Corporate Europe Observatory

‘Better Regulation’: corporate-friendly deregulation in disguise
February 2020

A deregulatory zeal continues to sweep through the European Commission and member states. If you care about the environment, workers’ rights, or public health, this so-called ‘Better Regulation’ agenda is highly concerning, as it is used to weaken or abolish current rules, while significantly hampering or even stopping the introduction of new ones. At the same time, big business interests take centre-stage in the considerations of policy-makers, and those with the most lobby power get the biggest say. This urge to deregulate has been reflected in Dieselgate, EU-US trade talks, chemicals regulation, and many other areas. Now in 2020 it risks being turbo-charged by the application of the so-called ‘innovation principle’ and the new ‘One In, One Out’ mantra.

This briefing was initially produced in 2016. In February 2020, it has been refreshed and republished with new sections to cover the most recent - and most worrying - developments.

What is deregulation?

Deregulation is about removing or weakening rules (laws, regulations, implementing acts) and other policy tools that companies perceive get in the way of business doing business. Deregulation can also take the form of a ‘regulatory chill’ where fewer new regulations are introduced, together with an emphasis on voluntary initiatives over mandatory action. Overall deregulation is based on the ideological belief that markets know best and that what is best for business must also be good for wider society.

Deregulation ignores all the good reasons why regulations were introduced in the first place. And while you can undoubtedly have bad regulations, protections are almost always introduced for good reasons eg. to ensure employees are entitled to paid leave after the birth of a child, or to manage the environmental impacts of corporate activities.

Such protections may create additional costs to business, but the benefits of these rules greatly outweigh the costs to society as a whole. In the United States, the Office of Information and Regulatory Affairs (OIRA) puts together annual estimates of the benefits versus the costs of certain regulations and its 2017 (most recent) report showed that the benefits of regulation greatly outweighed the costs.

But isn't cutting red tape a good thing?

If you believe the narrative espoused by parts of the media, the EU is hidebound by dreaded ‘red tape’, an excessive and highly paid bureaucracy requiring multiple form-filling, tick box exercises, annual checks, and high costs to comply with rules.

But it's a nonsense to characterise all regulation as administrative 'red tape'. Regulations can set common standards and prevent a race to the bottom in terms of workers' pay and conditions; set out a given policy direction and create confidence to invest for the future; level the playing field between big and small businesses; and can introduce fairness in terms of pricing and who picks up the bill for costs.

However, under political pressure to appease member states such as the UK and Netherlands and right-wing euro-sceptics, and after heavy corporate lobbying, the European Commission, the EU's executive arm, has gradually moved forward with a deregulatory agenda, cleverly rebranded as 'Better Regulation'. And as we shall see, current efforts to deregulate go far further than simply cutting 'red tape'.

Where did this 'Better Regulation' agenda come from?

The EU's deregulation agenda has the fingerprints of corporate lobbyists all over it.

It was the tobacco industry lobby back in the 1980s and 1990s which first promoted 'impact assessments', a key weapon in the de-regulator's armoury, and which can, if not used very carefully, ignore the social and environmental benefits of regulation and over-emphasise the direct costs to business, which are easier to quantify (and exaggerate). [see box below]

In the 1990s, an industry-sponsored think tank the European Policy Centre (EPC) pushed for cost-benefit analyses of regulations, managing to get this concept incorporated into the EU's 1997 Treaty of Amsterdam. This formed the stepping stone to the EPC's 'Better Regulation Programme' and the foundation of its 'Risk Forum', which is now a separate lobby platform called the European Risk Forum. From 1997 onwards, the EPC's Risk Forum organised "a number of seminars, workshops and conferences on risk, precaution, and Better Regulation". [sidenote]EPC Risk Forum, EUROPEAN COMMISSION GREEN PAPER, "Promoting Healthy Diets and Physical Activity: A European Dimension for the Prevention of Overweight, Obesity, and Chronic Diseases" (2005), Comments.[/sidenote]

Meanwhile, in 2011, the exclusive big business lobby the European Round Table of Industrialists (ERT) made a proposal to demand a complete overhaul of current, drafted, and future EU regulations. At the time, the proposals seemed far too extreme to be serious but, in one form or another, they have been adopted.

How did this industry-concept become EU standard practice?

A key player at the EU level pushing the deregulation agenda was German politician Dr Edmund Stoiber who, between 2007 and 2016, advised the Commission on this issue. His period in office saw a shift in perception at the EU level, from regulation as a useful tool to a burden – a very dangerous development indeed. And big business representatives were offered privileged access to officials and decision-makers in Brussels and London via working groups, to drawing up lists of the regulations which they wished to see banished.

From 2007-14, Stoiber chaired a working group on 'Better Regulation', a group where the majority of its 15 members came from, or were linked to, industry interests, even if they were formally appointed on "a personal basis". These included representatives of the farming and agribusiness lobby COPA-COGECA; Polish business lobby Lewiatan (a member of BusinessEurope); as well as several other business groups. Member Michael Gibbons was also chair of the Regulatory Policy Committee for the UK Government at the time, alongside being chair of the 'clean' coal lobby group the Carbon Capture & Storage (CCS) Association, whose members included BP, General Electric, Shell, Statoil, and other major corporations.

It is perhaps not surprising that the group proposed a strengthened deregulation agenda, one that was later adopted by the Juncker Commission almost entirely. However, four civil society members of the Stoiber group published a dissenting opinion which strongly opposed the report's "outdated, deregulatory agenda". They argued that the "pursuit of reducing the overall costs of regulation on business will come at the expense of health, safety and environmental protection that these regulations provide". By promoting deregulation as a recipe for more jobs and growth, the Stoiber group had "entered the realm of fact free policy making", which "fails to recognise the cost to society of not regulating", the dissenters argued.

In December 2014, Stoiber was appointed as special adviser to President Juncker on 'Better Regulation', despite the fact that he was a controversial figure with multiple private banking and financial interests. His appointment by the Commission was investigated by the European Ombudsman who criticised the way in which his new role was announced, before he had undergone any conflict of interest checks.

What does EU deregulation look like in practice?

At the European level, the deregulation agenda has a variety of components:

Annual scrapping of rules: Under REFIT, the European Commission's Regulatory Fitness and Performance programme, every year the EU must screen its entire body of law to find new regulations to scrap, weaken, or simplify. In total between 2012 and 2015, more than 140 proposals were dropped, including those on access to environmental justice, another on the protection of soil (see box below), and rules on supervision of medicines. Between 2015 and 2018, the Commission proposed 150 initiatives to "simplify" EU legislation and reduce regulatory burdens. The 2020 Commission work programme lists 44 existing rules and regulations which will be subject to review or a "fitness check" before the end of the year. These "fitness checks" assess whether a rule is "fit for purpose" and identifies "excessive burdens, overlaps, gaps, inconsistencies and/or obsolete measures". Many of these checks are run by corporate consultants which can be expected to have private sector values at the forefront. The status of these fitness checks can be monitored via the Commission's so-called REFIT scoreboard.

The Soil Framework Directive

Since 2006, the Commission had been seeking agreement on a draft agreement to minimise soil erosion, maintain the organic matter in soils and to prevent soil from being contaminated with toxic substances. Despite the importance of soil to the ecosystem and its role in preventing flooding, the proposed directive was scrapped under the REFIT programme in 2014. This followed years of Council impasse, and lobbying by the UK government and the farming industry, including the UK's National Farmers' Union (NFU).

Regulatory chill: According to the New Economics Foundation, the "Better Regulation process has so far tried and failed to water down vital directives that protect birds, habitats and clean air. Only a vast public outcry protected them … But that doesn't mean they've stopped trying. And now that regulations have been painted as 'burdens', it's harder than ever before to get vital new rules that protect us even considered, never mind passed." When Jean-Claude Juncker took office as President of the European Commission in November 2014, there was an even greater deregulation push, not just on specific rules and laws which should be scrapped, but on how decisions were to be made about future laws. Under Juncker, fundamental changes in policy-making were introduced which put major obstacles in the way of new regulations aimed at protecting the environment or improving social conditions. And they seem to have succeeded. The Commission has claimed that between 2011 and 2015, the number of proposals for new regulations declined from 159 to 48. From 2015 to 2019 "key initiatives", meaning new proposals, dropped by a whopping 83 per cent. This is perhaps the key consequence of recent deregulation at the EU level: this 'regulatory chill' has led to significantly fewer proposals for new laws and regulations in recent years. Now, the 2020 Commission work programme lists 32 existing proposals for new rules which are to now be withdrawn.

Regulatory chill: Antibiotic resistance

A specific example of the 'regulatory chill' stemming from so-called Better Regulation can be seen in the problem of antibiotic resistance and the related issue of the proliferation of 'super bugs'. Despite the scale and urgency of this health crisis, the EU continues to resist a tough regulatory approach and instead has supported guidelines and a voluntary approach with the pharmaceutical industry, rather than strong targets backed by new regulations.

Regulatory chill: Health and safety for hairdressers

A proposal by a trade union and an employers' organisation to improve health and safety in the workplace for hairdressers has been dismissed, and even mocked by EU leaders. Despite the workplace threat to hairdressers from skin conditions and musculoskeletal diseases such as arthritis and tendinitis, former Commission President Barroso has said that "The EU should not be concerned with blond women on high heels," while under the Juncker Commission, the hairdressers' proposal was ridiculed in a Commission publication which claimed that the EU should not be big on small things.

Vice-President for Better Regulation: Juncker appointed his right-hand man Frans Timmermans as Vice President for Better Regulation, giving this portfolio more political weight. Under 'Better Regulation', this role could veto new legislative proposals before elected politicians had even seen them, or at least prevent them from moving ahead. As of December 2019, Maroš Šefčovič has replaced Timmermans as the commissioner responsible for this area in the Von der Leyen Commission.

Impact assessments and consultation: As well as placing a requirement for an impact assessment on all new proposals, Commission statements on 'Better Regulation' often pledge a strong commitment to transparency and consultation and being open to feedback from citizens and stakeholders "at every stage of the process – from the first idea, to when the Commission makes a proposal, through to the adoption of legislation and its evaluation". However, this rhetoric needs closer inspection (see below).

Regulatory Scrutiny Board: This structure with members comprising Commission officials and external members, has a *de-facto* veto power. It scrutinises all proposed initiatives and their accompanying impact assessment and this unelected body is able to reject any impact assessment if it doesn't come up to scratch (or maybe if it doesn't come up with the 'right' answer), before the regulatory proposal even reaches the Parliament or the Council. According to its 2018 annual report, the Board made "initial rejections" of 28 per cent of the impact assessments with which they were presented. The board says that the vast majority of resubmissions were "up to standard" but that it delivered "one second negative opinion on an impact assessment" in 2018.

So, what's the problem with impact assessments?

The Commission has said that its impact assessments map out potential short and long-term costs and benefits, and assess the economic, environmental, and social impacts of new proposals. Impact assessments sound like they should be a useful, neutral tool, something which can allow policy-makers to understand the impact of the legislation they are contemplating, and there is a whole consultancy industry set up to assess the expected impacts on a business or sector of implementing a new legislative proposal.

In fact such evaluations are likely to be highly subjective, with the choice of questions and methodologies often requiring political value judgements.

Impact assessments: an idea pushed by the tobacco lobby

A key early promoter of impact assessments was the tobacco industry lobby. Academic research shows British American Tobacco promoted these kinds of risk assessments in the 1980s and 1990s in order to overcome the use of the precautionary principle in decision-making which places harm reduction at its core. A precautionary approach to tobacco would obviously see tight restrictions or even bans on aspects of tobacco use, to reduce the harm to public health. To head this off, the industry promoted impact assessments to ensure that the 'impact' on their bottom line was put at the heart of policy decisions, and so that they could influence the process to make it more difficult to introduce rules that hurt their profits.

It is very hard to get such assessments right as they require a monetary value to be assigned to all the expected costs and benefits of a policy, and arguably it is much harder to measure the environmental and social costs and benefits, than economic ones. For example, how do you place a monetary value on the health benefits for hairdressers of not using certain chemicals? And what about the cost of doing nothing to tackle a particular environmental problem? In practice impact assessments give an overriding weight to economic or trade impacts, thereby undermining the environmental or social case for a given policy. And few environmental or social organisations would be able to compete with the ability of big business to feed in their views, especially on technical matters such as costs.

Meanwhile, big business systematically 'cries wolf' at the prospect of stricter environmental legislation, arguing that it would harm the economy and lead to a loss of jobs. The New Economics Foundation has argued that companies systemically inflate estimates of the cost of new regulations in order to get them weakened or delayed, while targets for reducing costs to business create a direct incentive for lobbyists to provide inflated estimates – since the higher the projected costs, the harder a regulation will be to introduce. This is despite the fact that a 2015 report by ChemSec showed that the benefits of adapting to new environmental regulations for business are generally underestimated, with the costs for industry decreasing since the 1990s.

It's not surprising then that some have called impact assessments "propaganda documents rather than self-critical policy analyses", with business lobbies such as BusinessEurope and EuroCommerce supporting them.

Impact assessments as a lobby tool In 2018, the European Court of Justice (ECJ) ruled in favour of chemicals giant BASF, in a case involving the insecticide fipronil, previously linked to a food safety scandal involving eggs. The ECJ annulled a 2013 EU ban on fipronil because it found that the Commission had not performed an impact assessment on the proposed ban, showing how the 'Better Regulation' agenda can play into the hands of industry lobby groups, keen to protect their products from regulation.

Surely we need more, not less, consultation on what the Commission is up to?

Impact assessments fit with the Commission's emphasis on consultation "throughout the policy and law-making cycle". The Commission lauded its 'Better Regulation' package as providing more opportunities for consultation, transparency, and accountability of decision-making and its promotional video makes it look as if this is focussed on collecting the views of 'ordinary' citizens. But in the context of 'Better Regulation', consultation tends to mean lobbying. At whatever stage of the policy-making process the consultation takes place, big business almost inevitably has more money, resources, and capacity to surpass public interest groups in the Commission's consultation processes.

Too often consultations fail to achieve input from a broad range of stakeholders eg. the 2015 Commission consultation on the security of gas supply received 103 responses, but besides public bodies and governments, these – practically without exception – represented the fossil fuel industry, with almost all big energy firms responding.

Skewed consultation: Services Notification Procedure directive Documents released following a freedom of information request show that the Commission's DG GROW's preparation of the proposed Services Notification Procedure directive was biased and violated the Commission's own rules. When carrying out the public consultation that was held in spring 2016 and which informed the subsequent proposal, the Commission failed to secure input from a broad range of stakeholders, leading to imbalanced conclusions. Only one trade union and not a single other civil society group contributed to the consultation. Only four municipalities and seven regional authorities participated in the consultation. No larger cities responded, nor did any of the EU-level federations of municipalities. This was a remarkable consultation failure, considering the far-reaching impacts the proposed directive would have for municipalities. This happened despite the fact that the Commission's own rules instruct officials "to consult broadly and transparently among stakeholders who might be concerned by the initiative, seeking the whole spectrum of views in order to avoid bias or skewed conclusions ("capture") promoted by specific constituencies".

Furthermore, in its own report on this consultation, the Commission made the following claim about the views of public authorities, in support of their proposal: “Four out of five public authorities considered preventive examination necessary to ensure a more uniform application of single market rules for services whereas for business this is nearly 2 out of 3”. But as the consultation had failed to engage substantial public authorities in a meaningful way, these conclusions are arguably misleading.

Beyond this, the documents released reveal a very intimate working relationship between DG GROW and three major industry lobbying groups: BusinessEurope, EuroCommerce, and EuroChambres. While these lobby groups expressed full support for the Commission’s proposed directive, the reaction by virtually all other respondents was negative. This includes strongly-worded criticism by more than a dozen associations of engineers, tax advisers, architects, free professions, and small services businesses. While these organisations seem to never have received a response from the Commission, DG GROW entertained an active correspondence, and held several closed-door strategy sessions, with big business lobby groups – a relationship that resembled a strategic partnership. This was not extended to any other stakeholders.

You can read more about this in: Veto power to please lobbyists – corporations behind Commission power grab over services

In another case, the European Commission was “swamped” with 85,000 submissions to its consultation on the Tobacco Products Directive, with the tobacco industry using third parties and fake grass-roots campaigns to fight the introduction of plain packaging for cigarettes. According to Tobacco Control Research Group (TCRG) analysis of these submissions, “the research was of significantly lower quality than research supporting the measure [plain packaging]. For example, the tobacco companies’ arguments were not supported by any peer-reviewed journal articles about standardised packaging.” Nevertheless, the tobacco giants’ tactics resulted in a significant delay in the introduction of plain packaging. As the TCRG concludes, our “research into standardised packaging shows that ‘Better Regulation’ processes intended to enhance evidence-based policy making may actually undermine it, enabling corporate interests to misrepresent evidence in order to create confusion, doubt and delay.”

And in further evidence that the Commission listens far more to civil society than to business, according to a January 2019 presentation, 65 per cent of external submissions covered by an adopted REFIT Platform opinion originated from business interests, while less than 5 per cent of the adopted opinions covered submissions by citizens or NGOs.

Rather than more problematic consultations, we need a broader democratisation to empower citizens’ groups in decision-making, and a far more active commitment by decision-makers to defend public interest concerns against constant pressure from numerous well-resourced commercial lobbyists, as recommended by the Alliance for Lobbying Transparency and Ethics Regulation.

How has ‘Better Regulation’ impacted upon citizens?

The rhetoric of ‘Better Regulation’ - ‘simplification’, ‘burden reduction’, and ‘harmonisation’ - are used by industry lobbyists to delay, weaken, and avoid rules that are urgently needed on a daily basis.

Workplace cancers: In the EU alone, over 100,000 people a year die due to insufficient protection against cancer-causing substances in the workplace, making the industries' fight against stricter EU regulation of these carcinogens a severe threat to public health. A report by CEO Using 'Better Regulation' to make things worse shows how industry lobbies framed employee protection against work-related cancers as an 'unnecessary' burden on companies, and explained which tactics they used to hollow out the EU's revision of the Carcinogens and Mutagens Directive. The Commission's proposal contained exposure limits for only a small number of workplace carcinogens, and even those limits were set far too high to effectively protect workers from serious health hazards. The building blocks of 'Better Regulation' (impact assessments; boasting about 'sound science'; over-emphasising business costs; an emphasis on self-regulation and voluntary measures; more 'stakeholder' engagement; REFIT and fitness checks) were instrumental in industry lobbying on the Carcinogens Directive. MEPs worked hard to strengthen the Commission's weak proposal, with some important improvements included in the final deal agreed with the Council.

Pesticides: A key lobby battle has been fought in recent years over EU plans to ban hazardous substances found in pesticides from products imported from third countries, provoking the wrath of pesticide producers, the US, and other trade partners. LINKS. During this battle, industry repeatedly cited 'Better Regulation' to demand an impact assessment as part of its arguments to undermine the EU plan. To head these arguments off, the Commission pointed to the REFIT review of several pesticides regulations which has been underway since 2016. Indeed, the REFIT review has been heavily lobbied and used by industry to oppose strong regulation of pesticides. Pesticide Action Network (PAN) Europe has shown that the 53 questions and sub-questions included in the REFIT consultation were strongly biased towards finding out how 'burdensome' the regulations are to industry interests, rather than their usefulness for health and the environment. The REFIT review has been delayed and remains unpublished (as of February 2020). But the Commission has already backtracked on its initial proposal meaning that residues of hazardous pesticides that are banned in Europe may get tolerated in imported food and feed in the future.

Titanium dioxide: During the recent lobby battle to classify the chemical titanium dioxide, found in paint, sunscreen, toothpaste, and many other products, 'Better Regulation' was often cited by those wishing to delay or derail the classification. Specifically, industry lobbies queried whether the classification was "in line with the EU's proportionality principle and Better Regulation Guidelines". Others demanded an impact assessment, even though that would have distracted from the primary need to consider the intrinsic potential of the chemical to pose harm. Industry also introduced (irrelevant) economic arguments into the discussion. The final classification for titanium dioxide was much weaker than it should have been, following a major corporate lobby campaign focussed on the Commission and member state officials.

Data privacy: In the ongoing lobby battle on ePrivacy, industry has used 'Better Regulation' to argue against the proposed new regulation, instead demanding that the Commission should "leave room for and encourage effective sector-specific self-and co-regulatory initiatives" ie. a voluntary approach. As of January 2020, the ePrivacy regulation remains in deadlock in the Council, again following a major lobby campaign.

Marketing of seeds: A previous proposal by the Commission to "simplify" the entire package of existing legislation relating to the marketing of seeds in Europe ultimately failed in 2014; civil society had voiced significant concerns that such a consolidation would cement commercial seed companies' control over the market. However, citing 'Better Regulation' legislation, in 2020 Council member states are now pushing the Commission to reintroduce such an initiative.

Tobacco: While World Health Organisation rules essentially forbid decision-makers from being lobbied by the tobacco industry on public health matters, tobacco lobbyists have been trying to use ‘Better Regulation’ to circumvent this. In 2015, after attending a BusinessEurope meeting with the Commission on ‘Better Regulation’, Japan International Tobacco (JTI) requested a meeting with the cabinet of Commission Vice-President Timmermans to “discuss a number of specific areas”. When the meeting happened, the JTI lobbyists raised “the placing of health warning on cigarette packs with bevelled sides”, clearly a public health issue. Essentially JTI had attempted to use the ‘Better Regulation’ agenda in its lobbying and approached Timmermans' cabinet in order to bypass the Commission's health department.

Across many, many issues, 'Better Regulation' is being used by industry lobbies as a tool by which to oppose, weaken, or delay important EU legislation.

Is the ‘Dieselgate’ scandal linked to ‘Better Regulation’?

The Dieselgate scandal – when US regulators discovered that German car maker Volkswagen was using ‘defeat device’ software in diesel engines to reduce vehicles’ emissions during testing, effectively manipulating the results – showed what can go wrong when decision-makers get too close to corporate interests and when a culture of industry self-regulation and light-touch rule-making is allowed to take hold. Illegal levels of toxic nitrogen dioxide (NO2) pollution from diesel cars contributed to an estimated 75,000 premature deaths in Europe in 2015 alone and the February 2017 report by Corporate Europe Observatory and Friends of the Earth Europe Driving into Disaster – How the EU’s 'Better Regulation' agenda fuelled Dieselgate showed how the car industry had been working to shape the EU’s regulatory agenda for decades – and how the Commission and member states were apparently happy to let it do so.

Ten years before the Dieselgate scandal broke, in 2005, the Commission set up an advisory group to look at improving international “competitiveness” in the European car industry. The Competitive Automotive Regulatory System for the 21st Century group (CARS 21) brought together representatives from the car industry and government officials. It was chaired by then EU Commissioner for Industry, Günter Verheugen; the car lobby group, the European Automobile Manufacturers Association (ACEA) was also invited, with its President, Volkswagen’s Bernd Pischetsrieder playing a leading role. The car lobby saw an opportunity to shape the rules in the industry’s favour, with a key target being the way in which cars were tested on environmental, safety, and security standards.

A dedicated sub-group within CARS 21 was tasked specifically “to scrutinise the regulatory framework and to identify possibilities for withdrawing or simplifying the legislation in force”. The lobby group ensured that CARS 21 focused on the principles and aims of ‘Better Regulation’ from its very first meeting. CARS 21 was a huge success for the car industry as it ushered in the idea that car manufacturers would ‘self-test’ a range of emission and safety elements in the overall approval process for new vehicles.

In 2011 the Commission turned to industry once again for advice, this time looking for expertise on how to measure vehicle emissions under driving conditions, so-called “real driving emissions” (RDE). It established a technical working group, known as the RDE-LDV working group, which was again dominated by representatives from the car industry, with large delegations from ACEA. Following ‘Better Regulation’ principles, industry was involved in every stage of the legislation by the Commission, demanding that the proposed regulations were simplified, and insisting on the need for impact assessments to ensure cost effectiveness. This not only delayed the introduction of new regulation, it also ensured that industry concerns regarding costs were prioritised over impacts on health and the environment.

Even since ‘Dieselgate’ broke, the Commission’s trust in the car industry’s expertise remained unquestioned. In 2017 Corporate Europe Observatory revealed the continuing dominance of the car industry in an important EU advisory group on vehicle emission rules.

The ‘Dieselgate’ scandal revealed how the focus on simplified regulation that was meant to improve competitiveness has, in fact, allowed the car industry to set the agenda and shape the rules regulating the automotive sector. Rules were weakened and key responsibilities, including the enforcement of rules, were taken from the regulator and placed in the hands of the car industry. Companies’ commercial interests were prioritised over public interests. The Commission and member states effectively encouraged a push for a ‘simplification’ of the rules on type approval and introduced *de facto* EU-wide self-testing. ‘Better Regulation’ principles were an invitation to industry to delay and weaken the EU’s commitment to more accurately test emissions from vehicles on the road.

Read more in Driving into Disaster – How the EU’s 'Better Regulation' agenda fuelled Dieselgate.

What is this new 'One In, One Out' principle?

When Commission President Ursula von der Leyen was appointed in Summer 2019, she made clear her commitment to 'Better Regulation' and she doubled down on this deregulation push by introducing a so-called 'One In, One Out' (OIOO) approach to law-making. This will mean that “every legislative proposal creating new burdens should relieve people and businesses of an equivalent existing burden at EU level in the same policy area”. This is justified as “[making] lives easier for people and [allowing] businesses the time and space they need to grow, [ensuring] that regulation is targeted, easy to comply [with] and does not add unnecessary regulatory burden”.

This OIOO approach has now been defined in more precise, financial terms. Thus it does not simply mean for each new regulation, an old regulation must be scrapped. Rather it means that a new regulation that will incur costs for people or business can only be introduced if equivalent costs are “offset” in the same sector.

It is likely that Von der Leyen took inspiration from the Merkel coalition Government’s own OIOO policy which is also based on costs rather than the absolute number of regulations. In fact, extending this agenda to the EU level has been a stated priority of the coalition Government in Germany, so presumably it was very convenient when Von der Leyen became Commission President. The Government has backed up its own policy with a study commissioned by the German Ministry of Economics and Energy (BMWi), and conducted by Andrea Renda of the Centre for European Policy Studies (CEPS is a corporate think tank; see more below on its study of the ‘innovation principle’). The study looked at the feasibility of introducing OIOO in the EU.

But this kind of approach had been specifically rejected by the Commission as recently as April 2019 when it said that such “target-based approaches tend to overlook the fact that it is legitimate and necessary to impose some costs in pursuit of important societal objectives”! Even the then ‘Better Regulation’ Commissioner Frans Timmermans said: “[Q]uantitative targets for reducing regulation… are like criticising Mozart for having too many notes – which ones would you like to remove?”.

Under Von der Leyen the OIOO concept – and deregulation drive – will be reinforced by a 'Fit-for-future' platform so that governments and ‘stakeholders’ can “consider opportunities for simplification, burden reduction, digitisation and [check] if the legislation is fit for the future”.

The new Commission is clearly in step with Brussels’ biggest business lobbies which continue to urge more deregulatory zeal. In January 2020, BusinessEurope representatives addressed the Council of the EU’s Working Party on Better Regulation to push for further deregulatory action.

Meanwhile NGOs and trade unions are very worried. The Green 10 of environmental NGOs have slammed the OIOO proposal saying the concept is “inherently incompatible with the increased climate and environmental ambition set out by the Commission President-elect and risks undermining the potential benefits of new initiatives under the European Green Deal”. How on earth can serious action on the climate crisis and the Green Deal fit with the Von der Leyen Commission’s demand that it simultaneously cuts regulatory costs in “the same policy area”? Similarly, the European Trade Union Confederation has expressed deep concern about this “arbitrary rule and biased procedure which endangers society and citizens by risking to delay or block measures that are urgently needed”.

How does the ‘innovation principle’ relate to ‘Better Regulation’?

In recent years, the so-called innovation principle has become a new element in the EU’s ‘Better Regulation’ agenda. The ‘innovation principle’ presents a new form of impact assessment to ensure that “whenever policy is developed, the impact on innovation is fully assessed”. (See above on impact assessments)

Unlike the Precautionary Principle, which is established in the EU treaty, the ‘innovation principle’ is not a principle of law, but a tool designed to create more leverage for business interests in the early phase of decision-making.

The ‘innovation principle’ was invented and pushed by the chemical, tobacco, and fossil fuel industry lobby groups as a way to sideline the Precautionary Principle. It was the brainchild of the European Risk Forum (ERF) whose members mainly come from the chemical, fossil fuel, and tobacco sectors, with support from BusinessEurope and the European Round Table of Industrialists (ERT). These industry lobby groups promoted this invented concept through a high-pressure lobby campaign that included an avalanche of meetings as well as email correspondence with Commission officials in numerous DGs, as documented in a report by Corporate Europe Observatory.

The ‘innovation principle’ is a covert attempt at counteracting EU social and environmental safeguards as well as the Precautionary Principle. Innovation is very much needed to deal with the societal and environmental challenges ahead, but an industry-invented lobbying tool that jeopardises the EU’s safety standards is certainly not the way to foster this innovation. For this reason, legal experts as well as the federation of consumer unions BEUC, NGOs, and trade unions oppose the ‘innovation principle’.

Nonetheless, the ‘innovation principle’ received major support from the Dutch Government during its EU Council Presidency in 2016, when the Government actively cooperated with BusinessEurope and the European Risk Forum to get the idea incorporated into key Council outcomes. Subsequent Presidencies including Malta, Bulgaria, and Finland have also progressed this agenda.

To operationalise the 'innovation principle', the Commission has developed "Tool 21" of the 'Better Regulation' Toolbox, to assess the "impact on innovation" from new laws. In Autumn 2019, the Commission published an 'independent' study to support the interim evaluation of the innovation principle, for which it hired the corporate-sponsored think tank, the Centre for European Policy Studies (CEPS). CEPS is backed by the very same companies, including Total, Shell, British American Tobacco and Bayer, that pushed the principle in the first place. This presents such an obvious conflict of interest that it is incomprehensible that the Commission chose CEPS to carry out this evaluation. The study concluded that "the innovation principle has the full potential to create EU added value", but that its impact so far has been limited.

In 2019 the 'innovation principle' was incorporated into the preamble of the Horizon Europe Regulation accompanying the EU's new research funding package, creating the risk that even more EU funds will be spent on industry R&D, rather than research projects tackling broader societal needs.

It is imperative that the Precautionary Principle, rather than the so-called innovation principle, is used to guide EU decision-making.

Hasn't the UK Government been pushing something similar?

The deregulation agenda has been around in the UK since the 1980s and the Thatcher Government. It picked up pace under New Labour, but the arrival of David Cameron in Downing Street in 2010, coinciding with the wider economic crisis and the implementation of austerity policies, provided it with greater political impetus. Today, the UK's deregulation policy includes a 'one-in, three-out' policy ie. for every £1 of additional cost imposed on business by new regulations, the government should save businesses £3 by removing or modifying existing regulations; a Deregulation Act which requires those exercising specific regulatory functions to have regard to the desirability of "promoting economic growth"; and a Red Tape Challenge.

The impacts of deregulation in the UK have not been to simply cut back on red-tape and form-filling. Instead, important regulations have been weakened or scrapped.

Speed limits: The speed limit for heavy goods vehicles (HGVs) travelling on single carriageway roads was increased from 40 to 50 miles per hour, something which the road transport industry supported to reduce congestion and transit costs. The majority of respondents to the Government consultation rejected the idea but the proposal went ahead anyway, with the impact assessment trading off the extra fatal and serious injury accidents likely to be caused by higher HGV speeds with the expected reduction in business costs.

Salt in food: An effective programme to save lives by cutting salt levels in food was abandoned by the UK Government which then gave industry too much power over a weaker, voluntary replacement scheme. This weaker scheme is said to have failed to prevent thousands heart attacks and strokes due to excessive salt intake.

And the Grenfell fire tragedy of June 2017, when 72 people were killed in an out-of-control fire in a residential tower block in West London has raised many questions about the impact of decades of deregulation in the UK – in this case on building regulations – on people's lives.

Following Brexit, there are significant concerns from unions and NGOs that the Boris Johnson Government will speed-up deregulation. The UK Government has announced plans to pilot an ‘innovation test’ which would require officials to consider the impacts on innovation when developing a new policy. It has also announced a “Brexit red tape challenge” to “help identify EU regulations that we can improve or remove”.

I’ve heard of ‘regulatory cooperation’ being negotiated in trade talks; is that the same thing as ‘Better Regulation’?

Not content with giving European big business an enhanced say in EU policy-making via ‘Better Regulation’, proposals under the previous EU-US trade negotiations (TTIP) would have sought to extend that to US trade authorities (acting on behalf of US corporations), binding both the EU and the US into this deregulation agenda via the concept of regulatory cooperation. Not surprisingly, it was lobby groups on behalf of big business – BusinessEurope and the US Chamber of Commerce – which first lobbied the EU and US authorities to include it.

‘Regulatory cooperation’ was at the heart of TTIP talks meaning that, over time, the two regulatory rulebooks of the EU and the US would converge. In the EU where in most, but not all areas, regulations are tougher than in the US, this could have led to further pressure for deregulation. But the negotiators were canny. Fearing that legislators would reject any agreement which contained concrete proposals for deregulation in particular areas (allowing US chlorinated chicken or hormone-injected beef into the EU, for example), the proposal was for TTIP to instead introduce new procedures which, once it had been passed into law, would have enabled this hyper-deregulation phase to begin.

The main elements of the EU’s proposal for regulatory cooperation in EU-US trade talks have included:

An early warning system so that the European Commission would need to discuss a proposal for new rules (and potentially adapt it) with US trade authorities and offer them cooperation, before they are brought up for discussion with the EU’s co-legislators, the Council of the EU and the European Parliament.

Trade impact assessments which would have to include assessments of a given proposal’s impact on trade, or in other words, its impact on US companies.

Business groups to be able to **influence the cooperation programme significantly**. If corporations on both sides of the Atlantic were to agree on a “substantive proposal”, there would be a short-cut to include it in the official work programme.

An **institutional structure** to guide the EU and US towards regulatory convergence. According to the EU proposal, sectoral working groups (eg. on chemicals, food standards, consumer rights) would work out strategies in specific areas and business lobby groups would have privileged access. Non-elected entities would become the main actors under regulatory cooperation.

Now that TTIP has been dropped, has pressure on EU standards through ‘regulatory cooperation’ ended?

No. As you say, TTIP has now been abandoned, but fresh EU-US trade talks are underway. The deregulatory agenda remains, and with a new name in the mix, “conformity assessment”, as revealed in the report Trading away protection. This means that the EU would like to see more of its approved products enter the US market without further safety checks or investigation. While this may sound harmless, it could lead to less safe medical devices in the US, the introduction of hazardous electrical equipment, or to the marketing of toys that pose a risk to small children. Also, it would rule out the kind of safety checks made by US authorities that uncovered ‘Dieselgate’. Meanwhile, US negotiators and corporate lobbyists are targetting key European precautionary measures in areas such as chemicals, pesticides, GMOs, and food safety, leading to fears of lower standards in the EU.

In fact, in the ongoing talks between the EU and the US, Trade Commissioner Phil Hogan has offered regulatory cooperation as a way of accommodating US demands to weaken rules on hormone treated beef and use of chemicals to cleanse poultry (chlorinated chicken).

Regulatory cooperation would have a serious effect in the EU. It would increase the influence of US trade authorities in EU politics, and it would strengthen the hand of US corporations, often working in tandem with their European counterparts. In practice, the regulatory cooperation agenda and the ‘Better Regulation’ agenda work hand-in-hand and are mutually reinforcing. Both processes create obstacles and delays for decision-makers who want to introduce new regulations, and they risk creating ‘regulatory chill’ as law makers are discouraged from introducing new measures in the public interest.

Is regulatory cooperation also on the agenda for EU-UK trade talks?

Apparently yes! Work by Corporate Europe Observatory, LobbyControl, Observatoire des multinationales, and SpinWatch has shown how the financial sector has been coordinating a lobby campaign to influence the negotiations for the post-Brexit EU-UK trade arrangement, including to promote the ‘regulatory cooperation’ model found in EU-US trade talks. The financial industry has put many proposals on the table with ‘regulatory cooperation’ at their core. This could mean that diverging regulatory systems and conflicts over how the financial sector is to be governed would be dealt with via bureaucratic, opaque procedures that allow lobbyists to exert influence behind the scenes, while averting public debate about crucial issues.

How can I find out more?

It is vital that civil society, trade unionists and activists wise up to the implications of the ‘Better Regulation’ agenda on EU decision-making. Below is a reading list which will help you to get better informed:

- Reprotecting Europe, New Economics Foundation & European Environmental Bureau, January 2020
- Trading away protection, Corporate Europe Observatory, August 2019
- Brexit, finance sector lobbying and regulatory cooperation, Corporate Europe Observatory, LobbyControl, Observatoire des multinationales and SpinWatch, June 2019
- The ‘innovation principle’ trap, Corporate Europe Observatory, December 2018
- Driving into disaster: how the EU's Better Regulation agenda fuelled Dieselgate, Corporate Europe Observatory, February 2017
- Using better regulation to make things worse: industry tactics to delay and weaken workplace cancer laws, Corporate Europe Observatory, December 2016

- Commission CON-sultations, Problems with public consultations, and how “Better Regulation” will make them worse, Corporate Europe Observatory, May 2016
- Cooperating to deregulate; TTIP fits neatly with the domestic deregulation agenda of the EU, Corporate Europe Observatory, November 2015
- Threat to democracy; The impact of ‘better regulation’ in the UK, Christine Berry and Stephen Devlin, New Economics Foundation, September 2015
- EU REFIT machinery 'cutting red tape' at the cost of the acquis communautaire, Isabelle Schömann, European Trade Union Institute, April 2015
- The crusade against ‘red tape’: How the European Commission and big business push for deregulation, Corporate Europe Observatory, October 2014

On Twitter, you can follow New Economics Foundation @NEF, UNI Europa @UNI_Europa, European Trade Union @etuc_ces, European Environmental Bureau @Green_Europe, Friends of the Earth Europe @foeeurope, Corporate Europe Observatory @CorporateEurope