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# The European Union's Better Regulation agenda

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## Introduction

Rule-making and regulation must be among the most vexed and controversial issues on the current political agenda. The huge shock waves sent through the real economy by the meltdown in financial markets and the failure of business to police itself have put regulation back at the centre of the debate on European governance. The European Council of 18 and 19 June 2009 noted in this connection that “the financial crisis has clearly demonstrated the need to improve the regulation and supervision of financial institutions both in Europe and globally”<sup>1</sup>. The Commission’s recent proposal<sup>2</sup> to review the regulation of financial services points to the lack of appropriate rules in this area. The Commission wants to “improve the EU’s regulatory framework”<sup>3</sup> and “establish a new framework for macro- and micro-prudential supervision”<sup>4</sup>. Are these soundbite phrases, or is the European Union setting off down a new road?

The quality of laws is a recurring theme in legal writings<sup>5</sup>. It acquired political undertones in the United States in the early 1970s under the Republican administration<sup>6</sup> (Richard Nixon, Gerald Ford and Ronald Reagan), reaching the United Kingdom in the late 1970s with Prime Minister Margaret Thatcher’s revolution in *New Public Management*, used to deregulate labour laws. The OECD - but also Canada, Australia, New Zealand and the Netherlands – jumped on the bandwagon in the late 1990s<sup>7</sup> with a similar aim: deregulation

1. European Council of 18 and 19 June 2009, Presidency Conclusions, Document No. 11225/09 of 19 June 2009, paragraph 17. It is noteworthy that the words “supervision” and “regulation” recur 17 and 7 times respectively in paragraphs 17 to 24 of this document.
2. Communication from the European Commission, *European financial supervision*, COM (2009) 252 final, 27 May 2009. This communication proposes a fundamental reform of the current architecture of the committees responsible for financial services by creating a European Systemic Risk Council (ESRC) and a European System of Financial Supervisors (ESFS) composed of the new European supervisory authorities. Legislative proposals based on this Communication were to be presented in autumn 2009.
3. European Council 18 and 19 June 2009, Presidency Conclusions, *op. cit.*, paragraph 18.
4. *Ibid*, paragraph 19.
5. In his *The Spirit of Laws* (1758), Montesquieu wrote: “It should not come as a surprise, therefore, to find in the laws of these [monarchies] so many rules, restrictions and extensions which multiply the particular cases, and seem to turn reason itself into an art” (Book VI, Chapter 1).
6. Cf Renda, A. (2006) *Impact assessment in the EU. The state of the art and the art of the state*, Brussels, CEPS.
7. Cf in particular OECD (1997) *Regulatory impact analysis, best practices in OECD countries*, Paris.

to release competitiveness and enhance growth<sup>8</sup>. The mantra was turned into a policy objective of the EU at the Lisbon European Council in 2000.

The Better Regulation agenda pursues what is an ostensibly laudable aim: simplifying the Community acquis (the EU's body of laws and regulations) and helping to achieve better quality legislation. It is also the very crux of the Prodi Commission's (1999-2004) earliest initiatives, starting with the substantive discussion on European governance launched in 2001. Better Regulation was subsequently made the subject of an Interinstitutional Agreement between the Commission, Council and European Parliament in 2003, setting out the first specific measures. The packages of 2005 and 2007, refining the measures and finalising its nature, were followed by an "agenda", a "programme" and even a "strategic action plan" with fixed deadlines and hard targets.

An attempt will be made to show how the Barroso Commission (2004-2009) incrementally shifted the focus of the exercise. Another aim was double-banked onto and gradually took over from the original objectives of simplifying the acquis and improving the quality of legislation: enhancing the competitiveness of and reducing the administrative burden on businesses.

Is the Better Regulation agenda a real way of improving EU governance? Can it add something extra to the work of the European institutions and Member States? Will it change the relationship between stakeholders and their relationships with citizens?

This analysis first looks at some basic concepts: what do we mean by regulation and rule-making? It then moves on to consider the foundations of law-making and regulation in the European Union (Part 2). Having looked at these basics, a picture of the Better Regulation agenda is built up through its three objectives: simplifying and improving the Community acquis and reducing the administrative burden (Part 3). Developments since 2000 are then examined through the different components of the "packages" of initiatives approved by the European Commission (Part 4). The Better Regulation agenda has been gradually taken over by the Competitiveness Council bodies (Part 5), which raises the question of whether there is a "hidden side" to the Better Regulation Agenda (Part 6). The study concludes by illustrating the Better Regulation agenda with three examples of partial success and two questionable cases (Part 7). The conclusions seek to assimilate what has been learned, which should arguably clarify the issue.

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8. Cf Communication from the Commission to the Council and the European Parliament, *Better regulation for growth and jobs in the European Union*, COM (2005) 97, 16 March 2005. In the press release, the European Commission introduced the equation "Less red tape = more jobs", Press Release, IP/05/311, 16 March 2005.

## Part 1

# The basic concepts

To get to grips with Better Regulation, we first need to review the concepts inherent in regulation and rule-making, and the principles that underlie the act of lawmaking.

### Regulation or rule-making: which is which?

“Regulation” is not a neutral concept, but a somewhat ambiguous, catchall term that can give rise to some confusion when translated into other languages, French especially. It covers parts of three different things which are not correctly reflected by the way it has been translated into and used in the French versions of the Better Regulation documents:

- policy and market supervision by the public or private regulatory bodies responsible for policing and enforcing these rules, including the watchdog and warning role performed by the executive and legislative authority to make the necessary adjustments to rules in the public interest;
- proactive, reactive and forward-looking assessment of the functioning of policies and market developments, the rules that govern them and any adjustments required;
- the corpus of regulations as such – i.e., the collection of binding rules and principles that set the framework for policies and the functioning of markets, and that penalise any unfair or criminal practices. Regulations translate policy objectives into rules that are universally applicable and hence address what businesses and the public want. To that extent, governments make laws as a matter of principle in the public interest to achieve a range of objectives: establishing a fair, competitive market, ensuring certainty in the law, protecting health, ensuring social protection and social security, fostering a high level and quality of employment, combating poverty and social exclusion, ensuring security and law and order, preserving the environment and conserving natural resources, and so on.

Its societal governance and market surveillance dimensions make the regulatory system a component and guarantor of the democratic process. Left to their own devices, markets give rise to inefficiencies, inequalities and even inequities (abuse of dominant position, agreements, cartels, etc.). Regulation - understood in its sense of market surveillance and control – must ensure the level playing field that is needed to create confidence and lay down ground rules: formally organising markets, ensuring optimum working conditions,

protecting consumers, etc. Regulation is therefore a core political concept that cannot be reduced to a passive or bureaucratic control of economic activity. It refers to a comprehensive, long-term approach that goes beyond market surveillance and enforcement of competition rules alone to embody societal, social and environmental aspects. It is an essential complement to the concept of rule-making. They are two sides of the same coin: rule-making must precede regulation which must in turn have an impact on the level of rule-making. Unless properly regulated, businesses may be tempted to engage in avoidance, opportunism or exploitation: sidestepping the competition rules, avoiding taxes and in some cases, breaking the law.

However, the administrative obligations connected with applying the law are often seen as an unnecessary burden and an obstacle to profit-making. Controls are seen as a meddlesome intrusion in the private sphere. Some criticise the regulatory system as inefficient and a handicap in a globalised world where competition is fierce, while others claim it to be a necessary balancing force to market excesses. For the ordinary public, regulation is often seen as a technical matter that means little to them and has no connection with real life.

## Why make laws?

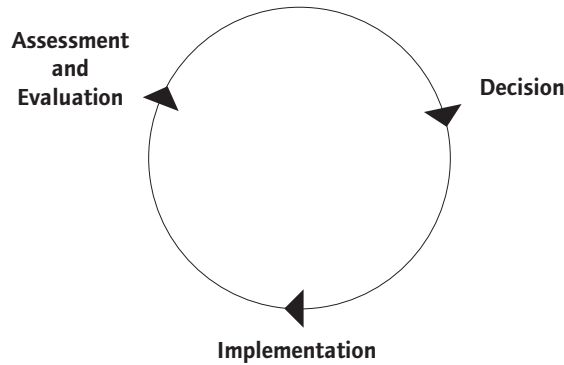
There are generally accepted to be six complementary principles governing the lawmaking cycle:

- **need**: the legislative act must be needed to achieve the objective and must add something. Is political/public intervention justified? Can a form of co-regulation or voluntary regulation replace a legislative act?;
- **proportionality**: the choice and nature of the action considered, as well as the instrument used, must be proportionate to the aims pursued and actually identified;
- **subsidiarity**: the objectives must be pursued at the most relevant level, be it EU or Member State level (national, regional or local);
- **transparency and consultation**: there must be dialogue and consultation with all stakeholders before legislative action is taken, and a prior impact assessment of the legislative or non-legislative initiative must be done;
- **accessibility**: the rules must be clear, understandable, accessible and ensure legal certainty;
- **transposition and implementation**, if required: each rule must be properly transposed into national law and be easily implemented by stakeholders.

The purpose of enacting regulations must be to achieve better results through the virtuous circle below (Figure 1).

It is important to understand the circular effect that breaks the “optimum lawmaking” cycle down into three distinct, indivisible and equally important stages.

Figure 1 **The virtuous circle of Better Regulation**



Rule-making plays a key role in meeting the challenges our society faces. Fast-paced technological developments, the opening-up of global markets and increasing access to information require rules to be continually revised and adapted to the sustained pace of a constantly-changing world. However, the measures and instruments chosen for certain policies may not always have been strictly proportionate to the needs. In some cases, regulations have proved to be too detailed and sometimes incurred expenditure that was unwarranted or proved to be counter-productive. In other cases, it has been found that non-regulation came with a very high cost in terms of the general interest. In all cases, it is important to choose the most appropriate tool, starting with harmonisation of rules at EU level, and proper practical implementation of the principle of mutual recognition of rules between member countries of the European Union.

As will be seen, however, some Member States – foremost among them the United Kingdom, Denmark and the Netherlands - along with the European employers' organisations (BusinessEurope, AmCham Europe, UEAPME, etc.), believe that the traditional internal market rules (harmonisation and mutual recognition) have not always produced the desired results and must make way whenever possible for more flexible forms of intervention (codes of conduct, voluntary agreements, guidelines, etc.).

## Part 2

### **Why make laws at EU level?**

Under Articles 2 and 3 of the Treaty on European Union (TEU), one of the main objectives of the European Union is the free movement of goods, services, persons and capital, and a big part of EU regulations are aimed at ensuring the proper functioning of that single market. So, the Community acts in particular to protect health by ensuring the safety of food; to preserve the environment by setting standards for water and air quality; lays down rules governing how businesses operate in the internal market so they can compete on equal terms. Legal provisions have also been framed by the EU in areas where Member States have agreed to implement common policies (agriculture, fisheries, trade, customs) and in other specific cases where they felt that EU-made laws could add value (environment, justice and home affairs, health and consumer protection).

The expansion of EU legislation inevitably leads to overlap and duplication in some areas, but making laws at European level has considerably reduced red tape. A businessman whose market extends beyond national borders finds it much simpler and more efficient to apply one common rule in all Member States instead of being subject to a maze of different regulations in the same field at national and regional levels. The Community harmonisation of rules has often effectively removed barriers that distort competition and bring different national systems into conflict.

The creation of an “internal market” - an area without internal borders in which the free movement of goods, services, persons and capital is ensured - is a fundamental objective of the Union. Amongst other things, this requires the rules laid down by Member State to be harmonised. Some harmonisation measures introduce common standards across the EU (positive harmonisation), while others are limited to removing national rules (negative harmonisation). Currently, about half the trade in value of goods within the EU is governed by harmonised rules. The other half lies in the “non-harmonised” sector which is either regulated by national authorities with no EU intervention, or unregulated.

Harmonisation has very often resulted in improved levels of environmental, consumer and worker protection compared to the previous situation in Member States. Harmonisation therefore leads to a strengthening of the law and an increased level of protection.

## **The Commission, guardian of EU law and a regulatory body**

Under article 17 TEU, the Commission “shall promote the general interest of the Union and take appropriate initiatives to that end”. It is the guardian of EU law<sup>9</sup>. It holds the exclusive right to initiate legislation and is the source of European regulations. It has the right to propose legislation or non-legislative instruments. It therefore has a special responsibility when it comes to better lawmaking. It has a duty to put forward relevant, good quality proposals and ensure that the Community acquis is preserved.

## **The Community acquis – the body of EU laws and regulations**

The Community acquis is the entire body of acts adopted jointly by the European Parliament and Council, and by the Council and the Commission within their respective spheres of competence pursuant to Article 13.2 TEU.

Under Article 2, indent 4, of the Treaty of Nice, “The Union shall set itself the objective to maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community.” It is a sign of the times that the words “maintain in full the *acquis communautaire*” have gone and no longer feature in article 3 TFEU.

For reference, under Article 288 TFEU, the different types of act adopted by the European institutions are regulations, directives, decisions, recommendations and opinions.

A regulation has general application. It is binding in its entirety and is directly applicable in all Member States. A regulation is the act adopted by the institutions when they wish to exercise the legislative function fully and exclusively. In practice, a distinction is made between “basic regulations” and “implementing regulations or rules”. This is an extremely common practice in agriculture, for example. In such cases, the Council or Council and Parliament adopt a basic regulation laying down the principles but delegating to the Commission the power to take the appropriate detailed implementing measures.

A directive is binding on all Member States as to the result to be achieved, while leaving national authorities the choice of form and methods. Once again, a distinction has to be made between ‘framework’ directives that describe the objectives that the Member States addressed have to achieve through national

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9. In relation to which, article 17.2 provides that “Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise”.

measures implementing or transposing it into national law, and technical directives that are more detailed and leave Member States less leeway.

A decision is binding in its entirety on those to whom it is addressed. A decision may be addressed to one or more persons or entities. It may also be addressed to one or more Member States. A decision may impose obligations to do or to refrain from doing something.

Recommendations and opinions are not binding. Being acts without binding force, they are not sources of Community law.

It is important to note that Community legal acts are distinguished into:

- acts adopted jointly by the Council and Parliament through the co-decision and cooperation procedure in particular;
- acts adopted by the Council;
- autonomous Commission legislative acts.

It should be said that it takes on average 18 to 24 months for EU legislation to be adopted by the co-legislators. Adding to that the time needed for new directives to be transposed and enter into force<sup>10</sup>, about four years or more can elapse between the start of work on an EU initiative and its actually being implemented.

A final element of the Community acquis is the case law of the Court of Justice of the European Communities (ECJ).

In the fifty years of its development, the EU has spawned a large body of laws. In 2005, the Community acquis had a volume of 80 000 pages<sup>11</sup> made up of some 10 000 legal acts<sup>12</sup>. That is a lot of legislation, and yet not excessive considering that it is still less than that of the United States. The proliferation of EU rules is the result of the increased number of legal acts that amend existing laws. The number of legal acts also increases with the enlargement of the European Union<sup>13</sup>. In a Union of twenty-seven, the translation of all legislative acts into all 23 official languages of the Community has produced a vast mountain of rules.

At the end of 2008, the Commission departments identified about 3 600 legislative acts (i.e., approximately one third of the entire Community acquis) that have a major impact on economic operators, public authorities and citizens.

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**10.** For example, the simplification initiative amending Directive 70/156/EEC on the type-approval of motor vehicles was published in the *Official Journal of the European Union* in October 2007 but entered into force only in April 2009. The Commission put forward the original proposal in July 2003 - COM (2003) 418.

**11.** In 2009, the Commission claimed that the Community *acquis* had been reduced by about 10%, - equivalent to 8 000 pages - as a result of the Better Regulation agenda.

**12.** The precise figure at 30 June 2009 is 10 785 legal acts in force.

**13.** On which, see in particular Dehousse, R., F. Deloche-Gaudez and O. Duhamel, O (eds) (2006) *Elargissement. Comment l'Europe s'adapte*, Paris, Presses de Sciences Po.

## Harmonisation and mutual recognition

One of the European Union's tasks, specified in article 26 TFEU, is to ensure the functioning of the internal market in accordance with the relevant provisions of the Treaty, in particular article 114. Up to the early 1980s, the Commission and Member States felt that where goods were concerned, the right way to remove barriers to their free movement within the internal market was through harmonising Member States' laws. For over twenty years, therefore, the European Community busied itself establishing harmonised rules among a growing number of Member States by setting very detailed uniform rules for placing products on the market. The Community institutions were in fact set on harmonising all national provisions for categories of products.

However, harmonisation was a slow and imperfect process because unanimity was required at the time. Also, the harmonised rules were often quickly overtaken by technological advances, and had to be regularly amended to enable new products to be brought onto the market. Full harmonisation of product rules to some extent held back technological innovation.

Following the 1979 Cassis de Dijon judgement, in which the ECJ gave a broad interpretation to the Treaty, while indicating that harmonisation was not a prerequisite for the free movement of goods within the Internal Market, the Commission changed tack, arguing that the principle of mutual recognition could ensure the free movement of goods and services without Member States' national laws necessarily having to be harmonised in every detail. Under this principle, therefore, a product lawfully manufactured and marketed in one Member State cannot be prohibited from sale in another Member State, even if the technical or quality requirements differ from those imposed on its own products. Mutual recognition applies to products that are not subject to harmonisation measures at EU level, or aspects of products that fall outside the scope of Community harmonisation measures. The only exceptions to this principle are restrictions justified by the reasons referred to in Article 36<sup>14</sup> of the Treaty or by overriding reasons of general interest that are non-discriminatory, objectively justified and proportionate to the aim pursued<sup>15</sup>. The same principle applies to services. Mutual recognition is a powerful, action-oriented means of economic integration. It relies on and reflects trust between Member States.

14. Article 36 provides that the provisions of Articles 34 and 35 of the Treaty (prohibition of quantitative restrictions) "shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy, public security, the protection of health and life of humans, animals or plants, the protection of national treasures (...)"

15. The overriding reasons of general interest have been defined in the case law of the Court of Justice and cover at least the following: the effectiveness of tax audits, fair trading, consumer protection, environmental protection, the preservation of pluralism of the media, and the risk of seriously undermining the financial balance of the social security system. These overriding reasons may justify certain obstacles provided these do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. Furthermore, the principle of proportionality must always be respected in determining whether the relevant authority has chosen the least restrictive measure.

On 14 June 1985, when Jacques Delors was President of the European Commission, Lord Cockfield, then Commission Vice-President in charge of the single market, tabled a white paper containing 300 harmonisation directives to eliminate physical, technical and fiscal divisions and complete the single market of 1993. “The general thrust of the Commission’s approach in this area will be to move away from the concept of harmonisation towards that of mutual recognition and equivalence”, emphasises the *White Paper on completing the Internal Market* (June 1985).

Abandoning full harmonisation and traditional regulatory approaches, the Commission turned to the technical harmonisation directives – the so-called “new approach” directives - implementing the following three basic principles:

- harmonisation of national laws is limited to essential safety requirements for products placed on the market or put into service;
- European standardisation bodies<sup>16</sup> are tasked with developing technical specifications that professionals can use on a voluntary basis to manufacture products that are in conformity with the requirements set by the directives, while allowing other manufacturing methods to be used;
- governments have to give recognition to products manufactured in conformity with European standards - a presumption of conformity with the essential requirements established by the “new approach” directive.

In this way, mutual recognition led to a first simplification of Community law. But this principle applies only to products that are not subject to Community harmonisation, and this is precisely where proper application of the mutual recognition principle by Member States has run into difficulties, with the Commission having to constantly resort to infringement proceedings against Member States’ failure to implement it. A European Parliament and Council Decision (No. 3052/95/EC) unsuccessfully sought to revive the mutual recognition principle in 1995. Finally, Council and Parliament adopted a new Regulation on mutual recognition on a Commission proposal, aiming to implement and organise the principle of mutual recognition of non-harmonised goods (common implementation of technical rules, establishing Product Contact Points to facilitate contacts and administrative cooperation, limited exceptions to the free movement of goods).

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16. Standardisation results from voluntary cooperation between industry, consumers, public authorities and other stakeholders to develop technical specifications based on consensus. The European stakeholders engage in standardisation both formally and informally. Formal standardisation takes place at three levels: the national standards bodies (NSB); the three European standardisation organisations: CEN (European Committee for Standardisation) for most sectors, CENELEC (European Committee for Electrotechnical Standardisation) and ETSI (European Telecommunications Standards Institute); and the international organisations: IEC (International Electrotechnical Commission), ITU (International Telecommunication Union) and ISO (International Standards Organisation) in other areas. Added to these are the International Civil Aviation Organisation, Codex Alimentarius and similar bodies. Industry also engages in informal standardisation through hundreds of forums and groupings that differ in terms of duration, sectoral coverage and territorial scope (cf in particular the Communication from the European Commission, *Towards an increased contribution from standardisation to innovation in Europe*, COM (2008) 133 final, 11 March 2008).

As a means of completing the internal market and bringing about a Europe without borders, harmonisation has the advantage of fixing a basic set of binding common rules that make up a minimum common denominator among all EU Member States and therefore a harmonised level playing field. The harmonisation process, however, has encountered several clear setbacks in recent years.

For one thing, it became apparent that some Member States wanted only minimum common standards, and so in such cases, the lowest common denominator often prevails. Also, Member States that wanted a high degree of harmonisation (health, social and environmental protection, consumer protection, etc.) increased the number of derogations to maintain their higher standards. As a result, harmonisation of laws, however desirable, has not always had the desired outcomes (improving the quality of services and products, raising the level of protection, etc.) due to lack of ambition or willingness by some Member States. In this respect, the Timeshare Directive<sup>17</sup> offers a regrettable illustration of this trend, insofar as most Member States strove to impose a minimum harmonisation for protectionist purposes.

But also, some Member States do not wish to go down the road of harmonisation, which they consider unwieldy and insufficiently responsive to societal, technological and economic changes. These states argue that the market and non-legislative instruments (codes of conduct, voluntary agreements, etc.) offer better assurances, a better incentive and more flexible support to business activities and guidance for consumer choice.

## The cycle of European lawmaking

The EU lawmaking process is divided into at least seven steps. It often takes several years for a piece of EU legislation to be implemented throughout the European Union.

1. Consultation and gathering expertise
2. Pre-legislative stage (impact assessment)
3. Drafting of documents and opinion of Impact Assessment Board
4. Legislative stage (regulation, directive, etc.)
5. Post-legislative stage (flanking measures.)
6. Transposition Implementation
7. Federal, regional or community laws

The EU lawmaking cycle starts very early on down the line<sup>18</sup> with stakeholder consultations (informal consultations, Green Paper), gathering expertise, taking into account new scientific, economic, social, environmental and societal

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17. Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009, *Official Journal of the European Union*, L 33, 3 February 2009, p. 10-30.

18. Source: European Commission, *Impact assessment guidelines*, SEC(2009) 92, 15 January 2009.

developments (minimum 14 weeks). Once the impact assessment is completed (52 weeks on average) and the most appropriate instrument chosen (legislative or non-legislative, regulation, directive or decision), the documents are drafted (time: 6 to 8 weeks). At this point, the Impact Assessment Board (IAB<sup>19</sup>) steps in to take a decision on the impact assessment done by the Commission or external experts. This phase takes from 2 to 8 weeks. The text is then submitted to inter-service consultation (minimum 2 weeks). It is then translated into the relevant languages (minimum 2 weeks). The measure then goes for review by the chiefs of staff (*chefs de cabinet*) and on to the registry, after which it goes to the full Commission for approval. The act is then forwarded to the other institutions via the Commission's General Secretariat and, where applicable, goes through the intricacies of the ordinary legislative procedure (article 294 TFEU) before being approved by the co-legislators (Council and European Parliament). Finally, the legal/linguistic experts produce the official translation of the legislative act in all 23 EU languages. The Commission has the right to withdraw its proposal if it considers it does not comply with Community law or its original intentions (completing the internal market, consumer protection, etc.). This brings us to the post-legislative stage when flanking measures are taken at Member State level. Finally, the directive is transposed by statutes, royal or ministerial decrees (regulations), executive orders, legislative orders, circulars, etc., and is implemented in practice. A new stage then opens: that of monitoring, enforcement and proper application of Community law.

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19. Cf p. 54.

## Part 3

# The Better Regulation agenda

The Treaty of Maastricht (1993) laid the first foundations of Better Regulation by introducing into Community law the principles of subsidiarity and proportionality - two legal principles that apply to the exercise of the EU's legislative powers.

Declaration No. 18 of the Maastricht Treaty provides that “the Commission undertakes, by basing itself where appropriate on any consultations it considers necessary and by strengthening its system for evaluating Community legislation, to take account in its legislative proposals of costs and benefits to the Member States’ public authorities and all the parties concerned”.

Protocol 30 of the Treaty of Amsterdam (1999) on subsidiarity (not only) gives the Commission an obligation to justify the relevance of every proposal with regard to the principle of subsidiarity, but also taking into account two other requirements that are closely linked to Better Regulation. It provides that “the Commission should consult widely before proposing legislation and, wherever appropriate, publish consultation documents”. It must also “take duly into account the need for any burden, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens, to be minimised and proportionate to the objective to be achieved”.

Finally, Declaration No. 39 on the quality of drafting of Community legislation, annexed to the Treaty of Amsterdam, notes that “the quality of drafting of Community legislation is crucial”<sup>20</sup> calls on the three institutions to “establish guidelines” on the matter<sup>21</sup> “and states that “the institutions should make their best efforts to accelerate the codification of legislative texts.”

To some extent, this phase from 1993 to 1999 could be said to be the beginnings of Better Regulation, namely a period in which the institutions were concerned only with improving the quality of legislation, and the subsidiarity and proportionality of EU action.

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**20.** The quality of drafting often gives rise to wry comment from outside observers. But in a Europe of 27 where the European Parliament and Council have to find political compromises, quality in the drafting of texts is often forsaken in favour of *realpolitik*. The relevant areas of uncertainty in a text often suit the parties, but complicate the actual meaning of the provision.

**21.** It was to implement these requirements on the quality of drafting that the three institutions concluded an Interinstitutional Agreement on 22 December 1998 containing 22 guidelines.

The Better Regulation agenda comprises three pillars. The first objectives pursued were simplifying and improving EU legislation; then came assessing the impact of legislation on competitiveness; finally, the third stage of the Better Regulation rocket - reducing the administrative burden, in fact a form of all-inclusive simplification of legislation.

## **Simplifying and improving the quality of the Community acquis**

The Commission distinguishes between two components in the first pillar of the Better Regulation agenda: simplification<sup>22</sup> and modification of the regulatory approach. It also assesses the general relevance of legislation through permanent screening.

### Simplification

This is an exercise that aims to make the substance of regulation simpler and more suited to users' needs. This aim is subdivided into five parts.

#### **Repeal**

Repeal is the removal of “unnecessary, irrelevant or obsolete” legal acts (“technical” withdrawal). Many legislative acts adopted since 1957 have become outdated or obsolete because of technical or technological progress, changes in EU policies, changes in how the general Treaty rules are applied, or the development of international regulations or standards. Such outdated acts have often already been repealed. But certain of their provisions continue to create obligations, particularly administrative ones, for authorities and businesses alike. Work on these covers about 2500 legal acts. The Commission means to continue its efforts to repeal those legal acts which are irrelevant or obsolete<sup>23</sup>. So, 28 of the 56 directives on the type-approval of vehicles have been repealed and replaced by United Nations Economic Commission for Europe regulations. Changes in a situation may require a law to be repealed. The Commission's right of initiative also includes a right to withdraw a proposal if amendments made by Parliament or the Council alter its nature or introduce complications that are incompatible with Treaty provisions (“political” withdrawal).

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22. It is worth noting that Belgium's Central Economic Council finds “simplification” to be an ill-chosen description and prefers the expression “improvement of existing legislation” (Opinion on Better Regulation, No. 1392, 21 December 2005).

23. The possibility of introducing “sunset clauses” into Commission legislative proposals has been considered to avoid obsolescence and more generally to compel the legislator to check regularly the relevance, effectiveness and proportionality of regulations and directives in force. Although not ruling this option out, the Commission thinks that review clauses serve a similar purpose whilst presenting a lower risk of legal lacunae.

### **Codification**

Codification<sup>24</sup> is the process whereby the provisions of an act and all its amendments are brought together in a new legally binding act which repeals the acts which it replaces, without changing the substance of those provisions. In a narrower sense, codification means adopting a new legislative act which incorporates and cancels the previous texts (i.e., the previous instrument and its successive amendments). This helps to clarify the law and make it more accessible without changing the substantive provisions. The 1976 Cosmetics Directive is a case in point: 7 successive amendments and 37 Directives adapting it to technical progress were codified and simplified into a single new directive<sup>25</sup>.

Codification is intended to eliminate duplication. This method, often held out as leaving the substance untouched, has not gone unchallenged, however. Member States' reactions on the Professional Qualifications Directive<sup>26</sup> are a case in point, presented by the Commission as a codification of existing provisions but considered by Member States as going beyond merely tidying-up the law. At the end of 2008, the Commission had codified 227 of the 400-odd codifiable acts, 142 of which have been adopted and published in the *Official Journal of the EU*. The codification programme was timetabled for completion by July 2009<sup>27</sup>.

### **Consolidation**

Like codification, the consolidation of legislative acts consists in bringing together a legislative instrument and its successive amendments into a single text. Although the resulting consolidated texts go through no official decision-making procedure and so have no legal status, they make the legislation much easier to access.

### **Recasting**

Recasting is where a new binding act, repealing those that it replaces, incorporates substantive amendments and a codification of the remaining non-amended provisions. It is done by adopting a single legislative act which makes the substantive amendments required, codifies them with the unchanged provisions of the previous act and repeals the previous act. The safety and health of workers, for instance, are governed by 20 Directives. By revising them, the periodicity of reporting can be harmonised. Legislative acts which undergo codification, consolidation or simplification must be submitted to the legislator for adoption as their structure or substance has been changed.

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24. Codification contributes greatly to reduce the volume of Community legislation, while also producing texts that are more comprehensible and of greater legal certainty, facilitating transparency and enforcement.

25. Commission Directive 2009/6/EC of 4 February 2009 amending Directive 76/768/EEC concerning cosmetic products, *Official Journal of the European Union*, L 36, 5 February 2009, p. 15-17.

26. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, *Official Journal of the European Union*, L 255, 30 September 2005, p. 22-142.

27. Communication from the European Commission, *Second strategic review of Better Regulation in the European Union*, COM(2008) 32 final, 30 January 2008.

### **Use of Regulations**

The Commission believes that replacing directives with regulations can under certain circumstances be a means of simplification as regulations can be applied immediately, and ensure that all actors are subject to the same rules at the same time. The Commission has emphasised that substituting directives with regulations would be done on a “case by case” basis. It will promote substitution “whenever possible”, particularly in relation to technical rules to ensure that legislation is put into practice more effectively. This is the Commission’s chosen approach for the package on the free movement of goods. The REACH Regulation<sup>28</sup> is a very good example here of a body of mainly directive-based rules shifting towards a regulation.

The Commission regularly reviews all proposals pending before the co-legislators to ensure they remain appropriate to the needs and meet the quality standards in force. The Commission’s simplification rolling programme aims to simplify and modernize EU law. The programme provides for the adoption of 185 measures over the period 2005-2009, and is now an integral part of its annual work programme. The Commission has already proposed or adopted 140 of them and will put up 35 in 2009.

## **Alternatives to legislation**

There are essentially two: self-regulation and co-regulation<sup>29</sup>.

### **Self-regulation**

Self-regulation means the possibility for economic operators, social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements) (see paragraph 22 of the Interinstitutional Agreement<sup>30</sup>). It includes corporate social responsibility. Self-regulation can allow an industry to regulate itself without public intervention. The two main weaknesses of self-regulation the absence of sanctions and its relative inability to cope with crisis situations.

Corporate social responsibility (CSR) comes under the heading of self-regulation. In the absence of reliable, harmonised indicators for measuring the societal performance of businesses and their genuine desire to regulate their activity, CSR can be used as a marketing tool to create a belief that firms are

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28. REACH is the Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals. It entered into force on 1 June 2007. It streamlines and improves the EU’s previous regulatory framework on chemicals.

29. This section is not concerned with the directives on the “new approach” to technical harmonisation which combines legislative and non-legislative elements, nor the open method of coordination (OMC). On this, see Zeitlin, J. and P. Pochet (eds) (2005) *The Open Method of Co-ordination in action. The European employment and social inclusion strategies*, Brussels, PIE-Peter Lang.

30. Interinstitutional Agreement on better law-making (2003/C231/01), *Official Journal of the European Union*, C 321, 31 December 2003, p. 1-5.

heedful of their social responsibility, and so economic laws and regulations are not needed. Significantly, CSR is big on the charitable and sponsorship activities of the firms concerned, but has little to say about fair trade, consumer protection or quality of information ...

### Co-regulation

Co-regulation means the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations) (see paragraph 18 of the IIA). Standardisation by independent bodies is an example of a recognised co-regulation instrument. The Commission actively encourages it as an alternative or adjunct to legislation<sup>31</sup>. It has also stated its wish to see co-regulation expanded to new areas, including cosmetics, motor vehicles and tractors, and banking.

The Commission regularly reviews all proposals pending before the co-legislators to ensure they remain appropriate to the needs and meet the quality standards in force. The Commission's simplification rolling programme aims to simplify and modernize EU law. The programme provides for the adoption of 185 measures over the period 2005-2009, and is now an integral part of its annual work programme. The Commission has already proposed or adopted 140 of them and will put up 35 in 2009.

Since 2005, 78 proposals have been withdrawn and 30 have been identified in the Commission's legislative and work programme for 2008.

While self-regulation often fails to achieve its objectives, co-regulation has proved useful because it involves government and private operators working together. However, for co-regulation to work properly, the State must have the final say on regulation, enforcement and sanctions.

## The screening of EU legislation

Screening is a process whereby the Commission scrutinises the EU's acquis on an ongoing basis to assess its general relevance and, if need be, propose the withdrawal, amendment or replacement of measures (regulations, directives, decisions) which are deemed inappropriate or obsolete, or have produced no significant effects for a significant period of time.

In this phase, the Commission aims to clear away the "deadwood", i.e., provisions that are no longer having any legal effect, but also to prune what the Commission describes as *low hanging fruit* - laws that are unnecessarily

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31. Communication from the Commission to the European Parliament and the Council on the role of European standardisation in the framework of European policies and legislation, COM (2004) 674 final, 18 October 2004; Proposal for a Decision of the European Parliament and of the Council on the financing of European standardisation, COM (2005) 377 final, 19 August 2005.

complex, redundant, costly and even harmful to the competitiveness of businesses, and therefore need to be adapted coordinated, recast or scrapped.

Screening has sometimes rightly been criticised as a back-door way of removing purportedly unnecessary or redundant legislative acts on grounds that are very much open to question, such as in the environmental field, ...

## Impact assessment of EU legislation

Better regulation also involves looking at the impact the relevant provisions will have before they are enacted. The proposals can then be adjusted to yield the best results and minimize the adverse side-effects.

Impact assessment is intended to facilitate policy formation<sup>32</sup>. It demarcates and analyses the issue at stake and the objectives pursued. It identifies the main ways of achieving these objectives and assesses the potential economic, environmental and social impacts. Finally, it points out the pros and cons of each option and examines the potential synergies.

The Commission's integrated impact assessment system aims to help the EU institutions frame better policies and laws. Impact assessment aims to enable better documented decision-making throughout the legislative process.

Commission impact assessments form part of an integrated approach introduced in 2002. They replace the old sectoral assessments and analyze the potential impacts of new policies or regulations in economic (including competitiveness), social and environmental terms.

Examples of economic, social and environmental impacts include<sup>33</sup>:

- **economic impacts:** both macro- and micro-economic impacts, notably in terms of economic growth and competitiveness, i.e., variations in compliance costs, including administrative burdens to businesses/SMEs and implementation costs for public authorities, impacts on the potential for innovation and technological development, changes in investment, market shares and trade patterns as well as pushing consumer prices up or down, etc.;
- **social impacts:** impacts on human capital, impact on fundamental/human rights, compatibility with the EU's Charter of Fundamental Rights, changes in employment levels or job quality, changes affecting gender equality, social exclusion and poverty, impacts on health, safety, consumer rights, social capital, security (including crime and terrorism), education, training and culture, as well as distributive effects like effects on particular sectors, categories of consumer or workers, etc.;

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<sup>32</sup>. Impact assessments are publicly accessible and a summary is available in all the EU's 23 official languages.

<sup>33</sup>. Examples taken from the Communication from the Commission on impact assessment, COM (2002) 276 final, 5 June 2002.

- **environmental impacts:** positive and negative impacts associated with environmental developments, such as climate change, air, water and soil pollution, changes in land use, bio-diversity loss, public health developments, etc.

Impact assessment is a balanced appraisal of all effects of the proposed initiative and must identify the direct and indirect impacts of the selected policy options.

The Commission has made impact assessments mandatory for major proposals and has carried out over 400 since 2003. One option now regularly assessed is for the EU to take no action. In taking its decisions, the Commission refers to a wide range of options, each with its own benefits and costs, the aim being to choose the most cost-effective option. The impact assessment may suggest harmonising the measure EU-wide, or opting for essential basic principles, or even taking no action.

The Commission performed approximately 180 impact assessments in 2008 against 130 in 2007. More than half of these were on initiatives that do not feature in the Commission's legislative and work programme.

Impact assessments have not always produced the desired effects. The Council, for instance, has called for an increase in the impact assessment filters. The impact on the three freedoms, the impact on proportionality and subsidiarity and an "internal market" test have been added to the three basic filters: the economic, social and environmental assessment of proposals. Also, a new body - the Impact Assessment Board - was set up in 2007 to appraise the quality of impact assessments. This suggests that the ultimate purpose of impact assessment is to limit regulatory initiatives and/or steer them towards non-binding (*soft law*) measures.

In June 2005, the Commission issued impact assessment guidelines setting out the methodology and procedure to be followed when appraising a proposal. These guidelines were adapted in 2006 and 2009<sup>34</sup> and stand as the basic textbook on the matter.

## Reducing the administrative burden

The Commission opened a third front in the review of the Community acquis and the overhaul of the Community method in 2007<sup>35</sup>. The idea is to calculate

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34. European Commission, *Impact assessment guidelines*, SEC (2009) 92, 15 January 2009.

35. At a European conference on subsidiarity in Austria on 19 April 2006, Vice-President Günter Verheugen told the meeting: "I hope by the end of this year that we will be able to devise a method aiming at assessing and reducing bureaucratic costs. The Commission has not made this decision yet, but I am going to propose it. We want to have a quantifiable goal and I think that a 25% reduction of bureaucratic costs for entrepreneurs would be very good". This confident assertion gave the real political signal for the quantifiable reduction in administrative burdens stemming from Community acts that the Commissioners and the European Council were to endorse in 2007.

the impact of compliance with the reporting obligations of legislation on competitiveness and businesses<sup>36</sup>.

The implementation of directives and regulations creates administrative costs that are borne by businesses, governments and citizens when they apply the rules.

## Administrative costs

EU legislation gives rise to two types of administrative costs<sup>37</sup> :

- compliance costs, which stem from the generic requirements of the legislation, such as costs induced by the development of new products, or processes that meet new social and environmental standards;
- costs specifically related to information obligations<sup>38</sup>, which are the costs incurred by enterprises, the voluntary sector, public authorities and citizens in meeting legal obligations to provide information on their activities (or production), e.g., the traceability of the implementation of legislation through a the supply of certain statistics or figures, monitoring reports, labelling, etc.

Both types of costs, which may be quite high, ensure the effective implementation of a law and its enforcement by the public authorities.

The fact that EU rules are often made in the form of a directive setting out broad principles and leaving Member States to determine the detailed implementing provisions makes it difficult to calculate the potential administrative costs in advance. These costs can vary between Member States or between regions, depending on the detailed implementing regulations. But it does not mean that they cannot be evaluated. The fact that Member States have some discretion in implementing the EU law can lead them to go beyond the obligations imposed by the European Union. This is known as *gold-plating* in EU jargon – where the Member State adds rules and obligations that go beyond the EU requirements. The Commission has repeatedly taken issue with such over-regulation<sup>39</sup> as an obstacle to the smooth functioning of the internal market.

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- 36.** The issue of reducing administrative burdens for businesses is dealt with in Ecofin bodies on the basis of work done in the Economic Policy Committee. It has been a repeated subject of discussion in the Ecofin Council.
- 37.** Commission Working Document, *Measuring administrative costs and reducing administrative burdens in the European Union*, COM (2006) 691 final, 14 November 2006.
- 38.** The number of such information obligations differs widely between Member States (over 10 000 in the United Kingdom, 5000 in Denmark, 3500 in the Netherlands).
- 39.** It is estimated that 32% of administrative burdens of EU origin are the result of the decision of some Member States to go beyond what is required by EU legislation (gold-plating) and of the inefficiency in their administrative procedures (source: Communication from the European Commission, *Action programme for reducing administrative burdens in the EU. Sectoral reduction plans and actions 2009*, COM (2009) 544 final, 22 October 2009).

## The standard cost model

In October 2005, the Commission put forward a common European methodology for assessing the administrative costs imposed by legislation, both existing and in the works. That methodology is based on what is known as the *Standard Cost Model*<sup>40</sup>, applied in the Netherlands in particular. The EU's Standard Cost Model facilitates comparison between countries and policy spheres, benchmarking and best practice development. The method was first used in the Netherlands in 2002, designed as a tool to measure the progress of national programmes to reduce the administrative burden. It consists of a detailed assessment of various laws based chiefly on direct interviews with businesses and the opinions of experts (micro-assessment). The method involves collecting data on the time and labour costs required to meet every information obligation imposed by some form of legislation, and the number of entities involved. Significantly, the SCM focuses only on the labour costs incurred by the company to comply with legislative obligations and does not calculate the potential positive impact of legislation in terms of legal certainty, for example. This "ballpark" type of analysis seems questionable for at least three important methodological reasons: (1) the interview with employees to assess the administrative costs they generate is not done on the basis of a scientifically validated questionnaire; (2) there are wide difference in the results: estimates vary in a ratio from 1 to 5 for equivalent legislation; (3) it leaves too great a degree of subjective judgement in the assessor and respondent to be safely extrapolated to an entire sector or economy, let alone another Member State, or all 27. Moreover, the Commission has itself acknowledged that a number of methodological issues could not be thoroughly examined and that problems had arisen regarding the availability and accuracy of source data.

The Commission has nevertheless concluded that an EU common methodology is feasible. Fortunately, it has made this subject to several preconditions, namely: (1) all EU and Member State institutions must use the same definition, the same core equation and the same report sheet to assess administrative costs from EU law; (2) the EU common methodology should be applied in a proportionate manner; (3) a larger number of Member States should be involved; and (4) the Commission should have sufficient human and financial resources to perform the analysis and assessment. The Commission document announced, however, that "a number of methodological points could not be fully addressed and there were problems with the availability and accuracy of basic data"<sup>41</sup>. By the Commission's own admission, the standard cost model methodology is significantly skewed.

In late 2007, this component received a policy boost, putting it ahead of the other two pillars (simplification and impact assessment):

40. A method initiated, described and analyzed by the OECD. See especially *A review of the standard cost model* (GOV/PGC/REG (2005)3), Working Party on Regulatory Management and Reform, 17 March 2005, which the Commission took as its starting point.

41. Communication from the Commission on an EU common methodology for assessing administrative costs imposed by legislation, COM (2005) 518 final, 21 October 2005, p. 4.

- in January 2007, the Commission presented a programme to measure the administrative costs stemming from Community legislation and reduce administrative burdens by 25% by 2012;
- in March of that year, the European Council adopted the Action Programme for Reducing Administrative Burdens in the European Union and called on the Commission to launch it with the help of Member States. It also invited Member States to set national targets of comparable ambition within their spheres of competence in 2008 to be achieved by 2012;
- on 19 November 2007, the Commission set up a high level group of experts in the field of reducing administrative burdens.

The exercise of measuring administrative burdens completed in late 2008 focused on a list of legislative and executive acts in 13 priority areas<sup>42</sup> deemed to be responsible for 80% of administrative costs. The Commission wanted the unnecessary burdens identified by this exercise<sup>43</sup> to be progressively eliminated.

As for the impact assessment, the Commission provides Member States with a free EU starter kit consisting of a handbook for measurement of administrative burdens, template computer presentations to organize awareness campaigns, and a database with an administrative burden calculator.

As regards Belgium, the total cost of administrative burdens on companies and the self-employed was estimated at 7.6 billion euros. As a percentage of GDP, the total relative weight of administrative burdens on companies and the self-employed has reduced year on year, having fallen to 2.44% in 2006 from 2.57% in 2004, 3.43 in 2002 and 3.48% in 2000<sup>44</sup>.

## Fast track actions

This expression refers to a US procedure of the same name giving the Executive the authority to negotiate and enter into trade agreements before Congress takes a decision, and leaving Congress 90 days to vote on the trade agreement.

The term was first officially used in the Commission Communication on the Action Programme for Reducing Administrative Burdens in the European Union of 24 January 2007. In paragraph 4, the Commission refers to a “series of fast track actions where significant benefits could be generated through relatively minor changes in the underlying legislation” and which “should be

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42. By way of background, it is interesting to note that the HLG on Competitiveness and Growth of 20 October 2004 proposed only four priority areas (environment, statistics, transport and e-commerce), whereas five years on coverage was virtually across-the-board.

43. In 2009, the “consortium” of sub-contractors operating on the Commission’s behalf (see point 6.5.5.) identified 356 information obligations in 42 Community acts, representing 115 to 130 billion euros in potential savings for businesses.

44. Kegels, C. (2008) *Les charges administratives en Belgique pour l’année 2006*, Brussels, Federal Planning Bureau, p. 60.

relatively straightforward to decide and implement without challenging the overall purpose of the legislation”.

Fast track action means that in a number of cases identified beforehand, the institutions will try to reach agreement between themselves in a single reading instead of the two readings provided for by the co-decision procedure (Article 294 TFEU).

## **In summary**

Simplification takes place when the wording of a rule is confusing, outdated or apt to be misconstrued; when the rule requires administrative procedures that are unnecessary or adverse; when different instruments affecting the same targets impose burdensome or conflicting requirements.

Screening is a close review of the entire Community acquis to assess the general relevance of regulations, directives and decisions with a view to amending or even withdrawing them if new scientific evidence or economic, social or societal developments have emerged.

Impact assessment guides and justifies the choice of the right instrument of the appropriate nature; it provides the legislator with more accurate and better organised information on the economic, social and environmental benefits and disbenefits; it is a means of selecting initiatives that are really necessary; it provides a support for decision-making without supplanting political judgment.

“Reduction of administrative burdens” aims to identify and eliminate unnecessary administrative burdens. The Commission was set a target of a 25% reduction by 2012. Member States have to achieve a similar target.

## Part 4

# The Better Regulation agenda since 2000

Having reviewed the conceptual framework of regulation and broken down Better Regulation into its key elements, it seems useful to look at the strategies of the different players involved in the Better Regulation agenda<sup>45</sup>. A brief consideration of the spearheading role of the Mandelkern group and the momentum added by the European Council will lead on to a more detailed examination of the role of the Commission and closer look at the action of the Council of Ministers and European Parliament. The role of the “stakeholders” in Better Regulation - think tanks, expert groups, trade unions and employers’ organisations – will also be considered.

## The impetus given by the Lisbon European Council (2000)

It was at the December 1992 Edinburgh European Council under the United Kingdom presidency that simplifying and improving the regulatory environment first surfaced as one of the EU’s main priorities. But it was the Lisbon European Council of 23-24 March 2000 that set as a strategic goal for the next decade: “To become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion”<sup>46</sup>. The European Council noted that “the competitiveness and dynamism of businesses are directly dependent on a regulatory climate conducive to investment, innovation, and entrepreneurship. Further efforts are required to lower the costs of doing business and remove unnecessary red tape, both of which are particularly burdensome for SMEs. The European institutions, national governments and regional and local authorities must continue to pay particular attention to the impact and compliance costs of proposed regulations, and should pursue their dialogue with business and citizens with this aim in mind<sup>47</sup>”. The mandate from the Lisbon European Council was to be confirmed by the Stockholm (23-24 March 2001), Laeken (8-9 December 2001) and Barcelona (15-16 March 2001) European Councils among others.

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45. A good summary of recent developments and reform proposals can be found in *Policy-making in the EU. Past achievements and proposals for reform*, Final Report edited by Andrea Renda, pp. 27 ff.

46. Lisbon European Council, Presidency Conclusions, 22-23 March 2000, paragraph 5.

47. Lisbon European Council, Presidency Conclusions, 22-23 March 2000, paragraph 14.

Signally, the European Council linked the regulatory environment directly to competitiveness, growth, jobs, investment and innovation. In 2000, Better Regulation, which had hitherto been a tool for improving and simplifying regulation, became a core component of the Lisbon Strategy for growth and jobs. The reasons for making the regulatory environment a key driver of EU competitiveness and growth will be considered later (see Part 6).

## The spearheading role of the Mandelkern Group

The EU's Internal Market Council played a key bridging and coordinating role, firstly by approving the final report<sup>48</sup> of the High Level Advisory Group set up by the Civil Service Ministers in November 2000, known as the "Mandelkern Group" after its chairman, top French civil servant Dieudonné Mandelkern. The Mandelkern report was drawn up by an advisory group of experts from across the EU in light of the conclusions of the Lisbon and Feira European Councils of 2000, which stressed the importance of the quality of regulation in the European Union, and called on the Commission, Council and Member States to set out a strategy for further coordinated action to simplify the regulatory environment, including the performance of public administration at both national and Community level. The group's report identified areas where coordinated action was possible and defined a common method for assessing the quality of regulation. The group was also tasked with exploring at national and Community level the systematic use of impact assessments, transparency in the consultation process prior to the drafting of texts, simplification of existing texts, wider use of codification, and the creation of structures to make sure that improvements in the quality of regulation were implemented.

The report identified three complementary approaches to improving the quality of regulation.

The first is to make a considered use of regulation. Sound regulation would be a regulation that is proportionate to the policy and goals pursued. This approach implies that rule inflation produces costs to the economy, complexity for the public, and a loss of credibility for government. Better regulation would mean regulating less, or rather regulating more appropriately. Two avenues emerge from this first approach: one leading to alternatives to regulation, the other towards simplification of existing legislation.

A second approach starts from the premise that it is increasingly not enough to be concerned with the intrinsic quality of regulation (clarity, coherence, precision) and increasingly necessary to consider the views of users or more broadly all those affected by regulation. This second approach to "sound regulation" is more akin to the Anglo-Saxon concept of *compliance*, which refers to voluntary observance of the law by users, but also implies that considerable

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48. Final Report of the High Level Advisory Group chaired by Dieudonné Mandelkern, submitted on 13 November 2001 under the Belgian Presidency.

importance is attached to users when laying down the legal rule. This approach has effects in the pre-enactment stage when regulations are being framed, mainly through consultations. It also requires better access to the law once the regulation has been adopted.

Finally, a third approach to the quality of regulation can be discerned which is less about its appropriateness than measuring its actual effects. From this angle, the quality of regulation is gauged first by its effective implementation, and whether it produces long-term effects in line with the aim of its authors.

## **The Commission's 2001, 2002 and 2003 Packages**

Relying on the European Council's mandate, the European Commission is key to developing Better Regulation through its task of translating the European Council and Council of Ministers' intentions and decisions into programmes. In the wake of the Lisbon European Council, the Commission put three packages of texts on the co-legislators' table.

### **The 2001 Package**

The 2001 package consists of four papers: a first interim report submitted to the Stockholm European Council in March 2001 taking stock of the situation and setting out ideas being considered<sup>49</sup>, a White Paper on European Governance adopted in July 2001<sup>50</sup>, a Communication on the future of the Union entitled "Renewing the Community method"<sup>51</sup>; and finally, a political communication, submitted to the Laeken European Council, for the purpose of consulting the Council, Parliament and Member States on the main points of the action plan<sup>52</sup>.

"Renewing the Community method" stands as the refrain launched in 2001 when the first Commission Communication on the subject appeared. Renewing the Community method is seen by the EU executive as a required "response to globalisation and enlargement": the world has changed and this, says the Commission, makes it necessary to look at how the powers of the EU are exercised and how compliance with the principles of subsidiarity and proportionality is achieved. There is a need to strengthen democratic legitimacy and make Europe's institutional system more effective.

In the first package, the Commission works from the premise that legislation is often only part of a broader solution combining formal rules with

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49. Interim Report from the Commission to the Stockholm European Council, *Improving and simplifying the regulatory environment*, COM (2001) 130 final, 7 March 2001.

50. *European governance. A White Paper*, COM (2001) 428 final, 25 July 2001.

51. Communication from the Commission on the Future of European Union, *European governance. Renewing the Community method*, COM (2001) 727 final, 5 December 2001.

52. Communication from the European Commission, *Simplifying and improving the regulatory environment*, COM (2001) 726 final, 5 December 2001.

other non-binding tools such as recommendations, guidelines, or even self-regulation within a commonly agreed framework. It calls for greater use of regulations in cases with a need for uniform application and legal certainty across the Union. It argues that so-called “framework directives” should be used more often. Whichever form of legislative instrument is chosen, more use should be made of “primary” legislation limited to essential elements (basic rights and obligations, etc.), leaving the executive to fill in the technical detail via implementing “secondary” rules.

It believes that under certain conditions, implementing measures may be prepared within the framework of co-regulation, which combines binding legislative and regulatory action with actions taken by the actors most concerned, drawing on their practical expertise.

Interestingly, the Commission goes into close detail about the use of co-regulation: “Co-regulation implies that a framework of overall objectives, basic rights, enforcement and appeal mechanisms, and conditions for monitoring compliance is set in the legislation. It should only be used where it clearly adds value and serves the general interest. It is only suited to cases where fundamental rights or major political choices are not called into question. It should not be used in situations where rules need to apply in a uniform way in every Member State. Equally, the organisations participating must be representative, accountable and capable of following open procedures in formulating and applying agreed rules. This will be a key factor in deciding the added value of a co-regulatory approach in a given case. Additionally, the resulting co-operation must be compatible with European competition rules and the rules agreed must be sufficiently visible so that people are aware of the rules that apply and the rights they enjoy. Where co-regulation fails to deliver the desired results or where certain private actors do not commit to the agreed rules, it will always remain possible for public authorities to intervene by establishing the specific rules needed.<sup>53</sup>”

## The June 2002 package

After the first 2001 Communications, the Commission confirmed its approach in the form of a set of three documents that guided the EU’s work for three years:

- a Communication on European governance<sup>54</sup>;
- a Communication on impact assessment<sup>55</sup>;
- an Action Plan entitled “Simplifying and improving the regulatory environment”<sup>56</sup>.

53. *European governance. A White Paper*, COM (2001) 428 final, 25 July 2001.

54. Communication from the European Commission, *European governance: better lawmaking*, COM (2002) 275 final, 6 June 2002.

55. Communication from the Commission on impact assessment, COM (2002) 276 final, 5 June 2002.

56. Communication from the European Commission, *Action Plan “Simplifying and improving the regulatory environment”*, COM (2002) 278 final, 5 June 2002.

The really new element of this package is the Commission Communication on the need for an impact assessment of all legislative initiatives and the adoption of an action plan whose foundations were laid in 2001.

## The March 2003 package

The February 2003 Communication on “Updating and simplifying the Community acquis”<sup>57</sup> is one of the actions taken under the Commission’s June 2002 Better Regulation action plan. It aims to fulfill the commitment made then to launch initiatives for a policy on the Community’s existing body of law, including:

- consolidating the existing acquis;
- intensifying consolidation;
- removal of obsolete and outdated legislation;
- modernising and simplifying existing laws and policies to replace the old approaches with more appropriate regulatory instruments;
- provide user-friendly access for the reading and use of Community law.

These three packages of measures (2001, 2002 and 2003) reflect a determination by the Commission to reposition the action of European institutions in terms of a governance that is more modern (i.e., which simplifies the existing body of law), more responsive (i.e., to globalisation), and more open through the coexistence of formal and informal rules.

## The 2003 Interinstitutional Agreement

The Interinstitutional Agreement adopted in December 2003 by Parliament, Council and the Commission is the three institutions’ cornerstone and benchmark for Better Regulation<sup>58</sup>.

This short document reviews the three institutions’ common objectives – their commitment to “improve the quality of law-making and observe general principles such as democratic legitimacy, subsidiarity and proportionality, and legal certainty” (paragraph 2) – and their agreement “to promote simplicity, clarity and consistency in the drafting of laws and the utmost transparency of the legislative process” (*ibid.*).

The three institutions confirmed “the importance which they attach to greater transparency and to the increased provision of information to the public at every stage of their legislative work” (paragraph 10).

The Commission is to “explain and justify to the European Parliament and to the Council its choice of legislative instrument (...) and ensure that the action it

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57. SEC (2003) 165 final, 12 February 2003.

58. Interinstitutional Agreement on better law-making (2003/C231/01), *Official Journal of the European Union*, C 321, 31 December 2003.

proposes is as simple as is compatible with the proper attainment of the objective of the measure and the need for effective implementation”( paragraph 12).

In this connection, the three institutions recall “the Community’s obligation to legislate only where it is necessary, in accordance with the Protocol on the application of the principles of subsidiarity and proportionality. They recognise the need to use, in suitable cases or where the Treaty does not specifically require the use of a legal instrument, alternative regulation mechanisms” (paragraph 16).

Evidencing the carefully-set limits which the three institutions placed on the use of alternative mechanisms, it states that “the Commission will ensure that any use of co-regulation or self-regulation is always consistent with Community law and that it meets the criteria of transparency (in particular the publicizing of agreements) and representativeness of the parties involved” (paragraph 17), going on to specify that, “It must also represent added value for the general interest. These mechanisms will not be applicable where fundamental rights or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all Member States. They must ensure swift and flexible regulation which does not affect the principles of competition or the unity of the internal market.”

Having defined what they meant by co-regulation and self-regulation, the three institutions state that “the Commission will notify the European Parliament and the Council of the self-regulation practices which it regards, on the one hand, as contributing to the attainment of the EC Treaty objectives and as being compatible with its provisions and, on the other, as being satisfactory in terms of the representativeness of the parties concerned, sectoral and geographical cover and the added value of the commitments given. It will, nonetheless, consider the possibility of putting forward a proposal for a legislative act, in particular at the request of the competent legislative authority or in the event of a failure to observe the above practices” (paragraph 23).

Significantly, therefore, the IIA makes the use of alternative regulation mechanisms subject to three conditions:

- consistency with Community law;
- meeting the criteria of transparency and representativeness of the parties involved;
- representing added value for the general interest.

The IIA laid important foundations for improving legislative cooperation.

Where impact assessment is concerned, a broad consensus has emerged that the Council should more systematically discuss the Commission’s impact assessment.

The Council considers that the Commission’s impact assessment should generally be the basis and reference point of impact assessments produced by other institutions and that the other institutions’ impact assessments should in general follow at least the broad lines of the Commission’s methodology to ensure a measure of comparability for evaluating the different policy options.

Where simplification and reducing the volume of legislation are concerned, the Interinstitutional Agreement provides for close coordination between the three institutions over the adoption of simplified proposals. After a first round of identifying priorities, the Luxembourg and UK Presidencies launched a second phase of consultations in the Member States after the Spring 2005 European Council.

## Confirmation by the 2005 Brussels European Council

Notwithstanding the harsh criticism of excessive rules and regulations in a preparatory report by former Dutch Prime Minister Wim Kok<sup>59</sup>, the Brussels summit of 15-16 December 2005 under the British presidency was to take a very even-handed view of the matter. On the one hand, it gave assurances to countries that set great store by the Community method by recalling its attachment to the Community acquis and the IIA which underwrites it. "Taking due account of the principle of subsidiarity and proportionality and the importance of respecting the *acquis communautaire*, the European Council stresses that an improved regulatory framework in the European Union, at Community and Member States level, is key to delivering growth and jobs. Emphasis should be placed on implementing commitments already made by all institutions, including the provisions of the Interinstitutional Agreement on Better Law-Making of 16 December 2003<sup>60</sup>." On the other hand, it gave assurance to the most free-market countries who wanted to go ahead with Better Regulation: "On that basis, the European Council welcomes the significant progress made since its last meeting and agrees on the importance of further work as set out in the attached annex covering i) reducing burdens on business and citizens through simplification and screening; ii) the revised impact assessment system and iii) EU common methodology for assessing the administrative costs of legislation<sup>61</sup>."

## The March 2005 package

The Commission took its momentum forward by publishing a new package of four Communications that amplify its previous Communications:  
— a strategy for simplifying the regulatory environment<sup>62</sup>;

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59. "A first obstacle for entrepreneurs is the overall burden of rules and regulations imposed on businesses. Although regulation is often launched with the best of intentions, there is now a growing feeling that a tipping point has been reached in which the gains from incremental regulation are outweighed by the costs – especially among manufacturers", in *Facing the challenge - The Lisbon strategy for growth and employment*, Report from the High Level Group chaired by Wim Kok, 24 November 2004, p. 28.

60. Brussels European Council, Presidency Conclusions, 15 and 16 December 2005, paragraph 20.

61. *Ibid.*

62. Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Implementing the Community Lisbon Programme: a strategy for the simplification of the regulatory environment*, COM (2005) 535 final, 5 October 2005.

- a system of impact assessment before adopting any important new legislation<sup>63</sup>;
- screening of legislative proposals pending before the legislator<sup>64</sup>;
- an EU common method for assessing administrative costs imposed by legislation<sup>65</sup>.

The real new feature of this package is the further development of the first two pillars of Better Regulation (simplification and impact assessment). The last of these Communications opened a new chapter in the Better Regulation agenda which would gradually gain ascendancy over the other two pillars of Better Regulation and can be summed up in a single sentence: the administrative costs of Community legislation must be drastically reduced.

## **A new impetus to reduce the administrative burden**

### The first strategic action plan (2006)

In its November 2006 Communication, considered by the Council in 2007, the Commission announced a major simplification programme for 2005-2008 with over one hundred initiatives. The Commission also proposed that the Spring 2007 European Council should set a joint objective of reducing administrative burdens by 25% by 2012<sup>66</sup>.

This first strategic review was followed by an action plan for reducing administrative burdens in the European Union in January 2007<sup>67</sup>. Paragraph 4 of the Commission's Communication refers to a series of fast track actions where "significant benefits could be generated through relatively minor changes in the underlying legislation" and which "should be relatively straightforward to decide and implement without challenging the overall purpose of the legislation".

Of the ten fast track actions proposed, four would be decided through the committee procedure (where decision-making is delegated to a committee composed of Member States and the Commission).

The proposal to exempt retailers like butchers and bakers from the requirements of Food Hygiene Regulation (EC) No 852/2004 of 29 April 2004 applicable to supermarkets was never adopted because of its contentious political and health implications.

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63. Communication from the European Commission, *Impact assessment guidelines*, SEC (2005) 791 final, 15 June 2005.
  64. Communication from the European Commission, *Outcome of the screening of legislative proposals pending before the Legislator*, COM (2005) 462, 27 September 2005.
  65. Communication from the Commission on an EU common methodology for assessing administrative costs imposed by legislation, COM (2005) 518 final, 21 October 2005.
  66. Communication from the European Commission, *A strategic review of Better Regulation in the European Union*, COM (2006) 689 final, 14 November 2006.
  67. Communication from the European Commission, *Action programme for reducing administrative burdens in the European Union*, COM (2007) 23 final, 24 January 2007.

The first fast track actions proposed were either cosmetic or in some cases contentious. The main thing was to focus attention by launching an ambitious process.

## Confirmation by the 2007 European Council

The March 2007 European Council may well be a crunch moment in that it put the focus squarely on reducing the administrative burden by setting the Commission an objective of reducing its administrative burden by 25% by 2012 and inviting Member States to “set their own national targets of comparable ambition within their spheres of competence by 2008<sup>68</sup>”. As of October 2009, all Member States had responded to this call.

## The second strategic action plan (2008)

On 30 January 2008, the Commission published a second action plan<sup>69</sup> which revived the goal of a 25% reduction of the administrative burden by 2012. The Commission's simplification rolling programme provided for 164 measures to be adopted in the period 2005-2009. The Commission has adopted 91 measures and introduced 44 additional initiatives in 2008.

## The third strategic action plan (2009)

On 28 January 2009, the Commission adopted its third strategic plan<sup>70</sup>. The main message of this Communication, found in both the introduction and conclusion, is a fairly balanced acknowledgement that regulation is necessary and beneficial for several reasons: to ensure that markets work properly, to create a level playing-field for companies and financial institutions competing on the internal market, to protect workers and consumers, health and the environment.

Where simplification is concerned, of the 185 proposals in its sights, the Commission scored with 132. The Commission adopted 75 proposals and fifty-odd are pending before the Council and Parliament. Of the 108 proposals repealed, almost one third (30) were repealed in 2008. For the period going forward from 2009, the Commission has identified 81 proposals that could be included in a future simplification programme, 33 of which were put forward in 2009. The Commission has reported that its simplification and consolidation programme has led to the removal of approximately 1300 acts, representing nearly 10% of the *acquis* and 7800 pages of the *Official Journal*.

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68. Presidency Conclusions, European Council of 8 and 9 March 2007, p. 10.

69. Communication from the European Commission, *Second strategic review of Better Regulation in the European Union*, COM (2008) 32 final, 30 January 2008.

70. Communication from the European Commission, *Third strategic review of Better Regulation in the European Union*, COM (2009) 15 final, 28 January 2009.

As to the administrative burden, the Commission identified in 2007 the administrative burden of 42 laws in 13 priority areas as being about 120 bn euros. The Commission considered it could achieve a quarter (30 bn euros) of its reduction target by 2012. The Commission has several laws in its sights, such as modernisation of customs legislation, and the exemption from the requirement for small companies to publish annual accounts. Making the VAT Directive alone more flexible would achieve savings of 18 billion euros.

The Commission also notes that a growing number of Member States have set similar national reduction objectives: from 7 in 2006, rising to 14 in 2007 and 21 in 2008 have established ambitious national programmes to reduce administrative burdens.

Where impact assessment is concerned, the Commission has since 2002 carried out 400 impact assessments, 135 of them in 2008. In 2009, the Commission announced it would carry out over 100 impact assessments. It has already put out revised impact assessment guidelines. In almost one in three cases (32%), it has resulted in a resubmission of the assessment. The Commission has announced that it will continue to improve the quality of its impact assessments through a more rigorous analysis of subsidiarity, better stakeholder consultation and an improved assessment of the impacts of administrative burdens, particularly on SMEs, fundamental rights, consumers and the regions.

## **The action Programme for Reducing Administrative Burdens in the EU (2009)**

In this Communication, the Commission reviews the progress made in reducing the administrative burden. It announces measures that could reduce the administrative burdens generated by EU legislation by 7.6 bn euros. Measures pending adoption by the EP and Council could increase this amount to 37.6 bn euros. In total, the proposals made by the Commission represented a reduction of 40.4 bn euros of the 123.8 bn euros in estimated burdens, a 33% reduction in the total administrative burden of EU origin. However, the Commission, which claimed to have out-performed the target it was set (33% reduction rather than the 25% recommended), complained about the co-legislators' (European Parliament and Council) reluctance to adopt some of these measures. The Commission thought it was nevertheless possible to do more and identified 31 additional measures where reduction was still possible, including in accounting and auditing, streamlining the procedures for marketing application and registration procedures. These measures would expand the scope of the current 13 priority areas and add new areas to the Better Regulation programme in such fields as civil and commercial law, the internal market for goods, R&D funding programmes and tourism. In 2009, therefore, the Commission continued its efforts on two fronts: proactively reviewing existing legislation to remove obsolete information obligations, and ensuring that requirements introduced by new policies are kept to the minimum.

## Part 5

# The state of play in the competitiveness council bodies

Better Regulation has been high on the agenda of the Competitiveness Council<sup>71</sup> since 2004 when it inherited overarching jurisdiction over the matter. It is responsible for preparing and adopting Council conclusions on the matter. In practice, each presidency of the European Union is responsible for monitoring developments and the progress made by the Commission, the Council as co-legislator, and the Member States. In recent years, however, the ECOFIN Council has adopted its own conclusions on reducing the administrative burden.

The Council's adoption of conclusions sets two constraints on any EU presidency. It requires a consensus of 27, which is problematic particularly on deeply divisive topics like Better Regulation. Also, a presidency must work for compromise, which inevitably waters down any strong political messages on the original objectives.

But even with their limitations – they have no binding force - Council conclusions do represent a snapshot of the balance of political power that plays into the approaches and actions of the Commission and Parliament.

The British, Dutch, Austrian, German and Czech presidencies have all made Better Regulation a priority. Conclusions were adopted on it by the Competitiveness Council of 28 May 2009, under the Czech Presidency, which also submitted a progress report on 5 March 2009. Sweden voiced interest in the matter when embarking on its presidency (second half of 2009). While not among their priorities, the Slovenian (progress report) and French (Council conclusions) presidency agreed to address the issue. The Spanish (first half of 2010) and Belgian (second half of 2010) presidencies have not made it a priority for different reasons. The Spanish Presidency thought there was nothing new in the form of a Communication, action plan or additional agenda from the Commission. Unlike Spain, Belgium will inherit a new package of measures in the form of a renewed so-called “*Smart Regulation*” agenda scheduled for September 2010. But the future Belgian Presidency is unlikely to set about drafting Council conclusions, feeling it would be hard put to maintain the delicate balance struck between ardently pro-deregulation Member States (the majority of states, led by Germany, the United Kingdom, the Netherlands,

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71. The Competitiveness Council is formed of the old Internal Market, Industry and Research Council configurations.

Sweden and Denmark) and Member States that wanted to maintain the Community acquis (France, Belgium, Luxembourg and Italy).

The main lines of thought and key conclusions from the French, Czech and Swedish Presidencies, each of which marked an individual and interesting point, are outlined below.

Broadly, the current positions are: the United Kingdom, Germany, Denmark, the Netherlands, the Czech Republic, Poland, Austria, Estonia, Sweden, Ireland, Finland and Slovenia want to use Better Regulation to unleash business competitiveness, deregulate some of the corpus of EU laws and regulations, and use non-legislative instruments whenever possible. They tend to favour ad hoc groups to advise the Commission. Facing them are France, Belgium, Italy and Luxembourg, who more favour an “integrated” approach that takes social and environmental aspects fully into account. Their agenda is very much in favour of the established institutional set-up, compliance with the Community acquis, and wherever possible, harmonisation of rules at Community level.

## **The Prague Declaration**

Just ahead of the Competitiveness Council of 28 May 2008 under the Slovenian Presidency, the Czech Republic, the United Kingdom, Denmark, Estonia, Germany, the Netherlands and Sweden signed and circulated an (unpublished) declaration on further cooperation in Better Regulation and better business environment.

The Declaration distanced itself both from the Conclusions of the March 2008 European Council and the Commission action plans on a number of points:

- the usual *caveats* are notable by their absence: there is no reference to compliance with the Community acquis or integrated impact assessments. Only the cost of regulation to businesses is envisaged;
- by scaling Better Regulation back to just reducing the administrative burden and impact assessments, the signatories do away with the 3<sup>rd</sup> pillar of the agenda (simplification of legislation) and its related aspects, including access to law.

In short, the signatories to the Prague Declaration were seeking to turn Better Regulation into an agenda focused exclusively on business competitiveness. The Declaration was treated as a minor piece of business during the Slovenian Presidency, and fizzled out thereafter, although competitiveness remained a paramount issue on the agenda of subsequent presidencies.

## **The French Presidency**

In company with Italy, Spain, Belgium and Luxembourg, France has often cautioned the Council against the risks of a shift in the Better Regulation agenda's focus.

France tried to use its presidency to redress the marked deregulatory trend and get back to basics: improving the quality of regulation and promoting access to law.

Putting the issue on the Competitiveness Council's agenda gave the French Presidency an opportunity to work towards two ends: (1) taking a positive, quality-oriented rather than a negative, numbers-oriented approach; (2) preserving an integrated, balanced agenda.

A third aim was for France to stake its claim as leader of the countries committed to the Community method and *acquis*.

The French Presidency therefore put forward draft Council Conclusions based on three things:

1. Giving harmonisation a more official role:
  - by recognising that it remains necessary when 27 national laws are to be replaced by a single rule for all (convergence approach) and emphasising the need for regular analysis of areas and sectors where more integration is needed without prejudice to the Commission's exclusive right of initiative and the subsidiarity principle;
  - by making mutual recognition a useful corollary of harmonisation if it is used properly and does not create direct competition between national laws;
  - by promoting a pragmatic approach based on identifying failings where they exist and the consistent use of the range of existing tools.
2. Put new issues at the heart of the programme:
  - improve access to law: this must be understood in two ways - understanding the law and making it more practically accessible: use of communication technologies). Improved access to the law should enable the principle "ignorance of the law is no excuse" found in most European legal traditions to be enshrined at EU level;
  - improve the quality of legal drafting by increased use of the Council General Secretariat's legal/linguistic experts service.
3. Create an EU and national process:
  - that fully includes the Member States: Better Regulation must be seen as a dynamic process: it is not just about drafting rules, but also includes the proper implementation and enforcement of the law, which are partly a matter for Member States;
  - that is aimed primarily at businesses and citizens: knowing the rules is key to increasing public confidence in the functioning of the European Union and better dissemination of their rights.

The French Presidency's Conclusions were adopted by the Competitiveness Council of 25 September 2008, not without some opposition from Member States who felt that the Council should not depart from its standard three aims of simplification, impact assessment and reducing the administrative burden.

As a result, the Council “acknowledges that better regulation represents *inter alia*, while respecting the *acquis communautaire*, a means of assessing correctly on each occasion the need for and relevance of a legislative initiative; considers that this is also important in order to highlight, for citizens and businesses, the added value of an action at EU level by explaining the advantages and disadvantages of it; recalls that the European Union has been able to make progress in particular by means of harmonisation and mutual recognition; considers that the use of these instruments has enabled the internal market to grow stronger by removing the obstacles harmful to trade in the EU and by improving the conditions for citizens’ confidence in the operation of the internal market; believes that, with due regard to the subsidiarity and proportionality principles, these instruments remain relevant for these purposes, together with other policy tools, as appropriate [inserted at the behest of the United Kingdom and Denmark]” (paragraph 3 of the Council Conclusions)<sup>72</sup>.

The French Presidency thereby strengthened the position of the Community *acquis* and the role to be played by traditional internal market instruments. Harmonisation and mutual recognition emerged more strongly positioned relative to alternative means of regulation.

In the final analysis, the French Presidency’s main achievement was to add the issue of access to law to the Better Regulation agenda - a sort of “back to the basics” of the 2003 Interinstitutional Agreement. This marks a positive turn in the matter, but no revolution. The balance of power in the Council is arguably against the states most apt to favour a “comprehensive” approach to the Better Regulation agenda (France, Belgium, Spain, Italy, Luxembourg).

## The Czech Presidency

The Czech Republic<sup>73</sup> is strongly in favour of Better Regulation, and made it a top priority of its presidency. Naturally, therefore, it was on the agenda of the two Competitiveness Councils of 5 March and 28 May 2009.

### The Czech Presidency's progress report

Unsurprisingly, most of the Czech Presidency’s report<sup>74</sup> was taken up with the two issues that had come to dominate the others:

- advance impact assessment before any Commission initiative;
- reducing administrative burdens.

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72. Draft Council Conclusions on Better Regulation, Document No. 13148/08, 24 September 2008.

73. The Czech Republic was one of the seven signatories of the Prague Declaration intended to give a boost to the Better Regulation agenda.

74. Presidency Progress Report on Better Regulation, Presented by the Czech Presidency to the Competitiveness Council of 5 March 2009, Document No. 6402/09, 18 February 2009.

The Presidency considers “impact assessment to be a continuous process and an integral part of the analysis and decision-making process” (paragraph 4).

There are three very telling pointers to the shift in the Better Regulation agenda:

- the call to involve stakeholders (i.e., most often the representatives of business) in the further stages of the preparatory process on impact assessments (paragraph 6). In other words, the Commission is asked to consider the views of interest groups after the consultation phase, which usually closes the phase of structured contacts with the Commission;
- the addition of four new filters when screening to assess the relevance of the initiative: an evaluation of proposals in relation to the subsidiarity and proportionality principles (paragraph 4); an “SME test” to provide specific guidance when preparing new initiatives (paragraph 7); an assessment of the external dimension of internal market policies (paragraph 7); an assessment of specific impacts on certain Member States and regions (paragraph 7);
- the Commission’s possibilities for making use of external expertise more regularly in its work on impact assessments (paragraph 9).

Certain other things in relation to reducing administrative burdens also clearly show where the bias lies:

- the figure of 30 billion euros’ potential savings for businesses mentioned in the reduction programme (paragraph 12);
- the 25% reduction target set for the Commission and a similar target for Member States<sup>75</sup> by 2012 is repeated with an emphasis that harks back to the “net target”<sup>76</sup> called for by NL, DK and UK in particular (paragraph 13).

Simplification is mentioned for completeness’ sake. The only positive development is the Presidency’s emphasis on the importance of using information provided by ex-post evaluations (i.e., information on the actual effects of approved EU legislation). The Presidency calls for the Commission’s impact assessment studies to include core progress indicators for future monitoring and evaluation of adopted proposals, and recalls the need to include a review clause in new legislation, where appropriate. The issues of access to law and information on legislation are mentioned almost for the record.

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75. In April 2009, 22 Member States (all except Belgium, Bulgaria, Estonia, Finland and Luxembourg) had laid down their national administrative burden reduction targets. Apart from Spain (30%) and the Czech Republic (20%), all other Member States set themselves a target of 25%.

76. The idea of the 25% “net” target is that eliminating 25% of the administrative burdens should not be nullified by additional administrative burdens from new legislative proposals adopted by the co-legislators. To that extent, the net target means that any new burden added will have to be offset by eliminating an equivalent existing administrative burden. The underlying issue is that the screening of all Community legislation means that the Commission has already removed all the “dead wood” (obsolete, redundant or inappropriate measures). The net target will push the Commission to eliminate “useful” administrative burdens to offset the new ones (monitoring the climate and energy package, etc.).

## The Competitiveness Council Conclusions under the Czech Presidency

In its Conclusions<sup>77</sup>, the Council emphasises the important role played by Better Regulation through the contribution that well-designed, high quality regulation makes to achieving the goals of sustainable growth and jobs: “reinforcing the respect and the effectiveness of the rules and minimizing the economic costs and thereby contributing to strengthening the competitiveness of European businesses, including SMEs and microenterprises, in the global context” (paragraph 1 of the Conclusions). In this regard, the Council believes in “regulating where it is necessary, in a manner which is as straightforward and transparent as possible and which keeps burdens on citizens, businesses and public authorities to what is necessary for meeting the objectives of new policy initiatives” (paragraph 2). The key message of this is that the burden and costs should not be transferred from businesses to public authorities. It emphasises that “any legislative action should be undertaken on the basis of full respect of the EU’s subsidiarity and proportionality principles while respecting the *acquis communautaire*” (paragraph 5). The addition of the last phrase is still a moot point between those states who believe it helps to structure the Better Regulation exercise (France, Belgium, Luxembourg) and those who see it as unnecessary (United Kingdom, Netherlands, Denmark).

The Council then welcomes and supports:

- the revised Impact Assessment Guidelines which aim at “providing for improved quantification of costs and benefits of proposed policy options” (paragraph 7);
- the High Level Group of Independent Stakeholders on Administrative Burdens (paragraph 8);
- the Commission’s simplification rolling programme “which has now proposed 140 of 185 initiatives and led to the identification of a further 81 initiatives with simplification potential” (paragraph 9).

The Council recalls the importance of access to law in the context of Better Regulation and the importance for “EU legislation to be clearly drafted and accessible in practice” (paragraph 10). This was a bone of contention between France, supported by Belgium, Bulgaria, Spain, Italy, Romania, Luxembourg and Slovenia, on the one hand, and the United Kingdom and Denmark, on the other, who wanted to gloss over this aspect, arguing that the focus should be on the three pillars of Better Regulation (simplification, impact assessment and reducing administrative burdens).

The Council then made a series of recommendations to itself or the Member States:

- “bear in mind joint efforts in respect of the EU target of 25% on reduction of administrative burdens” “so as to avoid an increase of administrative

77. Conclusions of the Competitiveness Council on Better Regulation of 13 May 2009, Document No. 9663/09, 13 May 2009.

- burdens, especially in the case of proposals which are part of the Action Programme” (paragraph 15);
- “consider establishing and developing impact assessment systems adapted to their national circumstances and administrative systems in order, where appropriate, to carry out the integrated assessment of economic, social and environmental impacts of national legislation” (paragraph 16).

## The Competitiveness Council Conclusions on industrial policy (May 2009)

Evidence of how Better Regulation permeates all stages of Council work is provided by the Economic Affairs Ministers’ discussion of it in connection with the Conclusions on industrial policy<sup>78</sup>. At issue was the attempt by some States to establish a link between the regulatory (rather than administrative!) burden, particularly in the area of social and environmental protection, and the flight of industry to areas outside the EU.

In its Conclusions, the Competitiveness Council points out that:

“(...) with a view to preserving and enhancing the competitiveness of European industry and improving the conditions for investment in Europe, compliance with new requirements should not cause excessive costs to businesses in all policy areas. Otherwise, such costs could lead to “production leakage”, notably in the present economic crisis” (paragraph 12).

It took resolute action by Belgium, Sweden and Denmark to get rid of the link between the regulatory burden and business relocation. The Conclusions finally referred to “excessive costs arising from for example regulatory, environmental and administrative requirements”. In footnote No. 25 to paragraph 12, the Conclusions link “production leakage” - or industry delocalisation - not to the regulatory burden, as wished by several Member States including Poland and Germany - but to “a wide range of factors and excessive costs arising from for example social, administrative or environmental requirements”.

The fact remains that this episode marks a new milestone in the Better Regulation agenda, which (1) linked the regulatory – rather than just the administrative – burden to industry relocations; (2) targeted social and environmental protection as the sources of excessive costs; and, finally, (3) made the Better Regulation agenda an instrument of EU competitiveness. It is an episode that also illustrates the lack of joined-up working across the different Council configurations.

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<sup>78</sup>. Conclusions of the Competitiveness Council of the European Union of 28 May 2009, *An integrated approach to a competitive and sustainable industrial policy in the European Union*, Document No. 10082/09, 19 May 2009.

## The Swedish Presidency

Surprisingly, the Swedish Presidency proved a watershed moment in the Better Regulation approach - not for any discovery that Sweden was a fervent advocate of Better Regulation, but rather from the extent of its support for the most radical agendas pushed by Germany and the United Kingdom in particular. The Swedish Presidency forced the traditional allies (France, Belgium, Italy and to a lesser extent Spain and Luxembourg) to be doubly vigilant in seeing that the Council did not take a radical new turn by urging the Commission to make Better Regulation a tool for deregulating competition.

The Council's Working Party on Better Regulation met four times to discuss the Swedish Presidency's draft Conclusions, while no less than three Coreper meetings were needed for the 27 to agree on the draft Conclusions adopted by the Competitiveness Council at its meeting of 3 and 4 December 2009.

The Swedish Presidency's aim to be ambitious led it to produce a text riddled with ambiguities and clumsy turns of phrase that reflected only the concerns of the "Prague group" (UK, DE, NL, DK, CZ, EE and SE) focused entirely on the competitiveness of businesses.

Robust action by the Commission and a number of resolute Member States (France, Belgium, Italy) managed to prune the most ambiguous passages from the text. Even so, these Conclusions bear the hallmark of the economic liberalism rampant in a growing number of capitals.

In paragraph 18 of the Conclusions, the Presidency introduced a new concept, which can be summed up as a further acceleration of the Better Regulation agenda towards deregulation of the Community acquis.

"18. CONSIDERS that Better Regulation must be based on a comprehensive approach that in the future may comprise, where appropriate, new incentives, indicators and targets that also take into account aspects of regulatory burdens other than just administrative ones, such as compliance costs and perceptions of the effects of regulatory requirements."

The wording of the Conclusions suggests a progressive approach that could include such things as new incentives, indicators and objectives that also take into account the regulatory rather than just the administrative burden.

More significantly, the text also asks the Commission to consider the "perception" of regulatory requirements. This is a highly subjective and very woolly concept which could justify proposals to withdraw certain laws on the grounds that they are "irritating" to businesses. Could this lead to proposals for a percentage – say, 25% - reduction in the "legislative burden" in some areas (environment, social, etc.)? Might social or environmental requirements deemed to be classifiable as irritating requirements?

This wording paves the way for deregulation proper. To that extent, this paragraph marks a political watershed in Better Regulation. It will be up to the European Commission - which is already on record as not favouring these kind of incentives, indicators and targets - to turn this qualified (“where appropriate”) call by Council into proposals – or not.

## The European Parliament’s view

In a Resolution contained in the report by Sylvia Kaufmann (GUE), adopted on 28 November 2001, the European Parliament “considers that the drafting of an ‘action plan for better regulation’ by a Council working party (Mandelkern group on better regulation) and, at the same time, by a Commission working party with a similar brief, represent[ed] a serious breach of the Community method, for Parliament, as co-legislator, was neither informed of, nor involved in, the work of these working parties<sup>79</sup>.”

Parliament has considered the issue repeatedly since then<sup>80</sup>. In their position on the Commission’s simplification priorities for 2006, the parliamentary committees stressed that the approach should not lead to the *acquis* being rewritten outside of democratic oversight. They argued that simplification must not become a pretext for throwing the policies adopted into question, and insisted on a clear distinction between technical simplification and policy simplification. Some committees also found unfortunate the lack of analysis of what simplification means in practice, given that it can imply fundamental changes that must be scrutinised by the legislator, however minor they may be<sup>81</sup>.

## The four parliamentary reports on Better Regulation/ Lawmaking

The European Parliament has adopted four own-initiative reports stemming from a common discussion on the “Better Regulation in the European Union” programme following the Commission Communication reviewing progress in this area<sup>82</sup>.

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79. European Parliament, Final Report on the Commission White Paper on European governance, Committee on Constitutional Affairs, Rapporteur: Sylvia-Yvonne Kaufmann, Report A5-0399/2001, 15 November 2001, paragraph 30.

80. See in particular, European Parliament, Report on the conclusion of the Interinstitutional Agreement on Better Law-making between the European Parliament, Council and Commission (2003/2131 (ACI)), Committee on Constitutional Affairs, Rapporteur: Monica Frassoni, Report A5-0313/2003, 25 September 2003.

81. Position of the parliamentary committees on the priorities set by the Commission for 2006, unpublished, February 2006.

82. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, *A strategic review of Better Regulation in the European Union*, COM (2006) 689 final, 14 November 2006.

The report by Katalin Levai (PES, Hungary) supports the Better Regulation process aimed at improving the clarity, accessibility and quality of Community legislation and reducing the administrative burdens originating in it. But the MEPs insisted on a number of preconditions for achieving that end: full and joint involvement of the three EU institutions and consultation of all relevant stakeholders; the need for transparency, in particular by opening Council meetings to public scrutiny when the Council is acting in its legislative capacity; consideration of economic, social and environmental aspects in the assessment of legislation; and ensuring that the simplification process does not lower the standards of current law.

They consider that the Commission plays a crucial role in preparing high-quality legislative proposals, which constitute the best starting-point for the whole simplification process. But it must preferably use clear language that is easily understandable by citizens.

In this report, the MEPs approved tighter scrutiny of impact assessments through the creation of an Impact Assessment Board under the authority of the Commission President.

The report by Bert Doorn (EPP-ED, Netherlands) on the application of the principles of subsidiarity and proportionality approves the Commission programme to reduce “needless and disproportionate” administrative burdens by 25% by 2012.

In this report, the MEPs consider that a high-quality regulatory environment should be an important objective of EU policy, and that that bad regulatory quality in the Member States and at Community level weakens the rule of law and alienates citizens from their institutions. They believe that the EU institutions and Member States should “keep a permanent watch on the application of the subsidiarity and proportionality principles”.

The report proposes that, in parallel to the programme to reduce unnecessary administrative burdens, the Commission should carry out a study in order to develop a methodology to quantitatively chart and assess all other burdens in addition to the administrative burden arising from new legislation and regulations, and subsequently launch a pilot project to apply the methodology for measuring the compliance burdens to impact assessments.

The report by Giuseppe Gargani (EPP-ED, Italy) on the strategy for the simplification of the regulatory environment emphasizes the need to put more emphasis on “implementation, enforcement and evaluation of Community legislation”. In the report, the MEPs welcome the inclusion of the simplification initiatives in the Commission’s legislative programme for 2007, “in confirmation of the political priority to be given to the simplification strategy”.

The report by Manuel Medina Ortega (PES, Spain) examines the use of non-binding legal instruments (*soft law*) like recommendations, green and white papers, and Council Conclusions.

The report deplores the use of soft law by the Commission where it is a surrogate for EU legislation that is still necessary per se. The MEPs urge the Commission to make a particular effort to guarantee transparency, visibility and public accountability in the process of adopting non-binding Community acts, to give special consideration to the effect of soft law on consumers. They emphasise that Parliament is the only democratically elected Community institution, but is not currently consulted about the use of soft-law instruments. They therefore call on the Commission to develop with Parliament a *modus operandi* that guarantees the participation of the democratically elected bodies and thus more effective monitoring of the adoption of soft-law instruments.

The report also considers that, in the context of the Community, soft law should be used with caution as all too often constituting an ambiguous and ineffective instrument which is liable to have a detrimental effect on Community legislation and institutional balance, even where it is provided for in the Treaty. In that line of thought, the European Parliament recalls that so-called soft law cannot be a substitute for legal acts and instruments, which are available to ensure the continuity of the legislative process, especially in the field of culture and education.

The report stresses that each EU institution, including the European Council, must consider both legislative and non-legislative options when deciding, on a case-by-case basis, what action, if any, to take.

Parliament considers the open method of coordination to be legally dubious, as it operates without sufficient parliamentary participation and judicial review, and therefore believes that it should be employed only in exceptional cases and that it would be desirable to consider how Parliament might become involved in the procedure.

Parliament is of the opinion that standardisation and codes of conduct are important elements of self-regulation, but nevertheless considers that standardisation must not lead to overregulation and hence constitute an additional burden for small and medium-sized enterprises in particular.

Parliament emphasises that it is the only democratically elected Community institution, and is not currently consulted about the use of so-called soft-law instruments, such as Commission recommendations (paragraph 14).

Parliament therefore calls on the Commission to consult with it on how it may be consulted before adopting soft-law instruments, in order to enable proposed soft-law measures to be scrutinised and to avoid any misuse of powers on the part of the executive (paragraph 17).

The Ortega report was adopted by 611 votes to 32 with 43 abstentions. The ALDE, EPP-ED, PES and Greens groups voted heavily in favour of the resolution on it, as well as the resolutions on the Doorn, Gargani and Levai reports.

## The European Parliament Resolution of June 2008

Parliament's Resolution of June 2008 criticised the Better Regulation agenda on two counts.

### **Impact Assessment**

Parliament considers that in many cases, impact assessments are an additional bureaucratic requirement that hampers the lawmaking process without delivering added value in terms of quality and efficiency. In that connection, it stresses the importance of the political assessment carried out at European Union level by bodies representing citizens, such as Parliament, or bodies representing local and social bodies such as the Committee of the Regions and the European Economic and Social Committee respectively.

### **Strengthening the formal regulatory system**

Parliament "voices doubts as to the appropriateness of encouraging self-regulation and co-regulation, which could ultimately turn into a form of 'legislative abstinence' that would favour only pressure groups and powerful players on the economic stage". It stresses that "regulations continue to be the simplest way of achieving the European Union's objectives and providing both businesses and citizens with legal certainty; calls on the Commission to develop a more consistent approach in this connection".

Finally, Parliament believes that the European Union's formal regulatory system needs to be strengthened, in the terms set out in the Treaties, and that short-cuts by means of informal legislation which has no binding force should be avoided.

## The European Parliament Resolution of 21 October 2008

The European Parliament addressed various aspects of the agenda in its resolution of 21 October 2008.

While calling for "external, independent scrutiny of the [Commission's] conduct of impact assessments" (paragraph 7), it "stresses the importance of the political assessment carried out at European Union level by bodies representing citizens, such as Parliament, or bodies representing local and social bodies such as the Committee of the Regions and the European Economic and Social Committee respectively" (paragraph 13).

However, it also "is aware that such cost-benefit analyses are no substitute for the political debate about the pros and cons of particular legislation" (paragraph 9).

The European Parliament "voices doubts as to the appropriateness of encouraging self-regulation and co-regulation, which could ultimately turn into a form of 'legislative abstinence' that would favour only pressure groups and powerful players on the economic stage" (paragraph 14) and "recalls that,

since ambiguous and ineffective soft-law instruments can have negative effects on the development of European Union law and on the balance between the institutions, they should be used only very cautiously – where provided for in the Treaties and in a manner strictly consistent with the allocation of competences under primary law – and that, in all cases, legal certainty should be guaranteed” (paragraph 22).

Turning to administrative burdens, the EP “emphasises that the Commission’s target of reducing administrative burdens by 25% by 2012 should be a net target (*author’s emphasis added*), meaning that reductions in certain areas must not be nullified by new administrative burdens imposed elsewhere” (paragraph 27).

Like the June 2008 resolution, this resolution was adopted by an overwhelming majority.

## **The role of stakeholders**

### Considering the views of citizens and businesses

The Commission has to put its proposals out to wide-ranging consultations before putting forward any draft legislation. This is the best way to ensure that all interests are considered. It is also the best form of quality assurance for proposals. Broad consultation of civil society can show up whether policies are practicable. The Commission traditionally consults in a range of ways: green papers, white papers, forums (like the European Energy and Transport Forum or the European Health Forum), workshops, permanent consultative groups and online consultations. All these resources now form part of the common framework of minimum standards for consultation, which is itself an integral part of impact assessments. The dialogue between the Commission and civil society organisations is a multifaceted one, and the methods of consultation and dialogue are adapted to different policy spheres. There are also structured processes, like the social dialogue with trade unions and employers’ organisations, and the dialogue between the Commission and the European and national associations of local authorities.

### The stakeholders in Better Regulation

The Better Regulation stakeholders can be divided into three groups of substantially differing interests, goals, participation and challenges.

Consultation with stakeholders is an integral part of the policymaking process. In most cases, consultation is a legal obligation to fulfil a procedure laid down by the EC Treaty.

John Hontelez, Secretary General of the European Environmental Bureau, believes that the outcomes of consultations and the resulting trade-offs are

not sufficiently clear. Questioned for this study in May 2008, he said the impression was that the messages put over by civil society are sent into a black box. It is an open question how the trade-offs between conflicting opinions are made, and what criteria govern the choice of an instrument, an initiative or taking no action. The issue might be taken further by wondering also what role the Committee of the Regions (CR) and the European Economic and Social Committee (EESC) play in assessing the economic, social, environmental and territorial impacts of Commission proposals. How do Parliament and Council take them into account? Why could these consultative bodies not play a more prominent role? The CR and the EESC have real democratic legitimacy and a recognised place in consultations. But, in practice, certain high-level groups, experts and consultants are often seen to enjoy more credibility and influence than the consultative/advisory bodies established by the EC Treaty.

Table 1 Main stakeholders and their stakes

	Government - EU	Business/ Industry	Consumer - citizen
<b>Interest</b>	<ul style="list-style-type: none"> <li>- Reflect the general consensus</li> <li>- Preserve the public interest and ensure a win-win situation</li> </ul>	<ul style="list-style-type: none"> <li>- Ensure competitiveness, profitability, productivity</li> </ul>	<ul style="list-style-type: none"> <li>- Achieve a positive cost benefit ratio</li> <li>- Protect against risks</li> </ul>
<b>Aim</b>	<ul style="list-style-type: none"> <li>- Attain a balance between economic growth, social and environmental protection</li> <li>- Redistribute the benefits of growth</li> <li>- Ensure certainty in the law</li> </ul>	<ul style="list-style-type: none"> <li>- Minimize costs</li> <li>- Sustainable profits</li> </ul>	<ul style="list-style-type: none"> <li>- Increase welfare</li> <li>- Increase confidence</li> </ul>
<b>Participation</b>	<ul style="list-style-type: none"> <li>- Continuous</li> <li>- Initiative and leadership</li> </ul>	<ul style="list-style-type: none"> <li>- Maintain pressure to reduce the regulatory burden and focus it positively</li> <li>- Try to influence governance</li> </ul>	<ul style="list-style-type: none"> <li>- Maintain pressure to defend interests</li> </ul>
<b>Stakes</b>	<ul style="list-style-type: none"> <li>- Legitimacy</li> <li>- Credibility</li> <li>- Good governance</li> </ul>	<ul style="list-style-type: none"> <li>- Wealth creation</li> <li>- Global Competitiveness</li> <li>- Profits</li> </ul>	<ul style="list-style-type: none"> <li>- Maximise welfare</li> <li>- Minimise costs</li> </ul>

Adapted from Hardacre, A., "What is at stake?", in *Eipascopie*, European Institute of Public Administration, No. 2008 / 2, p. 7

There is a broad consensus on the Better Regulation agenda among citizen interest groups. Generally, they are critical of its pro-business slant. A joint declaration by the European Trade Union Confederation, the European Environmental Bureau and the Platform of Social NGOs argued that, "Europe and its citizens and businesses need better regulation. But better regulation should not become synonymous for simple deregulation and a one-sided cost approach. The Commission and Council (must) avoid giving ultimate priority to favouring limited cost savings for business, rather than safeguarding people's health and environmental or social protection".

Finally, trade unions, NGOs and community organisations regularly, albeit informally, argue that impact assessments focus on the competitiveness of businesses, rarely considering job creation and quality, or wealth allocation and distribution. They feel that impact assessments are not sufficiently focused

on sustainable development. The underlying paradigm, they sometimes argue, is “competition as the be-all and end-all” with no regard for sustainable development.

## The standpoints of business lobbies

Its potential impact on competitiveness means that the Better Regulation agenda is closely monitored by business lobbies. The views of four such organisations (BusinessEurope, UEAPME, Eurochambres and AmCham EU) on each of the three components of the agenda are outlined below.

### **Simplification**

In its comments on the Commission’s third strategic review, BusinessEurope<sup>83</sup> argues that Council and Parliament should change their working methods so as to speed up the passage of simplification proposals. Also, “the legislature must not add to or amend proposals in any way that imposes new burdens (...) It is of vital importance that any simplification exercise really reduces costs and burdens for business”<sup>84</sup>.

### **Reducing the administrative burden**

BusinessEurope argues that the 25% target should be a net target and include all administrative costs and not only those generated by 30 or 40 pieces of legislation in certain priority areas. The Commission and the Member States should also not only look at the administrative costs, which are narrowly linked to information obligations, but also at the more varied and substantially higher compliance and enforcement costs which cover all costs of complying with legislation. There should also be an ex-post evaluation to assess whether the reduction measures really reduced burdens. UEAPME<sup>85</sup> stresses on this that in the Netherlands – albeit one of the most proactive countries in simplifying and reducing the administrative burden - 70% of all entrepreneurs declared in an opinion poll in June 2006 that they had not experienced any reduction in administrative burdens over the previous year (2005)<sup>86</sup>.

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**83.** BusinessEurope is the Confederation of European businesses representing 40 member associations from 34 countries. Its aim is to unite national federations to foster a competitive Europe in terms of industrial policy. BusinessEurope acts as spokesman to the European institutions.

**84.** BusinessEurope, *Comments on the Third Strategic Review of Better Regulation in the EU*, 27 February 2009.

**85.** The European Association of Craft, Small and Medium Enterprises (UEAPME) represents the interests of European crafts, trades and SMEs at EU level. UEAPME incorporates 83 member organisations from 36 countries. It claims to represent more than 12 million enterprises, which employ around 55 million people across Europe.

**86.** UEAPME press release, *Better Regulation agenda must move from theory to practice*, 17 April 2008, referring to a study cited by the Secretary General of UEAPME-Slovenia, Andrea Benassi.

Amcham EU<sup>87</sup>, meanwhile, welcomes the efforts to reduce the EU administrative burden by 25% by 2012 but believes that progress can be achieved only if the three institutions are included in the process.

### **Impact Assessment**

BusinessEurope supports the requirement to carry out an impact assessment for all initiatives in the Commission's work programme which are likely to have a significant impact. It believes that the opinions of the Impact Assessment Board should be binding on the Commission services. The Board should therefore have the power to stop a proposal going to the College of Commissioners for approval if there are shortcomings regarding the assessment. Eurochambres<sup>88</sup> and UEAPME<sup>89</sup> both call for more impact assessments, and for proposals that do not include a cost-benefit analysis for SMEs to be halted<sup>90</sup>. BusinessEurope also argues that an independent agency for quality control of legislation should be set up to ensure that the impact assessment guidelines are properly followed. In order to assist the Board to identify shortcomings, stakeholders should have the opportunity to address these directly to the Board before the proposal and the assessment is finalised. Therefore, UEAPME<sup>91</sup> supports the idea of creating "Better Regulation Units" within the European Commission, the Council and the European Parliament in order to co-ordinate regulatory review, to assist in improving the clarity and effectiveness of each of their contributions to EU legislation, in deciding whether legislation is actually necessary or whether there are alternative courses of action, and to ensure that the consequences of any legislative proposals for SMEs have been assessed and fully taken into account.

AmCham EU believes that there must be an impact assessment of any legislative or non-legislative proposal. It emphasises the importance of including an impact assessment for any specific legislation or political action affecting international trade in the impact assessment guidelines. It talks in terms of a "sustainability impact assessment" to identify the economic, social and environmental impact of any trade agreement. It also argues that stakeholder consultation should be an integral part of impact assessments. Finally, AmCham supports a balanced three-pillar approach, but with competitiveness testing forming a central element of all impact assessments<sup>92</sup>.

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- 87.** AmCham EU is the American Chamber of Commerce to the European Union. It speaks for companies of American origin established in Europe and is their spokesperson to the European institutions.
- 88.** Eurochambres is the European Association of Chambers of Commerce and Industry. It voices the interests of approximately 19 million enterprises in Europe - 96% of them SMEs - in 45 European countries.
- 89.** UEAPME claims that compliance costs can be from 6 up to 30 times greater than for large firms (source: UEAPME press release, *The voice of SMEs in Europe*, 17 April 2008).
- 90.** Joint Press Release of 28 April 2009.
- 91.** UEAPME Proposals for simplification, March 2008.
- 92.** AmCham Response to the consultation on the draft Commission Impact Assessment Guidelines.

It should be noted at this stage that the business lobbies' demands are highly specific and in line with the discussions taking place in the European Parliament and Council: a net target for reducing administrative burdens, competitiveness testing for the other pillars, impact assessments for all Commission initiatives, etc.

It is also worth pointing out that some organisations want specific structures to be set up to improve oversight on the exercise: Better Regulation Units within the European institutions (UEAPME), and an independent agency for the quality control of legislation (BusinessEurope).

## **The expanding influence of technical groups**

Since Better Regulation grew to the scale it now has, a number of independent or high level technical groups have been set up to support the Commission or Council, often in ways that lack transparency. There are at least five formal groups tasked to varying extents with monitoring and informing the Better Regulation process.

### The technical group to monitor the Interinstitutional Agreement

The Commission set up a High-Level Technical Group for Inter-Institutional Cooperation to monitor the implementation of the December 2003 Interinstitutional Agreement. It is a contact group of representatives of the three institutions, which meets only once or twice a year.

### The group of national experts for Better Regulation

By Decision of 28 February 2006, the Commission set up a new group of national regulatory experts to advise on its general strategy to simplify and improve European legislation and facilitate the development of Better Regulation measures at both national and European level. The group meets about four times a year. Its remit is to promote and assess Member States' implementation of measures suggested in the Better Regulation action programmes. It examines specific projects relating to regulatory impact assessment, indicators and simplification measures at national level.

### The Impact Assessment Board

On 14 November 2006, Commission President José Manuel Barroso set up an Impact Assessment Board to provide independent quality control and support to Commission impact assessments. The Impact Assessment Board reports directly to the President of the Commission. Its members are high-level officials from the Commission departments most directly involved with the three

pillars of impact assessment (economic, social and environmental impacts). Its members have been appointed in a personal capacity and for their expert knowledge, and so act “independently”. They are drawn from the General Secretariat of the Commission, DG Economic and Financial Affairs, DG Employment, Social Affairs and Equal Opportunities, DG Enterprise and Industry, and DG Environment.

The IAB’s remit is to examine and issue opinions on the quality of individual draft impact assessments. Its opinions are not binding, but they accompany the draft initiative together with the impact assessment report throughout the Commission’s decision-making process. Ultimately it is for the full Commission to decide on a proposal taking account of the impact assessment and the Board’s opinion. The IAB’s role was strengthened, especially after the UK consultancy The Evaluation Partnership (Richmond)<sup>93</sup> claimed that most impact assessments suffered from an inappropriate approach:

- insufficient scope of application: lack of clarity of the proportionality test and failure to perform an impact assessment for major legislative and non-legislative initiatives;
- non-timely approaches and delays: TEP criticizes the Commission’s lack of timely intervention and failure to adequately anticipate the impact of alternative scenarios;
- uneven quality of content, presentation and procedure;
- lack of available relevant data to perform impact assessments;
- lack of a balanced approach: weaknesses in the social and environmental aspects;
- interinstitutional dimension insufficiently taken into account.

In 2009, the Board examined 79 impact assessments<sup>94</sup>, compared to 135 in 2008 and 102 in 2007<sup>95</sup>.

## The High Level Group of Independent Stakeholders on Administrative Burdens

The High Level Group of Independent Stakeholders on Administrative Burdens (HLG), chaired by former Bavarian State Premier Edmund Stoiber was set up on 31 August 2007<sup>96</sup> and held its inaugural meeting on 17 January 2008.

The group is composed of 15 members drawn from a broad spectrum of society, including politicians and academics, businessmen, social partners and

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**93.** Report available at <<http://ec.europa.eu/governance>>.

**94.** The smaller number of impact assessments in 2009 compared to 2008 is explained by the fact that 2009 was a transition year in the European Parliament and Commission. The Board expects the numbers to rise again in 2010.

**95.** Commission Staff Working Document, *Impact Assessment Board report for 2009*, SEC (2009) 1728 final, 29 January 2010.

**96.** Commission Decision of 31 August 2007 (2007/623/EC), *Official Journal of the European Union*, L 253, 28 September 2007, p. 40-42.

NGOs<sup>97</sup>. Its main role is to support the Commission in implementing its action programme for reducing administrative burdens in the EU and to identify prospective laws for the simplification exercise. Specifically, the Stoiber Group advises the Commission on measures to reduce administrative burdens suggested by consultants, and through Internet consultations and local workshops in the Member States. It advises the Commission at its request on methodological issues that may arise in the action programme, and suggests, where appropriate, existing legislation which could be added to the measurement exercise undertaken at Community level. The Stoiber Group was originally given a three-year mandate, extended for two years due to staunch backing from Germany.

## Commission outside consultants

The Commission also uses a consortium of independent outside experts to assist it with simplification and selecting regulations for the administrative burden reduction programme. Firms regularly consulted include Deloitte&Touche, Rambol Management, PricewaterhouseCooper, CapGemini, London Economics, Copenhagen Economics, etc. Their job is to help the Commission identify “low hanging fruits” or those laws that can most easily be simplified on the basis of the criteria defined by the Commission.

The consultants' role is to turn the Commission's policy analysis and ideas in progress into suggestions or avenues for simplification, which may lead them to act as “pilot fish” for the Commission to put across a specific message. It may be wondered whether the consultants have the requisite expertise and independence, inasmuch as they may also provide consultancy services to major sectors or industry groups. Finally, these consultations second-guess and often overlap with the compulsory consultation of bodies established by the Treaty for that very purpose (the European Economic and Social Committee and Committee of the Regions), which may effectively short-circuit the traditional decision-making process.

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97. Roland Berger, Head of Roland Berger Management Consultancy, Gabriel Corte-Real de Carvalho, General Counsel of the Mirpuri Investments Group; Annika Fritsch, Coordinator of Better Regulation at Företagarna; Rick Hayhornthwaite, Chairman of the UK Better Regulation Commission; John Hontelez, Secretary General of the European Environmental Bureau; Robin Lindschoten, Chairman of the Dutch Advisory Board on Administrative Burdens (Actal), Johannes Ludwig, Executive Director Community of European Railway and Infrastructure Companies (CER), Candido Mendez, General Secretary of the General Workers Union - Spain, Jim Murray, Director of the European Consumers Organisation (BEUC); Pierre Pere Padrosa, Vice-President of the International Road Transport Union; Juhana Pesone, Secretary General of COPA-COGECA (European farmers' organisation), Jacques Potdevin, CEO of JPA International, Pavel Telicka, former European Commissioner and Senior Advisor at the European Policy Centre, Riccardo Illy, President of the Friuli-Venezia-Giulia Region and President of the Assembly of European Regions.

## Part 6

# The hidden face of the Better Regulation agenda

What makes the Better Regulation agenda different are its aims and how it goes about achieving them<sup>98</sup>. To the traditional aim of making clear, simple and understandable laws has been added an economic objective: enhancing the competitiveness of businesses. The impact of legislation in terms of its costs and effect on firms' competitiveness is now subject to systematic analysis, and this economic analysis even goes to the substantive content of the act – the idea being to come up with instruments which both meet the general Treaty requirements (promoting sustainable development, creating quality jobs, etc.) and do the least possible harm to business competitiveness. This drive to minimize the cost to business - especially small businesses - is the first big new development in the approach to lawmaking. It also brings two constraints that are not easily balanced. It means reconciling the promotion of sustainable development – something which in essence is incompatible with economic short-termism – with the competitiveness of European businesses faced daily with international competition.

Better Regulation has taken shape bit by bit. It took until the second strategic action plan in 2008<sup>99</sup> to get a definition of what it is and is not: “Better regulation does not mean deregulation or holding back new European rules when they are needed. But policy and regulatory proposals are now systemically assessed, and a wide range of options - regulatory and non-regulatory - are examined for each initiative.” It is worth noting that the Commission first specifies what Better Regulation is not before saying what it is. This is therefore an unprecedented situation where the Commission – the guardian of the treaties, and with the exclusive right to initiate legislation - has set itself two new criteria to be met, which could be a matter of course but are tending to become an “additional test”. The Commission is now asked: (1) to assess in advance whether any action it might take is relevant in line with an impact assessment; and (2) to put forward whichever of a legislative or non-legislative initiative is relevant. Adding tighter preconditions to the submission of a legislative initiative, and the pressure on the Commission to consider the non-legislative option first, are both factors that could lead to a degree of “legislative abstinence”.

<sup>98</sup>. See Durand, C.-F. (2008) “Mieux légiférer : une des priorités centrales de la Commission européenne”, *ERA Forum*, vol. 9, No.1, p. 41-52.

<sup>99</sup>. Communication from the European Commission, *Second strategic review of Better Regulation in the European Union*, COM (2008) 32 final, 30 January 2008.

## An agenda harnessed to competitiveness?

The main justification for the Better Regulation agenda is the widely endorsed claim that the Community and its Member States have too unwieldy and complex a body of regulations<sup>100</sup> that is a major handicap to EU competitiveness and crippling European companies in relation to not just their US partners but also emerging competitors.

Table 2 **Estimated Administrative burden for European companies - percentage of GDP - figures for 2003**

	% of GDP	US\$ Billions
<b>Belgium</b>	2.7	8.1
<b>Czech Republic</b>	3.7	2.7
<b>Denmark</b>	2.4	3.8
<b>Finland</b>	2.4	2.3
<b>France</b>	2.9	61.6
<b>Germany</b>	3.2	85.5
<b>Greece</b>	4.4	10.6
<b>Hungary</b>	4.4	4.4
<b>Ireland</b>	2.4	3.2
<b>Italy</b>	2.4	61.9
<b>Netherlands</b>	3.7	16.4
<b>Poland</b>	4.4	10.0
<b>Spain</b>	2.9	3.4
<b>Sweden</b>	2.4	4.2
<b>United Kingdom</b>	2.4	24.3

A number of studies financed by the Commission have claimed that European companies are labouring under an inordinate administrative burden. The EOS/Gallup<sup>101</sup> study for the Commission puts the cost of regulation at 4% of Community gross domestic product (GDP). Approximately 15% of this cost, or 0.6% of Community GDP, could be avoided by better regulation claims the study, bringing a saving of some 50 billion euros. A study done by George M. Gelauff and Arjan Lejour<sup>102</sup> using the Standard Cost Model<sup>103</sup> estimated the costs to business in the Netherlands alone at 16.4 billion euros, or 3.7% of Dutch GNP. Gelauff and Lejour estimate that 40% of this amount stems from international law, more specifically EU legislation.

The Dutch government therefore decided in 2002 to reduce the “administrative burden” by 25%, equivalent to 0.9% of GDP (4.1 billion euros). The OECD

**100.** The most commonly used terms being “Brussels red tape” and “EU over-regulation”.

**101.** Communication from the European Commission, *Simplifying and improving the regulatory environment*, COM (2001) 726 final, 5 December 2001.

**102.** “The new Lisbon Strategy. An estimation of the economic impact of reaching five Lisbon Targets”, *Industrial Policy and Economic Reforms Papers*, No. 1, Report prepared for DG Enterprise and Industry by George M. Gelauff and Arjan M. Lejour (CPB, Netherlands), January 2006.

**103.** Explained below.

incorporated the method into its own overall strategy. It was subsequently taken up by the European Union, through the Economic Policy Committee (EPC), but no counter-study has ever been done to quality-assess the cases made by EOS/Gallup and by the Dutch Centraal Plan Bureau.

## The biased nature of the agenda

The original intention of “better lawmaking” has gradually been taken over by other ill-defined and inexplicit aims. The legislative burden and the administrative burden seem to be lumped together as the same thing. “Red tape” and “necessary levels of regulation” are regularly treated as one and the same, even though they are as different as chalk and cheese. The legislative process is a basis of the parliamentary system and an act of sovereign democracy. The law is the fundamental guarantee of a balance between the benefits conferred by economic freedom and the duties entailed by such freedom in terms of oversight, enforcement and evaluation of the activity concerned. The administrative requirements placed on businesses are the expression of demands laid down by the legislator to achieve the purposes of the law. The administrative burden is an inherent, albeit “bureaucratic”, consequence of the law: ensuring compliance through information obligations: reports, statistical data<sup>104</sup>, etc. To confuse legislation and administrative burdens is to undermine the legislator by depicting the administrative requirement as unnecessary and even perverse. It is to disregard the fact that there may be a necessary administrative price to be paid for having certainty and predictability in the law.

But it is also an over-simplistic argument, in that simplifying texts does not necessarily improve them, and vice versa<sup>105</sup>. Clearly understandable rules do not necessarily protect a business or consumer, whereas complex texts may offer adequate protection. Simplifying and improving the quality of legislation are aims that must be tied to greater overall certainty in the law.

Also, a causal link is often made between the level of regulation and its associated administrative burden, and the competitiveness of the European Union. But competitiveness depends on a variety of other factors that go far beyond the burden of regulation and administration. They include investment conditions, level of taxation, management<sup>106</sup>, the level of education and training of

<sup>104</sup>. These information obligations are what have enabled public authorities to trace sources of contamination, investigate money laundering networks, or uncover systematic fraud.

<sup>105</sup>. “This overriding need for a simple explanation of the complex is disingenuous. It has become discernibly systematised, prescriptive and turned into inexorable rules of policy action in recent years” (*unofficial translation*) (Monjal, P.-Y. (2003) “Simplifiez, simplifiez, il en restera toujours quelque chose ... La simplification des instruments juridiques de l’Union”, *Revue du droit de l’Union européenne*, No. 2, p. 343-368).

<sup>106</sup>. On which, see the recent study by Dorgan *et al.* (Dorgan, S.J., J.J Dowdy and T.M. Rippin (2006), “The link between management and productivity”, *The McKinsey Quarterly*, Web Exclusive, No. 24 February.) “Managers are more important than the industry sector in which a company competes, the regulatory environment that constrains it (*emphasis added*), or the country where it operates.”

businessmen and workers, productivity, quality of infrastructure, technology and non-technology innovation, the creativity and inventiveness of businesses, etc. At some point, questions will have to be asked about why the Better Regulation agenda is being spun as the key to the EU's competitiveness when at the end of the day, it is only one - and probably not the most decisive - part of an overall strategy for good governance.

### **Reducing the administrative burden: prosecution or persecution?**

There is no doubt that unnecessary red tape should be completely eliminated, but there are many examples of "necessary" administrative burdens without which it would be hard to enforce the law. Three examples are given here.

#### The European emissions trading system (ETS)

Since 1 January 2005, 12 000 large industrial facilities in the EU have been allowed to buy and sell "pollution rights" - specifically, the right to discharge greenhouse gas emissions into the atmosphere. This new system, based on a directive<sup>107</sup> allows companies that exceed their greenhouse gas emission limits to buy allowances from more environmentally efficient firms and helps to achieve the EU's Kyoto Protocol objectives. To minimize the economic effects of the commitments to tackle climate change, the EU decided to create an internal market for companies to trade CO<sub>2</sub> emission quotas. About 10 000 energy-intensive plants can buy and sell emission credits representing approximately 40% of total CO<sub>2</sub> emissions in Europe. Sectors concerned by this system include the power generation, steel, glass, cement, pottery and brick-making industries. An emission limit is set for each firm within a National Allocation Plan (NAP) submitted by Member States and approved by the Commission. Companies that exceed their individual target must pay a fine per tonne of CO<sub>2</sub> emitted, which was around 100 euros in 2008.

Compliance with these commitments places a high administrative burden on the European Union and Member States.

#### **Registries**

Member States are required to provide for the establishment and maintenance of a registry<sup>108</sup> to ensure the accurate accounting of the issue, holding, transfer and cancellation of allowances. The Commission will establish a standardised and secured system of registries in the form of standardised electronic databases containing common data elements to track the issue, holding, transfer

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**107.** Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community, *Official Journal of the European Union*, L 275, 25 October 2003, p. 32-46.

**108.** Directive No. 2008/101/EC, 19 November 2008, Article 1.

and cancellation of allowances, to provide for public access and confidentiality as appropriate and to ensure that there are no transfers incompatible with obligations resulting from the Kyoto Protocol.

#### **Reports submitted by the Member States**

Each year, the Member States must submit to the Commission a report on the application of the directive<sup>109</sup>. This report pays particular attention to the arrangements for the allocation of allowances, the use of emission reduction units (ERUs) in the Community scheme, the operation of registries, the application of the monitoring and reporting guidelines, verification and issues relating to compliance with the directive and the fiscal treatment of allowances, if any.

On the basis of these reports, the Commission will publish a report on the application of the directive within three months of receiving the reports from the Member States.

The Commission will organise an exchange of information between the competent authorities of the Member States concerning developments relating to issues of allocation, the use of ERUs in the Community scheme, the operation of registries, monitoring, reporting, verification of emissions and compliance with the directive.

#### **Verification**

Emissions from each activity are subject to verification. The verification process addresses the reliability, credibility and accuracy of monitoring systems and the reported data and information relating to emissions, in particular:

- the reported activity data and related measurements and calculations;
- the choice and the employment of emission factors;
- the calculations leading to the determination of the overall emissions; and
- the appropriateness of the choice and the employment of measuring methods.

#### **Methodology of analysis**

The verification system is also based on three types of analysis:

- strategic analysis: verification is based on a strategic analysis of all the activities carried out in each installation. This requires the verifier to have an overview of all the activities and their significance for emissions;
- process analysis: verification of the information submitted is carried out on the site of the installation. The verifier uses spot-checks to determine the reliability of the reported data and information;
- risk analysis: the verifier submits all the sources of emissions in the installation to an evaluation with regard to the reliability of the data of each source contributing to the overall emissions of the installation.

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**109.** Directive No. 2004/101/EC, 27 October 2004, Article 1.6.

Despite the significant administrative burden of the ETS system, the Commission considers in its impact assessment that the EU will gain substantially from it<sup>110</sup>.

## Tackling employment discrimination

Directive 2006/54 of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment between men and women in matters of employment and occupation<sup>111</sup> calls on Member States to continue to develop and analyze comparable statistics disaggregated by sex and make them available at the appropriate levels (recital 37 of the Directive). The Directive also requires Member States to communicate to the Commission by 15 February 2011 all the information necessary for the Commission to draw up a report to Parliament on the application of the Directive.

An anti-discrimination framework has been created that requires the employer to retain the underlying documents (curriculum vitae, copies of interviews, ranking of applicants, etc.) of people he has employed to enable action to be taken if relevant against a discriminatory decision based on criteria other than those set out in the application form (discrimination on the grounds of sex, age, ethnicity, etc.).

This is a necessary administrative burden because it ensures the effective exercise of a fundamental right and redress in the event of discrimination.

## The Directive on the application of patients' rights in cross-border healthcare

Drawing on the research and extensive consultations carried out before adopting the proposal for a directive<sup>112</sup>, the Commission estimated that the data on cross-border health care were not sufficiently available or comparable to enable its long-term assessment and management. The Commission therefore considered that this burden could be eliminated. But properly-kept statistics and additional data on cross-border healthcare are vital to the efficient monitoring, planning and management of health care in general and cross-border healthcare in particular. Such statistics give a better understanding of the impact of cross-border healthcare on health systems as a whole. They ensure that a balance is struck between free provision of health services, a high level of health protection and respecting the responsibilities of Member States for ensuring the overall objectives of their health systems.

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**110.** Commission Staff Working Document, *Accompanying document to the Proposal for a Directive amending Directive 2003/87/EC*, SEC (2008) 52, 23 January 2008.

**111.** Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, *Official Journal of the European Union*, L 204, 26 July 2006, p. 23-36.

**112.** Proposal for a Directive on the application of patients' rights in cross-border healthcare, COM (2008) 414 final, 2 July 2008.

## The potential risks of the better regulation agenda

### The dialectical tension between the pre-eminence of competitiveness and the primacy of the general European interest

The Better Regulation agenda provides insights into the ongoing power struggle between Member States, institutions and stakeholders. As has been seen, it is a delicate exercise that is not without consequences for the Community acquis and method and, beyond that, EU policy-making. Basically, it is a clash of two approaches: one based on the primacy of the general European interest by dint of striking a balance between the three pillars of the Lisbon Strategy (economic, social and environmental), the other on the pre-eminence of one aspect – competitiveness – over the others.

In relation to its three components (simplification, impact assessment and reducing the administrative burden), the Better Regulation agenda is in a state of permanent dialectical tension between two approaches which are also policy options:

- maintaining and developing the Community acquis (paragraph 35 of the IIA and Article 2 TEU) *versus* reducing or even watering it down;
- more rule-making and regulation *versus* removing rules and deregulation;
- balance among the three pillars (economic, social and environmental) of the Lisbon Strategy *versus* the pre-eminence of competitiveness;
- the primacy of the Community method (paragraphs 16 and 17 of the IIA): harmonisation and mutual recognition *versus* alternatives to regulation: self-regulation and co-regulation;
- the Commission's exclusive right of initiative *versus* the parallel initiatives of high level, technical, independent groups;
- respect for interinstitutional balance and the common approach of the three institutions *versus* interference in the legislative and non-legislative process by lobbies and interest groups...

### The risk of bureaucratisation of the process

Paradoxically, as it has developed, the Better Regulation agenda has stage-by-stage spawned its own bureaucracy – the very thing it was intended to fight against. It has given rise to new bodies to monitor its implementation, assess its relevance, set it new objectives. This propensity to add extra intermediate layers to the traditional decision-making machinery has made the exercise increasingly less transparent and more unwieldy. In this connection, the risk inherent in the standard cost model - the illusion that everything is measurable – is not to be lightly dismissed. Perversely, putting a cost on every piece of legislation and the burden it creates could hijack the substantive debate on the best policy options and deter the Commission's exercise of its right of initiative.

## **The gradual transformation of the Better Regulation agenda**

The Better Regulation agenda has gone through three partly overlapping periods of change.

The beginnings cover the period from 1993 to 1999. Better regulation/lawmaking is seen as the driving force for good governance of the EU: ensuring that subsidiarity and proportionality are observed, improving the quality of lawmaking and drafting, simplifying the Community acquis.

The period 2000-2006 finds the Better Regulation agenda informing the Lisbon Strategy. The launch of the Lisbon Strategy in 2000 arguably sees the first change in the nature and an incipient “refocusing” of the Better Regulation agenda: it must now contribute to renewed growth and making businesses more competitive. The Better Regulation agenda steadily loses touch with its basic aim (improving lawmaking and promoting the good governance of the EU) to embrace a different kind of aim: supporting the competitiveness of businesses. The governance of the EU and the institutional undertone of the Better Regulation agenda gradually give way to issues of more practical concern to firms. The period 2000-2004 (Prodi Commission) was a time of “peaceful” coexistence between the thematic focuses developed between 1993 and 1999 and putting Better Regulation to work for EU competitiveness. This is evidenced by the extremely balanced 2003 Interinstitutional Agreement in particular. The Conclusions of the 2005 UK Presidency also arguably reflect a good balance between the two aspects: simplifying while respecting the acquis and contributing to the EU’s competitiveness.

The period starting in 2007 after the European Council of 15-16 March 2007 is arguably wholly in line with the renewed Lisbon Strategy, preparing to raise its game, namely: how to make Better Regulation work more for business competitiveness (the growth focus is gradually fading) moving from words to action. The hallmark of this period is competitiveness as the be-all and end-all, evidenced by the goal of a 25% reduction in the administrative burden, the time-consuming further development of procedure-bound impact assessments, the increased number of intermediate bodies (the Impact Assessment Board in 2006, and the Stoiber Group in 2007) responsible for screening all Commission initiatives, and the proliferation of tests prior to any legislation being introduced: integrated impact assessment, subsidiarity and proportionality tests, internal market test, SME test, external competitiveness test, and so on. This was the phase of refocusing Better Regulation, and peaked in 2009. Not just the United Kingdom, the Netherlands and Denmark, but also the European Parliament and business lobbies are calling for a net target to reduce administrative burdens. In a clear sign that its nature is changing, it is now no longer just the “administrative burden” but regulatory constraints that are being described as a hindrance (see the conclusions of the Competitiveness Council of 28 May 2009). This reduces the process to reckoning up the potential savings that could be achieved through making fewer laws or drastically reducing their administrative burdens. Finally, the Swedish Presidency

showed itself surprisingly keen to give Better Regulation an even more “business oriented” spin, to the extent that the Commission saw fit to distance itself from this all-out approach and call for a more balanced approach which would give more weight to preserving the institutional balance and social impacts, and where an ex-post assessment of legislation would be done to assess the entire legislative chain and its economic, social and environmental impacts. This is the current phase, but a fourth phase (2010-2014) is likely to follow on. The first post-financial crisis measures taken by the Commission to regulate markets are a tentative first step down this road, perhaps heralding a new wave of legislation and further regulation by the European Union, in the financial sector at any rate. The Commission is set to submit a new package in September 2010 suggestively-named “*smart regulation*”.

Table 3 **Better Regulation: Summary of key dates and events**

29 January 2010	Impact Assessment Board Report 2009
3-4 December 2009	Conclusions of the Competitiveness Council (Swedish Presidency)
22 October 2009	Programme of Action for Reducing Administrative Burdens in the EU. Sectoral plans and relief measures for 2009
28 May 2009	Conclusions of the Competitiveness Council (Czech Presidency)
5 March 2009	Progress of work under Czech Presidency
January 2009	Commission's Third Strategic Review of Better Regulation for the March 2009 Spring Council
25 September 2008	Competitiveness Council Conclusions (French Presidency)
28 May 2008	Progress Report to the Competitiveness Council (Slovenian Presidency)
January 2008	Commission's Second Strategic Review of Better Regulation for the March 2008 Spring EC
22 November 2007	Competitiveness Council: Progress Report
9 October 2007	ECOFIN Council Conclusions: Better regulation: improving competitiveness
17 September 2007	First fast-track decision adopted by the European Parliament (Merger Directive)
15 September 2007	Edmund Stoiber appointed to chair the HLG on reducing administrative burdens
5 September 2007	Commission Communication on the application of Community law
19 June 2007	Evaluation of Commission's Assessment System - PET (UK)
March 2007	European Council gives new impetus to reducing the administrative burden
30 January 2007	ECOFIN Council Conclusions on the administrative burden
January 2007	Action Programme for Reducing Administrative Burdens-COM (2007) 23
4 December 2006	Competitiveness Council Conclusions on Better Regulation
15 November 2006	Commission's First Strategic Review of Better Regulation for the March 2007 Spring Council
14 November 2006	Commission's Impact Assessment Board set up
10 October 2006	ECOFIN Council Conclusions on the administrative burden
5 April 2006	Members of the HLG of national experts on Better Regulation appointed
28 February 2006	Group of National Experts on Better Regulation set up (2006)
29 November 2005	Interinstitutional Common Approach to Impact Assessment
November 2005	Conclusions of the Competitiveness Council
8 November 2005	ECOFIN Council Conclusions on the administrative burden
Sept. – Oct. 2005	4th Commission package
31 December 2003	Interinstitutional Agreement on Better Lawmaking
12 February 2003	3rd Commission package

<b>June 2002</b>	2nd Commission package
<b>Nov. – Dec. 2001</b>	1st Commission package
<b>28 November 2001</b>	Interinstitutional Agreement on a more structured use of the recasting technique for legal acts
<b>22 December 1998</b>	Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation
<b>1995</b>	Amsterdam Treaty: Protocol on the principles of subsidiarity and proportionality
<b>20 December 1994</b>	Interinstitutional Agreement on an accelerated working method for official codification of legislative texts
<b>25 October 1993</b>	Interinstitutional Agreement on procedures for the implementation of the subsidiarity principle
<b>1993</b>	Statement No. 18 on estimated costs under Commission proposals and No. 19 on the implementation of Community law

## Part 7

# The simplification programme illustrated

As a result of Better Regulation, hundreds of laws have been sifted through in detail, and some have been scrapped, adapted, simplified, coordinated, codified or recast. Examining whether the Commission had made the right choices would be laborious and premature at this point. But a useful purpose may be served by looking at a few examples of proposals that arguably go towards a “smart” rationalisation<sup>113</sup> and others that have - wrongly or rightly – been considered as more questionable.

### Three cases of partial success

#### The REACH Regulation

The new REACH Regulation is an ambitious attempt at simplification. It replaces about 40 pieces of legislation in force; it will lead to the safety assessment of over 30 000 chemicals<sup>114</sup> that were placed on the market before 1981 - the year since which formal applications for authorisation are required - and are produced or imported in quantities above 1 tonne per year. Of these, nearly 3000 dangerous substances will be subject to a strict authorisation procedure with no assurance of being able to remain on the market. In future, therefore, it will no longer be for the public authorities to prove that products are harmful, but for manufacturers to prove that they are safe. The regulation's underlying principle is open to wide interpretation to the effect that the production, import and marketing of substances must be done responsibly and with a duty of care to ensure that in reasonably foreseeable circumstances human health or the environment are not affected. This regulation came into force on 1 June 2007 and will be implemented to a complex timetable set by it. Substances already on the market must be registered no later than 1 December 2010 for any substance produced or imported in quantities above 1000 tonnes per year, within six years for quantities between 100 and 1000 tonnes, and within eleven years for quantities above one tonne. It requires producers or importers of

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**113.** Other successful examples exist: the Customs Code, the revisions of the investment funds (UCITS), the regulation on block exemptions for state aid, the revised Company Law directive, the revision of Intrastat, etc.

**114.** This figure is an initial estimate. However, some 150 000 chemicals have been pre-registered. Current estimates are that approximately 20 000 chemicals will be registered by 31 December 2010. Between now and June 2018, over 50 000 chemicals will be registered.

chemicals to test and register all these substances with a European Chemicals Agency, which will issue or refuse registrations. After evaluating the dossiers, restrictions, or uses subject to prior authorisation will be imposed.

## The revision of the Directive on medicinal products for human and veterinary use

The revision of the Directive on medicinal products for human and veterinary use is an example of successful harmonisation<sup>115</sup>. Medicines are regulated throughout their lifetime. Changes made after they have been placed on the Community market (especially affecting the production process, packaging or manufacturer's address) are called "changes" in legal terminology and have to be dealt with through complex amending regulations. But these changes place a heavy administrative burden on businesses and the regulatory authorities. Estimates put this at over 60% of the human and financial resources of the company departments dealing with regulatory issues. A substantial share of the burden comes from the fact that in most cases, national provisions vary between Member States, resulting in a lack of harmonisation of requirements and unnecessary administrative burdens. While beneficial changes must be regulated to ensure that medicines remain safe and effective, the resulting burden may also stop certain changes being made that would benefit society in general and patients in particular. The Commission has proposed revising the legal basis of amending regulations by amending Article 39 of Directive 2001/82 and Article 35 of Directive 2001/83 so that the provisions relating to changes can be fully harmonised within the European Union. This will clarify, simplify and ease the regulatory framework governing changes to medicinal products (e.g., change of packaging, manufacturer's address, etc.).

## The Food Labelling Directive

Directive 2000/13/EC<sup>116</sup> was intended to create a single labelling rule to protect consumers against misleading descriptions of products and misleading advertising on pre-packaged foods. Various stakeholders felt that food labels had grown increasingly wordy, laborious and inefficient. They argued that consumers were faced with confusing labels bearing nutritional information or a list of ingredients written in microscopically-small print.

An important amendment to the EU Food Labelling Directive (Directive 2000/13/EC) was adopted by Parliament on 2 July 2003.

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**115.** Directives 2001/83/EC and 2001/82/EC, *Official Journal of the European Union*, L 311, 28 November 2001.

**116.** Directive 2000/13/EC of the European Parliament and Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, *Official Journal of the European Union*, L 109, 6 May 2000, p. 29-42.

The amendment ensures that consumers are informed of the complete contents of foodstuffs subject only to a very limited number of exceptions.

The new rules abolish the “25% rule” which currently means that it is not obligatory to label components of compound ingredients that make up less than 25% of the final food product.

Also, Council and Parliament laid down a list of twelve ingredients liable to cause allergies or intolerance. Whatever exceptions apply, the presence of these ingredients or their derivatives must be shown on the label with a clear indication of their source (e.g., soya lecithin). Also, they will have to be listed even when they form part of a compound ingredient that does not have to be listed on the label. This applies to foods whose composition is defined in European regulations (honey, jam, chocolate, etc.) where they form less than 2% of the composition of a product.

## Two questionable cases

### The withdrawal of the proposed Regulation on the Statute for a European mutual society

Notwithstanding that the Council's work on the proposed regulation on the European mutual society<sup>117</sup> had been in a political impasse since 1996, the Commission's withdrawal of its proposal in 2005 did not at first go unchallenged. In fact, the Commission's reasons for the withdrawal were that very political stalemate and changes in the legal framework. Progressive circles, mutual societies, as well as France and Belgium, however, thought it an ill-advised move, arguing that the recent establishment of a European private company and the European cooperative society made a regulation on the European mutual society essential to complete the legal framework that allows undertakings to operate in the internal market.

For one thing, mutual societies arguably help to shape the internal market. Such a status exists in twenty of the twenty-seven EU Member States<sup>118</sup>. Mutual societies make up a substantial share of the EU market, accounting in the insurance sector, for example, for nearly 20% of the market.

Secondly, like other undertakings with their own statute (*i.e.*, *body of rules governing their legal status*), mutual societies must be able to take full advantage of the internal market. But the lack of a European statute disadvantages mutual societies when competing with PLCs (public limited companies), for example. Mergers of mutual societies across EU borders and the creation of EU-scale groups of mutual societies are held back by the lack of common rules.

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<sup>117</sup>. 1991/0390/COD.

<sup>118</sup>. Estonia, Lithuania, the Czech Republic, Slovakia and Greece have no such status.

This cannot be dealt with by the existing Cross Border Mergers Directive<sup>119</sup>, for instance, not least because it contains no clear and distinct rules on mutual societies. An EU Regulation could have harmonised the legal rules, paving the way for consolidation of mutual societies.

At the Competitiveness Council of 29 November 2005, both France and Belgium spoke out against the Commission's withdrawal of this proposal, and to call for further discussions on it. Vice-President Verheugen pledged the Commission to draft a new proposal<sup>120</sup>. As yet, no Commission initiative has been forthcoming.

The Commission President subsequently proffered an explanation in a letter dated 6 March 2006<sup>121</sup>, which also addressed the requests made by the European Parliament in a letter dated 23 January 2006. In it, the President of the European Commission wrote that since the proposals concerned a system related to the European social model, the Commission would review developments in these organisations and look again at the possibility of making proposals at a later date. The argument relied on the importance of these texts for the "European social model", but President Barroso was vague about when the texts would be reconsidered in the light of new political developments.

In early 2009, Parliament adopted a resolution on the social economy<sup>122</sup> in which it "notes that there is a need for the recognition of European statutes for associations, mutual societies and foundations to ensure that social economy enterprises benefit from equal treatment in internal market law", "considers that the withdrawal of the Commission's proposals for regulations of the European Parliament and of the Council on the statute for a European association and on the statute for a European mutual society is a significant setback for the development of these forms of social economy within the European Union", and "therefore urges the Commission to review its work programme accordingly".

### Excluding micro-enterprises from the scope of Accounting Directive 78/660/EEC

In its Communication COM (2009) 83 final of 26 February 2009, the Commission proposes allowing Member States to exempt micro-enterprises from the requirements of the Accounting Directives. Micro-enterprises are defined as companies who do not exceed the thresholds of two of the following three

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**119.** Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies, *Official Journal of the European Union*, L 310, 25 November 2005, p. 1.

**120.** Consultations between the Commission and Parliament are still ongoing at the time of writing.

**121.** Barbier, C. (2006) "La ratification du Traité établissant une Constitution pour l'Europe", *Courrier hebdomadaire du CRISP*, No. 1939-1940, p. 49.

**122.** 2008/2250 (INI), 19 February 2009.

criteria: balance sheet total less than 500 000 euros, annual turnover below 1 000 000 euros, and an average workforce of fewer than 10 over the financial year. The Commission considered that such a measure would constitute a major reduction of administrative burden for those entities and encourage new start-ups<sup>123</sup>. It estimated at 6.3 billion euros the savings that could be made by small firms under the best-scenario assumption that all Member States take up the option without imposing additional demands. The measure was opposed in the Council by a minority of Member States on the grounds that:

- the publication of annual accounts is extremely useful, including for small firms. Public and private, national and international bodies and authorities can make use of the public and directly accessible information to assess the quality of the firm. Credit institutions, in particular, use this data to judge the solvency of firms and to grant loans. A loss of confidence by banks could push up the cost of borrowing;
- the measure could increase rather than reduce bureaucracy and red tape to the extent that each individual credit institution, supplier, government agency and company would be apt to ask the small firm to supply its accounts as proof of its soundness in terms of solvency, liquidity and profitability. It could therefore produce an unnecessary proliferation of burdensome and costly administration;
- it risks increasing information asymmetry<sup>124</sup>, and hence distorting competition among firms. Firms from Member States that exempt small firms from the requirements of the Accounting Directives will have direct access to all the accounting information of companies in countries that did not adopt the measure, but not vice versa.

Opponents argued that the proposal would create a lack of transparency, unfair competition, an increase in secret transactions, rampant red tape, time lost for small firms, higher costs and more. They argued that the best way to go would in fact be a simplified but harmonised accounting system for all Member States.

A solid blocking minority of states (Italy, Spain, Portugal, Austria, Luxembourg) led by France and Belgium gave the Commission proposal a rough ride, arguing that the requirements for micro-enterprises could be reduced stopping short of an outright exemption. There was, they said, a need for transparency and a level playing field for all at Community level. The EP's plenary vote held on 24 February 2010 went in favour of the rapporteur, Klaus-Heiner Lehne (EPP-ED). Under the ordinary legislative procedure (Article 294), the

**123.** In the National Bank of Belgium' best-scenario assumption, this would have meant that at least 72% of the Belgian companies who currently file annual accounts with the Belgian Central Balance Sheet Office would no longer have to do so, or even keep anything that could seriously be called accounts. The percentage was almost 90% for other European countries like France and Portugal.

**124.** "Such a development would make it harder for individuals, businesses and institutions to procure the information they need. It would therefore make it harder for firms to get information about their suppliers and customers", Opinion No. 1150, Central Economic Council on the Commission Communication on a simplified business environment for companies in the areas of company law, accounting and auditing, 3 October 2007, p. 8.

matter now has to go to Council to adopt a common position, paving the way - if positions are not too far apart – for a second reading or opening a conciliation procedure.

The European Parliament supported the European Commission's proposal to exempt micro-entities from the obligation to draw up annual accounts by adopting Klaus-Heiner Lehne's (EPP, Germany) report recommending the adjustment by 445 votes to 196 against with 21 abstentions on 10 March 2010.

The 8 March plenary debate heard mixed views on the proposal from MEPs. Many Socialist MEPs (and several Green and United Left MEPs) supported the amendment tabled by Belgium's Dirk Sterckx (ALDE) calling for the proposal to be rejected and a more comprehensive impact assessment done. "*Giving Member States the opportunity to exempt small businesses on a sporadic basis goes against the principle of equal treatment and will create distortions of competition*", argued Françoise Castex (S&D, France). This is a view shared by the European Association of Craft, Small and Medium-sized Enterprises (UEAPME), the Association of Chartered Certified Accountants (ACCA), which is a member of it, and by the European Federation of Accountants and Auditors for SMEs (EFAA). All three bodies believe that any such exemption is unlikely to generate reduced costs and will create an uneven playing field between companies.

Attention is now focused on the Council, where a compromise has to be worked out. A minority of countries - namely Austria, Italy, Portugal, Luxembourg, France, Malta, Ireland, Greece, as well as Spain and Belgium (the current and forthcoming Presidencies of the Council, respectively) - are still blocking the measure.

## Conclusion

At the end of this study, elements of a pattern to Better Regulation can be picked out.

First, the Better Regulation agenda is a huge, almost sprawling, work in progress which the Barroso I Commission has held out as one of the main drivers of the “renewed” Lisbon Strategy. As the 2000-2010 Lisbon cycle comes to an end, the record is mixed. On the one hand, the Community acquis has been simplified through codification and the withdrawal of outdated laws. Impact assessments are now carried out on all substantive measures initiated by the Commission, which has also launched an ambitious programme to reduce the administrative burden.

Secondly, the results achieved are on the slim side: a lack of conclusive outcomes in practice, methodological difficulties, a proliferation of intermediate bodies to strengthen the impact assessment or reduce the administrative burden ... As things stand, the Better Regulation agenda seems to have further complicated the preparatory work. Despite all the efforts, the proposals to simplify the Community acquis have rarely simplified matters in real life for business, public authorities or the public. It bears pointing out that the survey done in the Netherlands - the pioneer in the field - showed that 70% of Dutch business leaders have felt no effects from Better Regulation. From this perspective, the Better Regulation agenda is something of a let-down.

Thirdly – although it cannot be blamed for this - the Better Regulation agenda was unable to pre-empt the economic and financial crisis, due in part to under-regulation of financial services. The Better Regulation agenda should have engaged a positive and proactive approach from the outset, including by examining this particular sector to determine whether there was a need for more regulation rather than relying on the ability of the businesses concerned to regulate themselves. It is clear that the overall architecture of regulation is not just about simplifying the acquis, assessing the impact of the institutions’ new initiatives, or reducing the administrative burden. The Better Regulation agenda needs to have a much broader sweep taking in the entire governance of the European Union. To this extent, enlisting “external expertise” to select priority areas for simplification or an “independent consultant” to gauge the progress made by the institutions must be approached with caution. Granted it has proved useful in some cases, but the Commission’s power of initiative as well as the decision-making capacity of the other two institutions (European Parliament and

Council) could be undermined without realising it. Democracy would be endangered if the Better Regulation agenda were to result in “government by experts”. From this perspective, Better Regulation is a latent threat.

Fourthly, the Better Regulation agenda is tied into a more fundamental debate: that on the essence and nature of the European Union. Is the EU a talking shop for ratifying policy decisions taken elsewhere? Does it necessarily have to legislate to deliver the objectives laid down by the Treaty? Should it not consider alternatives to regulation first? Subsidiarity has been a means for some countries like Germany to challenge certain initiatives, and others like the United Kingdom to demand that the market be left to decide more. This demand for it to take a reduced role on two fronts has challenged the EU's ability to act, which could result in a crisis of legitimacy. To this extent, the divide often found between the signatories to the 2008 Prague Declaration (Germany, United Kingdom, Netherlands, Denmark, Czech Republic, Sweden, Estonia) and the other members of the European Union gives cause for concern.

Fifthly, by giving the impression that Better Regulation can generate savings (40 billion euros announced) and help businesses to become more competitive, the Commission raised expectations, especially among SMEs, which are likely to be disappointed. With the exemption for micro-entities from the Accounting Directives' requirements, the proposed regulation on the statute of the European mutual society and to a lesser extent, the Late Payments Directive all thrown into doubt, some of the Commission's predicted gains are anything but certain and may be on shaky ground. Also, the promised savings are underwhelming relative to the huge capital requirements needed to prime the economic recovery.

Sixthly, the competitiveness of the European economy is a central issue, of that there is no doubt. But by favouring an approach based purely on minimising costs to business (the net targets based on the Standard Cost Model), the Union risks upsetting the traditional balance between efficiency, competitiveness and productivity on the one hand, and overall security, sustainable development and social cohesion in the broad sense, on the other. Improving the quality of regulation, access to law and legal security are no less important things, and must be assessed by reference to the purpose of each law without disregarding the social and environmental costs, indirect costs and the cost of non-regulation. Some administrative costs are useful - monitoring the climate and energy package, traceability that is essential to public health, and the liability of financial services providers are cases in point.

Finally, following the adage that “he who controls the rules, controls the markets”, means that “smart”, innovative regulation can add up to new market opportunities. The EU's bold efforts to regulate for environmentally-friendly vehicles with strict CO<sub>2</sub> emission standards will help capture market shares. Far from being an objective, competitiveness can be a powerful means of promoting technological innovation with proper regard for high social and environmental standards.

Instead of carrying on down the road taken so far, will the new 2009-2013 Commission rethink the Better Regulation agenda and put the programme on hold? It seems to have that in mind. It could set about evaluating, with the new European Parliament, Council and the consultative bodies (Committee of the Regions and the European Economic and Social Committee), the new impetus and guidelines needed for this issue, particularly in view of the Europe 2020 strategy. If the European Union is to remain a relevant framework for regulation and solidarity, then the new College of Commissioners and the new European Parliament must break with a purely financial and numbers-based approach to regulation and get to grips with a balanced, coherent, quality-based and efficient combination of regulation/rule-making.

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