of*



This essay attempts to retrace the development of regulatory quality in European Union Law and, in particular, it explores some policies in which this principle is assessed. This way of looking at the develop of regulatory quality has raised questions of credibility regarding the policies in the European Union. In most cases, the credibility is linked to regulatory quality meaning that it refers to the quality of the economic environment in which business operators operate (section one)<sup>18</sup>. However, the link between good regulation and competitiveness does not mean that the main focus of regulatory reforms is only on business, attention must be paid to people's needs<sup>19</sup>.

According to some scholars, the challenge for the European Union and Member States is «to change the direction of the quality regulatory and assess the success of policies and its tools from the point of view of the citizens»<sup>20</sup>. In other words, the success of a policy, measured by the achievement of results established by regulators (the functional perspective of the regulatory quality), depends on the right reactions of people's behaviour. A new area of research – the so called “*law and behavioural sciences*”<sup>21</sup> - recognizes that regulation risks being poor, weak and ineffective if legislators do not reflect on how people really react, but rather only presume to know their reactions<sup>22</sup>. This paper reported how the EU institutions, and in particular the European Commission, have tried to apply the behavioural studies into an operational regulatory tool (section two).

## 2. Regulatory quality in the European Union

First of all, regulatory quality can be described by retracing its evolution within European Union law: «it was in the mid-1990s that the search for better quality regulation became systematic»<sup>23</sup>. As a preliminary result of these studies, the emphasis has shifted from deregulation to regulatory quality: «the question is not the

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*Regulatory Reform – Regulatory Reform for Recovery. Lesson from implementation during crises*, Paris, 2010, p. 35. «Regulatory reform can play an important role during crisis episodes. A well designed regulatory system facilitates market exit thereby helping to ensure that those firms exiting the market will do so with least possible damage to the sector as a whole. It also facilitates market entry and contributes to the economic recovery as new business opportunities reappear. Improving regulatory quality increases investors' confidence in the regulatory environment, and reducing regulatory constraints and burdens can speed up the rate at which stimulus packages can be channelled through the economy, as investment in major infrastructure may face regulatory hurdles».

<sup>18</sup> J. PELKMANS, S. LABORY, G. MAJONE, *Better EU Regulatory Quality: Assessing Current Initiatives and New Proposals*, in G. GALLI, J. PELKMANS (eds), *Regulatory Reform and Competitiveness in Europe*, Edward Elgar, 2001, p. 460 ss.

<sup>19</sup> N. RANGONE, *The myth and reality of good quality regulation tools*, cit., pp. 96-97.

<sup>20</sup> H. XANTHAKI, *European Union Legislative Quality After the Lisbon Treaty: The Challenges of Smart Regulation*, in *Statute Law Review*, Vol. 35, Issue 1, 2013, p. 15.

<sup>21</sup> A. L. SIBONY - A. ALEMANNINO, *The Emergence of Behavioural Policy-Making: A European Perspective*, in A. ALEMANNINO - A. L. SIBONY (eds), *Nudging and the Law. What can EU Learn from Behavioural Sciences?*, Oxford, Hart Publishing, 2014, pp. 8-10.

<sup>22</sup> A. ALEMANNINO, A. SPINA, *Nudging Legally. On the Checks and Balances of Behavioural Regulation*, Jean Monnet Working Paper No. 06, 2013, p. 9.

<sup>23</sup> R. BALDWIN, *Is better regulation smarter regulation?*, in *Public Law*, 485, 2005, p. 2.

total level of regulation, but its efficiency, accountability, consistency and transparency»<sup>24</sup>.

In general, the EU regulation is often accused of applying too many requirements stifling businesses; therefore, the European Commission has made a concerted effort over the past few years to streamline legislation and reduce regulatory burdens<sup>25</sup>. The quality of regulations has become a strategic objective within of the European Union and the latter recognizes this principle as one of the key factors to achieving competitiveness and attracting investments<sup>26</sup>. The EU institutions focus their efforts toward regulatory quality to reduce red tape for firms and in general to respond to the variable market conditions and business requirements<sup>27</sup>.

Starting from the Molitor Report of 1995 focuses on legislative and administrative simplification<sup>28</sup>; the Simpler Legislation for the Internal Market (SLIM) initiative of 1998 with the aim of simplifying and reducing the burdens of European requirements<sup>29</sup>; the White Paper on Governance in which the five good governance principles are fixed - these principles are: openness, participation, accountability, effectiveness, coherence<sup>30</sup> - and Mandelkern Report both issued in 2001; the launch of

<sup>24</sup> C. A. DUNLOP, M. Maggetti, C. M. RADAELLI, D. J. RUSSEL, *The many uses of regulatory impact assessment*, in *Regulatory & Governance*, Vol. 6, Issue 1, Blackwell Publishing Asia Pty Ltd, 2012, pp. 23-45; C. KIRKPATRICK, D. PARKER, *Regulatory Impact Assessment: developing its potential for use in developing countries*, Centre on Regulation and Competition Working papers, 2003, p. 2. «In turn, research on regulatory quality has shown that it cannot be achieved by simply clamping down on the total number of rules».

<sup>25</sup> A. RENDA, *The cost of Europe: can better EU regulation lift the burden?*, in *Policy Network*, 2 March 2015, p. 1. «In many of the EU's member states, policymakers and political parties often campaign against the union, claiming that its legislation creates unnecessary burdens on businesses and citizens [...]. Against this background, the EU has given itself tools to improve the quality of its legislation over the past decade»; F. DE FRANCESCO, C. M. RADAELLI, *Indicators of regulatory quality*, in C. H. KIRKPATRICK, D. PARKER (eds), *Regulatory Impact Assessment: Towards Better Regulation?*, Edward Elgar Publishing, 2007, p. 36. «In Europe, the European Union (UE) has rapidly emerged as a crucial arena where regulatory policies are defined. With the Lisbon Agenda goal of making the EU the most competitive knowledge-based society, regulatory reform has become a priority for the Member State and the EU institutions»; E. CAVALIERI, G. PERNICIARIO, *Le politiche della better regulation nella UE e nell'OCSE. I vincoli alle autorità nazionali*, in A. NATALINI, F. SARPI, G. VESPERINI (a cura di), *L'analisi di impatto e gli altri strumenti per la qualità della regolazione*, in Osservatorio AIR-Annuario 2013, p. 25. «L'impulso allo sviluppo delle politiche di miglioramento della qualità della regolazione in ambito nazionale e al loro allargamento alle AI si deve anche e soprattutto alle istituzioni europee, che sin dal Mandelkern Report on Better Regulation del 2001 hanno dedicato attenzione crescente a queste tematiche».

<sup>26</sup> R. BALDWIN, M. CAVE, M. LODGE, *Understanding Regulation. Theory, Strategy, and Practice*, Second Edition, Oxford University Press, 2012, p. 388. «The European Union has also developed an extensive interest in the use of policies, institutions, and tools to encourage 'better regulation'. The latter include the use of impact assessments and administrative simplification measures».

<sup>27</sup> M. DE BENEDETTO, M. MARTELLI, N. RANGONE, *La qualità delle regole*, Bologna, Il Mulino, 2011, p. 11 ss.; C. M. RADAELLI, *Better regulation and the lisbon agenda*, cit., p. 7. «A new focus on competitiveness (clearly a product of the re-definition of the Lisbon strategy) and the reduction of administrative burdens are steadily making progress across the member states. Arguably, this may switch the political pendulum back to the origins of better regulation, towards the pole of simplification, war on 'red tape Europe', and the reduction of compliance costs faced by firms operating in the single market».

<sup>28</sup> EUROPEAN COMMISSION, COM(95) 288/2.

<sup>29</sup> EUROPEAN COMMISSION, COM(1996) 559.

<sup>30</sup> EUROPEAN COMMISSION, COM (2001) 428.

Impact Assessment tool<sup>31</sup>; Interinstitutional Agreement on Better Law-Making of 2003<sup>32</sup>; the Better Regulation initiative, with the first objective identified is competitiveness<sup>33</sup>; the establishment of the Impact Assessment Board (IAB)<sup>34</sup>; the Small Business Act<sup>35</sup> (SBA) that provides a strategic framework to enable the potential growth and innovation of small and medium enterprises (SMEs) to be better exploited; the Small Medium Enterprises Test as required by SBA<sup>36</sup>; the Reducing Administrative Burden Act initiated a wide programme of 25 per cent reduction of EU administrative burdens for enterprises by 2012<sup>37</sup>; the Smart Regulation initiative, with the aims to help small businesses by minimising the regulatory burden of legislation that is deemed necessary at EU level<sup>38</sup>; the EU Regulatory Fitness and Performance Programme (REFIT)<sup>39</sup>, this is a programme to review the entire stock of EU legislation – to identify burdens, inconsistencies, gaps or ineffective measures, and further policies have added rules, over time, that can serve as criteria for the assessment of regulatory quality<sup>40</sup>. Recently, the new Better Regulation package of the European Union has confirmed a renewed interest in this issue<sup>41</sup>: it has recognized to the quality of regulations a central role in EU policies, and the new approach is «mainly characterised by applying evaluation to all policy areas (extending it in particular from expenditure to regulatory policies), and by strengthening the link between *ex ante* and *ex post* evaluation»<sup>42</sup>. This construction, as illustrated above,

<sup>31</sup> EUROPEAN COMMISSION, COM (2002) 276.

<sup>32</sup> Interinstitutional Agreement 2003 OJ 2003C321/01.

<sup>33</sup> EUROPEAN COMMISSION, COM(2005) 97.

<sup>34</sup> EUROPEAN COMMISSION, COM(2006) 689.

<sup>35</sup> EUROPEAN COMMISSION, COM(2008) 394.

<sup>36</sup> EUROPEAN COMMISSION, COM(2011) 803.

<sup>37</sup> EUROPEAN COMMISSION, COM(2006) 689.

<sup>38</sup> EUROPEAN COMMISSION, COM(2010) 543.

<sup>39</sup> EUROPEAN COMMISSION, COM(2012) 746.

<sup>40</sup> H. XANTHAKI, *The Problem of Quality in EU legislation: what on earth is really wrong?*, in *Common Market Law Review*, Vol. 38, 2001, pp. 651-676.

<sup>41</sup> F. SARPI, *Better for Whom?*, in *European Journal of Risk Regulation. Special Issue on the Better Regulation Package*, Vol. 6, Issue 3, 2015, p. 1. «[...] the package is a clear demonstration of the Commission's political commitment towards the relaunch of the smart regulation agenda, already proved by its inclusion within the scope of the mandate of the First Vice President, Mr. Timmermans».

<sup>42</sup> S. SMISMANS, *Policy Evaluation in the EU: The Challenge of Linking Ex Ante and Ex Post Appraisal*, in *European Journal of Risk Regulation*, Vol. 6, Issue 1, 2015, p. 7; A. RENDA, *Too good to be true? A quick assessment of the European Commission's new Better Regulation Package*, in *CEPS Special Report*, No. 108, April 2015, p. 1. «On 19 May 2015, the European Commission published a very comprehensive, ambitious and innovative Better Regulation package, which contains new guidelines on various phases of the policy cycle and various documents setting out the rules and functioning of entirely new consultation platforms and a new body in charge of regulatory scrutiny»; L. TAFANI (a cura di), *Better Regulation for Better Results. Momenti, soggetti e obiettivi delle politiche europee per la qualità della regolamentazione*, Senato della Repubblica, XVII Legislatura, 2015, p. 22. «Il pacchetto è composto da: - una Comunicazione al Parlamento europeo, al Consiglio, al Comitato economico e sociale e al Comitato delle regioni "Legiferare meglio per ottenere risultati migliori - Un'agenda dell'Unione europea" (COM(2015) 215), che delinea la *ratio* e le linee direttrici della riforma del processo regolatorio dell'Unione europea; - un documento di lavoro dei servizi della Commissione contenente le Linee guida per la migliore regolamentazione (SWD(2015) 111), completato da un "toolbox" dal profilo più immediatamente operativo; - una relazione della Commissione sul programma REFIT (SWD (2015) 110), che offre una panoramica sull'azione svolta dal Programma stesso; - una Comunicazione della Commissione sulla struttura ed il funzionamento della piattaforma REFIT (C(2015) 3260). I dettagli su tale Piattaforma sono contenuti nella decisione della Commissione



seems to converge on highlighting both procedures to adopt rules which must be participated, transparent and accountable, and on the rules themselves that must be clear, coherent, and comprehensible - in response to the requirements of formal quality - necessary, residual and respectful of the principles of proportionality and adequacy in the light of an assessment of less restrictive alternatives - in response to the requirements of substantial quality<sup>43</sup>.

### 3. Regulatory quality meets the *real* people

The substantial quality also requires careful attention to cognitive errors, non-economic incentives and psychological processes that influence stakeholders' choices; otherwise, the regulations risk being inadequate to achieving their objectives, with high and unjustified costs for all<sup>44</sup>. In other words, the human limits can have a negative effect on regulation, and risk compromising both the legislator's objectives and the quality of regulation<sup>45</sup>.

Researchers in several field of the sciences - cognitive science, behavioural economics, psychology, neuroscience and others - have shown that people are not always rational and are subject to recurring cognitive biases in decision-making<sup>46</sup>. The following are some of the most common cognitive biases. (a) *Framing*: people tend to be influenced by the way information is organized<sup>47</sup>. (b) *Social norms*: people are influenced by others' behaviours<sup>48</sup>. (c) *Confirmation*: people show a tendency to

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che lo istituisce (C(2015) 3261); - la decisione del Presidente della Commissione europea sull'istituzione di un organismo di controllo indipendente sulla regolamentazione (*Independent Regulatory scrutiny board*) (C(2015) 3263), accompagnata da una comunicazione sul ruolo dell'organismo medesimo, i compiti assegnati ed il personale (C(2015) 3262); - la proposta di un accordo interistituzionale sulla migliore regolamentazione (COM(2015) 216), completo di due Allegati sugli atti delegati».

<sup>43</sup> H. XANTHAKI, *The Problem of Quality in EU legislation: what on earth is really wrong?*, cit., p. 651; J. C. PIRIS, *The quality of Community legislation: the viewpoint of the Council Legal Service*, in A. KELLERMANN, G. CIAVARINI-AZZI, S. JACOBS, R. DEIGHTON-SMITH (eds), *Improving the Quality of Legislation in Europe*, Kluwer Law, The Hague, 1998, p. 28. «There are two separate aspects to the question of the quality of legislation: the first aspect, which concerns the substance of the law; the second aspect concerns the form of legislation (the quality of legislative drafting) and how accessible it is to the public».

<sup>44</sup> N. RANGONE, *Il contributo delle scienze cognitive alla qualità delle regole*, in *Mercato concorrenza regole*, XIV, 1, 2012, pp. 151-166 ss.

<sup>45</sup> N. RANGONE, *Il contributo delle scienze cognitive alla qualità delle regole*, cit., p. 151.

<sup>46</sup> On this point, see D. KAHNEMAN, A. TVERSKY, *Judgment under Uncertainty: Heuristics and Biases*, in *Science*, Vol. 185, No. 4157, 1974, p. 1124 ss.; A. TVERSKY, D. KAHNEMAN, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, in *Psychological Review*, Vol. 90, No. 4, 1983, pp. 293-294. «The question of how lay people and experts evaluate the probabilities of uncertain events has attracted considerable research interest in the last decade [...]. The term judgmental heuristic refer to a strategy - whether deliberate or not - that relies on a natural assessment to produce an estimation or a prediction».

<sup>47</sup> A. ALEMANNI, A. SPINA, *Nudging Legally. On the Checks and Balances of Behavioural Regulation*, Jean Monnet Working Paper No. 06, 2013, p. 9. For instance, our perspective changes if a doctor says that after a certain operation, 90 percent of patients are alive after five years or if he says 10 percent of patients are dead.

<sup>48</sup> A. RENDA, *Law and Economics in the RIA world*, Cambridge, Intersentia, 2011, p. 152. «For instance, it is possible refer to the so-called "herd-behaviour" during the recent financial crisis»; T. JACKSON, *Can we (should we) regulate 'cultures of consumption'?*, in P. VASS (ed) *Regulatory*

overestimate information that reinforces beliefs they already believe. (d) *Loss aversion*: people feel losses weigh more heavily than equivalent gains<sup>49</sup>. (e) *Status quo*: people prefer the current state to changed<sup>50</sup>. (f) *Optimism*: people tend to be over-optimistic, overestimating favourable and pleasing outcomes; this bias is linked to the idea that people think about dangers - such as accidents, infections, disasters, crashes and so on - as something far from themselves<sup>51</sup>. (g) *Mental accounting*: people categorize and organize their own financial activities on the basis of regular settings<sup>52</sup>.

Recently, the OCSE suggested to apply behavioural economics findings in the decision-making process<sup>53</sup> and the European Commission promotes some researchers on this issue, concluding that «behavioral sciences should play a greater role in EU policy making»<sup>54</sup>. However, the application of behavioural insights to policy-making is still an unsolved problem, in fact literature raised doubts about «how to turn the plentiful empirical findings about human behaviour into an operational regulatory tool»<sup>55</sup>.

### 3.1. The European Commission and its application of the default rules

In EU's perspective, it is possible to argue that the use of behavioural insights is limited to single cases or is refer to the works of Directorate-General for Health and

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*Review 2004/2005*, The University of Bath, 2005, pp. 164-165. «The evidence is unequivocal that consumer behaviours are socially negotiated. Government can play a key role in these processes: by recognising the importance of social norms in behaviour change policies; by initiating, promoting and supporting community-led».

<sup>49</sup> A. SMITH, *The theory of Moral Sentiments*, Sixth Edition, Meta Libri, 1790, p. 192. «[...] we suffer more [...] when we fall from a better to a worse situation, than we ever enjoy when we rise from a worse to a better».

<sup>50</sup> M. RABIN, *Psychology and Economics*, in *Journal of Economic Literature*, Vol. XXXVI, March 1998, pp. 26-27. An example of confirmation bias is the following: «48 students were recruited to participate in an experiment: twenty-four of them were favourable to capital punishment and twenty-four of them were contrary to capital punishment. Then, the researchers distributed the same documents on capital punishment to the two groups in order to estimate how reading of studies moved the attitudes of two groups toward the death penalty, and how they changed their beliefs regarding its deterrent efficacy. The result is that those who were proponents of the death penalty became on average more in favor of the death penalty and believed more in its deterrent efficacy, while opponents became even less in favor of the death penalty and believed even less in its deterrent efficacy».

<sup>51</sup> C. CAMERER, S. ISSACHAROFF, G. LOEWENSTEIN, T. O'DONOGHUE, M. RABIN, *Regulation for conservatives: Behavioral economics and the case for "asymmetric paternalism"*, in *University of Pennsylvania Law Review*, Vol. 151, No. 3, 2011, p. 1230. «An example of unrealistic optimism bias is lotteries: many people have a firm belief, based on a wrong estimate of probabilities, that the fortune will change their way and that they will win». B. LUPPI, F. PARISI, *Forgiving Overconfidence in Tort Law*, U. C. Berkeley: Berkeley Program in Law and Economics, 2009, p. 4. Another example of the optimism bias is offered by the findings of the survey in which respondents «see themselves as better and more competent drivers than average».

<sup>52</sup> R. H. THALER, *Mental Accounting Matters*, in *Journal of Behavioral Decision Making*, Vol. 12, No. 3, 1999, p. 183.

<sup>53</sup> P. LUNN, *Regulatory Policy and Behavioural Economics*, Paris, OCED Publishing, 2014, p. 10.

<sup>54</sup> P. HACKER, *The Behavioral Divide. A Critique of the Differential Implementation of Behavioral Law and Economics in the US and the EU*, in *European Review of Contract Law*, forthcoming 2015, p.

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<sup>55</sup> N. RANGONE, *Il contributo delle scienze cognitive alla qualità delle regole*, cit., pp. 151.



Consumers, which has shown the influence of behavioural economics<sup>56</sup>; and, overall, the EU has not yet demonstrated «a general commitment to integrate behavioural research into policy-making»<sup>57</sup>. This lack of a full behavioural approach integration seems to be apparently in contrast with the Better/Smart Regulation Programme, which has the fundamental objective to provide evidence-based on policies<sup>58</sup>.

The EU institutions have analyzed the behavioural effects on stakeholders and they focus on “default rules” which often have a large effect on choice outcomes. Default rules are based on a presumption of consent unless the interested parties want to choose in another sense. This strategy uses inertia (*status quo bias*) to nudge people to choose something which others consider better for them<sup>59</sup>.

The European Commission has recognized the power of default options when it enacted the Consumer Rights Directive<sup>60</sup>. The European Commission proposed limiting the use of pre-checked boxes in consumer contracts (the kind that made consumers purchase travel insurance even if they do not want it) in order to save consumers money<sup>61</sup>. The article 22 of Directive 2011/83/EU on Consumer Rights stated that: «Before the consumer is bound by the contract or offer, the trader shall seek the *express consent* of the consumer to any extra payment in addition to the remuneration agreed upon for the trader’s main contractual obligation. If the trader

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<sup>56</sup> M. NARDO, M. LOI, R. ROSATI, A. MANCA, *The consumer empowerment index. A Measure of Skills, Awareness and Engagement of European Consumers*, JRC Scientific and Technical Reports, no EUR 24791, 11 June 2011, p. 3 ss.

<sup>57</sup> A. L. SIBONY, A. ALEMANNI, *The Emergence of Behavioural Policy-Making: A European Perspective*, cit. p. 20.

<sup>58</sup> Evoking the American experience, under President Barack Obama, administrative agencies have been encouraged to draw on behavioural and social science insights in the design or implementation of new regulations. The Office of Information and Regulatory Affairs (OIRA), in the Memorandum on Disclosure and Simplification as Regulatory Tools of 2010, suggests regulators adopt default rules or active choosing. The first time that behaviourally-inspired deliberation was incorporated into the regulatory process was Executive Order 13563 of January 18, 2011. Section 4, entitled Flexible Approaches, prescribes that «(...) each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible».

<sup>59</sup> A. ALEMANNI, A. SPINA, *Nudging Legally. On the Checks and Balances of Behavioural Regulation*, cit., p. 16. C. R. SUNSTEIN, *Switching the default rules*, in *University of Chicago Law Review*, Vol. 162, 2001, p. 8 ss. In general, default rule uses can produce a relevant impact of end-users; for instance, some researchers have demonstrated the relevant effects of default rules on retirement saving, concluding that participation is higher among plans with automatic enrollment; O. BAR-GILL, *Consumer Transaction*, in E. ZAMIR, D. TEICHMAN (eds), *The Oxford Handbook of Behavioral Economics and the Law*, Oxford University Press, 2014, p. 483. «In many context default rules can be a powerful instrument [...]. The classic examples include rules that default driver’s-license applicants into being organ donors and rules that automatically enroll employees in their employer’s 401 (k) retirement saving plans».

<sup>60</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304/64, 2011.

<sup>61</sup> R. VAN BAVEL, B. HERRMANN, G. ESPOSITO, A. PROESTAKIS, *Applying Behavioural Sciences to EU Policy-making*, JRC Scientific and Policy Reports, European Commission, 2013, p. 8; C. R. SUNSTEIN, *Impersonal Default Rules vs. Active Choices vs. Personalized Default Rules: A Triptych*, Regulatory Policy Program Working Paper RPP-2012-17, 2012, p. 3. «One of the most important tasks of a legal system is to establish default rules. Indeed, many policies operate through default rules, and contract law consists in large part of such rules».

has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment». This choice can be explained through the recital (34) of the Directive, that requires traders to «take into account the specific needs of consumers who are particularly vulnerable» when providing information. Then, the recital (34) further defines these groups as «consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity»<sup>62</sup>.

Also, in a landmark case against Microsoft<sup>63</sup>, the Commission lately made use of behavioral economics in its decisions against Microsoft to establish an abuse of a dominant position. The European Commission relied on behavioural insights to arrive at a solution which offered consumers a sensible choice of internet browsers. In this way, this solution encourages an active choice of preferred browsers, and implicitly removes the impact of default.

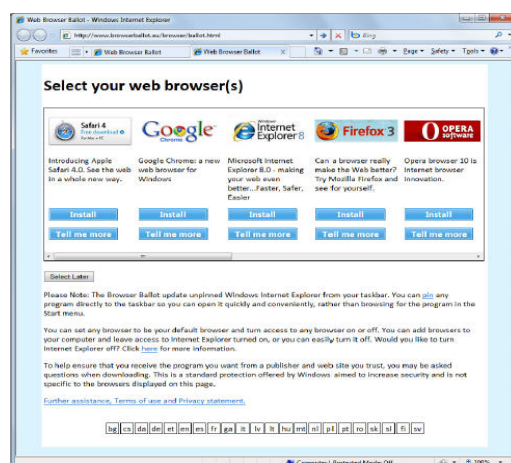


Figure 1: Web screen ballot-box

This solution offers a limited, but expandable, choice of browsers upon the installation of Microsoft Windows. «This was the first instance where a supply-side issue was tackled by acting on demand side, while letting the market find its own natural outcome»<sup>64</sup>.

#### 4. Conclusions

The first part of this essay has tried to answer the following question: what does regulation mean? Many authors in the past considered the regulatory quality as a meta-regulation or a meta-policy, not linked to a specific policy, but referred to the whole cycle of regulation. An informed regulatory environment promotes lower

<sup>62</sup> J. U. FRANCK, K. PURNHAGEN, *Homo Economicus, Behavioural Sciences, and Economic Regulation: On the Concept of Man in Internal Market Regulation and its Normative Basis*, EUI Working Papers, LAW 2012/26, pp. 10-11.

<sup>63</sup> Microsoft, COMP/C-3/37.792 recital 870 (2004); Microsoft (Tying), COMP/C-3/39.530 10-12 (2009).

<sup>64</sup> R. VAN BAVEL, B. HERRMANN, G. ESPOSITO, A. PROESTAKIS, *Applying Behavioural Sciences to EU Policy-making, Applying Behavioural Sciences to EU Policy-making*, cit., p. 8.

costs and higher benefits for stakeholders, it is an essential element of the rule of law, which affects the social-economic development of Member States and responds to the requirements of modern democracies. Therefore, the improvement of the quality of regulation is crucial for the proper functioning of democratic institutions and free market.

With the beginning of this century, in particular with the occurrence of the economic crisis, the quality of regulations has become a fundamental objective for all Member States. International organisations has identified the quality of regulations as key factors for regulators to achieve competitiveness and attract investments. The reports of various institutions - World Economic Forum, World Bank, OECD, Confindustria and so on - have demonstrated, though their methods and indicators are different - the relationship between regulatory quality and economic growth<sup>65</sup>.

The second part has focused the attention in the European Union context and has tried to explore the regulatory quality through policies and tools established by the European Commission, which have the goal to realize good regulatory regimes for firms. Starting from the Molitor report of 1995 to the new package of the better regulation reform of 2015, the EU institutions has adopted a cycle of regulation in which *ex ante* and *ex post* evaluation assume a central role. However, despite the relevant efforts put into enhancing the quality, the weakness of the better regulation tools - for instance, the quality of the analysis is still low<sup>66</sup>, the tools' application is still limited (in the case of SME Test)<sup>67</sup> and so on - risks to cause results that are more formal than substantial.

Finally, the third part has approached the regulatory quality starting from a different point of view summarized in the following concept: if regulators do not take into account the real reactions of stakeholders, including their biases and limits, there is a risk of compromising policy objectives and consequently of reducing the quality of regulation. In the EU context, the European Commission has elaborated some studies and it has introduced behaviour insights in its policies; for instance, the Commission has applied the default rules (which is based on inertia and procrastination of the end-users) in to Consumer Rights Directive. According to some authors, in order to well integrate the behaviour approach findings in the UE decision-making process, it seems possible to use some better regulation tools - in

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<sup>65</sup> S. SALVI, *La qualità della regolazione in Italia tra buone intenzioni e modesti risultati: un confronto internazionale*, in A. NATALINI, G. TIBERI (a cura di), *La tela di Penelope. Primo rapporto Astrid sulla semplificazione legislative e burocratica*, Bologna, il Mulino, 2010, pp. 61-85; Lisbon European Council, 23-24 March 2000. Presidency conclusions, par. 14. «The competitiveness and dynamism of businesses are directly dependent on a regulatory climate conducive to investment, innovation, and entrepreneurship».

<sup>66</sup> S. WHITE, *Impact Assessment – Experience from the European Commission*, in *The European Impact Assessment and the Environment*, K. BIZER, S. LECHNER, M. FÜHR (eds), Darmstadt, Springer, 2010, p. 66. «The quality of analysis in the Commission's impact Assessments is increasing, but the overall quality can still improve».

<sup>67</sup> C. FRELLE-PETERSEN, C. DAHL WINTHER, *Barriers and Best Practices in SME Test Implementation*, Brussels, European Parliament, July 2011, p. 11. «The first main finding of the study is that an SME test or similar procedure is adopted and implemented to varying degrees by Member States. The SME test, or another impact assessment procedure covering SMEs, is used in 15 Member States and in the EC services when new legislative proposals are prepared. Nearly every fourth Member State – 6 out of 27 Member States – do not have an assessment of the impact on SMEs of new legislative proposals. The remaining 6 use some kind of test but on an irregular basis».



particular consultation and impact assessment - that can provide real information about unresponsive behaviour, emphasizing the non-economic incentives for real people<sup>68</sup>.

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<sup>68</sup> F. DI PORTO, N. RANGONE, *Cognitive-based Regulation: New Challenges for Regulation*, in [www.federalismi.it](http://www.federalismi.it), No. 20, 2013, p. 4; C. R. SUNSTEIN, *Cognition and Cost-Benefit Analysis*, in *John M. Olin Law & Economics Working Paper*, 85, 1999, pp. 2-10. RIA and, in particular, cost-benefit analysis should be understood as a method for «putting on screen» important social facts - *i.e.* predictable problems in individual and social cognition - that might otherwise escape private and public attention; E. CIRIOLO, *Behavioural economics in the European Commission: past, present and future*, in *Oxera Agenda*, 2011, p. 2. «The methods, tools and insights of behavioural economics could also be used for testing remedies, and there are strong arguments for incorporating behavioural economics in the Impact Assessment procedure».