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Author(s)	Lynch Fannon, Irene
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University College Cork, Ireland
Coláiste na hOllscoile Corcaigh



**Regulation and Competitiveness: A mysterious and difficult relationship
in the European Union.**

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Regulation and Competitiveness: A mysterious and difficult relationship in the European Union.

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EUSA Conference, Montreal May 2007.¶

"However, the difference in legal infrastructure does not result from the California legislature's efforts to provide the proper conditions for the development of high technology industrial districts. Rather.... a serendipitous result of the historical coincidence between the codification movement in the United States and the new state's efforts at developing a coherent legal system out of its conflicting inheritance of Spanish, Mexican, and English law."

Introduction

The Lisbon Agenda, which has attempted to combine the attainment of ambitious competitiveness goals with social progression and inclusiveness, places Europe in a uniquely difficult position globally, most particularly as an example of an experiment which many consider to be doomed to failure.¹ As Europeans continue to examine ways in which Europe can become more economically competitive (compared, in particular, with US economic indicators) the focus has increasingly been on regulation and its effect on entrepreneurship, productivity, business growth, and capital liquidity. Assessing this effect or relationship is complex for a number of reasons. Firstly, it is clear that many non-regulatory factors contribute to economic and competitive success.² Legislative

¹ Hansmann H, and Kraakman R, *"The End of History for Corporate Law"* (2001) 89 Georgetown Law Journal 371. Some evidence that the failure concept has been internalised, at least by certain parts of the EU civil service. See Lisbon mid term assessments:

COM (2005) 24 final: Communication to the Spring European Council: Working Together for growth and jobs. A new start for the Lisbon Strategy.

COM (2005) 33 final: Communication from the Commission on the Social Agenda. The Commission issued documents on other matters less central to this discussion such as the Communication on Sustainable Development.

COM (2005) 37 final: Communication from the Commission to the Council and the European Parliament: The 2005 Review of the EU Sustainable Development Strategy: Initial Stocktaking and Future Orientation. Report of the High Level Group on the future of social policy in an enlarged European Union. European Commission: DG for Employment and Social Affairs. May 2004..

Kok Report on the Lisbon Strategy in an Enlarged Europe, November 2003.(The Kok Report).

² See previous study by the author in relation to EU-US comparative labour market regulation: ...Lynch-Fannon I: Working Within Two Kinds of Capitalism (Hart Publications, 2003) See also Lynch-Fannon I: *The European Social Model: Prospects for Success in an Enlarged Europe* in P.Ali and G. Gregoriou (Eds.) International Corporate Governance after Sarbanes-Oxley (John Wiley & Sons: New Jersey, 2006), pp.423-443.

on the very strange dissonance between extensive legislative efforts on the part of the EU to encourage workers to combine work and family life and falling birthrates in Europe. For an interesting study on reasons for success of some industrial districts in the US compared with others (Silicon Valley CA and

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3 policy is not the only significant element in the creation of conditions which are
4 conducive to competitiveness, innovation and productivity. Furthermore even if we can
5 agree that regulatory and legislative frameworks are important, sometimes the effects of
6 regulation are difficult to predict. Secondly, within the European Union there is evidence
7 of internal conflict within the Commission as to the relative importance of the Lisbon
8 goals and in particular regarding the relationship between the competitiveness goals and
9 the social goals of Lisbon. This, in turn, has led to a failure to engage in a profound way
10 with assumptions around what can be loosely described as cost-benefit analyses³, in other
11 words a failure to grapple effectively with the difficult task of balancing goals which,
12 despite protestations to the contrary⁴ do conflict. Thirdly, the experience of distinct
13 member states presents challenges.⁵ Despite considerable attempts at harmonisation
14 substantial regulatory differences exist between members states and in addition
15 substantial differences exist between the relative economic performance of member
16 states. More confusingly, economic performance within different states over the last ten
17 years delivers no clear lessons regarding the relationship between regulation and
18 competitiveness.⁶ Nevertheless, undaunted by the complexity of these issues the
19 European Union has embarked on a path which attempts to provide definitive insights
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31 Route 128 MA) see, Saxenian (cultural attitudes) Gilson (the unintended effects of historical and relatively
32 insignificant legislative endeavours) See Gilson, Ronald J: *The Legal Infrastructure Of High Technology*
33 *Industrial Districts: Silicon Valley, Route 128, And Covenants Not To Compete* (1999) 74 New York
34 University Law Review 575 on the surprising effects of some legislation on competitiveness... See also La
35 Porta, R, Lopez-de-Silanes F, Shliefer A, and Vishny R, " *Corporate Ownership Around the World*"
36 (1999) 54 Journal of Finance 1131. " *Legal Determinants of External Finance.*" (1997) 52 Journal Of
37 Finance, 1131;

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39 Roe Mark J: *Political Determinants of Corporate Governance: Political Context, Corporate Impact* (OUP,
40 2003).and others on path-dependancy issues.which adds an additional layer of complication regarding the
41 role of regulation in a comparative context.

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43 ³ It is fair to say however that the Lisbon Agenda, as originally conceived, embraced wholeheartedly the
44 concept that innovativeness and economic growth was the result of many contributory factors, in many
45 ways this appreciation of the complexities of the matter led to a 'golf umbrella' effect for Lisbon by 2005
46 where the many different strategies being pursued under the 'Lisbon Agenda' rendered it unmanageable.
47 The Barroso Report was specifically and trenchantly critical of this effect in 2005.

48 ⁴ See below regarding the 'Scandinavian approach' to these issues.

49 ⁵ Norway, one of the most regulated economies in the world is also one of the richest, largely due to oil
50 revenues. Similarly, the spectacular economic growth of the Irish economy from the mid 1990s on
51 occurred against a backdrop of increased regulation both domestically and emanating from Brussels.

52 ⁶ Some states such as Sweden, which are highly regulated, perform well, others with less regulation, for
53 example Ireland perform equally well if not better but Ireland's spectacular economic performance has
54 occurred against a backdrop of an overall increase in regulation. See Business Regulation Forum Report
55 March 2007. www.businessregulation.ie.

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2 into the effect of particular types of regulation on businesses. The European Commission⁷
3 has estimated that the cost of regulatory compliance obligations on businesses in the
4 European Union is between 4% and 6% of GDP and that 15% of this figure is avoidable
5 'red tape' (the term used to specifically signify unnecessary compliance burdens).
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7 Member states⁸ have embraced this Better Regulation project with varying degrees of
8 enthusiasm. This paper will, in the first part, consider the position of the EU at present in
9 the context of the Lisbon agenda following the midterm review in 2005. The second part
10 will consider some of the difficult questions surrounding the relationship between
11 legislative policy, regulation and competitiveness, particularly as experienced within the
12 EU. The third part will discuss the response of the EU Commission to these difficult
13 questions and will examine the Dutch⁹ and UK approaches to the reduction of the
14 regulatory burden, as examples of leaders in the field, in the context of the recently
15 announced EU project. The final part will raise some critical points regarding likely
16 outcomes as we rapidly approach 2010, the year for attainment of the Lisbon goals.
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26 ⁷ Com(2005) 24/final Communication on Better Regulation for Growth and Jobs. Following this between
27 April and September 2005 the Commission examined the possibility of developing an EU common
28 methodology for assessing administrative costs of EU derived legislation. In January 2006 the Council
29 invited the Commission to start measuring administrative burdens as part of an integrated impact
30 assessment approach to legislation and in Spring 2007 the Commission published its first initiative in this
31 area. See also OECD. *From Red Tape to Smart Tape*, OECD, 2003.

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33 ⁸ Within each member state, the source of administrative burdens will be domestic, EU or other
34 international. In many member state countries up to about a half of such burdens emanate from Brussels.
35 ⁹ In the Netherlands it has been estimated that the cost of the compliance burden on business is 2.2% of
36 GDP and significant steps have been taken to reduce this burden. In Germany this figure is 4.4%. Many
37 member states including Ireland and UK have adopted 3% as a guideline estimate of the overall
38 administrative burden. In Ireland, assuming that 15% of this guideline figure of 3% is unnecessary the cost
39 to Irish business has been estimated at 582 million in 2002 alone. Department of the Taoiseach:
40 Regulating Better. PRN 1395 (January 2004).
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Part I: European Competitiveness: The Challenges of Lisbon

Introduction

Everyone has heard of the Lisbon agenda, first declared in 2000 at the Council of Europe meeting held in that city. In 2005 the mid term review of how the Lisbon agenda was progressing involved a harsh reassessment of how Europe was measuring up to its own stated goals. President Barroso made it clear that the ‘golf umbrella effect,’ in other words the trend which had seen the Lisbon agenda grow in inclusiveness to a staggering 117 different policy initiatives, had to be urgently addressed, a realignment or revision of progress had to be embarked upon and a refocusing of efforts on core goals had to be achieved. In addition to this politically generated over inclusiveness and consequent lack of focus, by 2005 it was clear that the Lisbon agenda meant different things to different parts of the Commission; some emphasised economic growth and creation of jobs and support for industry, while others took heart in the phrases which consistently set these economic goals in the context of a wholehearted pursuit of the European social model. This intra institutional conflict is also reflected in differing positions of member states and the EU citizenry with rejection of the European Constitution for example, giving expression to such concerns in France at the dismantling of the social Europe whereas in contrast politically the UK would normally take a much more pro-market, anti interventionist approach as would its neighbour, Ireland, up until recently one of the most successful economic areas in the Euro zone over the last decade.¹⁰ Nevertheless, the essential hall mark of the European approach to continued prosperity is the view that these goals are not in conflict, an ambitious and visionary idea which is really at the centre of European progress. The difficulty is that sometimes there are conflicts which are both difficult to explain and difficult to resolve.

¹⁰ ‘Boston or Berlin’; Chicago or Copenhagen’ are phrases which neatly encapsulate Ireland’s ambivalent attitude to the European social model of economic progress and these are often used by politicians and policy makers in Ireland. Sweeney, Paul, “*The Celtic Tiger, Ireland’s Continuing Economic Miracle*,” (Oak Tree Press, Dublin, 1999). Sweeney, Paul, “*The Celtic Tiger, Ireland’s Economic Miracle Explained*,” (Oak Tree Press, Dublin, 1998).

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2 “The goal of the Lisbon partnership for growth and employment is to modernize our
3 economy in order to secure our unique social model in the face of increasingly global
4 markets, technological change, environmental pressures, and an ageing population. This
5 strategy is also to be seen in the wider context of the sustainable development
6 requirement that present needs have to be met without compromising the ability of future
7 generations to meet their own needs.”¹¹
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10 11 **Mid Term Review 2005**

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14 The original period for achieving the ambitious Lisbon strategy was the 10 years
15 from 2000 to 2010. Thus 2005 prompted much soul searching, research and positioning
16 as a ‘mid-term’ review of the Lisbon Agenda was embarked upon. A number of key
17 documents presented by the EU included the Kok Report(2003) the High Level Group
18 Report(2004) and in February and July of 2005 respectively, communications from the
19 President of the European Commission, President Barroso and Communications from the
20 Commission on the Social Agenda. At the same time 2004 saw a significant enlargement
21 of the European Union including the absorption of Poland, which is significant both
22 politically and in terms of population, and other countries from the former Eastern
23 Europe.
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30 In its report on the future of European Social Policy in an enlarged Europe, the
31 Commission-appointed High Level Group noted in its report that ‘there is a distinct
32 European social model’ marked by ‘the consistency between economic efficiency and
33 social progress.’ In identifying the following three significant features of the social model
34 the Group very clearly accepted a distinctly communitarian philosophy which many
35 consider central to the European social model.¹² These features are firstly, a compromise
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41 ¹¹ Com (2005) 24/final p. 2

42 ¹² The identification of the European Social Model as being communitarian in character is particularly
43 significant for legal theorists when contrasting this approach to the more contractarian approach evidenced
44 in the United States and championed by the ‘law and economics’ scholars of the Chicago School. See
45 Posner et al and more recent commentators. Lynch-Fannon *supra n.* Lynch-Fannon I, “*Employees as*
46 *Corporate Stakeholders: Theory and Reality in a Transatlantic Context.* (2004) *Journal of Corporate Law*
47 *Studies* 155. Hansmann and Kraakman, *supra n.* WT Allen, “Contracts and Communities” (1993) 50
48 *Washington and Lee Law Review* 1.
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2 between the state and the market, secondly, a compromise between labour and capital and
3 finally a compromise that must be made between the welfare state and individual
4 responsibility. In describing the social model in these terms the report noted that in the
5 1960s when the distinctively European approach was being developed by the original six
6 member states the 'conditions were excellent' with strong economic growth, low
7 inflation, confidence in public affairs as well as in individual rights. The report also
8 noted, in relation to the labour market, that law and collective bargaining played a 'key
9 role.' However, it was clear that in the new millennium these conditions no longer
10 persisted and thus Europe faced a challenge to adapt 'the balance between economic
11 efficiency and social progress' to take account of a changing economic environment and
12 social context.'

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19 The High Level Group report reiterated a commitment to the three-pronged
20 integrated approach to social, economic and employment policy. It described how from
21 1995 onwards and towards Lisbon the EU and its member states "started revisiting their
22 approach to social policy: affirmation of employment as an objective, and not only as an
23 outcome of economic policy; increasing attention paid to social policy as an investment
24 (and not only as a cost) and to the 'productive' role of social policy within the framework
25 of a virtuous circle combining flexibility and security, adaptability and employability."
26 The report emphasised the importance of developments of the EU in this direction from
27 the mid 90s with the accession of Sweden and Finland, acknowledging the Scandinavian
28 influence on thinking on these matters, on to Maastricht (1992) and the Social Charter
29 and on to Amsterdam (1997) when the Maastricht Protocol was incorporated into the
30 Treaty, and finally to Lisbon "with the affirmation of the integrated objectives and the
31 launching of the open method of co-ordination¹³ as a new instrument to address social
32 policy issues." The integrated approach, which was fully articulated at Lisbon
33 emphasised the view that these objectives and policies are not in conflict but can
34 reinforce each other. In fact the Scandinavian influence underlined even more the
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48 ¹³ For a description of what is involved in the OMC see the Report *supra n. 1* p. 35 para. 2.2.2. In addition
49 the OMC procedure will be included in the Constitution in relation to social policy under Article III-107.
50 See Report *infra* p. 36?

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‘Europeanness’ of the Lisbon Agenda by insisting that social protection and economic progress were two sides of the same coin rather than twin track goals..

By the mid-term review period of 2005 however, the core objectives of the Lisbon strategy seemed less a reflection of reality and more a collection of noble theoretical assertions. Unemployment still remained a significant problem in the European Union averaging at 9%, (latest figures say 7.2%, WSJ May 15) compared with a much lower 4-5% in the United States. Labour market participation figures compared unfavourably with the United States outside the core group of male workers of prime age¹⁴ and GDP growth was lower than the projected annual rate of 3%, with figures for the US being much healthier. In 2000 the Lisbon Agenda had stated that ‘an average economic growth rate of around 3% should be a realistic prospect for the coming years.’ Since 2001, the European Union growth rate which had been of 3.5% in 2000, hovered between 1.6% in 2001, 1.1% in 2002, and 1.3% in 2003. The forecast for 2004 was 2.3%. (High Level Group Report; 2004) . The Report went on to observe that 3% does not look like “a realistic prospect for the coming years.”¹⁵ In 2006 the overall growth in GDP was 2.7% in the Euro Area and 2.9% in EU25 compared with 3.3% in the US and 2.2% in Japan. 2006 was an improvement on 2005 where figures were 1.4% for Euro Area and 1.7% for EU25.¹⁶ Yet despite these negative indicators and despite ominous statements from the Kok Report (2003) on performance of the social aspects of the Lisbon Agenda in the context of enlargement, the Report of the High Level Group stated (in a surprisingly confident manner) that the first phase of the implementation of the Lisbon strategy was almost complete!!! It acknowledged however, that ‘many actors stress the gap between statement and reality.’

¹⁴ US, EU15 and EU25 figures for men of prime age between 25-54 are similar. See High Level Group Report p. 42 with figures from Eurostat, European Foundation for Living and Working Conditions and OECD.

¹⁵ However, it is important to note that some differences in GDP growth as between the US and EU can be explained by factors which are particular to the economic structures of both trading blocs. Gordon R, “Two Centuries of Economic Growth: Europe Chasing the American Frontier” <http://faculty-web.at.northwestern.edu/economics/gordon/2Cent-CEPR.pdf> p. 14/58 Robert Gordon: Why Europe Was Left at the Station when America’s Productivity Locomotive Departed? August 2004, NBER Working Paper Series w10661. <http://faculty-web.at.northwestern.edu/economics/gordon/P368-CEPR.pdf>

¹⁶ Eurostat Euro Indicators, April 2007. <http://epp.eurostat.ec.europa.eu/portal/page>. Accessed May 7, 2007.

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4 The subsequent Communication from President Barroso acknowledged the
5 difficult economic conditions which had occurred since Lisbon but more significantly the
6 President also noted that the failure of Lisbon to meet its mid term goals could also be
7 attributed to a 'policy agenda which has become overloaded, failing co-ordination and
8 sometimes conflicting priorities.' (the 'golf umbrella') In fact the Presidential address was
9 quite overt in reflecting criticisms that had been levelled against the Lisbon Agenda
10 regarding the burgeoning bureaucratic nature of the attempt to move Europe forward, the
11 core objective of which had translated into 28 core objectives and 117 indicators. In
12 contrast to the report from the High Level Group¹⁷ President Barroso's communication
13 clearly envisaged far greater focus as being essential to the success of Lisbon. The
14 Presidential address reiterated the main focus of Lisbon as being on 'growth and jobs'
15 and outlined three major strategies or goals going forward. These were to ensure that
16 Europe became a more attractive place to invest and work; that knowledge and
17 innovation was at the heart of European growth and that policies were developed which
18 allowed businesses to create more and better jobs. Similarly, the Communication from
19 the Commission on the Social Agenda identified two priority areas:
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28 Moving towards full employment, increasing the quality and productivity of work
29 and anticipating and managing change.
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31 A more cohesive society: equal opportunities for all.
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33 Although these documents did try to identify cause and effect factors regarding
34 the relationship between legislation, regulation and economic performance in attempts to
35 reach solutions to the mid-term problems faced by Lisbon, the reports were unsatisfactory
36 in that it was not clear whether these cause and effect issues had been tested either on a
37 statistical basis or an empirical basis. The yardstick against which the European Union
38 measures itself tends to be the performance of other large economic blocks such as the
39 United States and Japan, but even though some comparative figures were given there was
40 little evidence of an attempt to understand the reality of these comparative figures or to
41 question what these comparative figures might teach us. There did not seem to be any
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47 ¹⁷ Included in an Annex to the report a great deal of matters and policy initiatives pursued under the
48 umbrella of the Lisbon Agenda, ranging from Information Society initiatives, Environmental initiative,
49 Education and so on. (HLG Report, Annex 3, 2004).
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2 evidence of a sustained comparative analysis or indeed of a sustained internal analysis.
3 That is not to say that supporting research had not been carried out, the criticism being
4 more based on the fact that it was difficult to glean from the reports the potential impact
5 of solutions proffered even where these were expressed in more than vague aspirational
6 terms, because the **articulation** of the issues or the likely effect of proposed solutions
7 was not precise. A further criticism is more substantive and that is that although the
8 European policy makers were and are theoretically very confident of the European ‘social
9 model’ and its virtues, there seems to be a crisis of confidence when comparative
10 economic figures and the European experience are actually considered.¹⁸
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19 *Part II: 2005-2007 The emphasis on regulation*

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21 However, since the reassessment of Lisbon in 2005 the focus advocated by President
22 Barroso has been maintained and more specific problems have been addressed. Thus the
23 issue of regulation has become important and in 2005 the Commission established the
24 framework for the better regulation movement:
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27 **“3.2. Making Europe a more attractive place to invest and work**

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29 In order to attract more investment, generate employment and accelerate growth, it is
30 important to facilitate market-entry within sectors and between Member States. The
31 Community will therefore give **top priority to the completion of the internal market**
32 **and to improving the regulatory environment** as the two most important policy levers
33 to create jobs and improve Europe’s growth performance.
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37 **Better regulation** has a significant positive impact on the framework conditions for
38 economic growth, employment and productivity. By improving the quality of legislation,
39 it creates the right incentives for business, cutting unnecessary costs and removing
40 obstacles to adaptation and innovation. The measures foreseen in the ‘better regulation’
41 initiatives by the Commission and the Council Presidencies need to be implemented
42 rapidly.
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47 The Commission will continue its work mainly in three areas:
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49 ¹⁸ For more detail of the types of issues which are being referred to here see Lynch-Fannon: *supra n.*
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- New policy initiatives in the Commission Legislative and Work Programme, such as white papers, legislative proposals and expenditure programmes, will all be subject of a solid impact assessment.
- Thorough screening of proposals pending before the Council/Parliament will lead potentially to modification, replacement or withdrawal of such proposals.
- Simplification of key existing legislation will be pursued and a new phase of the simplification programme will be launched on the basis of sectoral action plans.

Inefficient regulation, difficult market access and insufficient competitive pressure can inhibit innovation in sectors with high growth potential and reduce benefits to consumers. The Commission therefore has launched a series of sectoral reviews to identify obstacles inhibiting growth and innovation in key sectors, with a particular view to SMEs. Moreover, the Commission will outline a new approach to taking **SME concerns** into account when proposing Community legislation and policies.”¹⁹

Clearly, the term regulation would generally cover both matters of legislative policy and the implementation and enforcement of such legislation. In the debate on the relationship between regulation and competitiveness there are two very clearly distinct issues, one, the area of legislative policy and the second the issue of administrative burdens which are placed on business as a result of a particular legislative initiative. The issue of administrative burdens addresses how a particular piece of legislation is implemented and enforced. So for example it is possible to look at the amount of administration currently required in terms of compliance with Rule X, rather than coming to agreement as to whether Rule X is a good thing or not. In the EU documents these distinctions are described but even though regulation is identified as a problem the difficulties of identifying a satisfactory method of impact assessment (a methodology which would allow us to weigh the cost of regulation against the benefits) have not been confronted in a satisfactory manner in these documents. This is not surprising. Apart from what we could describe as the methodological difficulties of mapping the precise

¹⁹ From COM (2005) 330 final Communication from the Commission to the Parliament: Common Actions for Growth and Employment: The Community Lisbon Programme P. 7

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2 causative relationship between a particular legislative policy and competitive and
3 economic outcomes²⁰ it is clear that within European political discourse a cost benefit
4 analysis of legislative policy may yield results that put quite simply a lot of Europeans do
5 not want to hear about. Not only that but identification of issues which might be linked to
6 (or even blamed on) a particular legislative policy is politically sensitive within the
7 Commission Directorates. These are the political difficulties. The combination of these
8 'methodological' and 'political' questions makes addressing the policy questions slow
9 and difficult.

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16 ***Methodological difficulties: The causative relationship between regulation and***
17 ***competitiveness***

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19 There is a considerable body of academic literature regarding the role of
20 regulation in supporting economic competitiveness, in supporting innovation,
21 productivity and industrial growth. Gilson in his seminal article identifies an important
22 feature of Silicon Valley success as compared with the decline in activity around Route
23 128 in Massachusetts. In tracing the development of these two globally significant
24 information technology regions, Gilson relies on concepts developed in earlier work of
25 XX and YY and identifies economic agglomeration of the first and second stages as a
26 useful analytical tool. The first state of economic agglomeration may be heavily reliant
27 on technology transfer from significant universities to the industrialized sector. In the
28 case of Silicon Valley, Stanford University and in the case of Route 128, MIT. However,
29 the second stage of economic agglomeration is not as dependent on this relationship for
30 continued development. In this second stage the two regions began to diverge in the rate
31 at which they continued to perform. Essential to this part of Gilson's thesis as to why this
32 difference occurred was the identification of continued employee mobility within Silicon
33 Valley as a significant factor, contributing to the sharing and dissemination of knowledge

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43 ²⁰ From the excerpts above we can see that there are proposals to subject new policy proposals to 'solid
44 impact assessment' but how this will be done in any satisfactory manner is not clearly outlined. Experience
45 with the practice in the UK and Ireland of what is now known as RIA (regulatory impact assessment) has
46 yielded results which are the subject of much skepticism..See Copp, S. F. Company Law Reform: The Role
47 of Regulatory Impact Assessment, presented at the SLS Conference September 2006. However RIAs are not
48 the subject matter of this paper, or any other mechanism for the assessment of new policy initiatives .
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2 amongst a group of experts. This feature of Silicon Valley had been identified by others
3 who gave different reasons for the pattern of development. (see Hyde,²¹ Saxenian)
4 Gilson's hypothesis was that the crucial defining factor in terms of differing success was
5 a different legal approach to the enforceability of restraint of trade covenants in
6 California as compared with Massachusetts. In the former the fact that no-compete
7 clauses are considered to be void was identified by Gilson as contributing significantly to
8 the mobility of employees from one company to another, and that this contributed to the
9 ability of employees to leave employment and engage in start up enterprises, and allowed
10 consequently for the free flow of knowledge which, although valuable would be of a
11 different category from the kind of knowledge which was protected by trade secret laws,
12 (approximately similar in both states). In Massachusetts in contrast there was no
13 evidence of the same mobility of employees from one company to another, nor the same
14 frequency of employees leaving to engage in start up or entrepreneurial activity.
15 One can argue about whether Gilson's hypothesis is really correct but the insight which
16 he provides is profoundly engaging. Firstly, the role of law or regulation in contributing
17 to success is acknowledged as essential, particularly in what Gilson describes in the
18 second stage of economic agglomeration and very interestingly he posits that the
19 regulatory infrastructure may be as important as innovation after what is described as the
20 first stage of economic agglomeration which is much more naturally dependant on the
21 quality of the original invention/innovation. A further insight provided by Gilson is that
22 law is more important than 'culture' (the culture of employee mobility had been
23 identified and described by Saxenian).²² Or more importantly even that what had been
24 identified as 'the culture of employee mobility' could be credibly explained by reference
25 to the absence or presence of a particular legal rule.. A further insight which is appealing
26 is that this serendipitous and significant regulatory difference occurred as a result of
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41 ²¹ Hyde, A: Real Human Capital: The Economics and Law of Shared Knowledge (May 1998) unpublished
42 manuscript referred to by Gilson....There may be many significant differences between Silicon Valley and
43 Route 128. The apocryphal stories of brilliant men engaging in hugely successful start ups in garages, may
44 also have to do with the availability of investment capital, other legal rules which facilitated venture capital
45 investment and reward and so forth.

46 ²² AnnaLee Saxenian, Regional Advantage: Culture and Competition in Silicon Valley and Route 128
47 (1994). Referred to by Gilson.

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2 historical accident rather than as a result of any sustained planning and this in itself
3 provides us with yet a further important insight and that is that sometimes the effect of
4 regulation can be accidental and unintended and affects human behaviour in ways which
5 seem inexplicable or unpredictable.
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10 The social model of economic progress as espoused by the Lisbon Agenda
11 provides us with quite a few examples of the either accidental or unpredictable effects of
12 regulation on human behaviour. I have discussed some of these internal conflicts within
13 the European Lisbon Agenda elsewhere but one example will suffice here. The mid term
14 review of Lisbon identified demographic changes as a huge challenge facing
15 Europe ‘...**Europe must address the challenge of ageing populations which in the
16 long-run will result in a considerable shrinking of the working-age population while
17 increasing the share of retired persons. Unless the decline in the size of the
18 workforce is compensated by increases in labour productivity, potential growth will
19 drop dramatically to around 1% by 2040.....Such a decline in economic
20 performance together with a rise in age-related expenditures would put the
21 European social model under considerable stress.**’ (COM (2005) 330 final).
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28 Despite the apparent support for families in the European model, the demographic
29 figures belie the expected impact these initiatives have had on the birth rate. EU
30 Directives impose significant burdens on all employers (SMEs, large corporations etc.) in
31 mandating maternity and parental leave for all employees. Harmonised standards across
32 the EU ensure that these rights are available to all employees. (However, in many
33 European countries the harmonisation of labour market regulation at EU level, represents
34 a de minimis situation where workers’ rights and entitlements in many member states are
35 significantly better than the minimum required under EC Directives). Furthermore
36 Europeans enjoy mandated rights to four weeks annual vacation and there is also
37 considerable regulation of working hours at European level under the Organisation of
38 Working Time Directive. On a national level considerable tax burdens are imposed on
39 workers and business to finance family friendly social protection initiatives. Childcare
40 provision is publicly funded and supported in Europe. In the United States, in contrast, a
41 system of individually based tax credits seems to be the primary source of financial
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2 support for childcare. Typically the European countries have early school starting ages,
3 much more so than in the US. Yet, total fertility trends in the EU-15 and EU 25 show a
4 decline from the 1970s to 2000 where the average birthrate for both groups has declined
5 to 1.5 per woman during the 1990s and into 2000. (High Level Group Report). In the US
6 in contrast, where there is little or no support for many workers in terms of family leave
7 (paid or unpaid) or vacation leave the overall figure is much nearer 2 births per woman.
8 Effectively despite considerable proactive positions in relation to protection against
9 gender discrimination and the legalisation of positive discrimination provisions in favour
10 of women²³ and despite generous mandated leave rights both relating to birth, childcare
11 and annual leave, European women are choosing to stay at work and not have families.
12 Older European women are choosing not to work at all. In this regard the policies and
13 resulting legislation seem to have had no positive impact. When looked at in a
14 comparative light the relationship between family friendly policies, including legislation
15 and other state funded and voluntary initiatives, does not make any sense at all. The US
16 presents an entirely different picture, indeed a labour market that some have described as
17 downright ‘hostile’ to the family(Williams, 2002) and certainly very little planned
18 support, yet a higher birth rate. A lot of legislation, regulation and no result.

19
20 Nevertheless the solutions proposed by EU policy makers revert to the old belief
21 that more regulation and more support will deliver, when already existing support has
22 achieved very little. The experience of France in recent years and of the Nordic member
23 countries are cited to support this approach, the report noting that “that France and the
24 Nordic member states have higher fertility rates because of better provisions for
25 combining child care and work, and partly because of family friendly policies.”
26 Interestingly the Commission report shies away from pursuing what it describes as a
27 ‘natalist policy’, although in some respects it seems that the relative success in France is

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²³ In the context of the EU as a whole it is instructive to consider Articles 2(3) and Articles 2 (4) of the EC Directive 76/207 implementing equal treatment of men and women. These two provisions exempt both maternity provision and positive discrimination provisions from the principle of equal treatment. Decisions of the European Court of Justice have approved of positive discrimination measures in favour of working women adopted in some member states, Case-450/93 Kalanke v Freie Hanestadt Bremen [1995] ECR I-3051 and Case C-409/95 Hellmut Marschall v Land Nordrhein Westfalen [1997] ECR I-6363. . Furthermore the ECJ has approved favourable treatment granted to women workers in the context of maternity, where such favourable treatment is specifically exempted from the broader gender equality agenda. See Case 184/83 Hofman v Barmer Ersatzkasse [1984] ECR 3047. See further Craig and de Burca, EU Law: Text, Cases and Materials (OUP, 2003) Chapter 20.

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2 as a result of certain policies giving significant financial support (in some cases an
3 amount of almost 20,000 Euro is available to support home care for children, this rate
4 varies to this upward point from about 16,000 Euro per annum) to parents for childcare.²⁴
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8 The conclusion in this section is that attempts to tackle this big issue facing
9 Europe again place faith in centralised managed planning, whether this is given
10 expression in further regulation, adoption of further publicly funded social policies or a
11 mixture of both. The question raised is about the role of regulation in a social and
12 cultural context. Whether imposing additional burdens on business and taxpayers can be
13 justified in light of the doubts raised regarding correlation between regulation and
14 outcome to date, particularly highlighted by the contrasting US experience. Is it the case
15 that sometimes the effects of regulation can be unexpected, almost capricious and
16 sometimes merely serendipitous? It must also be pointed out that even where planning
17 does seem to have effects, there seems to be a crisis of confidence, as there is regarding
18 youthful abstention from the workplace, in the EU between the outcomes of social
19 policies pursued over the last four decades and what is now considered to be desirable
20 economically. Perhaps it is timely for those assessing the Lisbon strategy to clearly
21 articulate its vision for Europe without yielding to what seems to be an institutional case
22 of profound ambivalence.
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31 ***Political difficulties: The Future of the EU Social Model.***

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33 The political difficulties are more complex. As mentioned above the failure of the
34 European Constitution highlighted the debate which is acutely felt amongst the citizenry
35 of the European Union about what it means to be European. During the French
36 referendum on the Constitution the right and left of the political spectrum were allied in
37 their opposition to the Constitution for different reasons. The right argued that increased
38 European domination would have a deleterious effect on the 'Frenchness' of France,
39 opening her both culturally and politically to unwelcome influences. The left had similar
40 concerns regarding the domination of French political and cultural life by outside
41 influences, but this was expressed in fears that ultimately this would lead to a dismantling
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47 ²⁴ See www.caf.fr for a complete list of specific financial supports provided under the French social
48 security system ranging from allowances for each child, allowances for childcare, for annual return to
49 school and so forth. Accessed on July 20th, 2005.
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of social protection and legislative in view of the continued liberalization of the social model perceived within the Commission.²⁵ Similar concerns (some of which are conflicting) were expressed in the Netherlands where the Dutch rejected the European Constitution in a referendum on June 1st 2005. In a speech following this referendum, Prime Minister Balkenende explained what he saw as being Dutch concerns over Europe which included concerns about identity in light of rapid enlargement, concerns about the economic future of Europe compared with the US and China and concerns about the kind of European Union that we were facing: ‘One that focuses primarily on consolidation of vested interests, or one that pursues reform and displays solidarity with the less prosperous member states and the world around it?’ In addition, however, he made the clear point that the Netherlands was no longer happy to be the largest net contributor to financing the European Union.²⁶

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A second aspect to the political difficulties regarding legislative policy becomes very evident in many debates at European level regarding future direction of legislative policy. Thus the Lisbon Agenda itself has fallen victim to a struggle between the focus on improving competitiveness and innovation within the European Union and maintaining the social model. The burgeoning of the goals and actions which were forced into the Lisbon Agenda over time and which was decried by President Barroso in his mid-term review is a classic case. And it is even more interesting that President Barosso refocused the Agenda squarely on competitiveness and achieving economic growth. Even within an area as specialized but yet central to supporting business growth such as company law, the policy debate²⁷ rages on whilst the European Commission tries to take a more simplistic approach.²⁸

²⁵ Pech, Dr. L: Non-sense: France’s No to the European Constitution.

<http://jurist.law.pitt.edu/forumy/2005/05/non-sense-frances-no-to-european.php>

. “And above all, the French No is a patchwork of inconsistent claims: essentially a no to what is called “Anglo-Saxon” Europe and its “neo-liberal” policies, a no to unemployment and social dumping (the “Polish plumber”) and finally, a no to Turkey. With ideological absolutism on the left side of the political spectrum and a deeply unpopular government, these ingredients have proven fatal to the proposed European Constitutional Treaty”

²⁶ Balkenende, Dr. J. P: The Dutch Position in the EU.(21 July 2005) www.minaz.nl (Accessed 3.05.2007).

²⁷ Policy issues within the Company law sphere began with a bitter debate about corporate governance models, which raged through the 80s and saw the introduction of two failed directives seeking to incorporate the two tier board model into the European corporate model. This was resisted vigorously by the UK and Ireland. Further legislative initiatives have sought to introduce the two tier model by stealth such as the introduction of the SE Regulation, the introduction of Works Councils and Information and

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3 ***Part III: A more conservative approach to the problem of regulation***
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5 ***A more focused approach.***
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9 Chastened by experience of failed headline projects and harsh political debate as to the
10 meaning of the European social model both within the Commission and across Europe, a
11 more conservative approach has been adopted to the relationship between regulation and
12 competitiveness. Building on the Commission's position in 2005 described above, at the
13 Spring Council this year, 2007, the EU initiated a more focused project addressing the
14 burden of regulation in the context of competitiveness in the EU. In this document²⁹ a
15 very clear distinction is made between addressing policy issues regarding new legislation
16 or existing legislation and on the other hand addressing what is termed the compliance
17 burden. This project is clearly not about de-regulation. Thus the project puts to one side
18 the issues and debates characterized as 'political difficulties' in the previous section. It
19 states quite clearly that there is no 'accepted method of addressing policy burdens.' The
20 report distinguishes what it terms impact assessment methodology (policy) and
21 administrative burden methodology and clearly places confidence in the latter as a means
22 of delivering results rather than the former. The goal is to reduce unnecessary
23 compliance burdens across all member states and the document is quick to point out that
24 not all compliance or administrative burdens experienced by businesses in particular
25 member states are derived from EU legislation. Thus 'suppressing..unnecessary burdens
26 at all levels...is a shared responsibility of the Member States and the European
27 Institutions. The figures are astonishing; the document claims that by removing
28 unnecessary compliance burdens GDP could be improved by 1.4% across the EU.
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42 Consultation Directives.... Company Law Action Plan indicates the debate still rages and even a most
43 recent project on One Share One Vote represents a division between the German dominated model and the
44 UK model. European Policy Forum document. Refs.

45 ²⁸ See *supra* n. 24

46 ²⁹ COM(2007)23

47 Communication from the Commission to the Council, the European parliament, the European Economic
48 and Social Committee and the Committee of the Regions: Action Programme for Reducing Administrative
49 Burdens in the European Union
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Methodology

The report describes a ‘bottom up’ approach by focusing on what it terms Information Obligations (IOs) which are described as ‘building blocks’ as distinct from any legislation as a whole. The project will ask member states to assess the burden of IOs placed on businesses by particular legislation and to reduce those where they are unnecessary because the information requirement is too frequent, yields information which is not important, (or outdated) or yields information which is repetitively required by different agencies. It also identifies ‘business irritants’ which should be the focus of particular attention, i.e. IOs which businesses find particularly irritating for scrutiny. Most impressively however, the report actually identifies particular areas of concern³⁰ and within these areas identifies particular pieces of EU legislation which ought to be addressed by member states in the short term³¹.

The Dutch Experience

The Netherlands has placed itself among the leaders in the field of reduction of administrative burdens in Europe.³² The Government of the Netherlands set a target to reduce all administrative burdens arising from all areas of government administration by 25% by 2007. This figure was arrived at following the initiation of a full baseline measurement of administrative costs on businesses arising from regulation. The measurement concluded that the total costs of administrative burdens was 16.4 bn (3.6% of Dutch GDP) and therefore a target reduction of 25% would yield a growth of Dutch GDP in the order of 1%. The project, in its implementation, depends on two governmental bodies IPAL (Inter Ministerial Project Unit for Administrative Burdens) which is a cross departmental body and Actal (Dutch Advisory Board on Regulatory

³⁰ These are Company (Corporate) Law, Pharmaceutical regulation; Working Environment/Employment legislation; Financial Services are the top four.

³¹ Within Company Law, particular provisions of the 2nd, 3rd, 4th and 6th Directives primarily on accounting regulations and information provisions. Within Working Environment, Health and Safety information requirements; within Financial Services Directives regarding some aspects of the regulation of credit institutions.

³² The regulatory reform project is run under the auspices of the Dutch Ministry of Finance www.minfin.nl in co-operation with the Dutch Ministry of Economic Affairs www.minaz.nl. It has a dedicated website www.compliancecosts.com run under the Ministry of Finance. (all sites accessed 04.05.2007).

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2 Burdens). The main function of this body is to propose initiatives for the simplification
3 of regulation. Government departments must send Actal details of all new legislative
4 proposals for review of the administrative costs calculation prior to the legislative
5 proposal being sent to Parliament. Actal also evaluates the administrative cost reduction
6 programme which all government departments are obliged to send annually to Parliament
7 At a recent meeting in Rotterdam the Dutch experience has been assessed by the OECD
8 and by the World Bank, this assessment will be considered in the concluding section.³³

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12 **more here??**

13 *Developments in the UK*³⁴

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15 The Hampton Report published in the UK (May 2005)³⁵ considered the issue of reducing
16 administrative burdens through what is described as 'efficient regulation' by improving
17 approaches to regulatory inspection and enforcement. Strategies identified by Hampton
18 for achieving this goal included

- 19 • a risk based regulatory function, for example this would include identifying firms
20 with greater risk of non compliance which could be identified and distinguished
21 from those with less risk..
- 22 • information obligations should be simplified and reduced in frequency of returns
- 23 • data requirements including the design of forms should be coordinated across
24 regulators.
- 25 reduce the number of regulators, specifically in the UK 31 national regulators
26 should be reduced to 7 thematic bodies.³⁶
- 27 • New regulations and regulatory activities should be implemented in accordance
28 with principles set out in the report.

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32 In Scotland, the Davidson Review was published in November 2006³⁷ which made
33 specific recommendations in relation to specific legislative areas...(but this sort of

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35 ³³ Philip Hampton, Chairman of J. Sainsbury plc: Reducing Administrative Burdens: Effective Inspection
36 and Enforcement, HM Treasury, 2005.

37 ³⁴ HM Government: Simplification Plans: A Summary. December 2006.

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39 ³⁵ "Regulatory bodies at national and local level enforce regulations in the UK. As discussed above,
40 including both levels there are 61,000 people working for 674 regulatory bodies within the scope of the
41 review. They have a combined budget of around £4 billion..".
42 Hampton Para 1.10

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44 ³⁷ Lord Neil Davidson, the Advocate General for Scotland.

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piecemeal approach is the least efficient way of reducing regulatory and compliance burdens and could have been pre-empted by a more immediate EU response). The 2007 EU Commission document actually does identify some key legislative areas and some key pieces of legislation which are to be addressed by all member states and it would certainly avoid duplication of effort if this template was followed...ie that knowledge was shared across the EU regarding particularly burdensome areas of legislation, because there is a high likelihood that similar patterns of onerous information obligations are identified. After all the EU is responsible for a lot of legislation and consequently administrative burdens. In the Irish experience for example, the UK have agreed to provide us with details of the 300 areas of regulation which accounted for 70% of the work and that sort of information sharing is efficient and renders the baseline measurement exercise a lot less costly.

The Macrory Review published in November 2006³⁸ followed up on the Hampton Report recommendation to adopt a risk based approach to enforcement, in particular through the identification of firms less likely to comply and those with a good track record of compliance.³⁹ Thus businesses in the UK that comply will benefit from light touch enforcement, whereas non compliant businesses will face tough rigorous penalties. These recommendations have led to the Legislative and Regulatory Reform Act 2006 (passed by Parliament in November) designed to facilitate a risk based approach to regulatory enforcement and to provide for a quick and easy reduction of administrative burdens process. It also introduces a statutory basis for a code of conduct for regulators, implements on a statutory footing five principles of good regulation and also provides for a more simplified process for the transposition of EU directives..

The criteria adopted subsequently by the Better Regulation exercise in the UK in relation to administrative burdens include the following:⁴⁰

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³⁹ Risk based enforcement has been adopted effectively in Ireland by the Office of Director of Corporate Enforcement which has adopted a policy of identifying habitual non complying companies but also has adopted a policy of identifying firms, accounting in this case, which seem to be advisors of non compliant companies, www.cro.ie and www.odce.org.

⁴⁰ www.betterregulation.gov.uk

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- Measuring the cost of administrative (or ‘red tape’) burdens on business.
- Reducing regulators and inspectorates from 31 national bodies to 7 (this is one of the most significant recommendations).
- Legislation to speed up the process of de-regulation and make EU transposition easier.
- Tougher scrutiny of new regulatory measures.

The Standard Cost Model

The method used to measure the cost of administrative burdens is called the SCM (Standard Cost Model)⁴¹ which was developed in the Netherlands and which has been adopted in the UK and by the European Commission in 2007. It is described by its proponents as a ‘**Simple, pragmatic** framework for measuring costs’ and is described as being ‘**Indicative** not statistically representative’. It begins by identifying information obligations under particular pieces of legislation and then costs the internal and external costs of producing the information and returning it to the relevant government department. The internal cost is a function of time and the cost of external advisors, or internal employees used to generate the information, this is then multiplied by the number of businesses affected and the frequency of the information requirement. (the cost of processing the information within each department is not as yet factored into the cost). In the Netherlands and the UK the scope of their SCM work extended beyond business to include the voluntary sector, charities and so forth but the EU Commission has, in the first phase, delimited the approach to business only. This more focussed approach is desirable given the emphasis on business competitiveness and the complexity of the task in hand.

Part IV: Likely stumbling blocks

www.cabinetoffice.gov.uk/regulation

⁴¹ International SCM Network site: www.administrative-burdens.com

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5 In this concluding part of the paper it is intended to address a number of issues
6 regarding the better regulation project as it relates to this particular area of administrative
7 and regulatory burden reduction. It must be emphasised that these points are made by
8 way of a general commentary on this initiative on the part of the EU Commission,
9 influenced as it is by the Dutch experience and to a lesser extent by the UK experience.
10 In some cases the issues arise because the nature of the project is sometimes
11 misunderstood, in other cases the issues arise because of limitations which are inherent in
12 an initiative such as this. The main goal is to highlight these issues so that we can
13 critically assess the potential of the project.
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19 *The function of law*

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21 Sometimes there is a limited understanding of the function of regulation and law.
22 Not all regulations are definitively addressed to market failure, For example consumer
23 protection and environmental protection legislation as we know it would never
24 necessarily be delivered either by what economic theorists call a perfect market or an
25 imperfect market. The function of legislation can be viewed through different
26 philosophical prisms and many of the comments from proponents of the better regulation
27 movement are firmly rooted in what would be called a law and economics, neo liberal
28 philosophy which is fine (if you like that sort of thing) but not necessarily the only way
29 of looking at law. In its limited and unsophisticated form this school of thought basically
30 assumes that all regulation which imposes a cost on business without yielding benefits to
31 business is unnecessary. It is very dominant in the United States at present and tends to
32 support a non-interventionist approach to the market by government. For example under
33 the EU social model, much employment and social legislation is passed to address issues
34 not particularly addressed very coherently either through the prism of market failure or
35 market efficiency. Many US commentators would be of the view that the US labour
36 market works very well without all the protective legislation we have in Europe. Under
37 the market failure view of regulation all these EU initiatives would be regarded as an
38 unjustified intervention in the market rather than addressing market failure and this area
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2 would be considered a prime area which could be de-regulated. (There is, needless to say,
3 a vast body of academic literature on this subject)! On the other hand the more
4 sophisticated proponent of the better regulation movement accepts that better regulation
5 is not primarily about policy and less so about de-regulation. It will take the viewpoints
6 of those supporting regulation on board and moreover accepts that regulation is also
7 necessary to achieve goals other than competitiveness, innovation and productivity.
8 Interestingly in the US agencies such as the OMB⁴² and the OIRA⁴³ which have been
9 involved in this kind of exercise for many years state quite clearly that there are functions
10 of regulation that are necessary which might be considered burdensome by business in
11 some respects but that in the better regulation field the primary focus is on administrative
12 burdens not policy driven burdens.⁴⁴

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14 Nevertheless it is possible and there is an inherent danger that any exercise of this
15 kind can be high jacked by the neo-liberalist view which is against big government and
16 regulatory intervention. COM(2007) is very clear about making sure that the better
17 regulation project is not captured in this way.
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20 “This Action Programme is not about deregulation. Nor does it aim to change
21 policy objectives set out in the existing Community legislation or the level of ambition in
22 existing legislative texts. Rather it represents an important effort to streamline and make
23 less burdensome the way in which policy objectives are implemented – one important
24 measure of the quality of regulation at every level. Unnecessary and disproportionate
25 administrative burdens can have a real economic impact. They are also seen as an irritant
26 and a distraction for business and are often identified as a priority target for
27 simplification. The Commission is committed to assist in suppressing these unnecessary
28 burdens at all levels and underlines that this is a shared responsibility of the Member
29 States and the European Institutions.”⁴⁵
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38 In the UK, the various reports referred to above acknowledge the policy
39 implications agenda also. Interestingly the COM(2007) document represents a ‘no
40 compromise’ approach to social Europe. The policy issues will be addressed elsewhere
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44 ⁴² US Office of Management and Budget

45 ⁴³ US Office of Information and Regulatory Affairs.

46 ⁴⁴ For details on the US experience see Hunt, Alex: From Cutting Red Tape to Maximizing Net Benefits.
47 (Presentation made at Rotterdam, The Netherlands, March 1 2007). See further 2006 Final Report to
48 Congress on the Costs and Benefits of Federal Regulation
49 www.whitehouse.gov/omb/infoereg/2006_cb/2006_cb_final_report.pdf

50 ⁴⁵ *Supra n. p. 2.*

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2 through RIAs and such exercises. This is an advantage but indeed a serious limitation of
3 the SCM type exercise,, it really does not bite the bullet on the big questions.
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9 ***Distinctions between small and medium enterprises and larger enterprises.***

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11 The fact that the better regulation project is not about policy but more about
12 administrative and compliance burdens has clear advantages, but these advantages are
13 also its limitations. The regulation of small businesses is a big issue here. Small
14 businesses are viewed by many as the drivers of knowledge based economies and one of
15 the issues which Europe will have to face is whether all businesses should be treated
16 similarly in areas of regulation where it is legitimate to argue that small businesses should
17 be exempt from some regulation. In the context of other areas of regulation such as
18 revenue and company law, it has been accepted that small and medium enterprises should
19 and can be treated differently to larger enterprises in relation to particular kinds of
20 requirements, for example specific disclosure requirements in company law. In the UK
21 DTI Company Law Reform project, which is now represented in the new Companies Act
22 2006 (December 2006) the slogan which was adopted was ‘Think Small First’⁴⁶. This
23 has been used in other contexts also and it might be something which could drive reform
24 of burdensome compliance requirements for smaller entrepreneurial firms. In relation to
25 the task in hand exemptions are required to feed into lessening the administrative burden
26 on small businesses and a risk based approach to enforcement might do something to
27 answer this. Hampton⁴⁷ was very strong on this point:

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29 “The most worrying aspect of research on the burden of regulation is the extent to
30 which burdens are felt disproportionately in smaller businesses. This is a key concern for
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42 ⁴⁶ www.dti.gov.uk/company

43 ⁴⁷ *Supra n.* “This burden is felt most heavily in smaller businesses. A recent NatWest survey claimed that a
44 business with two employees spends over six hours per month per employee on Government regulation and
45 paperwork, while a business with over 50 employees spends only two hours per employee.
46 (SBRC/NatWest survey of small business, 2003.) Research by the OECD suggests that the same is true
47 internationally, with businesses with fewer than 20 staff bearing a burden five times greater than businesses
48 with more than 50 staff.” (*From Red Tape to Smart Tape*, OECD, 2003.)
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2 Government, as the creation and continuance of smaller businesses is an essential part of
3 productivity growth. Particularly worrying is regulation's impact on business owners'
4 desire to start and grow their businesses. Small firms are keen to grow – two-thirds want
5 to expand in the next five years – but half see regulation as 'a serious barrier to growth'.
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7 (*Lifting the barriers to growth in UK small businesses*, Federation of Small Businesses,
8 2002.; SBRC/Natwest survey of small businesses, 2003.) Four in ten companies
9 questioned by SAP in 2004 believed that red tape was 'stifling their growth', while
10 Small Business Service research suggests that around a third of adults who think about
11 starting a business view the complexity of regulation as a barrier to
12 entrepreneurship.⁴⁸ (*Better regulation, is it better for business*, Robert Baldwin/Federation
13 of Small Businesses, 2004).

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15 The issue of exempting small businesses will inevitably however, become a
16 policy issue and if the better regulation project isolates itself from policy questions it will
17 face its limitations sooner rather than later. For example, in the US, firms with less than
18 50 employees are exempt from some elements of employment law, e.g the Federal
19 Family and Maternity Leave Act, an exemption which would be unthinkable for most
20 Europeans who would be of the view that these sorts of rights should be universally
21 available to all employees, irrespective of the nature of their employment. But
22 nevertheless the concept of significant exemptions for small businesses is something
23 which has to be considered and will have to be addressed.

24 25 *Is it just another costly bureaucratic exercise?*

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27 One reservation which has been expressed about the better regulation project and
28 the SCM method is that the costs of the exercise are in themselves significant. In the UK
29 the costs of doing the baseline measurement has been estimated at £30 million. As in
30 many other areas of activity the EU initiatives in this area are characterised by a belief in
31 the effectiveness of top-down, centralised managed planning. The emphasis on
32 government directed 'dirigiste' planning in relation to encouraging innovation and
33 business competitiveness can be contrasted in a general way with actions in other trading
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49 ⁴⁸ *Ibid.* p. 25

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blocs, most notably the US. In particular the EU model emphasises the ‘federal’ aspect of the dirigiste approach whereas the liberalist tradition of limited government, which is particularly dominant in US political culture at present, gives expression to some political scepticism regarding such an approach. Scepticism about the costs of the better regulation exercise measured against possible benefits is not misplaced. In the Dutch model as in the UK model it is for example envisaged that there would be a core group of civil servants employed in each government department to progress the project, in itself a costly expense. However, some steps can be taken to reduce these costs by having member states share information from one to the other on baseline measurement exercises. Secondly, the Commission approach following the Spring Council 2007 of identifying specific pieces of legislation which all member states should consider at the same time reduces the dangers of repetitiveness and inefficiencies. The danger of the better regulation exercise, particularly as regards business competitiveness, becoming yet another costly and ineffective bureaucratic exercise is a real one and steps must be taken to control that danger. .

Are the benefits overstated?

Some of the difficulties with the regulatory burden approach highlighted here were also brought to the fore in a recent OECD and World Bank⁴⁹ assessment of the Dutch experience. In the assessment the OECD called for a ‘deepening’ and ‘widening’ of the Dutch project but in doing so there seemed to be a failure to recognise that the Dutch project is limited but deliberately so. Similarly the Commission project launched this Spring is limited along the same lines as the Dutch model, again with a view to being effective. The limitations are and will continue to be criticised because they are misunderstood but also it is legitimate to ask questions as to whether the limited approach is sufficient in the long run to improve competitiveness in Europe. In its assessment of the Dutch project the OECD and World Bank emphasised some future goals such as considering the balance between ‘different societal goals’ and the point was made that

⁴⁹ Administrative Simplification in the Netherlands-Main findings of the OECD and World Bank Group: ‘Challenges of Cutting Red Tape. Rotterdam, March 1 2007.

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‘political neutrality could not longer be guaranteed’ in the exercise. It also called for a consideration of the cost-benefit analysis of regulation. This is the essential difficulty of this exercise, it is good but perhaps not enough. The OECD and World Bank assessment did not seem to appreciate the deliberately limited objectives. More appropriately to the better regulation project as it is now defined, the OECD called for a consideration of benefits which could be reaped from further IT initiatives. It also called for a consideration of the cost to governments of regulation, as it is clearly costly to collect and manage information and data. The OECD and World Bank group also called for consideration of the enforcement costs in the area of regulation also. The Dutch response has been to highlight the positive aspects of the assessment and to emphasise suggestions which can be delivered within the regulatory burden model such as ‘increasing focus on opportunities provided by ICT’ and to continue to work on burdens ‘emanating from local authorities and Europe’⁵⁰ The response seems to be that even if the OECD and World Bank group were not quite clear as to the goals of the SCM and regulatory burden project the Dutch government certainly were!

The Acquis and Enlargement issues.

Finally, we should not underestimate the complexity of a pan-European project such as this at it applies to each individual member state. The project will of course be embraced with varying degrees of enthusiasm given the costs of the exercise, varying stakeholder responses and so forth.⁵¹ Furthermore it must be borne in mind that as of 2004 a number of acceding countries are still struggling with implementation of the acquis and with their role as governments with an input into European policy developments. Nowak-Far describes the internal difficulties regarding accession to the EU and implementation of the acquis, not to mention the burdens of participating in debate on future policy direction in Poland, one of the largest of the accession states

⁵⁰ www.compliancecosts.com

⁵¹ In the Irish experience, reservations were expressed about the costs of the baseline measurement exercise. In addition surveys of businesses yielded different responses. A recent ESRI report for example reported that businesses felt the amount of regulation was ‘about right’ which contrasts particularly with the results of similar surveys made during the Hampton Review and with responses received by other surveyors in Ireland.

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acceding on May 1st 2004 see Nowak-Far.⁵² The difficulties and challenges faced by other much smaller countries must be considerable. For these countries compliance with EU implementation requirements is an enormous burden, engaging in a process of dismantling regulatory and administrative burdens will be a costly, complicated business which might be well down the line of priorities. Arising from this the idea of minimum necessary compliance, rather than maximum burdensome compliance is something which the Commission have alluded to increasingly over the last two years and it is an important element of optionality which has been preserved.

Conclusion

Finally, the potential contribution of the reduction of regulatory burden is significant. It is an exercise which is relatively tightly circumscribed and for that reason, despite its limitations, it is more likely to succeed. The Dutch experience has demonstrated the benefits to be gained. The EU has chosen to adopt the Dutch model and this has to a great extent been embraced by the UK, although the burden reduction project is part of the better regulation bigger picture there. There is no reason on balance to believe that such a project cannot succeed across the EU, as long as we do not expect it to deliver more than it can.

⁵² Nowak-Far: Co-ordination of European policy in Poland: The importance of path dependence and increasing returns for the determination of European 'viability'. (Presented at EUSA Austin TX May 2005).