

The ‘Plateau-ing’ of the European Better Regulation Agenda: An analysis of activities carried out by the Barroso Commission¹²

By

Ragnar E. Lofstedt
King’s Centre for Risk Management
King’s College London
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1. Abstract

This paper examines the European Commission’s (EC) Better Regulation Agenda, from the time that President Barroso came to power – in November 2004 – to the 2006 summer recess. It particularly focuses on whether the Commission’s regulatory thinking has moved away from the precautionary principle and towards Regulatory Impact Analysis (RIA), something I predicted in 2004 (Lofstedt 2004). The article summarises the papers and communications in the Better Regulation area put forward by the Commission since November 2004, and makes a number of observations about how the Better Regulation Agenda may develop in the future. In conclusion I argue that the Commission’s Better Regulation Agenda has plateaued. Commissioner Verheugen will not be successful in pushing the Agenda further forward because of issues such as REACH and opposition from member states, notably France. It is based on a combination of desk research and interviews with policy-makers, regulators, academics and stakeholders who have been involved either in shaping or fighting the Better Regulation Agenda.

2. Introduction

Of late, there has been much lip service paid in Europe to better regulation. That is to say that Commission officials have argued that Europe’s regulation needs to be improved in order to increase Europe’s competitiveness. A recent Commission Communication noted that less red tape leads to more growth (European Commission 2005a). The aim of this paper is twofold: firstly, to provide a summary of what the Commission has been doing in the Better Regulation area over the past couple of years (sections 3 to 5): secondly, to analyse the

¹ This paper focuses specifically on the European Commission’s activities with regard to better regulation. It does not examine the important roles of either the European Parliament or the European Council.

² This paper focuses primarily on social regulation. It does not address economic regulation, *per se*.

Commission's work and put forward a number of speculations of where the Commission will go next (sections 6-8). The paper ends on a rather pessimistic note, namely that the Better Regulation Agenda has plateaued and the future of it does not look bright, because of pending regulations – such as REACH – as well as member-state opposition to it (from France, for example). In so doing, the paper questions a prevailing European mind-set, namely that the Commission will be increasingly active in the Better Regulation area and that noticeable improvements will be made.

3. Background

On the 22nd of November 2004, Barroso and his 24 Commissioners came into power. With regard to the Better Regulation Agenda, the timing was crucial. The previous Prodi Commission had begun wrestling with the topic following the much-heralded June 2002 Better Regulation package, which among other things stipulated the use of RIAs for all proposed regulations (e.g. European Commission 2002a; 2002b; 2002c; 2002d). This package – and, historically, Europe's Better Regulation Agenda in general – was driven by three concerns: good governance, sustainable development, and competitiveness (for a detailed discussion see Lofstedt 2004).

At the time, however, there was arguably no clear and consistent way forward for Better Regulation. The Commission itself was struggling both in ensuring public and stakeholder participation, attempting to promote social and environmental concerns raised in the European Council of Gothenburg while at the same time arguing for greater European Union (EU) competitiveness. Initially, a number of key members within the Commission believed that these various elements could work in harmony: by focusing on social and environmental values, EU competitiveness could be increased. This was something that had been postulated not only by a number of academics – most notably Porter and Weale – but, more importantly, by Minna Gillberg, who had written her PhD on this topic (Gillberg 1999)³ and was a close advisor to Commissioner Margot Wallstrom (the Commissioner for the Environment DG).

But there was also significant opposition to the Better Regulation Agenda, as voiced by a number of EC Directorates-General (DGs), as well as by certain Members of the European Parliament (MEPs) (e.g. Schorling 2002) and environmental Non-Governmental Organisations (NGOs). These stakeholders felt that it threatened the further use of the precautionary principle and that there was

³ Minna Gillberg is now a member of Commissioner Wallstrom's cabinet.

too much focus on the economics of regulation, rather than on environmental and social values. The timing of the Better Regulation package was difficult. It was published at a time when there had been a number of Communications, White Papers and court rulings, which not only postulated the further use of the precautionary principle, but in effect legalised it (Lofstedt 2004; Marchant and Mossman 2004; Scott and Vos 2002; Van Asselt 2005; Van Asselt and Vos 2006).⁴ At the time, the Commission was generally seen as left-of-centre. The President of the Commission, Romano Prodi, was a former governor of the Bank of Italy, with left-of-centre sentiments, and the Commissioner for DG Environment – and main driver of REACH (the proposed European chemical-control policy) – was Wallstrom, a Swedish Socialist.

At the same time, discussions surrounding the European Better Regulation Agenda began receiving transatlantic attention. Academics in the United States (US) were analysing the European use of the precautionary principle (Graham 2001a and b; Graham and Hsia 2002; Hammitt et al. 2005; Kagan and Axelrad 2000; Keeney and von Winterfeldt 2001; Marchant 2001; Sunstein 2002 and 2005; Tickner 2003; Vig and Faure 2004; Vogel 2003; Wiener 2002; Wiener 2003; Wiener and Rogers 2002). A number of these studies were highly critical to the European use of the term and questioned the usefulness of the concept overall (e.g. see Sunstein 2002 and 2005). Many of these criticisms were shared by regulators in the Bush Administration (e.g. Graham 2002).

4. Better Regulation today

Much has changed since then, however. The Barroso Commission is fundamentally a different beast from the Prodi administration. It is right-of-centre and free-market oriented, in the Anglo-Saxon model, with a number of appointments and internal moves made to signify this. For example, responsibility for REACH moved from DG Environment to DG Enterprise, where the new Commissioner, Gunter Verheugen (also a Vice President of the Commission), has attempted to make it more palatable for industry. The new Commissioner for DG Environment is Stavros Dimas, a Greek Christian Democrat. Although seen by some critics to be weaker than his predecessor (Wallstrom) (Institute for European Environmental Policy 2006), he has been highly active pushing through a clean air strategy. Finally, within the new Commission, Wallstrom was moved from DG Environment and made Commissioner for Communications and Vice President, which has in effect sidelined her from any further participation in the development

⁴ These included the European Commission's Chemical White Paper (European Commission 2001) and the much-discussed European Court of First Instance case of Pfizer Animal Health vs European Commission.

of REACH. This has led to an occasional skirmish between Wallstrom and her colleagues in the Commission, such as when she challenged Barroso for putting forward a 'Room Paper' on REACH, which had been watered down even further than the compromise text agreed upon in the Commission during the UK presidency (McLauchlin 2005b). By far the most powerful Commissioner in the Barroso Commission is Verheugen. Verheugen, a highly regarded Commissioner who in the Prodi Commission was in charge of the difficult (yet ultimate successful) enlargement effort, was given DG Enterprise, which under his tutelage developed a strong Better Regulation Agenda. In one of his first speeches after becoming Vice President of the Commission he stated:

Cutting red tape will be my trademark. Reducing red tape, removing unnecessary restrictions, screening the existing legislation – whether or not we still need it, whether we can simplify it.... We should not bring forward legislation without proper impact assessment. (Verheugen 2004)

But questions remain, concerning how the Better Regulation Agenda has been affected by the Barroso Commission and what the consequences of this are for future regulation both within the EU and within individual member states. These are the topics for the rest of this paper.

4.1 Better Regulation is being streamlined.

Since its introduction, the Commission's various Better Regulation initiatives have been strongly criticised (Institute for European Environmental Policy 2004; Lee and Kirkpatrick 2004; Mather and Vibert 2005; Torriti 2006; Vibert 2004). Some critics take the view that the Commission initially tried to conduct too many RIAs, and as a result the quality of them was at best mixed (Ambler et al. 2003; 2004a; 2004b; 2005). Others argue that the consultants hired by both the Commission and other interest groups do not have adequate experience of conducting risk assessments. For example, with regard to REACH, there have been 36 RIAs to date, with the costs (depending on the funder) running as high as 6.7% of Germany's GNP and 1.735m job losses (Arthur D. Little 2002), and the benefits assessed as being anywhere between 50bn Euros (World Wildlife Fund for Nature) and 95bn Euros (Greenpeace), saving everything from Eskimo children to polar bears.⁵ To summarise, the RIAs conducted for REACH have been used as lobby instruments and are not unbiased measures of the actual costs and benefits,

⁵ The Commission's RIA showed that the costs for industry abiding by the new REACH regulations ranges from 2.6bn to 5.2bn Euros over 11 years, representing 0.05%-0.1% of the annual turnover of the chemical sector.

something noted by the European Parliament in its criticism of Arthur D. Little's RIA work for the German Industry Association (BDI).

The European Commission has acknowledged these criticisms and over recent years has begun to address them. It has done so in two ways: via top-down, policy-driven Communications on the topic, and via practical guidelines and sharing of best practice.

4.2 Top-down, policy-driven Communications

The Barroso Commission has issued a number of top-down, policy-driven Communications (European Commission 2005a; 2005c; 2005d; 2005e; 2005f; 2005g). A key focus was the issue of competitiveness (as part of the Lisbon Goal), particularly the role Better Regulation could play to help increase competitiveness and reduce regulatory burdens and red tape. Verheugen takes the view that the Better Regulation Agenda should be based on three 'pillars'. In one speech on the topic he said:

First we will withdraw more than a third of the proposals pending in the Council and Parliament since at least 2004.... Secondly, we will simplify existing legislation.... Thirdly, we will only present proposals for new legislation that have undergone impact assessment including a competitiveness test. (Verheugen 2005d)

These so-called 'pillars' are also apparent in the various communications and initiatives proposed by the Commission over the past few years:

- Improving and extending the use of impact assessments (European Commission 2005a). One way to achieve this would be via uniform Impact Assessment guidelines.
- Developing a methodology to measure administrative costs (European Commission 2005f). Along with a number of member states, most notably the Netherlands and the UK (Better Regulation Task Force 2005; OECD 2005), the Commission takes the view that administrative burdens (that is demonstrating compliance, inspection, form-filling, record-keeping) could be significantly reduced. Unlike the UK, which has adopted a horizontal analysis in determining administrative burdens, the Commission has adopted a horizontal sector-by-sector approach, with an initial focus on automotive, construction and waste sectors.

- The screening of legislative proposals (European Commission 2005c). In September 2005, Barroso's Commission, following the first extensive screening of 489 pending proposals, scrapped 67 pending EU laws, seen as outdated and unnecessary.

The biggest challenge regarding Better Regulation, however, was the October 2005 communication entitled *Implementing the Community Lisbon Programme: A strategy for the simplification of the regulatory environment* (European Commission 2005g). This highly ambitious document has as a first step the review of some 220 areas of legislation, involving more than 1400 related legal acts.

The Commission sees the simplification as being necessary because small and medium sized enterprises (SMEs), which account for 99 per cent of all enterprises and 75 per cent of Europe's workforce:

... suffer disproportionately from legislative and administrative burdens as they have more limited resources and expertise to tackle often complex rules and regulations. It is therefore necessary to assess how their special needs can be taken into consideration in the context of simplification. (European Commission 2005g)

Finally, the Commission realises that, whatever it does in this area, there will be no measurable results unless member states follow the Commission's initiatives. It is clearly worried about how member states will handle Better Regulation initiatives:

It is also quite clear, however, that better regulation will be possible if only the Member States also play their part, since it is the Member States that are responsible for many of the regulations that hamper competitiveness. According to a British study, 80% of the red tape encumbering the European economy does not come from Brussels but from the capitals — quite simply because EU Directives are implemented in an unnecessarily bureaucratic fashion. (Verheugen 2005a)

To address this, the Commission proposes that, firstly, Better Regulation agencies are established in all member states, like those already in place in Denmark, Germany, the Netherlands, Sweden and the UK. Secondly, the Commission is considering using 'Regulations' in the future,⁶ rather than Directives,⁷ for the

⁶ Regulations are binding laws that are narrowly defined and must be implemented by the member states as is.

implementation of EU-based regulations, thereby reducing the chances of member states ‘gold-plating’ the regulations.⁸ Finally, the Commission is considering introducing so-called ‘sunset clauses’ that will limit how long the Regulations/Directives will be in force (European Commission 2005g).

4.3 Practical guidelines and sharing of best practice

The top-down policy initiatives put forward by the Commission in its Communications have led to the development of a series of practical guidelines and encouraged interest in sharing best regulation practice among policy makers. In 2004, the Commission argued for the development of five-page ‘Roadmaps’, which have now replaced the Preliminary Impact Assessments introduced in 2002. These Roadmaps call for an estimation of the time required for completing the full Impact Analysis (IA), as well as identification of the likely impacts of each of the policy options (European Commission SEC 2004 1377). In June 2005, the Commission published its revised Impact Assessment Guidelines, devised to help Commission officials to develop uniform impact assessments (European Commission 2005b). Similarly, DG SANCO recently put forward *Guidelines for the Preparation of a SANCO Scoping Paper*, which aims to assist its civil servants develop the background documentation needed for any new regulatory initiatives that will need approval by the Commissioner, and other planning documents such as Roadmaps (DG SANCO 2005a). Similarly, in 2005, the Commission set up a High Level group of national experts on Better Regulation and is in the process of establishing an electronic network of specialists and experts who can be called upon to give advice of a technical and scientific nature in the elaboration of the Commission’s Impact Assessments.

Since Barroso came to power, the Commission has paid closer attention to the ongoing work on impact assessment and cost benefit analysis originating in the US. For example, the most senior Bush appointee working on this topic, Prof. John D Graham, the Director of the Office of Information and Regulatory Affairs (OIRA) within the Office of management and Budget (OMB) was well received by Barroso, Verheugen and colleagues. Over the past two years, Graham has been invited to teach on Better Regulation courses set up by DG SANCO as well as on training days for regulators in the new member states, arranged by the European Policy Centre, a Brussels-based think-tank. In 2005, based on his initiative, OMB,

⁷ Directives are binding laws in terms of their objectives and goals, but crucially, unlike the regulations, the member states themselves are allowed to decide how to best reach the objectives and goals.

⁸ Gold-plating refers to when the implementation goes beyond the minimum necessary to comply with an EU Directive by either extending the scope, substituting wider legal terms for those used in the Directive, or not taking full advantage of derogations within the Directive to keep requirements to a minimum.

together with DG Enterprise and the Secretariat General, established a high level US/Europe summit on Better Regulation, and since then there have been a number of summits in both Brussels and Washington, with a high level of interest from senior regulators on both sides of the Atlantic (EU-US Economic Initiative 2005). These dialogues are bound to receive even greater interest following the recent appointment of C. Boyden Gray as the US ambassador to the European Union, who has a personal interest in the Better Regulation agenda.

4.4 Research and actual improvements

Aside from the top-down and practical initiatives, the Commission has attempted to address criticism by hiring more staff to work on Better Regulation issues, and has commissioned academic research in this area. Over the past two years, for example, a number of DGs have increased their ability to carry out and review RIAs. While the Secretariat General continues to take the lead on the Commission's Better Regulation activities, DG Enterprise now also has a whole unit working on Better Regulation issues. DG SANCO and DG Environment have also increased their expertise in this area, and other DGs are following suit. The number of 'extensive' impact analyses is also increasing: in 2001, there were 21 extended impact analyses; by 2005 this had almost doubled, to 38.

Similarly, both DG Research and DG Enterprise are commissioning academic research in the Better Regulation area. This research has focused on both evaluating RIAs themselves via independent scientific peer review, and on providing external overviews of how the Better Regulation Agenda should, and should not, be formulated. Through these research efforts, scholastic and primarily economic-based power houses have become established at universities such as Exeter and Manchester, and academics such as Jacques Pelkmans and Claudio Radaelli have become familiar names in the corridors of DG Enterprise (e.g. Pelkmans et al. 2000; Radaelli 2004a; 2004b; 2005). Their research joins the rich vein of European regulatory studies long associated with Majone (Majone 1990; 1996; 2005; 2006). Finally, think tanks are keen to book their seats on this increasingly lucrative band-wagon. The European Policy Centre has a Better Regulation Programme (along with its already existing Risk Forum), and the Centre for European Policy Studies has established its Regulatory Affairs Programme (e.g. see a study by Renda 2006).

5. Competitiveness – the main driver of the Better Regulation Agenda

The Commission's interest in so heavily promoting the Better Regulation Agenda is linked with Verheugen and his colleagues' interest in increasing Europe's competitiveness (Verheugen 2004; 2005a; 2005b; 2005c; 2005d; 2005e; 2005f). In reviewing the Commission's Communication on Better Regulation and related themes, competitiveness is repeatedly raised as an issue. Verheugen and his colleagues take the view that 'Lisbon = competitiveness', and that this is achieved through Better Regulation – end of story. Hence, the much-touted three components of better regulation – good governance, competitiveness and sustainable development – have been reduced to one: competitiveness.⁹ Verheugen, for example, argued in a much-quoted Better Regulation speech:

Better regulation at all levels constitutes a central component in the Commission's proposal for revitalising the Lisbon process. The equation is simple: Less red tape = more growth and jobs. Today we have presented a specific package of measures for cutting down on red tape with a view of improving the environment for business and industry and hence strengthening the competitiveness of the EU economy. (Verheugen 2005a)

Neither sustainable development nor good governance measures were mentioned in this key speech. There are a number of reasons for this.

5.1 Good Governance

Vocal elements of the Commission (DG Enterprise) take the view that it already addresses the governance issue, as the Commission is more transparent and more open to public and stakeholder involvement than it ever has been (e.g. the highly publicised internet consultations that have been used repeatedly by the Commission over recent years, such as those used during the REACH consultation [Donkers 2006]). This is not a widely held view outside the Commission. The consumers NGO, BEUC, takes the view that the Commission, and in particular DG Enterprise, is not nearly transparent enough (Murray 2006), while others, such as UK's Better Regulation Task Force (now the Better Regulation Commission), argue that the Commission's consultation period is simply too short (Better Regulation Task Force 2005b). For example, at the UK presidency's Better Regulation Conference in September 2005, Sir David Arculus, Chair of the Better Regulation Task Force, argued:

⁹ One needs to note, however, that the impact assessments are neutral Better Regulation tools. These IAs continue to be applied in an integrated matter to assess impacts across all three dimensions, with the aim to present the evidence to the politicians to decide on whether and how to best proceed.

... there is also a lack of transparency in the Commission's reluctance to disclose how fully it is meeting its own standards for consultation. Reporting at the moment can be perfunctory, selective and superficial, and we discovered that almost a quarter of recent Commission consultations lasted for less than its own eight-week minimum standard, and the Commission didn't report this statistic itself. So citizens have a right to know how well the Commission is performing the tasks it set itself, and this is not just about efficiency and effectiveness, but also about accountability. (Arculus 2005)

The Commission disagrees. Verheugen, for example, argued at the same UK regulation meeting that:

As far as the consultation is concerned, I don't share fully your views, Sir David. I think that we are already over-consulting in the European Union, but I accept that we certainly can improve the transparency of the consultation process. Since we have the Internet it is more or less impossible to take into account everything that we get from stakeholders. In the case of REACH for instance, we got 40,000 responses during the consultation process, and that is something that must be discussed, but I would like to discuss that with Member States and the Parliament. (Verheugen 2005)

The debate regarding whether the Commission is adhering to 'good governance' is not about to go away. Recently, for example, Verheugen set up the Cars 21 group, to examine what regulation aimed at the automotive sector would look like over the next few years. With regard to this group, environmentalists and consumers took the view that they were under-represented. Similarly, in February 2006, European Parliamentarians attacked Verheugen's high-level advisory group on energy as unbalanced, as it had two representatives from the nuclear sector, yet no one from the renewables area (McLauchlin 2006; Taylor 2006). Verheugen feels that these accusations are unfair:

I could have sat with industry representatives behind closed doors and no one would have said anything. I deliberately decided not to do this but to launch a round table with all the stakeholders to achieve a balance between what the NGOs are asking for and what industry CEOs ask for. (McLauchlin 2006)

That said, within the Commission itself some DGs, most notably Communication, do take the view that more dialogue is needed. Commissioner Margot Wallstrom, for example, recently launched the Plan D initiative, which stands for democracy, dialogue and debate. The problem with this initiative in particular – and the DG Communication in general – is that since the European Constitution was voted down by the French and the Dutch, and after the revamped Lisbon agenda, outside policy observers take the view that Wallstrom and her colleagues have been notably absent from the media scene (Mettler 2006).

5.2 Sustainable development

Sustainable development is today viewed by a number of senior Commission figures as being equivalent to greater regulation, and hence hampering growth and threatening the success of the Lisbon agenda. This view should come as no surprise: by the time the Barroso Commission was being formed, a number of member states, notably Germany and the UK, were of the view that the proposed environmental regulatory measures coming from Brussels were out of control and unbalanced (Jones 2005; MacShane 2006; Schaefer and Young 2006). In particular, concern was expressed about the formulation of the chemical control regulation, REACH, and in the initial months of the new Commission there were numerous attempts to water down the proposed regulation (Lofstedt 2007). A number of NGOs and Green Party representatives also felt that the Commission was inherently more anti-environmentally biased than any other. However, the turning point with regard to taking sustainable development out of the Lisbon agenda occurred in early 2005, during the planned re-launch of the Agenda (commonly referred to Lisbon-2). In the *Better Regulation for Growth and Jobs in the European Union* Communication, the Commission argues:

The EU's better regulation policy aims to improve regulation, to better design regulation so as to increase the benefits for citizens, and to reinforce the respect and the effectiveness of the rules, and to minimise economic costs – in line with the EU's proportionality and subsidiarity principles. (European Commission 2005a)

In the same Communication the Commission argues that sustainable development is still vital:

Deepening the economic pillar of impact assessment does not compromise the importance of 'sustainable development' and the integrated approach, which remains the basis of the Commission's approach. Deepening the

economic analysis, which also includes competition aspects, should improve the quality of the assessment of the true impact of all proposals. (European Commission 2005a)

In the launch of Lisbon-2, however (and unlike previous communications on the topic), the Commission firmly places sustainable development within a set of economic criteria. Sustainable development is no longer a stand alone ‘pillar’ – something that critics of the Commission have also picked up on. For example, in a wide ranging and scathing report, the think tank Institute for European Environmental Policy takes the view that, with this Communication, the Better Regulation Agenda changed shape – from examining a wide array of possible Better Regulation tools, such as increasing the level of transparency, to a much narrower agenda, namely promoting a cost-effectiveness mechanism to increase competitiveness (Institute for European Environmental Policy 2005).

The inner circles in the Commission deny all this. Verheugen, for example, has made a number of statements disputing these arguments. In March 2006 he argued:

I do not share the view that trade-offs must be made and that to boost competitiveness you have to drop your responsibility to the environment or social standards. (McLauchlin 2006)

But there is evidence to support the environmental stakeholders’ claims that the Better Regulation Agenda is changing shape. In July 2005, for example, there was an attempt by DG Enterprise to halt DG Environment’s seven core environmental strategies, which focus on modernising and simplifying a number of key regulatory areas, ranging from air pollution to the marine environment. DG Enterprise took the view that rather than simplifying and modernising regulations in these areas, DG Environment’s strategy would actually increase Europe’s regulatory burden, and therefore went against the Better Regulation initiative and should be halted. It was only after an unprecedented hearing that Dimas was able to convince fellow Commissioners that his plans were in line with the Commission’s Better Regulation initiative. His views were substantiated in a Commission document published on the topic in September 2005 (European Commission 2005d).

In December 2005, the Commission published a Communication reviewing its sustainable development strategy (European Commission 2005h). It had a bold underlying statement, setting out an action plan; but rather than containing

concrete, specific actions, the Communication was rather vague. For example, the Commission argues:

Governments will always be an important part of the solution as they set the framework within which citizens and businesses take decisions. But, sustainable development cannot only be about what governments can do. All stakeholders, businesses and citizens in particular, need to be empowered and encouraged to come up with new and innovative ways to address the challenges and seize the opportunities. (European Commission 2005h)

The document itself was heavily criticised by the green lobby. For example, John Hontelez of the European Environmental Bureau (an NGO) took the view that the strategy implied that the Commission:

... basically withdraws as a leader for sustainable development. (ENDS Report 2006)

The Commission has addressed this and related criticisms by pointing out that at the conclusion of the Austrian presidency in June 2006 noted:

Integrate the internal and external dimensions and be based on a positive long-term vision, bringing together the Community's sustainable development priorities and objectives in a clear, coherent strategy that can be communicated simply and effectively to citizens. (Begg and Larsson 2006)

5.3 The response from the environmental lobby

The environmental lobby, concerned about the de-prioritisation of the sustainable development pillar, have tried to convince the Commission that its priority needs to be increased. For example, the so-called Prague Statement, issued by the heads of Europe's various Environmental Protection Agencies, noted that there was evidence that good environmental regulation makes good competitiveness (Network of Heads of European Environment Protection Agencies 2005), in line with earlier academic research on the topic (Hajer 1995; Porter 1998; Porter and van der Linde 1995; Vogel 1995; Weale 1992 and 1993). In addition, a number of environmental lobby groups – such as the European Panel for Sustainable Development – have shown that tough regulation leads to greater competitiveness,

rather than the reverse (Begg and Larsson 2006; European Panel for Sustainable Development 2005a and 2005b).

Member states themselves have also become active in this area. In January 2006 the Dutch Environment Minister Pieter van Geel proposed a five-step plan for cementing eco-efficiency into the EU Lisbon strategy (Netherlands Environmental Assessment Agency 2006). Similarly, the Swedish authorities have long argued that tough environmental regulation leads to greater competitiveness. As far back as 1996, their Prime Minister took the view that:

We will gain from... the marriage of ecology, economy and employment. (Cabinet Platform, September 17th, 1996 [Lundqvist 2000])

And Ethel Forsberg, Director General of the Swedish Chemicals Inspectorate, recently argued that:

Green chemistry will lead to new jobs and greater innovation, which will only benefit Sweden's competitiveness. (Forsberg 2006)

The most vocal proponent arguing that Better Regulation is still synonymous with sustainable development is Dimas himself. In a series of speeches in 2005, (Dimas 2005a; 2005b; 2005c) he defended the *raison d'être* of DG Environment, not accepting the agenda driven by Verheugen and colleagues.

For example, on the misinformation in the Commission and elsewhere:

... the last 12 months have seen the increasing acceptance of the outdated view that environmental protection limits growth and costs jobs. This is misinformation – and it's time to put the record straight.”

... environmental standards drive innovation and contribute to competitiveness. (Dimas 2005c)

And on the problems of ignoring the costs of inaction by not adopting stricter regulations:

... the cost of inaction can be many times the cost of sensible preventive measures. In the long term, pollution will affect the economy's bottom line just as much as it affects the quality of people's lives. It is therefore up to

policy makers not to compromise the environment in the short term (and short sighted) dash for growth. (Dimas 2005c)

Dimas and his cabinet back up these statements with figures and statistics, arguing that Europe's citizens agree with their position. For example, he notes that in one Eurobarometer survey, 72 per cent of Europe's citizens took the view that the environment influenced their quality of life either "very much" or "quite a lot" – only slightly less than economic factors (78 per cent). In addition he points out that in the same poll 63 per cent of citizens agreed that the EU should give priority to environmental protection over economic competitiveness (Dimas 2005c).

6. Analysis

The European Better Regulation Agenda, as defined by the European Commission, has changed direction in a remarkable fashion over the past three years. RIAs, administrative burdens reduction, and regulatory simplification are now all key concepts being promoted by Verheugen, Barroso and colleagues,¹⁰ and phrases such as 'the precautionary principle' are rarely used. The question that now remains is: what next? Will this drive continue, or will it eventually be watered down?

6.1 The Better Regulation Agenda and the Commission

On the face of it, it is perhaps surprising that the EU even has a Better Regulation Agenda – at least the current one. Historically, the Commission has never been known for promoting regulatory reduction. In fact, rather the opposite has been the case. The Commission exists for shaping uniform regulations within the EU, and it derives its power from promoting everything from environmental regulations to health-and-safety and food legislation. Indeed, it has been noted in a number of contexts that in countries such as the UK more than 50 per cent of environmental and health and safety regulations originate from the EU (Lowe and Ward 1998; Schaefer and Young 2006). Arguably, if the Commission was serious about promoting Verheugen's agenda, Commission officials would soon be out of a job. Today, there is a clear sense of unease within the Commission itself at middle manager level and below. Although a majority of the Commission officials want to continue to work for the Better Regulation Agenda, a number of Commission officials take the view, off-the-record, that it should be promoting the precautionary principle much more strongly than it does. The fights between Verheugen and Dimas are also arguably reducing the credibility of the Commission. In their speeches on Better Regulation, it is difficult to uncover

¹⁰ All these Better Regulation initiatives predate the Barroso Commission.

exactly what the Commission's policy on the topic is, with Dimas arguing that Better Regulation and environmental regulation go hand-in-hand and increase competitiveness, something that Verheugen would never say.

6.2 Better Regulation – just rhetoric?

Better Regulation, just like the Lisbon Agenda, is peppered with much rhetoric and, arguably, short on real concrete actions. The so-called 'bonfire of regulations' (European Commission 2005) was no more than a housekeeping exercise in the eyes of its critics, since no regulations with any substance were removed (McLauchlin 2005; Rasmussen 2005). Similarly, mapping out the costs of administrative burdens does not necessarily mean that they will be reduced once the mapping exercise is complete. As countless studies have indicated, it is easier to add regulations than to take them away. One only has to look at the history of the UK's deregulation/Better Regulation Agenda, where there has been a history of deregulation and Better Regulation initiatives, since the Thatcher government, without a noticeable impact on regulatory burdens (Eaglesham 2006; Renda 2006). Indeed, in the UK at least, regulatory burdens have increased over the past twenty years rather than decreased. The UK Cabinet Office's own review of red tape noted in 2005:

Historically governments have tended to prioritise the creation of new laws over the removal of outdated and unnecessary legislation. (Eaglesham 2006; UK Cabinet Office 2005)

So it is unclear if the Commission will do any better. At the end of the day, regulators like to regulate. Promoting tougher regulations gains public trust – the public takes the view that the regulators are acting in its best interest – while deregulating increases public distrust – the public takes the view that the regulator is captured by industry (Lofstedt 2005). In a post trust era, caused by a number of regulatory scandals such as that surrounding BSE (mad cow disease), it is hard to foresee that any regulator, be they EU or member-state based, will reduce regulations, as this would be their undoing.

6.3 The Commission and the United States

To date, the Commission's Better Regulation Agenda has been heavily influenced, directly or indirectly (e.g. via the OECD 1997; 2003; 2004), by work being conducted in the United States (Lofstedt and Vogel 2001; Majone 2006). Although there are some differences in government structures between the two trade blocks (Kagan 1997 and 2006; Radaelli 2004b), measures such as separation

of risk assessment from risk management, the importance of greater public participation in the policy-making process, and greater transparency all have their origins in the United States (Lofstedt 2003b; Lofstedt and Vogel 2001). The European Food Safety Authority, for example, was modelled on the US Food and Drug Administration (FDA), and one of the main purposes of this body was to regain public trust in food safety legislation, in the wake of the BSE/CJD crisis (Alemanno 2006). The Americans welcome the Commission's interest in the area. They see it as an opportunity to replace the irrational and non-scientific precautionary principle with scientific, evidence-based decision-making. The transatlantic regulatory summits, instigated by Graham and Verheugen, are examples of this co-operation. The question is whether this collaboration will continue. Graham has stepped down from OMB and joined the RAND corporation. The Secretariat General, which should be leading the effort on behalf of the Commission, appears to be less than enthusiastic. The next EU/US steps will depend on whether the Commission, or its advisors, believe there are other elements from the US regulatory policy-making agenda that are worth borrowing. At present there are four specific regulatory ideas that could be of interest to Europe:

- Establishing an Office of Information and Regulatory Affairs within the European Commission. Ideally this should be situated in the Secretariat General. The European Policy Centre (EPC) introduced this idea in 2001 (Ballantine 2001) and it refuses to go away (e.g. Allio et al. 2004; Renda 2006; Wiener 2006) but Commission observers feel that it is not yet ready to establish such a body.
- Ensuring that all risk assessments used in the making of regulations are scientifically peer-reviewed to ensure that the risk assessments in question reach a uniform standard across all regulatory agencies. This idea, already raised by a regulatory agency (US EPA 2005), has more recently been mooted by the OMB, and is at the time of writing undergoing public consultation in the US (OMB 2006).
- Developing a European Academy of Sciences, modelled on the US Academy of Sciences. This body would have select committees (as the US body has) and would evaluate regulatory programmes and policy issues which are clouded in scientific uncertainty, and advise policy makers on the scientific, state-of-the-art. The idea, originating from an EPC report (Ballantine 2005), has been received positively by DG SANCO, which recently appointed a scientific advisor (DG SANCO 2005b).

- Developing a systematic, science-based decision-making process. This would involve developing greater thinking on risk-risk trade-off issues (Graham and Wiener 1995), ensuring that Members of the European Parliament have sufficient scientific advice and that scientific regulatory advisory boards are modelled on those in US agencies (e.g. the Environmental Protection Agency's Scientific Advisory Board). These concepts have been discussed by a number of think tanks (Ballantine 2003 and 2005) and academics over the past few years (Lofstedt 2003b; 2004; Lofstedt and Vogel 2001; Majone 1990 and 1996).

Of the four topics on the table, it is likely that the Commission will borrow elements from at least two of them. Already DG SANCO, for example, has recognised the importance of risk-risk trade-offs (DG SANCO 2005b). The European Parliament is also aware that its scientific advisory board, STOA, needs to be reformed. But most of these measures are piecemeal in nature, and implementing them will not necessitate deep US collaboration. The Commission, in principle, will be unwilling to borrow too many ideas from the United States, and does not necessarily want to model itself on the US, but on a multitude of different regulatory frameworks. Deeper collaboration, such as transatlantic comparisons in order to improve cost-benefit analysis (CBA) between the two trade blocks (Hahn and Litan 2005) remains unrealistic. The European Commission will continue to favour a much more 'European' approach that combines CBAs with environmental and social values.

Better Regulation is a fashionable topic at moment, driven by a strong economic focus. Verheugen sees it as the key to solving the competitiveness issue. But how long will it remain in vogue? It was fortunate that the two major trade blocks both had centre-right governments at the same time, ensuring easy collaboration. But as with all frameworks, there are both proponents and opponents. Graham and his advisors, for example, have been heavily criticised for adopting a tough cost-benefit approach to regulation (Ackerman and Heizerling 2004). In Europe, the Better Regulation Agenda has not been as successful as it could have been. RIAs are still haphazard, regulations are at times based on emotions, not science, and the UK government at least remains highly concerned about 'gold-plating'.¹¹ The Commission has more staff than ever working on Better Regulation, but the task they face must clearly be daunting, and unless more competent staff are brought on board it is doomed to failure. It does not help, of course, that it still faces a barrage

¹¹ The UK Cabinet Office recently set up a taskforce to examine how many EU regulations over the past few years have been gold-plated (UK Cabinet Office 2006).

of criticism in the regulation area. Member state policy-makers still take the view that the Commission over-regulates, and studies of the Commission's own RIAs show multiple methodological failures (e.g. Renda 2006; Torriti 2006). The Commission is simply not trusted, and member state policy-makers attempt to gain public trust by continuing to blame the Commission, justifiably or unjustifiably, for domestic regulatory failures. To date neither regulators nor think tanks or academics have gone out of their way to praise the Commission's efforts. The majority of those praising the Commission's Better Regulation efforts are Commission officials themselves.¹² Unless the Commission can point to some clear Better Regulation successes, substantiated by a credible, trusted, third-party source (such as an NGO or an academic body), the Better Regulation initiatives (at least as outlined by Verheugen) will remain discredited. It is unfortunate that the implementation of Better Regulation initiatives is happening at the same time as the Commission is about to introduce the most comprehensive European environmental regulation ever, in REACH. Although not the fault of the Barroso Commission per se, as REACH was put together during the Prodi Commission, and indeed, the final version of REACH will be substantially milder than that originally advocated by Wallstrom, the impact on member state regulators and industries will still be considerable. The timing for Verheugen could not be worse (e.g. Gray 2006).

6.4 Better Regulation and the member states

The Commission has noted on a number of occasions that if the Better Regulation Agenda is to be successfully implemented, member states will have to follow suit. At present it is not clear that this will be the case. Some countries, such as the Netherlands and the UK, are keen on promoting Better Regulation Agendas. Both of these nations, for example, are examining how to best reduce administrative burdens (e.g. Better Regulation Task Force 2005a; Radaelli 2005). Other countries are less keen to do so, most notably France, which is going in the opposite direction. It recently adopted the precautionary principle into the French constitution (Godard 2003; Godard 2005; Godard 2006; Weill 2005), and policy makers there remain sceptical about the Anglo-Saxon Better Regulation construct (Defraigne 2006). Finally, countries like Sweden are very mixed. On the one hand it is a strong promoter of Better Regulation, actively pushing this internally and externally. But it remains utterly precautionary in other areas. For example, it decided in 2001 to adopt a toxic-free society whereby all synthetic chemicals will

¹² This, however, is slowly changing. Some external actors now feel that the Commission is doing a better job than before in this area, and rather it is the European Parliament and the European Council that have made slow progress in legislating and implementing the Better Regulation measures.

be phased out within a generation (Lofstedt 2003a; Swedish Committee on New Guidelines on Chemical Policy 2000).

7. Conclusions

Based on the above analysis one can speculate that the EU Better Regulation agenda, at least as outlined by Verheugen, has now 'plateaued'. There will continue to be some housekeeping exercises, removing regulations that will have only a rhetorical effect, with the regulatory burden on industry remaining virtually the same. In this regard, the European regulatory project (in terms of social regulations) is still following the US model, but with a 20-year time-lag. If one looks at the US, after a swathe of tough deregulation initiatives put forward by the first Reagan administration, the second Reagan administration and the following Clinton and Bush administrations very much distanced themselves from this policy. Following attempts in the early part of the first Reagan administration to roll back environmental regulation, for example, a massive public and stakeholder backlash ensued, leading Reagan to recall the Environmental Protection Agency's first administrator, William D Ruckelhaus, in order to re-establish authority and credibility to the EPA (Andrews 1999; Landy et al. 1994). Following his appointment, alongside that of his deputies, the number of enforcement actions and the size of civil penalties imposed rose substantially (Landy et al. 1994). The same is likely to happen in Europe as well. Europe, with its much shorter regulatory history, cannot simply catch up with the US in a period of four years as envisaged by Verheugen. Rather, the regulatory system in Europe will also go through the same trials and tribulations that the Americans did. That is not to say that the pendulum will swing back to the precautionary principle as we saw in the Prodi era; the pendulum will swing somewhat to the left of where it is at present, ensuring that regulations will be developed through a mixture of Better Regulation tools, and emotions, values, politics and culture will also play a substantial role. This is unless, of course, we have another major regulatory scandal in the BSE vein, in which case regulators will become risk-averse once again, and the pendulum may swing straight back to a greater use of the precautionary principle. Time will tell.

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