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**The End of the Lisbon Decade:
A Transformation of the EU's Regulatory State?**

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The End of the Lisbon Decade: A Transformation of the EU's Regulatory State?

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The original pronouncement of the Lisbon goals in 2000 rhetorically balanced social objectives, environmental sustainability, and economic competitiveness. Soon thereafter, "better governance" emerged as a central aspiration of the Lisbon process. By mid-decade, a relaunched Lisbon project came to focus much more narrowly on competitiveness, job creation and growth, the first indication of a process groping toward a clear objective (Radaelli, 2007; Allio, 2007: 83). By decade's end, a Lisbon process more deeply embedded in EU institutions established the primacy of competitiveness over social and environmental objectives, subjecting all single market regulation to scrutiny for the cost burden imposed on industry (European Commission, 2005; 2005a).

This evolution in the Lisbon goals is characterized by an emphasis in the EU policy making process on better regulation, to be achieved by virtue of regulatory simplification and systematic impact assessment. What is the significance of this development for European integration? This paper considers three different interpretations. First is the view that the focus on better regulation is inconsequential, since such instruments as regulatory impact assessment are hardly likely to constrain the regulatory activism of EU institutions. Given the Commission's right of legislative initiative and its commitment to advancing integration; the ambitions of Council presidencies; and the politicization of

regulatory matters in the European Parliament's political groups and committees, impact assessment can simply be utilized by EU institutions to justify preferred courses of action by each of these actors (Vibert, 2006: 19).

A second perspective is that the augmented focus on cost-benefit analysis is a productive step that improves regulatory governance in the EU by reducing an accountability gap. As Giandomenico Majone argues, regulation in the EU involves a high degree of discretion and has in the past been subject to too little scrutiny either by procedural requirements or institutional oversight (Majone, 1994: 93-4). By injecting into the regulatory process more widespread consultation of affected interests, routine requirements for independent evaluation, and closer scrutiny by the Council and the European Parliament, impact assessment addresses the problem of insufficient accountability inherent in regulatory governance.

Finally, there is the interpretation that, rather than changing nothing or modestly reforming and improving regulatory governance, the new emphasis on the burden of regulatory costs changes *everything* by transforming the EU's regulatory state. This argument begins from the premise that the defining elements of the regulatory state in the EU are as follows: (1) the establishment of credible commitments to enforce rules established by a central agent; (2) the objective of addressing negative externalities generated by market integration; (3) the ability of the European Commission acting as regulatory agent to transfer the costs of implementing regulation to member state governments and firms; and (4) a high degree of resistance of the European Commission to regulatory capture. While EU institutions and the Commission in particular may remain technically capable of

imposing the regulatory cost burden on national governments and firms, the scope of costs EU institutions can impose may be constrained by the increased prominence of impact assessment. Additionally, in response to pervasive impact assessment, regulatory objectives may move toward sustaining competitiveness rather than mediating externalities. And interinstitutional dynamics may shift in ways that limit Commission autonomy and undermine the influence of diffuse interests in the European Parliament. To the extent these developments are taking place, the EU may be shifting toward a circumscribed model of regulatory governance.

The paper proceeds as follows. First, the essay will examine how the "better regulation" project evolved as part of the reformed Lisbon agenda, which has come to rest on a definition of economic competitiveness focused on minimizing regulatory burdens for industry. Next, the paper elaborates on the three interpretations of this evolution identified above and evaluates each.

I reject the hypothesis that the widespread use of impact assessment is more or less meaningless because impact assessment is readily subject to manipulation by EU institutional actors. My reasoning is that the ascent of impact assessment is not just procedural; it is in fact structural. The weight placed on impact assessment has been driven substantially by the emergence of the Competitiveness Council as a guardian of the competitiveness of European industry since its creation in 2002 through the merger of the Internal Market, Industry and Research Councils. Interaction between the Competitiveness Council and the European Commission has generated an Action Program to reduce the administrative burden of EU regulation

which has numerical targets for cost reductions; a persistent emphasis on establishing early and ongoing consultation with industry; development of an "Impact Assessment Board" that, while inside the Commission, is independent of policy making departments; creation of a "High Level Group of Independent Stakeholders on Administrative Burden" to bring specific proposals to the Commission for its response; and use of external consultants to review the European Commission's impact assessment process.

Rejection of the "null" hypothesis -- that change is merely rhetorical rather than substantive -- generates the analytical question at the core of the paper: do structural changes in the evaluation of regulation represent checks on regulatory policy making that enhance accountability, or do they encroach on regulatory autonomy and shift the purpose of regulation from mitigating externalities to sustaining competitiveness? The former would provide evidence that the European Union is evolving toward a more effective and efficient regulatory state. The latter points toward the emergence of a circumscribed and less distinctive regulatory state.

In order to carry out this assessment, I examine reports of all 34 meetings of the Competitiveness Council from its inception in September 2002 through March 2010.¹ In addition, I evaluate the role of the High Level Group (HLG) of Independent

¹ This number excludes the extraordinary meeting of the Competitiveness Council of 13 December 2005. I obtained meeting reports from the Council's documents website at:

http://register.consilium.europa.eu/servlet/driver?page=Result&lang=EN&ssf=DATE_DOCUMENT+DESC&fc=REGAISEN&srm=25&md=400&typ=Simple&cmsid=638&ff_TITRE=Internal+Market%2C+Industry+and+Research&ff_FT_TEXT=&ff_SOUS_COTE_MATIERE=&dd_DATE_REUNION=&srs=1

Stakeholders on Administrative Burdens, established in fall 2007 as part of the Action Program to reduce administrative burdens on businesses in the EU, examining in particular the suggestions for reducing administrative burdens received by the HLG from individual firms, national industry federations, European federations, and public authorities between May and July 2009, and the recommendations of the HLG on these proposals.² The Competitiveness Council's discussions and actions regarding competitiveness, impact assessment and reduced regulatory burdens, provide critical evidence for evaluating the extent to which the Competitiveness Council is augmenting the accountability of the European Commission as a regulator or is in fact reining in the Commission as a regulatory agent. The recommendations of the HLG and its interactions with the Commission provide critical insight into the degree to which Commission autonomy has eroded and business interests have penetrated the regulatory policy making process.

As it turns out, the bulk of the proposals for burden reduction submitted to the HLG address compliance burdens rather than administrative costs. To the extent the HLG and other institutional actors advance these proposed "improvements" in regulation, they are likely to reduce regulatory rigor and shift

² The website of the Action Program may be found at: http://ec.europa.eu/enterprise/policies/better-regulation/administrative-burdens/action-programme/index_en.htm. The website of the HLG is found at: http://ec.europa.eu/enterprise/policies/better-regulation/administrative-burdens/high-level-group/index_en.htm. In April 2010, the Commission produced a "non-paper" that lists all of the suggestions received by HLG, the HLG position in response to the proposed administrative burden reduction, and the commentary of the European Commission. This document (Commission, 2010) generates a productive data set for analyzing the scope and nature of the "better regulation" program.

the focus of regulation from correcting market externalities to augmenting competitiveness. To the extent they resist, and sustain a sharp distinction between administrative costs and compliance burdens, regulatory governance may be improved and the Commission held to a higher standard of accountability for its legislative proposals.

The final section of the essay evaluates these two outcomes -- enhanced accountability versus departure from the principles of regulatory governance. Have EU institutions in the process of defining Lisbon goals become more reluctant and less able to impose regulatory costs? Has the narrowing of the focus of the "competitiveness" envisaged by the Lisbon agenda to regulatory cost-benefit analysis substantially constrained the autonomy of the European Commission as a regulatory agent? Has a drive for systematic and sustained consultation with industry ultimately produced a policy making dynamic that mimics regulatory capture? Have these developments fundamentally altered the EU's regulatory state?

The Tenets of Regulatory Governance

The literature on regulatory governance in the EU blossomed in the early and mid-1990s following implementation of the single market project. Here I provide a skeletal outline of EU regulatory governance in order to establish a standard for evaluating the consequences of the "better regulation" agenda. The essence of the EU regulatory state argument is that economic activity taking place across borders within the single market can not be regulated by national measures alone. National regulators may face incentives for weak regulatory enforcement because they will

not want to disadvantage national economic actors in international competition. Regulatory cost implications differ both across and between member states, which have varying approaches to regulation and distinct regulatory priorities (Egan, 2001: 15-16). Extending regulatory authority to the European Commission as an agent resolves coordination problems and reinforces the credibility of rigorous regulation. This enhances compliance by firms by making regulatory policy commitments more credible (Majone, 1994:90).

Reinforcing this tendency, the Commission has an interest both in expanding regulation of the single market and in strict, uniform enforcement (Majone, 1994: 90). The core purpose of regulation is to address market externalities (Majone, 1994; Caporaso, 1996: 39). As a rule-making body, the Commission has the authority and will to pass implementation costs to firms and public authorities (McGowan and Wallace, 1996).

The European Commission has additional advantages in pursuing the task of remedying externalities. The Commission resides at the hub of transnational policy networks, giving it an advantage in compiling the information resources required for the technical exercise of regulatory policy making (sources – Grande?;). Also, the Commission is more resistant to regulatory capture than national authorities because of its distance from and less direct interaction with national producer interests (McGowan and Wallace, 1996; 568). As McGowan and Wallace observe, "European regulatory initiatives, not only in the single market programme but in other areas such as the environment, have in many cases overcome the traditional national lobbies which have blocked reform in the past . . ." (1996: 561).

In the analysis that follows, I weigh the terms of the better regulation agenda against these defining features of regulatory governance in the EU -- credible commitments to regulatory rigor; ability to impose implementation costs; and autonomy/resistance to capture of regulatory policy making.

Evolution of the "Better Regulation" Agenda

Several features characterize the evolution of the "better regulation" project. The first of these concerns the relationship between the three "pillars" of the Lisbon agenda -- economic objectives (competitiveness), the social dimension (social cohesion) and environmental goals (sustainability). Over time, reconceptualization of these elements has recast them in a hierarchical relationship rather than as co-equal objectives (Radaelli, 2007). As several meetings of the Competitiveness Council concluded, growth, employment and productivity gains became *prerequisites* to social cohesion and environmental sustainability (Competitiveness Council 25-6 November 2004). Acknowledging in its 2009 review of the better regulation agenda that regulation is necessary to advance consumer, environmental and health protections, the Commission indicated that its aim "has been to ensure that the regulatory framework helps to stimulate entrepreneurship and innovation, allows business to compete more effectively and to exploit fully the potential of the internal market" (Commission, 2009: 2).

Second, minimizing the regulatory cost burden emerged as the driving force behind the better regulation agenda. Only with a more efficient regulatory environment would it be possible for the EU to attain social and environmental

objectives "without disproportionate administrative costs" (Competitiveness Council 7 March 2005). In March 2007, the Competitiveness Council approved a European Commission-proposed target of a 25% reduction in the administrative cost burden of EU and national regulation by 2012.³

Third, widespread reliance on impact assessment became the primary tool for reducing regulatory costs and thereby achieving a more productive regulatory environment. Between 2004 and 2009, the impact assessment process was applied to a growing range of legislation, from pending proposals to legislation already adopted. In its January 2008 strategic review of the better regulation project, the Commission boasted 284 impact assessments completed since 2003; by the start of 2009, the number exceeded 400 (Commission, 2008; 2009). The new European Commission that came to office in 2004 took on the task of systematically screening all proposals adopted under the prior Commission "to see if they aligned with the Growth and Jobs priority" (Commission, 2006: 7). The Commission called for this to become a routine practice of each new Commission during its first six months in office (Commission, 2006: 7). As a result of this screening, the Commission withdrew 68 proposals in 2006, an additional 10 in 2007, and 30 in 2008 (Commission, 2006; 2008).

The better regulation project also produced an institutional framework to oversee the broad expansion of the use of impact assessment. This included the creation in 2006 of an Impact Assessment Board (IAB) within the Commission to evaluate the quality of impact assessments, and elevation of the Impact Assessment

³ Press Release, 2784th Council Meeting, Competitiveness, Brussels, 19 February 2007.

unit in each Commission DG. In addition, a High Level Group (HLG) of public figures independent from the Commission began work in January 2008, charged with accumulating and channeling to the Commission suggestions for reducing administrative burdens of EU regulation.

Finally, in addition to a reorientation of objectives of regulation and new institutional mechanisms, the better regulation project has yielded changes in the substance of the impact assessment process. These changes include shifts in the focus and timing of business consultation and cost-benefit analysis. Closely related to the emergence of a hierarchical relationship between the competitiveness, growth and jobs agenda, on the one hand, and social cohesion and environmental sustainability, on the other, "better regulation" has advanced the concept of integrated impact assessment, consisting of evaluation of significant economic, social and environmental impacts in a single document. The Competitiveness Council has emphasized reliance on quantification and "evidence-based decision making."⁴

Particular attention to the regulatory cost burden faced by small and medium enterprises (SMEs) is a persistent theme in plans to advance the better regulation program. Regarding timing, the Competitiveness Council consistently has pressed for both consultation with stakeholders and impact assessment to occur earlier in

⁴ Council of the European Union, Note from the General Secretariat of the Council to the Competitiveness Council, Brussels, 30 November 2009, document 16111/09.

the policy development process, so that the Commission may consider alternatives to regulation before proposals are tabled (Commission, 2008: 4).⁵

The Meaning of "Better Regulation" for Regulatory Governance

Impact Assessment as an Empty Exercise

From a neoliberal perspective, the better regulation project may be considered more rhetorical than substantive and not especially meaningful in the face of EU institutional structures that drive the expansion of regulatory governance. The first of these is a European Commission whose commitment to augmenting the reach of EU authority distinguishes it from a national level economic regulator as long as its right of legislative initiative remains intact, and which retains sufficient autonomy to employ regulatory impact assessment selectively as an instrument of legitimation rather than as a constraint (Vibert, 2006: 18 and 19). Second, decision making within the Council is driven by a bargaining dynamic in which the presidency's agenda and political weights of national governments carry the day rather than the concerns of those sectors most heavily affected by legislation (Vibert, 2006: 19). Similarly, decision making in the European Parliament emerges from the competition between political groups, which also value their autonomy (Vibert, 2006: 19). Ultimately, politicized policy making by EU institutions is unlikely to be penetrated by the technical character of regulatory impact assessment.

⁵ Also see Competitiveness Council, Key Issues Paper submitted to the spring 2008 European Council, Brussels, 26 February 2008, document 6933/08. On early consultation, see Press Release, 2665th Council Meeting, Competitiveness, Luxembourg, 6-7 June 2005.

What evidence exists to support this hypothesis? In fact, an external evaluation of the European Commission's impact assessment process conducted in 2007 concluded that "too many impact assessments were carried out to justify a predetermined policy choice" (Commission, 2008: 4). Indeed, the large number of impact assessments conducted by the Commission, as cited in its 2008 and 2009 strategic reviews of the better regulation effort, is a poor measure of the significance of impact assessment for policy making. Moreover, the Impact Assessment Board (IAB) set up in 2006 is housed within the Commission, and reports to the Commission President, casting doubt on the independent role of this body. If carried out only after the political impetus behind a legislative proposal is well-developed, it seems dubious on the face of it that impact assessment is likely to fundamentally alter the political trajectory of EU policy making.

Nonetheless, close examination of the measures comprising the better regulation project suggests this conclusion is premature. By itself, independence of the IAB from the Commission's policy making departments may not elevate the constraining force of impact assessment. But there also is a clear tendency toward more independence of cost-benefit analysis, including increased use of external experts to evaluate the integrity of the impact assessment process. This external scrutiny is likely to heighten IAB efforts to behave impartially. Additionally, the practice of retrospective Commission screening of policy proposals means that legislation proposed by a Commission may be subject to review through the lens of administrative simplification by its successor; the shadow of future Commissions may inhibit the ambitions of the Commission.

Beyond these dynamics of the impact assessment process, institutional change has restructured regulatory policy making. The most significant alteration is the emergence of the Competitiveness Council, created from the Internal Market, Industry and Research Councils by a decision of the European Council at the June 2002 Seville summit. The Council explained the creation of the Competitiveness Council as "a response to the need for a more coherent and better co-ordinated handling of matters closely related to the competitiveness of European enterprises."⁶ The Competitiveness Council's remit is "systematic and comprehensive impact assessment of proposed Community legislation;" ensuring that the Commission consults and takes account of the concerns of the business community in the policy making process; and rebalancing the Lisbon agenda to take account of the objectives of competitiveness and growth.⁷

The first substantive issue taken on by the Competitiveness Council concerned the comprehensive chemicals sector regulation (REACH) proposed by the Commission, particularly ensuring that efforts to protect public health and the

⁶ Council of the European Union, Press Release, 2451st Council Meeting, Competitiveness (Internal Market, Industry and Research), Brussels, 30 September, 2002, 12293/02 (Presse 283). This and all other Council documents come from the Council documents database at http://register.consilium.europa.eu/servlet/driver?page=Result&lang=EN&ssf=DATE_DOCUMENT+DESC&fc=REGAISEN&srm=25&md=400&typ=Simple&cmsid=638&ff_TITRE=Internal+Market%2C+Industry+and+Research&ff_FT_TEXT=&ff_SOUS_COTE_MATIERE=&dd_DATE_REUNION=&srs=1

⁷ Council of the European Union, Press Release, 2490th Council Meeting, Competitiveness (Internal Market, Industry and Research), Brussels, 3 March 2003.

environment did not impose excessive costs on chemicals producers.⁸ If we consider REACH as a test of the significance of the Competitiveness Council for the tenor of regulation, the results are stark: the Council was at the center of a process in which an initial proposal that bore a strong imprimatur of environmental and health interests was significantly revised to diminish the regulatory cost burden on industry.⁹

The Competitiveness Council also has made a priority of reliance on expertise in evaluating regulatory burdens from outside the Commission. One product is the creation of the High Level Group of Independent Stakeholders on Administrative Burden (HLG). The HLG serves as an aggregation point for suggestions for reducing administrative cost of regulations from firms, national and European industry associations, and public authorities. As part of the European Commission's "Action Plan for Reducing Administrative Burdens,"¹⁰ the Commission presents its responses to these suggestions and proposals for action to reduce administrative burdens to the Competitiveness Council.

While incentives to use impact assessment to justify preconceived results remain high for EU institutional actors and the process of crafting regulatory policy remains highly politicized, it is unconvincing in the face of these structural changes

⁸ See accounts of the Competitiveness Council meetings of 3 March 2003 and 10 November 2003.

⁹ See Mitchell P. Smith, "Single Market, Global Competition: Regulating the European Market in a Global Economy," *Journal of European Public Policy* 17, No. 6 (forthcoming, October 2010).

¹⁰ Commission working document COM(2006) 691: "Measuring administrative costs and reducing administrative burdens in the European Union."

to conclude that the expansive role of impact assessment in EU policy making is of no more than rhetorical significance. At the very least, institutional innovations imply intensified horizontal accountability between EU institutions; maximally, they undermine the ability of the Commission to fully exercise its right of initiative and place pursuit of competitiveness ahead of addressing externalities, fundamentally impeding the application of the Commission's comparative advantage in regulatory governance. The critical question pursued in the remainder of the paper, then, is which of these in fact best describes the course of regulatory policy making in the EU? The question is of great significance: are we witnessing augmented accountability, or the fundamental reconfiguration of the EU's regulatory state?

Regulatory Impact Assessment as Accountability?

Giandomenico Majone stresses that the EU's institutional structure, designed to advance the project of European integration, is particularly ill-suited to deliver the accountability mechanisms demanded by regulatory governance. As he explains, in contrast with the U.S., "regulation in Europe is seen to be highly discretionary, suffering from weak accountability to Parliament, weak judicial review, absence of procedural safeguards, and insufficient public participation" (Majone, 1994: 91). James Caporaso emphasizes this last element -- limited scope of public engagement in regulatory issues -- as well as lack of transparency, as sources of an accountability deficit (Caporaso, 1996: 41-2). In addition, as Majone and others have pointed out, regulation in the EU largely has expanded on a sectoral basis, with no process for effective policy coordination. This raises the spectre of

inefficient regulation, supply-driven policy making that reflects the initiative of European Commission DGs rather than critical priorities for regulatory harmonization, and imposition of regulatory cost burdens that impede industrial competitiveness (Majone, 1994: 95).

These problems underscore the potential usefulness of such mechanisms as a regulatory budget constraint to encourage regulatory policy coordination and careful selection of policies that promise the most progress toward regulatory goals at lowest cost. Such constraints would promote scrutiny of the entire body of regulation, including interaction and overlap between regulatory measures (Majone, 1994: 96). Majone proposes the idea of a "regulatory clearing house" as an alternative that might be particularly effective in the EU context, where:

... such a clearing house should be located at a sufficiently high level in the Union bureaucracy, possibly in the office of the President of the Commission. Directorates-General would be asked to submit annually draft regulatory programmes to the clearing house for review. When disagreements or serious inconsistencies arise, the President or a 'working committee on regulation' would be asked to intervene. By extending centralised control over the regulatory agenda of the Directorates-General, this review process would help the Commission shape a consistent set of regulatory measures to submit to the Council and the Parliament (Majone, 1994: 96).

Accountability, then, has several essential features. The first is that the impact of the regulatory proposals initiated by the Commission should be made evident both in terms of their absolute impact and their relationship to alternative proposals. In order to accomplish this, policy formulation would have to register the perspectives of those that will bear the costs of regulation -- in other words, mechanisms for regularized consultation. In addition, to ensure their integrity, these processes should be subjected to horizontal scrutiny by other EU institutions.

Given the concern expressed by skeptics that impact assessment means little in practice because of pervasive politicization in the EU's policy making institutions, procedures for cost-benefit analysis and policy making should be subject to periodic scrutiny by external experts.

The better regulation program largely conforms to these requirements for enhanced accountability. The program has emphasized systematic consultation of affected interests, with a particular emphasis on small and medium enterprises that create a large share of jobs in the EU market and which are especially sensitive to regulatory cost burdens. Increased reliance on integrated impact assessment rather than separate environmental, social, and economic assessments augments the transparency of cost-benefit analysis. The practice of Council submissions to the Commission of priority lists for administrative simplification represents a significant horizontal check on the Commission's exercise of legislative initiative. Introduction of a fixed target for reductions in the administrative costs of regulatory compliance -- proposed by the Commission and approved by the Competitiveness Council in March 2007 -- moves the regulatory policy making process in the direction of a regulatory budget constraint. Although the Impact Assessment Board (IAB) set up in 2006 is located inside the Commission, it reports to the Commission President, enhancing the prospect that the IAB will take a more macroscopic view of the cumulative impact of regulation.

The rules governing the work of the HLG appear to support the interpretation that expanded reliance on impact assessment is advancing

accountability in EU regulatory policy making. One of the three core criteria for proposals for reducing burdens submitted to the HLG is that "They should not question or affect the objectives, ambitions of the legislation."¹¹ The HLG thus makes a distinction between suggestions focused on administrative burdens -- especially those involved in reporting information -- and those that question the substantive objectives of regulations.

According to criteria, then, of horizontal scrutiny, consultation of affected interests, transparency of costs and benefits, ensuring prioritization of regulatory measures, and improved regulatory policy coordination, there seems to be substantial evidence that the better regulation project has established elements of the heightened accountability required to improve the quality of regulatory governance. However, more effective regulatory governance also demands that measures to augment accountability not infringe deeply on the autonomy of the regulatory process. Encroachments on autonomy would result in a circumscribed regulatory governance in which the role of governance shifts from addressing market externalities and producing public goods to advancing the priorities of industry, mimicking outcomes produced by regulatory capture.

A Circumscribed Regulatory State?

Regulatory governance in the EU ultimately is about the autonomous role of EU institutions in correcting for market failures associated with the creation of the single market. As Majone argues, "The comparative advantage of EU regulation lies

¹¹ High Level Group of Independent Stakeholders on Administrative Burdens, "Invitation to Stakeholders Consultation on Administrative Burdens due to EU Environmental Legislation," Brussels, 19 May 2009.

mainly in the relative insulation of Community regulators from the short-run political considerations and pressures which tend to dominate national policymaking" (1994:94). As a regulatory agent for the entire EU market, the European Commission has a strong incentive to sustain its credibility through toughness and consistency and, especially, its independence. As Majone points out, "In the language of James Madison, the insulation of the Commission from day-to-day politics is an important safeguard against national and sectoral 'factionalism'" (1994: 94).

Close examination of the progress of the better regulation program raises questions about the consistency of the project with the Commission's ability to function effectively as an independent regulatory agent. Two questions are central: first, to the extent that the better regulation program advances processes of earlier and more sustained consultation of business interests, does it produce conditions approaching regulatory capture? And second, is it possible to contain efforts to reduce regulatory costs to administrative burdens, or is this effort likely to spill over into regulatory compliance cost containment more generally?

First, the timing and process of business consultation. The Competitiveness Council consistently has made a priority of "early consultation of stakeholders," and more recently has advanced the idea that impact assessment should take place earlier in the decision-making process.¹² In its 2008 strategic review of the better regulation project, the Commission cited the assertion of external consultants that

¹² See meeting of Competitiveness Council, 6-7 June 2005, and "Key Issues Paper" of 26 February 2008, respectively.

impact assessment should take place earlier in the process of policy development in order to consider alternatives "before a proposal is tabled" -- introducing the possibility of preempting regulatory action (Commission, 2008: 5). In this regard, privileging business interests through early and sustained consultation raises the spectre of conferring veto power on these actors.

Second, what is the substantive focus of efforts to secure "better regulation"? The criteria set out by the HLG for proposals to reduce administrative burdens indicate that suggestions submitted "should not question or affect the objectives, ambitions of the legislation."¹³ In other words, the reduction in administrative burdens should not come at the expense of regulatory objectives. To what extent do proposals to reduce the administrative burden of EU environmental regulations, and the positions of the HLG, meet this standard, and to what degree do these proposals in fact threaten to encroach on regulatory goals and Commission autonomy?

Between May and July 2009, the HLG invited suggestions from stakeholders for reducing "unnecessary" administrative burdens imposed by environmental regulation. The HLG was to focus on five regulations and directives included in the Action Plan for reducing administrative burdens proposed by the Commission and approved by the Council in March 2007.¹⁴ The administrative costs of these and

¹³ HLG "Invitation to Stakeholders Consultation on Administrative Burdens Due to EU Environmental Legislation," Brussels, 19 May 2009.

¹⁴ These include a 2003 directive of the EP and Council on the control of major accident hazards involving dangerous substances; a 2006 regulation of the EP and Council on shipments of waste; a 1996 Council directive on integrated pollution prevention and control; a 2003 directive of the EP and Council on waste electrical and electronic equipment; and a 2000 directive of the EP and Council on end-of-life vehicles. See HLG, "Invitation to Stakeholders Consultation," Brussels, 19 May 2009.

other environmental regulations were calculated by a consortium of private consultants hired by the Commission.

In its opinion on submissions to call for stakeholder suggestions, the HLG points out that information reporting requirements tend to create specific obligations for small numbers of firms, giving these firms strong incentives to make cost-reduction proposals to the HLG.¹⁵ It is not entirely surprising, then, that the HLG found that a high proportion of suggestions went beyond administrative burdens to focus on compliance costs.¹⁶ The HLG opinion acknowledges that these proposals go beyond its remit. Yet the HLG moves toward advocacy on behalf of SMEs that submitted a request for exemption from some registration requirements for chemical substances built into the 2006 REACH legislation that regulate the chemicals sector. Objections from SMEs to substantial elements of the requirements of REACH -- and advocacy by national government ministers, MEPs from the European Peoples' Party and the Parliament's Internal Market Committee, and by larger chemicals producers who saw in the case made by SMEs an opportunity to reduce the regulatory burden imposed by REACH -- had led to significant downgrading of some REACH requirements in the final phases of the policy making process. The Commission, accordingly, responded to the suggestions received by the HLG as an effort to reopen struggles settled in the legislative process. Nonetheless, in its opinion, the HLG reinterprets these regulatory compliance costs,

¹⁵ HLG, "Invitation to Stakeholders Consultation," 19 May 2009, p. 7.

¹⁶ HLG, "Invitation," p. 8.

asking the Commission "to take a closer look into the possibilities for further reductions" of these "administrative burdens" for SMEs.¹⁷

In March 2010, the European Commission's DG Enterprise issued a "non-paper" including the suggestions received from stakeholders in response to the invitation from the HLG, and Commission commentary on each of the proposals.¹⁸ The non-paper also indicates the initial position of the HLG rapporteurs on environmental regulation, permitting a comparison between the HLG view and the Commission response to each proposal.

The non-paper lists 100 proposals, initiated by business sector representatives (individual firms, national industry federations, and European associations) as well as public authorities (including national governments, regional governments, and the Committee of the Regions) in the proportions displayed in Table 1.¹⁹

TABLE 1
PROPOSALS FOR REDUCING ADMINISTRATIVE BURDENS
OF ENVIRONMENTAL REGULATIONS
SUBMITTED BY STAKEHOLDERS TO THE HLG
19 MAY - 17 JULY 2009

| Source of Proposal | Number | Percent of Total |
|--------------------|--------|------------------|
|--------------------|--------|------------------|

¹⁷ HLG, "Invitation," p. 12.

¹⁸ Accessed on the DG Enterprise "better regulation" website at: http://ec.europa.eu/enterprise/policies/better-regulation/administrative-burdens/high-level-group/files/abr_hlg_120410_non-paper_en.pdf

¹⁹ The total in Table 1 adds to more than 100 because some proposals had multiple sponsors.

| | | |
|--------------------------------------|----|------|
| public authorities | 22 | 20.4 |
| individual firms | 22 | 20.4 |
| national industry federations | 17 | 15.7 |
| European level industry associations | 47 | 43.5 |

How might we characterize the substance of these proposals? One group of suggestions (the first 10) deal with the 1998 biocides directive, which requires that producers of biocidal products -- which include disinfectants, preservatives, and pest control products -- apply for authorization and bear responsibility for providing the studies necessary to assess the chemical substance.²⁰ A review of proposals from individual firms and national and European industry federations indicates that many proposals seek to reopen debates or reintroduce positions considered in the legislative process. Suggestions to introduce centralized authorization procedures would, according to the Commission, overwhelm the capacities of the European Chemicals Authority (ECHA).

Also concerning the biocides directive, SMEs call for exemption from chemical notification and review due to high regulatory costs relative to small production volume. In its commentary, the Commission points out that hazard to environment and human health may stem from properties of the chemical substance, not simply production volume -- in other words, enacting this proposal would defeat regulatory objectives (Commission, 2010: 2). Similarly, the German chemicals industry federation calls for replacing the directive's authorization

²⁰ See the website of DG Environment at:
<http://ec.europa.eu/environment/biocides/index.htm>.

procedure with a notification procedure and for a reduction in testing requirements; the Commission indicates that these suggestions "would reduce administrative costs at the expense of compromising the high level of environmental and human health protection" (Commission, 2010: 4).

A total of 12 proposals (one of these from a public authority rather than a firm or industry association) concern the end-of-life vehicles recycling directive. The pattern is similar to that for the biocides directive. European vehicle manufacturers associations (ACEA and VDA) call for reducing the frequency of reporting updates on implementation of the directive (from 3 years to 5). The result would likely mean slower implementation of the directive; in response, the Commission points out that the reporting timetable is standard for all waste recycling directives (Commission, 2010: 14).

ACEA and VDA also propose a shift from recycling quota targets stipulated in the directive to use of approved technologies for treating material streams. As the Commission indicates in its response, the proposed "administrative burden" reduction in fact concerns regulatory goals rather than administrative costs, since recycling targets are at the core of the substance of the proposal's environmental protection objectives.

Table 2 shows the number of proposals falling into each of four categories – those focused directly on reducing the administrative burden imposed by a regulation or directive; those which pose a challenge to regulatory substance; comments that reflect a misinterpretation of the legislation in question or which bear on matters of implementation at the national level; and proposals that the HLG

and Commission were unable to assess or on which they did not offer comment because they were vague:

TABLE 2

**Distribution of Proposals Submitted to the HLG:
Administrative Costs vs. Regulatory Substance**

| <u>Nature of the proposal:</u> | Focus on reducing administrative costs | Challenge to substance of regulation | Misinterpretation or matter of national implementation | Vague/unable to assess |
|--------------------------------|--|--------------------------------------|--|------------------------|
| Number (total = 100) | 32 | 41 | 20 | 7 |

As the table demonstrates, the largest share of proposals submitted to the HLG -- 41% -- addresses regulatory substance rather than administrative burdens. More specifically, these proposals call for alterations in the substance of regulation; call for a change in the legal basis of the legislation; seek to reopen debates about regulatory substance that were settled (even if not to the satisfaction of all parties) in consultation processes prior to an official Commission proposals or in the legislative process resulting in the legislative output in question; or would, if enacted, overwhelm the capacities of regulatory bodies such as the European Chemicals Authority and thereby defeat regulatory objectives.

How has the HLG responded to proposals that seek to reopen debates over regulatory measures rather than focusing narrowly on administrative costs (as opposed to regulatory compliance burdens more generally)? Table 3 shows the

position of the HLG on the 41 proposals that focus on regulatory substance rather than administrative burdens.

TABLE 3

**POSITION OF HIGH LEVEL GROUP
PROPOSALS FROM STAKEHOLDERS THAT ADDRESS REGULATORY SUBSTANCE
RATHER THAN ADMINISTRATIVE COSTS (n = 41)**

| HLG endorses or calls upon Commission to consider proposal | HLG calls for more information or notes that proposal already is under consideration by Commission | HLG notes that proposal is beyond its mandate or does not address administrative burden |
|--|--|---|
| 9 (22.0%) | 11 (26.8%) | 21 (51.2%) |

In a majority of cases the High Level Group acknowledges that the proposals of firms and business associations for reductions in administrative burdens in fact speak to regulatory substance; the HLG, in short, does not demonstrate a commitment to shifting the focus of cost reductions to compliance costs. At the same time, as with the case of SMEs and REACH, the HLG indicates a willingness to move in this direction on some contentious regulatory measures.

Better Regulatory Governance or Constrained Regulatory Governance?

The "better regulation" agenda pursued by the European Commission and the Competitiveness Council since 2002 has produced significant steps toward enhanced accountability of policy makers for the regulatory burdens they impose on

European industry. At the same time, the evolution of the project toward intensified and earlier business consultation, greater reliance on external evaluation of regulatory burdens and opportunities for business interests to propose additional measures to reduce regulatory burdens creates the prospect of a more circumscribed model of regulatory governance in the EU. An evaluation of the substance of this process to date indicates that effort to reduce administrative burdens has not decisively breached the barrier between administrative costs and regulatory compliance. However, an evaluation of the significance of the activities of the High Level Group of Independent Stakeholders on Administrative Burden must be made in the context of the conclusions of the 30 November 2009 Competitiveness Council, which call for adding compliance costs to the project of reducing regulatory burdens. This is a fresh departure which would fundamentally alter the trajectory of the better regulation project. To the extent the focus on reducing regulatory burdens begins to encompass compliance costs, the project would clearly move beyond measures that enhance accountability of regulatory policy making in the EU; such a direction would limit the ability of EU regulation to address market externalities.

One interpretation of this development would be that the regulatory state identified by scholars in the wake of the single market ultimately is temporally confined to a particular period in the development of the EU. Over time, adaptation of producer interests to the multilevel structure of EU policy making, as well as adaptation of EU institutional actors to the demands of regulating the single market, along with the nesting of the European single market in a competitive global

economy, may be moving EU policy making in the direction of a circumscribed, less distinctive regulatory state.

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