

Chapter 2

Institutional capacities for Better Regulation

Regulatory management needs to find its place in a country's institutional architecture, and have support from all the relevant institutions. The institutional framework within which Better Regulation must exert influence extends well beyond the executive centre of government, although this is the main starting point. The legislature and the judiciary, regulatory agencies and the subnational levels of government, as well as international structures (notably, for this project, the EU), also play critical roles in the development, implementation and enforcement of policies and regulations.

The parliament may be the prime proposer of new primary legislation, and proposals from the executive rarely if ever become law without integrating the changes generated by the parliamentary scrutiny. The judiciary may have the role of constitutional guardian, and is generally responsible for ensuring that the executive acts within its proper authority, as well as playing an important role in the interpretation and enforcement of regulations. Regulatory agencies and subnational levels of government may exercise a range of regulatory responsibilities. They may be responsible (variously) for the development of secondary regulations, issue guidance on regulations, have discretionary powers to interpret regulations, enforce regulations, as well as influencing the development of the overall policy and regulatory framework. What role should each actor have, taking into account accountability, feasibility, and balance across government? What is the best way to secure effective institutional oversight of Better Regulation policies?

The OECD's previous country reviews highlight the fact that the institutional context for implanting effective regulatory management is complex and often highly fragmented. Approaches need to be customised, as countries' institutional settings and legal systems can be very specific, ranging from systems adapted to small societies with closely knit governments that rely on trust and informality, to large federal systems that must find ways of dealing with high levels of autonomy and diversity.

Continuous training and capacity building within government, supported by adequate financial resources, contributes to the effective application of Better Regulation. Beyond the technical need for training in certain processes such as impact assessment or plain drafting, training communicates the message to administrators that this is an important issue, recognised as such by the administrative and political hierarchy. It can be seen as a measure of the political commitment to Better Regulation. It also fosters a sense of ownership for reform initiatives, and enhances co-ordination and regulatory coherence.

Assessment and recommendations

The United Kingdom presents a complex but well articulated institutional environment which requires active management. The United Kingdom's institutional framework is the product of an evolution over centuries, which has not been disturbed by revolution.¹ It presents, as result, a rich, varied and complex landscape which requires careful mapping to identify all the relevant actors and their relationship with each other. There are a large number of regulators of different sorts. Adding to the challenge is the

fact that significant reforms which devolve powers and affect the roles and relationships of the executive, legislature and judiciary have been made over the last ten years, and there is more to come. The Hampton and Macrory reports underlined that a key challenge for Better Regulation in the United Kingdom was to work with very different legislative structures and institutional arrangements across the country, as well as noting that there are many common issues and challenges in the regulatory field that cut across geographical and sectoral boundaries. A very positive aspect is that the institutional architecture is, in many respects, well articulated and functions with a smoothness that is impressive relative to some other “simpler” jurisdictions. The development of institutional complexity has been matched by the development of a capacity to ensure that the machinery of government does not seize up, not least through the system of collective decision-making orchestrated by the Cabinet Office. Likewise, the institutions supporting Better Regulation have evolved and developed since the 1990s to address the challenges.

Given this starting point, it will be important to avoid further complexity wherever possible. Some recent institutional developments (the growth in the number of agencies, devolution, and the growing influence of the EU) complicate the task of better regulatory management. Frequent changes in the institutional architecture such as machinery of government changes² and changes to the structures for promoting Better Regulation itself generate further potential difficulties. The Hampton Report put it clearly – some of this complexity cannot be avoided, but wherever possible there should be streamlining. The 2002 OECD report had already picked up this important issue (Box 2.1). Strengthening the central unit is only part of the answer.

Recommendation 2.1. Consideration should be given, wherever possible, to minimising the complexity of the institutional architecture, for example by continuing to rationalise the number and types of regulatory agencies.

Box 2.1. Recommendation from the 2002 OECD report: Complexity

Clarify the overall institutional set-up of the regulatory system and strengthen the role of the centre of government. A large number of institutional players in the regulatory framework of the United Kingdom can blur the transparency and accountability of regulations, slow co-ordination and increase transaction and compliance costs. Clarifying and simplifying relations within the regulatory framework would be an important step to address this challenge. Strengthening the role of the centre of government from advisory and consultative toward a more structured, formalised and challenging role should increase its possibilities and obligations to create systematic incentives to assure high-quality regulations.

The Better Regulation Executive (BRE) has spearheaded a revitalised drive for Better Regulation. The BRE is an influential, energetic, well-resourced and well-connected central unit, with high-level leadership in the shape of a permanent secretary. It is one of the best examples of an effective central regulatory unit across the OECD, both in terms of its influence and of its broad remit which brings the main aspects of Better Regulation under “one roof”. Its establishment as a successor to the Regulatory Impact Unit with a broader mission, more staff, and improved tools and processes for the promotion of Better Regulation, has been a positive development. Nearly all of those interviewed for this report said that the BRE has played a positive role in driving regulatory reform across government. The business community seems to approve of the BRE’s semi-detached and semi-private status and structure. Whilst staff turnover and short postings at the BRE

promote a broad mix of competences and experiences, this needs to be monitored, as the BRE is an organisation that needs to work for the long haul of Better Regulation.

Recommendation 2.2. Ensure that the Better Regulation Executive continues to have the support and resources that it currently enjoys, and are necessary for the accomplishment of its missions. Monitor the staff structure and postings, to ensure that this produces an effective mix of experience and new ideas.

The United Kingdom appears to have entered a new phase in the institutionalisation of Better Regulation. The United Kingdom appears to have been successful in starting up a new phase in the “institutionalisation” of Better Regulation across most of the actors that need to be part of the process. The BRE itself does not deliver Better Regulation, as it is careful to underline. It operates as the centre point of a radial network of relationships drawing in other important actors, not only within the central government executive but beyond (the parliament, the National Audit Office, national regulatory agencies) as well as at the local level. At the end of the day it is a (relatively speaking) very small central entity seeking to influence a very large and disparate set of actors. Structures such as the identification of a minister responsible for Better Regulation in each department contribute to the strength of the system. There is a significant “political” dimension, to persuade ministers of the value and necessity of following Better Regulation principles which has also been enthusiastically embraced.³ The complexity of its institutional architecture suggests that this evolution is particularly necessary for the United Kingdom, but it does also offer a valuable model for spreading Better Regulation that might be of interest to other countries.

Recommendation 2.3. The Better Regulation Executive and ministers for Better Regulation should take opportunities to explain the institutional approach taken by the United Kingdom and its benefits, which combines a Better Regulation unit at the centre of a radial structure of relationships allowing it to project its reach and influence.

Nevertheless, reinforcement of the network of Better Regulation relationships beyond the inner circle and across all branches of government is needed. Although the BRE has been successful in developing a range of contacts and relationships (including through secondments from other departments), the overall picture remains uneven. Its “horizon scanning” abilities to spot relevant policy developments around departments has improved but the OECD peer review team were told it could be even better. There is also scope to develop stronger relationships and spread best practice with certain key actors beyond those central government departments and agencies which have developed a special interest in the subject.

Recommendation 2.4. Among other possible initiatives, the new better regulation subcommittee of the National Economic Council⁴ should be confirmed in its role in the review of significant new regulations, and in assessing and arbitrating impact assessments relating to the same set of policies across departments (such as climate change). Further work to consolidate links with the regulatory agencies should also be considered.

Significant progress has been made to progress culture change. A network of structures operating at different levels have been set up across central government, including Better Regulation ministers, board level champions (officials to support the ministers), impact assessment sign off by ministers, and Better Regulation units to support and deliver Better Regulation processes and programmes. Training for the application of Better Regulation tools and processes is also well-developed, on line, through the support of specialists, and as part of general training programmes for civil servants which tackle issues such as impact assessment and consultation. A highly structured performance measurement system is in place, covering the main dimensions of Better Regulation.

There remains a culture and/capacity gap, and the carrots and sticks for better performance may not be strong enough. Tools and processes are increasingly sophisticated, and they need commitment, as well as professionalism and expertise. It is relatively straightforward to set out principles of Better Regulation, and to invent tools and processes for its delivery. It is much harder to move from abstraction to actions that are embedded in the daily activity of officials on the frontline of regulatory management. The BRE does not dispose of any formal powers to call departments to account, and the real effectiveness of its supporting and challenging departments during the policy development process and its assessments of departments' performance is hard to judge from the outside, absent any clear sticks (such as budget cuts) if performance is inadequate. It is also not clear how good work by officials on Better Regulation is rewarded in the current performance appraisal system and career postings.

Recommendation 2.5. Consider whether the sanctions for poor regulatory performance are strong enough, and conversely, whether good work is adequately rewarded.

Box 2.2. Recommendation and comments from the 2002 OECD report: Culture change

Encourage — especially by training — the continued development among senior policy-makers of an administrative culture supporting regulatory quality management. A continued effort is needed to embed good regulatory practices not only in procedural guidelines but also into the culture of the public administration. The strong understanding at the highest political level and at the centre of government of prioritising early and sincere integration of regulatory impact assessments in the policy-making process needs to be extended to other departments and regulatory authorities in order to support a broad and continuous development of high-quality regulation. The development of such a culture could be encouraged by making regulatory quality management an integral part of the training not only of junior civil servants engaged in the regulatory process, but, as importantly, also to senior civil servants.

Although the principles and potential for regulatory quality management are permeating to the policy-making process, indications are that further efforts are required to truly embed such awareness in the administrative culture of senior policy-makers. To install such a culture may be the most important and difficult long-term challenge to fully exploit the already strong capacities for high-quality regulatory management in the United Kingdom. BRE recognises and is working towards this goal.

Regulatory agencies⁵ can help to define effective practical strategies, but fragmentation of their own Better Regulation efforts needs to be minimised. The capacity of regulatory agencies to assess what works best may be stronger than that of departments, because they are closer to the ground. At the same time, the wide variations in their status and powers means that Better Regulation policies such as impact

assessment may automatically apply to some regulators, but not to others. The issue of fragmentation (or simply the lack of) Better Regulation initiatives, for those regulators which are not constrained by central government policies, reduces transparency and increases complexity for stakeholders. One of the criticisms of the Macrory Report was the significant differences in powers and practices among regulators, causing inconsistency and detriment to business. The agencies appear somewhat sensitive in this regard, wanting to ensure that their independence and statutory mission is not compromised by centralised Better Regulation management (though it is hard to see what problems this could cause).

Recommendation 2.6. Consider the development of a more integrated framework for the deployment of Better Regulation practices by regulatory agencies.

Box 2.3. Recommendations and comments from the 2002 OECD report: Regulatory agencies

Develop a general policy framework for the role and functioning of independent regulators. The United Kingdom's system of regulators, which have been developed *ad hoc* and explicitly for the sectors and the market characteristics in which they operate, has many advantages which should not be lost. However the United Kingdom government should consider developing a single policy framework for the role and functioning of independent regulators including a consistent approach to the use of impact assessment, consultation and other quality assurance measures. Such policy framework should define clear objectives for the independent regulators and by doing so providing clear distinctions between its objectives and those of other regulatory authorities.

... (In parallel) the government should extend RIA disciplines to devolved administrations, independent regulators and non-governmental bodies currently not bound by the guidelines.

As the United Kingdom moves toward more sophisticated regulatory systems with an increasing number of independent regulators and other regulatory bodies with inter-linked and shared responsibilities, the question of a clear delineation of responsibilities, accountability and reporting should become an important priority.

Despite progress in setting up a general policy for regulators, which culminated in the 2000 Utility Act, room for improvement persists in organising the network. Policies and instruments to limit duplications and overlaps between authorities covering converging sectors (*e.g.* telecom and broadcast) as well as thematic areas (*e.g.* competition policy, regulatory quality tools) need to be appraised, or even invented.

The parliament's interest in Better Regulation is helpful, especially as regards feedback on the quality of consultation and impact assessments. The parliament's role in scrutinising secondary legislation is important and appears to add value to the efforts of the executive.⁶ Several parliamentary committees, in both houses, are active in this regard.

Recommendation 2.7. The BRE should continue to put efforts into strengthening its relationships with the parliament, via the various committees that take an interest in Better Regulation.

The National Audit Office (NAO) is a valuable asset for Better Regulation. The NAO provides an external, professional, concrete, independent view on the quality of

regulatory management. It has provided, over the last few years, valuable input to key Better Regulation programmes and processes such as impact assessment and the simplification programme. It has recently been engaged in joint review activities with the BRE. Its independence is an asset that needs to be preserved.

Recommendation 2.8. Care should be taken to ensure that any joint BRE/NAO activities do not undermine the real or perceived independence of the NAO.

The engagement of local levels of government is progressing; this is essential to the success of Better Regulation. The responsibility of local authorities for the enforcement of national regulations, as well as their responsibilities for licensing and planning, puts them at a critical interface between central government and local stakeholders who stand to benefit from Better Regulation. Recent important initiatives to rationalise and co-ordinate the approach to local regulatory enforcement, such as the Rogers Review and the establishment of the Local Better Regulation Office, represent an important extension of Better Regulation policy to this level of government, which needs to be developed in other areas too, such as the administrative burden reduction programmes.

Recommendation 2.9. Efforts should be reinforced to associate the local levels with all aspects of Better Regulation.

The interaction of the judiciary with regulatory developments is also important. The judiciary, especially in a legal system based on common law and precedent, should not be neglected in the pursuit of Better Regulation. They are at the frontline of important issues such as the trends in litigation and appeals, and what this reveals about the regulations that are being challenged. These insights could provide valuable feedback to the further development of Better Regulation policies.

Recommendation 2.10. Consideration should be given to the best way of engaging the judiciary in a dialogue over their experience of developments, perhaps via the Ministry of Justice, which should be encouraged as a partner in Better Regulation policy.

Background

General institutional context

The United Kingdom's public governance framework is based on traditions of market openness, and a relatively low proportion of state ownership. Its common law driven judicial and regulatory framework, its well-functioning tradition of collective responsibility for decision making within government, and its political system which usually gives the ruling party a clear majority in the parliament, are other important features that condition the way in which Better Regulation is taken forward.

There have been significant recent developments in the institutional and decision-making framework, with the establishment of elected assemblies and devolution of power for parts of the United Kingdom, as well as “work in progress” constitutional developments which are changing the way in which the different branches of government interact.⁷ The Better Regulation agenda has to keep up with this changing framework.

Box 2.4. Institutional framework for the United Kingdom's policy, law making and law execution process

General context

The United Kingdom is made up of four parts: England, Wales, Scotland and Northern Ireland.⁸ The different parts of the United Kingdom have distinct legal systems. The English and Welsh system is the same, whereas Northern Ireland and Scotland are different.

It is a constitutional hereditary monarchy and representative democracy. The monarch is head of state and his/her role is essentially one of influence. Effective authority lies with the elected lower chamber of the parliament (the House of Commons) and the central executive headed by the Prime Minister (elected by his/her party), who presides over a cabinet formed by the leading party and representing the main government departments.¹ Cabinet and other ministers are also members of the parliament. Elections must be held at least every five years; the precise timing is the decision of the Prime Minister.

Britain's constitution has been described as "partly written and wholly uncodified". Instead of being written down in a single document (as in many other OECD countries), it is contained in different sources, notably constitutional statutes, the common law (based on judicial decision and precedent), and conventions.

In recent times EU law and the European Convention on Human Rights (which was incorporated into United Kingdom law with the Human Rights Act 1998) have added new dimensions. The judiciary is responsible for checking that the European Convention on Human Rights is properly observed.

The most important constitutional principle is the parliamentary sovereignty, meaning that the parliament, representing the people, is the supreme law-making body, and its acts are the highest source of British law. The second most important pillar is the rule of law, meaning that all are equal before the law and that it must be applied consistently.

The "first past the post" parliamentary electoral system (under which electors only vote once, for a single constituency representative) generally gives a large majority to the leading party. Coalition governments are extremely rare. The conduct of the parliamentary business is also characterised by strong party discipline, aimed at ensuring there is no "breaking of the ranks" within a party in votes on draft laws.

The incoming government policy manifesto sets out the main lines of its proposed policy and legislative programme during its period of office. The annual Queen's speech on the opening of the parliament sets out the main lines for the coming year.

The civil service is politically neutral. Civil servants, up to and including heads of department (permanent secretaries), do not automatically leave their posts when a new government is elected. Ministers usually appoint "special" advisers (including members of the parliament) to provide them with political advice.

There are 19 central government departments. Generally speaking, what is called a department in the United Kingdom system is equivalent to a ministry in most other OECD countries. The political head of a department is generally known as a secretary of state, equivalent to the senior minister in most other OECD countries. A minister in the United Kingdom system is not therefore usually the top ranking politician at the head of a department. The hierarchy below a secretary of state consists of ministers and parliamentary under-secretaries of state.

The policy-making process

The United Kingdom policy-making process rests on the doctrine of collective government responsibility for major policies. This is a longstanding and central element of United Kingdom public governance. Policies requiring primary legislation must be approved by the Cabinet, before the bill is drafted and presented to the parliament. Underneath the Cabinet sits an extensive structure of cabinet

committees (and subcommittees) for different policy areas, made up of those ministers whose portfolio gives them the strongest interest in those policy areas. These are “shadowed” by committees of officials. A central government department, the Cabinet Office, orchestrates the process. The aim is to relieve the burden on the Cabinet; to support the principle of collective responsibility by ensuring that major policies are fully considered from all angles; and to secure a final decision that is sufficiently authoritative to carry the support of all ministers. Extensive consultation takes place within government as proposals are developed, and with external stakeholders once a proposal has started to take concrete shape.

Nearly all primary legislation originates in the executive, as do most secondary regulations. Only the parliament, however, can enact primary legislation. Bills are usually scrutinised by parliamentary committees prior to debate on the floor of the house. The government’s majority ensures that most government bills are enacted (become law), albeit with amendments reflecting the parliamentary concerns. The parliament also has an important role in the scrutiny of secondary regulations.

Regulatory agencies

Regulatory agencies range from very large bodies with a wide range of powers to small, highly specialised regulators. The economic regulators (those responsible for the network and infrastructure sectors, as well as the regulators responsible for competition policy) and some others are quite independent and have significant powers to make secondary regulations affecting their sector or area of interest.

The legislature

The parliament is made up of two chambers: the lower chamber (the House of Commons), and the upper chamber (the House of Lords). The House of Commons consists of 645 members (one for each constituency), elected by universal suffrage under a “first past the post” system (there is only one round of voting by citizens). The unelected House of Lords (741 members) is currently undergoing a process of reform, with the abolition of hereditary peers and other changes underway including the removal of its traditional function as a form of supreme court.

The parliament has a central role in the formal processes of approving regulations, as well as in the scrutiny of the policies and expenditure of government departments. A network of parliamentary committees covers the different areas of government policy.

The Public Accounts Committee scrutinises the effectiveness and efficiency of government spending. It has powers to demand information and personal appearances from Ministers and senior civil servants, using (among other sources) information supplied by the National Audit Office, which reports to it.

Standing or select committees scrutinise the activities (“expenditure, administration and policy”) of specific departments, as well as their “associated public bodies” (including regulatory agencies). Some of this work bears directly on Better Regulation. The work of these committees may also address Better Regulation issues. For example, the House of Lords Select Committee on the Constitution published a report in 2004 on “The Regulatory State: Ensuring its Accountability”. Key current committees for Better Regulation include the House of Commons Committee on Regulatory Reform and the House of Lords Delegated Powers and Regulatory Reform Committee, as well as the House of Lords Merits of Statutory Instruments Committee.

Scrutiny of EU-origin regulations is another important function. The parliament cannot directly amend proposals from the EU. However, the co-ordination/agreement of UK government positions for the negotiation of EU regulations is a joint responsibility of government and the parliament. Scrutiny committees of both houses must clear the government’s position on proposals before the government can vote on them in the EU Council of Ministers. The parliament can therefore exert influence on the government’s position by refusing to clear scrutiny (imposing a scrutiny reserve).

The judiciary

The common law, on which much of the English legal system rests,⁹ is based on decisions and

precedents handed down by the courts. The judiciary in England therefore traditionally exerts an important influence on the development and practical application of regulations, relative to the judiciaries of countries with a system based on civil law.

The absence of a single written constitutional source also means that there is no single supreme judicial guardian of constitutional principles.¹⁰ That said, although this formal role is absent from the judicial structure, the judiciary are responsible for interpreting and enforcing the law, and for ensuring that the executive acts within its proper authority.

The role of the judiciary is framed around two sets of principles:

Judicial independence and neutrality (freedom from political interference and control). The bulk of the judiciary is separate from the other two branches of government, the executive and the legislature. However, pending implementation of reforms to the House of Lords, there is some overlap at the highest levels, as senior members of the judiciary sit in the House of Lords, and the head of the judiciary (the Lord Chancellor) is a member of the Cabinet.

Strict application of the law (judges must consider whether the law has been correctly applied, not whether it is a “good” or a “bad” law). Again, this principle has to be seen in its practical context. The courts cannot strike down acts of the parliament and have a limited role in striking down secondary regulations. In practice, the role of the courts is not limited to the strict application of the law, as evidenced in the fact that judicial decisions over statute law have contributed to creating the significant body of common law that exists today.

The court system comprises two structures, one for the civil law and one for the criminal law. For cases involving civil law the first level is the County Court (218 across England and Wales). Above this level is the High Court, divided into three departments: the Family Division (cases relating to matrimonial affairs, child welfare, child custody and adoption), the Chancery Division (cases involving land, companies, bankruptcy and probate) and the Queen's Bench Division (most other cases, including cases that go to the Administrative Court, which exercises judicial review in relation to the decisions of local governments). The Queen's Bench Division is thus the most relevant for regulatory policy.

The EU dimension

The EU has added a fundamental new dimension to UK law and policy as well as to its constitution. It is a (relatively) new source of constitutional authority. The European Communities Act 1972 commits the United Kingdom to accepting that European law takes precedence over British law, when there is a conflict (either directly through EU regulations, or indirectly through the transposition of EU directives). The European Court of Justice in its decisions has made it clear that it is for the national judiciaries to apply European law and ensure its primacy over national law in cases of conflict.

Local government

There is either a single or two tier structure to local government in England. The structure is largely two tier in the counties (which are made up of a number of district areas), with a few exceptions of single tier smaller counties.

Local authorities have responsibilities covering a wide range of issues (and related regulations) relevant to local communities, similar to the picture found in many other OECD countries. These include housing, waste management and collection, education and lifelong learning, community safety and crime reduction, tourism, sport and culture, social services, health and the environment, transport, consumer protection, community safety, planning and licensing.

The main regulatory responsibility of local authorities is the enforcement of regulations. Local authorities have only limited rule- making powers. They can issue regulations (bye-laws) with a very local reach *e.g.* to address behaviour in public parks. They may table local acts before the parliament to extend their powers. The enforcement of national regulations is the most important responsibility of local authorities, shared to some extent with national regulatory agencies.

Developments in the general institutional context

Significant reforms which devolve powers and affect the roles and relationships of the executive, legislature and judiciary have been made over the last ten years. The Constitutional Reform Act 2005, which will come into force in October 2009, will take the reforms a stage further. Key developments:

- Devolved assemblies for Scotland, Wales and Northern Ireland. A new Scottish parliament and new assemblies for Wales and Northern Ireland have been established with powers to make laws in certain devolved areas, and some tax related powers.¹¹ Proposals for elected assemblies for the English regions have been debated, but not so far taken forward, with the exception of an elected mayor, accountable to the London Assembly, and the London Development Agency.
- Incorporation of the European Court of Human Rights into the British legal system. The courts can put pressure on the parliament to amend primary legislation that conflicts with the European Court of Human Rights. The United Kingdom courts must respect the rulings of the European Court in Strasbourg in relation to the European Court of Human Rights. If an act is contrary to the European Court of Human Rights, they can declare it incompatible but not override it. The parliament usually changes the act as a result.
- Ministry of Justice. This relatively new ministry regroups a range of issues including constitutional reform, electoral reform and human rights, the civil, family and criminal justice systems, and prisons.¹²
- The new Supreme Court. This will be established in 2009 with the entry into force of the Constitutional Reform Act. Its main role will be to hear appeals from United Kingdom courts (with the exception of Scotland). As such it will take over the judicial functions of the House of Lords (currently exercised by the Law Lords). It will function as the court of last resort for all matters under English, Welsh and Northern Irish law. The Supreme Court's focus will essentially be on cases which raise points of law of general public importance such as human rights, judicial review claims against public authorities, and devolution issues.

The United Kingdom has long been considered as an essentially unitary state because of the centralising political power exercised by the London-based executive and the parliament. The devolution of powers to the Scottish, Welsh and Northern Ireland assemblies, however, mark an important change and have led some commentators to suggest that the United Kingdom is now a “quasi-federal” state – “quasi” because unlike the other components of the United Kingdom, England has no legislature of its own (it is directly ruled from London).

Developments in Better Regulation institutions

Much of the structure has been in place for up to a decade, albeit under different names. The United Kingdom experience illustrates that it takes time to develop a well anchored institutional structure to support Better Regulation. But it should be encouraging for other countries to note that a form of Better Regulation unit has not only survived but also developed in various forms over more than a decade and in different government settings.

Table 2.1. Milestones in the development of Better Regulation institutions in the United Kingdom

1986	Establishment of a central task force, the "Enterprise and Deregulation Unit" set up in the Department of Employment. It is given power to oversee and co-ordinate the "anti-red tape" efforts of individual departments. Deregulation units are set up and a Departmental Deregulation Minister is appointed in each department. Creation of the Deregulation Task Force, an independent advisory panel to the government.
1987	The Enterprise and Deregulation Unit, now named "Deregulation Unit" is moved to the Department of Trade and Industry.
1989	Creation of a Cabinet committee on regulation (with ministerial membership).
1995	Creation of an advisory panel (made up of business people). Deregulation Unit is moved to the Cabinet Office. Seven business taskforces are set up to look at sector specific regulations.
1997	Deregulation Unit is renamed the Better Regulation Unit. Deregulation Task Force is renamed the Better Regulation Task Force (BRTF), and new members appointed by the Prime Minister.
1999	Regulatory reform ministers are appointed in each department. Better Regulation Unit is renamed the Better Regulation Executive (BRE). A public sector team is set up in the BRE to give "hands on" advice to public sector service deliverers to facilitate compliance with reporting and paperwork requirements. Panel for regulatory accountability (ministerial committee chaired by the Prime Minister) is established to "take an overall view of the regulatory implications of the government's regulatory plans" and to "ensure necessary improvements in the regulatory system and the performance of individual departments".
2000	The Small Business Service is set up to provide a single organisation dedicated to helping small firms and representing them within the government.
2004	House of Lords Merits of Statutory Instruments Committee is set up to strengthen the scrutiny of secondary regulations (statutory instruments).
2007	Better Regulation Executive is relocated to Department for Business, Enterprise and Regulatory Reform (BERR). Small Business Service is folded into the BERR, as the BERR Enterprise Directorate.
2008	Local Better Regulation Office (LBRO) is established.

Key institutional players for Better Regulation policy

The executive centre of government

Key ministries

Key central government departments for Better Regulation include the Department for Business, Enterprise and Regulatory Reform (BERR), the Cabinet Office and the Treasury.¹³ Some other departments have responsibilities which draw them deeply into the Better Regulation agenda, for example the Department for Environment, Food and Rural Affairs (DEFRA) in relation to climate change and EU-origin regulations. The Better Regulation Executive (BRE), which is part of the BERR but has a semi-detached status via its management structure, is the main driver and co-ordinator for the government's Better Regulation agenda.

The BERR is, in broad terms, the successor to the Department of Trade and Industry. It is a key actor in the government's objective to deliver improved productivity, through policies on enterprise and competition, and also by promoting Better Regulation across government. It shares responsibility with the Treasury for meeting productivity related objectives to raise the performance of the economy.¹⁴ One of these objectives is directly related to Better Regulation: to deliver the conditions for business success in the United Kingdom via competition and corporate governance regimes, labour market flexibility,

energy price competitiveness, Better Regulation and the reduction of administrative burdens. Important directorates for Better Regulation within the department include the Consumer Affairs Directorate and the Enterprise directorate, which is responsible for SME policy. This directorate replaced the Small Business Service in 2007.¹⁵

The Cabinet Office is a central government department headed by a minister and the civil servant head of the civil service. It orchestrates the process of collective decision-making.¹⁶ The Cabinet Office is also the home of the European Affairs Secretariat which orchestrates United Kingdom policy on EU issues.¹⁷

The Treasury's central role in setting policy targets for departments, linked to funding, draws it into the Better Regulation objectives that have started to be embedded in the targets. One of its own objectives, shared with the BERR gives it a direct responsibility for Better Regulation. A Senior Treasury Minister chairs the Panel for Regulatory Accountability (PRA) which vets costly or controversial proposals for new regulations, and departmental simplification plans. The Treasury was behind the launch of the 2005 Hampton Report, which promoted the new approach to enforcement that is being rolled out today.

The Better Regulation Executive

The BRE, established since 2006, has the main responsibility for the government's Better Regulation agenda. It is the latest in a line of central units with regulatory management functions going back to 1986 – albeit under different names, responsibilities, and departmental attachment. It was set up after the Hampton Report as a successor to the Regulatory Impact Unit (RIU), and has been part of the BERR since 2007, when it was moved from the Cabinet Office. With the move came a new institutional framework which makes it semi-independent of the BERR. Its leadership structure comprises a chief executive, Jitinder Kohli (a “regular” civil servant), and a part-time executive chair (Sir William Sargent), who splits his time between his business activities and this role, and who has the rank of permanent secretary (head of department, which puts him on the same level as the BERR permanent secretary), and direct access to the Prime Minister.

The BRE explains that its move from the Cabinet Office to the BERR was decided on the basis that the former has no direct practical links with business and other stakeholders, nor does it have direct responsibilities with policy areas that need to be better regulated, and was therefore increasingly perceived as too distant from the “real world”. It considers that the move has not, however, detracted from a close relationship with the Prime Minister and other influential individuals. It continues to work closely with the Cabinet Office at the centre of Whitehall. Its permanent secretary head gives it direct access to the heads of government departments. There are also close contacts between the BRE and Treasury which monitors departmental policy targets and spending.

A fundamental principle emphasised by the BRE is that it does not itself deliver the government's Better Regulation agenda. This is the responsibility of the departments and regulatory agencies, especially those that have an impact on the UK economy. There is also work with local government as much of the inspection and enforcement of regulations takes place at the local level. The BRE emphasises that all departments which have an impact on the economy are now shared “owners” of Better Regulation objectives.¹⁸

Box 2.5. The Better Regulation Executive

Structure and resources

The BRE is made up of a strategic support team and three directorates:

- The Regulatory Reform Directorate. “On the ground” management and promotion of key Better Regulation tools and processes such as impact assessment and departmental simplification plans. Responsibility for the EU dimension.
- The Regulatory Innovation Directorate. Think tank.
- The Regulatory Services Directorate. Service delivery, described as the part that aims to win over “hearts and minds”, responsible for enforcement and application of the Hampton Report principles.
- A communications director has also been recently appointed.

The BRE is staffed by civil servants, most of whom are on secondment from departments including BERR for typically two years, as well as business people and professionals seconded from the private sector. It has a staff of around 80, a slightly higher figure than the Regulatory Impact Unit (RIU) which it replaced.

Functions and powers

The BRE is the central authority for advocacy and co-ordination of Better Regulation policy across government. Its mission is both broader and in some respects different from that of the RIU.* Specifically, it has the following functions:

- *Monitoring and challenge.* It monitors the Better Regulation policies and progress of departments and key national agencies, through a network of account managers on a day-to-day basis, and through the Executive Chair briefing the Prime Minister on progress around government. It scrutinises new policy/regulatory proposals and advises whether they should be examined by the Panel for Regulatory Accountability. It is not however a formal gatekeeper: it does not have any powers to block proposals for regulation.
- *Advocacy and communication.* It encourages the development of Better Regulation principles across government, and manages external communication of the government’s policy on Better Regulation.
- *Institutional co-ordination and culture change.* It has developed – and continues to develop – a broad range of relationships within central government as well as outside, including with the National Audit Office (with which it has shared a recent evaluation of regulators), consumer representatives (the National Consumer Council is a policy adviser to the BRE), parliamentary committees, local authorities, and EU colleagues.
- *Support and guidance.* The BRE is a facilitator – its staff offer departments guidance in the development of impact assessment and simplification plans, among other issues. It has produced a wide range of guidance material and training tools.
- *Policy and project development and management.* It has been the main driver for all the recent Better Regulation initiatives, taking forward projects such as the establishment of the Local Better Regulation Office and regulatory budgets.

- *EU Better Regulation policy (shared with the Cabinet Office)*. It liaises at home, with colleagues across the EU, and with the European Commission to help drive forward the Better Regulation agenda in Europe.

* For example, the RIU used to examine all impact assessments, whereas the BRE only looks at those it judges difficult or important. However the RIU did not have the range of other responsibilities carried by the BRE, such as project development or scrutiny of departmental simplification plans (which did not exist then).

Monitoring Better Regulation performance¹⁹

The Executive Chair of the BRE, briefed by BRE staff, keeps the Prime Minister informed on progress made by different government departments on the key elements of the Better Regulation agenda. Departments are very much aware that this happens and want to be seen as doing well.

The sticks include the burden reduction targets, the need to clear new regulations via an impact assessment process which is evidence-based and requires quantification of costs and benefits, and the link to departmental funding, which might be at risk (at least in principle – it does not appear to have happened in practice) if departments perform poorly. The proposals to introduce regulatory budgets would take this “stick” approach a significant stage further. The carrots are the BRE’s support and advice, and the fact that Better Regulation means more effective policies that will win the support of stakeholders and the electorate.

Co-ordination across central government

A network of structures operating at different levels has been set up across central government departments to promote Better Regulation.

Box 2.6. Departmental structures for Better Regulation

Better Regulation ministers

Departments have a Better Regulation minister (s/he usually combines this with other responsibilities) who is accountable for Better Regulation within his/her department. Better Regulation ministers meet periodically to discuss strategic issues and challenges and report to the Panel for Regulatory Accountability. They also, together with their officials, report on their regulatory performance and progress to the Better Regulation Executive (BRE).

Impact assessment sign-off by ministers

The updated impact assessment process requires that the responsible minister (who may or may not be the Better Regulation minister in the relevant department) formally signs off impact assessments.

Better Regulation Board Level Champions

Better Regulation Ministers are supported by Better Regulation Board Level Champions, whose role is to ensure that departmental board members (the group of senior officials who head the department’s main work areas, reporting to the permanent secretary who heads the department) are committed to Better Regulation, provide adequate resources within their departments for it, and liaise with BRE senior management.

Better Regulation units

Day-to-day promotion of Better Regulation is carried out by departmental Better Regulation units (BRUs), who advise and support policy officials in their departments, especially as regards impact assessment (completion, quality assurance and publication), but also in the delivery of departmental simplification plans. Involvement of the BRUs in the preparation of impact assessments varies, depending on the expertise of others in the department. Staffing (between one and four) and the expertise of BRUs vary across departments depending on the level and nature of regulatory work. Funding also varies (the Department for Work and Pensions BRU has its own research budget). Departments determine how their BRUs interact with other key units (the DWP BRU for example has close links with their Benefit Simplification Unit, and their new Employer's Strategy Unit). BRUs work closely with the BRE (which has an account manager for each department), meeting formally with the BRE on a quarterly basis.

Better Regulation EU units

Some departments with considerable EU exposure (such as DEFRA) have parallel EU units.

The Panel for Regulatory Accountability, which was started in 1999, was a Cabinet subcommittee specifically responsible for Better Regulation issues. It was originally chaired by the Prime Minister. Its terms of reference were “to ensure that the burden of regulation on business, the public sector and the third (voluntary) sector is kept to the minimum necessary; and report as necessary to the Committee on Economic Development”. Ministers appear before the PRA to report on their department's Better Regulation programmes. It had a specific challenge and clearance function: in relation to departmental simplification programmes and in relation to particularly costly or controversial proposals for new regulations as part of the impact assessment process. The government announced in April 2009 that a new subcommittee of the National Economic Council will take over the PRA's responsibilities. It will “scrutinise planned regulation and proposals for new regulation that will impact on business. It will take account of the views of business in coming to its conclusions.”

Regulatory agencies

The United Kingdom has a large number of national regulatory agencies. These vary widely in their legal status, structure, powers and lines of accountability. Some, by no means all, national regulators have direct rule-making powers. Some lead on negotiating EU directives, whereas for others the parent department takes the lead. Regulatory responsibilities and the way in which these are exercised vary according to the sector. Some regulatory agencies have joint enforcement responsibilities with local authorities.

Their numbers have grown over the last decade. The 2006 Macrory Report identified 56 national regulators concerned with regulatory services (40 were identified in the 2002 OECD review). One of the recommendations of the 2005 Hampton Review was the need for rationalisation, and some mergers have since taken place. There are currently some 40 national regulatory bodies, and 10 economic regulators.

There are five major national regulatory bodies, referred to as the “large, economic regulators”—the Health and Safety Executive (HSE), the Environment Agency, the Food Standards Agency, the Office of Fair Trading and Financial Services Authority—responsible for regulating areas such as health and safety at work, financial services, the environment, competition and consumer protection, and food hygiene and safety.

The widely differing status of the United Kingdom's agencies – they vary from being an integral part of a central government department, to highly independent quasi-business entities – means that some have considerable if not total autonomy in matters of regulatory management, whilst others follow the lead of their parent department. For example, those closely linked to a parent department are required to contribute to the department's simplification plans for the reduction of administrative burdens. Others have set up their own targets and processes for simplification, impact assessment and public consultation.²⁰ The statutes setting up some regulators include Better Regulation requirements, for example as regards consultation. The overall picture and quality of regulatory management by agencies is unclear, and has not been mapped.

The legislature

The parliament has a growing role in UK Better Regulation policy. It has traditionally held a central role in the formal processes of enacting primary legislation and scrutinising secondary regulations, but the last decade has seen a progressive and growing implication in the quality of regulation. Its scrutiny of secondary regulations covers not only technical issues of legal drafting quality and the proper use of ministerial powers, but also policy aspects. Key committees are the Joint Committee on Statutory Instruments, the House of Lords Merits of Statutory Instruments Committee, the House of Commons Regulatory Reform Committee and House of Lords Delegated Powers and Regulatory Reform Committee.

For primary legislation, the parliament's influence is exerted not only through the process of debating, amending and enacting individual bills, but also through an influential network of parliamentary committees covering the different areas of government policy. These committees have taken a growing interest in the government's Better Regulation agenda as part of their scrutiny of government policies, paying increasing attention to the quality of impact assessments and consultation results attached to bills.

As regards secondary regulations, the parliament cannot amend these but it can reject them. It has stepped up its scrutiny of these regulations through a developing network of committees which have made it their business to cover not only technical issues of legal drafting quality and the proper use of ministerial powers, but also the policy aspects. Again, it has become increasingly demanding as regards quality of impact assessments and consultation processes in support of a proposed policy.

The House of Commons Regulatory Reform Committee published a report in July 2008 on the BRE and the government's Better Regulation policies (House of Commons, 2008). Other relevant reports have been made, including the 2007 House of Lords Select Committee report on regulators.

The judiciary

The English common law system, based on decisions and precedents handed down by the courts, means that the judiciary plays a relatively strong role in the practical application and development of regulations.

Local levels of government

The responsibility of local authorities for the enforcement of national regulations, including their responsibilities for licensing and planning, puts them at a critical interface

between central government and local stakeholders – notably citizens and SMEs – who stand to benefit from Better Regulation. Local authorities have traditionally had considerable discretion over the interpretation and enforcement of centrally generated regulations.

Other important players

The Risk and Regulation Advisory Council

The Risk and Regulation Advisory Council (RRAC) is a short-term independent advisory body (established in January 2008 for 16 months). It has a particular mission to consider the issue of public risk and regulation. It has been charged by the Prime Minister to:

- Work with ministers and senior civil servants to develop a better understanding of public risk, and how best to respond to it, through a series of workshops which consider both good and poor practice.
- Work with external stakeholders to help foster a more considered approach to public risk and policy making.

The RRAC is a form of successor to the Better Regulation Commission (BRC), another independent advisory body which had a more broadly-based mission to advise the government on Better Regulation. The RRAC chair is the former chair of the BRC (Rick Haythornthwaite), and it has six other members, several drawn from the BRC. The RRAC is supported by the Risk and Regulation Team, reporting to the BERR chief economist. The RRAC itself reports ultimately to the Prime Minister. The RRAC will be wound up in April 2009 on current plans.

The government’s April 2009 announcement included the establishment of a new external Regulatory Policy Committee whose role will be to “advise government on whether it is doing all it can to accurately assess the costs and benefits of regulation. Building on the work of Philip Hampton, this body will also advise government on whether regulators are appropriately risk-based in their work; however it does not have the power to require changes in the behaviour of independent regulators.”

The Business Council for Britain

The Business Council for Britain is another body to assist the government in the development of a strategy to promote the long-term health of the economy. It comprises senior business leaders of UK-based businesses, and advises the Prime Minister on issues that affect enterprise, business and the long term productivity and competitiveness of the economy. It reports to the parliament as well as the government.²¹

The National Audit Office

The National Audit Office (NAO) audits the accounts of all central government departments and agencies, as well as a wide range of other public bodies. It is independent of the executive, and reports to the parliament on the economy, efficiency and effectiveness with which they have used public money. It does not audit local government spending (the role of the Audit Commission). The head of the NAO – the Comptroller and Auditor General – is an officer of the House of Commons. The NAO

produces a corporate plan which sets out its work programme for a three-year rolling period, and its budget is approved by the parliament. About a fifth of its income is externally generated, including audit fees paid by international clients.

The NAO carries out three types of work:

- *Financial audits.* It audits the accounts of government departments and agencies.
- *Value-for-money audits.* “Value-for-money” audits scrutinise the economy, efficiency and effectiveness of government spending. Such reports cover a broad range of issues and organisations (for example, recent reports on the criminal justice system and DEFRA).
- *Good governance audits.* This type of audit lies somewhere between financial and value-for-money audits. It is a smaller but growing area of work. It includes briefing documents and papers for select committees, as well as scrutiny of tax collection procedures.

The NAO’s role in Better Regulation has grown steadily over time. It has contributed to setting the regulatory reform agenda by pointing to important regulatory challenges that need attention, not least as regards impact assessment, and more recently administrative simplification. It carries out an annual survey of business perceptions of regulation, and conducts annual reviews of the impact assessment process.

Resources and training

Around 200 officials are directly engaged full-time on Better Regulation in central government, including the staff of the BRE (around 80) and staff in the Better Regulation units of each department. In addition, the main five regulators have Better Regulation teams (around five staff each). The recently established Local Better Regulation Office has around 30 staff. Many more officials devote part of their time explicitly to Better Regulation, including government lawyers and government economists in an advisory role to policy officials.

The National School of Government provides training to civil servants and across the wider public service. Skills taught include those related to Better Regulation: cost-benefit analysis, making impact assessments, policy development and design, risk assessment, and stakeholder consultation. Technical training on Better Regulation is also provided within departments and by the BRE, for example on impact assessments, the Standard Cost Model for administrative burden reduction, and Legislative Reform Orders (a fast track legal and parliamentary process to simplify burdensome regulations). There is also specialised training for government lawyers and economists (which form distinct groups within the body of the civil service).

Notes

1. The last major institutional upheavals on a level with the revolutions and unifications experienced more recently in other parts of Europe, were the civil war of the 17th century which led to the execution of the monarch in 1649 and a short period of republican rule, and the Act of Union with Scotland in 1707.
2. Adjustments to the responsibilities of departments.
3. As the OECD peer review team were told by the BRE, “getting ministers to realise that they can’t always do what they want to do”.
4. The Prime Minister announced the formation of the National Economic Council (NEC) on 3 October 2008. The purpose of the council is to provide a new approach to co-ordinating economic policies across government. The NEC will work to help people and businesses deal with the current economic uncertainties.
5. The term “agency” for this report denotes a wide range of entities linked, to a greater or lesser extent, to a parent ministry and charged with different kinds of regulatory functions. They include among others inspectorates and enforcement agencies, as well as the economic agencies charged to oversee specific sectors such as the energy sector. See Annex 1 for the type of agencies that exist in the United Kingdom. The term does not include local authorities.
6. The House of Lords Merits of Statutory Instruments Committee, for example, which puts serious effort into scanning secondary regulations, referred to itself as a “critical friend”.
7. This report will be largely concerned with England, and does not seek to cover the broader picture in any detail.
8. The United Kingdom designates the political whole. Great Britain is a geographical term, referring to the parts that make up the main island, *i.e.* excluding Northern Ireland. Britain is often used as shorthand for the United Kingdom.
9. Scotland is different as it operates under a form of Roman law.
10. An example of such a judicial guardian is the French *Conseil d’Etat* (Council of State). This body is France’s supreme jurisdictional authority for public law, and part of its role is to ensure that laws enacted by the French parliament are consistent with the French constitution (OECD, 2003).
11. Devolved powers for Scotland: health, education and training, local government, social work, housing, planning, tourism, economic development and financial assistance to industry, some aspects of transport, including the Scottish road

network, bus policy, and ports and harbours, law and home affairs, including most aspects of criminal and civil law, the prosecution system and the courts, the police and fire services, the environment, natural and built heritage, agriculture, forestry and fishing, sport and the arts, statistics, public registers and records.

Devolved powers for Wales: agriculture and fisheries, culture, economic development, education and Training, environment, health, highways, housing, industry, local government, social services, sport, tourism, town and country planning, transport, water, the Welsh language.

Devolved powers for Northern Ireland: criminal law, policing, prisons, civil aviation, navigation, the Post Office, disqualification from membership of the Assembly, emergency powers, civil defence, consumer protection, telecommunications.

12. Some of these functions used to be with the Home Office – Interior Ministry.
13. There are 19 central departments in total: Cabinet Office; Department for Business, Enterprise and Regulatory Reform (BERR); Department for Children, Schools and Families; Department for Communities and Local government (DCLG); Department for Culture, Media and Sport (DCMS); Department for Environment, Food and Rural Affairs (DEFRA); Department of Health, Department for Innovation, Universities and Skills; Department for Transport; Department for Work and Pensions (DWP); HM Treasury (Ministry of Finance); Home Office (Ministry of the Interior); and the recently established Ministry of Justice.
14. These are to raise the productivity of the United Kingdom economy, to deliver the conditions for business success, and to improve regional economic performance.
15. The SBS was established in April 2000 to provide a single organisation dedicated to helping small firms and representing them within government. The 2002 OECD report noted that the SBS had a strong institutionalised position in the regulatory process, for example the right to have its views recorded in impact assessments in a wording of its own choice.
16. In many other OECD countries this role is carried out by the Prime Minister's Office.
17. Again, this differs from many other EU countries, where this role is held by the Ministry of Foreign Affairs.
18. As it was put to us: "Each Department is now in the mainstream. It has direct responsibility for Better Regulation, with BRE support".
19. See also Annex 2.

20. The Food Standards Agency, for example, has a relatively autonomous status as a non-ministerial department, and Better Regulation is largely a voluntary choice, which it has decided to embrace enthusiastically. The image of the agency matters, largely because of food crises before it was set up (in 2000) and it told us that it wants to be ranked world class, for which it is developing assessment criteria. It seeks to maximise the transparency of its work, by publishing or providing access to most of its research evidence, and its board meetings are posted on its website.

21. www.berr.gov.uk/aboutus/corporate/bcb/index.html.

