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### Is better regulation smarter regulation?

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**\*P.L. 485** The quest for “better” regulation is one being driven forward with a new urgency within the United Kingdom, the European Union and by international bodies such as the OECD. In this country, regulatory improvement strategies have been applied by governments for nearly 20 years and it is now appropriate to consider whether the better regulation movement is founded on secure approaches and assumptions; whether it is heading in the right conceptual direction, and, more particularly, whether it conduces to “smarter” regulatory regimes--regimes that offer the best mixtures of regulatory instruments and institutions.<sup>1</sup>

This article outlines the development of the better regulation movement within government, it describes the regulatory improvement tools that governments have deployed in furthering that movement, and then it considers the capacity of the “better regulation” approach to deliver smarter regulation. It will be argued that there are a number of identifiable reasons--practical and theoretical--why the better regulation movement may not readily conduce to the production of “smarter” regulatory policies and regimes.

#### The better regulation movement: politics, philosophy and institutions

The roots of the UK better regulation movement go back to 1985 and the Conservative government's policies on deregulation as set out in the White Paper, *Lifting the Burden*.<sup>2</sup> This stressed the negative effect of regulatory compliance costs on business and the need to deregulate by freeing markets and reducing administrative and legislative burdens. Deregulation policy was taken into specifics with two further White Papers in 1986 and 1988.<sup>3</sup> Compliance **\*P.L. 486** cost assessment (“CCA”) processes were introduced in order to determine the costs to businesses of proposed regulations and a series of business task forces was established to review more than 35,000 regulations and to suggest areas of governmental activity that could be deregulated.<sup>4</sup> A central task force, the Enterprise and Deregulation Unit, was set up in the Department of Employment in 1986 to oversee the “anti-red tape” efforts of individual departments. A year later the unit was renamed the Deregulation Unit when it moved to the Department of Trade and Industry (“DTI”) and in 1989 a Cabinet Committee on regulation was established. A further series of White Papers<sup>5</sup> was produced in 1994 to guide departments on improving regulatory quality and two initiatives were aimed at relieving small business burdens. British ministers and European officials were held to be accountable for minimising burdens and a “think small first” principle was introduced so that regulations would be framed “with the interests of small businesses in mind”. A “small business litmus test” for new regulations was introduced in 1994. Fast-tracked reductions of burdensome regulation were facilitated with the passing of the Deregulation and Contracting Out Act 1994, and the deregulation initiative was placed closer to the centre of government in 1995-96 when the Deregulation Unit was moved to the Cabinet Office. During that period, an Advisory Panel of business persons was established in order to assist in reducing regulatory burdens and seven new Business Taskforces were created to look at specific sectors.

It was in 1997, however, that Tony Blair's Labour government came into power and made the terminological and philosophical switch from “deregulation” to “better regulation”. Dr David Clark, Chancellor of the Duchy of Lancaster, introduced the initiative “Better Regulation” in July 1997 and emphasised that some regulatory activity was necessary for public and consumer protection. He argued: “Deregulation implies regulation is not needed. In fact good regulation can benefit us all--it is only bad regulation that is a burden.”

The Government set up the Better Regulation Task Force (“BRTF”) in 1997 to be located at the Cabinet Office. The BRTF was an independent advisory body with a majority of members from the business sector and was chaired by leading businessman Chris Haskins.<sup>6</sup> It was charged to take the better regulation initiative forward and was given the express task of considering the needs of “small

businesses and ordinary people". Within a year of its establishment the BRTF published a set of principles of better regulation<sup>7</sup> \*P.L. 487 (which were subsequently endorsed by the government), and the CCA procedure was replaced by a more developed Regulatory Impact Assessment process. By 1999, the Better Regulation Unit had been renamed the Regulatory Impact Unit at the Cabinet Office, Regulatory Reform Ministers had been appointed in each department and a Ministerial Panel for Regulatory Accountability had been established to scrutinise the implications of regulatory plans and to improve the regulatory system both generally and within departments.

Legislative support for improved regulation was provided with the passing of the Regulatory Reform Act 2001 and in the same year the Labour government's commitment to better regulation was underlined in its general election business manifesto. More recently further stimulus was given to the better regulation movement by a number of steps. In March 2004, the government announced that the Prime Minister would lead the effort to reduce the "red tape burden" by chairing the Panel for Regulatory Accountability; Sir Peter Gershon, Head of the Office of Government Commerce reported on government efficiency and emphasised the "desperate" need to rationalise regulation and reduce red tape; the BRTF launched investigations into unnecessary regulation and "regulatory creep" (the way regulation grows in unintended ways); and Gordon Brown instigated a review of regulatory inspection burdens by former Lloyds TSB Finance Director, Philip Hampton. More recently still, Tony Blair told a CBI dinner in October 2004 that regulatory reform would be a "centre-piece" of the UK presidency of the European Union in the second half of 2005 and that he would act to end the "cultural problem" in Whitehall that had left businesses struggling with red tape.<sup>8</sup>

Within the European Union it was in the mid-1990s that the search for better quality regulation became systematic. A protocol attached to the Treaty \*P.L. 488 of Amsterdam (1995) set out the principles of good regulation to be respected at the European level. Further co-ordinated action was stimulated when the 2000 Lisbon Council of Europe emphasised the need to develop better regulation as a part of making the European Union the most competitive and dynamic knowledge-based economy in the world. During that year, Ministers of Public Administration from across the Union met and established the highlevel Mandelkern group to look at ways of improving regulatory quality. The final report of the Mandelkern group was produced in November 2001 and set down seven core principles of better regulation.<sup>9</sup> It advocated the implementation, to a stipulated timetable, of an Action Plan for Better Regulation based on core recommendations which included the suggestion that the Commission should produce a set of indicators of better regulation and a new system of impact assessment.

The Mandelkern recommendations were reinforced by the Commission's White Paper on *European Governance*<sup>10</sup> which provided the foundations for the Commission's 2002 Action Plan for Better Regulation.<sup>11</sup> Key elements included: the introduction of a two-stage impact assessment process; a commitment to establish minimum standards for consultation; a programme of simplification of existing legislation; and the establishment of an internal better regulation network within the Commission, involving all the Directorates-General.

A series of associated initiatives can be seen as part of the same better regulation movement. The Simpler Legislation for the Internal Market ("SLIM") initiative was introduced fully in 1998 and was designed to reduce the burden of single market legislation. (Teams of Member State experts and representatives of users of legislation meet regularly to examine specific areas and report to the Commission on proposals for simplification.) A European Business Test Panel was also established in 1998 in order to assess business responses to proposed legislative measures. In December 2001 the Commission established the office of the SME Envoy of the Commission in order to feed the concerns of small and medium enterprises more systematically into EU regulatory and other programmes.<sup>12</sup> The Commission committed itself gradually to carry out impact assessments for all major legislative and policy initiatives<sup>13</sup> and to remove obsolete legal texts; rewrite legal texts to make them more understandable; develop more user-friendly access to consultations on community law; and to replace old policy approaches with "better adapted and proportional regulatory instruments".<sup>14</sup> Other Communications have dealt \*P.L. 489 with "Better Lawmaking"<sup>15</sup>; "The Operating Framework for the European Regulatory Agencies"<sup>16</sup>; and "Minimum Standards of Consultation".<sup>17</sup> More recently, in early 2004, the Irish, Dutch, Luxembourg and British Presidencies agreed a joint initiative to prioritise regulatory reform over the course of 2004-05.<sup>18</sup>

On the broader international stage, the OECD has been the major proponent of better regulation. Over the last 20 years its concerns have moved focus away from deregulation, regulatory reform and "regulatory management" towards "better regulation" through "regulatory policy"--governmentwide policy that aims continuously to improve the quality of the regulatory environment.<sup>19</sup> In 1995 the

OECD set out the first internationally accepted set of principles on ensuring regulatory quality which included a 10 point OECD Reference Checklist for Regulatory Decision-Making.<sup>20</sup> Since that time the OECD has sought to promote better regulation in member countries by devoting attention to regulatory policies, tools and institutions. *Regulatory policies* involve the systematic development and implementation of government-wide policies on how governments use their regulatory powers.<sup>21</sup> *Regulatory tools* are devices aimed at improving regulatory design and implementation. The essential design tools, in OECD terms, are: regulatory impact analysis (“RIA”); public consultation; consideration of regulatory alternatives; and compliance burden reduction measures (including administrative simplification and red tape reduction). Implementation tools focus on improving the accountability and fairness with which regulation is applied and include processes of appeals and reviews. *Regulatory institutions* are bodies that take forward regulatory policy. They include regulatory oversight bodies within cabinets and the executive government, and within parliaments. They also include independent regulators and other organisations contributing to better regulation.

The 1997 OECD *Report on Regulatory Reform* linked regulatory policy with the broader government policy agenda. In its wake there followed a series of “country reviews” of regulatory reform<sup>22</sup> and the OECD has continued to drive forward an emphasis on regulatory policies as a part of broader governmental improvement. At the current time almost all OECD countries have adopted policies on regulatory quality and the OECD has produced a *\*P.L. 490* series of leading-edge publications on strategies for improving regulatory policies, tools and institutions.<sup>23</sup>

### **Better regulation: the tool kit**

The practical manifestations of the better regulation movement can principally be seen in the application of a series of regulatory improvement tools<sup>24</sup>--tools that have been conceived of with some consistency by UK, EU and OECD policy-makers.

### **Regulatory impact assessments**

It is arguable that the RIA is seen as the key regulatory improvement tool by the UK government, the European Union and the OECD.<sup>25</sup> The operation of the RIA process is accordingly a central issue in answering the question whether “better” regulation produces “smarter” regulation. In the United Kingdom the RIA was emphatically endorsed by Tony Blair in August 1998 when he announced that no regulatory policy proposal that impacted on business, charities or voluntary bodies would be considered by ministers without a RIA being carried out. This involves an assessment of the impact of policy options and covers the purposes, risks, benefits and costs of the proposal and also considers: how compliance will be obtained; expected impacts on small business; the views of affected parties; and the criteria to be used for monitoring and evaluating the regulatory activity at issue. The RIA process precedes a recommendation to ministers and, in carrying out the RIA, the alternatives to regulatory options for achieving policy objectives must be considered. Since the RIA system was introduced, almost 900 RIAs have been conducted at around 160 a year.<sup>26</sup>

RIAs are carried out by regulatory agencies and Departmental Regulatory Impact Units (“DRIUs”). Guidance is offered by the Cabinet Office Regulatory Impact Unit (“RIU”).<sup>27</sup> Each RIA will be drafted at an early stage in policy-making and should be developed following consultation. The DTI’s *\*P.L. 491* Small Business Service (“SBS”) advises those conducting a RIA of the small business implications of a regulatory proposal and the SBS can have its views recorded on the face of a RIA. The final RIA will be submitted to the relevant government minister who is asked to sign it off with a statement that, in their opinion, the benefits justify the costs. The final version accompanies the submission of legislation.

RIAs are intended to inform decision-making, not to determine decisions or to substitute for political accountability. They are designed to encourage better regulation by the following means:<sup>28</sup>

- clarifying regulatory objectives and definitions of problems;
- ensuring that regulatory objectives are achieved effectively and at lowest cost by the strategy that maximises benefits over costs--be that regulatory or non-regulatory;
- identifying alternative options for achieving desired objectives;
- identifying the informational needs of policy-makers;
- unpacking assumptions about compliance effects and real world (including business) impacts;

- facilitating ministerial and parliamentary scrutiny of regulation;
- increasing regulatory accountability and transparency;
- furthering the BRTF's five principles for good regulation: transparency, proportionality, targeting, consistency and accountability.

If RIAs are carried out expertly and used astutely, the hope is that they will enhance regulatory policy-making. Effective use of RIAs does, however, involve a series of technical and other difficulties, notably concerning: the availability of good data, the assumptions to be made on values underpinning the RIA; the consistency of RIAs with statutory social objectives; the timing of the RIA; and administrative resistance to the RIA process.<sup>29</sup>

Examinations of the RIA process in action have served to emphasise the seriousness of the above and other implementation problems, as well as the difficulties that those carrying out RIAs have encountered in delivering high quality assessments. The National Audit Office ("NAO") looked at 23 "test case" RIAs in 2001<sup>30</sup> and reported on 10 further sample RIAs in 2004.<sup>31</sup> The **\*P.L. 492** NAO revealed in 2004 that only half the RIAs examined included "a reasonably clear statement of objectives" and seven out of 10 did not consider any option for regulation other than the one preferred by the department. None of the 10 RIAs considered what would happen in the absence of the regulation. All acknowledged a level of uncertainty about the data that were used for estimates, but such uncertainties were not always reflected in the cost and benefit figures used, which presented single point estimates rather than ranges. Only one out of 10 gave the results of sensitivity tests and only three out of the 10 contained quantified estimates of benefits (often no market for benefits existed, making quantification difficult). Most RIAs, accordingly, did not offer a quantified comparison of expected costs and benefits. As for considering the likely effects of regulations on the ground, only half of the sample RIAs considered enforcement and sanctioning effects. Most RIAs, moreover, described how the regulation would be monitored but "often in a very brief and vague way", and only four stated that there would be a formal review to evaluate the success of the regulation.

The NAO's findings were broadly in line with, though perhaps less critical than, the British Chambers of Commerce ("BCC") studies of 2003 and 2004 which looked respectively at 499 and 167 RIAs produced by government in the two periods studied (1998-2002 and 2002-03).<sup>32</sup> The BCC studies noted a series of problems with RIAs and concluded that ministerial statements that benefits justified costs were not in general supported by the evidence in the RIAs. Some departments, indeed, were under-resourced or badly managed for conducting RIAs. On choice of regulatory strategy, the BCC found that the option of not regulating was considered in only a minority of cases (11 per cent in 1998-2002 and 23 per cent in 2002-03) and less than half of RIAs (44 per cent) quantified all the options considered. RIAs are supposed to pay acute attention to business (and especially SME) compliance costs but the BCC reported that costs for business were only quantified in 23 per cent of RIAs and a quarter of RIAs did not consider effects on SMEs at all. A substantial minority of RIAs contained little factual data about consequential costs and benefits and "scant attention" was given to "sunset" clauses or to subsequent monitoring or evaluation. Nor was the BCC impressed by new efforts to improve RIAs--it found that the RIA process showed little recent evidence of improvement.

The European Commission has, for its part, carried out impact assessments (in qualified form) since the Business Impact Assessment system was introduced in 1986. European impact assessments have, however, possessed many shortcomings. These were analysed between 2000 and 2002 and a new Impact Assessment system was outlined by the Communication on Impact Assessment of June 5, 2002.<sup>33</sup> This formed part of the Better Regulation Action Plan<sup>34</sup> and aimed to analyse the effects of European regulatory proposals on business in **\*P.L. 493** order to conduce to competitiveness, innovation and growth. The first year for carrying the new Impact Assessment process was 2003 and so it is early to draw conclusions on its performance. A review by the European Policy Centre has, however, suggested that only 30 per cent of proposals have been assessed and there are a number of general failings, notably: to list alternatives; to comment on or quantify impacts; and to identify data gaps.<sup>35</sup>

On the international stage it is clear that the OECD's strategy on better regulation also sees the RIA as having a central position. The OECD *Recommendation on Improving the Quality of Government Regulation*<sup>36</sup> emphasised the role of the RIA in ensuring that the most efficient and effective policy options were chosen. Two years later the *Report on Regulatory Reform*<sup>37</sup> urged all governments to "integrate regulatory impact analysis into the development, review and reform of regulations". The organisation's "flagship" report on regulatory policies of 2002<sup>38</sup> re-emphasised the RIA as a key tool of

regulatory improvement. It noted a variety of implementation problems with RIAs<sup>39</sup> but stressed the burgeoning use of RIAs across OECD countries and urged: “there is nearly universal agreement among regulatory management offices that RIA, when it is done well, improves the cost-effectiveness of regulatory decisions and reduces the number of low quality and unnecessary regulations. RIA has improved the transparency of decisions, and enhances consultation and ... has also contributed to improve government coherence.”<sup>40</sup>

### ***Consultations and transparency***

Public consultation has long been seen as a tool for improving regulation by allowing those parties who are affected by regulation to input into regulatory processes their expertise, perspectives and ideas for alternative actions. Consultations help to: inform regulators and balance opposing interests; identify unintended effects and practical problems; quality check RIAs; and identify interactions between regulations as well as cumulative effects. The consultative tool is given an important place in the OECD's strategies for better regulation<sup>41</sup> as well as those of the United Kingdom and European Union.<sup>42</sup> Public consultations, moreover, contribute to regulatory transparency--the capacity of regulated entities to identify, understand and express views on relevant obligations and policies. When regulation is open this improves accountability, helps to reduce arbitrariness and conduces to the fair consideration of affected interests.

**\*P.L. 494** In the United Kingdom, the RIA process, as noted, incorporates consultative arrangements, notably in evaluating small business impacts, but, more generally, any consultative requirements for regulations tend to depend on secondary legislation and non-statutory arrangements. As the OECD review of UK regulation noted, however, the United Kingdom has a long-established tradition of well-respected consultation.<sup>43</sup> It has required consultation with business since 1985 and the UK government has produced a number of initiatives in this area. In November 2000 it produced a new code of practice on consultation that set down consultation criteria<sup>44</sup> and stipulated 12 weeks as the minimum consultation period. In the United Kingdom there is increasing use of “notice and comment” procedures with disclosures set out on one website. Consistently with the White Paper *Modernising Government*,<sup>45</sup> the Government plans to take forward web-based schemes of consultation as part of its aim to make 100 per cent of all dealings with government capable of being done by the public electronically by 2008. Access to legislation has now been made more easy via the internet. As a package, UK regulatory consultation procedures have been characterised as “impressive” and “consistent with international good practices for flexibility, transparency and accessibility”.<sup>46</sup>

### ***Reducing burdens and red tape: administrative and regulatory simplification***

In the United Kingdom, efforts to improve regulation by reducing burdens on business have spanned both programmes designed to reduce *administrative* burdens and strategies to lessen *regulatory* burdens.<sup>47</sup> With the former, the emphasis has been placed on reducing the requirements involved in interactions between individual firms or other actors and government, or on minimising form-filling and tax administration costs. With regulatory burdens, the focus has rested on general compliance costs. There is, however, considerable overlap between the two and both aspects of simplification will be considered here.

UK governments have given high priority to reducing unnecessary legislative requirements ever since the modern movement to reform regulation commenced in 1985. The Deregulation and Contracting Out Act 1994 offered a legislative means to ignite the “bonfire of red tape” that so many politicians had promised. By 1995, it was clear, however, that much was still to be done to reduce red tape. A regime was introduced whereby departments would report monthly on planned regulation, and departments were cautioned against **\*P.L. 495** “gold-plating” the transposition of EC directives.<sup>48</sup> Red tape was responded to with the creation of the BRTF (1997), the Small Business Service (2000) and the Cabinet Office's Panel for Regulatory Accountability (now chaired by the Prime Minister). The Government's commitment to better regulation and simplification was emphasised in the 1999 White Paper, *Modernising Government*.<sup>49</sup>

New underpinnings for the “war on red tape” were provided by the Regulatory Reform Act 2001 (“RRA”) which enhanced and widened the use of the deregulation orders that had originated in the Deregulation and Contracting Out Act 1994. Since that date, ministers had been empowered to repeal and amend primary legislation by means of secondary legislation. The aim had been to reduce not only burdens of regulatory compliance but also the administrative burdens of excessively complex rules or overlapping and outdated regulations. In the years 1995 to 2000, however, only 48 deregulation orders had been pursued and the RRA 2001 was designed further to ease the removal

of regulatory inconsistencies and anomalies. It allowed constraints of parliamentary time to be overcome by operating through consultation and scrutiny by parliamentary committee rather than by conventional legislative procedures.<sup>50</sup>

Following the passing of the RRA 2001, the Government committed itself to producing an Action Plan on Regulatory Reform. This emerged in February 2002<sup>51</sup> and itemised over 260 proposals for changes to reduce administrative and regulatory burdens. It noted progress made since 1997 by, for example, removing 51 sets of regulations and two Acts in the health and safety field and reforming licensing laws through use of the RRA 2001. The simplification measures proposed in the Action Plan included such terms as rationalising fire safety regulation (which was spread over 120 Acts); removing some burdensome requirements and consolidating in the area of weights and measures, and streamlining the planning system. Reviews of regulatory measures have been conducted within departments (for example, the DTI in 1999) and RIA guidance urges that simplified procedures should be considered by all regulators.

The target to make all dealings with government capable of being delivered electronically by 2008 also serves as a stimulus to lower costs. The Office of the e-Envoy was set up in September 1999 within the Cabinet Office in order to “lead the drive to get the UK on line” and the government's e-Government \*P.L. 496 strategy from April 2000 onwards contains a range of measures designed to reduce the burdens of administrative regulations.<sup>52</sup>

“One stop shops” constitute a further way to simplify regulatory compliance. These are offices or websites where businesses and citizens can process numbers of different regulatory issues. A development in the direction of “one stop shops” is represented by the SBS whose aims are *inter alia* to strengthen the input of small business views into governmental processes and to simplify and improve the quality of business support. It has a staff of around 30 dealing with regulatory issues and, as noted, has a key role in the RIA procedures. The SBS has published a series of regulatory guides and fact sheets and by 2001 had started work on a series of sector-specific guides specifically aimed at small and medium sized businesses. The government has also launched initiatives on onestop shops in respect of land use obligations and licensing for alcohol, public entertainment and other functions.<sup>53</sup> The DTI's Business Link organisation also provides one-stop guidance on, for example, regulatory and taxation requirements attending business start-ups.<sup>54</sup>

For its part, the BRTF has published a series of reports on strategies for simplifying and reducing the burdens of regulation. In its 2002 analysis of *Employment Regulation*,<sup>55</sup> for example, it recommended that the commencement dates for employment regulations should be grouped together. The BRTF, moreover, has taken a lead on reforms of special significance to small firms. Its *Payroll Review* of 2000 for instance, recommended, *inter alia* that the Inland Revenue should examine ways to simplify the calculation of tax for the smallest employers, offer all new employers an automated payroll service, and enhance small businesses' access to new technology by offering financial support and training.<sup>56</sup>

At the European level, the Commission's 2002 *Action Plan for Simplifying and Improving the Regulatory Environment*<sup>57</sup> involved the creation of a programme of simplifying existing legislation and reducing the volume of Community law. In February 2003 the Commission went further and launched a new rolling programme for the simplification of European legislation. This was designed to complement the SLIM Programme that had commenced in 1998 with the aim of simplifying and reducing the burdens of European requirements.

Across OECD member countries there has also been a general trend to seek to simplify and ease regulation<sup>58</sup> by such methods as: burden reducing \*P.L. 497 programmes; quantitative targets; burden measuring; reallocations of responsibility; streamlined processes; and use of information and communication technologies. In such endeavours four trends have been noted<sup>59</sup>:

- a shift from *ex-post* to *ex ante* burden reduction;
- a move towards “top down” government initiatives on simplification;
- an increasing pressure from market-based policies in the direction of simplification;
- IT-driven moves to cut red tape.

The OECD has, moreover, identified three strategies for dealing with the particular difficulties that small enterprises experience with red tape. A first is to provide special assistance and guidance with

compliance requirements; a second is to make requirements less stringent for small businesses; and a third is to design regulation with SMEs in mind by establishing appropriate RIA procedures or government bodies dedicated to helping small firms and representing them within government.<sup>60</sup>

Exemptions from regulation are another tool for improving regulation by helping smaller businesses to cope with complex or burdensome controls. Exemptions are encountered in the United Kingdom in a number of regulated areas. Firms with under five employees, for instance, are exempt from some health and safety rules and do not have to set up a stakeholder pension scheme. Firms with under 15 employees are exempt from the employment provisions of the Disability Discrimination Act. Other exemptions apply to such areas as union recognition, company abbreviated accounts, and publication requirements in directors' reports.<sup>61</sup> The BRTF produced a foundation report<sup>62</sup> on exemptions in 2000 that noted their value where regulatory burdens put SMEs at a significant competitive disadvantage or where small firms needed help with an administrative burden. The case against exemptions was said to be strongest where the protection of citizens or consumers was at issue.

Compensation is a further tool for improving regulation that the BRTF considered in its 2000 report on small firms. This was most appropriate, said the BRTF, when a burden was transferred from the state to the private sector without the entrepreneur feeling any benefit. An example was in statutory maternity pay, where small employers are permitted to claim reimbursement from the state at a higher rate than larger firms.

### ***Enforcement guidelines***

The quality of regulation depends not merely on the design of the control system or the nature of rules and requirements, but on how controls are applied on the ground. A regulated business, for instance, will be interested in such matters as whether enforcement officials give assistance in compliance, whether **\*P.L. 498** time-frames for obeying rules are reasonable, and whether enforcement policies take account of the difficulties that businesses may have in taking certain compliance steps. Enforcement guidelines, accordingly, constitute an important tool for regulatory improvement.

Section 5 of the Deregulation and Contracting Out Act 1994 offered protection against the unreasonable application of regulations, but it was only applied once.<sup>63</sup> The Labour government has opted to control enforcement not by statute but by resort to a voluntary code--the Enforcement Concordat. This was devised by the BRTF, signed by the government in March 1998, and has been adopted by more than 95 per cent of local authorities and central government agencies.

The Concordat signatories agree to help businesses and others to meet their regulatory obligations without unnecessary expense. The principles of good enforcement policy call, amongst other things, for:

- clear standards of performance, published and reported on;
- the provision of plain language information on rules, widely disseminated;
- openness about working methods and any changes;
- helpfully and actively working with businesses, especially small ones, to assist with compliance;
- clear explanations from enforcers;
- the opportunity to resolve differences before formal enforcement action is taken;
- information on rights of appeal;
- fair, practical, proportionate and consistent enforcement;
- well-publicised, timely and effective complaints procedures.

The SBS promotes the Enforcement Concordat and, to this end, has produced a good practice guide.<sup>64</sup> As for action on the ground, when the BRTF investigated enforcement activity in 1999,<sup>65</sup> it noted that small firms had a problem with guidance on enforcement. The difficulty was not the absence of guidance but that there was too much of it and that it assumed a certain level of knowledge, expertise and systems. Small firms wanted guidance to be more user-specific and explicit about what they were expected to do. They also wanted correspondence to be in plain English. The BRTF made a recommendation to this effect. It also provided a "Good Practice Checklist for

Regulators” which advocated, *inter alia*, a risk-based approach to inspection and the use of “secondments and training to raise awareness of business concerns about enforcement”.<sup>66</sup>

### ***Alternatives to traditional regulation***

The routine consideration of alternative ways to achieve policy objectives constitutes a tool of regulatory improvement in so far as it encourages \*P.L. 499 regulators to seek out the best strategies for achieving their given aims at least cost. The OECD has argued that a crucial challenge for regulatory policy is to encourage cultural changes within regulatory bodies so that regulatory and non-regulatory policy instruments are systematically considered when objectives are to be pursued.<sup>67</sup> Policy instruments that might be used include, for instance: information campaigns; performance-based regulation; process regulation; voluntary commitments; deregulation; contractual arrangements; co-regulation; taxes and subsidies; self-regulation; insurance schemes and tradable permits.

As indicated above, the RIA process demands that alternative policy instruments and strategies are considered alongside any given proposal. UK governments, more generally, have an established tradition of promoting alternatives to state regulation. Self-regulatory regimes, for instance, are encountered in the advertising field and approved codes are provided for under the Fair Trading Act 1973. Systematic overviews of alternatives to state regulation and to “traditional command regulation” have been undertaken by the BRTF, whose 2000 report *Alternatives to State Regulation*<sup>68</sup> recognised that state regulation was not necessarily the best way to achieve policy objectives. The BRTF developed its approach with *Imaginative Thinking for Better Regulation*,<sup>69</sup> published in September 2003. This divided regulatory strategies into:

- classic regulation;
- no intervention;
- incentive-based systems;
- information and education;
- self-regulation and co-regulation.

Many departments already consider approaches other than classic regulation and some (such as the DTI and Defra) have set up units whose role includes advising on regulatory alternatives. The BRTF report of 2003, however, challenged the Government and regulators “to be more inspired and creative in the way they achieve their regulatory objectives”. On current practice, the verdict was “More needs to be done. The culture of Whitehall needs to change to make sure that businesses and others are not unnecessarily burdened with prescriptive regulation where it is not necessary. Regulatory intervention can be necessary, but generally should be used only as a last resort.”<sup>70</sup>

As for the RIA process and its requirement that alternative methods be considered, the BRTF conclusion was:

“[T]he quality of RIAs still leaves much to be desired ... For RIAs to be a tool of better policy-making there needs to be further commitment by Departments to getting them right. This includes properly considering all \*P.L. 500 the alternatives to classic regulation and consulting on these alternatives.”<sup>71</sup>

In response to the BRTF report, the Government produced an action plan to promote the use of regulatory alternatives and undertook to flag up the consideration of alternatives within all RIA training events for departmental regulatory impact units and policy officials. Departments were instructed to include a section in their Annual Reports giving figures on their performance in considering alternatives to classic regulation.

Action on alternatives has also taken place outside the United Kingdom. The European Commission's 2002 *Action Plan on Better Regulation*<sup>72</sup> included a commitment to giving greater consideration to alternatives to legislation as a way of delivering policy. The OECD has also seen consideration of alternatives as an important tool for regulatory improvement,<sup>73</sup> but has noted that routine consideration of alternatives may not be easy to achieve. Thus, concerning practice on the ground, the OECD has commented<sup>74</sup>: “the use of [regulatory alternatives] is increasing at a substantial pace but the absolute extent of its use--in contexts in which regulation has traditionally predominated--remains low”. The organisation cautioned that consumers, pressure groups and others were often concerned that alternatives were “soft” regulatory options that favoured business and

evidenced regulatory capture. Small businesses, moreover, often feared that alternative methods of regulation placed them at a competitive disadvantage because large concerns were better placed to use them to their advantage (for example, by using self-regulatory systems to limit competition).

For the better regulation movement, a serious question is whether its toolkit has the practical effect of encouraging the use of the best possible combinations of regulatory strategy--be these traditional or alternative. This is an issue to be returned to below in pursuing the question whether "better" regulation really ensures "smarter" regulation.

### ***Sunset provisions***

A legislative sunset clause states that a given regulatory provision will expire after a stipulated time. A variant is a statement that there will be an automatic review of the regulation after a given period. Sunset and review procedures constitute regulatory improvement tools in that they force regulators and parliaments to look afresh at the need for a given control, they ensure a rolling review of regulation, and they encourage the weeding-out of regulations that are no longer justified. Such processes are, however, expensive in terms of governmental and parliamentary time, and they can create uncertainty in *\*P.L. 501* regulatory systems which can both increase investment costs and prejudice consumer confidence in the durability of protections.

The Mandelkern Report<sup>75</sup> argued, nevertheless, that sunset or review clauses can have a particular value in certain circumstances:

- where regulation is introduced at short notice in response to a crisis and without detailed analysis;
- where regulation is introduced on a precautionary motive and where further research will provide a firmer basis for decision-making;
- where a sector, event, technology or market is changing rapidly and the rationale for regulating may fall away;
- where the legislation is in the nature of a "pilot project";
- where the regulation confers rights on the state (rather than on citizens).

In the United Kingdom, the Cabinet Office has echoed such reasoning<sup>76</sup> and added that review clauses allow unintended consequences and implementation issues to be considered as part of consultative and reform processes. It has been the UK government's policy since 2000 that RIAs shall include a statement of how a proposed regulation will be monitored and reviewed; and that the appropriateness of time-limiting the whole or parts of legislation (including a commitment to review legislation) shall be considered for all new regulations.<sup>77</sup> Sunset clauses are, however, yet to be used widely in relation to primary legislation.

### ***Regulatory policies and reviews***

A widely recognised tool for improving regulation is the adoption, at the centre of government, of a programme of regulatory reviews. In the United Kingdom, reviews of regulation have been carried out regularly by the BRTF, the SBS, the Panel for Regulatory Accountability and central departments as well as by other scrutiny agencies such as the NAO (which has analysed not merely regulatory activities in specific sectors but also the use made of regulatory improvement tools such as RIAs.) At the international level, the OECD's country reviews sit alongside their issue-specific reports and offer a more distanced perspective on national progress towards better regulation.<sup>78</sup>

### ***Is better regulation smarter regulation?***

Few regulatory challenges can be responded to with success by applying a single regulatory instrument. This is why proponents of "smart" regulation *\*P.L. 502* have been able to argue convincingly that designing good regulatory systems requires a central focus on how best to combine different institutions and techniques.<sup>79</sup>

Smart regulation thus moves beyond the scrutiny of single regimes of state control and looks to mixes of control methods as applied not merely by public bodies but by other institutions and actors, including trade associations, pressure groups, corporations and even individuals. Its challenge is "to envisage what combination of instruments will be most appropriate in a given setting and to design

strategies that mix instruments and institutional actors to optimal effect".<sup>80</sup>

There appears, then, to be consistency between "better" and "smart" regulation--at least on paper. If, however, we investigate the capacity of the current better regulation movement to deliver better regulation on the ground, we see that the route to this delivery is not unproblematic. Here it is useful to measure the better regulation movement against the five core principles for smart regulatory design that are set out by Gunningham and Grabosky.<sup>81</sup> These principles can be summarised as follows:

- (1) Prefer policy mixes incorporating a broader range of instruments and institutions.
- (2) Prefer less interventionist measures.
- (3) Ascend a dynamic instrument pyramid to the extent necessary to achieve policy goals.<sup>82</sup>
- (4) Empower participants that are in the best positions to act as surrogate regulators.
- (5) Maximise opportunities for win-win outcomes.<sup>83</sup>

**\*P.L. 503** Looking at the first principle, it might be argued that the better regulation movement can be expected to perform well since it repeatedly emphasises the need to consider alternative, more imaginative, ways of regulating.<sup>84</sup> In practice, however, a number of factors may militate against its delivery of smart regulation. First, the RIA occupies a central place in "better regulation" but the evidence is that RIA processes are not highly effective in leading policymakers to consider more imaginative ways of regulating. RIA processes, moreover, may be more attuned to measuring the effects of traditional "command" systems of control than "alternative" methods and this may positively discourage the canvassing of more imaginative regulatory strategies --especially those "softer" strategies involving voluntary and incentivised activities where predicting effects (and hence calculating costs and benefits) is extremely difficult. Secondly, smart regulation is about cumulative regulatory effects and the co-ordination of regulatory systems with widely varying natures. RIA processes, however, are best suited to looking at the costs and benefits associated with a single, given, regulatory proposal rather than combinations of approach. They are most attuned to the "single strategy".<sup>85</sup> Those officials who are charged to carry out RIAs would find it very difficult to calculate the costs and benefits of a simultaneously acting combination of very different regulatory strategies and institutions. It would, for instance, be extremely hard for proponents of a combination of, say, state, corporate and trade association laws, codes and guidelines to predict how all the relevant actors will draft, design and apply their different control strategies. This would make calculations of costs and benefits a matter of heroic guesswork and the ensuing uncertainties would undermine the essential value of the RIA. Smart regulation involves too many variables, estimates and judgments to lend itself to the RIA process. To evaluate it by using RIA processes involves something approaching a category mistake.<sup>86</sup>

There are also significant bureaucratic incentive effects to consider. An official who is contemplating regulating and knows that the RIA process has to be undertaken, will experience little impetus to propose complex combinations of regulatory institutions and strategies with all the attendant predictive and calculative difficulties. Rather than aim for a "smart" form of regulation, he or she will accordingly incline towards a simpler regime that can be predicted to pass a RIA. Such bureaucratic incentives may, moreover, militate against the application of a high level of "regulatory craft" as advocated by Malcolm Sparrow.<sup>87</sup> Such craft calls for the placing of problem-solving at the centre of regulatory design.<sup>88</sup> Problems, when identified, are, on this view, to be responded to with a variety of strategies in a manner consistent with smart **\*P.L. 504** regulation.<sup>89</sup> For an official who faces a potential RIA, however, the incentive to adopt a problem-centred approach may be weak, not merely because this would require the evaluation of costs and benefits regarding a variety of institutions and strategies, but also because it may demand a resisting of "the temptation to define problems in ways that fit existing organisational structures or traditional programme areas, rather than in dimensions inherent in the problems themselves".<sup>90</sup> Adopting a problem-centred approach would thus be liable to call for an unpacking of the way that a host of existing regulatory regimes impinges on a problem and an examination, within the RIA process, of potential ways to reshape and re-deploy those regimes in combination with any new regulations. The political and bureaucratic implications would be daunting--the proponent of the RIA would often be questioning the way that numbers of established regulators go about *their* jobs in order to evaluate *his or her* proposed regulation. A far more attractive proposition will be to take any existing controls as givens and to consider whether the addition of a new regulation will pass a cost-benefit test.<sup>91</sup> The consideration of alternatives is liable, accordingly, to be straitjacketed by existing regulatory frameworks. Overall, then, if RIA processes are retained at the

centre of better regulation, they may not conduce to smarter regulation as encapsulated by its first principle.

The second principle of smart regulation holds that less interventionist measures should be preferred. Again, it might be anticipated that the “better regulation” approaches will encourage less prescriptive, less coercive methods. The record of the RIA procedures, however, does not demonstrate that they are well attuned to either the measurement, or the consideration, of alternative, less interventionist controls. Smart regulation, moreover, demands that attention is paid to *enforcement* strategy, not merely the formal design of regulatory laws.<sup>92</sup> It is, after all, how a regulatory power is used on the ground that tends to determine its essential character. Here again, however, the RIA process draws attention away from how regulations are applied in practice. First, it is the case (as was noted above) that very many RIAs do not attend to enforcement issues at all. Secondly, there are structural reasons why RIAs cannot be expected to come to grips with enforcement strategy in a routinely well-informed manner--RIAs tend to focus *ex ante* on the general design of regulation and it may be impossible to predict how any regulator or set of regulatory bodies will go about deploying the powers that they are to be given in a proposed regulation.

The third principle of smart regulation urges that “responsive” strategies of regulation should be adopted and should be employed across mixes of *\*P.L. 505* regulatory strategies--as applied by numbers of different institutions and instruments. Smart regulation thus holds out the possibility of escalating degrees of coercion through the interaction of different but complementary instruments and parties.<sup>93</sup> It is difficult, however, to argue that “better regulation” approaches sit easily alongside this principle. The RIA process, as noted, has difficulties in dealing with either questions of enforcement or with “combined” strategies of regulation. These difficulties are likely to be compounded by attempts to evaluate incremental, and co-ordinated escalations up the three sides of a strategic pyramid that reflect the combined use of quasiregulatory and corporate self-regulatory as well as state controls.<sup>94</sup>

The fourth principle of smart regulation advocates the empowerment of those participants who are in the best positions to act as surrogate regulators. This, accordingly, favours using the influence of quasi-regulators, such as industry associations and pressure groups, where appropriate. Here again the better regulation toolkit might be expected to prompt consideration of alternative regulatory methods but it may fail, for reasons discussed above, to come to grips with “combined” regulation where quasi-regulatory functions have to be evaluated alongside other regimes. This suggests that it is one thing to develop a set of regulatory improvement tools, but another to use those tools harmoniously. In practice the application of the toolkit may be hindered by tensions between different tools--as between the RIA tool and the consideration of alternatives. The better regulation toolkit, moreover, may fail to empower quasi-regulators optimally for cultural and political reasons--regulators and politicians may produce “single solution” proposals because, for instance, they see a problem in traditional ways due to their prior commitment to a certain course of control or because important interests distrust nontraditional regulatory methods. It may also be the case that the existence of a toolkit for evaluating regulatory strategies will not necessarily drive the use of surrogate regulators and produce “smarter” proposals because the messages to be gleaned from, say, RIA processes may be poorly heeded within the political and administrative systems that drive policies.

To expand on this last point. Even if it is assumed that the RIA process does identify a “smart” way of regulating, it may be rash to assume that ministers and legislatures will respond fully to such direction. A rapid look at the passage of two recent items of legislation--the Employment Act 2002 and the Local Government Act 2003--is enough to expose a number of reasons why RIA-based messages may become lost or distorted.<sup>95</sup> Governments, in the first instance, may be committed to certain regulatory steps and strategies for ideological reasons, or because of manifesto commitments or because a political settlement has been made with various interests. They will, accordingly, not be minded to pay too much attention to RIAs that send contradictory signals. *\*P.L. 506* Ministers, for example, tend to be predisposed towards legislative solutions and, if they have promised to legislate in order to address a problem, they will not respond enthusiastically to RIAs that propose non-legislative solutions. The costs and benefits of regulation, moreover, tend to be difficult to quantify<sup>96</sup> and the perceived “softness” of RIAs may reduce their impact on the policy or legislative process. This is liable to be the case especially where costs and benefits can only be calculated on the basis of guesses about the uses that various regulatory actors will make of their powers or about the strategies that will be deployed to apply regulatory rules. It is also frequently the case that the full nature of the regulatory proposal is unclear from any given item of legislation (such as a framework Act) because the real substance will follow in secondary legislation. The effect will be that regulation escapes a good deal of parliamentary and RIA scrutiny. It might be responded that the secondary legislation will, in all likelihood, be RIA-tested in its own right at a later date, but this may be no

complete answer to the point. The framework regulatory strategy within which that secondary legislation is to operate will in most instances be established by the primary legislation that has “escaped” RIA influence. Many key regulatory issues will already have been decided by the time the “secondary” RIA is carried out. Another concern is that even when the secondary legislation is RIA-tested, it may be extremely difficult to assess the substance of a regulatory proposal because its nature will still depend on the use that will be made of the delegated powers involved. Additionally, of course, secondary legislation will not be debated in Parliament in the way that primary legislation is<sup>97</sup> and any RIA-based messages are, accordingly, the less likely to influence decisions in the legislature. Finally, amendments of laws and rules may be introduced at a late stage in the legislative process and may, for that reason alone, accordingly escape RIA attention.

Yet another reason why “better” regulation may be slow to make best use of surrogate regulators and to come to grips with “combined” sets of controls is because empowering quasi-regulators or corporate self-regulatory mechanisms within combined regimes of control may require an incremental approach to regulatory design in which key actors negotiate and adjust the roles of different controlling institutions and influences over behaviour. This kind of regulation --as is envisaged by smart regulatory theory--involves a reflexive, dynamic approach in which regulatory strategies are constantly revised and “tuned” to changes in circumstances, preferences and so on. Such ongoing processes are not amenable to evaluations in a “one-shot” policy-making process. Issues will have to be revisited as different control systems adjust to each other. Those control systems, moreover, will have to deal collectively with changes. This can be portrayed as a process of continuous regulatory co-ordination and change rather than the operation of a single fixed design. The better regulation toolkit does envisage the use of a variety of regulatory controls but it is difficult to see how ongoing regulatory co-ordination, with all *\*P.L. 507* its flexibilities, can be tested in advance by a RIA process as if it is a static single-shot system.

The final principle of smart regulation suggests that opportunities for win-win outcomes should be maximised--so that, for instance, corporations can behave more responsibly and maximise profits at the same time.<sup>98</sup> Win-win outcomes, however, may not always be possible and, in certain circumstances, there are tensions between corporate profit-seeking and some regulatory objectives.<sup>99</sup> In practice, therefore, regulators will need to identify areas and issues that will lend themselves to win-win outcomes if certain stimuli are applied. The *targeting* of regulatory approaches will, accordingly, be central to success. Regulators of a variety of kinds will have to deploy a wide range of strategies and aim these at different kinds and sizes of enterprise, as well as activities, in order to maximise win-win outcomes. This, again, is exactly the sort of flexible and adaptive regulatory strategy that is extremely difficult to set out and evaluate in advance, according to the RIA-centred better regulation toolkit as now encountered.

To summarise, the better regulation movement has in many ways raised valuable questions in emphasising the need to think imaginatively about regulatory strategies and to go beyond traditional command and control devices. That movement has produced an extensive toolkit and a new emphasis on thinking about control systems. It cannot, however, be assumed that “better” regulation will produce “smart” regulation--even if it is applied with full commitment. There are tensions that are difficult to overcome. The above analysis suggests that conceptual, cultural, administrative and political factors may constrain “better” regulation in ways that do not serve the search for “smart” regulation and that the better regulation approach, as presently encountered, sits uneasily with the development of mixed regulatory systems that are ongoing, co-operative and dynamic.

### **Better “better regulation”**

How might the better regulation approach be re-orientated in order to produce smarter regulatory systems? The way forward may lie in meeting two sorts of challenges, both of which involve a rethinking of the way that the RIA is used.

#### ***Getting smarter earlier***

A first challenge involves a new emphasis on *targeting* the RIA so that it encompasses an appropriate combination of strategies and regulatory actors. Within current approaches there is, as noted, a tendency to add a new regulation to existing regimes, to take the latter as “given” strategies and to *\*P.L. 508* RIA-test the new element of control. When this happens, the existing framework is broadly assumed and this closes-off new thinking on alternative strategies and combination of strategy. When the RIA is carried out within such a scenario it is too late to consider new strategy mixes, and instructions in the RIA guidance that alternatives should be reviewed will count for little. A more astute

approach to design would involve “getting smarter earlier” in the process and placing a new emphasis on how the RIA is targeted.<sup>100</sup> This will often involve not merely identifying the objectives of a regulatory policy, but mapping out the areas of existing regulation that impact on the achievement of those objectives. It is likely to involve re-addressing the use of different bodies of law (domestic and European) and may demand that a view be taken on the different combinations of regulatory actors and strategies and rules (new and old) that are worth assessing through the RIA process. The key point here is that the RIA process should not be seen as a substitute for good preliminary policy-making.<sup>101</sup> Large-scale strategic questions have to be addressed in targeting or *setting-up* the RIA--it will be too late to open these up once the remit for the RIA is established. Such an emphasis on targeting the RIA would offer a way to open out alternative regulatory mixes that is not possible when the RIA is simply applied to the new “add-on” item of regulation.

### ***Moving from design to review***

A second challenge is to move away from a “single-shot design” approach to achieving better regulation and towards processes in which ongoing reviews and adjustments drive regulatory improvements--and do so to newly rigorous timetables. This will involve a change of mindset from the traditional approach in which policy-makers do their best to “get regulation right” and then move on with little inclination to glance backwards. Moving “from design to review” recognises that many aspects of regulation shift continuously. Regulatory participants (regulators and regulated) vary over time both in number and character and, in addition, markets, regulatory challenges, social and political contexts and preferences all change. As a result, it cannot be assumed that regulatory objectives remain static.<sup>102</sup>

Accepting a dynamic view of regulation emphasises the limitations of a RIA-driven process of design that involves a snap-shot view of regulation. It suggests the need for a new stress on revisiting mixes of regulatory strategy in an ongoing manner. This, in turn, implies the need for a new degree of **\*P.L. 509** priority within the regulatory improvement toolbox so that the RIA process to some extent gives way to other tools, notably to more programmatic systems of scrutiny and to reviews that are broadly strategic rather than further applications of the RIA process. There are, moreover, the foundations for such a revised approach in the United Kingdom in so far as the Government has expressed a commitment to regulatory reviews.<sup>103</sup> The ongoing challenge is to embed that review and adjustment process within governmental administration. This demands that the RIA process is not seen as a finishing point in regulatory design--that it is not treated as answering policy questions for all time (“We can't re-open that issue, it was decided in the RIA five years ago”). Embedding a review philosophy also demands that regulatory policy-makers come to grips with the difficulties of post-implementation evaluation and adjustment. These problems should not be understated. A first difficulty is that reviews and changes may create regulatory uncertainties and trigger adaptation costs. Some regulatory systems may be adjustable at low cost, but others may be difficult to change because high uncertainty and high adjustment costs are involved. Any scheme for scrutinising reviews must involve the setting of review frequency and timing in a manner that takes on board such potential problems.<sup>104</sup> A second concern is that evaluating regulatory performance is extremely difficult technically, not least because formulations of objectives will be contentious, and appropriate benchmarks particularly difficult to identify.<sup>105</sup> Regulatory statutes tend to allocate large discretions and mandates that are unclear--this means that little legislative guidance on yardsticks can be assumed. The dynamics of regulation that have been discussed above mean, moreover, that regulatory objectives may not be static and this will often aggravate the usual difficulties of performance measurement.

All the familiar problems of evaluating the performance of providers of public services<sup>106</sup> can be expected to be the more challenging in the regulatory **\*P.L. 510** context.<sup>107</sup> This is not least because regulatory processes and outcomes are frequently characterisable as joint activities involving regulators, service providers and other actors. It is, accordingly, often difficult to trace causal chains and to say who is responsible for which aspects of performance.

Smarter regulation, as emphasised, involves the more astute use of regulatory mixes, and we have seen that this poses problems for pre-implementation design devices, such as RIAs. Smart regulation, however, may bring with it a series of analogous difficulties for post-implementation review processes. These should not go unexplored as they are not insignificant. In multi-actor, multistrategy regimes, attributions of responsibility will be far more difficult to make than in simpler regimes. Other evaluative problems will be exacerbated. The application of performance measures always produces a danger of counterproductive effects,<sup>108</sup> but in mixed regulatory regimes such effects may be

particularly difficult to assess because they will be experienced by a variety of actors in quite different ways. The multiplicity of actors encountered in regulation brings another difficulty in so far as data collection and information systems may vary materially--which, in turn, will render performance measurement more difficult.

A further problem to be anticipated in the regulatory sphere is that of evaluating counterfactuals. It is difficult enough to measure the performance of a given regime, but all the more challenging to evaluate the potential performance of an alternative "mixed" way of achieving a set of objectives. That being so, the task of arguing for alternative mixes of strategy may prove daunting.

Even, moreover if such evaluative difficulties can be overcome, the problems of adjusting complex "smarter" regimes will be acute. Some involved parties may resist adjustment because they fear excessive regulatory uncertainties and adaptation costs. Changes may, moreover, demand high levels of commitment to co-ordination on the part of numbers of regulatory participants who may need to be convinced of the case for change and asked to co-operate in amending their ways. It might be responded that much hope on these fronts lies through developing regulatory processes that are more open, accessible and transparent but, again, smarter regulation is unlikely to be easier regulation --openness, accessibility and transparency are difficult to achieve in complex, multi-actor regimes because understandings, cultures, aspirations and frameworks of communications are liable to be widely divergent. Here the now familiar warnings of systems theorists should be borne in mind. Where different controls are located in different sub-systems, such as state law, quasiregulation and corporate self-regulation, it is to be expected that co-ordinated \*P.L. 511 action will be rendered difficult because these sub-systems are self-referential and will find it difficult to communicate without distortion and the need for mediation.<sup>109</sup> Those who are operating internal corporate controls, for instance, may find it difficult to respond to or understand regulators because they see their objectives as quite different from those of public regulators. They may think that they are engaged in a completely different game that employs a different language and different assumptions.<sup>110</sup> The quest for smart regulation cannot escape such difficulties.

## Conclusions

There are no easy routes to regulatory improvement but, in attacking the problems discussed above, a starting point is to be found in developing an awareness of the limitations of the regulatory improvement tools currently available. The import of this article is that the better regulation movement's leading tool, the RIA, has a more limited capacity to deliver smarter regulation than is often appreciated. Moving forward demands a rethinking of the use and targeting of the RIA as well as its primacy.

Advancing towards smarter regulation may require, moreover, a new emphasis on post-implementation evaluation and adjustment. In multi-actor, multi-strategy networks of regulation, however, the tools of such evaluation and adjustment will have to be used with an awareness of their limitations--an awareness that is not less than should be applied to pre-implementation tools such as the RIA.

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1. See N. Gunningham and P. Grabosky, *Smart Regulation* (Clarendon Press, Oxford, 1998) and the section "Is better regulation smarter regulation?" below. The prescription made here corresponds with the recommendations that Gunningham and Sinclair make on setting up the RIA by identifying goals, characteristics of the problem being addressed and identifying the range of potential regulatory participants and policy instruments (*Smart Regulation*, n.1 above, pp.381-385). The current author places more emphasis than Gunningham, Grabosky and Sinclair on potential tensions between the RIA process and the consideration of strategic mixes.
  2. DTI, *Lifting the Burden*, Cmnd 9571 (1985). It has to be acknowledged that greater attention to the scope and targeting of RIAs will increase regulatory costs, but these are likely to be offset by the gains of more desirable mixes of regulatory strategy.
  3. DTI, *Building Businesses Not Barriers*, Cmnd 9794 (1986); *Releasing Enterprise*, Cm.512 (1988). Gunningham and Sinclair talk of the need to establish clarity on overriding policy goals in setting up the RIA process (*Smart Regulation*, n.1 above, p.381), but the need for such clarity should not blind us to potential changes in policy goals--which any good regulatory regime should be capable of responding to.
  4. See F. Chittenden, S. Kauser and P. Poutziou, *Regulatory Burdens of Small Business* (Manchester Business School, 2001). These task forces launched 605 deregulatory initiatives--see OECD, *From Red Tape to Smart Tape* (OECD, Paris, 2003). UK Chapter by C. Scott

and M. Lodge, p.198. Government policy since June 2001 has required departments to review the impact of major pieces of regulation within three years of implementation (*United Kingdom: Challenges at the Cutting Edge*, n.22 above, p.34). The BRTF recommended post-implementation reviews in April 2000 (*Helping Small Firms Cope with Regulation*) but the revised RIA Guidance of 2003 limits systematic reviews to major pieces of legislation and only issues a general prescription: "say how the policy will be monitored and evaluated/reviewed". Research for the BCC, as noted, found that this aspect of the guidance was given "scant" attention in RIAs (BCC 2004, n.26 above); See now BRTF, n.8 above, p.7. On the OECD view that *ex post* evaluation of regulatory policies, tools and institutions is of value see OECD 2002 pp.115-116. On the case for revisiting regulatory systems see G. Mather and F. Vibert, *Reducing the Regulatory Burden* (European Policy Forum European Forum, London, 2004).

5. DTI, *Deregulation: Cutting Red Tape* (DTI, London, 1994); *Thinking About Regulation; A Guide to Good Regulation* (DTI, London, 1994); *Getting a Good Deal in Europe* (DTI, London, 1994). I am grateful to Ed Humpherson for this point.
6. The current chair is David Arculus. For a review of benchmarks on regulatory quality see University of Bradford, Centre for European Studies, *Indicators of Regulatory Quality* (CEC, DG Enterprise, January 24, 2005), project website: [www.bradford.ac.uk/irq](http://www.bradford.ac.uk/irq).
7. See now BRTF, *Principles of Good Regulation* (Cabinet Office, London, 2003). The principles are: Proportionality, Accountability, Consistency, Transparency, and Targeting. For other definitions of good or better regulation see e.g. Department of the Taoiseach, *Regulating Better* (Department of Taoiseach, Dublin, 2004) [www.betterregulation.ie](http://www.betterregulation.ie)—looking to necessity, effectiveness, proportionality, transparency, accountability, and consistency. See also the Australian Government, Department of Industry, Tourism and Resources: *Regulatory Performance Indicators* (DITR, Canberra, 1999), which measures whether regulation: confers net benefits; achieves objectives without unduly restricting business; is transparent and fair; is accessible to business; creates a predictable regulatory environment; and ensures responsive consultation. The Australian Office of Regulation Review refers to the seven features: minimum necessary to achieve objectives; not unduly prescriptive; accessible; transparent and accountable; integrated and consistent with other laws; communicated effectively; mindful of compliance burdens; and enforceable. See S. Argy and M. Johnson, "Mechanisms for Improving the Quality of Regulations: Australian Productivity Commission" (Staff Working Paper, July 2003). For Canada see Treasury Board of Canada Secretariat, *Federal Regulatory Process Management Standards* (Treasury Board of Canada Secretariat, Ottawa, 1996). The World Bank view is set down in World Bank, *Doing Business in 2004: Understanding Regulation* (World Bank, Washington DC and Oxford University Press, 2004). See also OECD, *Recommendation on Improving the Quality of Government Regulation* (OECD, Paris, 1995). The OECD has added that good regulatory systems should be set within effective governmental mechanisms for managing, co-ordinating, reforming and updating regulation and ensuring that regulators and regulatory processes are transparent, non-discriminatory and efficiently applied. OECD, *Policy Recommendations on Regulatory Reform* (OECD, Paris, 1995). For other definitions of good or better regulation see Mandelkern Group on Better Regulation, *Final Report* (CEC, Brussels, November 13, 2002) ("Mandelkern Report"). For discussions of performance measurement in UK government see e.g. Office of Government Commerce, *How to Manage Performance* (The Stationery Office, 2002), [www.ogc.gov.uk](http://www.ogc.gov.uk); Audit Commission, *Aiming to Improve: The Principles of Performance Measurement* (June 2000), [www.audit-commission.gov.uk/reports/AC-REPORT](http://www.audit-commission.gov.uk/reports/AC-REPORT); Audit Commission, *On Target: The Practice of Performance Indicators* (2000), [www.audit-commission.gov.uk](http://www.audit-commission.gov.uk); HM Treasury, *Executive Agencies: A Guide to Setting Targets and Measuring Performance* (HMSO, 1992); NAO, *Good Practice in Performance Reporting in Executive Agencies and Non-Departmental Public Bodies* (2000), [www.nao.gov.uk](http://www.nao.gov.uk); Comptroller and Auditor General, *Measuring the Performance of Government Departments* (2000-01 HC 301, March 22, 2001), [www.nao.gov.uk](http://www.nao.gov.uk).
8. Financial Times, "Blair Vows to End 'Culture' of Red Tape", *Financial Times*, October 19, 2004. See now: P. Hampton, *Reducing Administrative Burdens* (HM Treasury, London, 2005) and BRTF, *Regulation—Less is More* (Cabinet Office, London, 2005). The Better Regulation Executive (BRE) was set up in May 2005 and the Government plans to transform the BRTF into a Better Regulation Commission. See the discussion in Australian Government, Department of Industry, Tourism and Resources, *Regulatory Performance Indicators: A Guide for Departments and Agencies* (2000).
9. Mandelkern Report, n.7 above. The seven principles of better regulation were: necessity, proportionality, subsidiarity, transparency, accountability, accessibility, and simplicity. On perverse effects see e.g. NAO, n.7 above, para.11. HM Treasury, n.7 above; J. Sandbach, "Performance Indicators Could Damage Universities' Health" (1987) *Public Finance and Accountancy* 19; G. Bouckaert, "Improving Performance Measurement", in A. Halachmi and G. Bouckaert, eds, *The Enduring Challenges of Public Management* (Jossey-Bass, San Francisco, 1995); C. Pollitt, "Performance Indicators: Root and Branch", in M. Cave, M. Kogan and R. Smith, eds, *Output and Performance Measurement in Government* (Jessica Kingsley, London, 1990).
10. COM (2001) 428 Final. See e.g. N. Luhmann, "The Self-Reproduction of Law and Its Limits", in G. Teubner, ed., *Dilemmas of Law in the Welfare State* (Walter de Gruyter, Berlin, 1985); *Social Systems* (Stanford University Press, California, 1995); G. Teubner, *Law as an Autopoietic System* (Blackwell, Oxford, 1993); T. Prosser, "Theorising Utility Regulation" (1999) 62 M.L.R. 196; J. Black, "Constitutionalising Self-Regulation" (1996) 59 M.L.R. 24; "Proceduralising Regulation Part II" (2001) O.J.L.S. 33.
11. European Commission, *Action Plan on Simplifying and Improving the Regulatory Environment* CDM (2002) 278 final. See Baldwin, n.99 above, at 379. On analysing regulatory discourse see J. Black, "Regulatory Conversations" (2002) 29 J. Law & Soc. 163.
12. For arguments that the SME Envoy should play a stronger advocacy role for SMEs within the Commission see L. Allio *et al.*, *Achieving a New Regulatory Culture in the European Union: An Action Plan* (European Policy Centre, Working Paper 10, April 2004), p.20.
13. *Communication on Impact Assessment*, COM (2002) 276.
14. COM (2003) 371 final. See also Commission Staff Working Paper, *Impact Assessment: Next Steps*, SEC (2004) 1377, Brussels, October 21, 2004.
15. COM (2002) 275, June 5, 2002.
16. COM (2002) 718 final, December 11, 2002.
17. COM (2002) 277 final.
18. See Irish Presidency, *Joint Initiative on Regulatory Reform*, Letter, January 26, 2004. Postscript: see now the Communication *Better Regulation for Growth and Jobs in the European Union* COM(2005) 97 final.
19. See OECD, *Regulating Policies in OECD Countries* (OECD, Paris, 2002).
20. OECD, *Improving the Quality of Government Regulation* OECD/GD (95) 95 (OECD, Paris, 1995).
21. See *Regulatory Policies in OECD Countries*, n.19 above, p.29 and OECD, *Regulatory Reform* (OECD, Paris, 1997). By late 2000, 24 out of 30 OECD countries had adopted government-wide regulatory policies; the UK did so in 1985 (OECD, 2002, p.40).
22. The UK Review was carried out in 2001-02: see OECD, *United Kingdom: Challenges at the Cutting Edge* (Paris, OECD, 2002).
23. Reports have, for instance, dealt with the following: *Choices of Policy Instruments* (1997); *Regulatory Reform* (1995, 1997); *Regulatory Impact Analyses: Best Practices in OECD Countries* (1997); *Voluntary Approaches for Environmental Protection* (1998, 1999); *Information, Consultation and Public Participation* (2000); *Regulatory Compliance* (2000); *Business Views on Red Tape* (2001); *Administrative Simplification in OECD Countries* (2003); *Regulatory Reform in the UK* (2002).

24. The roles of regulatory policies and institutions are not to be forgotten, but they are not the focus of this paper--which does see tools as of far greater significance.
25. For OECD endorsement of the RIA see e.g. OECD, *Report on Regulatory Reform* (OECD, Paris, 1997); *Regulatory Policies in OECD Countries*, (OECD, Paris, 2002). See also the European Commission, *Communication on Impact Assessment* (June 5, 2002) and COM (2005) 97 final. On practice in the EU see "A Comparative Analysis of Regulatory Impact Assessment in Ten EU Countries", a report prepared for the EU Directors Better Regulation Group (Dublin, May 2004).
26. See T. Ambler, F. Chittenden and M. Obodovski, *Are Regulators Raising Their Game: UK Regulatory Impact Assessments in 2002/3* (British Chambers of Commerce, London, 2004) ("BCC 2004"). See also T. Ambler, F. Chittenden and M. Shamutkova, *Do Regulators Play by the Rules?* (British Chambers of Commerce, London, 2003) ("BCC 2003").
27. From January 1999 to December 2000, 283 RIAs were conducted by government departments --see NAO, *Better Regulation* (2001-02 HC 324, November 15, 2001), p.43. Postscript: in May 2005 the BRE took over the RIU's work.
28. See Cabinet Office, *Better Policymaking: A Guide to Regulatory Impact Assessment* (Cabinet Office, London, 2003).
29. See e.g. *Regulatory Policies in OECD Countries*, n.19 above, pp.48-51; R. Baldwin and M. Cave, *Understanding Regulation* (Oxford University Press, 1999), Ch.7; NAO *Better Regulation: Making Good Use of Regulatory Impact Assessments* (2001-02 HC 329, November 15, 2001) ("NAO 2001"); NAO, *Evaluation of Regulatory Impact Assessments Compendium Report 2003-4* (2003-04 HC 358, March 4, 2004) ("NAO 2004"). On carrying out RIAs, see Cabinet Office, *Better Policy Making: A Guide to Regulatory Impact Assessment* (Cabinet Office, London, 2003) [www.cabinet-office.gov.uk/regulation/](http://www.cabinet-office.gov.uk/regulation/); J. Froud, R. Boden, A. Ogus and P. Stubbs, "Toeing the Line: Compliance Cost Assessment in Britain" (1994) 24 *Policy and Politics*; J. Froud, J. and A. Ogus, "'Rational' Social Regulation and Compliance Cost Assessment" (1996) 74 *Public Administration* 221. On the economic appraisal, and cost-benefit testing of regulation see generally C. Sunstein, *Risk and Reason* (Cambridge University Press, 2002); A. Ogus, "Risk Management and Rational Social Regulation", in R. Baldwin, ed., *Law and Uncertainty* (Kluwer, London, 1996); R. Pildes and C. Sunstein, "Reinventing the Regulatory State" (1995) 62 *University of Chicago Law Review* 1; T.O. McGarity, *Reinventing Rationality* (Cambridge University Press, 1991).
30. NAO 2001, n.29 above.
31. NAO 2004, n.29 above.
32. See BCC 2003 and BCC 2004, both n.26 above.
33. COM (2002) 276 final, Brussels, June 5, 2002--"the process of impact assessment will be implemented in the Commission, gradually from 2003 for all major initiatives".
34. COM (2002) 278.
35. See L. Allio, n.12 above.
36. OECD, Paris, 1995.
37. OECD, Paris, 1997.
38. *Regulatory Policies in OECD Countries*, n.19 above.
39. *ibid.*, pp.48-50 (problems included: patchy coverage; disagreements on analytical methods; poor data collection strategies; resistance to RIA as a concept; poor sanctions for failing to carry out proper RIAs; lack of capacity to conduct high grade RIAs; conflicts with laws; poor quality controls; late preparation of RIAs within policy processes; poor integration into policy-making; low political acceptable of RIAs).
40. *ibid.*, p.48.
41. *Regulatory Policies in OECD Countries*, n.19 above, pp.69-71.
42. See Mandelkern Report, n.7 above, pp.26-32.
43. *Regulatory Policies in OECD Countries*, n.19 above, p.57. Command papers play an important role in publicising major reforms--408 such papers were produced in 2000.
44. The guideline criteria state that timing should be made available from the start of planning; it should be clear who is being consulted; the consultation document should be as simple and precise as possible; documents should be widely available; 12 weeks should be the minimum period for consultations; responses should be dealt with open-mindedly; and consultations should be monitored and evaluated.
45. Cabinet Office, *Modernising Government*, Cm.4310 (1999).
46. *United Kingdom: Challenges at the Cutting Edge*, n.22 above, p.58.
47. See C. Scott and M. Lodge, "Administrative Simplification in the United Kingdom", in OECD, *From Red Tape to Smart Tape* (OECD, Paris, 2003).
48. See now Cabinet Office, *Transposition Guide: How to Implement European Directives Effectively* (Cabinet Office, London, 2003), p.17.
49. Cabinet Office, *Regulatory Reform: The Government's Action Plan* (Cabinet Office, London, 2002). Business pressure to reduce "red tape" continues unabated--see British Chambers of Commerce's *Annual Burden Barometer*. In February 2005 the BCC claimed that the costs to business of regulation introduced since 1997 had risen to £38.9 billion.
50. For a review report see House of Commons, First Special Report, *The Operation of the Regulatory Reform Act 2001: A Progress Report* (2002-03 HC 908). A quantitative target was to deliver 60 drafts of regulatory reform orders by 2006.
51. Cabinet Office, *Regulatory Reform: The Government's Action Plan* (Cabinet Office, London, 2002).
52. A public web page, [www.businesslink.org](http://www.businesslink.org), has the objective of helping smaller companies regarding the interpretation of and compliance with different regulations.
53. See Scott and Lodge, n.4 above.
54. See *Business Link, The No Nonsense Guide to Government Rules and Regulations for Setting up your own Business* (DTI, London, 2003). See now BRTF, *Regulation--Less is More*, n.8 above and Hampton, n.8 above.
55. BRTF, *Employment Regulation: Striking a Balance* (BRTF, 2002).
56. The government subsequently welcomed the report, stating that its taxation plans would encourage small business use of IT, including internet-based payroll services.
57. COM (2002) 278 final.

58. See OECD, *From Red Tape to Smart Tape* (OECD, Paris, 2003). For a review of practices in 20 countries see RAMBOLL Management and ITPS (Sweden), *Efforts to Reduce Administrative Burdens and Improve Business Regulation* (Ministry of Business and Economic Affairs, Denmark, August 2003).
59. OECD (2003).
60. OECD (2003), p.40.
61. For a table of examples see BRTF, *Helping Small Firms Cope With Regulation* (Cabinet Office, London, 2000), App.G.
62. BRTF, *Helping Small Firms Cope with Regulation: Exemptions and Other Approaches* (Cabinet Office, London, 2000).
63. Scott and Lodge, n.4 above, p.212. Section 5 was repeated by the Regulatory Reform Act 2001 which gave ministers a reserve power to set out a code of good practice in enforcement.
64. SBS, *Enforcement Concordat: Good Practice Guide for England and Wales* (DTI, London, 1998).
65. BRTF, *Review: Enforcement* (Cabinet Office, London, 1999).
66. *ibid.*, p.5. On risk-based enforcement see new Hampton, n.8 above.
67. *Regulatory Policies in OECD Countries*, n.19 above, p.52.
68. BRTF, *Alternatives to State Regulation* (Cabinet Office, London, July 2000).
69. See also the BRTF leaflet, *Alternatives to Regulation* (Cabinet Office, London, 2004).
70. BRTF, *Imaginative Thinking for Better Regulation* (Cabinet Office, London, 2003).
71. *ibid.* The BCC's research has found that less than a quarter of RIAs consider non-regulatory options and that BRTF guidelines on alternatives were "largely ignored"--see T. Ambler, F. Chittenden and M. Obodovski, *Are Regulators Raising their Game?* (British Chambers of Commerce, London, 2004).
72. <http://europe.eu.int/eur-lex/en/com/cnc/2002/com20020278en01.pdf>.
73. OECD, *Choices of Policy Instruments* (OECD, Paris, 1997) and *Regulatory Policies in OECD Countries*, n.19 above, pp.51-57.
74. *ibid.*, p.55.
75. Mandelkern Report, n.7 above, p.18.
76. See Cabinet Office, *Better Policymaking: A Guide to Regulatory Impact Assessment* (Cabinet Office, London, 2001).
77. Though see the BCC's criticism that "scant" attention is given in RIAs to sunset clauses or to monitoring and evaluation--noted above and BCC 2004, n.26 above. For examples of UK sunset clauses see Electronic Communications Act 2000, s.16(4); Football (Disorder) Act 2000, s.5 (which had to be renewed annually but was amended by the Football (Disorder) Amendment Act 2002 to extend the period to five years); Criminal Justice and Police Act 2001, s.15(3); Education Act 2002, s.2.
78. See e.g. *United Kingdom: Challenges at the Cutting Edge*, n.19 above.
79. On "smart" regulation see Gunningham and Grabosky, n.1 above. For other discussions of mixed public and private, or "combined" regimes of regulation see e.g. D. Osborne and T. Gaebler, *Reinventing Government* (Addison-Wesley, Boston, 1992); I. Ayres and J. Braithwaite, *Responsive Regulation* (Oxford University Press, 1992); C. Sunstein, "Paradoxes of the Regulatory State" (1990) 57 *University of Chicago Law Review* 407; C. Sunstein, *After the Rights Revolution* (Harvard University Press, 1990); C. Parker, *The Open Corporation* (Cambridge University Press, 2002); G. Burchell, C. Gordon and P. Miller, eds, *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, 1991); J. Black, "Decentering Regulation: Understanding the Role of Regulation and Self Regulation Post-Regulatory World" [2001] 54 *C.L.P.* 103; "Enrolling Actors in Regulatory Processes" [2003] *P.L.* 62; M. Sparrow, *The Regulatory Craft* (Brookings Institution Press, Washington DC, 2000). On the British regulatory state as a "smart state" see M. Moran, *The British Regulatory State* (Oxford University Press, 2003), pp.21-26.
80. Gunningham and Grabosky, n.1 above, p.91.
81. See Gunningham and Grabosky, n.1 above, pp.387-422.
82. The idea here is that regulation should be "responsive" and escalate in severity as necessary to achieve compliance. Ayres and Braithwaite, in *Responsive Regulation*, (Oxford University Press 1992), are concerned with state and business relationships, but Gunningham and Grabosky argue for escalating approaches on three planes--not merely on one deploying state controls but also on one founded on commercial and non-commercial quasi-regulation and another on corporate self-regulation. These planes make up the three sides of their pyramid--see Gunningham and Grabosky, n.1 above, pp.397-399.
83. A win-win outcome is where higher levels of socially desirable behaviour produce higher profits--see N. Gunningham, "Beyond Compliance: Management of Environmental Risk", in B. Boer *et al.*, *Environmental Outlook* (ACEL Federation Press, Sydney 1994); M.E. Porter and C. Van der Linde, "Green and Competitive" (1995) *Harvard Business Review* 120-134; J.C. Robinson, "The Impact of Environmental and Occupational Health Regulation on Productivity Growth in U.S Manufacturing" (1995) 12 *Yale Journal of Regulation* 388.
84. See e.g. BRTF, *Imaginative Thinking for Better Regulation* (Cabinet Office, London, 2003); BRTF, *Alternatives to State Regulation* (Cabinet Office, London, 2000). OECD, *Regulatory Policies in OECD Countries* (OECD, Paris, 2002), pp.51-57.
85. See Gunningham and Grabosky, n.1 above, p.388.
86. See G. Ryle, *The Concept of Mind* (Hutchinson, London, 1949).
87. See Sparrow, n.79 above.
88. *ibid.*, Ch.9.
89. See Gunningham and Grabosky, n.1 above and also Black, n.79 above, on enrolling a variety of regulatory actors.
90. See Sparrow, n.79 above, p.310.
91. The Cabinet Office Guide, *Better Policy Making: A Guide to Regulatory Impact Analysis* (Cabinet Office, London, 2003). Chapter 2 focuses on the effects of the new regulation at issue and takes existing regulations as givens.
92. On the centrality of enforcement and the "practice of regulation", see Sparrow, n.79 above, pp.3-7.

93. Gunningham and Grabosky, n.1 above, p.400.
94. On the need to integrate different levels of action from different sides of the pyramid (e.g. nonpunitive state controls with quasi-regulatory and self-regulatory controls), see Gunningham and Grabosky, n.1 above, pp.398-401.
95. For discussion in more detail see R. Baldwin, *Better Regulation: Is it Better for Business?* (FSB, London, 2004).
96. The RIA relating to the Employment Act 2002, for instance, noted that "a great many assumptions" had to be made in its formulation.
97. See generally R. Baldwin, *Rules and Government* (Oxford University Press, 1995), Ch.4.
98. On win-win see M.E. Porter and C. Van Der Linde, "Towards a New Conception of the Environment-Competitiveness Relationships" (1995) 9 *Journal of Economic Perspectives* 97-118; J. Gobert and M. Punch, *Rethinking Corporate Crime* (Butterworths, London 2003), pp.342-345. It is arguable that the main advance on this front is to be made by providing information to firms on how to achieve such outcomes. See Gunningham and Grabosky, n.1 above, pp.416-418.
99. See R. Baldwin, "The New Punitive Regulation" (2004) 67 M.L.R. 351.
100. See N. Gunningham and P. Grabosky, *Smart Regulation* (Clarendon Press, Oxford, 1998) and the section "Is better regulation smarter regulation?" below. The prescription made here corresponds with the recommendations that Gunningham and Sinclair make on setting up the RIA by identifying goals, characteristics of the problem being addressed and identifying the range of potential regulatory participants and policy instruments (*Smart Regulation*, n.1 above, pp.381-385). The current author places more emphasis than Gunningham, Grabosky and Sinclair on potential tensions between the RIA process and the consideration of strategic mixes.
101. DTI, *Lifting the Burden*, Cmnd 9571 (1985). It has to be acknowledged that greater attention to the scope and targeting of RIAs will increase regulatory costs, but these are likely to be offset by the gains of more desirable mixes of regulatory strategy.
102. DTI, *Building Businesses Not Barriers*, Cmnd 9794 (1986); *Releasing Enterprise*, Cm.512 (1988). Gunningham and Sinclair talk of the need to establish clarity on overriding policy goals in setting up the RIA process (*Smart Regulation*, n.1 above, p.381), but the need for such clarity should not blind us to potential changes in policy goals--which any good regulatory regime should be capable of responding to.
103. See F. Chittenden, S. Kauser and P. Poutziou, *Regulatory Burdens of Small Business* (Manchester Business School, 2001). These task forces launched 605 deregulatory initiatives--see OECD, *From Red Tape to Smart Tape* (OECD, Paris, 2003). UK Chapter by C. Scott and M. Lodge, p.198. Government policy since June 2001 has required departments to review the impact of major pieces of regulation within three years of implementation (*United Kingdom: Challenges at the Cutting Edge*, n.22 above, p.34). The BRTF recommended post-implementation reviews in April 2000 (*Helping Small Firms Cope with Regulation*) but the revised RIA Guidance of 2003 limits systematic reviews to major pieces of legislation and only issues a general prescription: "say how the policy will be monitored and evaluated/reviewed". Research for the BCC, as noted, found that this aspect of the guidance was given "scant" attention in RIAs (BCC 2004, n.26 above); See now BRTF, n.8 above, p.7. On the OECD view that *ex post* evaluation of regulatory policies, tools and institutions is of value see OECD 2002 pp.115-116. On the case for revisiting regulatory systems see G. Mather and F. Vibert, *Reducing the Regulatory Burden* (European Policy Forum European Forum, London, 2004).
104. DTI, *Deregulation: Cutting Red Tape* (DTI, London, 1994); *Thinking About Regulation: A Guide to Good Regulation* (DTI, London, 1994); *Getting a Good Deal in Europe* (DTI, London, 1994). I am grateful to Ed Humpherson for this point.
105. The current chair is David Arculus. For a review of benchmarks on regulatory quality see University of Bradford, Centre for European Studies, *Indicators of Regulatory Quality* (CEC, DG Enterprise, January 24, 2005), project website: [www.bradford.ac.uk/irq](http://www.bradford.ac.uk/irq).
106. See now BRTF, *Principles of Good Regulation* (Cabinet Office, London, 2003). The principles are: Proportionality, Accountability, Consistency, Transparency, and Targeting. For other definitions of good or better regulation see e.g. Department of the Taoiseach, *Regulating Better* (Department of Taoiseach, Dublin, 2004) [www.betterregulation.ie](http://www.betterregulation.ie)--looking to necessity, effectiveness, proportionality, transparency, accountability, and consistency. See also the Australian Government, *Department of Industry, Tourism and Resources: Regulatory Performance Indicators* (DITR, Canberra, 1999), which measures whether regulation: confers net benefits; achieves objectives without duly restricting business; is transparent and fair; is accessible to business; creates a predictable regulatory environment; and ensures responsive consultation. The Australian Office of Regulation Review refers to the seven features: minimum necessary to achieve objectives; not unduly prescriptive; accessible; transparent and accountable; integrated and consistent with other laws; communicated effectively; mindful of compliance burdens; and enforceable. See S. Argy and M. Johnson, "Mechanisms for Improving the Quality of Regulations: Australian Productivity Commission" (Staff Working Paper, July 2003). For Canada see Treasury Board of Canada Secretariat, *Federal Regulatory Process Management Standards* (Treasury Board of Canada Secretariat, Ottawa, 1996). The World Bank view is set down in World Bank, *Doing Business in 2004: Understanding Regulation* (World Bank, Washington DC and Oxford University Press, 2004). See also OECD, *Recommendation on Improving the Quality of Government Regulation* (OECD, Paris, 1995). The OECD has added that good regulatory systems should be set within effective governmental mechanisms for managing, co-ordinating, reforming and updating regulation and ensuring that regulators and regulatory processes are transparent, non-discriminatory and efficiently applied. OECD, *Policy Recommendations on Regulatory Reform* (OECD, Paris, 1995). For other definitions of good or better regulation see Mandelkern Group on Better Regulation, *Final Report* (CEC, Brussels, November 13, 2002) ("Mandelkern Report"). For discussions of performance measurement in UK government see e.g. Office of Government Commerce, *How to Manage Performance* (The Stationery Office, 2002), [www.ogc.gov.uk](http://www.ogc.gov.uk); Audit Commission, *Aiming to Improve: The Principles of Performance Measurement* (June 2000), [www.audit-commission.gov.uk/reports/AC-REPORT](http://www.audit-commission.gov.uk/reports/AC-REPORT); Audit Commission, *On Target: The Practice of Performance Indicators* (2000), [www.audit-commission.gov.uk](http://www.audit-commission.gov.uk); HM Treasury, *Executive Agencies: A Guide to Setting Targets and Measuring Performance* (HMSO, 1992); NAO, *Good Practice in Performance Reporting in Executive Agencies and Non-Departmental Public Bodies* (2000), [www.nao.gov.uk](http://www.nao.gov.uk); Comptroller and Auditor General, *Measuring the Performance of Government Departments* (2000-01 HC 301, March 22, 2001), [www.nao.gov.uk](http://www.nao.gov.uk).
107. Financial Times, "Blair Vows to End 'Culture' of Red Tape", *Financial Times*, October 19, 2004. See now: P. Hampton, *Reducing Administrative Burdens* (HM Treasury, London, 2005) and BRTF, *Regulation--Less is More* (Cabinet Office, London, 2005). The Better Regulation Executive (BRE) was set up in May 2005 and the Government plans to transform the BRTF into a Better Regulation Commission. See the discussion in Australian Government, Department of Industry, Tourism and Resources, *Regulatory Performance Indicators: A Guide for Departments and Agencies* (2000).
108. Mandelkern Report, n.7 above. The seven principles of better regulation were: necessity, proportionality, subsidiarity, transparency, accountability, accessibility, and simplicity. On perverse effects see e.g. NAO, n.7 above, para.11. HM Treasury, n.7 above; J. Sandbach, "Performance Indicators Could Damage Universities' Health" (1987) *Public Finance and Accountancy* 19; G. Bouckaert, "Improving Performance Measurement", in A. Halachmi and G. Bouckaert, eds, *The Enduring Challenges of Public Management* (Jossey-Bass, San Francisco, 1995); C. Pollitt, "Performance Indicators: Root and Branch", in M. Cave, M. Kogan and R. Smith, eds, *Output and Performance Measurement in Government* (Jessica Kingsley, London, 1990).
109. COM (2001) 428 Final. See e.g. N. Luhmann, "The Self-Reproduction of Law and Its Limits", in G. Teubner, ed., *Dilemmas of Law in the Welfare State* (Walter de Gruyter, Berlin, 1985); *Social Systems* (Stanford University Press, California, 1995); G. Teubner, *Law as an Autopoietic System* (Blackwell, Oxford, 1993); T. Prosser, "Theorising Utility Regulation" (1999) 62 M.L.R. 196; J. Black, "Constitutionalising Self-Regulation" (1996) 59 M.L.R. 24; "Proceduralising Regulation Part II" (2001) O.J.L.S. 33.

110. European Commission, *Action Plan on Simplifying and Improving the Regulatory Environment* CDM (2002) 278 final. See Baldwin, n.99 above, at 379. On analysing regulatory discourse see J. Black, "Regulatory Conversations" (2002) 29 J. Law & Soc. 163.

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