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# Better Regulation: a critical assessment

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## Preface

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“Better regulation”? Who could be against that? It would be like complaining about sunny weather. But the eye-catching label is on a bottle of bitter potion. So what exactly is it about? The basic idea boils down to two things. The first is explicitly stated, the second implied:

1. Public regulation of any kind is apt to hold back business growth, especially where firms are bound by obligations to society and accountable for what they do in different ways. So it is about cutting the red tape on firms, especially their duty of information;
2. The only good legal rule is one that works to grow the economy. The legitimacy of public intervention must be measured by impact analyses, which means different kinds of cost-benefit assessment.

These ideas hark back to former US President Ronald Reagan’s administration of the early 1980s. In “Reaganomics”, the State was not the solution to the problem, it was the problem. An odd claim by the man who as chief executive of the world’s most powerful state headed up an unprecedented military machine. The deregulation credo found willing ears in Mrs Thatcher’s Britain. The New Labour government spun it, but never disowned that legacy. Meanwhile, the Organization for Economic Cooperation and Development (OECD) formed a kind of pro-deregulation think tank by setting up co-operation between deregulators of the leading industrialized countries. The OECD sponsors the models for calculating the costs of regulation that so appealed to the Barroso Commission. The results yielded by these models are lacking in serious substantiation. But so what? The economic calculation is just a smoke-screen. The real point lies elsewhere: it is about more self-regulation by business, cutting the information firms have to give to the public authorities, their workers or consumers. It is less an economic than a political issue. Putting more power in the hands of employers creates a policy-making system unhampered by the annoyances of democratic elections.

The current financial debacle ought to have dampened the deregulationist zeal. It again gives the lie to the old free-market credo that the sum of individual selfishness will add up to the common good. Telephone-number amounts are being poured into bailing out the financial system, but the political lesson of 25 years of deregulation has not been learned.

That said, the word “deregulation” seems now to have gone out of use, replaced by a variety of alternatives all designed to put a non-political veneer on what is a profoundly political debate: “better regulation”, “better lawmaking”. Commission President Barroso is well-pleased with his communication advisers’ latest brainwave: since September 2009, the buzzword has been “Smart Regulation” – a soundbite phrase that conjures up compact cars and slimming regimes.

When a bureaucracy mounts a crusade against bureaucracy, it does so in its own convoluted and impenetrable way. Typically, it is an arcane process. Most of the documents written by the Commission, its numerous astronomically-expensive consultants and the Stoiber Group are unintelligible to non-insiders. The political issues are covered up by obsessively-repeated, often fanciful figures stacked up one on top of another as if their accumulated weight alone made them meaningful. And the figures can change between documents. They are less a reality-check than a warning salvo. If the Commission wants to lean on member states, it will proclaim that 32% of administrative burdens related to Community law are the result of over-regulation, i.e., national measures to transpose Community laws that go further, are more detailed or more effective than the originals. If the Commission wants to rap the International Labour Organization’s knuckles, it publishes consultants’ reports claiming that 99% of administrative burdens related to two HSW directives originate in international labour conventions.

The impenetrability of the documents and lack of transparency in the methods play into an attempt to marginalize the policy bodies, whether deliberative (Parliament) or consultative, representing conflicting interests. The process is mostly controlled by an assemblage of bureaucracy and private consultants. The only voice that counts in calculating the costs and framing proposals is that of employers through the “Standard Cost Model” and online consultation. The symbiotic relationship between bureaucracy and consultancy is perfectly embodied in Dr. Edmund Stoiber who since November 2009 has worn two hats: Chairman of the “High Level Group” appointed by the Commission and Chairman of the Advisory Board for the Deloitte Group which has been paid millions of euros for work of the most debatable quality. This kind of multiple office-holding does not promote critical judgement.

This publication aims to help puzzle through this situation. It comprises two parts. One analyzes how the standard cost method has been applied to health and safety at work and discusses the respective roles of the Commission, the private consultants headed by the Deloitte group, and the Stoiber Group. The other reviews the latest developments in better regulation and attempts to make sense of documents that are all-but incomprehensible to anyone outside of a select group of officials and consultants. A good overview of the development of better regulation at EU level can be found in Van den Abeele, 2010.

Hopefully, it will help to inform a public debate on the various Better Regulation initiatives and restore to politics what a bureaucratic approach is trying to exclude from it: a discussion of the objectives of regulation and how best to deliver them.

## Part 1

# **“Making lies sound truthful”: applying the Standard Cost Model to European health and safety law**

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*"Orwell's Politics and the English Language is probably the most appropriate pre-reading nowadays for those about to be introduced for the first time to the world of better regulation documents."*

Professor George Yarrow, Oxford  
Regulatory Policy Institute, Memo-  
randum to the House of Commons,  
July 2008

On 22 October 2009, the European Commission put out a press release triumphantly entitled “Cutting red tape: Commission delivers on its promise and goes beyond.” In it, the Commission boasted that the measures it was proposing would enable businesses to save about €40.4 billion from €123.8 billion spent on red tape stemming from 72 EU legal texts and the measures that transpose and implement them in the member states<sup>1</sup>.

The two main Commission instigators of the better regulation campaign saw Parliament and the member states as duty-bound to fall in line. Commission President Barroso said “Businesses are already set to save €7.6 billion a year. That will become about €40 billion if member states and the European Parliament back our proposals in full.” Enterprise Commissioner Verheugen called on Parliament and the member states to toe the line. There was no need for discussion since, he said, “(the measure) does not cost anything.”

This report takes issue with the Commission’s two main claims. No robust methodology underpins the figures it puts up. The 123.8 billion euros in annual costs and 40.4 billion euros annual savings are both more akin to spin than reliable statistical estimates. And Commissioner Verheugen’s claim that the proposed measures cost nothing is more than questionable. A close analysis leads to the conclusion that the proposed measures will arguably come at a high cost for the public, workers and the public authorities.

This analysis looks at one of the thirteen priority areas included in the Commission’s action programme: the working environment. It is an area where sufficient evidence is found to conclude that the policy engaged by the Commission is fraught with peril and that the estimated savings for businesses are likely to have been seriously overstated. A critical assessment of the Commission’s proposals in other areas could lead to similar conclusions. This is clearly a job that needs doing to turn surmise into hard answers.

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1. European Commission press release IP/09/1562, 22 October 2009.

## Setting the scene

The European Commission's current proposals can only be understood against the background of the better regulation campaign.

The long background is formed by a growing number of publications. The bibliography points to a few of these.

The closer background dates from 2005, when some member states began pressing the European Commission to develop a common methodology for estimating the costs of EU rules (IDLUAF, 2004). In October 2005, the Commission opted for a Standard Cost Model already in use to varying extents by some EU states (COM, 2005, d). Even so, the Commission Communication expresses certain misgivings about the positions of the most pro-SCM states and urges more member states to engage national projects based on the method. A pilot phase was launched.

On 20 January 2007, the Commission adopted a Communication entitled "Action Programme for Reducing Administrative Burdens in the European Union" (COM, 2007, a) trailing its intention of reducing administrative burdens for business arising from legislation in the EU by 25%. In this, it is taking the advice of consultants to set a hard target before even beginning to measure the cost assumptions and determine whether those costs are justified or disproportionate to the ends sought (Boeheim, 2007, p. 139). It conjectures that achieving such a reduction from 2012 would lead to a medium term increase in GDP of 150 billion euros<sup>2</sup>. Off the back of this Communication, it set up a system - largely overseen by DG Enterprise - comprising three key things.

1. The Commission decided to calculate the administrative costs related to a set of EU laws in thirteen different areas, but to outsource performance of it to private consultants. This was done using a Standard Cost Model (SCM) devised in the Netherlands, taken up by various European countries and promoted by the OECD. The model has never been subjected to independent scientific validation. It was, however, formally adopted by the European Commission in 2005 (COM, 2005, b). A consortium was set up, headed by the multinational Deloitte group, and including the CapGemini and Ramboll Management groups. It did the bulk of the numbers work. Another private group, the Centre for European Policy Studies (CEPS) was also involved at various stages, sometimes alone, sometimes in association with the Austrian Institute of Economic Research (WiFO). On all the evidence, the cost of the operation was overpriced for the highly debatable quality of the reports produced. The Deloitte-headed consortium alone pocketed 17 million euros. The high political priority placed on

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2. The figure of 150 billion euros in annual savings dropped out of the Commission Communication of 22 October 2009. It was derived from Dutch data (Tang and Verweij, 2004) extrapolated by DG Enterprise. Most of the pronouncements by Commission members and Mr. Stoiber omit to specify that it was a projection to 2040!

- the objective led the Commission to ignore the warnings about underestimating the complex issues involved (Cavallo, Coco and Martelli, 2007).
2. The Commission set up a “High Level Group of Stakeholders” chaired by Edmund Stoiber, a former premier of Bavaria and a figurehead of the conservative Catholic right. The group’s composition gives an automatic majority to hard-line deregulators. Some minority members are taking a stand against the majority line, but rarely manage to exert significant leverage on the group’s positions<sup>3</sup>. Administrative support is provided by DG Enterprise. The group’s mandate is confined in principle to “administrative costs” and is limited to three years. From the very outset, however, most of the members have tried to widen its remit with opinions on issues that have no bearing on administrative costs, like the revision of the Working Time Directive. More especially, the majority want to get its term extended to make it a permanent fixture of the EU bureaucratic machine.
  3. An intensive propaganda campaign was launched around the theme of cutting “red tape”. A major conference was held in Brussels on 20 June 2008 with that as its title. Accompanying the campaign was a highly one-sided “digital democracy” initiative - a public consultation set going by the Commission for businesses to complain about inordinate “administrative costs”. The consultation and questionnaire to be filled in made no allowance for consumers or workers to argue for the relevance of particular information obligations. The consultation was at best a very qualified success to judge by the proposals on health and safety, most of which were simply copied over from existing documents (including from employers’ federations in Denmark or Slovenia, and public authorities in Bavaria). The very few original proposals reflect some employers’ fierce opposition to the very principles of a prevention policy. This e-consultation was to be used by the Stoiber Group to overstep its remit. Other organizations with very close ties to boardrooms channelled this through a series of public initiatives designed to put a positive spin on the campaign. These organizations include the European Policy Centre (EPC)<sup>4</sup> and the Bertelsmann Foundation.

The timeline set in 2007 made sense<sup>5</sup>. The consortium had to publish its report by the end of 2008 for the Stoiber Group to discuss the findings and adopt recommendations in 2009. That timetable should have enabled a public debate to take place on the consortium’s calculations and recommendations before they were taken as the basis for Commission policy proposals.

3. In what follows, the “Stoiber Group” is used as shorthand for the positions of the majority of the group’s members. The actual position of each member can be ascertained from the minutes of the group’s meetings.
4. The proposal to appoint one of the EPC’s consultants - Mr Telicka - to the Stoiber Group came from the EPC itself. Mr Telicka is one of two co-rapporteurs on the work environment. The EPC’s role in promoting tobacco industry interests to the European institutions has recently been exposed by researchers who had access to British American Tobacco records (Smith, 2010).
5. See MEMO/07/471 published by the Commission press department, 19 November 2007.

The timetable was not kept to. At the close of 2008, it became clear that the consortium's documents were riddled with mistakes. When it should have put them out to public debate, DG Enterprise pretended the problem did not exist, merely asking the consortium for little more than marginal corrections, and keeping the documents under wraps. Quality seems not to have been at the forefront of this revision exercise. What happened was that the consortium's cost estimates in the field of health and safety shot up from about 2.9 billion euros to over 4.2 billion, only to be cut back to 3.8 billion euros in the Commission Communication of 22 October 2009. No explanation was given for this sequence of changes.

While in September 2008, DG Enterprise still seemed inclined to acknowledge problems with the consortium's work, four months on, it had managed to rally the full Commission's settled support for the consortium's work. The Commission Communication of 28 January 2009 describes the work in these terms: "This reduction programme is based on an extensive exercise to map and assess the administrative burdens produced by EU legislation for the 27 member states and 13 priority areas. This has put the EU at the forefront of efforts to reduce the red tape that results from so-called "information obligations". It has provided a much better understanding of how member states transpose and implement EU legislation, and what this means for businesses in terms of information obligations" (COM, 2009, a).

On 22 October 2009, the Commission Communication asserted that the documents were publicly available. It was not until 13 November 2009 that a partial version of the consortium's report was posted on DG Enterprise's website. Large parts of it have still not been made public. This truncated version offers no clues as to the method by which data representing less than 5% of the total calculation was extrapolated. Furthermore, in November 2009, the Commission already had in its hands a highly critical report written by another consortium formed by the Austrian Institute of Economic Research (WiFO) and the Centre for European Policy Studies (CEPS)<sup>6</sup> highlighting the "curious results" of the consortium's documents on the work environment and Value Added Tax, and arguing that the total administrative burdens stemming from Community laws as calculated by the consortium should be greatly reduced. The consortium had calculated it as being in the range 184 to 223 billion euros. The WiFO-CEPS consultants put it at around 120 billion euros. The Commission has not made the WiFO-CEPS report public.

At first glance, this looks for all the world like political ventriloquism, with DG Enterprise using the voice of the Deloitte-headed consortium of private consultants to force its views on other areas of the Commission, then pushing the Stoiber Group to repeat the core proposals but ramped up into an even more swingeing attack on workers' rights. It finally carried the day by imposing its views in a document that binds the entire Commission in a sort of Barroso I Commission legacy to the Barroso II Commission.

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6. CEPS runs a European Network for Better Regulation. See: <http://www.enbr.org/home.php>

The reality is more complex, however. Beyond the superficial meeting of minds, each of these players is pursuing its own game plan.

A war is brewing between the Commission, which means to retain control of legislative initiatives, and the Stoiber Group, which aims to become a permanent body and extend its powers to all new legislative proposals (Telicka, 2009). The Stoiber Group is demanding a secretariat, a budget, the right to submit opinions to Parliament and the Council of Ministers, and a set of powers and resources that would turn it into a key player in lawmaking. It is actively supported by a coalition of national bodies responsible for action against “administrative burdens” in four EU countries (ACTAL<sup>7</sup> in the Netherlands, the Regulatory Policy Committee in the United Kingdom<sup>8</sup>, Regelrådet in Sweden and National Normenkontrollrat in Germany). The coalition wants the costing process to be extended to the entire Community *acquis* and all new legislative initiatives (ACTAL *et al.*, 2009).

Turning the Stoiber Group into a permanent body would complicate the institutional set-up. The new body would rival the Impact Assessments Board set up by the Commission in 2006. Let alone the risk of the legislative process grinding to a halt under the proliferation of bodies not provided for by the Treaty, there is a latent, far more fundamental conflict between a simplistic approach based purely on the costs to businesses and a more complex approach that encompasses both the costs and expected benefits<sup>9</sup>. The SCM, which forms the basis of the Commission’s method in this exercise, is a fairly rudimentary form of assessment that disregards all benefits and a fair share of the costs. Its surprising success stems from factors unrelated to its scientific validity (Wegrich, 2009). The private consultants involved are fighting to preserve their market share. This means singing from the same sheet when it comes to demanding more costs assessments of new legislation, but from different sheets when called to comment on the work of the competition. They have learned that when it comes to applying the SCM, astute political acumen is worth more than sound analysis and calculations.

The member states are not singing from the same sheet as the Commission, and are appalled at the sloppy analyses of national situations. Some are keeping a political silence. Their resolutely deregulationist agenda forces them to turn a blind eye to the consultants’ errors - seemingly so with the United Kingdom and the Netherlands at least. Seeing a chance to make political capital of them, the European employers have also chosen to gloss over the consultants’ errors, strenuously objecting to the data coming under scrutiny from the Advisory Committee on Health and Safety.

7. ACTAL stands for Adviescollege Toetsing Administratieve Lasten - advisory board for reducing administrative burdens.

8. Mr. Gibbons, one of the Stoiber Group’s two rapporteurs for the working environment, was appointed to head the Regulatory Policy Committee in October 2009.

9. Impact assessments that look at both costs and benefits may themselves be manipulated by economic interests, but an examination of that goes beyond the scope of this report (see, Smith *et al.*, 2010).

The Commission is riven by differences. The better regulation campaign provided DG Enterprise with an opportunity to shore up its own profile within the Commission (Radaelli, 2010) and assume a kind of oversight over the activity of other DGs. It also reflects strife between politicians keen to spin hard targets and the staff of the different DGs concerned about the medium and long-term harm of undermining public enforcement mechanisms. In 2005 and 2006, Commissioner Verheugen ran a press campaign portraying himself as the scourge of EU bureaucracy and calling for the different Commission departments to adopt a “new political culture”<sup>10</sup>.

Toning down its own differences with the Stoiber Group, DG Enterprise has largely used it to impose its own views in areas where it had no responsibility. DG Employment made a highly relevant response to the consortium’s documents. The fact that the final version of the documents was uncorrected for statistical errors is a clear indication of the political supremacy acquired by DG Enterprise. It reflects the marginalization of social policies by the majority of the Commission. The changeover from the Barroso I to the Barroso II Commission will shift the Centre of gravity of DG Enterprise’s operations towards the Commission presidency. The Commission is unlikely to mount a critical assessment of the disastrous experience of applying the SCM at EU level. So much is arguably implied by President Barroso’s undertaking to extend the Stoiber Group’s term and keep its president in office.

In this tangle of conflicting interests, a high-profile alliance has emerged between public and private interests. On 11 November 2009, the Deloitte group announced Mr Stoiber’s appointment to head its Advisory Committee. Arguably, this appointment creates a conflict of interest. The Stoiber Group has shrugged off the very substandard quality of the Deloitte-headed consortium’s work, finding support in it for its own political ends. It seems surprising that Mr Stoiber can continue to head the group while assuming leadership of a strategic body of that group.

The European Parliament has remained largely sidelined. It has adopted somewhat inconsistent resolutions on the matter, and appears not to be keeping close tabs on developments. It seems caught between reaffirming its political role as co-legislator and its support for the requirement of a net reduction of 25% in administrative burdens, which would seriously hobble any possibility of adopting new rules in many areas. Judging by the few parliamentary questions tabled, very few MEPs evince much interest in this issue. Mr Stoiber had appointed a fellow German Christian Democrat, Mr. Klaus-Heiner Lehne MEP, to liaise between the EP and the Stoiber Group<sup>11</sup> with the right to attend meetings. The minutes published show that he was at the meeting of 18 September 2008. After this courtesy call, he seems not

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<sup>10</sup>. See in particular “Interview with Günter Verheugen, vice-president and commissioner for enterprise and industry,” *EurActiv*, 2 August 2005; Hagelüken, A., “Der Kommissar ist nur ein Hausbesetzer” *Süddeutsche Zeitung*, 4 October 2006, Parker, G., “Uphill battle against Brussels bureaucracy,” *Financial Times*, 10 October 2006.

<sup>11</sup>. See Mr Verheugen’s reply to a parliamentary question, 23 July 2008, P-3371/08EN.

to have shown his face at other meetings or reported to Parliament on the Stoiber Group's activity.

## Is the SCM relevant to health and safety at work?

The Standard Cost Model (SCM) first saw the light of day in Holland in 1994, developed as part of a programme called “Market operation, deregulation<sup>12</sup> and the quality of lawmaking”. A method of calculating administrative costs - named MISTRAL - was then worked up by the EIM consultancy (Nijssen and Vellinga, 2002). As far as could be ascertained, this was the first time a deregulatory initiative had expressly dismissed the potential benefits of legislation, arguing that policy could be made on the basis of a straightforward cost estimate. One key argument in favour of what would become the SCM is that it would take the politics out of the debate by preserving the substantive aims of regulation while reducing administrative costs. In 2000, the Netherlands kitted itself out with a specific deregulationist bureaucracy in the form of the ACTAL committee<sup>13</sup>.

The adoption of the SCM in the United Kingdom came as part of an overt deregulationist policy thrust, as is clear from the Better Regulation Task Force's 2005 document singing the praises of the SCM (BRTF, 2005).

The SCM is basically an opinion poll with some singularities. The question-setting procedures are cumbersome and go through multiple stages. The extrapolation mechanisms are simplistic and quite opaque. All in all, the SCM is an enticing proposition for consultants, being significantly more financially rewarding than a survey. The results, by contrast, are much less robust. Sparse as the scientific literature on Better Regulation may be, SCM has been considered by only a handful of political science authors (Wegrich, 2009), and seems never to have been looked at by economics and statistics researchers to see if it stands up. While this method is now applied in one form or another in almost all EU states, and was originally a big market for a small number of consultancy groups, there is a notable absence of any independent evaluation of the model. Most of the literature comes from consultants and public bodies with a political stake in this approach. By and large, it is explanatory literature illustrating the working assumptions and steps that characterize the method. Most of it (with the odd exception like Cavallo, Coco and Martelli, 2007) is justificatory. It tends to dismiss and belittle objections as mere resistance to change by the authorities concerned. Any criticism of the statistical side is dismissed on the grounds that it is a “pragmatic” method. As far as the author

<sup>12</sup> The link between the SCM and the political aim of deregulation was overt in the early years. Subsequently, the OECD and the European Commission have tried to promote a less explicit terminology - not “greater deregulation” but better regulation! The same trend can be seen in the United Kingdom, where the Deregulation Unit was renamed the Better Regulation Unit.

<sup>13</sup> For a more detailed description of the process followed in the Netherlands: OECD, Paris, 2003, pp. 173-193.

is aware, barring the United Kingdom (CPA, 2008), no parliamentary report has examined the issues raised by this method.

In adopting the SCM to estimate costs at European level, the European Commission introduced some minor changes over the Dutch model and that proposed by international agencies. These are not considered in this paper.

This critical examination is confined to looking at how the SCM has been applied to health and safety at work. But it raises issues that go beyond that strict scope. It points to flaws that are inherent in the method whenever law-making aims to achieve general objectives by putting in place arrangements for information, analysis or consultation that will determine the substantive measures that each duty holder must apply. The method's inconsistencies affect employment law equally with environmental law, and regulation of the work equipment market as much as the chemicals market. It is interesting to note that neither the Machinery Directive nor REACH have been subjected to the administrative cost calculation exercise launched by the Commission, even though these rules on the free movement of goods are also based on a set of information obligations in the broad sense. The likelihood is that doing so would have thrown the entire better regulation campaign into crisis by showing up the artificiality of separating "administrative costs" from "compliance".

Two of the principles underlying the SCM are inapplicable to health and safety at work. A third raises serious doubts about the quality of the information collected.

The first principle is that a poll of a small number of firms can be extrapolated to an entire country (or the EU) without taking into account the specific characteristics of different industry sectors. For the SCM, company size is the only relevant criterion for extrapolation.

If the information obligation were no more than a tick-box exercise of providing officialdom with information on a single form used for all sectors indiscriminately, that criterion might be acceptable. So, if there is a set regulation model for making out a monthly pay slip, it can be assumed that the average time taken to prepare that document will not be industry-specific. The same reasoning can apply to a work accident report. Where health and safety, no less than the environment, is concerned, company size is emphatically not the only criterion that determines the time spent on most of the information obligations. The risk assessment for a chemicals concern will obviously be longer and more complex than for a same-sized government agency.

The second principle is that the cost of substantive compliance with the law can be distinguished from the administrative costs generated by that law. This is hardly ever the case in health and safety at work. This can be illustrated by a simple example. Where there is a statutory requirement for fire protection arrangements, consisting of providing an emergency exit, fire doors and fire extinguishers, the cost of compliance can be distinguished from the information obligations. The business concerned will have to acquire the equipment and fit

out its premises - this will be the cost of compliance. It will have to inform the workers, place signs or markings, and report to the fire authorities - this will be the “administrative cost” or “red tape” in the terminology of OECD publications on the SCM. Granted that fire protection arrangements may not work properly if no information is provided, but the distinction can still be made. Almost without exception, Community health and safety at work provisions do not allow of such a distinction. This is because they lay down only a very small number of specific substantive obligations. What they do is to establish a management system in which the processing of information is a prerequisite for identifying practical measures that vary with the specific characteristics of the individual business.

All reforms of health and safety at work legislation since the 1970s have been based on the premise that what was needed was systematic health and safety management. The production, processing and passing-on of information are building blocks of that process. Without regular information input, there cannot be a preventive approach, only case-specific reaction. Without information, consultation of workers and their representatives is meaningless. Without information, public policing and enforcement is reduced to responding to the most serious occurrences like fatal accidents. Without information, there is no hope of integrating health and safety into company strategy. Health and safety at work and a tax measure are as chalk and cheese in this respect. A substantive tax obligation like the payment of a particular levy can be distinguished from administrative-type information obligations like keeping accounting records or making out a tax return. This is an artificial distinction to make in health and safety matters, where almost no statutory preventive obligations are laid down in advance. Barring the odd case, employers have no list of toxic chemicals that they have to replace, or detailed instructions as to what to do to make machinery safe to use. The legislation is largely what is known as reflexive law - a concept frequently used in environmental law to mean rules that do not specify the substantive outcome to be achieved but lay down procedures by which to achieve ends couched in fairly general terms (Treubner, 1994).

This means that the framework directive and most other Community OSH directives contain few detailed substantive rules (occupational exposure limits, medical checks, technical specs of plant and equipment, the content of health surveillance, *etc.*). What they do do, by contrast, is to lay down a number of general objectives and establish forms of organization and procedures designed to create a management system and checks and balances tied to traditional collective labour relations. The regulatory procedures are complex, based on forging a link between making health and safety at work part of a business management system, and recognizing the opposing labour interests that make health and safety at work part of the collective relations system<sup>14</sup>. These rules can therefore be said to be chiefly about establishing a properly working system of information and relations (with workers and their reps,

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14. For a more detailed analysis, see Walters, 2002 and Frick *et al.*, 2000.

public authorities, preventive services and, to a lesser extent, other firms when concurrent activities are carried on, like working on mobile or temporary construction sites).

Ensuring that all aspects of work are safe and healthy depends entirely on this system of information and relations. Attempting to ring-fence substantive obligations by claiming them to be independent of the information obligations and management activities required of firms is pure fabrication. Rather than after-the-event information on substantive measures that have been put into practice, they are actually the starting point of a management system that must identify what practical measures to take.

A third principle of the SCM introduced a major bias into the different calculations. The SCM makes no allowance for expert counter-assessment where the legislation intervenes in disputed matters. The manual written by the European SCM Network provides for involvement by different parties at different stages in the method (SCM Network, 2005, pp. 13-14). It does not include trade unions. Likewise, it makes no provision for consulting environmental protection or consumer organizations. This exclusion is the logical consequence of the SCM being held out as a neutral tool that does not meddle in disputed matters. The administrative cost share of the administrative burden is calculated purely on the basis of what employers say. Employers' statements that most health and safety information obligations are performed only because the law requires it expresses a very real grudge against the existence of such obligations. It is, however, unlikely that these assertions reflect the facts. Even where there is no statutory duty, pressure from workers for information on occupational risks will not go away, but will likely be exerted through a sharp rise in court cases and labour unrest. There is little prospect of the employers forcing through a drastic rollback of their OSH obligations.

## **How the SCM is applied in the consortium's reports**

The consortium's reports are not written to the customary standard of scientific publications. Hard information on how the survey was actually performed is notable by its absence. The most basic questions go unanswered. How many employers were interviewed for each information obligation? Which sectors of the economy are represented? What is the size of firms? Are the interviews conducted by telephone, at home or at meetings? What is the percentage of non-responses? How were the averages calculated? What is the margin of error?

Readers are determinedly kept in ignorance of most of the salient factors needed to judge the quality of the data. According to DG Employment, matters went downhill from one version of the reports to the next. Crucial information has been lost in the changes. Variations - some highly significant - appear in the calculations with no explanations as to why. The estimated cost of risk assessments has doubled, while labour inspectors' visits have gone the other way, with a 60%-odd reduction being introduced. Most of the information

provided by the consortium is vague and imprecise. For instance, it says that the data derived from existing national surveys have been “manually adjusted”. It might have been useful to know on what basis the data were adjusted.

The way DG Enterprise has put out the consortium’s documents further befogged the methodology: it did not publish all of them. The public has only the right to know that “Original data collection (interviews / workshops, expert assessments) took place in 2007-8. The consultants also retrieved data from national baseline measurements completed at the time. These national data were produced between 2005 and 2008. Differences in time and currencies (euro, UK pound, Danish krone, Swedish kron) were assumed to have a marginal effect on the level of administrative burden and Therefore on the comparability of these data (when the latter correspond to the same regulatory perimeter - see below). The main factors affecting the level of administrative burdens were indeed overall relatively stable (inflation rate, hourly wages, exchange rate between these currencies and the euro, and the total number of businesses in the EU)” (See p. 26, Extrapolating the data to other countries). The longest part of this paragraph addresses issues related to currency exchange rate fluctuations, which indeed should have only a marginal effect on the calculations. The real problem - which arguably invalidates all the calculations - is mentioned only parenthetically. We are told that the consortium conducted interviews (how many for each information obligation?), seminars (how many and who took part?), and expert assessments (by experts who appear to have been selected for their political beliefs rather than knowledge of the facts of the situation).

At no point are the recommendations substantiated by analytical overviews. Simply, a set of disparate elements are “cut-and-pasted” together. The end result is a document riddled with contradictions and inconsistencies resembling nothing so much as a ragbag of different contributions with no attempt to find a common thread.

Vagueness is the hallmark of these analyses. Reading the report is often like travelling through a misty landscape. Vague outlines of reasoning are discernible, but everything is hazy, intangible and impalpable. To take just one example. Faced with a particularly high assessment of costs for health and safety plans on mobile and temporary construction sites in Portugal (4800 minutes in Portugal versus 510 in Sweden), the consortium fails to query the relevance of its own calculations. It explains this by saying that firms are taking the opportunity to check what goes on on the site. This is not a legal requirement, but it is factored into the calculated cost of the administrative burden. Where does this widespread practice in Portugal come from? The consortium replies that, “These so-called updates to the safety and health plan do not stem from the law but from a book published in 1996 (after the first transposition of the directive) by a Portuguese expert in which guidelines on drawing up a safety and health plan were published. Since then the book has been adopted as the model to follow and within the guidelines these updates were stated as necessary. This means that safety and health plans are burdensome due to the bad practice stemming from informal information at national level”. This is the

vaguest of explanations, and details of a book that has such decisive authority would have been welcome. What is most absurd is using it to justify including non-compulsory expenditure on ordinary business activities when calculating the administrative burden.

DG Enterprise's aim to preserve the monopoly of management of these contracts has arguably worsened matters. DG Employment has submitted relevant, cogently-argued critical notes which are all-but ignored in the final text. The general impression is that the ultimate political end (asserting DG Enterprise's dominance over the other Commission DGs) has outweighed all concerns of efficiency and consistency. Even obvious clerical errors have gone uncorrected.

## **The main steps of the calculation**

Applying the SCM to health and safety at work means going through a series of statistical steps<sup>15</sup>, which can be outlined thus:

1. Identification of information obligations which could be differentiated from the substantive compliance required by the Directive (each information obligation is usually split into different data requirements);
2. Selection of a small number of countries ("countries for benchmarking");
3. Conducting a number of interviews on the cost of information obligations (in seminars or by telephone);
4. Calculation of the ratio of administrative burdens to administrative costs during these interviews;
5. Extrapolation of interview data to the general situation of the "countries for benchmarking" based on the estimated cost of each obligation for a normally efficient business;
6. Use of existing data from other countries that have applied the SCM to the area concerned (so-called "baseline countries") and adaptation of that data to the study by different methods;
7. Extrapolation of the calculations for both groups of countries to all EU countries;
8. Formulation of recommendations;
9. Calculation of cost savings attributed to implementing these recommendations.

The inherent biases of the method and political directions from the sponsors mean that the factors of errors are significantly increased with each step.

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<sup>15</sup>. Only the key steps are considered here. The SCM Network's manual (2005) identifies 15 different steps.

## The arbitrary choice of information obligations

The EU OSH Directives are about setting up a systematic management of health and safety at work.

However, the Commission chose two Directives to assess the costs stemming from information obligations (IOs): the 1989 Framework Directive and the Temporary and Mobile Construction Sites Directive, later adding the Carcinogens Directive which is currently being revised. The Framework Directive was an obvious choice, being the kingpin of EU OSH legislation. Why the choice fell on the other two individual directives is not clear, other than that employers' organisations are lobbying particularly hard against them. The issues they address are crucial for workers. The construction industry has particularly high fatal accident rates coupled with significant exposure to health risks (Donaghy, 2009), resulting in excess cancer mortality among other things (Thuret, 2009). Multi-tier outsourcing, lack of coordination between on-site contractors and a failure to incorporate health and safety requirements in worksite planning are some of the reasons for this situation. Exposure to carcinogens at work is the leading cause of work-related mortality in Europe. The fact that these exposures cause cancer after long latency periods implies that there is no economic incentive for firms to carry out prevention if allowed to "get on with business" free of government constraints.

With few exceptions, the entire contents of these Directives (and especially the Framework Directive) can be described as a system that organizes the collection, processing, passing-on and discussion of information. Trying to isolate a "substantive" part that can be carried out independently of information obligations is an artificial distinction.

Hogtied by an inappropriate methodology, however, the consortium sought to distinguish specific information obligations. It counted 4 in the Framework Directive and 3 in the Temporary and Mobile Construction Sites Directive. This is not only down to the consortium - different Commission DGs were involved. The report does not specify what if any differences of opinion existed.

It is an arbitrary choice. The criteria for inclusion and exclusion are not defined. This has resulted in questionable inclusions and unexplained exclusions.

The inclusion of labour inspection visits is among the most questionable. The Framework Directive does not deal with labour inspection. It merely restates a principle that applies to all EU directives: member states must ensure compliance. The labour inspectorate is clearly not the only government agency with such a duty. The courts and police are also involved. Using the consortium's logic, this would mean adding to the IOs, the time spent by employers in appearing in court, preparing their legal defence, *etc.* It is interesting to note that for another social directive, the costs of litigation were included as administrative costs (COM, 2009, d, p. 104)). Court cases over the employer's liability as defined in the Framework Directive are likely to be much higher than those of the procedures for setting up European Works Councils.

It is also clear that labour inspection activities go far beyond just policing compliance with the Framework Directive's requirements. All EU member states have inspection systems that are markedly different, but common to all is the fact that they do not confine the work of inspectors to enforcing compliance with a particular legal instrument. Of the six countries from which the consortium collected data, five have a general labour inspectorate that is concerned with all aspects of employment law.

If risk assessment is the cornerstone of preventive activities in the company, it is unclear on what basis other activities, often related to risk assessment, were excluded. For instance, information for workers and their representatives, the operation of specific bodies like health and safety committees that are to be informed and consulted, and health surveillance are all activities that can be described as information obligations. Health surveillance in particular includes meeting, examining and questioning workers about their work and health, forwarding anonymised information on groups of workers to relevant bodies tasked with organizing prevention, etc. This is not a fundamentally different process from risk assessment, and should preferably even be joined up with it. There is no doubt that a health and safety committee meeting is inherently an exchange of information and views on working conditions, their impact on health and prevention measures. Ostensibly, the consortium's choice can only be explained by the express reference to a document in the Framework Directive and Temporary and Mobile Construction Sites Directive, so that only those obligations for which EU directives require a specific document to be drawn up would constitute information obligations. This would make the inclusion of labour inspection visits even more arbitrary. On the other hand, the description of costs involves far more than just drawing up a document.

The same arbitrary technique appears in regard to the Temporary and Mobile Construction Sites Directive. The consortium has discarded certain provisions (information to workers, responsible coordinator) without giving reasons. Once again, it is interesting to see how the choice of what are claimed to constitute information obligations can vary between contracts. In an earlier study done by the Ramboll group for DG Enterprise, for instance, the obligation to draw up a health and safety document for subsequent works is not considered as being an information obligation.

The United Kingdom, moreover, has pointed out these inconsistencies in the documents submitted to the Commission. Taking a hard-line approach that any information obligation has to be seen as an administrative cost, the United Kingdom says that the consortium should have taken the Framework Directive's requirement for employees to be informed and consulted into consideration. Where the Temporary and Mobile Construction Sites Directive is concerned, the UK authorities consider that the consortium has left out 5 information obligations.

## Analysis of the Directives

A correct analysis of the contents of the Directive is obviously essential to identify the information obligations. Both the consortium and the CEPS seem to have skimmed through so rapidly that inaccuracies and misinterpretations have piled up in the wake of their analysis.

The arbitrary interpretation of the Framework Directive was mentioned earlier. It establishes a management system, and provides for much greater and more systematic information flows than those picked up on by the consortium.

While not fully comprehensive, the framework directive does lay down many obligations that meet the definition of information obligations used by the SCM lobby.

Examples include:

1. Consulting workers on the introduction of new technologies (article 6.3.c);
2. Giving adequate instructions to workers who have access to areas where there is serious and specific danger (article 6.3.d);
3. Mutual information between employers of different undertakings sharing the same workplace and informing the workers of those undertakings (article 6.4);
4. Information for the staff of preventive services (article 7.4);
5. Various information related to the organization of first aid (article 8);
6. Information and consultation of workers (articles 10 and 11);
7. Training of workers, which is training repeated periodically to take account of new or changed risks and needs (article 12);
8. The provision of health surveillance (article 14).

A rigorous application of the SCM would have clearly shown up not only how completely unsuited the method is to the field concerned, but also that any serious attempt to reduce the “administrative burden” would actually undercut both the level of safety sought and workers’ rights. Rather than run that risk, the consortium and the Commission chose to do a half-baked job by including only some of the IOs actually contained in the Framework Directive and tacking on workplace health and safety inspections in a wholly arbitrary way.

The Temporary and Mobile Construction Sites Directive is structured in a very specific way, different from the other EU OSH Directives. It lays only a very few obligations on employers. Essentially, the aim is to make the client - *i.e.*, most often the owner of buildings or facilities - responsible by requiring him to take steps to ensure coordination between duty-holders so as to integrate health and safety requirements at the project design stage.

The consortium wrongly equates the client’s obligations to those of undertakings sharing the worksite, but acknowledges that the cost to private clients is substantial on the basis of Belgian data indicating that over 90% of building permits relate to private projects (Rec. No. 124, 2009, p. 5). It cites the

fact, but draws no conclusions from it. This typifies all the consortium's reports: they are cobbled together from texts written by different authors with no concern as to the consistency of the whole. This misconception leads the consortium to introduce the concept of external coordinator. The Directive, of course, requires coordination only where several undertakings share the site. Therefore, whatever coordinator there is must necessarily be external to all the undertakings (e.g., where the architect acts as coordinator, or a specialised coordinator is hired for that purpose only), or to the other undertakings if that coordinator is an employee of one of the undertakings involved.

The three obligations looked at by the consortium therefore go far beyond the scope of assessing administrative costs because they are not supported by businesses, except in cases where a business is itself a client. Most inconsistently, the consortium has omitted the very few information obligations actually placed on employers, like the obligation to report accidents and a series of signage obligations laid down in Annex IV of the Directive. It may, of course, be that the consortium does not know that the Annexes to a Directive are binding.

The consortium confined its work to two Directives. The Commission subsequently asked the CEPS to also look at the Carcinogens Directive (and the European Works Councils Directive), (Renda and Luchetta, 2009-b). While the CEPS' criticisms of the consortium's many errors were very much to the point, its own analysis of the Carcinogens Directive is even more of a shambles.

The CEPS tried to show that most of the IOs in the Carcinogens Directive merely repeated those already in the Framework Directive. This led it to make ludicrous assertions. For instance, the CEPS report took the obligation to report occupational cancers to be a simple revisiting of the obligation to report work accidents. Apparently, the researchers have not grasped the concept of an accident, which in the legal systems of all EU countries is a sudden occurrence causing immediate physical injury. This definition clearly does not square with a cancer that develops after a long latency period following the first exposure to a carcinogen. In contriving to prove that the Carcinogens Directive contains no information obligation distinct from those already laid down by the Framework Directive, the CEPS took no account of most of the Directive's articles that require specific or more distinct information to be provided to workers and public authorities, including: the obligation to keep information on the replacement and reduction of the use of carcinogens available to the public authorities (article 4); demarcation and signage of risk areas (article 5.5.j); labelling containers used for carcinogens (article 5.5.l) and various information obligations towards public authorities that go beyond what is provided in the Framework Directive (article 6); information for workers in cases of abnormal exposure (article 7); a series of provisions on information and training for workers which are far more detailed than those in the Framework Directive (articles 11 and 12); the organization of health surveillance (article 14); compliance with exposure limit values cannot be separated from a number of information obligations, like the measurement of airborne concentrations of certain agents (article 16).

In fact, some logic can be discerned in the CEPS' curious approach if the sponsor's expectations are taken into account. In having this Directive analysed, the Commission was clearly wanting the estimated costs of IOs to be minimised in a bid to convince the employers that revising the Directive would reduce administrative burdens. Everything that is known about the draft revision of the Carcinogens Directive goes against this. The aim of revising the Directive is to make it more effective by placing more detailed obligations on employers. There will likely be a larger number of limit values, which will obviously increase the information obligations. The Commission's defensive line of argument that the revision of the directive could potentially reduce these IOs is a flashing warning light of a deteriorating policymaking system. At a conservative estimate, cancers caused by occupational exposures cause 80,000 avoidable deaths a year in the European Union. There is every reason to impose specific and detailed legislative constraints on business that use carcinogens. For the Commission to try and justify this under the guise of reducing administrative burdens is nonsensical.

## **The analysis of national situations**

Time and again in the documents, inexplicable differences between countries force the consortium to provide an explanation. Mostly, it claims objective differences between national situations. A few examples suffice to show that these differences are clear evidence of the consortium's scant knowledge of national situations.

In principle, the data have been validated by "experts" chosen by the consortium and by "contact points" provided by public authorities in the member states. The involvement of both these parties is mentioned at various points in the documents published by DG Enterprise. In practice, it is open to question whether the authorities were kept regularly and fully informed. So frequent and in some cases glaring are the errors that questions may be asked about the way in which DG Enterprise managed implementation of the contract.

Only a few particularly striking examples will be given here. The estimated cost of risk assessment varies widely between countries. To cancel out the effect of wage rate differentials, the relevant unit of measurement is time per year spent on that obligation. In Sweden, it would be 20 minutes in both companies with 1 to 9 workers and those with between 10 and 50, rising to 50 minutes in companies with more than 50 workers. At the other extreme, it would be 150 times higher in Bulgarian companies with 1 to 9 workers (2995 minutes), 175 times greater in those with between 10 and 50 workers (3595 minutes), and almost 200 times greater in those with over 50 workers. Such a wide gap is particularly surprising considering that the data are supposed to have been collected on a consistent basis. These are two countries where the consortium's interviews were conducted using its own analytical check-list.

The consortium has an inventive explanation for this discrepancy. It cites two possible reasons for the small amount of time spent on risk assessment in Sweden:

1. Most risk assessment is done by union officials whose salary is paid out of public taxes. Now, risk assessment may be linked to a consultation of workers' reps, but it is still something done by the employer, possibly supported by preventive services. There is no trace of these in the consortium's calculations, which therefore suggests that the use of external consultants is unknown in Sweden. This is at variance with all the literature analysing health and safety at work in Sweden (Remaeus and Westerholm, 2001). It is also incorrect to say that the union reps' salaries are paid from public funds. The only representatives to benefit in any way from public funding are the regional safety reps, but they are concerned only with small workplaces. Around 2,000 of the total of approximately 100,000 safety representatives are regional representatives.
2. Risk assessment in Sweden is claimed to be a two-stage process: a general assessment and an assessment that takes sector-specific risks into account. This distinction is found nowhere either in Swedish law or in the analyses of business practice. It is pure invention. The consortium has misconstrued the existence of sector guides that are found in Sweden no less than in most other EU countries. To all intents and appearances, it is an explanation added afterwards by someone who was not involved in the interviews. In fact, the interview check-list specifically mentioned the need to take account of sectoral checklists in risk assessment.

The obligation to report work accidents to a competent authority gives rise to equally curious discrepancies and allows the consortium to give free rein to its imagination in its attempted explanations.

The first thing of note is the consortium's allegation that the obligation to report work accidents to a competent authority takes 0 minutes in firms employing 1 to 50 workers in Malta (FR, 2009, p. 78-79). It offers no explanation for this mystery. Is it a supernatural phenomenon of thought transference, or do accidents only happen in firms with more than 50 workers? Moving on from the Maltese miracle, the consortium claims that reporting an industrial accident takes 5 minutes in a Swedish firm and 1,400 minutes in a Romanian one. In Bulgaria, the time varies haphazardly with the size of the firm - curious, when it is the same questionnaire that has to be filled in. For firms with one to ten employees, 530 minutes must be allowed. Those with between 10 and 50 save an hour, taking 470 minutes. Those above 50 employees require 690 minutes. The longer time in bigger firms may be understandable, given the existence of specific bodies, but the shorter time in the intermediate category remains unexplained.

The difference between 5 minutes in Sweden and 23 hours in Romania could not go unexplained. The consortium thinks to get away with it by saying that in Sweden, accidents are reported by telephone. The author of this explanation has seemingly failed to read the consortium's own written material regarding interviews. The questions asked by the consortium were supposed to cover a sequence of four steps: holding meetings, finding the relevant information, writing a report and submitting it. It seems fairly reasonable to suppose that the first two steps are those requiring the most time. Writing and

submitting the report can be done in a relatively short time. Also, the headings of the report called for are almost identical in the different EU countries. National variations are relatively insignificant since work accident statistics are harmonized at Community level. The use of telephone reporting in Sweden does not explain how Swedish employers manage to collect all the information required in just five minutes.

Many other examples could be given. The space is lacking to include the host of errors relating to the Temporary and Mobile Construction Sites Directive. Not one of the consortium's calculations is not manifestly flawed. Not a single explanation put forward by the consortium stands up.

The lack of understanding of national situations is no less clear to see in the consortium's recommendations. It has gone about things in a fairly simple way. Its quest for "good practices" is a highly selective one. With few exceptions, no good practices are reported in the Netherlands, the United Kingdom or Sweden. The underlying agenda is that good practices are implemented only in those countries that apply the SCM to their health and safety law.

## **Conducting the interviews**

The consortium selected six countries from which to collect data directly - Bulgaria, Estonia, Malta, Portugal, Romania and Sweden. Nowhere are the reasons for choosing these countries explained. Taken together, they account for approximately 10% of all workers in Europe. Two of them have only just transposed the EU directives into national law. It is open to question whether at the time of the interviews, the Romanian and Bulgarian businessmen could stand at a sufficient remove to assess the real impact of the Directives. These two countries alone accounted for almost half the sample, based on worker numbers.

Of the 238 million euros estimated for the six countries mentioned, Portugal alone accounts for over 70% of the costs for only approximately 20% of the group's workers. Such an intriguing result also needed elucidation. However, the consortium merely states that the Portuguese costs are attributable to Portugal's large number of businesses and high work accident rate. Explaining this away by the large number of businesses lacks consistency. It does not account for the gap between Portugal and Sweden (approximately 5 to 1) or between Portugal and Spain, extending the comparison to countries that were extrapolated for. The comparison with Sweden is interesting. Swedish legislation has for many years focused on putting in place a health and safety at work management system. Sweden's requirement for "internal control" over OSH matters pre-dates its accession to the European Union and implementation of the Framework Directive. The consortium's estimates for Sweden putting the IOs at the lowest level among the countries where interviews were conducted lack credibility, therefore. Attributing the gap between Sweden and Portugal to the work accident total is misconceived on two counts. First, it relies on gross statistical errors: the consortium gave Portugal an inflated work

accident figure while dividing Sweden's accident figures by 10. But it also does not square with the fact that the accident reporting obligation accounts for less than a quarter of the total cost attributed to Portugal.

The reports published by DG Enterprise make no mention of the number of interviewees, the economic sectors concerned or the size of firms actually included in the sample. The secret is so well-kept that even the Employment Directorate General has not had access to the data. However, it observes in a note dated March 2009: "For the measurement of all 233 IOs in 6 member states, the number of interviews and workshops carried out to obtain information about the IOs and their costs and burdens seems rather low: 29 workshops and in total 2,850 interviews have been done for 11 policy areas (excluding the financial services and company law areas) with 33 legislative acts and not less than 233 IOs. This means that on average one workshop covered up to 10 IOs and that there were just 12 interviews for each IO. There is no specific information in the employment area report on the specific number of interviews and/or workshops held. The information in the main report about the number of workshops and interviews seems to have been removed in the latest version of the report. This further reduces the transparency of the examination methods of the consortium and raises further doubts about the reliability of the extrapolation exercise".

A comparison of the national data from these six countries reveals a clear lack of uniformity in the calculations. Whenever wide discrepancies have appeared, the consortium has sought to explain them away by alleged differences in national situations. What it has actually done in each case is simply to display its lack of knowledge of those situations.

## **Extrapolating the data to other countries**

The consortium used two techniques to extrapolate the data. One was to use existing available data in five countries (Germany, Austria, Denmark, Netherlands, United Kingdom), collected using checklists that differ significantly from the consortium's own. These data were then integrated by three different techniques: reuse, manual adjustment (!) or extrapolation. The consortium is no more specific about the methods used. The results of this first round of extrapolation are mystifying. The cost of the IOs appears to be higher in the United Kingdom than in Germany, and in Austria than the Netherlands. On the other hand, the adjustments made by the consortium seem huge. As reported by WiFO and CEPS (Renda and Luchetti, 2009, a, p. 23), the estimates derived from Dutch data were reduced from a national calculation of 979 million euros to 83,5 million euros in the consortium's calculations<sup>16</sup>. Denmark's bill was slashed by over 50%, from 145 million euros to 59 million. This is even

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<sup>16</sup> The consortium attempts to hold up the Netherlands as a model case for administrative costs. The Dutch estimate of close to one billion euros in costs clearly did not fit the bill. This could explain the drastic reduction of Dutch costs in the consortium's calculations.

harder to fathom in light of the consortium's claim that all the data for Denmark were reused unextrapolated and non-manually adjusted.

The degree of non-uniformity between the national data collected on the basis of the SCM can be illustrated by the example of Germany, where the estimated costs of risk assessment seem fairly modest compared to those calculated for other countries. The reason appears to be that in the German calculations, risk assessment as an ongoing process of knowledge production to ensure improved management is not considered as an administrative cost. This approach should have been examined at greater length. The reason for it is that risk assessment is a process of spreading around what is sometimes called a culture of prevention, which is subsumed into all a business' activities. Be it for starting up a machine or storing chemicals, risk assessment plays into the definition of procedures. The German data on risk assessment, therefore, refer only to the time taken in writing a specific document.

Italian researchers have cautioned against comparisons based on inordinately heterogeneous data: "For a good comparison/benchmarking and a correct interpretation of the results it is necessary not only to understand the basic social, economic and historical differences among countries but also to ensure that differences observed are uniquely due to differences in the regulations and not to the use of different approaches to measurement" (Cavallo, Coco and Martelli, 2007). These elementary requirements were not observed due to DG Enterprise's rush to prove that Europe had a first-rate costing tool.

For the other 16 states, the consortium merely extrapolated data without regard to how the Directives had been implemented. While the documents published offer no clues whatever as to the magical process behind these extrapolations, some oddities are to be found. The cost of the IOs examined in Italy, for instance, is more than double what it is in France. A comparative analysis of the legislation in both countries offers no clues as to why. In the Czech Republic, it is more than ten times the cost in Slovakia, even though the former has 2.5 times as many workers. The share of administrative burdens also varies from a minimum of 85% in Spain to a maximum of 97.55% in the Czech Republic.

In total, the original data account for less than 5% of the calculated costs, while those from extrapolations based on existing national data account for just over 40% of costs. This means around 55% of the costs estimated from extrapolations not based on national data.

One of the consortium's aims was to measure the magnitude of costs stemming from an implementation which went beyond the Directives' minimum requirements. Overall, those costs appear insignificant: less than one percent of total costs (32 million out of 4 228 million). The only country where these costs are relatively high is Ireland (just over one-third of the costs). In the United Kingdom, the consortium reports that implementation of the Directives applies to self-employed workers, but nevertheless estimates the share at zero per cent.

The arbitrariness of these extrapolations is thrown into relief when set against those done by the UK authorities<sup>17</sup> putting the cost of risk assessment for businesses in the European Union at 5.5 billion euros (BRE, 2008). The original version of the consortium's report had the amount at 1.453 billion euros. Less than a year later, after rewriting overseen by DG Enterprise, the same data produced an assessment which doubled the total cost to 2.9 billion euros. This double-to-quadruple variation arguably reflects nothing so much as the sponsors' reservations about the obligation to assess risks.

## **Estimating the administrative burden**

Estimating the administrative burden is key to the process. It paves a direct way from statistical calculations to policymaking, the objective set by the Commission being to measure administrative costs and reduce the administrative burden by 25%. The SCM claims to identify the cost of burdens by asking the employers interviewed what part of the activity they would continue to carry out if the regulation were removed.

This is a purely subjective approach. In most cases, the health and safety obligations form part and parcel of the ordinary running of the business. The reply given is not objectively verified, and mostly reflects a near knee-jerk hostility towards health and safety regulation. In practice, the hard line taken in interviews is unlikely to reflect the reality. The thing is that much risk assessment activity is inseparable from production management as such. Much information is collected for both risk assessment and work organization. This questions the credibility of the consortium's estimate that 92% of the time spent on risk assessment would be avoided if the regulation were removed. The same applies to the documents produced by site safety coordination, a significant proportion of which serve to clarify how the operations of the different undertakings sharing the site interact. Even without regulation, rational project management would probably dictate that the same information be collected, summarized and documented in writing. This point among others was made by Professor Rob Baldwin of the London School of Economics in a memorandum to the House of Commons submitted on 8 July 2008: "A second problem (with SCM) is identifying those costs that are imposed by a regulatory requirement and go beyond those costs that will be incurred by competent management in the ordinary course of business. These are issues that involve contentious assumptions and combine to produce the danger that, if industry is asked to cost administrative burdens (as is the case) they will tend to conflate policy and administrative, as well as regulatory and managerial costs. The effect will be grossly to exaggerate both the costs of informational burdens and the potential gains to be made by removing a regulation".

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17. The UK estimates are based on a 2005 study by the PricewaterhouseCoopers consultancy. The estimates were heavily criticised in a parliamentary report (CPA, 2008).

The extrapolations are also of doubtful validity in that business leaders are far from uniformly opposed to health and safety regulation. A British study found significant variations in the matter (Vickers *et al.*, 2001).

The arbitrary way in which the ratio of administrative costs to administrative burdens is calculated is clear from a comparison of the different estimates of this ratio obtained by applying the SCM. The Ramboll Management group carried out a previous study on the costs incurred by the Temporary and Mobile Construction Sites Directive for DG Enterprise some years ago (COM, 2005, c)<sup>18</sup>.

The questions differ slightly between studies. Ramboll Management did not single out the same information obligations in 2005 and 2007. That being said, the huge differences of scale in the estimates of what firms would continue to do in the absence of regulation cannot go unmentioned.

#### Assessment of the administrative burden in 2005

	Company would not at all do it / do it to a lower extent	Company would do it to the same extent / to a higher extent	Company does not know	Total replies
Appointment of coordinator	28 %	58 %	13 %	532
Elaboration of safety and health plan	27 %	58 %	12 %	544
Duties of the coordinators (project preparation stage)	30 %	55 %	16 %	535
Duties of the coordinators (project execution stage)	27 %	57 %	16 %	539
Communication of prior notice	29 %	54 %	16 %	534

Source: Ramboll Management in COM, 2005 c, p. 148-153

#### Assessment of the administrative burden in 2007

	% of the cost considered an administrative burden that companies would eliminate if there was no regulatory obligation	Number of businesses who replied
Prior notice	89 %	not stated
Health and safety plan	79 %	not stated
Subsequent works plan	79 %	not stated

Source: FR, 2009

**18.** Bearing in mind the inherent limitations of the SCM, the study published in 2005 was more accurate and better developed than that of 2007. This prompts the question why DG Enterprise should commission a second study on the same topic from the same organization (this time, as part of a consortium), but with much less exacting contract specifications the second time around.

The evidence of the 2005 report is that broadly-speaking, two-thirds of the respondent firms would continue to fulfil the regulatory requirements in the normal course of business, while about a third would consider reducing or eliminating the activity. In 2007, the report suggests that companies overwhelmingly would stop carrying out these activities. In the latter, the consortium estimates that 80 % of information obligations are administrative burdens that businesses would abandon if the regulation allowed them to do so.

It would also be interesting to look at the inconsistency of the calculations for each country. The consortium collected information from no more than six countries, extrapolating this to the other countries, supplemented in some cases by existing national data. In Germany, the administrative burden reportedly accounts for 100% of the costs of the IOs for both Directives considered. In other words, following the consortium's logic, if the regulatory requirements were to be scrapped, not a single German company would do a written risk assessment or report a work accident. This is less statistics than gross distortion, but the Stoiber Group - whose fifteen members include three German "high level experts" (including the chairman) - raised no objection to it. Conversely, one of the countries for which the consortium calculated the costs as being highest is also that where the administrative burden's share of administrative cost is among the lowest - Portugal, where the consortium estimates the administrative burden as accounting for only 78.95% of the administrative cost. Only the United Kingdom scores somewhat better with an administrative burden assessed at 75% of costs. Here again, there are surprising discrepancies between the consortium's calculations and those done nationally by the same method. The Slovenian government's estimates, for instance, report an administrative burden of 67%<sup>19</sup>, whereas the consortium's unfathomable extrapolations yield a forensically precise percentage of 91.16%.

Risk assessment in Sweden is another interesting case. The consortium calculates it as taking next to no time: 20 minutes a year for companies with between 1 and 50 workers, 50 minutes a year for businesses with more than 50 workers. Less than one minute a year per employee does not seem an inordinately long time to think about work hazards and how to organize prevention. Yet according to the consortium's calculations, if Swedish companies were allowed a free hand to get on with business without being regulated in this matter, they would stop 99% of their risk assessment activity; only one per cent of the time spent on it should be classed as "business as usual" (to use SCM terminology). This represents 12 seconds a year in companies with between one and 50 workers, and 30 seconds a year in companies with more than 50 workers (FR, 2009, pp. 70-71).

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19. Presentation given by S. Patekar of the Ministry of Public Administration to a conference in Brdo pri Kranju, 7 November 2008.

## Calculating the cost savings

The consultants make recommendations that will purportedly reduce the administrative burden without affecting compliance with the substantive legal requirements. The cost savings that these recommendations would produce are estimated.

This is the part most keenly awaited by politicians planning to announce spectacular cost savings for business. In its 22 October 2009 Communication, the Commission forecast potential savings of 40 billion euros. The savings in health and safety at work would come from 659.5 million euros.

The Netherlands and Denmark are instructive cases in point showing that this is the stage that most betrayed employers' expectations (NAO, 2007). In most cases, the savings announced far outweighed those actually achieved. In Denmark, only one third of SMEs think that costs have been reduced.

There are several reasons for this:

1. Flimsy cost estimates, about which no more need be said. The tendency to inflate costs automatically increases the total on which the savings are calculated.
2. The SCM assumes full compliance with their obligations by all firms. That assumption is clearly misguided. Also, the share of administrative burdens is inflated by the purely subjective method of calculation used. This probably results in two things: firms that did not comply with the law benefit from fraud. Their behaviour is legalized. Other companies do not necessarily benefit from cost reductions because they may continue carrying out an activity which is not an express legal obligation for other reasons. Where risk assessment is concerned, therefore - and *pace* the consortium and Commission's claims - a comparatively large number of smaller firms are likely to continue drawing up written risk assessments because it makes the business easier to run, gives them a reference document with which to inform and consult workers, because they are contractually bound by their insurance, because they may wish to achieve certification of their health and safety management system, etc. The difference is irrelevant to the SCM lobby. The simple retort is that firms now spend their time and money on what they decide to do.

The gap between the promised and actual cost reductions points up a major inherent flaw in the SCM. It is based on a highly simplistic view of regulation seen only as embodied in the written law. It posits a direct link between a legislative rule and actual expenditure. Changing the legislative rule would automatically reduce the expenditure concerned. This postulate is more the exception than the rule. It may hold good for simple, purely administrative obligations. For example, if a driving license is renewed at ten rather than five-yearly intervals, changing the rule will likely achieve savings of approximately 50% on that obligation. The practicalities of health and safety at work regulation are much more complex. Most available studies suggest that legislation plays a key role, mediated in a range of very different ways: from the

effectiveness of enforcement to the activity of workers' reps, from membership of collectivisation networks to labour disputation, from the pressure of public opinion to the activity of preventive services.

The Commission could have taken stock of this complexity had it bothered to scrutinise the consortium's reports closely. The United Kingdom is one EU country which has resolutely opted to carry over just the Directives' minimum requirements into law. It is also a country where the pressures for deregulation are strongest. This is very clear to see from the UK's transposition of OSH Directives. In some cases, there are even glaring omissions that have gone unremedied due to the Commission's failure to act. The exemption of businesses with fewer than 10 employees from the requirement to produce a written risk assessment is a case in point. The Commission initiated infringement proceedings against Germany for this, but held back from taking action in relation to the United Kingdom.

And yet the administrative costs calculated by the consortium for the United Kingdom are among the highest in the EU - almost double France's cost for a same-size working population and over 20% higher than Germany's costs with a much bigger working population. Only Italy is estimated to have higher costs. But the fact is that in many cases the consortium's recommendations refer only to what is done in the UK! Taking up the costs calculated nationally by the SCM in the Netherlands, the consortium would have arrived at the same result: a country very keen on introducing "minimum provisions" legislation ending up with particularly high costs.

But over and above the many glaring miscalculations, there is one thing that does call for more thoroughgoing study.

Many firms have outsourced a large part of their preventive measures - especially risk assessments in a large number of countries - leading to the development of an unregulated market of the best and worst consultancy of all kinds. In many cases, external consultants' assessments are simple tick-box exercises that do not result in systematic prevention plans and are seldom informed by workers' experience and consultation of their reps. That this is probably behind much waste was highlighted in Britain's case in a report by the parliamentary Work and Pensions Committee (2008). But the UK government and "better regulators" are standing by and doing nothing about this real problem, for purely ideological reasons. The way to cut waste and improve the quality of external preventive services is to lay down a more detailed regulatory framework and give workers' reps more powers of scrutiny over these outside services' activities. Such a practical solution is anathema to those whose only credo is self-regulation by market forces. The tightly-regulated preventive services obliged to operate as not-for-profit organisations in some countries (France, Belgium, Spain) probably act as a less-costly link between legislation and practice than a deregulated market of consultants as found in the United Kingdom (and to some extent in Italy) or primarily commercial preventive services as found in the Netherlands. But that is a surmise that will not be explored further in this report.

## Repetition as a validation technique

The SCM data are flawed by extreme uncertainty. To avoid putting them to the painful test of scientific validation, all parties involved - from the consortium through the Stoiber Group to DG Enterprise - have simply resorted to repetition. A figure's reliability is inversely proportional to how frequently it recurs from one document to the next, preferably under different hands. Repeated half-a-dozen times, deliberate falsehood or inaccuracy become truths.

This can be illustrated by the assessment of the share of administrative burdens in health and safety at work claimed to be attributable to the International Labour Organization (FR, 2009, p. 42-45). The percentage of 98.6% (or 99%) has been repeated from document to document since the beginning of 2009.

Where does it come from? The consortium took it that a number of obligations laid down in the OSH Directives reflect provisions in international Labour conventions. It therefore drew up a table of correspondence between the Community provisions to be costed and the ILO Conventions. The table is fairly approximate but not wholly inaccurate. At this point, we are still in the realms of "around about", *i.e.*, about as good as it gets for consortium documents. In fact, the contents of the Community obligations are broadly similar to, but not all-points congruent with, the obligations laid down in the international Labour conventions. The consortium concluded that 6 of the 7 information obligations it was assessing originated in ILO Conventions. The only EU-originated IO<sup>20</sup> was claimed to represent a marginal cost of around € 40 million of a total € 4.2 billion.

The consortium then referred to a provision of the EC Treaty (Article 307) which provides that the obligations contained in international treaties concluded by member states before their accession to the EU are not affected by the Treaty. This legal reference does not really stand up, since in social matters, member states are fully entitled to improve on the minimum provisions of EU law and can therefore continue to ratify agreements that contain more progressive provisions even after their accession. That said, it remains in the realms of "around about". It is a vague, ballpark assessment, but not wildly incorrect.

The consortium then concluded that since most of the obligations originated in international Labour conventions, they must be the cause of approximately 99% of the administrative burdens they entail. This is utterly nonsensical. Member states only have to comply with the provisions of ILO Conventions which they have ratified. Indeed, the consortium itself even states as much (FR, 2009, p. 45), not realizing that this leaves all its calculations in tatters.

The consortium came to its figure of 99% simply by failing to check which states had ratified the Conventions under review. According to the

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<sup>20</sup>. Prior notice of construction sites.

consortium's calculations, risk assessment is the most costly obligation. The international source of that obligation is chiefly to be found in article 5 of ILO Convention No. 161. How many member states have ratified that Convention? 9 of 27.

The obligations arising out of Safety and Health in Construction Convention 167 apply only in a third of member states (9 of 27). The consortium claims that they account for something over a quarter of costs. Only Labour Inspection Convention 81 has been ratified by all member states except the Czech Republic. The consortium imputes only 5% of total costs to the obligations arising under it.

It does not take a degree in statistics to realize that the figure of 99% is plucked out of the air. Even accepting the link between the Conventions cited and the EU Directives' IOs, the large number of states that have not ratified these Conventions means that the share of obligations stemming from ILO Conventions is unlikely to exceed 20 to 25% of total costs.

The figure of "almost 99%" turns into 98.6% in the Stoiber Group's opinion. The calculations clearly went unchecked. The decimal point may well have been added to give the appearance of thorough and accurate statistical research. The words "almost 99%" reflect an opinion, but "98.6%" brings it into the hallowed domain of the natural and physical sciences. The percentage has now become a settled figure. The consortium's cobbled together clumsy conjecture is entrenched as an unshakeable truth.

Even better than that - in 2005, the Dutch government commissioned private consultants to examine what share of companies' administrative burdens stemmed from international obligations. That study was done by one of the three consortium members: CapGemini.

It might be expected that the estimates produced by CapGemini under a contract paid for by Dutch taxpayers and those funded from the EU budget on the same subject would more or less tally (Kok *et al.*, 2005). Not so. Most of the Conventions looked at by the consortium for the European Union are among the 106 Conventions reviewed by a member of that consortium in the Netherlands. Their administrative cost is estimated at 0% in the report for the Netherlands compared to almost 99% for the EU. In CapGemini's 2005 study, neither labour inspection, risk assessment, or any other obligation contained in these ILO conventions are thought to be administrative burdens.

What can explain this inconsistency? It is hard to resist the inference that a combination of disingenuity and resigned acceptance brought the researchers to a realisation that their work had no real scientific value, and that what they put down in writing to satisfy the political demands of one client could be contradicted by what they wrote in another document commissioned by a different source some years on. If this premise is correct, numeracy becomes irrelevant and political (and business) acumen is what counts. What we have here is less to do with statistics than advertising.

There is no calculation that can explain this discrepancy between zero percent and “almost 99%”. But the customer’s agenda may offer a clue. The 2005 study appears to have two main objectives: to persuade the various Dutch ministries of the need to apply the IOs under international conventions in a restricted and qualified way; and to win over international organizations to the Standard Cost Model, especially the “CapGemini conceptual framework” (see Annex 4 of document). The latter objective holds promise of rich pickings for the consultants. Considering that they charged € 17 million for their work to the European Union, the price for extrapolations to the five continents does not bear thinking about.

## **The Stoiber Group's contribution**

In the final analysis, the Stoiber Group’s contribution was modest in terms of expertise but crucial from a political angle. It acted as the delivery system between the consortium’s output and the adoption of an action programme by the Commission.

From the very outset, the Stoiber Group was regularly briefed by various stakeholders about the serious mistakes made by the consortium. It was an issue that should logically have been addressed in its opinion. The problem is that the group had little original to contribute beyond what it could channel on from the consortium. It was extremely difficult for it to voice criticism and misgivings about a consortium on whose thinking it was almost entirely reliant. Furthermore, for the Stoiber Group to have demonstrated a critical bent would likely have compromised its chances of being turned into a permanent body by the next Commission.

In the early days, the Stoiber Group did sometimes distance itself from the consortium’s estimates, as evidenced in the opinion of 10 July 2008 on company law and annual accounts and the minutes of the meeting of 18 September 2008. The inconsistency of the data on occupational health and safety was highlighted by a minority of members. Ms Jongerius, a member put forward by the ETUC<sup>21</sup>, sent a detailed note profusely illustrated by examples. DG Employment sent a more specific and detailed note. Mr Stoiber dismissed all criticism of the consortium. His answer reveals that he was acting for reasons of political expediency. He said: “As regards the Consortium’s work he (Mr Stoiber) states that independent from quality issues, the measurement is one of the most important bases for the work of the HLG”<sup>22</sup>. Early versions of the opinion of 28 May 2009 still contained limited criticism of the consortium’s estimates. They were dropped from the final version by a majority vote of eight to two.

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<sup>21</sup>. The list of members of the Stoiber Group is available on <http://ec.europa.eu/enterprise/policies/better-regulation/administrative-burdens/>

<sup>22</sup>. Minutes of the meeting of 16-17 April 2009, p. 3.

### **From ignorance to manipulation**

Most of the mistakes made by the different consultants hired by the Commission can be put down to ignorance. But there are also some instances of blatant figure-massaging to meet the sponsors' political agendas.

The Deloitte-headed consortium claims that Belgian law does not require work accidents to be reported to the labour inspectorate. A glance at the Labour Ministry's website belies this claim. Belgian statutory obligations differ with the severity of the accident. For accidents not classed as "serious", the consortium has it right: a report goes in to the insurance company which then notifies the authorities. But, the information obligations for serious and fatal accidents are particularly stringent. The employer has to put in a detailed report to the labour inspectorate. If the inspectorate is not satisfied, it can order the employer to have an outside expert analyse the accident's causes and make recommendations. This is a textbook - and wholly justified - example of what the Commission calls *gold-plating* or "over-regulation". Belgium has gone better than the minimum EU rules in a bid to bring down work accidents. So blatant is the consortium's manipulation that it did not even bother trying to fit the statistical calculations to the analysis. In its calculations, the consortium costs out IOs in Belgium as particularly high, whereas the narrative comments put it at no cost. This piece of patent nonsense has not been picked up on by either the Stoiber Group or the Commission.

The consortium cites an International Labour Organization document as claiming that inspections should take no longer than an hour in small workplaces, half a day in medium-sized firms and a day in big companies.

Queried on this, the author of the document used by the consortium, Ms. Annie Rice, was indignant. The document has been spun to suggest that it laid down a general rule without mentioning the highly specific context in which it was written. Ms Rice said: "this is quoted out of context; it should be understood in the context of the audience it was written for – labour inspection services in South East Europe, who were having to come to terms with a different style of inspection. Previously, inspections of enterprises with 100-200 employees were taking four to five days to accomplish. This is a true administrative burden, and hardly efficient. With written risk assessment and risk management measures a labour inspector can effectively ascertain if an employer is compliant in a small enterprise within an hour or two, or half a day in a medium size enterprise, including a walk around visit. If necessary larger enterprises can be inspected in teams, or inspectors can focus on parts of an enterprise which are more hazardous. But in no way should the improvement in efficiency be taken to mean fewer visits. The whole idea of efficient inspection visits is to free up inspectors' time to make more visits to other enterprises. This aspect does not seem to have been taken into account by the consortium\* ".

Top prize for being interpretive of the facts, however, must go to Mr Telicka, a member of the Stoiber Group and one of two co-rapporteurs on health and safety matters. At the meeting of 16-17 April 2009, Mr Telicka spun his position in these terms: "Mr Telicka points to his experience as a Commissioner for health and safety. His intention is not to bring down legislation; it was not the job of the HLG to do policy making".

In point of fact, Mr Telicka was Commissioner-designate for public health and consumer protection between May and November 2004. Even with this short-lived experience, he could not have been unaware that health and safety is the Employment and Social Affairs Commissioner's portfolio. He never had anything to do with health and safety during his stint as a Commissioner.

\* Communication from Ms Annie Rice to Lawrence Vogel, 16 December 2009.

As to its recommendations, the group followed the consortium on most points. It did however drop one of the consortium's recommendations (on the health and safety document for subsequent works under the Temporary and Mobile Construction Sites Directive). More than that, it ramped up the consortium's deregulationist approach by adding a new legislative recommendation calling for businesses with fewer than 10 workers to be exempted from producing a written risk assessment if carrying out low-risk work.

The group justified this recommendation by massaging the figures in a way the consortium could not have bettered, using the work accidents statistics published by Eurostat and drawing putative conclusions from them. Following the HLG: "Within the SME categories the performance of micro companies with respect to lost time accidents is much better than both small and medium sized enterprises, and midway between them with respect to fatal accidents."

In fact, their conclusions fail to allow for two key things:

1. The statistics were unadjusted for the sectoral distribution of the different categories of business considered. Many sectoral analyses, both national and European, are at odds with the Stoiber Group. There is an inverse correlation between firm size and occupational accident rates in many sectors (UCATT, 2009). Similarly, all available data suggest that there are greater failings in health and safety management and less systematic risk information given to workers in smaller firms.
2. The Stoiber Group has refused to take into account varying levels of under-reporting of accidents. This may account for the apparent contradiction between the recorded all-accidents rate and the fatal accidents rate.

But this is about more than just "fiddling the figures". Where it thought it would serve its policy objectives, the Stoiber Group was quite prepared to contact the consortium directly in order to try and win its support for a recommendation exempting some small businesses from doing a risk assessment. One of the rapporteur members for the working environment tried to do so in March 2009 but was rebuffed by the consortium.

The consortium had clearly not calculated the cost reductions associated with a recommendation which it had dismissed. But the Stoiber Group was keen to play up the scale of the exemption being called for. The group's interim report adopted on 17 September 2009 claimed that the exemption would make potential savings of between 1 and 2 billion euros on a total cost estimated by the consortium at 2.9 billion. As the exemption would relate only to very small businesses, the message is clear: it is the entire risk assessment process that is in question, and not just drawing up a written document as the majority of the group claimed.

## **The contents of the Commission proposals**

The Commission Communication of 22 October 2009 contains eight Labour law measures. Seven relate to health and safety. One has already been

adopted, three are in the works, and the others are being contemplated. Essentially, they incorporate the Stoiber Group's recommendations, with some variances in the cost reductions calculated. The Commission has somewhat tempered the speculative frenzy about the savings achievable. 650 million euros is promised in cost reductions - almost all of it from health and safety at work.

The first measure oddly conflates two wholly unrelated initiatives. One is for the European Agency for Safety and Health at Work to produce guidance documents and checklists for risk assessment, the other for the Senior Labour Inspectors Committee to adopt a document on common principles on labour inspection in health and safety at work. The former is not intended to reduce the time allocated to risk assessments but to make it more efficient by systematizing analysis. Likewise the implementation of an IT tool for risk assessment (measure No. 2). The second initiative has no direct impact on risk assessments done by companies, and is all about efficient labour inspection. There is no evidence to suggest that it would result in fewer or shorter workplace inspections. This was also concluded by the CEPS consultants (Renda and Luchetti, 2009, c, p. 75-76). Even so, the Commission insisted on it being included among the measures contributing to a reduction in business costs. The chances are that the measures were lumped together to hide the fact that the second measure would have a zero cost-reduction effect because the total cost reductions announced for both measures is no more than that calculated by consultants for the first measure - €92.5 million!

Measure No. 5 is also to do with labour inspection, and calls on member states to apply a "risk-based approach". The Commission does not say what it means by this, nor show how labour inspection in the different member states might place inordinate information obligations on businesses. Both the consortium and the Stoiber Group have taken refuge in generalities on this, which primarily reflect their unwillingness to take the complexity of inspection systems into account. Savings of 62 million euros are promised (against 109 million originally announced by the consortium and taken up by the Stoiber Group).

The measure which the Commission contends will yield the greatest cost savings is guidance to member states for a lighter transposition of the Framework Directive (Measure No. 4). It would reduce the Directive's IOs by around 7% (230 million euros). The consortium's report contains no evidence that member states have misconstrued the Directive. A much bigger issue lies behind this proposal. The Commission has for some years been crusading against so-called "gold-plating" (over-regulation), which in both health and safety at work and the environment comes down to pressing for a "bare bones" transposition of directives. This is at variance with the Community Treaty itself, which is clear that the Directives lay down minimum health and safety requirements and that member states may maintain or introduce provisions that ensure better protection for workers. It was on this basis that the Directives were negotiated and that the member states accepted compromises in some cases, knowing that they could maintain better national provisions. The Commission is now raising a political challenge to this ability, arguing that

member states should do away with situations that go beyond the Directives' minimum requirements (COM, 2009, c, p. 7).

Measure No. 3 deals with revision of the Framework Directive. The Commission is considering an exemption for very small firms engaged in only "low-risk" work. This challenge to risk assessment is clearly the most disturbing of all. That risk assessment is the kingpin of the organization of prevention needs no further emphasis here. This measure would drive a huge wedge between workers in firms covered by the exemption and others. It would remove the right of workers in the former group to be consulted on health and safety issues. The measure will purportedly achieve a reduction of 135 million euros. Since this amount was calculated neither by the consortium nor the CEPS consultants, the Commission needs to explain how it came up with this amount<sup>23</sup>.

### What low risk firms?

Neither the Commission nor the Stoiber Group has bothered to define what a low risk business might be. To do so company by company would require a prior risk assessment. This makes a mockery of the proposed exemption unless the Commission allows each employer to determine for himself whether he is only exposing his workers to low risks.

Practically, business exemptions will be determined on a sector basis, which will undermine prevention on three counts:

1. Variations between firms within the same sector are wider than variations between sectors;
2. The "low risk" concept has no real meaning when talked about in generalities. Risks are real-life things. An activity may be low-risk for accidents but still expose workers to high psychosocial risks;
3. One core principle of the Framework Directive is adapting the work to the individual worker. Risk assessment is key in this because it enables each specific activity to be analysed in order to ascertain whether specific changes are needed for the individuals concerned. Not to do a risk assessment would put question marks over protection for pregnant workers, and adjusting the job to the individual.

The Stoiber Group gives no way of identifying what is "low risk", which has all the hallmarks of a soundbite phrase. In fact, the Stoiber Group's estimated cost savings (one to two billion euros) is well in excess of the total cost of risk assessment in all firms with fewer than 10 workers.

The Commission calculates an annual cost reduction of 165 million euros. It does not specify how it came to that figure.

Only the UK authorities have proposed specific criteria (BERR, 2008). The Better Regulation Executive specified the sectors that could be considered as low risk in a contentious report (Fidderman, 2008). The main criteria are the work-related accidents and illnesses reported by workers in a labour force survey. Other criteria are health and safety inspectorate activity and workers' perceptions of health and safety management in their company.

<sup>23</sup>. In September 2009, the Stoiber Group estimated the cost reductions from this recommendation at between one and two billion euros - an amount which seems higher than the total cost of risk assessment in all businesses with fewer than 10 workers. It is indicative of the tub-thumping approach to issues which should be addressed in a more serious way.

Four sectors were considered as low risk:

- finance and insurance;
- hotels and restaurants;
- wholesaling and retailing, and vehicle repair;
- teaching.

The UK criteria have a markedly pro-employer bias, focusing on risks that have immediate and direct financial impacts on the firm, but ignoring the long-term health impacts of work. So, a sector in which a high percentage of the workforce is exposed to carcinogens (e.g., vehicle servicing and repair) can be classed as low risk. In the same way, psychosocial risks are disregarded since they do not result in immediate illnesses.

The four sectors classed as «low risk» are exactly those four sectors where the cost of injury and illness to employers is below average (BERR, 2008, p. 78). This is not necessarily a calculated outcome but reflects the criteria chosen and the relative weighting assigned to each factor. Had illnesses been given a higher weighting, teaching would not have been classed as low risk. Had more weight been given to workers' perception of the quality of prevention, retailing and hospitality would not have fallen in the low-risk category.

The UK criteria exacerbate the tendency to disregard health and safety in female-dominated sectors. Women are present in high numbers in the four sectors described as «low risk», especially teaching and hospitality. Without a written risk assessment, getting recognition of occupational diseases will be much harder in these sectors, especially for illnesses whose symptoms develop over the medium and long term. This will further entrench the stereotype of these sectors as low risk.

Measure No. 6 is to draw up a guidance document under the Temporary and Mobile Construction Sites Directive. The idea of using such a document to reduce the time spent on prevention is outrageous - it should actually be to make information management more systematic and efficient. It is also open to question whether an EU document would automatically improve understanding of the national rules resulting from the transposition of the Directive. Be that as it may, the Commission's stated aim is a cost reduction of 21%, estimated at 140 million euros.

Measure No. 8 is about the revision of the Carcinogens Directive. The Commission takes great care not to be too specific about how this might reduce employers' IOs in this field. No cost reduction has been calculated.

## **The Commission's message**

The basic tenets of the better regulation lobby's approach are open to question. The backbone of prevention is more the information obligations than headgear that can be worn or removed at will. But what of the Stoiber Group and Commission's central message that the health and safety at work IOs are an onerous burden that stops firms from being competitive?

In practice, firms spend much less time than is needed on health and safety at work. The United Kingdom government is among the most vocal advocates of “better regulation” in health and safety, the aim being to reduce the administrative burden on small and medium-sized businesses. A report published by the Health and Safety Executive dismantles the myth that SMEs are crippled by their health and safety management obligations (Heriot Watt University, 2007). The report was based on a much more substantial methodology than the literature designed to quantify the administrative burden using costing models. The report’s conclusions show how little time is spent on health and safety. The authors report that, “SMEs spend surprisingly little time on health and safety activities, 59% of enterprises spend an hour or less a week with one in four spending no time at all”. The available evidence from other countries points the same way: the time spent on preventive measures in the broadest sense is not enough to ensure an effective health and safety policy.

On the Temporary and Mobile Construction Sites Directive more specifically, UK estimates are that no duty holder spends more than 2% of the project value on these core health and safety management measures (HSE, 2007, p. x).

In France, just 19% of workers were informed about the risks of their work in 2005 (Coutrot, 2008), falling to 15% in firms with fewer than 10 workers. It remains very low - below 30% - even in high-risk sectors like building. Women get even less information than men (13% against 25%). In Spain, a bare 25% of workers report a job risk study having been done in 2007 (MTAS, 2008). Temporary workers get a much worse deal than permanent employees (18.2% against 33.8%). The data from the European Working Conditions Survey bear this out: firms with fewer than 10 workers are found to be worst at providing information on occupational hazards to workers (Eurogip, 2009).

An Irish government study has come up with what seems a reasonably likely cost approximation<sup>24</sup> which estimates total health and safety measures at around 1% of non-construction industry firms’ labour costs, and about 2% in the construction industry. This is a very small percentage given the issues at stake - nearly 160,000 people in the European Union are killed each year because of inadequate workplace prevention.

A comparative study presented to a recent international conference by the Swedish researcher Kaj Frick found that poor health and safety management is behind technical and organizational risks, but that in small enterprises (from 1 to 49 workers) poor management can better be described as a separate risk type. Their lack of health and safety competence and/or planning very often exposes workers to risks that otherwise would be easy and cheap to avoid or abate. The higher risks found in small firms are partly an effect

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24. Daniel Kelly, *Economic Impact Assessment of Occupational Safety & Health Legislation in Ireland*, presentation given to the Conference in Brdo pri Kranju (Slovenia) on 7 November 2008.

of having more workers in manual work and/or in hazardous sectors. However, the main problem is the increased risk from poor health and safety management<sup>25</sup>.

## **Ignoring the real problems**

Arguing the case for the existing law does not mean turning a blind eye to the real problems. The law is often misapplied. Coherent prevention strategies are not implemented. Precisely the worst thing about the huge waste of resources that is the better regulation campaign is that it never gets to grip with the real problems. A one-size-fits-all magic solution - reducing the administrative burden by 25% - is supposed to cure all ills. No specific analysis of the difficulties of applying the rules is offered. "All it takes" is to list employers' complaints and award an across-the-board 25% cut regardless of the area concerned or the point of the legislation.

More rational analysis shows that the legislation could be made much more effective and waste avoided by turning towards solutions other than cutting back on relevant information.

Collectivising knowledge and experiences is a key way in which the public authorities can help firms implement more effective prevention policies. The experience of the Work Environment Funds in the Scandinavian countries for two decades after the reforms of the 1970s is a prime example of that. In all categories of risk, the existence of systems to exchange information and experiences on problems and possible solutions is a big help to firms (and especially SMEs) in implementing a prevention policy. Different national surveys have found that the best preventive practices tend to be found in firms that cooperate within networks, exchange information and keep up with technical developments. National prevention strategies can play a crucial role here, and Community policy could valuably incorporate this aspect more actively. In a sector like the construction industry, populated by a large and fragmented body of what may be short-lived small businesses, the existence of databases on substitutes for hazardous chemicals has paid dividends.

Collectivisation starts from a completely different approach to that of "better regulation" which is based on a rose-tinted view of enterprise seen in terms of the Old West pioneers, lone riders who scorn public rules and mean to be accountable to no-one for their actions. Any form of communication - verbal, written or otherwise - is an intolerable imposition. Having to account to the authorities, workers or other firms is seen as a burden. Economic history offers little endorsement for this blinkered view. Far from holding back directly productive activity, management tasks play into development. Markets work only on the two foundations of the systematic production/exchange of information

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25. Notes taken during Professor Kaj Frick's paper to the International Work and Health Forum, Paris, 3 November 2008.

and regulatory mechanisms. And yet Mr Stoiber feels able to proclaim that, “Businesses and their personnel should concentrate on their products and not be forced to do superfluous work for the state”<sup>26</sup>. It takes some political neck to swallow whole employers’ resentment and disparagement of public regulation when those same bosses clamour long and loud for more public rules and intervention when it suits their immediate interests.

#### **ELENA: a textbook example of SCM at work**

The Nationaler Normenkontrollrat (NKR) holds up the ELENA database (computerised income records) as a textbook example of the standard cost model (SCM) at work. It is claimed that the system could save business 86 million euros a year. It was developed from a detailed analysis of the cost of drafting legislation. The ELENA database is claimed to be a winning proposition all round – for business, the public and the state. The NKR’s 2008 report gives an entire chapter over to it as evidence that the SCM can produce objective solutions for lawmaking that can be taken up elsewhere (NKR, 2008, p. 34-37). However, the NKR thought the project did not go far enough and should have included more data. In its 2009 report, the NKR again cites ELENA as one of ten big contributors to reducing the administrative burden on business (NKR, 2009, p. 14). One of the authors of these reports, Mr Johannes Ludwig, President of the NKR, is also one of the Stoiber Group’s three German members.

Before ELENA came online, all employers had to issue workers with pay slips and notify the competent authority about any worker receiving unemployment benefit. ELENA is a central database consisting of employer-supplied information. It is a technical solution that is claimed to reduce the time spent on these obligations. It applies not only to unemployment benefit, but also parental and housing allowances. But this is not to say that it is a neutral solution that leaves only winners. The big loser may be the protection of workers’ privacy. The central database will collect a wide range of data, including on such things as sick leave and striking, as well as on the reasons why employment has been terminated (resignation, dismissal, etc.).

The ELENA database has been criticised as a threat to privacy and fundamental freedoms by Peter Schaar, who heads Germany’s citizens’ rights watchdog, the Data Protection and Freedom of Information Commission, (BfDI), an agency of Germany’s Home Office. Mr Schaar argues that Elena violates the German Constitution, while Frank Bsirske, the Ver.di trade union federation leader, has criticised the abuses that the system might give rise to. His position is clear: “Elena is a black hole that threatens the right to strike, respect for the individual and social gains.” Both the Die Linke opposition party, and the Liberal Democrat Party in the coalition government, have also come out against ELENA.

Even employers seem to be cool towards the system, believing that the cost savings have been heavily overstated. Proof if it were needed that SCM estimates have more appeal for politicians than business.

In January 2010, the German government had to back-pedal and announced that some aspects of ELENA were to be reviewed.

<sup>26</sup>. HLG press release, 29 May 2008.

Developing organized participation by workers in health and safety is also effective. Various studies have shown that where there is independent workers' representation for health and safety with sufficient means to act, preventive practices are much more systematic, practical and better fitted to address long-term problems. This again is diametrically opposed to the "better regulation" argument that workers' representation is only ever an added cost.

The third thing is effective, competent and credible labour inspection. Most studies on health and safety regulation claim a key role for labour inspection (Davis, 2004). The Commission proposals on this are irresponsible, aiming to reduce both firms' information obligations and workplace policing. This is an issue already pointed out for the United Kingdom by Professor Rob Baldwin of the London School of Economics. Commenting on the dual recommendation to reduce firms' IOs and to make labour inspection more targeted, he wrote, "The problems are, first, that targeting enforcement demands that inspections and other actions are based on intelligence, and second, that, if the obligations of businesses to supply information to regulators are reduced, it is increasingly difficult for regulators to engage in targeting without generating intelligence independently. Such independent generation of data may, of course, prove hugely expensive for regulators - indeed far more expensive for them than for the businesses that they are controlling (who may have the information quite readily to hand)".

## **Conclusions and recommendations**

The premise that the SCM is politically neutral, that everyone will win out, and that administrative costs can be reduced without affecting the substantive objectives of the legislation is disproved by this examination of health and safety at work. The Commission's proposed measures are apt to undermine workplace prevention activities, and foster a purely reactive approach in which the planning required by risk assessment is seen as an imposition. The benefits for employers are probably less economic than political. The cost savings are open to serious question, but reducing information obligations will certainly make consultation of workers and health and safety enforcement more difficult.

The SCM estimates costs by compartmentalising the legislation into boxes called "information obligations" and largely ignoring interactions between the different elements of what is complex legislation. The recommendations made are also compartmentalised. In some cases, this method may well produce conflicting recommendations and cost shifting rather than reduction. The Commission's two main proposed measures for the Framework Directive are at cross-purposes, for example: a number of small businesses would be exempt from the requirement to produce a written risk assessment, yet at the same time there would be fewer and/or shorter workplace inspections. It is reasonable to assume that with no written risk assessment, health and safety inspectors would have to conduct longer and more systematic inspections of the workplaces visited. In many countries, having a written risk assessment

allows labour inspectorates to target their priorities better. If some firms are no longer required to produce such a document, inspectors will themselves have to audit the workplace for the risks and prevention measures. Similarly, it can be assumed that in many cases SCM-based recommendations will not eliminate a particular activity but will simply reclassify the costs from being “administrative costs” to “business as usual”.

Arguably, the SCM is basically a propaganda tool for spinning a deregulation agenda. Its use in EU affairs has likely made the already shaky estimates even shakier. DG Enterprise’s political management is also part-responsible for the particularly implausible results. The barest political transparency dictates that the European version of the SCM should be critically assessed on the basis of this first large-scale trial before it is extended to other legislative acts.

The European Commission’s adoption of the SCM is set in a bigger political picture. The better regulation campaign has much in common with the property franchise systems that existed in many 19<sup>th</sup> century European countries. The arrangements put in place to control and limit the powers of the legislative branch are designed to channel only one voice, that of employers. This is plain to see in the calculation of what is deemed to constitute an administrative burden. Setting a target of a 25% reduction even before calculating and analysing what is to be reduced reflects nothing but the presumed needs of employers and disregards the potential costs that might be incurred for other social classes.

The Stoiber Group arguably fails to advance the discussion on regulation. Rather, it has held it back by trying to legitimize the consortium’s work instead of conducting an independent scrutiny of it. There is no justification for the group’s mandate to be extended as Commission President Barroso has said it will be. Reading its opinions calls to mind George Orwell’s words: “Political language (...) is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind<sup>27</sup>”. The European Parliament ought now to assume its responsibilities and mount a critical examination of how the better regulation campaign has been conducted to date.

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27. George Orwell, *Politics and the English Language*, 1946.

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- Make labour inspection visits more efficient (26 June 2009);
- Simplify the obligation to report on occupational accidents suffered by workers (26 June 2009);
- Provide more and better targeted information of practical use (26 June 2009).

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## Part 2

# Better Regulation: a new religion trying to spread the word?

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## Introduction

“Better Regulation will continue to be a key factor for strengthening the competitiveness of businesses - in particular micro, small and medium-sized enterprises - and for creating sustainable economic growth and jobs”<sup>1</sup>. (...) All levels in the EU institutions as well as in the Member States [need] to put Better Regulation principles at the heart of their decision-making processes”<sup>2</sup>. Strengthening the competitiveness of businesses, creating sustainable economic growth and jobs, ensuring a well-functioning market... Better Regulation has much to live up to. Too much? Is it a matter of putting faith in better regulation as the only true way to revive the EU model? The following pages look at three of the six components of better regulation - impact assessment, stakeholder consultation, and reducing the administrative burden - to see how they have been gradually refocused and turned to other ends than their original goal of improving... the quality of EU legislation. It will be seen how the Commission has created a Frankenstein’s monster of a system – one growing increasingly independent, seeking to break free of its oversight, and outsource some of the tasks vested in it by the treaty.

## The development of Better Regulation

The Conclusions of the Lisbon European Council of 23 and 24 March 2000 state 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>3</sup>.

1. Paragraph 1 of the Council Conclusions on “Better Regulation” adopted by the Competitiveness Council on 4 December 2009, Document 16111/09 of 30 November 2009.

2. *Ibid*, paragraph 3.

3. Lisbon European Council, Presidency Conclusions, 22 and 23 March 2000, paragraph 14.

The period ushered in by the European Council of 15 and 16 March 2007 marks a new departure in the path of the renewed Lisbon strategy, namely - how to make Better Regulation work more for business competitiveness. 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 increase in 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 refocusing of Better Regulation peaked in 2009.

To recap, there are six main components to Better Regulation:

- ex-ante impact analysis of Commission proposals;
- simplification of existing legislation (through the codification, recasting and repeal of laws);
- consultation with stakeholders on the proposals being framed;
- screening of the existing *acquis* and withdrawal of proposals deemed obsolete or outdated;
- reducing the administrative burden;
- access to law.

## Impact assessment

### The baselines

The Commission's June 2002 Action Plan<sup>4</sup> set out to integrate, strengthen, coordinate and replace the entire very mixed bag of instruments for analysing the impact of its legislative proposals. Impact assessment was intended to improve the quality and consistency of policy-making by focusing on "major policy initiatives" included in the Annual Policy Strategy or the Commission's Work Programme.

The 2003 Interinstitutional Agreement<sup>5</sup> states that "the Commission will continue to implement the integrated advance impact assessment process for major items of draft legislation, combining in one single evaluation the impact assessments relating *inter alia* to social, economic and environmental aspects" (paragraph 29). It further states that "where the codecision procedure applies, the European Parliament and Council may, on the basis of jointly defined criteria and procedures, have impact assessments carried out prior to the adoption of any substantive amendment, either at first reading or at the conciliation stage" (paragraph 30).

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4. Communication from the Commission "Action Plan: Simplifying and improving the regulatory environment", COM (2002) 278 final.

5. Interinstitutional Agreement on Better Law-Making, *OJ C* 321, 31.12.2003, p. 1-5.

The 2005 common interinstitutional approach to impact assessment confirms the 2003 Interinstitutional Agreement: “Impact assessment is an aid to help<sup>6</sup> the three institutions to reach a properly considered decision. It is in no sense a substitute for political decision in the democratic decision-making process” (paragraph 6).

This is an important qualification since it clearly shows that the co-legislators are intended to retain control of the policymaking process which is not to be ousted by impact analysis. But things have changed.

### **The role of the Impact Assessment Board (2006)**

On 14 November 2006, Commission President José Manuel Barroso set up an Impact Assessment Board (IAB) 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 the impact assessment (economic, social and environmental impacts). Its members have been appointed in a personal capacity and on the basis of their expert knowledge, and so act “independently”.

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 political decision-making. Ultimately it is the Commission which decides whether or not to adopt an initiative, 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>7</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.

### **The most recent developments under the EU Presidency**

Broadly, the current positions appear to be as follows: the United Kingdom, Germany, Denmark, the Netherlands, Sweden, the Czech Republic, Poland,

6. All emphases are added by the writer.

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

Austria, Estonia, and to a lesser extent 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, Spain, 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, harmonization of rules at Community level.

A full-throated debate went on under the Czech Presidency (first half of 2009) on the “evidence-based decision making process” – i.e., the need for Council and Parliament to make any amendment to legislation subject to a prior impact assessment based on convincing facts and evidence. The Council Conclusions talked of “the use of impact assessments in the policy making process” rather than just for specific legislative proposals.

In the Coreper working group meeting ahead of the Competitiveness Council of 4 December 2009 under the Swedish Presidency, Germany, backed by the United Kingdom, the Netherlands and Denmark, tried to get a requirement that impact assessments be conducted for all Commission proposals, including non-legislative acts, written into the Conclusions. It took determined action by the Commission, Belgium, Luxembourg and France to impress the terms of the 2003 Interinstitutional Agreement on them. The member states eventually compromised on an agreement that only “future important acts” should be subject to an impact assessment. A comparison of the 2003 Interinstitutional Agreement with the December 2009 Conclusions reveals a retreat on two fronts from the Interinstitutional Agreement, which referred to “major items of draft legislation”. Germany and its like-minded allies succeeded in extending the use of impact assessments, which can also be requested for non-legislative acts (communications, recommendations, guidelines, etc.) and more frequently (the adjective “important” covers a wider range of proposals than “major”). Behind the words lie an intention by Germany and its allies to screen the output of new EU rules in order to control and try to reduce legislation. Underlying this approach is an unfounded belief that law may hold back competitiveness, growth and business profitability. Increased use of impact assessment could have major consequences: placing a bigger drain on the EU budget (drawing up contract specifications, selecting and paying consultants, etc.) and significantly delaying decision-making (impact assessments take an average 6 to 12 months). Add to this that the co-legislators will also have to do impact assessments for all important amendments, and there is a real risk of the Community machine grinding to a halt. The point is that neither Council nor Parliament have either the expertise or the budget required to produce such studies. And the time required for the new impact assessments would be on top of that already spent by the Commission on its own impact assessments. This would turn the expert consultants co-opted to do the assessments into the real kingpins of the decision-making process. This trend towards the systematic use of experts which is undermining democratic decision-making should set alarm bells ringing.

One thing that cannot go unmentioned is José Manuel Barroso’s recent decision to add an extra step to impact assessments by calling for an ex-post assessment “to ensure that our proposals really deliver what they promise and to enable us to revise and correct them where they fail to work as expected”<sup>8</sup>.

## Stakeholder consultation

### The stakeholders in Better Regulation

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

#### 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 *Eipascopes*, European Institute of Public Administration, No. 2008 / 2, p. 7

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. Like impact assessment, public consultation is intended as a help to the legislature, a form of representation as it were. As the European Parliament has stated<sup>9</sup>, “consultation of interested parties (...) can only ever supplement and can never replace the procedures and decisions of legislative bodies which possess democratic legitimacy; only the Council and Parliament, as co-legislators, can take responsible decisions in the context of legislative procedures...”.

8. José Manuel Barroso, *Political Guidelines for the next Commission*, p. 29.

9. EP Resolution on the White Paper on Governance, A5-0399/2001, paragraph 4.

### **Consider the views of citizens and businesses**

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, including structured processes, like the social dialogue with trade unions and employers' organizations, and the dialogue between the Commission and the European and national associations of local authorities.

### **The most recent developments in the EU Council**

The debate under the Czech and Swedish presidencies of the EU polarized between two aspects of consultation:

- extending the prior consultation period;
- the consultation period.

First, under the influence of powerful employers' or business federations and various member states, including Germany, the Competitiveness Council of 28 May 2009 opened the possibility of "extending the minimum consultation period beyond an 8-week period"<sup>10</sup> for improved collection of information and responses.

Then, the Council of 4 December 2009 stressed "the need for early and timely stakeholder consultation, using appropriate methods including on-line consultation, throughout the policy-making cycle to enhance regulatory quality"<sup>11</sup>. This again is a fairly marked step-change over previous texts. Looked at more closely, it suggests that the stakeholders (i.e., essentially the employers' federations) could be involved at every stage of EU policymaking to a greater extent than either the employees and workers' representatives, who are less involved in the prior consultations, or the EU co-legislators who can only decide through the co-decision procedure<sup>12</sup>.

Consultation has become a big issue in Better Regulation and it is to be expected that the stakeholders will make renewed efforts to sway policymaking more in keeping with their own agendas.

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**10.** Competitiveness Council Conclusions on Better Regulation, 13 May 2009, Document No. 9663/09, 13 May 2009.

**11.** Paragraph 12 of the Council Conclusions on Better Regulation adopted by the Competitiveness Council of 4 December 2009, Document 16111/09 of 30 November 2009, Conclusions.

**12.** The wording of the 4 December conclusions was improved over the Swedish Presidency's original version, which read: "Invites the Commission to enhance the use of consultation during the whole policy-making cycle".

## Reducing the administrative burden

### The Commission proposals

In January 2007, the Commission put forward an action programme aimed at reducing unnecessary administrative burdens on EU businesses. The European Council approved the programme in March 2007 and endorsed the aim of a 25% reduction in the administrative burdens stemming from EU law and national implementing or transposing measures by 2012. The Commission put forward its new action programme for reducing administrative burdens on 22 October 2009<sup>13</sup>. The Commission identified the reduction of administrative burdens as one of the key areas for action in the European Economic Recovery Plan. Of the 123.8 billion euros representing the estimated administrative burden in the 13 priority areas<sup>14</sup>, the Commission argued that its proposals could represent a reduction of 40.4 billion euros - 33% of the total estimated burden of EU origin. The Commission nevertheless felt that it was possible to do “even better”, and so in January 2009 added a further 30 legislative acts to the initial list of 42 acts covered by the reduction programme.

### The situation in Council

The situation in Council is mixed. On the one hand, the Commission accuses the Council of inconsistency in demanding more efforts from the Commission when Council and Parliament are lagging behind in implementing the proposed reductions approved by the Commission; on the other hand, Germany, the United Kingdom, Denmark, the Netherlands and Sweden seem to be behind something of a falling-out between the Council and the Commission.

So, in paragraph 8 of its Conclusions of 4 December 2009, the Competitiveness Council “reiterates that progress in reducing administrative burdens would be undermined by additional administrative costs resulting from new legislative proposals”. This phrase, taken from the March 2009 Competitiveness Council’s “Key issue paper” for the Spring European Council, translates the “net target”, i.e., any additional burden of new legislation must be offset by an equivalent reduction in the administrative burden of the existing stock of EU laws and regulations. This principle should set alarm bells ringing on two counts. Firstly, it could to some degree undermine the Commission’s right of initiative and the role as guardian of EU law vested in it by the treaties. Secondly, going down this road would lead to swingeing cuts in the costs of labelling and producing the monitoring, recording, surveillance and assessment reports needed to inform the public authorities on top of the Commission’s

13. Commission Communication on the Action Programme for Reducing Administrative Burdens in the EU. Sectoral Reduction Plans and 2009 Actions, COM (2009) 544 final, 22. 10. 2009.

14. Agriculture and agricultural subsidies, Annual accounts/Company law, Cohesion policy, Environment, Financial services, Fisheries, Food safety, Pharmaceutical legislation, Public procurement, Statistics, Taxation / Customs, Transport, Working environment / employment relations.

existing reductions; this despite such things as the financial crisis showing that surveillance and regulation of financial markets was precisely what was lacking.

Furthermore, paragraph 18 of the Council Conclusions of 4 December 2009 introduced a new concept which effectively boils down to taking Better Regulation even faster down the road of deregulation of the Community acquis.

So, the Council “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”. Here again, Belgium backed by the Commission, had a hard fight right up to Coreper to get the magic words “where appropriate” included in order to avoid the Commission being sent too much of a like-it or lump-it message.

The wording of paragraph 18 now opens up a new road: no longer just the administrative burden, but reduction of the regulatory burden, or deregulation proper. It is a huge distinction! This paragraph marks a major political turning point in Better Regulation and heralds new attempts to turn Better Regulation. to other ends

## **Turning Better Regulation to other ends**

### The rise of the 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 keeping Better Regulation under review.

#### **The Better Regulation committees, expert groups and consultants**

##### *— The technical group to monitor the Interinstitutional Agreement (2003)*

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 once or twice a year. It could have a more influential role in the further development of Better Regulation.

##### *— The group of national experts for Better Regulation (2006)*

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 (2006) was discussed above (see p. 55).*

– *Commission outside consultants*

The Commission relies on 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, PricewaterhouseCoopers, CapGemini, London Economics, Copenhagen Economics, KPMG, NordWest Consult, etc. Their job is to help the Commission identify “low hanging fruit” or those laws that can most easily be simplified on the basis of the criteria defined by the Commission. They – and others – are also the consultants behind the ex-ante or ex-post impact assessments.

The consultants’ role is not always as neutral as it may seem. In some cases, it reflects the Commission’s strategic choices, which may lead the consultants to act as “pilot fish” for the Commission to put across a specific message. This asks the question whether the consultants are as independent as the Commission claims. What does prompt questions is that all these expert consultants regularly provide consultancy services to major international groups or business associations.

Where the consortium tasked with helping the Commission choose regulations is concerned, there has been a sort of cross-fertilisation which has produced some unintended consequences and a form of mutual influence. On the one hand, the Commission had everything to gain from favouring showy reductions of the administrative burden that reflected a significant cost reduction, forcing the consortium to find “low hanging fruit” that were easy targets. On the other hand, the consortium confined itself to skimming the Community acquis in areas where it thought savings could most easily be made, but not necessarily in areas where the administrative burden might have been most usefully reduced, particularly for government or citizens. Nor did it do so in areas where the inordinate administrative burden did not represent a substantial saving, or because the charge was merely an annoyance but not costly to business.

#### **The special case of the High Level Group of Independent Stakeholders on Administrative Burdens (2008)**

– *The Stoiber Group: the external “watchdog” pushed through by Angela Merkel*

The High Level Group of Independent Stakeholders on Administrative Burdens (HLG), chaired by Edmund Stoiber, former premier of Bavaria, was set up on 31 August 2007<sup>15</sup> and held its inaugural meeting on 17 January 2008. It was given a three-year mandate. It has a budget of 2 million euros under a European Parliament a pilot project. Its 15 members are politicians and academics,

<sup>15</sup> Decision of the European Commission, 31 August 2007 (2007) 4063.

businessmen, representatives of the social partners and NGOs. 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.

José Manuel Barroso appointed Edmund Stoiber at the express request of the German Chancellor, Angela Merkel as a “watchdog” to exert external leverage on the Commission and in particular on DG Enterprise<sup>16</sup> as sponsor for administrative burden reduction.

On 18 September 2009, in response to prompting from Angela Merkel, President Barroso announced that Mr Stoiber’s mandate would be extended for a further two years, up to December 2012. He was also assigned a new task: verifying that by late 2012, the process of administrative burden reduction is fully mainstreamed into the Commission’s internal working methods and ensuring that national targets for reducing the administrative burden by 25% were achieved on time by Member States. This stood to reason on two counts. First, it gave Mr Stoiber a specific objective on which to focus. And secondly, recasting the mandate in this way allowed the President - and the Commission - to wrest back control of Better Regulation. In a letter to President Barroso, however, Mr Stoiber claimed that the President had strengthened and widened his mandate. Mr Stoiber’s understanding was that he was entitled to scrutinise any legislation being drafted and that his mandate would cover all aspects of Better Regulation (and not just reducing the administrative burden). President Barroso’s cabinet (policy staff) disagreed with this interpretation, stating that there could be no question of outsourcing part of the Commission’s responsibility to an independent advisory group.

### **The abortive attempt to beef up the Stoiber Group**

Edmund Stoiber’s newly-strengthened mandate has attracted the attention of the 2 Council formations concerned.

#### *— The ECOFIN Council*

The ECOFIN Council of 10 November 2009 tiptoed around the issue, stating that “The Council takes note of the valuable input provided by the High Level Group of Independent Stakeholders on Administrative Burdens and of the intention of President Barroso to extend this mandate.” Circumspect as the wording was (“takes note”), it still placed on record that the work done had made a positive contribution and that the President intended to extend Mr Stoiber’s mandate.

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<sup>16</sup> There is irony in the fact that the “raw material” on which Edmund Stoiber works is precisely that which comes out of DG Enterprise. In other words, without DG Enterprise’s output, the IAB would have nothing to do.

— *The Competitiveness Council*

The issue also cropped up in the Competitiveness Council and its bodies, as Germany backed by a group of “like minded” allies (UK, DK, NL, IE and ... the Swedish Presidency) lobbied hard in the working party, then in the Coreper meeting of 13 November 2009, for the Commission and Member States to undertake to strengthen the existing advisory groups. It is of incidental interest that while the ECOFIN Council was focused on the extension of Mr Stoiber’s mandate, the Competitiveness Council bodies were concerned to strengthen it. Germany leaned heavily on the Commission to move towards the German Normenkontrollrat model (see p. 65). Resolute action by Belgium resulted in the 4 December Competitiveness Council inviting the EU institutions and member states to “consider strengthening existing advisory groups”. Strengthening the Stoiber Group has been put on the back burner for the moment, but the issue is sure to resurface at a future date.

**The policy and institutional issues raised by the Stoiber onslaught**

Through Edmund Stoiber, Germany picked up the baton from the United Kingdom, the Netherlands and Denmark. As has been seen, the onslaught has not been without effect. It raises four political and institutional issues.

- **Institutional issues:** unwonted proactive interference by outside “experts” in the phase where the Commission exercises its right of initiative. Not least of the effects of this would be to outsource oversight of impact assessments (currently performed “in-house” by the Impact Assessment Board). An (external) limit would be set on the Commission’s scope for action. The Commission’s independence (enshrined in article 17 of the Treaty of Lisbon) would ultimately be compromised.
- **Political substance/impact:** oversight and analysis (parallel and external) of the political scope of Commission action through the prism of “Better Regulation”. Analysis of the administrative burden is already provided for in the Commission guidelines on impact assessment (it systematically analyzes and quantifies the consequences of its proposals in terms of the administrative burden). The Commission’s impact assessments also consider whether proposals are appropriate when gauged in terms of proportionality and subsidiarity. Also, the tendency to focus on the cost angle of proposals and minimise the potential benefits of laws, may work against businesses in small and medium-sized states which may benefit more than large member states from mandatory harmonized standards (creating a level playing field at Community level) in terms of access to the internal market.
- **The Stoiber Group’s composition, representativeness and legitimacy:** the group’s members were chosen not to a preset skills profile, or from considerations of political and geographical balance, but by Mr Stoiber personally. As a result, the fifteen members include three representatives from Germany. Also, the composition appears to be a very mixed bag of politicians, experts of various standing and businessmen. There is only marginal representation of workers and civil society.
- **Interference with “traditional”, institutionalized stakeholder consultations:** the Group operates “off the radar”, behind the official

consultation of the various advisory committees, online consultations, and the official pronouncements of national and European federations. What point remains to these formal consultations? The whole point of the Commission's practice of structured, institutionalised dialogue is to be a useful safeguard to ensure balance.

## Agencies tasked with monitoring the administrative burden step into the debate

There are many agencies for simplification or monitoring of the administrative burden in Europe, but four are particularly active at Community level and share a common approach. This is because these four countries – the Netherlands, the United Kingdom, Germany and Sweden - are among those most committed to reducing the administrative burden, and pursuing the most ambitious deregulation agendas.

### **ACTAL (Adviescollege Toetsing Administratieve Lasten)**

The Netherlands is the undoubted pioneer in this field. It was Dutch researchers who in 2002 first came up with a method - the "standard cost model"<sup>17</sup> – for measuring the administrative burden of Dutch legislation. Holland was also the first country to establish (in 2000) an independent advisory body known as ACTAL (Adviescollege Toetsing Administratieve Lasten), an initiative of the Dutch government<sup>18</sup>, whose sponsoring department in the Ministry of Economic Affairs. Its remit has been regularly extended and widened. Its current term runs until 1 June 2011. ACTAL aims to create the conditions for a culture change by screening all the regulations enacted by the government departments with which it has an agreement. Actal advises the Dutch government on the burden of regulation and the administrative costs on businesses, the public and the authorities. It is concerned not only with information obligations but also compliance costs. In 2008, Actal investigated 198 cases and issued formal opinions on 47 of them<sup>19</sup>.

### **The Regulatory Policy Committee**

Along with the Netherlands, the United Kingdom is at the forefront of Better Regulation. The 2005 Hampton Report<sup>20</sup> laid down principles which still apply, and identified possible ways of reducing the administrative burden by adapting business regulation. On 2 April 2009, the UK government announced

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17. An empirical method designed as a tool to measure progress in programmes to reduce the national administrative burden. It consists of a detailed assessment of selected laws based mainly on direct interviews with businesses and expert opinions (micro-assessment), which makes it a particularly subjective method.

18. <http://www.actal.nl/pagina/Nederlands/>

19. [http://www.ez.nl/english/Subjects/Reducing\\_the\\_regulatory\\_burden/Documents/Regulatory\\_burdens\\_on\\_businesses\\_progress\\_report\\_May\\_2009](http://www.ez.nl/english/Subjects/Reducing_the_regulatory_burden/Documents/Regulatory_burdens_on_businesses_progress_report_May_2009)

20. The final report *Hampton Review on regulatory inspections and enforcement* was published on 16 March 2005.

its intention to set up a new external regulatory policy committee to advise on the costs and benefits of regulations. The new body has been tasked with providing effective external scrutiny throughout the policy making process. The Committee will advise the Government on how to minimize the costs of measures, maximize benefits and ensure that the benefits justify the costs incurred. It is also intended to be a powerful tool in helping to improve the quality of analysis. The Committee will not comment on the Government's policy objectives, which are a matter for Ministers, but will focus on the cost-effectiveness of the instruments to deliver them.

### **The Normenkontrollrat<sup>21</sup>**

The National Regulatory Control Council was set up in 2006 with a term that expires in 2011. This new independent body has 8 members, is chaired by Johannes Ludewig and reports directly to Chancellor Merkel. It acts as a “watchdog” to forestall any new bureaucracy and ensure compliance with the standard cost method. It has no power of veto. Its comments are sent to the Cabinet and as part of the bills to Parliament. The Normenkontrollrat has introduced a method for ex-ante and ex-post assessment of the administrative burden and coordinates reduction of the administrative burden at a central level. This system contrasts with previous schemes based on decentralization of the fight against bureaucracy. Since the Institute of the German Economy (Institut der Deutschen Wirtschaft) claimed that Germany could achieve short-term growth of 1.5% and a significant rise in the labour force, Angela Merkel's government has become a convert to Better Regulation. And like all converts, it has become a crusader at Community level for reducing the administrative burden, notwithstanding that some researchers have shown that “focusing exclusively on cutting administrative costs could be perverse” (Wiener, 2006) or that doubts exist as to an effect between diminishing administrative burdens and an increase in GDP (Van den Abeele, 2006; Torriti, 2007).

### **The Swedish Better Regulation Council**

The Swedish Better Regulation Council - Regelrådet - is an independent committee operating under the Ministry of Enterprise, Energy and Communications<sup>22</sup>. It consists of four members and is assisted by a secretariat. Like ACTAL, it has a short term (October 2008 - December 2010). The Regelrådet's task is to review proposals for new and amended regulations from ministries and government agencies that may have effects for business (working conditions, competitiveness, etc.). It focuses mainly on the administrative costs resulting from a new or amended regulation and examines the quality of the impact analysis. The Council is an element of the Government Action Plan

<sup>21</sup>. See in particular Bastian Jantz, *The National Normenkontrollrat in Germany: How to control the regulators?*, paper given to the second biennial conference of the ECPR Standing Group on Regulation and Governance in Utrecht, 5-7 June 2008.

<sup>22</sup>. <http://www.regelradet.se/Bazment/regelradet-eng/sv/startpage.aspx>

for Regulatory Simplification and is clearly tied into the aim of reducing the administrative burden. It focuses exclusively on the costs of regulation for businesses.

## The concerted effort of the four regulatory control agencies

Actal and its three sister organizations – Germany’s Normenkontrollrat<sup>23</sup>, Sweden’s Regelrådet and the UK Regulatory Committee – have drawn up a position paper making recommendations for the EU to reach an effective and ambitious reduction in regulation.

### The “Group of Four’s” agenda to influence the Commission

In a position paper<sup>24</sup> dated 18 October, the four regulatory control bodies make recommendations to the new President of the Commission for the 2009-2014 term of office. They urge that the current economic crisis reinforces the need to strengthen the competitiveness of the EU by relieving businesses of unnecessary regulatory pressure.

Five recommendations were made to the Commission:

1. Perceivable reduction measures: citing the Commission’s proposal to exempt micro enterprises from the requirement to file annual accounts, the four organizations call on the Commission to focus not only on initiatives with a large macroeconomic burden reduction, but also on proposals that can bring about a substantial relief for specific groups of businesses.
2. Baseline measurement of the administrative burdens of the complete Community acquis: the “Group of Four” recommends moving from a baseline measurement of currently no more than 42 legislative acts to a large-scale overview of all administrative burdens on businesses. More specifically, they call on the Commission to list all the information obligations for businesses. This would provide a basis to set an initial target for every additional information obligation to be compensated by a reduction of another within the relevant Directorate-General. Measurement of the administrative burdens in Euros of all the obligations would then follow. In addition to the most burdensome administrative requirements, the Commission should also seek to adopt reduction measures which tackle those areas that businesses identify as the most irritating, even if their costs may not be particularly high.
3. Net reduction target for the complete Community acquis and every DG: the four argue for a net reduction of the burden of the entire Community acquis (not just in the 13 priority areas), including regulations adopted through the committee procedure. The net target should be set only once the administrative burdens for the entire acquis have been calculated.

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23. <http://www.normenkontrollrat.bund.de/Webs/NKR/DE/Homepage/home.html>

24. Position Paper on Achieving a sustainable reduction of administrative burdens in the European Union signed by the Administrative Adviescollege Toetsing Lasten (Netherlands), the National Normenkontrollrat (Germany), the Regelrådet (Sweden) and the Regulatory Policy Committee (United Kingdom).

4. Ex-ante measurements of administrative burdens for every new initiative by the Commission: the “Group of Four” want an impact assessment of the administrative burden to be done for each legislative proposal put up by the Commission.
5. Establishing an independent and external committee for administrative burdens: the four call for an independent and external committee to be set up with a formal part in the legislative process. It should scrutinise all proposed legislation previously justified by an impact assessment and have the competence to advise the Commission on the reduction of administrative burdens in the stock of legislation. It would assess whether new or amended legislation has been formulated in a way that makes it easy to understand, implement and apply. The new committee would have to be staffed adequately and the staff would have to have a certain level of independence.

#### **The Commission's response**

In a letter dated 19 November, Catherine Day, the Secretary-General of the Commission, set the record straight. Pointing out that its reduction target had been reached, and that it was for Council and the European Parliament to make further progress, the Secretary General said that the aim of a “net reduction” was not compatible with its integrated approach to policymaking: “Administrative burdens are only one aspect of any policy initiative, and must be addressed as part of the overall assessment of the economic, social and environmental benefits and costs”. She went on to recall President Barroso’s opinion that an external EU body is not appropriate both for institutional reasons related to the Commission’s right of initiative “and also because we remain convinced that the cultural change at the heart of smart regulation is best driven from within the institution rather than from outside.”

#### **The EP's muted approach**

Parliament has addressed the issue on several occasions<sup>25</sup>. In its June 2008 resolution, Parliament criticised Better Regulation on two counts. It believes 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 which 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.

<sup>25</sup>. Cf in particular European Parliament, Final 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 Frassonni, A5-Report 0313/2003, 25 September 2003.

In its resolution of 21 October 2008, the European Parliament addressed various aspects of the agenda. 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).

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, 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. Since 2008, Parliament has not been much exercised over these issues.

## **How Better Regulation is veering off-course**

It is becoming increasingly bureaucratized

Paradoxically, as it has developed, Better Regulation has bit by bit spawned its own bureaucracy, notwithstanding that the whole point of it is to cut red tape.

### **Adding to the pillars of Better Regulation**

Better Regulation is built on six main pillars (see p. 54). On 3 September, José Manuel Barroso suggested adding a seventh pillar: the ex-post evaluation of the implementation of EU legislation. Increasing the components makes management - most often done through external consultants and experts - more complex and less transparent. Examples of this include the increased number of tests prior to any legislative act: integrated impact assessment, subsidiarity and proportionality tests, internal market test, SME test, external competitiveness test, and so on

### **Adding to the intermediate national and EU scrutiny bodies**

New bodies have been created to scrutinise implementation, assess its relevance, and specify new objectives. This trend to add intermediate layers to traditional decision-making has gradually made the system much more unwieldy. But the risk and illusion inherent in the standard cost method that it is possible to put figures on anything is not to be lightly dismissed. In fact, totting up the cost of every piece of legislation and the burden it creates may actually take away from the substantive debate on policy options and deter the Commission from proposing any legislation. But this may well be the goal. Added to this is the fact that the national regulatory control agencies are stepping unmasked into the debate with new requirements of their own.

## The emphasis is shifting to competitiveness as the be-all and end-all

Better Regulation has gone through four periods of gradual change that partly overlap and have seen the agenda turned to different ends.

1. **1993-1999:** Better Regulation is seen as the driving force for good EU governance: ensuring compliance with subsidiarity and proportionality, improving the quality of drafting of Community legislation, and simplifying the Community acquis.
2. **2000-2006:** the launch of the Lisbon Strategy in 2000 heralds the first change in the nature and an incipient “refocusing” of the Better Regulation agenda: it is now meant to contribute to boosting growth and enhancing competitiveness. EU governance and the institutional connotation of better lawmaking gradually give way to issues of more immediate concern to businesses. The period 2000-2004 (Prodi Commission) is marked by “peaceful” coexistence of the themes developed between 1993 and 1999. The 2003 Interinstitutional Agreement and the conclusions of the 2005 UK Presidency reflect a balanced compromise: simplify legislation while observing the acquis and contributing to the competitiveness of the European Union.
3. **2007-2009:** following the European Council of 15 and 16 March 2007, the better regulation agenda prepares to raise its game by wondering how regulatory reform could be made to work more for business competitiveness. This is the era of competitiveness as the be-all and end-all, as reflected in the aim of reducing the administrative burden by 25%, refocusing impact assessments in a more business-friendly way, adding to the number of intermediate bodies that screen Commission initiatives, and the increase in testing prior to any legislative act. This refocusing phase of Better Regulation peaks in 2009. The United Kingdom, Germany, the Netherlands and Denmark, but also the European Parliament and business confederations, call for the reduction of administrative burdens to be made a “net target”. As the harbinger of a clear shift in focus, it is now no longer just the “administrative burden” but regulatory constraints that are blamed for making businesses uncompetitive (see the conclusions of the Competitiveness Council of 28 May 2009), or potentially leading to “production leakages” – i.e., industry relocation.
4. **A fourth period (2010-2014)** may have started on 3 September 2009 with the announcement of a new turning point in Better Regulation: José Manuel Barroso announced “smart regulation to make markets work for people”. The soundbite title of this new strategy cannot conceal a major deregulatory onslaught headed by Germany with the United Kingdom, the Netherlands, Denmark and Sweden in its wake.

## Future prospects

José Manuel Barroso has decided to transfer the matter to central responsibility in the Secretariat-General. As it was previously split between DG Enterprise and the Secretariat-General, this is a welcome measure of consistency. Policy responsibility for the exercise will now be in the hands of two women in the Commission's Secretariat-General: the Secretary-General, Catherine Day (France), and Marianne Klingbeil (Germany), Director. Commission activities will in future be coordinated by three units. President Barroso is likely to delegate management of it to one of his Commissioners.

The President professes a pragmatic, delivery-based approach, favouring whichever he sees as the most appropriate kind of cooperation: intergovernmental cooperation or the Community method.

The Commission President is not a vocal advocate of the Lisbon Treaty but nor is he keen on outsourcing the responsibilities vested in the Commission by the Treaty. He is likely to stand firm against Mr Edmund Stoiber's demands.

Finally, the President is against the "net target" (the obligation to offset any additional new administrative burden by an equivalent reduction in an existing additional burden) or establishing an external Community agency of the Normenkontrollrat type to exercise oversight and scrutiny of the European Commission's activities - not because he is hell-bent on preserving the traditional institutional framework, or to safeguard the Community *acquis* or method, but on grounds of practicality.

## Concluding remarks

The conclusion of this has to be that all in all, the period since 2007 - the turning point of Better Regulation - has been an eventful one. Just three things will be mentioned here. Firstly, the Commission's initial enthusiasm, expressed by Günter Verheugen, has given way to marked diffidence in the Commission towards some proposals (net target, outsourcing of "better lawmaking", etc.) piloted by a highly active group of member states (Germany, United Kingdom, Netherlands, Denmark, Sweden). Günther Verheugen (SPD) and Edmund Stoiber (CDU) had been mandated by Angela Merkel to cut EU red tape. The scoresheet is mixed. While it has certainly impaired the functioning of the European Union and the Commission's right of initiative, the blitzkrieg has not had the hoped-for results. The Barroso II Commission will more than ever have to pitch its "smart regulation" idea as more a way forward than a buzzword phrase. Secondly, turning to the other actors: the Council has taken up the issue, but put out mixed messages; Parliament has been conspicuous by its absence from the EU debate; and the expert consultants are gradually ousting the co-legislators to become central to policymaking. Thirdly, given its objective of restoring competitiveness and boosting growth, Better Regulation is flagging badly. With 40 billion euros in virtual savings on the clock (but only 7.6 billion actual savings), Better Regulation is nowhere near delivering the

amounts needed to get the economy moving again, facilitate investment and create business confidence. Better Regulation stands disconnected from the big societal and social issues, and is a conviction verging on wishful thinking. It is high time for Better Regulation to return to what it should never have stopped being: guidance for policymaking.

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