

The Problem of Quality in EU legislation: what on earth is really wrong?

By Professor Helen Xanthaki¹

Amidst a bombardment of national legislation catapulted to citizens from their national legislatures and international fora, the EU finds itself accused of failure as a legislator: too much EU legislation² and bad EU legislation is at the core of neo-scepticism. However, little time is devoted to what constitutes good EU legislation, how good EU and good implementing laws can be drafted, and what constitutes best practice in EU legislating and transposing.

The objective of this chapter is to identify the main problem with EU legislation and to suggest possible ways of addressing it adequately. The chapter begins with the definition of good EU legislation as a theory and the identification of its constituting elements. It continues with the analysis of the expression of good EU legislation in institutional instruments, mainly in the post-Lisbon era, and assesses the extent to which the institutions have grappled with legislative quality as a product. Having applied legislative quality to the EU, the chapter attempts to identify legislative quality in the transposing/implementing national laws. Finally, the chapter collects the gaps identified at the EU and national levels and suggests possible solutions.³

1. What is good EU legislation: the theory

Defining good EU legislation is no easy task. And much of the answer depends on the lens under which the question is asked. My functional definition of good legislation defines good legislation as legislation that manages to achieve the desired regulatory results.⁴ In other words, good EU laws are laws that contribute to the achievement of the policy aims pursued

¹ Helen Xanthaki is Professor of Law and UCL and Director of International Postgraduate Laws, University of London; Senior Fellow at the Sir William Dale Centre for Legislative Studies of the Institute of Advanced Legal Studies of the University of London; and President of the International Association for Legislation.

² See 'How much legislation comes from Europe?', House of Commons Research Paper 10/62, 13 October 2010.

³ See Helen Xanthaki, "Emerging trends of legislation in Europe" in U. Karpen and H. Xanthaki (eds) *Legislation and jurisprudence in Europe* (2017, Hart, Oxford), pp.275-296.

⁴ See H. Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation*, (2014, Hart Publishers, Oxford), chapter 1.

by the EU regulators, to the extent set by these regulators, and within the timeframe imposed by them.

There is a direct link between EU regulation and EU legislation. Their precise relationship is mainly identified within an academic, non-functional⁵ context. Mousmouti and Voermans distinguish between legislative quality as an issue closely linked to the constitutional principles of legality, effectiveness and legal certainty; and regulatory quality as an issue related to the success of legislation in promoting economic development.⁶ And so, legislation is not synonymous to regulation. EU regulators, as indeed all regulators, use legislation as a tool of successful governing⁵; or a tool for putting into effect policies that produce the desired regulatory results⁷; or as the qualitative measure of successful legislation, which is the extent of production of the desired results.⁸ Provided of course that the regulators' choice be indeed put a policy to effect rather than only on paper.⁹

Within this context, EU regulation is the process of putting EU policies into effect to the degree and extent intended by government.¹⁰ EU legislation, as one of the many regulatory tools available to the regulators¹¹, is the means by which the production of the desired regulatory results is pursued. In application of Stefanou's scheme on the policy, legislative, and drafting processes¹¹, legislative quality is a partial but crucial contribution to regulatory quality.¹² This promotes the synergetic approach to legislation eloquently expressed by

⁵ See S. T. Trautmann, 'Empirical knowledge in legislation and regulation: a decision-making perspective' [2013] 1 *The Theory and Practice of Legislation* 533, 538-539.

⁶ See M. Mousmouti, 'Operationalising quality of legislation through the effectiveness test' (2012) 6 *Legisprudence* 191, 194; also, W. Voermans, 'Concern about the Quality of EU Legislation: What Kind of Problem, by What Kind of Standards?' (2009) 2 *Erasmus Law Review* 59, 223 and 225; and R. Baldwin and M. Cave, *Understanding Regulation: Theory, Strategy and Practice* (Oxford, Oxford University Press, 1999) 85. ⁵ See OECD, 'Recommendation of the Council on Improving the Quality of Government Regulation', 9 March 1995, C(95)21/Final.

⁷ The executive branch of government is no longer expected to confine itself to the mere making of proposals: it has to see them through. See J. Craig Peacock, *Notes on Legislative Drafting* (Washington, REC Foundation, 1961) 3.

⁸ See N. Staem, 'Governance, Democracy and Evaluation' (2006) 12(7) *Evaluation* 7, 7.

⁹ And the choice is the governments not the drafters: see P. Delnoy, *Le rôle des légistes dans la détermination du contenu des normes*, 2013 Report for the International Cooperation Group, Department of Justice, Canada, <http://www.justice.gc.ca/fra/apd-abt/gci-icg/publications.html>, 3.

¹⁰ See National Audit Office, Department for Business, Innovations and Skills, 'Delivering regulatory reform', 10 February 2011, para 1.

¹¹ Tools for regulation vary from flexible forms of traditional regulation (such as performance-based and incentive approaches), to co-regulation and self-regulation schemes, incentive and market based instruments (such as tax breaks and tradable permits) and information approaches. See Better Regulation Task Force

Richard Heaton, former First Parliamentary Counsel and Permanent Secretary of the Cabinet Office in London:

‘I believe that we need to establish a sense of shared accountability, within and beyond government, for the quality of what (perhaps misleadingly) we call our statute book, and to promote a shared professional pride in it. In doing so, I hope we can create confidence among users that legislation is for them.’¹³

This approach feeds into this diagram of elements of regulatory and legislative quality.¹⁴

(BRTF), ‘Routes to Better Regulation: A Guide to Alternatives to Classic Regulation’, December 2005; also see J. Miller, James, ‘The FTC and Voluntary Standards: Maximizing the Net Benefits of Self-Regulation’ (1985) 4 *Cato Journal* 897; and OECD Report, ‘Alternatives to traditional regulation’, para 0.3; and also OECD, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* (Paris, OECD, 2002).

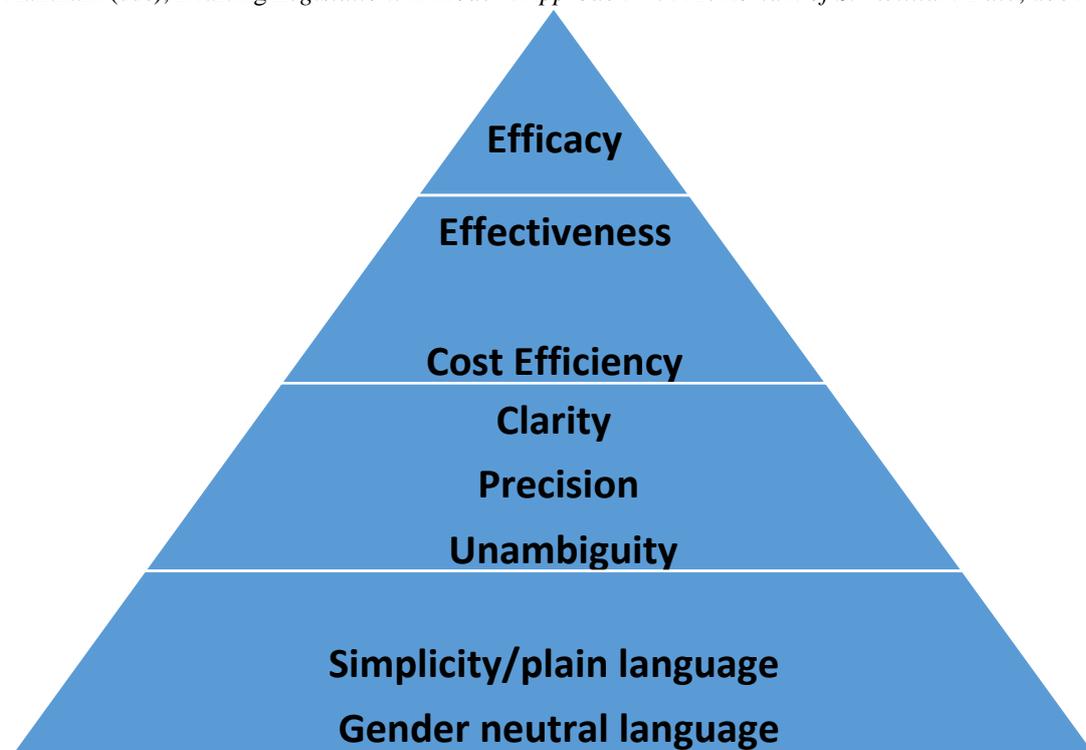
¹¹ See C. Stefanou, ‘Legislative Drafting as a form of Communication’ in L. Mader and M. Travares-Almeida (eds), *Quality of Legislation Principles and Instruments* (Baden-Baden, Nomos, 2011) 308; and also see C.

Stefanou, ‘Drafters, Drafting and the Policy Process’ in C. Stefanou and H. Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Aldershot, Ashgate, 2008) 321.

¹² In fact, there is an emergence of a public interest in good quality of rules: see M. De Benedetto, M. Martelli and N. Rangone, *La Qualità delle Regole* (Bologna, SE il Mulino, 2011), 23.

¹³ See R. Heaton, ‘Foreword’ in Cabinet Office, Office of Parliamentary Counsel *When Laws Become Too Complex*, 16 April 2013. ¹⁴ See H. Xanthaki, ‘On transferability of legislative solutions: the functionality test’ in C. Stefanou and H.

Xanthaki (eds), *Drafting Legislation: A Modern Approach – in Memoriam of Sir William Dale*, above, n.12, 1.



The ultimate goal for regulation is efficacy. Efficacy is the extent to which regulators achieve their goal.¹² It is often misnamed ‘effectiveness’, especially by non-English speakers or experts outside the legislative field. From the point of view of drafting, efficacy is the capacity of EU laws to achieve the regulatory aims that they are set to address.¹³ Efficacy, as a measure of quality of legislation for the purposes of achieving the desired regulation, is not a goal that can be achieved by the drafter alone.¹⁴ A wonderful draft may be capable of producing the desired regulatory effects, but bad implementation¹⁵ and bad judicial application may interfere with its actual results.¹⁶ Of course one has to accept that the extent of the margin for incorrect implementation and judicial application is directly linked to the quality of the draft,¹⁷ but it is quite possible that the error in the draft may be attributed to a fault in the content of the pursued policy or in the calculations of the regulatory impact assessment made for the allocation of resources for implementation.

Within the umbrella of efficacy the drafter pursues effectiveness in legislation.¹⁸ The term is used widely but often without a definition: the EU calls for accountability, effectiveness, and proportionality as a means of achieving better law-making, but the term is not defined at all.¹⁹ Similarly, the UKs Office of Parliamentary Counsel repeat their aspiration to effectiveness as a contribution to or in balance with accuracy, but do not define the term.²⁰ Mader defines effectiveness as the extent to which the observable attitudes and behaviours of

¹² See *ibid*, 126; also see M. Mousmouti, above, n 4, 200.

¹³ See N. Gunningham and D. Sinclair, ‘Designing Smart Regulation’, <http://www.oecd.org/dataoecd/18/39/33947759.pdf>, 18; and also R. Baldwin, ‘Is Better Regulation Smarter Regulation?’ (2005) *Public Law* 485, 511.

¹⁴ See J. P. Chamberlain, ‘Legislative drafting and law enforcement’ (1931) 21 *Am.LabLegRev* 235, 243.

¹⁵ See D. Hull, ‘Drafters Devils’ (2000) *Loophole*, www.opc.gov.au/calc/docs/calc-june/audience.htm.

¹⁶ See U. Karpen, ‘The norm enforcement process’ in U. Karpen and P. Delnoy, (eds.), *Contributions to the Methodology of the Creation of Written Law* (Baden-Baden, Nomos, 1996), 51, 51; also L. Mader, ‘Legislative procedure and the quality of legislation’ in U. Karpen and P. Delnoy (eds.), *Contributions to the Methodology of the Creation of Written Law*, above, n 35, 62, 68.

¹⁷ See G. Teubner, ‘Regulatory Law: Chronicle of a Death Foretold’ (1992) 1 *Social Legal Studies* 451.

¹⁸ See C. Timmermans, ‘How Can One Improve the Quality of Community Legislation?’ (1997) 34 *Common Market Law Review* 1229, 1236–7.

¹⁹ See ‘European Governance: Better lawmaking’, Communication from the Commission, COM(2002) 275 final, Brussels, 5.6.2002; also see High Level Group on the Operation of Internal Market, ‘The Internal Market After 1992: Meeting the Challenge – Report to the EEC Commission by the High Level Group on the Operation of Internal Market’, SEC (92) 2044.

²⁰ See Office of Parliamentary Counsel, ‘Working with OPC’, 6 December 2011; and OPC, ‘Drafting Guidance’, 16 December 2011.

the target population correspond to the attitudes and behaviours prescribed by the legislator.²¹ Snyder defines effectiveness as “the fact that law matters: it has effects on political, economic and social life outside the law – that it, apart from simply the elaboration of legal doctrine”.²² Teubner defines effectiveness as term encompassing implementation, enforcement, impact, and compliance.²³ Muller and Ulmann define effectiveness as the degree to which the legislative measure has achieved a concrete goal without suffering from side effects.²⁴ In Jenkins's socio-legal model effectiveness in the legislation can be defined as the extent to which the legislation influences in the desired manner the social phenomenon which it aims to address.²⁵ Voermans defines the principle of effectiveness as a consequence of the rule of law, which imposes a duty on the legislator to consider and respect the implementation and enforcement of legislation to be enacted.²⁶ Mousmouti describes effectiveness as a measure of the causal relations between the law and its effects: and so an effective law is one that is respected or implemented, provided that the observable degree of respect can be attributed to the norm.²⁷ For the purposes of drafting in its narrow sense, therefore, effectiveness is the ultimate measure of quality in legislation.²⁸ It simply reflects the extent to which the legislation manages to introduce adequate mechanisms capable of producing the desired regulatory results.²⁹ If one subjects effectiveness of legislation to the wider semantic field of efficacy of regulation as its element, effectiveness manages to hold true even with reference to diverse legislative phenomena, such as symbol legislation, or even the role of law as a ritual. If the purpose of legislation is to serve as a symbol, then effectiveness becomes the measure of achieved inspiration of the users of the symbol legislation. If the legislation is to be used as a

²¹ See L. Mader, ‘Evaluating the effect: a contribution to the quality of legislation’ (2001) 22 *Statute Law Review* 119, 126.

²² See F. Snyder, ‘The effectiveness of European Community Law: institutions, processes, tools and techniques’ (1993) 56 *Mod L Rev* 19, 19; also F. Snyder, *New Directions in European Community Law* (London, Weidenfeld and Nicolson, 1990) 3.

²³ See G. Teubner, ‘Regulatory law: Chronicle of a Death Foretold’ in Lenoble (ed), *Einführung in der Rechtssoziologie* (Darmstadt, Wissenschaftliche Buchgesellschaft, 1987) 54.

²⁴ See G Muller and F Uhlmann *Elemente einer Rechtssetzungslehre* Zurich, Asculthess, 2013) 51-52.

²⁵ See I. Jenkins, *Social Order and the Limits of the Law: a Theoretical Essay* (Princeton, Princeton University Press, 1981) 180; also see R. Cranston, ‘Reform through legislation: the dimension of legislative technique’ (1978-1979) 73 *NwULRev* 873, 875.

²⁶ See W. Voermans, above, n 4, 230.

²⁷ See M. Mousmouti, above, n 4, 200.

²⁸ See H. Xanthaki, ‘On Transferability of Legal Solutions’ in C. Stefanou and H. Xanthaki (eds.) *Drafting Legislation, A Modern Approach*, above, n 19, 6.

²⁹ See Office of the Leader of the House of Commons, *Post-legislative Scrutiny – The Governments Approach*, March 2008, para 2.4.

ritual, effectiveness takes the robe of persuasion of the users who bow down to its appropriate ritual.

In its concrete, rather than abstract conceptual sense, effectiveness requires a legislative text that can (i) foresee the main projected outcomes and use them in the drafting and formulation process; (ii) state clearly its objectives and purpose; (iii) provide for necessary and appropriate means and enforcement measures; (iv) assess and evaluate real-life effectiveness in a consistent and timely manner.³⁰

Leaving cost efficiency aside³¹, effectiveness can be achieved by clarity, precision, and unambiguity. Clarity, or clearness,³² is the quality of being clear and easily perceived or understood.³³ Precision is defined as exactness of expression or detail.³⁴ Unambiguity is certain or exact meaning:³⁵ semantic unambiguity requires a single meaning for each word used³⁶, whereas syntactic unambiguity requires clear sentence structure and correct placement of phrases or clauses.³⁷ Clarity, precision, and unambiguity offer predictability to the law. Predictability allows the users of the legislation, including enforcers³⁸, to comprehend the required content of the regulation. Predictability of effect is a necessary component of effectiveness and indeed of the rule of law.³⁹ Thus, compliance becomes a matter of conscious choice for the user, rather than a matter of the users' subjective interpretation of the exact content of the legislation and, ultimately, the regulation.

At the third level of the hierarchy of goals for the drafter comes plain language and gender neutral language.

³⁰ This is Mousmouti's effectiveness test: M. Mousmouti, above, n 4, 202.

³¹ See R. Posner, 'Cost Benefit Analysis: definition, justification, and comments on conference papers' (2000) 29 *The Journal of Legal Studies* 1153.

³² See Lord H. Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents* (London, John Murray, 1902) 61.

³³ See *Compact Oxford English Dictionary of Current English* (Oxford, Oxford University Press, 2005).

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ J. MacKaye, A.W. Levi and W. Pepperell Montague, *The Logic of Language* (Hannover, Dartmouth College Publications, 1939) chapter 5.

³⁷ For the distinction between semantic and syntactic ambiguity, see R. Dickerson, *The Fundamentals of Legal Drafting* (Boston, Little-Brown, 1986) 101 and 104; for an application of rules of logic to resolve syntactic ambiguities, see L.E. Allen, 'Symbolic logic: a razor-edged tool for drafting and interpreting legal documents' (1956-1957) 66 *Yale L J* 833, 855.

³⁸ See A. Seidman, R. Seidman and N. Abeyesekere, *Legislative Drafting for Democratic Social Change* (The Hague, Kluwer Law International, 2001) 255.

³⁹ See Sir S. Laws, CALC Conference 2009, Hong Kong.

Thus, good EU laws are laws that, with the synergy of the other actors in the legislative process, are capable of producing the desired policy results. This presupposes that EU regulators have set a realistic achievable and sound policy aim, with equally achievable and sound mechanisms for its achievement. If this is in place, a good EU law can express the aim, the mechanisms, and ultimately the demands made to citizens in a manner that can communicate the regulatory message adequately. A good EU law facilitates the user's understanding on what they have to do, for what reason, and in what way. This incites compliance, at least amongst those citizens who are inclined to comply. It also enhances accountability on the basis of the visibility of the legislative aim, the reasoning behind the mechanisms chosen, and the legislative quality: citizens know what is to be achieved by when and can therefore question if that has happened or whether it has not.

2. What is good EU legislation: EU instruments

The EU started its engagement with regulatory and legislative quality back in the early 1990s. However, it was in the 1998 Commission Staff Working Paper entitled Making Single Market Rules More Effective, Quality in Implementation and Enforcement⁴⁰ that the Commission clarifies the necessity for, the purpose and the content of quality in legislation. Clear and simple legislation helps businesses and citizens to comply with the law without excessive burdens. It facilitates its enforcement. Moreover, it addresses complaints for excessive wrong tape often leading to cases for damages, such as Francovich. All this can be achieved by use of legislation that is easy to transpose and apply and takes into account the views of interested parties expressed in consultation under the 1998 Regulatory Policy Guidelines of the Commission and the 2002 General principles and minimum standards for consultation of interested parties by the Commission. Accountability, effectiveness and proportionality were put forward as the main elements of better law making in the 2002 Communication on European Governance: Better law making.⁴¹ Moreover, the Commission Communication to the European Council 'Legislate Less to Act Better: the Facts' emphasised the need to concentrate on policy priorities

⁴⁰ See SEC(1998) 903, 25 May 1998, 3-5.

⁴¹ See Communication from the Commission - European Governance: Better lawmaking, COM/2002/0275 final.

with strict application of the subsidiarity and proportionality principles (legislate less), the need for improved consultation procedures, and the need for clearer, simpler, and more accessible legislation (act better). These aims are achievable through the reduction of legislative proposals; the use of alternatives to legislation as a regulatory tool; the quality of legislative drafting through the introduction of drafting guidelines for clear, coherent and unambiguous legislation; the simplification of legislation through SLIM; the appropriate use of formal consolidation [or codification, in today's terminology], recasting, and informal consolidation; easier access to information; proper transposition; shared responsibility amongst institutions; and rationalising of national legislation.

The culmination of rules for legislative quality came with the 1998 Inter-institutional Agreement on common guidelines for the quality of drafting of Community legislation⁴², as supplemented by the 2003 Inter-institutional Agreement on Better Law-Making⁴³ and consolidated into the Inter-institutional Style Guide on 22 April 2015⁴⁴: Community acts must be clear, simple, precise, concise, and with homogeneous content. Drafting must be appropriate to the type of act concerned, and to the audience to whom it is addressed. Terminology must be internally and externally consistent. The standard structure of title – preamble - enacting terms - annexes if necessary) applies. The title offers a full indication of the subject matter. Citations set out the legal basis of the act. Recitals set out concise reasons for the chief provisions of the enacting terms without paraphrasing or reproducing them. Only clauses of normative nature can be included in legislation. Internal and external references must be kept to a minimum. Repeals must be introduced expressly. Dates of transposition or enforcement must be introduced clearly as day/month/year.

The Inter-institutional Style Guide binds drafters in the institutions but continues to take the form of a formalistic, fragmented, and incomplete manual on legislating for the EU. As a result, it fails to address the elements of legislative quality and continues to promote a formalistic and technical approach to drafting.

The fury of action for the achievement of legislative quality in the EU ended somewhere in 2003. Numerous policy documents continued to refer to Better Regulation,

⁴² See *OJ C* 73, 17 March 1999, 1.

⁴³ See Parliament, Council and Commission Inter-institutional Agreement on better law-making, *OJ* 2003/C 321/01.

⁴⁴ See <http://publications.europa.eu/code/en/en-000500.htm>.

which continued to be at the forefront of the EU's governance debate, but a closer look at them shows beyond doubt a transfer from legislation as an autonomous product to legislation as a regulatory tool. This is of course exceptionally insightful as legislation is indeed a tool for regulation. However, unfortunately, in the EU this conceptual move led to a notable ignorance of legislation altogether at least from a drafting perspective. One could source the conceptual framework behind this movement as far back as 2001 and the Mandelkern Group Report on Better Regulation. It is notable that since 2001 the Better Regulation Reports are pursuant to and therefore limited to proportionality and subsidiarity, whereas from 2007 even the title of Better Regulation reports has been usurped by subsidiarity and proportionality, thus excluding scope for legislative quality conventions and innovative assessments. The 2008 Second strategic review of Better Regulation in the EU focuses solely on administrative burdens, legislative scrutiny, reducing the number of legislative instruments, and emphasising the shared responsibility of the EU and member states. Similarly, the 2009 Third strategic review of Better Regulation in the EU is another prime example of this move from legislation to regulatory agendas: although clear, precise, and accessible legislation lies at the ether of regulatory reform, none of the recommendations address it: pre and post legislative scrutiny are the only focus.

The most recent innovation in the field comes with the Smart Regulation Agenda⁴⁵, now revamped as Better Regulation Agenda. The October 2010 Commission Communication on Smart Regulation constitutes the formal passing from the old Better Regulation Agenda to the new Smart Regulation Agenda.⁴⁶ The Commission identified three key messages in the Agenda. First, Smart Regulation is about the whole policy cycle, and thus touches upon the design of a piece of legislation, its implementation, enforcement, evaluation, and revision. Second, Smart Regulation remains a shared responsibility between the EU institutions and the Member States. Third, the views of users of regulation have a key role to play in Smart Regulation, as consultation is an element of democracy. In other words, the novelty of Smart

⁴⁵ See H Xanthaki 'The regulatory reform agenda and modern innovations in drafting style' in L Mader (ed.) *Regulatory Reform* (Baden-Baden, Nomos, 2013), 128.

⁴⁶ See European Commission 'Smart Regulation in the European Union' Commission communication, COM(2010)543, 8 October 2010, <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0543:EN:NOT>.

Regulation refers to three main themes: smart regulation throughout the policy cycle; shared responsibility; and stakeholder engagement.⁴⁷

There is no doubt that Smart Regulation is revolutionary. The reaction of the experts to the Commission's agenda has been positive, although already need for further action has been identified. This includes the need to carry out impact assessments for every new regulatory proposal; to improve the informative value of roadmaps; to make the Commission's Impact Assessment Board more independent; to conduct systematic ex post-evaluations from the end users' perspective; to strengthen the role of the High Level Group; and to consult the public.⁴⁸ Smart Regulation presents obvious positive points. It follows Stefanou's identification of the drafting process as a part of the legislative process, which is a part of the policy process⁴⁹. It confirms that EU regulation is a shared responsibility of the institutions and member states. In addition, it affirms the need for in depth consultation. Focus is placed on the simplification of EU law via the reduction of administrative burdens past the expected 25% cuts in red tape by 2012; evaluation of law effectiveness and efficiency ex ante via fitness checks on key areas (environment etc.), and via strategic general policy evaluations; selection of the 'the best possible' legislation through Impact Assessment, improvement of implementation record, via post legislative scrutiny, SOLVIT, and EU Pilot; and achieving clearer and accessible legislation via simple language, codification, recasting, and e-access. These are worthy aims. In addition, the Commission can show considerable success. For example, the EU's Impact Assessment system has been praised as first class.⁵⁰ The question is how these noble aims are going to be achieved.

⁴⁷ See H McColm 'Smart Regulation: The European Commission's Updated Strategy' [2011] *European Journal of Risk Regulation* 9, 9.

⁴⁸ See 'Common Position Paper of the five European independent advisory boards for cutting red tape and better regulation', Adviescollege toetsing regeldruk (ACTAL), The Netherlands; Nationaler Normenkontrollrat (NKR), Germany; Regelrådet, Sweden; Regulatory Impact Assessment Board (RIAB), Czech Republic; Regulatory Policy Committee (RPC), United Kingdom, <http://www.regelradet.se/wp-content/uploads/2012/09/2012-Reaction-on-consultation-Smart-Regulation.pdf>

⁴⁹ See C Stefanou 'Drafters, drafting and the policy process' in C Stefanou and H Xanthaki *Drafting Legislation: A Modern Approach* (Aldershot, Ashgate, 2008) 321.

⁵⁰ See OECD 2011 'Sustainability in Impact Assessments — A review of Impact Assessment Systems in selected OECD Countries and the European Commission', European Parliament 2011, 'Comparative study on the purpose, scope and procedures of impact assessments carried out in the Member States of the EU', CEPS/University of Exeter 2012, 'Regulatory Quality in the European Commission and the UK: Old questions and new findings'.

Simplification of EU law is indeed a wonderful goal. A depressing [or it is impressive?] 74% of Europeans believe that the EU generates too much red tape.⁵¹ In addition, the Commission has responded to it via impact assessments and stakeholder consultation, and via regular fitness checks undertaken within the Regulatory Fitness and Performance Programme (REFIT) of December 2012. These initiatives have contributed to a reduction of red tape by well above the 25% target set out in the Administrative Burden Reduction programme:⁵² the precise figures correspond to a decrease of 25% of burden in 13 priority areas equivalent to savings of EUR 30.8 billion with a further EUR 5 billion still pending adoption by the co-legislator. However, simplification cannot be taken to mean simply a streamlining of legislation and a reduction of administrative burdens. In fact, the Smart Regulation agenda neglects to address a number of crucial aspects of simplification without which reduction of administrative burdens cannot be achieved. What about simplicity of the chosen policies? If a policy choice is complex in itself, then the reduction of red tape will not suffice to make it accessible to the citizens. What about simplicity in the selected regulatory means? Is the notoriously user-unfriendly legislation not a most complex regulatory tool? And so reducing administrative burdens via legislation carries inherent complexity, which may well endanger the end result. What about the chosen drafting style as a means of simplifying the expression of a simple policy when a simpler regulatory tool is considered ineffective? A complex legislative style would diminish the actual effect of any simplification effort irrespective of what the percentage of administrative burdens in the simple policy chosen may be: if the users cannot understand the language of the law, how can they benefit from the opportunities created by a policy of reduced red tape? What about straightforward enforcement methods? And could one rely on a reduction of administrative burdens within the EU text, if the national implementing measures are complex and seize on any opportunity for discretion in the EU text in order to add further burdens? Finally, could EU law be considered simple when the methods of pre- and post-legislative scrutiny utilised are inherently complex and therefore inaccessible for the users?

Similarly, evaluation of law effectiveness and efficiency ex ante is a fantastic initiative in theory. It is defined as a judgment of interventions according to their results and impacts,

⁵¹ See Eurobarometer Question QA16.4 on page 59: http://ec.europa.eu/public_opinion/archives/eb/eb79/eb79_anx_en.pdf.

⁵² See SWD(2013)401 final.

and the needs they aim to satisfy.⁵³ However, can it be achieved simply via fitness checks and general policy evaluations? In a legislative environment where the definition of effectiveness has not been provided conclusively, the goal that the regulatory team is supposed to be trying to achieve becomes a moving target, a vague and ambiguous goalpost, which carries a different meaning for the different actors in the regulatory process, much more so between EU and national levels. However, even where the concept of effectiveness appears clear, which are the specific criteria of effectiveness by way of successful regulation that must be used in reference to a specific piece of legislation? The application of the generic elements of the semantic field of the concept of effectiveness in the specific context of a piece of legislation as applied in the specific legal system that serves a specific society in a specific time is not an easy task, and should not really be ignored or left to chance. There is a dire need to ensure that the criteria for effectiveness of any piece of legislation are agreed between policy makers, law experts, and legislative drafters, and that they are clearly expressed in the legislation itself via perhaps their inclusion in a purpose clause or an objectives article. These can then be carried through to post legislative scrutiny. And then utilised to confirm effectiveness, thus allowing the text to continue its legislative life.

But how will ineffectiveness be addressed? What if the effectiveness criteria are not met by the piece of legislation at the pre-set time of post legislative monitoring: will the legislation die an automatic death via perhaps a sunset clause, will it continue to plague the statute book as it stands until an enlightened decision maker decides to address the problem, or will it lead to an automatic exercise of fine-tuning via perhaps an amending piece of legislation?

Moreover, Smart Regulation fails to identify the way in which, if at all, evaluation will take place at the member state level. Here other considerations should also come into play. Will national scrutiny be compulsory or could the member states be offered discretion based on national sovereignty in the legislative making process? Moreover, Smart Regulation fails to address the extent of any national scrutiny process, namely whether it must relate strictly to the national implementing measures or whether it can refer to the original EU text. This is rather crucial, especially in reference to national legislation, which departs from the policy and

⁵³ See G Luchetta 'Impact Assessment and the Policy Cycle in the EU' [2012] *European Journal of Risk Regulation* 561, 572-573.

law of the EU by means of either a direct or an indirect breach or even legitimately by means of an acceptable exercise of discretion as would be the case with the implementation of a Directive. And what if the national scrutiny exercise identifies a flaw in the EU policy? Can that be reported back to the EU and will this result in any action at the EU level?

Moreover, the initiative fails to define efficiency. It is unclear whether that refers to a mathematical exercise involving financial cost or whether social and other impact must be calculated towards the reduction of burdens, or indeed how these can be calculated.

The improvement of the implementation record is a third worthy point of reference for Smart Regulation. But once again one has to distinguish between the aim and the proposed methods for its achievement. Can implementation be improved solely via post legislative scrutiny, availability of SOLVIT, and the EU Pilot on clarification and assistance with the application of EU legislation? What about clear guidance on the definition of complete transposition for new, older and aspiring member states? What about clear guidance on the definition of quality in legislation for the purposes of EU drafting but also EU transposition? What about the establishment of national drafting offices with trained specialist drafters vetting (if not drafting) implementation measures based on the UK model for drafting national primary legislation [Office of Parliamentary Counsel]? What about extending the scrutiny of implementation beyond substantive transposition to technical quality of transposition?

Finally, who would disagree with the election of the ‘the best possible’ legislation? However, is this really achievable simply via Impact Assessments, clearer and accessible legislation, simple language, codification, recasting, and e-access? What about opening the debate for a holistic approach to effectiveness in the sense of the use of legislation as a tool for regulation? What about setting a hierarchy of goals for the drafter? What about training drafters to achieve these goals? What about considering a central drafting office with trained drafters within EU institutions, including the Commission, the Council, and the Parliament? What about training national drafters to contribute to the effort?⁵⁴

Therefore, even post Lisbon EU legislative quality continues to face challenges that have remained unaddressed, for the most part. The analysis of the relevant EU initiatives,

⁵⁴ For a full presentation of my critique to Smart Regulation see H Xanthaki ‘Implementation of EU legislation’, Oral Evidence, Public Hearing at the Legal Affairs Committee of the European Parliament ‘Better Regulation’ Hearing, Brussels, 21 June 2011.

namely the Better Regulation agenda, identified a pause somewhere around 2003. Despite the flurry of activity in the field of legislative quality until then, all initiatives from the EU after that date refer to legislative quality as an aim but have transferred the focus of attention to holistic regulatory quality thus leaving legislative quality aside.⁵⁵

The move to regulatory quality as the focus of the EU's better governance campaign is by no means a negative development in the field. Indeed, legislative quality is an intrinsic part of regulatory quality: without regulatory quality, one cannot perceive the notion of legislative quality. As legislative drafting can only aspire to effectiveness, namely to the production of a legislative text that, with the cooperation and synergy of all other actors in the policy process, can achieve the regulatory aims, one cannot possibly expect it possible to produce quality legislation when the regulatory aims are erroneous or illegal, when the choice of legislation as a regulatory tool is inappropriate, or indeed when the implementation of the legislation has not been thought through. However, at the same time one cannot possibly perceive regulatory quality without, in cases where legislation is the appropriate regulatory tool, legislative quality. To me, this is the great error of the EU's current strategy. By turning the focus of attention from legislation to regulation, the EU seems to have forgotten about legislation altogether, somehow trying to simply wish away the continuing problems of legislative quality.⁵⁶ The same conclusion is reached by the analysis of Smart Regulation, the 2010 EU initiative constituting the successor of Better Regulation. This conclusion is confirmed by an analysis of the new Inter-institutional agreement on Better Law-Making between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making made on 13 April 2016. One again, the institutions re-affirm their common goal for effectiveness of legislation but fail to address their drafting altogether: emphasis is on procedural issues (such as planning and monitoring) and on pre and post legislative scrutiny. However, the actual drafting is ignored, and therefore the criteria by which legislation as a product is to be assessed remain vague and therefore inapplicable in practice.⁵⁷

⁵⁵ See M Mousmouti 'The Effectiveness Test' [2012] *Legisprudence* 191, 196.

⁵⁶ See C-H Montin 'Smart Regulation in the European Union', <http://montin.com/documents/smartregulation.pdf>, (29.11.2012).

⁵⁷ Also see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, "Better regulation for better results – An EU agenda", 19.5.2015 COM(2015) 215 final.

What is even more disappointing is the 2020 Agenda for Europe, where not only Better Regulation but also Smart Regulation is ignored. The question is why the EU felt that they could move from Better Regulation to Smart Regulation, and then to a strategy for growth and competitiveness. From the perspective of legislative studies at least, none of the two moves make sense. Why would the EU decide to leave Better Regulation and Smart Regulation aside, when neither of these agendas has born the desired fruits? Surely, one could not seriously support the argument that EU legislation and national implementing legislation, or indeed the EU regulatory environment has reached perfection. One is tempted to attribute this move to an underlying policy of competitiveness for businesses rather than a policy for better legislation in Europe. Perhaps the legislative and then regulatory quality agendas are viewed by the EU solely as a means of pursuing the policy aim of growth and competitiveness. It is precisely this aim that is repeated, and even more clearly expressed, in the 2020 Agenda for Europe.

In view of this, where is Europe going with reference to legislative quality and quantity? What the EU has clumsily missed here is a unique opportunity to finally balance its focus of attention to both businesses and citizens. While the first enjoy the fruits of Better Regulation, Smart Regulation, and the 2020 Agenda for Europe, citizens are still facing the same issues of confusion stemming from the multitude of bad EU laws (not tackled by SLIM as they did not relate to SME), and bad regulation (not tackled by Smart Regulation since administrative burdens were not applicable). This imbalance may well be intentional. However, it remains unjustifiable within the focus on citizen and citizenship expressed clearly in the Treaty of Lisbon. And it cannot be accommodated within the emphasis on social equity for EU citizens so eloquently professed in the Treaty of Lisbon, which declares the passage from the Internal Market to a forum of citizenship, international justice, and peace.

It appears therefore that the new challenge for Europe in the field of EU legislative studies is to apply Better Regulation, Smart Regulation, and the 2020 Agenda for Europe to citizens, along with businesses, thus showing that the Treaty of Lisbon is not a list of good political intentions, but an accurate reflection of the new EU for its citizens and peoples. The challenge is to go back to Better Regulation and Smart Regulation, and assess their success from the point of view of the citizens using the Treaty's citizenship concept as a focus. Transferring the focus from businesses to citizens would tint the picture of the effectiveness of these three regulatory initiatives with much darker colours. Because the amount of work that

remains in order to make EU legislation and EU regulation palatable is daunting. But absolutely necessary.

Does this mean that there is only gloom and doom ahead for Europe and its legislation? Far from it. The EU as a regional organisation is lagging behind whilst a number of groundbreaking initiatives are pursued within the Member States: this is where inspiration is plentiful, and, conveniently, tried and tested. The Timmermans team are already seeking to learn from Member States, and their work is admirable, albeit not focused on legislation as a product. Not just yet. At the same time, the academic discipline of legislative studies is enriching Europe with innovative concepts for better legislative quality: the EU is in the envied position of harvesting European talent to pick the most effective legislative solutions. But only if it has the political inclination to do so, and the boldness to be radical.

Because what the EU needs to address its legislative gridlock is a radical and ruthless critical review of its own practices and processes. The starting point can only be a principles approach to legislative quality. Departing from the current dry formalistic approach to legislative dilemmas, which often serves well tick-boxing exercises, is not an easy reform. It would require less hierarchy in the performance of fonctionnaires' duties, thus allowing enlightened drafters to approach legislation in a creative manner. For example, instead of checking which national instrument transposes each of the provisions of EU legislation, those undertaking a transposition check could identify the regulatory efficacy sought by the text, and assess the effectiveness of the national transposing instrument on a holistic principled basis. This may seem like a subjective exercise but the law is subjective. And, in any case, is Impact Assessment not a subjective exercise anyway?

The subjectivity of the proposed creative approach to legislative scrutiny at the EU and Member State levels would be balanced by the identification of objective, clear policy goals to which the legislative text contributes. However, policy goals cannot possibly continue to be expressed in the political context currently present in most recitals: policy goals must be set in a concrete and measurable manner, in order to ensure that the contribution of the EU and national texts can be assessed as objectively as possible. For example, introducing money laundering as a criminal offence can no longer be presented as a measure contributing to the single market and to the safety and security of EU citizens. Although this supergoal is obviously relevant, for the purposes of legislative drafting more concrete goals can be used as

thresholds of effectiveness that can and will be applied in the post-legislative scrutiny of the legislative text. Succeeding in the prosecution or conviction of a minimum set number of money launderers saving the EU and its citizens a minimum set amount of money serves both as a concrete legislative objective and as a measure of legislative success within a period of a set number of years. Perhaps most importantly, it offers EU citizens a tangible, concrete and plausible rationale for the EU legislative text, thus hushing down the populist voices attributing the text to an alleged fearsome EU need for more control over citizen activities or to rather mundane policy aims. If the bananas Directive included as an objective the aim to eradicate disease in banana crops within a set period of time, those populist voices will have lost the opportunity to distort the regulatory aims of the EU, which may well have gained further following from farmers and consumers as their champion against disease.

Of course expressing EU legislative texts in a manner that reflects clear tangible policy objectives in a creative structure that reaches EU citizens as well as Member States authorities is a task that can only be performed adequately by professional drafters. Trained lawyers and non-lawyers, aware of the theory of legislative drafting, and experienced in the practice of achieving effectiveness do not grow on trees; and of course they are not available to the EU right now. Much more so, since Commission fonctionnaires lack the independence to express policy without vested policy agendas: since policy formulation, legislative drafting, and transposition vetting are all collected on the same person, there is little guarantee of independent legislative verification of the draft and, perhaps most importantly, little respect to the constitutional principle of separation of powers.

The lack of external verification of draft EU laws is exacerbated by a lack of trained parliamentary personnel. In order to perform its duty as a learned and able European Parliament, its staff and Members must be trained in legislative scrutiny. Without knowing what the quality elements of effective laws are, surely they cannot be expected to perform their scrutiny duties at any level other than the political one. At a time where, post-Lisbon, national parliaments are actively seeking to inform and train their staff and members, it makes little sense to deprive the European Parliament from the privilege of strengthening its voice in legislative quality.

Lastly, within the context of a stronger European Parliament, the choices offered to its members can be clarified further. What can they do, if draft laws are ineffective or are now

obsolete? Fine-tuning and repealing can become an initiative of MEPs, in addition of course to the current Commission staff.

One wonders whether these requirements are Utopian, under the current realities of an enlarged, at times, chaotic, EU. Much as I welcome the polyphony and multi-culturalism of a now richer EU, as a drafter I share these doubts. With a richer selection of diverse voices, it is becoming a triumph to pass any piece of legislation, let alone a quality one. The pressure is increased for the Commission and the other EU institutions to manage to achieve agreement on legislative instruments, whilst the task is becoming all the heavier.

But, if this is the case, is there not a mismatch between the legislative capacity of the EU institutions and the type of legislative instruments produced? It is not possible to change the legislative process and the customs created after almost 60 years of European integration. In addition, one can only rejoice at the great diversity of policy approaches, jurisdictions, legal cultures, languages, and legislative styles contributing to EU instruments. Given this wonderful status quo, which one would not want to change, it seems that the task of passing effective EU laws has reached a level of impossibility. In order to unblock this dead-end, one could simply embrace the new reality and accept that binding, final, and complete legislative texts that are effective in all national legal order are not feasible. Regulations are doomed to fail as regulatory tools simply because, irrespective of the greatness of talent and skill of EU drafters, it is humanly impossible to creating a law that is effective when parachuted within the political, legal, and financial environments of 28 Member States. When weighing the understandable delight of passing a Regulation against the great probability of its eventual ineffectiveness, perhaps the EU can begin to seek legislative quality as a means of regulatory efficacy as opposed to the now banal joy of the *droit diplomatique* of the olden times.

In practice, this means Regulations should be sought in the very rare cases where both the text agreed and the receiving national legal orders are identical – in which case one wonders if the Regulation is necessary anyway. It is time for the EU to embrace its crucial role as a goal regulator and legislate solely via Directives, thus ensuring that national drafters have the space to intervene legislatively and offer effectiveness in the national transposing measures as their national legal and legislative style directs. This move from the EU as a legislator to the EU as a regulator is no simple decision. It requires trust to national drafters to achieve effectiveness of the EU/MS regulatory package by means of national transposing regulatory [not necessarily

legislative] measures. In addition, it requires a shift of mentality, which places the responsibility but also the willingness to achieve full implementation to the Commission rather than to Member States. However, this mentality forgets that Member States remain within the EU because they share its ideals and its values, not because of fear for infringement procedures by the Commission. Of course, the task and responsibility of scrutinising the level of national implementation remains with the Commission and ultimately the European Courts. However, checking if implementation has been achieved is completely different to assuming the role of the only responsible drafter of legislation. After all, the Commission itself identified EU legislation as a shared responsibility with the Member States as far as back the 1990s.

3. What is good transposing legislation

Good transposition legislation is one that achieves effectiveness at two levels: the EU and the national level. National drafters pursue the achievement of the desired regulatory results as introduced in the EU legislative text and as translated within the national legal order. Drafting transposition legislation is one of the most difficult drafting tasks because the drafter serves two masters: two sets of regulatory goals, two texts, two sets of legal concepts, two sets of common and legal languages, and two drafting styles.

These difficulties are exacerbated by the inherent lack of freedom in the performance of the transposition task. Currently, transposition remains chained to the choices of the EU legislator. The tests of necessity, proportionality, adequacy, synergy, adaptability, and subsidiarity have been passed, albeit at the EU level. The choice of legislation as the appropriate regulatory tool has already been made, and alternative regulatory choices have been rejected. The type of legislative instrument has been decided, at least for the EU text. And the model law has been drafted. It is quite fathomable for national drafters to simply copy and paste the EU text. Equally explicable is the safety sought by national drafters in the faithful repetition of the EU text: within a formalistic scrutiny exercise, the Commission is expected to accept the text drafted by its staff as a plausible legislative solution.

However, effectiveness as a value of legislative quality demolishes the image depicted above. Effective transposition requires that the national drafter repeats all tests of necessity,

proportionality, adequacy, synergy, and adaptability. The repeat of these tests is necessary because the national drafter does not conduct them against the environment of EU law but rather against the national environment. It is possible that national law already provides for the desired EU regulatory aims rather successfully. What is necessary at the EU level may not be necessary at the national level. What is adequate at the EU level may require a more forcible legislative message in Member States where culture or societal values are adverse to the desired regulatory reform. Of course, national reservations on synergy, subsidiarity, or proportionality have little role here, as one would have expected them to arise at the level of passing of the EU text. Nevertheless, proportionality against existing national legislation may well be relevant where EU legislation offers a discretion above the required minimum.

In the transposition process, the choice of legislation as the appropriate regulatory tool must also be assessed against national laws. It is plausible for the national drafter to demote the regulatory tool for the achievement of the desired regulatory result in jurisdictions where legislation is not communicating with citizens adequately and non legislative tools are successful in regulating behaviours. The UK is one of those jurisdictions where legislation is reserved as a solution for last resort and regulatory results have been achieved by means of labour agreements or by means of self-regulation. If the EU departs from its formalistic box-ticking scrutiny of transposition, the national drafters' arguments for effective transposition by non legislative can serve true effectiveness. Of course, agreed monitoring mechanisms and agreed regulatory goals within set review times would be required, but the option is there and is quite plausible.

The same approach applies to the type of legislative instrument selected for transposition. It is not always necessary to provide a national implementing text whose type corresponds to the type of the EU text. Regulations may require further legislative intervention. Directives may require transposition by means of a national law, or even by a selection of diverse national texts of diverse types for the various regulatory parts of the EU text. Judgments of the European courts may well require legislative transposition. At the end of the day, the choice is one for effectiveness not for formal correspondence between the EU and transposing laws.

Finally, the EU text is not a model law whose role is to be copied and pasted. Effectiveness demands that EU laws are used by the national drafters as legislative instructions,

not model laws. They are there to state the desired regulatory result, to identify the policy tools promoted as most appropriate to achieve them, to draw the drafter's attention to the elements that must be transposed compulsorily, and to alert the drafter to discretion in transposing. Although currently these elements are not easily identifiable by the existing legislative structure of EU texts, nevertheless these are the elements that the national drafter must extract in order to transpose effectively. The process, if conducted adequately, can lead to an effective national text, which in turn can lead to correct implementation, and ultimately to true regulatory success for the EU and national legislators.

4. Conclusions: what on earth is really wrong and how to change it

Having identified effectiveness as the value of legislative quality, and juxtaposed it against current EU texts, policies, and practices, one can see the problem of EU legislation. It is not technical in nature. It is an expression of an inherent clash between the legislative procedures and customs developed over the last 60 years of European integration and the legislative needs of the EU. For quite a few years in its development, the EU produced a diplomatic law addressed to Member States and requiring sporadic intervention in the national legal orders. But the EU has changed, and so have its legislative needs. EU law is now also addressed to its citizens, who acquire rights and obligations as its direct result. It is not a diplomatic law, it is a law that regulates the everyday life of natural and legal persons. It is now a law that has direct effect and very often direct applicability. It is now a law that applies to the richness of its diverse cohort of 28 Member States. It is now a law that, as is that case with national laws, is read by its constituents who demand to understand it in order to apply it: much more so at a time when most national authorities simply copy it and glue it in the national statute books. And this success is the core of its failure. EU legislation, as a process and a product, is no longer fit for purpose. It continues to be passed as the olden *droit diplomatique*, yet it has succeeded to become much more than that. It is a binding, strong regulatory tool that achieves EU and national regulatory reforms, whose legislative expression is communicated exclusively via its texts.

This legislative deficit cannot possibly be addressed by means of formalistic guides or meticulous form-focused scrutiny pre or post legislative. Just as legislative needs have changed, the EU's legislative mentality must change to match them. There are two policy options open to the organisation. The first option requires a change in the regulatory and legislative processes to align with national legislative structures and processes. This option seems unfeasible: the EU is not a state and its processes are a wonderful compilation of political consensus that serves a fragile unique political balance. The second option requires a change in legislative mentality. The EU must accept its role as a goal regulator, and must embrace its potency as a goal legislator. Without releasing any responsibility of creative legislative and implementation scrutiny, the EU must legislate solely via Directives thus offering national drafters the space and opportunity to bring effectiveness to EU law through effectiveness of the national implementing measures.

Does this shift of drafting prerogative signify a shift in regulatory power? Absolutely not: under the proposed framework, the EU remains as the policy maker, the original drafter, and the scrutiniser of transposition and implementation. In fact, the EU retains the opportunity to draft complete binding provisions, where Member States "must" take set actions. But national drafters regain the responsibility, and the consequent liability, for discretion on the choice of national regulatory tool, national legislative tool, and national legislative expression.

This is not a paradigm that does not affect the way in which EU legislation is drafted. Far from allowing EU legislation to linger behind, it creates new opportunities for EU drafters. Under this paradigm, EU legislation must share the goal and super goal of the required regulatory results. Citizens acquire a clear and accurate vision of the required reforms, to which they have ownership. This shuts down the populist voices and avoid misunderstanding of the reasoning behind EU regulation. It also allows the EU to explain and persuade EU citizens that EU action is more effective than national action. In other words, it relays subsidiarity to non-specialists. Thus demolishing the myth of useless or unilaterally passed EU laws. Finally, it conveys a list of clear binding obligations for national transposition, and allows national drafters to diversify for increased effectiveness, where this is considered useful.

What is wrong with EU legislation? It is a victim of its own success. Much as political success required bold and radical thinking and actions, so does legislative success. The hope of this author is that this chapter is the start of a radical debate for real EU legislative quality.