

# Which Direction Is the Regulatory Quality Pendulum Taking?

Luca Di Donato \*

## Abstract

*This article seeks a systematic definition of regulatory quality. Most of the literature has recognised that the concept of regulatory quality is particularly difficult to define. Member states, international organisations, and others have produced studies on regulatory quality, and they have reached different findings. Even if regulatory quality is based on conventional good governance principles, the enforcement and measurement of the quality of regulations and of its tools within any single country can differ widely and be very complicated.*

*For these reasons, Part I explores regulatory quality in the European Union and – through the analysis of the policies, reports, and documents – indicates which direction the regulatory quality pendulum has taken.*

*Part II, basing itself on the results of Part I, provides a general definition of quality, and it based on the procedures that legislator should comply with to enact its rules.*

*Part III confirms the relationship between regulatory quality and competitiveness, and, in particular, this link has become more solid because the financial crisis has promoted new regulatory reforms by member states.*

*Finally, this article notes that the legislator's objectives can be achieved if the former takes into account the real people, including their irrational choices, human errors, and limits.*

**Keywords:** regulatory quality, meta-policy, competitiveness, impact assessment, cognitive sciences.

\* PhD Candidate at Luiss Guido Carli University. Email: sdc.luca@gmail.com.

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## A Introduction

This essay will try to answer the following question: what does quality of regulation mean?<sup>1</sup>

First of all, it explores some definitions of ‘regulatory quality’ or ‘legislative quality’ and, currently, a transversal notion does not exist.<sup>2</sup>

For instance, the OECD has set up the criteria for the quality of legislation in general;<sup>3</sup> the Mandelkern report presented seven principles of regulatory quality, namely necessity, proportionality, subsidiarity, transparency, accountability, accessibility, and simplicity.<sup>4</sup>

Regulatory quality is not a ‘one-size-fits-all’ concept;<sup>5</sup> rather, it is based on different logics and criteria.<sup>6</sup> According to some scholars, regulatory quality is not a ‘monolith’, rather it is a dynamic concept and intrinsically linked both to stakeholders and to context.<sup>7</sup>

The attention given to the quality of regulations is growing, because this principle is no longer a mere ‘cosmetic’ factor, but rather it is referred to as a way to design and formulate norms so as to favour compliance by end-users.<sup>8</sup>

This essay attempts to retrace the development of regulatory quality in European Union Law and, in particular, it explores some parameters in which this principle is assessed (Section B).

- 1 Before going on with the topic, it is necessary to answer to the following question: what is regulation? See OECD, *Improving the quality of laws and regulation: economic, legal and managerial techniques*, Paris 1994, p. 8. “Governments usually define ‘regulation’ as a precise set of legal instruments developed through specific constitutional/legal authorities, but this approach is not feasible when multiple countries are included in the analysis”. See N. Greco, ‘Consistenza, articolazione ed ambiguità della ‘regolazione’, SSPA, 2010, pp. 3 *et seq.* Regulation is an ambiguous term, which includes economic, legal, and technical principles. For this reason, a clear definition of regulation is very problematic.
- 2 W. Voermans, ‘Concern about the quality of EU legislation: what kind of problem, by what kind of standards?’, *Erasmus Law Review*, Vol. 2, No. 1, 2009, pp. 60 *et seq.* “It is possible to distinguish between the concept of ‘legislative quality’ and the concept of ‘regulatory quality’ [...]. The different notions are not mutually exclusive, in fact in some respects they coincide”.
- 3 OECD, *Guiding Principles for Regulatory Quality and Performances*, Paris 2005, pp. 3 *et seq.* These criteria are lawfulness, administrability and enforceability, effectiveness and efficiency, subsidiarity, proportionality, mutual harmonisation, simplicity, clarity, and accessibility.
- 4 Mandelkern Group on Better Regulation, *Final report*, 13 November 2001, pp. 9 *et seq.*
- 5 DG Enterprise of the European Commission, *Indicators of Regulatory Quality*, University of Bradford 2005, pp. 2 *et seq.*
- 6 R. Baldwin *et al.*, *Understanding Regulation. Theory, Strategy, and Practice*, New York, Oxford University Press 2012, pp. 25-39. There are five tests or criteria that should constitute a set of benchmarks for assessing regulatory regime: “the legislative mandate; accountability; due process; expertise and efficiency”.
- 7 C.M. Radaelli, *How context matters: Regulatory quality in the European Union*, paper delivered to the PSA conference, Lincoln 2004, pp. 3 *et seq.*
- 8 P. Caretti, ‘Introduzione’, *Osservatorio sulle Fonti*, Torino, Giappichelli Editore 2007, pp. 1 *et seq.*

Upon further analysis, it is possible to argue that regulatory quality is considered as a meta-policy or a meta-regulation: the focus is ‘on how rules are governed, rather than on a specific sector’<sup>9</sup> (Part I).

This way of looking at the development 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.<sup>10</sup> The policies, programmes, and tools have the fundamental objective to increase competitiveness and economic growth (Part II).

But the link between good quality 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>11</sup> According to 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” (Part III).

## B Regulatory Quality in the European Union

The traditional rationale for regulation is to prevent market failures, *i.e.* internalities, externalities, market power, and public goods.<sup>12</sup> The public intervention to remedy market failures has been increasingly under debate and, without going into detail, risks to favouring some government failures: “intervention by public authorities can have adverse effects, potentially worsening market failures or failing to achieve set public policy goals”.<sup>13</sup>

- 9 C.M. Radaelli, *Towards better research on better regulation*, Paper delivered to the Advanced Colloquium on Better Regulation, Centre for Regulatory Governance, University of Exeter, 25-26 January 2007, pp. 3 *et seq.*
- 10 J. Pelkmans *et al.*, ‘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, pp. 460 *et seq.*
- 11 N. Rangone, ‘The Myth and Reality of Good Quality Regulation Tools’, *Italian Journal of Public Law*, Vol. 4, 2012, pp. 96-97.
- 12 M. De Benedetto, ‘La comunicazione pubblica e l’attività di regolazione’, No. 2, 2002, pp. 34 *et seq.* See also N. Rangone, ‘voce *Regolazione*’, in S. Cassese (a cura di), *Dizionario di diritto pubblico*, Milano, Giuffrè 2006, pp. 5057-5069.
- 13 D.F. Spulber, *Regulation and Markets*, Cambridge, MA, MIT Press 1989, p. 37. See OECD, *The OECD Report on Regulatory Reform: Synthesis*, Paris 1997, p. 5. “Governments have long used economic, social, and administrative regulations to align better public and private interests in markets. Regulations will continue to be an important tool for preserving and advancing public interests. There is a real risk, however, particularly in a time of profound and rapid change in economic and social conditions, that regulations can become an obstacle to achieving the very economic and social well-being for which they are intended”. See G. Majone, *The rise of the regulatory state in Europe, West European Politics*, London, 17:3, 1994, pp. 82 *et seq.* “Regulation should be used to increase the efficiency of the economy by correcting market failures, but not for other purposes, however legitimate”. See also J.L. Guasch & R.W. Hahn, *The Costs and Benefits of Regulation: Implications for Developing Countries, Policy Research Working Paper*, The World Bank, 1997, pp. 5 *et seq.* “Correcting market failures and ensuring equity are laudable goals, but achieving those goals through regulation is not always successful”.

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The occurrence of market failures and government failures is “the reason why we need a specific policy dedicated to regulatory quality”.<sup>14</sup>

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>15</sup> As a preliminary result of these studies, the emphasis has shifted from deregulation to regulatory quality: “the question is not the total level of regulation, but its efficiency, accountability, consistency and transparency”.<sup>16</sup>

Starting from the Sutherland report of 1992 that set up quality standards for EU legislation and the European Council Resolution of 1993 on the quality of drafting of Community legislation,<sup>17</sup> the European Parliament, the Council, and the Commission adopted an Inter-Institutional Agreement in 1993 on the codification of legislative texts.<sup>18</sup> The Molitor Report of 1995 focuses on legislative and administrative simplification,<sup>19</sup> the Simpler Legislation for the Internal Market (SLIM) initiative.<sup>20</sup> The White Paper on Governance, which has five good governance principles – openness, participation, accountability, effectiveness, and coherence,<sup>21</sup> and the Mandelkern Report were both issued in 2001. The launch of Impact Assessment procedure,<sup>22</sup> Inter-institutional Agreement on Better Law-Making of 2003,<sup>23</sup> Better Regulation,<sup>24</sup> the establishment of the Impact Assessment Board (IAB),<sup>25</sup> Small Business Act,<sup>26</sup> Programmes for Reducing Administra-

14 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, pp. 2-4.

15 R. Baldwin, ‘Better Regulation: Tensions about the Enterprise’, in S. Weatherill (Ed.), *Better Regulation*, Portland, Hart Publishing Ltd. 2007, pp. 29 *et seq.*

16 C.A. Dunlop *et al.*, ‘The many uses of regulatory impact assessment’, *Regulatory & Governance*, Vol. 6, Blackwell Publishing Asia Pty Ltd 2012, pp. 23-45. See 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”.

17 See Edinburgh European Council of 17 June 1993, OJ no C 166.

18 See Inter-institutional Agreement of 20 December 1994, *Accelerated working method for official codification of legislative texts*, OJ no C 293/2, OJ no C 102/2. See also H. Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation*, United Kingdom, Hart Publishing Ltd. 2014, pp. 333 *et seq.* “The first set of concrete quality-promoting rules is expressed in the 1992 Sutherland Report [...]”.

19 European Commission, COM(95) 288/2 final.

20 European Commission, COM(1996) 559 final.

21 European Governance, COM(2001) 428 final.

22 European Commission, COM(2002) 276 final.

23 Inter-institutional Agreement 2003 OJ 2003C321/01.

24 European Commission, COM(2005) 97 final.

25 At the European Parliament plenary discussion on Better Regulation on 4 April 2006, Commission President Barroso acknowledged the need to respond to the varying quality of Commission impact assessments after which the Commission committed itself to establishing the Impact Assessment Board. See S. White, ‘Impact Assessment – Experience from the European Commission’, in K. Bizer, S. Lechner & M. Führ (Eds.), *The European Impact Assessment and the Environment*, Darmstadt, Springer 2010, p. 71.

26 European Commission, COM(2008) 394 final.

tive Burdens,<sup>27</sup> Smart Regulation,<sup>28</sup> EU Regulatory Fitness and Performance Programme (REFIT)<sup>29</sup> – and further policies have added rules, over time, that can serve as criteria for the assessment of regulatory quality.<sup>30</sup>

On the basis of these policies, the regulatory quality in the European Union can be explored by meeting the following requirements when drafting, enacting, and implementing legislative acts:<sup>31</sup> (1) the legislator's activity is subject to the law itself, and the author of the initiatives must respect the norms included in the treaties – this is the principle of legality; (2) preparation and enactment of the policies according to the due procedure. Moreover, the due process criterion is intrinsically linked as a type of procedure that should be “fair, accessible and open”;<sup>32</sup> (3) careful compliance with the subsidiarity and proportionality principles. A careful assessment of the principles of subsidiarity and proportionality during the pre-legislative phase is important to ensure that proposals are appropriately conceived, and, in this way, within the European Commission the Impact Assessment Board's role seems to be very important;<sup>33</sup> (4) choosing the right instrument: hard law or soft law; (5) the implementation and enforcement of legislation to be enacted – this is called the principle of effectiveness; (6) assessing the cycle of regulation: monitoring and evaluation of an act and its effects; and finally (7) the language must be “clear, simple and precise”.<sup>34</sup>

This construction highlights that regulatory quality includes both procedures to adopt rules which must be participated, transparent, and accountable and 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>35</sup>

As we will see in the end, substantial quality also requires careful attention to cognitive errors, non-economic incentives, and psychological processes that influ-

27 European Commission, COM(2006) 689 final.

28 European Commission, COM(2010) 543 final.

29 European Commission, COM(2012) 746 final.

30 H. Xanthaki, ‘The Problem of Quality in EU legislation: What on Earth Is Really Wrong?’, *Common Market Law Review*, Vol. 38, 2001, pp. 651-676.

31 Voermans 2009, pp. 71-72.

32 Baldwin *et al.* 2012, p. 29.

33 *Impact Assessment Board Report for 2009, 2010, 2011, 2012, 2013.*

34 N. Lupo & G. Piccirilli, ‘European Court of Human Rights and the quality of legislation: shifting to a substantial concept of “law”’, *Legisprudence*, Vol. 6, No. 2, p. 237. The Authors reported the European Court of Human Rights' position on the requirement of lawfulness: “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”.

35 J.C. Piris, ‘The Quality of Community Legislation: The Viewpoint of the Council Legal Service’, in A. Kellermann *et al.* (Eds.), *Improving the Quality of Legislation in Europe*, The Hague, Kluwer Law 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”.

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ence stakeholders' choices; otherwise, the regulations risk being inadequate to achieving their objectives, with high and unjustified costs for all.<sup>36</sup>

### *I Regulatory Quality as a Type of Meta-Policy*

In this brief analysis of regulatory quality development in the European Union, most of the strategies, programmes, and tools – that, as mentioned above, cover the formal and substantial level of quality – do not correspond to a single policy (e.g. media regulation, environmental regulation, and so on) or single phase of the regulatory cycle, but they have led to a different analysis that concerns the procedures of rulemaking, in order to ensure that some criteria of good regulation are respected.<sup>37</sup>

Therefore, this principle includes all policies and, for this reason, regulatory quality itself should be considered as a meta-policy or a meta-regulation.<sup>38</sup>

As a meta-policy, it does not deal with individual sectors; rather, it “sets central rules, standards and thresholds through which rules are created, assessed, adopted, implemented, enforced, appraised *ex post* and/or revised and scrapped”.<sup>39</sup>

This principle is a type of meta-regulation because of its emphasis “on standards and rules which, instead of government specific sectors or economic sectors, steer the process of adoption, enforcement and evaluation”.<sup>40</sup>

In other words, regulatory quality as a type of meta-policy means that a well-written law chooses those options with lower costs and higher benefits in which stakeholders are consulted through the whole process, all this creating an added benefit – and lower social costs – as well as the benefits expected already.<sup>41</sup>

In this way, regulatory quality is defined as an ‘added value’ of any policy, regardless of its content.<sup>42</sup> The quality of a regulation is an ‘autonomous public interest’ that is not to be identified with the different interest sectors of the regu-

36 N. Rangone, ‘Il contributo delle scienze cognitive alla qualità delle regole’, in *Mercato concorrenza regole*, XIV, 1, aprile 2012, pp. 151-166 *et seq.*

37 S. Cassese, ‘La qualità delle politiche pubbliche, ovvero del metodo del governare’, in *Atti del Convegno su Rapporto Italia decide 2012-2013*, Roma, Camera dei deputati, 11 febbraio 2013, pp. 2 *et seq.* See also J. Ponce Solé, ‘¿Mejores normas?: Directiva 2006/123/CE, relativa a los servicios en el mercado interior, calidad reglamentaria y control judicial’, *Revista de Administración Pública*, Madrid, No. 180, septiembre-diciembre 2009, pp. 201-243. The author agrees with this definition of regulatory quality as meta-policy “[...] parece haber un claro consenso en el sentido de que la calidad normativa se refiere tanto a los procedimientos de elaboración (con singular importancia del elemento de la participación ciudadana real y efectiva) como a los resultados alcanzados [...]”.

38 C.M. Radaelli, ‘Whither Better Regulation for the Lisbon Agenda’, *Journal of European Public Policy*, Vol. 14, No. 2, 2007, p. 3.

39 Radaelli & Meuwese 2009, pp. 1 *et seq.* See also A.C.M. Meuwese, *Impact Assessment in EU Law-making*, The Hague, Kluwer Law International 2008, pp. 24 *et seq.*

40 Radaelli 2007, at 3.

41 APEC-OECD, *First workshop of the Apec-Oecd co-operative initiative on regulatory reform*, 19-20 September 2001, OECD Publishing, Paris 2001, p. 15.

42 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.

latory activities but that has its own specificity and, consequently, that must be pursued with the correct instruments and strategies.<sup>43</sup>

## II *Regulatory Quality as an Economic Factor*

The OECD has launched a new regulatory reform programme each year and it has encouraged member states to promote a regulatory environment to increase competitiveness, in particular reducing administrative burdens for firms.<sup>44</sup>

The European Union recognised regulatory quality as one of the key factors to achieving competitiveness and attracting investments: in particular, the Reducing Administrative Burden Programmes,<sup>45</sup> the Small Medium Enterprises Test (so-called SME test)<sup>46</sup> as required by Small Business Act,<sup>47</sup> and the Regulatory Fitness Programme<sup>48</sup> have the fundamental objective of cutting red tape for firms and in general creating an environment to favour economic growth.<sup>49</sup>

The focus is on how rules are governed, rather than on specific sectors – as illustrated in Part I – and it explains the wide diffusion of better regulation within the priorities as seen in “the Lisbon agenda for competitiveness in Europe”.<sup>50</sup>

One can argue that politicians want good regulation for two reasons. Firstly, good regulation increases the legitimacy of the regulatory system;<sup>51</sup> secondly, in open economies, good regulation increases the competitiveness of a country.<sup>52</sup>

43 *Ibid.*

44 OECD, *Regulatory Reform for Recovery and Growth*, Paris 2010, p. 1. “Regulatory reform has been extensively used throughout the OECD to stimulate recovery from crises in the past, without further adding to debts and deficits. In the short term, reform can boost confidence in regulatory systems by showing that governments are committed to improving regulatory quality”.

45 European Commission, SWD(2012) 423 final.

46 The European Parliament Committee on Industry, Research and Energy (ITRE) has commissioned Copenhagen Economics to carry out a study on the implementation of the so-called Small Medium Enterprises (SME) test in member state and European commission services. In particular, Italy and Greece are among the member states that have not institutionalised the SME test in their impact assessment tools.

47 European Commission, COM(2011) 78 final.

48 *The Conclusions of the European Council*, EUCO 79/14, p. 8. The European Council recommended, in respect of regulatory fitness measures, that “Member States should make full use of regulatory flexibility provisions for the benefit of small and medium-sized enterprises in the implementation of EU legislation”.

49 M. De Benedetto, M. Martelli & N. Rangone, *La qualità delle regole*, Bologna, Il Mulino 2011, pp. 11 *et seq.*

50 Radaelli 2007. See also S. Jacobzone, C. Choi & C. Miguet, *Indicators of Regulatory Management Systems*, OECD Working Papers on Public Governance, OECD Publishing April 2007, p. 19. “In many European Union countries with the Lisbon Agenda, regulatory reform is seen as an instrument to boost competitiveness and growth, to improve the country as a business location”.

51 A. Morrone, ‘La qualità della regolazione: per una ricerca nell’esperienza regionale’, in A. Morrone *et al.* (Eds.), *La qualità della legislazione regionale*, Bologna, Maggioli Editore, Istituzioni del Federalismo 2011, p. 5.

52 C.M. Radaelli *et al.*, *The Implementation of Regulatory Impact Assessment in Europe*, Paper delivered to the ENBR workshop, University of Exeter 2008, p. 5. W. Voermans & Y. Schuurmans, ‘Better Regulation by Appeal’, *European Public Law*, Vol. 17, No. 3, 2011, p. 507. “Better regulation has the potential to boost economic growth and increase competitiveness by relieving burdens which come about as a result of legislation [...]”.

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Otherwise, a complex and poorly coordinated (organised) set of rules on the one hand promotes the beginning of and the continuation of episodes of corruptions;<sup>53</sup> on the other hand, it influences the functioning of market economy in a negative and significant way.<sup>54</sup>

The Reports of various institutions –World Economic Forum, World Bank, OECD, Confindustria, and so on – have amply demonstrated, though their methods and objectives are different, the relationship between a country's regulatory regime and its economic growth.<sup>55</sup> For instance, countries that have a rigidity of regulations, among which are Italy and Greece, have a low rate of the economic growth, poor regulatory quality and high level of corruption.<sup>56</sup>

The Italian Constitutional Court also recognised this relationship; in fact, in its sentence No. 299 of 2012, it affirmed 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”.<sup>57</sup>

As mentioned above, regulatory quality has become a strategic objective for OECD states, and it, as is known, has assumed a fundamental role in the political agenda of major countries.<sup>58</sup>

Especially during a period of crisis, great emphasis has been placed by governments on improving regulations.<sup>59</sup> It is necessary to utilise some instruments in order to support the functioning of the market economy, favour economic growth

- 53 M. Bianco *et al.*, ‘Concorrenza e regolamentazione in Italia’, *Questioni di Economia e Finanza*, No. 123, Aprile 2012, p. 13. Some studies have demonstrated the link between regulatory quality and corruption: the member states that have poor quality – the southern countries – also have a high level of corruption.
- 54 U. Morera & N. Rangone, ‘Sistema regolatorio e crisi economica’, *Analisi Giuridica dell'Economia*, No. 2, 2013, pp. 383-394.
- 55 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.
- 56 P. Parascandolo & G. Sgarra, ‘Crescita e produttività: gli effetti economici della regolazione’, in I. Cipolletta *et al.* (a cura di), *Concorrenza Bene Pubblico*, Roma, Confindustria, Editore SIPI 2006, p. 9. See World Bank, *Doing Business Report 2008*, Washington DC, 2007. Italy and Greece have the lowest Worldwide Governance Indicators – which measures the regulatory quality level – in the EU countries at 15.
- 57 Italian Constitutional Court, Sentence No. 200, 17 July 2012.
- 58 Morera & Rangone 2013, p. 384. See also World Bank, *Better Regulation for Growth. Governance frameworks and tools for effective regulatory reform*, Washington DC, 2010, p. 1. “[...] indicators of regulatory quality, performance measures of regulatory governance and targets for the reduction of paperwork and administrative burdens have become prominent items on the reform agenda of governments and international organizations”.
- 59 Morera & Rangone 2013, p. 384. See OECD, *Reviews of 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 [...]”. See also Rangone 2012, pp. 96 *et seq.* The Author reminds us that during negative economic trends, the most important states started a new regulatory reform programme. “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”.

and innovation, and promote the involvement of the end-users in the decision-making process.

The last point, in particular, is very important: the legislator should increase the stakeholders' participation, motivate their own rules, and make language easier to facilitate compliance with hard and unpopular policies.<sup>60</sup>

### III Regulatory Quality That Meets the People's Needs

The European Union focuses its efforts toward regulatory quality to reduce red tape for firms and in general to respond to the variable market conditions and business requirements; however, equal importance is "given to all the end-users of regulation, among these citizens, consumers, employees, and so on".<sup>61</sup>

According to some scholars, "the new challenge [...] is to apply Better Regulation, Smart Regulation, and the 2020 Agenda for Europe to citizens, along with business, thus showing that the Treaty of Lisbon is not a list of good political intentions but an accurate reflection of the new European Union for its citizens and peoples".<sup>62</sup>

Regulation cannot be effective or efficient – and therefore is of poor quality – "if policy makers do not consider how target people *really* react, but rather they presume to know what their reactions will be".<sup>63</sup>

In fact, cognitive sciences have shown that stakeholders' reactions to regulations are not always rational,<sup>64</sup> but rather stakeholder behaviour is unforeseeable and it risks compromising legislator's objectives and especially reducing regulatory quality.<sup>65</sup>

Behaviour economics findings – in which an important combination of information about human limitations is present – should be managed and implemented by legislators as effectively as possible.<sup>66</sup>

The fundamental question is, in general, how the study of the behaviour economics can enhance the quality of regulations and, in particular, "how to turn the plentiful empirical findings about human behaviour into an operational regulatory tool".<sup>67</sup> According to some authors, "one way for regulators to take the find-

60 Morera & Rangone 2013, p. 385.

61 Rangone 2012, p. 96.

62 H. Xanthaki, 'European Union Legislative Quality After the Lisbon Treaty: The Challenges of Smart Regulation', *Statute Law Review*, Oxford University Press 2013, pp. 15-16.

63 A. Alemanno & A. Spina, *Nudging Legally. On the Checks and Balances of Behavioural Regulation*, Jean Monnet Working Paper No. 06, 2013, pp. 9 *et seq.*

64 K.R. Popper, *In search of a Better World*, London, Routledge 1994, pp. 4 *et seq.* "To err is human. All human knowledge is fallible and therefore uncertain".

65 N. Rangone, 'Errori cognitivi e scelte di regolazione', in *Analisi Giuridica dell'Economia*, Vol. 1, 2012, pp. 7-18.

66 O. Amir & O. Lobel, 'Liberalism and Lifestyle: Informing Regulatory Governance with Behavioural Research', *European Journal of Risk Regulation*, in A. Burgess *et al.*, *Symposium on Nudge*, *European Journal of Risk Regulation*, Vol. 3, No. 1, January 2012, pp. 17 *et seq.*

67 Rangone 2012, pp. 151-166.

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ings of behavioural research seriously would be to introduce behavioural test into its Regulatory Impact Assessment (RIA)".<sup>68</sup>

Regulatory Impact Assessment (hereafter RIA) can be useful in helping legislators gather *real* information, including feedback from stakeholders via consultation – consultation is an ideal instrument to ascertain both the irrational reactions and cognitive errors of end-users and to integrate effective perceptions within policy process.<sup>69</sup>

RIA's goals as well as the gathering of information on citizens' behaviour – including cognitive error analysis – is to support the formulation of policy option alternatives and the doing nothing option "avoiding any over-estimation of the social costs of unexpected behaviour, and any under-estimation of the social costs of, for instance, a limitation of individual liberty".<sup>70</sup>

The adoption of RIA linked to the findings of behavioural research raises some questions. RIA should be placed in the initial phase of the policy process, followed by further analysis to permit the adjustment of inappropriate norms that have a negative effect, because they do not include a proper analysis of behaviour limitations.<sup>71</sup>

Then, this tool should develop in terms of information gathering and, therefore, it should incorporate risk analysis to consider heuristics and biases as risks which are to be used to calculate probabilities.<sup>72</sup>

Finally, RIA requires the support of cognitive science experts. So far this development of RIA, and in particular of impact assessment, has not received any real implementation into regulatory process.<sup>73</sup>

## C Conclusions

This essay has tried to answer to the question: what is good regulation? However, it is difficult to answer; the quality of regulations is a dynamic value, depending

68 A. Alemanno, 'Nudging Europe. Why the European Commission Should Include Behavioural Insights in the Design of Regulatory Proposals', *European Voice*, 16 May 2012, p. 3.

69 Rangone 2012, p. 11.

70 F. Di Porto & N. Rangone, 'Behavioural Sciences in Practice: Lessons for EU Policymakers', forthcoming in A.L. Sibony & A. Alemanno (Eds.), *Nudging and the Law. What Can EU Learn from Behavioural Sciences?*, Oxford, Hart Publications 2014, pp. 3 *et seq.*

71 European Commission, *Applying Behavioural Sciences to EU Policy-Making*, 2013, p. 10. The European Commission suggests: "placing behavioural insights at the beginning of the impact assessment process, in the problem definition section. In this way, individual behaviour can be one of the drivers of a policy problem that a new initiative tries to tackle".

72 F. Di Porto & N. Rangone, *Cognitive-Based Regulation: New Challenges for Regulation*, in <www.federalismi.it>, No. 20, 2013, pp. 4-6. R. Baldwin, M. Cave & M. Lodge, *Understanding Regulation. Theory, Strategy, and Practice*, New York, Oxford University Press 2012, pp. 90 *et seq.* "Risk perception studies are interested in seeking to understand better the individual biases that explain responses to risk".

73 F.M. Calvosa, *Interazione professionale e competenze multidisciplinari per una better regulation*, Roma, Forum P.A., 9 maggio 2011. "Better regulation requires high competences in the following sciences: sociology, economy, law, public communication and statistics".

both on the stakeholders and context.<sup>74</sup> Thus, the measurement of the performance of regulatory quality and better regulation tools is “extremely challenging for a number of reasons”.<sup>75</sup> According to some scholars, these factors make the quality of regulations an ‘elusive’ principle.<sup>76</sup>

This article has retraced the development of regulatory quality in the European Union: policies, programmes, and documents – mainly of a non-binding nature – have added rules that can serve as criteria for the assessment of quality regulation.

First of all, regulatory quality is defined as a meta-policy or meta-regulation: it refers to how rules should be enacted. In this way, regulatory quality does not correspond to a single sector but covers all policies. Starting from this construction, quality of regulations is constituted by both rules which must be clear, coherent, and comprehensible (formal quality) and rules must be accountable and adequate in the light of an assessment of less restrictive alternatives (substantial quality).<sup>77</sup>

Second, this principle is linked to an idea common to international organisations that have considered it as among the key factors to be used by states to achieve competitiveness and attract investments. In this way, many authors have explained that the main objective of Better Regulation is economic competitiveness.<sup>78</sup>

Finally, quality of regulations, in this ideal process, is also measured in the light of its capacity to reduce the short circuit determined by the heuristic and cognitive errors, which may be present in the choices made by stakeholders. In fact, if legislators do not have this relevant information about all stakeholders (citizens, consumers, end-users), or are not able to use it, there is a risk of compromising policy objectives and thus reduce the quality of regulation.<sup>79</sup>

74 Radaelli 2004, p. 10. Different stakeholders may have different notions of quality in mind: “[...] the bureaucrat defines quality as a matter of following proper and legitimate procedures in the regulatory process; for the politician, quality may well mean responsiveness to pressure groups or the median voter, or even responsiveness to extend pressure created by the European Union, the International Monetary Fund (IMF) and so on; firms perceive quality in terms of minimization of costs and defines success in terms of profit; citizens use yet another criterion, the effective protection from risk”.

75 Baldwin *et al.* 2012, p. 35. See C.M. Radaelli & A.C.M. Meuwese, *Impact Assessment Indicators Measuring. The quality of Impact Assessment*, FP6 project Evaluating Impact Assessments (EVIA), 2009, pp. 2-3. “[...] measuring quality is notoriously difficult to realize because of lack of agreement on standards in a country or, in the context of international organisations, across countries; intrinsic problems of operationalisation of concepts it is daunting to image a set of indicators of responsiveness; and lack of useful data”.

76 Radaelli & Meuwese 2009, p. 1. Voermans 2009, pp. 60 *et seq.*

77 M. De Benedetto, *Maintenance of rules*, CREI Working Paper No. 2, 2014, p. 17.

78 J.B. Wiener, ‘Better Regulation in Europe’, *Current Legal Problems*, Vol. 59, Oxford University Press 2006, p. 444.

79 Rangone 2012, p. 1; Rangone 2012, pp. 157 *et seq.*