

# ETUI Policy Brief

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### The Better Regulation agenda: a 'new deal' in the building of Europe?

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## Policy implications

Scrutiny of the Better Regulation agenda reveals the European Commission's use of doublespeak. Feigning a concern for modernisation, simplification and improvement of the quality of Community regulation, the Commission has embarked, with the help of the Council and the tacit approval of the European Parliament, on an insidious enterprise to deregulate the Community *acquis*. 'Business competitiveness must be saved' is the endlessly repeated refrain employed to curb the Commission's right of legislative initiative, limit the co-legislators' right of amendment and reduce the administrative and regulatory burden entailed by Community provisions. Bureaucratisation of the process and the sudden appearance of new actors (private consultants and interest groups) must alert us to the true aims of the Better Regulation agenda.

## Introduction

On 3 September last, on the eve of his re-election as President of the European Commission, José Manuel Barroso drafted a text outlining the priorities for action as he succeeded himself in office. In these 'Political guidelines for the next Commission' Barroso stated that 'the challenge for the next Commission will be to devise a smart regulatory approach in key policy areas. This will require rules to ensure transparency, fair play and ethical behaviour of economic actors, taking due account of the public interest. Smart regulation should protect the consumer, deliver effectively on public policy objectives without strangling economic operators such as SMEs or unduly restricting their ability to compete.' He continued, 'The Commission has instigated a revolution in the way policies are made at EU level, with public consultations and impact assessment now the norm for new legislative proposals and a major simplification of existing Community law now underway.' A revolution? Really? In the following pages, our aim is to return to the rudiments of the Better Regulation initiative and examine its component parts. We will attempt to show how this 'common-sense' agenda entails a hidden agenda and constitutes a risk for the Community *acquis* and the Community method. Using two examples, we will illustrate how the Better Regulation initiative

has moved beyond its initial praiseworthy intentions and has begun to jeopardise a previously existing and fragile balance.

## The hidden face of Better Regulation

The originality of the Better Regulation agenda lies in its aims and the ways in which it sets about achieving them. To the traditional aim of making laws that are clear, simple and understandable, an economic aim has been added, namely, to improve the competitiveness of businesses. The impact of legislation in terms of its costs and effect on firms' competitiveness is henceforth subject to systematic analysis and this economic analysis may even entail effects on the substantive content of regulatory acts. It has become a question of finding tools which, while

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satisfying the general requirements stipulated by the Treaties (to promote sustainable development, create quality jobs, and so forth), will have the least possible negative effect on business competitiveness. This determination to reduce, as much as possible, the cost to firms – and particularly small businesses – constitutes the first radical innovation in the approach to law-making. It constitutes also a twofold constraint within which it is not easy to achieve a balance. The requirement, after all, is tantamount to the demand to find a way of combining the promotion of sustainable development – a notion which, in its very essence, rules out a short-term economic vision – with the competitiveness of European businesses that have to deal, on a day-to-day basis, with the contingencies of international competition.

### An agenda in the service of competitiveness?

The primary justification for the Better Regulation agenda was the claim, unanimously upheld within the world of the economy and pretty much shared by the co-legislators, that the regulatory environment of the Community and its Member States is too complex and cumbersome and that it represents a major handicap for EU competitiveness by stifling European businesses, in relation to their American partners, in particular, but to other emerging competitors as well.

According to several studies commissioned by the European Commission, it is indeed true that European businesses labour

under an excessive administrative burden. Thus, according to the study carried out by EOS/Gallup at the request of the European Commission (CEC 2001), the cost of regulation is equivalent to 4% of Community gross domestic product (GDP). Approximately 15% of this cost, i.e. 0.6% of GDP, could, according to EOS/Gallup, be avoided by better regulation, potentially enabling an estimated saving of 50 billion euros. In a study conducted by George M. M. Gelauff and Arjan Lejour (2006), using the 'Standard Cost Model', the costs for business were estimated, for the Netherlands alone, at 16.4 billion euros, equivalent to 3.7% of the Dutch GNP. Of this sum, according to Gelauff and Lejour, 40% is attributable to the provisions of international legislation and, more particularly, Community legislation. The Dutch government thus decided, in 2002, to reduce this 'administrative burden' by 25%, i.e. the equivalent of 0.9% of GNP (4.1 billion euros). The critique and the method were taken up by the OECD and incorporated into its own general strategy in this respect, after which the European Union, via the Economic Policy Committee (EPC), espoused the same cause, without having taken steps to control, through appropriate additional studies, the quality of the arguments put forward by EOS/Gallup and the Dutch Centraal PlanBureau.

### The biased nature of the agenda

The initial intention of achieving 'better regulation' has gradually given way to other aims that are neither clearly defined nor explicitly stated. Thus regulatory burden and administrative burden seem to be tarred with the same brush. It is regularly implied without being explicitly stated that 'bureaucratic administrative burdens' and 'necessary levels of regulation' amount to one and the same thing. And yet these two concepts refer to realities that are fundamentally different in nature. The legislative process is constitutive of the parliamentary system and is an act of sovereign democracy. The law represents the essential guarantee of a balance between the advantages conferred by economic freedom and the duties entailed by this freedom in terms of enforcement of regulations, monitoring and evaluation of the activity concerned. The administrative requirements incumbent on businesses are the expression of demands laid down by the legislator in order to achieve the underlying purposes of the law. Administrative burdens, 'bureaucratic' as they may be, are an intrinsic consequence of the law, observance of the provisions of which is ensured by the compulsory supply of information in the form of reports, statistical data<sup>1</sup>, etc. To confuse legislation and administrative burden is to undermine the role of the legislator by presenting administrative demands as unnecessary, if not downright perverse; it is to forget that administrative formalities can have a useful role to play as the necessary counterpart to the need for legal security and certainty.

Table 1: Estimated administrative burden for European businesses as a percentage of GNP – 2003 figures

	As % of GNP	In billions of US dollars
Belgium	2.7	8.1
Czech Republic	3.7	2.7
Denmark	2.4	3.8
Finland	2.4	2.3
France	2.9	61.6
Germany	3.2	85.5
Greece	4.4	10.6
Hungary	4.4	4.4
Ireland	2.4	3.2
Italy	2.4	61.9
Netherlands	3.7	16.4
Poland	4.4	10.0
Spain	2.9	3.4
Sweden	2.4	4.2
United Kingdom	2.4	24.3

Source: Gelauff and Lejour (2006)

<sup>1</sup> It is as a result of such compulsory information, among other things, that the public authorities have, in some cases, been able to trace the origin of contamination, investigate money-laundering networks and reveal instances of fraudulent practice.

This reasoning is, furthermore, reductive to the extent that simplification of texts does not necessarily amount to their improvement, or vice versa. Highly readable texts do not necessarily protect the undertaking or the consumer, whereas complex texts may in some cases actually provide the necessary protection. Simplification and improvement of the quality of regulation are aims that have to be viewed and interpreted from the standpoint of overall better protection and security under the law.

A causal link is frequently established, what is more, between the level of regulation and the administrative burden attaching to it, and the competitiveness of the EU. Yet competitiveness depends on a whole set of additional factors that extend beyond – indeed very far beyond – the question of regulatory and administrative burdens. Such factors include terms of investment, level of taxation, management performance<sup>2</sup>, level of education and training of persons setting up in business and of workers, productivity, quality of infrastructure, technological and non-technological innovation, the creativity and inventiveness of firms, etc. And so it will become important to ask what reasons have caused the Better Regulation agenda to be presented as the focus of efforts to improve the EU's competitiveness when it in fact constitutes no more than one – and probably not the most decisive – component of an overall strategy for good governance.

### Are the Commission's charges against administrative burdens biased?

It is highly significant that the Commission has launched this critical exercise aimed at dismantling or calling into question an administrative burden that, regarded from the standpoint of the public authorities, has a useful role to play. The directive on the application of patients' rights in relation to cross-border health care represents a highly eloquent example in this respect. The Commission, referring to detailed work and consultations conducted prior to the adoption of the proposal for a directive (CEC 2008), proposed withdrawing the draft legislation on the basis of the argument that the statistics on cross-border health care were insufficiently complete or comparable for the purposes of evaluation and long-term management. And yet regular statistics and additional data on cross-border health care are essential for effective planning, management and monitoring of health care in general and cross-border health care in particular. Such statistics contribute to better identifying the incidence of cross-border health care on the performance of health systems as a whole, while ensuring ensure a balance between the freedom to provide health services, a high level of health protection and respect for the competences of the Member States in pursuing the general aims of their respective health systems. Instead of proposing that such statistics should cease to be compiled, it would have been better to propose their harmonisation.

<sup>2</sup> See, in this respect, the recent study by Dorgan et al. (2006): 'Managers are more important than the industry sector in which a company competes, *the regulatory environment that constrains it* (our underline), or the country where it operates.'

### 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 offers insight into the ongoing balance of power between Member States, institutions and stakeholders. It is a delicate exercise and one not devoid of effects on the Community *acquis* and method and, beyond this, on the development of EU policies. In general terms, it entails the confrontation of two separate rationales: one based on the primacy of the general European interest regarded via the search for a balance among the three pillars of the Lisbon Strategy (the economic, social and environmental dimensions); the other on the pre-eminence of a single pole, namely competitiveness, over the others.

If its three components (simplification, impact analysis and administrative burden reduction) are borne in mind, the Better Regulation agenda will be seen to entail a permanent dialectical tension between two broad policy directions, which also constitute political choices:

- Maintaining and developing the Community *acquis* (point 35 of the Interinstitutional Agreement and Article 2 of TEU) *versus* some shedding and even some weakening of its substance;
- appropriate forms of regulation *versus* deregulation;
- balance among the three pillars (economic, social and environmental) of the Lisbon strategy *versus* pre-eminence of the competitiveness aspect;
- primacy of the Community method (points 16 and 17 of the Interinstitutional Agreement): harmonisation and mutual recognition *versus* alternative routes to regulation: self-regulation and co-regulation;
- the Commission's exclusive right of initiative *versus* parallel initiatives by high-level groups, technical working parties, independent stakeholders;
- Respect of inter-institutional balance and a common approach by the three institutions *versus* interference in the legislative and non-legislative process by lobbies and interest groups.

#### The risk of bureaucratisation of the current process

Paradoxically, the Better Regulation agenda has, in the course of its development and in a series of stages, given rise to its own bureaucracy, even though the need to struggle against this phenomenon is the precise reason why the process was first initiated. As such, new bodies have been set up<sup>3</sup> to oversee its implementation, assess its relevance, introduce new aims. This

<sup>3</sup> National expert groups, impact analysis committee, high-level group of independent stakeholders on administrative burden reduction (Stoiber group); external consultants.

tendency to add intermediate layers to the classic decision-making mechanism has, gradually, made the whole exercise ever less transparent and far more unwieldy. The danger of systematically quantifying legislation and the burden generated by it may paradoxically lead to a silencing of the fundamental debate about which political option is to receive priority and to discouraging the Commission's right of initiative.

## Two questionable examples of the Better Regulation agenda

### Exclusion of small businesses from the scope of accounting directives (simplification)

In its proposal of 26 February 2009 to amend Directive 78/660 on the annual accounts of certain types of companies (simplification), the Commission proposes offering the Member States an option that would leave small businesses outside the scope of the accounting directives. The firms in question are those that do not exceed the thresholds in relation to two of the following criteria: total balance sheet lower than 500,000 euro, annual turnover lower than 1,000,000 euro and an average workforce of less than 10 over the financial year. The Commission argued that such a measure would enable a significant reduction of the administrative burden borne by small firms and would encourage people to set up in business. 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 initiative has been contested by a minority of Member States<sup>4</sup> in the Council for the following reasons:

- a) Publication of the annual accounts is extremely useful, including for small firms. Such publication enables public and private, national and international bodies and authorities to make use of the public and directly accessible nature of this information to assess the quality of the firm. Credit institutions, in particular, take this data as a basis on which to judge the solvency of firms and to grant loans. A lowering of trust by banks means that borrowing will become more expensive. The tax administration, meanwhile, uses these figures to levy corporation tax, while competitors, but also partner firms, have access to them.
- b) The risk of not reducing but actually increasing bureaucracy and red tape to the extent that each credit institution, each supplier, each administration, each individual firm will be likely to ask the small firm to supply its accounts as proof of its viability, solvency, liquidity, profitability, etc. The risk, accordingly, is that an unnecessary proliferation of onerous administrative acts will become necessary.
- c) It risks strengthening the asymmetry of information and hence distorting competition among firms. Firms from Member States that exclude small firms from the scope

of accounting directives will have direct access to all the accounting information of countries which did not adopt this measure, while the opposite will not be the case.

The Member States that oppose this proposal recommend as the most appropriate route, on the contrary, a simplified but harmonised accounting system for all Member States.

### The proposal for a directive on the fight against late payments (recasting)

In its proposal of 8 April 2009 to recast Directive 2000/35, the Commission proposes improving the cash flow of SMEs by introducing heavy sanctions in the form of highly punitive interest penalties (16.5%) for late payment of a bill. In plenary session of the European Parliament, on 1 September last, Commissioner Verheugen estimated that 179 MIA euros of additional liquidity could in this way be 'freed up' at the European level. Starting out from a praiseworthy intention – to help SMEs – the proposal introduces a system in which hospitals, universities, schools and mutual insurance funds, in particular, would face severe penalties if they failed to pay bills within 30 calendar days. Insofar as they are themselves dependent on state subsidies, these public authorities risk, under the terms of the directive, being exposed to major deficits or to having to postpone work, investment or purchases on account of the accounting rules introduced by the Directive.

## Concluding comments

To simplify the Community *acquis* and improve the quality of regulation were the initial aims of the Better Regulation agenda. Rapidly, however, the agenda became bogged down by other aims: to analyse the initial impact – above all economic – of European legislation and to reduce administrative burdens by 25% by 2012.

The Better Regulation agenda has today become an important driving force of the battle for European competitiveness. Is this justified? Is this really the purpose it should be serving?

The whole Community *acquis* has been placed under scrutiny and a process of monitoring designed to check up on its relevance.

In the wake of the charges brought against administrative burdens, the whole corpus of European legislation has gradually come to be called into question. Everything is now grist to the Better Regulation mill. The limits of this exercise have been indicated by two examples currently under discussion in the European Council and Parliament.

The situation is exacerbated by the insidious bureaucratisation of the process itself and the increasingly opaque nature of the decision-taking as a result of the proliferation of intermediate structures.

<sup>4</sup> Belgium, France, Italy, Spain, Portugal, Austria and Luxembourg, amounting to a blocking minority of 123 votes out of 345.

Is Better Regulation a war machine or a Trojan Horse intended to undermine the Community *acquis* and method? There can be no denying that reactions so far have been rather defensive and not always to the point. The stance adopted by the European Parliament is frequently enthusiastic and, at best, ambiguous. It is perhaps time to ask the Better Regulation initiative to produce some accounts of the results achieved, on the economic and social and environmental fronts.

One would like to believe that the 'revolution' called for by José Manuel Barroso in favour of 'smart regulation' will be something more than just another slogan, that it will actually herald a redirecting of the exercise along more balanced lines.

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## Annex

### The Better Regulation triptych

The Better Regulation Agenda consists of three pillars. Simplification and improvement of European legislation were the aims initially set. Then came the impact assessment to which all regulation was to be subjected. Finally, there arose the question of administrative burden reduction – which is, in fact, a component of the overall simplification of the legislation – and this came to form the third pillar of the Better Regulation initiative.

#### Simplification and a new regulatory approach

The Commission distinguishes two aspects of improvement of Community legislation: simplification and a new regulatory approach.

##### Simplification

This is an exercise intended to make the substance of regulations simpler and better adapted to users' needs. This general aim is broken down into four sub-headings:

##### *Repealing laws*

This refers to the withdrawal of legislation that has outlived its usefulness. Numerous pieces of legislation adopted since 1957 have, for a range of different reasons, become outdated or obsolete.

##### *Codification*

This consists of the adoption of a new piece of legislation that incorporates the basic provisions and all subsequent amendments. It is to be noted, however, that this method, frequently presented as fundamentally neutral, has been subject to criticism. For example, the 'professional qualifications' directive<sup>5</sup>, presented by the Commission as a codification of already existing provisions, is regarded by the Member States as being rather more than an exercise in 'tidying up the law'.

##### *Consolidation*

Consolidation of legislation is somewhat similar to codification insofar as a basic piece of legislation and all its amendments are brought together into a single text. Although the consolidated texts thus obtained are not subject to an official decision-making procedure and therefore have no legal status, they facilitate access to legislation and reduce its volume.

##### *Recasting*

Recasting is the procedure whereby a new piece of binding legislation, repealing those that it replaces, incorporates

– sometimes quite major – substantive amendments and codification of the remaining non-amended provisions.

Legislation subject to codification, recasting or simplification has to be presented to the legislator for adoption since the structure or the substance of the texts has been altered.

#### A new regulatory approach

This refers to what are modestly labelled 'alternatives to regulation'. There exist two such alternatives, namely, self-regulation and co-regulation.

##### *Self-regulation*

Self-regulation means the possibility for economic operators, social partners, NGOs or associations to adopt, among themselves and for themselves, common guidelines at the European level. This practice covers, in particular, voluntary codes of behaviour or sectoral agreements (cf. §22 of the Interinstitutional agreement<sup>6</sup>). Corporate social responsibility comes under this heading. The two main weaknesses of self-regulation are the absence of sanctions and its relative inability to cope with crisis situations.

##### *Co-regulation*

Co-regulation refers to the mechanism whereby a piece of Community legislation 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) (cf. § 18 of the Interinstitutional agreement). While self-regulation frequently falls short of achieving its aims, co-regulation can be a useful approach, insofar as it associates public authorities and private operators. However, if this approach is to function properly, it is important that the State should retain the final word in relation to regulation, enforcement and sanctions.

#### Screening of Community legislation

Since 2004 the Commission has embarked upon a screening of the whole of the Community *acquis*. This exercise examines the general relevance of regulations, directives and decisions with a view to their amendment or possible withdrawal. The Commission thus proposes, where necessary, the withdrawal, amendment or replacement of specific measures. During this phase, the Commission seeks to remove 'dead wood', in other words the provisions that no longer produce legal effect, and also to 'pick the low-hanging fruits', in other words, to prune legislation that is needlessly complex, redundant, unwieldy or even harmful, particularly for the competitiveness of businesses, and which has to be adapted, coordinated, recast or withdrawn.

<sup>5</sup> European Parliament and Council of the European Union, Directive 2005/36/EC of the European Parliament and the Council of 7 September 2005 on the recognition of professional qualifications, Official Journal L255, 30 September 2005, pp. 0022-0142

<sup>6</sup> Interinstitutional agreement 'Better Regulation', JOL 2003/C 321, 31.12.2003

## Impact analysis of Community legislation

The purpose of impact analysis is to facilitate the process of policy formation. It demarcates and analyses the problem at stake and the aims pursued. It determines the main ways in which these aims can be achieved and assesses the likely incidence at the economic, environmental and social levels. Finally, it points out, in theory, the pros and cons of each option.

The economic, social and environmental effects may be, for example,<sup>7</sup>

- Economic effects: macro-economic and micro-economic effects, particularly in terms of economic growth and competitiveness, i.e. variations in the cost of compliance, administrative burdens for firms and SMEs, implementation costs for public authorities, the impact on the potential for innovation and technological development, trends in investment, market shares and trade structures as well as increases or decreases in consumer prices, etc.
- Social effects: impact on human capital, fundamental human rights, compatibility with the EU Charter of Fundamental Rights, development in employment levels or employment quality, in gender equality, in social exclusion and poverty, impact on public health and safety, consumer rights, social capital, security (including criminality and terrorism), education, training and culture and distributive effects such as effects on specific sectors, categories of consumer or worker;
- Environmental effects: positive and negative incidences associated with environmental developments such as climate change, pollution of air, water and soil, changes in land use, loss of biodiversity, public health developments, etc.

Impact analysis is a method that sets out to select those initiatives that are genuinely necessary: it seeks to represent an aid to decision-making, yet without replacing political judgement. Such, at least, were the Commission's original intentions. It is surprising to note that the Commission is today seeking, with the support of part of the Council, to require the Council and Parliament to perform an impact analysis of their amendments.

## Administrative burden reduction

In 2007 the Commission opened up a third front in its review of the Community *acquis* and renewal of Community method, the aim here being to calculate the impact, on competitiveness and on businesses, of legislation relating to reporting requirements.

## Administrative costs

Community legislation gives rise to two types of costs:

- The costs of establishing compliance with the legislation, in other words, the costs incurred by the Member State

and the economic operators to comply with the European legislation once it has been transposed into national law;

- Costs specifically linked to the requirement for information that, in the absence of a legal requirement, businesses would not collect or supply, i.e. figures and statistics, labelling, information supplied to consumers or workers, etc.

## The Standard Costs Method

In October 2005 the Commission proposed a common European methodology for assessing the administrative costs resulting from existing Community legislation and proposals currently in the pipeline. This methodology is based on the so-called Standard Cost Model<sup>8</sup>, used for the first time in the Netherlands in 2002. This method seeks to facilitate comparison among countries and areas of activity, enabling comparative assessment of performance and development of best practices. It consists in a detailed assessment of the different pieces of legislation, principally based on direct contacts with businesses and on expert opinions (micro-assessment). It collects, among other things, data on the time and wage costs needed to meet each information requirement stipulated by a legislative act. This 'approximation-based' analysis appears subject to caution for at least three important methodological reasons:

- The questions asked of employees for the purpose of assessing administrative costs are not conducted on the basis of a scientifically validated questionnaire;
- Major differences in results can be observed: for equivalent legislation the estimates vary by a ratio of as much as 1 to 5;
- It is a method that allows the assessor and the person questioned a degree of subjectivity such that any extrapolation to a sector or an economy as a whole, *a fortiori* another Member State or the EU27, is highly problematic.

## Fast-track actions

This expression refers to a procedure of the same name used in the United States and which gives the executive the authority to negotiate and conclude trade agreements before a decision has been taken by Congress, while giving Congress a maximum of 90 days to vote the trade agreement. In its communication of 24 January 2007 on the action programme for reducing administrative burdens in the European Union, the Commission refers to a 'a series of fast-track actions where significant benefits could be generated through relatively minor changes in the underlying legislation' and which 'should thus be relatively straightforward to decide and implement without challenging the overall purpose of the legislation'. This means that, in a certain number of cases stipulated in advance, the institutions will attempt to reach agreement among themselves at a single reading instead of the two readings foreseen in the framework of the co-decision procedure (Article 251 TEC).

7 Examples drawn from the Commission Communication on impact analysis COM(2002) 276 final, 5 June 2002.

8 This method was introduced, described and analysed at the OECD. Cf. i.a. 'A review of the standard Cost Model', (GOV/PGC/REG(2005)3, Working party on Regulatory Management and reform, 17 March 2005, which directly inspired the Commission.

The 'reduction of the administrative burden' aspect seeks to identify and remove unnecessary administrative burdens. The Commission has a target of 25% by 2012 in this respect and the 27 Member States are to meet the same target.

*Translation from the French by Kathleen Llanwarne*

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