Better Regulation

Corporate-friendly deregulation in disguise

A deregulation agenda is sweeping through the European Commission and member states, particularly pushed by the United Kingdom. If you care about the environment, workers’ rights, or health and well-being you should be concerned about this agenda, because it is abolishing and weakening current rules and preventing new ones from being introduced. In EU circles it’s called ‘Better Regulation’, but in fact it’s rule-making at its worst, putting the interests of big business centre-stage, where those with the most lobby power have the biggest say. And with TTIP, rules to protect the public interest will come under even further assault.

What is deregulation?

Deregulation is about removing or weakening rules and regulations (laws, directives, implementing acts) and other policy tools that companies perceive get in the way of business doing business. It 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 in 2000-12, the benefits of regulation greatly outweighed the costs, on average, by a factor of six over the period covered.
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Who is pushing this agenda and how?

The deregulation agenda in the European Union has the fingerprints of corporate lobbyists all over it. For example, exclusive big business lobby the European Roundtable of Industrialists’ (ERT) 2011 proposal demanded a complete overhaul of EU legislation, affecting current, drafted, and future regulation. At the time, the proposals seemed far too extreme to be serious, but in one form or another they have been adopted.

And it was the tobacco industry lobby back in the 1980s and 1990s which first promoted ‘impact assessments’ which are a key weapon in the deregulator’s armoury, and which can, if not used very carefully, ignore the social and environmental benefits of regulation and place over-emphasis on the direct costs to business, which are easier to quantify (and exaggerate). Meanwhile, big business representatives have had privileged access to officials and decision-makers in Brussels and London via working groups, drawing up lists of the regulations which they wish to see banished.

Whichever way you look at it, deregulation is an agenda of big business interests and they have found a sympathetic ear in London. In 2013, the UK government set up the Business Taskforce to “to get bureaucracy out of the way of business” at both the national and EU levels. Led by six leaders from big business and a government minister, it came up with 30 proposals for where EU regulations should be abandoned, scrapped, or reduced and included a competitiveness test. Many recommendations were adopted at the EU level, including downgrading a proposed regulation on fracking to a light-touch recommendation.

But isn’t cutting red tape a good thing?

If you believe the media (particularly in the UK) 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 not all regulation is administrative ‘red-tape’, far from it, and much of the deregulation agenda goes much further and ignores the good reasons why laws and protections were introduced in the first place. Such rules ensure that when companies produce or deliver services, the public interest is preserved and wider social and environmental concerns do not lose out. They 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 they can introduce fairness in terms of pricing and who picks up the bill for costs.

Moreover corporate lobbying can actually add ‘red-tape’ to regulations in the form of loopholes and complexities. For example, a key piece of 2009 hedge fund regulation ended up almost three times as long as its initial draft due almost entirely to the introduction of loopholes and weakening of language. And the financial lobby played no small part in this. According to an estimate, 900 of 1,600 amendments were actually written by the financial industry.

However, under political pressure to appease members states such as the Netherlands and right-wing eurosceptics, particularly given the Brexit debate in the UK, and after heavy corporate lobbying, the European Commission, the EU’s executive arm, has gradually moved forward with its ‘Better Regulation’ agenda. And as we shall see, current efforts to deregulate go far further than simply cutting ‘red tape’. Crucially the deregulation agenda has been re-branded as Better Regulation and this masks a serious effort to undermine the implementation of current rules which serve an important social or environmental purpose. Additionally, Better Regulation represents a wholesale revamp of how new regulations are to be made which sees big business given a privileged voice – ahead of elected politicians.
Deregulation – why is it so alarming?

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 May 2015, the Commission reported that 23 initiatives had been identified for repeal. Meanwhile in 2015, 73 proposals which were pending in the legislative procedure were scrapped, including plans on labelling for organic produce, investor compensation, and the waste directive. In total since 2012, more than 140 proposals have been dropped, including those on access to environmental justice, another on the protection of soil, and rules on supervision of medicines.

- **‘Fitness Check’:** A specific review for some laws called a Fitness Check which will assess whether it is “fit for purpose”, and identify “excessive burdens, overlaps, gaps, inconsistencies and/or obsolete measures”. Since the end of 2012, the Commission has reported that 11 evaluations and Fitness Checks have already “delivered results” and 31 evaluations and Fitness Checks are planned, including of highly important laws such as Safety and Health at Work; Protection of birds and habitats (Natura 2000); and General Food Law. Many of these checks are run by corporate consultants such as Deloitte which can be expected to have private sector values at the forefront.

Who are the architects of the EU’s new Better Regulation agenda?

A key player at the EU level pushing the deregulation agenda has been 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 from regulation as a useful tool to a burden – a very dangerous development indeed.

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 recently criticised the way in which his new role was announced, before he had undergone any conflicts of interest checks.

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 pro-GMO farming and agribusiness lobby COPA-COGECA, Polish business lobby Lewiatan (member of BusinessEurope), as well as current and former executives from technology giant Invensys and coffee conglomerate Illy. Member Michael Gibbons chairs the Regulatory Policy Committee for the UK government, and is also chair of the ‘clean’ coal lobby group the Carbon Capture & Storage (CCS) Association, whose members include BP, General Electric, Shell, Statoil and other major corporations.

It is perhaps not surprising that the final report of the Stoiber group proposed a strengthened deregulation agenda, one that was later adopted by the Juncker Commission almost entirely, admittedly without the recommended deregulation target. However, four members of the Stoiber group from civil society 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 group had “entered the realm of fact free policy making”, which “fails to recognise the cost to society of not regulating”.

The Soil Framework Directive

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).
What sets the Juncker Commission’s deregulation package apart from earlier attempts?

Since Jean-Claude Juncker took office as President of the European Commission in November 2014, there has been an even greater deregulation push, not just on specific rules and laws which should be scrapped, but on how decisions are made about future laws. Under Juncker, fundamental changes in policy-making are being introduced which will put major obstacles in the way of new regulations aimed at protecting the environment or improving social conditions. It’s an irony that, while dressed-up as reforms to cut bureaucracy and red-tape, these reforms will add to the length, cost, and complexity of the legislative process. And they effectively put the interests of big business in the driving seat. These reforms include:

* **Vice-President for Better Regulation:** Juncker has appointed his right-hand man Frans Timmermans as Vice President for Better Regulation, giving this portfolio more political weight than at any time previously. And this is is not just cosmetic as this role is now imbued with huge political powers. As Vice President, Timmermans gets several opportunities to veto new legislative proposals before elected politicians have even seen them, to prevent them from moving ahead, with “subsidiarity, proportionality and better regulation… at the core of the work of the new Commission”.

* **Regulatory Scrutiny Board:** This new structure, with four Commission officials and three external members, also has a de-facto veto power. It will scrutinise all the impact assessments performed on all proposals for new rules and this unelected body will be 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.

* **Impact assessments and consultation:** As well as placing a requirement for an impact assessment on all new proposals, the Commission’s statements on Better Regulation continually pledge a strong commitment to transparency and consultation. It talks about 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”. This rhetoric needs closer inspection.

What’s the problem with impact assessments?

Impact assessments sound like they would be a useful, neutral tool, something which can allow policy-makers to understand the impact of the legislation which 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.

Additionally, it is very hard to get them right as they require a monetary value to be assigned to the expected costs and benefits of a policy; arguably it is much harder to measure the environmental and social costs and benefits, than the economic. For example, how do you place a monetary value on the health benefits for hairdressers of not using certain chemicals, or the environmental impact of a nature habitat? And what about the cost of doing nothing to tackle a particular problem? In practice impact assessments give an overriding weight to economic or trade over other impacts, and thereby undermining the environmental or social case for a given policy.

It is not hard to see how an under-pressure official required to produce or commission an impact assessment on introducing or scrapping a piece of legislation will undoubtedly be grateful for, and maybe even become dependent upon, the figures on expected economic costs provided by business interests. 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 argues that companies systematically 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 shows that the benefits of adapting for business are generally underestimated, with the costs for industry to adapt to environmental policies decreasing since the 1990s.

It’s not surprising then that some have called impact assessments “propaganda documents rather than self-critical policy analyses” and no wonder big business lobbies such as BusinessEurope, EuroCommerce and others called for, and have now won, a ‘process of gathering and analysing evidence and for scrutinising and supporting cost benefit analysis throughout the policy making process’. The EU says that its impact assessments will map out alternatives, potential short and long-term costs and benefits, and will assess the economic, environmental, and social impacts in an “integrated and balanced way”. That is the theory at least – it remains to be seen how this works out in practice.

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

Impact assessments fit with the Commission’s emphasis on consultation “at every stage of the process”. The Commission has lauded its Better Regulation package as providing more opportunities for consultation and transparency and accountability of decision-making. But in this context, 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 and this is a pattern we already see 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.

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 grassroots 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.”

Civil society is unlikely to be able to keep pace with the swell of consultations coming its way as the Better Regulation programme rolls on. Rather than more consultations, as the Alliance for Lobbying Transparency and Ethics Regulation has written, we need a broader democratisation that empowers the engagement of citizens’ groups in decision making, as well as a far more active commitment by decision makers to defend public-interest concerns against the constant pressure from numerous, well-resourced commercial lobbyists.
What does this mean for a (more) social and green Europe?

It is clear that the deregulation agenda in the EU undermines or even abolishes existing rules, while making new, progressive rules that much harder to introduce. Just look at these examples.

The Circular Economy Package was initially introduced as a way to boost Europe’s transition towards the more sustainable use of resources. But in 2014, wearing his Better Regulation hat, Frans Timmermans withdrew it from the Commission’s workplan for 2015. Justifying the decision, Timmermans said at the time “We are proposing to withdraw the existing proposal on the circular economy to make way for a broader and more ambitious approach that can be more effective.” The revised package was duly introduced at the end of 2015, but failed to live up to the billing. Not only had there been a year’s delay, the new legislative proposal was weaker and lacked the promised ambition. A ‘political’ target for resource productivity was absent from the new package (as demanded by BusinessEurope in 2014), meaning an important step towards reducing absolute resource consumption was missing, and the EU-specific target for food waste reduction had also been dropped. Not surprisingly, BusinessEurope welcomed the new proposal while green groups expressed their huge disappointment.

Under Better Regulation, proposals to introduce standardised maternity leave have also been scrapped. The bill, first introduced in 2008, received the support of the Parliament but was blocked by a handful of member states. Once again, BusinessEurope had been vocal in its opposition to the measure, claiming that “pregnant workers are already adequately protected” by current rules that date back to 1992 and that “it is not reasonable to come up at European level with rules which would significantly increase costs for companies and public finances”. The Commission has said it will re-visit the issue, but will it suffer a similar fate to the Circular Economy Package and be drastically weakened? Either way, expecting families are left reliant on decades-old legislation and employers are left unable to properly plan for the future.

Meanwhile, in 2012 a trade union and employers’ organisation signed a framework agreement aimed at protecting hairdressers in the workplace. According to the union UNI Europa, hairdressers are ten times more likely than the average worker to develop skin conditions and five times more likely to develop musculoskeletal diseases such as arthritis and tendinitis. It is estimated that 20 per cent will, at some point in their lives, be affected by work-related asthma. This positive agreement to protect hairdressers should have been forwarded by the Commission to the Council for final approval and to make it binding on all member states. Under former Commission President Barroso, the agreement was ridiculed and stalled. “The EU should not be concerned with blond women on high heels,” stated Barroso. Under Juncker, not only has the Commission’s handling of the agreement continued to be slow, it was also mocked in a Commission publication claiming that the EU should not be big on small things. UNI Europa reacted with a campaign pushing the Commission to act. This case illustrates that agreements reached through social dialogue between employers and unions may not be protected from the reach of Better Regulation. And meanwhile hairdressers continue to suffer.
Hasn’t David Cameron been pushing something similar in the UK?

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 10 Downing Street in 2010, coinciding with the wider economic crisis and the implementation of austerity policies, provided it with greater political impetus.

In 2010, the UK government introduced a ‘one-in, one-out’ policy i.e. for every £1 of additional cost imposed on business by new regulations, the government should save businesses £1 by removing or modifying existing regulations; as of 2016, the policy is now ‘one-in, three-out’.

The new Deregulation Act requires those exercising specific regulatory functions to have regard to the desirability of “promoting economic growth”. Such regulators could include those regulating social care, drinking water quality, environmental protection, equality, food standards, health and safety, education standards, and many, many others. Meanwhile, the Red Tape Challenge, invited members of the public to suggest regulations that should be scrapped and the Regulatory Policy Committee, dominated by corporate interests, is an unelected body which has the power to delay new rules by vetoing departments’ impact assessments (and has now been replicated in the EU by the Regulatory Scrutiny Board). Finally, the Focus on Enforcement has invited businesses to make proposals on how regulation should be enforced in their sector (e.g. agricultural lobbyists advising government on how farm safety and animal welfare inspections should be carried out).

What have been the effects of this in the UK?

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.

The speed limit for heavy goods vehicles (HGVs) travelling on single carriageway roads has now been 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 consultation rejected the idea but the government 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.

While the UK already has one of the most lightly-regulated labour markets among developed economies, businesses have continued to complain about the costs of complying with labour laws. In another Better Regulation trade off, cost reduction for businesses was prioritised over labour rights for workers by introducing new fees for employees who want to bring an employment tribunal case; doubling the period before employees can be protected from unfair dismissal from one to two years; and halving the minimum consultation period before collective redundancies (100 people or more) can be made from 90 to 45 days.

Site waste management plans required construction companies to plan for how they would tackle the waste generated on the site of their construction projects. Evidence showed that they were “beneficial to the majority of organisations and most achieve significant cost savings through implementing them”. Not surprisingly then, businesses supported them and crucially, they were good for the environment too. But under the Cameron Red Tape Challenge they were abandoned because an impact assessment claimed that repealing the regulation would provide a net financial benefit to businesses!

But perhaps the biggest impact of deregulation in the UK has been constraining the policy space for new rules to almost zero, even in new and emerging sectors which require totally new regulation eg. auto-enrolment into private pensions, e-cigarettes and many others.
How does this deregulation agenda link with the UK’s referendum on whether to stay in, or exit, the EU?

When David Cameron was renegotiating the terms of the UK’s membership of the EU with European Council President Donald Tusk, a greater European emphasis on deregulation was one of the four priority areas. To pile on the pressure, Cameron and the UK government spearheaded an appeal from 18 other member states, demanding quantitative targets, meaning that for every new regulation put in place, a certain number of other regulations should be removed. As part of a drive for ‘competitiveness’, the final deal negotiated by Cameron with the 27 other member states and Tusk commits to “lowering administrative burdens and compliance costs on economic operators”, “repealing unnecessary legislation” and “a burden reduction implementation mechanism”. Specifically, it says “The Commission, within the REFIT platform, will work with Member States and stakeholders, towards establishing specific targets at EU and national levels for reducing burden on business.”

As presented here, Cameron and the European Commission – together with big business - share a common approach on the deregulation agenda.

Isn’t there a similar proposal being negotiated in TTIP too?

Not content with giving European big business an enhanced say in EU policy-making, proposals under the EU-US trade deal (TTIP) would seek to extend that to US trade authorities (acting on behalf of US corporations), binding both the EU and the US into this deregulation agenda. 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' is at the heart of TTIP 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 is likely to lead to further pressure for deregulation. But the negotiators have been canny. Fearing that legislators will reject any agreement which contains concrete proposals for deregulation in particular areas (allowing US chlorinated chicken or hormone-injected beef into the EU, for example), TTIP is likely to instead introduce new procedures which, once the TTIP dust has settled and it has been safely passed into law, will enable this hyper-deregulation phase to begin.

The main elements of the EU’s proposal for regulatory cooperation in TTIP include:

✓ An early warning system so that the European Commission (which has the monopoly on initiating legislative proposals or implementing acts at the EU level), would need to discuss the idea (and potentially adapt it) with US trade authorities and offer them cooperation, before they are brought up for discussion with EU elected representatives in the Council and in the European Parliament.
Trade impact assessments which will have to include assessments of a given proposal’s impact on trade, or in other words, its impact on US companies.

Business groups are to be able to influence the cooperation programme significantly. If corporations on both sides of the Atlantic can agree on a “substantive proposal”, there is 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, it shall establish sectoral working groups (eg on chemicals, food standards, consumer rights) to work out strategies in specific areas and business lobby groups will have privileged access. It will be non-elected entities that will be the main actors under “regulatory cooperation”.

There will also be a series of sub-agreements on special procedures for particular sectors, and the influence of corporate interests is already making itself felt. The EU proposal on chemicals is strikingly similar to that of the chemicals lobby; the proposal on pesticides will block development of rules on pesticides in the US as well as the EU; and the proposal on financial regulation was hailed by TheCityUK, the financial lobby group, as “reflect[ing] so closely the approach of TheCityUK that a bystander would have thought it came straight out of our brochure on TTIP”.

Regulatory cooperation under TTIP is set to have a serious effect in the EU. It will increase the influence of the US trade authorities in EU politics, and it will 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 will work hand in hand and be mutually reinforcing. Both processes are creating 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.

Recently, the public was allowed to see a first glimpse of the US position on “regulatory cooperation” under TTIP. It happened when Greenpeace Netherlands was able to publish a series of leaked negotiation documents. From these documents we know that in general terms, the two sides agree on an approach to “regulatory cooperation”, on some points the EU has the most far reaching proposals, and on others the US is in the lead. The US, for instance, is clear in its attacks on the principles guiding EU food standards and chemicals regulation, and its negotiators suggest that anyone with an interest should be able to nominate a regulation for scrapping, if, for instance, it is deemed “too burdensome”.

But we just won two more cards! Card 1 - Better Regulation: Law is scrapped on the excuse it’s too costly to implement and Card 2 – Regulatory Cooperation: Law is withdrawn because it is allegedly bad for trade...
What can I do about all of this?

It is vital that civil society, trade unionists and activists wise up to the implications of the Better Regulation agenda as it will affect all of us. Below is a reading list which will help you to get better informed:

* **Commission CON-sultations, Problems with public consultations, and how 'Better Regulation' will make them worse**, Corporate Europe Observatory, May 2016

* **BETTER REGULATION; TTIP under the Radar?**, Pieter de Pous, European Environmental Bureau, December 2015

* **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

You can check out the Better Regulation Watchdog at the EU level and Uni Europa's Not Better campaign. On Twitter, you can follow New Economics Foundation @NEF, UNI Europa @UNI_Europa, European Environmental Bureau @Green_Europe, Friends of the Earth Europe @foeeurope, Corporate Europe Observatory @CorporateEurope, and follow the debate at #betterregwatch and #betterregulation.